SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DAVID ESCO WELCH, On Habeas Corpus.	**CAPITAL CASE** S107782 [Former related appeal S011323]

Alameda County Superior Court No. 90396
Hon. Stanley Golde, Judge

RETURN ON ORDER TO SHOW CAUSE

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DEATH PENALTY

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **DAVID ESCO WELCH,** On Habeas Corpus.	**CAPITAL CASE** S107782

COMES NOW the Director of the Department of Corrections and Rehabilitation to state in return to the order to show cause issued on November 16, 2005, as follows:

I.

In the early morning hours of December 8, 1986, petitioner David Esco Welch shot and killed Sean Mabrey, Darnell Mabrey, sixteen-year-old Dellane Mabrey and her two-year-old daughter Valencia Morgan, Cathy Walker and her four-year-old son Dwayne Miller. He shot and wounded Dellane's nine-month-old son, Dexter Mabrey, whom he incorrectly believed to be his son. Petitioner shot Leslie Morgan, the father of Dexter and Valencia, and left him for dead. Leslie Morgan testified about petitioner's room-to-room search for members of the Mabrey family, whom he had been threatening to kill all day and terrorizing for months. Two members of the family escaped before petitioner got to their rooms. Petitioner was hunting for Barbara Mabrey, the mother of Sean, Darnell and Dellane, muttering "where is the bitch at?" She had been scheduled to testify for the People at a preliminary hearing set for the following day. She incurred petitioner's wrath and threats upon her family when she confirmed hours before the killings that she would be appearing at the preliminary hearing. Barbara Mabrey ran out the back door when the shooting started and called police from her neighbor's house to report that petitioner was killing her family.

Barbara's son Stacey Mabrey hid in a closet and also survived to testify about the night his siblings, guests, and niece were murdered. Because of the threats, the family house was being observed by an Oakland Police patrol unit that night. Petitioner, watching the house and the police surveillance from further up the hill, moved in at change of shift to follow through on his threats. He was arrested at the home of his cousin shortly after the murders, after a standoff with police. He had used his cousin's fireplace to destroy evidence, including his clothing. (See generally, *People v. Welch* (1999) 20 Cal.4th 701, 722-725.)

Petitioner, whose street name is "Moochie," insisted on being the first defense witness. He testified that he did not kill the Mabreys or their guests, because they were not worth the trouble, and that Dellane's desperate screams of "no Moochie, don't" were explained by the commonness of the nickname "Moochie" in Oakland. Clearly the family he acknowledged having some problems with, including the night before the murders, was killed in the early morning hours by some other "Moochie." Petitioner asserted he could prove he was not at the Mabrey home at the time of the killings and explain the injuries he incurred, but was prevented from doing so by the code of the streets. He was an important man in Oakland. He was proud of being a good shot in a dangerous town. He sold drugs and guns, but only to cool people. He testified that he knew that as an ex-felon he was not supposed to possess weapons, but did so anyway. Even if guns were completely banned he would find a way to have access to weapons. He kept guns around wherever he might be, including several Uzis, but not the Uzi that killed the Mabrey family. The murder weapon was recovered at his cousin's house when he was arrested, wrapped in a pillow case, and spattered with Leslie Morgan's blood.

The defense presented evidence that petitioner had alcohol, cocaine and morphine (a heroin metabolite) in his urine. Two medical experts explained the possible effects of this combination of depressant and stimulant substances on

motor skills and mental functioning, even at low doses. One of them noted that sleep deprivation would have an additional deleterious effect on thought processing. (RT 5158-5159, 5342, 5347-5355, 5389-5404.) Additional witnesses, familiar with petitioner, testified that he used drugs and alcohol and behaved impulsively when he did so. (*People v. Welch, supra,* 20 Cal.4th at pp. 724-725.)

