IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DEWONE T. SMITH, Defendant and Appellant.	) No. S201186)) 2 Crim. B223181))) Los Angeles County) Case No. BA337647)

APPELLANT'S REPLY BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
of the State of California for the County of
Los Angeles

Honorable Jose I. Sandoval, Judge

MELANIE K. DORIAN
California State Bar No. 197955
P.O. Box 5006
Glendale, California 91221-5006
Telephone: (818) 241-5837

Attorney for Appellant
DEWONE T. SMITH

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DEWONE T. SMITH, Defendant and Appellant.	) No. S201186)) 2 Crim. B223181))) Los Angeles County) Case No. BA337647)

APPELLANT'S REPLY BRIEF ON THE MERITS

Appeal from the Judgment of the Superior Court
of the State of California for the County of
Los Angeles

Honorable Jose I. Sandoval, Judge

MELANIE K. DORIAN
California State Bar No. 197955
P.O. Box 5006
Glendale, California 91221-5006
Telephone: (818) 241-5837

Attorney for Appellant
DEWONE T. SMITH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (Cont'd)

Cases (Cont'd)

Statutes

Secondary Sources

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DEWONE T. SMITH, Defendant and Appellant.	) No. S201186)) 2 Crim. B223181))) Los Angeles County) Case No. BA337647)

APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Penal Code[1] section 69 may be violated in two different ways and includes two types of offenses. Each type of offense, in turn, includes different elements. The first one criminalizes attempts to deter a peace officer by threats or violence, and the second one punishes knowingly resisting a peace officer by use of actual force. To conclude that section 148, subdivision (a)(1) is not a lesser included offense of the second type section 69 offense would be to ignore these distinctions.

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

ARGUMENT

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DECLINED TO INSTRUCT ON SECTION 148, SUBDIVISION (A)(1), AS A LESSER INCLUDED OFFENSE OF SECTION 69, IN COUNT 2

The fact that section 69 contains two distinct offenses is clear. (*In re Manuel G.* (1997) 16 Cal.4th 805, 815-816 ("*Manuel G.*"); *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 8-9 [the first part of the statute defines a specific intent crime, whereas the second portion, much like section 148, subdivision (a)(1), constitutes a general intent offense]; *In re M. L. B.* (1980) 110 Cal.App.3d 501, 503.) Under the statutory elements test, section 148, subdivision (a)(1) is a lesser included offense of the second type offense in section 69. An analysis under the accusatory pleading test is, therefore, not required.

Regardless, for a myriad reasons, not only is respondent's argument that section 69 must be examined "as a whole" flawed, but, even under the accusatory pleading test, which is case-specific, appellant was still entitled to the lesser included offense instruction. Given, the prosecution's choice to proceed on the second type offense, ultimately, the failure to instruct on section 148, subdivision (a)(1) as the lesser included offense was prejudicial error.

A. Under the Statutory Elements Test, Section 148, Subdivision (a)(1) is a Lesser Included Offense of the Second Type Offense in Section 69.

Respondent points out that section 148, subdivision (a)(1) criminalizes "efforts to resist, delay, or obstruct an officer," and does not include "attempts to deter an officer's performance of a duty in the future." (RBM, p. 7.) For this reason, respondent argues section 148, subdivision (a)(1) is not a lesser included offense of section 69. (*Id.* at pp. 6-8.) This is true, however, only with respect to the first type offense in section 69. (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 257-259.)

Respondent also claims that in applying the statutory elements test, one must look at the statute "as a whole." (RBM, p. 6.) However, it is entirely possible for the same section of the Penal Code to prescribe two types of offenses or a single offense which can be committed in different ways and include different elements. [See e.g., *People v. Gonzalez* (2012) 211 Cal.App.4th 405, 413, fn. 5 [noting that the various subdivisions of the offense of rape, as defined by former section 261, included various subdivisions, and each subdivision contained an element that the other did not].) If so, logic dictates that, in applying the statutory elements test, the focus should be on the elements of the particular type of offense at issue, rather than viewing an entire section of the Code, "as a whole." (RBM, p. 6.)

For instance, the crime of murder is defined as "the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Section 189 differentiates between first and second degree murder, by setting forth the different ways that a person could commit first degree murder, including during the commission of certain felonies, known as the "felony murder" rule.

