In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JEAN PIERRE RICES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S175851

San Diego County Superior Court
Case No. SCE266581
The Honorable Lantz Lewis, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

ARGUMENT

I. DIRECT APPEAL IS NOT THE PROPER VEHICLE FOR APPELLANT'S DISCOVERY CLAIM BECAUSE HE RELIES ON FACTS OUTSIDE THE RECORD; MOREOVER, APPELLANT HAS NOT SHOWN THAT ANY STATE STATUTORY DISCOVERY ERROR INVOLVING INCULPATORY EVIDENCE AMOUNTED TO A PREJUDICIAL FEDERAL CONSTITUTIONAL VIOLATION

Appellant argues that his due process rights were violated when the prosecution did not disclose co-defendant Miller's "free talk" interview to the defense before Miller took the stand on his own behalf.[1] Specifically, he asserts he was deprived of his due process right to a meaningful opportunity to present a complete defense and a fair trial by impairing his ability to prepare a defense. He also claims his Sixth Amendment right to confrontation was violated. According to appellant, the violation of those rights was prejudicial. (Supp. AOB 9-15.)[2]

This Court should summarily reject this claim because it is not properly presented on direct appeal. Appellant sets forth factual allegations not contained in the four corners of the record in support of his argument. Because the record is insufficient to decide appellant's claim, this Court should decline to do so. Should this Court consider the merits of appellant's argument, it should conclude that appellant has not shown that any failure

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[1] Appellant withdrew his first argument contained in the supplemental brief relating to the admission of one of his convictions in his letter dated February 16, 2017.

[2] Although appellant references prosecutorial error in his argument heading, he does not offer any specific argument, authority or explanation relating to a claim of prosecutorial error. Rather, he focuses on appellant's due process and Sixth Amendment rights in conjunction with the disclosure of the transcript. Consequently, the issue of prosecutorial error should be deemed forfeited. (*People v. Whalen* (2013) 56 Cal.4th 1, 72 fn. 28 [issue on appeal is deemed forfeited when it is only mentioned in appellate brief without argument or supporting authority].)

to disclose the transcript resulted in a fundamentally unfair trial in violation of his due process or Sixth Amendment rights. Even if the Court concludes any discovery error implicated appellant's constitutional rights, the minimal impact of Miller's testimony in conjunction with the strong evidence in aggravation -- the brutality of the underlying offense and appellant's prior violent conduct --renders any error harmless under any standard.

A. Facts Relating to Miller's "Free Talk"

Detailed facts regarding Miller's "free talk" have been previously set forth in Respondent's Brief Argument X, which responded to appellant's claim that counsel was ineffective for failing to object to the Rices jury being present for Miller's testimony, and Argument XI, which responded to appellant's argument that the court should have provided Miller's transcript to the defense once Miller elected to testify. For the sake of context, a brief recitation of the pertinent facts will be included here.

Miller submitted to a police interview upon being arrested. In sum, Miller admitted his involvement in the robbery. Specifically, he admitted he and appellant discussed committing a robbery and that Miller suggested the Granada Liquor Store. When the employees walked out of the store at closing time, appellant took his gun out, approached them, and ordered them back in. Once inside, Miller took money from the register. After he accomplished that, appellant told him to get in the car so he could "handle some business." Appellant then shot Heather and Firas, the employees. (See Supp. 37 CT 8373-8374, 8388-8634.)

On July 23, 2007, the prosecution engaged in a "free talk" with Miller. (Supp. 40A CT 8885.) As part of the interview, the prosecution agreed that any statements made by Miller would not be used against him in the prosecution's case-in-chief. However, any statements could be used as impeachment should he testify inconsistently in court. Miller was also advised that any exculpatory statements regarding other charged

codefendants would be turned over to the court and counsel. (Supp. 40A CT 8886.)

