IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY ALLEN WHITMER, Defendant and Appellant.	)	No. S208843

Second District Court of Appeal, Division Four, Case No. B231038
Los Angeles County Superior Court Case No. GA079423
Honorable Candace J. Beason, Judge Presiding

DEFENDANT'S OPENING BRIEF ON THE MERITS

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By Appointment of The
Supreme Court Of California

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ISSUE PRESENTED

"(1) Was defendant properly sentenced on multiple counts of grand theft or did his multiple takings constitute a single offense under *People v. Bailey* (1961) 55 Cal.2d 514?"

FACTUAL AND PROCEDURAL BACKGROUND

Defendant adopts the Factual and Procedural Background set forth in the Court of Appeal's Opinion, and notes that it accurately, concisely, and

comprehensively sets forth the applicable factual and procedural background of this case. (Slip Opn. pp. 2-9.)

ARGUMENT

I

BECAUSE ALL OF DEFENDANT'S TAKINGS WERE PART OF A COMMON SCHEME OR PLAN, HE SHOULD ONLY HAVE BEEN CONVICTED OF A SINGLE COUNT OF GRAND THEFT

A. Introduction And Relevant Proceedings Below

Upon a jury trial, defendant was convicted of 20 counts of grand theft. (Slip Opn. pp. 2, 14-17; 1 C.T. pp. 160-198.) The jury further found true an enhancement allegation that the thefts arose from a common scheme or plan and that the aggregate value of the takings involved a loss in excess of $200,000, within the meaning of Penal Code section 12022.6, subdivisions (a)(2) and (b). (Slip Opn. pp. 2-3; 1 C.T. pp. 154-155, 200, 291.)

The information erroneously alleged, and the jury's verdict forms erroneously referred to, the offense of grand theft of an automobile in violation of Penal Code section 487, subdivision (d)(1), which crime was inapplicable to this case because defendant's crimes involved the theft of motorcycles, motorized dirt bikes, and related vehicles. (See Slip Opn. pp. 2, 9-14; 1 C.T. pp. 82-98 [information], pp. 160-198 [verdict forms].)

On appeal, the Court of Appeal held that in light of the fact that the jury was alternatively instructed on grand theft of property with a value exceeding $400 without objection by the defense and because the evidence indisputably established that each stolen item was worth more than $400, the information was impliedly amended and defendant was properly convicted of 20 counts of grand theft in violation of Penal Code section 487, subdivision (a).[1] (Slip Opn. pp. 14-17; 1 C.T. pp. 145-146 [jury instructions on grand theft based on either theft of property worth in excess of $400 or theft of automobile].)

The Court of Appeal then turned to the question under review herein, namely, whether defendant was properly convicted of multiple counts of grand theft or whether his multiple takings constituted a single offense under *People v. Bailey* (1961) 55 Cal.2d 514 ("*Bailey*"). (Slip Opn. pp. 18-29.)

In *Bailey*, this Court held that the defendant therein was properly convicted of one count of grand theft based on a series of takings committed pursuant to the same recurring welfare fraud scheme, each of which was less

[1] Penal Code section 487, subdivision (a), has since been amended to increase the minimum amount for grand theft to $950. (See Pen. Code § 487, subd. (a).)

than the then $200 threshold for grand theft, but taken in the aggregate was greater than $3000. (*People v. Bailey, supra,* 55 Cal.2d at pp. 515, 518-520.)

This court reasoned: "Several recent cases involving theft by false pretenses have held that where as part of a single plan a defendant makes false representations and receives various sums from the victim the receipts may be cumulated to constitute but one offense of grand theft. [Citations.] The test applied in these cases in determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. The same rule has been followed in larceny and embezzlement cases, and it has been held that where a number of takings, each less than $200 but aggregating more than that sum, are all motivated by one intention, one general impulse, and one plan, the offense is grand theft. [Citations.]" (*People v. Bailey, supra*, 55 Cal.2d at pp. 518-519.)

This Court additionally provided that a defendant may not be convicted of more than one count of grand theft where all of the takings are committed against a single victim with one intention, one general impulse, and one plan. (*People v. Bailey, supra,* 55 Cal.2d at p. 519.) As set forth by this Court: "Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may

be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]" (*Ibid.*)

The Court of Appeal in the case at bar held that the above rule set forth in *Bailey* regarding whether a single or multiple crimes have been committed applies only to multiple acts of petty theft, and despite the above express language to the contrary in *Bailey*, does not apply to multiple acts of grand theft. (Slip Opn. pp. 20-27.)

