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FILED
LOS ANGELES SUPERIOR COURT

OCT 04 2004

JOHN A. CLARKE, CLERK

Mr. L. O.

GLENN L. COVEY, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

TO STEVE COOLEY, DISTRICT ATTORNEY OF LOS ANGELES COUNTY AND HIS AGENTS AND REPRESENTATIVES; AND TO DEPUTY DISTRICT ATTORNEY SHELLIE SAMUELS:

PLEASE TAKE NOTICE that on October 14, 2004, or as soon thereafter as the matter may be heard in the above-entitled court, defendant ROBERT BLAKE, by and through his counsel, M. Gerald Schwartzbach, will move in limine to exclude character evidence and/or prior act testimony proffered by the prosecution. The motion will be made on the following grounds:

(a) No justification licensed by Evidence Code section 1101, subdivision (b), permits introduction of the proffered testimony -- particularly as the alleged prior offenses bear no similarity to the offense with which defendant is charged, and are otherwise unconnected.

(b) Under Evidence Code section 1102, opinion evidence about a criminal defendant's character may *only* be offered by the prosecution in rebuttal to similar evidence presented by the defense; further, specific instances of conduct are inadmissible to prove character.

(c) Under subdivision (b) of Evidence Code section 1103, evidence of a criminal defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character *and* is offered *after* evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant. *No such evidence will be adduced by Mr. Blake in this case.*

(d) Inasmuch as the probative value of the proffered evidence is minimal at best, it is clearly outweighed by its potential prejudicial effect and thus is inadmissible pursuant to Evidence Code section 352.

Said motion will be based on this notice of motion, the memorandum of points and authorities served and filed herewith, on all the papers and records on file in this action, on the transcript of the preliminary hearing, and on such oral and documentary evidence as may be presented at the hearing of the motion.

DATED: October 4, 2004

Respectfully submitted,

M. GERALD SCHWARTZBACH
Attorney for Defendant
ROBERT BLAKE

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

The following categories of possible prosecution evidence, if offered at trial, would serve little or no purpose other than to constitute character evidence.¹

A. WITNESSES

The prosecution witness list includes Robert Roth, a television and movie producer/director. According to an interview conducted by Detective Brian Tyndall on September 6, 2002, Mr. Roth produced *The John List Story: Judgment Day*, a television movie starring defendant Robert Blake. Mr. Roth initially met with Mr. Blake in 1992, finding him “personable.” During the course of filming, however, Mr. Blake “proved difficult” and “was a hard person to direct,” although he was “hard worker” who “stayed on the set and was very focused/intense.” Among other things, he also stated that Mr. Blake was “very into and immersed in his character,” a “very grim guy to work with,” “very keyed up,” and a “super narcissist” – who “did not follow” his directives. He thus never felt comfortable on the set with Mr. Blake, who he characterized as a “loose cannon.”

Among other things, Mr. Roth also described an incident in which Ms. Blake became angry after repeated rehearsals of one scene. When Mr. Roth announced that he could not continue filming the scene, Mr. Blake became angry and “lunged at” him; set personnel intervened and restrained Mr. Blake. Mr. Roth also reported hearsay statements by an actress in the movie and second assistant director (neither of whom is included in the prosecution’s witness list). According to Mr. Roth, “the best acting” Mr. Blake “did on the movie was the scene in which [he] had to shoot his family.” He added that Mr. Blake seemed comfortable and familiar with weapons and appeared to know how to use them – although he never saw Mr. Blake with his own guns.

B. MR. BLAKE'S DRAMATIC ROLES

As noted above, Mr. Blake played the title role in *The John List Story* (directed by Mr. Roth); the movie was based on the true story of John List, a convicted killer who murdered his

¹ The prosecution witness list also continues to include Sondra Kerr, Mr. Blake's ex-wife. Defendant has already moved to exclude any statements by her pertaining to supposed domestic violence occurring more than twenty years ago and for which no evidence exists.

