# In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**CEDRIC JEROME JOHNSON,**

**Defendant and Appellant.**

**CAPITAL CASE**

Case No. S075727

Los Angeles County Superior Court Case No. TA037977
The Honorable John Joseph Cheroske, Judge

## SUPPLEMENTAL BRIEF

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## INTRODUCTION

In the opening brief appellant filed on January 16, 2009, and the reply brief he filed on August 7, 2013, appellant argued at length that he was treated unfairly at trial. He argued that he articulated sophisticated and valid legal complaints that were rejected by his attorney and biased judges. (AOB 22-224; Reply 3-100.)[1] However, in the supplemental opening brief filed on March 14, 2018, appellant shifts course and contends that when viewed through a different "lens," the record instead demonstrates that his behavior below was so blatantly illogical and self-destructive, and his objections were so obviously baseless, that the trial court's failure to initiate competency proceedings amounted to error under state law and the federal Constitution. (SAOB 6-23.) Specifically, contrary to his claim in the opening and reply briefs that Judge John C. Cheroske was biased against him (AOB 22-55; Reply 3-37), appellant now asserts that his "offending conduct" during the proceedings below were "mainly expressions" of a "fixed, irrational belief that counsel and court were conspiring to 'railroad' him" (SAOB 7).

On March 14, 2018, this Court ordered respondent to file a response. Appellant's new claim is meritless—his behavior below demonstrated a calculated attempt to disrupt the proceedings, not incompetency. Indeed, appellant appeared before eight judges below, and none of them declared a doubt as to his competency. However, appellant's new characterization of his behavior at trial tends to refute the arguments in appellant's opening and reply briefs that he articulated valid arguments that were unfairly rejected by a supposedly-biased trial judge.

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[1] "AOB" refers to appellant's opening brief, "RB" refers to respondent's brief, and "SAOB" refers to appellant's supplemental opening brief.

### A. A Trial Court Has a Duty to Hold a Competency Hearing Only if there is Substantial Evidence of Mental Incompetence

The conviction of a legally incompetent person violates both the federal constitutional right to due process and California state law. (*Drope v. Missouri* (1975) 420 U.S. 162, 171-172; *Pate v. Robinson* (1966) 383 U.S. 375, 378; *People v. Taylor* (2009) 47 Cal.4th 850, 861; Pen. Code, § 1367, subd. (a).)[2] A defendant is incompetent to stand trial if as a result of a mental disorder or developmental disability, he is unable to understand the nature of criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (§ 1367; *Medina v. California* (1992) 505 U.S. 437, 440; *Dusky v. United States* (1960) 362 U.S. 402, 402; *People v. Clark* (2012) 52 Cal.4th 856, 892.)

"A defendant is presumed competent unless it is proved otherwise by a preponderance of the evidence." (*People v. Ramos* (2004) 34 Cal.4th 494, 507; accord *People v. Blacksher* (2011) 52 Cal.4th 769, 797.) Section 1368 provides that if "a doubt arises in the mind of the judge as to the mental competence of the defendant," the court should inquire of defense counsel regarding his client's competence and, if counsel believes the defendant may be incompetent, the court should order a hearing on the matter. A trial court is required to conduct a competency hearing, sua sponte if necessary, whenever there is substantial evidence of mental incompetence. Substantial evidence for these purposes is evidence that raises a reasonable doubt about the issue. (*People v. Mickel* (2016) 2 Cal.5th 181, 195.) By contrast, evidence that "merely raises a suspicion that the defendant lacks present sanity or competence but does not disclose a present inability to participate rationally in the trial is not deemed

[2] Unless indicated otherwise, further statutory references are to the Penal Code.

'substantial' evidence requiring a competence hearing." (*People v. Deere* (1985) 41 Cal.3d 353, 358, disapproved on other grounds in *People v. Bloom* (1989) 41 Cal.3d 1194, 1228, fn. 9.)

This Court gives great deference to a trial court's decision whether to hold a competency hearing, as this Court "'is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.'" [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 33.) But this Court exercises independent review as to whether, as a matter of law, the evidence before the trial court "raised a substantial doubt as to defendant's mental competence," such that he was entitled to and the court was bound to hold a section 1368 hearing during the course of the proceedings. (*People v. Mickel*, *supra*, 2 Cal.5th at p. 195.) In other words, "absent a showing of 'incompetence' that is 'substantial' as a matter of law, the trial judge's decision not to order a competency hearing is entitled to great deference, because the trial court is in the best position to observe the defendant during trial." (*People v. Mai* (2013) 57 Cal.4th 986, 1033.)

