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6 **(*** Note - facts and names have been changed. All names are pseudonyms. Any
similarity between any real or fictional person or circumstances is unintended. ***)**

7 SUPERIOR COURT OF CALIFORNIA

8 IN AND FOR THE COUNTY OF SAN DIEGO

9 NORTH COUNTY DIVISION

10 THE PEOPLE OF THE STATE OF
11 CALIFORNIA,

12 Plaintiff,

13 v.

14 JOHN SMITH,

15 Defendant.

Case no: CNXXXXXXXX

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT’S MOTION TO
SUPPRESS EVIDENCE DUE TO A
VIOLATION OF DEFENDANT’S
FIFTH AMENDMENT AND
FOURTEENTH AMENDMENT
RIGHTS

Judge:

Dept:

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24 Defendant John Smith respectfully submits the following Memorandum of Points
25 and Authorities in Support of his Motion to Suppress Evidence Due to the Violation of
26 his Fifth and Fourteenth Amendment Rights.

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7 *United States v. Heldt* (9th Cir. 1984) 745 F.2d 1275. 6

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13 *People v. Bradford* (1997) 14 Cal.4th 1005. 7

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Defendant’s Memorandum of Points and Authorities in Support of his
 Motion to Suppress Evidence Due the Violation of
 Defendant’s Fifth and Fourteenth Amendment Rights

1 **Federal Constitution**

2 Fifth Amendment 3-6, 10, 12

4 Fourteenth Amendment 3, 10, 12

7 **California Statutes**

8 Penal Code § 17(b)(4). 1

10 Penal Code § 187. 1

12 Penal Code § 243 (e)(1). 1

14 Penal Code § 273.5(a). 1

16 Penal Code § 664. 1

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1 **I. INTRODUCTION AND PROCEDURAL HISTORY**

2 On February 17, 2005 Mr. Smith was arrested for a suspected violation of Penal
3 Code § 664 and Penal Code § 187. Those charges have since been dropped but Mr.
4 Smith has been charged with a violation of Penal Code § 273.5(a), corporeal injury to a
5 spouse and/or roommate, a misdemeanor pursuant to Penal Code § 17(b)(4) and with a
6 violation of Penal Code § 243 (e)(1), battery of a current or former significant other. Mr.
7 Smith entered a plea of not guilty at his recent arraignment on February 23, 2005.

8 **II. STATEMENT OF THE FACTS**

9 According to Officer Jones’s police report and the follow up report written by
10 Officer A.L. Folkins, on February 10, 2005, Officers Jones and Allen received a radio call
11 to investigate a family disturbance at 4800 Rancho Santiago, Apartment F38. (See
12 Exhibit A, attached to Declaration of Scott A. McMillan, hereinafter “Ex. A”, p.18.) The
13 officers arrived at the scene at approximately 10:15 p.m. (Ex. A, p.18.) The follow up
14 report indicates that Officer Jones saw April Johnson, Defendant’s wife, carrying a small
15 child and pulling luggage away from the address. (Ex. A, p.18.) Officer Jones indicated
16 that he saw Johnson crying and stopped to investigate. (Ex. A, p.18.) Officer Jones, in
17 his report, indicates that he and Officer Allen contacted April Johnson. (Ex. A, p.18.)
18 Officer Jones states in his report that Johnson was emotionally distraught and initially
19 reluctant to give any information regarding the alleged altercation between herself and her
20 husband, Mr. Smith. (Ex. A, p.18.)

21 On February 11, 2005, in the early morning hours, Johnson contacted Officers
22 Jones and Allen again. (Ex. A, p.4.) Johnson told the officers that she had fabricated the
23 entire story. (Ex. A, p.4.) Johnson indicated that she was upset and just wanted to get
24 Smith in trouble. (Ex. A, p.4.) Johnson indicated that the incident on February 10, 2005
25 had stemmed from a photograph on Smith’s cellular phone of a co-worker of his. (Ex. A,

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1 p.4, 13.) Johnson was concerned that Smith was having an affair with this woman and
2 Johnson became very upset when she discovered the photo stored in Smith’s phone. (Ex.
3 A, p.4, 13.)

