In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CRAIG DANNY GONZALES,

Defendant and Appellant.

Case No. S240044

Third Appellate District Third, Case No. C078960
Sacramento County Superior Court, Case No. 03F07705
The Honorable Marjorie Koller, Judge

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

OTHER AUTHORITIES

ISSUE PRESENTED

"What relationship, if any, must exist between convictions for forgery and identity theft in order to exclude a forgery conviction from sentencing as a misdemeanor under Penal Code section 473, subdivision (b)?" (Order Granting Petn. for Review.)

INTRODUCTION

In a single proceeding, appellant Craig Danny Gonzales pled guilty to multiple offenses stemming from three different cases, including four counts of check forgery committed in 2003 and one count of identity theft committed in 2006. Forgery is a "wobbler" alternatively punishable as a felony or a misdemeanor. (Pen. Code, § 473, subd. (a).)[1] Proposition 47, which established the Safe Neighborhoods and Schools Act ("the Act"), added section 473, subdivision (b). That subdivision now punishes as a misdemeanor a "forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of the [item] does not exceed nine hundred fifty dollars ($950)." (See *People v. Romanowski* (2017) 2 Cal.5th 903, ___ [215 Cal.Rptr.3d 758, 766-767].) Under section 473, subdivision (b), forgery remains a wobbler for "any person who is convicted both of forgery and of identity theft, as defined in Section 530.5." (§ 473, subd. (b).)

Appellant petitioned to reduce his forgery convictions to misdemeanors under newly established section 473, subdivision (b), and to be resentenced accordingly. The trial court denied the petition, but the Court of Appeal reversed, holding that section 473, subdivision (b), requires an identity theft offense to be "transactionally related" to a forgery conviction in order to preclude relief. (*People v. Gonzales* (December 19,

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[1] Further unspecified statutory citations are to this code.

2016, C078960) [nonpub. Opn.], at pp. 2-4.) As demonstrated below, no such transactional relationship is required.

STATEMENT OF THE CASE

A. Original Convictions

The Sacramento District Attorney filed an amended information charging appellant, in pertinent part, with four counts of check forgery (§ 470, subd. (d); counts 1, 3-5), obtaining property by fraud (§ 532, subd. (a); count 2), possessing blank checks with the intent to defraud (§ 475, subd. (b); count 6), possessing counterfeit bills (§ 476; count 7), and possessing counterfeit driver's licenses with intent to assist a forgery (§ 470, subd. (b); count 8). The information consolidated a 2003 case stemming from a search of appellant and a van in which he had been a passenger and a 2005 case stemming from a search of a hotel room connected to appellant. (*People v. Gonzales, supra,* C078960, at pp. 6-7.)

While those charges were pending, the District Attorney filed a second information charging appellant in pertinent part with identity theft (§ 530.5, subd. (a); counts 3-5) stemming from appellant's jailhouse conspiracy to obtain unauthorized phone services under other people's names. In a negotiated plea covering both charging documents, appellant pled no contest to all counts stemming from the 2003 and 2005 cases and to one count of identity theft stemming from the 2006 case in exchange for a total maximum sentence of 20 years. In a single sentencing proceeding, the trial court imposed a term of 18 years four months on the 2003 and 2005 offenses and a consecutive term of one year four months on the 2006 identity theft offense. (*Gonzales, supra,* C078960, at pp. 2-4.)[2]

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[2] The Court of Appeal derived the full procedural history from appellant's prior appeal of the 2008 judgment (Third District Court of Appeal, case no. C058340), which the court incorporated by reference into

(continued...)

B. Proposition 47 Proceeding

In November 2014, the Electorate passed Proposition 47, which reduces specific felonies and wobblers to misdemeanors, including certain acts of forgery, and created a retroactive petitioning procedure to provide sentencing relief to those serving terms on such felony convictions. (*Gonzales, supra*, C078960, at pp. 1, 4.) In January 2015, appellant filed a petition requesting resentencing on his forgery convictions, among others. The People opposed the motion, arguing that appellant's forgery convictions were ineligible for reduction because, under section 473, subdivision (b), he had also been convicted of identify theft. (CT 5-6.) The trial court agreed, denying appellant's petition based on his "current convictions." (CT 7.)

