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 County Superior Court, Case No. 96NF1961
The Honorable RICHARD L. WEATHERSPOON, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On April 14, 1997, the Orange County District Attorney's Office filed a one-count information charging appellant Hung Thanh Mai with the July 16, 1996 murder with malice aforethought of California Highway Patrolman Don Joseph Burt in violation of Penal Code section 187 and further alleging the special circumstance that Mai intentionally killed Officer Burt while the officer was engaged in the performance of his duties within the meaning of Penal Code section 190.2, subdivision (a)(7). (1 CT 16-17.)

On August 12, 1997, the District Attorney's Office notified Mai that it would be seeking the death penalty. (1 CT 80-83.) Mai was arraigned on August 28, 1997, and pled not guilty and denied the special circumstance allegation. (1 CT 87.)

On July 23, 1999, Mai waived trial by jury, his rights to self-incrimination and to confront witnesses, and the prosecutor and defense counsel stipulated that the trial court could review the preliminary hearing transcripts and the exhibits from that hearing and determine Mai's guilt of the charged offenses and special circumstance allegation based on that record. (2 CT 491.) On July 30, 1999, the trial court found Mai guilty beyond a reasonable doubt of murder in the first degree as to count one, and found the special circumstance allegation to be true. (2 CT 503.)

The penalty phase jury was sworn on April 11, 2000 (2 CT 669-670), and the presentation of evidence commenced the next day (2 CT 678-681). On April 17, 2000, the prosecution rested. (2 CT 698-699.) On April 19, 2000, Mai testified and then the defense rested. That same day jury deliberations began and later that day the jury returned its verdict finding the appropriate punishment to be death. (3 CT 853, 867-868.)

On June 23, 2000, the trial court denied Mai's motion to modify the verdict and motion for new trial, and sentenced Mai to death for the murder of Officer Burt. (4 CT 1124-1128.)

This appeal is automatic pursuant to Penal Code section 1239, subdivision (b).

STATEMENT OF FACTS

A. Guilt Phase [1]

On the evening of July 13, 1996, California Highway Patrol Officer Don Joseph Burt was patrolling an area near the 57 freeway in Fullerton, California. (1 PHRT 57.) Officer Burt activated the overhead lights of the marked California Highway Patrol car he was driving and stopped Mai for a routine traffic violation. Mai stopped his vehicle in the parking lot of a Chevron gas station located at 2915 Nutwood in Fullerton. (1 PHRT 58, 152-155.) Mai was driving a white 1995 BMW 525i. (1 PHRT 62, 157, 164.) Although Mai had his wallet in the car with him under the front driver's seat, he told Officer Burt that he did not have his driver's license and gave Officer Burt the false name of "Phu Duc Nguyen." (1 PHRT 65, 69, 93, 147-148.) Officer Burt called California Highway Patrol dispatch and learned that Phu Duc Nguyen's driver's license was suspended. Officer Burt began writing a citation in the name of Phu Duc Nguyen listing a Vehicle Code violation for driving with a suspended license. (1 PHRT 65, 93-94, 133, 136, 147.)

Because the driver of the BMW had a suspended license, the car had to be towed. Before a vehicle can be towed, a CHP 180 form and an

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[1] This Statement of Facts is taken from the Preliminary Hearing transcript since Mai's guilt was determined based on the evidence presented in that hearing.

inventory search must be completed. Accordingly, Officer Burt started to fill out a CHP 180 form for the 1995 BMW and he began an inventory search of the vehicle. As part of that inventory search, Officer Burt looked into the trunk of the BMW where there was a paper bag containing counterfeit traveler's checks. (1 PHRT 118-119.) As Officer Burt then walked from the rear of the BMW toward the driver's side door, Mai came out of the car and in rapid succession, Mai fired five gunshots into Officer Burt. Officer Burt moved from the driver's side door to the front of the BMW with Mai following him. Officer Burt fell to the ground near the front of the BMW. Mai walked over to where the officer was lying, stood over him and fired a gunshot into his head. (1 PHRT 160-163, 206-207.)

Several people were yelling and screaming as they fled the area in response to the gunfire. Mai pointed his gun up towards a hotel that overlooked the parking lot of the Chevron station. (1 PHRT 164-165.) After he shot the officer, Mai did not have his car keys because he had handed them to Officer Burt, and he did not know what the officer had done with his keys. Mai took Officer Burt's gun and keys and fled in his patrol car. (2 PHRT 284-285, 451.)

Officer Burt's citation book was found on the ground near the BMW. There was a bloody shoeprint on the citation book. Also near the officer's citation book was a "cheat sheet" which listed Vehicle Code sections. The citation for driving with suspended license written in the name of Phu Duc Nguyen was found inside Officer Burt's citation book. (1 PHRT 64-65, 70.) The ticket was incomplete as it was still in the citation book and it was unsigned. (1 RT 64-66; Exhs. 17-20.)

Officer Burt's patrol car was found at the Mills Ford dealership located at the intersection of Loara and Lincoln in Fullerton. Mai's residence was located at 1780 West Lincoln, down the street from where Officer Burt's patrol car had been abandoned. (1 PHRT 72-74.) Around

9:00 p.m. on July 13, 1996, a security guard at a furniture store at 1672 West Lincoln saw an Asian man run from the vicinity of Mills Ford towards 1780 West Lincoln. The Asian man jumped onto the bumper of a Honda parked next to the security guard's car. (1 PHRT 76-78.) A shoe print was visible in the dirt and dust on the bumper. The shoeprint on the bumper was lifted and taken to the crime lab. (1 PHRT 78-80.)

On the night of July 13, 1996, Chang Nguyen,[2] who lived in Houston, Texas, received a telephone message from Mai. (2 PHRT 265-266.) Nguyen had known Mai for approximately six months and during that time Nguyen had spoken to Mai in both person and on the telephone in both Texas and in Orange County, California. (2 PHRT 270.) Nguyen purchased forged travelers checks from Mai. (2 PHRT 282.) As was their custom, Nguyen paged Mai and Mai called within a few minutes. Mai told Nguyen he was "'in deep shit'" because he "'just took down a California Highway Patrolman.'" (2 PHRT 271-272.) Mai said he needed somewhere to "lay low" and Nguyen said he would book a flight to Houston for Mai. (2 PHRT 272.) Mai arrived in Dallas the next night (Sunday, July 14, 1996), and Nguyen picked up Mai from the Dallas airport and drove to Houston. Mai traveled under a friend's name, Vu Le. Le used his identification to pick up the boarding pass and then gave the boarding pass to Mai. (2 PHRT 276-277, 418.)

During the drive from Dallas to Houston, Mai told Nguyen that he had been pulled over on Saturday night by a California Highway Patrolman for driving without his lights on. Mai believed he had an outstanding warrant so he used someone else's name but that name came back as having

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[2] Throughout both the federal and state proceedings Chang Nguyen was referred to as both "Alex Nguyen" and Chang Nguyen. The witness will be referenced herein as "Chang Nguyen," since that is the name he provided when he testified. (2 PHRT 263-264.)

a suspended driver's license. (2 PHRT 278.) Mai told Nguyen the officer said, "'Well, you know, I got to tow your car,'" and the officer checked the trunk of Mai's car to do an inventory check. (2 PHRT 278-281.) The officer found a bag of forged travelers checks in the trunk of Mai's car and Mai believed he was about to be arrested. (2 PHRT 281-283, 422, 443.) So Mai drew his nine millimeter gun and shot the officer three times. The officer fell down, and Mai said, "'I still see that he's still twitch (sic), still moving, I didn't want to have any witness, I shot him four more times.'" (2 PHRT 282, 284, 438-440.) Mai also believed that he was subject to California's Three Strikes Law, so that if he were caught having committed a crime, it would be his third strike and he would be incarcerated for life. (2 PHRT 284.)

Mai was arrested at Nguyen's apartment in Houston. (1 PHRT 81-82.) Mai did not have shoes on when he was arrested, but there was a pair of K-Swiss tennis shoes nearby his feet. There was blood on the bottom of one of the tennis shoes. A comparison of the bloody shoeprint left on Officer Burt's citation book and the sole of the tennis shoe recovered at the time Mai was arrested had a similar pattern that was consistent with the shoe that left the bloody print on the citation book. A comparison with the shoeprint left on the bumper of the Honda with the tennis shoe recovered when Mai was arrested yielded a "positive match." (1 PHRT 83-87, 122-127.)

Officer Burt suffered multiple gunshot wounds. A gunshot wound on the left side of the back of his head, near his left ear was a graze wound. A second gunshot wound just above his left ear was an entry wound that had a corresponding exit wound through his right eye. There was stippling (unburned gun powder emitted from a gun that leaves a pattern on flesh when a gun is fired at close proximity) around the wound to Officer Burt's head above his left ear. The officer suffered another graze wound to his left

flank that corresponded to an entry wound to the inner part of his upper right arm. The gunshot to Officer Burt's upper arm caused the humerus bone in his right arm to fracture. There was an entrance wound on the back left thigh, another entrance wound just behind the left ankle, another entrance wound just above the right buttocks, and another entry wound on the left buttock. (1 PHRT 88-92.) The cause of Officer Burt's death was traumatic shock due to multiple gunshot wounds. The fatal wounds were caused by the bullet that entered near Officer Burt's left ear and exited his right eye causing a laceration to his brain; and the bullets that entered his left and right buttock areas that traveled through his torso into his intestines, stomach and lungs. (1 PHRT 92.)

B. Penalty Phase

The prosecution presented the circumstances of the crime as evidence in aggravation consistent with the facts set forth hereinabove. In addition, the penalty phase jury learned that Mai confirmed to a Houston Police Officer that the white tennis shoes that were compared to the bloody shoe print on Officer Burt's citation book and the car bumper belonged to him. (7 RT 1285-1289.)

The prosecution presented DNA evidence regarding the blood on Mai's shoe. While Mai could not be the source of the blood, Officer Burt could not be excluded as the source of the blood. The frequency of a random match for caucasians for the DNA profile for the blood found on Mai's shoe was about one in thirty million. (7 RT 1249-1255.)
A comparison between the blood on Mai's shoe and Officer Burt's DNA profile was found to be a "match" both visually and numerically for markers D10S28, D4S139, and D2S44. The frequency of a random occurrence of all these markers in combination is one in six billion. The

expert testified that at that time there were about five billion people on earth. (7 RT 1260-1263.)

During the traffic stop, between 8:00 and 8:20 p.m., Fullerton Police Officer Michael Lyman drove his marked police car into the Chevron station lot. Officer Lyman saw Officer Burt speaking with Mai as Mai sat in the white BMW. Officer Burt acknowledged Officer Lyman's presence, and indicated "Code 4" by holding up four fingers. Code 4 indicates the situation is under control and the officer does not need assistance. (6 RT 1156-1158.) The situation appeared to be calm, a typical traffic stop wherein the officer was writing a citation. Mai appeared to be talking with Officer Burt. (6 RT 1159.)

The prosecution presented additional details as to the positioning of Mai when he shot Officer Burt, and the sequence of the bullets that were fired, showing that Officer Burt suffered eleven gunshot wounds, inflicted by seven bullets. A grazing wound to the left side of his head nicked his left ear and grazed near the top of his head. There was an entry wound just above the left ear lobe with an exit wound through the right eye. There was a grazing wound to the back side of his left hip, close to the waistline, that then entered the upper right arm and exited the outer side of the right arm. This bullet caused the humerus bone to fracture and rendered his right arm essentially useless. (7 RT 1293-1295, 1302.) There was an entry wound on the outer lower thigh area, just above the left knee and that bullet exited on the inside thigh. This wound was considered a flesh wound since it did not strike any bone as it passed through Officer Burt's body. There was an entry wound on the outer right ankle that exited towards the inside of the ankle. Officer Burt would have been turned away from the shooter when suffering these gunshot wounds. (7 RT 1295-1297.) There was an entry wound in the left buttock area, just below the crease that traveled through the officer's body in a left to right trajectory going through his abdominal

cavity and ended up in his right shoulder. This was a fatal shot because it injured internal organs, including the diaphragm and right lung. The trajectory indicates the shooter was standing erect and Officer Burt was either on the ground or bent at his waist. (7 RT 1297-1298.) There was an entry wound in the back of the upper right thigh, and this bullet also had an upward trajectory and moved from right to left. This was also a fatal wound because the bullet struck and damaged Officer Burt's left lung. The bullet's trajectory indicates Officer Burt was bent over as if falling or on the ground when the bullet was fired. (7 RT 1298-1299.) The other fatal wound was the bullet that entered near his left ear and exited his right eye because it caused a massive laceration to his brain. The gun was fired while it was held at a distance of about twelve inches from Officer Burt's head. There were lacerations to Officer Burt's face caused by gravel or pieces of concrete or asphalt when the bullet exited. This indicated that Officer Burt's face was on the ground or close to it when the bullet was fired. (7 RT 1299-1301, 1303.) There were no signs of defensive wounds or to indicate a struggle. Officer Burt died from a combination of injuries to his brain, lungs and visceral organs from multiple gunshot wounds. (7 RT 1301.)

United States Treasury Department Agent Brian Ebert testified as to Mai's counterfeit check enterprise that had caused a loss of approximately $240,000. (7 RT 1271, 1283-1284.) The bag found by Officer Burt in the trunk of Mai's white BMW contained approximately $10,000 in counterfeit traveler's checks. (7 RT 1281-1282.) Officer Burt's and Mai's fingerprints were found on a paper band that bundled the counterfeit traveler's checks discovered by the officer in the trunk of Mai's BMW. (7 RT 1234-1235, 1239-1240.)

1. Other Crimes Evidence

Mark Baker was Mai's neighbor at an apartment complex where they lived on the second floor and shared a common walkway. Mai lived with his girlfriend, Vicki Pham. Around 1:50 a.m. on September 11, 1995, Baker heard loud arguing and a "large thud" on the common wall shared between his and Mai's apartment. (7 RT 1315-1317.) Baker had heard Mai and Pham fighting once or twice before. That night, Baker had just arrived home so he went outside the door of his apartment and saw Pham and Mai struggling. Mai forced Pham face first up against the railing, giving the appearance he was trying to push her over the railing. Baker yelled at them to "knock it off." Both Mai and Pham turned to face Baker. Mai struck Pham in the back of the head or neck area with his fist.[3] (7 RT 1317-1319.) Pham fell to her knees, and Baker said, "'Knock it off, you motherfucker.'" (7 RT 1319.) Mai ran inside his apartment and Baker called him a "'wuss.'" Mai came out of the apartment with a machine gun.[4] (7 RT 1320.) He was about twelve to fifteen feet away from Baker when Mai loaded the machine gun in front of Baker. Immediately after loading it and pulling the bolt back, Mai raised his arm and pointed the gun at Baker's head. Baker turned his back and took a few steps towards his door, then

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[3] Immediately after Baker testified that Mai had used his fist, Mai interrupted his testimony and said, "Shut the fuck up, I think you are full of shit. If I fucking hit with a fist, I would have knocked her fucking ass on the floor. What are you talking about?" "You want to say something, speak the fucking truth." "Bullshit." (7 RT 1319.)

At this point in Baker's testimony, Mai again interrupted and said, "I should have killed your fucking ass is what I should have done, waste my goddamn time." (7 RT 1320.)

[4] At this point in Baker's testimony, Mai again interrupted and said, "I should have killed your fucking ass is what I should have done, waste my goddamn time." (7 RT 1320.)

turned back towards Mai. Mai said, "'What was that that you called me, I think you called me a motherfucker,'" and "'Let me hear you say it again.'" (7 RT 1320-1321.) Baker asked Mai if the gun was real and Mai asked, "'You want to find out?'" (7 RT 1321-1322.)

At that point the apartment manager ran out to the courtyard and yelled at them both to get back inside their apartments. Mai went into his apartment. Baker went inside his, quickly got dressed and went down to the courtyard to make sure the officer manager was going to call the police. (7 RT 1322.)

On June 17, 1996, Robert Bachand was working the late shift at Hardin Honda in Anaheim when Mai and another Asian man were looking at a 1996 Honda Prelude SI.[5] (7 RT 1313-1325.) The three men went for a test drive with Mai in the passenger seat, the other Asian man drove, and Bachand was in the backseat. About a quarter mile after getting on the 57 freeway southbound, Mai said, "'Let's do this.'" Mai pointed a Ruger nine millimeter semi-automatic at Bachand and asked for his wallet and pin number.[6] Bachand handed Mai his wallet. Mai handcuffed Bachand's hand in front of him and forced Bachand to lie down sideways on the rear seat. The men inquired whether the car had Lojack and were upset when Bachand told them he did not know. (7 RT 1326-1328, 1335.)

Mai was on a cell phone that was handed to Bachand. A voice on the cell phone told Bachand "not to fuck with my guys or they will kill you."

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[5] Mai interrupted Bachand's testimony and said, "With all due respect, your honor, no disrespect on you, this is fucking bullshit. What the fuck am I going to carjack a piece of shit Honda? [¶] If you were in the car I would have wasted your fucking ass, it would have been stupid." "You fucking ass, I will put something on." (7 RT 1325.)

