In the Supreme Court of the State of California

In re **ANTHONY COOK,** On Habeas Corpus.	Case No. S240153

Fourth Appellate District Division Three, Case No. G050907
San Bernardino County Superior Court, Case No. WHCSS1400290
The Honorable Katrina West, Judge

REPLY BRIEF

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INTRODUCTION

As detailed in our opening brief, habeas corpus jurisdiction, while broad, is constrained by a few essential requirements—one of which is that habeas petitioners must demonstrate that their custody is in some way unlawful. As this Court observed in *In re Drake* (1951) 38 Cal.2d 195, 197, "The purpose of the writ of habeas corpus is to inquire into the legality of the detention." When "the detention [is] admittedly legal, no ground for issuance of the writ exists." (*Ibid.*) Our opening brief also explains that Cook is not subject to any unlawful restraint or illegal sentence.

Cook counters by noting that the parole process is also subject to habeas review and asserting that a "claim of a right to develop information in the trial court related to the [parole] board's consideration of him for parole fits comfortably within the habeas umbrella of unlawful custodial restraint." (Answer Brief on the Merits 11 (ABM).) Cook also suggests that his "entitlement to the *Franklin* relief the Court of Appeal granted has a statutory and constitutional basis." (*Id.* at p. 18.) The materials Cook cites, however, provide no authority for granting habeas relief to afford a hearing of the type contemplated by *People v. Franklin* (2016) 63 Cal.4th 261.

At bottom, Cook's argument is that providing a *Franklin* hearing will render the parole process more attuned to the individual characteristics of a minor offender. While that is undoubtedly a laudable goal, habeas corpus is not a proper vehicle for achieving it. (*People v. Villa* (2009) 45 Cal.4th 1063, 1069-1070 ["'Thus, it is well settled that the writ of *habeas corpus* does not afford an all-inclusive remedy available at all times as a matter of right'"].) The policy questions Cook raises are best left to the Legislature, which is free to act on the issue just as it has recently acted on related issues in the area of juvenile sentencing and parole.

HABEAS CORPUS JURISDICTION DOES NOT EXTEND TO PROVIDING A SUPERIOR COURT HEARING PURSUANT TO *FRANKLIN*

Cook's efforts to expand habeas jurisdiction rest in large part on parole cases providing for habeas relief. Those cases, however, confirm that habeas jurisdiction depends on there being an underlying illegality and therefore support our argument, not Cook's. There is, moreover, no evident constitutional or statutory basis for using habeas in the manner Cook seeks.

A. Parole Habeas Cases Require an Underlying Illegality

Cook correctly notes that this Court has long held that habeas jurisdiction extends to parole determinations. (See ABM 14-15 [listing cases].) Cook asserts that those holdings likewise provide authority for using habeas corpus to order a hearing under *Franklin*. Cook's reliance on this line of authority, however, fails for two reasons.

First, the parole cases relied upon by Cook were predicated on unlawful restraint. Specifically, the cases addressed a purportedly illegal action by the parole board that directly affected the lawfulness of the inmate's continued custody. For example, in *In re Sturm* (1974) 11 Cal.3d 258, *In re Prewitt* (1972) 8 Cal.3d 470, and *In re Minnis* (1972) 7 Cal.3d 639, the Court held that an inmate has a due process right to certain procedural protections attendant to the parole board's decisions setting, delaying, denying, or rescinding parole hearings or parole dates, and it found the parole board's actions in delaying or denying parole violated those constitutional protections. Similarly, the Court held in *In re Sandel* (1966) 64 Cal.2d 412, 414-418, that the parole board lacked the authority to "correct" a sentencing error by extending the petitioner's confinement beyond that set by the sentencing court. (Accord, *In re Lee* (1918) 177 Cal. 690 [legislative grant of authority to parole board to extend petitioner's sentence beyond what was available at the time of the offense violated ex

post facto clause]; see also *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658-667 [Governor's decision to override parole grant subject to habeas review for compliance with due process]; *In re Shaputis* (2011) 53 Cal.4th 192, 199 [same]; see generally *In re Morrall* (2002) 102 Cal.App.4th 280, 296-297 & fn. 7 [discussing role of habeas corpus in parole context].) There is no suggestion in this case, however, that the parole board has acted unlawfully in relation to Cook's incarceration or parole eligibility.