Miller's second statement varied from the first to a degree. Miller attempted to distance himself from the crime by asserting he tried to talk appellant out of the robbery. Also, Miller claimed he was scared and intimidated by appellant and felt that he had no choice but to go along. Once in the store, when he realized appellant was going to kill Heather and Firas, Miller tried to talk him out of it to no avail. (40A CT 8888-8889, 8901, 8910, 8916-8918.)

On July 30, 2008, the People requested that statements made by "John Doe #1" not be disclosed to the defense pursuant to Penal Code section 1054.7 due to threats or possible danger to the safety of a witness. (3 CT 590-591.) The defense opposed the motion arguing that it would be impeded from adequately preparing for trial without knowing the identity of John Doe #1. (3 CT 689-692.) The court held an in camera hearing on November 17, 2008, and the sealed transcript of that hearing is contained in Reporter's Transcript 4B.

Following the hearing, the trial court issued an order, stating in pertinent part:

> "People's motion is granted in part. There is good cause to defer disclosure of the name, address, and statement of John Doe #1. In reaching this conclusion, the Court has weighed the following: a) the possibility of danger to John Doe #1 if his identity is disclosed immediately; b) the nature of the statements attributed to John Doe #1; c) the inculpatory information provided by John Doe #1 would not serve the interests of Defendant Rices on the issue of penalty; d) the information contained in the statements is available in other materials already disclosed to the defense; e) the representation of the People that John Doe #1 will not be called as a witness by the People; and f) the absence of detriment to defendant's right of confrontation if disclosure is delayed."

(4 CT 769.)

During the presentation of evidence to the Miller jury, Miller confirmed he was going to testify. (12 RT 1849.) Miller testified before both his jury and appellant's. (12 RT 1850.) He testified consistently with his "free talk" interview. In essence, he recalled going to a liquor store and seeing appellant pull out a gun, which he had not seen previously. (13 RT 1907.) Appellant told him, "You're about to take somebody's money for me," which scared Miller. Appellant instructed him to put on a ski mask and gloves. Miller felt like he had no choice but to participate. (13 RT 1908-1909.)

Miller could not recall a lot of the details of the robbery, only that when he walked into the liquor store, Heather and Firas were already on the ground. (13 RT 1910-1912.) Heather and Firas cooperated, telling appellant and Miller to take the money and leave them alone. (13 RT 1916.) Miller left the store once he had the money in hand. (13 RT 1918.) He got in the car. About 90 seconds later, appellant got in and they left. (12 RT 1919-1920.) He later refused to take proceeds from the robbery because he wanted no part of it and was scared for his life knowing appellant's reputation. (13 RT 1927-1928.)

Miller admitted that his police interview was inconsistent with his testimony. He testified he was not previously truthful when he said he had not gone in the liquor store with appellant, rather it was someone named "nut-nut." (13 RT 1933-1935.) He also falsely told police that he had robbed a 7-11 with appellant seven years earlier. (13 RT 1936-1937.) Miller further explained he feared appellant based on his reputation as a gang member. (13 RT 1939-1940.)

On cross-examination, the prosecution mostly focused on Miller's prior statement to police. Specifically, Miller told police that he heard Heather say, "Please don't kill me. I just want to be with my family." Although Miller recalled making that statement to the police, at trial he

testified he did not actually hear Heather say that. Rather, he just told police that to get them to believe him. (13 RT 1958-1959.) Initially, Miller did not recall telling police that Firas begged, "I'm young. Please don't kill me. Let me live." The prosecutor attempted to refresh his recollection that the statement was made, but again, Miller denied that it actually happened and reiterated that he had been lying to the police. (13 RT 1959-1960.) The prosecutor also impeached him with other statements that he had seen the gun before the robbery, had touched the gun at some point, and spent time with Heather before the robbery. (13 RT 1965, 1969.)

