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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RAMIRO GONZALES,** **Defendant and Appellant.**	Case No. S191240

Sixth Appellate District, Case No. H032866
Santa Clara County Superior Court, Case No. 211111
The Honorable Alfonso Fernandez, Judge

REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General
BRIDGET BILLETER
Deputy Attorney General
State Bar No. 183758
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1340
Fax: (415) 703-1234
Email: Bridget.Billeter@doj.ca.gov
Attorneys for Respondent

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I. APPELLANT'S RELIANCE ON THE LACK OF A KNOWING AND INTELLIGENT WAIVER IS MISPLACED

In our opening brief, respondent argued that appellant's parole-mandated therapy records were not privileged for purposes of SVP proceedings following a violation of parole. (RBOM 6-17.) In response, appellant argues that he did not knowingly and intelligently waive his rights to confidentiality in his therapy sessions at the Atkinson Center. However, his focus on "waiver" conflates two distinct issues—whether a waiver was obtained and whether an exception to the general privilege applied. (See *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1092 ["Evidence Code section 1024 creates an exception to the privilege rather than anything akin to a waiver of the privilege"].) Respondent does not claim that appellant expressly waived his confidentiality rights in his parole-mandated therapy records. If appellant had waived confidentiality, this case would not be before this court. The issue, instead, is whether, despite appellant's assertion of the privilege as to communications with his therapist, the statutory scheme provides an exception that precludes that assertion.

As discussed in respondent's opening brief, the statutory scheme provides express exceptions to the privilege. (See Evid. Code, §§ 1017-1027.)[1] There is no requirement of an express waiver before these exceptions apply. For example, section 1021 provides an exception to the privilege "as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an

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[1] Unless otherwise noted, all further references are to the Evidence Code.

interest in property." Pursuant to that section, the privilege would not apply to the relevant communications even though the deceased patient never expressly waived his confidentiality rights before his death. The statutory scheme provides the exception to the privilege, regardless of the wishes of the patient.

Appellant cites *People v. Corona* (2008) 160 Cal.App.4th 315 and *In re Christopher M.* (2005) 127 Cal.App.4th 684, to support his contention that "a waiver of confidential communications is required before any disclosure can be made." (ABOM 13.) But if a waiver were required before any disclosures could be made, the exceptions in the Evidence Code would be rendered meaningless. The cases cited by appellant do not support such a sweeping proposition.

In *People v. Corona*, the defendant was placed on parole with the following conditions:

> "1. You shall attend Parole Outpatient Clinic (POC) for an initial evaluation and remain in that treatment program as directed by your POC clinician and parole agent.
>
> "2. You shall actively participate in any programs specific to your criminal offense history or behavior, as directed by your parole agent.
>
> "3. You shall participate in a psychiatric treatment program as approved by your parole agent.
>
> "4. You shall actively participate in any programs specific to the High Risk Sexual Offender/High Control/Sexual Habitual Offender/Sexually Violent Predator Program as directed by P&CSD [Parole and Community Services Division].
>
> "5. You must submit to any psychological or physiological assessment to assist in treatment planning and/or parole supervision due to CCCMS [Correctional Clinical Case Management Services] or EOP [Enhanced Outpatient Program] status."

(160 Cal.App.4th at p. 318.) While on parole, the defendant underwent, and paid for, sessions with a private therapist. His parole agent required him to sign a waiver of confidentiality so the agent could monitor his treatment with the private therapist. (*Ibid.*) The state contended that it could revoke parole for the defendant's refusal to sign the waiver. (*Id.* at p. 320.)

The Court of Appeal held that the defendant's parole could not be revoked for failing to sign the waiver because the condition was not reasonably related to parole supervision. (*People v. Corona*, *supra*, 160 Cal.App.4th at pp. 320-321; Pen. Code, § 3053, subd. (a).) It further concluded that the statutory language of sections 1012 and 1024 did not justify the attempt to compel the waiver. (*Id.* at p. 322.)

