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In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
RAMIRO VILLALOBOS,
Defendant and Appellant.

S176574

SUPREME COURT
FILED
MAR 23 2010
Frederick K. Ohlrich Clerk
Deputy

California Court of Appeal, Fifth Appellate District No. F056729
Tulare County Superior Court, Case No. VCF189886A

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the imposition of a restitution fine and a parole revocation restitution fine violate defendant's plea agreement in light of the circumstance that he was told he might be required to pay restitution but no mention was made of restitution fines?

INTRODUCTION

Pursuant to a negotiated plea bargain, appellant pled no contest to charges of attempted murder with a gang enhancement and second degree robbery. The trial court sentenced him to a term of 17 years in state prison and imposed a $4,000 restitution fine and a $4,000 parole revocation restitution fine. On appeal, he claimed that the restitution fines violated the terms of his plea bargain. The Fifth District Court of Appeal disagreed and affirmed both fines. This Court granted review. As explained below, the decision of the Court of Appeal was correct—neither fine violated the terms of appellant's plea bargain. Thus, the judgment should be affirmed.

STATEMENT OF THE CASE

On March 20, 2008, the District Attorney of Tulare County filed an information charging appellant in count I with attempted willful, deliberate, premeditated murder (Pen. Code,[1] §§ 664/187, subd. (a)), in count II with assault with a deadly weapon (§ 245, subd. (a)(1)), and in count III with second degree robbery (§ 211). (I CT 163-166.) With respect to each count, the information also alleged that appellant had (1) personally inflicted great bodily injury (§ 12022.7, subd. (a)), (2) used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), and (3) committed each count

[1] Unless otherwise noted, all future statutory references are to the Penal Code.

for the benefit of a criminal street gang (§§ 186.22, subd. (b)(1)(C), 186.30, subd. (a)). (I CT 163-166.)

Several months later, pursuant to a negotiated plea bargain, appellant entered a plea of no contest to counts I and III, and admitted the criminal street gang allegation on count I. (I CT 187, 214-217.) At the change of plea hearing, the prosecutor stated that it was his understanding that appellant, under the terms of the plea bargain, would receive an indicated sentence of 17 years in state prison. (I CT 192.) The prosecutor then asked whether that was the court's understanding as well, and the court indicated it was. (I CT 193.) The prosecutor reminded the court that there "are obviously the advisements" and stated that appellant's plea would be "a plea regarding gang registration, restitution, [a] strike and the deportation consequences pursuant to section 186.30." (I CT 193.) The court responded, "Those will definitely be all incorporated." (I CT 193.)

After inquiring with the prosecutor as to the maximum sentence that appellant was facing, the court began explaining to appellant the consequences of his plea. (I CT 193-194.) The court first asked appellant whether he understood that the maximum sentence he was facing was a term of 15 years to life, and appellant responded, "Yes, ma'am." (I CT 194.) The court then asked appellant whether having that in mind he would "still wish to enter into this plea whereby the [c]ourt has given an indicated sentence . . . of 17 years." (I CT 194.) Appellant indicated that it was still his desire to go forward with the plea. (I CT 195.)

The court then explained to appellant other consequences of the plea (I CT 200-204), and asked him whether he understood "that as a result of [his] plea, [he] may be required to pay restitution" (I CT 203). Appellant responded, "Yes, ma'am." (I CT 203.) The court also asked appellant "other than what [the court] ha[s] told you regarding the consequences of

your plea, has anyone threatened you or promised you anything today to enter into this plea." (I CT 204.) Appellant responded, "No." (I CT 204.)

At the sentencing hearing, the court sentenced appellant to a term of 17 years in state prison in accordance with the plea bargain. (I CT 233-235, 1 RT 6-7). The court also imposed a $4,000 restitution fine (§ 1202.4, subd. (b)) and a $4,000 parole revocation fine (§ 1202.45).[2] (1 RT 7.) Appellant did not object to the imposition of the fines. (See 1 RT 1-10.)