4 The follow up report, in the section labeled, “Victim’s Statement: Statement of
5 April Johnson,” indicates that Johnson “was insistent that she lied to the responding
6 officers.” (Ex. A, p.4.) Furthermore, Smith stated that she lied to the officers “because
7 the officers told her she might lose her child.” (Ex. A, p.4.) Because of the threat of
8 losing her six week old child, Johnson “felt she had to come up with a story implicating
9 Smith.” (Ex. A, p.4.)

10 Mr. Smith was arrested on February 10, 2005 following the initial contact between
11 his wife, April Johnson, and the responding officers. (Ex. A, p.4.) Mr. Smith was
12 arrested for attempted murder but the charges were later reduced to two misdemeanor
13 counts related to domestic violence. (Declaration of Scott A. McMillan, hereinafter
14 McMillan Dec, ¶ 3. 4.) Mr. Smith, affirmatively and unequivocally requested an attorney
15 on the night that he was arrested. He declined to speak to the officers without an attorney
16 present.

17 On February 15, 2005 an employee of Child Protective Services, CPS, contacted
18 April Johnson regarding a visit to the house. (Declaration of April Johnson, hereinafter
19 Johnson Dec, ¶ 16.) The employee came to the apartment and requested that Johnson
20 remove her child’s clothing so an inspection of the child’s body could be done. (Johnson
21 Dec ¶ 16.) During this visit from CPS, Johnson was told that if she allowed Smith to
22 return to the home and CPS found the home to be unsuitable, their newborn baby would
23 be removed from the home. (McMillan Dec ¶ 16, 17; Johnson Dec ¶ 14, 15.)

24 The next day, February 16, 2005, the CPS employee visited Mr. Smith, who is 19
25 years old, in jail. At this time, Mr. Smith was being held for attempted murder arising

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1 from the alleged incident with his wife on February 10, 2005. The CPS officer and Mr.
2 Callender met in a private room within the jail facility. Mr. Smith immediately informed
3 the CPS officer that he was represented by counsel and he did not want to speak to her
4 outside the presence of his attorney. The CPS officer proceeded to inform Mr. Smith that
5 if he did not tell her what happened, Mr. Smith would be incarcerated indefinitely. Mr.
6 Smith was worried about his wife and child. He did not know when he would see them
7 again. Given what the police had told his wife, Mr. Smith was also worried about CPS
8 removing his child from the home.

9 Eventually, Mr. Smith told the CPS officer what happened on the night of
10 February 10, 2005. The CPS officer was not satisfied with Mr. Smith's responses to her
11 inquiries. She continued to badger Mr. Smith even when after he told her what happened
12 on the night of February 10, 2005. She asked Mr. Smith why the Police would make up
13 such an elaborate story. She asked Mr. Smith why she should believe his story. She
14 asked Mr. Smith who she should believe. This interview between Mr. Smith and the CPS
15 officer lasted approximately 30 minutes.

16 **III. ARGUMENT**

17 **A. The questioning by the CPS officer was a violation of Mr. Smith's Fifth** 18 **Amendment right to counsel because there was custodial interrogation subsequent** 19 **to Mr. Smith's unequivocal request for counsel**

20 “[A] suspect may not be subjected to custodial interrogation unless he or she
21 knowingly and intelligently has waived the right to remain silent, to the presence of an
22 attorney, and to appointed counsel in the event the suspect is indigent.” (*Miranda v.*
23 *Arizona* (1966) 384 U.S. 436.) A person's Fifth Amendment rights, as applied to the
24 states via the Fourteenth Amendment, protect them against intrusions by the government.
25 (*TRW, Inc. v. Superior Court* (1994) 25 Cal.App.4th 1834, 1844.) “Custody for the

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1 purposes of triggering the Fifth Amendment right to counsel is formal arrest, or the loss
 2 of freedom of movement to the same degree as formal arrest.” (*Id.* at 1849-1850.) “[T]he
 3 term 'interrogation' under *Miranda* refers not only to express questioning, but also to any
 4 words or actions on the part of the police (other than those normally attendant to arrest
 5 and custody) that the police should know are reasonably likely to elicit an incriminating
 6 response from the suspect. . . .” (*People v. Sims* (1993) 5 Cal.4th 405, 440 quoting *Rhode*
 7 *Island v. Innis* (1980) 446 U.S. 291, 300-301.)

