

NAME JAVIER MALDONADO PEREZ

PRISON NUMBER V-86534

CURRENT ADDRESS OR PLACE OF CONFINEMENT CSP-COR 3C01-237  
P.O. Box 3471  
Corcoran, CA 93212

CITY, STATE, ZIP CODE

**FILED**  
OCT 13 2011  
CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY *[Signature]* DEPUTY

2254	<input checked="" type="checkbox"/>	1983	<input type="checkbox"/>
<b>FILING FEE PAID</b>			
Yes	<input type="checkbox"/>	No	<input checked="" type="checkbox"/>
<b>IFP MOTION FILED</b>			
Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>
<b>COPIES SENT TO</b>			
Court	<input checked="" type="checkbox"/>	ProSe	<input type="checkbox"/>

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

JAVIER MALDONADO PEREZ  
(FULL NAME OF PETITIONER)  
**PETITIONER**

v.

C. GIBSON, Warden(A) et al...  
(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED  
PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE  
CALIFORNIA DEPARTMENT OF CORRECTIONS])

**RESPONDENT**  
and

The Attorney General of the State of  
California, Additional Respondent.

Civil No **11 CV 2385 IEG WMc**  
(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

**"EVIDENTIARY HEARING"  
[REQUESTED]**

**PETITION FOR WRIT OF HABEAS CORPUS**

UNDER 28 U.S.C. § 2254  
BY A PERSON IN STATE CUSTODY

- Name and location of the court that entered the judgment of conviction under attack:  
Riverside County Superior Court  
46-200 Oasis St.  
Indio, CA 92201
- Date of judgment of conviction: 6/2/05
- Trial court case number of the judgment of conviction being challenged:  
INC 076996 & INF 046895
- Length of sentence: 73 years & 8 months - Life

5. Sentence start date and projected release date: 6/2/05 - Parole hearing 2078
6. Offense(s) for which you were convicted or pleaded guilty (all counts): Penal Code §206, P.C. §273d(a) w/ P.C. §12022.7, P.C. §273a(a), P.C §261(a)(2), P.C. §667.6(d), P.C. §273(a)(b).
7. What was your plea? (CHECK ONE)
- (a) Not guilty
  - (b) Guilty
  - (c) Nolo contendere
8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
- (a) Jury
  - (b) Judge only
9. Did you testify at the trial?
- Yes  No

**DIRECT APPEAL**

10. Did you appeal from the judgment of conviction in the California Court of Appeal?
- Yes  No
11. If you appealed in the California Court of Appeal, answer the following:
- (a) Result: Affirmed
  - (b) Date of result (if known): 9/29/2006
  - (c) Case number and citation (if known): E038393
  - (d) Names of Judges participating in case (if known): King, J.; Hollenhorst; Richli
  - (e) Grounds raised on direct appeal:
 

Denied Unanimous Verdict	Ineffective Assit. Of Counsel
Insufficient Evidence	Judicial Error
Improper Jury Instruction	
Improper Sentence	
12. If you sought further direct review of the decision on appeal by the California Supreme Court (e.g., a Petition for Review), please answer the following:
- (a) Result: Denied
  - (b) Date of result (if known): U/K
  - (c) Case number and citation (if known): U/K
  - (d) Grounds raised: Same as above

13. If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to that petition:

- (a) Result: Denied Review
- (b) Date of result (if known): U/K
- (c) Case number and citation (if known): U/K
  
- (d) Grounds raised: Same as above

#### COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Superior Court?

Yes  No

15. If your answer to #14 was "Yes," give the following information:

- (a) California Superior Court Case Number (if known):
- (b) Nature of proceeding: Habeas Corpus
  
- (c) Grounds raised: Ineffective Assistance of Counsel  
Judicial Error  
Improper Jury Instruction  
Insufficient Evidence  
Denied Unanimous Verdict  
Improper Sentence
- (d) Did you receive an evidentiary hearing on your petition, application or motion?  
 Yes  No
- (e) Result: Denied
- (f) Date of result (if known):

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Court of Appeal?

Yes  No

17. If your answer to #16 was "Yes," give the following information:

(a) California Court of Appeal Case Number (if known):

(b) Nature of proceeding: **Habeas Corpus**

(c) Names of Judges participating in case (if known)

(d) Grounds raised: **Same As Above**

(e) Did you receive an evidentiary hearing on your petition, application or motion?

Yes  No

(f) Result: **Denied**

(g) Date of result (if known):

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Supreme Court?

Yes  No

19. If your answer to #18 was "Yes," give the following information:

(a) California Supreme Court Case Number (if known):

(b) Nature of proceeding: **Habeas Corpus, de novo review**

(c) Grounds raised: **Same As Above**

(d) Did you receive an evidentiary hearing on your petition, application or motion?

Yes  No

(e) Result: **Post Card Denial**

(f) Date of result (if known):

20. If you did *not* file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the California Supreme Court, containing the grounds raised in this federal Petition, explain briefly why you did not:

**COLLATERAL REVIEW IN FEDERAL COURT**

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?  
 Yes  No (If "YES" SKIP TO #22)
- (a) If no, in what federal court was the prior action filed?  
(i) What was the prior case number?  
(ii) Was the prior action (CHECK ONE):  
    Denied on the merits?   
    Dismissed for procedural reasons?   
(iii) Date of decision:
- (b) Were any of the issues in this current petition also raised in the prior federal petition?  
 Yes  No
- (c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?  
 Yes  No

---

**CAUTION:**

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present *all* other grounds to the California Supreme Court before raising them in your federal Petition.
  - **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
  - **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.
-

GROUNDS FOR RELIEF

22. State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground. (e.g. what happened during the state proceedings that you contend resulted in a violation of the constitution, law or treaties of the United States.) If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

- (a) **GROUND ONE**: UNANIMOUS JURY VERDICT FAILED TO BE REACHED DENYING PETITIONER'S DUE PROCESS RIGHTS AS GUARANTEED BY THE 6th AMENDMENT OF THE UNITED STATES CONSTITUTION.

Supporting FACTS: In the absence of the CALJIC 17.01 instruction, the jury could have believed that it was proper to return a guilty verdict as to the torture count, even though some of the jurors thought the elements had been satisfied only with respect to the kicks, and the remaining jurors thought the elements of torture had been satisfied only with respect to the shocks. Petitioner asserts that failure to give CALJIC 17.01 instruction is **REVERSIBLE ERROR** and warrants Federal Review since the State Court's rulings are contrary to established Supreme Court decisions and violative of Petitioner's Constitutional Rights.

[PLEASE SEE ATTACHMENTS - pp.25-37]

[SEPERATED UNDER "D"]  
[ALL GROUNDS]

Did you raise GROUND ONE in the California Supreme Court?

Yes  No.

If yes, answer the following:

- (1) Nature of proceeding (i.e., petition for review, habeas petition): Habeas Petition
- (2) Case number or citation: U/A
- (3) Result (attach a copy of the court's opinion or order if available):

- (b) **GROUND TWO:** EVIDENCE OF TORTURE IN THE PEOPLE'S ALLEGATION WAS INSUFFICIENT TO WARRANT A REASONABLE, CREDIBLE, DETERMINATION OF THIS FACT. THIS DENIED PETITIONER HIS DUE PROCESS RIGHT'S AS GUARANTEED BY THE 5th AMNENDMENT OF THE UNITED STATES CONSTITUTION.

**Supporting FACTS:** A petition for federal habeas corpus relief may challenge the sufficiency of the evidence supporting a verdict. (See: Jackson v. Virginia (1979) 443 U.S. 307, 61 L Ed 2d 560, 99 S Ct 2781; Vachon v. New Hampshire (1974) 414 U.S. 478, 38 L Ed 2d 666, 94 S Ct. 664; Thompson v. Louisville (1960) 362 U.S. 199, 4 L Ed 2d 654, 80 S Ct. 624.

While it is true that the determination of whether a victim suffered great bodily injury is a question of fact for a trier of fact to decide, (See People v. Escobar, 3Cal. 4th 740, 750 (1992), the evidence supporting the trier of fact's decision must still be substantial. (See People v. Martinez, 171 Cal. App. 3d 727 (1985). As such this constitutes **REVERSIBLE ERROR** warranting Federal Review since the State's Court's rulings are contrary to established Supreme Court decisions and violative of Petitioner's Constitutional Rights.

[PLEASE SEE ATTACHMENTS - pp. 37-47]

Did you raise GROUND TWO in the California Supreme Court?

Yes  No.

If yes, answer the following:

- (1) Nature of proceeding (i.e., petition for review, habeas petition): Habeas Petition
- (2) Case number or citation: N/A
- (3) Result (attach a copy of the court's opinion or order if available): N/A

(c) **GROUND THREE:** THE COURT FAILED TO PROPERLY INSTRUCT THE JURY ON THE ELEMENTS OF TORTURE. The Federal Constitution's 5th Amendment Right To Due Process And Sixth Amendment Right To Jury Trial, Made Applicable To The States Through The 14th Amendment, Require The Supporting FACTS: Prosecution To Prove To A Jury Beyond A Reasonable Doubt Every Element Of A Crime.