1 entire family (all of whom, including his mother, were placed in sleeping bags). Police in this case
2 seized a videotape of *The John List Story* from Mr. Blake's residence during a search conducted
3 May 5, 2001, and interviewed several witnesses in an unsuccessful attempt to establish some sort of
4 connection between the story on which the movie was based and this case. Generally speaking, Mr.
5 Blake has played hundreds of roles throughout his career; in many, he played "tough guy" or
6 "killer" roles, engaging in violent conduct (as, for instance, in *In Cold Blood*).

7 **C. STATEMENTS BY MR. BLAKE ON TELEVISION TALK SHOWS**

8 Over the course of many years, Mr. Blake made frequent television appearances on talk
9 shows – most notably, *The Tonight Show*, starring Johnny Carson. During the course of such
10 appearances (made many years ago, some decades ago), he often made deliberately outrageous
11 statements and generally acted in a fashion consistent with the "tough guy" image he cultivated.

12 **D. DEFENDANT'S AUTOBIOGRAPHICAL NOTES**

13 Years before meeting Ms. Bakley, Mr. Blake apparently penned a few autobiographical
14 notes for a possible book; these were produced in discovery by the prosecution (at A00039674 to
15 A00039692). The top of the first page bears a fax date of January 13, 1993, and Mr. Blake makes a
16 reference to his being 59 years of age at one point (he is now 71 years of age) – suggesting these
17 notes were written or dictated in 1993, years before Mr. Blake ever met Ms. Bakley or she was
18 killed. In the course of the notes, Mr. Blake refers to his lengthy therapy, the abuse he suffered as a
19 child, his relationship with his parents, his career ups and downs, his reasons for quitting the
20 television series *Hell Town*, and other related topics. No portion of the notes refers to Ms. Bakley.

21 **II.**

22 **THE PROFFERED CHARACTER/PRIOR ACTS EVIDENCE
23 IS INADMISSIBLE UNDER THE RELEVANT SECTIONS OF
24 THE EVIDENCE CODE AND MUST BE EXCLUDED**

25 The foregoing evidence should be deemed inadmissible at defendant's forthcoming trial
26 for all of the following reasons.

27 **A. THE PROFFERED EVIDENCE IS NOT RELEVANT**

28 Evidence Code section 210 defines "relevant evidence" as "evidence, including evidence
relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove

1 or disprove any disputed fact that is of consequence to the determination of the action.”² (Evid.
2 Code § 210.) Under this definition, evidence which has no tendency in reason to prove or disprove
3 any disputed fact of consequence to the determination of the action is irrelevant -- as is evidence
4 which has a tendency in reason to prove or disprove a fact which is not of consequence to the
5 determination of the action. (*People v. Hill* (1992) 3 Cal.App.4th 16, 29.)

6 There is no respect in which the proffered evidence is relevant:

7 (a) Mr. Roth’s various descriptions of Mr. Blake as “difficult,” “a hard person to
8 direct,” a “hard worker” who “stayed on the set and was very focused/intense,” “very into and
9 immersed in his character,” a “very grim guy to work with,” “very keyed up,” a “super
10 narcissist” who “did not follow” his directives, and a “loose cannon,” have no tendency in reason
11 to prove or disprove any disputed fact of consequence to the determination of this action.

12 (b) Mr. Blake’s various roles as “tough guys” and “killers” have no more tendency in
13 reason to prove or disprove any disputed fact of consequence to the determination of this action
14 than his roles as priests (*Helltown*) or police officers (*Baretta*). Of course, the jury will
15 undoubtedly be apprised of Mr. Blake’s background as an actor. Defendant objects merely to
16 any attempt on the prosecution’s part to try to suggest that such roles as John List somehow
17 constitute evidence that he killed Ms. Bakley.

18 (c) Mr. Blake’s deliberately outrageous statements in the 1970s and 1980s on
19 television talk shows have no tendency in reason to prove or disprove any disputed fact of
20 consequence to the determination of this action – which involves the prosecution claim that he
21 killed Ms. Bakley *in 2001*.