Appellant subsequently appealed the judgment. He claimed, inter alia, that the trial court's imposition of the restitution fines violated the terms of his plea bargain. On August 28, 2009, the Fifth District Court of Appeal issued a published opinion affirming the imposition of the fines.[3] The court held that neither the restitution fine, nor the parole revocation restitution fine, violated the terms of the plea bargain because appellant had "pointed to nothing in the record that would support a reasonable belief on his part that restitution fines were barred by the plea agreement rather than left within the trial court's discretion." (Opn. at p. 9.)

On December 2, 2009, this Court granted appellant's petition for review.

SUMMARY OF ARGUMENT

In *People v. Crandell* (2007) 40 Cal.4th 1301 (*Crandell*), this Court held "'that the core question in every case is . . . whether the restitution fine was actually negotiated and made a part of the plea agreement, or whether it was left to the discretion of the court.'" (*Id.* at p. 1309.) Here, the record reflects that the mandatory restitution fines were not a bargained-for part of appellant's plea agreement, but were instead left to the discretion of the

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[2] The probation report had recommended that the court impose a $4,000 restitution fine and a $4,000 parole revocation fine. (I CT 242.)

[3] The opinion was previously published at 177 Cal.App.4th 82.

court. Thus, the restitution fines were not "imposed contrary to the actual terms of [the] plea bargain," and appellant is not entitled to any relief. (*People v. Crandell*, *supra*, 40 Cal.4th at p. 1309.)

ARGUMENT

I. THE TRIAL COURT'S IMPOSITION OF RESTITUTION FINES DID NOT VIOLATE THE TERMS OF APPELLANT'S PLEA BARGAIN

Appellant contends that he is entitled under *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*), to have his fines "reduced to the [statutory] minimum because he received more punishment than he bargained for." (AOB 4.) Appellant argues further "that the distinction drawn in *Villalobos* between *Walker* and *Crandell* is not only incorrect, it is confusing, and will spawn yet more litigation." (AOB 7.) His argument has no merit.

A. General Principles

Section 1202.4 mandates judicial imposition of a restitution fine and restitution to the victim whenever a person is convicted of a crime. (§ 1202.4, subd. (a)(3)(A) & (B).) In the case of a felony conviction, the "restitution fine shall be set at the discretion of the court" and must be no less than $200 and no more than $10,000. (§ 1202.4, subd. (b)(1).) Express findings as to the amount of the fine are not required. (§ 1202.4, subd. (d).) In addition, section 1202.45 requires a parole revocation fine in the same amount as the restitution fine "in every case where a person is convicted of a crime and whose sentence includes a period of parole."

In *Walker, supra,* 54 Cal.3d 1013, the defendant pled guilty pursuant to a negotiated plea bargain. (*Id.* at p. 1018.) In exchange for the guilty plea, the prosecutor and defendant agreed that one count would be dismissed and the midterm sentence would be imposed on the remaining count. (*Id.* at p. 1019.) Defendant signed a change of plea form and initialed his understanding of the agreement. (*Ibid.*) The court then

advised the defendant that "'the maximum penalties provided by law for this offense are either three years, five years, or seven years in state prison and a fine of up to $10,000,' followed by a period of parole." (*Ibid.*) A probation report prepared before the plea recommended a $7,000 restitution fine, but "the record disclose[d] no other mention of the possibility of such a fine prior to sentencing." (*Ibid.*)

The court sentenced defendant immediately after the guilty plea and imposed the midterm sentence in accordance with the terms of the plea bargain. (*Walker*, *supra*, 54 Cal.3d at p. 1019.) The court also imposed a restitution fine of $5,000, even though the plea agreement did not mention such a fine. (*Ibid.*) Defendant did not object. (*Ibid.*) On appeal, defendant claimed that the restitution fine should be stricken because it was not part of the plea bargain. (*Ibid.*)

In *Walker*, this Court noted that the determination of whether a restitution fine was properly imposed requires a consideration of "two related but distinct legal principles" relating to guilty pleas. (*Walker*, *supra*, 54 Cal.3d at p. 1020.) First, there is a " 'judicially declared rule of criminal procedure' [citations]" that requires a trial court to advise the defendant of both the constitutional rights that are being waived and the direct consequences of the plea. (*Id.* at p. 1022.) "Thus, before taking a guilty plea, a trial court should advise the defendant of the minimum [$200] and maximum $10,000 restitution fine." (*Ibid.*) Yet "when the only error is a failure to advise of the consequences of the plea, the error is waived if not raised at or before sentencing." (*Id.* at p. 1023.)