[6] Mai interjected as Bachand testified, "Fucking sit here and – " (7 RT 1326), "Fuck –" (7 RT 1328).

(7 RT 1329.) Mai warned Bachand, "'You don't know what you are messing with,'" "'We're Asian, Vietnamese Mafia.'" (7 RT 1330.) Bachand was taken to a house in the Garden Grove or Westminster area and Mai got out of the car, and a younger Asian man got in.[7] (7 RT 1330-1331.) Mai gave this younger man the gun he had been holding on Bachand. The men drove around and received a cell phone call and Bachand was again asked for his pin number. Bachand explained he had no money in the account. The two men in the car argued whether they would let Bachand go or kill him. Eventually they dropped Bachand off. (7 RT 1335-1337.) Later that evening Bachand was taken by the California Highway Patrol to a crash site that involved the Honda Prelude that had been taken earlier. The two Asian men were at the scene and Bachand identified them. Mai was not there. (7 RT 1338-1339.)

At approximately 7:30 a.m. on July 13, 1996, Aryan Neghat was driving to work in the fast lane on the 91 freeway westbound. A white BMW driving very fast came up close behind Neghat's car. Neghat changed lanes. There was a red car in the fast lane that had been in front of Neghat. The driver of the white BMW pulled very close to the red car, and hit the rear bumper of the red car with the BMW's front bumper. (7 RT 1342-1344.) The driver of the white BMW leaned over to the right then passed a gun from his right hand to his left. He pointed the gun out the

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[7] At this point Mai disrupted the proceedings by overturning counsel table. The jurors were escorted out of the courtroom and into the jury deliberation room by the court reporter. Mai was removed from the courtroom and the jurors were brought back in. The trial court admonished the jurors saying, "The defendant has chosen not to be present during this phase of these proceedings. You should not let his absence from the courtroom prejudice you in any manner." (7 RT 1331-1332.) A recess was taken. The trial court then addressed Mai outside the presence of the jury and Mai assured the court he would not disrupt the proceedings again. (7 RT 1333-1334.)

window with his left hand waving the gun. The red car then changed lanes. The white BMW sped up and the driver brought the gun back into the car. (7 RT 1345-1346.) While Neghat could not positively identified Mai at trial, in July 1996, Neghat was shown a photographic lineup when his memory was fresher and he identified Mai as the driver of the white BMW. (7 RT 1344, 1346-1347; Exh. 74 [Photo No. 2.].)

2. Victim-Impact Evidence

Officer Burt's wife, Christin Burt, his father, Don Raymond Burt, and his mother, Jeannie Burt, testified during the penalty phase. (7 RT 1350-1370.) Officer Burt's murder devastated his wife, parents, two sisters, and his extended family. (7 RT 1356-1358, 1361-1362, 1365-1370.) Officer Burt was his parents' only son. (7 RT 1361-1363.) Officer Burt had been on active duty with the California Highway Patrol for approximately fourteen months at the time he was shot to death. (7 RT 1356.) Officer Burt's father was a sergeant for the California Highway Patrol, but he retired approximately a year after Officer Burt's death because he was devastated by the loss of his son. (7 RT 1360, 1363-1364, 1367-1368.) Officer Burt considered being a California Highway Patrol to be his dream job. (7 RT 1366-1367.) Officer Burt was twenty-five years old when he died. He was married to his "best friend" Christin, who was seven months pregnant with the couple's first child. (7 RT 1351, 1354, 1356, 1366-1369.) Officer Burt was described as a very spontaneous, sentimental, fun-loving, and intelligent man. (7 RT 1354, 1359, 1366.) It was especially difficult for Officer Burt's niece and two nephews to lose their Uncle because their father had been killed in a car accident about nine months before Officer Burt died. His niece and nephews had gone out to dinner with Officer Burt and his wife just prior to his being shot to death. (7 RT 1351-1352, 1369.)

3. Defense

Mai testified in a narrative form as follows:

> Thank you. [¶] Before I start, I would like to say that I did request for my lawyers not to say anything on my behalf, and I appreciate that.
>
> Jurors, I am not here to ask or beg for your sympathy or pity. Nor am I here to ask or beg of you, the jurors, to spare my life.
>
> Personally I believe in an eye for an eye. I believe in two eyes for every eye. If you were to take down one of my fellows, I would do everything that is necessary to take down at least two of yours, just to be even.
>
> In this penalty phase trial, the prosecutor, Mr. Jacobs, is seeking the maximum penalty, which we all know is death. I personally feel that the maximum penalty is properly suited for this occasion. I also feel that it is the right thing for you, the jurors, to do so.
>
> Being in my situation now I feel it is only fair, there's a price to pay for everything in life, now that I am here it's time I pay that price. Because, after all this entire ordeal, it is just part of the game.
>
> That's all I have to say, your honor.

(7 RT 1409-1410.)

There was no cross-examination of Mai by the prosecutor. The defense presented no other witnesses, and the prosecution presented no rebuttal witnesses. (7 RT 1410.)

ARGUMENT

I. MAI'S CONFLICT-OF-INTEREST CLAIM WAS WAIVED; AND IN ANY EVENT, HIS ATTORNEYS' REPRESENTATION WAS NOT ADVERSELY IMPACTED BY A CONFLICT OF INTEREST

Mai claims that his trial counsel had a potential conflict of interest after the arrest of defense investigator Daniel Watkins by federal authorities as a co-conspirator of Mai's in the attempt to murder a prosecution witness in this case, Chang Nguyen. Mai alleges the potential conflict ripened into an actual conflict of interest when one of his two defense counsel in this case also represented Mai in the federal case and negotiated a plea agreement in that case without any benefits in either the state or federal case. (AOB 27-92.) Mai contends that prejudice is presumed because his attorneys had an actual conflict of interest that adversely affected their performance in his capital case. Mai argues the adverse impact on representation from an actual conflict included: (1) the negotiated plea to the federal charges; (2) the "slow plea" to the special circumstances allegation when a defense to that allegation allegedly existed; (3) failure to pursue a mental competency hearing; (4) allegedly failing to ensure Mai's decision to forgo a mitigation defense was a fully informed, competent, and rational decision; and (5) failing to stop Mai from testifying in the penalty phase. (AOB 19-167.) Mai's claim on appeal should be rejected based on his express waiver of any conflict of interest relating to the federal prosecution for conspiracy to murder prosecution witness Nguyen. However, Mai contends that his waiver was not knowing and intelligent because he was only advised relating to a potential conflict of interest stemming from a possibility his attorneys could be witnesses in the federal case. (AOB 40-62.) On the contrary, as detailed below, Mai's waiver forecloses his challenge on appeal. Moreover, even assuming arguendo the absence of a valid waiver, Mai has not shown an actual conflict existed, nor

has he shown a conflict of interest adversely affecting his counsel's performance in this case.

A. The Purported Conflict of Interest

While Mai was in Orange County Jail awaiting trial in this case, he maintained contacts outside the jail to continue his criminal operations. Specifically, Mai sought to (1) distribute weapons within the prison system and continue his counterfeit securities scheme, and (2) organize disparate Asian gangs into a single gang to be known as the Asian Mafia. To this end, an undercover officer from the Santa Ana Police Department met with Mai in Orange County Jail. Mai asked the undercover officer to help him kill Chang Nguyen, a prosecution witness in this case. (2 CT 394-395.) Mai provided the undercover officer with extensive personal information about Nguyen, including Nguyen's Social Security number, driver's license number, home address, business address, a description of the cars driven by Nguyen and his family members, and a photograph of 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. (2 CT 392, 396-397.)

In late July 1998, the Federal Bureau of Investigation ("FBI"), United States Secret Service, Bureau of Alcohol, Tobacco, and Firearms, and Santa Ana Police Department concluded an investigation that resulted in the arrest of Mai, defense investigator Daniel Watkins, Mai's girlfriend Victoria Pham, and Huy Ngoc Ha on federal charges of weapons trafficking

and conspiracy to solicit the murder of Chung Nguyen.[8] (1 RT 62-64; 1 CT 125-154; 2 CT 392.)

Within days of Mai's arrest on the federal charges, James Waltz, the attorney representing Mai's co-defendant, Daniel Watkins, sent a memorandum (hereinafter referred to as "Waltz Memo") with a copy to the federal prosecutor, Assistant United States Attorney ("AUSA") Marc Greenberg. In the Waltz Memo attorney Waltz denied all wrongdoing by his client (defense investigator Watkins), and stated his intention to challenge the federal complaint by calling as witnesses, among others, Mai's defense counsel in this case, George Peters and Dennis O'Connell.[9] In the Waltz Memo, it is asserted that Watkins' "activities" were "blessed" by attorneys Peters and O'Connell, and Watkins "did nothing to aid Mai's plan which was well known among his defense team." (1 CT 156.) The Waltz Memo is the cornerstone of Mai's claim on appeal that his counsel had a disabling conflict of interest. (AOB 20-23.)

On August 7, 1998, defense counsel Peters informed the court of the arrest of defense investigator Watkins by federal authorities. Peters observed that because he could be a potential witness in the federal case, it raised "the specter of some conflict of interest." (1 RT 66) On that basis, he requested the trial court appoint another attorney to Mai for the purpose of determining if any potential or actual conflict existed and to advise Mai regarding any such conflict. Defense counsel O'Connell and the prosecutor

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[8] In addition to the activities concerning Chang Nguyen, the Federal Government alleged that Mai and Watkins conspired to intimidate witnesses in another Asian gang member's trial, and that Watkins provided Mai with a witness interview report from that other Asian gang member's case. (2 CT 398-399.)

[9] The Waltz Memo was sealed by the trial court (1 RT 84), and unsealed by this Court in a March 24, 2010 order.

joined in his request for appointment of an independent attorney. (1 RT 66-68.) The trial court appointed attorney Gary Pohlson for the purpose of determining whether a conflict of interest for Mai's trial counsel existed, and to advise Mai regarding any potential or actual conflict of interest. [10] (1 RT 68-69, 75, 82.) Mr. Pohlson had been previously appointed by the court in other cases and advised defendants regarding conflicts of interest. His experience extended beyond the law on conflict of interest, as he was also experienced at defending against homicide and capital charges. (1 RT 82.)

On August 21, 1998, attorney Pohlson informed the trial court he had reviewed the FBI affidavits in support of the arrest and search warrants in the federal case, the Waltz Memo, conducted legal research regarding conflicts, and spoke with the prosecutor and both defense counsel in this case, as well as the federal prosecutor. (1 RT 75, 83-84.) The federal prosecutor, AUSA Greenberg, planned, if the case went to trial, to have two juries, one for Mai and another for Watkins. (1 RT 76; 1 CT 125-154.) Attorney Pohlson assumed defense counsel Peters and/or O'Connell would be called as a witness in the federal case, and that this created an appearance of a conflict or a potential conflict. (1 RT 76.) While Pohlson learned, but did not disclose to the trial court, the potential testimony in the federal case by Mai's attorneys in this case, Pohlson opined that it would be "in no way harmful to Mr. Mai." (1 RT 76-77.)

Attorney Pohlson determined there was, at most, an appearance of a conflict because "anytime you have a situation where lawyers are testifying in a case against, where their client is being prosecuted, you

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[10] The initial attorney appointed by the trial court was unavailable, so after consultation with defense counsel and the prosecutor, the trial court appointed attorney Gary Pohlson to review the matter for conflict of interest and to advise Mai. (1 RT 74-75.)

would definitely have a conflict situation." (1 RT 77.) Pohlson discussed with Mai the potential dangers of the conflict situation and that Mai was entitled to representation by attorneys without any conflict. Mai stated he understood the information regarding conflict of interest and waiver, and it was his desire to have attorneys Peters and O'Connell continue to represent him. (1 RT 77-78, 80.) Pohlson opined that "even if there is a possible conflict, that in no way will that affect the representation, in no way will that render their representation by Mr. O'Connell and Mr. Peters ineffective in itself." (1 RT 78.)

In response to the trial court's inquiry regarding whether they knew of any conflict of interest, Attorney Peters responded:

> No, sir, ever since this came up I have talked with a number of parties and done some legal research myself, and I believe there is no actual conflict. And I am having even a hard time imagining any potential conflict based on what I know, which includes talking to the U.S. attorney and talking to [state court prosecutor]. [¶] I think it is important to note in terms of the federal case two things, in my opinion. One is [state court prosecutor] has represented to me, and I have every confidence in that, that he has no intention to use the federal case in this state court matter, that is intentional on his part, and that reduces the conflict to about zero. [¶] And also in the federal case I know what I am, even if I was allowed, if the attorney-client privilege was waived and I did testify, I believe I would have nothing to say that would harm Mr. Mai. [¶] So at every level, emotionally and intellectually, I do not believe I have a conflict, and if I did I would certainly bring it to the court and counsel's attention, and Mr. Mai, and have it dealt with at that time.

(1 RT 80-81.)

Mai's other defense counsel, Dennis O'Connell, responded to the trial court's inquiry: "[a]t this point from what I know now I don't believe a conflict exists." (1 RT 81-82.)

After hearing from the independent attorney appointed to investigate whether a conflict existed, the statements from defense counsel that no conflict existed, the trial court engaged in the following colloquy with Mai:

> The Court: Mr. Mai, you had an opportunity to speak with Mr. Pohlson yesterday; is that correct?
>
> The Defendant: Yes.
>
> The Court: And you have had an opportunity this morning to speak with your counsel present?
>
> The Defendant: Yes.
>
> The Court: Mr. Pohlson indicated that it is your desire to waive any possible conflict in this matter and retain Mr. Peters and Mr. O'Connell as your counsel of record?
>
> The Defendant: Yes.
>
> The Court: Is that your desire?
>
> The Defendant: Yes.
>
> The Court: The court is going to make a determination, that based upon the information furnished to the court by attorney Pohlson and all counsel, that there is an appearance of a potential conflict. The court cannot determine any more than Mr. Pohlson can at this time that an actual conflict exists. It appears that one does not exist, but there is an appearance.
>
> But it also appears, based upon what the court has been advised, that if a conflict exists it would not render the representation of defense counsel ineffective in and of itself.
>
> Because of that appearance of conflict, or potential conflict, or conflict, Mr. Mai, the lawyers may not be able to furnish you effective representation, and you might not have a fair trial if represented by these counsel; do you understand that?
>
> The Defendant: Yes.

The Court: We have appointed independent counsel to confer with you, and you have confirmed that you spoke with Mr. Pohlson yesterday; is that correct?

The Defendant: Yes.

The Court: And he advised you of the same possibilities, and possibilities of harm that I am advising you of at this time; is that correct?

The Defendant: Yes.

The Court: Do you understand that the conflict or potential conflict facing your lawyer could prevent your lawyer from representing you effectively or adequately?

The Defendant: Yes.

The Court: And when I say, "your lawyer," I am referring both to Mr. Peters and Mr. O'Connell; that is your understanding as well?

The Defendant: Yes.

The Court: Should you have ineffective counsel, your chances of being convicted are greater, and when you waive your right to conflict free counsel, you are also waiving an appeal based upon that conflict; do you understand that?

The Defendant: Yes.

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

The Defendant: Yes, I understand.

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

The Defendant: Yes.

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

The Defendant: No, sir.

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

Mr. Peters: Yes, your honor.

Mr. O'Connell: Yes.

Mr. Peters: I think the court, there may be one other admonishment or advisement the court may give Mr. Mai, that is waiving the conflict now, that if at some future time a different aspect of conflict or some, or the potential became a reality and he could see some impact, he still retains the right at that time to say there is a change in circumstance, and he would like to exercise and unwaive his waiver.

The Court: Well, that's a matter of law.

Mr. Peters: I just thought it would be fair to tell him.

The Court: Yes.

You understand what Mr. Peters just stated?

The Defendant: Yes, I do.

The Court: The court then finds the defendant has made a knowing and intelligent and voluntary waiver of possibility of conflicts with respect to counsel, and accepts that waiver.

(1 RT 84-88.)

B. Mai Waived Any Conflict of Interest Claim Based on Representation by Attorneys Peters and O'Connell

Mai contends that his waiver was inadequate, unknowing, and involuntary because not every potential conflict was stated on the record. Specifically, he complains that the waiver did not include acknowledgment of the "theoretical possibility" that his defense attorneys faced criminal

liability for their alleged roles in the conspiracy to murder prosecution witness Nguyen. (AOB 40-62.) To the contrary, the waiver of any conflict was adequate, knowing, and voluntary.

When a defendant seeks to waive his counsel's conflict of interest, the waiver must be knowing and intelligent, an act "done with sufficient awareness of the relevant circumstances and likely consequences." (*People v. Mroczko* (1983) 35 Cal.3d 86, 109-110.) When taking a conflict of interest waiver, a trial court must assure itself that (1) the defendant has discussed the potential conflict with his attorney or an independent counsel; (2) the defendant has been made aware of the dangers and possible consequences that may result from the conflict; (3) the defendant knows of his right to conflict-free representation, and (4) the defendant voluntarily wishes to waive that right. (*People v. Sanchez* (1995) 12 Cal.4th 1, 47, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Mroczko*, *supra*, 35 Cal.3d at p. 110.) A waiver of conflict-free counsel "'need not be in any particular form, nor is it rendered inadequate simply because all the conceivable ramifications are not explained.' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 728, disapproved on other grounds by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Sanchez*, *supra*, 12 Cal.4th at pp. 47-48 ["In deciding whether a defendant understands the nature of a possible conflict of interest with counsel, the trial court need not explore each foreseeable conflict and consequence."].)