Miller also admitted that appellant never threatened him in order to get him to commit the robbery. (13 RT 1973.) Miller considered appellant to be like a brother. (13 RT 1974.) In fact, appellant had agreed to say he had forced Miller into the robbery so he could be exonerated. (13 RT 1980.) Miller continued to correspond with appellant while in jail and referred to himself as appellant's "protégé." (13 RT 1982.)

Counsel for appellant declined to ask Miller any questions. (13 RT 1983.)

During closing argument, the prosecution mentioned Miller's testimony sparingly and only to point out that the victims begged for their lives before appellant shot them. In doing so, the prosecutor noted that Miller did not directly testify to that, rather he impeached Miller with his prior statement to police. (19 RT 2747.) Defense counsel addressed Miller's testimony, equally briefly. In doing so, he focused on Miller's inconsistencies and summed up his testimony by asserting, "I don't think we can rely on anything that man said on the stand." (19 RT 2763-2764.) On rebuttal, the prosecutor, again, briefly acknowledged appellant's argument and admitted that Miller was "pretty incredible about some things, pretty darn incredible." (19 RT 2779-2780.) The prosecutor urged the jury to find the statements Miller made to police to be credible and not

his in-court testimony because he was trying to help appellant. (19 RT 2780.) During the defense's rebuttal argument, counsel specified the inconsistencies in all of Miller's statements, including initially blaming an innocent person for committing the crime. Counsel characterized all of Miller's statements as a "package of lies" and urged the jury to disregard Miller's statements due to his lack of credibility. (19 RT 2788.)

Miller's "free talk" transcript was ultimately provided to the defense following record correction in 2014. (42 CT 8884.)

B. Direct Review is not the Appropriate Vehicle to Review This Claim

Throughout appellant's argument, he makes factual assertions that lie outside the record in this case. Specifically, he asserts that counsel did not know about the "free talk" (Supp. AOB 9), that counsel was under a "substantial misimpression" about Miller's testimony (Supp. AOB 13), that counsel did not know how Miller was going to testify, (Supp. AOB 13), and that counsel was unprepared to respond to Miller's testimony during cross-examination and plan accordingly his opening statement, closing argument, and jury selection (Supp. AOB 13-14). Indeed, appellant provides a virtual laundry list of all the matters counsel did not know related to the second Miller interview. (Supp. AOB 13.) Appellant offers no citation to the record for these assertions, and Respondent has not found them anywhere in the record.

In fact, contrary to these unsupported factual allegations, there is evidence that counsel may have been aware of the substance of Miller's testimony before he took the stand. To begin with, in the court's order deferring discovery, the court notes that "the information contained in the statements is available in other materials already disclosed to the defense." (4 CT 769.) It is unclear what that statement is based upon, but it suggests counsel had information about the change to Miller's story. The record also

shows that Miller and appellant were communicating while in custody, a fact confirmed by Miller when he testified and admitted that appellant wanted to take the blame for Miller. (13 RT 1980-1982.) In light of these facts, appellant's reliance on the "surprise" that counsel may have labored under when Miller testified differently than his first police interview may not have been a surprise at all. But, the point is: on this record it is not known one way or another. This problem is compounded by the fact that the issue was not litigated before the trial court so no findings on an alleged discovery violation were made. As will be discussed below, these circumstances render this issue inappropriate for review on direct appeal.

The appellate jurisdiction of this Court is limited to the four corners of the record. (*People v. Waidla* (2000) 22 Cal.4th 690, 743.) The decision in *People v. Gamache* (2010) 48 Cal.4th 347, is instructive on this point. There, the defendant withdrew his plea of not guilty by reason of insanity. (*Id.* at p. 376.) On appeal, he challenged the validity of the withdrawal of that plea. (*Ibid.*) As part of his argument, he claimed that a report by an expert surfaced finding him legally insane and that counsel lied to him about the expert opinions that had been offered. (*Id.* at p. 377.) The Court declined to resolve the claim on appeal. It stated,

> "We do not know what defense counsel did or did not know.....nor what tactical considerations may have played into the decision to advise Gamache to forgo a sanity phase trial. As the burden is on Gamache to affirmatively demonstrate error, in the absence of evidence his claim must fail. [Citations]."

