IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MICHAEL EUGENE MAAS,	)	S225109
	)	
Petitioner,	)	(Court of Appeal No.
	)	D064639)
vs.	)	
	)	(San Diego County
SUPERIOR COURT (PEOPLE),	)	Sup. Ct. Nos. SCE185960
	)	& SCE188460)
Respondent.	)	
	)	

Appeal from the San Diego County Superior Court

PETITIONER'S OPENING BRIEF ON THE MERITS

After the Decision by the Court of Appeal
Fourth Appellate District, Appeal No. D064639
Filed December 10, 2014

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PETITIONER'S OPENING BRIEF ON THE MERITS

ISSUE BEFORE THE COURT ON GRANT OF REVIEW

On March 25, 2015, this Court granted review of the following issue: "Does Code of Civil Procedure section 170.6 permit a peremptory challenge to be asserted, before an order to show cause has issued, against a judge who is assigned to assess a petition for writ of habeas corpus?"

STATEMENT OF THE CASE AND SUMMARY OF FACTS

In 1998, petitioner, Michael Eugene Mass, was convicted of grand theft of a car an automobile and unlawfully driving or taking of a vehicle and sentenced to 25 years to life in prison. (Petition at p. 1.) The trial was presided over by the Honorable Allan J. Preckel. (Order Denying Petition for Writ of Habeas Coprus, August 7, 2013, p. 1.) Later, petitioner was convicted of burglary and forgery of a fictitious check and sentenced to a consecutive term of 25 years to life. (Petition at p. 1.) The trial was presided over by the Honorable Larrie R. Brainard. (Order Denying Petition for Writ of Habeas Coprus, August 7, 2013, p. 2.) Both of these cases were affirmed by the Court of Appeal. (*People v. Thomas et al.* (Jan. 11, 2001, D031288 [nonpub. opn.]; *People v. Maas* (May 16, 2000, D032176) [nonpub. opn.].)

On July 13, 2013, petitioner filed a petition for writ of habeas corpus in the San Diego County Superior Court. (Petition, Exhibit A.) On July 19, petitioner wrote to the clerk of the Superior Court, asking for the case number assigned to the petition, the date the petition was filed, and the name of the judge assigned to the petition.

(Petition, Exhibit B.) On July 29, petitioner received a photocopy of his petition's cover page file stamped with the date July 17, 2013. (Petition, Exhibit C.) On August 4, 2013, petitioner wrote to the clerk a second time, again asking for the name of the judge assigned to his case. (Petition, Exhibit D.) On August 7, 2013, Judge John M. Thompson filed an order denying petitioner's request for a writ of habeas corpus. (Petition, Exhibit E.)

Petitioner petitioned the Court of Appeal, raising a variety of challenges to the lawfulness of his sentence and ineffective assistance of counsel. In his initial petition with the Court of Appeal, petitioner explained that if he had been told that Judge Thompson would be the judge reviewing his petition, he would have filed a motion to disqualify him. (Petition at p. 2; Code Civ. Proc., § 170.6.[1]) In a declaration attached to his initial petition, petitioner repeated his claim that he would have requested that Judge Thompson be removed under section 170.6 and asked for another judge. (Petition, Exhibit G.) In his traverse filed on March 27, 2014, petitioner reiterated his claim that Judge Thompson was biased against him. (Second

[1]All references to code sections refer to the Code of Civil Procedure.

Traverse, 1-2.)

The Court of Appeal asked the Attorney General for an informal response addressing Maas's contention that he was denied the right to file a peremptory challenge under section 170.6. After receiving the Attorney General's response, the Court of Appeal issued an order to show cause and appointed counsel for petitioner. Petitioner's appointed counsel filed a supplement petition for writ of habeas corpus.

The Court of Appeal deemed Maas's petition as seeking a writ of mandate directing the Superior Court to vacate its August 7, 2013, order denying his petition for writ of habeas corpus and grant that relief. It also directed the Superior Court to reassign Maas's petition to a judge other than Judge Thompson for the decision. (*Michael Eugene Maas v. Superior Court (People)* (December 10, 2014, D064639) [nonpub. opn.] pp. 6-7.)