Appellant's reliance on *Corona* is misplaced. First, as appellant recognizes, *Corona*'s holding was limited to the records generated by a private therapist, not a therapist hired by the state to provide parole-mandated therapy. Conversely, the disclosures in this case involved a therapist hired by the state to provide therapy in connection with a state program—parole. Whether a court could order a private therapist, hired by appellant, to disclose his or her records is not the issue before this court.

More important, nothing in *Corona* suggests that pursuant to section 1012, the superior court could not have ordered the disclosure of the state-mandated parole therapy records in order to monitor the defendant's progress on parole. Indeed, the Court of Appeal's acceptance of the fact that, as "a required part of his supervision," the defendant had to "agree[] to a waiver of the psychotherapist-patient privilege for the state-reimbursed group therapy program" demonstrates the difference between state-mandated therapy and private therapy. (160 Cal.App.4th at p. 319.)

Appellant claims that the "waiver obtained in *Corona* reinforces the notion that a waiver is not automatic, presumed, or unnecessary due simply

to one's status of being a parole[e] subject to sex offender treatment conditions." (ABOM 10.) However, as discussed above, the existence of a waiver and the existence of an exception permitting disclosure are distinct concepts. The *Corona* court did not address whether disclosure of the state-mandated therapy records would have been permitted *absent* the defendant's waiver. As we discussed in our opening brief, based on the statutory language of section 1012 and the holdings in *In re Pedro M.* (2000) 81 Cal.App.4th 550 and *In re Kristine W.* (2001) 94 Cal.App.4th 521, such disclosure is permitted for purposes of an SVP proceeding following a parole revocation. (RBOM 7-17.)

In *In re Christopher M.*, *supra*, the minor challenged a probation condition which required that all treatment records relating to his court-ordered counseling programs be made available to the court and probation department. (127 Cal.App.4th at p. 691.) The Court of Appeal rejected the minor's contentions that: (1) the condition was not reasonably related to his reformative and rehabilitative needs (*id.* at pp. 693-694); (2) that the condition violated the minor's state constitutional right to privacy (*id.* at p. 695); and (3) that the condition violated the statutory psychotherapist-patient privilege (*id.* at pp. 695-696). As to the latter claim, the court held that the probation condition did not violate the privilege because the disclosure was permitted under section 1012. (*Id.* at p. 696.) The court did not, however, indicate that the agreement by the minor to the probation condition (or an otherwise knowing and intelligent waiver of the privilege by the minor) was required in order to justify the condition. The condition was justified—regardless of the minor's consent—by the "express exception to the psychotherapist-patient privilege that permits disclosure of otherwise privileged communications between patient and psychotherapist to third person to whom disclosure is reasonably necessary to accomplish the purpose for which the psychotherapist is consulted." (*Ibid.*)

Appellant argues that the juvenile court in *Christopher M.* required the minor to waive the right of confidentiality which "reinforces the notion that a waiver of confidential communications is required before any disclosure can be made." (ABOM 13.) However, the probation condition in *Christopher M.* simply provided that the treatment records would be made available; there was no requirement of an express waiver by the minor. Indeed, because a ward, unlike an adult probationer, cannot refuse a probation condition, the ward cannot be said to have voluntarily waived the right to confidentiality. (See *In re Tyrell J.* (1994) 8 Cal. 4th 68, 83, ["Because a minor has no choice whether or not to accept a condition of probation that subjects him to a warrantless search, we cannot find that he consented to the condition"], overruled on another ground in *In re Jaime P.* (2006) 40 Cal. 4th 128.) Thus, appellant's contention that the "exception" described in *Christopher M.* "still requires a waiver," is erroneous. (ABOM 13.) Moreover, as discussed above, his contention conflates two distinct concepts. If a waiver is required before an exception to the privilege can apply, then the exceptions are rendered meaningless. Under appellant's understanding of the law, a psychotherapist who learns that a patient sought his services to "escape detection or apprehension after the commission of a crime" (§ 1018) could not disclose any information to the authorities without first getting a knowing and voluntary waiver from the patient. Appellant provides no authority for such a counterintuitive (not to mention counterproductive) interpretation of the privilege.

