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ROBERT SCOTLUND VAILE,

Appellant,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CHERYL B. MOSS, DISTRICT COURT JUDGE, FAMILY COURT DIVISION,

Respondents,

and

CISILIE A. PORSBOLL, f/k/a CISILIE A. VAILE,

Real Party in Interest.

SC NO: 52244
DC NO: D-98-230385-D

REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

Attorney for Real Party In Interest:

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Petitioner In Proper Person:

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08-27024

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT SCOTLUND VAILE,

Petitioner,

vs.

THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CHERYL MOSS, DISTRICT JUDGE, FAMILY COURT DIVISION,

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ANSWER TO PETITION FOR WRIT OF MANDAMUS

I. INTRODUCTION; SCOPE OF ISSUES:

In the eight years since he kidnapped his children in Norway and fled to Texas, Mr. Vaile has instituted litigation in seven different venues, and has not prevailed in convincing ***any*** of those courts that he was justified in doing all the terrible things he did to his children and former spouse.[1] His

[1] *See Vaile v. Eighth Judicial District Court*, 118 Nev. 262, 44 P.3d 506 (2002) (holding that the kidnapped children were to be returned to their mother in Norway); *Vaile v. Porsboll, et al.*, United States Supreme Court (rejecting Scotlund's attack on this Court's *Opinion* requiring return of the children); *Vaile v. Vaile*, Case No. D 230385 (finding that as of July 24, 2003, Scotlund owes $116,732.09 for the attorney's fees incurred in recovering the children by Nevada counsel, and as of October 9, 2008, Scotlund owes the sum of $118,369.96, in principal, and $45,089.27 in interest for a total of $163,459.23 in child support arrears that Scotlund has refused to pay since the kidnapping, plus penalties which have yet to be decided by the court); *In re Kaia Louise Vaile and Kamilla Jane Vaile*, No. 2000-61344–393, District Court of Denton County, Texas 393rd Judicial District (finding as of April 17, 2002, Scotlund owes attorney's fees of $20,359.00 with interest at 10% per annum, compounded annually, travel expenses of $25,060.00, with interest at 10% per year compounded annually, and an award for $81.00 for costs of court with interest at 10% per annum, compounded annually, for fees incurred in recovering the children by Texas counsel); *Vaile, Cisilie A. v. Vaile, Robert, Scotlund*, No. 00-3031 A/64, Oslo District Court, dated February 6, 2003, confirming Cisilie's custody of the children and entitlement to payment of child support; *Vaile v. Vaile et al.*, No. CV-S-02-0706-RLH-RJJ (*Judgment* dated March 13, 2006, holding Scotlund liable for $450,000 in combined damages in favor of Cisilie A. Porsboll, Kaia Louise Vaile, and Kamilla Jane Vaile, for injury, pain and suffering, and $100,000 in punitive damages); *Vaile v. Vaile, et al.*, No. 06-15731, Ninth Circuit Court of Appeals (rejecting Scotlund's attacks on the tort suit judgment).

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current writ before this Court seeks the disqualification of undersigned counsel, who represents the former spouse and children.

This Court's *Order Directing Answer* filed October 1, 2008, appears to confine the issues in this proceeding to Scotlund's challenge of "a district court's oral ruling refusing to disqualify real party in interest's counsel." This is relevant because Scotlund's proper person filing is a rambling rant that purports to attack virtually every holding of every Court that has ruled against him – including this Court – on issues ranging from the jurisdiction of the State of Nevada to collect child support, to the interpretation of the Nevada interest and penalty statutes.

Obviously, a response to all of those other purported "issues" would be much longer, and take much more time, than is available to respond to the specific issue identified by this Court's *Order*. Additionally, it appears that all such other matters may be raised by way of direct appeal from the orders at issue,[2] or are long since final and unappealable, and in either case are inappropriate subjects for this writ proceeding.

Accordingly, this *Answer* is confined to the one issue of Judge Moss' order refusing to disqualify undersigned counsel. If we have misperceived, and the Court actually wanted us to address any of the other matters identified as "issues" by Mr. Vaile, we ask that the Court so direct us, and we will submit a supplemental answer accordingly.

For the same reasons, we will not directly address the bulk of the documents provided by Scotlund in his Appendix.[3] They deal primarily with our request for disqualification of Ms. Muirhead, who Scotlund had retained in a supposedly "unbundled" capacity to argue the issue of child support, but who entered the case for the wrongful purpose of trying to force Judge Moss to

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[2] As even Scotlund appears to concede. *See Petition* at 9, lines 23-24.

