

SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

JAMES ARY, JR.,

Defendant and Appellant.

Case No. S173309

SUPREME COURT
FILED

DEC 22 2009

~~Frederick K. Ohlrich Clerk
Deputy~~

First Appellate District, Division Two, Case No. A111029
Contra Costa County Superior Court, Case No. 5-980575-5
The Honorable Garrett J. Grant, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Appellant's answer brief attempts to reformulate the issue on which this Court granted review. Insofar as he seeks to alter the question, it is improper. (See Cal. Rules of Court, rule 8.520(b)(3); *Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 951, fn. 5.) Insofar as he addresses the issue on which the Court granted review, he relies on the analysis of the Court of Appeal majority below and the authorities cited in that opinion. He ignores that retrospective competency hearings have been held across the country for decades, and that the majority of jurisdictions place the burden on a defendant to prove his substantive incompetency, both before and after trial. His argument is unpersuasive.

ARGUMENT

I. THE TRIAL COURT PROPERLY PLACED ON APPELLANT THE BURDEN TO PROVE HIS INCOMPETENCY AT THE RETROSPECTIVE COMPETENCY HEARING

Respondent argued in the opening brief that statutory and decisional law support placing the burden on appellant to prove by a preponderance of the evidence that he was not competent at the time of his trial when the issue is decided at a retrospective competency hearing. Appellant's contrary argument reflects a fundamental misreading of the applicable law. We address several of his contentions below. As to those contentions not specifically addressed here, we rely on our opening brief.¹

¹ Appellant includes a statement of facts in his answer brief, which is both incomplete and inaccurate. Because the issue before this Court is one of law, and does not depend upon the relative merits of either party's factual presentation, we do not address appellant's factual recitation.

Appellant misstates the procedural background in his case in one significant respect: "the lower court determined by a preponderance of the
(continued...)

A. Appellant Misconstrues the Procedural Posture of the Case

Appellant argues that, because he suffered a procedural due process deprivation at his trial, based on the trial court's failure to hold a contemporaneous competency hearing, the burden of persuasion at a retrospective hearing must be premised on the concept of harmless error analysis for a federal constitutional violation. Under his theory, the state must bear the burden of proof at the retrospective competency hearing to vindicate the constitutional violation. Appellant cites *Chapman v. California* (1986) 386 U.S. 18 and argues the "*Chapman* burden—and arguably the *Chapman* standard—should apply here." (AB 20.)² He is wrong.

The failure to hold a contemporaneous competency hearing is not subject to harmless error analysis. The Court of Appeal explicitly so stated in its first opinion on the issue. "The trial court had a duty to order a competency hearing in the face of substantial evidence of defendant's incompetence. Its failure to do so is per se prejudicial." (*Ary I, supra*, 118

(...continued)

evidence that sufficient evidence had been identified to permit it to conduct a retrospective competency hearing." (AB 8.) In fact, the trial court made no mention of a factual burden. (1 RT 16125-16126.) It simply found there was sufficient evidence to go forward with the hearing. (*Ibid.*) The Court of Appeal had expressly declined to impose "a standard of evidentiary proof," finding the determination was "not primarily a factual matter." (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1029 (*Ary I*.)

² Appellant argued before the Court of Appeal that the prosecution should have borne the burden of proving he was competent beyond a reasonable doubt at the retrospective competency hearing. He also argued the prosecution should have had to prove beyond a reasonable doubt that a retrospective hearing was feasible. The Court of Appeal rejected the latter contention (Maj. opn. at p. 3, fn. 2) and did not specifically address the former contention. No cited case has agreed the *Chapman* standard applies, and appellant does not pursue the argument.

Cal.App.4th at p. 1025.) The court later stated, “While it is certainly the case that the trial court’s error in failing to hold a competency hearing when one is warranted is not subject to harmless error review, this does not mean that the procedural due process violation can never be cured retrospectively, under appropriate circumstances, as the United States Supreme Court has suggested.” (*Id.* at p. 1028.) The court noted that several federal courts had “cured this due process error by directing trial courts to consider the possibility of holding retrospective competency hearings.” (*Ibid.*) If a hearing could not be held, appellant’s judgment would be reversed. (*Id.* at pp. 1029-1030; see *Drope v. Missouri* (1975) 420 U.S. 162, 182-183 [in absence of ability to conduct a retrospective competency hearing, the judgment was reversed].)