Second, a writ of habeas corpus in this and similar cases would not be directed to the Board of Parole Hearings to redress some illegality in the parole process. Rather, the writ would be directed to the original sentencing court, which is not a party to the parole proceedings. Ultimately, Cook points to no illegality in the parole process or in his underlying criminal conviction sufficient to invoke habeas jurisdiction.

Cook counters by asserting that "the Court has inherent supervisory authority over the whole of our State's administration of justice, including the parole process." (ABM 15.) Cook's argument improperly conflates two distinct legal principles. This Court has "inherent supervisory authority" over the judicial branch of government and questions of judicial procedure. Hence, it had the authority on direct appeal in *Franklin* to order the superior court to conduct further proceedings in a case not yet final. (See Opening Brief on the Merits 22 (OBM).) The Court does not have inherent supervisory authority over executive agencies such as the Board of Parole Hearings. (See, e.g., *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 445 [court's authority is limited to requiring legislative or executive bodies act in conformity with the law].) Rather, the Court has a constitutional and statutory grant of habeas authority to ensure that an inmate's confinement is not unlawful. (See *People v. Romero* (1994) 8 Cal.4th 728, 737.)

Cook quotes broad language from *In re Rodriguez* (1975) 14 Cal.3d 639, 648, regarding the role of the courts in overseeing the "execution of the penal laws," including oversight of "the administration of the Indeterminate Sentencing Law," as support for his assertion that the courts have inherent authority to control the parole process without respect to any underlying unlawfulness. (ABM 17.) *Rodriguez*, however, does not support Cook's claim of inherent authority over the parole process unbounded by the requirement that the petitioner's custody be unlawful. *Rodriguez* considered a claim that the length of the prisoner's incarceration violated the California Constitution's protection against cruel or unusual punishment—a prototypical basis for invoking habeas jurisdiction to challenge unlawful continued custody. (*Rodriguez*, at p. 649 ["Our duty to assure that practices followed by the Authority do not permit unconstitutionally excessive punishment is surely no less compelling than our duty to assure that the legislative purpose of the law is carried out"].)

Likewise, *In re Minnis*, *supra*, 7 Cal.3d 639, relied on by Cook, reflects traditional habeas review, not inherent supervisory authority. In *Minnis*, the Court rejected a blanket policy adopted by the parole board of refusing early parole consideration for any prisoner convicted of selling narcotics for profit. (*Id.* at pp. 643-646.) The Court held that the challenged rule was arbitrary and contrary to the legislative grant of authority given the parole board under the indeterminate sentencing laws because it denied the petitioner's statutory rights to an individualized parole determination and to "due consideration" of his parole application. (*Id.* at pp. 646-649.) Accordingly, the grant of habeas relief in *Minnis* was predicated on an unauthorized act by the parole board that rendered Minnis's continued custody unlawful by denying his statutory right to individualized consideration of release prior to the maximum term of imprisonment. No such claim of illegality by the parole board exists here.

Cook also notes that *Minnis* affirmed the role of Penal Code section 1203.01 (now Penal Code section 1203.01, subdivision (a)), as a postjudgment vehicle for providing relevant information for use in future parole proceedings.[1] (ABM 17; *In re Minnis*, *supra*, 7 Cal.3d at p. 650.) Section 1203.01, subdivision (a), provides a statutory mechanism, immediately after sentencing and imposition of judgment, for the judge, the prosecutor, the defense attorney, and the investigating law enforcement agency to provide a "brief statement of their views" regarding the offense and the offender, to be transmitted to the California Department of Corrections and Rehabilitation (CDCR) for future consideration. Cook acknowledges he was not denied the opportunity to use this section. (ABM 17.) He suggests instead that he had no reason to use it at the time in light of the length of his sentence. (*Ibid.*) This assertion does not provide any new justification for habeas jurisdiction. The failure to use this available mechanism owing to the circumstances that existed at the time of judgment does not render his current custody unlawful or authorize the use of habeas corpus to order a *Franklin* hearing in a case long final on appeal. (Cf. *People v. Duran* (1969) 275 Cal.App.2d 35, 37 [purported error regarding filing statement of views under § 1203.01 "does not affect the fairness of [the] trial or validity of [the] conviction"].) Moreover, the "brief statement" provisions of section 1203.01 bear little resemblance to the adversarial proceedings articulated in *Franklin*.

