IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS RAYMOND SHOCKLEY, Defendant and Appellant.	)	S189462

Fifth Appellate District No. F058249
Stanislaus County Superior Court No. 1238243
Honorable Thomas D. Zeff, Judge

OPENING BRIEF ON THE MERITS

GREGORY W. BROWN
SBN 164519
2280 Grass Valley Highway #342
Auburn, California 95603
(530) 401-5554

By appointment of the California Supreme Court
Attorney for Appellant
Thomas Raymond Shockley

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATUTES

SECONDARY AUTHORITIES

CALIFORNIA CRIMINAL INSTRUCTIONS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. THOMAS RAYMOND SHOCKLEY, Defendant and Appellant.	)	S189462 Court of Appeal No. F058249 Stanislaus County Superior Court No. 1238243

ISSUE PRESENTED

Is battery a lesser included offense of committing a lewd act with a child under 14 years of age?

STATEMENT OF THE CASE

On July 1, 2008, the Stanislaus County District Attorney filed a one-count information against appellant Thomas Shockley, charging him with committing a single lewd act with a child under the age of 14 in violation of Penal Code section 288, subdivision (a).[1] (CT 49.) Trial began on February 2, 2009. (CT 62.) When the case was submitted to the jury, the jury was not instructed on the lesser included offense of battery (Pen. Code §242). (CT 70-104.) On February 6, 2009, the jury found appellant guilty of committing a lewd act with a child. (CT 108.)

The trial court sentenced appellant on July 17, 2009. (CT 159.) The court granted appellant probation, and as a condition of probation, sentenced appellant to 120 days in county jail. (CT 159-160.)

Appellant appealed his conviction. (CT 161-162.) On December 8, 2010, the Fifth District Court of Appeal issued its opinion affirming that conviction. Appellant filed a petition for rehearing on December 20, 2010, which the Court of Appeal denied on December 21, 2010.

This Court granted review on March 16, 2011.

---

[1] All further code references are to the Penal Code.

STATEMENT OF FACTS

A. Background

"Jane Doe" testified at trial that in October 2007, appellant touched her on three occasions: he "French kissed" her at her house (RT 84-85; 117-118); he rubbed her stomach as they drove home from a movie (RT 64-65, 74-75); and he rubbed her vagina through her clothes on the same drive. (RT 60-61, 80.)

At trial, the prosecution told the jury that appellant could be convicted of a lewd act for any one of those three acts. (RT 44; Augmented RT 89, 92-93.) In finding appellant guilty of the lewd act charge, the jury did not specify which of the three acts served as the basis for its finding. (CT 110.)

B. Appellant's Relationship To Jane Doe

In 2007, appellant's daughter, Hannah, lived with Ryan Clark and their five children in Modesto. (RT 33-34.) The children in the house included Jane Doe, Ryan's ten-year-old daughter from a previous relationship, and Aliyah, Hannah's nine-year-old daughter from a previous relationship. (RT 33-35.) Appellant and Jane Doe were not related by blood, but she had known appellant for five years, and called him "Grandpa." (RT 34, 45.) Appellant had a good relationship with the family. (RT 36, 120.)

C. The Alleged French Kiss

Jane Doe testified on direct examination that on October 17, 2007, appellant visited Ryan and Hannah's house to celebrate Jane Doe's birthday with the family. (RT 33, 46.)

Jane Doe testified that appellant walked into a room where she had been playing on a computer. (RT 46.) Nobody else was in the room. (RT 46.) Appellant gave her a kiss on the lips. (RT 46-47.) She first testified that she "forgot" whether there was something unusual about appellant's kiss, then she testified she did not know and could not remember whether appellant's mouth was open or closed when he kissed her on the lips. (RT 47.) After a lunch recess, she testified that appellant French kissed her. (RT 84-85; 117-118.) She testified that the kiss embarrassed her. (RT 85.) Then, on cross-examination, when asked whether a French kiss occurred, she replied, "I don't know. I don't know." (RT 121-122.)

D. Further Testimony Regarding the Birthday Party

Jane Doe testified that, as a birthday present, appellant gave her the choice of receiving $35 or the opportunity to go with him to a movie two days later. (RT 86.) While in past years Jane Doe had chosen the money, this year she chose the movie. (RT 86.) Appellant told her that she could bring anyone she wanted with her to the movie. (RT 86.) She asked appellant if she could bring Aliyah, her nine-year-old step-sister (and appellant's natural granddaughter). Appellant agreed. (RT 86-87.)

E. Alleged Events In the Car Two Days Later

Jane Doe testified that on October 19, 2007, appellant drove her and Aliyah from her house in Modesto to see a movie in the city of Riverbank. (RT 51.) After the movie, he bought them a cappuccino milkshake at Baskin Robbins, then drove them home. (RT 51,

66.) Jane Doe sat in the middle of the front seat and Aliyah sat by the passenger door. (RT 55.)

Jane Doe testified that she asked appellant if she could put her hands on the steering wheel. (RT 58.) Appellant agreed. (RT 58.) Appellant told her to put her leg over his leg. (RT 59.) Jane Doe took off her sweater because she was hot, and appellant rubbed her stomach. (RT 64-65, 74-75.) That made her uncomfortable, so she giggled. (RT 64-65.) Appellant then wrapped his right arm around her right shoulder, reached down, and rubbed her vagina over her clothes while he looked at the road. (RT 60-61, 80.) She was uncomfortable and squirmed, but appellant did not stop. (RT 61.) She looked over at Aliyah with a worried face while squirming, and Aliyah looked right back at her. (RT 81.) Aliyah wanted to move to the middle seat and hold the steering wheel too, so Aliyah and Jane Doe switched seats. (RT 62.) They drove home. (RT 81-82.)

F. Aliyah's Testimony

Aliyah testified that, as she sat next to Jane Doe, she could see events inside the car, and was not looking out the car window. (RT 139-141.) She never saw appellant touch Jane Doe's vagina. (RT 139-142.) At one point, Jane Doe wiggled in her seat and giggled. (RT 134, 141-142.) Aliyah looked at Jane Doe, but did not see anything unusual. (RT 141-142.) Jane Doe asked Aliyah to switch spots with her, and they did. (RT 134.)

G. Subsequent Events

After they got home, the girls went to Jane Doe's room while appellant chatted with

Ryan (Jane Doe's father). (RT 66-67.) Jane Doe told Aliyah that appellant had molested her, and after appellant left the house, Jane Doe told Ryan the same thing. (RT 66-67.)

H. Appellant's Statements To Police

Appellant did not testify. He told police that he did not French kiss Jane Doe or touch her vagina, but he did playfully rub her stomach. (RT 152-157, 165-169.)

I. Impeachment of Jane Doe's Testimony

Jane's Doe's testimony at trial was substantially impeached with numerous inconsistent statements. Some of those inconsistent statements are set forth in Section IX, *post*, in conjunction with an analysis of the prejudice stemming from the trial court's failure to instruct the jury regarding battery.

I.

TRIAL COURTS HAVE A SUA SPONTE DUTY TO INSTRUCT ON A LESSER INCLUDED OFFENSE IF THE EVIDENCE WOULD JUSTIFY A CONVICTION ON THE LESSER OFFENSE.

A. Sua Sponte Instructions

A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) This sua sponte obligation extends to lesser included offenses if the evidence "raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense." (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351; accord, *People v. Barton*, *supra*, 12 Cal.4th at pp. 194-195.) "A criminal defendant is entitled to an instruction on a lesser included offense only if 'there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense' but not the lesser." (*People v. Memro* (1995) 11 Cal.4th 786, 871, emphasis and citations omitted.)

The requirement that courts give sua sponte instructions on lesser included offenses "is based in the defendant's constitutional right to have the jury determine every material issue presented by the evidence." (*People v. Ramkeesoon*, *supra*, 39 Cal.3d at p. 351.) This sua sponte duty to instruct exists even if the defendant expressly objects to the instruction. (*People v. Barton*, *supra*, 12 Cal.4th at p. 195.) "[A] defendant has no legitimate interest in

compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth." (*People v. St. Martin* (1970) 1 Cal.3d 524, 533; see also *People v. Birks* (1998) 19 Cal.4th 108, 117-120.)

B. The Law Regarding Lesser Included Offenses

A lesser offense is included in the charged offense if either of two tests is met. The first test is the statutory elements test. This test provides that a lesser offense is included in the greater offense when the statutory elements of the greater offense include all of the statutory elements of the lesser offense. (*People v. Birks*, *supra*, 19 Cal.4th at p. 117; see also *People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

The second test is referred to as the accusatory pleading test. The accusatory pleading test looks to whether the charging language describes the greater offense in such a way that if committed, the lesser offense is necessarily committed. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035.) Under this test, an offense is necessarily included in a greater offense if it is impossible to commit the greater offense as pled without also committing the lesser offense. (*Ibid.*)

Battery, then, is a lesser included offense of a lewd act with a child if it is impossible to commit the crime of a lewd act with a child without also committing a battery.