The second principle requires that the parties must adhere to the terms of a plea bargain. (*Walker*, *supra*, 54 Cal.3d at p. 1024.) *Walker* explained that "'[w]hen a guilty plea is entered in exchange for specified benefits . . . both parties, including the state, must abide by the terms of the

agreement.'" (*Ibid.*) "The punishment may not significantly exceed that which the parties agreed upon." (*Ibid.*)

Ultimately, *Walker* held that "the $5,000 restitution fine was a significant deviation from the negotiationed terms of the plea bargain." (*Walker, supra*, 54 Cal.3d at p. 1029.) Consequently, this Court ordered the fine reduced to the statutory minimum. (*Id.* at p. 1030.)

In *In re Moser* (1993) 6 Cal.4th 342, the trial court erroneously advised Moser that the period for parole was 36 to 48 months, when in fact a lifetime parole period was statutorily mandated. (*Id.* at pp. 347, 351-353.) Relying on *Walker*, Moser argued that the imposition of a lifetime period of parole violated the terms of his plea agreement. (*Id.* at p. 356.) This Court concluded, however, that Moser's argument rested upon "an erroneous, overbroad reading of *Walker*," and held that "imposition of the statutorily mandated terms of parole would not constitute a violation of the parties' plea agreement" provided (as it appeared from the record) "that the subject of parole was not encompassed by the parties' plea negotiations." (*In re Moser, supra*, 6 Cal.4th at p. 357.)

In *In re Moser,* this Court explained its holding in *Walker* as follows:

> In concluding that the imposition of such a substantial fine constituted a violation of the plea agreement in *Walker*, we implicitly found that the defendant in that case reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed. Moreover, in reaching this conclusion, we reasoned that, because the amount of an appropriate restitution fine imposed upon a defendant could vary significantly depending upon the specific facts of a given case, 'the restitution fine should generally be considered in plea negotiations.' [Citation.]

(*In re Moser, supra*, 6 Cal.4th at pp. 356-357.)

In *People v. McClellan* (1993) 6 Cal.4th 367 (*McClellan*), the defendant pled guilty to assault with the intent to commit rape. (*Id.* at p. 371.) And before accepting the defendant's guilty plea, the trial court

failed to advise him that his guilty plea would require him to register as a sex offender under § 290. (*Id.* at p. 372.) On appeal, the defendant claimed, inter alia, that the imposition of mandatory sex offender registration violated the terms of his plea bargain. But this Court found that "*Walker* [did] not support defendant's claim," and explained that "the circumstance that a statutorily mandated consequence of a guilty plea is not embodied specifically within the terms of a guilty plea does not signify that imposition of such a consequence constitutes a violation of the agreement." (*Id.* at pp. 380-381.)

Lastly, in *Crandell*, this Court revisited the issue of the imposition of restitution fines in a plea-bargain case. (*Crandell, supra,* 40 Cal.4th 1301.) In *Crandell*, the prosecutor and defendant entered into a negotiated disposition. (*Id.* at p. 1305.) At the change of plea hearing, the court asked the prosecutor to "state the offered disposition" and the prosecutor responded:

> 'As to the defendant Jeffrey David Crandell, the People have made the following offer: If he should plead no contest or guilty to Count One as amended . . . the offer is to dismiss Count Two and the enhancement on Count Two as well. And that would be for a 13-year top bottom.'

(*Crandell, supra*, 40 Cal.4th at p. 1305.)

