In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MAURICE G. STESKAL,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S122611

Orange County Superior Court Case No. 99ZF0023
The Honorable Frank F. Fasel, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
RONALD A. JAKOB
Deputy Attorney General
KELLEY JOHNSON
Deputy Attorney General
State Bar No. 216387
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9233
Fax: (619) 645-2012
Email: Kelley.Johnson@doj.ca.gov
Attorneys for Plaintiff and Respondent

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INTRODUCTION

In the early morning hours of June 12, 1999, appellant Maurice G. Steskal brutally gunned down Orange County Deputy Sheriff Bradley Riches in the parking lot of a Lake Forest convenience store. On February 6, 2004, following a jury trial, Steskal was sentenced to death for the special-circumstance murder of Deputy Riches.

On August 8, 2014, Steskal filed his Opening Brief which presented 16 claims for relief including challenges to California's death penalty laws. On March 17, 2015, Steskal was granted leave to file a Supplemental Opening Brief which expounded upon one of his Opening Brief claims. On August 4, 2015, the Respondent's Brief was filed. On July 29, 2016, Steskal was granted leave to file a Second Supplemental Opening Brief raising additional challenges to the constitutionality of California's death penalty laws.

The Second Supplemental Opening Brief consists of well-worn, previously rejected challenges to the death penalty newly inspired by and repackaged in the format of Justice Breyer's dissenting opinion in *Glossip v. Gross* (2015) __ U.S. __, 135 S.Ct. 2726. These challenges remain meritless and Steskal presents no persuasive reasons to revisit them. Moreover, Steskal urges this Court to make an inherently legislative decision about the effectiveness and deterrent and retributive value of the death penalty. Steskal's complaints about California's death penalty should be rejected, and the judgment affirmed.

ARGUMENT

I. CALIFORNIA'S DEATH PENALTY IS CONSTITUTIONAL

In his Second Supplemental Opening Brief, Steskal claims the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment. Relying on a selective compilation of law review

articles, studies, Internet sites and dissenting opinions, Steskal contends the death penalty is constitutionally infirm because it is unreliable and arbitrarily imposed, subjects death row inmates to extreme delays, fails to measurably contribute to its objectives of deterrence and retribution, and has declined in use nationwide. (2d Sup. AOB 1-74.) This Court has already explained why California's death penalty does not violate the Eighth Amendment, and Steskal provides no basis for this Court to depart from its prior holdings on the subject.

Steskal first contends that the death penalty is unconstitutional because it lacks sufficient reliability. (2d Supp. AOB 16-24.) Steskal begins this criticism on the reliability of the death penalty by asserting that innocent people are "regularly" sentenced to death in the United States. (2d. Supp. AOB. 16.) He recites a rate of "wrongful conviction of innocent persons in capital cases" of 4.1 percent, and cites as authority for that proposition a dissenting opinion by Justice Breyer. (2d Supp. AOB 17, citing *Glossip v. Gross, supra,* 135 S.Ct. at p. 2758 (dis. opn. of Breyer, J.).) This estimate, however, rests with studies and articles that have been the subject of criticism both in terms of methodology and conclusions being drawn.[1]

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[1] When a case is on direct appeal, review is limited to facts in the appellate record, except that the Court can properly take judicial notice pursuant to Evidence Code section 452, subdivision (h) of "'[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.'" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1372, quoting Evid. Code, § 452, subd. (h).) The sources of support for Steskal's assertion that the death penalty is regularly being imposed on innocent persons are not properly subject to judicial notice since the facts and propositions in question are reasonably subject to dispute. (See, e.g. *Kansas v. Marsh* (2006) 548 U.S. 163, 193 (conc. opn. of Scalia, J.) ["even in identifying exonerees, the dissent is willing to accept anybody's say-so.

(continued...)

The primary flaw in these studies, articles and their accompanying arguments is that they equate exoneration, wrongful convictions and failures of proof with innocence. As noted by Justice Scalia in his concurring opinion in *Kansas v. Marsh, supra,* 548 U.S. at page 188, there has not been "a single case – not one – in which it is clear that a person was executed for a crime he did not commit." "[M]ischaracterization of reversible error as actual innocence is endemic in abolitionist rhetoric, and other prominent catalogues of 'innocence' in the death-penalty context suffer from the same defect." (*Id.* at p. 196 [discussing one study's "inflation of the word 'exoneration'"].)