II.

LEWD ACTS WITH CHILDREN ARE "UNLAWFUL USES OF FORCE" AND "HARMFUL OR OFFENSIVE" TOUCHINGS, AND ARE THEREFORE BATTERIES, AS A MATTER OF LAW.

A. The Statutory Definitions of a Lewd Act With a Child and Battery

Section 288(a), prohibiting lewd acts with children, provides in pertinent part:

> [A]ny person who willfully and lewdly commits any lewd or lascivious act ... upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

Section 242 defines a battery as "any willful and unlawful use of force or violence upon the person of another."

B. A Lewd Act With a Child Is A "Willful and Unlawful Use of Force," and Thus a Battery, As a Matter of Law

A lewd act with a child is by definition a "willful and unlawful use of force," and is therefore also a battery. First, the lewd touching of a child always constitutes a "use of force" under the battery statute. This Court has determined that a lewd act with a child is accomplished by "any touching" of the child if that touching is done with lewd intent. (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) Similarly, this Court has determined that a battery is accomplished by the "least touching" of a person. (*People v. Rocha* (1971) 3 Cal.3d 893, 899, fn. 12.) If a perpetrator touches a child in any manner with sexual motivation, then, he or she has committed the type of force contemplated under the battery

statute (i.e., the "least touching"). A lewd act with a child, therefore, necessarily includes the "use of force" described in the battery statute.

Furthermore, that lewd touching is necessarily an "unlawful" and "willful" use of force as described in the battery statute. The Legislature classifies lewd acts with children as "violent" and "serious" criminal offenses punishable by up to eight years in state prison. (Pen. Code, § 288, subd. (a); Pen. Code, § 667.5, subd. (c)(6) [violent felony]; Pen. Code, § 1192.7, subd. (c)(6) [serious felony].) Lewd acts with children, therefore, are, without question, "unlawful." And both statutes require that the touching itself be "willful." (Pen. Code, § 242; Pen. Code, § 288, subd. (a); CALCRIM 960 (2010 ed.) Vol. 1, p. 659 [battery]; CALCRIM 1110 (2010 ed.) Vol. 1, p. 807 [lewd act with a child].) Any lewd act with a child, then, is necessarily a "willful and unlawful use of force," and is therefore a battery, as a matter of law. Our Legislature has deemed it so.

C. Batteries are Harmful and Offensive Touchings As a Matter of Law

Any "harmful or offensive" touching satisfies the elements of battery under section 242. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961; CALCRIM 960 (2010 ed.) Vol. 1, p. 659.) Put another way, then, the question before this Court is the one set forth by Court of Appeal in its opinion in this case: "whether a defendant can commit a lewd act [with a child] without touching the victim in a harmful or offensive manner." (Court of Appeal Opinion, p. 7.)

The California Legislature and this Court have already answered this question.

According to the California Legislature and this Court, committing a lewd act with a child is *always* harmful and offensive. The Legislature has declared that committing a lewd act with a child under the age of 14 is punishable by up to eight years in state prison. (Pen. Code, § 288, subd. (a).) The Legislature has also deemed such acts as "serious" and "violent" criminal felonies. (Pen. Code, § 667.5, subd. (c)(6); Pen. Code, § 1192.7, subd. (c)(6).) Because committing a lewd act with a child is, by definition of the Legislature, a serious, violent, criminal offense, it is harmful and offensive as a matter of law. To answer the Fifth District's question, then, a defendant cannot commit a lewd act with a child without touching the victim in a harmful or offensive manner.

And this Court is in full agreement with the Legislature regarding the inherently harmful and offensive nature of lewd acts with children. As this Court recently set forth in *People v. Soto* (2011) 51 Cal.4th 229, 243, citing *People v. Martinez*, *supra*, 11 Cal.4th at pp. 443-444:

> [S]ection 288 was enacted to provide children with "special protection" from sexual exploitation. (*People v. Olsen* (1984) 36 Cal.3d 638, 647-648, 205 Cal.Rptr. 492, 685 P.2d 52.) The statute recognizes that children are "uniquely susceptible" to such abuse as a result of their dependence upon adults, smaller size, and relative naiveté. [Citation.] The statute also assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire.

Section 288 protects young children from harm because young children are particularly subject to outrage and exploitation:

> Significant harm may occur to a child who is caused to engage

> in or submit to the lustful intendments of a person seeking sexual self-gratification. The range of proscribed potentially harmful acts is limited only by the imagination of the perpetrator. The harm may be manifested in many different mental, emotional and physical ways, leaving a child with possible lasting and debilitating fears.
>
> (*People v. Austin* (1980) 111 Cal.App.3d 110, 114-115.)

Accordingly, this Court has determined that any touching of a child with lewd intent is *always profoundly harmful* to the child victim. (*People v. Soto*, *supra*, 51 Cal.4th at p. 243; *People v. Martinez*, *supra*, 11 Cal.4th at pp. 443-444; *J.C. Penney Casualty Ins. Co. v. M.K.* (1990) 52 Cal.3d 1009, 1025-1026.) "The act [touching a child under 14 years of age with lewd intent] is the harm." (*J.C. Penney Casualty Ins. Co. v. M.K.*, *supra*, 52 Cal.3d at p. 1026.) And such touching is not only profoundly harmful, it is also by definition "offensive." (*People v. Martinez*, *supra*, 11 Cal.4th at p. 443, fn. 7, citing *People v. Greer* (1947) 30 Cal.2d 589, 601.) If touching a child with lewd intent is always profoundly harmful and offensive, it must also be a battery, a "harmful or offensive" touching.

It is a matter of law decreed by the Legislature, then, that a person cannot commit a lewd act with a child under the age of 14 without touching the victim in a profoundly harmful and offensive manner. This Court has consistently reaffirmed this principle, most recently in *Soto*. (*People v. Soto*, *supra*, 51 Cal.4th at p. 243.) Since a lewd act with a child under the age of 14 is by definition harmful and offensive, it must also be a battery.

This syllogism is unassailable. As will be demonstrated below, it does not matter how the perpetrator effectuates the lewd touching, whether directly, indirectly, or constructively; it

does not matter whether the young child knows the lewd touch is harmful, or subjectively "takes offense" to it; and it does not matter whether the young child "consents" to such a lewd touch. Touching a child with lewd intent is *per se* harmful and offensive. It is, by definition, an unlawful use of force on another. A lewd act with a child, then, is a battery as a matter of law. This Court need go no further in resolving the issue.

III.

ONE CANNOT COMMIT A LEWD ACT WITH A CHILD WITHOUT ALSO COMMITTING A BATTERY.

A. Introduction

As appellant will demonstrate, one cannot commit a lewd act with a child without committing a battery. Sections 242 and 288(a) both proscribe harmful or injurious touchings. Both statutes broadly construe what constitutes a touching, and what constitutes an injury that results from such touching. The "willful touching" element is identical in both statutes, and the harm inherent in a lewd touch satisfies the "harmful or offensive touching" element of battery.

B. The Elements of a Lewd Act With a Child and a Battery

The elements of a lewd act with a child are:

> 1. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing;
>
> 2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or herself or the child; and
>
> 3. The child was under the age of 14 years at the time of the act.
>
> (Pen. Code, § 288, subd. (a); *People v. Martinez*, *supra*, 11 Cal.4th at pp. 444-445; CALCRIM 1110 (2010 ed.) Vol. 1, p. 807.)

The statutory elements of battery are:

> 1. The defendant willfully touched a person in a harmful or offensive manner.

(Pen. Code, § 242; *People v. Pinholster*, *supra*, 1 Cal.4th at p. 961; CALCRIM 960 (2010 ed.) Vol. 1, p. 659.)

One can simplify the elements of both offenses for a direct comparison. When one subtracts the unique elements under section 288(a) - that the touching involves a child under the age of 14 and is done with lewd intent – the following elements remain:

242: The defendant willfully touches a person in a harmful or offensive manner.
288(a): The defendant willfully touches any part of a person's body whether on the bare skin or through the clothing.

One must ask, then: 1) whether the touching requirement is the same for both offenses; and 2) whether the harm or injury inherent in a lewd act with a child qualifies as a "harmful or offensive" touching.

