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6 Attorneys for Defendant  
TRACY GORDON

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF SAN DIEGO**

10 THE PEOPLE OF THE STATE OF )  
11 CALIFORNIA, )  
12 ) Plaintiff, )  
13 v. )  
14 )  
15 TRACY GORDON )  
16 ) Defendant. )  
17 )  
18 )

Case No.: SCD252629/SCD252672

**NOTICE OF MOTION AND  
MOTION TO DISMISS PURSUANT  
TO Cal. Penal Code § 1170.18  
(Deering)**

Date: March 2, 2015  
Time: 9:00 a.m.  
Dept: Presiding  
Status: March 2, 2015  
J/T:  
Estimated Time: 30 min.  
Number of witnesses: 0

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20 **TO: PLAINTIFF ABOVE-NAMED AND ITS ATTORNEY, BONNIE M. DUMANIS,  
AND HER AUTHORIZED REPRESENTATIVE LISA RODRIGUEZ:**

21  
22 **PLEASE TAKE NOTICE** that on the above date, time and location defendant, Tracy  
23 Gordon, will move the court to dismiss his Cal. Penal Code § 12022.1(b) (Deering) conviction  
24 pursuant to Cal. Penal Code § 1170.18 after his Proposition 47 eligible primary offense was  
25 reduced to a misdemeanor.

26 This motion will be made on the grounds that Mr. Gordon's recent reduction and  
27 resentencing of his primary felony conviction to a misdemeanor requires dismissal of his Cal.  
28

1 Penal Code § 12022.1 (Deering) conviction, because his “felony” conviction is now deemed to  
2 be a misdemeanor for all purposes.

3 This motion will be based upon the instant notice of motion, the attached memorandum  
4 of points and authorities and on such other oral and documentary evidence as may be presented  
5 at the hearing of this motion.

6  
7 Dated:

8 Respectfully Submitted,

9 RANDY MIZE, Chief Deputy  
10 Office of the Primary Public Defender

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12 by: \_\_\_\_\_  
13 TROY A. BRITT  
14 Deputy Public Defender

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Attorneys for Defendant  
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF SAN DIEGO**

10 THE PEOPLE OF THE STATE OF )  
11 CALIFORNIA, )

12 Plaintiff, )

13 v. )

14 TRACY GORDON )

15 Defendant. )

Case No.: SCD252629/SCD252672

**MOTION TO DISMISS PC Cal.**  
Penal Code § 12022.1(b)  
**ALLEGATION**

Date: March 2, 2015  
Time: 9:00 AM  
Dept: Presiding  
Status: March 2, 2015  
J/T:  
Estimated Time: 30 min.  
Witnesses: 0

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19 **STATEMENT OF THE CASE**

20 Mr. Gordon originally entered a guilty plea to the crime of possession of a controlled  
21 substance in violation of Cal. Health & Safety Code § 11377 (Deering) ("Primary Offense") as a  
22 felony and was sentenced to prison. The charge was a felony but was subsequently recalled and  
23 resented as a misdemeanor pursuant to Cal. Penal Code § 1170.18 (Proposition 47). Mr.  
24 Gordon was resented to 240 days in custody.

25 Mr. Gordon was also sentenced to 4 years in prison for violating Cal. Penal Code  
26 § 530.5 (Deering) ("Secondary Offense"). An additional 2 years was added when Mr. Gordon  
27 admitted that the offense was committed while he was out-on-bail in violation of Cal. Penal  
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1 Code § 12022.1(b).

2 **QUESTION PRESENTED**

3 Should Mr. Gordon’s Cal. Penal Code § 12022.1(b) allegation, for committing an  
4 offense while out-on-bail pending a felony offense, be dismissed after the felony on which the  
5 allegation was based was reduced to a misdemeanor pursuant to Proposition 47?