Therefore, a trial court's failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction unless it can be shown "beyond a reasonable doubt" that the error did not contribute to the jury's verdict. (See People v. Sengpadychith, 26 Cal. 4th 316, 324-25 (2001), People v. Davis, 36 Cal. 4th 510, 567-68 (2005).

[PLEASE SEE ATTACHMENTS pp.47-49]

Did you raise GROUND THREE in the California Supreme Court?

Yes  No.

If yes, answer the following:

- (1) Nature of proceeding (i.e., petition for review, habeas petition): habeas Petition
- (2) Case number or citation: N/A
- (3) Result (attach a copy of the court's opinion or order if available): N/A



- (d) **GROUND FOUR:** PETITIONER'S SENTENCE AND MANNER IT WAS DETERMINED VIOLATED HIS DUE PROCESS RIGHT'S UNDER THE 6th & 14th AMENDMENTS. (SEE: McMillan v. Pennsylvania (1986) 477 U.S. 79, 91 L Ed 2d 67, 106 S Ct 2411; Brothers v. Dowdle (9th Cir 1987) 817 F2d 1388.)

**Supporting FACTS:**

If, arguendo, the defendant's torture conviction was proper, the Court's sentence improperly imposed consecutive sentences as to the child beating and child neglect counts. P.C. §654(a) "...precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one act within the meaning of Penal Code §654(a)..."

[PLEASE SEE pp. 49-51]  
[IN ATTACHMENTS]

.....  
GROUND FIVE: INEFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING PETITIONER'S 6th AMENDMENT RIGHT TO HAVE ASSISTANCE OF COUNSEL. United States v. Cronin, 466 U.S. 648 654-55 (1984); Colman v. Alabama, 399 U.S. 1, 9-10 (1970).

[PLEASE SEE ATTACHMENT AT pp. 51-54]

.....  
GROUND SIX: JOINDER OF TWO INDICTMENTS DEPRIVED PETITIONER OF FUNDAMENTALLY FAIR TRIAL BECAUSE EVIDENCE WAS NOT CROSS-ADMISSIBLE AND PROSECUTOR REPEATEDLY URGED JURY TO CONSIDER SIMILARITY OF CRIMES. (SEE: BEAN v. CALDERON (9th Cir 1998) 163 F3d 1073; CORBETT V. BORDENKIRCHER (6th Cir 1980) 615 F2d 722, 724.

[PLEASE SEE ATTACHMENT AT pp. 54-64]

.....  
**Did you raise GROUND FOUR in the California Supreme Court? & 5 - 6 Grounds.**

Yes  No.

If yes, answer the following:

- (1) Nature of proceeding (i.e., petition for review, habeas petition): Habeas Petition
- (2) Case number or citation: N/A
- (3) Result (attach a copy of the court's opinion or order if available): N/A

23. Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?

Yes  No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court:

(b) Case Number:

(c) Date action filed:

(d) Nature of proceeding:

(e) Name(s) of judges (if known):

(f) Grounds raised:

(g) Did you receive an evidentiary hearing on your petition, application or motion?

Yes  No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing ..... Riverside public defender

(b) At arraignment and plea ..... Same

(c) At trial ..... Same

(d) At sentencing ..... Same

(e) On appeal ..... Wallin & Klarich Attorneys

(f) In any post-conviction proceeding. None

(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes  No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes  No

(a) If so, give name and location of court that imposed sentence to be served in the future:

(b) Give date and length of the future sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes  No N/A

### 28. Consent to Magistrate Judge Jurisdiction.

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to proceed before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of final judgment, by indicating your consent below.

Choose only one of the following:

Plaintiff consents to magistrate judge jurisdiction as set forth above.

OR

Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case.

29. Date you are mailing (or handing to a correctional officer) this Petition to this court:  
September 30, 2011

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

---

SIGNATURE OF ATTORNEY (IF ANY)

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

9/30/11

Perez Javier.

(DATE)

SIGNATURE OF PETITIONER

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	I
TABLE OF AUTHORITIES .....	III
PROCEDURAL HISTORY .....	1
JURISDICTIONAL STATEMENT.....	5
FACTUAL HISTORY .....	5
ARGUMENT .....	25
I. DEFENDANT WAS DENIED HIS RIGHT TO A UNANIMOUS JURY VERDICT AS TO THE ALLEGATION THAT HE WAS GUILTY OF TORTURE.....	25
II. THE PEOPLE PRESENTED INSUFFICIENT EVIDENCE IN SUPPORT OF THEIR ALLEGATION THAT THE DEFENDANT WAS GUILTY OF TORTURE. ....	37
A. THE KICKS THAT LUIS DESCRIBED DO NOT CONSTITUTE TORTURE.....	38
B. LUIS' DESCRIPTION OF BEING STRUCK WITH A METAL STICK IS NOT SUFFICIENT TO CONSTITUTE TORTURE. ....	40
C. THE BLOWS WITH THE WET ROPE ARE INSUFFICIENT TO CONSTITUTE TORTURE.....	40
D. THE BLOW WITH THE WRENCH WAS INSUFFICIENT TO CONSTITUTE TORTURE.....	42
E. THROWING THE BICYCLE FRAME WAS INSUFFICIENT TO CONSTITUTE TORTURE.....	43
F. THE SHOCKS WERE INSUFFICIENT TO CONSTITUTE TORTURE.....	44

G. FORCING LUIS TO SLEEP IN THE DOGHOUSE DID NOT  
CONSTITUTE TORTURE..... 46

III. THE COURT FAILED TO PROPERLY INSTRUCT THE  
JURY ON THE ELEMENTS OF TORTURE..... 47

IV. IF, ARGUENDO, THE DEFENDANT'S TORTURE  
CONVICTION WAS PROPER, THE LOWER COURT'S  
SENTENCE IMPROPERLY IMPOSED CONSECUTIVE  
SENTENCES AS TO THE CHILD BEATING AND CHILD  
NEGLECT COUNTS. .... 49

V. DEFENDANT'S TRIAL COUNSEL RENDERED  
INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE ASKED  
THE JURY TO RETURN A VERDICT OF GUILTY AS TO TWO  
OF THE COUNTS CHARGED AGAINST DEFENDANT. .... 51

VI. THE TRIAL COURT ERRED IN JOINING THE SEXUAL  
ABUSE COUNTS RELATING TO YESENIA WITH THE CHILD  
ABUSE COUNTS RELATING TO MARTIN AND LUIS..... 54

A. THE SEXUAL ABUSE AND CHILD ABUSE COUNTS WERE  
NOT "CONNECTED TOGETHER IN THEIR COMMISSION." .... 55

B. THE DEFENDANT WAS PREJUDICED BY JOINDER OF  
THE SEXUAL ABUSE AND CHILD ABUSE OFFENSES..... 58

CONCLUSION..... 64

DECLARATION PURSUANT TO CAL. R. CT. R. 33(B)(1)..... 66

DECLARATION OF SERVICE ..... 67

## TABLE OF AUTHORITIES

### CASES

<u>Chapman v. California</u> , 386 U.S. 18 (1967) .....	35
<u>Coleman v. Alabama</u> , 399 U.S. 1 (1970).....	51
<u>Glasser v. United States</u> , 315 U.S. 60 (1942) .....	38
<u>People v. Arias</u> , 13 Cal.4th 92 (1996).....	58
<u>People v. Cleveland</u> , 87 Cal.App.4th 263 (2001).....	50
<u>People v. Crow</u> , 28 Cal.App.4th 440 (1994) .....	25
<u>People v. Cudjo</u> , 6 Cal.4th 585 (1993) .....	52
<u>People v. Davenport</u> , 41 Cal.3d 247 (1985) .....	39
<u>People v. Davis</u> , 8 Cal.App.4th 28 (1992).....	26
<u>People v. Deletto</u> , 147 Cal.App.3d 458 (1983).....	36
<u>People v. Escobar</u> , 3 Cal.4th 740 (1992) .....	41
<u>People v. Ewing</u> , 72 Cal.App.3d 714 (1977).....	31, 32
<u>People v. Grant</u> , 113 Cal.App.4th 579 (2003).....	59
<u>People v. Hale</u> , 75 Cal.App.4th 94 (1999).....	42
<u>People v. Hester</u> , 22 Cal.4th 290 (2000).....	50
<u>People v. Laport</u> , 189 Cal.App.3d 281 (1987).....	26
<u>People v. Martinez</u> , 171 Cal.App.3d 727 (1985).....	41, 43
<u>People v. Mendoza</u> , 24 Cal.4th 130 (2000) .....	59
<u>People v. Pearson</u> , 42 Cal.3d 351 (1986).....	50

