In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Petitioner, v. MAURICE DION SANDERS, Defendant and Respondent.	Case No. S191341

SUPREME COURT
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Fifth Appellate District Court, Case No. F059287
Kern County Superior Court, Case No. BF126309A
The Honorable Michael E. Dellostritto, Judge

PETITIONER'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

(1) Is possession of a firearm after conviction of a specified violent offense (Pen. Code § 12021.1, subd. (a)[1]) a necessarily included offense of possession of a firearm after conviction of a felony (§ 12021, subd. (a)(1))?

(2) Was appellant properly sentenced to concurrent terms for his simultaneous possession of two firearms in violation of section 12021, subd. (a)(1))?

INTRODUCTION

After authorities found two shotguns in appellant's closet, a jury found him guilty of two counts of being a felon in possession of a firearm (§ 12021, subd. (a)(1)) and two counts of possessing a firearm after committing a specified violent offense (§12021.1, subd. (a)).

On appeal, appellant asserted that the section 12021.1, subdivision (a), convictions must be reversed because they were necessarily included lesser offenses of the section 12021, subdivision (a)(1), counts. He also argued that the trial court erred in sentencing him to concurrent terms for his simultaneous possession of two firearms.

The Fifth Appellate District agreed with appellant. It reversed counts two and four (§ 12021.1, subd. (a)) as necessarily included offenses of counts one and three (§ 12021, subd. (a)(1)). The Court of Appeal also determined that section 654 precluded imposition of separate punishment for appellant's simultaneous possession of two firearms.

This Court granted review of both issues on its own motion.

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[1] Hereafter, all statutory references are to the Penal Code, unless otherwise indicated.

STATEMENT OF THE CASE

Based on the discovery by law enforcement of two shotguns in appellant's master closet, a jury found appellant guilty, in counts one and three, of being a felon in possession of a firearm (§ 12021, subd. (a)(1)), and in counts two and four, possessing a firearm after committing a specified violent offense (§ 12021.1, subd. (a)). (1 CT 287-290, 292-293; 4 RT 563-564.) In a bifurcated court trial, the trial court found true the allegations that appellant had suffered four prior serious felony convictions (§§ 667, subds. (a)-(e), 1170.12) and three prior prison terms (§ 667.5, subd. (d)). (1 CT 292-293; 4 RT 587-590.)

The trial court sentenced appellant to 25 years to life on counts one and three, with the term on count three to run concurrently with count one. The court stayed imposition of sentence on counts two and four pursuant to section 654.[2] (2 CT 343-345, 348-349; 4 RT 611-614.)

Appellant appealed, arguing that the corpus delicti of the crimes were not established, counts two and four (§ 12021.1, subd. (a)) must be reversed as lesser included offenses of the violations of section 12021, subdivision (a)(1), and the concurrent term imposed for count three should have been stayed pursuant to section 654. The Fifth Appellate District found the corpus delicti of the offenses was adequately proven. It agreed with appellant on the second two contentions. The court reversed counts two and four as necessarily included offenses of counts one and three, and it determined that section 654 precluded imposition of separate punishment for appellant's simultaneous possession of two firearms. (Opn. at pp. 6, 9-10.)

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[2] The court struck the three section 667.5, subdivision (b), enhancements pursuant to section 1385. (2 CT 343-345, 348-349; 4 RT 611-614.)

Appellant filed a petition for review in pro per, arguing that the evidence was insufficient to establish the firearm possession convictions.

The Court denied appellant's petition for review. On its own motion, however, the Court granted review on the issues set forth herein.

SUMMARY OF ARGUMENT

Because the statutory elements of possession of a firearm after conviction of a specified violent offense (§ 12021.1, subd. (a)) include all the elements of possession of a firearm after commission of a felony (§ 12021, subd. (a)(1)), and one cannot commit a violation of section 12021.1, subdivision (a), without committing a violation of section 12021, subdivision (a)(1), the latter is a necessarily included offense of section 12021.1, subdivision (a).

By its express terms, section 654 does not apply where an individual commits more than one violation of the same provision of law. Additionally, because appellant's possession of one firearm was not "merely incidental to" or "the means by which" he possessed the second firearm (*Neal v. California* (1960) 55 Cal.2d 11, 20 (*Neal*)), section 654 does not apply to this case. The trial court's imposition of a concurrent sentence for appellant's unlawful possession of a second shotgun is consistent with the Legislature's expressed intent that a felon's possession of each firearm be deemed a "distinct and separate offense." (§ 12001, subd. (k).) Appellant is more culpable than a felon who only possessed a single firearm, and his punishment should be commensurate with his culpability.

