# In the Supreme Court of the State of California

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>**Plaintiff and Respondent,**<br>**v.**<br>**DEWONE T. SMITH,**<br>**Defendant and Appellant.** | Case No. S201186 |

SUPREME COURT
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Second Appellate District, Division One, Case No. B223181
Los Angeles County Superior Court, Case No. BA337647
Honorable Jose I. Sandoval, Judge

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## ISSUE PRESENTED

Was the trial court required to instruct the jury on misdemeanor resisting a peace officer (Pen. Code, § 148, subd. (a)(1)) as a lesser-included offense of the charged crime, resisting an executive officer (Pen. Code, § 69)?

## INTRODUCTION

Penal Code section 69 may be committed in "two separate ways" with the first way including attempts to deter an officer from performing his or her duty at some point in the future. (*In re Manuel G.* (1997) 16 Cal.4th 805, 814-817.) Unlike the first way of violating section 69, misdemeanor resisting a peace officer ("misdemeanor resisting") under section 148, subdivision (a)(1) does not apply to efforts to manipulate an officer's performance of some duty in the future. As a person can violate section 69 without also violating section 148, subdivision (a), misdemeanor resisting is not a lesser included offense of section 69 under the statutory elements test.

Seeking to treat the two ways of violating section 69 as separate offenses, appellant asserts that the question of "whether section 148, subdivision (a)(1) is a lesser included offense of section 69 depends on which 'type of offense' is alleged and presented to the jury under section 69." (AOBM 29.) This Court, however, has made clear that the determination of whether a lesser offense is necessarily included must be based on the statutory elements and the accusatory pleading without regard to the evidentiary presentation. (*People v. Ortega* (1998) 19 Cal.4th 686, 698.) Moreover, there was nothing in the accusatory pleading that prohibited the prosecution from proving appellant's guilt by relying on the first way of violating section 69. Accordingly, the trial court was not required to instruct the jury on misdemeanor resisting.

## STATEMENT OF THE CASE

On April 21, 2008, Los Angeles County Deputy Sheriff Deloy Baker was working at Men's Central Jail when appellant and six to eight additional inmates were being moved back into the general population. (2RT 974-975, 985-988; 3RT 1267.) In attempting to search each inmate's personal belongings without jeopardizing deputy safety, the deputies instructed the inmates to face the wall approximately two feet apart from each other and not to speak. (2RT 986-987; 3RT 1204-1205, 1268-1269.)

As the searches began, appellant looked back at Deputy Baker and the other deputies. Appellant repeatedly told the deputies, "Don't lose any of my paperwork, it's important legal materials." (3RT 1208, 1277.) Deputy Baker instructed appellant not to talk and to face the wall. Appellant once again turned and said the same thing. Deputy Baker again told appellant to be quiet and to face the wall. (3RT 1209.) Appellant did not cooperate. He turned towards the deputies and stated, "Don't lose any of my fucking paperwork." (3RT 1210, 1269, 1271.)

Because appellant was uncooperative and not following orders, Deputy Baker approached appellant. The deputy grabbed appellant's left wrist with his left hand, put his right hand in appellant's back, and attempted to keep him facing the wall. (3RT 1211, 1213, 1271-1272.) As Deputy Baker was holding appellant, he felt appellant tense up. Deputy Baker instructed appellant to put his hands behind his back so that he could be handcuffed. Appellant quickly spun around to his left to face the deputy. Deputy Baker responded by swinging around and taking appellant down to the ground. Deputy Baker lost his footing and also fell to the ground. (3RT 1212, 1272.) Appellant jumped up before Deputy Baker could rise. Appellant struck Deputy Baker twice with his left hand on the right side of his head. Deputy Baker was struck once in the jaw and once

in the ear, which affected his sense of balance and made his eyesight blurry. (3RT 1213-1216, 1273.)

