In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ADAM SERGIO RODRIGUEZ,

Defendant and Appellant.

Case No. S223129

Sixth Appellate District, Case No. H038588
Santa Clara County Superior Court, Case No. C1110340
The Honorable Vincent J. Chiarello, Judge

RESPONDENT'S BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Acting Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General
RENÉ A. CHACÓN
Supervising Deputy Attorney General
State Bar No. 119624
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5957
Fax: (415) 703-1234
Email: Rene.Chacon@doj.ca.gov
Attorneys for Respondent

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ISSUES

1. Does Penal Code section 1538.5, subdivision (p), vest the trial court with discretion to determine whether the judge who heard a defendant's original motion to suppress is "available" to hear a subsequent motion, and if so, what considerations should guide the trial court in exercising that discretion?

2. Did the trial court err in concluding that the original trial judge was "unavailable" to hear a renewed motion to suppress within the meaning of Penal Code section 1538.5, subdivision (p)?

INTRODUCTION

The presiding judge reasonably interpreted Penal Code section 1558.5, subdivision (p), to allow the presiding judge to determine whether the original judge who granted a motion to suppress was "available" to preside at the preliminary hearing and hear a renewed motion to suppress evidence. The record does not establish that the presiding judge erred in determining the original judge was unavailable to hear a combined preliminary hearing and motion to suppress evidence.

STATEMENT OF THE CASE

A. Proceedings

On February 24, 2010, the Santa Clara County District Attorney filed a complaint in case No. C1070138 that charged appellant with possession of child pornography (Pen. Code, § 311.11, subd. (a)) and misdemeanor possession of marijuana (Health & Saf. Code, § 11357, subd. (c)). (Aug. 1 CT 159-161.)

On September 24, 2010, Magistrate Diane Northway denied the defense motion to suppress evidence and held appellant to answer. (Aug. 1 CT 155.) On May 2, 2011, Judge Vincent Chiarello granted the renewed defense motion to suppress evidence. (Aug. 2 CT 340.) The presiding

judge subsequently granted the prosecutor's motion to dismiss the case. (Aug. 2 CT 342.)

By complaint filed in case No. C1110340, the Santa Clara County District Attorney charged appellant with possession of child pornography (Pen. Code, § 311.11, subd. (a); count one) and misdemeanor possession of marijuana (Health & Saf. Code, § 11357, subd. (c); count two). (1 CT 170-171.)

On September 29, 2011, appellant moved to suppress evidence (Pen. Code, § 1538.5). (1 CT 191-208.)[1]

On December 13, 2011, the magistrate denied the motion to suppress evidence, granted the prosecutor's motion to dismiss count two, and held appellant to answer on count one. (2 CT 423.)

On December 22, 2011, the prosecutor filed an information charging appellant with possession of child pornography. (2 CT 425.)

On March 6, 2012, appellant moved to set aside the information (Pen. Code, § 995). (3 CT 494-517.) On March 28, 2012, the trial court denied the motion to set aside the information. (3 CT 526.)

On April 6, 2012, appellant filed a renewed motion to suppress evidence (Pen. Code, § 1538.5, subd. (i)). (3 CT 528-550.) On April 25, 2012, the trial court denied appellant's renewed motion to suppress evidence. (3 CT 739.)

On May 7, 2012, the parties waived jury trial and agreed to submit the issue of guilt on the police reports before Judge Chiarello. (3 CT 741.) On May 11, 2012, the Judge Chiarello found appellant guilty as charged. (3 CT 742.)

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[1] We provide additional detail on the proceedings arising from the various suppression motions in the next section.

On July 19, 2012, Judge Chiarello suspended imposition of sentence and placed appellant on probation for three years. (3 CT 788-789.)

