

**DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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	)	California Supreme
	)	Court
PEOPLE OF THE	)	
STATE OF CALIFORNIA,	)	No. S166168
	)	
Plaintiff and Respondent,	)	Orange Co. Super.Ct.
	)	No. 03CF0441
v.	)	
	)	<b>CAPITAL CASE</b>
MICHAEL ALLEN LAMB,	)	
	)	
Defendant and Appellant.	)	
	)	

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Orange County Superior Court Case  
The Hon. William R. Froeberg, Judge

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**APPELLANT’S SUPPLEMENTAL REPLY BRIEF**

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**INTRODUCTION**

In *People v. Cooper* (2023) 14 Cal.5th 735, 742-743, this Court assessed the harm from gang charges and enhancements imposed without jury instructions requiring the elements enacted in the revised gang statute. *Cooper* defined this standard as determining “whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” The issue here is whether the record contains evidence that the predicate offenses provided an individual or reputational benefit.

Respondent dutifully cited to *People v. Cooper* and then disregards it. Instead, he repeats the argument rejected in *Cooper*, i.e., that this Court should infer from the general evidence of the predicate offenses that they were committed for, and *actually* benefited, the common gang. Respondent uses the

test for assessing the sufficiency of the evidence, rather than the test for assessing the harm from the instructional omission on an element.

The evidence in this case shows harm under *Cooper* because “the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” The gang expert testified as to general reputational benefits and an individual benefit to an offending gang member, neither of which satisfies AB 333.

**I. ASSEMBLY BILL NO. 333 [AB 333], WHICH APPLIES RETROACTIVELY TO APPELLANT’S CASE, REQUIRES THAT THE GANG CHARGES ENHANCEMENTS, AND THE GANG SPECIAL CIRCUMSTANCE BE REVERSED BECAUSE OF AB 333’S SUBSTANTIVE AMENDMENTS**

**A. Respondent Urges This Court to Assess Harm from Instructional Error Under the Reasonable Inference Standard Expressly Rejected by This Court in *People v. Cooper*.**

The test for assessing prejudice from an omitted element in a jury instruction is longstanding and based on United States Supreme Court precedents. (*People v. Brown* (2023) 14 Cal.5th 453, 474 citing *U.S. v. Neder* (1999) 527 US. 1, 17, 19.) *People v. Mil* (2012) 53 Cal.4th 400, 417-418, reversed a Court of Appeal opinion finding instructional error harmless because its analysis suggested “it may have relied on the less demanding standard of whether that finding was supported by substantial evidence.” *Mil* pointed out that the substantial evidence test was appropriate in assessing the sufficiency of the evidence, but not for instructional

error. The “task in analyzing the prejudice from instructional error is whether any rational fact finder could have come to the opposite conclusion.” *Mil* pointed to contrary evidence favoring the defendant and reversed. (*Id.* at 417.)

In assessing instructional error based on the new gang elements enacted by AB 333, *People v. Cooper*, 14 Cal.5th at 742-743, followed these cases and defined the standard as determining “whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.”

Respondent concedes that appellant’s jury was not instructed with the elements now required under AB 333. (Supplemental Respondent’s Brief [SRB]19.) He also admits that instructions omitting of an offense are reviewed for prejudice under the *Chapman v. California* (1967) 386 U.S. 18 standard as expressed in *People v. Cooper*, 14 Cal.5th at 742-743. (SRB 19-20 [internal quotation marks omitted].)

Although respondent correctly states these principles, he gives them only lip service. He argues instead that, under the “ordinary rules of evidence,” reasonable inferences may be drawn from evidence. (SRB 20.) Respondent’s argument is contrary to *Cooper*, and unsupported by the cases he cites. *People v. Livingston* (2012) 53 Cal.4th 1145, 1165-1167 does not address the omission of an element from an instruction; the question was how the jury would construe the proper instructions given. Respondent’s other citation, *People v. Wallace* (2008) 44 Cal.4th

1032, 1094, holds that a prosecutor can argue reasonable inferences from the evidence.