At the penalty phase, the people proved three prior convictions and twelve additional episodes of violent criminal conduct. *(People v. Welch, supra,* 20 Cal.4th at pp. 725-727.) Petitioner specifically requested that no mitigating evidence be put on. (RT 5916-5917.) Petitioner's family was unwilling to meet with, or petitioner was unwilling to have his family members meet with, defense counsel or defense investigators to discuss family social history. (See RT [11/08/1988] 37-38, 48-49; see also Resp. Exh. C.) Nevertheless, defense counsel presented two witnesses in mitigation. In preparation for his testimony and in order to develop a diagnosis, psychologist William Pierce, PhD., interviewed petitioner and reviewed the extensive social history information the defense team had gathered, including prison and juvenile court records, probation reports, transcripts of judicial proceedings, hospital records, school records and other materials. (RT 5930-5936, 5941-5943, 5966-5967, 5989; CT 2494.) Dr. Samuel Benson, Jr., M.D., a psychiatrist, also interviewed petitioner and reviewed the social history information to diagnose and explain the behavior of petitioner. (RT 6009-6015, 6043.) On direct examination, both mental health professionals diagnosed petitioner with personality disorders affecting his ability to conform his conduct to the law. (RT 5937, 5971-5973, 6010-6015, 6043, 6083.) Dr. Pierce also made an axis I diagnosis of delusional paranoid disorder combined with psychoactive substance disorder and found some indications of paranoid schizophrenia. (RT 5937.) On cross-examination, both mental health

professionals agreed that petitioner was fully aware that he was killing the Mabreys, intended to kill the Mabreys, and knew all along that killing his victims was against the law. Petitioner lacks self-control. (RT 5996-5999, 6092-6099.) (See generally, *People v. Welch, supra,* 20 Cal.4th at pp. 727-728.)

II.

Petitioner was convicted of six special-circumstance murders, two attempted murders, and possession of a firearm by an ex-felon. He was sentenced to death on July 25, 1989. (*People v. Welch, supra*, 20 Cal.4th at p. 721.)

III.

Petitioner's conviction and sentence were affirmed by this Court in 1999. (*People v. Welch, supra*, 20 Cal.4th at p. 721.) Such judgment constitutes the authority and cause for petitioner's restraint in the custody of respondent at the California State Prison, San Quentin, California.

IV.

Petitioner alleges, *inter alia*, that the jury committed misconduct by receiving extrajudicial information from the bailiff (claim 6) and that his trial counsel were ineffective for failing to investigate and present social history information (claim 18). Specifically, he asserts that the bailiff communicated to the jury that petitioner urinated in the stairwell leading to court, that petitioner was violent, and that petitioner had threatened witnesses. He further alleges that the jurors and the bailiff were on too familiar terms. On the claim of ineffective assistance of counsel, petitioner alleges that counsel failed to interview "former teachers, friends, relatives, neighbors," or court personnel and did not obtain housing records for an apartment in which petitioner briefly lived. On November 16, 2005, this Court issued an order to show cause why the relief prayed for should not be granted on these two grounds.

V.

The jury did not commit misconduct. Moreover, if any misconduct occurred as alleged, it could not have been prejudicial. It is improper for a juror to receive significant evidence outside of court about a pending case. (*In re Carpenter* (1995) 9 Cal.4th 634, 647.) Juror misconduct raises a presumption of prejudice that may be rebutted by proof that no prejudice occurred "or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]." (*In re Hitchings* (1993) 6 Cal.4th 97, 119; but see *Smith v. Phillips* (1982) 455 U.S. 209, 217 [the defendant bears the burden of establishing not only juror misconduct but prejudice when pursuing a collateral attack on his judgment].) The relevant question is whether the exposure to the extrinsic evidence so infected the proceedings with unfairness that the conviction was a denial of due process. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 129 L.Ed.2d 1, 13.) Assuming that the jurors followed the trial court's instructions to consider only the evidence developed at trial (*Richardson v. Marsh* (1987) 481 U.S. 200, 206-207), then such evidence should have had little – if any – effect on their deliberations. (Paraphrasing *Romano v. Oklahoma, supra,* 129 L.Ed.2d at pp. 13-14.) Welch ultimately offered the information about inappropriate urination at the penalty phase, as evidence that he acts impulsively and lacked appropriate control mechanisms.