In *People v. Taylor* (2010) 48 Cal.4th 574, 612-622 ("*Taylor*"), the information charged the defendant with first degree murder based on the felony murder rule. The trial court refused to instruct on the lesser included offense of second degree murder. This Court found no prejudicial error, but made the following observation:

> Defendant contends the trial court reversibly erred by failing also to instruct on second degree implied-malice murder as a lesser included offense of first degree felony murder. We disagree. [P] Although it is settled that "[s]econd degree murder is a lesser included offense of first degree murder" (*People v. Blair* [(2005)] 36 Cal.4th [686], 745), we have yet to decide whether second degree murder is a lesser included offense of first degree murder where, as here, the prosecution proceeds only on a theory of first degree felony murder. (*People v. Romero* (2008) 44 Cal.4th 386, 402 []; *People v. Wilson* (2008) 43 Cal.4th 1, 16 []; but see *People v. Anderson* (2006) 141 Cal.App.4th 430, 445 [] [the trial court erred in failing to instruct on second degree murder when the prosecutor argued only felony murder liability but the information charged murder with malice aforethought].) We need not decide that question here because, as explained below, there was no substantial evidence of second degree implied-malice murder.

(*People v. Taylor*, *supra*, 48 Cal.4th at p. 623.)

Taylor did not deal with section 69 or 148. Still, the foregoing suggests that in determining whether an offense is necessarily included in a greater offense, one must examine the elements and/or theories of the particular offense that a defendant was charged with or that the prosecution elected to proceed on, rather than looking to the statute "as a whole." (RBM, p. 6.)

B. The Accusatory Pleading Test is Not Applicable, and Regardless, the Charging Document Also Entitled Appellant to the Instruction.

Respondent's arguments concerning the accusatory pleading test may be summarized as follows: (1) The prosecutor properly alleged a violation of section 69 in the conjunctive, even though the statutory language appears in the disjunctive (*In re Bushman* (1970) 1 Cal.3d 767 ("*Bushman*"), disapproved on other grounds by *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1); (2) As alleged in the second amended information, the accusatory pleading test is not met, because section 69 may be committed without necessarily committing the lesser offense; (3) The issue should be resolved by examining the accusatory pleading, without any regard to the evidence deduced at trial (*People v. Ortega* (1998) 19 Cal.4th 686 ("*Ortega*"). (RBM, pp. 8-12.) For reasons that appellant will explain, these arguments fail.

Under the accusatory pleading test, a lesser offense is included within the greater charged offense if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228; *People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) Here, the second amended information alleged that appellant unlawfully attempted by means of threats and violence to deter and prevent the officers from performing their lawful duties, "*and* did knowingly resist by the use of force and violence said executive officer in the performance of his/her duty." (1 C.T. p. 72, emphasis added.)

Since Count 2 included both types of section 69 offenses and was pleaded in the conjunctive, in the latter part, it necessarily also included all of the elements of section 148, subdivision (a)(1) of willful resistance. It would appear, therefore, that the accusatory pleading test was met. (*People v. Reed, supra*, 38 Cal.4th at pp. 1227-1228.) However, even if the test failed, appellant submits that the accusatory pleading test has no application in the instant situation.

In *Bushman*, this Court held: "When a statute such as [] section 415 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. [Citations.] Merely 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. [Citation]." (*In re Bushman, supra*, 1 Cal.3d at p. 775.) Consistent with this principle, the prosecution here properly alleged the violation of section 69 in the conjunctive "to avoid uncertainty." The question is whether this has any relevance as to whether section 148, subdivision (a)(1) is a lesser included offense of section 69. The answer is no.

In *People v. Wright* (1996) 52 Cal.App.4th 203, 211 ("*Wright*"), the court held that assault was not a lesser included offense of robbery under the accusatory pleading test. The charging document there alleged that an attempted robbery resulted from the defendant's application of "force *and* fear." (*Id.* at p. 210, emphasis added.) The court considered whether the force required to commit a robbery necessarily included the force required to commit an assault and decided it did not. (*Ibid.*)

The court opined that force could be merely "constructive" and included threats of violence and physical harm. (*Id.* at pp. 210-211.) As such, it concluded: "Since the element of force can be satisfied by evidence of fear, it is possible to commit a robbery by force without necessarily committing an assault. Consequently, under the 'accusatory pleading' test,

assault is not necessarily included when the pleading alleges a robbery by force."[2] (*Id.* at p. 211.)

