IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, **Plaintiff and Respondent,** **v.** **LOUIS SANCHEZ EMANUEL,** **Defendant and Appellant.**	**Case No. S280551** **Court of Appeal No. H049147** **(Superior Court No. C1246799)**

APPELLANT'S REPLY TO ANSWER TO PETITION FOR REVIEW

On Appeal from a Judgment of the Superior Court of the State of California, County of Santa Clara Honorable Vanessa Zecher, Judge Presiding

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Under Appointment by the Court of Appeal
(Sixth District Appellate Program – Independent Case)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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THE PEOPLE, Plaintiff and Respondent, v. LOUIS SANCHEZ EMANUEL, Defendant and Appellant.	]]]]]]]]]	Case No. S280551 Court of Appeal No. H049147 (Santa Clara County Superior Ct. No. C1246799)

INTRODUCTION

Appellant Louis Emanuel left in the middle of an ongoing robbery when it became apparent that the victim, John Cody Sonenberg ("Cody"), did not plan to easily give up his property. (10 ORT 1078.) Not only did Emanuel leave; he also called on his accomplice, Jacob Whitley, to do the same. (10 ORT 1081.) Instead, Whitley remained behind and ended up fatally shooting Cody during a struggle. Emanuel, himself, did not possess any weapon or know that Whitley possessed one. (1 CT 198, 203-204.)

Despite these facts, both the trial court and Court of Appeal concluded that Emanuel did not do enough to prevent Whitley from shooting or to come to Cody's aid. The Court of Appeal even suggested that Emanuel should have tried to disarm Whitley. (Decision, p. 12.) Emanuel now seeks review so this Court may provide guidance on the type of intervention that a physically present aider and abettor should reasonably be expected to take in order to prevent a finding of reckless indifference.

Respondent asserts that review is unnecessary, as this Court has already provided guidance on the factors relevant to reckless indifference to human life. They further argue that there was substantial evidence of reckless indifference and that Emanuel's argument to the contrary rests on a defense-friendly version of the evidence rather than the version favorable to the judgment or found true by the trial court. As will be seen, it was actually the trial court's ruling – and the Court of Appeal's decision affirming it – which derived from speculation and unsupported inferences.

NECESSITY FOR REVIEW

I.

The facts shown by the undisputed evidence raise important questions about the circumstances in which physical presence is indicative of reckless indifference to human life.

Despite respondent's efforts to find conflicting evidence, the evidence at trial showed, quite definitively, that Emanuel walked away before the shooting while urging Whitley to do the same. Once Emanuel left, it was unclear where he went or what he remained in position to see or do. The undisputed facts, thus, raise substantial questions about the outer limits of the felony-murder doctrine as applied to unarmed aiders and abettors.

A. This Court has never addressed whether physical presence weighs in favor of reckless indifference when decoupled from any ability to restrain the crime or aid the victim, or when the aider and abettor does, in fact, try to restrain the crime.

Respondent characterizes Emanuel's case as a straightforward, fact-specific application of the multi-factor test for reckless indifference to human life set forth in *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), and further discussed in *In re Scoggins* (2020) 9 Cal.5th 667, 683 (*Scoggins*). (Answer, pp. 12-

15.) For this reason, respondent argues that this case implicates no unresolved issues of statewide importance. (Answer, p. 12.)

In *Clark*, this Court identified five factors relevant to assessing reckless indifference to human life. (*Clark*, *supra*, 63 Cal.4th at pp. 618-622.) The second of these factors was "Physical Presence at the Crime and Opportunities to Restrain the Crime and/or Aid the Victim." (*Id.* at p. 619, original capitalization.) Four years later, in *Scoggins*, this Court applied the *Clark* factors to a specific fact pattern. That fact pattern did not include the defendant's physical presence at the robbery scene, since the defendant in *Scoggins* waited at a nearby gas station while the robbery took place. (*Scoggins*, *supra*, 9 Cal.5th at pp. 671-672.)