6 **INTRODUCTION**

7 Proposition 47, passed overwhelmingly by the voters on November 4, 2014, reclassified  
8 numerous theft and drug crimes as misdemeanors and established a legal process for individuals  
9 convicted of those crimes as felonies to either petition or apply for those convictions to be  
10 reduced to misdemeanors. Simple possession in violation of Cal. Health & Safety Code  
11 § 11350 (Deering) is one of those eligible offenses.

12  
13 Mr. Gordon was originally charged with Cal. Health & Safety Code § 11377(a)  
14 (Deering) (“Primary Offense”). This felony offense was reduced to a misdemeanor for all  
15 purposes. Mr. Gordon was also convicted of violating Cal. Penal Code § 530.5 (“Offense”) in a  
16 different case. These charges arose while Mr. Gordon was pending the original felony case.  
17 Mr. Gordon is serving an 4 year sentence in state prison for those offenses which are not eligible  
18 for reduction pursuant to Proposition 47. However, 2 of the 4 years are the result of an  
19 allegation that Mr. Gordon committed the instant offense while out-on-bail on a felony offense.  
20 (Cal. Penal Code § 12022.1(b).) The felony offense on which the allegation was based was  
21 reduced and resentenced pursuant to Cal. Penal Code § 1170.18. Since the out-on-bail  
22 allegation must be based on a felony conviction, there is no longer a basis to impose the  
23 additional 2 years and the allegation must be dismissed and Mr. Gordon resentenced.  
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**POINTS AND AUTHORITIES**

**MR. GORDON IS ENTITLED TO DISMISSAL OF THE OUT-ON-BAIL  
ALLEGATION SINCE THE FELONY CONVICTION UPON WHICH IT  
RELIED HAS BEEN REDUCED TO A MISDEMEANOR**

On November 4, 2014, California voters passed Proposition 47. The Act is to be “liberally construed to effectuate its purposes.” “As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.]” (People v. Murphy, 25 Cal. 4th 136, 142, 105 Cal. Rptr. 2d 387, 19 P.3d 1129 (2001).) “ ‘When the language of a statute is clear, we need go no further.’ [Citation.] People v. Harrison, 57 Cal. 4th 1211, 1221, 312 P.3d 88, 95 (2013). The intent of Proposition 47 is to “[e]nsure that people convicted of murder, rape, and child molestation will not benefit from this act” and “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.” (Proposition 47, Cal. Penal Code § 3.)

Proposition 47 added Cal. Penal Code § 1170.18 which establishes resentencing procedures and designation of felonies to misdemeanors. In pertinent part, Cal. Penal Code § 1170.18 allows a sentenced defendant to petition the court for a recall of a sentence for designated crimes, and request resentencing pursuant to the amended sections. (Cal. Penal Code § 1170.18(a) (Deering).) The added section further grants a court a limited amount of discretion to recall the previous sentence, and resentence the defendant consistent with the amended sections. (Cal. Penal Code § 1170.18(b) (Deering).) Specifically, “[a]ny felony conviction that is recalled and resented under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 of Division 9 of Title 4 of Part 6.” (Cal. Penal Code § 1170.18(k) (Deering).)

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2 The instant case also implicates Cal. Penal Code § 12022.1. Cal. Penal Code § 12022.1  
3 talks about “primary” and “secondary” offenses. These offenses must be felonies. A “‘Primary  
4 offense’ means a felony offense means a felony offense for which a person has been released  
5 from custody on bail or on his or her own recognizance prior to the judgment becoming final . .  
6 . .” (Cal. Penal Code § 12022.1(a) (Deering).) A “ ‘Secondary offense’ means a felony offense  
7 alleged to have been committed while the person is released from custody for a primary  
8 offense.” (Cal. Penal Code § 12022.1(b).) “Any person arrested for a secondary offense that  
9 was alleged to have been committed while that person was released from custody on a primary  
10 offense shall be subject to a penalty enhancement of an additional two years, which shall be  
11 served consecutive to any other term imposed by the court.” (Cal. Penal Code § 12022.1(c)  
12 (Deering).) Cal. Penal Code § 12022.1(g) (Deering), is most relevant to our purposes, and  
13 addresses what happens if the primary offense is reversed on appeal. Section (g) reads:

14 If the primary offense conviction is reversed on appeal, the enhancement shall be  
15 suspended pending retrial of that felony. Upon retrial and reconviction, the  
16 enhancement shall be reimposed. If the person is no longer in custody for the  
17 secondary offense upon reconviction of the primary offense, the court may, at its  
18 discretion, reimpose the enhancement and order him or her recommitted to  
19 custody. (Id.)