(*Id.* at p. 378.)

Like the circumstances in *Gamache*, much of appellant's claim is predicated on what counsel knew and the tactical decisions he might have made had he been privy to the interview. Those crucial underlying facts are not contained in this record.

It should also be noted that this Court has declined to review issues on direct appeal in a variety of contexts where doing so requires consideration of matters outside the record. For example, in *People v. Cunningham* (2001) 25 Cal.4th 926, 1045, the Court refused to consider an issue regarding a sentencing enhancement because to do so, it would have had to rely on matters outside the record. This Court has also declined to entertain arguments on direct appeal based on excessive delays in carrying out punishment on the basis that the argument relied upon evidence and matters not reflected in the record. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183.)

On the other hand, there are numerous examples of situations where discovery issues that are identified after trial are litigated on habeas corpus review in order to permit presentation of evidence outside the record underlying the claims. (See e.g. *In re Miranda* (2008) 43 Cal.4th 541, 545-547; *In re Salazar* (2005) 35 Cal.4th 1031, 1035; *In re Brown* (1998) 17 Cal.4th 873, 877; *Elloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1059.)

In light of these circumstances, this Court should decline to review appellant's claim because a proper resolution of the merits of this issue simply cannot be made on the appellate record. The proper avenue for appellant to pursue this claim is by means of a petition for writ of habeas corpus, because on direct appeal, this Court cannot consider matters outside the record. (*People v. Maciel* (2013) 57 Cal.4th 482, 505; *People v. Catlin* (2001) 26 Cal.4th 81, 144.)

C. Appellant's Constitutional Rights Were Not Violated

This Court should reject appellant's assertion that his due process and Sixth Amendment rights were violated when he did not have the benefit of Miller's second interview. Penal Code section 1054.1 (the reciprocal-discovery statute) requires the prosecution to disclose to the

defense statements of all defendants which are in the possession of the prosecution or investigating agencies. (Pen. Code, § 1054.1, subds. (a) & (b)). Typically, such statements must be disclosed at least 30 days before trial. (Pen. Code, § 1054.7.) However, as occurred here and is permitted by statute, the trial court issued an order allowing the prosecution to defer the discovery of Miller's statement. (4 CT 769.) Appellant does not argue that the court acted outside its discretion to do so in this case. Rather, he argues that either the court (AOB 176-184) or the prosecution should have turned over the transcript when it became clear that Miller would testify. (Supp. AOB 10.)

Assuming the prosecution should have provided the transcript under Penal Code section 1054.1 when Miller elected to testify, any error that arose out of state statutory authority and does not amount to a federal constitutional violation. The right to cross-examination is guaranteed under both the due process clause and the Sixth Amendment. To deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer v. Texas* (1965) 380 U.S. 400, 405 [85 S.Ct. 1065, 13 L.Ed.2d 923].) An error results in the denial of due process when it renders the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385].) Similarly, the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 89 L.Ed.2d 674.]) This right means more than merely confronting the witness physically, but requires that a defendant have a meaningful opportunity to cross-examine. (*Ibid*; *Davis v. Alaska* (1974) 415 U.S. 308, 315 [94 S.Ct. 1105, 39 L.Ed.2d 347].)