This Court has never had occasion to provide guidance on the circumstances in which physical presence weighs in favor of a reckless indifference finding. Nor has it had any opportunity to address what it meant by the phrase "restrain the crime." (*Clark*, *supra*, 63 Cal.4th at p. 619.) For instance, must an on-the-scene aider and abettor physically intervene or try to disarm his accomplice in order to prevent a reckless indifference finding? Or is it enough that he, himself, opts out of the encounter or verbally encourages his accomplice to leave after the risk to human life escalates?

Respondent asserts that the decisions in *Clark* and *Scoggins*, as well as *People v. Banks* (2015) 61 Cal.4th 788, 804-807, already establish that reckless indifference requires more than just mere participation in the robbery. (Answer, pp. 6-7, 12, 14.) While that may be true, this Court's jurisprudence does not address the legal sufficiency of a reckless indifference finding based on presence at the scene, coupled with a failure (or perceived failure) to prevent the crime or aid the victim. That is the question presented in Emanuel's case.

Respondent argues that Emanuel's presence at the robbery scene was not the lone factor which gave rise to the reckless indifference finding. (Answer, p. 7.) However, the additional factors relied on by the Court of Appeal were that Emanuel did not adequately try "to minimize the risk of violence during the robbery" or come to Cody's aid afterwards. (Decision, p. 14.) Those are just different aspects of *Clark*'s second factor: "physical presence at the crime and opportunities to restrain the crime and/or aid the victim." (*Clark*, *supra*, 63 Cal.4th at p. 619, capitalization omitted.)

In point of fact, Emanuel did make efforts to restrain the crime. When Cody refused to part with his pound of marijuana, Emanuel urged Whitley to leave, then walked away from the ongoing robbery. (10 ORT 1078, 1081.) Emanuel is not aware of any published case which has found reckless indifference under such circumstances. As such, the decision highlights the need for this Court to provide further guidance about the significance of physical presence and about what a physically present aider and abettor should reasonably be expected to do to restrain an armed coparticipant or aid the victim.

The published case law reflects this need for guidance. This state's appellate courts have reached significantly different outcomes in cases where physical presence, plus inaction, were the primary factors advanced in support of a reckless indifference finding. At one end of the spectrum are a series of cases which found reckless indifference in this situation. (See *In re Loza* (2017) 10 Cal.App.5th 38, 53-55 (*Loza*); *In re McDowell* (2020) 55 Cal.App.5th 999, 1014-1015 (*McDowell*); *People v. Mitchell* (2022) 81 Cal.App.5th 575, 580 (*Mitchell*).) The courts in these cases gave examples of the kinds of actions the aider and abettor might have taken to prevent the crime or at least convey his desire not to participate. Such actions included fleeing the scene (*Mitchell*,

at p. 593), yelling at the accomplice to stop or demanding that they leave (*Loza*, at p. 54), or, at the very least, saying something to try "to deescalate the situation." (*McDowell*, at p. 1014.)

At the other end of the spectrum are cases like *In re Ramirez* (2019) 32 Cal.App.5th 384, 404-406, and *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987-989, which found no substantial evidence of reckless indifference despite the aider and abettor's presence at the scene and his knowledge that an accomplice had a gun. The divergence of appellate outcomes, despite relatively similar facts, shows considerable disagreement among this state's courts about the importance of physical presence and the expectations placed upon an aider and abettor. Although unpublished, the decision in Emanuel's case only adds to the existing muddle.

Emanuel actually did some of the very things which the courts in *Loza*, *McDowell*, and *Mitchell* faulted the defendants in those cases for not doing. Yet, the Court of Appeal expressed the view that Emanuel should have done more – such as distracting Whitley, making further attempts to persuade him to leave, or trying "to take the gun from Whitley." (Decision, p. 12.) During proceedings in the trial court, the prosecutor even argued that Emanuel should have tackled Whitley or "taken the bullet" himself. (Aug. RT 39.)

There was a reason that Senator Skinner, in her amicus letter to this Court, characterized Emanuel's case as "an exemplar as to why Senate Bill 1437 was needed." (Amicus Letter, p. 2.) If an unarmed aider and abettor were required to come to the victim's aid or physically intervene against an armed accomplice in order to prevent a finding of reckless indifference, almost no aider and abettor would ever escape such a finding. The effect would be to render Senate Bill No. 1437's reforms "meaningless" – creating a virtual per se rule that a physically

present aider and abettor is guilty of felony-murder. (Amicus Letter, p. 2.)