### B. There Was No Substantial Evidence Raising a Doubt as to Appellant's Competency

In his instant claim, appellant does not identify a specific date in which a doubt should have been declared as to his competency. Appellant's first court appearance contained in the record occurred on September 26, 1997 (1CT 2), and his last on December 18, 1998 (25RT 1824). During that timespan, appellant appeared before Commissioner Robert R. Johnson (1CT 2), Judge Marcelita V. Haynes (1CT 7), Judge Irma J. Brown (1CT 13), Judge John J. Cheroske (1RT 1), Judge George Wu (1RT 1-3), Judge Rose Hom (1RT 107), Judge Jack W. Morgan (1RT 263-265), and Judge Kenneth Gale (16RT 3508). In other words, appellant's claim is that *eight* judges erred in failing to declare a doubt as to

his competency. Appellant's trial counsel did not declare a doubt, nor did the prosecutor, nor did counsel for codefendant Betton. Indeed, far from declaring a doubt as to competency, Judge Brown granted appellant's request to represent himself (1CT 26), and Judge Wu dismissed co-counsel in light of appellant's expressed desire to represent himself (1RT 56-57). Appellant had also represented himself in a prior case. (1RT 194; see 1CT 269.)

Appellant's behavior at trial is described in great detail in the respondent's brief. (See RB 12-66.) Notably, in the first trial, he testified for two days. His testimony on direct was smooth and detailed, which indicated that he and trial counsel had previously discussed the testimony in great detail. (12RT 2784, 2862; see also 6RT 1591-1592 [appellant states he has discussed strategy with trial counsel]; 8RT 1835 [same]; 17RT 2-69 [trial counsel describes defendant's cooperation with him during the first trial].)

In his opening and reply briefs, appellant argued that he was wrongfully stripped of his right to represent himself, to testify, and to be present at trial. Far from arguing that the record demonstrated a doubt as to competency, appellant argued that he had made legitimate and nuanced legal arguments that were rejected because Judge Cheroske was biased against him. (See, e.g., AOB 22 ["Judge Cheroske's actual bias was shown by acts such as expelling Johnson from the courtroom when Johnson made a proper objection"]; AOB 31 ["By . . . not allowing Johnson to complete his well-founded objection . . . Judge Cheroske abused his authority"]; AOB 42 ["Johnson was correct. Judge Cheroske had misstated the law"]; AOB 44-45 ["Judge Cheroske was not merely wrong on the law in revoking Johnson's pro per status. Because there was no support in the law or the record for what he did to Johnson, Judge Cheroske acted out of bias against a pro per defendant"]; Reply 81 [When push came to shove with

Johnson's life on the line, Johnson and Hauser communicated to put the defense on"]; see also Reply 19 [citing appellant's "good conduct during the preliminary hearing"]; Reply 42 [appellant's presence at hearing was crucial because he "could have assured Judge Cheroske that he would have acted appropriately at his trial"]; Reply 89 [hearing would have been valuable because "After the [first] trial, Johnson had weeks to study reporter's transcript of the entire trial"].)

But in the supplemental opening brief, appellant refutes his prior characterization of the record. He argues that he "did not assist his counsel in a rational manner because he was unable to do so" (SAOB 6), that his "offending conduct" during trial proceedings were "mainly expressions" of a "fixed, irrational belief that counsel and court were conspiring to 'railroad' him" (SAOB 7), and that his various objections below demonstrated a "distorted thinking and defective understanding of the judicial process" (SAOB 7). To the contrary, as discussed in the respondent's brief, appellant's behavior at trial demonstrated a determined effort to derail the legal proceedings by causing maximum disruption. (RB 66-68, 83-101.) The fact that appellant demonstrated a sophisticated understanding of the legal system and how best to try to inject error did not demonstrate incompetence. And the various judges appellant appeared before were in the best position to evaluate the nature of his disruptive behavior, and none entertained a doubt as to his mental competency. (See, e.g., 17RT 95 [describing appellant's attempt to inject error into the proceedings, Judge Cheroske stated, "If some appellate court disagrees with me, that's the way it is. But they should have been here when it was happening"].) As this Court stated in *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1033, "disruptive conduct and courtroom outbursts by the defendant do not necessarily demonstrate a present inability to understand the proceedings or assist in the defense. [Citations.]" "An appellate court

is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper." (*Ibid.*, citation and quotation marks omitted.)

