IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent.

v.

DARREN D. SASSER,

Defendant and Appellant.

Case No. S217128

First Appellate District, Division Five, Case No. A136655
Alameda County Superior Court No. 156534
The Honorable C. Don Clay, Judge

APPELLANT'S REPLY BRIEF

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By appointment of the
California Supreme Court

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INTRODUCTION AND SUMMARY OF ARGUMENT

This court has posed the question whether a 5-year serious felony prior conviction enhancement (Pen. Code §667(a)(1))[1] can be added multiple times to a determinate sentence imposed as a second-strike

[1]The statute requires imposition of the 5-year term "in addition to the sentence imposed by the court for the present offense," but does not itself state what that "sentence" is to be. (§667(a).) The relevant subdivision provides, "(a) (1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." (§667(a)(1).)

Further unspecified statutory references are to the Penal Code.

sentence (§667(e)(1)).[2] The question arises, to what "sentence imposed" is the 5-year prior to be applied? Since 1984 determinate sentencing law has construed subdivision (a) of section 667 to provide that the 5-year prior serious felony enhancement is to be imposed once in addition to the consecutive determinate terms otherwise imposed. (*People v. Tassel* (1984) 36 Cal.3d 77 [distinguishing offender- and offense-related enhancements] ("*Tassel*").) In 1994 the Three Strikes law was enacted. In 1999 this court construed the Three Strikes law to incorporate determinate sentencing law unless the Three Strikes law "otherwise provided." (§667(e)(1); *People v. Nguyen* (1999) 21 Cal.4th 197 [determinate sentencing is to be applied "unless the Three Strikes law expressly abrogates" the relevant provision] ("*Nguyen*").) In 2004 this court clarified that subdivision (e)(2)(B) indeed "provides otherwise" when it comes to indeterminate terms impose under the Three Strikes law. (*People v. Williams* (2004) 34 Cal.4th 397 [5-year prior ***must*** be added consecutive to third-strike indeterminate terms] ("*Williams*").) Yet, subdivision (e)(2)(B) has no application to subdivision (e)(1) of section 667, the second-strike portion of a sentence imposed under the Three Strikes law. Thus, the short answer to the question presented on review is "no."

Respondent disagrees. Respondent finds *Tassel* inapplicable, distinguishes *Nguyen* and seeks to extend to second-strike sentencing *Williams'* application of subdivision (e)(2)(B) of section 667 to third-strike

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[2]Three Strikes provides for the punishment of second-strike offenders as follows, "(1) If a defendant has one prior serious and/or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." (§667(e)(1); see also §1170.12(c)(1).)

sentences. Respondent argues that, for both second and third strike cases, the Three Strikes law provides an alternative sentencing scheme independent of the Determinate Sentencing Law and thus free of case law interpreting determinate sentencing, ' ... Three Strikes is a separate sentencing scheme intended to ensure longer prison sentences for recidivist offenders. Whether the Three Strikes sentence is for a second strike or a third strike, determinate sentencing principles govern the calculation of the principal and/or subordinate terms rather than additional enhancements to those terms." (ROBM 3.)

Appellant herein responds.

I. SECOND-STRIKE SENTENCING UNDER THE THREE STRIKES LAW UTILIZES, NOT REPLACES, DETERMINATE SENTENCING LAW

Respondent and appellant agree that the instant sentencing occurs at the intersection of five different sentencing schemes. (ROBM 4.) Some of these sentencing schemes work together, others in the alternative. Alternative sentencing schemes generally describe a sentence to be imposed in the alternative.[3] Respondent appears to argue that in the instant case the