Appellant requests this court take judicial notice of a publication entitled "Sex Offender Treatment Program Certification Requirements," which specifies the requirements for certifying sex offender treatment programs and was promulgated by the California Sex Offender

Management Board (CASOMB).[2] Included in the certification standards is the requirement that the treatment provider obtain a signed waiver of the psychotherapeutic-patient privilege. (Sex Offender Treatment Program Certification Requirements (SOTPCR), at p. 6.) The waiver shall include "the supervising officer and all members of the Containment Team." (*Ibid.*)[3]

Appellant contends that inclusion of the waiver requirement reflects the recognition by the CASOMB that the "parole status of a sex offender does not itself strip a person of the rights to privacy and confidentiality, and that a waiver is required." (ABOM 15.) The SOTPCR mandates a certified treatment provider obtain a waiver in order to be approved by the state as a qualified service provider. It does not state or imply that a waiver is legally *required* before any disclosures can be made. Certainly, obtaining a waiver is a sensible administrative choice to avoid litigation, as in *Pedro M.* and *Kristine W.*, about the manner and extent of legally permissible disclosures. If a defendant has waived his rights, then litigation regarding what disclosures are "reasonably necessary" would be avoidable. But, according to appellant, the absence of a waiver also makes such litigation unnecessary because no disclosure can be made without a waiver. Again, appellant's contention improperly conflates two distinct concepts and is not supported by the statutory or case law.

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[2] We have no objection to the court granting appellant's request for judicial notice.

[3] The "Containment Team" is defined as "the collaborators who work together to provide various specialized functions and services to 'contain' each identified sex offender living in the community under direct criminal justice system supervision." (SOTPCR at p. 2.) The containment team includes, but is not limited to, "the supervising probation officer or parole agent or similar representative of judicial authority; . . . the provider o[f] specialized sex offender treatment services; [and] . . . polygraph examiner." (*Ibid.*)

Finally, appellant's focus on the concept of waiver, as opposed to the exception codified in section 1012, reflects a misunderstanding of respondent's argument. We do not suggest "that fundamental rights to privacy and confidentiality disappear simply because a person is on parole." (ABOM 15; ABOM 7 ["Put simply, the Attorney General's position is that a person who receives treatment on parole does not have a privilege"].) We contend instead that where an individual who undergoes state-mandated sex offender therapy as a condition of parole, has subsequently violated parole, and, as a result, is subjected to an SVP proceeding, the disclosure of parole-mandated therapy records is "reasonably necessary" to determine whether the parole violator is successfully reintegrating into society, or whether he poses a future danger of reoffending, necessitating a need for more intensive therapies and more restrictive conditions and placement.

II. APPELLANT HAS NOT DEMONSTRATED A VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY

Appellant contends, as the Court of Appeal held, that the violation of a state statutory privilege violates his federal constitutional right to informational privacy, thereby requiring *Chapman* harmless error review. Appellant spends considerable effort in brief arguing the existence of a federal right to informational privacy. (ABOM 16-19.) However, even assuming the existence of the federal constitutional right, appellant has not established the necessary correlation—that a violation of the privilege, in and of itself, establishes a federal constitutional (or even a state constitutional) violation.

As discussed in respondent's opening brief (see RBOM 27-32), whether the release of information violates an evidentiary privilege or violates a state or federal constitutional right to privacy are distinct

concepts. This distinction was highlighted in *Manela v. Superior Court* (2009) 177 Cal.App.4th 1139. That case was a custody dispute in which the mother sought to subpoena the father's medical records to prove that he suffered from a seizure disorder that hampered his caretaking abilities. (*Id.* at p. 1144.) The mother subpoenaed records from a physician (Dr. Cohen) whom the mother and father had seen together, as well as records from a physician (Dr. Morrison) whom the father had seen when he was 11 years old. (*Id.* at p. 1145.)