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[1] Statutory references are to the Penal Code unless otherwise noted.

B. There Is No Constitutional or Statutory Basis for Using Habeas Corpus to Provide a Superior Court *Franklin* Hearing

Cook next asserts that there exists a "statutory and constitutional basis" for the appellate court's grant of habeas relief. (ABM 18.) He claims a need "to effectively cure the unconstitutionality of [his] sentence and carry out the salutary aims of the youth offender law." (ABM 21.) His claim is unpersuasive. The asserted constitutional violation has already been resolved, and the legislative enactments creating the new youth offender parole system do not contemplate habeas jurisdiction in the absence of any underlying illegality.

Cook first relies on the fact that his sentence, as originally imposed, would have been unconstitutional under *Miller v. Alabama* (2012) 567 U.S. 460, *People v. Caballero* (2012) 55 Cal.4th 262, and *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718], absent the enactment of section 3051. (ABM 18.) However, the United States Supreme Court explained in *Montgomery* that a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (*Montgomery*, *supra*, 136 S.Ct. at p. 736.) *Montgomery* did not suggest, let alone dictate, that in addition to parole consideration, a hearing in the trial court to supplement the record regarding the offender's youthful characteristics was also necessary to cure the initial unconstitutionality. (*Ibid.*)[2] Likewise, this Court in *Franklin*

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[2] *Montgomery* cited as an example of a statutory change sufficient to remedy a *Miller* violation Wyoming's statute governing life without parole sentences. (*Montgomery*, *supra*, 136 S.Ct. at p. 736.) That statute, which was amended to provide for a parole hearing for juvenile offenders after serving 25 years, does not require a remand for record supplementation. (See Wyo. Stat. Ann. § 6-10-301(c) (2013); *State v. Mares* (Wyo. 2014) 335 P.3d 487, 498; cf. *Virginia v. LeBlanc* (2017) ___ U.S. ___ [137 S.Ct. (continued...)

concluded that the defendant's Eighth Amendment claim was rendered moot by the enactment of section 3051, which by operation of law entitled the defendant to a parole hearing and possible release after 25 years of incarceration. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 279-280 ["In sum, the combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that Franklin is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration"].)

Cook contends that the availability of a hearing in superior court—to supplement the record with information potentially relevant to a future parole hearing—was essential to the Court's holding that the Eighth Amendment violation had been remedied. (ABM 20-21.) Cook's ambitious interpretation of *Franklin* finds little support in the Court's analysis in that case. Notably, *Franklin* resolved the constitutional question—finding that the enactment of section 3051 rendered the constitutional violation moot by transforming a functional life-without-parole sentence into a one with a parole hearing date after 25 years—without any suggestion that mooting the Eighth Amendment claim turned on the availability of a further record-supplementing hearing in superior court. (*Franklin*, *supra*, 63 Cal.4th at pp. 276-280 [part IV].) And when the Court subsequently articulated the scope of the remand proceeding in *Franklin*, the Court was careful to confirm that the sentence originally

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1726, 1729] (per curiam) [holding under AEDPA that *Graham v. Florida* (2010) 560 U.S. 48 required only that juvenile offender receive a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," and had not otherwise identified any constitutionally mandated procedures].)

imposed remained constitutional, and thus, no resentencing was required. (*Id.* at p. 284.)[3]