To Respondent's knowledge, there is no direct authority issued by this Court or the United States Supreme Court as to what, if any,

constitutional rights are implicated if the prosecution neglects to discover inculpatory evidence as required under a state statute. However, it appears that the federal appellate courts have found on occasion that the failure to provide inculpatory evidence could rise to the level of a due process violation under limited circumstances, which usually results in an element of unfair surprise. (See e.g. *Lindsey v. Smith* (11th Cir. 1987) 820 F.2d 1137, 1151; *Gholson v. Estelle* (5th Cir. 1982) 675 F.2d 734, 378; *United States v. Roybal* (9th Cir. 1977) 566 F.2d 1109, 1110.) For example, should the prosecution assure the defense certain evidence does not exist and then introduce it, such a circumstance may result in a due process violation. (*Lindsey v. Smith, supra*, 820 F.2d at p. 1151.) It must be noted that due process is not implicated simply because the defense might be impaired by an error of the prosecutor; rather, it must be shown that the error affected the whole trial, rendering it fundamentally unfair. (*Ibid.*)

Although appellant asserts that substantial authority supports the proposition that the failure to discover inculpatory evidence can amount to a Sixth Amendment confrontation violation, the cases cited by appellant cannot be construed to stand for that proposition even by inference. (AOB 11-12.) Rather, the cases cited by appellant stand generally for the proposition that a defendant is entitled to an opportunity for effective cross-examination or have no direct application to the issue here. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 738 [107 S.Ct. 2658, 96 L.Ed.2d 631] [confrontation clause generally]; *Delaware v. Fensterer* (1985) 474 U.S. 15, 20 [106 S.Ct. 292, 88 L.Ed.2d 15] [confrontation clause generally]; *United States v. Alvarez* (1st. Cir. 1993) 987 F.2d 77, 85 [discovery violation analyzed under federal rules]; *United States v. Baum* (2nd Cir. 1973) 482 F.2d 1325, 1331-1332 [no reference to Sixth Amendment when witness identity was not disclosed by prosecution until trial]; *United States v. Padrone* (2nd Cir. 1969) 406 F.2d 560, 560-561 [no reference to Sixth

Amendment]; *State v. Thomkins* (1982) 318 N.W.2d 194, 198 [no reference to Sixth Amendment]; *State v. Stapleton* (1976) 539 S.W. 644, 659 [discovery issue analyzed under state rules].) Consequently, appellant's argument should be analyzed under a broad framework in ascertaining whether counsel simply had a meaningful opportunity to cross-examine Miller.

The unique facts of this case do not compel a finding that appellant's federal constitutional rights were implicated. To begin with, the trial court characterized Miller's interview as "not [serving] the interests of Defendant Rices on the issue of penalty," available in other materials already provided to the defense, and not being detrimental to Rices right to confrontation should discovery be delayed. (CT 769.) As the trial court also noted in its order, Miller was not a prosecution witness. The prosecution played no role in deciding whether he would testify at trial or not. Indeed, the prosecution cross-examined him at length, exposing the inconsistencies of his statements and the implausibility of much of his testimony. (13 RT 1950-1952, 1957-1982.) This situation does not present as one where a key witness's testimony was left untested because the defense lacked the ability to prepare. Arguably, the prosecution had already impeached Miller to the point where counsel for appellant decided to forego cross-examination because sufficient damage had already been done. (13 RT 1983 [counsel for appellant passes on cross-examination of Miller].)

It is also important to consider in the context of appellant's complaint regarding the purported surprise to counsel, that the evidence suggests that counsel may have known that Miller had changed his tact from his first interview. Miller had communicated with appellant in jail, and those communications were documented in jail calls and correspondence between the two. (13 RT 1981-1982 [Miller's testimony regarding his letter to appellant contained in Exhibits 65 and 65A and his

jail call to a friend indicating that appellant wanted to take the blame for him]; 6 CT 1258 [Exhibit list containing reference to Exhibits 66 and 66A, another letter from Miller to appellant].)[3] Notwithstanding the likelihood that counsel was aware that Miller was going to try to redeem himself, competent counsel would be prepared for the possibility that a witness, particularly a codefendant, may change stories to benefit his position at trial. Even without the free talk transcript, it should have been no surprise to counsel that Miller would mitigate his role in the crime.

In light of the circumstances of this case, it simply cannot be said that any error in failing to provide appellant with a prior statement made by his codefendant rises to the level of a violation of appellant's Sixth Amendment or due process rights by infecting the entire trial with fundamental unfairness.