C. The "Touching" or "Use of Force" Requirements for a Lewd Act With a Child and a Battery Are Identical

1. "Any Touching" of a Child Satisfies the Use of Force Requirement for Section 288(a)

Section 288(a) prohibits a person who harbors lewd intent from touching any part of a child's body, specifically, "commit[ting] any lewd or lascivious act ... upon or with the body, or any part or member thereof, of a child." Any touching of any part of a child's body, whether through the child's clothing or not, satisfies the touching element of the statute. (CALCRIM 1110 (2010 ed.) Vol. 1, p. 807.) As this Court stated in *Martinez*:

> [T]hroughout the statute's history, the cases have made clear that a "touching" of the victim is required, and that sexual gratification must be presently intended at the time such "touching" occurs. However, the form, manner, or nature of the offending act is not otherwise restricted. Conviction under the statute has never depended upon contact with the

> bare skin or "private parts" of the defendant or the victim. Stated differently, a lewd or lascivious act can occur through the victim's clothing and can involve "any part" of the victim's body.
>
> More recent authorities apply the same principles but tend to articulate them in more succinct terms. Like the jury instructions given in this case, modern courts state or imply that *any* touching of an underage child is "lewd or lascivious" within the meaning of section 288 where it is committed for the purpose of sexual arousal.
>
> (*People v. Martinez*, *supra*, 11 Cal.4th at pp. 444-445, emphasis in original, citations omitted.)

Thus, this Court "adhere[s] to the long-standing rule that section 288 is violated by 'any touching'" of the person of a minor under age 14. (*Id.* at p. 452.)

2. The "Least Touching" Satisfies the Use of Force Requirement for Section 242

Similarly, a battery is defined expansively to include any type of touching to any part of a person's body. This broad interpretation of what constitutes a battery "touching" spans centuries. In 1770, stone, citing various English cases, defined battery as:

> [T]he unlawful beating of another. The *least touching* of another person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, *in any the slightest manner.*
>
> (3 Blackstone's Commentaries (1770) p. 120, emphasis added.)

This expansive definition of battery was adopted early on in California. The crime of "assault and battery" in California was first defined by the Legislature in 1850. At that time, the Legislature deemed that "assault and battery is the unlawful beating of another." (Stats.

1850, ch. 99, § 51, p. 234.) When the original Penal Code was enacted in California, however, that definition of assault and battery was repealed and not reenacted, and hence ceased to be the law. The new definition of battery set forth in 1872 in section 242, which has not been amended since that time, defines a battery as "*any* willful and unlawful *use of force or violence* upon the person of another." (1 Pen. Code, §242 (1st ed. 1872, Haymond, Burch & McKune, cmmrs.) p. 62, emphasis added.)

While the battery statute proscribes the willful and unlawful use of any "force or violence," the word "violence" has no real significance. (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 87-88.)

> The "violent injury" ... is not synonymous with "bodily harm," but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act. The term "violence" as used here is synonymous with "physical force," and in relation to assaults the two terms are used interchangeably. Mr. Bishop says: "The kind of physical force is immaterial; ... it may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will."
>
> (*People v. Bradbury* (1907) 151 Cal. 675, 676-677, citations omitted.)

Accordingly, in 1971, this Court succinctly summed up the force requirement for battery in California:

> It has long been established, both in tort and criminal law, that "the least touching" may constitute battery. In other words, *force* against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.

(*People v. Rocha*, *supra*, 3 Cal.3d at p. 899, fn. 12, emphasis in original.)

Thus, section 242 may be violated by "the least touching."

3. Both Sections 288(a) and 242 Require That the Touching Be "Willful"

Section 288(a) requires that the act committed upon the body (i.e., the touching) must be done "willfully." Section 242 requires that the use of force upon the person must be "willful."

The amount of force needed to satisfy the touching requirement of section 288(a), i.e. "any touching," is identical to the amount of force needed to satisfy the touching requirement for battery ("the least touching"). Both statutes proscribe any touching, even the slightest touching, when such touching is harmful or offensive. Any willful touching, then, or the least willful touching, satisfies that element.

D. The Emotional or Psychological Injury Inherent In a Lewd Touching of a Child Qualifies As a "Harmful or Offensive" Injury Proscribed By the Battery Statute

Just as the notion of "touching" or "use of force" is expansively construed in both statutes, so too is the notion of the harm that results from the touching.

As set forth above, the harm or injury necessary for a conviction under section 288(a) need not be physical:

> The harm may be manifested in many different mental, emotional and physical ways, leaving a child with possible lasting and debilitating fears.
>
> (*People v. Austin*, *supra*, 111 Cal.App.3d at p. 115.)

Accordingly, this Court has declared that a child victim always suffers emotional and psychological harm from a lewd touching. (*J.C. Penney Casualty Ins. Co. v. M.K.*, *supra*, 52 Cal.3d at p. 1026.) Thus, emotional or psychological injuries satisfy the "harm" or "injury" requirements of section 288(a).

It is the same for battery. The offense of battery traces at least from the *Lex Cornelia de Injuriis*, a series of laws imposed in 81 B.C. by the Roman dictator Lucius Cornelius Sulla. (Burrill, 2 Law Dictionary and Glossary (2d ed. 1867) p. 148; Berger, 43 Encyclopedic Dictionary of Roman Law (1953) p. 549.) The *Lex Cornelia de Injuriis* prohibited not only the act of *verberation*, a beating that causes pain, but also the act of *pulsation*, a beating that causes no pain. (3 Blackstone's Commentaries (1770) p. 120.) That notion - that a battery can be completed even if no physical pain results - was later adopted in England. (*Ibid.*)

As early as 1907, this Court recognized this expansive concept of what type of injury satisfies the "harm" element for battery, stating that a battery may be committed even if "only the feelings of [the victim] are injured by the act." (*People v. Bradbury*, *supra*, 151 Cal. at p. 676.) Thus, this Court defines a battery as a harmful *or offensive* touching. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 961, emphasis added; see also CALCRIM 960 (2010 ed.) Vol. 1, p. 659.) This Court's inclusion of the word "offensive" in the definition of battery confirms longstanding California law that touches resulting in emotional or psychological injuries ("hurt feelings") qualify as batteries under section 242.

It should be pointed out that this recognition does not alter the fact that the gravamen of the crime of battery is that the touching must be injurious or harmful in some way. (*People v. Rocha, supra*, 3 Cal.3d at p. 899; *People v. Colantuono* (1994) 7 Cal.4th 206, 215.) This Court has stated that the essence of a battery is the "injury-producing nature of the defendant's acts." (*People v. Colantuono, supra*, 7 Cal.4th at p. 215.) Thus, when this Court states that a battery may be found for an "offensive" touching, this is merely a shorthand way of recognizing that "hurt feelings," otherwise known as emotional or psychological harm, is a type of injury or harm sufficient for a battery. One can view the word "offensive," then, in either of two ways: as a touching which causes emotional or psychological harm, and is thus objectively offensive (as a synonym for harmful); or that the victim is subjectively offended by the touching, indicating he or she may have suffered emotional or psychological injury. Either way, the battery is determined by the harmful ("injury-producing nature") of the touch.

If a lewd touching always causes emotional and psychological injury to the child victim, that use of force always results in a battery, since emotional and psychological harm is sufficient to satisfy the "use of force" element of section 242. The "harm" element for battery, therefore, is necessarily satisfied when a lewd act with a child has been committed.

E. A Lewd Act With a Child Is Nothing More Than a Battery On a Child Under the Age of 14 Done With Lewd Intent

Considering the elements of the two offenses as set forth above, a lewd act with a child is no more than a battery committed against a child with lewd intent. If a defendant touches a child in a harmful or offensive manner, but does so without lewd intent, then the

act must be a battery. Thus, if a person kisses a child sloppily on the lips or rubs a child on the stomach in such a manner that the child is rightfully offended, but does so without lewd intent, that act must be a battery. This would encompass situations where the perpetrator touches the child in an offensive manner for sadistic rather than lewd reasons, or where the perpetrator lacks the social skills to realize that his clumsy touching is offensive. Even though the touching is not done with lewd intent, it is offensive and it is harmful, and is therefore a battery.

Under the statutory element test for determining lesser included offenses, therefore, a person who commits a lewd act on a child also necessarily commits a battery.

F. The Accusatory Pleading Test

Likewise, the accusatory pleading test for determining lesser included offenses yields the same result. Under that test, an offense qualifies as a lesser included offense if the language in the charging document describes the greater offense in such a way that if that greater offense is committed, the lesser offense is also necessarily committed. (*People v. Montoya, supra,* 33 Cal.4th at p. 1035.)

In the Information accusing appellant of committing a lewd act with a child, the prosecution alleged that appellant "did willfully, unlawfully, feloniously, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of 10-year-old Jane Doe, a child under the age of 14 years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant and

the said child." (CT 49.) This mirrors the statutory language of section 288(a). Because the accusatory pleading mirrors the statute, if a person commits the offense set forth in the accusatory pleading, a lewd act with a child, that person also commits a battery. The charging language, therefore, describes a lewd act with a child in such a way that if that act is committed, a battery is also necessarily committed.

Both the "statutory elements" test and "accusatory pleading" test, then, have been satisfied. Battery is a lesser included offense of committing a lewd act with a child.

IV.

CONSENT IS NOT A DEFENSE TO A BATTERY THAT FORMS THE BASIS FOR A LEWD ACT ON A CHILD.

Appellant knows of three rationales for the proposition that battery is not a lesser included offense of a lewd act with a child.