Nonetheless, respondent insists that this Court can find the instructional error harmless by inferring the missing element of a common gang benefit beyond the reputational.<sup>1</sup> (See e.g., SRB 21 [“a trier of fact may reasonably infer [ ] that a predicate offense benefited the gang in a way that was more than reputational”]; SRB 22 [“inferences from the evidence of a gang’s primary activities [ ] might inform whether a predicate offense involved a common benefit that was more than reputational”].)

Immediately after citing the *Cooper* standard of review for instructional error, respondent attempts to distinguish it. He claims that in this case, “unlike *Cooper*, there was substantial evidence” sufficient to prove that the “predicate offenses provided a common benefit to the gang that was more than reputational.” (SRB 23.) He claims that “the only reasonable inference” and “unavoidable” inference “from the predicate offense evidence is that the benefit to the PENI gang was more than reputational. (SRB 24, 26.)

This Court expressly rejected this very same “reasonable inference” argument in *People v. Cooper*:

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<sup>1</sup> In a footnote, respondent points out that appellant’s “claim is limited to his belief that the predicate offenses fail to establish a benefit [to the gang] that was more than reputational,” and does not raise any additional claims. (SRB 10, fn. 4.) This is accurate but irrelevant. An element of the offense was not proven or instructed on. That is sufficient for a reversal of all the gang charges and enhancements. It is not necessary to claim that all the elements were missing.



“The Attorney General incorrectly characterizes the *Chapman* inquiry before us as asking whether the jury could draw a reasonable inference that the alleged predicate offenses commonly benefited the gang. This, however, is not the proper standard. As noted above, our task ‘is to determine whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.’” (14 Cal.5th at 743, fn. 7, quoting *People v. Mil*, 53 Cal.4th at 417 [internal quotation marks omitted].)

**B. Correct Application of the *Cooper* Test Requires Reversal of the Gang Charges And Enhancements in This Case.**

A correct application of *Cooper* in this case shows that the record is replete with “evidence that could rationally lead to a contrary finding with respect to the omitted element.” The gang expert testified to his opinion generally, and as to almost each predicate offense, that all the predicate offenses were committed for “the benefit of the gang.” (16RT 3179, 3201.) However, no specific evidence of any kind was presented as to how or why the offenses actually provided a more than reputational benefit to the gang.

Respondent not only ignores the rule in *Mil* and *Cooper*, he flouts it. In both cases, this Court tasked itself with determining whether the record contained evidence rationally leading to a contrary finding as to the element omitted in the jury instructions. The record here contains evidence leading to just such a contrary finding. The gang expert testified to the individual reputational benefit to the gang member who committed crimes. (16RT 3084-3085 [individual gang member

earns respect through the use of violence]; 16RT 3089 [individual who commits a violent crime increases his status in the gang]; 16RT 3090 [the gang member who pulls the trigger would have more status than someone who just stood there]; 16RT 3197-3198 [an individual gang member would raise his stature in the gang by fleeing from the police]; 16RT 3201 [any crime committed by an individual gang member that benefits him also benefits the gang].) In opening statement, the prosecutor told the jury about the importance of status and how an individual gang member would enhance his status in the gang. (7RT 1361.) In closing argument, the prosecutor told the jury that the predicate offenses “need not be gang related. The crimes, if any, that establish a pattern of criminal activity, need not be gang-related.” (21RT 4317.)

Respondent argues that the inferences he claims lead “unavoidably” to the conclusion of more than reputational benefit are “not undermined by any other evidence that was before the jury.” (SRB 26.) Yet, by ignoring the reputational evidence quoted in Appellant’s Supplemental Opening Brief, respondent purposefully disregards the established rule of *Cooper* and *Mil*, i.e., evidence leading to a contrary finding as to the omitted element not only undermines respondent’s argument, it requires reversal of the gang findings.