B. The Presiding Judge Interprets Penal Code Section 1538.5, Subdivision (P) As Allowing Discretion to Find the Original Judge "Available"

On September 29, 2011, defense counsel filed a request to place the case on the arraignment calendar to set the department for the preliminary hearing and motion to suppress evidence. (1 CT 184.) On October 7, 2011, defense counsel asked the presiding judge that the matter be sent to Judge Chiarello. (3 ART 40.) Presiding Judge Nadler denied the request, as follows:

> Well, counsel, I don't agree with your interpretation that it needs to go back to Judge Chiarello by law. Furthermore, Judge Chiarello is not available to me any longer; he's been transferred to another division, in Palo Alto.
>
> And judges are—mine is a limited jurisdiction Court—I hate to say it—and so departments make themselves available when they're available to me, with the exception of Department 54, who's Judge Del Pozzo, who's assigned full time to my division, or to take Preliminary Examination matters. Everyone else volunteers for that assignment on an availability basis.
>
> So I'm not sure who's going to be available on October 27th at 8:32 when this matter is set for Preliminary examination and now 1538.5.
>
> It will just have to go out to whatever Judge is available on that date.
>
> It remains as set for prelim October 27th, 8:32 for both Preliminary Hearing and 1538.5 motion.

(3 ART 40-41; 1 CT 185.)

On December 8, 2011, the matter came to Magistrate Vanessa Zecher for preliminary hearing. (1 CT 4.) Defense counsel cited Penal Code section 1538.5, subdivision (p), argued that "venue" was not appropriate,

and demanded that the matter be sent to Judge Chiarello for litigation of the defense motion to suppress evidence. (*Ibid.*) Judge Zecher heard argument and declared she would place a telephone call to the presiding judge. (1 CT 9.)

> MR. AHMED [Defense counsel] : [The presiding judge] denied it, but without a finding that Judge Chiarello was unavailable. So as the Court knows in a criminal case, we're not barred from raising the same objection, as opposed to a civil case, where there is formal rules on a motion for reconsideration. In a criminal case, what I'm setting forth today is just the argument that venue is proper with Judge Chiarello, and I'm not waiving my client's—in my opinion, his right under Penal Code Section 1538.5(p) by stipulating to a Court different than Judge Chiarello from hearing that motion.
>
> THE COURT: All right. So, Ms. Rose, would you call over to Judge Nadler and ask if Judge Chiarello—I just want to know if he's available or unavailable. If he's unavailable, that takes care of the problem. If he's available, then I am going to want to hear arguments on the merits
>
> Does that sound like an appropriate manner to proceed?
>
> MR. AHMED: With a question. Available as of which date?
>
> THE COURT: Right this minute.

(1 CT 9.)

After the magistrate talked with Presiding Judge Nadler, the magistrate represented that Judge Nadler made a determination that Judge Chiarello was unavailable. (1 CT 13.) Defense counsel persisted, demanded a finding that Judge Chiarello was unavailable to hear the motion to suppress evidence, and asked to argue the matter to Judge Nadler. (1 CT 15.) The magistrate telephoned Judge Nadler for direction and told the parties to report to Judge Nadler, immediately, at his request. (1 CT 16.)

The parties argued the matter in front of Judge Nadler. (3 CT 513-515.) Judge Nadler stated that "Judge Chiarello has a sentencing calendar today in Palo Alto and, therefore, [is] not available for this prelim. [¶] The matter is reassigned to Judge Zecher for prelim right now." (3 CT 515.)

After a brief recess, the magistrate asked the parties to report, as follows:

> THE COURT: We are going to go back on the record in the matter of People v. Rodriguez. Both counsel are present, and Mr. Rodriguez is present. And would one of you like to update me on what happened with Judge Nadler?
>
> MR. AHMED: Judge Nadler decided that venue is proper with Your Honor.

(1 CT 16.)

On December 13, 2011, the magistrate denied the defense motion to suppress evidence. (1 CT 162.)

C. Statutory Provisions

In 1993, the Legislature amended Penal Code section 1538.5 to create avenues of relief for the prosecution after a defendant's motion to suppress evidence has been granted. Subdivision (j) was rewritten and subdivision (p) was added, so the statute now provides that when a felony case is dismissed because a court has granted the defendant's motion to suppress evidence, the prosecution may refile the case and may relitigate the motion to suppress evidence. (Pen. Code, § 1538.5, subd. (j); see *People v. Superior Court* (*Jimenez*) (2002) 28 Cal.4th 798, 801, 806-807 ["Accordingly, we conclude that, notwithstanding a peremptory challenge, that judge or magistrate, if otherwise available, remains available to hear the relitigated suppression motion"].)