For example, Justice Breyer relies on the 2012 report of the University of Michigan's National Registry of Exonerations (hereafter "National Registry") in declaring "the number of exonerations in capital cases has risen to 115" since 2002. (*Glossip v. Gross, supra,* 135 S.Ct. at p. 2757.) Steskal likewise cites that report with emphasis. (Supp. AOB 18.)

The National Registry defines "exoneration" as follows:

> "Exoneration," as we use the term, is a legal concept. It means that a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered.

(National Registry of Exonerations, Exonerations in the United States, 1989-2012, p. 7 (2012) (Exonerations 2012 Report).) Thus, Steskal's argument relies on legal, not actual, innocence despite his assertions to the contrary. (See *id.* at p. 6 ["We do not claim to be able to determine the guilt or innocence of convicted defendants"].)

(...continued)
It engages in no critical review, but merely parrots articles or reports that support its attack on the American criminal justice system."].)

It is also notable that the National Registry's standard does not require a causal link between new evidence of innocence and the decision to relieve the defendant of the legal consequences from his or her conviction. The standard simply requires that the decision occur "after" such evidence is discovered. There may be other reasons, such as due process or fair trial concerns, which move a court to grant complete relief from a conviction without regard to guilt or innocence, which the National Registry of Exonerations nonetheless construes as the exoneration of an innocent person. (See, e.g., *Giglio v. United States* (1972) 405 U.S. 150.) Similarly, a governor's pardon or prosecutor's decision after, but not necessarily because of, newly discovered evidence may very well be due to loss of confidence in the reliability of the conviction rather than a determination of actual innocence.

Indeed, a prosecutor's decision to declare a defendant innocent need not be accepted by the court. For example, in *Haynesworth v. Commonwealth of Virginia* (Va.Ct.App. 2011) 717 S.E.2d 817, 817-830, four judges dissented from the issuance of a writ of actual innocence despite the recommendation of the prosecutor. One of those dissenting judges explained that the prosecutors' "views of what they believe happened in these two cases do not overcome the clear, plain language of the actual innocence statute and what it requires" and "their views do not establish that NO rational factfinder could conclude that Haynesworth is guilty of" two sexual assaults. (*Id.* at p. 825 (dis. opn. of Beales, J.) (capitalization in original).)

Moreover, one of the cases for which Steskal argues "there are now compelling reasons to believe that innocent men were put to death" occurred in the 1800's (William Jackson Marion) and another in the 1930's (Joe Arridy), long before the heightened standard of reliability currently

required for death judgments.[2] (AOB 17, citing *Glossip v. Gross, supra,* 135 S.Ct. at p. 2756 (dis. opn. of Breyer, J.).)

> The broader point, however, is that it is utterly impossible to regard "exoneration"--however casually defined-- as a failure of the capital justice system, rather than as a vindication of its effectiveness in releasing not only defendants who are innocent, but those whose guilt has not been established beyond a reasonable doubt.

(*Kansas v. Marsh, supra*, 548 U.S. at p. 194 (conc. opn. of Scalia, J.).)

> Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.

(*Id* at p. 193.) Thus, Steskal's source of criticism is actually confirmation that the system does ensure the reliability he claims to be lacking.

Steskal also relies on the effect of death-qualification of jurors in capital cases as support for his contention the death penalty is unreliable. (2d Supp. AOB 23, fn. 9.) As both the Supreme Court and this Court have made clear, excusing jurors who would automatically vote for death or for life does not violate a defendant's constitutional right to an impartial jury, even assuming that empirical studies adequately establish that death qualification produces more conviction-prone juries.[3] (*Lockhart v. McCree*

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[2] Steskal also suggests more innocent people may have been executed because "defense investigations cease when capital defendants die," "their cases are moot due to their deaths," and "[t]here is no judicial process for post-execution exoneration." (AOB 17.) However, the very cases of William Marion and Joe Arridy cited by Steskal involved posthumous pardons resulting from post-execution investigations. (See *Glossip v. Gross, supra,* 135 S.Ct. at p. 2756 (dis. opn. of Breyer, J.).)

[3] Steskal expressly notes that the Second Supplemental Opening Brief does not raise any claims under the California Constitution. (2d. Supp. AOB at 10, fn. 3.) This Court has observed in rejecting a challenge

(continued...)