This Court has acknowledged the ease with which bailiffs can be charged with misconduct, and the need to give them the benefit of the doubt. "Bailiffs have innumerable contacts with deliberating juries any of which offers the opportunity for an untoward comment. The mere potential for impropriety, however, cannot sustain an inference of misconduct. As officers of the court, bailiffs must be presumed to act in accordance with their sworn duty to keep the jury insulated from all extraneous influences, including their own. (Evid. Code,

§ 664; see *People v. Napolitano* (1959) 175 Cal.App.2d 477, 480; cf. *Rushen v. Spain, [(1983)]* 464 U.S. [114] at pp. 118-119.)" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 67.) By failing to establish impropriety, since the subject matters of the alleged misconduct were abundantly clear to anyone paying attention in court (the smell of the urine, the fact that the entire Mabrey family had been threatened with death and torture for months before petitioner made good on his threats), and because all parties are subject to a presumption of performance of duty, petitioner has not alleged facts sufficient to charge the jurors (or the bailiff) with misconduct.

Additional evidence is available to show that the bailiff and back-up bailiff protected the jurors from extraneous influences, including their own.

The declaration from Alameda County Sheriff Deputy John Dimsdale, the courtroom bailiff for the Welch trial, explains that the jurors were scrupulously protected from outside influences and in particular that the bailiffs did not, and could not have, provided the extraneous information alleged to have been provided in claim 18. He explains his duties to keep the courtroom safe, including the jury and all participants and to protect the jury from outside influences. He specifically denies that he provided outside information to any juror or alternate. He explains he would not have permitted the jurors to discuss outside information or to discuss the case outside of deliberations. He further explains the procedures for moving defendant Welch to and from the courtroom and the way taken by the unescorted jurors, showing that no bailiff would have been with the jurors to identify the source of any urine smell they may have encountered in the stairwell. Neither the bailiff nor the back-up officer ate with the jurors. There was no baby shower for the bailiff's wife. None of the jurors reported feeling threatened during the trial. Had any juror reported feeling threatened procedures were available to escort them. (Exh. A.) Further, the accuracy and truthfulness of the declarations is in serious doubt.

Alternate jurors did not deliberate, and yet alternate juror Wells claims first-hand knowledge of matters occurring during deliberations. (Pet. Exh. 35, p.2.) The declaration from Alameda County Sheriff Sergeant Herbert Walters, Jr., the back-up officer in Judge Golde's courtroom during the Welch trial, further confirms that although juror's may have reached their own conclusions about the source of a urine smell in the stairwell, they were not informed by the bailiff or backup officer about the source of the smell. He denies revealing or discussing any outside information to jurors. (Exh. B.) Both the bailiff and the back-up officer describe how Judge Golde immediately handled courtroom outbursts and any concerns jurors expressed about their safety. Neither the bailiff nor the back-up officer provided information to the jury or alternates about where witnesses lived. (Exh. A & B.)

VI.

Defense counsel were not ineffective. The burden is on petitioner to establish that, under the circumstances, counsel's acts or omissions were outside the wide range of reasonably competent professional assistance and that the error or omission deprived petitioner of a trial whose result is reliable, that is, it is reasonably likely that absent the error the outcome of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) The reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Id.* at p. 689.) "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (*Id.* at pp. 690-691.) Defense counsel's obligation is "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*Id.* at p. 691.)