C. The Court of Appeal's Ruling

The Court of Appeal reversed the trial court's ruling in part, holding that appellant's identity theft offense committed in 2006 did not preclude the reduction of his forgery convictions committed in 2003 because they were not "transactionally related" to each other. While the court recognized that the statutory text does not impose a transactional relationship requirement on its face, it found the word "both" preceding identity theft and forgery in section 473, subdivision (b), ambiguous because it does not clearly prescribe the necessary relationship between the two offenses. Based on this perceived ambiguity, the court reviewed the ballot statement by the Legislative Analyst, which noted: "[u]nder this measure, forging a check worth $950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft *in connection*

(...continued)
the record of this Proposition 47 appeal. (*Gonzales, supra,* C078960, at p. 2, fn. 2.)

with forging a check." (Italics added.) The Court of Appeal interpreted this statement in the Voter Information Guide as a requirement that the forgery and identity theft be "transactionally related." (*Gonzales, supra,* C078960, at pp. 6-7.) This Court granted review on its own motion. (Order Granting Petn. for Review.)

SUMMARY OF ARGUMENT

Section 473, subdivision (b), reduces forgery under $950 to a misdemeanor unless the offender was also concurrently convicted of identity theft. By the plain terms of the statute, appellant, who was concurrently convicted of both forgery and identity theft, is not eligible to have his forgery convictions reduced to misdemeanors.

The Court of Appeal erred in requiring a transactional relationship between appellant's forgery and identity theft offenses. In doing so, the court determined that the word "both," as used in section 473, subdivision (b), is ambiguous because "it does not clearly prescribe the necessary relationship between the two offenses." The court then relied on a statement by the Legislative Analyst in the Voter Information Guide to hold that an identity theft conviction must be "transactionally related" to a forgery conviction to preclude relief. But the statutory phrase "is convicted both of forgery and of identity theft" is not susceptible to more than one reasonable interpretation. It requires that an offender only be concurrently convicted of both forgery and identity theft, and it imposes no transactional relationship between the two offenses.

But even if the statute could be deemed ambiguous, extrinsic evidence of intent does not establish a transactional relationship requirement. The Legislative Analyst's statement relied on by the Court of Appeal is best viewed as a singular example of the identity theft exception in practice rather than a transactional relationship requirement that is absent in the plain terms of section 473, subdivision (b).

ARGUMENT

I. APPELLANT'S CHECK FORGERY CONVICTIONS ARE INELIGIBLE FOR REDUCTION BECAUSE HE WAS CONCURRENTLY CONVICTED OF FORGERY AND IDENTITY THEFT

Section 473, subdivision (b), precludes the reduction of a forgery offense if an offender is concurrently convicted of both forgery and identity theft, which is precisely what occurred in this case. The unambiguous statutory text does not require a "transactional relationship" between the two offenses.

A. Relevant Law

1. Standard of Review

Issues of statutory construction are questions of law that are reviewed de novo on appeal. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *People v. Morris* (2005) 126 Cal.App.4th 527.)

2. Overview of Proposition 47

"On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act." (*People v. Morales* (2016) 63 Cal.4th 399, 404.) The Act reduces certain drug- and theft-related offenses from felonies or wobblers (crimes that can be punished as either felonies or misdemeanors) to misdemeanors. (*Ibid.*) Additionally, the Act establishes a retroactive petitioning procedure allowing for those serving sentences on such felony convictions at the time the Act took effect to seek reduction and resentencing. (§ 1170.18, subds. (a), (f).)

Pertinent to this case, the Act amended section 473, setting forth the punishment for forgery, by adding subdivision (b), which reads:

> Notwithstanding subdivision (a), any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of the check, bond, bank bill, note, cashier's check, traveler's check, or

> money order does not exceed nine hundred fifty dollars ($950), shall be punishable by imprisonment in a county jail for not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290. *This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.*

(Voter Information Guide., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 6, p. 71; see § 473, subd. (b), italics added.) In short, forgery remains punishable as either a misdemeanor or a felony if the value of the instrument exceeds $950, the offender has been convicted of a so-called "super strike" offense or a crime requiring sex offender registration, or the offender "is convicted both of forgery and of identity theft, as defined in Section 530.5." (§ 473, subds. (a), (b).)