ARGUMENT

I. POSSESSION OF A FIREARM AFTER CONVICTION OF A SPECIFIED VIOLENT OFFENSE IS NOT A NECESSARILY INCLUDED OFFENSE OF POSSESSION OF A FIREARM AFTER CONVICTION OF A FELONY, BUT THE REVERSE IS TRUE

Petitioner submits that possession of a firearm after conviction of a specified violent offense (§ 12021.1, subd. (a)) is not a necessarily included offense of possession of a firearm after a conviction of a felony (§ 12021, subd. (a)(1)), but the reverse is true.[3]

In *People v Birks* (1998) 19 Cal.4th 108, 117, this Court noted:

> The definition of a lesser necessarily included offense is technical and relatively clear. Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.

(Accord, *People v. Barrick* (1982) 33 Cal.3d 115, 133.) However, when determining if a defendant may be convicted of multiple offenses, only the elements test applies. (*People v. Reed* (2006) 38 Cal.4th 1224, 1229.)

Section 12021.1, subdivision (a), provides that "any person who has been previously convicted of any of the offenses listed in subdivision (b) and who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony." Subdivision (b) lists 26 "violent" offenses and enhancements.[4] Therefore, in order to violate section 12021.1,

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[3] Petitioner took the reverse position in the proceedings below, but upon further consideration submits that section 12021, subdivision (a)(1), is a necessarily included offense of section 12021.1, subdivision (a).

[4] Section (b) provides:

As used in this section, a violent offense includes any of the following: (1) Murder or voluntary manslaughter. (2)

(continued...)

subdivision (a), the following two elements must be met: 1) an individual must have been convicted of one of the felonies listed in subdivision (b), and 2) he or she must own or possess a firearm. (See *People v. Hopkins* (1992) 10 Cal.App.4th 1699, 1704.)

Section 12021, subdivision (a)(1), provides:

(...continued)

Mayhem. (3) Rape. (4) Sodomy by force, violence, duress, menace, or threat of great bodily harm. (5) Oral copulation by force, violence, duress, menace, or threat of great bodily harm. (6) Lewd acts on a child under the age of 14 years. (7) Any felony punishable by death or imprisonment in the state prison for life. (8) Any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, that has been charged and proven, or any felony in which the defendant uses a firearm which use has been charged and proven. (9) Attempted murder. (10) Assault with intent to commit rape or robbery. (11) Assault with a deadly weapon or instrument on a peace officer. (12) Assault by a life prisoner on a noninmate. (13) Assault with a deadly weapon by an inmate. (14) Arson. (15) Exploding a destructive device or any explosive with intent to injury. (16) Exploding a destructive device or any explosive causing great bodily injury. (17) Exploding a destructive device or any explosive with intent to murder. (18) Robbery. (19) Kidnapping. (20) Taking of a hostage by an inmate of a state prison. (21) Attempt to commit a felony punishable by death or imprisonment in the state prison for life. (22) Any felony in which the defendant personally used a dangerous or deadly weapon. (23) Escape from a state prison by use of force or violence. (24) Assault with a deadly weapon or force likely to produce great bodily injury. (25) Any felony violation of Section 186.22. (26) Any attempt to commit a crime listed in this subdivision other than an assault. (27) Any offense enumerated in subdivision (a), (b), or (d) of Section 12001.6. (28) Carjacking. (29) Any offense enumerated in subdivision (c) of Section 12006.1 if the person has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417.

> Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, or who is addicted to the use of any narcotic drug, who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

In order to violate section 12021, subdivision (a)(1), an individual must commit two elements: (1) he or she must have been convicted of a felony or be addicted to any narcotic drug, and (2) he or she must own, purchase, receive or possess a firearm. (*People v. Baird* (1995) 12 Cal.4th 126, 129.)

When comparing the elements of possessing a firearm after committing a specified violent offense (§12021.1, subd. (a)), with being a felon in possession of a firearm (§ 12021, subd. (a)(1)), it appears that all of the elements of the latter are included within a violation of the former, such that one cannot commit a violation of section 12021.1, subdivision (a), without committing a violation of section 12021, subdivision (a)(1). (See *People v. Reed, supra,* 38 Cal.4th at pp. 1227-1228; *People v. Pearson* (1986) 42 Cal.3d 351, 355 ["'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense,'" quoting *People v. Greer* (1947) 30 Cal.2d 589, 596.].) One cannot commit a violation of section 12021.1, subdivision (a), without committing a violation of section 12021, subdivision (a)(1). For example, if one has committed a prior rape and possesses a firearm in violation of section 12021.1, subdivision (a), one would have necessarily committed a felony and possessed a firearm, fulfilling the elements of section 12021, subdivision (a)(1).