By granting review, this Court will be in position to provide much needed guidance about what it means for an aider and abettor to try to "restrain the crime" – thereby demonstrating he did not act with reckless indifference to human life. This Court should grant review to address this difficult and important question.

B. Respondent's substantial evidence analysis rests on the same unsupported speculation as the decisions of the trial court and Court of Appeal.

Respondent devotes most of their discussion to the argument that Emanuel's case for review rests on a mischaracterization of the facts. (Answer, p. 16.) For instance, respondent disputes Emanuel's assertion that he left the scene and urged Whitley to do the same. (Answer, p. 18 & fn. 7.) They also dispute Emanuel's claims about the timing of his departure and whether the evidence showed he was in position to see the ongoing struggle between Cody and Whitley and the fact that Cody had been badly injured. (Answer, pp. 16-18.)

Respondent correctly points out that an appellate court must view the facts "in the light most favorable to the judgment." (Answer, p. 15, citing *People v. Ramirez* (2022) 13 Cal.5th 997, 1117.) That means drawing all inferences, and resolving all conflicts in the evidence, in favor of the prevailing party – in this case, the prosecution. (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 330.) Respondent accuses Emanuel of ignoring this standard and instead construing all facts in the light most favorable to Emanuel, himself. (Answer, pp. 14-15.) Quite conversely, the facts recited in Emanuel's petition for review derive from the only description of the robbery presented at trial: the description which Emanuel and Whitley gave to Breanna Santos, and which Santos subsequently related to the police.

1. The undisputed evidence established that Emanuel left, and told Whitley to leave, before Whitley struck Cody with the gun and shot him.

In its order denying Emanuel's petition, the trial court made only passing mention of the evidence that Emanuel told Whitley to leave the scene. (1 CT 207.) The trial court then quickly dismissed the significance of this evidence – calling it "unclear" whether Emanuel made this statement "before or after the shooting occurred." (1 CT 207.) Contrary to the trial court's belief, the evidence unambiguously showed that Emanuel told Whitley to leave before the latter struck Cody with the gun and shot him.

There were only three eyewitnesses to the Cherry Park robbery: Emanuel, Whitley, and Cody. None of them testified at trial. The sole evidence about how the robbery unfolded came from Emanuel and Whitley's statements to Santos, which Santos later revealed to Sergeant Stewart Davies. (10 ORT 1077-1081.) Santos initially told Davies that Emanuel left when he saw Cody did not want to give up the marijuana. (10 ORT 1078.) Santos then added that, "when [Emanuel] was walking away, Jacob hit [Cody]," and later shot him. (10 ORT 1078.)

After Santos's initial account, Davies asked her to repeat what Emanuel and Whitley had told her. This time, Santos stated:

> [Cody] was trying – wasn't trying to give it up. So I (Emanuel) just told Jacob, let's go, but he wouldn't come on. He wouldn't let – he wouldn't like, you know, let go, so Jacob hit him with the gun. And Jacob said he hit him on the head with the gun . . . The guy started fighting back and Jacob pointed the gun. And Jacob said he pointing the gun down, he was trying to aim down, but the guy hit his hand, it went up and Jacob pulled the trigger and he said he shot him in his neck.

(10 ORT 1080-1081.)

Santos's two statements left no serious doubt that Emanuel walked away before Whitley bludgeoned Cody with the gun – let alone shot him. Santos's statements also made clear that, at the same time he walked away, Emanuel told Whitley, "let's go." (10 ORT 1081.) Respondent nonetheless finds it significant that Santos was Emanuel's "on and off" girlfriend. (Answer, p. 18, fn. 7; see 8 RT 750-751.) In light of this bias, they argue that the trial court could reasonably have rejected the exculpatory parts of her statement and found that Emanuel never urged Whitley to leave at all – or that, if he did, he did so only after the shooting had occurred. (Answer, p. 18, fn. 7.)