3. Principles of Statutory Construction

In interpreting a statute enacted through voter initiative, courts apply the well-settled canons of statutory construction. (*People v. Arias* (2008) 45 Cal.4th 169, 177; *People v. Canty* (2004) 32 Cal.4th 1266, 1276.) The statute's terms are first given their plain and ordinary meaning. If the language is clear and unambiguous, there is no need for further construction, and courts should not indulge in it. (*People v. Snook* (1997) 16 Cal.4th 1210, 1215; *People v. Hendrix* (1997) 16 Cal.4th 508; *People v. Overstreet* (1986) 42 Cal.3d 891, 895.) "When statutory language is unambiguous, [courts] must follow its plain meaning 'whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature.'" (*In re. D.B.* (2014) 58 Cal.4th 941, 948.) Courts should not "interpret away clear language in favor of an ambiguity that does not exist." (*People v. Loeun* (1997) 17

Cal.4th 1, 9.) It is presumed the lawmakers meant what they said. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265; *In re Young* (2004) 32 Cal.4th 900, 906; *People v. Walker* (2002) 29 Cal.4th 577, 581.)

Further, courts should not add provisions to a statute and are "not free to rewrite the law simply because a literal interpretation may produce results of arguable utility." (*People v. Guzman* (2005) 35 Cal.4th 577, 587; see also *People v. Eckard* (2011) 195 Cal.App.4th 1241, 1248.) "We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

But if a statute is indeed susceptible to two reasonable interpretations, courts "may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*People v. Walker, supra,* 29 Cal.4th at p. 581; *People v. Dieck* (2009) 46 Cal.4th 934, 940; *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444-445.) Specifically, a summary authored by the office of the Legislative Analyst sets forth information the average voter needs to adequately understand a measure on the ballot. (*People v. Cordova* (2016) 248 Cal.App.4th 543, 559.)[3] But the summary is not responsible for providing voters a complete understanding of the pending measure. (*Ibid.*) Instead, the summary reflects a rational judgment about what effects are most likely to matter to voters and describes them in a fair and intelligible way. (*Ibid.*) And "[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in

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[3] This Court granted review of *People v. Cordova* on August 31, 2016, in case number S236179. Respondent cites to the case as persuasive authority. (Cal. Rules of Court, rule 8.1115(d)(1).)

context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) While the summery and other extrinsic aids may be helpful in interpreting an initiative, the language of an enactment itself is always more indicative of intent. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 330-331; see also *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 580; *People v. Knowles* (1950) 35 Cal.2d 175, 182-183.)

B. The Identity Theft Exception Established in Section 473, Subdivision (b), Applies to Offenders Concurrently Convicted of Forgery and Identity Theft, Regardless of Any Transactional Relationship Between the Offenses

1. The Unambiguous Identity Theft Exception Requires Only Concurrent Convictions

Section 473, subdivision (b), states in relevant part that "any person who is guilty of forgery relating to a . . . check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value . . . does not exceed . . . $950 . . . shall be punishable by imprisonment in the county jail for not more than one year." But the statute also specifies that it does not apply "to any person who *is convicted both* of forgery and of identity theft, as defined in Section 530.5." (Italics added.) By its plain terms, section 473, subdivision (b), does not apply to an offender, such as appellant, who is concurrently convicted of both check forgery and identity theft.

First, section 473, subdivision (b), uses the present tense ("is convicted") to describe the identity theft exception. Contrasted with the past-tense language used to describe separate disqualifying factors in the second-to-last sentence of subdivision (b), ("has ... prior convictions") and disqualifying factors in other sections of the Act, such as section 476a ("has

previously been convicted"), the statute's use of the present tense signals that the forgery and identity theft offenses must be current or presently occurring. (*People v. Loeun, supra,* 17 Cal.4th at p. 11 [verb tense is generally significant in interpreting statutes]; *In re Reeves* (2005) 35 Cal.4th 765, 771-772 [the past perfect tense ('has been convicted' or 'previously has been convicted') is generally used instead of the present tense ('is convicted') to impose a continuing disability based on criminal history.].)