Mai argues that his waiver of any conflict of interest was invalid because the "only possible" conflict discussed on the record was the potential that his two attorneys could be called as witnesses in the federal trial. (AOB 60.) However, a defendant's waiver of conflict is not limited to merely matters discussed on the record. (*People v. Sanchez*, *supra*, 12 Cal.4th at p. 48.)

For 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. Also based solely on the Waltz Memo, Mai contends that Watkins "admitted" he knew about Mai's plan to kill Nguyen and that both his defense attorneys knew of the plan and "'directed'" and "'blessed'" all of Watkins' activities.[11] (AOB 31, citing 1 CT 156.) Based on this supposed knowledge of Watkins' criminal activities with Mai, he

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[11] Paragraph four of Waltz's Memo reads as follows:

> The federal complaint is full of errors and drips with phony suggestions intending to inculpate Defendant [Watkins]. I intent to present a full court press and challenge the accuracy by calling Rob, George Peters and Dennis O'Connell in a challenge under FRCP 4. For your info, Defendant was the investigator for George Peters who is representing Mai in State court. At Peters behalf, Defendant interacted with Mai. Mai told Defendant about Mai's plan to kill Alex in Texas, and Defendant reported all that to George Peters , Dennis and Rob Harley, and took their directions. As a side to Marc Greenberg, George Peters and O'Connel (sic) should be disqualified from further representing Mai in state court, as their testimony in Federal court will be adverse to Mai (in federal court) as they all exculpate Defendant from any wrong doing. If not disqualified, the state will otherwise easily convict Mai in both cases and give the defense a great appellate issue which now can be so easily avoided. Peters and O'Conel (sic) are a cornerstone of Defendant defense (sic). Meanwhile, Defendant denies any and all allegations in the complaint concerning any wrong doing and all his activities were blessed by Peters, Harley and O'Conel (sic). Just ask them. Defendant did nothing to aid Mai's plan which was well known among his defense team. Yes, that is true. Thus, I am asking you to interview Peters, O'connell (sic) and Harley ASAP. [attorney's phone numbers omitted].

(1 CT 156.)

argues his attorneys were fearful of being prosecuted by state and federal authorities, and they had a "compelling self-interest in maintaining a positive relationship" with the state and federal authorities prosecuting Mai to conceal wrongdoing on their parts. (AOB 27-40.) Mai's argument ignores the fact that independent counsel appointed by the court to advise Mai, attorney Pohlson, was privy to the Waltz Memo and considered it in advising Mai regarding the potential conflict of interest presented by the federal charges then pending against Watkins and Mai. (1 RT 75-76, 84.)

Moreover, there is no "admission" by Watkins to any criminal conduct in the Waltz Memo. (1 CT 156.) Neither defense counsel Peters nor O'Connell risked criminal liability because of their employing Watkins as a defense investigator in this case.[12] The record is clear, Mai was adequately advised by independent counsel of the conflict of interest, the dangers and possible consequences if he continued to be represented by counsel who may not be conflict-free, and that he was entitled to representation by conflict-free counsel. Aware of all of this information, Mai voluntarily waived the conflict and requested defense attorneys Peters and O'Connell remain his counsel.

C. Defense Counsels' Representation Was Not Adversely Affected by a Conflict of Interest

To support his claim defense counsel were adversely affected by a conflict of interest, Mai cites: (1) defense counsel Peters' negotiation of

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[12] Mai's reliance on appeal of the Penal Code section 987.9 records in this case (AOB 34-35 & fn. 19) is misplaced. Defense counsel Peters signed that Watkins' "work was performed under my direction and at my request in a satisfactory manner." (AOB 34-35 citing 987.9 CT 67, 71-75) The form was not sworn to by defense counsel as asserted by Mai. Moreover, the 987.9 records Mai relies on contain a list of legitimate investigative work for Mai's defense performed by Watkins in this case.

Mai's guilty plea in the federal case (AOB 69-72); (2) defense counsel's failure to challenge the murder charge and special circumstance allegation (AOB 73-78); (3) the consent of defense counsel to the slow plea without obtaining a promise or expectation to avoid the death penalty (AOB 78-85) and without challenging the sufficiency of the evidence to support the special circumstance allegation (AOB 85-91); (4) the failure to request a mental competency hearing (AOB 92-103); and (5) the failure to stop Mai from testifying in the penalty phase, and the failure to present mitigating evidence (AOB 103-141). Defense counsel Peters and O'Connell represented Mai free from any conflict of interest. Defense counsel's choices that Mai faults on appeal were strategic decisions based on careful consideration of the evidence, the results of defense investigation efforts and influenced by Mai's actions. In this case, defense counsel never compromised their loyalty to Mai, and never tempered their advocacy for him.

A criminal defendant has the right to the representation of conflict-free counsel under both the state and federal Constitutions. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 417; *People v. Rundle* (2008) 43 Cal.4th 76, disapproved on other grounds by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) A criminal defendant's conflict of interest claim leveled at his or her trial attorney is a category of ineffective assistance of counsel. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166 [122 S.Ct. 1237, 152 L.Ed.2d 291]; *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) "In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest 'that affected counsel's performance – as opposed to a mere theoretical division of loyalties.'" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 417, quoting *Mickens v. Taylor*, *supra*, 535 U.S. at p. 171.)

"In determining whether a defendant has demonstrated the existence of an actual conflict of interest satisfying the first prong of the [*Strickland*] analysis, we consider whether 'the record shows that counsel "pulled his punches," i.e., failed to represent defendant as vigorously as he might have had there been no conflict.' (*People v. Easley* (1988) 46 Cal.3d 712, 725 [250 Cal.Rptr. 855, 759 P.2d 490] (*Easley*).) And yet we must bear in mind, as we observed in *People v. Roldan* (2005) 35 Cal.4th 646, 674 [27 Cal.Rptr.3d 360, 110 P.3d 289] (*Roldan*), that when '"a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission."'" (*People v. Rundle*, *supra*, 43 Cal.4th at pp. 169-170.)

The burden is on the defendant to show that an actual conflict of interest existed and that "an actual conflict of interest adversely affected his lawyer's performance.'" (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692, citing *Cuyler v. Sullivan* (1980) 446 U.S. 335, 348 [100 S.Ct. 1708, 64 L.Ed.2d 333]; *Mickens v. Taylor*, *supra*, 535 U.S. at p. 171; *People v. Doolin*, *supra*, 45 Cal.4th at p. 417; *People v. Rundle*, *supra*, 43 Cal.4th at p. 169.) Mai has done neither.

Here there was no actual conflict of interest based on supposed concern by Mai's attorneys over being prosecuted for conspiring to murder prosecution witness Nguyen. Notably, no charges were ever filed against Mai's counsel relating to the matter. Mai's contention on appeal that defense trial counsel Peters and O'Connell never disavowed Watkins' counsel's accusation that they were aware of, condoned, and assisted Watkins and Mai's efforts to kill prosecution witness Nguyen is belied by

the record. Both Peters and O'Connell denied any knowledge of Watkins conspiring with Mai. (1 RT 80-82.) While the Waltz Memo says Mai told Watkins about Mai's plan to kill witness Nguyen, it also says Watkins denies all the allegations in the federal complaint and denies any wrongdoing. (1 CT 156.) The statements attributed to Watkins in the Waltz Memo 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.) Moreover, the Waltz Memo contains multiple layers of hearsay for which there is no exception. (Evid. Code, § 1200.) Contrary to Mai's assertion on appeal, there is no admission of criminal wrongdoing by Watkins in the Waltz Memo. The multiple-layers of hearsay in the Waltz Memo are not sufficient to establish that Mai's state court defense counsel suffered from an actual conflict. At most, as correctly determined by the trial court, and by the independent counsel appointed to advise Mai, the Waltz Memo creates the appearance of conflict. (1 RT 77, 85.)

There is nothing in this record to support Mai's speculation that defense counsel Peters or O'Connell sought to curry favor with the federal government or Orange County District Attorney's Office to avoid being investigated and prosecuted for allegedly playing a role in Mai's effort to kill Nguyen. (AOB 38.) Mai's claim is an example of the type of theoretically-based conflict of interest claims cautioned against by both this Court and the United States Supreme Court. (See *People v. Doolin*, *supra*, 45 Cal.4th at p. 421; *Mickens v. Taylor*, *supra*, 535 U.S. at p. 171.)

Even assuming arguendo an actual conflict, Mai must still demonstrate deficient performance based on that actual conflict affecting counsel's performance. In determining whether counsel's performance was affected, this Court compares counsel's performance to what reasonable

and unconflicted counsel would have done. If counsel's actions could not have been based upon a strategic choice regarding how to best protect the defendant's rights, an actual conflict affected counsel's performance is demonstrated. (*People v. Rundle*, *supra*, 43 Cal.4th at p. 171.)

Mai claims four aspects of his counsel's representation demonstrate counsel's performance was affected by an actual conflict: (1) entry of a guilty plea in the federal case; (2) the absence of any challenge to the murder charge and special circumstance allegation; (3) failure to request a mental competency hearing; and (4) failure to present mitigating evidence in the penalty phase. (AOB 69-70, 73, 78, 85-86, 93-94, 104, 111-141.) As explained below, Mai has not shown his counsel's performance regarding these matters demonstrated their representation of Mai in this case was adversely affected.

1. Guilty Plea in Federal Case

Mai contends on appeal that defense counsel Peters and O'Connell forced Mai to plead guilty to the federal charges because defense attorneys "Peters and O'Connell had reason to believe that they could reap a substantial personal benefit from the agreement by currying favor with the U.S. Attorney, which held such tremendous power over their futures, while their client, Mr. Mai, received essentially no benefit for substantial sacrifices." (AOB 72) Mai complains that after the federal judge gave defense counsel Peters "coequal powers" with Mai's federal counsel, Neison Marks, Peters then "orchestrated" Mai's plea agreement in the federal case to avoid the federal government investigating and potentially indicting defense counsel Peters and O'Connell for participating in the plot to murder Nguyen. (AOB 63-92.) The record does not show that Mai's guilty plea in federal court was other than voluntary, knowing and intelligent. (2 CT 415.) Mr. Peters represented Mai in the federal court

because the assigned federal public defender, Neison Marks, had objections to the federal plea agreement which Marks discussed at length with Mai, and Marks stated for the record in federal court.[13] (2 CT 409, 411-412.) Defense counsel Peters acted at Mai's request in representing him in the federal matter. (1 RT 98-104; 2 CT 409-410.) The record shows Mai pled guilty in the federal case in an effort to get a sentence reduction for his girlfriend, Victoria Pham. (1 RT 155-162.)

Mai cannot satisfy the deficient performance prong because the record does not demonstrate an absence of any tactical reason for the entry of his plea in the federal case. (See *People v. Rundle*, *supra*, 43 Cal.4th at p. 174 & fn. 48 [if counsel's conflicted performance affected development of appellate record, then appellant can pursue claim by way of habeas corpus].)

2. The Absence of Challenge to the Murder Charge and Special Circumstance Allegation

Mai argues that his attorneys should have negotiated a cooperation agreement for Mai with the state prosecutor to provide information about the conspiracy to kill Nguyen in exchange for a reduced charge or leniency.[14] (AOB 91.) Any suggestion that Mai would have cooperated with law enforcement is belied by his criminal history, and his crimes, including his effort to have Nguyen killed for cooperating with authorities.

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[13] Deputy Federal Public Defender Marks objections to Mai's federal plea agreement related to the waiver of appeal, the waiver of collateral review, and the administrative restrictions in the federal case. Marks also objected on the basis he lacked knowledge regarding the evidence and potential defenses in the state case. (2 CT 411.)

[14] Mai claims his attorneys were ineffective for failing to challenge the evidence that he committed capital murder. (AOB 73-92.) The lack of merit to that claim is discussed herein in Argument III, *infra*.

(See 987.9 CT dated Jan. 9, 2009, at p. 30.) Common sense refutes Mai's suggestion that authorities would have reduced a capital murder charge or elected not to seek the death penalty for the execution-style killing of a California Highway Patrol Officer during a routine traffic stop in order to prove what federal authorities already knew regarding the conspiracy to murder a prosecution witness in this case.

Mai also argues that his counsel should have refused to consent to his entry of a "slow plea" based on the preliminary hearing evidence and contested the murder charge and special circumstance allegation. (AOB 91-92.) This contention ignores the overwhelming evidence that Mai murdered a peace officer during the performance of his duties.

Officer Burt stopped Mai in what by all accounts in this record was a routine traffic stop. Since Mai provided the officer with a false name, and that person had a suspended driver's license, Officer Burt commenced a vehicle inventory search prior to towing Mai's white BMW. After looking in the trunk of the vehicle containing counterfeit checks, the unsuspecting officer walked to the driver's door, Mai exited the car firing his gun at Officer Burt. There were numerous witnesses who identified Mai as the individual who shot Officer Burt, and many people who witnessed Mai walk over to the officer, already lying on the ground disabled by multiple gunshots from Mai, and then shoot him in the head at close range before fleeing. Additionally, there was circumstantial physical evidence connecting Mai to the shooting.

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 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.

There was overwhelming evidence of Mai's guilt for the first degree murder Officer Burt and the special circumstance that Mai killed Officer Burt while the officer was performing his duties as a California Highway Patrolman. The record demonstrates that this was defense counsel's strategic reason for agreeing to the slow plea and the record does not show any viable defense to the special circumstance allegation. Accordingly, Mai has not met his burden regarding demonstrating that his counsel's performance was adversely affected by an actual conflict.

3. The Absence of a Request for Mental Competency Hearing

Mai speculates that his attorneys failed to seek a competency determination in this case because they feared displeasing him because Mai could corroborate defense investigator Watkins' accusation in the Waltz Memo that both of Mai's attorneys participated in the conspiracy to murder Nguyen.[15] (AOB 93-103.) Mai contends that his attorneys could have relied 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 in this case. (AOB 95-96.) Additionally, this claim is belied by the record below as the trial court observed Mai and noted Mai's ability to participate in and understand the proceedings, and fully assist counsel. Defense counsel did not seek a mental competency hearing due to a conflict or fear of possibility facing criminal charges, there

[15] Mai claims the trial court erred in failing to declare a doubt as to his mental competency. (AOB 92-103.) The lack of merit to that claim is discussed herein in Argument IV, *infra*.

was no request simply because there was not substantial evidence upon which to doubt Mai's mental competency.

A person cannot be tried or adjudged to punishment while that person is mentally incompetent. (*People v. Lawley* (2002) 27 Cal.4th 102, 131; Penal Code, § 1367.) A competency hearing must be conducted whenever there is substantial evidence a defendant is mentally incompetent. (*People v. Lewis* (2006) 39 Cal.4th 970, 1047; see also *Pate v. Robinson* (1986) 383 U.S. 375 [86 S.Ct. 836, 15 L.Ed.2d 815].) Substantial evidence is evidence that raises a reasonable or bona fide doubt as to the defendant's competency. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1047.)

A defense counsel's opinion, although relevant, does not necessarily constitute substantial evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 953; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1111.) So even if defense counsel had relied on the Ninth Circuit filings in asking the trial court to declare a doubt as to Mai's mental competency, the trial court was aware of the Ninth Circuit filings by Mai's defense counsel challenging Mai's conditions of confinement. (4 RT 588-592; 2 Supp. CT 28-301.) Nothing in those filings caused the court to declare a doubt as to Mai's mental competency. As discussed herein in Argument IV, *infra*, and incorporated herein by reference, the record does not show a substantial basis for declaring a doubt as to Mai's mental competency. Accordingly, on this record there is no basis to conclude that Mai's counsel performed any differently than would be expected of reasonable and unconflicted counsel.

4. The Absence of Mitigation Evidence in the Penalty Phase

Mai faults a conflict of interest for his defense counsel failing to stop him from testifying and for failing to present evidence in mitigation. (AOB 103-143.) Mai voluntarily testified on his own behalf, and the record

shows defense counsel tried to dissuade Mai from doing so. The decision to forego presenting mitigating evidence was made by Mai after he was made aware of the mitigating evidence defense counsel had learned as a result of their investigation. The record does not show that either of these decisions was impacted by any conflict.

Mai knew defense counsel had investigated and were prepared to present mitigating evidence. However, that was contrary to Mai's express wishes. (7 RT 1375-1378; 8 RT 1399-1403.) The trial court inquired regarding the absence of mitigation evidence:

> Mr. Peters: Yes, your honor, I asked for this in-camera hearing because for some time I have been discussing with Mr. Mai any defenses he wants raised in this penalty trial, and it has been his consistent wish not to defend himself for what he believes are valid moral reasons, and I believe that he is competent and he is thinking morally for himself.
>
> Yesterday and the last few days we have been discussing his testimony, he is going to testify, it will be limited, I don't think he will discuss the facts at all, that is up to him, I don't know, but I think he will just talk about what he thinks the appropriate penalty is.
>
> So, anyways, I, of course, feel obligated to make a statement to save his life, I am not here to kill Henry Mai personally, and I have very strong feelings about that.
>
> However, in discussing this with Mr. Mai, he can speak for himself later, he was adamant that I not do this, that it is his life and his case, and I have wrestled with this. And then Mr. Mai informed me that if I did do this, that he would act out, either talk while I was talking, or turn tables over, or do something to indicate his displeasure with my taking a position contrary to him, he being my client.
>
> Here is what I believe, I have the ability to speak in his defense, and he can't stop it, if that's what I want to do. However, 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. Especially versus having Mr. Mai act out again in front of the jury.