The court in *Wright* focused on the *statutory language*, which was disjunctive and defined robbery as taking of property with force "or" fear, rather than the manner in which the offenses had been pleaded in the charging document in the conjunctive. (§ 211.) This was consistent with the *Bushman* principle that the manner of pleading did not dictate the manner in which a defendant could violate a statute.

The reasonable inference is that a prosecutor's choice of pleading does not and should not redefine an offense as described in a statute, which, here, is either an attempt to deter an officer by threats or violence, *or*, a knowing resistance by actual force. (§ 69.) If the statute can be violated by knowingly resisting an officer by use of force, then, it cannot be disputed that this type of offense includes all the elements of willful resistance in section 148, subdivision (a)(1), as required by the accusatory pleading test. (*People v. Reed, supra*, 38 Cal.4th at pp. 1227-1228.)

Even assuming that respondent is correct and that the accusatory pleading test fails due to the inclusion of both types of section 69 offenses in the second amended information, respondent's reliance on *Ortega* is still

---

[2] This Court has not decided whether assault is a lesser included offense of a robbery that is charged as a taking of property by "force and fear." (See *People v. Parson* (2008) 44 Cal.4th 332, 350; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 622, fn. 4.)

misplaced. Respondent is seemingly under the impression that *Ortega* either invalidated *Manuel G.* or makes its application here questionable. Respondent is mistaken. (RBM, p. 11.)

The main issue in *Ortega* was the propriety of multiple convictions arising from a single act or course of conduct. (*People v. Ortega, supra*, 19 Cal.4th at p. 692.) This Court decided that grand theft was a lesser included offense of robbery; thus, the convictions for both robbery and grand theft could not be sustained. (*Id.* at pp. 693-695, 699.) When examining relevant authority, this Court criticized the decision in *People v. Rush* (1993) 16 Cal.App.4th 20, in resorting to facts and evidence introduced at the preliminary hearing to determine whether grand theft was a lesser included offense of robbery. (*People v. Ortega, supra*, 19 Cal.4th at pp. 697-698.)

These discussions gave rise to the quote that respondent has included on the page 10 of its brief, wherein this Court ruled that, for "practical reasons," the determination of a necessarily included offense should be made by examining the statutory language of the offenses or the charging document, because, otherwise, the issue would place a heavy burden on all parties, including the reviewing courts. (*Id.* at p. 698.) *Ortega*'s reasoning, as sound as it is, has no application here, because deciding whether section 148, subdivision (a)(1) is a lesser included offense of section 69 does not require that this Court review the evidence introduced at trial.

For instance, in *People v. Cheaves* (2003) 113 Cal.App.4th 445, 454, the appellate court found that using 911 with an intent to harass, in violation of section 653x, was not a lesser included offense of filing a false report, in violation of section 148.1, subdivision (c). The court reasoned that the charging document did not include any allegation that the person the defendant had contacted was a 911 operator. (*Ibid.*) Relying on *Ortega*, the court also properly refused to consider the evidence introduced at trial for said determination. (*Ibid.*, citing *People v. Ortega*, *supra*, 19 Cal.4th at p. 698.)

The concerns raised in *Ortega* are absent here. It is not necessary to study the evidence or evaluate the testimony of the witnesses to decide whether section 148, subdivision (a)(1) is a lesser included offense of section 69, and this Court need not "scour the record to determine which additional offenses [were] established by the evidence underlying the charged offenses." (*People v. Ortega*, *supra*, 19 Cal.4th at p. 698.) It would appear that the foregoing would apply mostly if the issue involved separate offenses described in completely different sections of the Penal Code.

In contrast, here, the charging document included the statutory language of section 69, in its entirety. (1 C.T. p. 72.) The jury instructions were also clear, in that, in count 5, the prosecution proceeded on both types of offenses, while, in count 2, it elected to proceed on the resisting by force

type of offense. (1 C.T. pp. 170-171.) The issue of a lesser included offense presenting in this case, therefore, requires a legal analysis, rather than a factual inquiry that would otherwise impose the high burden this Court noted in *Ortega*.

