

# Supreme Court Copy

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SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of V.V., a person  
Within the Jurisdiction of the Juvenile Court

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THE PEOPLE OF THE STATE OF CALIFORNIA )

Respondent )

vs. )

V.V. )

Appellant )

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) 2 CRIM. B212416  
) Sup. Ct.No.GJ25585  
)  
)  
)  
)  
)

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY  
HONORABLE ROBERT LEVENTER, REFEREE PRESIDING

---

APPELLANT'S OPENING BRIEF ON THE MERITS

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Attorney for Appellant  
V.V



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## STATEMENT OF ISSUES

Pursuant to California Rules of Court, Rule 8.520 subdivision (b)(2)(B), the question presented here is: When the juvenile court found that the minor was a "good kid" who had no intention of causing a fire, was the intentional lighting of a firecracker that resulted in a fire on a hillside sufficient to constitute malice under Penal Code section 451 or was it the reckless causing of a fire under Penal Code section 452 ?

Does the "malice" element of arson require the intent to do harm?

## INTRODUCTION

This case arose because the minor and two friends set off a firecracker on a hillside in Pasadena and the hill caught fire. A petition charged one count of arson and one count of reckless burning. The juvenile court referred to the minors as "basically good kids" who "had no intention to set the hill on fire," but it was persuaded that their conduct constituted arson rather than unlawfully causing a fire, under this court's decision in *People v. Atkins* (2001) 25 Cal. 4th 76. The Court of Appeal agreed that the lighting of the firecracker was sufficient to establish malice for the arson statute, Penal Code section 451.

The Court of Appeal erred in its application of *Atkins*, by conflating the elements of malice and intent. The error is significant because although the action of lighting the firecracker was intentional, there was nothing in the record to show that it was done out of a wish to "vex, defraud, annoy , or injure" another person, or out of "an intent to do a wrongful act." (See Pen Code § 450 subd.(e).)

Accordingly, because there is no evidence of the statutory element of malice, the juvenile court's adjudication that the minor committed arson cannot stand.

### STATEMENT OF THE CASE

A petition was filed under Welfare and Institutions Code section 602 alleging that the minor had committed the offense of arson of a structure or forest, in violation of Penal Code section 451 subdivision (c) (Count One) and the offense of recklessly causing a fire of a structure or forest, in violation of Penal Code section 452 subdivision (c). (Count Two.) ( Clerk's transcript, "(CT" 1.)<sup>1</sup> The minor denied the allegations. (CT 12.) He had no prior arrest record. (CT 20.) Another minor, Jahiro H. was also charged with the same offenses.<sup>2</sup> (Reporter's transcript, "(RT" 1.)<sup>3</sup> The court sustained the petition as to Count One and dismissed Count Two. (CT 41.) The minor was placed home on probation. (CT 41-42.) Notice of appeal was timely filed. (CT 43.)

The Court of Appeal affirmed the order of the juvenile court in an unpublished opinion and this court granted the minor's petition for review on January 21, 2010.

### STATEMENT OF THE FACTS

On the afternoon of July 18, 2008, Abel Ramirez and Ara Moujoukian were both outside their houses on Winding Road in Pasadena. (RT 5-6, 16-17.)

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<sup>1</sup> The Clerk's Transcript is contained in a single volume.

<sup>2</sup> GJ 25587

<sup>3</sup> The Reporter's Transcript is contained in a single volume.

Ramirez testified that he heard a loud boom and almost immediately saw smoke on the mountain east of his house. (RT 6.) About three minutes later, he saw fire, and three kids running down the mountain. (RT 7.) They ran across the street and disappeared behind another house. (RT 7-8.)

Moujoukian told a police officer that he saw three Hispanic males talking loudly and walking at a fast pace away from the mountain. Moujoukian yelled 'What are you kids doing?' Moujoukian looked back at the mountain and he saw there was a brush fire, and he then looked back at the three youths who ran southbound on Startouch and out of sight. (RT 58-59.)<sup>4</sup> Both Moujoukian and Ramirez called 911. (RT 8, 19.) Moujoukian gave a description of the kids he had seen. (RT 22.)