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**C. Respondent's Arguments as to Certain Specific Predicates Do Not Provide a Basis for Inferring a More than Reputational Benefit.**

**1. A predicate act within the gang's primary activities does not prove a common more than reputational benefit to the gang.**

Respondent argues that a predicate act that is among the gang's primary activities may provide a basis for inferring that the offense commonly benefited the gang more than reputationally. (SRB 21-22.) Respondent agrees that under the new statute a gang enhancement cannot be found true if the predicate offenses benefited the individuals who committed them or benefited the gang only reputationally – and that is the state of the evidence here. However, he argues that the new statute does not “disallow reasonable inferences” from the evidence that might inform whether a predicate offense involved a more than reputational common benefit. (SRB 22.)

Respondent misses the mark. He fails to acknowledge that the question is not as to the quantum of evidence and the inferences therefrom, but the omission of a required element from the instructions and the standard for assessing the prejudice from that instructional error. If the issue before this Court were the sufficiency of the evidence, his reasonable inference argument would be appropriate.

But the issue here is instructional error. Prejudice from the instructional omission of an element is not assessed, and harmlessness is not demonstrated, by favorable inferences that

might support a finding of more than reputational common benefit to the gang. The test is that set out in *Cooper*: whether the record contains evidence from which a contrary finding, such as individual benefit, could be reached, as the record does here.

**2. The number and category of the predicate offenses do not prove a common and more than reputational benefit to the gang.**

Repeating the incorrect and rejected test for assessing prejudice, respondent argues that the category or type and number of the predicate offenses render this case so “unique” and “anomalous” that the only and “unavoidable” inference is that those offenses proved a more than reputational benefit, despite the lack of the required instruction on that element. (SRB 24, 26.) Respondent is wrong.

**a. The witness intimidation predicate offense.**

Respondent first addresses the predicate offense of dissuading a witness committed by Brody Davis. (SRB 23, citing Exh. 233; see also SRB 15-16.) Respondent notes that such an offense could support a common benefit to the gang that is more than reputational. (SRB 23-24.)

Although that possibility exists, *People v. Cooper*, 14 Cal.5th at 743-744, requires more. *Cooper* emphasized that the question whether a predicate offense provides a common benefit to the gang beyond reputational requires evidence as to how the specific predicate offense *actually* provided that benefit. (See also *People v. E.H.* (2022) 75 Cal.App.5th 467, 473, 478-480.)

The prosecution presented no such specific evidence explaining if or how the intimidation of that witness was of common benefit to the gang, and respondent cites none.

Instead, respondent points to the gang expert's testimony that "intimidating witnesses" was a feature of the gang and "they can stop a lot of prosecutions against them by intimidating the witnesses." (SRB 23, citing 16RT 3106.) This vague and general testimony does not show that Davis' intimidation of a witness *actually* provided a common benefit to the gang beyond that of reputation.

Respondent also argues that the "fact" that the crime was committed by "one of the founding members and 'leading members' of PENI" supports the conclusion that the crime provided a common benefit to the gang that was more than reputational. (RB 23, citing 16RT 3133-3134.) The expert did testify that Davis was "there in the beginning" but there was no testimony that he was a founding or leading member. (16RT 3095.) To the contrary, the expert testified that "Brody [Davis] *wasn't* a leader." (16RT 3185; emphasis provided.)

*Cooper* and *People v. Clark* (2024) 15 Cal.5th 743 both emphasize the requirement of specific evidence of an actual common benefit beyond reputational. Respondent offers the kind of generalized and theoretical testimony this Court has rejected, and then compounds that legal error with his conclusion based on the incorrect reasonable inference, asserting that "no rational juror considering this evidence could conclude that the benefit to PENI was merely reputational." (SRB 23.)

**b. The burglary and forgery predicate offenses.**

Respondent makes the same argument with respect to Daniel Lansdale’s guilty plea to burglary after being charged with burglary and several counts of forgery. (Exh. 238.) Respondent relies on the gang expert’s testimony that Lansdale was PENI’s “identity theft guy,” SRB 23-24, although that is not quite what the expert said. The prosecutor’s sole question on direct exam was whether the expert took Lansdale’s conviction into consideration when in reaching his opinion as to the gang’s primary activities. (16RT 3142.) When he later asked if Lansdale was “the big identity theft guy [ ] for PENI,” the expert said, “Yes, he did a lot of that.” (16RT 3215.) Another follow-up question revealed that this was the extent of the expert’s knowledge regarding Lansdale. (*Ibid.*) Even if the gang expert had testified that the offense might have benefited the gang theoretically, that is insufficient.