In relevant part, Penal Code section 1538.5, subdivision (p) states that "[r]elitigation of the motion shall be heard by the same judge who granted the motion at the first hearing *if the judge is available*." (Italics added.)

These provisions were enacted in response to the decision in *Schlick v. Superior Court* (1992) 4 Cal.4th 310, which interpreted Penal Code section 1538.5, subdivision (d) as "precluding the prosecution from relitigating a suppression motion that the superior court had granted in a felony matter." (*People v. Superior Court* (*Jimenez*), *supra*, 28 Cal.4th at p. 805.) The Los Angeles County District Attorney sponsored a bill to allow a criminal case to be refiled after the grant of a suppression motion and dismissal of the case "because trial deputies were overworked and might lose the first suppression motion simply because they did a poor job of presenting the evidence." (*Id.* at p. 808.) When introduced, the bill "contained no language describing which judge should hear relitigated suppression motions. [Citation.] As a result, the California Attorneys for Criminal Justice (CACJ) opposed the original bill 'because it would allow prosecutors to "take another shot" with another judge after losing a suppression motion in superior court . . . [which] would encourage forum shopping . . . .'" (*Id.* at p. 807, citing Sen. Com. on Judiciary, Analysis of Sen. Bill No. 933 (1993-1994 Reg. Sess.) May 11, 1993.) The bill was then amended to include the language in subdivision (p) that "the judge who granted the earlier motion should rehear the relitigated motion." (*Ibid.*)

"This legislative history 'makes it clear the Legislature intended these amendments to prohibit prosecutors from forum shopping.'" (*People v. Superior Court* (*Jimenez*), *supra*, 28 Cal.4th at pp. 807-808 [the prosecution cannot "forum shop" by exercising a peremptory challenge (Code Civ. Proc., § 170.6) against the judge who heard the first motion], citing *Barnes v. Superior Court* (2002) 96 Cal.App.4th 631, 638.)

D. Appeal

The Court of Appeal affirmed the judgment after ordering certain probation conditions modified. (Typed Opn. at pp. 20-21.) The Court of Appeal found that pursuant to Penal Code section 1538.5, subdivision (p), the presiding judge has discretion to determine whether the original judge was available, and properly exercised that discretion. (Typed Opn. at pp. 14-16.)

ARGUMENT

I. THE STATUTE ALLOWS THE PRESIDING JUDGE DISCRETION TO DETERMINE AVAILABILITY OF THE ORIGINAL JUDGE

Appellant agrees that Penal Code section 1538.5, subdivision (p) allows the presiding judge discretion to determine the availability of the original judge. (AOBM 3.) However, appellant complains that the Court of Appeal, in interpreting Penal Code section 1538.5, subdivision (p), placed no "limits" on the discretion to be exercised by the presiding judge. (AOBM 15-19.) Appellant asserts that the presiding judge must exercise its discretion in a manner consistent with promoting the statute. (*Ibid.*) Appellant fears that any administrative concerns of the presiding judge may trump a defendant's statutory rights, rendering the statutory right a nullity. (AOBM 15.) Appellant asks the statute be interpreted "narrowly." (*Ibid.*) Appellant asserts that every trial court must adopt policies which assure the availability of the original judge, consistent with a narrow interpretation of the statute. (AOBM 19.)

A. Presiding Judge Discretion

Subject to Judicial Council rules, a presiding judge "shall distribute the business of the court among the judges, and prescribe the order of business." (Gov. Code, § 69508, subd. (a).) The presiding judge's "[a]ssignments of the 'business' of the court among judges of the court is

wholly discretionary." (*Anderson v. Phillips* (1975) 13 Cal.3d 733, 737.) The California Rules of Court confirm the presiding judge's plenary authority to make judicial assignments (Cal. Rules of Court, rule 10.603(c)(1)), to "[a]ssign judges to departments and designate supervising judges for divisions" (*id.*, rule 10.603(b)(1)(A) & (B)), to reassign cases (*id.*, rule 10.603(c)(1)(D)), and to delegate these powers to another judge (*id.*, rule 10.603(d)).