The Court of Appeal found that father had waived the physician-patient privilege with respect to Dr. Cohen because the mother had been present for the examination. However, the court held that the privilege applied to cover Dr. Morrison's medical records and upheld the trial court's order quashing the subpoena directed to that physician. (*Manela*, *supra*, 177 Cal.App.4th at pp. 1146-1147.) After determining that Dr. Cohen's records were not privileged, the court turned to the issue of whether, despite the waiver of privilege, the father's federal and state constitutional rights to privacy prevented the mother from obtaining those records. (*Id.* at p. 1150.) The court applied a balancing test and determined that the state's compelling need in determining the best interests of the child outweighed the father's privacy rights. (*Id.* at p. 1151.)

Manela demonstrates that medical records that are not statutorily privileged may nevertheless be protected by a constitutional right to privacy. Conversely, the erroneous dissemination of statutorily privileged information may not necessarily violate the state or federal constitutional right to informational privacy. (See also *In re Christopher M.*, *supra*, 127 Cal.App.4th at pp. 695-696 [whether probation condition requiring release of court-mandated psychotherapeutic records violated the minor's state constitutional right to privacy analyzed separately from whether condition violated state statutory privilege]; *United States v. Mazzola* (D.Mass. 2003)

217 F.R.D. 84, 88 ["Because a federal common law privilege does not apply, it becomes necessary to address whether Joseph Mazzola has a privacy privilege rooted in the Constitution protecting the medical records at issue"].)

Appellant disagrees with our reliance on *Jaffee v. Redmond* (1996) 518 U.S. 1, noting "the constitutional issue was not even discussed in *Jaffee*." (ABOM 19.) It is the fact that the constitutional issue was not discussed which supports our contention that the federal evidentiary privilege is not rooted in the constitutional right to privacy. In *Jaffee*, the proponent of the privilege made no argument that her therapy records were not discoverable because the dissemination of those records would violate her federal right to informational privacy, nor did she argue that the federal rules of evidence should recognize an evidentiary privilege because to do otherwise would violate her constitutional rights. Moreover, as discussed in respondent's opening brief, subsequent cases have recognized that *Jaffee*'s recognition of an evidentiary privilege was not constitutionally-based. (See *Henry v. Kernan* (9th Cir. 1999) 197 F.3d 1021, 1031; *United States v. Squillacote* (4th Cir. 2000) 221 F.3d 542, 559-560; *New York Times Co. v. Gonzales* (S.D.N.Y. 2005) 382 F.Supp. 2d 457, 484-508 [recognition of a qualified reporter's privilege with respect to confidential sources analyzed separately under the First Amendment and common law privileges pursuant to *Jaffee*].)

Indeed, appellant recognizes that the Ninth Circuit, in *Henry v. Kernan*, *supra*, 197 F.3d at pages 1031, specifically rejected a habeas petitioner's claim that a violation of a state evidentiary privilege, in and of itself, constitutes a federal constitutional violation. (ABOM 23.) However, he suggests that the subsequent decision in *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, in which this office conceded a federal constitutional violation as the result of a violation of the privilege, should carry more

weight. (ABOM 24.) Appellant questions whether our desire "not to be bound by the concession" is based on the difference between criminal cases and civil SVP cases. (ABOM 24.) However, the distinction between civil cases and criminal cases has no bearing on our claim. As discussed in respondent's opening brief, we are simply not bound by a concession in another case, and we ultimately disagree with *Parle*—based on a concession or not—to the extent it holds that a violation of the statutory privilege constitutes a per se federal constitutional violation.