This Court granted a petition for review on its own motion, designating petitioner Maas as petitioner.

ARGUMENT

I.
A PETITIONER MAY ASSERT A PEREMPTORY CHALLENGE UNDER CODE OF CIVIL PROCEDURE SECTION 170.6 AGAINST A JUDGE WHO IS ASSIGNED TO ASSESS A PETITION FOR WRIT OF HABEAS CORPUS BEFORE AN ORDER TO SHOW CAUSE HAS BEEN ISSUED, IF THE JUDGE IS DIFFERENT FROM THE ORIGINAL TRIAL JUDGE

A. Standard of Review

Claims raising legal questions – including questions of statutory interpretation – are subject to independent review on appeal. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 384-385; *Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388, 394 [statutory construction].)

B. Legal Analysis

A judge may not "try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law" when it is shown that he is prejudiced "against a party or attorney or the interest of a party or attorney appearing in the action or proceeding." (§ 170.6, subd. (a)(1).) To disqualify a judge under this statute, a party "may

establish this prejudice by an oral or written motion without prior notice, supported by affidavit or declaration under penalty of perjury, or an oral statement under oath," that the judge presiding over the matter "is prejudiced against a party or attorney, or the interest of a party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the judge . . . ." (§ 170.6, subd. (a)(2).) So long as the "motion is duly presented, and the affidavit or declaration under penalty of perjury is duly filed or an oral statement under oath is duly made, thereupon and without any further act or proof," a new judge shall be assigned. (§ 170.6, subd. (a)(4).)

Section 170.6 provides a party with "an extraordinary right to disqualify a judge," a right that is " 'automatic' in the sense that a good faith *belief* in prejudice is alone sufficient, proof of facts showing actual prejudice not being required. [Citations.]" (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531, original italics.) "The right conferred by . . . section 170.6 . . . is a substantial right which is now part of the system of due process and judicial fair play in this state." (*McCauley v. Superior*

Court (1961) 190 Cal.App.2d 562, 564 (*McCauley*).) "The purpose of the disqualification statute is . . . to promote fair and impartial trials . . . ." (*International Union of Operating Engineers v. Superior Court* (1989) 207 Cal.App.3d 340, 349).

As this Court has noted, this right to disqualify a judge for prejudice without an adjudication of bias resulted from "many years' effort by the organized bar of this state." (*Johnson v. Superior Court* (1958) 50 Cal.2d 693, 696 (*Johnson*).) Since it is difficult to prove a judge's prejudice and it is important that the judicial system be free of any "suspicion of unfairness," the Legislature may have reasonably decided that a party should have a chance to automatically disqualify a judge, without needing to prove a judge's prejudice. (*Ibid.*)

In passing section 170.6, the Legislature "[u]ndoubtedly [considered] the possibility" that this right to automatically disqualify a judge could be abused by litigants. (*Mayr v. Superior Court of Tehama County* (1964) 228 Cal.App.2d 60, 64 (*Tehama County*.) In some cases, litigants might use section 170.6 to go "[j]udge-shopping" by removing a judge not because they believe the judge is prejudiced against them, but because they believe the judge's views

on the law or attitude towards the exercise of judicial discretion is not favorable to their position in the case at hand. (*Solberg v. Superior Court of San Francisco* (1977) 19 Cal.3d 182, 194 (*Solberg*).) In other cases, litigants may use section 170.6 to gain a tactical advantage over opponents, such as by delaying a trial. (*Id.* at p. 195.) Nevertheless, after weighing this potential for abuse "against its obvious advantages," the Legislature still chose to enact the law. (*Tehama County*, *supra*, 228 Cal.App.2d at p. 64.)