Courts with more than three judges may designate criminal departments or divisions. (Cal. Rules of Court, rule 10.950.) Nonetheless, the presiding judge "retains final authority over all criminal and civil case assignments." (*Ibid.*) The supervising judge of the criminal division "must assign criminal matters requiring a hearing or cases requiring trial to a trial department." (*Id.*, rule 10.951(a).) The presiding judge, supervising judge, or other designated judge from the criminal division, "where not inconsistent with law, [must] assist in the disposition of cases without trial." (*Id.*, rule 10.951(b).) Further, as necessary, the presiding judge may designate additional judges to assist in the disposition of cases without trial, under the supervising judge's supervision. (*Id.*, rule 10.951(d).)

Consistent with its broad discretion to make judicial assignments, the presiding judge found Judge Chiarello was unavailable to handle the preliminary hearing and the expected renewed motion to suppress evidence because of a sentencing calendar assignment in the Palo Alto courthouse. (3 CT 515 ["I'm not in agreement with the interpretation by the Defense with regard to who the 1538.5 Judge is, so I don't think it goes back to Judge Chiarello. Furthermore, Judge Chiarello has a sentencing calendar today in Palo Alto and, therefore, not available for this prelim."].)

Penal Code section 1538.5, subdivision (p), read in light of the Legislature's broad grant of authority to presiding judges, plainly allows the presiding judge to decide if the prior judge is available for purposes of

assigning a preliminary hearing for possible relitigation of the suppression motion.

B. The Court of Appeal Correctly Recognized Administrative Limitations Make Judges Unavailable from Time to Time

The Court of Appeal correctly observed that administrative limitations make judges unavailable to handle the business of the court from time to time. A presiding judge necessarily assigns cases daily to seek efficiency, administer process within the limitations placed by changing staffing levels, and seek the orderly administration of justice. In pertinent part, the Court of Appeal accurately stated:

> Like the [*People v. Arbuckle* (1978) 22 Cal.3d 749] court, we too are faced with a quandary. There may be times when it would be difficult for the judge who heard and granted the first motion to suppress to hear the relitigated motion to suppress due to the complex administrative processes of the court system. However, defendant argues that the requirement of section 1538.5, subdivision (p) is mandatory and must be followed regardless of any practical difficulties. What defendant fails to acknowledge is that contrary to his assertions, section 1538.5, subdivision (p) is not absolute; it concludes a caveat: a renewed motion to suppress shall be heard by the same judge only if that judge is *available.*
>
> Defendant insists a presiding judge cannot find a judge unavailable to hear a relitigated motion to suppress due to administrative reasons, because the presiding judge cannot deprive defendants of fundamental or statutory rights even in the interest of efficiency. He contends our Supreme Court determined in *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 375 that a judge cannot violate a defendant's rights for the purpose of judicial economy, like to improve a congested court calendar. In *Gonzalez*, a judge improperly disregarded procedures by holding a "half-off sentencing 'bargain day' for persons pleading guilty," an "en masse plea bargaining technique" that "sought 'a couple of dollars for the county and a conviction for the state.'" (*Ibid.*) The *Gonzalez* court concluded the judge's mass plea bargain

offer contravened the principle of individualized sentencing embodied in the Penal Code, thereby constituting willful judicial misconduct. (*Ibid.*) We agree with the sentiments set forth in *Gonzalez* and with defendant's assertion that a judge cannot sacrifice a defendant's statutory rights in the interests of efficiency.

However, we disagree with defendant that a presiding judge's determination that a judge is unavailable to hear a relitigated motion to suppress due to administrative reasons somehow deprives a defendant of a fundamental or statutory right. As previously discussed, it is clear from the language of section 1538.5, subdivision (p), that while the provision is mandatory, its application is subject to the first judge's availability. Therefore, a presiding judge who determines the first judge is not available and assigns the relitigated motion to suppress to another judge does not, in doing so, deprive a defendant of his statutory rights.