Extensive social history information was collected and analyzed by the defense team and provided to the mental health experts who testified at trial. (RT 5930-5936, 5941-5943, 5966-5967, 5989.) Indeed almost every relevant detail asserted in the petition was acquired by the defense investigators in advance of trial. The declaration from petitioner's aunt, Sarah Perrine, was not available at trial, because petitioner did not want his family members participating in a social history investigation. (RT [11/08/1988] 37-38, 48-49.) While these documents were provided to the psychiatric experts and informed their penalty phase testimony, very few of them were placed directly in evidence for obvious tactical reasons, because each document contained evidence that strongly supported the prosecution theory that petitioner knew right from wrong, knew that killing the Mabreys was wrong and against the law, and failed to exercise the self-control necessary to avoid committing criminal acts. For example, the school records obtained by trial counsel (CT 2494) are included in the exhibits to the petition (Pet. Exh. 112) and show petitioner was capable of A-quality work in the subjects that interested him, like reading, drama, and art, but exhibited self-control problems and became stubborn at times. These records were the subject of penalty phase testimony and informed the mental health professional's diagnoses, but also their conclusions that Welch knew right from wrong. His juvenile and probation reports, also obtained by trial counsel, provide extensive family history, and establish petitioner has "average intelligence," "is not psychotic," and has the ability to abide by the rules in juvenile hall, given the incentive to avoid a CYA commitment, but is violent and lacks self-control when he is not getting what he wants. (Exh. D, Commitment to the Youth Authority, with social reports, is provided to the Court under seal.) The adult probation report further supports the theory and predicts, as Dr. Pierce, informed the jury, that "[petitioner] will kill someone some day." (RT 5989.) Further investigation into the social history of the

family was curtailed by petitioner, who preferred to think of himself as dangerous and important, rather than crazy, and forbid his family members from talking to defense counsel. (Exh. C.) The social history investigation was reasonably thorough. Counsel made reasonable decisions about how much investigation to undertake, especially given the control exercised by their client over his family members, and about how to use the extensive information gathered.

VII.

Except as otherwise indicated, respondent denies each and every allegation of the petition, denies that petitioner's confinement is in any way illegal, and denies that petitioner's rights have been violated in any respect.

VIII.

If petitioner disputes the material facts asserted in this return, a referee should be appointed and an evidentiary hearing held to resolve any conflict thus created.

IX.

Respondent incorporates by reference Exhibits A through C, appended to this return, and Exhibit D, filed separately under seal.

WHEREFORE, it is respectfully submitted that the petition for writ of habeas corpus should be denied and the order to show cause discharged, unless petitioner disputes any material assertion contained herein. If petitioner does deny any material fact asserted herein, a referee should be appointed and an evidentiary hearing should be convened to resolve such disputed fact or facts, after which the petition for writ of habeas corpus should be denied and the order to show cause denied.

Dated: February 16, 2006

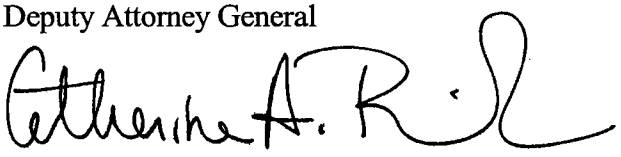
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

BRUCE ORTEGA
Deputy Attorney General



CATHERINE A. RIVLIN
Supervising Deputy Attorney General

Attorneys for Respondent

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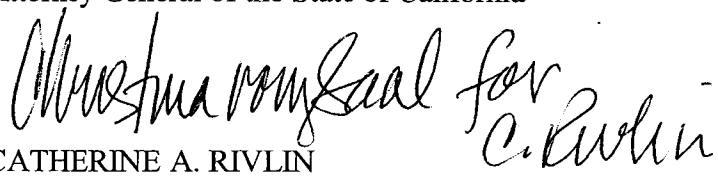
CERTIFICATE OF COMPLIANCE

I certify that the attached RETURN ON ORDER TO SHOW CAUSE uses a 13 point Times New Roman font and contains 2,648 words.