Acknowledging that other appellate courts have disagreed with this interpretation of *Bailey*, the Court of Appeal in the case at bar held "that under *Bailey*, a defendant may be convicted of multiple counts of grand theft based on separate and distinct acts of grand theft committed pursuant to a single scheme." (Slip Opn. pp. 2, 27.)

This Court granted review.

This Court should now reaffirm that the rule set forth in *Bailey* applies to all theft cases, and hold that whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and that a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the

offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan.

B. The Court Of Appeal's Analysis Of *Bailey* Was Flawed

The Court of Appeal acknowledged that in *Bailey* this Court set forth the following rule with respect to multiple acts of grand theft: "Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]" (Slip Opn. pp. 21-22, 25; *People v. Bailey, supra,* 55 Cal.2d at p. 519.)

However, the Court of Appeal effectively determined this Court did not mean what it said because after making the above statement, this Court cited to and did not overrule *People v. Stanford* (1940) 16 Cal.2d 247, *People v. Ashley* (1954) 42 Cal.2d 246, and *People v. Rabe* (1927) 202 Cal. 409. (Slip Opn. pp. 25-26.) The Court of Appeal concluded that the "cases underlying the rule" and the rule set forth in *Bailey* "are in sharp conflict," and determined that the *Bailey* Court actually intended for the rule to be applied in accordance with the above three cases, not in accordance with the

rule as stated in *Bailey* or in the other cases discussed in *Bailey*. (Slip Opn. pp. 25-26.)

The Court of Appeal's analysis was flawed for several reasons.

First, this Court's statement in *Bailey* was clear, and applying an interpretation directly contrary to what was stated by this Court was inappropriate.

Second, in setting forth the above rule in *Bailey*, the only case immediately cited to by this Court was *Stanford*. However, the portion of *Stanford* cited to contains the legal proposition that "the question of whether a series of wrongful acts constitutes a single or multiple offense must in the last analysis be determined by the peculiar facts and circumstances of each individual case," which statement is entirely consistent with the portion of the *Bailey* opinion at issue. (See *People v. Bailey, supra,* 55 Cal.2d at p. 519; *People v. Stanford, supra,* 16 Cal.2d at pp. 250-251.)

Third, and perhaps most significantly, the *Bailey* Court expressly addressed the cases relied upon by the Court of Appeal herein and observed that "[a]lthough none of these decisions discussed the rule set forth above, it does not appear that the convictions would have been affirmed had the evidence established that there was only one intention, one general impulse, and one plan." (*People v. Bailey, supra,* 55 Cal.2d at p. 519.) Thus, the *Bailey*

Court had no reason to overrule these decisions because they did not address the rule set forth in *Bailey*, and because they were not necessarily inconsistent with the rule set forth in *Bailey*.

Fourth, this Court did expressly overrule *People v. Scott* (1952) 112 Cal.App.2d 350. (See *People v. Bailey, supra,* 51 Cal.2d at pp. 519-520.) In *Scott*, the defendant was convicted of multiple counts of grand theft, and the Court of Appeal held the defendant's requested jury instruction providing "that if several acts of taking were done pursuant to one design, the same constitutes one offense only" was properly denied because it was an incorrect statement of the law. (*People v. Scott, supra,* 112 Cal.App.2d at pp. 351-352.) Thus, unlike *Stanford*, *Ashley*, and *Rabe*, *Scott* was a case that expressly adopted a rule of law that was plainly inconsistent with the rule announced in *Bailey*, and the *Bailey* Court's express disapproval of *Scott* made clear its intention that the rule in *Bailey* was as stated. (*People v. Bailey, supra,* 51 Cal.2d at pp. 519-520.)

For all of the above reasons, the Court of Appeal erred in applying a different rule of law to this case than the one set forth by this Court in *Bailey*.

C. This Court Should Not Overrule *Bailey*

To the extent the Attorney General requests this Court now overrule *Bailey*, this Court should decline the invitation.

There are numerous reasons why this Court should reaffirm the rule set forth in *Bailey*.

1. There Is No Statutory Basis To Impose Different Rules For Grand Theft And Petty Theft

As discussed above, *Bailey* sets forth the same rule of aggregation of multiple acts for both petty theft and grand theft. (See *People v. Bailey, supra,* 51 Cal.2d at pp. 518-519.) This is consistent with the statutory scheme.