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[3]The One Strike and Habitual Offender Law provide alternative sentencing schemes for designated sexual offenses. (See *People v. McQueen* (2008) 160 Cal.App.4th 27 [stay versus strike alternative sentencing schemes], citing *People v. Snow* (2003) 105 Cal.App.4th 271, 283 [strike], *People v. Lopez* (2004) 119 Cal.App.4th 355, 358-359 [stay].) See also, *People v. Mancebo* (2002) 27 Cal.4th 735 [pleading necessary to invoke "alternative sentencing scheme"]; *People v. Jenkins* (1995) 10 Cal.4th 234 [Habitual Offender Law (§667.71) provides an alternative sentencing scheme, not an enhancement]; *People v. Belmontes* (1984) 34 Cal.3d 335, 346 [Section 667.6(c) provides an alternative sentencing scheme for sex offenses within its ambit]; *People v. Canty* (2004) 32 Cal.4th 1266, *In re Varnell* (2003) 30 Cal.4th 1132 [Proposition 36

Three Strikes law has served to displace determinate sentencing law insofar as the method of calculating the stayed determinate term imposed in the instant case. Respondent adds that replacement of the determinate sentencing law in this regard would be appropriate because the Three Strikes law was intended to provide for longer prison sentences. Respondent's Summary of the Argument states, "Three Strikes is a separate sentencing scheme intended to ensure longer prison sentences for recidivist offenders." (RBOM 3.)

Much of the ambiguity about applying 5-year serious felony prior convictions to determinate sentences under the Three Strikes law has already been cleared up by prior decisions by this court. In *Tassel* this court applied the 5-year prior serious felony conviction enhancement to a sentence for multiple sexual offenses. (§667(e)(1), §667.6(c).) *Tassel* ruled that the 5-year enhancement was to be applied once to the determinate term. In *Nguyen* this court construed the second-strike provision of the Three Strikes law to incorporate determinate sentencing law unless "otherwise provided." (§667(e)(1).) The term "otherwise provided as punishment" incorporated the determinate sentencing law. (*Nguyen, supra.*) In *Williams* this court construed the three-strike provision of the

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provides an alternative sentencing scheme]; *People v. Jenkins* (1995) 10 Cal.4th 234, fn. 10 [minimum term of imprisonment under §667.7 provides life sentence under an alternative sentencing scheme with minimum parole eligibility date increased by (two) 5-year prior convictions]; *People v. Acosta* (2002) 29 Cal.4th 105 [One Strike law is alternative sentencing scheme, not an enhancement and minimum term under One Strike sentence may be tripled under Three Strikes and 5-year priors added for those prior strikes]; *People v. Murphy* (2001) 25 Cal.4th 136 [both One Strike and Three Strikes laws applied, court held ***not*** alternative sentencing schemes as applied to that case]; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527 [notes the "alternative sentencing scheme" provided by third strike sentencing under the Three Strikes Law].)

Three Strikes law, particularly subdivision (e)(2)(B) of section 667, to provide that indeterminate life terms required by the Three Strikes law are to be served "consecutive to any other term of imprisonment for which a consecutive term may be imposed by law." (§667(e)(2)(B); *Williams, supra.*) Subdivision (e)(2)(B), which applies ***only*** to third-strike life terms, thus "otherwise provided" for purposes of determining a sentence. (Cf. *Nguyen, supra.*) However *Williams,* apparently, can be misunderstood as authority for the proposition that the Three Strikes law has pre-empted determinate sentencing law in regard to second-strike sentences as well as third-strike sentences. (See ROBM 3, 6-7.) The decision in *Williams* thus bears further examination.

A. Williams construed Subdivision (e)(2) [the third-strike provision], which has a subdivision (B), not subdivision (e)(1) [the second-strike provision], which does not

Respondent notes that in *Williams* this court ruled that "under the Three Strikes law, section 667(a) enhancements are to be applied individually to each count of a third strike sentence." (ROBM 6-7.) Appellant agrees that *Williams*, as well as subdivision (e)(2)(B) of the Three Strikes law, requires application of 5-year prior to run consecutive to life terms imposed under subdivision (e)(2) of section 667. As noted by appellant's opening brief on the merits, *People v. Williams* (2004) 34 Cal.4th 397 ruled that third-strike defendants are sentenced under the Three Strikes law, as provided by Sections 667(e)(2)(B), 1170.12 (c)(2). (AOBM 14-15, 22.) *Williams* noted that subdivision (e)(2)(B) of section 667 requires that such life terms be served consecutively, "the Three Strikes law provides that the indeterminate life sentence 'shall be served consecutive to any other term of imprisonment for which a consecutive term may be

imposed by law' (§§ 667, subd. (e)(2)(B), 1170.12, subd. (c)(2)(B)) and shall be in 'addition to any other enhancement or punishment provisions which may apply' (§§ 667, subd. (e), 1170.12 subd. (c))." (*Williams, supra*, at p. 404.)