The problem with respondent's argument is that there was no other evidence in the record to refute any aspect of Santos's account. It is, of course, true that a factfinder "may accept as true a portion of the testimony of a witness and disbelieve the remainder." (*People v. Crooker* (1956) 47 Cal.2d 348, 355.) But a fact-finder may not speculate about possible scenarios which have no basis in evidence. And there was no basis in evidence for concluding that Emanuel never left the scene or instructed Whitley to leave. Likewise, there was no evidence to suggest that Emanuel did do these things but only after the shooting.

In *People v. Sanford* (2017) 11 Cal.App.5th 84, 85-86 (*Sanford*), the Court of Appeal reversed a robbery conviction for lack of substantial evidence. The court noted that the only path to finding substantial evidence was to find that the jury reasonably rejected a witness's claim that she could not identify the getaway car's occupants. (*Id.* at p. 95.) The court characterized this line of reasoning as "dubious" and declined to employ it. (*Ibid.*)

Respondent relies on the same "dubious" line of reasoning which the *Sanford* court rejected. (*Sanford*, *supra*, 11 Cal.App.5th at p. 95.) To find substantial evidence that Emanuel left after the shooting – or that the timing of his departure was unclear –

would require this Court to presume that the trial court rejected the sole evidence presented on the point. While the substantial evidence standard is deferential, it does not permit the trial court to affirmatively misread the record and inject ambiguity or contradictory evidence where none exists. Yet, that is exactly what the trial court did when it found a lack of clarity about whether Emanuel left before or after the shooting. (1 CT 207.) And it is exactly what respondent does now by asking this Court to defer to that erroneous and unsupported finding. (Answer, pp. 18-19 & fn. 7.)

"[T]he absence of evidence is not evidence." (*People v. Thomas* (1992) 2 Cal.4th 489, 552 [dis. opn. of Mosk, J.].) To treat it as such would shift the burden to the accused to prove his innocence. (*Thompson v. Sullivan* (10th Cir. 1993) 987 F.2d 1482, 1491.) Here, the prosecution presented no other account of the Cherry Park robbery except the one which Emanuel and Whitley told to Santos. The prosecution used that account at trial to convict both defendants of felony-murder. They used it again at the Penal Code section 1172.6 proceedings to prove Emanuel's presence at the robbery scene. Yet, that same statement also showed that Emanuel urged Whitley to leave before the bludgeoning and shooting. The evidence provided no basis for finding otherwise.

2. The prosecution presented no evidence to suggest that, after he left the scene, Emanuel remained in position to see and intervene in the ongoing struggle or see that Cody had been shot.

Respondent next argues that the Court of Appeal correctly found substantial evidence to support the trial court's finding of reckless indifference to human life. (Answer, p. 15.)

The trial court based its reckless indifference finding on its belief that Emanuel: (1) saw Whitley pull out the gun and hit Cody with it (1 CT 205-206); (2) saw Cody fight back against

Whitley (1 CT 206); (3) knew Cody had been shot and was badly injured (1 CT 210); and (4) remained close enough to the shooting scene to intervene or render aid to Cody. (1 CT 206, 209.) Respondent portrays the trial court's findings as reasonable inferences based on substantial evidence. (Answer, pp. 18-20.) Emanuel disagrees.

Respondent's argument confuses reasonable inference with outright speculation. To indulge all inferences in favor of the judgment does not mean speculating about possible scenarios in the face of a silent evidentiary record. (*People v. Morris* (1988) 46 Cal.3d 1, 21.) The courts of this state – including this one – have rigorously applied this principle when conducting substantial evidence review of reckless indifference findings. (See, e.g., *Clark*, *supra*, 63 Cal.4th at pp. 619-620 [no reckless indifference where there was no evidence about defendant's ability to see or prevent the shooting]; *Scoggins*, *supra*, 9 Cal.5th at p. 678 [shooting took place behind a van, making it unlikely the defendant could have seen it]; *People v. Ramirez*, *supra*, 71 Cal.App.5th at p. 989 [physically present defendant had no meaningful opportunity to intervene where he was standing on one side of a vehicle and the shooting took place on the other].)