To minimize the abuse of section 170.6, the Legislature placed several limitations on a party's right to automatically disqualify a judge. (*Johnson, supra,* 50 Cal.2d 693, 697; *The Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025, 1032 [section 170.6 "is designed to prevent abuse by parties that merely seek to delay a trial or obtain a more favorable judicial forum"].) First, the Legislature limited each side to one disqualification motion in any one action or special proceeding. (§ 170.6, subd. (a)(4); *Pappa v. Superior Court* (1960) 54 Cal.2d 250, 353.) Second, the Legislature required the party or attorney making the motion to "show good faith by declaring under oath that the judge is prejudiced." (*Johnson*, *supra*, at p. 697.)

And third, the Legislature imposed strict timeliness requirements. (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1252 (*Peracchi*).)

To be timely, a motion to disqualify a judge under section 170.6 must be filed before the occurrence of certain specified events that mark the beginning of the "trial of the cause" or in the case of a hearing, before the beginning of the hearing. (§ 170.6, subd. (a)(2)). Section 170.6, subdivision (a)(2), specifically provides, "In no event shall a judge, court commissioner, or referee entertain the motion if it is made after the drawing of the name of the first juror, or if there is no jury, after the making of an opening statement by counsel for plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing, other than the trial of a cause, the motion shall be made not later than commencement of the hearing." This timeliness requirement deters parties from "judge shopping" (*Peracchi*, *supra*, 30 Cal.4th at p. 1252) by not allowing them to remove a judge once he or she has issued a ruling against them. It

also prevents parties from delaying a trial or hearing once proceedings have begun.

While this Court has held that a party may not make a motion to disqualify a judge at any time after a proceeding has begun, including at a subsequent proceeding that amounts to a continuation of the earlier, original proceeding (*Jacobs v. Superior Court* (1959) 53 Cal.2d 187 (*Jacobs*)), this Court has never addressed a situation in which the judge presiding over the original proceeding and the judge presiding over the subsequent proceeding were different. In *Jacobs*, this Court rejected as untimely two grandparents' motion to disqualify a judge from hearing their request to modify an earlier custody order and their petition for guardianship. (*Id.* at p. 190.) The judge whom the grandparents moved to disqualify was the same judge who had presided over the original custody proceedings. (*Ibid.*) In finding the grandparents' motion untimely, this Court explained that the request to modify a custody order and the petition for guardianship did not constitute new actions or special proceedings, but rather continued the original custody proceedings, because in both cases the grandparents sought to modify the judge's earlier orders. (*Id.* at pp.

190-191 [noting that the parties were the same and "the paramount questions to be decided" by the same judge were the same].)

Even though section 170.6 does not specify whether or not a party may move to disqualify a judge in a subsequent hearing, this Court concluded that "since the motion [to disqualify under section 170.6] must be made before the trial has commenced, it cannot be entertained as to subsequent hearings which are a part or a continuation of the original proceedings." (*Jacobs*, *supra*, 53 Cal.2d at p. 190.) The rationale for this rule in *Jacobs* was to prevent a party from judge shopping. As this Court explained, if a disqualification were allowed in supplemental proceedings, "it would mean that the judge who tried the case, and who is ordinarily in the best position to pass upon the questions involved, could by a mere general allegation of prejudice, . . . be disqualified from hearing such matters . . . ." (*Id.* at p. 191.) Such a rule "would make it possible for litigants to gamble on obtaining a favorable decision from one judge, and then, if confronted with an adverse judgment, allow them to disqualify him without presenting facts showing prejudice, in the hope of securing a different ruling from another judge in supplementary proceedings

involving substantially the same issues." (*Ibid.*)

By preventing parties in a supplementary proceeding from moving to disqualify the same judge who presided over the original proceeding, this Court rightly balanced the substantial right of automatic disqualification against the substantial danger of judge shopping. Since in *Jacobs* the grandparents had already accepted the judge in the earlier proceeding and therefore indicated he was not prejudiced against them, there was no danger that the later, supplementary proceedings might appear to be unfair.