(1986) 476 U.S. 162, 176-177; *People v. Mendoza, supra,* 62 Cal.4th at p. 913; *People v. Sandoval* (2015) 62 Cal.4th 394, 412-413; *People v. Chism* (2014) 58 Cal.4th 1266, 1286 [noting Supreme Court has rejected contention that death-qualification portion of jury selection process is unconstitutional and declining to reconsider issue as to state Constitution]; *People v. Taylor* (2010) 48 Cal.4th 574, 602.)

Steskal next claims the death penalty is arbitrarily imposed in California and the rest of the nation. (2d Supp. AOB 24-44.) Relying on statistics relating to death penalty charging and sentencing practices, Steskal first argues racial discrimination renders the death penalty arbitrary. (2d Supp. AOB 25-35.) However, a purely statistical showing that does not "describe or analyze the facts or circumstances of any case, other than the sentence and race of the victim" will not suffice to show racial bias. (*In re Seaton* (2004) 34 Cal.4th 193, 202-203; see *McCleskey v. Kemp* (1987) 481 U.S. 279, 292, 296 [rejecting statistically based claim ("Baldus study") that a prosecutor's decision to seek the death penalty was racially motivated because "the policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made'"]; *People v. Montes* (2014) 58 Cal.4th 809, 831 ["defendant's study failed to take into account the case characteristics of the homicides, which is a crucial factor for a district attorney's capital charging decisions . . . whatever benefit defendant's study gained by focusing on the charging

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to the constitutionality of death qualification, that it may not depart from the high court's rulings as to the United States Constitution. (*People v. Mendoza* (2016) 62 Cal.4th 856, 914.) While all of Steskal's contentions are meritless, most are expressly contradicted by binding Supreme Court precedent.

authority was negated by the failure to address the homicide case characteristics."]; see also *People v. Pride* (1992) 3 Cal.4th 195, 268 ["[t]he death penalty law in California . . . is not presumptively applied in a racially discriminatory, arbitrary, or disproportionate manner."].) Steskal's statistics-based assertion of gender discrimination (See 2d. Supp. AOB 36-39) fails for the same reason.[4]

Steskal next argues geographical differences render the death penalty unconstitutionally arbitrary (See 2d Supp. AOB 36-39), an argument which has been rejected by the Supreme Court as well as this Court. The existence of prosecutorial discretion in charging capital offenses does not violate the Eighth Amendment. (*Proffitt v. Florida* (1976) 428 U.S. 242, 254; *Gregg v. Georgia* (1976) 428 U.S. 153, 199; *People v. Vines* (2011) 51 Cal.4th 830, 889; *People v. Gutierrez* (2009) 45 Cal.4th 789, 833; *People v. Holt* (1997) 15 Cal.4th 619, 702 [lack of statewide standards and prosecutorial discretion does not mean charging decisions are arbitrary or invite reliance on impermissible racial or economic factors]; *People v. Ray* (1996) 13 Cal.4th 313, 359 [prosecutorial discretion does not render the death penalty arbitrary or cruel and unusual punishment]; *People v. Arias* (1996) 13 Cal.4th 92, 189 [same].)

Steskal further argues that the death penalty is arbitrary because it is "essentially a death lottery." (2d. Supp. AOB 39-43.) A similar argument was rejected in *Seumanu, supra,* 61 Cal.4th 1293, where the record

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[4] Steskal's assertion of gender discrimination relies on "Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973, Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. of Empirical Legal Studies 637, 644-645 (2014)" (2d. Supp. AOB 26-27, 42), which was the subject of criticism by Justice Thomas for its methodology in *Glossip v. Gross, supra*, 135 S.Ct. 2726 at 2751 (conc. opn. of Thomas, J.).

disclosed no systemic delays in California resulting in arbitrariness. (*Id.* at p. 1374.) This Court explained:

> Our conclusion would be different were California's Department of Corrections and Rehabilitation to ask all capital inmates who have exhausted their appeals to draw straws or roll dice to determine who would be the first in line for execution. But the record in this case does not demonstrate such arbitrariness.