Shortly thereafter, the defendant indicated that he would accept the prosecutor's offer. (*Crandell, supra*, 40 Cal.4th at p. 1305.) The court then asked him whether he understood that (1) the maximum time he could be sentenced to state prison was 16 years, and (2) the prosecutor had offered a 13-year sentence. (*Ibid.*) The court also advised him of the various consequences of his plea, and "warned [him] he would 'have to pay a restitution fund fine of a minimum of $200, a maximum of $10,000.'" (*Ibid.*) The defendant indicated that he understood. (*Ibid.*) The court then asked him the following:

> 'Anyone made any promises to you other than what I promised you here today in open court? [¶] And all I promised you is Mr. Crandell, 13 years in prison . . . [¶] Has anyone made any other promises to you, Mr. Crandell?'

(*Crandell*, *supra*, 40 Cal.4th at p. 1305.)

The defendant responded, "'No, ma'am,'" and acknowledged that he was entering the plea freely and voluntarily. (*Crandell*, *supra*, 40 Cal.4th at p. 1305.) The trial court accepted the plea and sentenced the defendant to a term of 13 years in state prison in accordance with the terms of the plea bargain. (*Id.* at p. 1306.) The court also imposed a $2,600 restitution fine and a $2,600 parole revocation fine.[4] (*Ibid.*) The defendant did not object to the fines. (*Ibid.*)

On appeal, the defendant claimed that the imposition of the restitution fines violated the terms of his plea bargain and, under *Walker*, he was entitled to have the amount of the fine reduced to the statutory minimum. (*Crandell*, *supra*, 40 Cal.4th at p. 1308.) Yet this Court found no violation of the plea agreement because the "record demonstrate[d] that the parties intended to leave the amount of defendant's restitution fine to the discretion of the court." (*Id.* at p. 1309.) *Crandell* explained that "*Moser* and *McClellan* teach that the core question in every case is . . . whether the restitution fine was actually negotiated and made a part of the plea agreement, or whether it was left to the discretion of the court." (*Ibid.*) And "[w]hen a restitution fine above the statutory minimum is imposed contrary to the *actual terms* of a plea bargain, the defendant is entitled to a remedy." (*Ibid.*, italics added.)

Crandell found *Walker* distinguishable because the trial court (1) advised defendant that he would have to pay to a restitution fund fine of a

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[4] The probation report had recommended that the court impose such a fine. (*Crandell*, *supra*, 40 Cal.4th at p. 1306.)

minimum of $200 and a maximum of $10,000; and (2) "ascertained that the prosecution had not made 'any other promises' beyond that defendant would sentenced to 13 years in prison." (*Id.* at pp. 1309-1310.) Thus, unlike in *Walker*, the defendant in *Crandell* "could not reasonably have understood his negotiated disposition to signify that no substantial restitution fine would be imposed." (*Id.* at p. 1310.)

B. Neither the restitution fine nor the parole revocation restitution fine violated the terms of appellant's plea bargain because the amount of the fines was left to the discretion of the court

Appellant contends that "the second *Walker* error is present" because "[t]he trial court imposed a restitution fine 'that had not been mentioned in the parties' plea bargain.' [Citation.]" (AOB 4.) But as this Court stated in *Moser*, that "argument rests upon an erroneous, overbroad reading of *Walker*." (*In re Moser*, *supra*, 6 Cal.4th at p. 356.) Although *Walker* does recommend that "[c]ourts and the parties should take care to consider restitution fines during the plea negotiations" (*Walker*, *supra*, 54 Cal.3d at p. 1030), it does not actually require such fines to be the subject of plea negotiations, or of final plea agreements.

Along these lines, *Crandell* explained:

> [T]he parties to a criminal prosecution are free, within such parameters as the Legislature may establish, to reach any agreement concerning the amount of restitution (whether by specifying the amount or by leaving it to the sentencing court's discretion) they find mutually agreeable. As the Court of Appeal majority below correctly observed, '*Moser* and *McClellan* teach that the core question in every case is . . . whether the restitution fine was actually negotiated and made a part of the plea agreement, or whether it was left to the discretion of the court.