Here, Santos's statement to Sergeant Davies provided no information about where Emanuel went, how far away he walked, or what he was in position to see after he left the robbery scene. It also provided no way to tell whether Whitley had already pulled out the gun at the time of Emanuel's departure. Despite these gaps in the evidence, the trial court found that Emanuel's statements to Santos "indicate that he observed Whitley hit Cody on the head with the gun and saw Cody start fighting back before Whitley pointed the gun at Cody and shot him in the neck." (1 CT 206.) The trial court concluded that these events provided "at

least a minimal period of time in which [Emanuel] was aware of the gun," but failed to intervene. (1 CT 206.)

The Court of Appeal engaged in similar speculation – stating that Emanuel had "a brief window of opportunity" to try to deescalate the situation after the struggle between Whitley and Cody broke out and Whitley produced a gun. (Decision, p. 13.) The Court of Appeal's statement rested on the implicit assumption that Emanuel saw Whitley produce the gun and saw his ensuing struggle with Cody. In actuality, there was no evidence which spoke to either point.

Respondent views the trial court's findings as reasonable inferences based on Emanuel's conflicting statements to Santos. (Answer, pp. 17-20.) As evidence of these conflicting statements, respondent takes portions of Emanuel's statements out of context, then concludes that these out-of-context statements established his ability to see the ongoing events even after he walked away.

For example, as evidence that Emanuel saw Whitley bludgeon Cody, respondent points to several isolated statements which Emanuel made to Santos. In one statement, he said that Cody "wasn't trying to give it up," so Whitley "hit him with the gun." (Answer, pp. 16, 23, citing 10 ORT 1078, 1081.) Yet, respondent fails to mention that, immediately after the latter statement, Emanuel added, "And Jacob said he hit him on the head with the gun." (10 ORT 1081.) Elsewhere in the same conversation, Emanuel said of the bludgeoning, "I guess when [Whitley] hit him, he didn't, I guess, get knocked out." (10 ORT 1078.) Such comments suggest that Emanuel was basing his description of the struggle on what Whitley had told him about it after the fact.

Respondent also seizes on Emanuel's statement that "the guy started fighting back and [Whitley] pointed the gun." (Answer, p. 16, citing 10 ORT 1081.) Again, respondent neglects

to mention that, in the very next sentence, Emanuel stated, "And Jacob said he pointing the gun down." (10 ORT 1081.)

"Not every surface conflict of evidence remains substantial in the light of other facts." (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) By repeatedly using the phrase "Jacob said," and prefacing other comments with the phrase "I guess" (10 ORT 1078), Emanuel let it be known that a good deal of what he was describing was not based on personal observation. The prosecution presented no evidence to show or suggest otherwise. If anything, the only inference supported by the remaining evidence was that Emanuel would not have seen the ongoing struggle between Whitley and Cody since it took place inside Cody's truck. (5 ORT 369; 6 ORT 461-462.)

Respondent acknowledges that Emanuel used the phrase "Jacob said" on three different occasions while speaking with Santos.[1] (Answer, p. 22 & fn. 8; see 10 ORT 1078, 1081.) However, they contend that, elsewhere in his statement, Emanuel described the incident without citing Whitley as the source of his information. (Answer, pp. 22-23.) In this regard, respondent points to Emanuel's comments that, "The dude [Cody] was trying – wasn't trying to give it up. So I told [Whitley], let's go, but he wouldn't come on. He wouldn't let go, so [Whitley] hit him with the gun." (Answer, p. 23; 10 ORT 1081.) But, once again, respondent fails to include Emanuel's very next sentence: "And Jacob said he hit him on the head with the gun." (10 ORT 1081.)

Moreover, the first two sentences in the above quoted passage **were** based on personal knowledge, as Emanuel had not yet left when Cody "wasn't trying to give it up" and when

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[1] In addition to the three occasions mentioned by respondent, Emanuel also once used the phrase "he said" when describing the actual shooting. (10 ORT 1081.)

Emanuel told Whitley, "let's go." (10 ORT 1081.) Hence, it is unsurprising that Emanuel chose not to qualify those two sentences with the phrase, "Jacob said." Indeed, his failure to use this phrase only shows that Emanuel took care to specify which events he saw and which ones he heard about from Whitley. Such specificity only further erodes any basis for inferring that he personally observed the struggle between Cody and Whitley.