[3] The appendix provided by Scotlund is procedurally defective. It has no index, and the pages are not numbered, making it useless as a reference. While counsel is reluctant to duplicate any documents that are in Petitioner's Appendix, it is necessary in order to provide the court with documents that can be properly identified and addressed, so all references are to the Appendix we have supplied.

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recuse,[4] despite this Court's specific prohibition of such a tactic as unethical and sanctionable in *Millen*.[5] Those documents have nothing to do with Scotlund's request to disqualify me or this firm.

II. STATEMENT OF FACTS:

The current filing continues Scotlund's quest to evade responsibility for support of the two children he kidnaped eight years ago, and then financially abandoned when they were recovered. He has ***never*** voluntarily paid a dime in child support since the children were abducted from Norway.[6] Similarly, Scotlund has never paid a penny of the hundreds of thousands of dollars in damages, attorney's fees, and penalties assessed against him by multiple courts throughout the country and the world. Most recently, he has been held in contempt for refusing to pay child support for the past eight years.[7] To date, he has not been criminally prosecuted for failure to pay support, or otherwise.

Most of the relevant facts are detailed in the various orders and opinions – including this Court's *Opinion*.[8] A summary of the continuing litigation was contained in the Nevada Federal District Court's *Findings of Fact and Conclusions of Law*, which is included in our *Appendix* for the illumination of the Court, but is not reiterated here. Rather, this factual statement will only go over matters not appearing in the record known to this Court, or which we think are central to the issue currently before this Court.

The reason we are in this case in the first place is that this office is the Nevada contact for the National Center for Missing and Exploited Children; when an internationally-abducted child is

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[4] Exhibit 1, at 1 & 4, Ex-Parte Motion To Recuse.

[5] *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 148 P.3d 694 (2006).

[6] Every court that has heard argument on whether Scotlund wrongfully took the children from their mother's custody has found that Scotlund did abduct them wrongfully. Scotlund still will not admit this in any pleading – he actually asked the trial court of the Eighth Judicial District Court to deduct the time the children were kidnapped from his child support obligation.

[7] "Findings of Fact, Conclusions of Law, Final Decision and Order" filed October 9, 2008, in Case D 230385.

[8] *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 44 P.3d 506 (2002).

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requesting sanctions for a hearing that she never attended, challenging the statute on calculating interest and penalties for child support arrearages, and filing papers in this Court opposing examination of judgment debtor. But these were all law and motion hearings – there was no evidentiary hearing until the recent proceedings to have Scotlund held in contempt for non-payment of child support, and counsel was never called to the stand, or testified, at ***any*** hearing.

On June 11, and again on July 11, Ms. Muirhead purported to put in issue the methodology of calculations used in figuring child support principal, interest, and penalties. As noted by Judge Moss in the recent proceedings, Ms. Muirhead eventually abandoned her challenges to the child support principal and interest, retaining only a complaint as to the calculation of penalties.

Since for many years I have written papers, taught CLE courses, and created the program in common use to automate the interest and penalty calculations, I knew how and why Ms. Muirhead's arguments were fallacious, and was able to respond with facts, history, and math refuting her attacks on the child support judgment. At the family court's request, I answered all questions asked about the legal history of the statutory provisions, and the mechanics of the necessary calculations.[14]

The Court indicated its appreciation of the legislative history leading up to the adoption of NRS 125B.095, which had been on the books since before the judge had begun practice, and the explanation of the mathematical mechanics involved in interest and penalty calculations.

Ms. Muirhead, however, filed a *Motion to Disqualify Marshal Willick and the Willick Law Group* on the behalf of Scotlund – without any case law or statutory authority[15] – essentially alleging that she could eliminate opposing counsel by raising the issue of how calculations were to be performed and soliciting a response, and then asserting that any knowledge or expertise I had in the area that she raised somehow converted my argument into "testimony" that disqualified me from continuing to represent my client.

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[14] Exhibit 3, at 9, Minutes for the July 11, 2008, hearing.

[15] In fact, no Memorandum of Points and Authorities was included in the filing at all, in violation of EDCR 2.20(a). Exhibit 5, Motion to Disqualify Marshal Willick, including as an exhibit the letter to the State Bar instituting a Bar Complaint against Ms. Muirhead.