Penal Code section 484 sets forth the general definition of the crime of theft. (Pen. Code, § 484.) Penal Code section 487 sets forth numerous specific circumstances under which the crime will constitute grand theft, including as pertinent herein, if the value of the property taken exceeds $950 under the current version of the statute or $400 under the version applicable at the time of the crimes herein. (Pen. Code, § 487.) Penal Code section 488 provides that all other cases of theft are petty theft. (Pen. Code, § 488.)

There is absolutely nothing in the statutory scheme to indicate that multiple acts of petty theft committed pursuant to a single plan should be aggregated into one offense, but multiple acts of grand theft committed pursuant to a single plan should not be aggregated. Both conceptually and as a matter of statutory construction, how can multiple small thefts be one big theft, but multiple big thefts not be one bigger theft?

Moreover, petty theft is a lesser included offense of grand theft. (*People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1116; *Gomez v. Superior Court* (1958) 50 Cal.2d 640, 643-647.) To apply one rule for multiple convictions of the greater offense, and a different rule for multiple convictions of the lesser included offense is not only unsupported by the statutory scheme, but is illogical and appears to be without precedent anywhere else in our criminal law.

Thus, to the extent respondent asks this Court not to apply the rule set forth in *Bailey* to the crime of grand theft, the first question respondent should answer is whether the rule should also not be applied to the lesser included offense of petty theft.

To the extent respondent contends the rules should be different for these two types of theft, that contention should be rejected as inconsistent with the statutory scheme, logic, and law.

2. There Has To Be A Rule Regarding The Propriety Of Multiple Theft Convictions, And The Rule Set Forth In *Bailey* Is Reasonable

By necessity, there must be a rule regarding the propriety of multiple theft convictions. Otherwise, the law would be unworkable and absurd results would necessarily follow. (See, e.g., Chemerinsky, Counting Offenses, 58 *Duke Law Journal* 709-746 (2009), pp. 723, 735-738 [not having a clear rule

regarding the number of crimes committed for a particular act or series of acts results in inconsistent punishment, fundamental unfairness, arbitrary application of the law, and also invites prosecutorial abuse].)

For example, consider a hypothetical case in which a defendant intentionally exits a grocery store with a shopping cart full of groceries without paying. Is such a defendant guilty of one count of theft based on all the items in the shopping cart, guilty of one count of theft for each item in the shopping cart, or guilty of one count of theft for each piece of gum in the package of gum stolen and one count of theft for each grain of rice in the package of rice stolen?

Bailey appropriately and reasonably answers that question by providing that whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted of separate counts of theft from the same victim if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. (*People v. Bailey, supra,* 55 Cal.2d at pp. 518-519.) On the other hand, if all the takings were committed pursuant to one intention, one general impulse, and one plan there has been but one theft committed. (*Ibid.*)

3. Principles Of Stare Decisis Support The Continued Application Of The *Bailey* Rule

People v. Bailey, supra, 55 Cal.2d 514 was decided in 1961. For the next 52 years, until the Court of Appeal's decision in this case, it has been consistently applied in grand theft cases throughout this State in accordance with its terms. (See *People v. Jaska* (2011) 194 Cal.App.4th 971, 979-985 [recognizing *Bailey* as governing law and applying the rule as set forth therein]; *People v. Tabb* (2009) 170 Cal.App.4th 1142, 1148 [concluding under *Bailey* that the defendant could not remain convicted of multiple grand theft offenses in light of jury finding that defendant committed thefts pursuant to a "'single, overall plan or objective'"]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 363-364 [reversing all but one grand theft conviction pursuant to *Bailey* because the several takings committed over the course of several days were all committed pursuant to a single plan]; *People v. Brooks* (1985) 166 Cal.App.3d 24, 31 [reversing 13 of 14 counts of grand theft under *Bailey* because they were the product of a general intent or overall plan, with but a single ultimate object]; *People v. Packard* (1982) 131 Cal.App.3d 622, 626-627 [reversing all but one grand theft conviction pursuant to *Bailey* because the several takings were all committed pursuant to a single plan]; *People v. Gardner* (1979) 90 Cal.App.3d 42, 48 [reversing

three of four counts of grand theft under *Bailey* because defendant acted pursuant to a single purpose and objective]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866 [reversing all but one of the defendant's attempted grand theft conviction under *Bailey* because the several attempted takings were all committed pursuant to a single objective, i.e., to steal $3.2 million from the city]; *People v. Neder* (1971) 16 Cal.App.3d 836, 852 [recognizing that application of the *Bailey* rule to theft cases is appropriate because "[i]f a certain amount of money or property has been taken pursuant to one plan, it is most reasonable to consider the whole plan rather than to differentiate each component part."].)