So, I am making a conscious decision, and I will bear whatever consequences fall from it, that I would rather have Mr. Mai get up and say his thing, I think the jurors will get the point without me telling them that he is not contesting the death verdict. I would rather have him get up and say his peace, and have the rest of the trial end on a respectable basis like that, than for me to spend a few minutes arguing, which would only cause an outbreak by Mr. Mai. So that's the decision I made at this point.

The Court: Well, we had a little discussion, Mr. Mai, day before yesterday, wherein you indicated you were aware that your counsel has mitigating evidence to present on your behalf; you remember that?

The Defendant: Yes.

The Court: And you acknowledged that, that he is ready, willing and able to present it; and you acknowledge that?

The Defendant: Right.

The Court: And that he wishes to present it.

The Defendant: Right.

The Court: And I also told you to give it some thought. [¶] Is it your position at this time you do not want him to present any mitigating evidence on your behalf?

The Defendant: Yes, it is.

The Court: And he indicates that you want to testify and basically ask the jury for the death penalty, is that, and I am not asking you what your testimony is going to be, I would say if you do that, that is almost tantamount to suicide, and the State of California doesn't assist or participate in suicides.

The Defendant: Right.

The Court: I just am telling you that, you know, that's not the way to go, I would recommend that you not do that.

The Defendant: Right.

The Court: But you have the right to take the stand and talk to the jurors, you understand that later on if you are given a death penalty, that you can't come back and allege error, appeal it on the grounds of incompetency of your attorney or the court's error in this matter --

The Defendant: I understand that.

The Court: -- By making these elections. [¶] Now, by telling your attorney you don't want him to present an argument on your behalf, that's entirely another position, even though you don't present mitigating evidence, based upon what has been presented in the courtroom, he can put different spins on that, he can put, you know, present different arguments to the jurors that might be favorable to you. And precluding him from that is another step towards the death penalty. [¶] Are you sure you want to preclude him from arguing this case?

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

Mr. Peters: Mr. Mai, let me ask you this, however, if I were to get up and make an argument, which I have prepared to make on your behalf, as you told me are you prepared to act out if I do?

The Defendant: Yes, I will. It is not something I want to do, but I would prefer just to keep this the way we have it now.

Mr. Peters: Well, again, I am making a conscious decision, and I will bear the consequences if I make a mistake in judgment, but I would rather have Mr. Mai say his peace to the jury, and the jury understands what that means, than to have

Mr. Mai afterwards act out as I try to say something in mitigation of his case.

The Court: And if I order you not to act out if your attorney presents an argument?

The Defendant: Your honor, between my lawyer and I, I think our understanding should be pretty firm, I feel that, I just feel this is right, and I am hoping my lawyer agrees to that.

The Court: All right.

(8 RT 1399-1403.)

A criminal defendant has a "fundamental right to testify on his own behalf." (*People v. Nakahara* (2003) 30 Cal.4th 705, 717.) Although it is ill-advised, as the trial court told Mai, a defendant such as Mai who is competent, not suicidal, and has made an informed free-choice absent fear or intimidation, may testify on his own behalf and tell the jury the appropriate punishment for the crimes committed is death. (See *People v. Lancaster* (2007) 41 Cal.4th 50; *People v. Webb* (1993) 6 Cal.4th 494, 535.) Here, it was Mai's informed decision, contrary to defense counsel's wishes, that Mai testified in the penalty phase. The record shows defense counsel attempted to dissuade Mai from this choice, but to no avail.

It was the strategic decision of defense counsel to forego presenting mitigating evidence and penalty phase argument based on Mai informing counsel that he would disrupt the proceedings or otherwise act out. Defense counsel's strategic and tactical decisions must be rational and "'founded upon adequate investigation and preparation.'" (*People v. Doolin, supra*, 45 Cal.4th at p. 423, quoting *In re Thomas* (2006) 37 Cal.4th 1249, 1258.) There were several conversations between Mai and defense counsel regarding the presentation of mitigating evidence in this case. Defense counsel conducted a thorough investigation into Mai's background and were prepared to present mitigating evidence. This included defense

counsel arranging the travel for Mai's father and uncle from Vietnam to Orange County. Defense counsel investigated Mai's childhood, Mai's escape from Vietnam as a young child, and the fact Mai had not seen his father since that escape. (1 RT 7; 2 RT 235, 247-249, 302-304, 316-317,321-324, 327-330, 387; 5 RT 861, 867.) Counsel was prepared and willing to present mitigating evidence and informed Mai as to the existence and content of that mitigating evidence. Nevertheless Mai stated on the record he did not want counsel to present the mitigating evidence or argument, and he would disrupt the proceedings if defense counsel attempted to do so. It was based solely on these facts and circumstances, and not on any conflict, that defense counsel obliged Mai's wishes to testify on his own behalf and not present the mitigation evidence they had uncovered as a result of their investigation and efforts. Nothing in defense counsel's performance is distinguishable from what would be expected from reasonable and unconflicted counsel. Accordingly, Mai has not met his burden of showing his counsel's representation was adversely affected by an actual conflict.

D. There Is No Valid Reason for This Court to Adopt a "Presumption of Prejudice" Standard in All Cases Where an Actual Conflict Exists

Mai urges this Court to reconsider its holding in *People v. Doolin* and 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 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." (AOB 143-167.) Given that there is no actual conflict of interest on the part of Mai's defense counsel, there is

no basis for applying any presumption of prejudice Moreover, Mai presents no convincing basis for this Court to depart from the holding in *People v. Doolin*, *supra*, 45 Cal.4th 390.

Under the Sixth Amendment of the United States Constitution, a criminal defendant has the right to counsel to insure the defendant receives a fair trial. (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 166, citing *United States v. Cronic* (1984) 466 U.S. 648, 658 [104 S.Ct. 2039, 80 L.Ed.2d 657].) It is well established that if a defendant demonstrates counsel provided ineffective representation that caused the results of the proceeding to have a different outcome, the fairness mandated by the Sixth Amendment cannot be met. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 685-686.) An exception to this general rule that a defendant must show counsel's ineffective representation had a probable effect on the outcome, is when there is a complete denial of the assistance of counsel entirely or during a critical stage of the proceedings. In such an instance, prejudice is presumed. (*United States v. Cronic*, *supra*, 466 U.S. at pp. 658-659.)

The United States Supreme Court has also applied the presumption of prejudice in cases where counsel has an actual conflict of interest due to multiple concurrent representation of criminal defendants. (*Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 347-349; *Holloway v. Arkansas* (1978) 435 U.S. 475, 485-490 [98 S.Ct. 1173, 55 L.Ed.2d 426].) After expanded application of the presumption of prejudice by lower courts, in *Mickens v. Taylor*, *supra*, 535 U.S. at pages 170-175, the high court restricted the *Sullivan* presumed prejudice to cases where an actual conflict exists arising from multiple concurrent representation of criminal defendants by counsel. The court determined that in all other instances of an actual conflict, requiring a criminal defendant to make the necessary showing of prejudice under *Strickland* was sufficient. (*Id.*, at pp. 166-176.)

In *People v. Doolin*, *supra*, 45 Cal.4th 390, this Court was presented with a case were a superior court's compensation agreement with criminal defense counsel "created an inherent and irreconcilable conflict of interest." (*Id.*, at p. 412.) Prior to the *Doolin* decision, California had a different standard for review of conflict of interest claims than that employed by the United States Supreme Court under the Sixth Amendment. (*Id.*, at p. 419 [previously to establish a violation of the right to conflict-free counsel a defendant need only "(1) show counsel labored under a potential conflict of interest, and (2) raise an informed speculation that the potential conflict adversely affected counsel's performance."].) This Court adopted the standard set out in *Mickens*. (*Id.*, at p. 421.) In so doing, this Court rejected the broad application of presumed prejudice in actual conflict cases. (*Id.*, at p. 428.)

Mai urges this Court to expand upon the application of presumed prejudice to include cases other than when an actual conflict exists due to multiple concurrent representation. This Court should reject Mai's request because to do otherwise would cause the exception to subsume the rule. Moreover, this would not be the case to reach that issue because there was never multiple concurrent representation, or the existence of an actual conflict in this case. This Court should also reject Mai's "functional equivalent" argument. Mai labels his defense counsel as unindicted co-conspirators based solely on the contents of the Waltz Memo. Mai's "functional equivalent" argument alleges that because his defense counsel were unindicted co-conspirator potentially facing criminal charges, and they are attorneys, there was concurrent multiple representation because they were "actively representing *themselves*" and Mai simultaneously. (AOB 165, italics in original.) In this appellate record, there is no evidence that defense counsel (1) were unindicted co-conspirators, (2) faced criminal charges, or (3) represented themselves in connection with a criminal

investigation or charges. Therefore, to accept Mai's "functional equivalent" argument in this case, prejudice would be presumed absent affirmative evidence of an actual conflict or multiple concurrent representation.

E. Even Assuming the Deficient Performance Prong of *Strickland* Has Been Met, Mai Has Not Shown Prejudice

Mai contends that even if prejudice is not presumed, he has satisfied the prejudice prong of *Strickland*. (AOB 63-68.) To the contrary, the appellate record does not demonstrate a reasonable probability that, absent the conflict of interest, the result of the trial would have been different.

Because the presumption of prejudice is not applicable, this Court determines whether there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Friend* (2009) 47 Cal.4th 1, 46; *Strickland v. Washington, supra*, 466 U.S. at p. 694.) Mai has not and cannot meet his burden on this appellate record.

There were numerous witnesses who saw Mai shoot Officer Burt. (1 PHRT 160-165, 206-207.) Mai was seen driving away from the shooting in a marked California Highway Patrol car. (2 PHRT 284-285, 451.) Mai told Chang Nguyen that he killed the officer by shooting him multiple times before executing him with a shot to his head. (2 PHRT 278, 282, 284, 438-440.) The sole of Mai's tennis shoe was a "match" to the impression left in the dirt on the car bumper by a fleeing Asian man near where the patrol car was found and where Mai lived. (1 PHRT 83-87, 122-127.) Blood on Mai's tennis shoe was found to be a "match" to Officer Burt's DNA profile at specific markers. (7 RT 1249-1255, 1260-1263, 1285-1289.)

Mai was involved in an expensive counterfeit checks scheme. Officer Burt found a bag of approximately $10,000 worth of counterfeit traveler's checks during the inventory search of the trunk of Mai's car. (7 RT 1234-1235, 1239-1240, 1271, 1281-1284.) Mai slapped his girlfriend during an argument and then threatened to kill his neighbor while pointing a loaded machine gun at his head. (7 RT 1315-1317, 1319-1321.) Mai carjacked a car while on a test drive and pointed a gun at the salesman while demanding his pin number. (7 RT 1323-1328, 1335.) When a motorist would not change lanes to allow Mai to drive unimpeded, Mai pointed a gun out the window at the car. (7 RT 1344-1347.)

Officer Burt was a twenty-five year old man who had followed in his father's career path and obtained his "dream job" when he become a California Highway Patrolman. (7 RT 1356-1358, 1361-1363, 1365-1370.) He was an intelligent, funny, caring, and loving brother, son and husband. His wife was seven months pregnant with their first child when he was murdered by Mai. (7 RT 1351, 1354, 1356, 1359, 1366-1369.)

Even assuming arguendo defense counsel's performance was deficient, there is not a reasonable probability of a different outcome based on this record. Accordingly, Mai has not established resulting prejudice.

Based on the record, Mai has not demonstrated that his counsel were adversely affected by an actual conflict of interest, nor has he demonstrated prejudice as a result. Accordingly, Mai's claim should be denied.

II. SUFFICIENT EVIDENCE SUPPORTS THE TRIAL COURT'S TRUE FINDING MAI INTENTIONALLY KILLED OFFICER BURT WHILE HE WAS LAWFULLY ENGAGED IN THE PERFORMANCE OF HIS DUTIES AS A PEACE OFFICER

In Argument II, Mai claims insufficient evidence supports the trial court's true finding that Officer Burt was lawfully engaged in the performance of his duties when he was killed within the meaning of Penal

Code section 190.2, subdivision (a)(7). Mai argues insufficient evidence based on the lack of evidence as to the specific Vehicle Code violation for which Officer Burt initially stopped Mai translates into an illegal stop which in turn demonstrates that Officer Burt was not acting lawfully when Mai killed him. (AOB 168-178.) Mai has forfeited his claim that Officer Burt illegally detained Mai by failing to raise it below. Even if the claim was not forfeited, sufficient evidence supports the trial court's true finding that Officer Burt was killed during the lawful performance of his duties within the meaning of the Penal Code section 190.2, subdivision (a)(7).

A sufficiency-of-the-evidence claim requires the evidence be viewed in the light most favorable to the judgment of conviction and all reasonable inferences deduced from the evidence must be presumed in favor of the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Barnes* (1986) 42 Cal.3d 284, 303.) In reviewing a challenge to the sufficiency of the evidence, the reviewing court does not determine the facts. Instead, the court examines "'the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value-such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Kraft* (2000) 23 Cal.4th 978, 1053, 99 Cal.Rptr.2d 1, 5 P.3d 68; see also *Jackson v. Virginia* (1979) 443 U.S. at pp. 319-320, 99 S.Ct. 2781, 61 L.Ed.2d 560; *People v. Johnson* (1980) 26 Cal.3d 557, 578, 162 Cal.Rptr. 431, 606 P.2d 738.) [The court] presume[s] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Kraft, supra,* 23 Cal.4th at p. 1053, 99 Cal.Rptr.2d 1, 5 P.3d 68.) [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. (*People v. Maury, supra,* 30 Cal.4th at p. 396, 133 Cal.Rptr.2d 561, 68 P.3d 1.) '[I]f

the circumstances reasonably justify the [trier of fact]'s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' (*People v. Farnam*, *supra*, 28 Cal.4th at p. 143, 121 Cal.Rptr.2d 106, 47 P.3d 988.) [The reviewing court] do[es] not reweigh evidence or reevaluate a witness's credibility. (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206, 26 Cal.Rptr.2d 23, 864 P.2d 103.)" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129; see *People v. Lindberg* (2008) 45 Cal.4th 1, 27, 82.)

Penal Code section 190.2 lists multiple "special circumstances" under which a defendant, convicted of first-degree murder, may be sentenced to either death or life imprisonment without the possibility of parole if one of the circumstances is found true. As relevant here, the seventh circumstance provides,

> The victim was a peace officer ... who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer ... or a former peace officer ... and was intentionally killed in retaliation for the performance of his or her official duties.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1019; Pen. Code, § 190.2, subd. (a)(7).)

An element of this special circumstance is a requirement the officer was acting lawfully at the time he was killed. (*People v. Mayfield* (1997) 14 Cal.4th 668, 791, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) When there are disputed facts as to whether the police actions are supported by legal cause, this issue must be submitted to the trier of fact to consider the lawfulness of the officer's conduct. (*Ibid.*; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1020.) However, absent disputed facts about the lawfulness of an officer's actions, it is presumed the officer acted lawfully.

(Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"].) Here, there were no disputed facts as to whether Officer Burt's actions prior to being shot to death by Mai were supported by legal cause. Mai did not make any assertion below that Officer Burt's actions were unlawful and there is no evidence to support that Officer Burt was not acting in a lawful manner when Mai exited his car without warning and shot the officer to death during a traffic stop.

The undisputed evidence showed that Officer Burt stopped Mai for an ordinary traffic violation and was in the process of writing Mai a citation based on driving with an expired license, and preparing to tow his vehicle when Mai killed him. Officer Burt was in uniform driving a marked California Highway Patrol car. His citation book showed he was citing a person by the name of "Phu Duc Nguyen" for driving with a suspended driver's license. (1 PHRT 64-65, 93-94.) This evidences that Officer Burt was acting lawfully in his capacity as a California Highway Patrol Officer in his interactions with Mai. There is nothing in this record that indicates anything other than lawful conduct on the part of Officer Burt. Nor is there evidence to counter the presumption that Officer Burt regularly performed his official duty as a California Highway Patrol in stopping or citing Mai for a traffic violation.

Mai told Chang Nguyen that the officer initiated the traffic stop because "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." (2 PHRT 278.) Mai attempts to challenge reliance on this statement for the first time on appeal with an untimely hearsay objection. (AOB 175-176, citing 2 PHRT 280.) Even assuming a timely objection, Mai's statement is nevertheless admissible as an admission and therefore admissible as a hearsay exception. (Evid. Code, § 1220; *People v. Horning* (2004) 34 Cal.4th 871, 898.) It was only later during the preliminary hearing,

when Nguyen was testifying as to the officer's response to Mai's request that the officer merely ticket him and tell him where to pick up his car after it is towed that a hearsay objection was made. At that point pertaining to the discussion regarding towing Mai's car, the prosecutor stated his understanding that the layer of statements from the officer to the defendant was not for the truth of the matter. The trial court overruled the objection stating the officer's statements while not admitted for the truth allowed an understanding of the full meaning of Mai's admissions. (2 PHRT 280.) Mai's admissions further support the presumption that Officer Burt was acting lawfully.