*People v. Cooper* held that suggestions of a theoretical financial benefit from certain predicate does not show the required *actual* benefit to the gang. (14 Cal.5th at 743-744, citing *People v. E.H.*, 75 Cal.App.5th at 473-480.) This is the key point.

There was no evidence that other gang members knew of Lansdale’s thefts, no evidence that Lansdale was directed<sup>2</sup> by the gang to commit those offenses, and no evidence that he shared his profits with the gang. As explained in *People v. Clark*, 15 Cal.5th at 764, expert testimony as to potential benefits to the

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<sup>2</sup> Respondent’s characterization of Lansdale as being “designated” by the gang, SRB 24, is not supported by the record.

gang is insufficient to establish the required common benefit where “the prosecution did not present evidence to establish whether the predicate offenses were committed to benefit the gang, or whether there existed an organizational nexus between those offenses and the gang as a collective enterprise.”

Moreover, in this case as in *People v. Cooper*, the jury was specifically instructed that predicate offenses “need not be gang-related,” directly contradicting the new AB 333 requirement. Based on such a record, *Cooper* held that a “jury could have reasonably concluded that the predicate offenses at issue were committed for personal gain alone.” (*Id.* at 744.) The same is true here, and even more so, where the gang expert testified to the personal benefit in status accrued by individual gang members who committed crimes. (See above, pages 9-10; 16RT 3084-3085 [personal benefit to gang member who uses violence]; 16RT 3089 [personal increase in status to gang member who pulls the trigger]; 16RT 3197-3198 [personal increase in status to gang member who flees from the police]; 16RT 3201 [any crime committed by a gang member that benefits him also benefits the gang].)

**c. The conspiracy and attempted murder predicate offenses.**

The prosecutor next addresses the predicate offenses for attempted murder and conspiracy committed by Donald Mazza, Nick Rizzo and another PENI gang member. Respondent argues that these offenses “further support” a finding of a common benefit to the gang beyond reputationally because Rizzo and

Mazza were high-ranking PENI members and committed the crimes together. (SRB 24-25; Exhs. 235-237.)

Respondent implies here, as he did in the Brody Davis intimidation offense, Part C, section 2, subsection (a) at pp. 12-13, above, that the status of a predicate offender is a sufficient substitute for specific evidence of an actual common benefit to the gang in a more than reputational manner. For this point, respondent cites *People v. Cooper*, 14 Cal.5th at 745-746. (SRB 23-24.)

In *Cooper*, this Court rejected the arguments made by respondent here as to theoretical benefits to the gang. The Court then noted that the Attorney General tried “to save his argument” by claiming that because the predicate offenders were senior, well-known members, it was reasonable to infer that they were among the “most active” gang members committing the gang’s primacy activities, “making it in turn reasonable to infer that they committed the predicates offense for the common benefit of the gang.” (*Id.* at 745.)

*Cooper* rejected this argument on the ground that the record did not support the Attorney General’s characterization of the offenders as senior gang members, “even assuming arguendo that senior or well-known gang membership could possibly be evidence that predicate offenses commonly benefited the gang.” (*Ibid.*) This offhand assumption for the sake of argument is not and cannot be authority for respondent’s claim that predicate crimes committed by high-ranking gang members satisfy *Cooper*’s unequivocal requirement that the predicate offenses must be



shown to have *actually* “benefited the gang in a manner that was more than reputational.” (*Id.* at 743-744.)