18 In the instant case, Mr. Gordon was charged in case SCD252672 with violating Cal.  
19 Health & Safety Code § 11377(a). Mr. Gordon was released on bail so this is the “primary  
20 offense”. While out on bail, Mr. Gordon was arrested and charged in case SCD252672 with  
21 violating Cal. Penal Code § 530.5. Since Mr. Gordon was out on bail pending a felony charge  
22 this is the “secondary offense.” The prosecution added a Cal. Penal Code § 12022.1(b)  
23 allegation which added 2 years to Mr. Gordon’s sentence. Ultimately, Mr. Gordon was  
24 sentenced to 4 years in prison.

25 Pursuant to Cal. Penal Code § 1170.18(f), (g) (Deering) Mr. Gordon was resentenced on  
26 his original felony charge of Cal. Health & Safety Code § 11377(a) which was reduced to a  
27 misdemeanor. Now, Mr. Gordon moves to dismiss the Cal. Penal Code § 12022.1(b) allegation  
28

1 since the “primary offense,” which was the basis of the allegation attached to the “secondary  
2 offense” was reduced and resentenced as a misdemeanor.

3 **ONCE MR. GORDON’S ORIGINAL SENTENCE WAS REDUCED TO A**  
4 **MISDEMEANOR FOR ALL PURPOSES THE ALLEGATION BASED ON THAT**  
5 **CONVICTION NO LONGER APPLIES**

6 Mr. Gordon’s eligible charge, once designated a misdemeanor, shall be considered a  
7 misdemeanor for all purposes, and remove the basis for the out-on-bail allegation. (Cal. Penal  
8 Code § 1170.18(k).) The reduction to a misdemeanor is the result of a resentencing which states  
9 that the charge is a misdemeanor for all purposes. As a result of reducing the “primary offense”  
10 to a misdemeanor, the out-on-bail allegation attached to the “secondary offense” must be  
11 dismissed since there is no longer a felony conviction. Unfortunately, there are no cases  
12 directly on point.

13 However, the instant case is similar to the facts found in the case of *In re Ramey*, 70 Cal.  
14 App. 4th 508 (1999). In *Ramey*, the defendant was arrested for committing a robbery in  
15 Colorado (primary offense). Mr. Ramey was released on bond and came to California, where  
16 he committed another robbery (secondary offense). Mr. Ramey entered a guilty plea to the  
17 California robbery and admitted that he was on bond for the Colorado felony. Mr. Ramey was  
18 sentenced to an additional 2 years pursuant to Cal. Penal Code § 12022.1(b). After entering the  
19 plea, Mr. Ramey returned to Colorado where the primary felony offense was reduced to a  
20 misdemeanor. Mr. Ramey filed a writ of habeas corpus seeking relief from the additional 2  
21 year sentence for violating Cal. Penal Code § 12022.1. The Court of Appeal held that “[o]ur  
22 Supreme Court has unequivocally stated that a conviction for the criminal charge on the  
23 primary offense is an essential prerequisite to the imposition of the “on bail” enhancement.”  
24 (*Id.*; citing to *In re Jovan B.*, 6 Cal. 4th 801, 814 (1993).) “The sole conviction suffered by  
25 Ramey in Colorado was for a misdemeanor. Like the Cheshire Cat, the felony count  
26 disappeared from sight, leaving nothing behind but a mischievous grin. There being no felony  
27 conviction, the stay of the enhancement should have become permanent.” (*Id.*)  
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1           Moreover, the reduction and resentencing found in Cal. Penal Code § 1170.18 is  
2 similar to Cal. Penal Code § 17(b) (Deering). Both sections mandate that the reduction is for all  
3 purposes. "By its very terms, Cal. Penal Code § 17(b)(3) (Deering) contemplates that a  
4 probationer might come before the court by way of application to seek a reduction of his felony  
5 wobbler offense to a misdemeanor. Where such a motion is granted, as it was here, the  
6 unambiguous language of Cal. Penal Code § 17 (Deering) requires that the offense be treated as  
7 a misdemeanor thereafter "for all purposes," and we may not create exceptions to that rule  
8 without further legislative guidance. (People v. Camarillo, 84 Cal. App. 4th 1386, 1394 (2000).)