22 (d) Mr. Blake’s autobiographical statements, penned years before he ever met Ms.
23 Bakley (and thus years before she was killed), have no tendency in reason to prove or disprove
24 any disputed fact of consequence to the determination of this action.

25 **B. THE PROFFERED EVIDENCE IS INADMISSIBLE CHARACTER EVIDENCE**

26 It is well established that character evidence is generally inadmissible against a criminal
27 defendant; even when such evidence is deemed admissible, *specific instances* of misconduct by a

28 ² All statutory references shall be to the Evidence Code unless stated otherwise.

1 defendant are permitted only under very limited circumstances. More to the point, evidence of a
2 defendant's "bad character" may only be offered *in rebuttal* – since it requires as a preliminary
3 that the defendant introduce either evidence of his *good character* or the victim's character for
4 violence or trait of character tending to show violence.

5 The general proscription against admission of character evidence is set forth in
6 subdivision (a) of Evidence Code section 1101³ ("section 1101(a)"), which states:

7 Except as provided in this section and in Sections 1102, 1103, 1108, and
8 1109, evidence of a person's character or a trait of his or her character (whether in
9 the form of an opinion, evidence of reputation, or evidence of specific instances
of his or her conduct) is inadmissible when offered to prove his or her conduct on
a specified occasion.

10 Under subdivision (b) ("section 1101(b)"), section 1101 does not prohibit admission of
11 evidence of uncharged misconduct when such evidence is relevant to establish some fact *other*
12 than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) More
13 precisely, section 1101(b) states:

14 Nothing in this section prohibits the admission of evidence that a person
15 committed a crime, civil wrong, or other act, to prove a fact (such as motive,
16 opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or
17 accident, or whether a defendant in a prosecution for an unlawful sexual act or
attempted unlawful sexual act did not reasonably and in good faith believe that
the victim consented) other than his or her disposition to commit such an act.

18 Section 1101(b) thus permits admission of evidence of uncharged specific acts *for certain*
19 *limited purposes*, but does not authorize opinion testimony about a defendant's character. Such
20 testimony is permitted under section 1102, which provides:

21 In a criminal action, evidence of the defendant's character or a trait of his
22 character in the form of an opinion or evidence of his reputation is not made
23 inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant
24 to prove his conduct in conformity with such character or trait of character. [¶] (b)
Offered by the prosecution to rebut evidence adduced by the defendant under
subdivision (a).

25 Thus section 1102 permits admission of evidence of a criminal defendant's character "in
26 the form of an opinion or . . . reputation," *but not specific instances of conduct*. (*People v. Felix*
27

28 ³All statutory references will be to the Evidence Code, unless expressly indicated otherwise.

1 (1999) 70 Cal.App.4th 426, 431; *People v. Wagner* (1975) 13 Cal.3d 612, 618-619.) As the Law
2 Revision Commission Comment following section 1102 expressly notes, "evidence of specific
3 acts by the defendant is inadmissible to prove his guilt even though the defendant has opened the
4 question by introducing evidence of his good character." (Evid. Code § 1102, Law Rev.
5 Comm'n. Comment; *People v. Gin Shue* (1943) 58 Cal.App.2d 625, 634.)

6 The comment adds that section 1102 "codifies the general rule under existing law which
7 precludes evidence of specific acts of the defendant to prove character as circumstantial evidence
8 of his innocence or of his disposition to commit the crime with which he is charged." (Evid.
9 Code §1102, Law Rev. Comm'n. Comment.) Accordingly, section 1102 allows the prosecution
10 to present relevant *opinion* evidence regarding a defendant's character -- **but only when the**
11 **defendant has first offered evidence placing his character in issue.** (*People v. Pangelina*
12 (1984) 153 Cal.App.3d 1, 8.)