However, the reverse is not true. If one previously committed the felony of grand theft and possessed a firearm in violation of section 12021, subdivision (a)(1), one could not be guilty under section 12021.1,

subdivision (a), because grand theft is not included in the specified list of violent felonies contained in section 12021.1, subdivision (b).

In *People v Scheidt* (1991) 231 Cal.App.3d 162, 170-171, the Court of Appeal noted:

> . . . . It is manifest that a greater offense and all its statutorily included lesser offenses protect the identical interest. As to any given statute, for each act the Legislature presumably intended only that a defendant be convicted of the greatest offense proved or admitted, not every lesser offense as well. For example, conviction of assault vindicates the same interest in personal security as conviction of battery. Where a defendant is convicted of battery, vindication of the protected personal security interest does not require conviction of assault for the same act. Conviction of the assault would be superfluous.

Accordingly, appellant's convictions in counts one and three for being a felon in possession of a firearm (§ 12021, subd. (a)(1)) should be reversed as lesser included offenses of the section 12021.1, subdivision (a), convictions in counts two and four. (*People v. Sanchez* (2001) 24 Cal.4th 983, 987 ["[a] defendant . . . cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act"], overruled on another point in *People v. Reed, supra*, 38 Cal.4th at pp. 1228–1229.)

II. THE TRIAL COURT PROPERLY SENTENCED APPELLANT TO CONCURRENT TERMS FOR HIS SIMULTANEOUS POSSESSION OF TWO FIREARMS

The Fifth Appellate District determined that the concurrent term imposed by the trial court on count three (§ 12021, subd. (a)(1)) should have been stayed pursuant to section 654 because the record contained no evidence that appellant possessed independent criminal objectives in possessing the two shotguns. (Opn. at p. 9.) This decision was erroneous.

By its express terms, section 654 does not apply where an individual commits more than one violation of the same provision of law. Section 654, subdivision (a), provides:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .

The statutory language thus pertains to "an act or omission that is punishable in different ways by different provisions of law." In contrast, this case concerns an act giving rise to more than one violation of the *same* provision of law. Thus, section 654 does not preclude separate punishment when an act gives rise to more than one violation of the same provision of law.

In *Neal*, the Court expanded the reach of section 654, when it stated:

> Although section 654 does not expressly preclude double punishment when an act gives rise to *more than one violation of the same Penal Code section* or to multiple violations of the criminal provisions of other codes, it is settled that *the basic principle it enunciates precludes double punishment in such cases also*. (*People v. Brown*, 49 Cal.2d 577, 591; see *People v. Roberts*, 40 Cal.2d 483, 491; *People v. Clemett*, 208 Cal.142, 144; *People v. Nor Woods*, 37 Cal.2d 584, 586 (italics added).

(*Neal, supra*, 55 Cal.2d at p. 18, fn. 1 ("the footnote").) This Court recently requested the parties in *People v. Victor Correa* (*Correa*), S163273, to respond to the question, "Does the authority cited in this footnote [in *Neal*] support the italized language?" Petitioner adopts the position taken by respondent in *Correa* that the authority cited in the footnote does not support the italicized language.

In particular, the first case cited in the footnote, *People v. Brown* (1958) 49 Cal.2d 577, 590 (*Brown*), concerned the application of section 654 to convictions for second degree murder and performing an abortion on

the victim. *Brown* does not address applying section 654 to multiple violations of the same Penal Code section.

The second case cited, *People v. Roberts* (1953) 40 Cal.2d 483 (*Roberts*), also does not support the italicized language in the footnote. In *Roberts*, the defendant was convicted of conspiracy to violate Health and Safety Code section 11500, as well as three counts of violating that same section based on transporting, selling, furnishing and giving away, or possessing heroin "on or about April 3, 1951." (*Id.* at p. 486.) At the time *Roberts* was decided, section 11500 of the Health and Safety Code provided: "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician . . . ." (*Ibid.*) The *Roberts* Court held that the defendant could only be convicted of conspiracy to violate Health and Safety Code section 11500 and one count of violating that code section. (*Id.* at p. 491.)