Respondent's final point involves appellant's reliance on *Manuel G.* (RBM, p. 11.) Respondent contends this Court did not address the issue that is the subject of review here—that section 148, subdivision (a)(1) is a lesser included offense of section 69. (*Ibid.*) Respondent is correct. Clearly, if this Court had made that determination then, this would have obviated the need to review appellant's case. Still, this does not erase the fact that in *Manuel G.*, this Court defined the two types of offenses within section 69, based on their differing elements. (*In re Manuel G.*, *supra*, 16 Cal.4th at pp. 815-816.)

To that end, respondent asserts that, in *Manuel G.*, this Court "looked to the accusatory pleading, not the evidence," in deciding the type of section 69 offense at issue. (RBM, p. 11.) Respondent misses the point. This Court did not conduct an analysis under the accusatory pleading test to decide whether section 148, subdivision (a)(1) was a lesser included offense; it looked to the charging document to ascertain whether the evidence substantially supported juvenile court's true findings of the *charged* offense. (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 814.)

In doing so, the court distinguished *People v. Wilkins* (1993) 14 Cal.App.4th 761, 767-769, where the defendant was charged with the second type offense in section 69. (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 816.) The court noted that since the two types of offenses each had different elements, it was not proper to focus on the second type offense elements to decide the sufficiency of proof of the elements of the first type offense involved in the case before it. (*Id.* at pp. 816-817.)

Looking to the charging document to decide whether the prosecution had proven the elements of the particular charged offense beyond a reasonable doubt was not the same as looking to the accusatory pleading to determine whether the facts of the charging document included all the elements of the lesser included offense. To the extent that respondent suggests otherwise with respect to *Manuel G.*, the long standing rule—that an opinion is not authority for propositions not considered—contradicts its conclusion. (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

C. The Error in failing to Instruct on the Lesser Included Offense Was Not Harmless, But Prejudicial, Requiring Reversal of Appellant's Conviction in Count 2.

Respondent claims that the failure to give the instruction was not error, because the evidence did not support a finding that appellant committed a violation of section 148, subdivision (a)(1). (RBM, pp. 12-16.) The assertion is based on appellant's use of force when the deputies were

attempting to handcuff him. Respondent additionally argues that any error in that respect was harmless, because the jury received an alternative instruction defining lawful and excessive force. (*Id.* at pp. 12-14.)

Appellant was entitled to the instruction, because there was "substantial evidence" from which the jury could have deduced that appellant was only guilty of a violation of section 148, subdivision (a)(1). (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826; *People v. Hughes* (2002) 27 Cal.4th 287, 365-367; *People v. Mendoza* (2000) 24 Cal.4th 130, 174; *People v. Kraft* (2000) 23 Cal.4th 978, 1063.) Consistent with the holding in *People v. Lacefield, supra*, 157 Cal.App.4th at p. 261, the jury could have concluded that appellant's use of force was lawful, because it was in direct response to the deputies' unlawful use of force.

The "substantial evidence" that appellant was, at most, guilty of resisting Deputy Baker's attempt to handcuff him without use of unlawful force, may be summarized as follows:

When Baker took appellant down, he lost his footing and fell to the ground along with appellant. (3 R.T. pp. 1212, 1242, 1273.) Baker was much taller than appellant was. (3 R.T. pp. 1242-1243.) There was no evidence that Baker made any statement to appellant. When appellant jumped back up and struck Baker in the face, it would have been entirely

reasonable for the jury to conclude that appellant believed he was being attacked and responding accordingly.

Resistance is justified when a person employs reasonable force to defend "life and limb," including when an officer is using excessive force. (*People v. Curtis* (1969) 70 Cal.3d 247, 356-357, 359.) The law of self-defense is defined as follows: "It is lawful for a person who is being assaulted to defend [himself] [herself] from attack if, as a reasonable person, [he] [she] has grounds for believing and does believe that bodily injury is about to be inflicted upon [him] [her]. In doing so, that person may use all force and means which [he] [she] believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent." (CALJIC No. 5.30; see also CALCRIM No. 3470.)