Dazed, Deputy Baker was finally able to stand up and begin fighting with appellant. With the assistance of other deputies, appellant was wrestled to the ground. Appellant said, "Get the fuck off me, motherfuckers." Deputy Baker punched appellant in the face while trying to hold him down. Deputy Lim then applied pepper spray to appellant's eyes. Appellant continued to kick and punch as he attempted to stand up. (3RT 1216-1217, 1243-1248, 1279.) Because appellant was thrashing around and trying to kick and punch the deputies, it took 30 seconds to a minute for the deputies to subdue and handcuff appellant. (3RT 1216-1217, 1244, 1278.) Appellant then stated, "Fuck you Baker, I knocked your ass out, I got you." (3RT 1276.)

Based on the foregoing evidence, appellant was charged with resisting an executive officer in the lawful performance of his duty (Pen. Code, § 69). At trial, defense counsel requested the jury be instructed on misdemeanor resisting (Pen. Code, § 148, subd. (a)(1)). The trial court found that the lesser instruction was not required because the evidence was insufficient to support a finding that appellant resisted without using force or violence. (4RT 1808, 1874-1877.) Appellant was subsequently convicted.

On appeal, the Court of Appeal found that misdemeanor resisting (Pen. Code, § 148, subd. (a)(1)) was not a lesser-included offense of section 69 under either the statutory elements test or the accusatory pleading test. (Slip Opn. at pp. 7-8.) The Court of Appeal also found the evidence was insufficient to support the lesser instruction. (Slip Opn. at pp. 8-9.)

## SUMMARY OF ARGUMENT

Section 69 sets forth two separate ways in which the crime can be committed. "The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G., supra,* 16 Cal.4th at p. 814.) The first way includes attempts to deter an officer from performing his or her duty at some point in the future. (*Id.* at p. 817.) Because section 148, subdivision (a)(1) does not apply to attempts to deter an officer's future conduct, it is not a lesser included offense of section 69 under the statutory elements test.

Consideration of the accusatory pleading filed against appellant does not change the result. When a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way. Such allegations do not require the prosecutor to prove that the defendant committed the crime in more than one way. (*In re Bushman* (1970) 1 Cal.3d 767, 775.) Accordingly, the second amended information allowed the prosecution to secure a conviction against appellant based entirely on the first way of violating section 69. It makes no difference that the prosecution may have produced evidence that showed appellant committed the crime in the second, rather than the first, way.

Nevertheless, to the extent misdemeanor resisting was somehow necessarily included within the charged violation of section 69, appellant still would not be entitled to relief. The trial court had no obligation to give the instruction because the evidence could not have supported a finding that appellant committed the lesser offense without also committing the charged crime. Moreover, any error in failing to instruct on the lesser offense was harmless.

## ARGUMENT

### THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON MISDEMEANOR RESISTING (§ 148, SUBD. (A)(1)) BECAUSE IT WAS NOT A LESSER INCLUDED OFFENSE OF SECTION 69 AND BECAUSE THE EVIDENCE DID NOT SUPPORT A FINDING THAT APPELLANT COMMITTED THE LESSER OFFENSE WITHOUT ALSO COMMITTING THE CHARGED CRIME

Recognizing that section 69 may be committed in a way that does not violate section 148, subdivision (a)(1), appellant seeks to persuade this Court that the manner in which the charged crime was alleged in count 2 and presented to the jury somehow made misdemeanor resisting (§ 148, subd. (a)(1)) a lesser included offense of section 69. (AOBM 29.) But neither the accusatory pleading nor the presentation of evidence against appellant converted misdemeanor resisting into a lesser included offense of section 69. As such, the trial court had no obligation to instruct on misdemeanor resisting. The court also had no obligation to instruct on misdemeanor resisting because the evidence did not support a finding that appellant committed the lesser offense without also committing the charged crime. In any event, appellant suffered no prejudice from the court's failure to instruct on misdemeanor resisting because the evidence that he used force or violence in resisting the officers was overwhelming.