**D. Respondent’s Argument Fails Even On Its Own Terms.**

Even accepting respondent’s (incorrect) “reasonable inferences” argument on its own terms, it fails. Respondent argues, for example, that crimes committed by leading gang members lead to the conclusion that the crimes were committed to benefit the gang in a way more than reputationally. He argues that a financial crime committed by a gang member must be for the common financial benefit of the gang; that a gang member who intimidated a witness, did so for common benefit of the gang. The argument is faulty under the terms of logic on which the reasonable inferences doctrine is premised. For example, the gang expert testified the jury should “keep in mind that gang members bring a gang response to all sets of circumstances and all stimulus[sic]” . . . so that “even stealing a sandwich” would be for the benefit of the gang. (16RT 3200-3201.) This illogic would render much of AB 333’s changes “mere surplusage.” (*Cooper*, 14 Cal.5th at 744.)

**E. *People v. Lopez*.**

In the Supplemental Opening Brief, appellant pointed out that *People v. Lopez* (2021) 73 Cal.App.5th 327, 346-347, refused to find harmless error for the omission of instructions on the element enacted by AB 333, even if the record included evidence that would have permitted the pre-AB 333 jury to make a particular finding, such as common benefit to the gang beyond

reputational. The *Lopez* court held that it would violate the defendant's right to a jury trial were an appellate court to make a finding that the *jury might have made*, which is what respondent asks this Court to do.

Respondent argues that *Lopez* is inapposite because in that case respondent relied on evidence from unpublished appellate decisions, whereas in this case respondent relies on the gang expert's testimony and the certified records of the predicate offenses. (SRB 25-26.) Appellant agrees the facts in this case differ from those in *Lopez*, but that does not legitimize the "facts" respondent relies on here. The inferences from the facts here do not satisfy the requirement that the predicate offenses *actually* "benefited the gang in a manner that was more than reputational." The principle of *Lopez* nonetheless applies. Appellant's jury was not properly instructed and thus it was not asked to make the required finding.

Finally, respondent complains that appellant cites *Lopez* to "suggest that there can never be harmless error." (SRB 26.) This is not correct: Appellant argues that the error was prejudicial under *Chapman v. California*, 386 U.S. at 24 and *People v. Cooper*, 14 Cal.5th at 742-743. (See SAOB 15; SARB, 7, above.)

#### **F. Conclusion.**

Respondent's basic premise is that the non-specific testimony of the gang predicate offenses, alone and/or together, provide a basis to infer the required element of a common benefit to the gang beyond reputational. Respondent uses the substantial evidence test that is used for assessing sufficiency of

the evidence. The test here is different, as made clear in *Cooper* and *Mil*: AB 333 requires evidence of an *actual* common benefit to the gang that is more than reputational.

And in assessing harm from the instructional omission of an element in this case, the test is whether the record has with “evidence that could rationally lead to a contrary finding with respect to the omitted element.” (*Cooper*, 14 Cal.5th at 743-744.) The record here contains evidence that could rationally lead to a contrary finding, i.e., that the offenses were committed for the personal benefit of the offender or the benefit the gang’s reputation. The gang expert testified to just such benefits.

Because respondent’s argument is virtually the same as that rejected by this Court in *People v. Cooper*, appellant repeats this Court’s conclusion in *Cooper*:

“The Attorney General’s interpretation would render superfluous much of the new amendment that requires both that predicate offenses ‘commonly benefited’ the gang and that the common benefit is ‘more than reputational.’” (*Id.* at 744.)

“If all that were required to prove a predicate offense is that the prosecution show that the gang member committed as one of the gang’s primacy activities any one of the enumerated predicate offenses that typically involve a financial benefit, then the additional requirement that predicate offenses also ‘commonly benefited a criminal street gang’ in a ‘more than reputational’ manner would be mere surplusage.” (*Ibid.*)

Respondent’s argument would also discard years of precedents from this Court and the United States Supreme Court

as to the proper standard for review of prejudice when the jury instruction omits an essential element of the offense.

Based on this record, the absence of jury instructions on the new requirements was not harmless beyond a reasonable doubt. And, as respondent concedes, AB 333's amendments apply retroactively to this case. (SRB 14, Supp. AOB 7.) Thus, reversal is required.