Here, appellant was instructed to face the wall, so that he could be handcuffed. (3 R.T. p. 1212.) Suddenly, he was being thrown to the ground. He was a county jail inmate, surrounded by sheriff's deputies, rather than in a public place, where he could have shouted for assistance. He could not have read Baker's mind in ascertaining the reason for the deputy's actions and evidently felt the need to defend himself. The jury could have concluded that appellant was acting in self-defense, in response to Baker's use of excessive force, regardless of whether this was an accident.

Thereafter, appellant was wrestled to the ground and struck in various parts of his body by several deputies, then, pepper sprayed. (3 R.T. pp. 1216, 1243-1244, 1256, 1273-1274, 1278, 1283-1285.) According to Baker, appellant was thrashing his body back and forth and shouted, "Get the fuck off me, motherfuckers." (3 R.T. pp. 1216, 1243, 1278, 1284.) He was also screaming and complaining of pain to his face, ankle and head. (3 R.T. pp. 1246-1247, 1254.)

Again, the jury could have concluded that appellant was continuously attempting to defend himself against the officers who were now on top of him, assaulting him and crushing him. Certainly, his statement, demanding that the officers get off him, demonstrated not only the degree of the force used against appellant, but appellant's own state of mind in moving his body in ways that could have assisted him in defending himself against the evidently painful blows.

Appellant also continued to kick and punch, attempting to stand up. (3 R.T. pp. 1216-1217, 1243, 1245-1248, 1254, 1256-1257, 1263-1264, 1279.) However, Baker could not tell whether the kicking and punching was the result of the pepper spray, although both Baker and Esquedo admitted that kicking and trying to grab one's face was one of the usual reactions to the spray which was very painful. (3 R.T. pp. 1244-1253, 1257, 1260, 1263, 1278-1279, 1285.) In fact, the pepper spray had caused some

of the deputies to cough. (3 R.T. pp. 1260, 1263.) In other words, there was substantial evidence that appellant's kicking and punching was a reaction to the peppery spray.

Respondent does not take into account what occurred that led to appellant striking Baker. Rather, it focuses on appellant's statement, "Fuck you Baker, I knocked your ass out, I got you," which Baker included in a supplemental report, solely at the request of the prosecuting attorney. (3 R.T. pp. 1275-1277, 1287-1289, 1291-1292.) Respondent contends this showed appellant was essentially acting purposefully or intentionally when striking Baker or after he was pepper sprayed. (RBM, pp. 14-16.)

First, the statement, in no way, proved that, appellant's movements after being pepper sprayed were voluntary. Not only did the deputies themselves testified that appellant's movements were consistent with the type of reaction a person would have to the pepper spray, but there was also no evidence that when appellant was kicking and punching, as Baker testified, his actions were directed at Baker.

More likely, this statement related to appellant striking Baker when they both fell to the ground. Still, the fact that appellant intentionally struck Baker had no relevance to the ultimate issue of self-defense or excessive force. The jury could have easily also interpreted this statement as appellant expressing relief that he had been able to strike Baker in self-defense.

Respondent's interpretation of the evidence is an oversimplification of what began as appellant's verbal resistance and escalated to a rather violent assault on him and what the jury could have concluded as acts of self-defense. Had appellant turned around and punched Baker when being instructed to face the wall, respondent's contentions may have merit. However, this was not the case.

Respondent further argues that since the court gave the excessive force instruction in CALCRIM No. 2671, if the jury believed that Baker had used excessive force, it would have acquitted appellant in count 2. (RBM, pp. 14-16.) What if the jury concluded that Baker was both engaged in performance of lawful duties and using excessive force, but decided to hold appellant accountable, because, after all, he did show resistance?

Baker testified that taking appellant down in order to handcuff him was consistent with departmental policy and his training and experience, not only for officer safety, but also to maintain control of the jail and the inmates. (3 R.T. pp. 1213-1214, 1239.) For similar reasons, Baker decided to engage in the fight and apply force after he took appellant down. (3 R.T. pp. 1217-1220, 1261-1262.)