Respondent appreciates appellant's new characterization of some of his legal arguments below as being frivolous. But the fact that he made legally-unsound arguments does not demonstrate incompetence. (See, e.g., *People v. Mai, supra,* 57 Cal.4th at p. 1035 ["A wish for the death penalty, and an insistence on presenting no penalty defense, are not, by themselves, evidence of incompetence sufficient to trigger competency proceedings"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1073 ["But a proclivity to boast or exaggerate, a tendency to digress in argument, a shaky grasp of the legal concept of relevancy even a certain tangentiality in speech patterns does not necessarily mean that a defendant lacks a rational and factual understanding of the proceedings"].)

Aside from his attempts to disrupt the proceedings, appellant points out that trial counsel made at least reference to appellant's mental state in a fee proposal, in an in camera hearing on May 13, 1998, and also presented psychological evidence during the penalty phase. (SAOB 10, 12 fn. 3.) None of those facts amounted to substantial evidence raising a doubt as to competency.

As to the fee proposal dated October 15, 1997, trial counsel stated, "The defendant appears to be mentally unstable, in that he has difficulty relating to counsel and expressed a desire to represent himself, which he apparently did in a recent case . . . ." Trial counsel continued, "I anticipate a lot of extra time to be taken with trying to convince the defendant that he is better off with appointed counsel and to obtain his cooperation in presenting a meaningful defense." (1CT 46.) That assertion by trial counsel does not reflect a concern that appellant was *unable* to understand

the nature of criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. Rather, it reflected the accurate perception that appellant was going to be combative and disruptive. As further discussed below, characterizing appellant as possibly "mentally unstable" is not synonymous with incompetence to stand trial. Indeed, mental illness is not the equivalent of incompetency. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 403 ["'[e]ven supposing defendant is correct that the various examples of his rambling, marginally relevant speeches cited in his briefing may constitute evidence of some form of mental illness, the record simply does not show that he lacked an understanding of the nature of the proceedings or the ability to assist in his defense'"].)

Appellant's medical records and the expert testimony presented during the penalty phase did not demonstrate the need for competency hearings, either.

The medical records were discussed on May 13, 1998, during an in camera hearing before Judge Morgan. Trial counsel explained that he had spoken to appellant's mother, brother, sister, and friend. From those conversations, he had learned that appellant had received some sort of treatment for unspecified psychiatric problems at UCLA and USC hospitals, as well as the California Youth Authority and jail. (2RT 285-287.) Trial counsel had subpoenaed records from those institutions. Because appellant had not signed a written consent, records from UCLA were sent to the court. Judge Morgan reviewed the UCLA records and disclosed them to trial counsel. (2RT 285, 288.) Trial counsel had learned the Youth Authority records were unavailable as they were destroyed after five years. (2RT 287.) As to the other outstanding records, after receiving contact information from trial counsel, Judge Morgan personally contacted the relevant individuals to accelerate the process of obtaining the records. (2RT 293-294.) During the hearing, trial counsel explained that he had

"had at least four extensive conversations" with appellant (2RT 296), did not believe appellant was incompetent to stand trial, but would revisit that opinion after reviewing the records and having appellant examined by an expert:

> It's my belief that Mr. Johnson does not have a 1368 situation. I personally believe he is capable of cooperating with counsel. However, I haven't had this medically documented. I have a doctor that is going to examine him, a neuropsychiatrist, that will examine him on Saturday. Hopefully, he will have these records, and he'll have more insight as to what the situation is.
>
> So, based on that, I wanted to tell you what my situation is. I don't know if Mr. Johnson is medically incapable of cooperating with me. I suspect that is not the case and that these records and his problems would tend to go towards penalty, if we get into penalty. However, I am faced with a dilemma. I don't know if his mental problems affected his specific intent at the time of the crime, if he was, indeed, there at the crime scene.
>
> In talking with him, I believe that it is his wish to proceed without that type of defense. And that is my plan. I want that on the record.

(2RT 297.)[3] Later that day, in response to the prosecutor's request for discovery, Judge Morgan stated that he had reviewed the records and saw nothing relevant to the guilt phase that needed to be turned over to the prosecutor. (2RT 572-574.)

Appellant's psychiatric records were again discussed on May 20 and 26, 1998. Judge Morgan reiterated that he had reviewed those records (3RT 581-582, 742; 5RT 1049-1050), and responded to appellant's objection to the records being shared with trial counsel. (3RT 741-744; 5RT 1058-1059, 1068-1069.)

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[3] Trial counsel further noted that appellant's relatives seemed frightened of appellant and therefore reluctant to speak further to trial counsel. (2RT 297.)

