# S185305

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## In the Supreme Court of the State of California

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| **THE PEOPLE,**<br>**Plaintiff and Respondent,**<br>**v.**<br>**RAYSHON DERRICK THOMAS,**<br>**Defendant and Appellant.** | Case No. |

SUPREME COURT
FILED

AUG 11 2010

Frederick K. Ohlrich Clerk

Deputy

Fifth District Court of Appeal, Case No. F056337
Madera County Superior Court No. MCR10473
The Honorable John W. DeGroot, Judge

**PETITION FOR REVIEW**


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

Respondent, the People of the State of California, respectfully petitions this Court to grant review in the above-entitled matter, pursuant to rule 8.500 of the California Rules of Court. A copy of the unpublished opinion of the Court of Appeal, Fifth Appellate District, filed on July 2, 2010, is attached as Exhibit A. A Petition for Rehearing was denied on July 26, 2010. This petition for review is timely. (Cal. Rules of Court, rule 8.500(e).)

## ISSUES PRESENTED

1. Does the dual venue statute allow prosecution for possessing cocaine for sale in Madera County of a defendant who stores his cocaine in Fresno County but lives and conducts sales in Madera County?

2. Is a trial court's ruling on a motion to dismiss for improper venue reviewed for harmlessness?

## STATEMENT OF THE CASE

A search of appellant, his vehicle, and his residence, all in Madera County, unearthed evidence that appellant was involved in selling rock cocaine. Appellant also had a key to and receipts for a storage locker in Fresno County. Officers searched that locker and found a large amount of cocaine and a revolver with appellant's initials. Possessing cocaine for sale and gun possession charges were filed in Madera County.

On June 17, 2002, prior to the preliminary hearing, appellant filed a motion to dismiss based on improper vicinage and venue, alleging that Fresno County was the proper venue because that was where the contraband was located. (1 CT 16-26.) On July 24, 2002, the People filed an opposition. (1 CT 38-47.)

At the August 2, 2002 hearing on that motion, appellant presented testimony from the resident manager of the storage locker. (5 RT 1201-1203.) He explained the procedures for renting and using the lockers. (5 RT 1203-1224.) Robert Blehm, a detective with the Madera County Narcotics Enforcement Team, testified about his declaration and affidavit that was attached to the People's opposition. (5 RT 1232-1238; see 1 CT 42-46.) Blehm had searched appellant, his vehicle, his residence, and the storage locker after appellant was detained on November 2, 2001. (5 RT 1239-1241; 6 RT 1513-1522.)

The People asked Detective Blehm a hypothetical question based on these facts:

> Being that on November 2nd of last year Mr. Thomas was stopped by his parole officer at 807 Clinton Street, Madera California. Upon being contacted by his parole agent, Mr. Thomas was found to be in possession of a large plastic bag. It contained a large amount of U.S. Currency, as well as a receipt to a storage locker; that being the Derrel's Mini Storage that's been discussed. Specifically, in the red bag there were found 956 one-dollar bills, 745 five-dollar bills, 228 ten-dollar bills, 260 twenty-dollar bills, two fifty-dollar bills, 3 one-hundred dollar bills, for a total of $12,561.
>
> After that initial contact with Mr. Thomas, his parole agent then went to the address that Mr. Thomas was reporting to parole, that being 524 Adelaide Street, No. 103, to do a search; that location was searched. Between that location and documentation that was on Mr. Thomas' person at the time of his contact by the parole officer on Clinton Street, there was a connection found to 522 Adelaide Street, No. C, in the City of Madera. Also during the search of Mr. Thomas at the Clinton Street address, a number of keys were found in his possession. Was found that he had a key in his possession that opened the padlock or the locking mechanism to the door at 522 Adelaide Street, No. C. Based upon that, 522 Adelaide, No. C, was accessed.
>
> At that location agents found another large stack of money in a dryer that was in the kitchen. The money found in the dryer

> consisted of 31, one-dollar bills, 10 five-dollar bills, 16 ten-dollar bills, 20 twenty-dollar bills, and another hundred dollar bill, for a total of $741. Additionally, at that location agents discovered two microwave ovens, a bag of – a box of sandwich bags, a face filter mask, and a second receipt for the Derrel's Mini Storage, as well as some baking soda.
>
> At that point agents then proceeded to the location of the mini storage. In the Derrel's Mini Storage that was on the receipts, they took with them the keys that had been found on Mr. Thomas' person. At the Derrel's Mini Storage, they discovered that the key on his person fit a padlock on the locker that was mentioned earlier in the testimony. I think it's 452, but I may be wrong. But the one that was referred to by Mr. Litman, inside that locker upon opening the locker, agents smelled a strong odor of cocaine. The locker was searched. 2.4 pounds of cocaine was found in the locker, as well as a stainless steel revolver. The stainless steel revolver was wrapped in a handkerchief, had – that had the initials RT on it.