<u>People v. Pre</u> , 117 Cal.App.4th 413 (2004).....	28, 38, 39
<u>People v. Reed</u> , 78 Cal.App.4th 274 (2000).....	37
<u>People v. Ruiz</u> , 44 Cal.3d 589 (1988).....	58
<u>People v. Sandana</u> , 233 Cal.App.2d 24 (1965).....	56
<u>People v. Sengpadychith</u> , 26 Cal.4th 316 (2001).....	47
<u>People v. Thompson</u> , 36 Cal.App.4th 843 (1995).....	26, 31
<u>People v. Valdez</u> , 32 Cal.4th 73 (2004).....	55
<u>People v. Vargas</u> , 91 Cal.App.4th 506 (2001).....	34
<u>People v. Walker</u> , 47 Cal.3d 605 (1988).....	58
<u>People v. Watson</u> , 46 Cal.2d 818 (1956).....	34, 35
<u>People v. Welch</u> , 20 Cal.4th 701 (1999).....	52, 67
<u>People v. Wolfe</u> , 114 Cal.App.4th 117 (2003).....	34, 35
<u>Price v. Superior Court</u> , 25 Cal.4th 1046 (2001).....	58, 59
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	52
<u>United States v. Cronin</u> , 466 U.S. 648 (1984).....	51
<u>United States v. Gomez-Lepe</u> , 207 F.3d 623 (9th Cir. 2000).....	25
<u>United States v. Perez</u> , 280 F.3d 318 (3d Cir. 2002).....	1, 38, 65, 67
<u>Walker v. Superior Court</u> , 37 Cal.App.3d 938 (1974).....	56
<u>Williams v. Superior Court</u> , 36 Cal.3d 441 (1984).....	58
<b>STATUTES</b>	
Penal Code § 1118.1 .....	3



Penal Code § 12022.7 .....	passim
Penal Code § 1237(a).....	5
Penal Code § 206 .....	passim
Penal Code § 261(a)(2) .....	2, 3, 4
Penal Code § 261.5(a).....	4
Penal Code § 261.5(d).....	2, 3
Penal Code § 273a.....	passim
Penal Code § 273a(a).....	passim
Penal Code § 273a(b).....	4, 50, 54
Penal Code § 273d(a).....	1, 3, 4
Penal Code § 654(a).....	49, 50
Penal Code § 954 .....	55, 58
Penal Code § 995 .....	2, 46
<b>OTHER AUTHORITIES</b>	
CALJIC 17.01 .....	passim
CALJIC 17.20 .....	48
CALJIC 9.90 .....	47, 48
<b>CONSTITUTIONAL PROVISIONS</b>	
Cal. Const. Art. I, § 15 .....	51
Cal. Const. Art. I, § 16 .....	25
U.S. Const. amend. VI .....	51

## PROCEDURAL HISTORY

On March 10, 2004, a three count felony complaint was filed in the Riverside County Superior Court charging Appellant-Defendant<sup>1</sup>, Javier Perez, with two counts of child endangerment, in violation of Penal Code § 273a(a) count of child beating, in violation of Penal Code § 273d(a). Clerk's Transcript at 1-2<sup>2</sup>.

On March 24, 2004, the People filed an amended felony complaint, charging Defendant with one count of torture, in violation of Penal Code § 206, and with three counts of child endangerment, in violation of Penal Code § 273a(a), and four counts of child beating, in violation of Penal Code § 273d(a). CT 5-6. The Defendant entered a plea of not guilty as to all counts alleged in the amended complaint, and a preliminary examination was held with respect to said complaint on June 14, 2004. CT 4, 18. At the conclusion of the preliminary hearing, the magistrate found sufficient cause to hold the Defendant to answer to the charges in the complaint. CT 19.

On June 28, 2004, a felony information was filed, charging Defendant with one count of torture, in violation of Penal Code § 206, and with three counts of child endangerment, in violation of Penal Code § 273a(a), and four counts of child beating, in violation of Penal Code § 273d(a), and, as to one of the child beating counts, a special allegation that Defendant inflicted great bodily injury on another, contrary to Penal Code § 12022.7. CT 127-130. The information also alleged seventeen

---

<sup>1</sup> Appellant-Defendant Javier Perez shall hereinafter be referred to simply as Defendant.

<sup>2</sup> References to the Clerk's Transcript shall hereinafter be referred to as "CT" and references to the Reporter's transcript shall hereinafter be referred to as "RT".

counts of rape, in violation of Penal Code § 261(a)(2), and sixteen counts of statutory rape, in violation of Penal Code § 261.5(d). CT 130-140<sup>3</sup>.

On July 14, 2004, a separate information was filed charging the Defendant with twelve counts of rape, in violation of Penal Code § 261(a)(2), and with twenty counts of statutory rape, in violation of Penal Code § 261.5(d). CT 149-159. On August 31, 2004, the People filed a motion to consolidate the statutory rape and rape case with the torture and child abuse case. CT 162-167. On September 14, 2004, the Defendant, through counsel, filed papers in opposition to the People's motion to consolidate. CT 170-179. On September 17, 2004, argument was held on the motion. CT 182-192. The Court granted the People's motion and the matters were consolidated. CT 180.

On October 26, 2004, the Defendant, through counsel, filed a motion, pursuant to Penal Code § 995, to set aside the torture charge in the information. CT 201-212. The People filed their opposition to said motion on November 1, 2004. CT 213-218. The Court denied the motion on November 19, 2004. CT 222, RT 1-7.

On January 25, 2005, the People filed a first amended information, charging Defendant with one count of torture, in violation of Penal Code § 206, three counts of child neglect, in violation of Penal

---

<sup>3</sup> It is worth noting here that the torture and child abuse counts related to Defendant's step-sons, and that the rape and statutory rape allegations related to the Defendant's step-daughter. With respect to the torture and child abuse counts, the Defendant was initially charged with his wife, Alma Salazar. However, the information that the Defendant was ultimately tried upon did not list the Defendant's spouse as a co-defendant. CT 271, 300. As will be discussed further hereinafter, the rape and statutory rape allegations were also listed in a separate information and were the subject of a motion to consolidate. CT 162.

Code § 273a(a), and four counts of child beating, in violation of Penal Code § 273d(a), and, as to one of the child beating counts, the People alleged that the Defendant caused great bodily injury pursuant to Penal Code § 12022.7. This amended information also contained sixteen counts of rape, in violation of Penal Code § 261(a)(2), and sixteen counts statutory rape, in violation of Penal Code 261.4(d). CT 271-281. The Defendant entered pleas of not guilty as to all counts and denied the special allegation. CT 268.

The People rested their case-in-chief on February 8, 2005. CT 292. At the end of the People's case-in-chief, the Defendant, through counsel, moved to dismiss certain counts pursuant to Penal Code § 1118.1. CT 292. The Court granted the motion with respect to certain of the rape counts for insufficient evidence, and the Court granted the motion as to all of the statutory rape counts because the People failed to introduce any evidence of the Defendant's age at the time of the acts. RT 589.

The People moved to amend the information to allege violations of Penal Code § 261.5(a) in the place of the Penal Code § 261.5(d) charges that had been alleged. CT 292-293. The Court directed the People to file an amended information. CT 292-293. The People filed a second amended information on February 10, 2005. CT 300-307. The second amended information charged one count of torture, in violation of Penal Code § 206, three counts of child neglect, in violation of Penal Code § 273a(a), and four counts of child beating, in violation of Penal Code § 273d(a), and, as to one of the child beating counts, the People alleged that the Defendant caused great bodily injury, contrary to Penal Code § 12022.7. In addition, the said second amended information charged Defendant with ten counts of rape, in violation of Penal Code §

261(a)(2), and ten counts of misdemeanor statutory rape, in violation of Penal Code § 261.5(a).

On February 15, 2005, the jury returned verdicts of guilty as to all of the offenses charged, save for one count of a violation of Penal Code § 273a(a), and, as to that count, the jury found the Defendant guilty of the lesser included offense of a misdemeanor violation of Penal Code § 273a(b). CT 311-314<sup>4</sup>

Probation was denied in the instant matter. On June 2, 2005, the Defendant was sentenced to life in prison with the possibility of parole on the Penal Code § 206 torture charge. The Court selected the one count of a violation of Penal Code § 273d(a) with the Penal Code § 12022.7 special allegation as the principal count, and sentenced Defendant to the mid term of four years on the substantive count, and three years consecutive as to the special allegation. As to the remaining three counts of Penal Code § 273d(a), and two counts of Penal Code § 273a(a), the Court sentenced the Defendant to one year four months as to each count consecutive to other counts. As to the ten violations of Penal Code § 261(a)(2), the Court imposed the mid term of six years consecutive as to each count pursuant to Penal Code § 667.6(d). As to the misdemeanor violation of Penal Code § 273a(b), the Court imposed one hundred twenty days to run concurrent to the other counts. With respect to the ten Penal Code § 261.5(a) convictions, the Court stayed the sentence on those counts pursuant to Penal Code § 654. RT 891-891, CT 505-510.

---

<sup>4</sup> It should be noted that the page that should be page 314 in the Clerk's Transcript does not have a page number. The page following that page is marked, erroneously, as Clerk's Transcript page 314. The page that does not contain a page number is referred to as Clerk's Transcript page 314.