But if a different judge presides over the subsequent proceedings, then the rationale of *Jacobs* should not apply. First, if a different judge presides over the supplementary proceedings, there would be no danger that parties might misuse section 170.6 to try to shop for a judge that they perceived to be more favorable to their position. Second, and even more important, to apply the rule set forth in *Jacobs* to a situation in which a different judge presided over the supplementary proceeding would undermine the purpose of section 170.6. Section 170.6 was designed to give parties a substantial right to automatically disqualify a judge as "part of the system of due

process and judicial fair play in this state." (*McCauley*, *supra*, 190 Cal.App.2d at p. 564.) The right also helps preserve the integrity of the state's judicial system. (See *Johnson*, *supra*, 50 Cal.2d 693, 696.)

To preserve both the actual and perceived fairness of the judicial process, this Court should follow the Court of Appeal in modifying the *Jacobs* rule for situations in which the judge who presides over a supplementary proceeding is different from the judge who presided over the original proceeding. A party, either petitioner or respondent, who has not previously moved under section 170.6 may do so in a supplemental proceeding to the original action only if the challenge is directed "as to a judge other than any judge who has previously heard any phase of the matter." (*People v. Smith* (1961) 196 Cal.App.2d 854, 859 (*Smith*); see also, California Criminal Defense Practice (2015) § 60.07[2][d] ["The only time a disqualification motion can be made in a supplemental hearing is when the presiding judge is one other than the one who has heard previous phases of the matter"].)

In *Smith*, the Court of Appeal concluded that a defendant may file a section 170.6 affidavit to disqualify a judge from hearing an allegation that the defendant violated probation where the judge had

no previous connection to the case. (*Smith*, *supra*, 196 Cal.App.2d at p. 859-860.) Because the judge had never heard any earlier proceedings in the case, the Court of Appeal determined that the party moving to disqualify the judge under section 170.6 could not engage in the kind of abuse identified by this Court in *Jacobs*. (*Smith*, *supra*, 196 Cal.App.2d 854, 859.) As the court in *Smith* explained, when the judge at the subsequent proceeding is a different judge from the one at the original proceeding, "we are not dealing with the limitations imposed by the Legislature to prevent an abuse of the section but with the basic objective of the section itself." (*Smith*, *supra*, 196 Cal.App.2d 854, 859.) That objective, as the court in *Smith* emphasized, is set forth in the opening paragraph of section 170.6, which specifies that "[n]o judge of any superior . . . court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of law or fact" if a party establishes that the judge is prejudiced in accordance with the requirements of section 170.6.

This court should apply the Court of Appeal's reasoning in *Smith*

to petitioner's case because there is no danger that petitioner was trying to judge shop or cause undue delays. Although a petition for writ of habeas corpus "is generally regarded as a special proceeding" (*People v. Villa* (2009) 45 Cal.4th 1063, 1069), courts have also described habeas corpus as a continuation of the original criminal proceeding. (See *Yokley v. Superior Court* (1980) 108 Cal.App.3d 622, 627-628 (*Yokley*).) In *Yokley*, the Court of Appeal explained that a proceeding constitutes a continuation of the original action when the supplementary proceeding concerned "matters necessarily relevant and material to the issues involved in the [original] action." (*Id.* at p. 626, quoting *McClenny v. Superior Court* (1964) 60 Cal.2d 677, 684 (*McClenny*), italics omitted.) The Court of Appeal cited cases holding that a contempt proceeding is a continuation of the original domestic relations action (*McClenny*, *supra*, 60 Cal.2d at p. 681), a probation revocation hearing is a continuation of the original criminal trial (*People v. Rojas* (1963) 216 Cal.App.2d 819), and a retrial after reversal in a criminal case was a continuation of the original criminal proceeding (*Pappa v. Superior Court* (1960) 54 Cal.2d 350).