(6 RT 1524-1527.) Detective Blehm was also aware that several informants had identified appellant as a large trafficker of cocaine in the City and County of Madera and that he was a validated 916 Sac Town Blood gang member. (6 RT 1527.) Based on those facts, as well as his contacts with street gang members in Madera who had sold and been arrested for possession and possession for sale of rock cocaine, Detective Blehm opined that appellant possessed the cocaine for purposes of sale. (6 RT 1527-1529.) He opined that appellant was using the 522 Adelaide, No. C residence to manufacture and sell rock cocaine. (6 RT 1538-1539.)

The trial court denied the motion on September 9, 2002. (1 CT 95.) It found that evidence of some of the elements of possession for sale of a controlled substance was located in Madera County. (6 RT 1546.)

On July 12, 2005, appellant filed a motion to dismiss pursuant to section 995 based on improper venue. (1 CT 202-215.) The People filed oppositions to the motion. (1 CT 218-223, 227-236, 239-248.) On January

26, 2006, the trial court denied the motion. (1 CT 250; 21 RT 6020-6021.) In doing so, the court stated:

> What the People have alleged and have proved and with regard to establishing venue, they only have to establish that by a preponderance of the evidence. We are talking not about a street dealer, we are talking about a criminal enterprise trafficking in illegal narcotics whose home base or home office is in the City of Madera.
>
> We have Mr. Thomas living in the City of Madera, either at his puported [*sic*] parole address or at his hideaway, where is apparently the base of his operations. His money is here. And a large amount of money is here. His financing is here. He lives here. He is gang related to here. His business records are here. The only thing absent is his inventory. And his inventory, in a business sense, is just across the county line on Herndon. And so he is in constructive possession of his inventory like any other business even though it could be located a county away or state away, his base of operation is here and so the enterprise is here. He is in constructive – his constructive presence is here. Element obviously of the crime is here but you look at all this evidence presented by the People, a jury could conclude beyond a reasonable doubt that he is in constructive possession in Madera County of the drugs and the gun. So for those reasons the motion is denied.

(21 RT 6020-6021.)

On October 14, 2003, an information was filed in Madera County Superior Court charging appellant with possessing more than a kilogram of cocaine while armed, being a felon in possession of a weapon, and having two strike prior convictions. (1 CT 125-128.) On October 10, 2008, appellant was sentenced to 8 years plus 25 years to life on these charges.

On July 2, 2010, the Fifth District Court of Appeal reversed appellant's judgment in an unpublished opinion. The court determined that Fresno County, not Madera County, was the proper venue for prosecution. A petition for rehearing was denied on July 26, 2010.

## REASONS FOR GRANTING REVIEW

## I. REVIEW SHOULD BE GRANTED TO SETTLE TWO IMPORTANT QUESTIONS OF LAW

### A. Background

This case concerns the proper interpretation of Penal Code section 781, which provides that when a crime is committed in two counties or when acts necessary to commit a crime occur in two counties, a defendant can be prosecuted in either county. (*People v. Carrington* (2009) 47 Cal.4th 145, 182.) This remedial statute must be liberally construed (*People v. Hernandez* (1976) 63 Cal.App.3d 393, 401) and applied to protect a defendant from being required to stand trial in a distant locale. (*People v. Posey* (2004) 32 Cal.4th 193, 200.) The prosecution need only prove the facts of venue by a preponderance of the evidence. (*Id.* at p. 211.) A trial court's venue determination will not be disturbed on appeal as long as there is some evidence to support its holding. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1117.) Importantly, no published case discusses whether an erroneous ruling under this statute is subject to a harmless error analysis.