## **II. THE EXPERT TESTIMONY IN VIOLATION OF *PEOPLE V. SANCHEZ* AND *CRAWFORD V. WASHINGTON* REQUIRES RECONSIDERATION AND REVERSAL OF THE TRIAL COURT'S SEVERANCE RULING**

Appellant does not address those contentions in the Supplemental Respondent's Brief that are adequately addressed in Appellant's Supplemental Opening Brief. Appellant replies here only to two issues raised by respondent that require elaboration.

Respondent argues that the prosecution's expert witness Edwards "was brought into the case at Lamb's request." (SRB 27, citing 13RT 2358-2359.) Respondent seems to imply that appellant requested Edwards' testimony, possibly forfeiting any claim to his testimony. The citations to the Reporter's Transcript consist of Edwards' testimony that appellant's attorney requested a re-examination of the evidence, that is, the attorney was complying with his constitutional duty to investigate the case. Appellant did not "bring" Edwards into the case and did not subpoena him to testify. There is nothing in the record that appellant's attorney approached or contacted Edwards in any

other way, apart from cross-examination at trial. The attorney's actions are irrelevant to appellant's claim before this Court.

Respondent also argues that appellant does not challenge the admissibility of Edward's testimony (SRB 33.) Appellant disagrees. Appellant addressed the inadmissibility of Edwards' testimony at length under *People v. Azcona* (2020) 58 Cal.App.5th 504. (SAOB 23, 26, 27.) Appellant expressly argued the inadmissibility of expert opinion testimony is based on reasons unsupported by the material on which the expert relies. (*Azcona*, 58 Cal.App.5th at 513.) In this case, Edwards twice insisted his opinion was true with "zero doubt" and that no other conclusion was even possible. (13 RT 2366.) *Azcona* held that such a definitive conclusion, together with the hearsay statements about supervisor approval, "gave the impression that the expert's opinion was entitled to more weight than it would otherwise deserve." (*Id.* at 515.)

The failure to address any other arguments or allegations made by respondent, or to reassert any particular point already made, does not constitute a concession, abandonment or waiver of the points made by appellant, see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, but reflects appellant's view that the issue has been adequately presented.

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## CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court vacate the special circumstance finding, and all the gang enhancements, as well as the substantive gang conviction, and remand for reconsideration of the severance ruling.

DATED: March 18, 2024

Respectfully submitted,  
*/s/ Kathy R. Moreno*  
Kathy R. Moreno  
Attorney for Michael Lamb

**CERTIFICATE PURSUANT TO RULE OF COURT 8.630(b)**

I, Kathy R. Moreno, attorney for Michael A. Lamb, certify that this Appellant's Supplemental Reply Brief does not exceed 102,000 words pursuant to California Rule of Court, rule 8.630(b). According to the Word word- processing program on which it was produced, the number of words contained herein is 4663 and the font is Century Schoolbook 13.

I hereby declare under penalty of perjury, that the above is true and correct, on March 18, 2024, in Berkeley, CA.

*/s/ Kathy R. Moreno*

KATHY R. MORENO

## CERTIFICATE OF SERVICE

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 9006, Berkeley, CA 94709-0006. I have made service of the foregoing APPELLANT'S SUPPLEMENTAL OPENING BRIEF on March 18, 2024, by Truefiling and/or email to :

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And by depositing, postage paid, in the United States mail on March 18,, 2024 a true and full copy thereof, to the following:

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Michael Lamb  
San Quentin, CA 94974

I hereby declare under penalty of perjury that the above is true and correct. Executed March 18, 2024, in Berkeley, CA under penalty of perjury.

*/s/ Kathy Moreno*

KATHY R. MORENO



**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
Supreme Court of California

Case Name: **PEOPLE v. LAMB (MICHAEL ALLAN)**

Case Number: **S166168**

Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

3/18/2024

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Date

/s/Kathy Moreno

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Signature

Moreno, Kathy (121701)

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Last Name, First Name (PNum)

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Law Firm