The language of section 3051 is similarly unhelpful in providing a statutory basis for a *Franklin* remand proceeding on habeas corpus. The plain language of that section speaks to the eligibility for and timing of future parole hearings. (§ 3051; accord, § 4801.) It does not address the prior sentencing hearing. Of course, as we noted in our opening brief, the new parole statute also had the effect of making mitigation evidence newly relevant for the future parole hearings. But the statute itself did not purport to provide any mechanism for receipt of new information through a trial court hearing. Nor did the Legislature contemplate that section 3051 would authorize a writ of habeas corpus to supplement the sentencing record with a new trial court hearing in cases already final. As noted in our opening brief, the Senate's and Assembly's committee and floor analyses for the bills enacting and expanding section 3051 noted that the provision would lead to a *reduction* of habeas corpus petitions. (OBM 27-28 & fn. 12.)[4]

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[3] Of course, if the *Franklin* remand procedure were predicated on the Eighth Amendment, it would only be available to defendants who were under 18 at the time they committed their offense. *Graham*, *Miller*, and *Montgomery* did not extend any constitutional protection to adults.

[4] Since the filing of our opening brief, the Legislature has once again expanded the scope of section 3051, making youth offender parole hearings available to offenders who were under the age of 26 when they committed their offenses. (Stats. 2017, ch. 675, § 1.) As with the prior amendments, nothing in the Senate floor analysis of the bill suggests an intent to authorize habeas corpus for *Franklin*-style record supplementation proceedings. To the contrary, the analysis did not contemplate habeas corpus petitions prior to a parole hearing. (See Sen. Floor Analysis of Assem. Bill No. 1308 (2017- 2018 Reg. Sess.), as amended Mar. 30, 2017, p. 5 [noting under fiscal impact for the courts: "Potential unknown costs to state trial courts to adjudicate any new filing of habeas corpus writ petitions *for denial of parole* made possible by this bill. These possible costs could be offset to an unknown degree as a result of an accompanying *reduction in*

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Accordingly, there is no apparent constitutional or statutory basis for invoking habeas corpus jurisdiction to order a record-supplementing hearing pursuant to *People v. Franklin*, *supra*, 63 Cal.4th 261, based on either Cook's conviction or his current parole process.

C. Significant Legal and Practical Concerns Remain for Extending *Franklin*'s Record-Supplementing Hearing Procedure Via Habeas Relief

As we detailed in our opening brief, extending the *Franklin* remand procedure via habeas would present both legal and practical challenges that are not implicated on direct appeal. (OBM 25-34.) A few points merit further discussion.

First, we noted in our opening brief that the number of inmates eligible for the new parole procedures under section 3051 who might seek a *Franklin* hearing by way of habeas is not inconsiderable. (OBM 29-30 [noting over 14,500 prisoners eligible].) After we filed our opening brief, the Legislature enacted A.B. 1308, expanding the prisoner population who would benefit from section 3051 to include defendants who committed their offenses before the age of 26. (Stats. 2017, ch. 675, § 1.) This amendment adds an additional 3,400 eligible inmates who could seek to file habeas petitions requesting *Franklin* hearings. (See Sen. Com. on Appropriations, Rep. on Assem. Bill No. 1308 (2017- 2018 Reg. Sess.) as amended Mar. 30, 2017, p. 2.)

Cook counters by suggesting that any burdens imposed on the courts in allowing *Franklin* hearings in long-final cases by way of habeas corpus will be more than offset by the considerable benefits to the prison system

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habeas petitions by inmates who become eligible for parole" (italics added)], available at <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB1308#>.)

through the parole of those inmates. (ABM 23-24.) This assertion, however, is predicated on the assumption that having a supplemental record from a *Franklin* hearing will be determinative as to whether eligible inmates will be granted parole. Yet, there is no reason to believe that the parole board cannot sufficiently evaluate a youthful offender's level of immaturity and subsequent growth based on the original trial record and evidence provided at a later date, without the benefit of a supplemented record after a *Franklin* hearing, particularly given the diminishing value of such hearings on habeas corpus in long-final cases.[5]