Dated: February 16, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



CATHERINE A. RIVLIN
Supervising Deputy Attorney General

Attorneys for Respondent

EXHIBIT A

Declaration of Alameda County Sheriff Deputy John Dimsdale

I, John Dimsdale, do declare that I am over the age of 18, and if called to testify would testify under oath as follows:

For seven months in 1989, I served as the courtroom bailiff for Judge Golde's court during the murder trial of David Esco Welch. My duties included: keeping the courtroom safe; protecting the safety of the judge, the jury, and all participants, including Mr. Welch; maintaining the fairness of the trial by protecting the jury from any outside influences; providing lunch to the jury; providing security and transportation for the jurors to, during, and from any lunches provided at restaurants; providing secure transportation for Mr. Welch between the jail and court and when he was taken for medical appointments; bringing to the judge's immediate attention any questions or concerns of the jury; and enforcing the judge's constantly repeated admonition to the jurors and alternates not to discuss the case until it was finally submitted to the jurors for a decision.

I never discussed newspaper articles about the case, or any information about the case, with any jurors or alternates. I never heard any jurors discussing newspaper articles or press coverage of the case. I never had discussions with others about the case in front of any jurors or alternates. I never heard the jury discussing and I never participated in any discussions with the jury about Mr. Welch's clothing.

I did not provide any juror or alternate any information about Mr. Welch. I did not tell any juror or alternate that witnesses had been threatened or that any witness was in danger. I did not discuss with any juror or alternate where any witnesses lived. I did not hear any jurors discussing where Barbara Mabrey lived.

The procedure for getting Mr. Welch and the jurors to the court room was worked out in advance and followed to the letter each day. I waited for Mr. Welch to enter the court room from the stairwell in shackles. Once I admitted him to the courtroom, I removed his shackles. I remained with Mr. Welch. When it was time for the jury to come down, I radioed the deputy on the 6th Floor to unlock the door and allow the jurors to walk down the stairs to the courtroom. The jurors came down the stairs unaccompanied. There were many appearances in the courtroom before trial started each day that involved prisoners from the jail. One or more of them, possibly including Mr. Welch, may have urinated in the stairwell on the way to or from the jail. This would have been evident to the jurors from the smell.

Judge Golde reminded the jurors and alternates at every break not to read about or hear about the case, and not to discuss the case until it was finally submitted to the jurors for decision.

On the few occasions when the jurors were taken to lunch at a restaurant that was not walking distance from the court, two bailiffs would transport and accompany them and get them set up at a table. The bailiffs sat at a separate table, near enough to keep the jurors isolated from

outside contacts. We (the bailiffs) did not participate in the conversation at the jurors' lunch table, although we could hear some of it. I never heard jurors and alternates discussing the case over lunch or at any other time during the evidence portion of the case.

Although my wife was pregnant during this period, and I probably mentioned that fact to the jurors, it is not true that the jurors threw my family a baby shower. My wife never met the jurors and never was provided a baby shower by the jurors.

No juror or alternate ever reported feeling threatened by Mr. Welch. Threats to jurors were taken extremely seriously by Judge Golde. If I had ever heard a juror assert that they were feeling threatened I would have insisted that the concern be put in writing and would have taken it immediately to Judge Golde. Judge Golde would have interviewed any juror who reported feeling threatened and all the other jurors and alternates about whether they felt threatened. That is how Judge Golde handled this kind of juror concern in an earlier case when I was also serving as his court room bailiff.

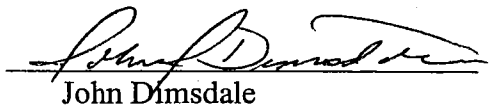
Judge Golde also took court room outbursts very seriously. There was only one such outburst that I recall in this case. Judge Golde told the spectators that anyone making an outburst or even a distracting gesture would be permanently barred from the courtroom. There were no further outbursts. The jury was told to disregard the outburst.

If any juror or jurors had requested an escort to the parking lot, I or another bailiff would have accompanied him, her or them. Part of our job is to protect the jurors and make them feel safe during their jury service. Walking jurors to the parking lot in the evening is done routinely.

The alternate jurors did not participate in deliberations.

At one time I transported Mr. Welch to a hospital in Oakland for an MRI the court ordered at the request of defense counsel as part of their investigation into whether Mr. Welch had any brain damage.

Executed January 3, 2006, in Oakland, Alameda County, California, under penalty of perjury.