Principles of stare decisis support the continued application of the *Bailey* rule as set forth by this Court 52 years ago.

"It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.' [Citation.] [¶] It is likewise well established, however, that the

foregoing policy is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case. [Citation.] As we stated in *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 924, '[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction.'" (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.)

"[T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." (*Patterson v. McLean Credit Union* [1989] 491 U.S. [164,] 172-173 [109 S.Ct. 2363, 105 L.Ed.2d 132]; see also *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 921.)

In accordance with principles of stare decisis, the rule set forth by this Court in *Bailey* should continue to be applied as it has in this State for the past 52 years.

4. The Fact That The Legislature Has Never Acted To Overrule *Bailey* In The Past 52 Years Indicates The Legislature's Support For That Interpretation Of The Law

As noted, *Bailey* was decided in 1961. (*People v. Bailey, supra,* 55 Cal.2d 514.) The fact that the Legislature has never acted over the past 52 years to overrule *Bailey* indicates the Legislature's support for that interpretation of the law regarding the crime of theft. As previously recognized by this Court, the longevity of a judicial interpretation of a statute without legislative action to overrule that interpretation is not necessarily conclusive, but tends to indicate legislative acquiescence in the judicial interpretation. (*People v. Williams* (2006) 26 Cal.4th 779, 789-790)

For example, with respect to the crime of unlawful possession of a firearm, the Legislature in 1994 enacted former section 12001, subdivision (k), to provide that the possession of "each firearm ... shall constitute a distinct and separate offense" under, among other provisions, Penal Code section 12021.[2] Former Penal Code section 12001, subdivision (k), was enacted in response to *People v. Kirk* (1989) 211 Cal.App.3rd 58. (See *People v. Correa* (2012) 54 Cal.4th 331, 345.) In *Kirk*, the Court of Appeal construed former Penal Code section 12020, subdivision (a), which made it

[2] Former Penal Code section 12001, subdivision (k), has been replaced with new Penal Code section 23510, which contains virtually identical language.

a felony to possess "*any* instrument or weapon of the kind commonly known as a ... sawed-off shotgun," as permitting only one conviction upon the simultaneous possession of two such firearms. (*People v. Kirk, supra,* 211 Cal.App.3d at pp. 61-66, emphasis added.)

The Court of Appeal acknowledged, however, that the Legislature could amend the statute to permit multiple conviction and punishment, if it wished: "We have no doubt the Legislature could, it if wanted to, make criminal and subject to separate punishment the possession of each and every sawed-off shotgun found at the same time and place. [Citation.]" (*People v. Kirk, supra,* 211 Cal.App.3d at p. 62.) "In response, the Legislature amended the statute to do just that. The legislative history of section 12001, subdivision (k), is replete with statements that it was intended to overrule *Kirk* and to make it clear that possession of each weapon constitutes a separate offense under the enumerated statutes. (See, e.g., Legis. Counsel's Dig., Sen. Bill No. 37, 5 Stats.1994 (1993-1994 1st Ex.Sess.) Summary Dig., pp. 583-584.)" (*People v. Correa, supra,* 54 Cal.4th at p. 346.)

The Legislature's enactment of former Penal Code section 12001, subdivision (k), in response to the *Kirk* decision clearly demonstrates that the Legislature knows how to act when it disagrees with a judicial interpretation

of a statute regarding whether multiple convictions are appropriate, and the fact that the Legislature has never acted to overrule the *Bailey* decision indicates its approval of that interpretation of the law regarding the crime of theft. (See *People v. Williams, supra,* 26 Cal.4th at pp. 789-790; see also *Miklosy v. Regents of Univ. of California* (2008) 44 Cal.4th 876, 896 ["'[W]hen the Legislature uses a critical word or phrase in one statute, the omission of that word or phrase in another statute dealing with the same general subject generally shows a different legislative intent.'"].)

D. Because All Of Defendant's Takings Were Committed Pursuant To A Single Plan, His Multiple Takings Properly Constituted A Single Offense Under *Bailey*

All of defendant's takings were committed against the same victim and were committed pursuant to the same scheme of arranging for the fraudulent sale of motorcycles and other similar vehicles in conjunction with his employment at the motorcycle dealership. Under *Bailey*, because all of defendant's takings were committed pursuant to a single plan, his takings properly constituted only one count of grand theft.