Thus, the record reflects that trial counsel considered and investigated appellant's mental state and competency. After reviewing the medical records, neither trial counsel nor Judge Morgan indicated any concern over appellant's competence. Those conclusions are entitled to deference. (See *Medina v. California, supra,* 505 U.S. at p. 450 ["defense counsel will often have the best-informed view of the defendant's ability to participate in his defense"]; see, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 848 ["defendant's suicidal tendencies did not constitute substantial evidence of incompetence, for they were not accompanied by bizarre behavior, the testimony of a mental health professional regarding competence, or any other indications of an inability to understand the proceedings or to assist counsel"]; see also *Williams v. Woodford* (9th Cir. 2004) 384 F.3d 567, 608 [that counsel did not express any doubts about defendant's competence was "especially relevant" evidence that he was competent].)

On December 1, 1998, during the penalty phase, trial counsel called psychiatrist Dr. Marshall Cherkas as a witness. (25RT 1741.) Dr. Cherkas testified that he had reviewed some records related to appellant. (25RT 1743.) It was not entirely clear which records he reviewed, but it appeared that no records concerned the time between 1978 and 1996. (25RT 1750-1751.) Dr. Cherkas also spoke to appellant on May 16, 1998, but for less than five minutes because appellant was "very uncooperative." (25RT 1744, 1751.) Dr. Cherkas said the records indicated appellant had a "low normal intellect" (25RT 1746), and was "violent, threatening" and disruptive in school (25RT 1746, 1749). There was also some indication from the records that appellant "appeared to be illogical and irrational" and "psychotic," and "there was some kind of a thinking disorder." (25RT 1747-1748.)

The fact that records dating from 1978 indicated appellant might have a vaguely-defined disorder did not amount to substantial evidence he was

unable to understand the nature of criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. Needless to say, Dr. Cherkas did not testify appellant was mentally incompetent. (See, e.g., *People v. Romero* (2008) 44 Cal.4th 386, 420 [penalty phase testimony "that defendant was mentally deficient, that the deficiency arose before defendant was 18 years of age, and that the deficiency constituted a substantial disability" did not implicate his competency to stand trial]; *People v. Halvorsen , supra,* 42 Cal.4th at p. 403 ["Nor did Dr. Vicary's testimony that defendant suffered from a psychotic mental illness reasonably compel a declaration of a doubt as to his competency"]; *People v. Ramos* (2004) 34 Cal.4th 494, 508-511 ["defendant's propensity for violence, hoarding of medication for an alleged suicide attempt, and history of psychiatric treatment do not indicate he was incompetent"; "That defendant lived by his own code of conduct neither indicates he was mentally incompetent and could not understand the penalty proceedings, nor presents any new evidence or changed circumstance that would require the court to suspend the proceedings"]; *People v. Frye* (1998) 18 Cal.4th 894, 949, 952, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [no error in failing to hold hearing despite testimony that defendant suffered from various "psychological and neurological defects" that "would make it difficult for him to testify on his own behalf"].)

Indeed, as discussed above and in the respondent's brief, appellant's disruptive behavior simply demonstrated a rational understanding of the strength of the evidence against him, and the likelihood that obstructing trial was the best available strategy. His behavior throughout the proceedings demonstrated that he comprehended the severity of the charges, the role of the various involved individuals, and the status of the case. He also had no difficulty assisting counsel when he believed it in his

best interest. Indeed, that is exactly what appellant argued in the reply brief. (See, e.g., Reply 81 ["When push came to shove with Johnson's life on the line, Johnson and Hauser communicated to put the defense on"].)

Arguing otherwise, appellant relies on Ninth Circuit cases that involved facts not remotely comparable to the instant case. (SAOB 14-15.) For example, appellant cites *Torres v. Prunty* (9th Cir. 2000) 223 F.3d 1103, in which the Ninth Circuit rejected the ruling by this Court, and concluded that the trial court erred in not holding a competency hearing. (*Id*. at p. 1105.) In *Torres*, the defendant pleaded not guilty by reason of insanity. One expert opined the defendant was sane at the time of trial. The other expert examined the defendant and determined he was unable to distinguish right from wrong at the time of the offense and appeared to satisfy the legal test for insanity. This expert concluded that the defendant's "psychotic delusions were extreme" and that the result of the standard personality inventory test was "one of the most disturbed profiles on this instrument seen" by the expert. As to those delusions, which primarily focused on being the victim of a medical conspiracy, the expert opined the defendant was "fully credible and not seeking consciously to deceive in any way." Apparently without clarification, the expert also opined the defendant was competent to stand trial. Subsequently, the defendant withdrew his insanity plea. Defense counsel refused to join in that decision. The defendant requested new counsel, or to represent himself. The court denied both requests. (*Id*. at pp. 1105-1106.) During trial, defense counsel said to the court there was "possibly a doubt" as to the defendant's competency, and explained that there had been a new development—the defendant had become convinced that defense counsel and the court were part of the conspiracy against him. The court declined to investigate the question of competency, stating, "He testified on the witness stand. I watched his demeanor. He's no different than any other

defendant who is dissatisfied with his attorney." (*Id*. at p. 1108.) The Ninth Circuit concluded that the trial court erred in failing to hold a competency hearing, and emphasized the following facts: (1) the prior evaluation indicated that the defendant believed in a delusional conspiracy *and* honestly believed that conspiracy; (2) the situation had changed in that the defendant now believed defense counsel was part of the conspiracy; (3) defense counsel had indicated a doubt as to competency; and (4) the defendant had engaged in "unusual and self-defeating" behavior during the court proceedings. (*Id*. at pp. 1109-1110.)

