**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>ERNEST OROZCO,<br><br>Defendant-Appellant. | Case No. S249495 |

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San Diego County Superior Court Case No. SCN335521

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**REPLY BRIEF**

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## Argument

### I. Respondent's arguments that section 496d was not amended by Proposition 47 have already been rejected by this Court.

In this case, the Court is considering whether Proposition 47 affected the crime set forth in Penal Code section 496d.[1] Respondent begins its brief by characterizing appellant's argument as seeking recall and resentencing under Penal Code section 1170.18. Respondent is wrong.[2] As explained more fully below, Orozco was sentenced after the effective date of Proposition 47, which applied automatically to his case. Orozco seeks relief under *In re Estrada* (1965) 63 Cal.2d 740 and the correct sentence for his nonviolent, nonserious low-level property crime.

To rebut Orozco's arguments, Respondent repeatedly relies on the fact that Proposition 47 did not make any changes to section 496d. (RB 13,

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[1]All statutory references are to the Penal Code, unless otherwise noted.

[2]As explained more fully below, respondent is incorrect that this case involves a "resentencing.")

18–19, 32.) Respondent emphasizes that Proposition 47's resentencing provision, section 1170.18, provides for resentencing under enumerated code sections "'*as those sections have been amended or added by this act.*'" (RB 13, italics in RB.)

This Court has already rejected the argument that the italicized portion of section 1170.18 limits Proposition 47 relief to statutes amended or added by the act. (*People v. Page* (2017) 3 Cal.5th 1175, 1184 (*Page*).) As explained in *Page*, section 1170.18 lists code sections under which defendants may be *resentenced*—a defendant's *original* sentence need not have been under one of the enumerated code sections. (*Id.* at p. 1184.)

The question here is whether Orozco may be sentenced under section 496. Under the plain language of section 496, which applies to "any property" worth less than $950, he can.

## II. Both section 496d and section 496 apply in specific circumstances; the *Williamson* rule does not dictate sentencing under section 496d.

Respondent argues that Orozco cannot be sentenced under section 496 because of the *Williamson* rule, so named for *In re Williamson* (1954) 43 Cal.2d 651, 654. (RB 16–17.) The rule has also been called "general-versus-special rule" or the "preemption rule," and states that "if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute." (*People v. Brown* (2016) 6 Cal.App.5th 1074, 1080–1081 & fn. 1 [§ 137, subd. (c), does not preempt § 136.1, subd. (b)(2)].)

Therefore, according to respondent, "a person who receives a stolen vehicle **must** be prosecuted under the specially created provision of section 496d, not under the general provision of section 496[.]" (RB 17, emphasis

added.) Respondent misapprehends the nature of the general-versus-special rule. It is *not* a rule "of constitutional or statutory mandate, but serves as an aid to judicial interpretation when two statutes conflict," and it applies only "[a]bsent some indication of legislative intent to the contrary." (*People v. Brown, supra,* 6 Cal.App.5th at p. 1074.) As described in the Opening Brief and below, here there are such indications to the contrary. The electorate intended that when the property crime involves goods valued under $950, the crime must be a misdemeanor.

Furthermore, respondent's reasoning would preclude the result in *Page*. Like section 496d, Vehicle Code section 10851 applies to a specific type of property, automobiles. And like the punishment provision of section 496, subdivision (a), section 490.2 applies to all property, but with a specific value: less than $950. Thus, when a stolen car is worth less than $950, the "special" portions of both statutes conflict. Based on the plain language of section 490.2 and the voters' intent that Proposition 47 be construed liberally, this Court held that section 490.2 applies in that situation. (*Page*, *supra*, 3 Cal.5th at p. 1187.) The same is true here.

Another way to look at this is, under the *Williamson* "general-versus-special rule," Proposition 47 created a special rule based on the valuation of the stolen property that makes the "less than $950 valuation" the preemption rule to the more general 496d rule that is based solely on the type of property. The newly amended section 496, subdivision (a) is the special rule that applies when the value of any stolen property is less than $950. (*People v. Murphy* (2011) 52 Cal.4th 81, 86 ["The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply."])

## III. Applying Proposition 47 in this case is consistent with the voters' intent.

### A. Reducing possession of extremely low-value stolen cars to a misdemeanor does not unduly undermine the legislative intent of section 496d.

When section 496d was enacted, it did not "change criminal penalties or expand the definition of a crime." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assembly Bill No. 2390 (1997-1998 Reg. Sess.) as amended June 23, 1998.) Instead, its purpose was to track statistics about car theft and allow persons identified as car thieves to be punished as recidivists. (*Ibid*; see also, Assem. Floor Com. on Public Safety, Rep. on Assemb. Bill No. 2390 (1997-1998 Reg. Sess.) as amended April 13, 1998.)