In its opinion finding that battery is not a lesser included offense of a lewd act with a child, the Fifth District Court of Appeals offered one such rationale to reach its conclusion. Without citing to any authority, the Fifth District found that, if a child under the age of 14 did not object to a lewd touching, then no battery would occur. (Court of Appeal Opinion, p. 9.)

The Fifth District found:

> This case provides an example where a sexually motivated touching may not be a battery, an example with which many parents are familiar. Many children enjoy being tickled on their stomachs. In this case, Shockley was accused of having a sexual motivation when he touched and rubbed the victim's stomach. If the victim enjoyed being tickled on the stomach, no battery would occur because she would be consenting to the touching. Even if the victim expressly consented to the tickling episode, however, Shockley still would be guilty of violating section 288 if his conduct was sexually motivated.
>
> Or a perpetrator may put ice cream on his finger and ask a child to lick off the ice cream. The child may willingly perform the requested task, but the perpetrator's conduct would violate section 288 if it was sexually motivated.
>
> To assume, as *Thomas* did, that all sexually motivated touching is a battery, is unsupported by common sense. Nor are we willing to conclude that somehow a child's consent was invalid because of the defendant's sexual motivation. Indeed, a child under the age of 14 may consent to the act, even knowing the defendant's motivation, if

> the reward is perceived as sufficient. A violation of section 288 would occur if the defendant had the requisite motivation, regardless of the child's consent. A bright-line rule, like the one assumed by *Thomas*, simply is unrealistic.
>
> (Court of Appeal Opinion, p. 9.)

Appellant disagrees. The principle that all lewd touches of a child are batteries is realistic and supported by common sense. While not every touching of a child is a battery, the *lewd* touch of a child *must* be a battery, because such touches are non-consensual and harmful as a matter of law.

Specifically, the Fifth District's assertion that consent is a defense to the underlying battery that forms the basis for a lewd act with a child flies in the face of venerable California law. Just recently, this Court reiterated the long-standing proposition that the consent of a child is no defense to an assault made on a child made for sexual purposes. (*People v. Soto*, *supra*, 51 Cal.4th at pp. 247-248.) In so doing, this Court quoted with favor *People v. Verdegreen* (1895) 106 Cal. 211, 215, as follows:

> It is true that an assault implies force by the assailant and resistance by the one assaulted; and that one is not, in legal contemplation, injured by a consensual act. But these principles have no application to a case where under the law there can be no consent. Here the law implies incapacity to give consent, and this implication is conclusive. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her.
>
> (*People v. Soto*, *supra*, 51 Cal.4th at pp. 247-248.)

This is well-settled law in California. (See, e.g., *People v. Gordon* (1886) 70 Cal.

467, 468-469; *People v. Babcock* (1911) 160 Cal. 537, 540; *People v. Dong Pok Yip* (1912) 164 Cal. 143, 147; *People v. Kanngiesser* (1919) 44 Cal.App. 345, 347-348; *People v. Parker* (1925) 74 Cal.App. 540, 545-546; *People v. James* (1935) 9 Cal.App.2d 162, 163-164.) The Fifth District's finding that consent is a defense to a battery made for lewd purposes cannot be squared with this Court's finding in *Soto* that consent is no defense to an assaultive act made on a child for lewd purposes.

The Fifth District's opinion, while not stating so explicitly, finds that the factual situation it posits – an adult, with lewd intent, tickling a child's stomach or licking ice cream off the child's fingers - qualifies under the "ordinary physical contact" exception to the general rule that consent is not a defense to a battery. "[C]onsent of the victim is not generally a defense to assault or battery, except in a situation involving *ordinary physical contact* or blows incident to such sports as football, boxing, or wrestling. (*People v. Samuels* (1967) 250 Cal.App.2d 501, 513, emphasis added.) This maxim makes sense where another adult can recognize whether a person's "ordinary" touches (such as a pat on the shoulder or a peck on the cheek) is an ordinary, innocent touch, or instead constitutes a masked lewd advance.

But as this Court made clear in *Soto*, touching a child with lewd intent can never be considered "ordinary physical contact." As this Court has recognized time and again, dependent, naïve children cannot always recognize when "ordinary physical contact" is made with their bodies for lewd purposes. (*People v. Soto*, *supra*, 51 Cal.4th at pp. 245-246.)

Children under the age of 14 cannot legally consent to a lewd act, because they lack the capacity to give informed consent to such acts. (*People v. Soto*, *supra*, 51 Cal.4th at pp. 247-248; *People v. Martinez*, *supra*, 11 Cal.4th 434, at p. 451, fn. 17; *People v. Olsen* (1984) 36 Cal.3d 638, 645-648.) Such lewd, insidious touches are always profoundly harmful, and children must be protected from them. (*People v. Martinez*, *supra*, 11 Cal.4th at pp. 443-444, 450, *People v. Soto*, *supra*, 51 Cal.4th at p. 243.)

As *Soto* makes clear, in cases of lewd acts with children, this Court extends its protective reach to the assaultive predicates to those lewd acts. (*People v. Soto*, *supra*, 51 Cal.4th at pp. 246-247.) All lewd acts with children are non-consensual and harmful as a matter of law, and therefore, are batteries. This Court should so find.

V.

A LEWD ACT WITH A CHILD ACCOMPLISHED WITH "CONSTRUCTIVE" TOUCHING IS ALSO A BATTERY.

A. Introduction

The second rationale for the proposition that battery is not a lesser included offense of a lewd act with a child was the following rationale unsuccessfully set forth by the Attorney General in *People v. Thomas* (2007) 146 Cal.App.4th 1278: that lewd acts do not require that the defendant touch the child victim, while batteries require that the defendant touch the victim. Thus, this rationale posits, a lewd act with a child accomplished by a constructive touching would not qualify as a battery.

In *Thomas*, the defendant was charged with several counts of violations of section 288(a). (*People v. Thomas*, *supra*, 146 Cal.App.4th at p. 1282.) The defendant asserted on appeal that the trial court erred in failing to instruct the jury with the lesser included offense of battery. (*Id.* at p. 1291.) The People disagreed, contending that battery was not a lesser included offense of a lewd act with a child, because a battery requires a touching of the victim, whereas a lewd act with a child does not require that the defendant touch the child. (*Id.* at p. 1292.)

In rejecting this argument, the First District Court of Appeals pointed out that both statutes require a "touching" of the victim. (*Id.* at p. 1293.) The First District noted that even though this Court in *People v. Marshall* (1997) 15 Cal.4th 1 at page 38 stated that "a battery cannot be accomplished without a touching of the victim," this Court in *Marshall* never

considered the question of whether such touching could be constructive. (*Ibid.*) The First District concluded that if lewd acts with children may be accomplished by constructive touching, the same logic applies to batteries. (*Ibid.*) As will be demonstrated, the First District was correct.

B. Precedential Law On the Issue

Direct California precedents are few and far between when it comes to the question of whether a battery may be committed with a "constructive touch." As stated above, the First District found in *Thomas* that batteries may be committed with constructive touches. In another case, the Third District Court of Appeal stated that "[a] defendant can commit a battery indirectly by causing the force to be applied to the person of another and thus can be guilty of indirect assault as well." (*People v. Wright* (1996) 52 Cal.App.4th 203, 210, fn. 17, citation omitted.)

Legal scholars agree. According to Witkin, batteries may be accomplished by indirect touches. (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 13, p. 646 [e.g., by forcing a person to jump from a window or vehicle, using a spring gun or trap, or administering poisons or chemicals].) And the Judicial Council Task Force on Criminal Jury Instructions, after surveying the law regarding battery in California, states in CALCRIM 960: "The touching can be done indirectly by causing an object *or someone else* to touch the other person." (CALCRIM 960 (2010 ed.) Vol. 1, p. 659, emphasis added.)

C. A Lewd Act With a Child Accomplished By Constructive Touching Must Also Be a Battery

As set forth above, the law in California protects children from lewd acts because children are "uniquely susceptible" to such abuse as a result of their dependence upon adults, smaller size, and relative naiveté. (*People v. Soto*, *supra*, 51 Cal.4th at p. 243; *People v. Martinez*, *supra*, 11 Cal.4th at p. 444; *People v. Scott* (1994) 9 Cal.4th 331, 341-342.) Moreover, as set forth above, this protection extends to the assaultive acts that form the bases of lewd acts. (*People v. Soto*, *supra*, 51 Cal.4th at pp. 246-247.) The Legislature has consistently extended such protections to children, as explained by this Court in *People v. Olsen*, *supra*, 36 Cal.3d at pages 647-648:

> Time and again, the Legislature has recognized that persons under 14 years of age are in need of special protection. This is particularly evident from the provisions of section 26. That statute creates a rebuttable presumption that children under the age of 14 are incapable of knowing the wrongfulness of their actions and, therefore, are incapable of committing a crime. A fortiori, when the child is a victim, rather than an accused, similar "special protection," not given to older teenagers, should be afforded.