Further, the term "is convicted," as used in section 473, subdivision (b), refers solely to the establishment of guilt. A person is convicted when his or her guilt is ascertained, whether by plea or by verdict. (*People v. Goldstein* (1867) 32 Cal. 432, 433; see also *People v. Banks* (1959) 53 Cal.2d 370, 386-387; *People v. Clapp* (1944) 67 Cal.App.2d 197, 200 ["The jury, or the court where a jury has been waived, convicts the accused. Conviction does not mean the judgment based upon the verdict, but it is the verdict itself. It is the ascertainment of guilt by the trial court" (citations omitted)].) Although in other contexts such as the termination of civil liberties and parental rights, the terms "convicted" and "conviction" have been construed to mean when guilt has been determined and judgment has been pronounced (see, e.g., *People v. Kirk* (2006) 141 Cal.App.4th 715, 721; *In re Sonia G.* (1984) 158 Cal.App.3d 18, 24), "in criminal cases, courts have held an admission or finding of guilt is sufficient to establish a 'conviction'" (*Kirk*, at p. 721). "As a general matter, it has been settled law for over 250 years that a person stands 'convicted' upon the return of a guilty verdict by the jury or by entry of a plea admitting guilt. [Citation.] An exception to this general rule has been recognized where . . . a civil penalty follows as a consequence of the conviction." (*People v. Moon* (2011) 193 Cal.App.4th 1246, 1252, some internal quotation and edit marks omitted.)

Second, the word "both" in section 473, subdivision (b), is used as a conjunction to "indicate and stress the inclusion of each of two or more things specified by coordinated words, phrases, or clauses." (Webster's 3d New Internat. Dict. (2002) p. 258; *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122 ["When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word"].) The word "both" placed immediately after the term "is convicted" to stress the inclusion of "forgery" as well as "identity theft" demonstrates that the ascertainment of the offender's guilt of both crimes must occur in the same proceeding. Otherwise, there would have been no need to include the reference to "forgery" in the exception, as the entirety of section 473 is devoted to establishing the punishment for forgery and therefore presupposes a forgery conviction. A contrary construction would render the reference to "forgery" surplusage, violating the rules of construction. (*People v. Gilbert* (1969) 1 Cal.3d 475, 480.)

Accordingly, the plain language of section 473, subdivision (b), indicates that a forgery conviction is not eligible to be reduced to a misdemeanor if the offender was also concurrently convicted of identity theft. The statutory language makes no indication that the two offenses need to be transactionally related. Had the Electorate intended to impose a transactional relationship requirement, it could have easily specified so in the statutory text, just as lawmakers have similarly done before. For example, section 12022, subdivision (a), states that a person who is armed with a firearm *in the commission* of a felony or attempted felony shall be punished by an additional term of imprisonment. The "in commission" language establishes a facilitative nexus between the arming and the felony, requiring the firearm to serve some purpose towards commission of the crime. Its involvement cannot be the result of accident or coincidence.

(*People v. Bland* (1995) 10 Cal.4th 991, 1002-1003; see also *Smith v. United States* (1993) 508 U.S. 223, 238-239 [facilitative nexus also required in federal enhancement for using or carrying a firearm "during and in relation to" an offense].)

Similarly, the Three Strikes Reform Act of 2012, also enacted by the voters through Proposition 36, disqualifies a petitioner from sentencing relief if the petitioner was armed with a firearm *during commission* of the current offense. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032, italics added.) Unlike the facilitative nexus required by the firearm enhancement, the "during commission" language establishes a temporal nexus requiring the petitioner to be armed with the firearm only while committing the underlying offense, regardless of whether it is used towards its commission. (*Ibid.*) In both examples, law makers established a specific relationship between the two acts and specified that relationship in the statutory text. Here, the Electorate could have also specified a transactional nexus requirement between forgery and identity theft in the statutory text. (*In re Lance W.* (1985) 37 Cal.3d 873, 890 fn. 11 [electorate presumed to be aware of existing laws and their judicial construction].) But it did not. And the Court of Appeal was not free to rewrite the statute to impose such a requirement. By its plain and unambiguous terms, section 473, subdivision (b), precludes the reduction of a forgery conviction to a misdemeanor if the offender was also concurrently convicted of identity theft, which is precisely what occurred in this case.

