In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LEE V. COTTONE,** **Defendant and Appellant.**	Case No. S194107

Fourth Appellate District Division Three, Case No. G042923
Orange County Superior Court, Case No. 06HFI734
The Honorable M. Marc Kelly, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
JAMES H. FLAHERTY III
Deputy Attorney General
State Bar No. 202818
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2196
Fax: (619) 645-2271
Email: James.Flaherty@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Issue Presented 1

Introduction 1

Argument 2

I. Whether a criminal defendant has the capacity to commit an uncharged crime, which the prosecution wishes to use as Evidence Code section 1108 propensity evidence, is a preliminary factual determination to be decided by the trial court before it allows the prosecution to introduce the evidence 2

II. The trial court did not have a sua sponte duty to instruct the jury that it was required to find that appellant possessed capacity to commit the uncharged crime 9

III. Even if instructional error occurred, it was harmless 11

Conclusion 13

TABLE OF AUTHORITIES

Page

CASES

In re Cindy E.
(1978) 83 Cal.App.3d 393 12

In re Tony C.
(1978) 21 Cal. 3d 888 12

People v. Balcom
(1994) 7 Cal.4th 414 6

People v. Ewoldt
(1994) 7 Cal.4th 380 ..... 5, 6

People v. Flores
(2007) 147 Cal.App.4th 199 11

People v. Gonzales
(2011) 52 Cal.4th 254 10

People v. Kelly
(2007) 42 Cal.4th 763 5

People v. Lewis
(2001) 26 Cal.4th 334 ..... 6, 7, 11, 12

People v. Simon
(2001) 25 Cal.4th 1082 10

People v. Watson
(1956) 46 Cal.2d 818 11

Sullivan v. Louisiana
(1993) 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 11

STATUTES

Evidence Code
§ 310.....1, 6, 9
§ 310, subd. (a).....3
§ 402.....2, 3, 9, 12
§ 402, subd. (b).....7
§ 403.....8, 9, 10
§ 403, subd. (c).....10
§ 405.....1, 6, 9
§ 405, subd. (a).....3
§ 1101, subd. (b).....4, 5, 6
§ 1108.....passim
§ 1108, subd. (a).....2
§ 1108, subd. (d)(1).....2, 4

Penal Code
§ 26.....3, 7, 9
§ 190.3.....7, 10

OTHER AUTHORITIES

CALCRIM
No. 375.....5, 6

ISSUE PRESENTED

Does the inquiry of whether or not an act is an "offense," for purposes of qualifying as Evidence Code section 1108 propensity evidence, constitute a preliminary factual determination that must be made exclusively by the trial court, and not the jury, under Evidence Code section 405?

INTRODUCTION

In its opening brief on the merits, respondent explained that preliminary factual determinations upon which the admissibility of proffered evidence rests, including capacity to commit an uncharged crime, are left to the sound discretion of the trial courts. In his answer, appellant disagrees. He argues that despite the fact that his capacity to commit the uncharged crime constituted a preliminary matter governing admissibility of the uncharged crime evidence, the capacity issue should have been resubmitted to the jury. (AABM[1] 18.) As will be shown below, appellant's position should be rejected because it ignores the plain language of Evidence Code sections 310 and 405.

In its opening brief, respondent further explained that to the extent the jury may re-determine a trial court's finding of capacity for purposes of an uncharged Evidence Code section 1108 crime, there is no sua sponte duty to instruct the jury as to capacity. In his answer, appellant responds that he was entitled to such a sua sponte instruction because he "it was part of the prosecution's burden to prove appellant was guilty of a prior crime" as propensity evidence. (AABM 41.) Appellant's suggestion fails because in order to prove appellant guilty of the *charged crimes*, the prosecution had no burden whatsoever to prove, let alone introduce, propensity evidence.

---

[1] Appellant's Answer Brief on the Merits.

The prosecution's "burden" was to prove appellant guilty beyond a reasonable doubt of the charged crimes. The admissibility of the evidence was decided by the trial court and the weight to be assigned to the evidence, if any, was decided by the jury. Accordingly, if appellant wished for a pinpoint instruction telling the jury that capacity could be considered for purposes of deciding what weight, if any, should be given to the propensity evidence, he should have asked for it. He did not.

Finally, even if error had occurred, it was harmless. It is not reasonably probable that the verdict would have been different because if the prosecution had been required to present its evidence of capacity to the jury, rather than to the trial court in an Evidence Code section 402 hearing. The jury heard that when appellant committed the uncharged act he was days away from his 14th birthday, and that age is a factor in a minor's ability to appreciate wrongfulness. The jury also heard that appellant used a ruse and carried his six-year-old victim to a secluded place before molesting her, and that such circumstances are indicative of appreciation of wrongfulness. Given this evidence, any reasonable jury would have concluded that appellant appreciated the wrongful nature of his action such that the incapacity presumption had been overcome.