As this Court reiterated in *Soto*, the law constructively "resists" for a child in the assault forming the basis for a lewd act, because the child often cannot do so. (*People v. Soto*, *supra*, 51 Cal.4th at p. 246-247.) This same reasoning applies to constructive touches. When an adult persuades a child to touch himself or herself, or persuades another person to touch them - while the perpetrator watches and derives sexual pleasure from the touching – the child may not possess the wherewithal to understand the import of, or resist, the touching.

That touching, though, is just as much an assault upon the child, and is just as profoundly harmful, as if the perpetrator touched the child. As the court in *People v. Meacham* (1984) 152 Cal.App.3d 142, 154 stated:

> Here ... the evidence establishes that appellant instructed or posed the children in such manner that their hands were caused to be placed upon their own genitalia. These acts of touching are imputable to appellant as if the touching had been actually done by his own hands. It is a "constructive" touching and is perceived as such in the eyes of the law.

This Court adopted the *Meacham* analysis in *People v. Mickle* (1991) 54 Cal.3d 140, 175-176, finding that section 288(a) is violated by a constructive touching because such acts are inherently harmful to the child.

If the law imputes a constructive touching to lewd acts with children, it must also impute a constructive touching to the battery which forms the basis of the lewd act. The touching, orchestrated by the perpetrator, is the same, and the touching is the harm. As this Court has found, the *constructive* touching of a child for lewd purposes is "presumptively harmful and prohibited by section 288(a)." (*People v. Mickle*, *supra*, 54 Cal.3d at p. 176.) If a constructive touching is harmful, it is a battery. Constructive lewd touches, then, must also be batteries.

If the law steps in to resist a constructive lewd attack on behalf of a child, the law must also step in to resist the inherently harmful battery that forms the basis for that act. The law in California protects naïve and dependent children from harmful and offensive touches,

whether those touches are constructive or not.

As stated above, the gravamen of battery is the harmful, injury-producing nature of the touch. (*People v. Rocha, supra*, 3 Cal.3d at p. 899; *People v. Colantuono, supra*, 7 Cal.4th at p. 215.) If a harmful constructive touching occurs, and the perpetrator by his or her course of conduct initiates or directs that touching, then the perpetrator is morally responsible for the touching, and should be punished for the resulting battery. The touching is imputable to the perpetrator "as if [it] had been actually done by his own hands." (*People v. Meacham, supra*, 152 Cal.App.3d at p. 154.) By applying the reasoning of this Court, constructive lewd touches are also batteries.

D. Constructive Lewd Touches By Child Molesters Are Batteries, Because They "Directly, Naturally, and Probably Result" In the Harmful Touching of a Child

In this section, Appellant will demonstrate that a defendant satisfies the elements of a battery if he or she willfully commits a course of conduct that would "directly, naturally, and probably" result in an injury to another, and such injury occurs. At the outset, it is essential to stress that the mental state necessary for a conviction of assault or battery is identical. (*People v. Rocha, supra*, 3 Cal.3d at p. 899; *People v. Colantuono, supra*, 7 Cal.4th at pp. 216-217; *People v. Hayes* (2006) 142 Cal.App.4th 175, 180.) "If one commits an act that by its nature will likely result in physical force on another, the particular intention of committing a battery is thereby subsumed." (*People v. Colantuono, supra*, 7 Cal.4th at p. 217.) While most of the cases cited below set forth criteria for determining the crime of assault by examining the mens rea element of that crime, they equally apply to the determination of

whether an act is a battery, because the mental state for both assaults and batteries is the same.

In *People v. Rocha*, decided in 1971, this Court defined the mental state for assault (and thus battery), holding that an assault does not require the specific "intent to cause any particular injury, to severely injure another, or to injure in the sense of inflicting bodily harm...." (*People v. Rocha*, *supra*, 3 Cal.3d at p. 899, citations and footnotes omitted.) Rather, assault required "the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another." (*Ibid.*)

This Court refined its analysis of the issue in 1994 in *People v. Colantuono*. There, this Court noted that its decision in *Rocha* "accurately focused on the violent-injury-producing nature of the defendant's acts, rather than on a separate and independent intention to cause such injury," and reiterated that assault was a general intent crime. (*People v. Colantuono*, *supra*, 7 Cal.4th at pp. 215-216.) The "pivotal question," though, was "whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm." (*Id.* at p. 218.) This Court explained that the "the mental state for assault ... is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery." (*Id.* at p. 214.)

In *People v. Williams* (2001) 26 Cal.4th 779, this Court refined the analysis even further. This Court noted that because the mental state for assault (and thus battery) focused

on the likelihood of harm, i.e., the "direct, natural, and probable" likelihood of injury, confusion had arisen whether such a standard was akin to a negligence standard. (*Id.* at p. 787.) This Court then stated:

> Recognizing that *Colantuono*'s language may have been confusing, we now clarify the mental state for assault. Based on the 1872 definition of attempt, a defendant is only guilty of assault if he intends to commit an act "which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences." Logically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery.
>
> (*Id.* at pp. 787-788, citation omitted.)

This Court therefore concluded that "a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Id.* at p. 788.)

The *Rocha/Colantuono/Williams* analysis was applied to a battery case in *People v. Hayes*, *supra*, 142 Cal.App.4th at pages 179-180. In that case, the Second District Court of Appeal upheld a battery conviction where the defendant kicked a concrete ashtray, which in turn struck a probation officer. That court found that the defendant, by kicking the ashtray with great force knowing that the probation officer was standing beside it, "was aware of facts sufficient to establish that his intentional act 'would directly, naturally, and probably result in a battery' by causing the ashtray to fall on [the officer]." (*Id.* at p. 180.)

Accordingly, the facts of the lesser-included-offense scenario currently before this

Court may be plugged into the *Rocha/Colantuono/Williams* framework to determine whether a constructive lewd touching of a child is also a battery.

Lewd touches of children must be made for the perpetrator's "immediate sexual gratification." (*People v. Martinez, supra*, 11 Cal.4th at pp. 444, 452.) In a constructive lewd touching of a child, an adult perpetrator requests, persuades, coerces, or threatens a child to touch himself or herself, and the perpetrator watches the touching to gain sexual gratification. (*People v. Meacham, supra*, 152 Cal.App.3d at p. 154.) Alternatively, the perpetrator requests, persuades, coerces, or threatens another person (perhaps another child) to touch the child victim, and watches the touching to gain sexual gratification. (*People v. Austin, supra*, 111 Cal.App.3d at p. 115.)

A person who initiates and then watches the touching of a child for sexual gratification, therefore, is aware of facts that would lead a reasonable person to understand that his or her course of conduct would "directly, naturally, and probably" result in the child being touched in a harmful manner. Indeed, that is the very reason that the adult engages in the course of conduct: so that a lewd touching will occur and the perpetrator will derive sexual pleasure from watching it. The profoundly harmful touching of the child directly, naturally and probably follows this course of conduct, and is therefore a battery.

Under the legal framework set forth by this Court to determine batteries, then, a constructive touch constituting a lewd act with a child must also constitute a battery. The perpetrator's act of orchestrating and watching a harmful, lewd touching of a child will

"directly, naturally, and probably" result in the child being touched in a profoundly harmful manner.

E. The Statutory Language of the Two Offenses and California Case Law Support the Conclusion That A Lewd Act With a Child Accomplished By Constructive Touching Is Also a Battery

The language regarding force contained in sections 288(a) and 242 bolsters the conclusion that if lewd acts with children may be accomplished by constructive touching, the same holds true for batteries.

If "committing an act upon the body, or any part or member thereof of a child" under section 288(a) may be accomplished by a constructive touching, then there is no reason why a "use of force or violence upon the person" under section 242 may not be completed via a constructive touching. "Using force" on a person in a battery, if anything, connotes the possibility of indirect force more so than "committing an act upon the body" in a lewd act with a child. One definition of "use" is to "put or bring into action or service; to employ for or apply to a given purpose." (Webster's New Universal Unabridged Dict. (2d. ed. 1983) p. 2012.) Section 242, then, is satisfied by a course of conduct which "employs" force, even somebody else's force, to bring about the desired result, a harmful touching. In short, the language in section 242 is at least as amenable to constructive touches as that contained in section 288(a).

In addition, California case law makes it clear that for batteries, there is no requirement that the perpetrator physically touch the victim. In *People v. Duchon* (1958) 165

Cal.App.2d 690, 692, the defendant threw a hedge clipper at the victim, striking him in the head. Even though the defendant did not physically touch the victim, the Court of Appeal upheld his battery conviction. (*Id.* at p. 693.) In *People v. Pinholster*, *supra*, 1 Cal.4th at p. 961, this Court found a battery where the defendant threw a cup of urine in another person's face.