8 In the case of *Nash v. Estelle* (1979) 579 F.2d 513, 514 the Court reheard, *en banc*,
 9 a petition for a writ of habeas corpus. (*Nash v. Estelle* (1979) 597 F.2d 513, 514.) The
 10 criminal defendant who had been sentenced to 100 years in prison for murder argued that
 11 a written confession was elicited from him in violation of his *Miranda* rights and that
 12 such confession was used against him during trial. (*Id.* at 514, 515.) The confession was
 13 made to the district attorney who later recorded the statement in writing and had the
 14 defendant sign it. (*Id.*) The Court concluded that the confession was not in violation of
 15 his *Miranda* rights because the district attorney had reassured the defendant that he could
 16 have an attorney present if he so desired and the defendant was merely making sure that
 17 he could have an attorney present during the later stages of the proceeding. (*Id.* at 518-
 18 520.) However, nowhere in its opinion did the Court state that it would have been
 19 impossible for the district attorney to subject the defendant to custodial interrogation.
 20 (See *Nash, supra*, 597 F.2d 513.) The Court engaged in discussion regarding whether the
 21 district attorney violated the defendants’ *Miranda* rights. (*Id.*) As such, the Court
 22 implied that had the defendants’ *Miranda* rights been violated, the district attorney could
 23 have properly been the party to violate them. (See *Nash, supra*, 597 F.2d 513.) The
 24 custodial interrogator, therefore, is not required to be a police officer but merely a
 25 government agent. (*Id.*)

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1 Further, in the case of *TRW, Inc. v. Superior Court* (1994) 25 Cal.App.4th 1834,
2 the Court considered whether a privately owned company who performed defense
3 contracts for the federal government violated its officers Fifth Amendment right to
4 counsel by ordering him to attend a security questioning regarding suspicious activities in
5 which he engaged. (*TRW, Inc., supra*, 25 Cal.App.4th at 1839-1843.) Although the
6 Court found that the officer was neither the subject of custodial interrogation nor was the
7 privately owned company a government actor, the Court did recognize the possibility that
8 a person's Fifth Amendment right to counsel could be violated by a government actor
9 other than a police officer. (*Id.* at 1843-1844.)

10 A government agent can be someone employed by the government or acting at the
11 behest of the government. (*People v. Memro*, (1995) 11 Cal.4th 786, 827-829.) Jailhouse
12 informants can be government agents. (*Id.*)

13 To begin with, the officer of CPS who subjected Mr. Smith to questioning
14 regarding his child and the incident that occurred on February 10, 2005, was a
15 government officer. Child Protective Services is a division of the California Department
16 of Social Services. This is a government agency. As such, its officers are government
17 actors. Although custodial interrogation is usually perpetrated by police officers, it can be
18 perpetrated by other government actors. (See *Nash, supra*, 597 F.2d 513; *TRW, Inc.,*
19 *supra*, 25 Cal.App.4th 1834.)

20 It can hardly be disputed that Mr. Smith was in custody during the time of the
21 questioning by the CPS officer. He was in jail on a charge of attempted murder, which
22 was later reduced to two misdemeanor counts of domestic violence.

23 In terms of interrogation, the CPS officer questioned Mr. Smith about his six week
24 old child and the incident that occurred on February 10, 2005. She specifically asked him
25 questions and made statements which she knew would elicit incriminating information

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1 from him. Her suspected purpose in questioning Mr. Smith was to obtain this
2 incriminating information related to the incident. The CPS officer therefore engaged in
3 custodial interrogation of Mr. Smith.