In *Yokley*, the court then explained that "[t]he factual issues to be resolved [in an order-to-show-cause proceeding] relate directly to the criminal proceeding and involve matters necessarily relevant and material to the issues involved in the original action, and thus constitute a continuation of the original action." (*Yokley*, *supra*, 108 Cal.App.3d at p. 628.) Since the judge in the order-to-show-cause proceeding had been the judge in the petitioner's criminal trial, the Court of Appeal did not permit the petitioner in *Yokley* to use section 170.6 to challenge the judge. (*Id.* at p. 627.) The court, however, did note in dictum that as long as a judge who had "never previously participated in the case was assigned to the case, a party who had not yet exercised a section 170.6 challenge could exercise it against the new judge." (*Ibid.*)

Although *Yokley* addressed the stage of a habeas corpus proceeding after an order to show cause has been issued, the stage at which a judge decides whether to issue an order to show cause also involves contested issues of law and fact. "A habeas corpus proceeding begins with the filing of a verified petition for a writ of habeas corpus" (*People v. Romero* (1994) 8 Cal.4th 728, 737

(*Romero*)) that "allege[s] unlawful restraint, name[s] the person by whom the petitioner is so restrained, and specif[ies] the facts on which [the petitioner] bases his claim that the restraint is unlawful." (*In re Lawler* (1979) 23 Cal.3d 190, 194; see Pen. Code, § 1474.) In reviewing a petition for a writ of habeas corpus, a court must determine whether the petition puts forward a prima facie case for relief by setting forth facts that, if true, would entitle a petitioner to relief, and whether the petitioner's claims are procedurally barred. (*Romero*, *supra*, 8 Cal.4th at p. 737.) If the petition either fails to state a prima facie case for relief or is procedurally barred, then the court may summarily deny it. (*Ibid.*) But if a habeas corpus petition "states a prima facie case on a claim that is not procedurally barred," then "the court is obligated by statute to issue a writ of habeas corpus." (*Ibid.*; Pen. Code, § 1476.) When the court is deciding whether or not it may issue a writ of habeas corpus, it is resolving a contested issue of law and fact – namely, whether a prima facie case for relief has been made by the petitioner.

Although this court has explained that "because of the dangers presented by judge-shopping – by either party – the limits on the

number and timing of challenges pursuant to this statute are vigorously enforced" (*Perrachi*, *supra*, 30 Cal.4th at p. 1263), petitioner contends that in his case the statute should be liberally construed "to effect its objects and to promote justice" (*Eagle Maint. & Supply Co. v. Superior Court* (1961) 196 Cal.App.2d 692, 695; see also § 4). First, the kind of abuse that this court was concerned about in *Jacobs* could not have occurred in petitioner's case because the judge who ruled on his habeas petition was different from the judges who presided over his two trials. The Honorable Allan J. Preckel presided over his trial in case number SCE185960. (Order Denying Petition for Writ of Habeas Corpus, August 7, 2013, p. 1.) And the Honorable Larrie R. Brainard presided over his trial in case number SCE188460. (Order Denying Petition for Writ of Habeas Coprus, August 7, 2013, p. 2.) The Honorable Judge M. Thompson ruled on petitioner's habeas petition.

Judge Thompson had no previous connection to either of petitioner's criminal jury trials. Therefore, petitioner could not have been judge shopping or otherwise trying to abuse his right to automatically disqualify Judge Thompson. Since petitioner had not

previously moved to disqualify any judge under section 170.6 in any of the earlier proceedings, he was entitled to move to disqualify Judge Thompson.

To deny petitioner his right to make a motion to disqualify Judge Thompson would undermine the purpose of section 170.6, which was designed to give parties the right to automatically disqualify a judge whom they perceived was biased against them. For many habeas petitioners, their petition presents their last and perhaps only chance to get their conviction overturned. A judge's ruling on whether or not a petition for habeas corpus states a prima facie case can be a dispositive motion. If the habeas petition is denied by a Superior Court judge, then the petitioner cannot file the same petition again in the Superior Court. (See *In re Clark* (1993) 5 Cal.4th 750, 774 ["repetitious successive habeas petitions are not permitted"].) It would be unfair to deny habeas petitioners their right to automatically disqualify a judge they believe is prejudiced against them.