Even assuming Officer Burt was mistaken and Mai had not violated the traffic laws prior to being stopped, this does not make the officer's 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.) Officer Burt was in the process of writing a citation, which was incomplete and unsigned. The only traffic violation the officer definitively cited Mai for was driving with a suspended license and it is undisputed that the false name Mai provided to the officer, Phu Nguyen, had a suspended license. Accordingly it is entirely possible that had Mai not slain the officer before he could complete the citation, additional infractions could have been listed. It is also possible that Officer Burt intended on issuing a warning to Mai for driving without his headlights on but upon discovering he was driving with an expired license, he wrote a citation for that violation. Based on the false identification provided to the officer by Mai, the officer wrote an appropriate traffic citation. The facts before the judge sitting as the trier of fact were undisputed the officer was acting lawfully in initiating the traffic stop. (See *People v. Gonzalez, supra*, 51 Cal.3d at p. 1217.)

Mai mounts another challenge to the traffic stop for the first time on appeal claiming the time and the position of the sun did not warrant driving with headlights illuminated. As support Mai cites to the testimony of Berniece Sarthou who had on sunglasses as she sat in the restaurant's drive-through line. (AOB 175-177.) As set forth above, Mai's failure to raise this challenge below forfeits this issue on appeal. Moreover, Ms. Sarthou's testimony does not support Mai's claim that the officer acted unlawfully. While Sarthou testified it was just before dusk, and that she had her sunglasses on because the sun was still bright enough to need them (1 PHRT 152), she clarified that where her car was located she was facing toward the sun and her sunglasses were prescription glasses (1 PHRT 190-191). She also made it clear; she wore her sunglasses all the time, "even when it rains." (1 PHRT 190.) This evidence is insufficient to rebut the presumption that the officer acted lawfully in initiating the traffic stop and then commenced writing a citation upon learning the person whose name Mai had provided had a suspended license. In any event, an officer's mistaken belief a traffic violation has occurred does not establish unlawful conduct by the officer.

The cases relied upon by Mai in making his claim challenging the lawfulness of the officer's actions are inapposite for all involve instances where the defendants challenged their detention either on Fourth Amendment grounds, or that the law enforcement officer used excessive force in making an arrest and therefore was not acting lawfully. (See, *e.g.*, AOB 170-173.) Here, there was no challenge, either under the Fourth Amendment or otherwise, to the lawfulness of Officer Burt's actions in stopping Mai for a traffic violation. All evidence presented showed that Officer Burt was acting within the course of his duties as a law enforcement officer in stopping Mai for a Vehicle Code violation. The evidence presented below is sufficient to support the trial court's true finding of the

special circumstance. Any absence of the specific Vehicle Code section that Mai violated which caused the officer to initiate the stop does not then render Officer Burt's actions unlawful because it is insufficient to rebut the evidentiary presumption of lawful actions by the officer, and Mai's actions in murdering Officer Burt rendering the officer unavailable to provide the specific Vehicle Code violation.

III. COUNSEL WAS NOT INEFFECTIVE FOR CONSENTING TO ENTRY OF A SLOW PLEA

Mai contends that his counsel rendered ineffective assistance when they consented to Mai's "slow plea" and failed to present a "compelling reasonable doubt defense to the sole special circumstance." (AOB 179-199.) The record confirms defense counsel's tactical reason for providing their consent to the slow plea and the "compelling reasonable doubt defense" Mai faults defense counsel for not presenting is not apparent from the record on appeal. Accordingly, Mai has failed to demonstrate ineffective assistance of counsel.

The well established standard for ineffective assistance of counsel requires Mai to show both deficient performance and prejudice that resulted from counsel's deficiencies. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 692.) Deficient performance is shown by establishing that "counsel's representation fell below an objective standard of reasonableness." (*Id.*, at p. 688.) This requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Id.*, at p. 687.) In considering a claim of ineffective assistance of counsel, a court must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. (*Id.*, at p. 689.) Prejudice is demonstrated by showing "a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at pp. 694-695.) It is insufficient "to show that the errors had some conceivable effect on the outcome of the proceedings." (*Id.*, at p. 693.) The errors of defense counsel must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Id.*, at p. 687.)

"'[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions," claims of ineffective assistance of counsel generally must be raised in a petition for writ of habeas corpus based on matters outside the record on appeal. (*People v. Salcido* (2008) 44 Cal.4th 93, 172, citing *People v. Lopez* (2008) 42 Cal. 4th 960, 972; see *People v. Mendoza Tello* (1997)15 Cal.4th 264, 266-267.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation." (*People v. Gamache* (2010) 48 Cal.4th 347, 391 [internal quotations omitted], citing *People v. Carter* (2003) 30 Cal.4th 1166, 1211; *People v. Mendoza Tello, supra*, 15 Cal.4th at p. 266.) With these principles in mind, it is clear that Mai has not shown either deficient performance by his defense counsel nor resulting prejudice.

Mai was advised of his rights to confrontation and cross-examination of witnesses, and to self-incrimination, and expressly waived those rights in agreeing to submit the guilt determination to the trial court based on the preliminary hearing transcripts. (1 RT 181-200.) In *People v. Sanchez, supra*, 12 Cal.4th 1, this Court defined a "slow plea" as "a submission of the guilt phase to the court on the basis of the preliminary hearing transcripts that is tantamount to a plea of guilty because guilt is apparent

on the face of the transcripts and conviction is a foregone conclusion if no defense is offered." (*Id.*, at p. 28, citing *People v. Wright* (1987) 43 Cal.3d 487, 496.) Mai contends that, as a matter of law, whenever a defense counsel consents to a defendant's guilty plea absent some benefit, counsel has rendered ineffective assistance. (AOB 179, 186-190.) However, as this Court recognized, "[s]ometimes, a defendant's best defense is weak [and] [h]e may make a tactical decision to concede guilt as ... part of an overall defense strategy." (*People v. Sanchez, supra*, 12 Cal.4th at p. 28-29, citing *People v. Wright, supra*, 43 Cal.3d at p. 496-497.)

Here the trial court informed Mai that a submission of the case on the preliminary hearing transcripts was tantamount to a guilty plea to first degree murder and an admission of the truth of the special circumstance alleged. (1 RT 184-185.) The trial court specifically asked if the defense wished to reserve the right to produce additional evidence and defense counsel declined. (1 RT 181.) Both Mai and defense counsel expressed tactical reasons on the record for submitting the guilt-phase determination to the trial court based on the preliminary hearing. Defense counsel agreed to it because they hoped to maintain credibility with a penalty-phase jury that Mai had acknowledged his guilt and taken responsibility for his actions. (1 RT 189-190, 197-199.) Mai agreed to the strategy expressing a desire to help his girlfriend, Victoria Pham, in connection with the federal case that he felt he had inappropriately involved her in. However, Mai was aware at the time he agreed to allow the trial court to determine the guilt phase on the preliminary hearing transcripts that it would do nothing for Pham and there was nothing that he could or could not do which would hurt her. (1 RT 155-158, 188-189, 191, 195-199.)

Defense counsel were not ineffective for consenting to the slow plea. Penal Code section 1018 requires counsel consent to a defendant's entry of a guilty plea in a capital case. Defense counsel consented to Mai's

submission of guilt on the preliminary hearing transcripts, what essentially was tantamount to a guilty plea, because Mai was actually guilty of the murder of Officer Burt and the special circumstance allegation was true. Therefore cases relied upon by Mai, *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300-1301, and *People v. Chadd* (1981) 28 Cal.3d 739, 744, 747-750 (AOB 185), are distinguishable. In *People v. Alfaro, supra*, 41 Cal.4th 1277, the defendant disputed her guilt of the murder and the truth of the special circumstances allegation, but wished to plead guilty for other reasons. Alfaro's defense counsel refused to consent to Alfaro's guilty plea because she sought to plead guilty in an effort to avoid testifying against "Beto," who her counsel claimed was an accomplice. (*Id.*, at p. 1300.) The defendant in *People v. Chadd, supra*, 28 Cal.3d 739, had attempted to commit suicide and was suicidal when he pled guilty to his capital crime. The trial court erred in accepting that guilty plea absent defense counsel's consent, who refused to grant consent because of Chad being suicidal. (*Id.*, at pp. 744-748.) Mai was not suicidal (8 RT 1402), nor was he seeking to pled guilty out of fear or intimidation from some third party. Mai entered into the slow plea because he was guilty of Officer Burt's murder and the special circumstance that Mai murdered the officer in the performance of his duties was true. Therefore, no prejudice can be demonstrated in this case.

This Court has described the protections sought by the legislature in enacting the consent requirement in Penal Code section 1018, as "the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings." (*People v. Alfaro, supra*, 41 Cal.4th at p. 1300, citing *People v. Chadd, supra*, 28 Cal.3d at pp. 750, 753.) Those protections were fully met in this case. Mai now complains that the slow plea entailed his attorneys essentially stipulating to a death sentence and contends that

instead of consenting to the slow plea, defense counsel should have argued or pursued a "compelling reasonable doubt defense" to the special circumstance. (AOB 181, 190, 192-199.) The "compelling reasonable doubt defense" to the special circumstance Mai faults defense counsel for not raising is a challenge to the legality of the traffic stop by Officer Burt. Mai's argument inappropriately presupposes an absence of additional evidence relating to the legality of the traffic stop that defense counsel may have considered before foregoing the challenge Mai urges on appeal; or evidence supporting the legality of the stop that the prosecution could have proferred but for the absence of any challenge to the legality of the stop. Defense counsel was fully aware of the circumstances of the crime and the special circumstance allegation after conducting a full investigation. (See 987.9 CT dated Mar. 16, 2007, at pp. 30-42, 65-66, 85-86, 88-100, 102-105, 108-133, 140-144, 146-148, 150-151, 153-168.)

As a result of the investigation, defense counsel were aware there was no "compelling reasonable doubt defense" to the special circumstance in this case. For the reasons detailed herein in Argument II, *supra*, challenging the sufficiency of the evidence supporting the special circumstance finding, there is nothing to indicate anything other than all of Officer Burt's actions involving Mai were lawful.

Mai contends there was a viable defense because his statement to Nguyen that Officer Burt told Mai he stopped him because he did not have his headlights illuminated cannot be considered because it is hearsay. (AOB 194-198.) There was no hearsay objection below and so it is forfeited on appeal. (*People v. Wheeler* (1992) 4 Cal.4th 284, 300.) Moreover, as explained in Argument II, *supra*, the statement was nevertheless admissible under an exception to the hearsay rule even if an objection had been made below.

Mai's reliance for a defense to the special-circumstance allegation based on matters outside the record as to the time of sunset and the weather conditions in Fullerton the night Mai murdered Officer Burt so as to support Mai's contention on appeal concerning the lawfulness of Officer Burt's action in initiating the traffic stop (see AOB 194-198) should be rejected. 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.' [Citations.] 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. [Citations.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 134.) The evidence never presented to the trial court that Mai seeks to rely upon to make the quantum leap that Officer Burt's actions were unlawful because he may have been mistaken as to whether or not headlights should have been illuminated based on the amount of sunlight and weather conditions would result in unfairness to the prosecution. Moreover, there is no unfairness to Mai, as this Court has made it clear that 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.)

Here, due to Mai's actions, Officer Burt is not available to provide the articulable facts as to the specific traffic violation for which he initially detained Mai. Further, Mai does not show that Officer Burt's actions were unlawful, only that there was possibly an ambiguity as to whether the sun's position warranted driving with headlights on and whether Mai had his

headlights illuminated. "In the absence of evidence to the contrary, it is presumed that the officers acted legally." (*Badillo v. Superior Court* (1956) 46 Cal.2d 269, 272; see also *People v. Farrara* (1956) 46 Cal.2d 265, 268-269; Evid. Code, § 664.) Mai does not show that Officer Burt acted unlawfully. To the contrary, the record shows Officer Burt's actions were legal in that it was a routine uneventful traffic stop until Mai fatally shot the officer in the middle of the traffic stop. There is no indication that at anytime Officer Burt's decision to initiate a traffic stop was pretextual or the limited detention of Mai was unlawful at any point before Mai shot the officer to death. As this Court has stated, "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*, *supra*, 45 Cal.4th at p. 271.) Consequently defense counsel were not ineffective for failing to present a "compelling reasonable doubt defense," because one simply did not exit.

IV. THE TRIAL COURT WAS NOT REQUIRED TO HOLD A COMPETENCY HEARING BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE THAT INDICATED MAI WAS NOT MENTALLY COMPETENT

Mai presented the testimony of psychologist Veronica Thomas at an Evidence Code section 402 hearing about the impact the conditions of Mai's federal confinement were having on him. Mai now contends, based on Dr. Thomas's testimony alone, the trial court was compelled to declare a doubt as to Mai's mental competency to stand trial and suspend criminal proceedings and conduct a hearing pursuant to Penal Code section 1368. In the alternative, Mai cites his "self-defeating" behavior such as pleading guilty, his "outbursts," and his testimony during the penalty phase as additional reasons that in combination with Dr. Thomas's testimony compelled the trial court to conduct a competency hearing. (AOB 200-

248.) To the contrary, the trial court did not err in failing to declare a doubt as to Mai's mental competency.

The due process clause of the Fourteenth Amendment to the United States Constitution prohibits trying a criminal defendant who is mentally incompetent. (*Medina v. California* (1992) 505 U.S. 437, 439 [112 S.Ct. 2572, 120 L.Ed.2d 353]; *Pate v. Robinson*, *supra*, 383 U.S. at p. 378; *People v. Ary* (2011) 51 Cal.4th 510, 517.) A criminal defendant is deemed competent to stand trial only if he "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'" and he "'has a rational as well as factual understanding of the proceedings against him.'" (*Godinez v. Moran* (1993) 509 U.S. 389, 396, 397-402 [113 S.Ct. 2680, 125 L.Ed.2d 321]; *Dusky v. United States* (1960) 362 U.S. 402, 402 [80 S.Ct. 788, 4 L.Ed.2d 824] (per curiam); *People v. Ary*, *supra*, 51 Cal.4th at p. 517.)

Penal Code section 1368, subdivision (a), requires a trial court to suspend criminal proceedings at any time "prior to judgment" if the court reasonably doubts "the mental competence of the defendant." A defendant can create a bona fide doubt concerning his competency to stand trial through substantial evidence of mental incompetence, or the trial court can raise the issue on its own. (*People v. Ary*, *supra*, 51 Cal.4th at p. 517; *People v. Lewis* (2008) 43 Cal.4th 415, 524; *People v. Blair* (2005) 36 Cal.4th 686, 711; see Pen. Code, § 1368, subds. (a), (b).) "'Substantial evidence is evidence that raises a reasonable doubt about the defendant's competence to stand trial.' [Citation.] Evidence ... that does no more than form the basis for speculation regarding possible current incompetence is not sufficient. [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1281.) "A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial." (*People v. Rogers* (2006) 39 Cal.4th

826, 847.) Here, no evidence whatsoever, let alone substantial evidence, was presented calling into question Mai's competency to stand trial.

At an Evidence Code section 402 hearing held on March 2, 2000, Mai presented the testimony of clinical psychologist Veronica Thomas. (3 RT 406.) Dr. Thomas first evaluated Mai in January 1999. Between that time and the time of the 402 hearing fourteen months later, Dr. Thomas had met with Mai between twenty and twenty-five times. The defense's purpose in having Dr. Thomas evaluate Mai was two-fold, to determine whether he was mentally competent and to provide mitigating evidence at the penalty phase trial. (3 RT 407.)

Dr. Thomas testified extensively about Mai's conditions of confinement, Mai's personality and the impact those conditions of confinement were having on Mai. (3 RT 408-421.) Dr. Thomas diagnosed Mai with an antisocial personality disorder and explained that Mai is a sociopath with a propensity towards violence based on his history of violent crimes. (3 RT 421-422.) Conspicuously absent from Dr. Thomas's testimony was any evidence that Mai was unable to understand the proceedings against him, or that Mai was unable to consult with his lawyers with a reasonable degree of rational understanding. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1111 [defense psychiatrist's opinion without elaboration or details did not establish substantial evidence of incompetence].)

On appeal, Mai nevertheless contends Dr. Thomas's testimony alone was sufficient to raise a reasonable doubt about his competency. (AOB 228.) However, throughout her testimony, Dr. Thomas never opined that Mai was mentally incompetent. (3 RT 406-428.) Nothing in Dr. Thomas's testimony raised a doubt as to Mai's competence. She testified that Mai was an individual with normal, if not higher than average, intelligence.

(3 RT 425.) Dr. Thomas's testimony did not provide substantial evidence Mai lacked mental competency.