4 Although the CPS officer knew that Mr. Smith was represented by counsel, she
5 questioned him outside the presence of his attorney. Mr. Smith did not waive his right to
6 counsel before the questioning by the CPS officer. In fact, Mr. Smith expressly told the
7 CPS officer that he had an attorney and he did not want to speak to her without his
8 attorney present. As such, the CPS officer violated the Fifth Amendment rights of Mr.
9 Smith.

10 **B. Because Mr. Smith's Fifth Amendment rights were violated, the statements**
11 **made by him should be excluded from trial**

12 The prosecution may not use statements taken from a criminal defendant during a
13 custodial interrogation unless the prosecution can demonstrate the use of procedural
14 safeguards effective to secure the privilege against self-incrimination. (*Miranda, supra*,
15 384 U.S. at 444.) Once a criminal defendant is in custody, *Miranda* warnings must be
16 given before an interrogation. (*United States v. Estrada-Lucas* (9th Cir. 1980) 651 F.2d
17 1261, 1265.) The warnings given to the criminal defendant must advise him of each of
18 his 'critical' rights. (*United States v. Bland* (9th Cir. 1990) 908 F.2d 471, 474.) The
19 custodial interrogation must cease as soon as the criminal defendant indicates that he
20 wishes to remain silent or he requests counsel. (*Miranda, supra*, 384 U.S. at 444.)
21 Statements taken by the interrogator in violation of *Miranda* are usually inadmissible.
22 (*United States v. Heldt* (9th Cir. 1984) 745 F.2d 1275.)

23 As indicated above, the CPS officer who questioned Mr. Smith knew that he was
24 represented by counsel. Even if she did not know before she began her interrogation of
25 Mr. Smith, he expressly told her that he did not want to speak to her without his attorney

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1 present. This officer proceeded to inform Mr. Smith that he would not be released from
 2 jail until he spoke to her. This officer is a government agent and she is subject to the
 3 rules regarding custodial interrogation of criminal defendants. (See *Nash, supra*, 597
 4 F.2d 513; *TRW, Inc., supra*, 25 Cal.App.4th 1834; *People v. Memro*, (1995) 11 Cal.4th
 5 786, 827-829.) The CPS officer’s custodial interrogation of Mr. Smith and her threats of
 6 indefinite incarceration lead to the conclusion that any statements taken by her during the
 7 interview were clearly in violation of *Miranda* and should be excluded from Mr. Smith’s
 8 trial.

9 **C. Because the statements made by Mr. Smith were involuntary, the statements**
 10 **should be excluded from trial**

11 Statements taken in violation of a criminal defendant’s *Miranda* rights are usually
 12 excluded from trial. (*Sims, supra*, 5 Cal.4th at 444.) These “statements are inadmissible
 13 to establish guilt.” (*Id.*) Statements made in violation of *Miranda*, however, may
 14 sometimes be admissible for impeachment purposes provided the Court finds that the
 15 statements were voluntary. (*Oregon v. Elstad* (1985) 470 U.S. 298, 307.) The burden is
 16 on the Government to establish that the statements were voluntary. (*Lego v.*
 17 *Twomey* (1972) 404 U.S. 477, 488-489.) In order to determine voluntariness, the Court
 18 will look to the totality of the circumstances. (*Withrow v. Williams* (1993) 507 U.S. 680,
 19 693-694; *People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) The factors to examine in
 20 deciding voluntariness include “‘the length of interrogation [citation]; its location
 21 [citation]; its continuity’ as well as ‘the defendant’s maturity [citation]; education
 22 [citation]; physical condition [citation]; and mental health.’” (*People v. Williams* (1997)
 23 16 Cal.4th 435 quoting *Withrow v. Williams, supra*, 507 U.S. at 693-694.) “A statement
 24 is involuntary [citation] when among other circumstances, it was extracted by any sort of
 25 threats...[or] obtained by any direct or implied promises, however slight...[citations].