### B. Venue was Proper in Madera County Because Appellant Committed Acts There that Were Necessary to Possessing Cocaine for Sale

The Court of Appeal found the offenses with which appellant was charged to be merely possessory crimes. Since the gun and drugs were found in Fresno County, and there was no evidence appellant ever had them in Madera County, the appellate court believed that Fresno was the *only* county where appellant could be prosecuted for these crimes. But appellant could not have possessed the cocaine and gun in Fresno without the key (which gave him access to the locker) and the receipts (which entitled him to access the locker). Appellant possessed those items in Madera. These acts were requisite to the consummation of the charged offenses. Moreover,

several informants had identified appellant as a big-time cocaine trafficker in Madera County. And the contraband in Fresno was just over the Madera/Fresno county lines, and thus easily accessible to appellant in Madera. As the trial court reasonably concluded, appellant's entire criminal drug enterprise took place in Madera County; appellant only stashed his drugs in Fresno County. In short, appellant's criminal conduct -- possessing and selling cocaine -- took place in Madera County, so venue was proper there.

Venue rules are designed to protect defendants from having to defend in a distant locale. Here, appellant lived in Madera County. The only inference supported by this record is that appellant sought to get the charges dismissed and inconvenience prosecution witnesses by forcing them to travel out of county for trial. Alarmingly, the appellate court's ruling encourages defendants to cross county lines and hide their drugs in neighboring counties to make prosecution more difficult.

The appellate court noted that there are no cases construing section 781 to permit prosecution of a defendant in a county who had only the requisite mental state while in that county. (Opn., p. 6, citing *People v. Posey, supra*, 32 Cal.4th at p. 221.) But mental state evidence *is* relevant, and the appellate court wrongly discounted it. In *People v. Betts* (2005) 34 Cal.4th 1039, 1057, the defendant, a long-haul truck driver, was convicted in Riverside County of molesting girls on three trucking trips that began in Riverside but ended outside that county. Tellingly, the molests occurred outside of Riverside County. However, it was enough for venue purposes that the defendant formed the intent to molest the girls when the trips began in Riverside County. (*People v. Betts, supra*, 34 Cal.4th at p. 1057-1058.) The same is true here. Evidence of appellant's knowledge of cocaine and intent to sell it came from evidence found primarily in Madera County.

Appellant, a known Madera County drug seller, had the key to and receipt for the Fresno County locker with him in Madera County.

It does not appear that this Court has discussed section 781 in an intent to sell narcotics case. Since the events that occurred here are likely to reoccur, this Court should grant review to decide whether the dual venue statute allows prosecution for possessing cocaine for sale in Madera County of a defendant who stores his cocaine in Fresno County but lives and conducts sales in Madera County.

### C. Appellant's Convictions Should Not Be Reversed Without a Showing of Prejudice

Assuming the appellate court correctly found error, review should still be granted because the question of harmless error has not been entertained by this court. The remedy of reversal chosen by the appellate court is too severe. Instead, any error should be subject to a harmlessness test, and here any error was harmless because appellant would not have fared any better had he been tried in Fresno County.

Only if an error is so fundamental in nature that it affects a trial court's integrity, will a reviewing court reverse the trial court's judgment without a showing that the error had some impact. (*Arizona v. Fulminate* (1991) 499 U.S. 279, 309.) Venue does not implicate a trial court's fundamental jurisdiction, either personal (authority to proceed against a defendant) or subject matter (authority to decide a criminal action.) (*People v. Posey, supra*, 32 Cal.4th at p. 208.) Errors which are not jurisdictional in the fundamental sense are reviewed under the appropriate standard of prejudicial error. (*People v. Letner* (July 29, 2010, S015384) ___ Cal.4th ___ [2010 WL 2976678, *21].)

Venue is governed by statute and does not present a constitutional issue. (*People v. Posey, supra*, 32 Cal.4th at p. 209.) To the extent appellant's motion invoked a right of vicinage, that right in California state

courts comes from our state constitution, not the federal constitution. (*Id.* at pp. 222-223.) Consequently, any error warrants reversal only if it resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) Here, it is not reasonably probable that a result more favorable to appellant would have been reached had he been tried in Fresno County because the evidence was overwhelming. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) This Court should grant review, establish that *Watson* applies, and reverse the appellate court decision.

## CONCLUSION

Accordingly, respondent respectfully requests that this Court grant review on the scope of Penal Code section 781 in possession with intent to sell prosecutions and to address the harmlessness issue.

Dated: August 9, 2010

Respectfully submitted,

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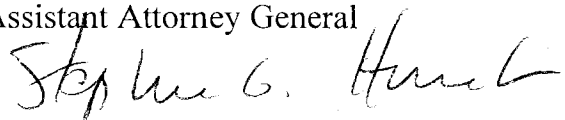

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## CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,412 words.