People v. Clemett (1929) 208 Cal.142, 144 (*Clemett*) similarly does not support the language in the footnote in *Neal*. The statute in *Clemett*, like the statute in *Roberts*, listed a number of acts—any one of which would constitute a violation of the same code section. The Court held that the defendant in *Clemett* therefore only committed a single offense, and his conduct only gave rise to one violation of the code section at issue.

In *People v. Nor Woods* (1951) 37 Cal.2d 584, the last case cited in the footnote, the defendant was convicted of two counts of grand theft. The defendant, a car dealer, offered to sell a 1949 Ford in exchange for another car and $1,183.14. (*Id.* at p. 585.) The defendant represented that title to the 1949 Ford was clear except for a lien of $1,183.14, which he promised to discharge with the cash payment. In reality the lien on the 1949 Ford was much greater than $1,183.14, and the defendant did not discharge the

lien with the victim's payment or the proceeds of the sale of the victim's car. (*Ibid.*) Under these facts, the Court determined that there was only one theft, as both the car and the money were taken at the same time as part of a single transaction, and "the fact that the sentences were ordered to run concurrently does not cure the error." (*Id.* at pp. 586-587.) *Nor Woods* thus does not address the scenario where a defendant's conduct results in more than one conviction of the same provision of law, as in the instant case. Accordingly, as asserted by respondent in *Correa*, the authorities cited in footnote one of *Neal* do not support the italicized language of the footnote. This Court should reject footnote one as authority for expanding section 654 to preclude separate punishment when a defendant commits more than one violation of the same code provision.

In 1994, when it amended section 12001, subdivisions (k) and (l), the Legislature made clear that "each firearm" possessed in violation of sections 12021 and 12021.1 constitutes "a distinct and separate offense."[5] The Legislature's amendments to section 12001 abrogated *People v. Kirk* (1989) 211 Cal.App.3d 58, 60 (*Kirk*), which had held that a defendant could not be convicted of two violations of former section 12020, subdivision (a),

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[5] The 1994 amendments to section 12001, subdivisions (k) and (l) provide:

> (k) For purposes of Sections 12021, 12021.1, 12025, 12070, 12072, 12073, 12078, and 12101 of this code, and Sections 8100, 8101, and 8103 of the Welfare and Institutions Code, notwithstanding the fact that the term "any firearm" may be used in those sections, each firearm or the frame or receiver of the same shall constitute a distinct and separate offense under those sections.
>
> (l) For purposes of Section 12020, a violation of that section as to each firearm, weapon, or device enumerated therein shall constitute a distinct and separate offense.

for his simultaneous possession of two sawed-off shotguns. (See *People v. Rowland* (1999) 75 Cal.App.4th 61, 64-67.)

In this case, the trial court's imposition of a concurrent sentence for appellant's unlawful possession of a second shotgun is consistent with the Legislature's expressed intent that a felon's possession of each firearm be deemed a "distinct and separate offense." (§ 12001, subd. (k).) It would frustrate the purpose of the amendment abrogating *Kirk* to allow multiple convictions, but not separate punishments, for each firearm illegally possessed by a felon. Moreover, to conclude that a felon could be convicted of multiple "distinct and separate" firearm offenses, but could not be punished commensurately with his or her greater culpability is inconsistent with the purpose of section 654, which is to insure that the defendant's punishment is commensurate with his criminal liability. (*Neal, supra*, 55 Cal.2d at p. 20; accord, *People v. Jones* (2002) 103 Cal.App.4th 1139, 1148.)

Finally, the Court of Appeal's analysis misapplied the test governing the applicability of section 654 set forth in *Neal* and repeated in *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267. The Court of Appeal determined:

> . . . [A]ppellant's unlawful possession of each shotgun constitutes "a distinct and separate offense." (§ 12001, subd. (k).) Yet, *separate sentences must nonetheless be supported by substantial evidence of independent criminal objectives.* (§ 654; *People v. Cleveland, supra*, 87 Cal.App.4th at pp. 267-268). Here, the record lacks such evidence. The two shotguns were found next to each other in the master bedroom closet. The record does not contain any proof that appellant intended to use these weapons in different crimes or to sell them to different people. There is also no proof that appellant obtained the shotguns in separate transactions. There is no evidence the two weapons were previously used in different crimes.
>
> In sum, the record lacks evidence from which the court could have inferred that appellant had a different criminal objective or

> intent for each shotgun. Therefore, we conclude section 654 precludes imposition of separate punishment for count 3 and the concurrent term imposed for this count must be stayed.