2. Extrinsic Evidence of Voter Intent Does Not Establish a Transactional Relationship Requirement

The statute is unambiguous, and extrinsic aids are unnecessary to determine its intent. But if the statute is deemed ambiguous, extrinsic

evidence of intent does not establish a transactional relationship requirement. The official summary of Proposition 47 stated that the Act "[r]equires [a] misdemeanor sentence instead of felony for the following crimes when [the] amount involved is $950 or less: petty theft, receiving stolen property, and forging/writing bad checks." (Voter Information Guide, Gen. Elec., *supra*, off. tit. and summary by the Attorney General, p. 34.) And the Legislative Analyst provided a statement that listed "check forgery" as a reducible offense and stated: "Under current law, it is a wobbler crime to forge a check of any amount. Under this measure, forging a check worth $950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft *in connection with* forging a check." (Voter Guide, *supra,* Analysis of Prop. 47 by the Legislative Analyst, p. 35, italics added.) The analyst's statement is best viewed as an example of the identity theft exception in practice rather than a narrow construction of the exception.

First, the analyst's statement references only forged checks. But the Act also applies to forged bonds, bank bills, notes, cashier's checks, traveler's checks, and money orders. Because the statement does not address six of the seven types of forgeries enumerated in the statute, it should not be read to narrow the identity theft exception in relation to all forgeries. There is no indication that the single reference to one type of forged instrument was intended to narrow the plain language of a statute applicable to all listed acts of forgery.

Second, forgery of currency (a bank bill or note) requires no identifying information, and it is difficult to imagine how one would commit identity theft "in connection" with the offense. (*People v. Maynarich* (2016) 248 Cal.App.4th 77, 80-81 [forged United States Currency is a forged bank bill or note under the Act].) Imposing such a requirement could negate the identity theft exception to specific acts of

forgery listed in section 473, subdivision (b). But when the Legislative Analyst's statement is viewed as a practical example of the identity theft exception, instead of an exclusive limitation, the lone reference to checks becomes a useful illustration rather than an incomplete rule and maintains the exception's applicability to all forgeries listed in section 473, subdivision (b). (*People v. Cordova, supra,* 248 Cal.App.4th at p. 559 [Legislative Analysts summary reflects a rational judgment about what effects are most likely to matter to voters and describes them in a fair and intelligible way].)

Third, section 530.5 defines several types of identity theft, only one of which involves an offender's obtainment *and use* of someone else's personal identifying information (§ 530.5, subd. (a)). The remaining provisions either protect the victim or criminalize the acquisition, retention, or sale of personal identifying information with the intent to defraud and mail theft (§ 530.5, subds. (b)-(e)). If the Electorate intended to limit the exception to forgeries that were facilitated by identity thefts, it would have restricted the exception to persons convicted of identity theft as defined in Penal Code section 530.5, *subdivision (a).* (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 [courts "presume that the [drafters] intended every word, phrase and provision . . . in a statute . . . to have meaning and to perform a useful function."; *Loeun, supra,* 17 Cal.4th at p. 9 [statutory "[i]nterpretations that lead to absurd results or render words surplusage are to be avoided" (internal quotation marks omitted)].) But again, it did not.

In sum, section 473, subdivision (b), unambiguously states that a forgery conviction under $950 is not eligible to be reduced to a misdemeanor if the offender was concurrently convicted of forgery and identity theft. This language does not impose a transactional relationship between the two offenses, and further interpretation of intent is unnecessary. But even if the language is deemed ambiguous, extrinsic aids do not reveal

an intent to require a transactional relationship. Because appellant was concurrently convicted of both check forgery and identity theft, section 473, subdivision (b), precludes the reduction of his forgery convictions.

CONCLUSION

For the reasons stated above, Respondent respectfully asks this Court to vacate the Court of Appeal's opinion with instructions to reinstate the trial court's order denying appellant's section 1170.18 petition.

Dated: May 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 4,079 words.

Dated: May 15, 2017

XAVIER BECERRA
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Gonzales**
No.: **C078960 / S240044**

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 May 15, 2017, I served the attached **RESPONDENT'S OPENING 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 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 15, 2017, at Sacramento, California.

_____
Declarant

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