Cook also contends that youthful offenders are not capable of creating or preserving a record of their youthful characteristics and the circumstances related to the offense. He asserts that "the very attributes and incompetencies of youth that contributed to the youth offender's crime, if not also other attributes of youth, compromise the offender's ability to be his own best advocate in the development and presentation of information concerning his youth." (ABM 25.) The force of this contention is dissipated by the fact that the "incompetencies of youth" cited by Cook are transitory. The vast majority of affected inmates are no longer youthful or suffering from incompetencies of youth that would impair their ability to create or preserve a record for future parole use. And the rest will soon reach that mark as well.

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[5] Petitioner's discounting of the effect of expanding habeas jurisdiction ignores that the substantial burdens imposed by holding such hearings for every petitioning inmate would be felt by the courts immediately, whereas any potential benefits through potential earlier parole release of some inmates would come into play only once an inmate reaches the relevant benchmark of between 15 and 25 years of incarceration—and even then the potential countervailing benefits would accrue to the prison system, which would not offset the burden on the judiciary of processing the petitions and holding *Franklin* hearings.

Indeed, after the latest revision to section 3051, more than 75 percent of the inmates now eligible for youthful offender parole were in fact adults when they committed their offenses.[6] And given that *Franklin* already provided a remedy for cases not yet final, only those defendants whose cases were final before *Franklin* would need to resort to habeas for a hearing, which means most cases would already be several years removed from the commission of the offense. Accordingly, most affected inmates are either already past the age where their early cognitive development might impair their ability to record and preserve relevant information, or soon will be full adults capable of preserving any relevant record to assist with a future parole hearing.[7]

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[6] When the Legislature added section 3051 in 2013 for offenders who were minors when they committed their crimes, the Assembly Appropriations Committee analysis noted that approximately 2,500 juvenile offenders had already served at least 15 years as of January 1, 2014. (See Assem. Com. on Appropriations, Rep. on Sen. Bill No. 260 (2013- 2014 Reg. Sess.) as amended Aug. 12, 2013, p. 3.) The California Board of Parole Hearings (CBPH) estimated, as of September 1, 2016, the number of offenders who committed their offenses while under the age of 18 and were incarcerated was 3,867. (Request for Judicial Notice, Exh. A at p. 4 [Decl. of Jennifer Shaffer, Executive Officer, CBPH] (hereafter Schaffer Decl.).)

In 2015, the Legislature amended section 3051 to increase the eligible age at commission of the crime to under 23. (Stats. 2015, ch. 471, § 1 (S.B. 261), effective Jan. 1, 2016.) The Senate Appropriations Committee noted 8,600 new inmates (who were between 18 and 23 when they committed their offense) would be eligible for a parole hearing within a few years of enactment (Sen. Com. on Appropriations, Rep. on Sen. Bill No. 261 (2015- 2016 Reg. Sess.) as amended Mar. 24, 2015, p. 3), and CBPH estimated as of September 1, 2016, that 10,648 eligible inmates who were between the age of 18 and 23 at the time of their offense fell within this revision to the statute. (See Shaffer Decl.) And as noted, the most recent amendment adds an additional 3,400 adult offenders who were between the ages of 23 and 26 at the time of their offense.

[7] Cook's preference for superior court proceedings rests in part on his incorrect assessment that the CBPH undertakes no factfinding role in

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In an effort to demonstrate the ready feasibility of extending habeas jurisdiction to provide for record supplementation hearings, Cook contends that section 1203.01, subdivision (a) "provides a ready-made mechanism in the trial court for the efficient development and preservation of information relevant and essential to the parole determination" that is accessible by way of habeas proceedings. (ABM 23.) However, as noted above, this post-judgment "mechanism" does not correspond to the remand hearing described in *Franklin*. (See *People v. Franklin*, *supra*, 63 Cal.4th at pp. 283-284.)