It is the appellate reversal that vindicates appellant’s claim of constitutional error. The Court of Appeal in *Ary I* found that appellant had been deprived of a constitutional right, that the error was prejudicial per se, and that he was entitled to competency proceedings on remand consistent with that finding. The subsequent competency hearing did not constitute a means to render the constitutional error harmless. Rather, it placed appellant in the position he should have been at the initial trial by affording him a hearing on the substantive issue of his competency. (See *Tate v. State* (Okla. 1995) 896 P.2d 1182, 1187.)

Appellant ignores the crucial point of this case—the court must determine whether a retrospective competency hearing can be held. Specifically, either the reviewing court or the trial court must determine whether a retrospective hearing is feasible before the burden of proof is placed on the defendant as Penal Code section 1369, subdivision (f) directs. In *Drope v. Missouri, supra*, 420 U.S. at pages 182-183, the court concluded, in light of the circumstances of the case, that a retrospective competency determination would not be adequate. Here, the Court of

Appeal assigned that determination to the trial court, and required the prosecution to show that a retrospective hearing was feasible. (*Ary I, supra*, 118 Cal.App.4th at p. 1029.) It is in the feasibility determination that a court decides whether a procedural due process violation under *Pate v. Robinson* (1966) 383 U.S. 375 (*Pate*) can be cured.

A finding that the hearing is feasible does not mean the procedural due process violation has been found harmless. Harmlessness is based on the appellate record and entails no additional proceedings. When a reviewing court finds a trial court should have held a competency hearing, the finding usually results in reversal. If, however, a retrospective competency hearing is feasible, it means the trial court is in a position to rectify the constitutional violation by giving the defendant the hearing to which he was originally entitled.

Here, the Court of Appeal determined that a retrospective competency hearing might be feasible. On remand, the prosecution showed a retrospective hearing was feasible. Appellant expressly agreed. If the trial court had found the hearing was not feasible, the judgment would have been reversed.

Appellant takes issue with respondent's citation to cases in which no *Pate* violation was found, arguing they are not instructive because they do not involve the procedural due process violation that occurred here. As we explained, the retrospective hearing is a hearing on the substantive issue of a defendant's competency. A defendant who does not raise a *Pate* claim, or who fails to prevail on that issue, must meet a far higher burden in order to obtain a retrospective hearing on the substantive issue of his competency. (See *United States v. Williams* (5th Cir. 1987) 819 F.2d 605, 609 [defendant must "present facts sufficient 'to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to [his] mental capacity . . . to meaningfully participate and cooperate with counsel. . . .'"].) Once a

hearing is ordered, however, the parties are in the same position with respect to the substantive issue.

Appellant's concern that the procedural due process violation he suffered would be treated as if it had never occurred is thus unfounded. The *Pate* violation resulted in a remand of this case for a determination whether the violation could be rectified, or if it could not, for a new trial. Here, the trial court found a retrospective hearing was feasible, a finding in which appellant concurred. In that circumstance, notwithstanding the initial *Pate* violation, due process does not require the state to bear the burden of proving a defendant's competency. (*Moran v. Godinez* (9th Cir. 1995) 57 F.3d 690, 696-697, overruled on other grounds in *Lockyer v. Andrade* (2003) 538 U.S. 63.) "When it is established that a petitioner's competence can be accurately evaluated retrospectively, there is no compelling reason to require states to divert from their normal procedures for assessing competence." (*Ibid.*) Accordingly, a state is "not constitutionally obligated to place the burden of proof on the prosecution to establish [defendant's] competence, or to relieve him of the burden of establishing his incompetence." (*Ibid.*)

B. Appellant Makes Arguments not Supported by the Record

As did the Court of Appeal below, appellant asserts the prosecution was at fault for the failure to hold a contemporaneous competency hearing. He argues the prosecution should bear the burden of proof at the retrospective competency hearing because it violated his constitutional rights. First, the burden of proof in a hearing does not vary according to which party was at fault when a hearing should have been, but was not, held at an earlier time. Second, the fault argument makes no sense in this case. As respondent pointed out, the only participant in this case who raised the issue of appellant's competency to stand trial was the prosecutor.

During a pretrial hearing on appellant's competence to waive his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, the prosecutor raised the issue of appellant's competence to stand trial. Upon inquiry by the trial court, defense counsel expressly stated she was not raising a doubt regarding appellant's competence under Penal Code section 1368. (2 RT 397-399 [A095433].)³ Accordingly, the argument that the state is at fault for the failure to hold a competency hearing at the time of trial is unavailing.