#### A. Applicable Law

A lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Birks* (1998) 19 Cal.4th 108, 117-118.) In criminal cases, a trial court must instruct on lesser included offenses when the evidence raises a

question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. (*People v. Taylor* (2010) 48 Cal.4th 574, 623; see *People v. Thomas* (2012) 53 Cal.4th 771, 813; *People v. Huggins* (2006) 38 Cal.4th 175, 215.) In this regard, the testimony of a single witness, including that of a defendant, may suffice to require lesser included offense instructions. (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Courts must assess sufficiency of the evidence without evaluating the credibility of witnesses, for that is a task reserved for the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) The failure to instruct on a lesser included offense in a noncapital case does not require reversal "unless an examination of the entire record establishes a reasonable probability that the error affected the outcome." (*People v. Breverman, supra,* 19 Cal.4th at p. 165; see *People v. Thomas, supra,* 53 Cal.4th at p. 814.)

### B. As Alleged In Count 2, Section 148(a)(1) Was Not a Lesser Included Offense of Section 69

A violation of section 148, subdivision (a)(1) is *not* necessarily included within a violation of section 69. The statutory elements of the greater offense do not include all of the statutory elements of the lesser offense. Additionally, the facts actually alleged in the accusatory pleading did not include all of the elements of the lesser offense.

#### 1. The statutory elements test was not satisfied because section 69 may be violated in a way that does not include all the statutory elements of section 148

Looking at the statute as a whole, it cannot be said that when a person violates section 69, he or she necessarily violates section 148, subdivision (a)(1). Section 69, states:

> Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any

> duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.

Accordingly, section 69 sets forth two separate ways in which the offense can be committed. (*In re Manuel G., supra,* 16 Cal.4th at p. 814.) The first way may involve "attempts to deter either an officer's immediate performance of a duty imposed by law or the officer's performance of such a duty at some time in the future." (*Id.* at p. 817.) If the threat is to deter the officer's performance of duty at a later time, "only the future performance of such duty must be lawful," which means it is unnecessary to decide whether the officer was lawfully performing a duty at the time the threat was made. (*Ibid.*) The second way a violation of section 69 may be established requires that the resistance must include "force or violence," and the officer had to be lawfully engaged in the performance of his or her duty at the time of the defendant's resistance. (*Id.* at pp. 815–816.)

Section 148, subdivision (a)(1) provides in part: "Every person who willfully resists, delays, or obstructs any. . . peace officer . . . in the discharge or attempt to discharge any duty" has committed a punishable offense. Thus, the statute addresses efforts to resist, delay, or obstruct an officer who is performing or attempting to perform his duty at that time. The statute does not encompass attempts to deter an officer's performance of a duty in the future. In that regard, section 148(a)(1) is similar to the second way of committing a violation of section 69. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1530; *People v. Belmares* (2003) 106 Cal.App.4th 19, 24.)

Because section 69 can involve a present attempt to deter an officer's future duty, it can be committed in a manner that section 148, subdivision

(a)(1) cannot. Thus, under the statutory elements test, misdemeanor resisting or obstructing a peace officer in violation of section 148, subdivision (a)(1) is not a lesser-included offense of section 69.

**2. The accusatory pleading test was not satisfied because the information alleged both ways section 69 may be violated**

As for the accusatory pleading test, the second amended information alleged both ways in which section 69 can be committed. The amended information alleged count 2 as follows:

> On or about April 21, 2008, in the County of Los Angeles, the crime RESISTING EXECUTIVE OFFICER, in violation of PENAL CODE SECTION 69, a Felony, was committed by DEWONE T. SMITH, who did unlawfully attempt by means of threats and violence to deter and prevent ROWLAND, ESQUEDA, LIM, BAKER, MORENO, FARINO, who was then and there an executive officer, from performing a duty imposed upon such officer by law, and did knowingly resist by the use of force and violence said executive officer in the performance of his/her duty.