As an alternative to Dr. Thomas's testimony, Mai contends his incompetency was demonstrated in the record by his counsel's numerous comments, that Mai's girlfriend, Victoria Pham, said Mai had been in a car accident and afterward his behavior changed and he was violent. Mai speculates on appeal this could have indicated a brain injury which was the cause of Mai's violent behavior. (AOB 228-229.) A person with significant brain damage may nonetheless be competent to stand trial. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1415-1416.) Additionally, the record is insufficient to establish any correlation between Mai's car accident and his violent behavior. Dr. Thomas's opinion that Mai has an antisocial personality disorder, *i.e.*, that he is a sociopath with a propensity towards violence, contradicts Mai's unsupported assertion on appeal that his violence is the byproduct of brain damage attributable to a car accident. Mai's speculation about possible brain injury is an untenable basis for finding the trial court erred in failing to declare a doubt as to Mai's mental competency. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1111 [statement by defense psychiatrist that he felt defendant had brain damage did not constitute substantial evidence of incompetence].)

Mai also contends the conditions of his confinement lead to him becoming incompetent. (AOB 229-231.) However, Dr. Thomas never testified that the conditions of Mai's confinement had caused him to become mentally incompetent – even though she had been retained by the defense to evaluate Mai's mental competency. The defense was attempting to modify the conditions of Mai's confinement in federal custody and Dr. Thomas's testimony in support of those efforts did not compel the trial court to express doubt and suspend criminal proceedings to determine Mai's mental competency to stand trial. Having failed to opine that Mai

was mentally incompetent or testify he was unable to understand the proceedings, or that he was unable to assist his defense counsel, Dr. Thomas's testimony does not support a finding that the trial court erred in failing to suspend criminal proceedings.

Mai claims his "increasingly self-defeating behavior" evidenced that he was incompetent. Mai cites as self-defeating behavior evidencing his mental incompetence as consisting of his pleading guilty in the federal case, his slow plea in this case, his "outbursts" in the courtroom, and his desire that no mitigating evidence be presented and his testimony to the penalty phase jury. (AOB 231-236.) Dr. Thomas was aware of the conduct Mai describes on appeal as "self-defeating behavior." (3 RT 412-414.) Nevertheless, the doctor did not opine Mai was mentally incompetent.

Mai's reliance on his federal plea ignores the reasons for his actions. Mai plead guilty to the federal charges in an effort to obtain leniency for his girlfriend, Victoria Pham. Mai felt he had gotten Pham involved in his criminal efforts to murder prosecution witness Chang Nguyen and to traffic weapons. Mai chose to submit this case to the trial court based on the preliminary hearing transcript because he recognized his guilt was established beyond a reasonable doubt, and there was no viable defense to the capital murder charges. Mai's preference for not presenting mitigating evidence also did not require the trial court to declare a doubt as to his mental competency. This Court has repeatedly concluded that a "defendant's preference for receiving the death penalty does not invariably demonstrate incompetence." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 526; *People v. Grant* (1988) 45 Cal.3d 829, 859; *People v. Guzman* (1988) 45 Cal.3d 915, 963-964.)

Mai's disruption of the proceedings did not evidence mental incompetency. Mai was angered by the testimony of penalty phase witnesses Mark Baker and Robert Bachand. He was angry when he

thought that the court clerk may have provided the victim's family members with a cup of coffee. Mai also expressed anger over his conditions of confinement due to the level of security he was being held under by federal authorities. While in Orange County Jail, Mai attempted to traffic weapons, form as super gang "Asian Mafia" by the joining of disparate Asian gangs into one, and he hired someone to murder prosecution witness Chang Nguyen. When placed in federal custody, Mai continued to attempt to communicate with other inmates using "kites."[16] It was for this reason that Mai was not allowed writing materials, including paper, books, magazines, pencil or pen, and he was not allowed to flush his toilet because he was caught sending the "kites" through the toilet system. In any event, Mai's reactions to the conditions of his confinement by federal authorities did not require the trial judge to suspend criminal proceedings and conduct a mental competency hearing. (See *People v. Rundle*, *supra*, 43 Cal.4th at p. 180 [emotional reaction to the stress of the penalty phase of trial, reflecting a difference of opinion over a strategic decision whether the defendant should be absent from further proceedings, was not a sufficient basis for the trial court declaring there was "bona fide doubt" as to the mental competency of defendant].)

After Mai disrupted the courtroom during the testimony of Mr. Bachand, Mai assured the trial court that he would not cause any further disruptions. (7 RT 1333) For the remainder of the trial, Mai did not have any other outbursts or cause disruption. This shows that Mai chose to be disruptive and that he could control his behavior. In any event, more is required to raise a doubt of competence than actions or statements that have

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[16] A "kite" is a note "that inmates illegally pass to other inmates or to individuals outside of prison while incarcerated." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 800.)

little reference to his ability to assist in his own defense. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1064, 1073; *People v. Marshall* (1997) 15 Cal.4th 1, 33; *People v. Medina* (1995) 11 Cal.4th 694, 735.)

As for the trial court failing to *sua sponte* call for a competency determination (AOB 236-248), the trial court made it clear based on its observations of Mai that it had no question as to Mai's mental competency. Shortly after the jurors were sworn, but not present (5 RT 1070, 1074), the trial court noted for the record that it had read a writ and reply brief to the writ filed by Mai's attorneys in the Ninth Circuit regarding the impact the extra security precautions by federal authorities were having on Mai.[17] (5 RT 1075; see also 2 Supp.CT 28-156). The trial court was concerned with the statement in the Ninth Circuit pleading that stated:

> "Petitioner is alleging that he cannot any longer present evidence as to his mental condition to the trier of fact at his penalty phase trial, because the conditions of this confinement have caused him to become mentally unstable, to the point where his counsel and psychologist cannot prepare the petitioner for trial."

(5 RT 1075.)

The trial court then stated its observations for the record:

> The defendant has appeared in this courtroom on April 3rd, April, 6th, April 10th, and April the 11th during jury selection.
>
> He has attentively followed roll call page by page. He has read questionnaires and reviewed prospective juror lists. He has made notes. He has appeared to consult with both of his counsel concerning the lists and questionnaires. I note that he has assisted Mr. Peters in the exercise of peremptory challenges.

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[17] Mai also seems to rely on his Petition for Writ of Prohibition/ Mandate Request for Emergency Stay denied by the Fourth Appellate District of California, Division Three. (AOB 210-211.) The record below does not indicate that the trial judge reviewed the writ to the Court of Appeal.

> He has not given an appearance of being nervous or upset. On the contrary, he has appeared to be rather calm and collected during this four-day time frame.

(5 RT 1075-1076.)

In response, defense counsel Peters stated that Dr. Thomas had seen and spent considerable time with Mai the previous Wednesday and she noted an increase in Mai's physiological symptoms, "headaches, nausea, dizziness." (5 RT 1076.) According to defense counsel, Dr. Thomas also noted an "increase in the intensity of his emotional reaction to innocuous stimuli, the smaller the problem, the bigger the reaction which she expected." (5 RT 1076.) After acknowledging Mai's outburst that morning, defense counsel stated,

> And if he was 1368, I'd say that, I am not doing that because that would be a game, and I am not here to play games. Neither is the defendant. So I have not pulled that card, because our purpose isn't to delay. The writ isn't to delay. We don't want to delay this, but to have a defendant who has lights on 24 hours a day and is completely sealed off and has no contact, no mail, no phone calls, it is bound to have an effect on somebody. Especially somebody facing the death penalty. That's all we are saying.

(5 RT 1077.)

The next morning, an in-camera hearing was held wherein defense counsel Peters explained that Mai was acting out. Initially, Mai refused to come out of his cell unless ordered by the trial court. The trial court was contacted by telephone and ordered that Mai come out of his cell and be transported. The trial court put on the record that Mai's counsel had been in the holding cell with Mai, and Mai had been so loud that it could almost be heard in the courtroom. (6 RT 1079.) Defense counsel Peters noted that while Mai had "good reason to yell and scream," in his experience that after Mai was able to "vocalize enough of his anger that he gets back to some sort of rationality." (6 RT 1080.) Defense counsel then explained the

cause for Mai's anger was that the other day Mai had observed the court clerk giving coffee to the victim's family members, which made Mai feel like he was not on neutral grounds, and that although the federal government had promised to give him lunch, it had not done so. (6 RT 1080.)

The trial court inquired whether it was something beyond the custodial situation that had been previously cited by defense counsel. Again, defense counsel said it was not that Mai was "1368, I am not saying that, but he is very upset, and part of it he can control, and part he can't, because of the frustrations he goes through." (6 RT 1081.) Defense counsel reiterated, "Dr. Thomas's testimony about the volatility of his emotions is an accurate portrait, and you will see, I think he will come out and be quite calm. And that is caused by being so isolated. And when anything goes wrong, like the visits with the father, or lunch, they become magnified." (6 RT 1082.)

Although trial counsel's failure to seek a competency hearing is not determinative, it is significant because trial counsel interacts with the defendant on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 848.) Accordingly, denial of Mai's claim is supported by defense counsel expressly and affirmatively indicating an absence of doubt as to his client's competency to stand trial.

Mai's claim of error is belied by the fact that: (1) the mental expert who examined him for the defense regarding his mental competency never opined he was incompetent; (2) defense trial counsel expressly and affirmatively indicated his belief that Mai was not mentally incompetent; and (3) the trial court's observations of Mai did not provide any indication of mental incompetency. There was no basis for the trial court to declare a doubt as to Mai's mental competence. Given the absence of substantial

evidence Mai was mentally incompetent, Mai's claim of error should be rejected.

V. MAI FREELY TESTIFIED IN THE PENALTY PHASE TRIAL AND HE CANNOT NOW COMPLAIN THE TRIAL COURT SHOULD HAVE PROHIBITED OR LIMITED HIS TESTIMONY

Mai contends the trial court violated his constitutional rights under the Eighth and Fourteenth Amendments and under state law because of the contents of Mai's testimony in the penalty phase trial. Analogizing to victim impact testimony cases where courts have limited opinion evidence concerning punishment, Mai claims his testimony as to the appropriate punishment was irrelevant and inadmissible. (AOB 249-271.) Mai voluntarily testified on his own behalf in the penalty phase trial, and he cannot now claim error because the trial court did not curtail or limit the scope of his testimony.

Mai refused to allow his defense counsel to present available mitigating evidence. Mai was the only witness presented by the defense at Mai's insistence. During an in camera hearing prior to Mai testifying, the trial court advised Mai to listen to his attorneys and recommended that Mai not testify in the manner his counsel informed the court he desired to, *i.e.*, telling the jury the death penalty was the appropriate punishment in this case. (8 RT 1400-1402.) Mai assured the court he was not suicidal, but that he felt it was important and that it was something he needed to do. (8 RT 1402.)

Mai testified in a narrative form as follows:

> Thank you. [¶] Before I start, I would like to say that I did request for my lawyers not to say anything on my behalf, and I appreciate that.

> Jurors, I am not here to ask or beg for your sympathy or pity. Nor am I here to ask or beg of you, the jurors, to spare my life.
>
> Personally I believe in an eye for an eye. I believe in two eyes for every eye. If you were to take down one of my fellows, I would do everything that is necessary to take down at least two of yours, just to be even.
>
> In this penalty phase trial, the prosecutor, Mr. Jacobs, is seeking the maximum penalty, which we all know is death. I personally feel that the maximum penalty is properly suited for this occasion. I also feel that it is the right thing for you, the jurors, to do so.
>
> Being in my situation now I feel it is only fair, there's a price to pay for everything in life, now that I am here it's time I pay that price. Because, after all this entire ordeal, it is just part of the game.
>
> That's all I have to say, your honor.

(7 RT 1409-1410.)

There was no cross-examination of Mai by the prosecutor. The defense presented no other witnesses, and the prosecution presented no rebuttal witnesses. (7 RT 1410.)

Evidence presented in mitigation must be relevant to the defendant's character and prior record, or the circumstances of the charged offense. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 102, citing *People v. Zapien* (1993) 4 Cal.4th 929, 988-989, and *Kansas v. Marsh* (2006) 548 U.S. 163 [126 S.Ct. 2516, 2525, 165 L.Ed.2d 429]; Pen. Code, § 190.3.) A criminal defendant has a "fundamental right to testify in his own behalf." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 717 [defendant testified in penalty phase against advice of counsel].) Moreover, "a defendant's absolute right to testify cannot be foreclosed or censored based on content." (*People v. Webb*, *supra*, 6 Cal.4th at p. 535.) For that reason, a trial court has no

obligation to prevent a defendant from testifying in favor of a death sentence. (*Id.*, at pp. 534-535.)

On appeal, Mai now challenges his testimony as "irrelevant, inadmissible, and extraordinarily damaging" and argues the trial court violated his rights under the Eighth and Fourteenth Amendments and state law in admitting it. (AOB 250.) Mai's testimony, however, was relevant because it concerned his character, record, and the circumstances of the offense. (Pen. Code, § 190.3.)

Relying on *Rock v. Arkansas* (1987) 483 U.S. 44 [107 S.Ct. 2704, 97 L.Ed.2d 37], and other cases, Mai contends he did not have an absolute right to testify and because his testimony was irrelevant it was inadmissible. (AOB 251-252.) While it is undisputed that a criminal defendant has a fundamental right to testify, the right is not absolute. However, the cases relied upon by Mai are distinguishable. In *Rock v. Arkansas*, the United States Supreme Court held that a blanket rule prohibiting hypnotically refreshed testimony was unconstitutional because "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections." (*Id.*, at p. 61.) The other cases relied upon by Mai have to do with a defendant deflecting culpability by arbitrarily placing blame on a phantom third-party culprit. (AOB 251-256.) Mai's testimony was an acceptance of responsibility for his crime, as such it reflected on his character and was therefore relevant and admissible.

Mai argues that this Court's holding in *People v. Guzman*, *supra*, 45 Cal.3d 915, (overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046), *People v. Webb*, *supra*, 6 Cal.4th 494, and *People v. Grant*, *supra*, 45 Cal.3d 829, are distinguishable and should not be followed in this case. (AOB 261-265.) The distinctions cited by Mai are insubstantial and do not make the holdings in the cases inapplicable to

Mai's. The crux of Mai's claim of distinction is that his testimony was irrelevant. As set forth above, Mai's testimony was relevant to the jury's determination of the appropriate penalty. As this Court has held in *People v. Nakahara*, *supra*, 30 Cal.4th at page 719, a defendant has the right to testify even if that testimony indicates a preference for imposition of the death penalty. Mai contends this Court's decision in *People v. Lancaster*, *supra*, 41 Cal.4th 50, limits the holding in *Nakahara*. (AOB 264.) He is wrong. In *Lancaster*, the defendant argued he had a constitutional right to testify to matters that were irrelevant to the jury's penalty decision. Those matters, *i.e.*, evidence of third parties being wrongfully convicted in other capital cases, experimentation upon prisoners after labeling them "crazy," did not gain relevance simply because the defendant wished to address them in his penalty phase testimony. (See *People v. Lancaster*, *supra*, 41 Cal.4th at p. 102.) Accordingly, nothing in *Lancaster* limits the admissibility of Mai's penalty-phase testimony.

The cases relied upon by Mai where courts have said a victim's family members cannot opine as to the appropriate punishment for a defendant are also distinguishable. (AOB 252-255.) That opinion evidence does not pertain to a defendant's character, crimes, or culpability and therefore is not relevant. (See *People v. Pollock* (2004) 32 Cal.4th 1153, 1180.) Mai's testimony pertained to his character, his crimes and his culpability. Therefore, Mai's testimony was admissible and the trial court cannot be faulted for not *sua sponte* curtailing it.

VI. MAI FORFEITED HIS JUROR BIAS CLAIM; IN ANY EVENT, THE JURY THAT DETERMINED THE APPROPRIATE PENALTY WAS IMPARTIAL AND PROVIDED MAI WITH A FAIR TRIAL

Mai claims Juror Number Twelve had an actual bias in favor of execution when he sat as a juror for the penalty phase of Mai's trial.[18] Mai argues that Juror Number Twelve's responses to the prospective juror questionnaire and during voir dire showed he was unequivocally biased in favor of death. Mai contends this position is supported because although Juror Number Twelve said he would "try" to be impartial and decide the case fairly, he unequivocally stated on the questionnaire that it was his opinion the death sentence was the appropriate sentence. Mai contends for the first time on appeal that Juror Number Twelve had a "pre-formed opinion" about the case. (AOB 272-294.) Mai's claim must be rejected. By failing to challenge this juror for cause or exercise an available peremptory challenge to excuse Juror Number Twelve, the defense indicated its satisfaction with and approval of Juror Number Twelve. So Mai may not now claim error on appeal. In an effort to avoid forfeiture of the issue on appeal, Mai contends counsel rendered ineffective assistance for failing to challenge Juror Number Twelve for cause; or alternatively, the right to an impartial jury is a fundamental personal right which cannot be waived. Juror Number Twelve's statements did not demonstrate that his views on capital punishment would substantially impair the performance of his duties as a juror. Accordingly, counsel was not ineffective for failing to challenge Juror Number Twelve, and Mai's rights to a fair and impartial

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[18] In his AOB, Mai uses the female pronoun as to this juror (AOB 272, fn. 95); however, the record indicates Juror Number Twelve was a male (5 RT 885 [trial court uses "Mr." in addressing Juror Number Twelve], 5 RT 901 [trial court refers to Juror Number Twelve as "sir"]).

jury were not implicated by Juror Number Twelve serving on the penalty jury.