ARGUMENT

I. WHETHER A CRIMINAL DEFENDANT HAS THE CAPACITY TO COMMIT AN UNCHARGED CRIME, WHICH THE PROSECUTION WISHES TO USE AS EVIDENCE CODE SECTION 1108 PROPENSITY EVIDENCE, IS A PRELIMINARY FACTUAL DETERMINATION TO BE DECIDED BY THE TRIAL COURT BEFORE IT ALLOWS THE PROSECUTION TO INTRODUCE THE EVIDENCE

Evidence Code section 1108 allows for the introduction of the defendant's uncharged criminal sexual offenses as propensity evidence relevant to the charged crimes. (Evid. Code, § 1108, subds. (a) & (d)(1).)

As appellant was 13 years and 11 months old when alleged to have committed the uncharged crime evidence, before allowing the prosecution to introduce the evidence to the jury, the trial court first held an Evidence Code section 402 hearing in order to determine the preliminary question of whether or not appellant possessed the capacity to have committed the uncharged crime. (See Pen. Code, § 26, ¶ 1 [minors under 14 presumed to lack capacity to commit crime].) Upon finding that appellant had appreciated the wrongfulness of his uncharged conduct, such that the presumption that he lacked capacity to commit crime had been rebutted, the court allowed the prosecution to introduce the uncharged crime evidence as inculpatory evidence relevant to the charged crimes. The jury was subsequently tasked with determining if the uncharged crime had occurred at all and if so, what weight, if any, should be attached to the evidence. (See 32 CT 345 [CALCRIM 1191, Evidence Of Uncharged Sex Offense].)

As to the introduction of this uncharged crime evidence, appellant complains that the preliminary question of whether he appreciated the wrongfulness of his conduct, such that the Penal Code section 26 incapacity presumption had been rebutted, should have been resubmitted to the jury. (AABM 17-18.) His argument ignores the fact that the uncharged crime evidence was just that, evidence. As respondent discussed in its opening brief, the Evidence Code plainly directs that "the admissibility of evidence" is to be "decided by the court[,]" and "[d]eterminations of issues of fact preliminary to the admission of evidence are to be decided by the court[.]" (Evid. Code, § 310, subd. (a).) Accordingly, appellant's capacity to commit crime, when he was alleged to have committed the uncharged crime, was a preliminary admissibility question to be determined by the trial court before allowing the inculpatory evidence. (See Evid. Code, § 405, subd. (a) ["The court ... shall admit or exclude the proffered evidence ... ."].) In his answer

brief on the merits, appellant largely ignores the plain language of these Evidence Code sections.

Appellant's argument further ignores respondent's argument that the Court of Appeal's conclusion would lead to an absurd result. (See ROBM 22-23.) Specifically, the Court of Appeal's conclusion could reasonably allow for the jury to be tasked with determining the preliminary capacity question in order to decide whether or not it should accept and consider the uncharged crime evidence as Evidence Code section 1108 propensity evidence, while simultaneously being instructed by the trial court to consider the uncharged conduct evidence as probative of intent, common design or plan, under Evidence Code section 1101, subsection (b). (Evid. Code, §§ 1101, subd. (b), 1108, subd. (d)(1).)

Unlike Evidence Code section 1108, which is limited to the admissibility of certain prior "crimes," Evidence Code section 1101, subdivision (b), includes the admission of prior "acts" not amounting to a crime. (Evid. Code, §§ 1101, subd. (b) [allowing evidence of an "act" to prove some fact other than the defendant's disposition to commit such an act], 1108, subd. (d)(1).) Consequently, under Evidence Code section 1101, subdivision (b), there is no preliminary fact regarding the defendant's capacity. In his answer brief on the merits, appellant does not to dispute this point.

Here, under section 1101, subdivision (b), subject to the trial court resolving an important admissibility question (discussed below), appellant's "act" of molestation against his six-year-old sister, years before, could have properly been submitted to the jury without the jury being tasked with having to decide if appellant had capacity because the evidence would be relevant to prove, inter alia, motive, intent or plan. (Evid. Code, § 1101, subd. (b).)