9           The California Supreme Court was confronted with the question of whether an offense  
10 that was reduced from a felony to a misdemeanor pursuant to Cal. Penal Code § 17(b) could be  
11 used as an allegation pursuant to Cal. Penal Code § 667(a) (Deering). The California Supreme  
12 Court held that "[i]f the court exercises its discretion pursuant to Cal. Penal Code § 17(b), the  
13 prior crime is a misdemeanor and cannot be used for purposes of sentence enhancement under  
14 Cal. Penal Code § 667(a)." (Id.) The Court in *Park* went on to hold that "[w]hen the court  
15 properly has exercised its discretion to reduce a wobbler to a misdemeanor under the  
16 procedures set forth in Cal. Penal Code § 17(b), the statute generally has been construed in  
17 accordance with its plain language to mean that the offense is a misdemeanor "for all  
18 purposes." (Id.) (See People v. Navarro, 7 Cal. 3d 248, 271 (1972) (commitment to the (former)  
19 Youth Authority, which reduced a wobbler to a misdemeanor by operation of § 17(b)(2),  
20 rendered the defendant eligible for a narcotics addiction rehabilitation program that prohibited  
21 participation by convicted felons); People v. Hannon, 5 Cal. 3d 330, 340 (1971) (concluding  
22 that the statutory language of § 17(b) was plain and unequivocal); see also People v. Marshall,  
23 227 Cal. App. 3d 502, 504-05 (1991) (the defendant's honorable discharge from the Youth  
24 Authority, which by operation of the terms of § 17, subd. (c), rendered his wobbler a  
25 "misdemeanor for all purposes," precluded imposition of a five-year prior serious felony  
26 enhancement under § 667(a) in a subsequent criminal proceeding).)

27           The California Supreme Court, citing an appellate court decision, declared that "one of  
28 the 'chief' reasons for reducing a wobbler to a misdemeanor 'is that under such circumstances



1 the offense is not considered to be serious enough to entitle the court to resort to it as a prior  
2 conviction of a felony for the purpose of increasing the penalty for a subsequent crime.’ ”  
3 (People v. Park, 56 Cal. 4th 782, 794 (2013) (citing In re Application of Rogers, 20 Cal. App. 2d  
4 397, 400-01 (1937)).)

5 “[W]e are unable to find in the cases any indication that a ‘reduced’ misdemeanor  
6 should be treated differently from a crime charged as a misdemeanor *ab initio*.” (Keener v.  
7 Mun. Court, 91 Cal. App. 3d 213, 218 (1979).) Although *Keener* dealt with a “wobbler” offense  
8 that was reduced by the court pursuant to Cal. Penal Code § 17(b)(5) (Deering), the court’s  
9 reasoning is just as applicable to matters reduced to misdemeanors by operation of law.

10 Moreover, in the context of recalling a sentence pursuant to Cal. Penal Code § 1170  
11 (Deering), the Fourth District decided that a recalled sentence could not be used to enhance a  
12 subsequent crime. (In re Acker, 158 Cal. App. 3d 888 (1984).) Cal. Penal Code § 1170(d)  
13 (Deering), grants a Court the authority to recall a prison sentence, and subsequently resentence  
14 the defendant. (Id.) A Court, which chooses to exercise this power, may sentence the  
15 defendant in a manner as if the defendant had never been sentenced. Specifically, the statute  
16 states that “[t]he court may . . . recall the sentence and commitment previously ordered and  
17 resentence the defendant in the same manner as if he or she has not previously been  
18 sentenced...” (id.) This language was expressly cited and relied upon by the Court in *In re*  
19 *Acker*.