13 Subdivision (a) of section 1103 then allows a criminal defendant to offer evidence of the
14 victim's character to prove conduct in conformity with that character, thus avoiding the general
15 bar on character evidence in section 1101(a). Subdivision (b) of section 1103 then provides:

16 [E]vidence of the defendant's character for violence or trait of character
17 for violence (in the form of an opinion, evidence of reputation, or evidence of
18 specific instances of conduct) is not made inadmissible by Section 1101 if the
19 evidence is offered by the prosecution to prove conduct of the defendant in
conformity with the character or trait of character and is offered after evidence
that the victim had a character for violence or a trait of character tending to show
violence has been adduced by the defendant . . .

20 That is, "[w]here a defendant has introduced character evidence to prove a victim's
21 conduct then the prosecution may introduce such evidence to rebut the evidence introduced by
22 the defendant." (*People v. Clark* (1982) 130 Cal.App.3d 371, 384, disapproved on other grounds
23 in *People v. Blakeley* (2000) 23 Cal.4th 82, 92.) Generally speaking, of course, introduction of
24 evidence of a defendant's trait for violence is appropriate if he or she has first presented evidence
25 of a victim's character for violence – typically, to show that the defendant acted in self-defense.
26 (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1175-1176.)

27 In sum,

28 (a) Under section 1101(a), evidence of a defendant's character or a trait of his or her

1 character (whether in the form of an opinion, evidence of reputation, or evidence of specific
2 instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a
3 specified occasion.

4 (b) Under section 1101(b), evidence that a defendant committed a crime, civil wrong,
5 or other act, may be admitted to prove a fact (such as motive, opportunity, intent, preparation,
6 plan, knowledge, identity, or absence of mistake or accident) *other than* his or her disposition to
7 commit such an act.

8 (c) Under section 1102, the prosecution may offer evidence of a defendant's
9 character or a trait of his or her character *in the form of an opinion or evidence of his reputation*
10 **only after** the defendant has already introduced evidence of his or her character.

11 (d) Under section 1103, the prosecution may offer evidence of the defendant's
12 character for violence or trait of character for violence (in the form of an opinion, evidence of
13 reputation, *or* evidence of specific instances of conduct) **only after** the defendant has presented
14 evidence of the victim's character for violence or a trait of character tending to show violence.

15 **1. Virtually All Of Mr. Roth's Testimony Is Inadmissible**

16 **(a) No Testimony By Mr. Roth Is Admissible As A "Prior Act"**

17 The only "prior act" that would theoretically be testified to by Mr. Roth is his claim that
18 Mr. Blake "lunged at" him and had to be restrained by set personnel. Such testimony would be
19 inadmissible under section 1101(a), and thus could only be introduced pursuant to the exceptions
20 set forth in sections 1101(b), 1102, or 1103. *No such exception, however, applies.* As the
21 California Supreme Court has observed, evidence of uncharged crimes is admissible under
22 section 1101(b) to prove identity, common design or plan *only if* the charged and uncharged
23 crimes are *sufficiently similar* to support a rational inference of identity, common design or plan,
24 or intent. (*People v. Ewoldt, supra*, 7 Cal.4th at 402-403.)

25 Accordingly, the trial court "must look behind the label describing the kind of similarity
26 or relation between the [prior] offense and the charged offense; it must examine the precise
27 elements of similarity between the offenses with respect to the issue for which the evidence is
28 proffered and satisfy itself that each link of the chain of inference between the former and the

1 latter is reasonably strong.”” (*People v. Thompson* (1980) 27 Cal.3d 303, 315, quoting *People v.*
2 *Schader* (1969) 71 Cal.2d 761, 775.)