Dated: August 9, 2010

EDMUND G. BROWN JR.
Attorney General of California

STEPHEN G. HERNDON
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# EXHIBIT A

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYSHON DERRICK THOMAS,

Defendant and Appellant.

F056337

(Super. Ct. No. MCR10473)

**OPINION**

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted defendant and appellant Rayshon Derrick Thomas of possession of cocaine for sale (Health & Saf. Code, § 11351; count 1) and possession of a firearm by a convicted felon (Pen. Code, § 12021 subd. (a)(1); count 2).[1] With respect to count 1, the jury found that defendant possessed 57 grams or more of cocaine (§ 1203.073, subd. (b)(1)), the weight of the cocaine exceeded one kilogram (Health & Saf. Code, § 11370.4, subd. (a)(1)), and defendant was personally armed with a firearm in the commission of the offense (§ 12022, subd. (c)). The jury further found that defendant suffered two prior convictions within the meaning of section 667, subdivisions (b) through (i). The trial court sentenced defendant to prison for a total of 33 years to life. One of defendant's contentions on appeal is that the trial court erred in denying his pretrial motions to dismiss the action on the ground the Madera County Superior Court lacked territorial jurisdiction over the counts because the cocaine and firearm he was charged with possessing were found in Fresno County, and the People failed to sustain their burden of showing venue was proper in Madera County. We agree and reverse the judgment.

## *FACTUAL AND PROCEDURAL BACKGROUND*

The complaint alleged that defendant committed the offenses in Madera County. Before the preliminary hearing, defendant moved to dismiss the action. He argued that Fresno County, not Madera County, was the proper jurisdictional territory for prosecution of the charges because the subject cocaine and firearm were found in a storage locker at a mini-storage facility in Fresno.

In opposing the motion, the prosecutor argued venue was proper in Madera County on the theory that "[defendant] was selling his cocaine in Madera County and simply storing the bulk of it in Fresno County to try and avoid its discovery by law enforcement." Robert Blehm, a Madera police officer assigned to the Madera County Narcotic Enforcement Team, testified as a narcotics expert for the prosecution. Agent

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1 Further statutory references are to the Penal Code unless otherwise specified.

Blehm opined the cocaine found in the Fresno storage locker was possessed by defendant for the purpose of converting it into cocaine base and selling it in Madera. The agent's opinion was based on facts presented in a "hypothetical question" posed to him by the prosecutor and information Blehm had received from confidential informants to the effect that defendant was "a very large trafficker of cocaine in the City and County of Madera."

The factual scenario the prosecutor posed to Agent Blehm included the following: Defendant was stopped by his parole agent in Madera and was found to be in possession of a plastic bag containing a large amount of cash ($12,561) and a receipt for a storage locker in Fresno. Defendant also had a number of keys in his possession. One of the keys opened an apartment in Madera that was different than the one he had reported to his parole agent as his residence. Police found a second receipt to the Fresno storage locker in this apartment. A stack of cash ($741) was found inside a dryer in the kitchen. Also found in the kitchen were items often used in connection with the manufacture and sale of cocaine base, including a face filter mask, a box of plastic sandwich bags, a box of baking soda, and two microwave ovens. Police agents went to the Fresno storage locker listed on the receipts. One of defendant's keys opened the locker. Inside the locker, agents smelled the strong odor of cocaine and found a stainless steel revolver wrapped in a handkerchief, bearing the initials "RT."

On cross-examination, Agent Blehm acknowledged no controlled substances were found on defendant's person at the time of his arrest, and no cocaine residue was found on items in his possession. The items found in the kitchen of the Madera apartment were not necessarily indicative of criminal activity. Although he could not recall precisely where they were found in the kitchen, Officer Blehm acknowledged the possibility one of the microwave ovens was found on top of the kitchen counter, while the other was found inside a kitchen cabinet. He did not check to see if the microwave ovens were functioning.

In denying defendant's motion to dismiss the action, the trial court reasoned venue was proper in Madera County because evidence the prosecution needed to establish the requisite mental state for the crime of possessing cocaine for sale "was seized here in Madera County." When asked if the court's ruling also applied to the firearm possession charge, the court stated it did not think it would be proper "to bifurcate that weapon out" and noted the inefficiency of trying the counts in separate courts.