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<sup>4</sup> The deputy district attorney and defense counsel stipulated that this account of what Moujoukian saw and heard is contained in the police report. Moujoukian's testimony in the juvenile court added new details about what he said he saw and heard that he did not give to the police when he spoke to them after the incident. (RT 27.) In court, Moujoukian testified that he heard what sounded like some kids having a good time, yelling and screaming. (RT 17.) In its recitation of the facts the Court of Appeal stated that Moujoukian heard the minors "laughing, yelling, and shouting. It sounded as if they were having a good time," and that he saw them "'high-fiving.'" (Opinion, p. 2) In finding that the minor and his friends were good kids who had no intention of setting the hill on fire, the juvenile court implicitly rejected Moujoukian's characterization of their conduct in his testimony. For the purpose of finding facts "the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence." ( *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

Two Pasadena police officers apprehended them on a nearby street. (RT, 29, 30, 32.) One of them did a patdown search of the minor and found a lighter, a set of keys and a large firecracker, about the size of a golf ball, that he said would be described as a cherry bomb. (RT 32-33.) The minor told him that they had set off a firecracker on the hill, and it caused the fire. (RT 33.) All three kids were detained for a field show up (RT 34.)

The minors were interviewed at the police station by Detective Jess Carillo. (RT 41.) Carillo testified that the minor told him they went to the mountain to climb, and that they were planning to go to Chinatown afterwards to get something to eat. (RT 47.) They lit one firecracker, just to hear the noise. (RT 45.) The minor told Carillo that he did not think the hillside would catch on fire. Carillo asked him specifically, "So you saw a lot of green and you didn't think it would catch fire?" and the minor responded, "No, I didn't." (RT 43.) The minor also told Carillo that when they saw the fire, they got scared because the fire could have reached them. (RT 45.) Carillo testified that there was no indication that the minor had the intention of setting anything on fire. (RT 44.) The other minor told Carillo that the intention was to throw the firecracker into a concrete drainage area on the hillside. (RT 52.) Concrete drainage areas were visible in photographs of the hillside introduced by the district attorney. (RT 24, 51.)

## ARGUMENT

### I

#### EVIDENCE THAT THE MINORS LIT AND THREW A FIRECRACKER WITH NO INTENT TO CAUSE A FIRE IS NOT SUFFICIENT TO CONSTITUTE MALICE UNDER PENAL CODE SECTION 451

##### A. Introduction and Standard of Review

The question squarely presented in this case is what kind of intentional conduct is sufficient to constitute malice under Penal Code section 451 rather than recklessness under section 452. A person is guilty of arson when he or she "willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." (Pen. Code § 451.) A person is guilty of unlawfully causing a fire "when he recklessly sets fire to or burns or causes to be burned, any structure, forest land or property." (Pen. Code § 452 .) The terms "maliciously" and "recklessly" are both defined in Penal Code section 450.

"Maliciously" imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." (Pen Code § 450, subd (e).)

"'Recklessly' means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary

intoxication also acts recklessly with respect thereto." (Pen. Code § 450 subd (f).)

In finding that the minors' conduct constituted arson even though they had no intention of causing a fire, the juvenile court relied upon the statement in *Atkins* that " there must be a general intent to willfully commit the act of setting on fire under such circumstances that the direct, natural, and highly probable consequences would be the burning of the relevant structure or property." (RT 64, quoting *People v. Atkins* (2001) 25 Cal. 4th 76, 89.) The Court of Appeal agreed that the intentional lighting of the firecracker was sufficient to establish malice even if the minors did not subjectively want the brush to burn. (Opinion, pp 4 - 5.)