(*Ibid.*)

Steskal next complains that the number of special circumstances rendering murderers punishable by death violates the Eighth Amendment. (2d Supp. AOB 41) This argument has been repeatedly rejected. (See, e.g., *People v. Masters* (2016) 62 Cal.4th 1019, 1077 [California's death penalty statute adequately narrows the class of death-eligible defendants and is not impermissibly broad]; *People v. Manibusan* (2013) 58 Cal.4th 40, 99 [same].)

Steskal also claims that the lengthy delay experienced by death row inmates awaiting execution in and of itself constitutes cruel and unusual punishment. (2d Supp. AOB 44-46.) This argument, commonly known as a *Lackey* claim derived from Justice John Paul Stevens memorandum opinion on denial of certiorari in *Lackey v. Texas* (1995) 514 U.S. 1045, has consistently been rejected by this Court. (*People v. Seumanu, supra,* 61 Cal.4th at pp. 1369-1370.)

> As explained in *People v. Anderson* (2001) 25 Cal.4th 543,
>
> the automatic appeal process following judgments of death is a constitutional safeguard, not a constitutional defect [citations], because it assures careful review of the defendant's conviction and sentence [citation]. Moreover, an argument that one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life. [Citation.]

(*Id.* at p. 606; accord *People v. Vines, supra,* 51 Cal.4th at p. 892; *People v. Brown* (2004) 33 Cal.4th 382, 404; *People v. Lewis* (2004) 33 Cal.4th 214, 232-233.)

Fourteen years later, this Court again observed:

> Unquestionably, some delay occurs while this court locates and appoints qualified appellate counsel, permits those appointed attorneys to prepare detailed briefs, allows the Attorney General to respond, and then carefully evaluates the arguments raised, holds oral argument, and prepares a written opinion. Further delays occur when this court locates and appoints qualified counsel for habeas corpus, allows ample time for counsel to prepare a petition, and then evaluates the resulting petition and successive petitions. But such delays are the product of "a constitutional safeguard, not a constitutional defect [citations], because [they] assure[] careful review of the defendant's conviction and sentence."

(*People v. Seumanu, supra,* 61 Cal.4th at p. 1374, quoting *People v. Anderson, supra,* 25 Cal.4th at p. 606.)

Moreover, much of the delay is attributable to capital defendants and their counsel, who routinely request numerous and lengthy extensions for their own benefit. Steskal is no exception. More than five years of post-judgment delay in this case is already attributable to him.[5]

A system that affords capital defendants and their counsel additional time upon their request to pursue post-conviction relief is not a denial of the prohibition on cruel and unusual punishment. "[I]nvocation of the resultant delay as grounds for abolishing the death penalty calls to mind the man

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[5] Following transmittal of the record on appeal in July 2008, Steskal's Opening Brief was originally due on April 24, 2009. Thereafter, Steskal requested 31 extensions of time through May 30, 2014, to file his Opening Brief. Following the denial of a 32nd extension request filed on the due date, Steskal did not file his Opening Brief until two months later on August 8, 2014, requiring relief from default. Steskal's Reply Brief was originally due on October 5, 2015. Steskal has yet to file his Reply Brief after five extensions of time.

sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan." (*Glossip v. Gross, supra,* 135 S.Ct. at p. 2749 (conc. opn. of Scalia, J.).)

Steskal next argues the death penalty fails to measurably contribute to its objectives of deterrence and retribution. (2d Supp. AOB 47-67.) However, the question of deterrence "is primarily a consideration for the legislature." (*Spaziano v. Florida* (1984) 468 U.S. 447, 461, overruled on another ground in *Hurst v. Florida* (2016) __U.S.__, 136 S.Ct. 616, 623; see also *People v. Turner* (2004) 34 Cal.4th 406, 438 ["leav[ing] decisions regarding the propriety of the death penalty to the Legislature and People of the State of California"] *People v. Marshall* (1996) 13 Cal.4th 799, 859; *People v. Benson* (1990) 52 Cal.3d 754, 807; *People v. Thompson* (1988) 45 Cal.3d 86, 132.)

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

(*Gregg v. Georgia, supra,* 428 U.S. at p. 186.)