The law in California is clear: a perpetrator need not touch a victim in order to be guilty of a battery. This Court's *Rocha/Colantuono/Williams* line of cases, coupled with this Court's protection of children as set forth in *Soto* and its antecedents, support the conclusion that both lewd acts with children and the assaultive acts that form the bases for those offenses may be accomplished by constructive touches. After all, in all these cases, the perpetrator is orchestrating the use of harmful force on a child, and should be punished accordingly.

F. The Rationales For the Proposition That Constructive Lewd Touches May Not Also Constitute Batteries Are Not Persuasive

As set forth above, the Attorney General in *Thomas* contended that constructive touches cannot be batteries, because this Court has stated that "a battery cannot be accomplished without a touching of the victim." (*People v. Thomas*, *supra*, 146 Cal.App.4th at p. 1292, citing *People v. Marshall*, *supra*, 15 Cal.4th at page 38.) This contention is faulty for two reasons.

First, as appellant has shown, the language of both section 288(a) and 242 require a touching of the victim. (*People v. Thomas*, *supra*, 146 Cal.App.4th at p. 1293; see, e.g., *People v. Martinez*, *supra*, 11 Cal.4th at p. 444 [lewd acts with children]; *People v. Marshall*,

supra, 15 Cal.4th at p. 38 [batteries].) If lewd acts with children may be accomplished by constructive touches given such a requirement, then the battery which forms the basis for such an act may also be accomplished constructively.

Second, this Court in *Marshall* did not consider the issue of whether batteries, or batteries that form the basis for lewd acts, may be accomplished by constructive touching. (*People v. Marshall*, *supra*, 15 Cal.4th at pp. 38-39; *People v. Thomas*, *supra*, 146 Cal.App.4th at p. 1293.) Cases are not authority for propositions not considered therein. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.)

G. Summary

Children, who are "uniquely susceptible" to profoundly harmful lewd touches, should be protected by the law when adults persuade them to touch themselves for the perpetrator's own sexual gratification, or persuade other persons to touch the child. In these cases, the touching is imputable to the perpetrator as if the touching had been actually done by the perpetrator's own hands. Those touches are always harmful, and as such, are batteries. If the law protects children from such lewd acts, it must also protect children from the batteries which underlie those acts.

VI.

A BATTERY OCCURS EVEN IF A CHILD VICTIM IS NOT SUBJECTIVELY OFFENDED BY A LEWD TOUCHING, BECAUSE LEWD ACTS ARE ALWAYS HARMFUL TO CHILDREN.

Regarding the third rationale, appellant anticipates that respondent may argue that while lewd acts are determined by whether the perpetrator harbored lewd intent against the child, batteries are determined solely by whether the victim subjectively perceived a touch as offensive. A child may not subjectively perceive a lewd touch as offensive, this argument would continue, and if the child does not, the lewd act on the child would not be a battery.

This argument has several fatal flaws. First, batteries are not determined by whether the victim was subjectively offended by the touching. As stated above, the gravamen of battery is the harmful, injury-producing nature of the touch (*People v. Rocha, supra*, 3 Cal.3d at p. 899; *People v. Colantuono, supra*, 7 Cal.4th at p. 215), not the victim's reaction to it. Even if a person is subjectively offended by a touching, to determine whether that touch constitutes a battery, it still must be determined whether the person who employed the force was "aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*People v. Williams, supra*, 26 Cal.4th at p. 788.) Thus, for example, a person who is pathologically averse to any human touching may take subjective offense to a friendly handshake or a slight jostling on the subway ("the least touching"), but if the person who touched them had no good reason to believe that such a touch would cause offense, no battery would result. The person who has

been touched is subjectively offended, but the touching is not a battery.

Just as a touching that is subjectively offensive to the recipient may not constitute a battery, the opposite is also true: a touching that is not subjectively offensive to the recipient may still constitute a battery. For example, in cases of "mutual combat," such as a bar fight, even though both participants willingly enter into the fray and may not be subjectively offended by the punches, both parties are criminally liable for battery. (*People v. Lucky* (1988) 45 Cal.3rd 259, 290-291; 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, §87, p. 426.) This is because the touching is "unlawful," i.e., harmful to society, and it is therefore proscribed, even though the recipients are not subjectively offended by it. (*Ibid.*) Similarly, even if one is not subjectively offended by the force that results in great bodily injury, the person administering that force will still be held criminally liable for the assault. (*People v. Samuels*, *supra*, 250 Cal.App.2d at pp. 513-514 [consensual sadomasochistic beating]; *People v. Alfaro* (1976) 61 Cal.App.3d 414, 429.) This is because the touching is objectively harmful to the recipient. (*People v. Samuels*, *supra*, 250 Cal.App.2d at p. 514.)

Furthermore, a battery is the harmful *or* offensive use of force. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 961.) In phrasing the definition of battery this way, this Court in *Pinholster* employed the disjunctive "or." By doing so, this Court recognized that batteries can be accomplished either by an offensive use of force, or, in the alternative, by a harmful use of force. (See, e.g., *Vons Companies v. Seabest Foods* (1996) 14 Cal.4th 434, 455, 462

[disjunctive "or" language in a legal opinion indicates a relaxed, flexible standard that may be satisfied by incorporating either of the terms or concepts that is separated by the disjunctive.] A lewd touching of a child, then, may not be offensive to a naïve child, but it is, without a doubt, harmful and unlawful. Harmful and unlawful touches such as this are necessarily batteries.

In the hypothetical set forth by the Fifth District in the Court of Appeal opinion in this case, a parent tickles a child's stomach or kisses the child on the lips without lewd intent, and the child does not take offense to that touching. (Court of Appeal Opinion, p. 9.) Appellant agrees with the Fifth District that this is not a battery, since the act of touching a child without lewd intent is not inherently harmful, and the child has not been injured or harmed in any way. But if such an act is undertaken with lewd intent, which is the fact pattern at issue before this court, such a touching is always harmful and unlawful, whether the child is offended by it or not. The lewd touching of a child is, therefore, a battery.

In summation, all of the rationales for the proposition that a person committing a lewd act with a child does not necessarily commit a battery fail to persuade. This Court should find that batteries are lesser included offenses of lewd acts with children.

VII.

A FINDING THAT BATTERY IS NOT A LESSER INCLUDED OFFENSE TO A LEWD ACT WITH A CHILD WOULD ALLOW PERSONS WHO TOUCH CHILDREN IN A HARMFUL MANNER TO ESCAPE CRIMINAL SANCTION.

A decision by this Court that batteries are not lesser included offenses of lewd acts with children would create a void in the law in cases where a lewd act with a child under 14 is charged. If a jury in such a case determines that a defendant touched a child under 14 in a harmful or offensive manner but did so without lewd intent, and the jury does not have the option of finding that the act constitutes a battery, no criminal liability would result. In such a scenario, the harmful or offensive touching would not constitute the offenses of battery or annoying a child (Pen. Code, § 647.6, subd. (a); *People v. Lopez* (1998) 19 Cal.4th 282), or any other offense (CALCRIM 1110 (2010 ed.) Vol. 1, p. 809). In prosecutions for alleged violations of section 288(a), judges and juries should be allowed to assign criminal liability to the harmful and offensive touching of children under 14 years of age done without lewd intent.

California law should protect children from harmful and offensive uses of force in cases such as this. Time and again, the Legislature and this Court have formulated and interpreted laws to protect young and naïve children from those that would seek to molest or injure them, and this Court should reaffirm those protective principles here.

VIII.

BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT APPELLANT COMMITTED A BATTERY AND NOT A LEWD ACT WITH A CHILD, THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY REGARDING BATTERY.

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, citations omitted, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149.)

These general principles of law include instructions on lesser included offenses if there is a question about whether the evidence is sufficient to permit the jury to find all the elements of the charged offense. (*People v. Breverman, supra,* 19 Cal.4th at pp. 154-155.) There is no obligation to instruct the jury on theories that do not have substantial evidentiary support. (*Id.* at p. 162.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.]" (*Ibid*, emphasis in original.) Evidence is substantial if it would permit the jury to conclude the lesser offense was committed, but the greater offense was not. (*Ibid.*)

Before analyzing whether there was evidence sufficient for the jury to conclude that a

battery rather than a lewd act had been committed, it is important to reiterate that the prosecution told the jury that appellant could be convicted for any one of three alleged acts: the French kiss at the birthday party, the stomach touching in the car, or the over-the-clothes touching of Jane Doe's vagina in the car. (RT 44; Augmented RT 89, 92-93.) And again, in finding appellant guilty of the lewd act charge, the jury did not specify which of the three acts served as the basis for its finding. (CT 110.)

It is impossible to know which of the three alleged acts formed the basis for the conviction. It is possible that the jury convicted appellant for the alleged French kiss. The jury could have reasoned that the alleged French kiss occurred because the perpetrator of a lewd act would be more likely to commit such an act outside the prying eyes of witnesses. Jane Doe testified that the alleged kiss at her house occurred when she was alone with appellant, and that the other alleged acts took place in the presence of Jane Doe's stepsister.