(*Crandell*, *supra*, 40 Cal.4th at p. 1309.)

By way of example, many plea negotiations do not result in an agreement regarding the term of imprisonment, and leave resolution of that issue to the discretion of the court. Nothing in *Walker* forbids the parties from similarly preserving the status quo by leaving the amount of the mandatory restitution fine (and the parole revocation restitution fine) to the discretion of the court.[5]

Here, as the Court of Appeal observed, nothing in the record indicates that restitution fines were barred by the plea agreement or that the parties bargained for or agreed on any term regarding fines. (Opn. at pp. 8-9.) In fact, when the prosecutor described the plea agreement, he mentioned only the prison sentence. (I CT 192, see also Opn. at p. 8.) And neither party later spoke up to (1) clarify any portion of the plea agreement, (2) claim that any portion of the plea agreement had been omitted, or (3) point out that the fines recommended in the probation report conflicted with the terms of the plea agreement. (See I CT 192-221; 1 RT 1-10; see also Opn. at p. 8.) Such silence from the parties and the court does not suggest that there was an agreement to limit the amount of the mandatory restitution fines. Rather, it implies that no agreement was reached and the parties instead preserved the status quo by leaving the amount of the fines to the discretion of the court.[6]

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[5] For example, in *People v. Soria* (2010) 48 Cal.4th 58, this Court recently noted that "defendants are free to negotiate the amount of restitution fines as part of their plea bargains." (*Id.* at p. 65, fn. 6.) *Soria* did not conclude, however, that defendants are required to do so.

[6] In *People v. Dickerson* (2004) 122 Cal.App.4th 1374, the Sixth District Court of Appeal came to a similar conclusion. In *Dickerson*, the defendant argued that his plea bargain excluded imposition of a substantial restitution fine because "the [trial] court 'said nothing whatsoever about a restitution fine being imposed' when reciting the plea agreement." (*Id.* at p. 1385.) But the court concluded that "this simply show[ed] that the parties reached no agreement on the imposition or amount of any fine." (*Ibid.*)

(continued...)

In addition, the colloquy at the change of plea hearing further evidences that restitution fines had not been negotiated and made a part of the plea agreement. Similar to *Crandell*, the court asked appellant "other than what I have told you regarding the consequences of your plea, has anyone threatened you or promised you anything today to enter into this plea," and appellant responded, "No." (I CT 204; see also *Crandell*, *supra*, 40 Cal.4th at pp. 1309-1310.) Given that the court had not "told" appellant anything about restitution fines, his response indicates that no agreement had been reached (and that no promises had been made) regarding the fines, and that they had instead been left to the discretion of the court.

Yet unlike in *Crandell*, the court here did not advise appellant of the minimum and maximum amounts of the restitution fines that would be imposed. (*People v. Crandell*, *supra*, 40 Cal.4th at pp. 1305, 1309-1310.) It did ask appellant whether he understood "that as a result of [his] plea, [he] may be required to pay restitution," but made no mention of the term "restitution fines." (See I CT 203.) This omission, however, does not alter the analysis or entitle appellant to a remedy.

First, though the court should have advised appellant of the minimum and maximum amounts of the restitution fines that would be imposed, appellant has forfeited any such claim of advisement error by failing to object before sentencing. (*Walker*, *supra*, 54 Cal.3d at pp. 1022-1023, 1029.) Thus, the advisement error, standing alone, does not entitle appellant to a remedy. (*Ibid.*)

(...continued)
The court explained further that "[t]his omission does not imply that there was an agreement on no fine or a minimum fine. Instead, this omission is among the circumstances suggesting to us that the parties in this case expressly or implicitly agreed to leave the imposition and amount of restitution fines to the court's discretion." (*Ibid.*)

But more importantly, the trial court's omission of the term "restitution fines" from the advisements did not affect the terms of the plea bargain. (See *McClellan*, *supra*, 6 Cal.4th at p. 379 ["[T]he trial court's *omission*, at the change of plea hearing, of advice regarding defendant's statutory obligation to register as a sex offender did not transform the court's error into a *term of the parties' plea agreement.*" (Italics in original.)].) Consequently, even though no mention was made of the term "restitution fines," there is still nothing in the record to indicate that restitution fines were barred by the plea agreement or that the parties bargained for or agreed on any term regarding fines.