3 In *People v. Ewoldt, supra*, 7 Cal.4th 380, the Supreme Court noted the degree of
4 similarity varies depending on the issue sought to be proved by the prior conduct evidence. (*Id.*,
5 at 402.) The least degree of similarity is required when the issue to be proved is whether the
6 defendant harbored the requisite intent for the charged crime, because of the recurrence of
7 similar results tends increasingly to negate accident or inadvertence, self-defense, or other
8 innocent mental states -- and instead tends to show the presence of the criminal intent which
9 normally accompanies criminal acts. (*Ibid.*)

10 A greater degree of similarity is required when the prior conduct evidence is used to
11 establish a common scheme or plan. (*People v. Ewoldt, supra*, 7 Cal.4th at 402.) In this context,
12 the evidence must show more than merely similar results: instead, there must be such a
13 concurrence of common features that the various acts can be explained as being caused by a
14 general plan of which events are but individual manifestations. (*Ibid.*) Evidence that the
15 defendant has committed uncharged criminal acts that are similar to the charged offense may be
16 relevant if these acts demonstrate circumstantially that the defendant committed the charged
17 offense pursuant to the same design or plan he or she used in committing the uncharged acts.
18 (*Id.*, at 403.) The common features must show the existence of a *plan*, moreover, rather than a
19 series of spontaneous acts. (*Ibid.*)

20 The greatest degree of similarity is required when the prior conduct evidence is used to
21 establish identity: to be relevant on the issue of identity, the uncharged crimes must be highly
22 similar to the charged offenses. (*People v. Ewoldt, supra*, 7 Cal.4th AT 403.) Evidence of an
23 uncharged crime is relevant to prove identity only if the charged and uncharged offenses display
24 a ““pattern and characteristics . . . so unusual and distinctive as to be like a signature.”” (*Ibid.*,
25 quoting 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803.) “The strength of the
26 inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual
27 shared marks, and (2) the *number* of minimally distinctive shared marks.” (*People v. Thornton*
28 (1974) 11 Cal.3d 738, 756, emphasis in original, disapproved on other grounds in *People v.*

Flannel (1979) 25 Cal.3d 668, 684, fn. 12.)

In this case, *there is absolutely no similarity between the act described by Mr. Roth and the instant crime.* As such, evidence that Mr. Blake supposedly once “lunged at” Mr. Roth is *not* made admissible by section 1101(b). Nor is it admissible under sections 1102 or 1103:

(a) Under section 1102, specific instances of conduct are inadmissible under section 1102 to prove character: the statute permits, in a criminal trial, evidence "in the form of an opinion or . . . reputation"; it does not, however, permit evidence of specific instances of misconduct. (*People v. Felix, supra*, 70 Cal.App.4th at 431.) Moreover, evidence of a defendant's bad character may only be offered by the prosecution under section 1102 *in rebuttal to* similar evidence presented by the defense. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1216.) Accordingly, such evidence cannot be offered during the prosecution's case in chief.

(b) Under section 1103, evidence of a criminal defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character *after* evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant. Thus the evidence cannot be offered until the prosecution's rebuttal, and *only* may be offered if Mr. Blake introduces evidence of Ms. Bakley's character for violence or trait of character tending to show violence – which he has no intention of doing.

The balance of Mr. Roth's would-be testimony is equally inadmissible: Mr. Roth's assessment of Mr. Blake as "difficult," "a hard person to direct," a "hard worker" who "stayed on the set and was very focused/intense," "very into and immersed in his character," a "very grim guy to work with," "very keyed up," a "super narcissist" who "did not follow" his directives, and a "loose cannon" plainly constitutes an assessment of his *character*. As such, even if it were deemed relevant to the instant action, evidence of his assessment would be inadmissible during the prosecution's case in chief.

111

1 2. **Evidence Of Mr. Blake's Roles As "Violent" Characters Is Inadmissible**

2 Even if the dramatic roles played years ago by Mr. Blake could in any sense be deemed
3 relevant to this action, evidence of his "violent" roles in movies and television would be offered
4 for no reason other than to establish his disposition to commit violence – and thus would be
5 inadmissible under sections 1101, 1102, and 1103 for all of the just-advanced reasons.
6