(1CT 72.)

When a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way. Such allegations do not require the prosecutor to prove that the defendant committed the crime in more than one way. (*In re Bushman* (1970) 1 Cal.3d 767, 775, disapproved on other grounds by *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1; *People v. Marquez* (2007) 152 Cal.App.4th 1064, 1068 [conjunctive phrase "permanently and temporarily permitted proof of an intent either to permanently or temporarily deprive the victim of possession, attempted carjacking could be committed without also committing the crime of attempted grand theft auto".)

In *Bushman*, the complaint charged petitioner with "tumultuous and offensive conduct." (*In re Bushman*, *supra*, 1 Cal.3d at p. 774.) In

instructing the jury, the court said: "The defendant is charged in the Complaint to have maliciously disturbed the peace by tumultuous and offensive conduct. He may be found guilty of maliciously disturbing the peace if you find that he did in fact maliciously disturb that peace by tumultuous conduct or by offensive conduct alone. It is not necessary that you agree to the charge of both tumultuous and offensive conduct." (*Ibid.*) Bushman alleged that the court must find him guilty of both "tumultuous and offensive conduct." This Court held that "when a statute . . . lists several acts in the disjunctive, any one of which constitutes an offense, the complaint, in alleging more than one of such acts, should do so in the conjunctive to avoid uncertainty." (*Id.* at p. 775.) The Court noted that "[m]erely because the complaint is phrased in the conjunctive, however, does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged acts." (*Ibid.*) In fact, "[t]he jury could have found petitioner guilty of 'tumultuous conduct' if the evidence proved that his conduct was maliciously and willfully violent, endangering public safety and order. They might also have found him guilty of 'offensive conduct' if his malicious and willful actions incited others to violence, although his own conduct was not in itself violent." (*Ibid.*)

Here, the second amended information simply charged appellant with violating section 69 in the statute's terms. "When ... the accusatory pleading describes a crime in the statutory language, an offense is necessarily included in the greater offense when the greater offense cannot be committed without necessarily committing the lesser offense." (*People v. Marshall* (1997) 15 Cal.4th 1, 38; *People v. Wolcott* (1983) 34 Cal.3d 92, 99.) Since, as pleaded, section 69 may be committed in a manner without necessarily committing the lesser offense, the accusatory pleading test fails. In other words, because the second amended information alleged appellant committed both forms of violating section 69, the statutory elements test

governs. Accordingly, section 148, subdivision (a)(1) was not a lesser included offense of section 69.

It is entirely irrelevant that the prosecutor may have elected to proceed with the second form of violating section 69 by presenting evidence and argument that appellant committed the offense by punching Deputy Baker in the face. (ABOM 30-32.) Established law requires that the determination as to whether a lesser offense is necessarily included must be based on the statutory elements or accusatory pleading, not the events that occur during trial. (*People v. Ortega* (1998) 19 Cal.4th 686, 698; *People v. Cheaves* (2003) 113 Cal.App.4th 445, 454 ["evidence adduced at trial is not to be considered in determining whether one offense necessarily is included in another"].) As this Court explained in *Ortega*:

> There are several practical reasons for not considering the evidence adduced at trial in determining whether one offense is necessarily included within another. Limiting consideration to the elements of the offenses and the language of the accusatory pleading informs a defendant, prior to trial, of what included offenses he or she must be prepared to defend against. If the foregoing determination were to be based upon the evidence adduced at trial, a defendant would not know for certain, until each party had rested its respective case, the full range of offenses of which the defendant might be convicted. Basing the determination of whether an offense is necessarily included within another offense solely upon the elements of the offenses and the language of the accusatory pleading promotes consistency in application of the rule precluding multiple convictions of necessarily included offenses, and eases the burden on both the trial courts and the reviewing courts in applying that rule. Basing this determination upon the evidence would require trial courts to consider whether the particular manner in which the charged offense allegedly was committed created a sua sponte duty to instruct that the defendant also may have committed some other offense. In order to determine whether the trial court proceeded correctly, a reviewing court, in turn, would be required to scour the record to determine which additional offenses are established by the evidence underlying

> the charged offenses, rather than to look simply to the elements of the offenses and the language of the accusatory pleading.