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1 Voluntariness does not turn on any one fact, no matter how apparently significant, but
2 rather on the totality of the circumstances.” (*People v. Neal* (2003) 31 Cal.4th 63, 79.)

3 Further, the Court must consider whether the government agents overbore the will
4 of the criminal defendant. (*Haynes v. Washington* (1963) 373 U.S. 503, 513-514.) This
5 determination is made by examining (1) the conduct of the government agents in terms of
6 creating pressure on the defendant and (2) the defendant’s ability to resist the pressure
7 created by the government agents. (*Mincey v. Arizona* (1978) 437 U.S. 385, 399-401.)

8 As was established above, the statements taken by the CPS officer were taken in
9 violation of Mr. Smith’s *Miranda* rights. She questioned Mr. Smith outside the presence
10 of his counsel even though she knew that he was represented and had expressed his desire
11 to not speak with her (or any other authorities) outside the presence of his counsel. Mr.
12 Smith was in custody, as he was still being held by the police for attempted murder and he
13 was confined to a jail cell. Further, the CPS officer asked Mr. Smith a series of questions
14 related to the incident of February 10, 2005 and related to his six week old child. The
15 CPS officer clearly violated Mr. Smiths’ *Miranda* rights by subjecting him to custodial
16 interrogation outside the presence of his attorney.

17 Statements taken by the CPS officer should be excluded, not only because they
18 were taken in violation of *Miranda*, but also because the statements were involuntary. On
19 or about February 15, 2005, the CPS officer contacted Mr. Smith while he was in custody.
20 Mr. Smith, who is 19 years old, had been in custody for five days. He had neither been in
21 jail nor been arrested before. Mr. Smith was being held on charges of attempted murder.
22 The judge did not set bail for Mr. Smith so he did not know how long he would have to
23 remain in custody. He did not know when he would next see his wife and child. At Mr.
24 Smith’s arraignment on March 1, 2005, Mr. Smith was finally released on his own
25 recognizance after being held in jail for eighteen days.

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1 The CPS officer who contacted Mr. Smith questioned him regarding the incident
2 that occurred on February 15, 2005 and regarding his six week old child. At the
3 beginning of the conversation, Mr. Smith indicated that he was represented by counsel
4 and he did not want to speak to the CPS officer without his attorney present. This officer,
5 however, threatened Mr. Smith. The officer told Mr. Smith that if he did not tell the CPS
6 officer what happened on February 10, 2005, he would remain incarcerated indefinitely.
7 She questioned his account of the events when he did tell her what happened and she
8 intimated that he was lying to her.

9 During the interview, Mr. Smith was nervous about losing his newborn baby, since
10 the CPS officer told him it was a realistic possibility. Mr. Smith knew that CPS had gone
11 to his apartment to make a physical inspection of his baby the previous day. All of the
12 above factors show that the CPS officer used her status as a government agent in order to
13 overcome the will of Mr. Smith. (*Haynes, supra*, 373 U.S. at 513-514; *Mincey,*
14 *supra*, 437 U.S. at 399-401.) Mr. Smith felt compelled to cooperate with the CPS officer,
15 for the sake of his newborn child and wife. (*Id.*) Mr. Smith did not feel that he had a
16 choice in the matter. If he refused to speak to the CPS officer, he believed he would
17 remain incarcerated indefinitely.

18 Given the nature of the charges and the circumstances surrounding the questioning
19 engaged in by the CPS officer, it is clear that Mr. Smith's statements were not voluntary.
20 He was in a position to be taken advantage of by this government officer. He was facing
21 serious criminal charges and the loss of his family. Questioning by the CPS officer on
22 such sensitive subjects when Mr. Smith was confused, scared and clearly in custody was a
23 violation of Mr. Smith's *Miranda* rights. An examination of the totality of the
24 circumstances also reveals that the statements were not made voluntarily. (*Neal, supra*,
25 31 Cal.4th at 79.) Because the statements obtained from Mr. Smith were involuntary, the

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1 statements must be excluded from his trial. (*Id.* at 67.)