The instant facts are distinguishable from *Torres* in every relevant respect. Here, there was no determination that appellant was delusional, let alone an expert determination that appellant was honest in expressing those delusions. Also, trial counsel did not express a doubt as to appellant's competency. (Compare *Torres v. Prunty, supra*, F.3d at p. 1109 ["Torres's defense counsel was in the best position to evaluate Torres's competence and ability to render assistance"].) Finally, appellant certainly engaged in disruptive behavior. But far from being obviously "self-defeating," that behavior was clearly a strategic choice by appellant to derail the proceedings. Indeed, at least in the opening and reply briefs, appellant characterized his behavior below as largely an appropriate response to the supposedly wrongful actions taken by trial counsel and Judge Cheroske. (See *id*. at p. 1110 ["Although 'bizarre actions' are not necessarily sufficient evidence to compel a *Pate* hearing, they are a factor to be considered"].)

*Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, cited by appellant, is similarly inapposite. There, prior to trial, the defense counsel raised a doubt as to the defendant's competency. Five psychiatrists examined the defendant: four opined the defendant was competent and that he was feigning or embellishing a psychosis, and the fifth psychiatrist concluded

the defendant was incompetent. The presiding judge reinstated proceedings. (*Id*. at p. 565.) Trial commenced over a year later. The Ninth Circuit concluded that the trial court erred in failing to order a new competency hearing based on the sum of the following facts. First, the defense attorney advised the court that the defendant's mental state seemed to be deteriorating to the point where it was not clear the defendant understood what defense counsel was saying to him. The defendant had asked counsel to "hand over evidence helpful to the prosecution." Due to the inability to communicate with the defendant, the defense counsel "was unable to develop a theory of the case or prepare an opening statement." Second, the defendant behaved in a bizarre manner in court, including making noises and blurting obscenities. Third, the defendant had refused to take his prescribed psychiatric medication, and had assaulted another inmate with a knife. Fourth, after trial began, the defendant attempted suicide and was admitted to a psychiatric ward. The initial 72-hour hold was extended to 14 days (while trial continued in the defendant's absence). The psychiatrists who evaluated the defendant reported that he was both "a danger to himself" and "gravely disabled." One of the experts found the defendant to be "actively psychotic" and "actively hallucinating." A second expert reported that the defendant was "unable to function . . . because of his poor mental state" and was not "oriented to time or place." (*Id*. at pp. 569-576.)

None of those facts is present in this case. Defense counsel neither indicated a doubt as to appellant's competency, nor asserted he was unable to develop a trial strategy due to difficulty communicating with appellant. To the contrary, as appellant acknowledged in his reply brief, he communicated with defense counsel when he believed it to be in his best interest. As noted, appellant certainly behaved in a disruptive manner, but that behavior was consistently calculated to cause maximum disruption of

the trial. Finally, there was no evidence of mental illness or hallucination inhibiting competency, let alone an expert opinion of incompetency. Thus, *Maxwell* does not help appellant. Indeed, the cases cites by appellant are relevant only in the sense that they illustrate the type of extreme facts that support a finding of error for failing to initiate competency proceedings.

In sum, there was no substantial evidence of mental incompetency requiring the trial court to conduct a competency hearing, and thus, appellant's claim should be rejected. However, if Judge Cheroske (and the other trial judges) erred in failing to initiate competency proceedings, then the matter should be remanded for a competency hearing. There is no indication that any of the pertinent individuals or relevant documents are unavailable. (See generally *People v. Lightsey* (2012) 54 Cal.4th 668, 707-710 [remand for competency hearing may be appropriate remedy].)

Dated: April 24, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 4,177 words.

Dated: April 24, 2018

XAVIER BECERRA
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**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL**

Case Name: **People v. Cedric Jerome Johnson** No.: **S075727**

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 collecting and processing electronic and physical correspondence. 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 with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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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 April 25, 2018, at Los Angeles, California.

Mary Emami
Declarant

Signature

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**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

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