(*People v. Ortega*, *supra*, 19 Cal.4th at p. 698.)

Although this Court's *Ortega* decision is unmistakably clear that the decision of whether one offense is necessarily included in another must be made without regard to the presentation of evidence, appellant asserts that *Manuel G.*, which predated *Ortega* and did not even address lesser included offense instructions, somehow allows consideration of the evidence presented to the jury in making the decision. (AOBM 28-29; see AOBM 31 [appellant seeks to rely on his assessment that "the evidence deduced at trial included the second type section 69 offense"].) Appellant's reliance on *Manuel G.* is misplaced. In *Manuel G.*, this Court looked to the accusatory pleading, not the evidence, in deciding which type of section 69 offense was at issue. (See *In re Manuel G.*, *supra*, 16 Cal.4th at p. 814 ["Because the minor is accused only of attempting by threats to deter or prevent an officer from performing a duty imposed by law, we are concerned here only with the first type of offense under section 69"].)[1] Although this Court then proceeded to consider the evidence adduced at trial, it did so simply because the claim on appeal consisted of a challenge to the sufficiency of the evidence.

In short, this Court must look only to the elements of the offenses and the language of the accusatory pleading. As previously discussed, looking

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[1] The opinion had previously stated, "The Orange County District Attorney filed a petition to declare the minor a ward of the court (Welf. & Inst. Code, § 602), charging him with attempting by means of threats to deter and prevent an executive officer from performing a duty imposed by law, in violation of section 69." (*In re Manuel G., supra,* 16 Cal.4th at p. 811.) The opinion contains no indication that the charging document also alleged that the minor used force or violence to knowingly resist an officer (i.e., the second way of violating section 69).

only at the aforementioned information, appellant's claim must be rejected because section 148, subdivision (a)(1), was not necessarily included within the violation of section 69 charged in count 2.[2]

### C. In Any Event, The Evidence Failed To Support A Finding That Appellant Committed The Lesser Offense Without Also Committing The Charged Crime

As set forth above, a trial court need not give an instruction on a lesser included offense if the evidence fails to support a finding that the defendant committed the lesser offense without also committing the charged crime. (See *People v. Blair* (2005) 36 Cal.4th 686, 745.) Here, as the Court of Appeal properly found (Slip Opn. at pp. 8-9), there was no rational basis for the jury to conclude that appellant resisted arrest without the use of force.

Appellant had to be forcibly taken to the ground because he repeatedly refused to comply with Deputy Baker's orders, and became physical when Deputy Baker attempted to handcuff him. (3RT 1211, 1213, 1271-1272.) Appellant jumped up and struck Deputy Baker twice, once in the ear and once in the jaw, with his left hand. (3RT 1213-1216, 1273.)

With the assistance of other deputies, appellant was wrestled to the ground. Appellant said, "Get the fuck off me, motherfuckers." Deputy Lim then applied pepper spray to appellant's eyes. Appellant continued to kick and punch as he attempted to stand up. (3RT 1216-1217, 1243-1248, 1279.) Because appellant was thrashing around and trying to kick and punch the deputies, it took almost one minute for the deputies to subdue

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[2] Although appellant was also convicted of resisting an officer in count 5, he only seeks relief as to count 2 in apparent recognition that any instructional error with respect to count 5 was harmless. (AOBM 2, 38.) Accordingly, this brief is limited to a discussion of count 2. Nevertheless, as count 5 was alleged in the same manner as count 2, misdemeanor resisting was not a lesser included offense on count 5 for the same reason it was not an included offense on count 2.

and handcuff appellant. (3RT 1216-1217, 1244, 1278.) After being subdued, appellant stated, "Fuck you Baker, I knocked your ass out, I got you." (3RT 1276.)