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At the hearing held July 24, 2008, the court declined to disqualify me or this law firm, stating:

> Attorney Willick's statements on the record as to the Marshal law Program had to do only with the design and function of the software and is completely irrelevant to the Court's decision as to interpretation of the Statute at issue. There was no testimony provided.[16]

In other words, it was certainly bad for Scotlund's argument to have the legislative history of the relevant statutes presented, and a clear explanation of the relevant calculations made, but neither the legal history nor the mathematical details were either intended or perceived by the court as testimony. The *Motion to Disqualify* was denied.[17]

III. ARGUMENT

Scotlund alleged in the proceedings below that the Family Court had incorrectly totaled the child support principal, interest, and penalties sought to be assessed against him.[18] Of ***course*** I explained to the court how such calculations had been, and should be, done. Whether by hand on paper or by machine, there are a number of ways in which such calculations can be performed correctly, or incorrectly, and I have been attempting to keep the bench and Bar informed on the subject for many years.[19] My next article, detailing the ways in which the State Welfare Division's legacy computer system is erroneously computing arrears, will be published shortly.[20]

Ignoring the various paranoid musings and irrelevant non-issues in Scotlund's *Petition*, his complaint boils down to the assertions that I somehow crossed over from being an advocate to being

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[16] Exhibit 4, at 10, Minutes for the July 24, 2008, hearing.

[17] Exhibit 4, at 11.

[18] As noted, this was later recanted, first as to principal, and then as to interest, leaving only a protest of the methodology of calculating statutory penalties under NRS 125B.095.

[19] My first law-review-type article on this subject was published nearly twenty years ago: *A Matter of Interest: Collection of Full Arrearages on Nevada Judgments*, NTLA *Advocate*, September, 1990. Since then, I have tracked developments and revised the write-up several times, most recently as CLE materials at the Twelfth Annual Family Law Showcase (Tonopah, Nevada, 2001). A further reworking including an analysis of the Penalties calculation is in draft.

[20] At this time, it is uncertain which Bar publication will run this article (the Nevada Family Law Report, Nevada Lawyer, or Communique). Accordingly, a pre-publication copy has been included in the *Appendix*. The article sets out in detail the entire legislative history, applicable math, and includes a section dealing with the specific calculations involved in this case.

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a "witness" in two ways: by explaining the legislative history of the relevant statutes, and by authoring a computer program that automates the calculation of interest and penalties on child support arrears. Both assertions are nonsense.

A. THE RELEVANT LEGAL STANDARD

Nevada's rules are based upon ABA Model Rule 3.7, and are designed to avoid the unseemly situation of a lawyer "vouching for his own credibility." The ABA Model Rule (and our corresponding Rule of Professional Conduct, RPC 3.7), states:

> Lawyer as Witness.
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
> (3) Disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

First, I neither am or was a "necessary witness" in this child support case. There is no question of material fact at issue in this case – all sides agree that Scotlund stopped paying child support when he kidnapped the children, so there ***are*** no material issues of fact in dispute. In any event, I have no personal knowledge of any relevance to the question. Scotlund's claim (citing only Black's law dictionary) that since anything the lawyers say is intended to get a ruling in their client's favor, all their argument must be considered "evidence"[21] is mere sophistry.

Second, any disqualification would work a substantial hardship on the client. As Scotlund observes,[22] this ***should*** be a simple child support case – but Scotlund has turned it into a decade-long, multiply-appealed, multi-jurisdictional cat-and-mouse game that has racked up a whopping half-million dollars in unpaid legal fees trying to obtain a recovery for impecunious victims in another country. The file fills ***six*** banker's boxes. Scotlund knows full well that it would it would be nearly

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[21] *Petition* at 7.

[22] *Petition* at 9.

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impossible for Cisilie, from Norway, to find counsel able and willing to continue pursuing him, and figures he can get away with all his mis-deeds, and game the system forever, if he can just eliminate the attorneys who are closing in on him.

B. THE LEGISLATIVE HISTORY OF THE STATUTES AND THE "MARSHAL LAW" COMPUTER PROGRAM

As to knowledge of the legislative history of laws, I submit that it would be malpractice for a lawyer to argue the proper application of statutes without having inquired into why the statute exists, what ills it was intended to address, and how it was intended to operate. Scotlund is upset that undersigned counsel was partially responsible for the existence of the statutory provisions in question, and participated in the legislative process leading up to their enactment.