The Court of Appeal acknowledged that the juvenile court stated that the minor and his companions were "trying to throw the thing into a patch of green or into a cement area. So they're trying to avoid setting the hill on fire. I know they had no intention to set the hill on fire." (Opinion, p.3.) The Court of Appeal was correct in deferring to the juvenile court's finding that the minors did not intend to set the hill on fire. The trial court's factual findings, whether express or implied, must be upheld if they are supported by substantial evidence. (*People v. Leyba* (1981) 29 Cal. 3d 591.). However, the application of a statute to undisputed facts raises a pure question of law and on appeal the court must make an independent determination as to whether those facts support the conclusion that a crime has been committed. (*People v. Aldridge* (1984) 35 Cal.3d 473, 477.)

In the instant case, the Court of Appeal erred in making this determination because it confused the elements of malice and wilfulness or intent. In *Atkins*,

this Court carefully and expressly explained that the malice requirement serves to distinguish arson's "deliberate and intentional" setting of fires from reckless and unintentional fires within the meaning of Penal Code section 452, which are committed by a person who is "aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property." (*People v. Atkins*, supra, 25 Cal. 4<sup>th</sup> at 89.)

The Court of Appeal's construction and application of the element of malice was erroneous. It effectively dispenses with the element of malice and thus abrogates the distinction between the arson statute, Penal Code section 451, and the crime of recklessly causing a fire, Penal Code section 452. In this case, although the act of lighting and throwing the firecracker was intentional, there was nothing in the record to show that it was done out of malice. When Penal Code section 451 is properly construed and applied here, the undisputed facts do not constitute the crime of arson.

#### **B. Arson Requires Proof of Both General Intent and Malice**

In *Atkins*, this court addressed the question whether evidence of voluntary intoxication was admissible on the issue of whether a defendant had formed the required mental state for arson. It held that it was not, because arson is a general intent crime. (*People v. Atkins*, supra, 25 Cal.4th at 79.) Because arson requires only general criminal intent, the court held, "[T]he specific intent to set fire to or burn or cause to be burned the relevant structure or forest land is not an element of arson." (*People v. Atkins*, supra, 25 Cal.4th at 84.) However, the court's analysis of the statutes makes clear that even though no specific intent is required, the distinct element of malice must be proved. (*Id* at 88.)

In setting out its explanation of why arson is a general intent crime, *Atkins* began with an examination of the statutory language describing the proscribed conduct, first with the statutory elements, and then with their statutory definitions. The court noted that under Penal Code section 451 "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." (Id at 84-85.) The court next observed that "[m]aliciously' is defined in the arson chapter as 'a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law'." (Id. at 85, citing Penal Code section § 450, subd. (e) and Penal Code § 7, subd. 4.) The court further noted that "[w]illfully' is not defined in the arson chapter, but in section 7, subdivision 1: 'The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.'" (*People v. Atkins*, supra, 25 Cal. 4<sup>th</sup> at 85.)

Thus, *Atkins* makes clear that the statutory definition of "wilfully" does not require any intent to violate law or injure another, and that by contrast the definition of "maliciously" requires exactly that - - a desire to injure another or do a wrongful act. Malice is in essence, therefore, wrongful intention.<sup>5</sup>

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<sup>5</sup> This distinction is in accord with the definitions set forth in Blacks Law Dictionary, which defines "wilfull" as "voluntary and intentional but not necessarily malicious" and "malice" as "the intent, without justification or excuse to commit a wrongful act." (Black's Law Dictionary, 9<sup>th</sup> Edn, pp 1042, 1737.)

In the context of the arson statute, neither "wilfully" nor "maliciously" require specific intent. (Id at 85-86.) However, "[a]rson's malice requirement ensures that the act is 'done with a design to do an intentional wrongful act . . . without any legal justification, excuse or claim of right.'" (Id at 88, quoting 5 Am.Jur.2d (1995) Arson and Related Offenses, § 7, p. 786.) Its willful and malice requirement ensures that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional ignition or act of setting a fire. (*People v. Atkins*, supra, 25 Cal. 4<sup>th</sup> at 88-89.)