*People v. Carrasco* (2008) 163 Cal.App.4th 978, 985 is analogous. In *Carrasco,* the court held that instruction on misdemeanor resisting was not required where, "if appellant resisted the officers at all, he did so forcefully, thereby ensuring no reasonable jury could have concluded he violated section 148, subdivision (a)(1) but not section 69." The court explained that

> "[a]ppellant had to be physically taken to the ground . . . because he refused to comply with . . . repeated orders to remove his hand from his duffle bag. Appellant failed to comply with several officers' repeated orders to relax and [one officer's] orders to 'stop resisting.' He continued to struggle with [several officers]. [One officer] attempted to control appellant's torso, while three other detectives attempted to control appellant's arms. Appellant placed his hands and arms underneath his body, was 'yelling, kicking, [and] cussing,' and said he would 'kick [the officers'] ass[es].' Appellant continued to squirm and refused to give his right hand to [the officer trying to handcuff him]. Appellant did not comply until after [an officer] administered pepper spray. There was no contrary evidence disputing the officer's description of the struggle on the floor. Hence, the jury would have had no rational basis to conclude appellant wrestled with the officers, for which they convicted him of resisting or delaying an officer, but the struggle did not involve force or violence; accordingly, the trial court properly instructed the jury by not instructing it with section 148, subdivision (a) as a lesser included offense."

(*Id.* at pp. 985–986.)

Similarly, herein, appellant refused to comply with orders and became physical with Deputy Baker. "[T]he jury would have had no rational basis to conclude appellant wrestled with the officers for which they convicted him of resisting or delaying an officer, but the struggle did not involve force or violence . . . ." (*People v. Carrasco, supra*, 163 Cal.App.4th at p.

986.) Accordingly, the trial court had no obligation to instruct on misdemeanor resisting even if it was a lesser included offense of the charged crime.

For his part, appellant contends that the jury could have convicted him of the lesser offense if it had concluded that, in hitting Deputy Baker, he was merely responding to the deputy's use of excessive and unlawful force. (ABOM 33-34.) But as the Court of Appeal properly recognized (Slip Opn. at p. 8), if the jury found that Deputy Baker was using unreasonable force, it would have had to acquit appellant for any ensuing resistance, not convict him of misdemeanor resisting. Indeed, an officer must be engaged in the lawful performance of his or her duty for conviction under either section 148, subdivision (a)(1) or under the second way of violating section 69. (*In re Manuel G., supra,* 16 Cal.4th at p. 816 ["for purposes of the offense set forth in the second part of section 69, the officers must have been acting lawfully when the defendant resisted arrest"]; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1108-1109; see CALCRIM No. 2671 ["an officer is not lawfully performing his or her duties if he or she issuing unreasonable or excessive force in his or her duties"].)

Alternatively, appellant contends that the jury could have found that his "kicking and screaming while on the ground was the result of the pepper spray, not an attempt to resist." (AOBM 34.) This claim, however, must also be rejected. As previously discussed, appellant had already struck Deputy Baker twice with his left hand on the right side of his head, once in the ear, and once in the jaw. (3RT 1213-1216, 1273.) Thus, the crime was completed before pepper spray was even used. Moreover, any suggestion that appellant involuntarily kicked the deputies is belied by the fact that he later told Deputy Baker, "Fuck you Baker, I knocked your ass out, I got you." (3RT 1276.) In any event, to the extent appellant's kicking

was the result of pepper spray rather than an attempt to resist, such actions would *not* have supported a conviction for misdemeanor resisting.