Thus, the Defendant's aggregate sentence, as imposed by the lower Court, is a term of seventy-three years eight months to life in state prison. CT 505-510, RT 886.

### **JURISDICTIONAL STATEMENT**

Defendant timely filed his notice of appeal as to the judgment and sentence with the Court below on June 22, 2005. CT 511-512. This Court has jurisdiction over this appeal pursuant to Penal Code § 1237(a).

### **FACTUAL HISTORY**

#### **A. The People's Case**

As alluded to hereinabove, the charges against the Defendant related allegations that the Defendant physically abused and neglected his two step-sons, and that the Defendant sexually abused his step-daughter.

##### **1. Alleged Abuse and Neglect as to Luis N.**

Luis N. testified at trial that Defendant is his step-father. RT 69-70. Luis testified that he went to the police in March 2004 because Defendant was hitting him. RT 71. He stated that the week before he went to the police, Defendant forced him to sleep outside in a doghouse that was in the family's yard because he made Defendant angry because he broke a bicycle. RT 73, 80-81. Luis testified that he slept outside for one week and that he was only allowed to wear shorts and that he was given no blankets, pillows, or sleeping bags. RT 77. Luis stated that the doghouse had a cement floor and that the Defendant put dirt in the doghouse and wet the dirt down before sending him into the doghouse. RT 77-78. Luis stated that it was cold in the doghouse and that he could not sleep while in there because of the cold and that it was raining for two nights and the doghouse leaked due to there being cracks in the roof.

RT 80-82. Luis stated that he was not given any breakfast or dinner for the week he was in the doghouse, and that he ate lunch at school "sometimes" because the Defendant had taken his lunch card and that Luis was only able to get lunch when the lunchroom worker at his school allowed him to. RT 85, 88, 95. He testified that his mother was at work and that she did not give him dinner either and that Defendant would not allow her to bring him dinner. RT 89-90. Luis testified that Defendant threatened to hit him if he told anyone that he was made to sleep in the doghouse. RT 91.

Luis stated that Defendant would hit him and that Defendant was always angry when he hit Luis. RT 103-104.

Luis testified that, in February or March 2004, that Defendant kicked him. RT 97, 102. He testified that Defendant was wearing pointy boots and that Defendant kicked him in the leg near his knee six times or less. RT 98-99. Luis stated that the kicks were hard and that he fell to the ground. RT 99. His leg became swollen and he could not walk very well and that his leg still hurt in June 2004 at the time of the preliminary examination. RT 99-100, 102.

Luis testified that he had a non-permanent scar on his back between the shoulder blades and that he knew that Defendant had hit him with a stick and he does not know if the stick caused the scar and he did not remember if Defendant hit him between the shoulder blades with the stick. RT 104-105. Luis did not remember what the stick looked like or what the stick felt like. RT 106-107. Luis' memory was refreshed with his testimony at the preliminary examination where he testified that the stick was a long black metal stick and that he had trouble walking for two days after being struck with the stick. RT 108.

Luis also said that, in or around the end of February 2004, Defendant hit him in his back with a wet rope. RT 110-112. Luis stated that Defendant hit him because Luis took a chain off his bicycle. RT 112-113. Luis stated that Defendant struck him in the back with the rope and that his back hurt for approximately one hour after being struck, and that his back hurt for days thereafter if the area was touched. RT 114.

Luis also testified that a "while" before he went to the police in March 2004, that Defendant hit him on the right side of his head with a wrench. RT 116-117. He testified that he was bleeding a little bit and that the Defendant cleaned the injury up. RT 117. He testified that the Defendant was mad when he struck Luis with the wrench. RT 117.

Luis also testified that, on approximately February 25, 2004, the Defendant threw a bicycle frame at Luis and that Luis was struck on the arm by the bicycle frame, which hurt Luis and caused him pain. RT 119-120. Luis testified that, at this time, Defendant was angry because bicycles were broken. RT 119.

Luis also testified that he was fixing bicycles in the backyard with his brother, Martin when Defendant called Luis into the garage and closed the garage door. RT 120-121. Once Luis was in the garage, Defendant became angry and tied Luis up with rope. RT 122-123. Luis was tied up to a rack next to a truck in the garage. RT 124. Luis' hands and feet were tied up so that he could not move. RT 124-125. Before he tied Luis up, Defendant instructed Luis to remove his shoes and socks. RT 125. Defendant then used a "Baskin-Robbins" bucket to put water on Luis' feet and on the cement floor under his feet. RT 126. After Luis was secured, Defendant tied wires around each of Luis' wrists, with one wire being tied to each wrist. RT 127-128. Wires were then hooked up to an electric outlet. RT 128. Luis testified that there were two wires that were



protruding from a hole in the truck and that the hole is where the truck's radio antenna should have been, but that the truck did not have a radio antenna. RT 132-133. Luis testified that, when Defendant would touch the two wires together, Luis would receive a shock. RT 132-133. He testified that, when he was shocked, he would "shiver" and move and that the shocks hurt "everywhere." RT 133. Luis testified that Defendant would hold the wires together a little bit each time. RT 134. Defendant would ask Luis questions about who broke Defendant's screwdriver and Luis would respond each time that he did not know who did it and Defendant would shock Luis. RT 134. Luis went on to state that he could not scream because the Defendant put tape over Luis' mouth. RT 135. Luis stated that the Defendant wrapped the tape around Luis' head two times. RT 136. When confronted with the question as to how Luis could answer the question as to who broke Defendant's screwdriver with his mouth taped shut, Luis stated that the Defendant asked Luis "yes or no" questions where Luis could nod or shake his head to answer those questions, but that Defendant would take the tape off when he was asking Luis the questions about the screwdriver. RT 136. Luis stated that he was shocked approximately four to six times by Defendant. RT 137. Luis stated that, on one of those shocks, Defendant shocked him for a long time and that this shock hurt more. RT 137. Luis said that Defendant then untied him and told him to get out of the garage. RT 138. Luis stated that he had trouble walking after the shocks and that it hurt him to walk, and that he had red marks on his wrists. RT 138-139, 141. Luis said that he could not walk well and that it hurt for him to walk for the rest of that day. RT 140-141. Luis stated that the day following the shocks, that he felt "regular" and that the red marks were also gone from his wrists the next day. RT 141.

On cross-examination, Luis admitted that he would have fun with Defendant and that Defendant went hiking with Luis and went to Disneyland with Luis. RT 147. Luis admitted that he was glad when Defendant was gone from the house because he could play more, and that, when Defendant was home, Defendant made Luis clean his room, and the rest of the house and the yard. RT 151-152, 165-166. Luis also admitted that Defendant would get upset with Luis when Luis' grades were bad because Defendant wanted Luis to do well in school and get good marks. RT 150-151. Luis also admitted that, when he had the "lump" on his leg that he said Defendant caused by kicking him, that Luis still participated in physical education at school, although Luis said that he "sagged" his shorts so no one could see the lump and that he tried not to participate in physical education class. RT 158-160. Luis further conceded that, while he testified in court that the wires were hooked up to the electrical outlet, he told the investigating officer that the wires were hooked up to the car battery in addition to being plugged into the outlet. RT 168. Luis also admitted that, while he testified in court that he was able to shower each day in the house while he was living in the doghouse, he told the police that, for the first two days he was out in the doghouse, that Defendant made him clean himself with the garden hose. RT 196-197.

The People called Carlos B. to testify. Carlos testified that he was a friend and playmate of Luis' and that the two would play basketball after school and "a lot" on weekends. RT 216-217. He testified that, one day, while he was on his way to the bus stop to go to school, he saw a big man standing near Luis with a silver metal pipe in his hands. He said he heard Luis say something in Spanish and then he heard a "thud" like someone falling down and he saw the man standing near Luis. RT 218-

220, 222. Carlos admitted that he never saw the man strike Luis and that he never saw the man to be able to identify the man. RT 218, 224.

The People called Deputy Robert Burbach, of the Riverside County Sheriff's Department to testify. Mr. Burbach testified that he works at La Quinta middle school and that he was working there on March 8, 2004 when Luis came in and asked to speak with him. RT 225-226. Luis asked Mr. Burbach if it was "okay for a step-dad to beat a kid." RT 227. Mr. Burbach testified that he interviewed Luis briefly and that he did not go into a great deal of detail, since the case would be investigated further. RT 228-229. Mr. Burbach testified he saw a bump the size of an egg on Luis' leg and that Luis said that he had been kicked in his leg by his step-father. RT 229-230. Mr. Burbach also testified that Luis told him that Luis had been forced to sleep in a doghouse, hit with a chain, and that he had been hooked up to wires and the wires were hooked to a battery and Luis was shocked. RT 230. Mr. Burbach was certain that Luis said that the wires were hooked to a battery and not to an electric outlet. RT 236-237. Mr. Burbach acknowledged that he signed a form that had been filled out by a worker with Child Protective Services and that the form had inaccurately reflected that Luis said that, when he was shocked, Luis was standing in the shower. RT 232-233. Mr. Burbach acknowledged that, although he signed the form under penalty of perjury, he did not read the form as carefully as he should have because he was concerned that Luis had not eaten, and he wanted to make sure that Luis was given food. RT 238-240, 251.

The People also called Adam Weissman, MD, to testify. Dr. Weissman testified that he is an emergency room physician and that he treated Luis on March 8, 2004. RT 254-255. Dr. Weissman testified that Luis had pain in his lower leg and pain in the back of his head. RT 257.

He testified that Luis was poorly nourished and that he had swelling in the back of his head, and a mild muscle spasm in his neck, multiple contusions on his arms, and old scars on his hands, tenderness on his left pinkie, abrasions on his knees, and a moderate to severe fungal infection on his feet, and a large contusion to his left knee area below the knee. RT 257-265.

Dr. Weissman testified that it was dangerous to be in a cold environment for a long period of time, especially with inadequate clothing, and that long exposure to cold can lead to hypothermia, frostbite, and fungal infections. RT 265. Dr. Weissman testified that Luis was very thin, and this led him to diagnose Luis as being undernourished. RT 268. Dr. Weissman testified that he concluded that Luis was abused and/or neglected. RT 269.

On cross-examination, Dr. Weissman conceded that his diagnosis was based in part on Luis' statements to him. RT 271. He further conceded that the contusion on Luis' leg could have been caused by Luis falling off of a bicycle. RT 271. He further conceded that he did have blood work done on Luis, and that he found that Luis had a mildly elevated blood urea nitrogen (b.u.n.) level, and that this was indicative of mild dehydration, which can be caused, for instance, by playing a round of golf in the summertime. RT 272. Dr. Weissman further stated that there was nothing in any of the blood work that was done that would indicate that Luis was malnourished. RT 272. Dr. Weissman further conceded that he examined Luis' scalp and touched the scalp but no scalp scarring was documented, although he testified that he might have missed the scalp scars. RT 275. Dr. Weissman further testified that he has treated people who have been shocked with electricity and that electric shocks from wall outlets can cause burns to the skin. RT 281. Dr.

Weissman conceded that Luis did not have any burns on his wrists. RT 282. Dr. Weissman further testified that he ordered that x-rays be taken of various parts of Luis' body and that a CAT scan be done on Luis' head and that the x-rays and CAT scan did not reveal any evidence of fractures on Luis' body, or any subdural hematoma to Luis' head, although, as to the subdural hematoma, Dr. Weissman testified that a blow to the head does not always result in a subdural hematoma and that a CAT scan cannot always rule out that a patient has suffered a trauma to the head. RT 281-283, 285.

The People called Joe Quintero to testify. He testified that he is a detective with the Riverside County Sheriff's Department and was assigned to Luis' case. RT 286. He testified that he interviewed Luis on March 8, 2004 and again on March 16, 2004. RT 287, 289. He testified that he sat down with Luis and a calendar and that Luis told him, roughly, when Luis alleged that the Defendant did the various acts described above. RT 289-296. Mr. Quintero testified that, according to Luis, he was struck by the metal bar on February 1, 2004. RT 293. Mr. Quintero further testified that Luis told him that he was hit with the wrench on about February 15, 2004, and that the bicycle frame was thrown at Luis on or about February 25, 2004. RT 295-296. Mr. Quintero testified that Luis told him that he was struck in the back with the rope on or about February 29, 2004. RT 294-295. Finally, Mr. Quintero testified that Luis told him that he was kicked by Defendant on or about March 1, 2004, and that he was forced to sleep in the doghouse between March 1, 2004 and March 8, 2004. RT 294.

The People also called Larry Bojkovsky to testify. Mr. Bojkovsky testified that he has been an electrical contractor since 1976. RT 406. He testified that he was shown a drawing by the prosecution that Luis had

apparently made during the preliminary examination and that the drawing was consistent with what Mr. Bojkovsky referred to as a switch circuit, and that if implemented in the way indicated in the drawing, it would shock someone. RT 411. Mr. Bojkovsky was shown a drawing that Luis made during trial of how he alleges Defendant shocked him and, although this drawing was "rougher" than the earlier drawing, Mr. Bojkovsky still concluded that, if implemented in the way depicted in the drawing, the result could still shock someone. RT 411-412.

On cross-examination, Mr. Bojkovsky testified that, if wires were connected from a house outlet to a car battery, the result would either be that the car battery would explode or that the house's circuit breaker would be tripped. RT 420.

2. Alleged Abuse and Neglect as to Martin N.

Martin N. was called by the People and testified that he is Luis N.'s brother and that Defendant is his step-father. RT 301. He testified that he did not have "that many" problems with Defendant but that the Defendant did order him and Luis to sleep in the doghouse. RT 302-304. He testified that he was often called upon to help Defendant and that he liked to help Defendant. RT 304. Martin testified that Defendant became angry and said that he and Luis had to take off their cloths, except their shorts, and go outside to the doghouse. RT 304. Martin testified that it was cold outside and that he was not given any blankets or sleeping bags. RT 307. Martin said that, at the time he was told to stay in the doghouse, the Defendant put dirt in the doghouse and wet the dirt down. RT 310. Martin testified that it was cold and wet in the doghouse and that the roof leaked when it rained and he could not sleep. RT 311. He testified that he and his brother Luis were allowed into the house in the morning to shower and get dressed for school. RT 314. Martin stated that

he was able to eat breakfast and lunch at school, but, while he was in the doghouse, he did not receive any dinner. RT 316, 318. Martin further testified that, during the time he and Luis were in the doghouse, he asked the Defendant for a "second chance" and the Defendant permitted him to return to the house for two days. RT 314-315. Martin also stated that Defendant hit him with a wet rope and that Luis was hit more often than he was. RT 323-324. Martin did indicate that remembers a time that Luis fell off of his bicycle and received a cut on his leg. RT 327.

On cross-examination, Martin admitted that Defendant would take the family on outings and do fun things with them. RT 335. Martin acknowledged that, when Defendant was not at home, he and Luis had more fun and that, when Defendant was at home, it was permissible to play sometimes, but that when they would help Defendant work on cars, that was typically an all day job. RT 332, 337. Martin indicated that Luis was involved in a lot of fights and that Luis did get hurt as a result of playing and the like. RT 333-334. Martin further stated that neither he nor Luis was ever cut with the rope when Defendant struck them and that he was struck a few times in the low back and buttocks area with the rope. RT 335-336. Martin did state, on redirect examination, that being hit with the rope caused him pain for half a day to a day and that the pain would then go away. RT 343. Martin admitted that they had access to food and were well-fed when they were not living in the doghouse, and that he was never hit by Defendant with a metal pipe, and was never shocked with electricity by Defendant. RT 339, 342.

3. Other Evidence of Defendant's Alleged Treatment of his Step-Sons.

The People called Kim Loutsenhizer to testify. Ms. Loutsenhizer testified that she was a neighbor of Defendants and has seen Defendant

and his two sons outside their home. RT 346-347. She testified that the boys were always working outside the home and that she would observe them outside at 2-3AM sometimes. RT 347. She testified that she never saw the boys playing or riding bicycles and that their yard and cars were always spotless. RT 347-348. She testified that she remembered a time when Defendant's dogs were in the front yard for a period of days and that the dogs were not in the back yard, where they usually were. RT 351. She testified that she does not speak Spanish and she did not believe Defendant spoke English, but that she tried to confront Defendant about his dogs being out in the front yard. RT 351. She testified that Defendant ignored her and that Defendant was spraying water into the doghouse area. RT 351.

On cross-examination, Ms. Loutsenhizer conceded that she never saw Defendant hit the boys, and never heard Defendant yell at the boys. RT 353. She further admitted that she never heard the children scream as though they had been hit. RT 353.

The People then called Jose Juan Rodriguez as a witness. Mr. Rodriguez testified that he was a neighbor of Defendant's and knows Defendant well. RT 354-355. He testified that he knew that the boys would work outside late and that he saw them outside as late as 11PM and that was not unusual. RT 356. He testified that he never saw the Defendant discipline the children and that he never told the police that he was bothered by the way Defendant would treat the children and that he never tried to distance himself from Defendant as a result of the way Defendant treated the children. RT 357.

On cross-examination, Mr. Rodriguez testified that he still wanted to be friends with Defendant. RT 359. He testified that he would get together with his family and Defendant's family from time-to-time and



that he never saw Defendant do anything he considered "wrong" to the children and that he believed that Defendant acted appropriately with the children. RT 360.

On re-direct examination, he testified that he never called Child Protective Services on the Defendant, but that he knows that a call was made. RT 362-363. Mr. Rodriguez testified that he believed that Child Protective Services investigated Defendant and that their investigation revealed that everything was "okay." RT 362.

Robert Nagles was called by the People. He testified that he is a detective with the Riverside County Sheriff's Department and that he went to the Defendant's home on March 8, 2004. RT 365, 368. He testified that there were three bedrooms – the boys' room, a bedroom used by the two girls, and the master bedroom. RT 369-370. He testified that the girls' room was neat, but there was some disarray that gave an indication that it was "lived-in." RT 369. He testified that the boys' room appeared as though it was not "lived-in" like the girls' room. He stated that the boys' room was set up as if for a military inspection. RT 371. He testified that the master bedroom appeared "lived-in" as well. RT 370. He testified that he interviewed Luis in the garage and that Luis demonstrated the method that he said Defendant used to "shock" him. RT 378. He testified that he looked at the truck in the garage and that the truck had no battery, but that there were batteries in the garage that could fit the truck. RT 374-375. He also testified that, when he went through the garage and cupboards, that he found "Hot Wheels" cars and other toys. RT 382. He testified that the boys did not know that the toys were in the garage and cupboards, but that they knew that the toys were theirs. RT 382.

Mr. Nagles testified on cross-examination that he never checked any of the batteries in the garage to see if they contained a charge. RT 395. He conceded that the toys he found could be for younger children, but he still concluded that the boys were being deprived of access to the toys because they were kept in areas not accessible to them. RT 396-397. Mr. Nagles admitted that the boys had a television and board games in their room. RT 398. He further conceded that he searched the home and found that there was plenty of food in the home. RT 398.

Yesenia N.<sup>5</sup> was called as a witness by the People. She testified that Defendant is her step-father. RT 435-436. She testified that, before March 8, 2004, her two brothers Martin N. and Luis N. were staying outside in the doghouse and that they were staying out there for two to three weeks because they made Defendant mad. RT 437. She testified that she snuck her brothers food once or twice. RT 439. She further testified that Defendant would have her brothers working outside until late into the night – until after bedtime. RT 440. She testified that Defendant would hit both Martin and Luis, but would hit Luis more often. RT 447. She testified that, on one occasion, she saw Defendant hit Luis in the head with metal scissors. RT 448. She further testified that, on one occasion, Defendant was in the garage with Luis and Defendant came out and got a paint bucket, returned to the garage, and turned up the music loud, and, about one half hour later, Luis emerged from the

---

<sup>5</sup> Yesenia N. not only gave testimony about acts of alleged abuse by Defendant against her, but was also called upon to describe the Defendant's treatment of her two brothers, Martin N. and Luis N. Aspects of her testimony concerning Defendant's treatment of her two brothers will be summarized under this heading, and aspects of her testimony concerning allegations of abuse by Defendant against her personally will be summarized infra.

garage limping and hunched over and favoring his right leg. RT 450-452.

Esmerelda Nicasio was called as a witness by the People as well. She testified that her siblings were Yesenia and Martin and Luis, and that she did not have a good relationship with Defendant. RT 551-553. She testified that Defendant treated her brothers badly and that Defendant did nothing about it. RT 554. She testified that her brothers were always outside helping Defendant and that they could not come inside and watch television. RT 557-558. She stated that Defendant would hit her brothers with his hand or a belt if they got into trouble and that her brothers were afraid of Defendant. RT 559. She stated that Defendant never sexually abused her. RT 561. She stated, though, on one occasion, Defendant walked into her room late at night and sat on her bed and asked her what she was doing and she told Defendant to leave, and he left and was laughing as he left the room. RT 567. Ms. Nicasio testified that she told her mother about this and that Defendant was mad when he was confronted by her mother and that, thereafter, Defendant stayed out of her room. RT 568.

Ms. Nicasio admitted on cross-examination that she stole money from a store where she worked and that, at the time she was testifying, she was waiting to see if the Riverside County District Attorney would prosecute her. RT 569. She stated that she did not expect anything from the District Attorney in exchange for her testimony. RT 569. Ms. Nicasio testified that in February 2004 she slept in the same bedroom as Yesenia and that the two shared secrets with one another and that Yesenia appeared "normal." RT 574-575. Ms. Nicasio further testified that Luis fell off of his bicycle on one occasion and that she noticed that he was injured badly from the fall. RT 576.

4. Alleged Sexual Abuse of Yesenia N.

Yesenia N. testified that Defendant went to Mexico after Thanksgiving 2003 and that she was fifteen years old then. RT 454. Approximately two to three days to one week before he left, Yesenia said that something "bad" happened. RT 455. She stated that, on that day, when her brothers were outside and while her mother and sister were at work, Defendant came into the room where she was watching television. RT 455. Defendant told her to lie down and she remembered that his voice was not loud but a "hard" angry voice. RT 456. She complied with Defendant's demand and Defendant then touched her breasts under her cloths. RT 457. Defendant also touched her vagina with his hand – making "skin-to-skin" contact. RT 459. Defendant said nothing but she told Defendant to stop and tried to push Defendant away, but Defendant ignored her and persisted. RT 459. Yesenia testified that she then told Defendant that she heard someone at the door and it was then the Defendant stopped. RT 460. Yesenia testified that Defendant told her not to tell anyone or he would do "something" to her. RT 461.

Yesenia testified that something "bad" happened to her in the First week of February 2004. RT 462. She testified that, at that time, her brothers were outside and her mother and sister were at work. RT 463. She was watching television in her mother's room and that Defendant came in and closed the blinds and the door and proceeded to take his clothes off. RT 463. Yesenia stated that she tried to leave the room, but Defendant would not let her go and grabbed her hand to stop her from leaving. RT 464. Defendant pushed her down onto the bed and ignored her when she said "no." RT 464. She said she lay down on the bed because Defendant's tone of voice sounded "mad" and she thought he might do something bad if she did not comply. RT 465-466. Yesenia

testified that, while Defendant was on top of her, he pulled her pants and panties off and that she tried to keep him from doing this by pulling her pants up. RT 467-468. She testified that Defendant touched her all over, including her breasts and vagina, and then he inserted his penis into her vagina and that the weight of his body held her down. RT 469-470. Yesenia said that she told him to stop, but that Defendant did not listen to her. RT 470. She also testified that Defendant told her that he would do something to her if she ever told anyone. RT 471.

Yesenia testified that a similar incident happened again during the first week of February 2004<sup>6</sup>. RT 472. She testified that, once again, Defendant came into the room and closed the door and blinds. RT 473. She tried to leave the room and he ignored her when she told him to move out of the way so she could leave. RT 473. Yesenia testified that Defendant inserted his penis into her vagina again and she told him to stop and he did not stop and that Defendant is too strong for her to fight. RT 474. Eventually, she told Defendant that she heard the telephone ringing or that someone was at the door and Defendant got mad and went into the garage. RT 474-475.

Yesenia testified that Defendant performed similar acts on her three times during the second week of February 2004. RT 475. Yesenia stated that the acts were performed one time in her bedroom, and two times in her mother's bedroom. RT 475-476. As to the one incident that she stated occurred in her bedroom, Defendant walked into her room and got on top of her, and he ignored her when she told him no. RT 476-477.

---

<sup>6</sup> Although Yesenia testified initially that the Defendant performed similar acts on her "two or three" times during the first week of February 2004, RT 472, she later clarified her testimony and stated that the Defendant performed such acts upon her two times during that first week of February 2004. RT 475.

She stated that Defendant grabbed her hands and pulled off her cloths, and she tried to push Defendant off of her, but Defendant was too strong and heavy for her. RT 478-479. Yesenia testified that, even though she was telling Defendant to stop, he put his penis into her vagina. RT 480. As to the two times in her mother's bedroom, Yesenia testified that, on each occasion, Defendant would come into the room and close the door and blinds. RT 486-487. She stated that, on each occasion, Defendant would put his penis in her vagina, and she would say no to Defendant and try to fight back. RT 488-489.

Yesenia testified that similar incidents occurred three times during the third week of February 2004. RT 490. She stated that, during that week, on each occasion, the Defendant would insert his penis into her vagina and she would tell him no and he would not listen to her. RT 491.

Yesenia testified that, during the fourth week of February 2004, the Defendant forced her to have sex with him one time. RT 492. She testified that this happened in the living room of the family's house. RT 493. Yesenia testified that, at that time, Defendant closed all the blinds and locked all the doors in the house. RT 493. She said that Defendant grabbed her hand and took her into the living room and she sat down on the couch. RT 496. Defendant was telling her to lie down and she did not want to lie down. RT 496. Defendant then pushed her down onto the couch and took off his cloths and removed her pajama bottoms and panties. RT 497. Yesenia testified that he then put his penis into her vagina. RT 498. She told him that she did not want him to have sex with her, and after that, he did not do anything. RT 498.

Yesenia further testified that, during the week of February 29, 2004, the Defendant performed similar acts upon her. RT 499. Yesenia testified that Defendant forced her to have sex with him and that he put

his penis into her vagina, and that she told him to stop and he did not listen and she tried to get away and struggle with Defendant but Defendant she could not do so because of Defendant's body strength. RT 500-501.

Yesenia stated that she did not tell the first police officer she spoke to about these incidents because he was a man and she did not feel comfortable discussing these incidents with him, and she further stated that, although her foster care mother is a woman, Yesenia did not tell her about the incidents either because Yesenia did not want her to know about the incidents. RT 501-504.

On cross-examination, Yesenia admitted that she never liked Defendant. RT 504. She further conceded that, after these incidents happened, Defendant would take her to visit her mother at work or to visit a friend in Indio and that Defendant would take her places in his truck. RT 506, 539-540. Additionally, Yesenia admitted that she told police that Defendant put his penis into her vagina a lot in November 2003, but that she told the Court that he never put his penis into her vagina in November 2003. RT 508. She admitted that what she told police was not true and that Defendant only touched her one time in November 2003. RT 508-509. Yesenia further conceded that she told the police that everything was "okay" with her and Defendant and that Defendant buys her things and takes her shopping. RT 518-519. She explained that she said these things because she was afraid of Defendant and was uncertain if he would get out of jail. RT 519-520. Yesenia admitted that she never told her sister or any social workers about the incidents with Defendant. RT 531.

Yesenia further admitted on cross-examination that she told police that she never saw bruises on Luis' leg because he always wears pants.

RT 520. She acknowledged that Luis wore shorts when he was in the doghouse, but, Yesenia explained that she never saw Luis up close when he was in the doghouse. RT 520. She further conceded that one of the police officers told her what Luis told him about being shocked with electricity by Defendant. RT 535.

Yesenia further admitted that she hates the Defendant and that he is strict and she liked it when he was not at home, and that she wants to live with her biological father. RT 523, 524, 543.

B. The Defense Case

At the commencement of the Defendant's case-in-chief, Defendant played a videotaped interview with Yesenia that was conducted on March 8, 2004. CT 317-338. During the interview, Yesenia stated that she does not pay attention to whether Defendant hits her brothers because she is always taking on the telephone or watching TV. CT 320. She further admitted to officers during the interview that Defendant is never mean to her and that Defendant lets her do more than her mother does. CT 321. She also told officers that she does not know if Luis has a lump on his leg. CT 322-323. She did tell officers, though, that her brothers are always outside helping Defendant and that Defendant will not let them eat and that she sneaks them food. CT 326-329.

The Defendant called Gloria Kelly to testify. She is a social worker for Child Protective Services and she interviewed Yesenia and Yesenia denied that she was ever physically abused by Defendant, and, furthermore, Yesenia never told Ms. Kelly that she was sexually abused. RT 599-603.

The Defendant also called Kathleen Halkin to testify. Ms. Halkin testified that she is a social worker and that she interviewed Yesenia in



September 2004 and that Yesenia told her that her mother knew that Yesenia was being sexually abused and that her mother did nothing about it. RT 608-610. She testified that she did not know how the mother supposedly knew about the alleged sexual abuse. RT 610.

The Defense also called Michelle Brintle to testify. She testified that she is a marriage and family therapist and that she also interviewed Yesenia. RT 665-666. She testified that she interviewed Yesenia in private in March 2004 at Yesenia's shelter home and that Yesenia never told Ms. Brintle that she was sexually abused. RT 666-667.

The Defense called Alma Maldonado to testify. Ms. Maldonado testified that she is Defendant's husband. RT 612. She testified that Defendant treated the children well and that he taught them things and made them laugh. RT 619. She said that, starting in 1997, the children's attitudes began to change. RT 621. She testified that Defendant would discipline Luis by talking to him and by hitting him with his hand and a belt but that no bruises or bleeding ever resulted. RT 622. She testified that Yesenia never told her in December 2003 or January 2004 that Defendant made her take her cloths off in November 2003. RT 627. She testified that she would check on the boys during the time they were in the doghouse. RT 638. She stated that it was chilly at night but that the boys had cloths and jackets to keep them warm. RT 638-639. She said that, although it was chilly and drizzling sometimes, it was dry in the doghouse and she would check on the boys every two hours when they were in the doghouse. RT 640. She admitted that she plead guilty to violating Penal Code § 273a(a) in connection with this case. RT 641.

The Defendant testified on his own behalf<sup>7</sup>. He testified that he did discipline the children from time-to-time by striking them with a belt. RT 673. Defendant denied ever hitting the children with a rope. RT 674. He also denied ever depriving the children of food, and denied ever kicking Luis, or hitting Luis with a pipe. RT 680, 682, 684. Defendant testified that he never shocked Luis with electricity. RT 689-690. Defendant admitted making the boys sleep in the doghouse, but that the boys had cloths and shoes. RT 679. Defendant denied ever putting mud in the doghouse. RT 679. Defendant stated that he broke all of the bones in his right hand in a work related accident and that he cannot grip things well with his right hand and that the children help him with tasks because of his injured hand. RT 685-686. Defendant testified that he never raped or inappropriately touched Yesenia. RT 690.

### **ARGUMENT**

#### **I. DEFENDANT WAS DENIED HIS RIGHT TO A UNANIMOUS JURY VERDICT AS TO THE ALLEGEATION THAT HE WAS GUILTY OF TORTURE.**

It is well-established that a defendant in a criminal action has a right to a unanimous jury verdict. See Cal. Const. Art. I, § 16, United States v. Gomez-Lepe, 207 F.3d 623, 630 (9th Cir. 2000)(recognizing that right to unanimous jury verdict in criminal case is rooted in the Sixth Amendment to the US Constitution), People v. Crow, 28 Cal.App.4th 440 (1994). What this means is that all twelve jurors must agree that the defendant is responsible for one discreet criminal event.

---

<sup>7</sup> Prior to taking the witness stand, Defendant called a friend of his, who testified that Defendant had a good character with respect to his truthfulness and that, in the friend's opinion, Defendant is a truthful person. RT 656-657.

People v. Davis, 8 Cal.App.4th 28, 41 (1992). Where the information charges one specific criminal act, and the evidence shows more than one such unlawful act, the prosecution must select one specific act to rely upon to attempt to prove the charge, or the jury must be instructed that it must agree, beyond a reasonable doubt, that the defendant committed the same specific criminal act. People v. Thompson, 36 Cal.App.4th 843, 850 (1995). See also People v. Laport, 189 Cal.App.3d 281, 282-83 (1987)(court has sua sponte duty to instruct jury on CALJIC 17.01 when defendant is charged with one count of a crime and facts show that defendant could have committed more than one count of that crime).

In the instant matter, the People initially charged the Defendant with torture, and alleged that the crime of torture occurred on March 1, 2004. CT 127. Thereafter, the People filed an amended information and alleged that the crime of torture was committed "on or about February 1, 2004 through March 8, 2004." CT 271. This same allegation was contained in the second amended information in this matter, and this information was the one that was submitted to the jury. CT 300.

At the conclusion of all evidence, the parties went into the judge's chambers and discussed issues surrounding how the jury should be charged, and those discussions were not reported. See RT 742. After the jury had been deliberating for some time, it submitted a note to the court that it "[could] not match [the alleged criminal] acts with [the] counts." RT 858. The note stated that the jury wanted the "specific action [that] resulted in Count 1, Count 2, et cetera, parentheses, all counts." RT 858. After this note had been sent out by the jury, the following exchange occurred between the Deputy District Attorney and the trial Court:

THE COURT: I don't think they can make any sense of this, because of the way it's plead.

It's not plead – the court was confused when we discussed this matter in chambers with respect to the torture count, what action applied. And, initially you requested instructions that all conduct applied.

[DA]: Right. And we took that out, and I indicated it was just the shocking<sup>8</sup>.

THE COURT: Yes. But it doesn't say any of that on the information.

RT 859.

After discussions between counsel and the trial Court, it was decided by the parties and the Court that the Court should refer the jury back to the jury instructions and remind them that, if they needed to have any witness' testimony re-read, the jury could have that done. RT 866. This is the procedure that the Court followed and the jury was sent back

---

<sup>8</sup> It is worth noting here that the People had requested the Court give CALJIC 17.01, CT 316, which provides:

The defendant is accused of having committed the crime of \_\_\_ [in Count \_\_\_]. The prosecution has introduced evidence tending to prove that there is more than one [act] [or] [omission] upon which a conviction [on Count \_\_\_] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of such [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count \_\_\_], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict.

CALJIC 17.01.

Apparently, after the People had purportedly "elected" to proceed on the theory that the Defendant's alleged acts of shocking Luis N. were what constituted the torture, the Court refused to give the jury the CALJIC 17.01 instruction. CT 416.

to the jury room to deliberate. RT 866. The jury returned a verdict of guilty on the torture count. CT 311. It is respectfully asserted that, given the nature of the evidence that was adduced at trial, and given the way that the torture count was plead, and given the way that the Court instructed the jury, and given that the Court did not give the jury the CALJIC 17.01 instruction or a similar instruction, that the Defendant was deprived of his right to a unanimous jury verdict as to the torture count.

Initially, torture, as defined in Penal Code § 206, has two elements, (1) a person inflicted "great bodily injury" on the person of another; and (2) the person inflicting the pain did so with the specific intent of causing cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. People v. Pre, 117 Cal.App.4th 413, 419 (2004).

In reviewing the instant record, it is clear that there were numerous acts that were allegedly perpetrated by the Defendant against Luis N. during the time period between February 1, 2004 and March 8, 2004, and that those acts caused injury to Luis N. Accordingly, it is not possible to determine, from the jury's verdict alone, in the absence of an indication that the jury was given the CALJIC 17.01 instruction or similar instruction, that all twelve jurors agreed as to the specific criminal act that the Defendant allegedly committed in deciding to find Defendant guilty of torture.