Moreover, the actual issue addressed by the Ninth Circuit and the federal district court (see *Parle v. Runnels* (N.D.Cal. 1996) 448 F.Supp.2d 1158), was whether the cumulative effect of the erroneous admission of the psychotherapist's testimony along with other trial errors "violated due process" and "render[ed] the resulting criminal trial fundamentally unfair" pursuant to *Chambers v. Mississippi* (1973) 410 U.S. 284. (505 F.3d at p. 927; 448 F.Supp.2d at p. 1162.) Neither case specifically analyzed whether the single error in admitting evidence in violation of the privilege constituted an independent federal constitutional violation, because the issue was whether the cumulative effect of all the errors violated the petitioner's right to due process. "[I]t is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)[4]

Further, in *Seaton v. Mayberg* (9th Cir. 2010) 610 F.3d 530, the Ninth Circuit recognized that, in SVP proceedings, the disclosure of medical

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[4] Indeed, the Ninth Circuit recognized that "the right to privacy of a patient's communications with his psychotherapist is grounded in the federal and state constitutions," but clarified that "[t]his right to privacy exists *in addition* to the statutory protection of confidential communications between patient and psychotherapist. Cal. Evid. Code § 1014." (505 F.3d at p. 930, fn. 11, italics added.)

records generated while a defendant was in prison or at the state hospital for an SVP evaluation did not violate the defendant's right to privacy. Appellant distinguishes *Seaton* on the ground that appellant's records were generated while he was on parole, not in prison or at the state hospital. (ABOM 23.) However, we did not cite *Seaton* for the proposition that appellant's parole-generated medical records were necessarily comparable to records generated in prison or the state hospital. We cited *Seaton* for the proposition that in order to establish a violation of appellant's federal constitutional right to informational privacy, it is not enough to prove only that the state statutory privilege was violated. Appellant must prove that the balance of his interest in confidential therapeutic communications against the state's compelling interest in protecting the public tips in his favor. (See RBOM 27-29.)

In addressing the requisite balancing test, appellant ignores the compelling state interests in protecting the public from dangerous sexual predators, and in insuring "that truth is ascertained in legal proceedings in its courts of law." (*Caesar v. Mountanos* (9th Cir. 1976) 542 F.2d 1064, 1069.) Appellant focuses only on the proposition that his reasonable expectation of privacy was not completely abrogated by his being on parole, a point which we have never disputed. (See ABOM 25-26.) As discussed in respondent's opening brief, the limited disclosure of the therapeutic records to the state for purposes of an SVP proceeding does not violate appellant's federal right to informational privacy; however, we do not suggest that his right to privacy would not protect the confidentiality of the therapeutic records "as between appellant and the world generally." (*In re Edward D.* (1976) 61 Cal.App.3d 10, 15.)

Appellant also contends that the dangerous patient exception in section 1024 is sufficient to protect the state's compelling interest in ensuring public safety. (ABOM 26.) However, appellant, like the Court of

Appeal, conflates the issues of whether a disclosure of confidential information is statutorily privileged and whether it is independently protected by the Constitution. That the Legislature has provided certain statutory exceptions to the privilege does not mean that any disclosure not falling within those exceptions necessarily violates an individual's federal right to informational privacy.

In short, appellant has not demonstrated that the violation of state statutory privilege constitutes a per se constitutional violation. Nor has he demonstrated that in balancing the competing interests, disclosure of his therapeutic records in SVP proceedings violates his constitutional right to informational privacy.

III. APPELLANT HAS NOT DEMONSTRATED PREJUDICE UNDER ANY STANDARD OF REVIEW

Appellant argues that the admission of McAndrew's testimony was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18, 24. First, we note that appellant points out that in *Jaffee*, "once the Court of Appeals found there had been a violation of the psychotherapist-patient privilege which had not been abrogated by a greater compelling interest, the court reversed the judgment and ordered a new trial without further consideration . . . and this reversal was upheld by the Supreme Court." (ABOM 28.) We are unclear as to what point appellant is making with reference to *Jaffee*. If he is claiming that no harmless error analysis need be done, i.e., any violation of the privilege is structural error, he cites no authority stating such a proposition. And to the extent he claims that because the violation of the privilege in *Jaffee* resulted in a reversal, so must a violation of the privilege in this case result in reversal, such a claim ignores the case-specific nature of harmless error analysis.