To the best of my knowledge, there is no prohibition of any kind of attorneys who had a hand in enacting a law subsequently litigating cases involving that law, or in answering judges' questions based on the knowledge acquired during that process. In a State the size of this one, such situations are not only common, they are nearly inevitable. Apparently, Scotlund urges this Court to adopt a rule whereby only lawyers who know nothing about the laws they are attempting to apply are allowed to litigate cases involving them. The logical and public policy absurdity of such a position is self-evident.

The situation is much the same as to the "Marshal Law Judgment Arrearage, Interest, and Child Support Penalty Calculator." As detailed in the article included in the *Appendix*, the program simply automates math that ***could*** be done by hand – with a hugely increased amount of time, wasted

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money, effort, and opportunity for error.[23] The math involved is quite straight-forward; not only are counsel allowed to ***explain*** the math, judges are permitted to take ***judicial notice*** of such math.[24]

And to whatever degree the question before the court is not how to ***do*** the math, but which of two potential ways of doing calculations is the legally ***correct*** way to do it, the matter is one of argument, which is what lawyers are there to do. There is no known legal barrier to a lawyer being competent to make an argument.

The ramifications of the request being made by Scotlund go beyond child support arrearage calculations. He essentially wants the Court to bar counsel who have had a hand in creating the tools used by courts from participating in proceedings using those tools. That would create quite a hardship on this office – I drafted the model joint legal custody language in near-universal use, created the Affidavit of Financial Condition used in pretty much every case until the new Financial Disclosure Form was adopted, and I wrote most of the Family Practice Manual.

I used to think it was funny when someone would object to my citation to the Manual, simply because I had written it – so that out of all the lawyers in Nevada, I was somehow the only one not allowed to cite a standard reference work – until it became clear to me that some lawyers really do not seem to see the absurdity of such a position. If I could not argue cases involving joint legal custody, financial affidavits, or the law recited in the Family Practice Manual, I'd pretty much be out of a job.

To accept Scotlund's position in the current writ petition would be to create a rule disqualifying lawyers from working in areas where they created the tools and reference materials used in the practice of law in those fields. Such a construct is not the law, and should not be the law,

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[23] The wild accusation that there is some kind of pecuniary motive to argue the case as I have to "save" the calculations as done by the computer program (*Petition* at 8) is just silly. The programming could be easily altered at any time; if for some unforeseeable reason this Court ever issued an opinion altering the correct way of calculating interest, or penalties, it would be a simple matter to alter the computer program accordingly. Of course, as is pretty obvious, there is no conflict of any kind between me and my client – it is in my client's best interest to have the calculations performed correctly, just as I, and the computer program, do them.

[24] *See* NRS 47.130 (matters of fact subject to judicial notice must be capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute); a mathematical error is correctable at any time under NRCP 60(a) because a mathematical miscalculation is ***clerical*** and cannot be attributed to the exercise of judicial discretion. *Kirkpatrick v. Temme*, 98 Nev. 523, 654 P.2d 1011 (1982).

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if for no other reason than that it is counterproductive and would create a disincentive to anyone who knew enough to improve the practice from actually taking any steps to do so, lest he be disqualified from working in the field.

Luckily, the law does not require, or even allow, such an absurd result. Nevada authority is pretty scant on this subject, but the question would appear to be whether my statements involved a contested issue of fact in the proceedings at which I was acting as advocate.[25] As noted, there ***are*** no contested issues of fact in this case. And even if one could do the handsprings required to conclude that either "what is in the legislative history?" or "how to do math?" constituted a "contested issue of fact," the cases would not allow such to disqualify counsel. In *Zurich Ins. Co. v. Knotts*,[26] the Kentucky court detailed that:

> the showing of prejudice needed to disqualify opposing counsel as trial advocate must be more stringent than when the attorney is testifying on behalf of his own client, because adverse parties may attempt to call opposing lawyers as witnesses simply to disqualify them.

In this case, there was no testifying, merely argument. And Scotlund's counsel, Ms. Muirhead, brought the issue before the Court for argument. The question of "what is in the legislative history" and "how should the math be done" was resolved, at her insistence, upon argument, without a single witness being called to the stand, taking an oath, or testifying on any subject. Scotlund and Ms. Muirhead did not ***like*** my argument, but that did not make it "testimony."

And even if the argument that was compelled could be deliberately mis-stated as being "testimony," under the standards announced by this Court in *DiMartino*,[27] counsel would still not be disqualified.