Besides, even if Emanuel did see the escalating violence, he demonstrated his unwillingness to participate in that violence by walking away and calling on Whitley to do the same. (10 ORT 1078, 1081.) Even cases like *Loza* and *Mitchell* have implied that such actions would be sufficient to defeat a claim of reckless indifference to human life. (*Loza*, *supra*, 10 Cal.App.5th at p. 54; *Mitchell*, *supra*, 81 Cal.App.5th at p. 593.) Other cases, like *People v. Keel* (2022) 84 Cal.App.5th 546, 560, and *In re Ramirez*, *supra*, 32 Cal.App.5th at p. 404, have been even more emphatic – holding that, when the shooting arises quickly or in response to unexpected resistance, it is not reasonable to expect intervention from an aider and abettor.

Finally, respondent places considerable significance on Emanuel's after-the-fact conduct. (Answer, pp. 26-28.) Such conduct included failing to check on Cody's well-being, leaving the scene with Whitley, getting rid of the evidence, cutting his hair, and encouraging Santos to lie to the police. (Answer, pp. 26-27; see Decision, pp. 6-7.)

Disposing of evidence, changing one's appearance, and telling a witness to lie all demonstrate "consciousness of guilt and constitute[] an implied admission." (*People v. Perry* (1972) 7 Cal.3d 756, 771-772.) But that implied admission encompassed the mere fact of Cody's death. It said nothing about whether Emanuel possessed the now-required mental state of reckless indifference. (See *United States v. Myers* (5th Cir. 1977) 550 F.2d

1036, 1050 [recognizing that consciousness of guilt does not mean consciousness of guilt of the specific crime charged].)

Moreover, numerous cases, including *Clark*, have found insufficient evidence of reckless indifference despite the defendant's failure to aid the victim. (*Clark*, *supra*, 63 Cal.4th at pp. 536-537, 623; see also *In re Bennett* (2018) 26 Cal.App.5th 1002, 1024, 1026; *In re Ramirez*, *supra*, 32 Cal.App.5th at pp. 390, 406; *In re Taylor* (2019) 34 Cal.App.5th 543, 559-561; *People v. Ramirez*, *supra*, 71 Cal.App.5th at pp. 987, 989.) The holdings in these cases implicitly recognized that, however admirable it might be for a robbery participant to come to the aid of an ailing victim, it would also be exceedingly rare. If the failure to give such aid were a substantial factor in the reckless indifference analysis, almost no aider and abettor would escape felony-murder liability – as pointed out in Senator Skinner's amicus letter. (Amicus letter, p. 2.)

Viewed in the light most favorable to the judgment, the evidence in this case fell far short of that needed to show reckless indifference to human life. This Court should grant review to address the important questions which this case presents regarding the outer limits of felony-murder liability for unarmed aiders and abettors like Emanuel.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in Emanuel's petition for review, this Court should grant review in this matter.

DATED: August 18, 2023

Respectfully Submitted,

/s/ Solomon Wollack
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Louis Sanchez Emanuel

WORD COUNT CERTIFICATE
(Cal. Rules of Court, rule 8.504(d)(1))

I Solomon Wollack, appointed counsel for Louis Sanchez Emanuel, hereby certify, pursuant to rule 8.504(d)(1) of the California Rules of Court, that I prepared the foregoing petition for review on behalf of my client, and that the word count for this petition is 4,099 words, which does not include the tables, the Court of Appeal's opinion, or this certificate. The petition therefore complies with rule 8.504(d)(1), which limits a petition for review to 4,200 words. I certify that I prepared this document in Wordperfect 21 and that this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Pleasant Hill, California on this 18th day of August, 2023.

By: /s/ Solomon Wollack
Solomon Wollack

PROOF OF SERVICE

I, SOLOMON WOLLACK, declare that I am over the age of 18, an active member of the State Bar of California, and not a party to this action. My business address is P.O. Box 23933, Pleasant Hill, California 94523. On the date shown below, I served the within:

APPELLANT'S REPLY TO ANSWER TO PETITION FOR REVIEW

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__X__ **BY MAIL** – Placing a true copy of the foregoing, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pleasant Hill, California, addressed to:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 18th day of August, 2023 at Pleasant Hill, California.

/s/ Solomon Wollack