Thus, while malice does not transform arson into a specific intent offense, it requires proof that the act that causes the burning is "done with a design to do an intentional wrongful act . . . without any legal justification, excuse or claim of right." As Justice Mosk explained in his concurring opinion:

Thus, the crime of arson requires a mental state with two components. In its first component, arson requires that the perpetrator act with the "purpose" or "willingness" ( Pen. Code, § 7, item 1) to "set fire to" a "structure, forest land, or property," to "burn" any such object, or to "cause" it "to be burned" (id., § 451). Apparently, the perpetrator's intent need not be resultative, in the sense of aiming to burn down an indicated object. But it must be inceptive, in the sense of aiming to start a fire. In its second component, arson requires that the perpetrator act for the purpose of "do[ing]" any other "wrongful act," including "vex[ing], defraud[ing], annoy[ing], or injur[ing] another person." ( Pen. Code, § 450, subd. (e).)

(*People v. Atkins*, supra, 25 Cal. 4<sup>th</sup> at 94-95, Mosk, J., concurring.) In sum, while arson is a general intent crime, the element of malice requires proof that the perpetrator's intentional act was wrongful in its purpose. (5 Am. Jur. 2d Arson and Related Offenses, supra, § 7.)

Thus, malice is a necessary part of the state of mind of the perpetrator, and this requirement is in no way inconsistent with the classification of arson as a general intent crime. In *People v. Williams*, this court recognized that the classification of an offense as a general intent crime " by itself, may not fully describe the requisite mental state for every criminal offense." (*People v. Williams* (2001) 26 Cal. 4th 779, 785.) In *Williams*, the issue before the court was the mental state for assault. Noting that a defendant is guilty of assault only if he intends to commit an act which, if done, would be indictable as a battery, either from its own character or that of its natural and probable consequences, the court held that " [l]ogically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another ".(Id at 787-788.) In other words, while assault is a general intent crime, to be guilty of assault the defendant must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur. (Ibid.) Accordingly, the court did not disturb its previous holding that assault is a general intent crime, but it clarified that the state of mind included a requirement of knowledge. Similarly in *Atkins*, the court held that arson is a general intent crime and clarified that while "wilfully" implies no evil intent, the malice requirement ensures that the act is "done with a design to do an intentional wrongful act . . . without any legal justification, excuse or claim of right. ( *People v. Atkins*, supra, 234 Cal. App. 2d at 75 )

In finding sufficient proof of malice in the intentional lighting and throwing of the firecracker, the juvenile court and Court of Appeal focused on the statement in *Atkins* that arson "requires only an intent to do the act that causes the harm," not "'an intent to cause the resulting harm.'" (See *People v. Atkins*, supra, 25 Cal.4th at 86.) However, this reading of *Atkins* is a partial one, because, as discussed above, there is nothing in *Atkins* that dispenses with the statutory requirement that the act must also be done "maliciously."

Applying this standard to the case at hand, the district attorney was not required to prove that the minor specifically intended to set fire to the hillside, but he was required to prove that the acts that caused the hillside to burn were done not only willfully but also maliciously. (*People v. Atkins*, supra, 25 Cal.4th at 88.) As discussed below, there is no such evidence.

### **C. There Is No Evidence That the Minor Acted with Malice**

Proof of malice may be determined from the nature of the intentional act that caused property to be burned. (*People v. Fry* (1993) 19 Cal. App. 4th 1334, 1339.) It is instructive, therefore, to consider the nature of the intentional act in this case, the lighting and throwing of the firework, with the intentional acts in the cases cited and discussed in *Atkins*.