Third, case law on the issue uniformly addresses the constitutional deprivation under *Pate* in terms of a trial court's failure to hold a competency hearing when one is warranted, not as error by the prosecution or as some form of misconduct. (E.g., *Zapata v. Estelle* (5th Cir. 1979) 588 F.2d 1017, 1020, fn. 2 ["A *Pate* violation is usually thought of as an error committed by the trial court during the course of the trial."].)⁴ The prosecution has no unique obligation to guard against trial of an incompetent defendant, and is less likely to be aware of any basis for questioning a defendant's competence. As this Court has found, defense counsel is likely to have better access than the prosecution to facts relevant to a defendant's competence. (*People v. Medina* (1990) 51 Cal.3d 870, 885.)

Appellant takes issue with the relative accuracy of a retrospective competency hearing compared with one held before trial. But he agreed below that a retrospective hearing was feasible. He did not argue on appeal

³Appeal No. A095433 refers to the appellate record in *Ary I*, which was incorporated in the second appeal.

⁴In federal habeas corpus proceedings, the trial court's error is sometimes referred to as an error by the state. (E.g., *Zapata v. Estelle*, *supra*, 588 F.2d at p. 1020.) That reference is not synonymous with the prosecution, however.

that the hearing should not have been held, nor did he seek review of the issue before this Court.

Moreover, appellant's assumption that mental state determinations are problematic when conducted retrospectively ignores that such determinations are routinely made with respect to a defendant's mental state at the time of a crime. Mental state experts are well equipped to conduct such evaluations. No expert in this case stated he could not evaluate appellant's competency retrospectively, notwithstanding that none had made such an evaluation before. In addition, appellant was diagnosed as mildly mentally retarded. As the trial court noted, the experts agreed that the condition generally remains constant over time. In the case of a mentally retarded defendant, therefore, any danger of a less accurate post-trial determination of competency would be significantly diminished.

Furthermore, a court conducting a retrospective competency hearing has access to information not available to a court making a determination before trial. (*Williams v. Woodford* (9th Cir. 2004) 384 F.3d 567, 608.) Here, at least one prosecution expert stated he had far more information than usually available to him when making a competency assessment. (5 RT 17829, 17849-17851.) While appellant appears to assume the mere passage of time renders the retrospective hearing less accurate, the record in this case shows otherwise. (See *Reynolds v. Norris* (8th Cir. 1996) 86 F.3d 796, 803 ["The passage of time is not an insurmountable obstacle if sufficient contemporaneous information is available."]; accord *Maynard v. Boone* (10th Cir. 2006) 468 F.3d 665, 675.)

It is the feasibility finding that addresses the issue whether sufficient evidence exists to make the competency determination. That unopposed determination should not be second-guessed at this stage. Accordingly, the difficulty of conducting a retrospective competency hearing goes to feasibility in a particular case. It does not bear on the question of the

burden of proof at the substantive hearing itself, particularly when feasibility was not disputed as is the case here. Once it is determined the hearing can be held, that consideration is no longer at issue.

Appellant suggests that, because the trial court did not state it would have found him competent had the burden of proof been on the prosecution, the case must be close. His argument is without merit. There is no requirement that a court make alternative findings depending on which party bears the burden of proof. Moreover, although appellant acknowledges the trial court issued a lengthy written decision, he does not address the court's findings. In particular, he does not acknowledge that the court thoroughly reviewed the evidence and found appellant's witnesses were not credible. The court's ultimate decision leaves no doubt of its conviction on the issue of appellant's competence. (See 8 CT 2513-2550.)

C. Appellant Relies on Unpersuasive Authority

Like the Court of Appeal in *Ary II*, appellant relies on the dissenting opinion of Judge Pregerson in *Moran v. Godinez, supra*, 57 F.3d 690, which was based, in turn, on dicta in *James v. Singletary* (11th Cir. 1992) 957 F.2d 1562, to argue that the prosecution should bear the burden of proof at a retrospective competency hearing. He quotes at length from those opinions, but does not address respondent's arguments concerning them. He also fails to acknowledge that no court, until *Ary II*, has followed the dissenting opinion in *Moran v. Godinez* in the 14 years since it was written. The Ninth Circuit continues to follow the majority decision in *Moran v. Godinez*. (*McMurtrey v. Ryan* (9th Cir. 2008) 539 F.3d 1112, 1131 ["In *Moran*, 57 F.3d at 696, this court described the framework with which we evaluate retrospective competency hearings."].)⁵

⁵ Judge Pregerson also authored *McMurtrey v. Ryan*.