John Dimsdale

EXHIBIT B

Declaration of Sgt. Herbert Walters, Jr.:

My name is Herbert Walters, Jr. I am now an Alameda County Sheriff Sergeant. In 1989, I was a Deputy Sheriff and the assigned backup officer to courtroom bailiff John Dimsdale for the murder case of People v. David (Moochie)Welch in Department 9, at the Alameda County Courthouse. If called to testify, I would make the following statements under oath.

In my career as a courtroom bailiff, I have never allowed an alternate juror to participate in deliberations.

Judge Golde heard large morning calendars in Department 9 before the Welch trial got underway for the rest of the day. If anyone had urinated in the stairwell during the morning calendar, or if Welch had done so before the jury was called down, an attempt would have been made to clean up, but a smell might have remained. I never said, nor did I hear anyone tell a juror that Moochie Welch urinated in the stairwell.

I do not remember any courtroom outbursts from witnesses or the audience. In particular I do not recall hearing the phrase: "The jury's going to make you fry" or anything like that. If any such outburst had occurred, Judge Golde would have told the person making the outburst to stop and would have warned them that the next time they made such a statement they would be removed permanently from the courtroom.

If any juror ever told me that they felt threatened by the defendant, I would have immediately told Deputy Dimsdale about it, since he was the Department 9 assigned bailiff. We would both immediately have gone into chambers to report it to Judge Golde.

I do not recall any jurors ever giving a baby shower to Deputy Dimsdale.

I did not overhear any members of this jury or the alternates discussing the case during lunch times. If I was ever present nearby while a jury was at lunch, and they started to discuss the case, I would immediately tell them to stop. I never discussed or revealed any information about the case to any juror. Further, I never heard Deputy Dimsdale discuss any facts about the case or about Mr. Welch with any juror or alternate.

Mr. Welch had two attorneys at trial, Spencer Strellis and Alex Selvin. I never heard either defense counsel joke about Martini time or drinking after work.

I never told a juror or alternate about any witness either being threatened or feeling afraid. I did not know that Barbara Mabrey was flown in from out of state.

Signed under penalty of perjury on January 4, 2006, in Oakland, California.

#467

Sgt. Herbert Walters, Jr.

EXHIBIT C

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re DAVID ESCO WELCH On Habeas Corpus.	S107782 [Former related appeal S011323]

DECLARATION OF CATHERINE A. RIVLIN

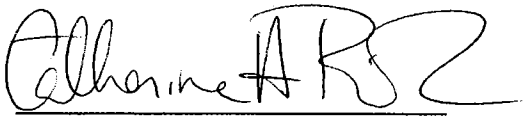
1. I, the undersigned, am counsel for respondent.

2. On or about January 14, 2006, I contacted Mr. Spencer Strellis, petitioner's lead trial counsel and Mr. Alex Selvin, petitioner's second trial counsel by letter and explained that an order to show cause had issued concerning their representation at trial. I provided them a copy of petitioner's claim 18. In follow-up telephone conversations, both attorneys declined my request to prepare declarations

concerning the extent of their social history investigation and any reasons for proceeding to trial with the information they had. Both attorneys stated their expectation that if a factual dispute was joined they would be subpoenaed and would testify in any evidentiary hearing.

3. Mr. Selvin confirmed by phone, as indicated in the record (RT [11/08/1988] 37-38, 48-49), that although numerous appointments were made to interview members of petitioner's family, the family members never showed up for the appointments and refused to cooperate with the social history investigation in accordance with petitioner's wishes.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on February 16, 2006.



CATHERINE A. RIVLIN
Supervising Deputy Attorney General

455 Golden Gate Avenue, Suite 11000
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Telephone No:(415) 703-5977

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re David Esco Welch** No.: **S107782**

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 and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **February 21, 2006**, I served the attached **RETURN ON ORDER TO SHOW CAUSE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

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 **February 21, 2006**, at San Francisco, California.

Gloria J. Milina
Declarant

Signature

40080567.wpd