Furthermore, as the Court of Appeal noted, "[C]ourts are not required to give a 'detailed lecture on criminal procedure as it pertains to all the various dispositional devices available.'" (Opn. at p. 8., quoting *People v. Sorenson* (2005) 125 Cal.App.4th 612, 621.) And while it is true that restitution to the victim and restitution fines are different (§ 1202.4, subds. (a)(3)(B), (a)(3)(A), (b), & (c)), appellant's acknowledgement that he understood that "as a result of [his] plea, [he] may be required to pay restitution" (I CT 203), is nonetheless an additional circumstance that distinguishes this case from *Walker*.

In *Walker*, the defendant "reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed." (*In re Moser*, *supra*, 6 Cal.4th at p. 356.) Yet in this case, not only is there nothing in the record to indicate that restitution fines were barred by the plea agreement or that the parties bargained for or agreed on any term regarding fines, but appellant also acknowledged that (1) no promises had been made to him other than what he had been "told" by the court, and (2) he understood that as a result of his plea, he may be required to pay restitution. Consequently, the record is devoid of evidence "that would support a reasonable belief on [appellant's] part that restitution fines

were barred by the plea agreement rather than left within the trial court's discretion." (Opn. at p. 9.)

Thus, the record reflects that restitution fines were not a bargained-for part of appellant's plea agreement, but were instead left to the discretion of the court. So, as in *Crandell*, the mandatory fines were not "imposed contrary to the actual terms of [the] plea bargain," and appellant is not entitled to any relief. (*Crandell*, *supra*, 40 Cal.4th at p. 1309.)

Lastly, even assuming, arguendo, that the restitution fines were not left to the discretion of the court, the imposition of the fine did not significantly increase appellant's punishment, and thus did not violate his plea bargain. (See *Walker*, *supra*, 54 Cal.3d at p. 1027 ["[O]nly a punishment significantly greater than that bargained for violates the plea bargain."].) In *Walker*, the defendant was sentenced to five years in state prison and the court imposed a $5,000 restitution fine. (*Id.* at p. 1019.) In this case, appellant was sentenced to 17 years in state prison and the court imposed a restitution fine of $4,000 (along with an identical parole revocation restitution fine). So, while the fine in *Walker* amounted to $1,000 per year in prison, the fine here is much less—only $235.29 per year in prison. Furthermore, the fine imposed in *Walker* is five times the current section 1202.4, subdivision (b)(2), formula amount, while the fine imposed in this case is *actually 41% less* than the formula amount.[7]

Although it is true that *Walker* stressed that "[c]ourts should generally be cautious about deeming nonbargained punishment to be

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[7] Section 1202.4, subd. (b)(2), provides: "In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." Under this formula, the restitution fines would have been $1,000 in *Walker* and $6,800 in this case.

insignificant" (*Walker*, *supra*, 54 Cal.3d at p. 1027, fn. 3), here not only is the restitution fine $1,000 less than the fine imposed in *Walker*, but appellant's prison sentence is also 12 years longer than the defendant's in *Walker*. Consequently, unlike in *Walker*, the restitution fines did not significantly increase appellant's punishment and the judgment should be affirmed.

CONCLUSION

Based on the foregoing, respondent respectfully requests that this Court affirm the judgment.

Dated: March 19, 2010

Respectfully submitted,

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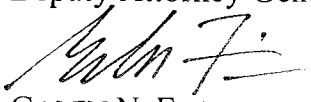

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 4464 words.

Dated: March 19, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. VILLALOBOS** No.: S176574

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 22, 2010**, I served the attached **RESPONDENT'S ANSWER 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 **March 22, 2010** at Sacramento, California.

_____

DECLARANT