Furthermore, a determination that a judge is unavailable in this scenario does not encourage prosecutorial forum shopping. Unlike the situations confronted by the courts in *Jimenez* and *Barnes*, here the prosecution did not take affirmative steps to divert defendant's relitigated motion to suppress away from a particular court. The People may have initially opposed defendant's request to transfer his suppression hearing to Judge Chiarello, but it was the presiding judge who ultimately determined that Judge Chiarello was not available to hear the motion. We are guided in our interpretation of section 1538.5, subdivision (p) by the express intent of the Legislature when enacting the provision. Judge Nadler's decision to assign the motion to suppress to Judge Zecher did not promote judge shopping by the prosecution. It did not, as defendant argues, eviscerate the legislative intent of the statute.

In coming to this conclusion, we reiterate the presiding judge has discretion to manage the court calendar and assign matters to various divisions and judges across the courts of the county. Therefore, while the language of section 1538.5, subdivision (p), requires a relitigated motion to suppress to be heard by the judge who granted the motion in the first case, this requirement is subject to the presiding judge's discretionary determination that the first judge is available. Given our

> interpretation of the legislative intent behind section 1538.5, subdivision (p), coupled with the presiding judge's inherent discretion to assign matters, Judge Nadler's determination of Judge Chiarello's availability was not an abuse of discretion. It was not arbitrary or capricious, and it did not deprive defendant of his rights under the statute.

(Typed Opn. at pp. 14-16, fn. omitted, original italics.)

C. Contrary to Appellant's Argument, the Statute Does Not Limit a Presiding Judge's Broad Discretion to Make Assignments

Short of the original judge's retirement or death, appellant argues that the statute must be interpreted to allow for availability of the original judge, regardless of staffing limits challenging the presiding judge at the time of assignment. (AOBM 15-19, 22.)

Contrary to appellant's argument, the statute does not limit a presiding judge's broad discretion to make assignments. (Pen. Code, § 1538.5, subd. (p).) Changing staffing levels, security limitations, courtroom availability, and criminal law "speedy trial" requirements place constant demands on a presiding judge's assignments and are juggled to maximize court efficiency. Importantly, courtroom and security staffing are determined by the court administrator and county sheriff—outside of the presiding judge's mandate. Given this complex milieu, the Legislature meant to grant the presiding judge discretion to determine whether the original judge was "available" to hear the relitigated motion, consistent with the complex demands of running a criminal court.

Consistent with the discretion provided by the statute, the presiding judge's assignment of the case to the original judge if "available," or an alternative neutral judge, necessarily satisfies the statutory rights of the defendant. Moreover, a presiding judge's case assignments do not promote forum shopping when made by the presiding judge, irrespective of the wishes of either party.

Appellant's argument that the statute demands the adoption of court policies that "assure" the availability of the original judge over other court administrative demands is baseless, potentially costly, and threatens court efficiency. In this case, the preliminary hearing assigned to Magistrate Zecher began on December 8, 2011, progressed through December 9, 2011, and parts of December 13, 2011, and consisted of testimony from four witnesses and the arguments of the parties. (1 CT 1-167.) In the end, the preliminary hearing assignment demanded a substantial time commitment by the magistrate. The presiding judge was entitled to weigh the substantial time required by the pending assignment.

The Legislature meant to allow the presiding judge discretion to determine availability, and assign cases as administrative limits allow, consistent with a criminal defendant's statutory rights.

II. THE PRESIDING JUDGE DID NOT ERR IN FINDING THE ORIGINAL JUDGE UNAVAILABLE WITHIN THE MEANING OF THE STATUTE

Appellant argues that the presiding judge erred because: (1) the prosecutor's acts demonstrated forum shopping in violation of the statute; (2) the original judge was truly available; (3) the presiding judge misunderstood the discretion allowed by the statute; and (4) the judicial assignment policy, in effect, made "*all* judges *always* unavailable" to hear relitigated suppression motions at the preliminary hearing stage. (AOBM 25-44.)