Before trial, defendant brought a second motion to dismiss the action based on improper venue. The trial court denied the motion, finding the prosecution had sustained its burden of showing venue was proper in Madera County because a reasonable jury could find defendant was "in constructive possession in Madera County of the drugs and the gun."

## ***DISCUSSION***

Section 777 states the basic rule of venue: "[E]xcept as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed." "The words 'jurisdictional territory' ... in case of a superior court mean the county in which the court sits." (§ 691, subd. (b).)

Section 781 provides an exception to the rule: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."

"Courts have construed the phrase 'requisite to the consummation of the offense' to mean requisite to achieving the offender's unlawful purpose. [Citation.] Pursuant to this interpretation, venue is proper in a county where only preliminary arrangements or acts leading to commission of the crime occur, even though such acts are not essential elements of the charged offense. [Citations.]" (*People v. Bismillah* (1989) 208 Cal.App.3d 80, 85.)

"[V]enue should be considered a question of law for determination by the court prior to trial rather than a question of fact for the jury at the conclusion of trial." (*People v. Posey* (2004) 32 Cal.4th 193, 210 (*Posey*).) The People must prove the facts underlying venue by a preponderance of the evidence. (*Id.* at p. 211.) "On review, a trial court's determination of territorial jurisdiction will be upheld as long as there is 'some evidence' to support its holding. [Citations.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1117.)

The possessory crimes in this case occurred in Fresno and, thus, the appropriate venue was Fresno County under section 777. There is no evidence in the record that defendant ever possessed the subject cocaine and firearm within Madera County. However, in denying defendant's second motion to dismiss, the trial court found venue was proper in Madera because there was evidence defendant constructively possessed the cocaine and firearm in Madera. We disagree with the trial court's conclusion.

"Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another." (*People v. Morante* (1999) 20 Cal.4th 403, 417.) "For purposes of drug transactions, the terms 'control' and 'right to control' are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance." (*Armstrong v. Superior Court* (1990) 217 Cal.App.3d 535, 539.)

It is true defendant's right to control the contraband located inside the Fresno storage locker could be inferred from evidence found in Madera, including the key and receipts for the locker. It does not follow, however, that defendant constructively possessed the cocaine and firearm *in Madera*. Rather, under the principles set forth above, the law could fairly treat defendant as if he were in actual possession of the contraband, which was physically located and thus constructively possessed *in Fresno*.

Invoking section 781, the People insist venue was proper in Madera County because "[o]ther than the cocaine itself, all of the evidence proving [the crime of possessing cocaine for sale] was located in Madera County." In essence, the People have adopted the trial court's position in denying defendant's first motion to dismiss, that Madera County was a proper venue for the action because evidence establishing defendant had the requisite *mental state* (e.g., knowledge of presence, intent to sell) was connected to Madera. We are aware of no cases applying section 781, which support this position.

"[V]enue turns on the presence or absence, in a county, of acts or effects constituting the crime or requisite to the commission of the crime—*not on the defendant's state of mind* or on the soundness of any beliefs that he or she might hold as to the location of those acts or effects." (*Posey*, *supra*, 32 Cal.4th at p. 221, italics added.) While the prosecution's theory that defendant intended to sell the cocaine in Madera might have been factually true, the record disclose no evidence that any acts or effects "requisite to the consummation" (§ 781) of the crimes of possession of cocaine for sale (Health & Saf. Code, § 11351) or possession of a firearm by a felon (§ 12021) occurred in Madera County. There was no evidence defendant engaged in any preparatory acts in Madera leading to his possession of the cocaine and the firearm in the Fresno storage locker. Nor was there any evidence defendant sold or transacted to sell any of the subject cocaine in Madera.

Because Madera County was not the proper venue for prosecution of defendant's Fresno crimes of possession of cocaine for sale and possession of a firearm by a felon, the judgment must be reversed. In light of the reversal, we do not address defendant's other contentions on appeal.

## ***DISPOSITION***

The judgment is reversed.

HILL, J.

WE CONCUR:

CORNELL, Acting P.J.

POOCHIGIAN, J.

## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Thomas**

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 August 10, 2010, I served the attached PETITION FOR REVIEW 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 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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The Honorable Michael R. Keitz
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209 West Yosemite Avenue
Madera, CA 93637

Madera County Superior Court
209 West Yosemite Avenue
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 10, 2010, at Sacramento, California.

_____
Declarant