The subdivision for third-strike sentencing referenced by *Williams, supra*, bears citation in full:

> (2) (A) Except as provided in subparagraph (C), if a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of:
>
> ...
>
> (B) The indeterminate term described in subparagraph (A) ***shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law***. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.
>
> (§667(e)(2)(A) & (B) [emphasis added].)

Subdivision (A) of subsection (e)(2) provides the term to be served. Subdivision (B) provides that the term shall be served consecutively. Thus the Three Strikes law itself provides for how third-striker life terms are to be served: "consecutively."

However, appellant is a second-strike offender. His punishment is subject to a different subdivision of the Three Strike law. The relevant portion of the Three Strikes law for second-strike offenders is subdivision (e)(1) of section 667. Subdivision (e)(1) does not replace the determinate term with a life sentence, rather it amplifies it by two:

> (1) If a defendant has one prior serious and/or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.
>
> (§667(e)(1); see also §1170.12(c)(1).)

Unlike subdivision (e)(2), subdivision (e)(1) does not provide for a life term that "shall be served consecutive" to any other term. (See AOBM 8.) Unlike the third-strike life term subject of *Williams*, appellant's second-strike terms are not required by statute to be served "consecutively." (Compare §667, subd. (e)(1) & (e)(2).)

Respondent argues that *Williams* itself made no distinction between determinate and indeterminate sentencings imposed under the Three Strikes law and that "the logic underlying the court's holding in *Williams* applies equally" to both. (ROBM 6.) Of course, *Williams* made no distinction between second and third-strike sentencings because it did not need to. *Williams* was not confronted with a second-strike sentence, and the solution for how to apply a third-strike sentence was provided by subdivision (e)(2) itself, life terms imposed under Three Strikes are to be run consecutively. (§667(e)(2).) *Williams* did not resolve the second-strike, determinate-term issue presented by the instant case.

Respondent also notes that *Misa* purports to follow *Williams* to the extent that this court noted that the Three Strikes Law intended longer prison sentences for recidivists. (ROBM 6.) Respondent observes that *Misa* found that a 5-year prior could properly be appended to both the determinate and indeterminate sentences imposed in that case, "the statutory scheme permitted imposition of the section 667(a) enhancements for both

the torture and assault convictions." (ROBM 7, citing *Misa*, *supra*, at pp. 845-847.) Respondent reads *Misa* to extend *Williams*' holding regarding third-strike sentences to second-strike sentences because "the operative distinction is not whether the defendant was sentenced to determinate or indeterminate terms, but whether the scheme under which he was sentence was DSL or Three Strikes." (ROBM 7.) Yet, *Misa* does not stretch so far. *Misa* involved alternate sentencing schemes that resulted in a life term and a determinate term for offenses consecutively sentenced. Torture was a life sentence, assault was a determinate term. (§206.1.)[4] Torture provided an alternative sentencing scheme, imposing life. *Misa* does not go so far as to impose more than one 5-year prior on an aggregate determinate term.

B. Nguyen construes subdivision (e)(1) of section 667, the second-strike provision of Three Strikes law, to incorporate determinate sentencing law

Respondent concedes that "DSL governs the calculation of principal and subordinate determinate terms for defendant's second strike offenses," and agrees that the "DSL applies to the extent of calculating the doubled second strike 'term' itself." (ROBM 4, 8.) Yet, respondent argues that the determinate sentencing law "does not otherwise apply to the recidivist enhancement for a prior serious felony conviction applicable to each of the current sexual felony offenses." (ROBM 4-5.) Respondent continues that the Determinate Sentencing Law is of limited use in calculating the sentence to be imposed, "When DSL is preempted by the subsequently enacted sentencing schemes, DSL only provides a means of calculating certain limited components of the overall sentence." (ROBM 4.)