Initially, the record reflects that over the year this case progressed through the Santa Clara County criminal courts, the judicial assignment policy in effect allowed Judge Chiarello to rotate into the group of jurists assigned to hear suppression motions, and later rotate into the group of jurists assigned to try criminal cases. The record does not reflect that Judge Chiarello was ever assigned to preside over preliminary hearings, at any

relevant time period. Moreover, there is no evidence that the prosecutor ever challenged (Code of Civ. Proc, § 170.6) Judge Chiarello, or any other jurist assigned to this case. Thus, Judge Nadler's implicit factual finding that the prosecutor did not engage in forum shopping is supported by the record.

Clearly, on December 8, 2011, the date the presiding judge sent the case to Magistrate Zecher for preliminary hearing, appellant elected to demand a preliminary hearing on the new complaint, and elected to present a concurrent motion to suppress evidence at the time of the preliminary hearing. At the time of appellant's elections and demands for Judge Chiarello's assignment, the presiding judge found that Judge Chiarello was presiding over a sentencing calendar at the Palo Alto courthouse, and not available for the pending preliminary hearing assignment.

The record reflects that the presiding judge was well aware of appellant's repeated demands for assignment to Judge Chiarello under Penal Code section 1538.5, subdivision (p). Appellant does not show that the presiding judge was biased, or that the presiding judge made an arbitrary or capricious assignment decision. (3 CT 515; see also Evid. Code, § 664 [presumed official duty regularly performed].) The record does not demonstrate that the presiding judge erred in assigning the case to Judge Zecher for preliminary hearing.

Appellant's assertion that the act of filing the new complaint demonstrated that the prosecutor engaged in "extended resistance to litigation the suppression motion" and demonstrated forum shopping is mistaken. The record reflects that the prosecutor exercised prosecutorial discretion within all statutory and constitutional limits.

Appellant's assertion that Judge Chiarello was truly available to hear the preliminary hearing is contradicted by the presiding judge's contrary factual finding. Appellant's related assertion that the presiding judge

misunderstood the statute is not supported by the record. The presiding judge understood that the statute allowed the court to determine the availability of the original judge. The presiding judge duly considered appellant's demands for assignment of the case.

Appellant's assertion that the judicial assignment policy made "*all* judges *always* unavailable" to hear relitigated suppression motions at the preliminary hearing stage is baseless conjecture. The record does not establish that existing assignment policy eviscerates the statutory right as a matter of law.

In all events, on this record, appellant does not demonstrate that any presumed error was prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As demonstrated in the appellate court, Magistrate Zecher reasonably denied the defense motion to suppress evidence. (Typed Opn. at pp. 16-19 ["substantial evidence supported the trial court's finding of voluntary consent to search"].) The record does not demonstrate a reasonable probability of a better result had the presiding judge assigned the preliminary hearing to Judge Chiarello, rather than to Judge Zecher.

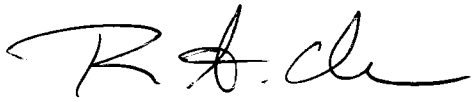
CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: August 6, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Acting Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General



RENÉ A. CHACÓN
Supervising Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,940 words.

Dated: August 6, 2015

KAMALA D. HARRIS
Attorney General of California

Rene A. Chacon by: JAB

RENÉ A. CHACÓN
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Adam Sergio Rodriguez*** No.: **S223129**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 6, 2015, I served the attached **RESPONDENT'S 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:

Jonathan E. Berger
Attorney at Law
1415 Fulton Road, #205-170
Santa Rosa, CA 95403
(2 Copies)

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

Victoria Hobel Schultz
Attorney at Law
P.O. Box 1145
Mountain View, CA 94042
(2 Copies)

Court of Appeal of the State of California
Sixth Appellate District
Attn: Clerk of the Court
333 West Santa Clara Street, #1060
San Jose, CA 95113-1717

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 6, 2015, at San Francisco, California.

M. T. Otanes
Declarant

Signature

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