Then again, it is possible that the jury convicted appellant for the alleged stomach rub. The jury could have reasoned that appellant admitted to this act, and there was insufficient corroboration to prove the other alleged acts. Or perhaps they convicted him for the alleged touching of the vagina due to the inflammatory nature of the charge, or due to a belief that a child would not fabricate a story about that type of behavior.

Since it is impossible to know which of the three alleged acts formed the basis of the conviction, if substantial evidence existed that appellant committed a battery rather than a lewd act *for any one of the three acts*, the trial court's failure to instruct the jury on the lesser

included offense of battery was error. (*People v. Thomas*, *supra*, 146 Cal.App.4th at pp. 1291-1294.)

Substantial evidence existed that appellant committed a battery rather than a lewd act if he kissed Jane Doe. Considering Jane Doe's recantations regarding whether appellant French kissed her, the jury had good reason to believe that appellant never French kissed Jane Doe, but that he did kiss her on the lips. In determining whether a kiss is lewd, a kiss on the lips is a far cry from a French kiss. A kiss on the lips is susceptible to innocent explanation (*People v. Thomas*, *supra*, 146 Cal.App.4th at p. 1294), whereas a French kiss is not. There was substantial evidence that appellant kissed Jane Doe on the lips without lewd intent, but that the kiss was harmful or offensive, because Jane Doe testified that it embarrassed her. (RT 85.) There was substantial evidence, therefore, that the kiss constituted a battery rather than a lewd act.

Substantial evidence also existed for the jury to find that appellant committed a battery rather than a lewd act during the stomach touch. Regarding this act, Jane Doe testified this touching made her uncomfortable (RT 64), but there was also substantial evidence that the act was done in the spirit of horseplay rather than for a lewd purpose. Jane Doe testified that the touch came only when she took off her sweater, and that it made her giggle. (RT 64-65.) Such touching or tickling of a non-sexual part of a child's body is entirely susceptible to innocent explanation (*People v. Thomas*, *supra*, 146 Cal.App.4th at p. 1294), and, according to the testimony of police officer, appellant freely admitted that he engaged in such

horseplay. (RT 156, 165.) The prosecutor acknowledged during closing argument that the evidence of lewd intent regarding this act was weak:

> [M]aybe if you think, well, you know, him kind of rubbing her stomach, or some of you think maybe he was tickling her, if you think that wasn't done with the intent, the sexual intent, then, again, that's not a crime. It's okay to tickle a kid, to play with them. Just like it's okay when a child – a baby needs a diaper change. You're touching their body. You're not doing it with the intent of a sexual intent. But it draws the line when you stick your tongue in a child's mouth. It draws the line when you're touching her crotch area.
>
> (Augmented RT 89-90.)

As this prosecutorial argument illustrates, there was substantial evidence from which the jury could conclude that appellant committed a battery, i.e., a too-familiar, offensive touching (it made Jane Doe uncomfortable), but did so without lewd intent.

Similarly, there was substantial evidence that the alleged touching of Jane Doe's vagina was accidental or involved another body part, and thus constituted a battery rather than a lewd act. Jane Doe testified that she could not remember how long appellant rubbed her vagina, and Aliyah testified that, as she sat next to and looked at Jane Doe, she saw nothing unusual, but Jane Doe wiggled and asked to switch places. (RT 61, 134, 141-142.) From this evidence, the jury could conclude that any touching of the vagina was of a short duration, and thus may have been accidental, i.e. appellant might have thought he was innocently rubbing Jane Doe's leg or stomach rather than her vagina. Or the jury could have concluded that appellant actually touched her leg or stomach rather than her vagina.

This is especially true because there was no persuasive corroborating evidence that this touching was done with lewd intent. In some cases, other evidence may indicate that a touch has been made with lewd intent. (*People v. Thomas*, *supra*, 146 Cal.App.4th at pp. 1293-1294.) For example, when a touch is coupled with a sexual comment, or there is persuasive evidence that the defendant committed other lewd acts, that touching is more likely to be found lewd. (*Ibid.*) Here, there was no evidence of lewd behavior or comments in relation to this touching, or persuasive evidence that defendant committed other lewd acts.

Absent such corresponding indicia of lewd intent, and considering that Aliyah was sitting next to and looking at Jane Doe and did not witness a sexual act, there was substantial evidence that any such touching here was either accidental, or did not involve Jane Doe's private parts.

This is not just idle appellate speculation: the trial court expressed grave doubt regarding the evidence of lewd intent in connection with this alleged act. At the preliminary hearing, the trial court heard testimony similar to that adduced at trial regarding this alleged act. During the preliminary hearing, Jane Doe recanted her earlier allegation regarding an alleged French kiss, and did not testify regarding a stomach rub, but testified regarding the alleged touching of the vagina in the car. (CT 10-45.) She testified that this touching took place for about five minutes, and that she squirmed and wiggled throughout. (CT 18-19, 28-29.) She testified that in order to get appellant to stop, she placed her jacket on her lap, and told appellant she had to go to the bathroom. (CT 19-20.)

During argument as to whether there was sufficient evidence of intent to bind appellant over for trial, the trial court expressed grave doubt as to whether the "lewd intent" element had been met. The trial court asked the prosecutor, "[w]hat type of proof is there of the element of intent to arouse, appeal to, gratify the lust, passions, or the sexual desires, other than the touching of the vagina or is it your opinion that is sufficient?" (CT 42.) The prosecutor argued that the touching of the vagina in and of itself was sufficient to satisfy the intent element. (CT 42.) The trial court asked, "[h]ypothetically, what if he was inadvertently touching her vagina. Is that – do you think there is intent there?" (CT 42.) The prosecutor replied, "[y]ou mean if she was a child and he's wiping her because she's a baby?" (CT 42.) The trial court stated, "[n]o. He's driving and he thinks he's touching some other part of her body." (CT 42.) The prosecutor argued that she did not think the act was an accident, because appellant touched Jane Doe for some time, and she squirmed, put her jacket over her lap area, and told appellant she had to use the restroom. (CT 43.) In ruling that appellant could be bound over for trial, the trial court stated in part:

> And I am troubled by that [intent] issue. And just so the record is complete, there was a considerable pause after the arguments made by counsel. And the Court was reviewing the case of *People v. Martinez 11 Cal.4th 434*. And, unfortunately, it was not particularly helpful on that issue.
>
> It is clear from that case, as well as CALCRIM Instruction 1110, that intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the defendant is an element.
>
> I suppose, just so the record is clear, the Court is drawing the inference of that element from the fact – from the following

facts:

> One, it is a person close to the defendant, her step-grandfather; the age of the victim, which was ten at the time; the fact that there is undisputed evidence that the defendant, at least at this stage undisputed evidence, that he did touch her on the vagina; it was done outside the presence of any adults, although, it was allegedly done in the presence of her younger sister; and from that I draw the inference that the intent has been established, *certainly not beyond a reasonable doubt*, but for sufficient purposes to meet the element or the necessary proof at a preliminary hearing.
>
> *I will say that the Court is not all that comfortable with that, and we'll leave it at that.*
>
> (CT 44, emphasis added.)

While the testimony during the preliminary hearing and the trial were different, the testimony at trial produced less evidence of lewd intent than that adduced in the preliminary hearing. At the preliminary hearing, Jane Doe testified that the touching lasted about five minutes (CT 18-19, 28-29), but at trial, she testified that she could not remember how long the touch lasted. (RT 61.) At trial, Jane Doe did not testify - as she did at the preliminary hearing - that she put her jacket over her lap area, or that she told appellant she had to use the restroom, in order to get him to stop touching her vagina. In addition, Aliyah never testified at the preliminary hearing, but during the trial, she testified that she was sitting next to Jane Doe and looking at her during the timeframe of this alleged act, but did not see a sexual touching. (RT 139-142.) The evidence adduced at trial, therefore, was even more susceptible to an innocent explanation than that adduced during the preliminary examination,

where the trial court expressed grave doubts regarding the sufficiency of evidence of lewd intent.

There was substantial evidence adduced at trial, then, that if such a touching occurred, it did not involve Jane Doe's private parts, or occurred for innocent reasons. The jury, therefore, could have concluded that appellant touched Jane Doe on the vagina or on another body part in a harmful or offensive manner, but did so without lewd intent. Regarding this alleged act, then, the trial court erred in failing to give the jury the option of finding that appellant committed a battery rather than a lewd act.

The trial court was required to instruct the jury on the lesser included offense of battery if there was substantial evidence that appellant committed battery in relation to any one of the three alleged acts. Here, there was substantial evidence that appellant committed a battery in relation to *all three* alleged acts. The trial court, therefore, committed error when it failed to instruct the jury on the lesser included offense of battery.

IX.

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON BATTERY AS A LESSER INCLUDED OFFENSE TO A LEWD ACT WITH A CHILD WAS PREJUDICIAL IN THIS CASE.