7 3. **Evidence Of Mr. Blake's Public Statements Is Inadmissible**

8 Consistent with the "tough guy" persona he had adopted, some of Mr. Blake's colorful
9 statements during television talk show appearances (some twenty or thirty years ago) might have
10 suggested some sort of predilection for violence. Again, evidence of any such predilection for
11 violence may not be introduced under section 1101(a) – and are only admissible under sections
12 1102 and 1103 *on rebuttal* if Mr. Blake has previously introduced evidence either of his own
13 character or Ms. Bakley's character for violence.
14

15 4. **Evidence Of Mr. Blake's Autobiographical Notes Is Inadmissible**

16 Mr. Blake's "autobiographical" notes cover a wide array of topics; with the exception to
17 a lone reference to his anger at a previous therapist, absolutely notes involves any mention
18 whatsoever of violence. Again, the only purpose to offering such evidence would be to prove
19 character as circumstantial evidence of Mr. Blake's supposed disposition to commit the crime
20 with which she is charged – or, more bluntly, to prove that he is violent. Under sections 1101(b),
21 1102, and 1103, such evidence must be excluded.
22

23 III.
24

25 **THE EVIDENCE IS ALSO INADMISSIBLE UNDER SECTION 352**

26 There is an additional requirement for the admissibility of character evidence or evidence
27 of prior acts: the probative value of the uncharged offense evidence must be substantial, and
28 must not be largely outweighed by the probability that its admission would create a serious
danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Ewoldt*,
supra, 7 Cal.4th at 404-405.) In *Ewoldt*, the court identified various factors relevant to this
analysis; such factors include the tendency of the evidence to prove the material disputed fact
and the question of whether the two incidents occurred close in time. (*Ibid.*)

In this case, the only non-hearsay evidence of an alleged "prior act" is Mr. Roth's claim that Mr. Blake "lunged at" him on one occasion. Obviously, the balancing test requires exclusion of the proffered evidence. First, the proffered evidence has no tendency to prove any material disputed fact. Second, the alleged act occurred *years* before the events giving rise to the instant charges against Mr. Blake. Third, introduction of the evidence would both confuse the issues and mislead the jury: the issue for the jury to determine is whether Mr. Blake solicited Ronald "Duffy" Hambleton and Gary McLarty to kill Ms. Bakley, and whether he himself thereafter killed her using a Walther P-38; the issue is *not* whether Mr. Blake ever had occasion to become angry at a movie director on a set many years earlier. Finally, introduction of the evidence by the prosecution would require the defense to call other percipient witnesses and thus unduly consume court time.

CONCLUSION

For all of the foregoing reasons, defendant Robert Blake respectfully requests this court to exclude the proffered character evidence and other acts evidence.

DATED: October 4, 2004

Respectfully submitted,

M. GERALD SCHWARTZBACH
Attorney for Defendant
ROBERT BLAKE

PROOF OF SERVICE
§ 1013A(3) C.C.P.

STATE OF CALIFORNIA COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 15303 Ventura Blvd. Suite 900, Sherman Oaks, CA 91403.

On October 4, 2004, I served the foregoing document(s) described as **NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE CHARACTER EVIDENCE/EVIDENCE OF PRIOR ACTS** (Evid. Code §§ 1011(b), 1102, 1103) on all parties as follows:

Deputy District Attorney Shellie Samuels
Los Angeles County District Attorney's Office
Van Nuys Division
6230 Sylmar Ave., #201
Los Angeles, CA 94401

[] **BY MAIL:** I caused each envelope, with postage thereon fully prepaid, to be placed in the United States mail at Los Angeles, California. I am readily familiar with the business practice for collection and processing of mail in this office; that in the ordinary course of business said document would be deposited with the US Postal Service in Los Angeles on that same day. I understand that service shall be presumed invalid upon motion of a party served if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained on this declaration.

[] **BY FACSIMILE:** I served a copy of the within document on Ms. Shellie Samuels at fax number 818-782-5349.

[X] **BY PERSONAL SERVICE:** I personally hand-delivered the within document to
Rita Christensen.

Executed on October 4, 2004, Los Angeles, California.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



David Christensen