A. Mai Forfeited Any Challenge to Juror Number Twelve

To preserve a claim of juror bias for appellate review, this Court requires a defendant to challenge the juror for cause and use available peremptory challenges in the trial court. (*People v. Bonilla* (2007) 41 Cal.4th 313, 339; *People v. Hinton* (2006) 37 Cal.4th 839, 860; *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 48.) "'To preserve a claim of error in the denial of a challenge for cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted.'" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 487, quoting *People v. Millwee* (1998) 18 Cal.4th 96, 146.) Here, Mai did not challenge Juror Number Twelve for cause, and twice passed for cause while Juror Number Twelve was in the jury box during jury selection. (5 RT 990, 1051.) Mai had available eight peremptory challenges when Juror Number Twelve moved into the jury box, and yet, Mai did not exercise a peremptory challenge to excuse Juror Number Twelve. (5 RT 733-734, 787-789, 935-936.) While ultimately the defense used all available peremptory challenges, Mai lodged no objection to the jury as finally constituted. (5 RT 1060.) If Mai believed Juror Number Twelve threatened his right to a fair and impartial jury, he should have used a peremptory challenge to preserve that right or otherwise expressed dissatisfaction with his jury. He did not and he therefore cannot now claim error on appeal.

Mai claims defense counsel could not waive Mai's right to an impartial jury because it required Mai's personal and express waiver. (AOB 292.) Mai actively participated in the selection of the jurors. In a discussion about whether to bring in an additional panel of prospective jurors, defense counsel said, "If I [can] have a few minutes with Mr. Mai,

because we already know that the situation he is in, Mr. Mai and I do, I want to talk to him about scheduling and being more cautious about exercising peremptories in the future." (4 RT 795-796.) This prompted the trial court to inquire who was exercising the peremptories, counsel or Mai. Defense counsel responded that "both" he and Mai were exercising the peremptories. (4 RT 796.) Accordingly, Mai personally accepted Juror Number Twelve in the finally constituted jury without objection. There is no legal requirement for a trial court to obtain an express waiver from the defendant personally when the defense accepts the jury. (See *People v. Richardson* (2008) 43 Cal.4th 959, 983; *People v. Cox* (1991) 53 Cal.3d 618, 648, fn. 4.)

B. Defense Counsel Was Not Ineffective for Failing to Challenge Juror Number Twelve for Cause

In an attempt to avoid forfeiture of the claim, Mai contends his counsel rendered ineffective assistance for not challenging Juror Number Twelve for cause because the juror was actually biased in favor of choosing the death penalty. (AOB 285-294.) Mai cannot demonstrate either deficient performance or prejudice as a result of defense counsel's conduct in not challenging Juror Number Twelve for cause. In reviewing challenges for cause, the applicable law is well settled:

> "The state and federal constitutional guarantees of a trial by an impartial jury include the right in a capital case to a jury whose members will not automatically impose the death penalty for all murders, but will instead consider and weigh the mitigating evidence in determining the appropriate sentence. [Citation.] '[A] juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath.' [Citations.] If the death penalty is imposed by a jury containing even one juror who would vote automatically for the death

> penalty without considering the mitigating evidence, 'the State is disentitled to execute the sentence.' [Citation.]
>
> Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.] The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' [Citation.] A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether the remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.] '[W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court. [Citations.]' [Citation.]"

(*People v. Boyette* (2002) 29 Cal.4th 381, 416, quoting *People v. Weaver* (2001) 26 Cal.4th 876, 910; *Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222, 119 L.Ed.2d 492]; *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].)

In the context of an ineffective-assistance-of-counsel claim, this Court asks whether the challenged juror "would have been properly excused under this standard [of challenging jurors for cause]"; if not, the ineffective assistance claim fails. (*People v. Coffman & Marlow*, *supra*, 34 Cal.4th at pp. 47-48.) It is apparent that Juror Number Twelve's statements did not demonstrate his views on capital punishment would substantially impair the performance of his duties as a juror. On his questionnaire, Juror Number Twelve revealed that his "cousin-in-law" was a fireman who had treated the officer at the scene. (5 CT 1413.) The juror 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. (5 CT 1413.) Juror Number Twelve wrote, "I think so" in response to the question whether he would be

willing to set aside any formed opinion and decide the case on the law and evidence as provided in the trial. (5 CT 1414.) The juror wrote that "I'm for the death penalty but if court (sic) proved to me that defendant should be spared death – I might not vote death." (5 CT 1420.) Juror Number Twelve stated he could set aside his personal feelings and follow the law. (5 CT 1420.) When the trial court conducted voir dire of the group of prospective jurors that included Juror Number Twelve, the trial court asked if after hearing the questions of the attorneys and the court if it raised any doubt in the prospective jurors' minds as to whether they could be a fair and impartial juror in this case. Several of the prospective jurors raised their hands (4 RT 790), however, Juror Number Twelve did not indicate he could not be a fair and impartial juror. Following further questioning, those prospective jurors who could not be fair and impartial were excused. (4 RT 790-793.)

The trial court asked three specific questions to prospective jurors: "(1) Moving away from your general views, I want to ask you some personal questions. [¶] Faced with the responsibility of deciding which of the two punishments to impose, do you believe that you personally could vote to impose the death penalty, if you decided that was the appropriate punishment? (2) If you believed this was not a case in which the death penalty was appropriate, could you vote to impose life without the possibility of parole? and (3) Will you carefully consider both options before coming to a conclusion?" (5 RT 878.) When the questions were addressed to Juror Number Twelve, he answered affirmatively to all three. (5 RT 879.)

When the trial court was addressing whether any of the prospective jurors had knowledge regarding the crime, Juror Number Twelve indicated his cousin's husband was a Fullerton fireman who was at the scene trying to help the officer. Juror Number Twelve confirmed that he had provided

that information in his questionnaire. (5 RT 885; 5 CT 1413.) The trial court then noted Juror Number Twelve's response to question number five about setting aside any opinions about the case,[19] was "I think so." (5 RT 886.) The trial court asked the juror if he could assure counsel and the court that he could set aside any preconceived opinion and decide this case, and Juror Number Twelve responded, "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.) The trial court inquired whether it was his position they have to prove why somebody should not be put to death, and Juror Number Twelve answered, "Uh-huh." The trial court noted that counsel will have some further questions. (5 RT 886.)

The 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. (5 RT 886-887.)

The trial court questioned the prospective jurors, including Juror Number Twelve, as follows:

> There are several rules of law which I will instruct on throughout and at the conclusion of the trial. It is important that I have your assurance that you will follow my instructions and rulings on the law and will apply that law to this case. [¶] Put it somewhat differently, whether you approve or disapprove of this court's rulings on instructions, it is your solemn duty to accept as correct these statements of the law. You may not substitute your own idea of what you think the law ought to be. [¶] Is there any member of the panel that will not follow the law as it is given to you in this case?

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[19] Questionnaire question number five specifically stated: "If you formed or expressed any opinions about this case before coming to court, would you be willing and able to set aside such opinions and decide this case based upon the evidence and law presented during the trial?"

(5 RT 890.) Juror Number Twelve did not raise his hand in response.

However, Juror Number Twelve raised his hand when asked if any close friend or relative had ever served as a juror on a capital case, and told the trial court his immediate boss had served on one the previous year. (5 RT 891.) In response to the trial court's question of whether he had any discussions regarding the experience, the juror responded, "He said that it, you don't know what it is like, you have an opinion about it until you get there and actually have to make that decision, you just don't, you can't understand it." (5 RT 892.)

In response to the trial court's general question to the prosepective jurors, Juror Number Twelve confirmed that had family members who were involved in law enforcement. (5 RT 901.) Juror Number Twelve also said he was single, age forty-three, had for the last twenty-four years worked at Disneyland, and a couple of years before that worked for the Orange County Republican Central Committee, completed high school, and a couple of years of college. (5 RT 908-909)

During voir dire by defense counsel, Juror Number Twelve was questioned about his response on the questionnaire as to delays in the death penalty system. Juror Number Twelve agreed that it was more of a political problem and he did not think it would impact Mai's case. (5 RT 514.) Juror Number Twelve believed he could weigh the mitigating and aggravating evidence and render a fair verdict. (5 RT 915.) After conducting voir dire of other prospective jurors, defense counsel passed for cause. (5 RT 921.)

During the prosecutor's voir dire, he questioned Juror Number Twelve, and the juror said he could consider, accept and vote for either of the available punishments. (5 RT 931-932.) The prosecutor also passed for cause. (5 RT 934.)

Later, after the jury was selected and sworn, in an in-chambers conversation prior to opening statements and the presentation of evidence, the trial court told defense counsel that "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; is that his issue?" To which defense counsel said, "No." (6 RT 1081.) The trial court noted, "the record should reflect I sat there and watched him exercise 20 peremptories through his counsel." (6 RT 1081.)

Accordingly, Mai personally accepted the jury as it was constituted with Juror Number Twelve on it. The record does not reveal that Juror Number Twelve would have been dismissed pursuant to a challenge for cause. Mai has failed to demonstrate either deficient performance or resulting prejudice as to defense counsel accepting a jury with Juror Number Twelve on it. While the juror may have had some incorrect beliefs and understandings as to how a trial operates, the juror said he would follow the law and instructions. The trial court properly instructed the jury and it is presumed the jurors understood and followed the instructions they were provided. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 ["we and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury.' [Citations.]"]; *People v. Holt* (1997) 15 Cal.4th 619, 662 ["Jurors are presumed to understand and follow the court's instructions."].)

C. Juror Number Twelve Was Not Actually Biased in Favor of Executing Mai

An examination of the record shows that Juror Number Twelve did not demonstrate that his views on capital punishment would substantially impair the performance of his duties as a juror. It also reveals that Juror

Number Twelve possessed no actual bias in favor of executing Mai as he contends (AOB 281-285).

"[A] prospective juror is biased and disqualified to serve only if his state of mind will prevent him from acting impartially and without prejudice to any party." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1290.) "If the prospective juror's statements are equivocal or conflicting, the trial court's determination of his state of mind is binding on appeal." (*Ibid.*) "The trial court is in the best position to make this assessment, since it can observe demeanor and tone, and decide credibility firsthand." (*Ibid.*) Bias does not automatically exclude potential jurors for cause. Such jurors are not disqualified so long as "they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*People v. Martinez*, *supra*, 47 Cal.4th at p. 427.) A juror's biases on capital punishment are not determinative. It is only if that "predilection would actually preclude him from engaging in the weighing process." (*Ibid.*)

Juror Number Twelve's responses on the questionnaire and during voir dire indicated 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. It is not unusual for a prospective juror in a capital case to be unfamiliar with the complexities of the law. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1094.) Juror Number Twelve never expressed a strong or an "unalterable preference in favor of the death penalty." (*People v. Crittenden* (1994) 9 Cal.4th 83, 123.) Juror Number Twelve stated he could set aside his opinions and follow the trial court's instructions. The 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*, *supra*, 31 Cal.4th at p. 139.) There is nothing in this record to rebut this presumption that all jurors, including

Juror Number Twelve, did anything other than follow the given instructions. Since Juror Number Twelve did not demonstrate actual penalty bias that would substantially impair the performance of his duties as a juror, Mai's claim must be rejected.

VII. THE TRIAL COURT PROPERLY DENIED MAI'S *WHEELER* MOTION

Mai contends the trial court improperly denied his motion claiming the prosecutor exercised peremptory challenges in a discriminatory manner because he excused the only three African-American prospective jurors on the panel of prospective jurors. Mai claims that after the prosecutor provided racially neutral reasons for exercising the relevant peremptory challenges, the trial court failed to properly determine whether the challenges were the result of purposeful race discrimination. Mai seeks reversal of the death judgment or, in the alterative, the case remanded to permit the trial court to properly make the requisite determination. (AOB 295-331.) The prosecutor's challenges to three African-American prospective jurors were based on reasonable and credible race-neutral reasons. Moreover, the trial court properly denied Mai's motion.

It is well settled that "'[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias-that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds-violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]'" (*People v. Hamilton* (2009) 45 Cal.4th 863, 898, citing *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277, overruled in part in *Johnson v. California*

(2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129]; see also *Batson v. Kentucky* (1986) 476 U.S. 79, [106 S.Ct. 1712, 90 L.Ed.2d 69] overruled in part in *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411].)

When a defendant asserts at trial that the prosecution's use of peremptory strikes violates either the California or federal Constitutions, trial courts use a three-step process in adjudicating claims of discriminatory use of peremptory challenges. (*Snyder v. Louisiana* (2008) 552 U.S. 472 [128 S.Ct. 1203, 1208, 170 L.Ed.2d 175]; *People v. Salcido*, *supra*, 44 Cal.4th at p. 136.) This process entails: "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 447; *Johnson v. California*, *supra*, 545 U.S. at p. 168) Excluding even a single juror for an impermissible reason requires reversal. (*People v. Huggins* (2006) 38 Cal.4th 175, 227.)

A defendant satisfies his burden of making a prima facie showing "'by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 614, quoting *Johnson v. California*, *supra*, 545 U.S. at p. 170.) The trial court found a prima facie case was made by Mai. (5 RT 942.) Notwithstanding a prima facie case having been found, the ultimate burden of persuasion regarding racial motivation remained with Mai, and never shifted from him as the opponent of the strike. (*Rice v. Collins*

(2006) 546 U.S. 333, 338 [126 S.Ct. 969, 973-974, 163 L.Ed.2d 824] [third step in a *Batson* analysis "involves evaluating 'the persuasiveness of the justification proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'"]; *People v. Mills* (2010) 48 Cal.4th 158, 184; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343.)

A. Mai's Prima Facie Case Showing

On the second day of jury selection, the prosecutor exercised his seventh and ninth peremptory challenges to excuse prospective jurors L.P. and P.F., both of whom were African-American. (4 RT 788, 789; 5 RT 939.) On the third day of jury selection, the prosecutor exercised his thirteenth peremptory challenge to excuse M.H., the only remaining African-American prospective juror on the panel. (5 RT 936, 937.) The defense then brought a motion pursuant to *Wheeler* claiming the prosecutor was using peremptory challenges on the basis of race. (5 RT 937.)

The trial court excused the prospective jurors and conducted a hearing outside their presence. (5 RT 938.) Defense counsel argued that on the face of it, there was nothing that distinguished these three prospective jurors from the other prospective jurors. (5 RT 938-939.) The trial court asked the clerk for prospective jurors M.H., P.F., and L.P.'s questionnaires. (5 RT 939.) The trial court said, while the clerk was finding the questionnaires, it would go ahead and make a prima facie finding. The trial court's finding was based on the fact that all three African-American prospective jurors on the panel had been challenged. The trial court asked the prosecutor to provide the reasons for exercising the peremptory challenges as to prospective jurors L.P., P.F., and M.H. (5 RT 939.) The trial court then indicated that it wanted to revisit the issue of a prima facie case and asked defense counsel to demonstrate the strong likelihood that

the prospective jurors were challenged solely because of their group association and not for a genuine non-discriminatory purpose. (5 RT 940.)

Defense counsel expanded on his earlier comments and said,

> As I recall, none of them were disqualified because of their feelings about the death penalty, all were educated, so what is the difference there? They all had college degrees and responsible jobs. I think they all, except for [M.H.], were married or had children, or had been married and had children. I couldn't see anything to distinguish them, anything that I heard, or some relative or other circumstance I can recall that would differentiate them from anybody else, except their color.

(5 RT 940.)

The trial court noted its understanding that the mere allegation that the prospective juror belongs to the same identifiable racial group is insufficient. (5 RT 940.) Defense counsel reiterated that it was a piece of circumstantial evidence, they were all educated, "all moderate kind of people" and nothing else differentiated them from the other prospective jurors. When asked again by the trial court if there was something more than the mere fact these prospective jurors belonged to an identifiable group, defense counsel reiterated that there were very few African-Americans in the jury pool, and three African-Americans had been excused by the prosecution using peremptory challenges. (5 RT 940-941.) The trial court confirmed with defense counsel that counsel believed this constituted a pattern. Defense counsel also confirmed that he had nothing more to add. (5 RT 941-942.) While observing the showing was "marginal," the trial court then asked the prosecutor to provide reasons for the challenges. (5 RT 942.)

B. The Prosecutor's Reasons for Exercising Peremptory Challenges of Three African-American Prospective Jurors

The prosecutor stated prospective juror M.H. was single, she had no children, she was younger than the jurors preferred by the prosecutor because she was in her thirties. Additionally, her attitude regarding the death penalty was personal and emotional, not philosophical. The prosecutor said prospective juror M.H. spoke that if it was one her family members, then she could understand it. The prosecutor reiterated that the primary reason was because she was young, single and had no children. (5 RT 942.)