DiMartino started with the proposition that "Disqualification of the lawyer would work substantial hardship on the client," and indicated that the proposition stated should be in the forefront of any disqualification argument. In that case, this Court held that even where an attorney would be a necessary witness at trial, the attorney was not disqualified from acting for the client at motion

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[25] *DiMartino v. Eighth Judicial Dist. Court*, 119 Nev. 119, 66 P.3d 945 (2003).

[26] *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 560 (Ky. 2001).

[27] *DiMartino v. Eighth Judicial Dist. Court*, 119 Nev. 119, 66 P.3d 945 (2003).

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hearings. Of course, in this case, there ***was*** no trial, and there will never be one; these proceedings are all post-divorce proceedings to reduce to judgment eight years of child support arrears.

This Court held in that case that it was "loathe to allow a party to wholly disqualify opposing counsel under SCR 178 by simply listing that counsel as a witness two years into the litigation and asserting that disqualification doubts should be resolved in favor of disqualification. The potential for abuse is obvious. Interpreting SCR 178 to permit total disqualification would invite the rule's misuse as a tactical ploy."[28]

This Court in *Millen* stated it even more strongly:

> Attorney disqualification is an ***extreme*** remedy that will not be imposed lightly. Invariably, disqualifying an attorney causes delay, increases costs, and deprives parties of the counsel of their choice. Courts should, therefore, disqualify counsel with considerable reluctance and only when no other practical alternative exists.

(Emphasis added.) The request to disqualify this office was a transparent ploy by Scotlund and his misguided counsel to deprive Cisilie of her counsel of choice.

A review of the annotations to the ABA Model Rule indicate that the "Lawyer as Witness" basis for disqualifying counsel is disfavored, only to be used when the lawyer is a necessary witness to a matter of fact central to a disputed issue of fact, and the lawyer is likely to be called at trial.[29] None of those elements are present here. I am not a witness of any kind, "necessary" or otherwise, there are no disputed issues of fact, and there is no trial, past or future.

And – even if there ***was*** some scintilla of legitimacy to the request for disqualification, the rule would allow me to continue prosecution of this case through any of my several associates.[30] But there is no potentially valid reason why I should have to do so.

Scotlund's *Motion* does not come anywhere ***close*** to the standard for disqualification of counsel under either *DiMartino* or *Millen*, and my client would be unduly prejudiced by the disqualification of her counsel of the past eight years, who knows the law and facts necessary to

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[28] 119 Nev. at 122-23, 66 P.3d at 947.

[29] *See* Annotated Model Rules of Professional Conduct 357-368 (ABA Center for Professional Responsibility, 6th ed., 2007).

[30] NRPC 3.7(b) (disqualified lawyer-as-witness' partners or associates are permitted to assume the role of advocate at a trial).

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finally bring Scotlund to justice. Both the *Motion*, and the current writ petition, are frivolous and vexatious.

IV. CONCLUSION

Scotlund argues that counsel on this case for over eight years should be disqualified because I wrote a computer program that automates the math of calculating interest and penalties on child support arrearages so those calculations don't have to be done by hand, and because I explained to the Family Court judge the legislative history of the statutes at issue, and the math involved in calculating interest and penalties. Nothing even faintly resembling relevant authority was presented in support of that position.

Explaining legislative history is not "testimony." Explaining mathematical steps in argument is not "testimony." And the judge found that there had ***been*** no "testimony." The "lawyer as witness" rule is completely irrelevant, and if it ***had*** been relevant, would have been outweighed by the substantial hardship to Cisilie of depriving her of counsel of choice who might actually run Scotlund to ground.

Scotlund has been found by this Court and others to be a liar, kidnapper, and worse. It is far past time that the legal system stops enabling his ongoing abuse and evasion of legal forms while he stands in an attitude of open contempt and defiance of every court order that has ever been entered against him. The *Petition* should be summarily dismissed, with costs assessed against petitioner.

Dated this 20th day of October, 2008.

Respectfully Submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this *Answer To Petition for Writ of Mandamus*, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e) which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing was made on the 20th day of October, 2008, by U.S. Mail addressed as follows:

Robert Scotlund Vaile
P.O. Box 727
Kenwood, California 95452
Petitioner In Proper Person

That there is regular communication between the place of mailing and the place so addressed.

An Employee of the WILLICK LAW GROUP

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