A trial court's failure to instruct sua sponte on lesser included offenses that are supported by the evidence is subject to reversal if an examination of the record establishes a reasonable probability that the error affected the outcome. (*People v. Breverman, supra*, 19 Cal.4th at p. 178; *People v. Thomas*, *supra*, 146 Cal.App.4th at pp. 1293-1294; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The focus is "not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177, emphasis in original.)

Here, the tables are turned. The evidence supporting the judgment was relatively weak, and, as set forth in Argument VIII, the evidence supporting a battery was substantial. As such, there is a reasonable probability that the error affected the result.

The evidence that appellant committed a lewd act rested primarily on Jane Doe's uncorroborated testimony. Even when taking into account Jane Doe's age when testifying (eleven), her testimony regarding alleged lewd acts was internally inconsistent, filled with

recantations, and was contrary to her prior statements. While this brief cannot set forth every recantation and inconsistency in Jane Doe's testimony due to their sheer number, the following are some highlights:

A. Jane Doe's Inconsistent Statements Regarding Kissing

On October 20, 2007, Jane Doe told a Modesto police officer that, when appellant kissed her on October 17, 2007, he put his tongue in her mouth. (RT 187, 190-191.) During an interview with a Modesto Police Department detective on January 3, 2008 (CT 165-202; RT 199-200), Jane Doe stated that, when appellant kissed her, he placed his hands on her face and put his tongue in her mouth. (CT 176-177.)

At the preliminary hearing on June 17, 2008, Jane Doe testified that appellant kissed her on the lips. (RT 93; CT 14.) When asked whether he put his tongue in her mouth, she answered, "no, he didn't." (RT 93-94; CT 14-15.)

At trial, Jane Doe first testified that she "forgot" whether there was something unusual about appellant's kiss, then she testified she did not know and could not remember whether appellant's mouth was closed when he kissed her on the lips. (RT 47.) After a court recess, she testified that appellant French kissed her. (RT 84-85; 117-118.) Then, when asked whether a French kiss occurred, she replied, "I don't know. I don't know." (RT 121-122.)

B. Jane Doe's Inconsistent Statements and Testimony Regarding Alleged Events In the Car

1. Timing of Alleged Vagina Touch

Jane Doe told the Modesto police officer that appellant rubbed her vagina after they

left the ice cream parlor and drove home. (RT 188-189.) During her interview with the detective, she said that this incident occurred after they went to one gas station, and before they stopped at a second gas station. (CT 184-189.) She then stated that appellant did not stop touching her vagina until they reached her house. (CT 190-191.)

At the preliminary hearing, Jane Doe testified that this incident occurred before they stopped at a gas station. (RT 99-101, 103; CT 18-20, 28-29.) At trial, she first testified that it occurred after they stopped at the second gas station (RT 60-65, 68), then testified it occurred before they stopped at the first gas station (RT 75-79), then testified it occurred after they stopped at the second gas station. (RT 80, 113, 123-124.)

2. Details Surrounding Alleged Vagina Touch

During her interview with the detective, Jane Doe said that Aliyah did not see appellant touching her vagina, and that Aliyah told her she was looking out the car window. (CT 192.) At the preliminary hearing, Jane Doe testified that, when appellant touched her vagina, she looked at Aliyah. (RT 101; CT 19, 28-29.) At trial, she testified that, when appellant touched her vagina, she looked over at Aliyah with a worried face, and Aliyah looked right back at her. (RT 81.)

During her interview with the detective, Jane Doe said that when appellant touched her vagina, she tried to put her sweater in her lap to stop appellant's hand, but he pulled the sweater out and threw it on the car floor at Aliyah's feet, and continued touching her. (CT 191.) She stated that appellant stopped only when she asked him if she and Aliyah could

switch spots. (CT 184.) She then stated that appellant did not stop rubbing her until they reached the driveway of her house. (CT 190.) She then stated that he stopped before they got to the house. (CT 191.)

At the preliminary hearing, she testified that she took off her jacket and placed it in her lap to stop appellant. (CT 19-20.) She then testified that to get appellant to stop, she told him she had to go to the bathroom. (CT 20.) At trial, she testified that appellant stopped when Aliyah said she wanted to move to the middle seat. (RT 62, 66.) At trial, she mentioned nothing about placing her jacket in her lap, about appellant throwing the jacket to the floor of the car, about asking him to switch seats, or about asking him to go to the bathroom.[2]

C. The Prosecutor Acknowledged the Problems With Jane Doe's Testimony

The prosecutor acknowledged Jane Doe's inconsistent testimony during the trial, attributing it to the fact that she was a "kid." (Augmented RT 95.) The prosecutor also had to explain away Jane Doe's robotic demeanor during her testimony:

> [Appellant's counsel] was right. She was up here for a long time, to the point where he noticed towards the end of the day she would stare. She wasn't looking at you anymore. She wasn't – she would just stare and answer yes, uh-huh. She was tired. She had been asked so many different times, so many different things, so many different ways. She's 11 years old. And she was tired.
>
> (Augmented RT 107.)

[2] Aliyah testified that she did not see Jane Doe put a sweatshirt in her lap, and did not see appellant throw Jane's Doe's sweatshirt on the floor of the car. (RT 141-142.)

D. There Is a Reasonable Probability That the Jury Would Have Convicted Appellant of Battery Rather Than a Violation of Section 288(a) Had It Received a Battery Instruction

As demonstrated above, the evidence that appellant committed a lewd act was not strong. At the preliminary hearing, Jane Doe completely recanted her claim that appellant French kissed her. At trial, she waffled several times at trial as to whether this alleged incident occurred, and ultimately testified that she did not know if it occurred. As to the stomach rub, as set forth above, the prosecutor admitted that the evidence of lewd intent was weak. For that act in particular, the "objectively nonsexual nature" of the stomach rub suggests that it was not done with lewd intent. (*People v. Thomas*, *supra*, 146 Cal.App.4th at p. 1294.) As to the alleged touching of the vagina, Jane Doe offered wildly inconsistent accounts as to when such alleged touching happened, how it happened, how long it happened, and how it stopped. The only percipient witness to this alleged incident, who was sitting next to Jane Doe, saw no such touch, or any lewd act. Finally, Jane Doe's demeanor as she was examined regarding her allegations was robotic.

As set forth in Argument VIII, in contrast to the anemic and/or discredited evidence that appellant committed a lewd act, there was more than sufficient evidence for the jury to find that appellant touched Jane Doe in an offensive, but not a lewd, manner, and thus committed a battery. This is especially true regarding the stomach rub. All the parties acknowledged that it occurred, and the prosecutor acknowledged that the evidence of lewd intent regarding that touch was weak. Yet that touch made Jane Doe uncomfortable, which is

evidence that a battery occurred. There is a reasonable probability, then, that the jury would have convicted appellant of the lesser offense of battery had it received that instruction. The trial court's failure to give that instruction requires reversal.

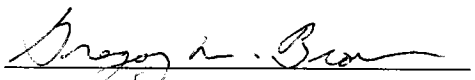
CONCLUSION

For all these reasons, this Court should find that battery is a lesser included offense of a lewd act with a child. This Court should also find that the trial court in this case should have given the jury a battery instruction, and that its failure to do so prejudiced appellant, requiring reversal of his conviction.

Dated: July 21, 2011

Respectfully submitted,

GREGORY W. BROWN

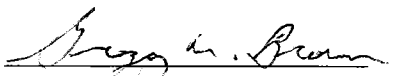


By: Gregory W. Brown
Attorney for Defendant and Appellant
Thomas Raymond Shockley

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief was produced on a computer. The word count of the computer program used to prepare the document shows that there are 13,935 words in the brief.

Dated: July 21, 2011



Gregory W. Brown

Re: *People v. Thomas Raymond Shockley* No. S189462

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party within the action; my business address is 2280 Grass Valley Highway #342, Auburn, CA 95603

On July 21, 2011, I served the attached

APPELLANT'S OPENING BRIEF ON THE MERITS

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Auburn, California, with postage thereon fully prepaid. There is delivery service by United States mail at each of the places so addressed, or there is regular communication between the place of mailing and each of the places so addressed.

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Attorney for Respondent
State of California

The Honorable Thomas D. Zeff
Stanislaus County Superior Court
800 11th Street
Modesto, CA 95354

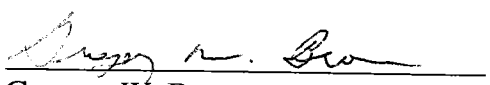
Central Calif. Appellate Program
2407 J Street
Suite 301
Sacramento, CA 95816-4736

Stanislaus County District Attorney's Office
832 12th Street, Suite 300
Modesto, CA 95354

Thomas Raymond Shockley
2371 Bronzan Street
Manteca, CA 95337

Office of the Clerk
Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721-3004

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 21, 2011, at Auburn, California.



Gregory W. Brown
DECLARANT