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[4]206.1. Torture is punishable by imprisonment in the state prison for a term of life.

Respondent's analysis is at variance with this court's decision in *Ngyuen* which ruled that the Three Strikes law incorporates determinate sentencing law unless expressly abrogated by the Three Strikes law. (*Nguyen, supra*, at p. 202-203; and see AOBM 12-14.) Cited by both parties[5] *Nguyen* merits further examination. *Nguyen* resolved the issue whether the Three Strikes law incorporated or supplanted determinate sentencing law. This court phrased the question presented in that case, "the issue is whether the two strike sentencing provision incorporates the principal term/subordinate term methodology of Section 1170.1, one of the central provisions of the Determinate Sentencing Law." (*Id.*, at p. 200.) *Nguyen* ruled that it did. *Nguyen* ruled that "the statutory language" of subdivision (e)(1) of section 667 requires incorporation of the determinate sentencing law:

> ... ***The phrase 'otherwise provided' would seem to encompass all sentencing provisions outside the Three Strikes law, except for those provisions that the Three Strikes law expressly abrogates.*** Section 1170.1, which specifies the usual principal term/subordinate term methodology for calculating consecutive determinate terms for felonies, is one such sentencing provision. Therefore, unless the Three Strikes law expressly abrogates the relevant provisions of section 1170.1, the most natural reading of the provision at issue is that the sentencing court must designate principal and subordinate terms as required by section 1170.1, calculating the subordinate terms as one-third of the middle term (except when full-term consecutive sentences are

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[5]Respondent also notes *Williams*'s citation of *Nguyen* in ruling that the life sentences imposed under the Three Strikes law did "not draw any distinction between status enhancements, based on the defendant's record, and enhancements based on the circumstances of the current offenses, ..." (ROBM 6-7.)

> otherwise permitted or required), and then double each of the resulting terms. This is what the sentencing court did here.
>
> (*Id.*, at pp. 202-203 (emphasis added); and see AOBM 13.)

The court ruled that the phrase "otherwise provided" did incorporate "all sentencing provisions outside the Three Strikes law" unless expressly abrogated. (*Id.*, at p. 202.) *Nguyen* ruled that the Three Strikes law did not abrogate settled determinate sentencing law.

However, *Nguyen* did anticipate the issue regarding ***third-strike*** cases, which third-strike cases are governed by subdivision (e)(2), the subdivision which immediately follows subdivision (e)(1), the subdivision *Nguyen* had just applied. (*Id.*, at p. 204.) As noted above, subdivision (e)(2) provides the method of calculation of the term to be imposed for a third strike, which term subdivision (e)(2)(B) expressly provides is to be consecutive to an determinate terms. (See §667(e)(2)(B), *supra*.) A third-strike sentence thus presents an alternative sentencing scheme which has little need for reference to provisions of the determinate sentencing law rules on consecutive sentencing, "The consecutive sentencing provisions of section 1170.1 simply have no relevance in this context." (*Id.*, at p. 104.) When *Williams* quoted *Nguyen* as authority for the proposition that Section 1170.1 had no application to a third-strike sentence, it quoted *Nguyen* in this context. (See *Williams*, *supra*, at p. 404.)