The Court of Appeal's conclusion, as well as appellant's argument, do not explain why a trial court's preliminary determination that an Evidence Code section 1101, subdivision (b) signature act had occurred, thus allowing for the introduction of the 1101 subdivision (b) evidence, should be treated differently from a trial court's preliminary determination that an enumerated sex "crime" had occurred, thus allowing for its introduction under Evidence Code section 1108. In *People v. Ewoldt* (1994) 7 Cal.4th 380, this Court held "that evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan." (*Id.* at p. 401.) The determination whether to admit evidence of uncharged offenses is within the discretion of the trial court. (*People v. Kelly* (2007) 42 Cal.4th 763, 783.)

The preliminary questions that must be addressed before admitting Evidence Code section 1101, subdivision (b) evidence are whether the "prior offenses (1) are not too remote in time, (2) are similar to the offense charged, and (3) are committed upon persons similar to the prosecuting witness." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 397.) Thus, without a requisite showing of timeliness and similarity, the evidence cannot constitute an "act" admissible under Evidence Code section 1101, subdivision (b). Similarly, under section 1108, without a requisite showing of criminality then the evidence cannot constitute a "crime" admissible under that section. The standard jury instruction governing the jury's use of section 1101, subdivision (b) evidence is CALCRIM 375. That instruction does not require the trial court to instruct the jury that it must re-determine timeliness and similarity before considering the evidence.

CALCRIM 375 provides that the prosecution has "presented evidence" that appellant committed another offense or some alleged act. (CALCRIM 375.) It further instructs that the jury may only consider the

evidence if the prosecution has proved by a preponderance of the evidence that the defendant in fact committed the "act." (*Ibid.*) The jury is forbidden to "consider the evidence" if the prosecution has failed to prove it by the stated standard of proof. (*Ibid.*) The instruction directs that once the jury determines the act has been proven, it may consider the evidence for the limited purpose of, inter alia, motive, intent or plan. (*Ibid.*)

There is no requirement that the preliminary issues of timeliness and similarity, as decided by the trial court, be re-determined by the jury before the jury may "consider the evidence." (See CALCRIM 375.) Indeed, although the instruction includes a bracketed sentence providing: "[In evaluating the evidence, consider the similarity or lack of similarity between the uncharged (offenses[s]/[and] act[s]) and the charged offense[s]," in the Bench Notes, the Judicial Counsel directs that "the court may give" the instant bracketed sentence "at its discretion when instructing on evidence of *uncharged offenses* that has been admitted based on similarity to the current offense." (*Ibid*, citing *People v. Ewoldt, supra*, 7 Cal.4th at pp. 380, 402-404 and *People v. Balcom* (1994) 7 Cal.4th 414, 424.) Neither the Court of Appeal's conclusion, nor appellant's argument, explain why Evidence Code section 1101, subdivision (b) evidence should be treated differently that section 1108 evidence.

Without addressing the plain language of Evidence Code sections 310 and 405, appellant relies on *People v. Lewis* (2001) 26 Cal.4th 334, in support of his argument that the trial court was required to resubmit its preliminary finding regarding capacity to the jury. (AABM 24.) He asserts that in *Lewis* "this Court found that [jury] was appropriate for deciding the question of whether the defendant knew the wrongfulness of his conduct when he was under 14 years old[.]" (AABM 24, 33 [*Lewis* found that the trial court "correctly" submitted the question to the jury].)

Respondent disagrees. Contrary to appellant's assertion, in *Lewis* this Court noted that the jury in the penalty phase of a capital case was required under Penal Code section 190.3 to determine the presence or absence of prior criminal activity that Lewis was alleged to have committed. (*People v. Lewis, supra*, 26 Cal.4th at pp. 376-377.) The prosecution presented evidence that when Lewis was 13 years and 9 months old he committed a murder by dousing a man with gasoline and lighting him on fire. (*Ibid.*) The *Lewis* court rejected Lewis's claim that it was prejudicial error for the trial court to submit to the jury the question of whether Lewis possessed the Penal Code section 26 capacity to commit murder. (*Ibid.*)

This Court rejected Lewis's claim that the trial court erred in failing to decide the question of Lewis's capacity as a preliminary fact before submitting the evidence to the jury. As this Court pointed out, any error was harmless, because the trial court later made this determination. Notably, this Court rejected as "unsupported" Lewis's argument that the determination of capacity should be considered the same as determining the admissibility of a confession, which under Evidence Code section 402, subdivision (b), must first be determined outside the presence of the jury. (*People v. Lewis, supra*, 26 Cal.4th at p. 380.) Appellant quotes a portion of this discussion in *Lewis*, but he fails to recognize that it does not support his argument. Confessions and admissions are uniquely treated in the Evidence Code, which specifies that the admissibility of such statements must be made before they are submitted to the jury. (Evid. Code, § 402, subd. (b).) Lewis's claim went to the timing of the trial court's ruling. This Court's rejection of that claim did not amount to a larger statement as to whether a trial court may determine exclusively the issue of a defendant's capacity in this evidentiary context – a question that was not even before this Court because the trial court had submitted the question to the jury. Simply stated, in Lewis, the defendant received more than he was entitled

to because the question of capacity was submitted to both the jury and the trial court; hence, Lewis could not have suffered prejudice.