In *Atkins* itself, the defendant told others he was going to burn down the house of the intended victim, a neighbor called Figgs. He then intentionally set fire to dry vegetation in the canyon below the house, during extreme fire conditions. The defendant's claim that he set a fire only to clear weeds and that the fire got out of hand was contradicted by the fire marshal's testimony that there was no evidence the fire started accidentally during the burning of debris,

or that anyone had tried to put it out. Although the court in *Atkins* did not discuss the application of the malice requirement to the evidence, its recitation of these facts shows unambiguously that the defendant's acts arose out of a desire to vex, injure, or annoy, or out of an intent to do a wrongful act.

In *People v. Green*, the defendant was convicted of convicted of arson of an inhabited structure and arson of property. (*People v. Green*, supra, 146 Cal. App. 3d at 373.) The evidence showed that the defendant started a fire in an apartment in which his estranged wife had been living. The defendant had been heard threatening to kill his wife. ( *Id* at 375.) An arson investigator testified that in his opinion the fire was deliberately set. The fire started in the dining room area and burned through the floor and the burn pattern was characteristic of a fire started with a flammable liquid. (*Id* at 374 .) Flames from the apartment fell onto the carport in which neighbors' cars were parked. One of the cars caught fire and was destroyed. (*Ibid.*)

The defendant argued that with respect to the car, his conviction for arson of property should be reduced to a violation of Penal Code section 452, because the burning was "reckless" and not "willful and malicious" as required by section 451. The Court of Appeal disagreed, because there was evidence that the fire was set "willfully and maliciously," and the fact that some of the resulting damage may have been unintentional was irrelevant. (*Id* at 379.)

In sum, in *People v. Green* as in *People v. Atkins*, there was evidence of hostility between the defendant and the intended target, and evidence that the defendant intentionally started a fire because of a wish to vex, injure or annoy. There was an intentional wrongful act, the setting on fire of his estranged wife's

apartment, without legal justification, excuse or claim of right. ( See *People v. Atkins*, supra, 25 Cal.4th at 88.) In both cases, this evidence satisfies the requirement of malice even as to any resulting damage that was unintentional. In the minor's case, by contrast, there is no evidence of this kind of transferred malice.

In *People v. Fry*, the defendant spent the evening in a bar drinking heavily. When he left he was drunk, emotionally upset, and angry at his girlfriend with whom he had argued earlier in the day. On his way home, he intentionally set fire to four vehicles with a disposable lighter. The fire in one of the vehicles damaged the carport in which it was parked. (*People v. Fry* (1993) 19 Cal. App. 4th 1334, 1337.) The defendant was convicted of four counts of arson of a vehicle and one count of arson of a structure . (Ibid.)

The defendant argued that he was not guilty of arson of a structure because he did not intend the carport to burn. The Court of Appeal rejected his argument noting that it was undisputed that the defendant's conduct actually and proximately caused the carport to be burned, that setting fire to the car created a substantial and unjustifiable risk that the carport would burn, the carport did in fact burn, and its burning was a natural and probable consequence of his conduct. Accordingly, whether the defendant committed arson of a structure or unlawful burning of a structure depended only on "whether he willfully and maliciously performed the acts that caused the carport to burn, in which case the offense is arson, or recklessly, in which case the offense is unlawful burning " (Id at 1339.)

The Court of Appeal noted that in finding the defendant guilty of arson of

the car in the carport, the trial court implicitly found that he willfully and maliciously set fire to the car, and that the record revealed substantial evidence to support this finding, and that the defendant did not claim otherwise. (It was undisputed that the defendant intentionally set the cars on fire with a lighter.) Accordingly, the court held, “it follows, a fortiori, that in causing the carport to be burned, defendant acted willfully and maliciously” and that the trial court properly found defendant guilty of arson of a structure.