20 In *Acker*, the defendant was sentenced to state prison in 1979. Before the defendant was  
21 arrested for a subsequent case, his original sentence was recalled pursuant to Cal. Penal Code  
22 § 1170(d) and probation was imposed. In 1981, the defendant was convicted of a subsequent  
23 felony and sentenced to state prison. The sentencing court added a one year term for the prison  
24 commitment that had occurred in 1979. (Id.) The Court found that the sentence was illegal,  
25 and held that the one year enhancement for a prison prior was improper because the prior  
26 sentence had been recalled. (Id.) The Court looked to the language of Cal. Penal Code § 1170,  
27 and determined that a recalled sentence is inoperable. According to the Court, “[a] prison  
28 sentence recalled pursuant to Cal. Penal Code § 1170(d), is vacated for all intents and purposes,

1 not completed; and the defendant is resentenced as if he had not previously been sentenced,  
2 provided the new sentence, if any, is no greater than the initial sentence.” (Id.) Continuing on,  
3 the Court found that the recall had effectively erased the prior sentence, and the deleterious  
4 effects that it could have previously caused. (Id.)

5 Cal. Penal Code § 1170.18, like Cal. Penal Code § 1170, employs the recall and  
6 resentence procedure. Consistent with the canons of statutory interpretation, it is proper to  
7 impute the same meaning and effect to the language of the new statute. Specifically, Cal. Penal  
8 Code § 1170.18(k), provides that a recalled felony sentence, which is resentenced as a  
9 misdemeanor, shall only operate prospectively so to deprive the Client of her ability to own and  
10 possess a firearm. Further, the import of the recall and resentence meaning from Cal. Penal  
11 Code § 1170(d), seems increasingly proper when considered in conjunction with Cal. Penal  
12 Code § 1170.18(m) (Deering). Cal. Penal Code § 1170.18(m), expressly vests a qualifying  
13 Client with a new remedial avenue by which to erase a felony conviction. Insofar as it creates a  
14 new right, it also distinguishes the added relief of Cal. Penal Code § 1170.18 from preexisting  
15 remedies, such as reductions pursuant to Cal. Penal Code § 17(b).

16 In the context of Sexually Violent Predator cases, when a person’s conviction has been  
17 reversed on appeal after being imprisoned and determined to be SVP the California Supreme  
18 Court held “that if the People seek to continue SVP proceedings against someone whose  
19 present conviction has been reversed, it must retry and reconvict him.” The Court regretted  
20 “that this requirement imposes an additional burden on the People, particularly when the  
21 person has already served his prison sentence,” the Court believed that the statutory scheme  
22 “impose[d] this burden due to the constitutional concerns.” (In re Smith, 42 Cal. 4th 1251,  
23 1270, 178 P.3d 446, 458 (2008).)

24 This Court should treat Mr. Gordon’s reducible offense as a misdemeanor for all  
25 purposes. “There is one consideration of paramount importance. It leads inevitably to the  
26 conclusion that the Legislature must have intended, and by necessary implication provided, that  
27 the amendatory statute should prevail. When the Legislature amends a statute so as to lessen  
28 the punishment it has *obviously expressly determined that its former penalty was too severe and that a*

1 *lighter punishment is proper* as punishment for the commission of the prohibited act. It is an  
2 inevitable inference that the Legislature *must have intended that the new statute imposing the new*  
3 *lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could*  
4 *apply.” (In re Estrada, 63 Cal. 2d 740, 744-45 (1965) In the absence of any constitutional*  
5 *prohibition, the principles set forth in Estrada require the court to treat the alleged violation of*  
6 *Cal. Penal Code § 12022.1(b) as if the underlying offense as already a misdemeanor at the time*  
7 *of the alleged commission of the new offense.*

8 In every similar context, the reduced or reversed conviction can longer be used to  
9 enhance an offense. The court should treat the underlying offense as “a crime charged as a  
10 misdemeanor *ab initio*,” which means only the provisions of Cal. Penal Code § 12022.1(b) is  
11 inapplicable. Because the primary offense was reduced and no longer a felony, there is no basis  
12 to enhance the secondary offense. As in *Ramey*, the felony conviction, like the Cheshire cat, is  
13 gone.