Moreover, it is difficult to see how this mechanism is amenable to invocation by way of habeas corpus. Section 1203.01, subdivision (a) does not authorize any hearing; it merely allows for submission of a particular document by certain trial participants and investigative agencies. The trial court, moreover, has no obligation to undertake any action under section 1203.01, subdivision (a) if a probation report is prepared, as occurred in this case. (See Typed Opn. at p. 6.) Even if a probation report is not prepared, the court's role under section 1203.01 is limited to preparing a post-sentencing statement of views. Section 1203.01 also permits, but does not require, defense counsel to provide a brief written statement of his or

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the parole process and is merely a "passive recipient" of information (ABM 24). (See Cal. Code Regs, tit. 15, § 2240 [requiring preparation of "Comprehensive Risk Assessment" including a psychological evaluation]; see also *Parole Suitability Hearings* <http://www.cdcr.ca.gov/BOPH/parole_suitability_hearings_overview.html > [as of Oct. 30, 2017] [describing consultation with youth offender five years before initial parole hearing date]; *Bench Guide: Consultations*, CBPH Memorandum (June 15, 2015) <http://www.cdcr.ca.gov/BOPH/docs/BenchGuides/Consultations%20Benc h%20Guide.pdf> [as of Oct. 30, 2017] [explaining CBPH's consultation program for youth offenders].)

her views to the clerk for transmission to CDCR. (*Ibid.*) Habeas corpus is inapplicable to this largely discretionary provision. Habeas corpus cannot be used to compel the court or defense counsel to undertake a discretionary act, nor can it require a hearing under a statute that, by its terms, does not provide for one, and instead opts for postjudgment filings and transmittal of documents.[8]

Cook's flawed suggestion that section 1203.01 can serve as a mechanism for supplementing the record by way of a writ of habeas corpus simply highlights the problems with attempting to use habeas corpus for effectuating policy goals rather than for correcting any underlying illegality. Ultimately, the Legislature is far better equipped to make such policy decisions about whether to provide a mechanism for supplementing a record of immaturity for use in a subsequent parole hearing, and if so, what that mechanism should be.[9]

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[8] Even in the unusual circumstance where the court must provide a statement in lieu of a probation report, the failure to comply with the duty to provide such a statement is properly remedied by way of a writ of mandate, not habeas. And because the statement is provided *after* judgment, any failure in providing the statement would not affect the judgment or render a defendant's conviction or sentence unlawful (cf. *People v. Duran, supra*, 275 Cal.App.2d at p. 37), thereby precluding habeas jurisdiction. Moreover, unlike a *Franklin* hearing, this statutory mechanism for providing a "statement of views" to CDCR was designed to benefit the parole authority, not the defendant. (*In re Minnis, supra*, 7 Cal.3d at pp. 649-650.)

[9] The Legislature knows how to provide for a mechanism, either through habeas or otherwise—even in the absence of an underlying illegality or custody—when it so chooses. (See, e.g., § 1490 [expressly providing for a detainee to bring a writ of habeas corpus to seek a grant of bail "without alleging that he [or she] is illegally confined"]; § 1473.6 [establishing motion to vacate judgment for "[a]ny person no longer unlawfully imprisoned or restrained"]; § 1016.5, subd. (b) [authorizing withdrawal of guilty plea regardless of custodial status].)

The recent amendment to section 3051 demonstrates that the Legislature remains attuned to issues surrounding youthful offender parole hearings. If the Court has continuing concerns about the process, it could invite the Legislature to consider taking appropriate additional steps. But in the absence of any claim of unlawful custody, there is no basis in existing law for using habeas corpus jurisdiction as a mechanism for addressing the situation.

CONCLUSION

The judgment of the Court of Appeal granting the writ of habeas corpus should be reversed.

Dated: November 13, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF uses a 13 point Times New Roman font and contains 4,169 words.

Dated: November 13, 2017

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In re Anthony Cook on Habeas Corpus***
No.: **S240153**

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 13, 2017, I served the attached **REPLY 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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