Respondent also acknowledges that *Nguyen* "employed the 'aggregate' term." (ROBM 9.) Respondent explains that in calculating the doubled "terms," the court's use of the word "did not apply to the calculation of an aggregate term, but only to the doubled subordinate term." (ROBM 9.) Thus, respondent continues, section 1170.1 was used only "to calculate the proper second strike subordinate 'term,' under the 'otherwise

provided' language." (ROBM 9.) Yet, this is exactly the point. As applied to second-strike cases, the Three Strikes Law makes no sense unless the underlying term is first calculated under the applicable determinate law statutes, such as Section 1170.1.[6]

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[6]Respondent also cites *People v. Hojnowski* (Aug. 4, 2014) ___ Cal.App.4th ____ [No. A139455], a recent case by the First District, Division Five. *Hojnowski* essentially agrees that a second-strike sentencing is calculated under determinate sentencing law and then doubled by the Three Strikes law. (*Hojnowski*, at p. ____ [A139455, p. 14], citing *Nguyen, supra*, at pp. 203-204.) Joseph Hojnowski, a Pelican Bay inmate, was convicted of three counts of "gassing" based upon spitting at three separate prison guards. (*Id.*, at p. ____ [A139455, p. 2].) Sentenced to consecutive determinate terms and a prison prior, totaling 11 years, Hojnowski seized upon language in the Three Strikes law, particularly subdivision (c)(6) of section 667, which Hojnowski argued allowed for imposition of concurrent sentences despite Penal Code section 4501.5, which mandates consecutive sentencing for battery by inmates on non-inmates. (*Id.*, at p. ____ [A139455, pp. 15-16].) The Court of Appeal was not impressed with Hojnowski's argument, "The Three Strikes law requires that a defendant's determinate term be doubled when he or she has a single qualifying prior conviction. (§§ 667, subd. (E)(1), 117012, subd. (c)(1).)[footnote] In the case of consecutive determinate terms, "the sentencing court must designate principal and subordinate terms as required by section1170.1, calculating the subordinate terms as one-third of the middle term (except when full-term consecutive sentences are otherwise permitted or required), and then double each of the resulting terms." (*Id.*, at p. ____ [A139455, p. 14], citing *Nguyen, supra*, 21 Cal.4th, at pp. 203-204.) The decision then applied section 4501.5, which mandated the consecutive sentencing, and noted that interpreting the Three Strikes law to lessen punishment, as urged by Hojnowski, would be inconsistent with its stated purpose. (*Ibid.*, citing *People v. Davis* (1997) 15 Cal.4th 1096, 1099, *People v. Williams* (2004) 34 Cal.4h 397, 404; and §667(b).)

C. At the time the Three Strikes Law passed Tassel construed the manner by which 5-year enhancements were to be applied to determinate sentences

Respondent notes *Tassel* and the distinction between enhancements based on the offender as opposed to enhancements based upon the nature of the offense, but distinguishes *Tassel* as a decision preceding enactment of the Three Strikes Law. (ROBM 5-6.) Here respondent overlooks *Tassel*'s significance as precedent in calculating the sentence to be doubled by the Three Strikes Law. The formula provided by the Three Strikes Law does not work unless the term to be doubled is calculated by other laws. In the case of 2nd Strike sentences, the Three Strikes Law provides doubling of "the ***term otherwise provided*** as punishment for the current felony conviction." (§667(e)(1).) As noted by appellant's opening brief on the merits, *Tassel* provided the method of calculating the determinate term to which the Three Strikes law's second-strike provisions were to be applied. (AOBM 10-12.)

There does not appear to be much dispute that *Tassel* has remained the law governing application of 5-year priors to determinate sentences. Respondent notes this court's decision in *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1163-1164, which reduced a 25-year aggregate determinate term "for substantive offenses and enhancements imposed in conjunction with [a] death penalty" case. (ROBM 5.) In addition to the death penalty, Isaac Gutierrez, Jr. received a 25-year determinate term which included a combination of firearm and prior serious felony conviction enhancements. Included in the determinate term was one 5-year prior, plus two more stayed impositions of the same 5-year prior on additional counts. Although those additional 5-year terms were stayed, this court ruled that they must be

stricken. *Gutierrez* ruled, "only one section 667, subdivision (a) enhancement should have been imposed in connection with the aggregate sentence. (See People v. Tassell (1984) 36 Cal.3d 77, 91, 201 Cal.Rptr. 567, 679 P.2d 1.) Accordingly, we shall order the section 667, subdivision (a) enhancements under counts III, IV, and VII stricken, and the abstract of judgment amended to reflect only one such enhancement imposed under count I." (*Id.*, at 1164.)