#### 14 **VIOLATES EQUAL PROTECTION**

15 The out-on-bail allegation must be dismissed or run afoul of the equal protection clause.  
16 “The constitutional guaranty of equal protection of the laws has been judicially defined to mean  
17 that no person or class of persons shall be denied the same protection of the laws which is  
18 enjoyed by other persons or other classes in like circumstances in their lives, liberty and  
19 property and in their pursuit of happiness. [Citations.]” (*People v. Romo*, 14 Cal. 3d 189, 196  
20 (1975).) The concept recognizes that persons similarly situated not be treated differently unless  
21 the disparity is justified. (*In re Eric J.*, 25 Cal. 3d 522, 531 (1979); *People v. Nguyen*, 54 Cal.  
22 App. 4th 705, 714 (1997); *Bd. of Supervisors v. Local Agency Formation Com.*, 3 Cal. 4th 903,  
23 914 (1992).)

24 Cal. Penal Code § 1170.18 is a unique statute that applies retroactively as well as  
25 prospectively. While it is true that Proposition 47 does not have an explicit “savings” clause  
26 stating whether the operation is prospective only, Proposition 47 does have what can be  
27 construed as a savings clause—a clause stating the extent to which it applies to people who are  
28 already convicted as of its effective date. (*Id.*) Cal. Penal Code § 1170.18 applies to people

1 “currently serving a sentence” for a conviction and to people who have “completed their  
2 sentence” for a conviction. (Id. § 1170.18(a), (f).) Additionally, Cal. Penal Code § 1170.18  
3 provides for a petition for resentencing that can be filed by people convicted before Proposition  
4 47’s effective date. (Id. § 1170.18(g).) This “savings” clause found in Proposition 47 is similar  
5 to a clause upheld as “the functional equivalent of a savings clause” in the Three Strikes Reform  
6 Law. (People v. Yearwood, 213 Cal. App. 4th 161, 172 (2013).)

7 Precluding someone from seeking relief via Cal. Penal Code § 1117.18 (Deering)  
8 presents a violation of equal protection rights for anyone who had the misfortune of committing  
9 their offenses prior to November 5, 2014. The court would create two classifications of offenses  
10 for similarly situated individuals—someone who allegedly committed an offense while out-on-  
11 bail before or after November 5, 2014. Because Mr. Gordon was convicted in 2008 he would  
12 not be entitled to the relief offered by the passage of Proposition 47. This not only violates the  
13 equal protection rights of Mr. Gordon but is illogical and confounding.

14 Mr. Gordon is subject to an unfair result if the out-on-bail allegation is not dismissed. It  
15 is comparable to someone sentenced to prison for crime or allegation that was later overturned  
16 on appeal or law found to be unconstitutional. However, this is precisely the situation that Mr.  
17 Gordon finds himself.

18 **CONCLUSION**

19 The out-on-bail allegation against Tracy Gordon must be dismissed. The out-on-bail  
20 allegation is based on a primary felony conviction that was reduced to a misdemeanor for all  
21 purposes. Thus, Mr. Gordon was not out-on-bail pending a felony as required by Cal. Penal  
22 Code § 12022.1(b). Penal Code section 1170.18 is a new statute that has not been fully tested.  
23 However, in every analogous situation, the same result is reached—the secondary offense or  
24 allegation is dismissed.

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27 Dated:

28 Respectfully Submitted,

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Office of the Primary Public Defender

by: \_\_\_\_\_  
TROY A. BRITT  
Deputy Public Defender

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