Respondent casts section 496d as a "much needed" statute to combat the car theft business. (RB 15.) As evidence, respondent notes that section 666.5 was enacted simultaneously and provides enhanced penalties for recidivist car thieves with prior car theft-related convictions. (RB 16.) It is true that section 496d does not merely serve statistics-gathering purposes, but also serves as a predicate offense (when the conviction is a felony) under section 666.5 (§ 666.5, subd. (a).) Other predicate offenses, however, include felony violations of section 487 and Vehicle Code section 10851. (*Ibid.*) Proposition 47 explicitly covers section 487, and this court in *Page* held that Vehicle Code section 10851 is also covered. (*Page*, *supra*, 3 Cal.5th at p. 1189.) Proposition 47 contemplated that some theft-related conduct involving extremely low-value cars would no longer be eligible as a predicate offense under section 666.5. To the extent there is a conflict between the two statutory schemes, "one enacted by the Legislature, and one by the public[,]" it is presumed that the "electorate weighed the costs

and benefits of Proposition 47." (*People v. Romanowski* (2017) 2 Cal.5th 903, 914 (*Romanowski*) [consumer protection rationale behind § 484e did not preclude application of Proposition 47].)

Respondent also notes case law stating that a "fence" or possessor of stolen property is more dangerous than the original thief, which can warrant a harsher sentence. (RB 26–27.) These cases, however, focus on the role of the fence in providing a market for stolen goods or profit motive for thieves. (*People v. Adams* (1974) 43 Cal.App.3d 697, 709 [fences "provide thieves with a market or depository for their loot"]; *People v. Jaramillo* (1976) 16 Cal.3d 752, 758 [same]; *People v. Loera* (1984) 159 Cal.App.3d 992, 1002 [punishing the fence necessary to discourage "thefts as a profitable venture"].) Cases affected by Proposition 47 will concern only the most dilapidated, lowest-value cars; the need to deter a profitable market for these cars is not great. Again, it is presumed the electorate weighed the costs and benefits of Proposition 47. (*Romanowski* (2017) 2 Cal.5th at p. 914.) Even if there is some theoretical justification for punishing possession of a stolen car more harshly than the theft itself, the concerns cited by respondent do not outweigh Proposition 47's purpose of saving money by treating nonviolent property crimes as misdemeanors and focusing resources on more serious crimes.

### B. Proposition 47 generally sought to treat minor property crimes as misdemeanors, as determined by the value of the property.

As noted in *Page*, the Voter Guide for Proposition 47 explained that the proposition would eliminate statutes making theft of low-value property a felony because of the type of property stolen, including the explicit example of "cars." (*Page*, *supra*, 3 Cal.5th at pp. 1183, 1187.) This passage

appeared under the heading for grand theft; respondent argues that because the later reference to possession of stolen property did not repeat the same language, the electorate did not intend to similarly eliminate property-based distinctions for possession of stolen property crimes. (RB 29–30.)

Respondent parses the guide too finely. The overarching goal of Proposition 47 was to "'ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment,' while also ensuring 'that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed.'" (*People v. DeHoyos* (2018) 4 Cal.5th 594, 598 (*DeHoyos*), quoting Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70) Proposition 47 would accomplish this goal by reducing "certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Leg. Analyst, pp. 4–5.) Possession of stolen property—whether a car or other property—is a nonviolent, nonserious property offense. It was not necessary to repeat the language from the prior "grand theft" bullet point about eliminating distinctions based on property, especially because voters were explicitly told that under Proposition 47, "receiving stolen property worth $950 or less would **always** be a misdemeanor." (*Ibid.*) "[G]iving the words of the statute their ordinary meaning as understood by the electorate," (*People v. Bunyard* (2017) 9 Cal.App.5th 1237), the electorate would have understood "stolen property" to include stolen cars. (*Page*, *supra*, 3 Cal.5th at p. 1183 ["An automobile is personal property"].)

Similarly, although section 496d does not define a "theft crime" as argued by respondent, it is a "theft-related" property crime. (RB 23–25.) Proposition 47 sought to make nonserious and nonviolent property offenses misdemeanors, saving resources better spent on more serious crimes. Possession of a stolen car worth less than $950 is a nonviolent, nonserious property crime. Reducing it to a misdemeanor is consistent with the goals of Proposition 47.