(Opn. at pp. 9-10, emphasis added.) The Court of Appeal erred in requiring evidence of independent criminal objectives for appellant's possession of two shotguns.

In *Neal*, the seminal case governing the application of section 654, this Court held:

> Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.

(*Neal, supra*, 55 Cal.2d at p. 19) Following this pronouncement, the *Neal* Court provided several examples regarding whether section 654 applied in various situations. It noted that in *People v. Logan* (1953) 41 Cal.2d 279, 290 (*Logan*), defendant, who chose to commit robbery by first knocking out his victim with a baseball bat and then taking his valuables, was convicted of both robbery and assault. The Court reversed the assault conviction on the ground that the double punishment violated section 654. (*Neal*, at pp. 19-20.)

Neal next noted that in *In re Chapman* (1954) 43 Cal.2d 385, 387 (*Chapman*), the Court held that when the assault "is not a means of" perpetrating the robbery but is an act that follows after the robbery is completed, the defendant is guilty of two punishable acts. (*Neal, supra*, 55 Cal.2d at p. 20.) *Neal* further explained:

> Likewise in *People v. Greer*, 30 Cal.2d 589, 600 [184 P.2d 512], statutory rape and lewd and lascivious conduct were held to be one act since both offenses arose from a single act of sexual intercourse. In *People v. Slobodion*, 31 Cal.2d 555, 561-563 [191 P.2d 1], however, we sustained convictions for sex perversion and lewd and lascivious conduct, even though both

> acts were closely connected in time and a part of the same criminal venture since the act giving rise to the lewd and lascivious conduct was *separate and distinct and was not incidental to or the means by which* the act of sex perversion was accomplished.

(*Ibid.*, emphasis added.)

In *Neal*, where the petitioner threw gasoline into the bedroom of the victims and ignited it, resulting in the victims being severely burned, the Court found that petitioner's convictions for both arson and attempted murder violated section 654, since the arson was "merely incidental to the primary objective of killing Mr. and Mrs. Raymond." (*Neal, supra*, 55 Cal.2d at pp. 20-21.) However, the Court found that consecutive sentences for the two attempted murders were proper because they were crimes of violence against separate victims. (*Ibid.*)

Appellant's case is distinguishable from the cases discussed above. Unlike the facts of *Neal, Chapman*, and *Logan,* appellant did not engage "in a course of criminal conduct" that was divisible and gave rise to "more than one act within the meaning of section 654." (*Neal*, *supra*, 55 Cal.2d at p. 19.) Appellant did not possess one firearm as "a means of" (*Chapman, supra*, 43 Cal.2d at p. 387) perpetrating his possession of the second firearm. Nor was his possession of one firearm "incidental to" or "the means by which" his possession of the second firearm was accomplished. (*Neal,* at p. 20, discussing *People v. Slobodion* (1948) 31 Cal.2d 555, 561-563.) Likewise, appellant's possession of one firearm was not "merely incidental to the primary objective" of possessing the second firearm. (*Ibid.*) Rather, appellant committed two separate and distinct violations of section 12021.1, subdivision (a), by possessing two firearms as a felon. Appellant is more culpable than a felon who only possessed a single firearm, and his punishment should be commensurate with his culpability. This conclusion also furthers the legislative goal of discouraging firearm

possession by felons. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1409 [Section 12021 uniquely targets the threat posed by felons who possess firearms].) For these reasons, the trial court properly sentenced appellant to concurrent terms for his simultaneous possession of two firearms.

CONCLUSION

Appellant's convictions in counts one and three for being a felon in possession of a firearm (§ 12021, subd. (a)(1)) should be reversed as lesser included offenses of the section 12021.1, subdivision (a), convictions in counts two and four. The trial court's imposition of concurrent sentences for appellant's two felon in possession of a firearm offenses should be affirmed.

Dated: June 15, 2011

Respectfully submitted,

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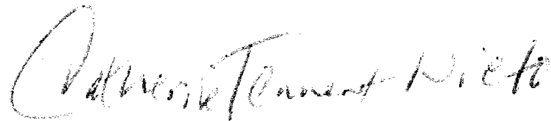
CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITIONER'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 4,154 words.

Dated: June 15, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Sanders** No.: **S191341**

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 June 15, 2011, I served the attached **PETITIONER'S OPENING BRIEF ON THE MERITS** 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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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 June 15, 2011, at Sacramento, California.

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Declarant