In any event, the trial court in *Jaffee* ordered disclosure of the civil defendant's therapeutic records, and when the defendant refused to disclose the records, the trial court instructed the jury that it could presume that the records would be unfavorable to the defendant. (*Jaffee v. Redmond* (7th Cir. 1995) 51 F.3d 1346, 1351.) The Court of Appeal considered the claim that the instruction was erroneous, but noted that "[r]eversal is warranted only if a jury instruction misguided the jury to a litigant's prejudice." (*Id.* at p. 1353.) The Court of Appeal found the instruction erroneous because it determined that Federal Rule of Evidence section 501 encompassed a psychotherapist-patient privilege which protected the challenged records from disclosure. (*Id.* at pp. 1354-1358.) Implicit in the court's reversal was the determination that the erroneous instruction was prejudicial to the litigant. However, because *Jaffee* was a civil case in federal court, it provides no further guidance on whether *Chapman* or *Watson* harmless error analysis should apply in this case.

As to the specific facts of his case, appellant claims that "the only significant development between the first jury trial where appellant was found not to meet the commitment criteria and the second trial was the highly prejudicial and inflammatory disclosure" of appellant's treatment records and the testimony of McAndrews. (ABOM 27.) Not so. The most significant development between the first trial and the second was that appellant, when released after the first trial, violated his parole. As discussed in respondent's opening brief, the primary disputed issue was the experts' interpretation of the importance of the parole violations. (See RBOM 32-36.)

Appellant, like his witnesses at trial, focuses on the fact that his parole violations did not involve new criminal acts. He points out that there was no evidence that he was at the park for any improper reason, and that his isolation and "guilessness" explained his failure to report the fact that his

sister and her children were present during his visits to his mother's home. (ABOM 27.) He also notes that when contacted by his parole officer, he was not in close proximity to his sister's children. (ABOM 27.) Despite appellant's "innocent" explanations for his parole violations, both prosecution experts found appellant's behavior on parole to constitute significantly changed circumstances in determining his likelihood of reoffense. (1 RT 78-79; 4 RT 734-735.) Both doctors believed that appellant's four parole violations since 2004 demonstrated his decreasing control over his behavior. (1 RT 162; 4 RT 740.) The jury assessed the credibility of that testimony and adopted the opinion of the prosecution experts that the parole violations were material changes in the circumstances that demonstrated an increased likelihood of reoffense.

Moreover, as discussed in respondent's brief, both prosecution experts concluded, without reviewing the Atkinson Center records, that appellant met the SVP criteria. (RBOM 35.) The one prejudicial statement—that appellant had molested 16 children—was extensively attacked as unreliable, and the jury was otherwise aware that appellant had been previously convicted of child molestation on more than one occasion. Any error was harmless under either the *Chapman* or *Watson* standard.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: November 21, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General

BRIDGET BILLETER
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4,078 words.

Dated: November 21, 2011

KAMALA D. HARRIS
Attorney General of California

BRIDGET BILLETER
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Ramiro Gonzales***
No.: **S191240**

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 November 21, 2011, I served the attached **REPLY BRIEF ON THE MERITS** 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Jean Matulis
Attorney at Law
P.O. Box 1237
Cambria, CA 93428
(2 copies)

Attn: Executive Director
Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
Attention: Criminal Clerk's Office
191 North First Street
San Jose, CA 95113-1090

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

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 November 21, 2011, at San Francisco, California.

Tan Nguyen
Declarant

Signature

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