Given the overarching goal of saving money by reducing nonserious, nonviolent property crimes to misdemeanors, the elimination of special property-based theft felonies for cars, and the assurance that receiving stolen property worth less than $950 "would always be a misdemeanor," voters would have understood and intended that possession of a stolen car worth less than $950 would be a misdemeanor.

### C. Proposition 47 explicitly requires a broad construction.

Finally, Proposition 47 explicitly directed that the text of the initiative "shall be broadly construed to accomplish its purposes" and "shall be liberally construed to effectuate its purposes." (*Romanowski, supra,* 2 Cal.5th at p. 909.) When discussing principles of statutory construction, respondent recites the familiar rule of lenity, which requires a broad construction in favor of a criminal defendant "only if [] two reasonable interpretations of the statute stand in relative equipoise." (RB 13.)

The rule of lenity is a common law principle with constitutional roots; it applies to all criminal statutes and need not be explicitly stated. (*People v. Avery* (2002) 27 Cal.4th 49, 57–58 ["[A]lthough true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent".]) Reading Proposition 47's requirement of a

board, liberal construction as co-extensive with the already-operative rule of lenity would render it a nullity. Instead, Proposition 47 requires a more affirmative thumb on the scale: if a reasonable construction of Proposition 47 permits a nonserious, nonviolent property or drug crime to be punished as a misdemeanor, that construction should be given effect.

Here, the plain text of section 496 and the legislative history of Proposition 47 support treating possession of stolen cars worth less than $950 as a misdemeanor. To the extent there is any ambiguity, that ambiguity must be resolved in favor of applying Proposition 47.

## IV. *Page* did not rely on the "nonwithstanding" language in section 490.2.

As repeatedly noted above, respondent's arguments are inconsistent with this Court's reasoning in *Page*. *Page* held that because an automobile is a type of property, "any property" as used in section 490.2 includes automobiles, and a defendant convicted of stealing such property under Vehicle Code section 10851 could be resentenced under section 490.2, even though Vehicle Code section 10851 section was not explicitly mentioned or amended. (*Page*, *supra*, 3 Cal.5th at p. 1183) This result was consistent with the electorate's desire to construe Proposition 47 "broadly" and "liberally" to effectuate its purposes, one of which is saving money by treating non-serious, non-violent property crimes as misdemeanors. (*Id.* at p. 1187.) All of this can also be said of sections 496 and 496d.

Respondent attempts to distinguish section 496 from section 490.2 by arguing section 490.2 contains a "broad-sweeping provision" redefining theft generally, namely the prefatory phrase "Nonwithstanding Section 487 or any other provision of law defining grand theft." (RB 25.) In *Page,* however, the Attorney General argued this phrase *limited* the scope of

section 490.2. (*Page*, *supra*, 3 Cal.5th at p. 1186.) Because Vehicle Code section 10851 was not a "law defining grand theft," the Attorney General argued section 490.2 did not apply to Vehicle Code section 10851. (*Ibid.*) This Court acknowledged Vehicle Code section 10851 was not a "law defining grand theft" within the prefatory clause of section 490.2. (*Id.* at pp. 1182, 1186.) Nonetheless, the plain language of the section 490.2 applied to certain cases of Vehicle Code section 10851. A car is property, and "'after the passage of Proposition 47, "obtaining any property by theft" constitutes petty theft if the stolen property is worth less than $ 950.'" (*Id.* at p. 1186, citing *Romanowski, supra*, 2 Cal.5th at p. 908.) "'Omitting the opening clause does not alter the meaning of the remainder of the sentence; the independent clause containing the definition of petty theft stands on its own and means what it says—the act of "obtaining any property by theft where the value ... does not exceed nine hundred fifty dollars ($ 950)" constitutes petty theft and must be charged as a misdemeanor.'" (*Ibid.*)

The same is true of section 496 which constitutes the broad sweeping provision redefining the stolen property crime. Just as "any property" in section 490.2 includes automobiles, so too does "any property" in section 496, subdivision (a)—also modified by Proposition 47. That section 496 lacks the opening clause of section 490.2 does not alter the meaning of "any property." Section 496 means what it says: A conviction for possessing a stolen car worth less than $950 is a misdemeanor under Proposition 47.

To support the argument that the electorate did not intend the words "any property" in section 496, subdivision (a), to include types of property identified in other statutes, respondent argues that Proposition 47 amended section 496, subdivision (b), which defines a type of receiving stolen property specific to swap meet vendors. (RB 18–19.) According to

respondent, this demonstrates that the electorate was aware of other statutes governing receipt of stolen property, and elected to change some of those statutes but not others. (*Ibid.*) On this point, however, respondent is simply incorrect. Proposition 47 did not modify section 496, subdivision (b). (Prop. 47, § 9 [making no changes to § 496, subd. (b)].)