Notably, appellant does not contend that the question of capacity in admitting the evidence in the present case fell under the rule of Evidence Code section 403. Indeed, he does not even mention that section, and appropriately so. In certain circumstances, a judge's rulings on preliminary factual determinations are not exclusive, and they are resubmitted to the jury. Evidence Code section 403 covers those situations in which the judge admits proffered evidence after a party has introduced sufficient evidence to establish a preliminary fact, but the jury must then determine whether the preliminary fact exists. Subdivision (a) of that section defines four circumstances in which this occurs: (1) when the relevance of the proffered evidence depends on the existence of a preliminary fact; (2) when the preliminary fact is the personal knowledge of a witness; (3) when the preliminary fact involves the authenticity of a writing; and (4) when the proffered evidence involves a statement or other conduct of a particular person and the preliminary fact requires a determination whether the statement or conduct occurred.

Of the four conditions set forth in subdivision (a), only one even remotely bears upon the evidence of admissibility in the present case – subdivision (a)(1), in which the relevance of the proffered evidence depends on the existence of the preliminary fact. Here, however, the relevance of appellant's prior act does not depend on whether or not he understood the wrongfulness of his actions. Even assuming, arguendo, appellant did not know it was wrong when he was 13 years and 11 months old to insert his fingers inside his sister's underwear and rub her vagina, this evidence was nevertheless relevant to establishing his propensity to engage in such acts. Based on these actions, it was hardly surprising when he later engaged in similar acts against yet another family member. Even if

appellant did not know his earlier acts were wrong, they were relevant to demonstrate that this is what appellant does.

Because the evidence in the instant case does not fall within Evidence Code section 403, it is therefore governed by section 405 as a preliminary fact to be determined exclusively by the trial court. (See Evid. Code, § 405 ["With respect to preliminary fact determinations not governed by Section 403 or 404. . . ."].) As noted above, appellant does not argue to the contrary. But even if he could show that the evidence in the instant case was controlled by Evidence Code section 403, that section would not help his cause. As discussed below, section 403 is clear that in those cases in which a preliminary factual determination must be resubmitted to a jury, the trial court does not have a sua sponte duty to instruct the jury to re-determine that issue.

II. THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO FIND THAT APPELLANT POSSESSED CAPACITY TO COMMIT THE UNCHARGED CRIME

Appellant argues that once the prosecution elected to introduce the Evidence Code section 1108 propensity evidence, it had the burden of overcoming the Penal Code section 26 incapacity presumption. (AABM 40-44.) Respondent agrees. The prosecution did precisely that during the Evidence Code section 402 hearing. However, appellant further argues that the preliminary capacity question had to be resubmitted to the jury. Respondent disagrees. As discussed above, Evidence Code section 310 and 405 dictate that preliminary questions governing the admissibility of evidence are to be resolved by the trial court. Further, in insisting that the prosecution, in order to prove the merits of the case (guilt of the charged crimes), was required to rebut the incapacity presumption, appellant ignores the fact that to prove appellant guilty, the prosecution had no burden whatsoever to prove, let alone introduce, the propensity evidence.

After hearing the evidence, the jury was instructed as to its use of the propensity evidence. Specifically, among other things, it was told that before it could consider this piece of evidence, the prosecution was burdened with proving by a preponderance of the evidence that the uncharged crime had occurred and should it find that the uncharged crime had indeed occurred, it was to decide what weight, if any, should be give to the evidence, which should be considered along with all of the other evidence. (2 CT 345 [CALCRIM 1191].) If appellant wished for a pinpoint instruction telling the jury that when analyzing the intent element of the uncharged crime it should consider whether appellant knew what he was doing was wrong, he needed to ask for it. (See *People v. Simon* (2001) 25 Cal.4th 1082, 1110, fn. 18 [because defendant "failed at trial to provide an appropriate jury instruction or authority supporting the giving of such an instruction[,]" the Court would not consider the issue on appeal]; see also *People v. Gonzales* (2011) 52 Cal.4th 254, 324 [in the context of the penalty phase of a capital case, this Court has provided that it is well settled that the trial court has no sua sponte duty to instruct on the elements of other crimes offered under section 190.3, factor (b)].) As appellant did not request the complained of pinpoint instruction, his argument should be rejected.