Specifically rejecting vagueness challenges to the special-circumstance for killing a peace officer, this Court concluded the special-circumstance "reasonably serves the goals of retribution and deterrence." (*People v. Thomas* (2012) 53 Cal.4th 771, 818.) Steskal offers no basis for this Court to reconsider the matter. His murder of Officer Riches rendered him eligible for the death penalty, and the Eighth Amendment does not preclude California from affording "'special protection to officers who risk their lives to protect the community'" reflected by the killing of a peace officer being designated as a special-circumstance murder. (*Ibid*, quoting *People v. Jenkins* (2000) 22 Cal.4th 900, 1021.)

Steskal also argues that a decline in the use of the death penalty – specifically abolition of the death penalty in seven states since a similar claim was rejected in *People v. Moon* (2005) 37 Cal.4th 1 – confirms that the death penalty is cruel and unusual punishment. (2d Supp. AOB 68-74.) It confirms nothing of the sort. The Eighth Amendment doctrine of cruel and unusual punishment "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (*People v. Seumanu, supra,* 61 Cal.4th at p. 1369, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 100-101.) Thus, cruel and unusual punishment is an evolving rather than static concept. (*Ibid.*)

One manifestation of evolving standards under the Eighth Amendment is where a national consensus has emerged against a particular punishment. (See *People v. Moon, supra,* 37 Cal.4th at p. 47, citing *Roper v. Simmons* (2005) 543 U.S. 551, 567.) Steskal concedes that a majority of the states (31) currently have the death penalty as a form of punishment. (2d Supp. AOB 68.) In addition, the federal government and federal military utilize the death penalty. (*People v. Moon, supra,* 37 Cal.4th at p. 48.) Accordingly, no national consensus has emerged against capital punishment. (Compare *Roper v. Simmons, supra,* 543 U.S. at p. 568 [observing that a majority of states had rejected imposition of the death penalty on juvenile offenders].)

Steskal attempts to divine significance from the fact that California has not carried out an execution in the past decade. (2d Supp. AOB 72.) However, the reason for no executions in California in that time period is a decision by the United States District Court in 2006 rejecting California's protocol for lethal injection – not a state or national consensus against the death penalty. (See *Sims v. Department of Corrections and Rehabilitation* (2013) 216 Cal.App.4th 1059, 1064, citing *Morales v. Tilton* (N.D.Cal. 2006) 465 F.Supp.2d 972.)

Rejecting similar challenges against the death penalty as morally wrong and unconstitutional under evolving standards of decency, this Court has observed that

> the United States Supreme Court has established that "capital punishment is constitutional" even under contemporary standards. (*Baze v. Rees* (2008) 553 U.S. 35, 47, 128 S.Ct. 1520, 1529, 170 L.Ed.2d 420 (plur. opn. of Roberts, C. J.); *id.* at p. 87, 128 S.Ct. at p. 1552 (conc. opn. of Scalia, J.) ["[T]he death penalty is a permissible legislative choice."]; *id.* at p. 95, 128 S.Ct. at p. 1556 (conc. opn. of Thomas, J.) ["[T]he Constitution permits capital punishment in principle ..."].)

(*People v. Gamache* (2010) 48 Cal.4th 347, 405, fn. 24.) Steskal has not shown otherwise.

"Whatever the merit of the concerns articulated in the dissent [by Justice Breyer in *Glossip*], binding precedent – as reflected in the majority opinion of the same case – compels this Court to reach the contrary conclusion." (*United States v. Tsarnaev* (D.Mass. 2016) __ F.Supp.3d __, 2016 WL 184389 at *18 (January 15, 2016).) Steskal's renewed challenges to California's death penalty law likewise fail.

CONCLUSION

For the reasons stated herein and the Respondent's Brief previously filed with this Court, respondent respectfully requests that the judgment be affirmed.

Dated: August 24, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
RONALD A. JAKOB
Deputy Attorney General

KELLEY JOHNSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 3,592 words.

Dated: August 24, 2016

KAMALA D. HARRIS
Attorney General of California

KELLEY JOHNSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Steskal** No.: **S122611**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On August 25, 2016, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Clerk of the Court
Orange County Superior Court
Central Justice Center
Attn: Hon. Frank F. Fasel
700 Civic Center Drive West
Santa Ana, CA 92701

Gilbert Gaynor
Law Office of Gilbert Gaynor
244 Riverside Dr., #5C
New York, NY 10025-6142

Attorney for Appellant Steskal
(2 copies)

Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

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 August 25, 2016, at San Diego, California.

Bonnie Peak
Declarant

Bonnie Peak
Signature

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