Respondent attempts to use *People v. Gonzalez* (2014) 60 Cal.4th 533 (*Gonzalez*), to claim 496d defines a separate crime from 496. (RB 17.) Unlike the crimes at issue in *Gonzalez*, the elements of the crimes in sections 496 and 496d overlap and they proscribe the same conduct. The singular difference between sections 496 and 496d is punishment. A person cannot be convicted of 496d and 496, subdivision (a) for receiving the same stolen car. (*People v. Chenze* (2002) 97 Cal.App.4th 521, 528 ["'[i]t is axiomatic the Legislature may criminalize the same conduct in different ways,'" thereby giving the prosecutor "discretion to proceed under either of two statutes that proscribe the same conduct, but which prescribe different penalties."]) *Gonzalez* addressed whether two subdivisions of section 288a set forth separate crimes such that a defendant could be convicted of both, and does not support respondent's position in this case. (*Gonzalez*, *supra*, 60 Cal.4th at 536.)

The voters modified section 496, subdivision (a), which applies to "all property" to provide that receipt of stolen property worth less than $950 is a misdemeanor. If there was any doubt about their intent, the voters further directed that Proposition 47 be given a broad, liberal construction. (*Page*, *supra*, 3 Cal.5th at p. 1187.) The voters did not need to individually amend every statute which potentially applies to conduct within the scope of section 496, subdivision (a). (*Id.* at p. 1186 [while omission of Vehicle Code § 10851 from Proposition 47 "may suggest its drafters did not have

that statute specifically in mind", plain language of section 490.2 still applied wherever property worth less than $950].)

## V. Orozco was sentenced after Proposition 47.

Finally, should this Court hold that section 496, subdivision (a) applies to any property worth less than $950 as argued above, respondent is incorrect as to the remedy here. Respondent characterizes Orzoco's motion to reduce his convictions as a petition under section 1170.18. (RB 11, 32.) But Orozco was sentenced when Proposition 47 was already in effect. Orozco was found in possession of the vehicle on August 7, 2014. (CT 13.) Voters enacted Proposition 47 while Orozco's case was pending on November 4, 2014, and it became effective the following day. (Cal. Const., art. 11, § 10, subd. (a).) Orozco was sentenced on December 11, 2014. (CT 61.)

Where a change in the law benefits defendants by redefining the elements of an offense in their favor, the new law applies automatically to defendants tried or sentenced after the change goes into effect. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 (*Tapia*), citing, inter alia, *Estrada, supra,* 63 Cal.2d at p. 746; *People v. Rossi* (1976) 18 Cal.3d 295, 299 ["a statute mitigating punishment applie[s] to acts committed before its effective date as long as no final judgment ha[s] been rendered"].) This is so even if the defendant committed the criminal conduct before the effective date of the change. (*Tapia*, at pp. 286–287, 300-301; *Rossi*, at pp. 298–302.)

In *Tapia*, the defendant committed his crimes before the effective date of Proposition 115, the Crime Victims Justice Reform Act, and his trial was pending when the initiative took effect. This Court had to resolve the question of whether provisions of Proposition 115 applied to prosecutions

of crimes committed before the proposition's effective date. (*Tapia*, at p. 286.) The Court answered the question in the affirmative for the provisions that made criminal conduct less culpable, such as those adding the element of intent to kill to crimes that previously required no such intent. (*Tapia*, *supra*, 53 Cal.3d at pp. 300–301.)

The *Tapia* court stated, "'[W]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act' and 'sufficient to meet the legitimate ends of the criminal law.'" (*Id.* at p. 301, quoting *Estrada*, *supra*, 62 Cal.2d at p. 745, and *People v. Oliver* (1956) 1 N.Y.2d 152.) The Court pointed out that it had "applied the same reasoning to statutes which redefine, to the benefit of defendants, conduct subject to criminal sanctions." (*Tapia*, at p. 301, citing *People v. Rossi* (1976) 18 Cal.3d 295 (*Rossi*),) "These authorities," the Court held, "compel the conclusion that . . . [provisions benefiting criminal defendants] may be applied to pending cases." (*Tapia*, at p. 301.)

Similarly, in *People v. Wright* (2006) 40 Cal.4th 81, 85–86 (*Wright*), the Compassionate Use Act of 1996 (the CUA) provided no affirmative defense to transporting marijuana when defendant committed the crime in 2001. (*Id.*, at p. 84, citing Health & Saf. Code, § 11362.5.) Before defendant's case was final, however, the Legislature enacted the Medical Marijuana Program (the MMP) (Health & Saf. Code, § 11362.7 et seq.), which provided an affirmative defense to that crime. (*Wright*, at p. 85, citing Health & Saf Code, § 11362.765.) This Court held that the MMP applied to cases pending at the time of its passage, even for crimes committed before the effective date of that act. (*Wright*, at pp. 94-95.)