Indeed, as noted above, even if appellant could show the capacity evidence fell within Evidence Code section 403 (and he cannot), that provision undermines his attempt to fault the trial court for failing to instruct the jury to re-determine this issue. Evidence Code section 403, subdivision (c), provides:

> If the court admits the proffered evidence under this section, the court:
>
> (1) *May, and on request shall*, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

(Italics added.)

As the italicized language above reveals, even when a jury may re-determine the existence of a preliminary fact, a trial court has no sua sponte duty to so instruct the jury. Hence, appellant still cannot show error.

III. EVEN IF INSTRUCTIONAL ERROR OCCURRED, IT WAS HARMLESS

Even if the trial court was required to instruct the jury sua sponte as to the issue of appellant's capacity to have committed the uncharged propensity evidence crime, or as to any other relevant use of capacity, its failure to do so was harmless. Appellant's reliance on *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182], is misplaced. The court in *Sullivan v. Louisiana* held that the denial of the right to a jury verdict of guilt beyond a reasonable doubt qualified as "structural error" after the jury in that case had been given a constitutionally defective definition of reasonable doubt. (*Id.* at pp. 276-277, 281-282.) The jurors there "were misdirected or misinformed as to the proper standard of proof." (*People v. Flores* (2007) 147 Cal.App.4th 199, 211.)

Here, even if the trial court was required to instruct the jury that capacity was a requirement of the uncharged crime, the jury would only have been required to find that the incapacity presumption capacity had been proven by "clear and convincing evidence that the minor knew the act's wrongfulness." (*People v. Lewis, supra*, 26 Cal.4th at p. 378.) Because the jury would not have been required to find *beyond a reasonable doubt* that the incapacity presumption had been rebutted, the *People v. Watson* (1956) 46 Cal.2d 818, standard should apply.

Accordingly, even if error had occurred, it was harmless because it is not reasonably probable that the verdict would have been different if the prosecution had been required to present its evidence of capacity to the jury, rather than to the trial court in an Evidence Code section 402 hearing. The victim's section 402 hearing testimony established that when appellant committed the uncharged act he was mere days away from his 14th birthday. (4 RT 950-951, 973.) The jury would therefore have fairly been instructed that his close proximity to the age of 14 made "it more likely that he understood the wrongfulness of his act." *(People v. Lewis, supra*, 26 Cal.4th at p. 379, citing *In re Cindy E.* (1978) 83 Cal.App.3d 393, 399.)

The victim's section 402 hearing testimony further established that appellant used a game as a ruse to attempt to lure his six-year-old victim and her playmate to more secluded area of the family home. (4 RT 953-954.) When the playmate declined and departed, appellant picked up his victim and physically carried her to "the most secluded area" of the home. (4 RT 954-959.) The jury would have fairly been instructed that although a minor's knowledge of wrongfulness may not be inferred from the commission of the act itself, "the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment" may be considered. (*People v. Lewis, supra*, 26 Cal.4th at p. 378; *In re Tony C.* (1978) 21 Cal. 3d 888, 900.) Given this evidence, any reasonable jury would have concluded that clear and convincing evidence existed to find that appellant appreciated the wrongful nature of his action such that the incapacity presumption had been overcome. If error occurred, it should be deemed harmless.

CONCLUSION

For the reasons stated in its opening brief on the merits, and in this reply, respondent respectfully request this Court reverse the Court of Appeal's judgment below and affirm the jury's verdict.

Dated: January 19, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General

JAMES H. FLAHERTY III
Deputy Attorney General
Attorneys for Plaintiff and Respondent

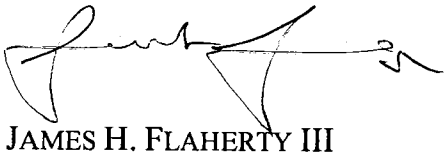
JHF:bp
SD2011701863
70536780.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 3,752 words.

Dated: January 19, 2012

KAMALA D. HARRIS
Attorney General of California



JAMES H. FLAHERTY III
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Lee V. Cottone** No.: **S194107**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 19, 2012, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

William J. Kopeny (2 copies)
Attorney at Law
8001 Irvine Center Drive, Suite 400
Irvine, CA 92618-2956
Attorney for Lee Cottone

The Honorable Tony J. Rackauckas
District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

Hon. Stephen M. Kelly, Clerk
California Court of Appeal
Fourth Appellate District
Division Three
P.O. Box 22055
Santa Ana, CA 92702

Clerk of the Court
Central Justice Center
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **January 19, 2012** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

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 January 19, 2012, at San Diego, California.

Bonnie Peak
Declarant

Bonnie Peak
Signature

SD2011701863
70536996.doc