These cases, like *Atkins*, present evidence of malice, conduct done with a design to do an intentional wrongful act, without legal justification, excuse or claim of right. ( See *People v. Atkins*, supra, 25 Cal.4th at 88.) Many other arson cases illustrate similar malicious conduct. (See e.g. *People v. Glover* (1991) 233 Cal. App. 3d 1476, 1483 [defendant told others she would burn her apartment for insurance money, the fire was deliberately set and after the fire, defendant applied for fire insurance proceeds and received an insurance settlement as a result of the fire]; *People v. Clagg* (1961) 197 Cal. App. 2d 209, 212 [evidence that two independent fires in the building were deliberately set, and the defendant had threatened to burn the house on numerous occasions to penalize his wife by destroying furniture]; *People v. Lee* (1994) 28 Cal. App. 4th 659, 664 [defendant admitted he set three or four fires in different places inside the house but contended it was in order to kill himself]; *People v. Lopez* (1993) 13 Cal. App. 4th 1840, 1845-1846 [defendant removed his mother and his personal property from the vicinity of a trailer which burned shortly thereafter].)

In the cases discussed above, the evidence of wilful and malicious burning is a far cry indeed from the actions of the minors in the instant case, who

lit and threw a firecracker to hear the noise it would make with the unintended consequence that the hillside caught fire. In *Atkins*, this court stated: "the offense of unlawfully causing a fire covers reckless accidents or unintentional fires, which, by definition, is committed by a person who is "aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property." ( *People v. Atkins*, supra, 25 Cal 4<sup>th</sup> at 89, quoting Penal Code §§ 450, subd. (f) and 52.) The court gave as an example a fire caused by a person who recklessly lights a match near highly combustible materials. The minor's reckless conduct here is akin to the reckless lighting of a cigarette near combustible materials. It was not done maliciously as in *Atkins*, *Green*, or *Fry*, where fires intended to burn one structure spread to another. Consistent with the holding and rationale of *Atkins*, therefore, the minor's intentional lighting of the firecracker was not done with the requisite malice, and it does not meet all the elements of arson under Penal Code section 451.

In finding that the minor's conduct was sufficient evidence of malice to meet the requirements of Penal Code section 451, the Court of Appeal implicitly and incorrectly broadened the definition of malice far beyond what was expressed or implied in this court's analysis in *Atkins*. In blurring the line between sections 451 and 452, the Court of Appeal strayed from the normal rules of statutory construction that a statute should be construed so as to harmonize with the entire scheme of law ( see eg. *Clean Air Constituency v. State Air Resources Board* (1974) 11 Cal. 3d 801, 814) and that a construction rendering some words useless or redundant is to be avoided. (*Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 22.)

Because the evidence in this case does not meet the statutory definition of malice in Penal Code section 451, the adjudication of arson cannot stand.

### CONCLUSION

Consistent with the holding and analysis set forth in *Atkins*, the minors' intentional lighting and throwing is not evidence of malice, and the Court of Appeal erred in affirming the juvenile court's adjudication. Because the evidence does not establish sufficient proof of all the elements of arson under Penal Code section 451, the wardship petition cannot be sustained and must be reversed.

Respectfully submitted



Laini Millar Melnick



In re V. V., S177654

Certificate of Word Count

I hereby certify that the number of words in the Appellant's Opening Brief on the Merits is 4,575. This certification is made in reliance upon the word count of the computer program used to prepare the brief.

Signed: 

Laini Millar Melnick

Dated: April 29, 2010



In re V. V., S177654

PROOF OF SERVICE BY MAIL

I am employed in the county of Santa Barbara, State of California. My business address is 610 Anacapa Street , Santa Barbara, California 93101. I am over the age of 18 and not a party to the action herein.

On the date written below, I served the attached APPELLANT'S BRIEF ON THE MERITS on all interested parties in this action by placing a copy in envelopes with postage fully prepaid, addressed as follows:

Clerk's Office,  
Second District Court of Appeal, Division 1  
300 South Spring Street  
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Clerk of the Superior Court  
For delivery to  
The Honorable Robert Leventer, Judge,  
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I deposited the aforesaid envelopes in the mail at Santa Barbara,  
California. I declare on penalty of perjury under the laws of the State of  
California that the foregoing is true and correct. Dated April 29, 2010

*Lam New*