Citing *Rossi* and *Estrada*, the Court said, "This authority makes clear that [the MMP] may be applied retroactively to provide, if its terms and the applicable facts permit, a defense to appellant." (*Wright*, at p. 95, quoting *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1545.)

Here, Proposition 47, by means of Penal Code section 496, made possession of "any property" that was stolen a misdemeanor if the property was worth less than $950. Under *Tapia* and *Wright*, this ameliorative change applied automatically at Orozco's sentencing proceedings held after Proposition 47's effective date.

That conclusion is consistent with this Court's recent decision in *DeHoyos*. The question in *DeHoyos* was whether Proposition 47's ameliorative provisions applied directly to persons already serving sentences for their crimes. (*DeHoyos*, *supra*, 4 Cal.5th at pp. 597, 600.) Because Proposition 47 provided a specific avenue for relief in those circumstances—petitioning for recall of the sentence under section 1170.18, subdivision (a)—this Court determined that the Legislature intended that to be the only avenue for relief for those defendants. (*Id.* at pp. 597, 603.) Proposition 47 makes no such provision for defendants who, before the effective date of Proposition 47, committed a crime subsequently reduced to a misdemeanor by the proposition, but who had not yet been sentenced. Therefore, section 496 applies automatically to such defendants; they need not petition for relief under section 1170.18. Respondent's contention that the trial court must determine whether Orozco poses a risk to public safety under section 1170.18, subdivision (b) (RB 32), is without merit.

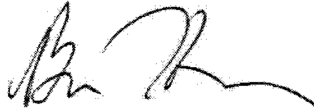
**Conclusion**

Respondent's arguments that 496d was not amended by or mentioned in Proposition 47 conflict with this Court's reasoning in other

cases and do not preclude sentencing under section 496. In arguing that the general-versus-special rule requires possession of a stolen car always be prosecuted under section 496d, respondent elevated one aid to judicial interpretation above all the rest. In fact, the history of Proposition 47 indicates the electorate intended section 496 to apply in cases like this one.

The electorate wanted to treat non-serious, non-violent property crimes as misdemeanors to ensure the State's resources were spent on ends it deemed more worthy than incarcerating low-level offenders. The electorate was told Proposition 47 would ensure receiving stolen property worth less than $950 "would always be a misdemeanor," and specifically directed that Proposition 47 be interpreted broadly to serve its purposes. The plain language of section 496 "'means what it says.'" (*Page*, *supra*, 3 Cal.5th at p. 1186.) Possession of "any property" worth less than $950 is a misdemeanor.

Respectfully submitted,



Dated: March 1, 2019

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**Certificate of Word Count**

I, Benjamin Kington, counsel for petitioner certify pursuant to the California Rules of Court, rule 8.504(d)(1) that this brief contains 3762 words as calculated by the Word Perfect software in which it was created.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 1, 2019, at San Diego, California.

BENJAMIN KINGTON
Attorney for petitioner
ERNEST OROZCO

*People v. Orozco*
*Case No. S249495*

**Proof of service**

I, the undersigned declare that: I am over the age of 18 years and not a party to the case; I am a resident of the County of San Diego, State of California, where the mailing occurs; and my business address is 934 23rd Street, San Diego, California 92102.

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; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On March 1, 2019, I caused to be served the following document: REPLY BRIEF by placing a copy of the document in an envelope addressed to each addressee, respectively, as follows:

Ernest Orozco
c/o 934 23rd Street
San Diego, CA 92102

I then sealed each envelope and, with postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

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**Proof of electronic service**

Furthermore, I declare that I electronically served from my electronic service address of mj@boyce-schaefer.com on March 1, 2019, to the following entities:

Office of the Attorney General
Sdag.docketing@doj.ca.gov

Appellate Defenders, Inc.
eservice-court@adi-sandiego.com

Douglas L. Miller
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San Diego County District Attorney's Office
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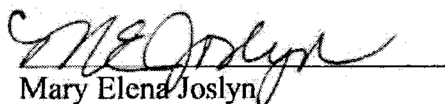
Hon. Michael Popkins
Appeals.Central@SDCourt.ca.gov

Court of Appeal, Fourth District, Division One
(served via truefiling)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 1, 2019, at San Diego, California.



Mary Elena Joslyn