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

APPELLANT'S REPLY BRIEF ON THE MERITS

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I. ANOTHER DISTRICT COURT OF APPEAL HAS RULED THAT BATTERY IS A LESSER INCLUDED OFFENSE OF A LEWD ACT ON A CHILD.

Since appellant filed his Opening Brief on the Merits (AOB), the Second District Court of Appeal, in a published decision, has found that battery (Pen. Code, § 242) is a lesser included offense of a lewd act on a child (Pen. Code, § 288, subd. (a)). (*People v. Gray* (Sept. 14, 2011, B224430) __Cal.App.4th__ [2011 WL 4060299].) In that decision, the Second District found that a constructive touching may constitute a battery, as well as a lewd act on a child. (*Id.* at pp. 7-8.) The Second District also found that a child's apparent consent to a sexually motivated touching, which is ineffective as a defense to a lewd act on a child charge, is also ineffective as a defense to a battery charge. (*Id.* at p. 8.) The reasoning of the Second District in *Gray* is succinct and persuasive, and should be adopted by this

Court.

II. RESPONDENT'S CONTENTION THAT LEWD ACTS ON CHILDREN ARE NOT HARMFUL OR OFFENSIVE IS CONTRARY TO ESTABLISHED CALIFORNIA SUPREME COURT PRECEDENT.

Appellant asserted that all lewd touches of children are harmful or offensive, and are therefore batteries. (AOB, pp. 9-13.) Respondent contends that not all lewd touches of children are harmful or offensive. (RB, p. 9.) Respondent's position directly contradicts this Court's unequivocal jurisprudence on the subject - that the lewd touching of children is always harmful and offensive *as a matter of law*. (*People v. Martinez* (1995) 11 Cal.4th 434, 443-444; *J.C. Penney Casualty Ins. Co.* v. *M.K.* (1991) 52 Cal.3d 1009, 1026, *People v. Soto* (2011) 51 Cal.4th 229, 243.)

If, as this Court has found, touching a child with lewd intent is always harmful and offensive as a matter of law, then it must also be a battery, a harmful and offensive touching. It necessarily follows, then, that one cannot commit a lewd act on a child without committing a battery.

Faced with this precedential monolith, respondent offers up a series of red herrings. The test to determine whether battery is a lesser included offense of a lewd act on a child is whether touching a child with lewd intent is always a battery. (RB, p. 6.) But respondent consistently poses the irrelevant question of whether touching a child *without* lewd intent is always a battery, and concludes (quite reasonably) that it is not. (RB, p. 8 ["absent the lewd intent there would be nothing unlawful or forceful about the nature of the touching."]; RB, p.

9 ["there are numerous scenarios in which a sexually motivated touching may not be a battery because absent the specific intent of the perpetrator, there is no harmful or offensive touching."]; RB, p. 16 ["absent the lewd intent, no crime would be committed if the victim was not offended."].)

But the question before this Court is not whether the *non-lewd* touching of a child is always a battery. Obviously, it is not. The question, rather, is whether the *lewd* touching of a child is always a battery. This Court has consistently stated that such lewd touches are *always* harmful and offensive. (*People v. Martinez*, *supra*, 11 Cal.4th at pp. 443-444; *J.C. Penney Casualty Ins. Co.* v. *M.K.*, *supra*, 52 Cal.3d at p. 1026, *People v. Soto*, *supra*, 51 Cal.4th at p. 243.) Since battery requires nothing more than a harmful or offensive touch, touching a child with lewd intent must *always* be a battery as a matter of law.

Rather than directly analyzing whether a lewd act on a child may be committed without committing a battery, respondent inverts the analysis. Time and again, it 1) presents the situation of a non-harmful touch (i.e., a non-battery); 2) asks whether adding lewd intent to such a touch constitutes a lewd act on a child (yes); then 3) somehow concludes that not all lewd touches are batteries. (See RB, pp. 8, 13, 16, 19, 24.) As stated above, the question is not whether the touching of children with lewd intent can transform non-batteries into lewd acts, it is whether touching a child with lewd intent is necessarily a battery.

Furthermore, respondent's inverted analysis is demonstrably illogical. As respondent formulates the issue:

1. Assume a non-lewd touching of a child that is not harmful or unlawful (and thus is not a battery).
2. That same touch made with lewd intent is always harmful and unlawful (and thus violates Section 288(a).)
3. Therefore, a touch that is always harmful and unlawful (Section 288(a)) is not always a harmful and unlawful touch (a battery).