The jury might have concluded that while Baker used excessive force when taking appellant down, he was also still engaged in his lawful duties as a peace officer, to the extent that his objective was to handcuff

appellant, as he had initially intended. Therefore, CALCRIM No. 2671 could not have been a substitute for an instruction on section 148, subdivision (a)(1), which would have allowed the jury to properly decide whether appellant should be accountable for resisting Baker, either verbally or physically, but in response to Baker's own use of excessive force.

Instead, the jury was presented with an "all or nothing" situation, where it felt compelled to convict appellant, even though it may have believed that Baker had used excessive force. (*People v. Webster* (1991) 54 Cal.3d 411, 444, fn. 17.) This is especially true, since the jury received extensive testimony and watched a video, all showing appellant using force against other deputies in several other separate incidents. (1 C.T. p. 108; 2 R.T. pp. 633-636; 3 R.T. pp. 1567-1572.)

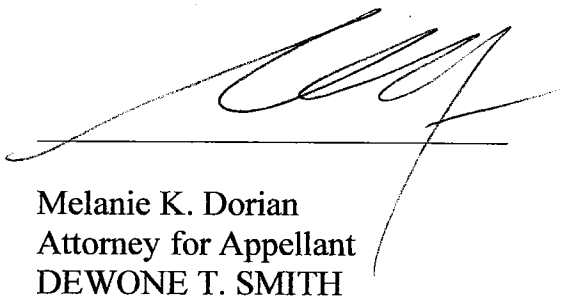
The failure to give the lesser included instruction, combined with the evidence presented during trial, probably swayed the jury to convict appellant in count 2, even though there was substantial evidence that appellant used reasonable force to defend himself and was subjected to excessive and unreasonable force by several deputies. The failure to give an instruction on section 148, subdivision (a)(1) was, therefore, reversible error. (*People v. Breverman* (1998) 19 Cal.4th 142, 177-178; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740.)

CONCLUSION

For the foregoing reasons, appellant urges this Court to find that section 148, subdivision (a)(1) is the lesser include offense of section 69, and that the failure to instruct the jury as such in count 2 was reversible error.

Dated: February 4, 2013

Respectfully submitted,

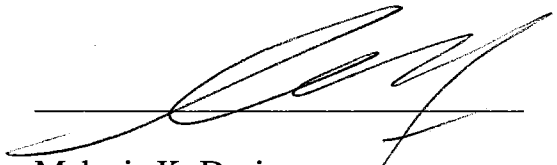


Melanie K. Dorian
Attorney for Appellant
DEWONE T. SMITH

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I, Melanie K. Dorian, appointed counsel for Dewone T. Smith, hereby certify that I prepared the foregoing Reply Brief on the Merits on behalf of my client, and that the word count for this brief is 4,128, excluding the tables and cover.

This brief therefore complies with the rule which limits a computer-generated brief to 14,000 words. I certify that I prepared this document in Word, and that this is the word count Word generated for this document.



Melanie K. Dorian
Attorney for Appellant
DEWONE T. SMITH

PROOF OF SERVICE

Re: People v. Dewone T. Smith
No. S201186

I, Melanie K. Dorian, declare that I am over 18 years old; my business address is P.O. Box 5006, Glendale, California 91221-5006.

On February 4, 2013, I served a true copy of APPELLANT'S REPLY BRIEF ON THE MERITS, by first class mail, on the following parties:

California Court of Appeal
Second District, Division One
300 S. Spring Street, Room 2217
Los Angeles, California 90013

Dewone T. Smith AC6787
RJ Donovan Correctional Facility
P.O. Box 799003
San Diego, California 92179-9003

Ryan M. Smith
Office of the Attorney General
300 S. Spring Street, Room 1702
Los Angeles, California 90013

Earl Evans, Esq.
P.O. Box 4638
La Puente, California 91747

Craig Kleffman
District Attorney's Office
210 West Temple Street, 18th Floor
Los Angeles, California 90012

California Appellate Project
520 South Grand Ave, 4th Floor
Los Angeles, California 90071

Criminal Justice Center
210 West Temple Street, Dept 125
Los Angeles, California 90012
FOR DELIVERY TO:
Hon. Jose I. Sandoval, Judge

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 2013, at Glendale, California.

MELANIE K. DORIAN