Finally, appellant contends that his repeated refusal to face the wall could have constituted a misdemeanor resisting, but nothing more. (AOBM 34.) *If* appellant had only refused to face the wall, this contention may have had some merit. But all the evidence elicited at trial showed that the initial refusal was followed by a physical altercation in which appellant repeatedly struck Deputy Baker. In fact, appellant struck Deputy Baker twice with his left hand on the right side of his head. (3RT 1213-1216, 1273.) Dazed, Deputy Baker was finally able to stand up and he began fighting with appellant. With the assistance of other deputies, appellant was wrestled to the ground. (3RT 1216-1217, 1243-1248, 1279.) After the altercation, appellant proclaimed, "Fuck you Baker, I knocked your ass out, I got you." (3RT 1276.) Accordingly, appellant's conduct was much more egregious than the misdemeanor resisting that he suggests. This claim fails.

### D. Any Error In Failing To Instruct On Misdemeanor Resisting Was Harmless

In any event, it is not reasonably probable that appellant would have obtained a more favorable result if the jury had been instructed on misdemeanor resisting without the use of force or violence. (*People v. Breverman, supra,* 19 Cal.4th at pp. 177-178 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836, to erroneous failure to give lesser included offense instruction]) As discussed *ante*, there was overwhelming evidence that appellant used force or violence in his resistance, and the jury necessarily rejected any notion that the deputy acted unlawfully prior to appellant's resistance. (See 1CT 171 [CALCRIM No. 2671; 1CT 171; see also, *People v. Chatman* (2006) 38 Cal.4th 344, 392 ["Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions

adversely to defendant under other properly given instructions."].)
Appellant punched Deputy Baker in the head twice with such force and violence as to affect the deputy's balance and make his eyesight blurry. (3RT 1213-1216, 1273.) In the immediate aftermath, appellant acknowledged his use of force against the deputy by stating, "Fuck you Baker, I knocked your ass out, I got you." (3RT 1276.) Under the circumstances, it is far from reasonably probable that the jury would have found that appellant resisted Deputy Baker without using force or violence. Any instructional error was therefore harmless.

## CONCLUSION

Respondent respectfully requests that this Court find that section 148, subdivision (a)(1) is not a lesser included offense of section 69, that substantial evidence did not support an instruction on section 148, subdivision (a)(1), and that any error in failing to instruct was harmless.

Dated: January 9, 2013

Respectfully submitted,

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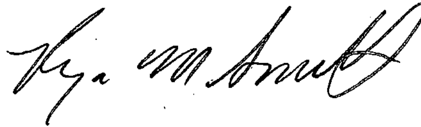

RYAN M. SMITH
Deputy Attorney General
*Attorneys for Plaintiff and Respondent*

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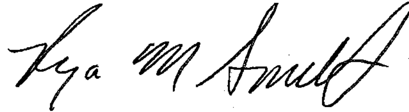
## CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4,970 words.

Dated: January 9, 2013

KAMALA D. HARRIS
Attorney General of California



RYAN M. SMITH
Deputy Attorney General
*Attorneys for Plaintiff and Respondent*

## DECLARATION OF SERVICE

Case Name: **People v. Smith** No.: **S201186**

I declare:

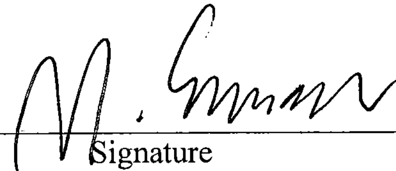
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 11, 2013, I served the attached **[ANSWER BRIEF ON THE MERITS]** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Melanie K. Dorian
Attorney at Law
P.O. Box 5006
Glendale, CA 91221-5006

On January 11, 2013, I caused ***ORIGINAL +THIRTEEN (13) copies*** of the **[ANSWER BRIEF ON THE MERITS]** in this case to be delivered to the California Supreme Court at **[CALIFORNIA SUPREME COURT, 350 McAllister Street, First Floor San Francisco, California 94102-4797 ]** by **Messenger Service**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 11, 2013, at Los Angeles, California.



Mary Emami
Declarant

Signature

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