Respondent's conclusion does not follow from its premises. By respondent's logic, a touch that is always harmful and unlawful is not a harmful and unlawful touch.

Appellant does not contest respondent's point that if one adds the element of lewd intent to the outwardly innocent touch of a child, an unlawful and harmful act occurs. Indeed, appellant agrees that such an act is "violent," "serious," and unlawful, and is so harmful that it carries a penalty of up to 8 years in prison for its commission. (AOB, pp. 10-11.) The question before this Court, though, is whether such an inherently harmful and unlawful act is harmful and unlawful. The question answers itself, just as respondent's logic refutes itself.

Respondent offers another irrelevant observation. Regarding the touching inherent in both offenses, respondent points out that batteries may involve a different sort of touching than a touching that is lewd. (RB, p. 8.) This statement may be true, but it has no bearing on the issue before this Court. The question is not whether lewd touches involve the same type of touching as most batteries, but whether a lewd touch of a child is necessarily harmful or offensive, i.e., a battery. This Court has found that such touches are harmful and offensive as a matter of law. As such, they are batteries.

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

Respondent contends that consent can never be a defense to a lewd act on a child, but may be a defense to a battery in cases of "ordinary physical contact." (RB, pp. 18-20, 26-27.) Again, this is true as far as it goes, but this observation is irrelevant. The question is not whether consent is a defense to either crime. Rather, the issue before this Court is whether a *child* can consent to the battery underlying a *lewd* touch.

In *Soto*, this Court reiterated longstanding California law that a child cannot consent to a lewd touch, or to the assaultive predicate to such a touch. (*People v. Soto, supra*, 51 Cal.4th at pp. 247-248; see also *People v. Gray, supra*, __ Cal.App.4th __ [2011 WL 4060299, p. 8].) The law in California, therefore, is crystal-clear and decisive on the consent issue.

Accordingly, appellant asserted that the Fifth District Court of Appeal's finding in this case, that consent is a defense to a battery made for lewd purposes, cannot be squared with this Court's finding in *Soto*. (AOB, pp. 24-26.) In response, respondent claims that the Fifth District never held that consent is a defense to a battery made for lewd purposes. (RB, p. 20.) But the Fifth District stated:

> 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.*
>
> (Court of Appeal Opinion, p. 9.)

The Fifth District, therefore, necessarily concluded the opposite: that a child may

consent to the battery that underlies a lewd touch. That was the whole basis behind the Fifth District's ruling. To pretend that the Fifth District did not so rule - in an effort to evade the unambiguous ruling to the contrary in *Soto* – speaks volumes as to the merits of respondent's position.

IV. A LEWD ACT ON A CHILD ACCOMPLISHED WITH "CONSTRUCTIVE" TOUCHING IS A HARMFUL AND OFFENSIVE TOUCHING.

Appellant asserted that "constructive" lewd touches of children are harmful and offensive, and are therefore batteries. (AOB, p. 30.) In response, respondent contends that the rationale behind allowing a "constructive touching" under Section 288(a) does not apply to battery, in that: 1) a Section 288(a) "touching" is broadly construed; 2) Section 288(a) was designed to protect children; and 3) Section 288(a) punishes a perpetrator's specific intent. (RB, pp. 22-23.)

It is immaterial whether the rationales underlying lewd acts on children and batteries are the same or different. Comparing the rationales for the crimes adds nothing of value for this Court to consider in determining the question before it. Of course the rationales for the two crimes are different – they are different crimes. The truism that Section 288(a) protects children and requires specific lewd intent merely highlights that the greater offense (Section 288(a)) includes two more elements than battery. Whether one crime involves specific intent and one involves general intent, or whether one is specifically aimed at children and the other is not, is irrelevant. The pertinent question is whether one can commit a lewd act on a child without committing a battery.

As to the touching, respondent contends that the force required for battery, unlike the force required for lewd acts on children, must be direct or indirect. (RB, pp. 21, 24.) This is a curious observation, since lewd touches may also be direct or indirect. (AOB, pp. 29-30.) In any event, appellant agrees that batteries may be accomplished by indirect touching. And what is a constructive touch if not an indirect touch? Batteries may involve indirect touches of all sorts, whether by inanimate objects, other persons, or the victims themselves, so long as the defendant 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* (2001) 26 Cal.4th 779, 788; AOB, pp. 32-33.) This formulation allows for indirect-touching batteries so long as the nexus between the defendant's conduct and the touch is sufficiently proximate. A defendant who orchestrates and watches the lewd touching of a child knows that his or her course of action will directly, naturally and probably result in a harmful touching, and thus is guilty of battery. (AOB, p. 34.)

Again, the key question is whether the constructive lewd touch of a child is a harmful or offensive touch. This Court has found that constructive lewd touches are inherently harmful. (*People v. Mickle* (1991) 54 Cal.3d 140, 175-176; AOB, p. 30.) Ergo, constructive lewd touches must be batteries. Following the rationale of this Court in *Soto*, if the law protects a child from an inherently harmful, constructive lewd touch, the law must also protect that child from the harmful battery that forms the basis for that lewd act. (AOB, pp. 30-31.)

V. THE LAW OF BATTERY DOES NOT REQUIRE THAT THE VICTIM BE SUBJECTIVELY OFFENDED BY THE TOUCHING.

Appellant contended that a battery is not determined by whether the victim is subjectively offended by the touching, but by whether the touching is harmful or offensive. (AOB, pp. 38-40.) Respondent, however, suggests in its brief that a battery is determined by whether the victim is subjectively offended by the touching. (RB, pp. 13-14 ["the essence of the crime of battery is the offensive touching"] RB, p. 14 [a lewd act may not be a battery because a child "may not necessarily perceive the touching as harmful or offensive"]; RB, p. 18 [it is a necessary element of battery that the victim "perceived the touching as harmful or offensive"].)

Respondent provides no authority for this proposition. Nor could it. As respondent elsewhere acknowledges, "the gravamen of the crime of battery is that the touching must *be* injurious or harmful in some way" (RB, p. 15, emphasis added), not that the victim *perceives* the touching to be harmful. The essence of the crime is injury, not the perception of injury. A lewd touch may be inoffensive to a child who does not know any better, but that touch is inherently harmful, and is therefore a battery.

VI. RESPONDENT'S EFFORT TO HIGHLIGHT DIFFERENCES BETWEEN THE TWO CRIMES DOES NOT ALTER THE CONCLUSION THAT ALL LEWD TOUCHES OF CHILDREN ARE BATTERIES.

Appellant pointed out the similarities in the touching and harm requirements for lewd acts on children and batteries, and contended that a Section 288(a) violation completed all the elements of a battery. (AOB, pp. 14-21.)

In response, respondent attempts to isolate and pick apart the various touching and intent requirements of the two crimes in order to show that a violation of Section 288(a) is not necessarily a battery. (RB, pp. 8-17.) This effort is a diversion, and is unsuccessful on its own terms.

First, respondent contends that since Section 288(a) is determined by the perpetrator's specific lewd intent (RB, pp. 11, 14-15, 23, 27), the harm inherent in a lewd touch under Section 288(a) does not necessarily satisfy the harm element of battery. (RB, pp. 15, 27.) But for purposes of determining whether the harm inherent in a lewd act on a child is also a battery, it matters not one whit how the harm is determined. If a child is touched in a lewd manner, the child always suffers mental or emotional harm. (AOB, p. 19.) And the harm element of battery is satisfied by mental or emotional harm. (AOB, pp. 19-20.) If a lewd touch on a child occurs, harm always results, and therefore, a battery is also committed.

Respondent also contends that harm to the child victim is not an element of Section 288(a), in that the jury need not find that the victim was harmed. (RB, pp. 14-15.) It is irrelevant whether one calls the harm inherent in all lewd acts on children an "element" of that crime: for purposes of the question before this Court, mental and emotional harm is present in every violation of Section 288(a). (*People v. Martinez, supra*, 11 Cal.4th at p. 444.) The statute assumes such harm. (*Ibid.*) A jury need not find whether a lewd touch of a child is harmful, because all lewd touches of children are, *ipso facto*, harmful.

Respondent also contends that the manner in which a lewd act is accomplished is not a

factor the jury considers; rather, it just considers the perpetrator's intent. (RB, p. 15.) This is manifestly incorrect. As this Court has specifically found, the manner in which the act is accomplished is a relevant factor for the jury to consider in determining whether the act was lewd. (*People v. Martinez, supra*, 11 Cal.4th at p. 445.) Respondent's efforts to isolate lewd intent as the sole factor in determining harm in Section 288(a) cases, without reference to the touching, are unpersuasive.

Respondent also contends that the "touching required under section 288, subdivision (a), need not be harmful, offensive, or even lewd." (RB, p. 16.) This line of argument is misleading. The touching may *appear* innocuous or harmless, but if it is made with lewd intent, it is harmful as a matter of law. As this Court has found for lewd acts on a child, "[t]he act is the harm." (*J.C. Penney Casualty Ins. Co. v. M.K., supra*, 52 Cal.3d at p. 1026.) Thus, the touching, if made with lewd intent, is, as a matter of law, harmful, offensive, and lewd. As such, it must be a battery.

Respondent then moves to battery. Respondent contends that battery requires an inherently violent, rude, or angry touch, and that this requirement rises to the level of an element. (RB, pp. 8, 10, 11, 15.) Thus, respondent reasons, an outwardly innocuous lewd touch would not qualify as a battery. (RB, p. 17.) This is not the case.

With battery, the touch need not be inherently violent, rude, or angry. As respondent acknowledges, any type of harmful or offensive touching can be a battery. (See RB at p. 7 citing *People v. Myers* (1998) 61 Cal.App.4th 328, 335 ["The slightest touching can constitute

a battery so long as the victim incurs unreasonable harm or offense."].) The word "violence" in the statute has no real significance, the "least touching" suffices for the force element of battery, and only the feelings of the victim need be injured by the touching. (AOB, pp. 16-18.)

A touch need not be inherently rude, angry, or violent to be harmful. No such requirement or element for battery exists, and respondent cites no precedential authority in support of its contention. Respondent's efforts to limit the types of touchings that may constitute battery should be rejected by this Court. The least or slightest touching may constitute a battery if the victim is harmed or offended by it. Harm is the gravamen of battery, not the type of touch, and all lewd touches of children are harmful. Consequently, they must be batteries.

VII. *PEOPLE V. LOPEZ* IS NOT PERSUASIVE OR CONTROLLING ON THE ISSUE BEFORE THIS COURT.

Respondent contends that the reasoning of this Court in *People v. Lopez* (1998) 19 Cal.4th 282 regarding lesser included offenses to Section 288(a) is persuasive and should be applied to this matter. (RB, pp. 10-11.) In *Lopez*, this Court found that the misdemeanor crime of child annoyance under Penal Code section 647.6, subdivision (a), is not a lesser included offense of Section 288(a). (*Id.* at p. 294.) This Court noted that Section 288(a) requires specific lewd intent, whereas Section 647.6(a) requires an act that must be "objectively and unhesitatingly viewed as irritating or disturbing" by a "normal person." (*Id.* at pp. 289-291.) Thus, this Court reasoned, a parent who embraces or touches a child with

lewd intent would be guilty of a lewd act on a child, but would not be guilty of the crime of child annoyance, because a normal person might not unhesitatingly find such objectively innocent behavior irritating or disturbing. (*Id.* at p. 290-291.)

Respondent contends that because battery, like the crime of child annoyance, is not determined by the specific intent of the perpetrator, a battery is not necessarily committed when "objectively innocent" lewd touches such as the ones discussed in *Lopez* occur. (RB, p. 10.) The flaw in this reasoning is that the crimes of battery and child annoyance are determined in different ways. Child annoyance requires that the touching must be "objectively and unhesitatingly viewed" as irritating or disturbing. (*People v. Lopez, supra*, 19 Cal.4th at pp. 290-291.) There is no such requirement for battery. As stated above, the gravamen of battery is whether the victim suffers harm from the touching, either physically, mentally, or emotionally, not whether someone would unhesitatingly *view* the touching as harmful, or whether a reasonable person would be offended by it.

The test for battery is simple: was there harm from the touch? In cases of lewd acts on children, harm always results from the lewd touch. Where there is a harmful touch, there is a battery.

VIII. PERSONS WHO TOUCH CHILDREN IN A HARMFUL MANNER WILL ESCAPE CRIMINAL SANCTION IF THIS COURT FINDS THAT BATTERY IS NOT A LESSER INCLUDED OFFENSE OF A LEWD ACT WITH A CHILD.

Appellant pointed out that where a defendant is charged with a violation of Section 288(a), the jury may find that a defendant's touch harmed or offended a child, but may also

find that the defendant did not harbor lewd intent. (AOB, p. 41.) In such a case, if the jury does not have the option of finding the lesser included offense of battery, no criminal liability would result, even though the child had suffered harm from the touch. (*Ibid.*)

In response, respondent observes that prosecutors in lewd act cases may exercise their discretion by charging the defendant with a battery in addition to a lewd act, and therefore, those defendants would not escape criminal liability. (RB, pp. 27-28.) But just as prosecutors have the discretion to charge a battery in such cases, they also can decide that they will *not* charge a battery. This case is a perfect example of a prosecutor deciding not to charge a battery in addition to a lewd act, and many other such cases will occur in the future. In those cases, judges and juries should be allowed to assign criminal liability to the harmful and offensive touching of a child accomplished without lewd intent.

IX. 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.

The prosecutor argued that the jury could use any one of three separate alleged acts to find that Appellant committed a lewd act on child. (Augmented RT 89, 92-93.) Appellant asserted that for all three of those alleged acts, substantial evidence existed that appellant committed a battery rather than a lewd act. (AOB, pp. 42-49.)

Regarding the alleged kissing, respondent contends that if appellant French kissed Jane Doe on the night of her birthday, he must have done so with lewd intent, and if he kissed her as he normally did, Jane Doe had no objections, and thus the kiss was not offensive to

her. (RB, pp. 29-30.) This ignores Jane Doe's testimony that appellant normally kissed her on the cheek, which was "okay" with her (RT 47), but this time, something "unusual" happened; he kissed her on the lips. (RT 46-47.) Her testimony was wildly inconsistent as to whether it was a kiss on the lips or a French kiss. (RT 47, 84-85, 93-94, 117-118, 121-122.) A kiss on the lips is susceptible to innocent explanation, whereas a French kiss is not. (AOB, p. 44.) Given Jane Doe's recantations and inconsistent statements on the topic, there was more than enough evidence for the jury to find that appellant kissed her on the lips rather than gave her a French kiss. And the kiss upset and embarrassed her. (RT 84-85.) There was substantial evidence, then, that the birthday kiss was not lewd (i.e., that it was not a French kiss), but was offensive (it upset and embarrassed her). Thus, there was substantial evidence that this alleged act was a battery.

Respondent argues that appellant touched Jane Doe's stomach with lewd intent. (RB, pp. 29-30.) But there was substantial evidence that the act was not lewd. Jane Doe testified that the touch came only when she took off her sweater, and that it made her giggle. (RT 63-64.) Such touching or tickling of a non-sexual part of a child's body is entirely susceptible to innocent explanation (AOB, p. 44), and appellant freely admitted that he engaged in such horseplay. (RT 156, 165.) Even the prosecutor acknowledged to the jury in closing argument that if appellant rubbed or tickled Jane Doe's stomach, it might conclude that he did so without lewd intent. (Augmented RT 89-90.)

Respondent argues in the alternative that if appellant did not have lewd intent when he

touched her stomach, Jane Doe did not object to the touch. (RB, pp. 29-30.) But Jane Doe testified that the touch to her stomach made her uncomfortable. (RT 64.) Thus, the jury could have easily concluded that the touch was done without lewd intent, but that Jane Doe was offended by it. Substantial evidence was presented, then, that the stomach touch was a battery, i.e., a harmful or offensive touch.

Respondent states that there was no evidence presented that appellant touched Jane Doe's vagina for a non-sexual purpose, since appellant denied that he touched her vagina. (RB, p. 30.) But if appellant accidentally touched her vagina, he might not have known it. Aliyah, Jane Doe's step-sister, was sitting next to Jane Doe in the car and saw nothing unusual, and no corroborating evidence of lewd intent was presented. (AOB, pp. 45-46.) If the trial court could express sincere doubts about lewd intent regarding this act after hearing similar evidence (AOB, pp. 47-48), surely a juror could do the same.

Contrary to respondent's assertions, there was substantial evidence that appellant committed a battery in relation to all three alleged acts. Appellant need only show that there was substantial evidence of a battery in relation to any one of the three alleged acts.

X. THE FAILURE TO GIVE A BATTERY INSTRUCTION WAS PREJUDICIAL BECAUSE THE EVIDENCE OF LEWD INTENT WAS WEAK.

As to prejudice, respondent asserts that the evidence indicates that appellant acted with lewd intent regarding each alleged act, and that Jane Doe's testimony only contained "minor inconsistencies." (RB, pp. 30-31.) As appellant set forth in his brief, the evidence of lewd intent for each alleged act was particularly weak, and the inconsistencies in Jane Doe's

testimony were numerous and substantial. (AOB, pp. 50-53) The record speaks for itself.

Respondent also asserts that the failure to instruct on battery was harmless because appellant did not put forward the defense that the alleged acts were batteries rather than lewd acts; instead, he denied that he engaged in the acts at all. (RB, pp. 30-31.) But appellant did not deny that he rubbed Jane Doe's stomach in a playful manner after her sweater rode up; he admitted it to a police officer. (AOB, pp. 6, 54.) Otherwise, appellant did not present a defense per se, in that he declined to testify or call witnesses at trial. (RT 211.)

Respondent also contends that the jury believed Jane Doe's testimony despite the inconsistencies; otherwise, the jury would have acquitted appellant. (RB, p. 31.) This is not true, since the jury may have disbelieved Jane Doe's testimony regarding French kissing and the touching of the vagina, but may have nevertheless convicted appellant on the stomach touching allegation because he admitted to that touch. But the question is not whether the jury believed Jane Doe; it is whether, for each of the three alleged acts that may have formed the basis for the single conviction, a reasonable jury would have likely convicted appellant of battery rather than a lewd act *had it been given that option.* (AOB, p. 54.)

A jury that is given the option of finding a defendant guilty of either a lewd act on a child or the lesser included offense of battery is likely to convict the defendant of battery when 1) the evidence of lewd intent is not strong; 2) the touch is objectively non-sexual; 3) the touch is brief; and 4) no corroborated evidence of other lewd acts (such as a conviction on a separate count of a lewd act) exists. (*People v. Thomas* (2007) 146 Cal.App.4th 1278,

1293-1294; *People v. Gray, supra,* __ Cal.App.4th __ [2011 WL 4060299, p. 8].)

Here, as set forth above, the evidence of lewd intent for each alleged act was weak, especially regarding the stomach touch. (AOB, p. 54.) The prosecutor acknowledged that there may not have been sufficient evidence of lewd intent regarding the stomach touch to convict appellant of a lewd act. (Augmented RT 89-90.) Rubbing or tickling a child's stomach is objectively non-sexual, and the touch was brief. No other credible evidence of lewd intent - such as sexual statements or corroborated evidence of another lewd act - exists in relation to that alleged act. All the hallmarks of prejudice are present.

The other alleged acts (the alleged French kiss and the alleged vagina touch) cannot be used to impute lewd intent to the stomach touch, since they are mere allegations rather than corroborated evidence of other lewd acts, and we have no idea whether the jury found those allegations credible. This is especially true because the jury had good reason to disbelieve that these other alleged incidents occurred: Jane Doe twice denied that appellant French kissed her, and despite Jane Doe's allegation that appellant rubbed her vagina for five minutes in the car, Aliyah was sitting right next to Jane Doe at that time and was aware of activities in the car, *but she never saw such an act.*

While the prosecutor admitted that evidence of lewd intent regarding the stomach touch was weak, Jane Doe testified that it made her uncomfortable. (RT 64.) Again, all the hallmarks of prejudice are present in regard to this act. It is reasonably probable, therefore, that a jury would have convicted appellant of battery rather than of a lewd act on a child in

relation to the stomach touch. Since the stomach touch allegation may have formed the basis for the conviction, reversal is required.

The same hallmarks for prejudice apply to the kissing allegation, since the jury may have convicted appellant for that act even if it believed – pursuant to Jane Doe's testimony - that appellant kissed her on the lips rather than gave her a French kiss. As to the other allegation, considering that Aliyah was right next to Jane Doe and did not see any extended, lewd touches, there is sufficient evidence that if the alleged vagina touch occurred, it was quick and accidental, and if so, the same hallmarks for prejudice apply.

Appellant need only show that for one of the three alleged acts, there was sufficient evidence that appellant touched Jane Doe in an offensive, but not lewd manner, and thus committed a battery. Appellant has made that showing for all three acts. The trial court's failure to give a battery instruction, therefore, requires reversal.

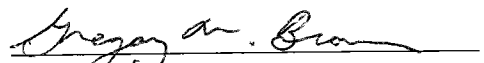
CONCLUSION

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 erred in failing to give the jury a battery instruction, and this failure prejudiced appellant. Accordingly, this Court should reverse the lewd act on a child conviction.

Dated: October 5, 2011

Respectfully submitted,

GREGORY W. BROWN



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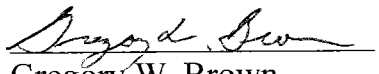
CERTIFICATE OF COMPLIANCE

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 5,001 words in the brief.

Dated: October 5, 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 October 5, 2011, I served the attached

APPELLANT'S REPLY 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.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 5, 2011, at Auburn, California.

Gregory W. Brown
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