Once a criminal defendant's trial or guilty plea has begun, the defendant has accepted the judge assigned to hear his or her case by not moving to disqualify the judge under section 170.6. Ordinarily,

when a convicted defendant files a habeas petition in the Superior Court, the judge who presided over the original proceeding will rule on the habeas petitioner, since "there is no judge better suited for making a determination of the issues raised in [a] petitioner's petition than the original trial judge." (*Yokley*, *supra*, 108 Cal.App.3d at p. 661.) But if the judge ruling on the habeas petition is different from the original trial judge, then the habeas petitioner has not yet accepted this judge and may believe the judge is prejudiced against him or her.

The substantial right conferred by section 170.6 on litigants can only be protected if this Court allows a habeas petitioner to automatically disqualify a judge assigned to rule on a habeas petition when that judge is different from the original trial judge. This rule would not be difficult to implement and would not waste judicial resources. Since in the vast majority of cases the same judge who presided over the original criminal trial would also rule on the habeas petition, the petitioner would not be allowed to move to disqualify the judge under section 170.6. Therefore, the court who assigns the habeas petition to the judge would not need to notify the petitioner of the judge who would be reviewing his petition. In the few instances,

like petitioner's case, where a judge who is different from original trial judge, however, the superior court clerk would need only to notify the petitioner of the name of the judge who would rule on his petition.

This would be an easy administrative matter. The court clerk could include the name of the judge with the file stamped petition returned to the petitioner. Without this notification, there would be no way for a habeas petition to know who was the judge reviewing his habeas petition.

In petitioner's case, since the clerk of the superior court never told petitioner the name of the judge presiding over his habeas petition despite his previous requests. Thus, he never had a chance to exercise his right to move to disqualify the judge who reviewed his petition in the Superior Court. By explaining that he would have filed a motion under section 170.6, challenging Judge Thompson, petitioner showed that he would have substantially complied with the requires of that statute, if he had been given the opportunity. Petitioner made his statement in his initial petition, which he filed with the Court of Appeal under oath, and in a declaration attached to

his petition. (Petition, 1-2 & Exhibit G.) Under the statute, the only requirements are timely submission of an oath or affidavit and a good faith belief that the judge is prejudiced against the party. (*Jacobs*, *supra*, 53 Cal.2d at p. 190; *McCartney*, *supra*, 12 Cal.3d at p. 513.)

CONCLUSION

For the reasons given above, section 170.6 permit a peremptory challenge to be asserted, before an order to show cause has issued, against a judge who is assigned to assess a petition for writ of habeas corpus if the judge is different from the original trial judge.

Dated: September 9, 2015

Respectfully Submitted,

Russell S. Babcock
Attorney for Petitioner MAAS

CERTIFICATION OF WORD COUNT

I certify that the word count of this computer-produced document, calculated in accordance with rule 8.520(c) of the California Rules of Court, does not exceed 14,000 words, and that the actual word count is 4,207 words, as calculated by the WordPerfect software in which it was written.

Date: September 9, 2015

Russell S. Babcock
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

(Cal. Rules of Court, rules 1.21, 8.50.)

(*Michael Eugene Maas v. Superior Court (People)*, No. S225109)

I, Russell S. Babcock, declare that: I am over the age of 18 years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California, where the mailing occurs; and my business address is 1901 First Avenue, Suite 138, San Diego, California 92101.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I caused to be served the following document(s): PETITIONER'S OPENING BRIEF ON THE MERITS by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

Court of Appeal
Fourth Appellate District, Div. 1
750 B. Street, Suite 300
San Diego, CA 92101

San Diego Superior Court
Hon. John M. Thompson
East County Courthouse
Department EC-12
250 E. Main Street
El Cajon, CA 92020

Michael Eugene Maas
Petitioner

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PROOF OF SERVICE BY ELECTRONIC SERVICE

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(*Michael Eugene Maas v. Superior Court (People)*, No. S225109)

Furthermore, I, Russell S. Babcock, declare I electronically served from my electronic service address of russbab@gmail.com the above-referenced document on September 9, 2015 to the following entities:

APPELLATE DEFENDERS INC,
eservice-criminal@adi-sandiego.com

ATTORNEY GENERAL'S OFFICE, adieservice@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 9, 2015

Server signature