Appellant cites the statement in *James v. Singletary, supra*, 957 F.2d at page 1570, that ““*Pate*, in essence, established a rebuttable presumption of incompetency upon a showing by a habeas petitioner that the state trial court failed to hold a competency hearing on its own initiative” (AB 40.) This misreads *Pate*.

In *Pate*, the court extensively reviewed the evidence of the defendant’s mental state. It then concluded, “We believe that the evidence introduced on Robinson’s behalf entitled him to a hearing on this issue. The court’s failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial.” (*Pate, supra*, 383 U.S. at p. 385, fn. omitted.) The court continued, “Having determined that Robinson’s constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, we direct that the writ of habeas corpus must issue and Robinson be discharged, unless the State gives him a new trial within a reasonable time.” (*Id.* at p. 386.) As to the suggestion that the state court could hold a limited hearing on Robinson’s competence at the time of trial, the court stated, “we have previously emphasized the difficulty of retrospectively determining an accused’s competence to stand trial.” (*Id.* at p. 387.) In the circumstances, a hearing was not possible. (*Ibid.*)

Contrary to the statement in *James*, *Pate* did not establish a rebuttable presumption of incompetency upon a court’s failure to hold a competency hearing. It held that, where evidence warranted a competency hearing before trial, a trial court’s failure to hold a hearing violated the defendant’s right to a fair trial. Since the defendant’s competency could not be determined after trial, the judgment had to be reversed. As the dissent in *Pate* further explained, “The constitutional violation alleged is the failure to make an inquiry. In the more usual case, the simple claim that a defendant was convicted while incompetent during the trial, there is of course no

proof of a constitutional violation until that incompetence is established in appropriate proceedings.” (*Pate, supra*, 383 U.S. at p. 388, fn. 1 (dis. opn. of Harlan, J.).)

In *Pate*, the defendant might have been incompetent at the time of trial. Because no inquiry was made and no hearing held, and because no hearing could be held after trial, the judgment had to be reversed due to the constitutional violation. That does not mean a defendant as to whom doubt of competency existed at trial is presumed thereafter incompetent where there was no contemporaneous competency hearing. Where a retrospective competency hearing is feasible, the substantive issue of the defendant’s competence can be determined. In that event, the constitutional deprivation based on the failure to make an inquiry can be rectified. There is no reason to alter the established burden of proof on the substantive issue in such circumstances.

In sum, contrary to appellant’s argument and the dissenting opinion in *Moran v. Godinez* (see AB 42), *Pate* never addressed which party would bear the burden of proof at a retrospective competency hearing. It found that such a hearing was not possible in that case. Accordingly, the view that *Pate* “established that where the trial court failed to hold the required contemporaneous hearing the state then bears the burden of nonpersuasion in any subsequent competency determination” (*Moran v. Godinez, supra*, 57 F.3d at p. 701 (dis. opn. of Pregerson, J.)) is incorrect.

D. The Majority of Jurisdictions Require a Defendant to Prove his Incompetency at a Retrospective Competency Hearing

As explained in respondent’s opening brief, the majority of courts that have considered the matter place the burden on the defendant to prove his incompetency at a retrospective competency hearing. Appellant agrees that burden is appropriate if a defendant raises a substantive claim. (AB 47.)

He disagrees the burden is appropriate where a *Pate* violation has been found. As we have explained, however, given a feasibility finding that allows the substantive issue to be litigated, no persuasive reason exists at that point to alter the statutory procedure for determining a defendant's competency. On that issue, the cases overwhelmingly require a defendant to bear the burden, both before and after trial. Accordingly, respondent adheres to its reliance on the cited cases.⁶

Appellant's arguments challenging these decisions are unpersuasive. He fails to show that imposition of the burden of proof on a defendant at a retrospective competency hearing violates due process. The trial court properly allocated the burden of proof to appellant, consistent with statutory and decision law.

⁶ Appellant cites *United States v. Patel* (D. Mass. 2007) 524 F.Supp.2d 107 with respect to the interpretation of 28 U.S.C. § 4241, although he acknowledges that section is not dispositive on the issue presented here. *Patel*, which chose not to follow the United States Supreme Court's interpretation of section 4241, is unpersuasive, particularly given its heavy reliance on authority that predates the Supreme Court's decision in *Cooper v. Oklahoma* (1996) 517 U.S. 348, 362.



CONCLUSION

For the reasons stated, respondent respectfully asks that the Court of Appeal's decision be reversed.