Prospective juror P.F. was also younger than the prosecutor wanted jurors to be. Prospective juror P.F.was in her thirties. "She had very casual attitude and dress." In her questionnaire, prospective juror P.F. believed the death penalty was appropriate only where there was a pattern of violent conduct. Additionally, prospective juror P.F. did not appear particularly interested in the proceedings. It also appeared as if she seemed bored with the prosecutor's and defense counsel's questions. (5 RT 942-943.)

The prosecutor had two reasons for challenging prospective juror L.P. Her occupation was social worker. The prosecutor stated he generally used a peremptory challenge on social workers unless there was a reason not to do so. Also, prospective juror L.P. said she could not vote for the death penalty unless the facts were proved beyond a shadow of a doubt. So the prosecutor felt she might hold the prosecution to a higher burden on some of the facts, particularly on the other acts that were alleged. (5 RT 943.)

The prosecutor added that he had a grading system and that based on the questionnaires, prior to seeing the prospective jurors for voir dire, he had graded prospective juror L.P. as a three; prospective juror P.F. as a three plus, and prospective juror M.H. as a four. (5 RT 943.)

Defense counsel then pointed out that Juror Number Twelve was unmarried. (5 RT 943.) The trial court found "that no discriminatory intent is inherent in the explanations, and the reasons appear to be race neutral, and on those grounds the court will deny the Wheeler motion." (5 RT 944.)

C. The Trial Court Properly Denied Mai's *Batson/Wheeler* Motion

Mai acknowledges that the reasons provided by the prosecutor were facially race-neutral but contends they were not bona fide. (AOB 306-307.) Mai also contends that trial court's language in denying the motion, establishes the court failed to conduct the third prong of the *Batson/Wheeler* analysis. (AOB 307-321.) Substantial evidence supports the trial court's rulings denying Mai's *Wheeler* motion. Moreover, the trial court credited the prosecutor's reasons and its determination is entitled to deference on appeal.

"'Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] "We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] *So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.* [Citation.]'" (*Lenix, supra*, 44 Cal.4th at pp. 613–614, 80 Cal.Rptr.3d 98, 187 P.3d 946, fn. omitted, italics added.)." (*People v. Mills, supra*, 48 Cal.4th at p. 175.)

With respect to a prosecutor's reasons for exercising a peremptory challenge, his explanation need not be persuasive, so long as the reason was not inherently discriminatory. (*Rice v. Collins*, *supra*, 546 U.S. at p. 338.) Indeed, it should be considered that the choice to use a peremptory challenge is "subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." *(Miller-El v. Dretke* (2005) 545 U.S. 231, 238 [125 S.Ct. 2317, 162 L.Ed.2d 196].) These principles should be considered in conjunction with the presumption that the prosecutor used peremptory challenges in a constitutional manner. (*People v. Morrison* (2005) 34 Cal.4th 698, 709.)

"The credibility of a prosecutor's stated reasons 'can be measured by, among other factors ... how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 900, quoting *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 [123 S.Ct. 1029, 154 L.Ed.2d 931].) The prosecutor's justification "need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Lenix* (2008) 44 Cal.4th 602, 613, quoting *People v. Arias* (1996) 13 Cal.4th 92, 136.)

Whether there was purposeful discrimination is a question of fact. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 900.) On appeal, a finding against purposeful racial discrimination is reviewed for substantial evidence. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 900; *People v. McDermott* (2002) 28 Cal.4th 946, 971.) So long as the court makes "a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." The court's ability to distinguish "bona fide reasons from sham excuses" is entitled to deference. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 227; *People v. Burgener* (2003) 29 Cal.4th 833, 864.)

The prosecutor's reasons for exercising the peremptory challenges as to the three prospective jurors who were the subject of the Wheeler motion were supported by the record. Prospective juror M.H. clearly expressed that her 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.) When defense counsel sought to probe prospective juror M.H.'s ideas regarding her belief the death penalty was appropriate for a killing to her family member, she seem to become disagreeable. Defense counsel explained that our system does not allow the victim's family members to make a sentencing decision, nor could it be based on revenge. Prospective juror M.H. responded, "Oh, definitely, I'm not saying that. I think maybe you are misunderstanding what I am saying to you; are you misunderstanding me?" (4 RT 696-697.) Defense counsel answered that he did not believe so. (4 RT 697.) Accordingly, the prosecutor's reason relating to prospective juror M.H.'s attitude toward the death penalty being personal and emotional, as opposed to philosophical (5 RT 942) is supported by the record.

The prosecutor also cited as his primary reason for challenging prospective juror M.H. was that she was single, had no children, and was young. (5 RT 942.) Mai argued below, and on appeal, that Juror Number Twelve was also unmarried. (5 RT 943; AOB 312.) While Juror Number Twelve was unmarried, he was older than prospective juror M.H. (5 RT 674, 908.) Additionally, his views toward the death penalty did not present the same concern to the prosecutor as prospective juror M.H. (See 5 RT 942.)

Prospective juror L.P. was a social worker who had worked in a prison as a counselor and was then working for Orange County Social Services as a foster care social worker. She had another job at the Marriott and she was in graduate school working towards a masters in marriage and

family therapy. (4 RT 748-749.) Prospective juror L.P. had a cousin who was a criminal defense lawyer. (4 RT 767-768.) Prospective juror L.P. maintained that she wanted the standard for conviction to be "beyond a shadow of a doubt." (4 RT 778-779.) Accordingly, the record supports the prosecutor's challenge 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.)

Prospective juror P.F. was of the 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.) Accordingly, the record supports the prosecutor's concern that she believed the death penalty was only appropriate where there was a pattern of violent conduct. (5 RT 942-943.) Additionally, 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. (See *People v. Mills*, *supra*, 48 Cal.4th at p. 176.) The prosecutor's stated reasons for exercising peremptory challenges to prospective jurors M.H., L.P., and P.F. were race-neutral, reasonable, and credible.

The trial court adequately performed the third prong of the *Batson/Wheeler* analysis and its finding that the prosecutor exercised the peremptory challenges for race-neutral reasons is entitled to deference. Accordingly, Mai's claim should be denied.

VIII. MAI RECEIVED A FAIR TRIAL AND THE RESULTING DEATH JUDGMENT IS RELIABLE AND CONSTITUTIONAL

Relying on Arguments I through VII, Mai claims his trial was an "empty charade" because defense counsel, the prosecutor, trial court and jurors deferred to Mai's wish in imposing the death sentence. Mai contends

for societal interests, fairness and integrity in the proceedings, and the heightened degree of reliability demanded by death verdicts, his death sentence must be set aside. (AOB 332-352.) As explained herein, Mai's counsel were not burdened by a conflict, the evidence was sufficient to support the special circumstance and Mai's guilt for murdering Officer Burt while engaged in the performance of his duties, Mai was not tried while mentally incompetent, nor were his counsel ineffective, the jury that determine the penalty was fair and impartial, and the prosecutor exercised peremptory challenges for race-neutral reasons. Mai knowingly, voluntarily, and intelligently waived his right to a jury trial and entered a slow plea. Mai freely testified on his own behalf and his testimony was relevant to the penalty determination. His counsel properly acquiesced to his demand that no mitigation case be presented in the penalty phase. Nothing in these aspects of his case rendered his trial fundamentally unfair or his death sentence unreliable.

The Eighth Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944] (plurality opinion of Stewart, Powell, & Stevens, JJ.); see also, *e.g.*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427-428 [100 S.Ct. 1759, 64 L.Ed.2d 398]; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384 [108 S.Ct. 1860, 100 L.Ed.2d 384].) This standard requires "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die" (*Gregg v. Georgia* (1976) 428 U.S. 153, 190 [96 S.Ct. 2909, 49 L.Ed.2d 859] (joint opinion of Stewart, Powell, & Stevens, JJ.)), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination" (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed.2d

392]); *Simmons v. South Carolina* (1994) 512 U.S. 154, 172 [114 S.Ct. 2187, 129 L.Ed.2d 133] Souter, J., concurring).

Here defense counsel conducted an investigation into mitigation evidence, and was ready to present that mitigating evidence to the jury. The Supreme Court held in *Strickland* that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 691.) Such a strategic decision is accorded a high level of deference by reviewing courts. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 690 ["[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."].) Defense counsel explored presenting psychological evidence regarding Mai. Defense counsel had Mai evaluated by Dr. Veronica Thomas, who conducted neuropsychological testing of Mai. Defense counsel explored the possibility with Dr. Thomas of having an M.R.I or C.T. Scan performed on Mai. (2 RT 231-235, 240, 250.)

Additionally, defense counsel investigated Mai's childhood and the manner in which Mai left Vietnam as a child. (2 RT 323.) Defense counsel worked diligently to bring Mai's father and uncle to Orange County from Vietnam. (2 RT 235, 246-247, 302-304, 322-324, 326-329, 372-373; 5 RT 858.) Mai was able to meet with both his father and his uncle. (5 RT 858-859; 7 RT 1221.) Mai also had friends who attended his trial (7 RT 1488) who presumably were available to present mitigating evidence. Defense counsel put extensive effort into preparing a mitigation case. (2 RT 237.) They had extensive conversations with Mai regarding his desire not to put on mitigation evidence. They attempted to change his mind and allow the mitigation evidence that they had developed to be presented. (3 RT 448-449; 5 RT 861; 8 RT 1488.) Mai's defense counsel provided effective assistance because they conducted a sufficient investigation and discussed

the mitigating evidence with Mai prior to him making the decision that he did not want to present mitigating evidence in the penalty phase.

Even if trial counsel for a capital defendant conducts a deficient investigation into mitigating evidence, there must still be prejudice to the defendant before counsel's inadequate performance will be found to constitute a Sixth Amendment violation. (See *Wiggins v. Smith* (2003) 539 U.S. 510, 534 [123 S.Ct. 2527, 156 L.Ed.2d 471].) To assess prejudice, a reviewing court will "reweigh the evidence in aggravation against the totality of available mitigating evidence." (*Ibid.*).

The prosecution's evidence in aggravation was substantial. It showed Mai to be a person who disregarded the law and engaged in violent behavior. In three different instances, witnesses testified to Mai cavalierly pointing a gun at innocent civilians. In addition, the execution of an already disabled officer was overwhelming evidence in aggravation. Mai gunned down the unsuspecting officer who had observed contraband in the trunk of Mai's car during an inventory search before having the vehicle towed because the name provided by Mai to the officer during a routine traffic stop had a suspended driver's license. Instead of fleeing while Officer Burt was lying on the ground disabled, Mai instead, walked over and shot him execution style in the head.

Even assuming Mai allowed his attorneys to present the mitigation evidence described in the record, it was not sufficient to outweigh the aggravating evidence. Accordingly, Mai cannot demonstrate prejudice.

As set forth above, counsel consented to the slow plea for tactical reasons in an attempt to maintain credibility with the penalty jury in order to advocate that Mai did the right thing by acknowledging his guilt and accepting responsibility for shooting Officer Burt to death. Mai thwarted this effort when he threatened to disrupt the proceedings if defense counsel argued to the jury or attempted to present mitigation evidence. Mai freely

testified against the advice of his defense counsel and although the trial court told him it was imprudent. Mai was not suicidal, and made a reasoned choice. Mai's testimony was relevant to his crimes, his character, and the penalty determination. The jury was properly instructed as to the weighing process to reach a penalty determination. There is no substantial evidence in this record to cause doubt as to Mai's mental competency. Mai's mental health expert testified and she never opined that Mai was incompetent, unable to assist his counsel, or did not understand the proceedings against him. A fair reading of Mai's comments throughout the record supports the absence of calling into question his competency.

Mai's trial met the heightened reliability for a death judgment encompassed in the Eighth Amendment.

IX. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL AND WAS PROPERLY APPLIED TO MAI

Mai asserts several standard challenges to the constitutionality of California's death penalty statute. (AOB 353-365.) All of these challenges have been repeatedly rejected by this Court and Mai presents no valid reason for this Court to depart from its well established holdings.

Mai claims Penal Code section 190.2 violates the Eighth Amendment because it is impermissibly broad based upon its failure to "meaningfully narrow the pool of murders eligible for the death penalty." (AOB 253-364.) This Court has repeatedly rejected this claim and Mai offers no persuasive reason for doing otherwise here. (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.)

Mai asserts the "broad application" of factor (a), circumstances of the crime under Penal Code section 190.3, does not provide an adequate narrowing principle. (AOB 354-355.) To the contrary, "Section 190.3, factor (a), whether considered on its face or as applied, does not allow for

arbitrary and capricious imposition of the death penalty." (*People v. Brady* (2010) 50 Cal.4th 547, 590, citing *Tuilaepa v. California* (1994) 512 U.S. 967, 975-976 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

Mai contends the absence of a requirement of proof beyond a reasonable doubt as to aggravating factors and requirement that those aggravating factors be found unanimous by the factfinder violates the Sixth, Eighth, and Fourteenth Amendments contrary to the United States Supreme Court's holdings in *Apprendi v. New Jersey* (2000) 530 U.S. 466, [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584, [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. As this Court held in *People v. Brady*, *supra*, 50 Cal.4th at page 590, a death sentence need not be premised on a beyond a reasonable doubt finding by a unanimous jury as to the existence of aggravating factors, only "that these factors outweigh the mitigating factors, and that death is the appropriate penalty." Additionally Mai argues the standard instructions given here, CALJIC Nos. 8.85 and 8.88, are vague and ambiguous such that they fail to provide constitutionally required guidance to the jury in making the penalty determination. Finally, Mai claims his constitutional rights were violated because the jury was not informed that synonymous with the presumption of innocence, there exists a presumption of life in determining the appropriate penalty. (AOB 355-362.) To the contrary, the standard instructions given below were not constitutionally deficient for failing to state there is a presumption of life that is analogous to the presumption of innocence in the guilt phase. (*People v. Lomax* (2010) 49 Cal.4th 530, 595.)

Mai's contends the federal Constitution mandates written jury findings during the penalty phase. (AOB 363.) He is wrong. (*People v. Burney* (2009) 47 Cal.4th 203, 267-268.)

Mai complains constitutional error occurred because the trial court did not omit aggravating and mitigating factors that were inapplicable to his case from CALJIC No. 8.85. Mai asks this Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, holding to the contrary. (AOB 363.) This Court has repeatedly denied this claim (*People v. Zamudio* (2008) 43 Cal.4th 327, 372) and Mai presents no convincing reasons to reconsider the issue.

Mai asserts the prohibition against intercase proportionality review violates the federal Constitution. (AOB 363-364.) Intercase proportionality review is not constitutionally required, and this Court has "consistently declined to undertake it." *(People v. Riel* (2000) 22 Cal.4th 1153, 1223; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29].)

Mai contends, as implemented, California's death penalty statutes "violate a capital defendant's constitutional right to equal protection 'because the sentencing procedures for capital defendants are different from those for noncapital defendants.'" (AOB 364.) He is wrong. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 373, quoting *People v. Leonard*, *supra*, 40 Cal.4th 1370, 1430.)

Finally, Mai acknowledges this Court's repeated rejection of the claim that California's use of the death penalty as a form of punishment violates international norms, however, he urges the Court to reconsider. (AOB 365.) As this Court stated in *People v. Brady*, *supra*, 50 Cal.4th at pages 590-591, "Despite the abolition of the death penalty in the majority of nations (including all of Western Europe), California's assertedly regular imposition of the death penalty as punishment for a substantial number of homicides does not violate international law or norms." Mai presents no persuasive reasons for this Court to revisit its rejection of challenges to California's death penalty law based on international law and norms.

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: March 24, 2011

Respectfully submitted,

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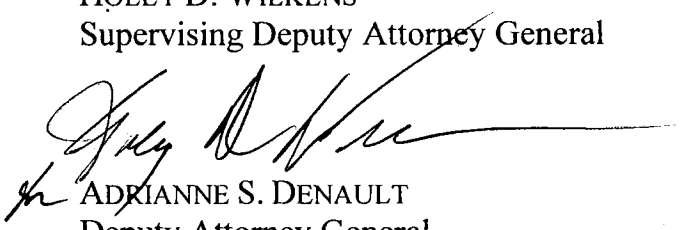

ADRIANNE S. DENAULT
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 28,115 words.

Dated: March 24, 2011

KAMALA D. HARRIS
Attorney General of California

ADRIANNE S. DENAULT
Deputy Attorney General
Attorneys for Respondent

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 March 25, 2011, I served the attached **RESPONDENT'S BRIEF** 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:

C DELAINE RENARD
DEPUTY STATE PUBLIC DEFENDER
221 MAIN ST 10TH FL
SAN FRANCISCO CA 94105
Attorney for Appellant
Hung Thanh Mai
(2 Copies)

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State Habeas Counsel for Petitioner
Hung Thanh Mai
(Courtesy Copy E-Mail service only)

CLERK OF THE COURT
ATTN HON FRANCISCO P BRISENO
ORANGE CO SUPERIOR COURT
P O BOX 1994
SANTA ANA CA 92702-1994

HON ANTHONY J RACKAUCKAS
DISTRICT ATTORNEY
COUNTY OF ORANGE
P O BOX 808
SANTA ANA CA 92702

CALIFORNIA APPELLATE PROJECT
101 SECOND ST STE 600
SAN FRANCISCO CA 94105-3672

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 March 25, 2011, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature