SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. VICTOR CORREA, Defendant and Appellant.	No. S163273 (Related Cases: Third Appellate District, C054365; Sacramento Superior Court No. 06F01135)

SUPREME COURT
FILED
AUG 20 2008
Frederick K. Ohlrich Clerk
DEPUTY

APPEAL FROM THE SUPERIOR COURT OF SACRAMENTO COUNTY
Honorable, Patricia C. Esgro, Judge

APPELLANT'S OPENING BRIEF on the merits

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CERTIFICATE OF COMPLIANCE

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word count is 4,179 words and thus does not exceed 25,500 words, and thus is within the limits (25,500 words) of California Rules of Court, rule 8.360, subdivision (b).

ISSUE ON REVIEW

Was defendant properly sentenced on multiple counts of being a felon in possession of a firearm where he was discovered in a closet with a cache of weapons?

STATEMENT OF THE CASE

By information filed September 14, 2006, appellant was charged in 13 counts with the following offenses:

> Counts 1 through 9, possession of a firearm by a person convicted of a felony in violation of Penal[1] Code section 12021, subdivision (a),[2]
>
> Count 10, unlawful driving or taking of a vehicle, a 1996 Lexus, in violation of Vehicle Code section 10851, subdivision (a); and
>
> Counts 11 through 13, receiving stolen property in violation of Section 496, subdivision (a).[3]

It was alleged that appellant had suffered three prior felony convictions on March 11, 1983 within the meaning of Sections 667, subdivisions (b) through (i), and 1170.12 . (CT 119-123.)

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1 All references are to the Penal Code unless otherwise noted.

2 The objects of these counts are the following:
Count 1, a Stevens .410 shotgun;
Count 2, a .22 caliber Marlin rifle;
Count 3, a .12 gauge Winchester shotgun;
Count 4, a .22 Remington rifle;
Count 5, an 8 millimeter rifle;
Count 6, a .22 caliber Marlin rifle;
Count 7, a 12 gauge Master Mag shotgun;
Count 8, a 12 gauge shotgun; and
Count 9, a Connecticut Valley Arms .50 caliber rifle.

3 The objects of these counts are the following:
Count 11, a 1996 Lexus;
Count 12, a 1994 Ford Mustang; and
Count 13, a 2004 Nissan.

Appellant pled not guilty. (CT 88-90.) On September 22, 2006, following four days of testimony and two days of deliberations, the jury found appellant not guilty on Counts 8 through 11, guilty on Counts 1 through 7, and 12, and were unable to reach a verdict on Count 13. The court declared a mistrial on Count 13. Appellant waived a jury trial on the prior felony conviction allegations and they would be tried at his sentencing hearing. (CT 124-126, 138-147, 184-186, 202-214, 216-222.)

On October 20, 2006, the court granted the prosecution's motion to dismiss the first alleged prior conviction allegation and found the remaining two allegations to be true. The court denied appellant's *Romero*[4] motion. The court sentenced appellant to state prison for 200 years to life—25 years to life for each of the eight counts for which he had been found guilty, each to be served consecutively to the others. Appellant was ordered to pay a restitution fine of $400 pursuant to Section 1202.4, and an additional $400 that was suspended pursuant to Section 1202.45. Appellant was granted total custody credits of 386 days. (CT 273-274.)

Appellant's timely notice of appeal was filed on December 4, 2006. (CT 276-278.)

On April 4, 2008, in a published decision, the Third Appellate District affirmed appellant's conviction.

STATEMENT OF THE FACTS

PROSECUTION'S CASE

On February 4, 2006, at shortly after 5:00 p.m., Sacramento Police Officer Howland arrived at a two-story residence at 60 Tundra Way, Sacramento in response to a report of suspicious circumstances regarding firearms being moved into the residence at that address. (RT 107-109, 168; 2RT 369.) The officer

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[4] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 [53 Cal.Rptr.2d 789]

blocked the driveway preventing a black T-bird from pulling out of the driveway. (RT 110-111, 116.)

Officer Howland noted a male Hispanic, six feet tall, about 180 pounds, wearing sunglasses get out of a green 1996 Lexus parked across the street from the residence and walk in front of his patrol car and into the garage attached to the residence. (RT 112-115, 133-134, 136, 141-142, 151, 163-164; 2RT 413, 417.) The male had colored tattoos on both arms that began at his writs. (RT 113, 147, 162.) He wore a light colored, short-sleeved shirt. (RT 162.) From the garage, he went into the house. (RT 116-117.)

Immediately thereafter, Carlos Melgar, five feet, nine inches tall, about 240 pounds, 25 years old, got out of the T-bird, did not respond to the Officer Schindler's order for him to stop with his hands in the air, and went into the garage. (RT 111, 154-155.) Thereafter, Howland lost sight of him. (RT 117.)

Two other cars were parked in the driveway, a 2004 Nisan underneath a car cover, and a red Ford Galaxy. (RT 118, 132-136, 157-158, 413-415; People's exh. 21.) The garage was filled with boxes and car parts. (RT 117.) A primer colored Mustang on jacks with wheels removed was parked behind a gate alongside the garage. (2RT 414-415, 432-433.)

About that time, another officer arrived and, when Melgar emerged from the garage, he was detained. (RT 119-120, 154.) Two females on the driveway, Ms. Selena Arriaga and Ms. Elizabeth Jean Schultz, were also detained. (RT 112, 120, 166-167; 2RT 387.)

Over the course of the evening it was determined that the Lexus, Nissan, and Ford Mustang were stolen. (RT 120-121, 2RT 413-417, 444-450, 453-461, 514-518.)

More officers arrived and the residence was surrounded. (RT 122-124, 127.) Eventually a third female came out of the house, Juanita Paulin, and she was detained. (RT 126, 165-167.) Apparently a standoff ensued. Officer Howland, aided by access to Sergeant Dubke's computer, provisionally identified

the male emerging from the Lexus as appellant. (RT 128-130, 145-149, 171-172; 2RT 410-411, 424-429.) Later, Howland confirmed that appellant was that male. (RT 130-131, 142-143, 149, 171, 173-174, 178-179, 181-182, People's exhs. 54, 56.) A search warrant for the residence was obtained. (RT 184, 2RT 316.)

A SWAT team arrived. (RT 185-186, 254.) Around midnight, aided by tear gas grenades propelled into the building, the officers gained access to the residence. (RT 149, 259-260; 2RT 395, 412.) Once inside, they heard appellant's muffled voice, which they determined was coming from under the stairs to the second floor. (RT 260, 263-264.) They entered the closet under the stairway, removed clothes and boxes, and found that he was stuck between a pair of two-by-four studs in a pony wall under the stair. (RT 201-202, 265, 269, 271, 274, 276, 280; 2RT 282, 294, 297, 299-300; People's exhs. 28, 30-33, 66; Def. exh. B.) They made a hole in the wall on the side of the stair and extracted him. (RT 190, 195, 267-270, 2RT 288.) No one else was found in the house. (RT 192, 2RT 287-288; People's exh. 64.)

Several gun cases containing weapons as well as two guns not in cases were found on the floor of the closet under the stair. (RT 265-267, 278-279; 2RT 282, 290, 319-320, 322-331, 334-337, 340-344, 372-379; People's exhs. 1-8, 33, 38, 65; Counts 1-7.) Two gun cases were found in the living room behind a couch. (RT 195-196, 202, 220-224, 236, 344-348; People's exhs. 10-10B, 11-11A, 41.) One held a .12 gauge shotgun and the other a .50 caliber rifle. (RT 195, 202, 205; People's exhs. 42-43; Counts 8 & 9.) The few latent fingerprints found on these items did not match appellant's prints. (2RT 466-487, 521, 525-526, 531.)

The house had four bedrooms, one downstairs and three upstairs. (RT 237, 267; 2RT 498.) In an upstairs bedroom on the northeast corner of the house, a key to the Lexus was found on the floor of the closet. (RT 198, 200; 2RT 349-350, 364; People's exhs. 45, 63.) Paperwork found in the bedroom bore the name of Robert and Georgina Cuevas. (RT 198.)

Paperwork was found bearing the name of appellant in the upstairs bedroom on the southwest corner of the house as well as in the downstairs bedroom. (RT 199, 224-226; 2RT 343-344, 349, 351-352, 354-357, 379-381, 399-402; People's exhs. 12-12F, 15-15A, 16.) A duffle bag in the southwest bedroom closet was found containing some shotgun rounds. (2RT 400-402, People's exhs. 17, 47.) A duffle bag was found in the garage containing letters addressed to appellant as well as shotgun shells and .38 caliber bullets. (2RT 352-360, 396-399, 417-418, People's exhs. 9, 12-12A, 13-13A, 17, 44.)

A neighbor who had been in the residence many times, testified that appellant lived in the house with his parents, brother Jessie, and Jessie's girlfriend. (2RT 496-500, 506-507.) She had seen as many as six to eight adults in the house at a time. (2RT 509.) The neighbor testified that she had driven appellant to many medical appointments and had seen appellant in possession of firearms on two or three occasions. (RT 501-504.) She testified that appellant drove the black T-bird and said appellant claimed that most of the cars in front of the home were his. (2RT 508-509.)

At some point, Robert Cuevas was also detained. (RT 150-151, 168-169; 2RT 383; People's exh. 55.) He was in his 40s or 50s, was wearing glasses, and had tattoos covering his arms, beginning at the wrists. (2RT 384-386, 430, 438-439; People's exh. 55, Def. exh. G.) The neighbor testified that she had also seen him at the house two or three times. (2RT 511-512.)

It was stipulated that appellant had been convicted of a felony. (RT 104.)

DEFENSE'S CASE

Appellant's mother, with the aid of an interpreter, testified for the defense. (3RT 571-572.) She had lived in that four bedroom residence with her husband for 18 years. (3RT 572, 585.) She confirmed that there was one bedroom on ground floor and three on the second floor. (3RT 572-574.) Appellant occupied an upstairs bedroom on the southwest corner of the house and her other son, Jessie, occupied another on the northeast corner of the house with his girlfriend,

Elizabeth Garduno. (3RT 573-575, 585-586, 592-593.) Jessie and Elizabeth were in the process of moving out of the house and had not been at the house for six or seven days prior to the incident. (3RT 582, 593-594.)

Appellant's brother-in-law, Robert Cuevas, also used the northeast upstairs bedroom. (3RT 575, 583, 589, People's exh. 55.) No one else lived in the home. (3RT 576.)

At 2:00 p.m. on the day of the search, appellant's mother went to the hospital where her husband was admitted. (3RT 588-589.) When she left the house, Robert Cuevas was at the house, and appellant may also have been there. (3RT 584, 589.) She testified that the red 1964 Ford in the driveway was her husband's car. (3RT 576.) She had never seen appellant drive the Nissan. (3RT 576-577.) She had never seen the green Lexus and did not know who the car belonged to. (3RT 580, 583-584, 590.) She did not know that the Ford Mustang was parked alongside the garage. (3RT 577, 591.) She had never seen the gun cases in the closet below the stairs or the gun cases behind the couch. (3RT 578-579, 586.) She did not want guns in her house. (3RT 586.)

ARGUMENT

SECTION 654 REQUIRES THAT SIX OF THE SEVEN SENTENCES FOR POSSESSION OF A FIREARM BY A FELON MUST BE STAYED

All seven of the firearm possession offenses under Section 12021, subdivision (a)[5] of which appellant was convicted arose from a single incident in which he was found with seven firearms stacked on the floor in a below stairs closet near his feet. Appellant submits that the sentences for six of these offenses

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[5] Section 12021, subdivision (a) provides in pertinent part:

> (a)(1) Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country … and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony. ¶ ….

must be stayed pursuant to Section 654[6] because they were part of an indivisible transaction for which a sentence also was imposed.

A. BACKGROUND

Appellant was charged and convicted of seven counts of possession of a firearm by a person convicted of a felony in violation of Section 12021, subdivision (a). (CT 119-123.) The firearms were found on the floor of the closet under the stair in the two story home appellant shared with his parents, brother, brother's girlfriend, and brother-in-law. (RT 265-267, 278-279; 2RT 282, 290, 319-320, 322-331, 334-337, 340-344, 372-379; People's exhs. 1-8, 33, 38, 65; Counts 1-7.)

The court imposed consecutive 25-years-to-life sentences for each of the seven counts of possession of a firearm. (3RT 763, CT 273-274.) The court found "that each one of these is a separate and individual offense with a separate and individual purpose," and thus was not governed by Section 654. (3RT 757-758.) Yet, the court acknowledged:

> Where [654] might apply ..., if it did at all, would be Counts 2 through 7 because that was—I guess you'd call it, a cache... of weapons and so Counts 2 through 7 are each an individual weapon and—but the Court is finding that each of those is an individual and separate weapon, each had its own ammunition, and in the Court's view, there would be a different purpose and a different crime for each of those individual weapons and that's how the Court is addressing it. Not to say that you might want to make a 654 argument as to Counts 2 through 7, but my tentative ruling is I'm not doing that. ... I am treating them individually and separately. (3RT 758.)

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6 Section 654 provides in pertinent part:

> (a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. (§ 654, subd. (a).)

Defense counsel argued that all the weapons were in one place, it was not an act of bringing things in or selling things; the totality of what appellant did was possess these weapons at one time. Counsel rhetorically posed what if it had been 400 weapons? It was one act done at one time. (3RT 759-760.) Defense counsel continued, "how much else can you do with a 42 year old man. You're going to give him 25 to life. That's probably where he's going to end up for the rest of his life...." Defense counsel asked that the sentences be stayed under Section 654. (3RT 760.)

B. ONE FIREARM OR SEVEN FIREARMS, APPELLANT CAN ONLY BE PUNISHED ONCE FOR THEIR POSSESSION

Section 654 applies to sentencing both for crimes flowing from a single act and for crimes resulting from an indivisible course of conduct which violates more than one statute. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208 [23 Cal.Rptr.2d 144]; accord *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466 [83 Cal.Rptr.2d 307].) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of Section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) Cal.2d 11, 19 [9 Cal.Rptr. 607]; *People v. Perez* (1979) 23 Cal.3d 545, 551 [153 Cal.Rptr. 40].)

"The question of whether the defendant held multiple criminal objectives is one of fact for the trial court, and, if supported by any substantial evidence, it's finding will be upheld on appeal." (*People v. Herrera, supra,* at p. 1466.) However, the dimensions and meaning of Section 654, and its application to conceded or undisputed facts, is a question of law. (*People v. Harrison* (1989) 48 Cal.3d 321, 335 [256 Cal.Rptr. 401]; *People v. Perez, supra*, 23 Cal.3d at p. 552, fn. 5.) In this case the facts relevant to a Section 654 analysis are not in dispute.

The offenses here are seven counts of possession of a firearm by a felon (§ 12021, subd. (a).) The only evidence of appellant's involvement with the firearms

is his proximity to them at the time of his arrest. As the trial court described them, it was "a cache ... of weapons." (3RT 758.) The trial court concluded that "there would be a different purpose and a different crime for each...." (*Ibid.*) The question of course is did appellant hold multiple criminal objectives. (*People v. Herrera, supra,* at p. 1466.)

In resolving Section 654 issues, appellate courts should not "parse[ ] the objectives too finely." (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138 [13 Cal.Rptr.3d 921] [where illustrative was possessing ammunition and a firearm], quoting *People v. Britt* (2004) 32 Cal.4th 944, 953 [12 Cal.Rptr.3d 66] .) Possession offenses are "instantaneous" crimes, like the majority of crimes, in that they are complete as soon as every element is satisfied. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 525-529 [63 Cal.Rptr.2d 322].) But, unlike most other instantaneous crimes, possession offenses are also "continuing" offenses in that each day (or each time interval of any length) brings "a renewal of the original crime or the repeated commission of new offenses." (*Id.* at pp. 525-529, quoting *Toussie v. United States* (1970) 397 U.S. 112, 119 [25 L.Ed.2d 156, 90 S.Ct. 858].) This court in *Wright* explained:

> "Ordinarily, a continuing offense is marked by a continuing duty in the defendant to do an act which he fails to do. The offense continues as long as the duty persists, and there is a failure to perform that duty." [Citations.] Thus, when the law imposes an affirmative obligation to act, the violation is *complete* at the first instance the elements are met. It is nevertheless not *completed* as long as the obligation remains unfulfilled. "The crime achieves no finality until such time." (*Id.* at p. 526, quoting *United States v. Cores* (1958) 356 U.S. 405, 409 [2 L.Ed.2d 876, 78 S.Ct. 875].)

In possession crimes, no one could effectively argue that each day or each hour created a new criminal objective for the possessor. The reason is that the gravitas of the offense is not substantially enhanced by time. In simple possession cases involving drugs, no one would effectively argue that each gram (or other increment of measurement) created a new criminal objective. Again, the gravitas

of the offense, at least vis-à-vis the public, is not substantially enhanced. Illustrative by comparison is *People v. Butler* (1996) 43 Cal.App.4th 1224, 1248-1249 [51 Cal.Rptr.2d 150] where the defendant was convicted and sentenced on two counts of possession of a cloned cellular telephone. His Section 654 claim there failed not just because there were two phones in his possession, but because there were two victims, each a lawful owner of one of the phones. In short, the gravitas of the offense was twice as great.

In the limited context of the instant case, the gravitas of the offense of simple possession of a firearm was not enhanced by the addition of the second, third, or even seventh firearm. Appellant had only the realistic potential of being able to fire one weapon at a time. As a matter of law, there were no multiple criminal objectives. Thus, the trial court's imposition of consecutive 25 years to life sentences on Counts Two through Seven violated Section 654 and should be stayed.

Yet, the Appellate Court below disagreed, citing *People v. Kirk* (1989) 211 Cal.App.3d 58 [259 Cal.Rptr. 44]. In *Kirk*, the court had before it the possession offense defined by Section 12020[7] in the context of two sawed-off shotguns. There Mr. Kirk had committed two separate burglaries and among the items taken were a shotgun from each residence that were subsequently modified. (*Id.* at pp. 59-60.) The *Kirk* Court addressed the question of whether Mr. Kirk could be *convicted* of multiple violations of the weapons statute, since the statutory language, proscribing possession of "any" such weapon, was facially ambiguous as to the unit of prosecution. The Court observed that the use of the word "any" had long been construed as ambiguously indicting the singular or the plural. (*Id.* at pp. 62-65.) Thus, the Court resolved the ambiguity in Mr. Kirk's failure and

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[7] "When [Mr. Kirk] committed his crimes in 1985, subdivision (a) of Section 12020 provided: "Any person ... who ... possesses ... *any* instrument or weapon of the kind commonly known as a ... sawed-off shotgun ... is guilty of a felony, ..." (Stats. 1984, ch. 1414, § 3, pp. 4972-4973, italics added; Stats. 1984, ch. 1562, § 1.1, p. 5499.)" (*People v. Kirk, supra,* at p. 60.)

found that he could only be convicted of one violation of the section. (*Id.* at pp. 65-66.)

The Legislature responded and amended Section 12001 that defines numerous terms for Title 2, *Control of Deadly Weapons*. As noted by the Appellate Court below:

> In 1994, the Legislature stated: "The amendments to Section 12001 of the Penal Code made by this act adding subdivisions (k) and (*l*) thereto are intended to overrule the holding in *People v. Kirk*[, *supra,*] insofar as that decision held that the use of the term "any" in a weapons statute means that multiple weapons possessed at the same time constitutes the same violation. It is the further intent of the Legislature in enacting this act that where multiple weapons are made, imported, transferred, received, or possessed, each weapon shall constitute a separate and distinct violation." (Legis. Counsel's Dig., Sen. Bill No. 37, 5 Stats. 1994 (1993-1994 1st Ex. Sess.) ch. 32, § 5, pp. 8657-8658; see hist. notes, 51D West's Ann. Pen. Code (2008 Supp.) foll. § 12001, p. 4.) (Slip. opn., p. 9, fn. 4.)

The Appellate Court's reliance on the above amendment does not dictate the conclusion the court reached below. *Kirk* addressed multiple *convictions*, not multiple punishments. The above amendment too addresses multiple *convictions* and not multiple punishments. The gravitas driving the Legislative amendment was the inherent dangerousness itself of each of the weapons encompassed by Section 12020, subdivision (a), (including the sawed-off shotgun the subject in *Kirk*) that would naturally be increased with each additional weapon. In the instant case, that was not the case. Here the gravitas was merely appellant's status as a felon; it had nothing to do with the nature or even number of the weapons themselves.

Had the Legislature intended to remove the applicability of Section 654 in the context of Penal Code Part 4, Title 2, it could have done so; but it did not. (See *People v. Kirk, supra,* at p. 62, citing *Bell v. United States* (1954) 349 U.S. 81, 82-83 [99 L.Ed. 905, 75 S.Ct. 620].)

The Appellate Court below added:

> There is also factual support for the trial court's determination that defendant's possession of each firearm had a "separate and individual purpose." Each weapon had its own ammunition and, therefore, each could serve a different purpose or be used to commit a different crime. The fact that the firearms were of different makes and calibers indicated that defendant harbored separate objectives for possessing each one. ¶ ... The trial court could infer that defendant was stockpiling different firearms for a variety of future uses. (Slip opn., pp. 9-10.)

What objectives? It is respectfully submitted that saying it does not make it so. Shotguns have different firing patterns and ranges than rifles; different calibers have differing stopping power. None of this changes the fact that the gravitas of the offense is the status of their possessor, not that the individual firearms had different firing characteristics.

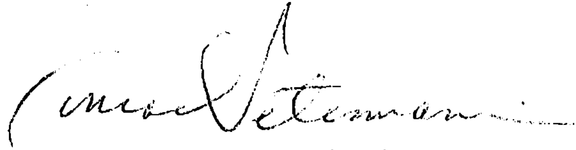
By the Appellate Court's formulation, since four of the weapons were shotguns and five were rifles, then seven *sentences* could not be imposed, but only two. Certainly one *sentence* had to have been stayed since two of the weapons were .22 caliber Marling rifles. Or, two *sentences* had to have been stayed since three of the weapons were .12 gauge shotguns. It is again respectfully submitted, that the Appellate Court's omission to address these differences evidences that they even they did not take their reasoning seriously.

Moreover, there was just absolutely no evidence introduced to shed any light on for what purpose any of the weapons were possessed. The reasoning employed below simply does not consider that it is appellant's status that is at the core of these offenses, not the weapons themselves, whatever their caliber and whatever their number.

CONCLUSION

For the foregoing reasons, appellant's sentence should be reversed and the case remanded for sentencing.

Dated: August 18, 2008



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CASE NUMBER: S163273

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address.

On the date executed below, I served the *APPELLANT'S OPENING BRIEF* by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed as follows:

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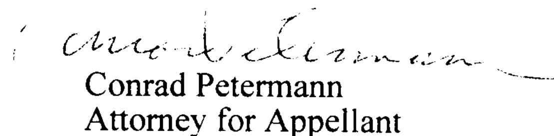
I declare under penalty of perjury that the foregoing is true and correct. Executed on August 18, 2008, at Ojai, California.



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