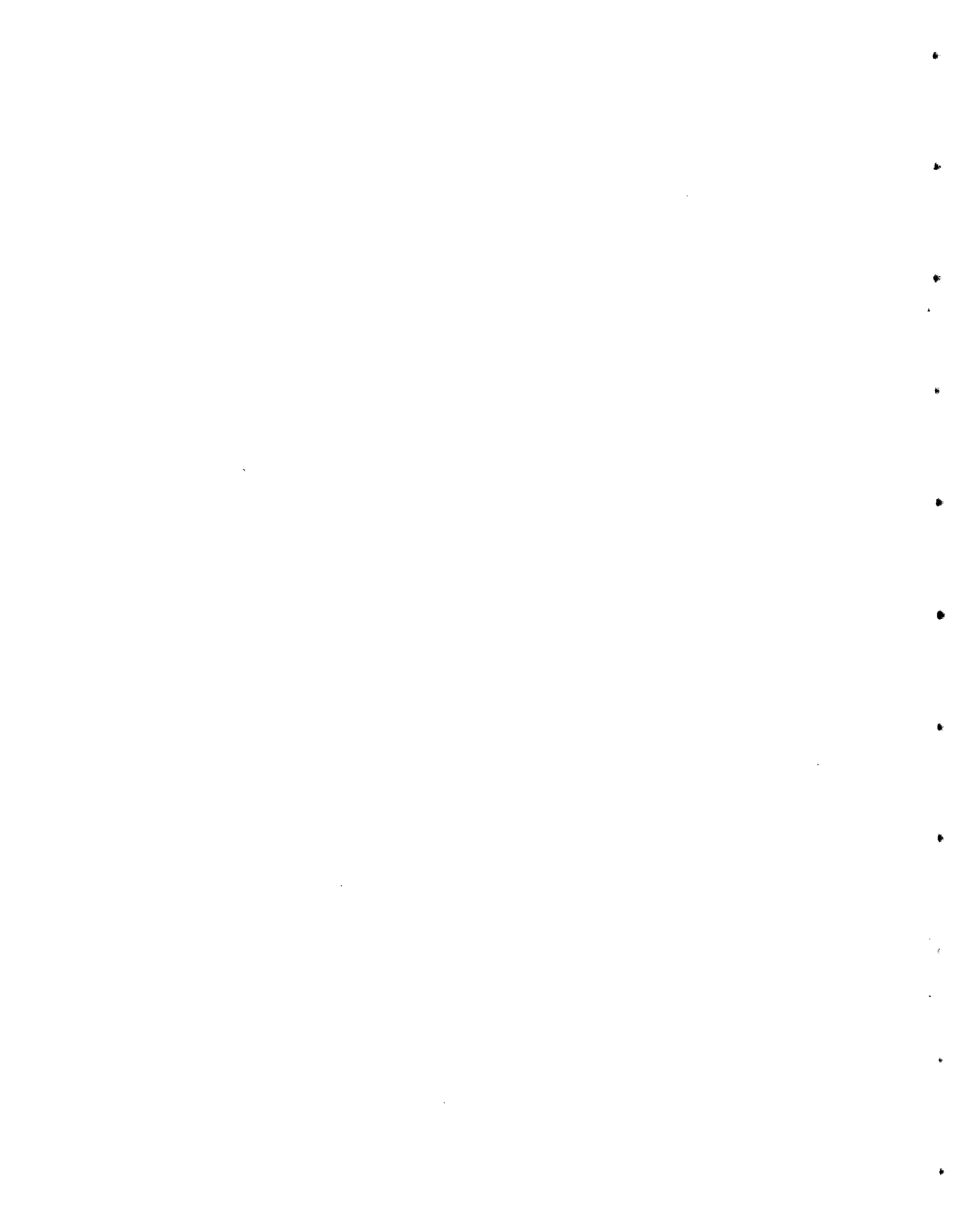
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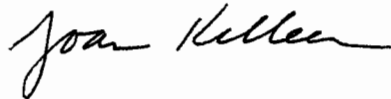


CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 2,961 words.

Dated: December 22, 2009

EDMUND G. BROWN JR.
Attorney General of California

A handwritten signature in cursive script that reads "Joan Killeen".

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. James Ary, Jr.**

No.: **S173309**

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 that same day in the ordinary course of business.

On December 22, 2009, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, 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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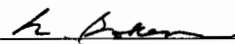
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 22, 2009, at San Francisco, California.

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Signature