D. Any Error In Failing to Provide the Free Talk Transcript Was Plainly Harmless

Even when considered under the most stringent standard of prejudice, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct.824, 17 L.Ed.2d 705].) To begin with, it is notably absent from appellant's argument any avenue of cross-examination left unexplored by the prosecution that could have hurt the prosecution's case in aggravation or assisted his case in mitigation. This is likely because one can readily conclude that the result here would have been no different had counsel been provided with Miller's prior statement before his testimony. Miller's testimony was not particularly

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[3] Again, with no facts before this Court as to what counsel knew and why he forewent cross-examination, a true assessment of the merits of appellant's argument proves somewhat academic and rife with speculation. This shortcoming is particularly troublesome in the context of alleged surprise to the defense.

damaging to appellant in light of the many inconsistencies with his prior statements, the implausibility of his explanations for those inconsistencies, and his obvious bias. The prosecution conducted a scathing cross-examination and both parties spent little time discussing Miller during closing arguments, and mostly to point out how incredible or untrustworthy his testimony was. (See e.g. 13 RT 2779-2780, 2788.)

Whatever theoretical benefit the defense might have gained by having the transcript of the free talk is eclipsed by the circumstances in aggravation presented by the prosecution. Appellant shot Heather and Firas in the back of the head at the conclusion of the robbery. They were defenseless, and the murders were absolutely senseless. The jury saw surveillance video of the robbery and murder and could see that Heather and Firas cooperated and offered no resistance. (11 RT 1630-1632, 1636-1639.)

The prosecution presented much more than the callous nature of the crimes in support of its case for a death sentence. Seven years earlier, appellant committed an armed robbery at a Taco Bell while armed with a gun telling the manager, "Back up bitch, I want the money." (15 RT 2197-2201.) Just a month after that, appellant carjacked Paul Hillard with a gun. (15 RT 2208-2210.) Appellant was convicted of robbery while armed with a firearm in August of 1999, for the carjacking. (15 RT 2307.) Appellant served time in custody from March 8, 1999, during the pendency of the case to December 3, 1999, when his custodial term expired. (15 RT 2310.)

Additionally, appellant was convicted of possession of cocaine for sale and was in prison from November of 2000 until October of 2005. (15 RT 2307, 2310.) While in prison he was convicted for possession of a deadly weapon. (15 RT 2307.) He committed the instant offense on March 1, 2006. (10 RT 1370.) After having murdered two people, he then robbed the Bank of America, firing shots while in the bank. (15 RT 2223, 2226,

2234-2235.) Just a few days after that, appellant robbed a Washington Mutual, again using a gun, managing to steal about $25,000. (15 RT 2238-2244, 2252-2253, 2256.)

Appellant's violent behavior continued while in custody awaiting trial on these and other charges. He engaged in two attacks on other inmates. (15 RT 2266-2267, 2272, 2293-2295, 2305-2306.) He also pled guilty to attempted murder of a peace officer when he attacked a deputy at the jail with a razor, causing substantial injuries to the deputy. (15 RT 2308-2309, 2320-2321, 2324.)

In light of the circumstances of the crime and appellant's extremely violent and dangerous behavior both before and after the murders were committed, any error arising from the inculpatory free talk transcript not being disclosed was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth above, and in Respondent's Brief, Respondent respectfully requests that the death judgment be affirmed.

Dated: March 10, 2017

Respectfully submitted,

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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 **4,169** words.

Dated: March 10, 2017

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DECLARATION OF SERVICE BY OVERNIGHT COURIER AND INTERNAL MAIL

Case Name: **People v. Rices**
Case No.: **S175851**

I declare:

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Furthermore, on **March 13, 2017**, I placed 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:

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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 13, 2017**, at San Diego, California.

Olivia De La Cruz
Declarant

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Signature