2 **D. The burden of proving that Mr. Smith waived his right to counsel when speaking**
3 **with the CPS officer is on the prosecution**

4 “Under the familiar requirements of Miranda, designed to assure protection of the
5 federal Constitution's Fifth Amendment privilege against self-incrimination under
6 "inherently coercive" circumstances, "a suspect may not be subjected to custodial
7 interrogation unless he or she knowingly and intelligently has waived the right to remain
8 silent, to the presence of an attorney, and to appointed counsel in the event the suspect is
9 indigent.” (*Sims, supra*, 5 Cal.4th at 440 citing *Miranda v. Arizona* (1966) 384 U.S. 436,
10 444-445.) “Once having invoked these rights, the accused "is not subject to further
11 interrogation by the authorities until counsel has been made available to him, unless the
12 accused himself initiates further communication, exchanges, or conversations with the
13 police.”” (*Id.* quoting *Edwards v. Arizona* (1981) 451 U.S. 477, 484- 485.) Merely
14 because the criminal defendant initiates a dialogue with the government agents, does not
15 justify further interrogation of the defendant. (*Oregon v. Bradshaw* (1983) 462 U.S.
16 1039, 1044.) When the criminal defendant does, however, initiate a conversation with the
17 government authorities which then leads to an interrogation of the criminal defendant,
18 “the burden remains upon the prosecution to show that subsequent events indicated a
19 waiver of the Fifth Amendment right to have counsel present during the interrogation.”
20 (*Id.*)

21 In this case, Mr. Smith did not initiate conversation with the CPS officer.
22 However, even if the prosecution in this case makes the argument that Mr. Smith
23 somehow engaged in conversation and allegedly waived his right to counsel, the burden is
24 on the prosecution to prove such a waiver. (*Id.*)

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E. The actions of the CPS officer were a violation of the Defendant’s Fourteenth Amendment Due Process rights because her actions “shock the conscience” and are “brutal and offensive”

“The Fourteenth Amendment provides that no person shall be deprived "of life, liberty, or property, without due process of law." Convictions based on evidence obtained by methods that are "so brutal and so offensive to human dignity" that they "shock the conscience" violate the Due Process Clause.” (*Chavez v. Martinez* (2003) 538 U.S. 760, 774 citing *Rochin v. California*, (1952) 342 U.S. 165, 172, (overturning conviction based on evidence obtained by involuntary stomach pumping).) Evidence that is gathered in a way that “shocks the conscience” or is so “brutal and offensive” that it does not “comport with traditional ideas of fair play and decency” is a violation of the due process clause of the Fourteenth Amendment. (*Breithaupt v. Abram* (1957) 352 U.S. 432, 435.)

Although Mr. Smith was not subjected to a physical examination in order to gather evidence, he was subjected to psychological coercion and emotional torture. The government agent working for CPS told Mr. Smith that his only options were to participate in the interview or remain incarcerated indefinitely. This is hardly a choice. The fact that a non-police officer would feel compelled to threaten a teenaged inmate who is incarcerated for attempted murder of his wife, with the removal of his six week old child from his home “shocks the conscience.” (*Id.*) The officer’s tactics which were likely designed to scare Smith and obtain the information sought resulted in governmental conduct that is “brutal and offensive.” (*Id.*) The statements taken from Smith by the CPS officer cannot be admitted into his trial because admission would result in a violation of Smith’s right to due process under the Fourteenth Amendment. (*Chavez, supra*, 538 U.S. at 774.)

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Defendant’s Memorandum of Points and Authorities in Support of his
Motion to Suppress Evidence Due the Violation of
Defendant’s Fifth and Fourteenth Amendment Rights

1 **IV. CONCLUSION**

2 Defendant, John Smith, respectfully requests that this Court grant his Motion to
3 Suppress Evidence Due to the Violation of Defendant's Fifth and Fourteenth Amendment
4 Rights.

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6 Dated: Respectfully submitted,

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10 Scott A. McMillan
11 Attorney for Defendant,
12 John Smith
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26 Defendant's Memorandum of Points and Authorities in Support of his
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