People v. Tabb, supra, 170 Cal.App.4th 1142 is illustrative. In *Tabb*, the defendant engaged in an ongoing scheme over the course of several months by stealing metal parts from his employer and selling them to a recycling company. (*Id.* at pp. 1145-1147.) The jury in that case further found

that the defendant's thefts were inflicted under a "single, overall plan or objective." (*Id.* at p. 1148.) As held by the Court of Appeal, under these circumstances, *Bailey* compels the conclusion that the defendant could not be convicted of multiple grand thefts. (*Ibid.*)

Similarly, in the case at bar, defendant's jury specifically found that defendant's takings arose from a common scheme or plan. (Slip Opn. pp. 2-3; 1 C.T. pp. 154-155, 200, 291.) As in *Tabb*, under these circumstances, only one grand theft conviction was permissible under *Bailey*. (See also *People v. Packard, supra,* 133 Cal.App.3d at pp. 625-627 [reversing all but one grand theft conviction where the defendant committed a series of thefts from his employer pursuant to a common scheme].)

E. To The Extent This Court Decides To Overrule *Bailey* And Imposes A New Rule For Grand Theft, The Rule Should Be Applied Prospectively Only

To the extent this Court decides to overrule *Bailey* and imposes a new rule permitting multiple convictions of grand theft even though the takings were committed pursuant to a single scheme, the rule should be applied prospectively only.

"The due process clause is a limitation on the powers of the legislature and does not of its own force apply to the judicial branch of government. However, the principle on which the clause is based, that a

person has a right to fair warning of the conduct which will give rise to criminal penalties, is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the due process clause of the Fourteenth Amendment to the United States Constitution. (*Marks v. United States* (1977) 430 U.S. 188, 191-192 [97 S.Ct. 990, 51 L.Ed.2d 260]; *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 21; *People v. Morante* (1999) 20 Cal.4th 403, 431.)" (*People v. Correa, supra,* 54 Cal.4th at p. 344.)

Thus, for example, in *People v. King* (1993) 5 Cal.4th 59, this Court overruled *In re Culbreth* (1976) 17 Cal.3d 330. The *Culbreth* court had held that even if there were multiple counts involving multiple victims of violent crime, a firearm use enhancement under section 12022.5 could be imposed only once if all the charged offenses were incident to one objective and effectively comprised an indivisible transaction. (*In re Culbreth, supra,* 17 Cal.3d at p. 333.) The *King* court concluded, however, that its holding overruling *Culbreth* could not be applied retroactively. (*People v. King, supra,* 5 Cal.4th at p. 80.) "The *Culbreth* rule has been the law of this state since 1976. It was the law when defendant committed his crimes. Refusing to apply it here would make the punishment for his crimes more

burdensome after he committed them. Defendant is therefore constitutionally entitled to its benefit." (*Ibid.*)

Similarly, in *Correa*, this Court overruled the interpretation of Penal Code section 654 previously adopted by the Court in *Neal v. State of California* (1960) 55 Cal.2d 11, 18, fn. 1. (*People v. Correa, supra,* 54 Cal.4th at pp. 334-344.) However, this Court again held that the due process and ex post facto clauses of the federal constitution bar applying the new rule to the defendant in that case. (*Id.* at pp. 344-345.)

Similarly, in the case at bar, in the event this Court overrules *Bailey* and applies a new rule permitting multiple grand theft convictions when all the offenses were committed pursuant to the same plan or scheme, the rule should be applied prospectively only, and all but one of defendant's grand theft convictions should be reversed under the rule set forth in *Bailey* that was applicable at the time of the crimes herein.

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CONCLUSION

For the foregoing reasons, and in the interests of justice, defendant respectfully requests this Court reaffirm the *Bailey* rule and reverse all but one of defendant's grand theft convictions.

Dated: 9/4/13

Respectfully submitted,

Eric Larson

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CERTIFICATE OF WORD COUNT

I, Eric R. Larson, hereby certify pursuant to California Rules of Court, rule 8.520(c)(1), that according to the Microsoft Word computer program used to prepare this document, Defendant's Opening Brief On The Merits contains a total of 5,351 words.

Executed this 4th day of September, 2013, in San Diego, California.

Eric Larson

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Supreme Court No.: S208843
Court of Appeal No.: B231038

DECLARATION OF SERVICE BY MAIL

I, Eric R. Larson, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, #609, San Diego, California, 92101. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 4th day of September, 2013, I caused to be served the following document(s):

DEFENDANT'S OPENING BRIEF ON THE MERITS

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 4, 2013, at San Diego, California.

Eric Larson

Eric Larson