Subdivision (e)(1), the relevant portion of the Three Strikes law applied to the determinate term in the instant case, incorporates the law of determinate sentencing including particularly this court's decision in *Tassel.*

II. POLICY CONSIDERATIONS INCLUDING CLOSURE AND FINALITY

Respondent argues that the cost of extending terms of incarceration and increased medical care are "wholly appropriate to ensure public safety for recidivist violent offenders like defendant." (ROBM 11.) Yet, respondent correctly points out that the resolution of this case in appellant's favor will not effect his release. "Defendant's own sentence is not affected by the enactment of the Three Strike Reform Act." (ROBM 10-11.) Win or lose on the issue concerning 30 years of the 229-to-life sentence imposed under the One Strike law, appellant's 495-to-life sentence remains unaltered. Rather, the impact of the decision in the instant case will be on second-strike offenders currently overcrowding and aging in the California state prison system, and on those who are soon to follow.

Respondent does not answer appellant's concern that multiple applications of the 5-year prior conviction enhancement to determinate terms in the manner suggested was probably not intended by the electorate,

nor contemplated by the legislature, and would dramatically increase the maximum penalty faced by second-strike offenders beyond that which suits our criminal justice and corrections systems. (AOBM 24-30, 32.)

Respondent also notes that finality and closure present important policy considerations. No one disagrees that it is important to provide closure for victims of violent crimes. The 495-year term before parole eligibility is as much as incarceration can provide in terms of helping with closure. On the other hand, "finality" actually favors leaving unaltered the distinction between offender and offense-related enhancements that has been in place based upon accepted sentencing practice and this court's precedents.

CONCLUSION

For offenders facing a third strike, the Three Strikes law presents an alternative sentencing scheme which imposes an indeterminate life term instead of a determinate prison sentence. On the other hand, for second strike offenders the Three Strikes law leaves in place the determinate term but dramatically increases the term by doubling it. Viewed through the lens of the Three Strikes law, a determinate term is significantly more punitive. However it is not necessary to further increase the punitive effect by interpreting the Three Strikes law as altering the manner by which recidivist-type enhancements are applied to aggregate determinate terms. Such interpretation was probably not intended by the electorate, nor contemplated by the legislature, would dramatically increase the maximum penalty faced by second-strike offenders and the increased terms of imprisonment would result in unintended fiscal consequences.

Respectfully Submitted,

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CERTIFICATE OF SERVICE BY MAIL

I declare under penalty of perjury that I am a citizen of the United States over eighteen years of age, not a party to the above action or proceeding and that my business address is Post Office Box 5575, Berkeley, California 94705 and that I served a copy of the attached

APPELLANT'S REPLY BRIEF

By placing said copy in a sealed envelope addressed as follows:

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First District Court of Appeal, Division Five, 350 McAllister St., S.F., CA (hand delivered)

with postage thereon fully prepaid and thereafter deposited in the United States Mail at Alameda County, California, that there is delivery service or regular communication by United States mail and the place so addressed, and that the date of deposit in the mail is the date of execution of this certificate.

I declare under penalty of perjury that the foregoing is true and correct, executed at Alameda County on September 12, 2014.

_____
Dirck Newbury

CERTIFICATE OF WORD COUNT
(Cal. Rules Court, rule 8.520(c))

I, Dirck Newbury (State Bar No. 87959), declare under penalty of perjury that I am a citizen of the United States over eighteen years of age, not a party to the above action or proceeding and that my business address is Post Office Box 5575, Berkeley, California 94705 and that the attached brief contains 4,329 words (per WordPerfect X5 wordprocessor).

I declare under penalty of perjury that the foregoing is true and correct, executed at Alameda County on September 12, 2014.

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Dirck Newbury