On March 1, 2004 it was alleged that Defendant kicked Luis. RT 97, 102, 294. Luis testified that Defendant was wearing pointy boots and that Defendant kicked him in the leg near his knee six times or less. RT 98-99. Luis stated that the kicks were hard and that he fell to the ground. RT 99. His leg became swollen and he could not walk very well and that

his leg still hurt in June 2004 at the time of the preliminary examination. RT 99-100, 102.

It was also alleged that, on February 1, 2004, Defendant had hit Luis with a long black metal stick and that Luis had trouble walking for two days after being struck with the stick, and that Luis had bruising on his back as a result. RT 108, 293.

It was also alleged that, on February 29, 2004, Defendant hit Luis on his back with a wet rope. RT 110-112, 294-295. Luis stated that Defendant hit him because Luis took a chain off his bicycle. RT 112-113. Luis stated that Defendant struck him in the back with the rope and that his back hurt for approximately one hour after being struck, and that his back hurt for days thereafter if the area was touched. RT 114.

It was also alleged that that, on February 15, 2004, Defendant hit Luis on the right side of his head with a wrench. RT 116-117, 295. Luis testified that he was bleeding a little bit and that the Defendant cleaned the injury up. RT 117. He testified that the Defendant was mad when he struck Luis with the wrench. RT 117.

It was also alleged that, on approximately February 25, 2004, the Defendant threw a bicycle frame at Luis and that Luis was struck on the arm by the bicycle frame, which hurt Luis and caused him pain and that he was bleeding a little. RT 119-120, 296. Luis testified that, at this time, Defendant was angry because bicycles were broken. RT 119.

It was also alleged that, on February 25, 2004, that Defendant applied repeated electric shocks to Luis N. RT 291. Luis testified that he was fixing bicycles in the backyard with his brother, Martin when Defendant called Luis into the garage and closed the garage door. RT 120-121. Once Luis was in the garage, Defendant became angry and tied Luis up with rope. RT 122-123. Luis was tied up to a rack next to a truck

in the garage. RT 124. Luis' hands and feet were tied up so that he could not move. RT 124-125. Before he tied Luis up, Defendant instructed Luis to remove his shoes and socks. RT 125. Defendant then used a "Baskin-Robbins" bucket to put water on Luis' feet and on the cement floor under his feet. RT 126. After Luis was secured, Defendant tied wires around each of Luis' wrists, with one wire being tied to each wrist. RT 127-128. Wires were then hooked up to an electric outlet. RT 128. Luis testified that there were two wires that were protruding from a hole in the truck and that the hole is where the truck's radio antenna should have been, but that the truck did not have a radio antenna. RT 132-133. Luis testified that, when Defendant would touch the two wires together, Luis would receive a shock. RT 132-133. He testified that, when he was shocked, he would "shiver" and move and that the shocks hurt "everywhere." RT 133. Luis testified that Defendant would hold the wires together a little bit each time. RT 134. Defendant would ask Luis questions about who broke Defendant's screwdriver and Luis would respond each time that he did not know who did it and Defendant would shock Luis. RT 134. Luis went on to state that he could not scream because the Defendant put tape over Luis' mouth. RT 135. Luis stated that the Defendant wrapped the tape around Luis' head two times. RT 136. When confronted with the question as to how Luis could answer the question as to who broke Defendant's screwdriver with his mouth taped shut, Luis stated that the Defendant asked Luis "yes or no" questions where Luis could nod or shake his head to answer those questions, but that Defendant would take the tape off when he was asking Luis the questions about the screwdriver. RT 136. Luis stated that he was shocked approximately four to six times by Defendant. RT 137. Luis stated that, on one of those shocks, Defendant shocked him for a long

time and that this shock hurt more. RT 137. Luis said that Defendant then untied him and told him to get out of the garage. RT 138. Luis stated that he had trouble walking after the shocks and that it hurt him to walk, and that he had red marks on his wrists. RT 138-139, 141. Luis said that he could not walk well and that it hurt for him to walk for the rest of that day. RT 140-141. Luis stated that the day following the shocks, that he felt "regular" and that the red marks were also gone from his wrists the next day. RT 141.

Here, the People alleged that the Defendant committed the crime of torture on or about February 1, 2004 through March 8, 2004, and the Court also advised the jury that this was what it had to decide – i.e., whether the Defendant committed the crime of torture "on or about February 1, 2004 through March 8, 2004." CT 300, 425, RT 826. Since several criminal acts were allegedly committed by the Defendant against Luis N. during the relevant time period charged in this count in the information, and since the jury was not given CALJIC 17.01, it cannot be said that the jury's verdict reflects the unanimous opinion of all twelve jurors that they were all relying upon the same criminal act to find the Defendant guilty of torture.

It is worth noting here that there is an exception to the general rule that the jury must be given the CALJIC 17.01. The instruction is not required where the offense itself consists of a continuous course of criminal conduct. People v. Thompson, 36 Cal.App.4th 843, 851 (1995). It has been held that crimes involving child abuse can fall within this category. Id. People v. Ewing, 72 Cal.App.3d 714, 717 (1977) provides the rationale for this rule in child abuse cases, and, when that rationale is reviewed, it becomes clear that this rationale is not applicable in the



instant matter, and that the offenses charged herein do not fall within the continuous course of criminal conduct exception.

The Ewing Court noted that Penal Code § 273a is a statute that punishes acts generally classified as child abuse and that, in such prosecutions, evidence of "battered child syndrome" is admissible and that this syndrome is denoted by a series of repeated injuries inflicted over a span of time and that the nature, severity, and number of such injuries are sufficient to preclude an inference of accident. *Id.* The Ewing Court went on to note that, although Penal Code § 273a can be violated by a single act, more commonly it covers repetitive or continuous criminal conduct. *Id.*

In the instant matter, it is clear that the People proceeded under a theory that the Defendant committed several distinct acts of child beating. This is reflected not only in the prosecutor's closing argument, but also in the Court's copy of the information, which contains the lower Court's notations that, for example, Count II related to the "dog cage" and Count IV related to the "bike." CT 425-427. Given that the acts charged herein are discreet and individual alleged criminal acts, it cannot be said that the instant matter involved a continuing course of criminal conduct such as would eliminate the need for giving the jury the CALJIC 17.01 instruction.

Furthermore, the prosecutor's argument to the jury eliminates the inference that the jury would have understood that an "election" was made to proceed on the theory that the "shocking" was what was alleged to have constituted the torture in the instant matter. Here, it is interesting to note that the prosecutor, during her arguments to the jury, made numerous references to the word "sadistic." This word is contained in the statutory definition of torture in Penal Code § 206, and that the word

“sadistic” does not appear in any of the other statutes the Defendant was charged with violating.

For example, after referring to Luis as a “scared, beaten-down, submissive, scarred, bruised, shocked, malnourished little boy,” the prosecutor went on to discuss how Luis testified that he had been beaten with belts, and a braided rope, and how he was shocked. RT 752. The prosecutor then went on to discuss how both Luis N. and Martin N. were forced to sleep in a dog cage and deprived of food, shelter, and clothing. RT 752. The prosecutor then argued “[i]s that discipline? No. It’s abuse. It’s abuse that these kids suffered at the hands of this defendant. This cold defendant, who wanted to control them, **for sadistic purpose.** Not any reasonable reason for discipline. **For sadistic purposes** these kids were abused.” RT 752 (emphasis added).

Approximately fifteen pages of transcript later, the prosecutor pointed out how a neighbor was called to testify and how the neighbor testified that the boys were subservient to the Defendant. The prosecutor then argued that “[t]he defendant was the man of the house. He had control over that entire family. The entire family. But especially those boys, especially those boys. Especially the target of his rage, his **sadistic behavior:** Luis. For whatever reason, the defendant targeted him for his **sadistic behavior.**” RT 766-767 (emphasis added).

A few pages later, the prosecutor went on to argue how the Defendant’s “weapons of choice,” including the ropes, and the metal bar, were all kept in the garage. RT 769-770. The prosecutor then went on to argue how the Defendant took the boys’ lunch cards and tooth brushes and cloths and that those items were found in the Defendant’s bedroom in a drawer. The prosecutor then went on to argue how the Defendant’s

alleged acts of depriving the boys of necessities was “sadistic behavior.” RT 770 (emphasis added).

These lines of argument give a clear indication that, although the prosecutor purported to “elect” that the criminal act in support of the torture count was the alleged shocking of Luis N., she was arguing to the jury that all of the acts testified to by Luis N. and Martin N. were “sadistic behavior” by Defendant or that the acts were done for a “sadistic purpose.” These arguments tracked the statutory language in Penal Code § 206, and sent the clear message to the jury that they were not confined to the alleged “shocking” in determining whether the Defendant was guilty of torture. Accordingly, it cannot be said that all twelve jurors necessarily agreed that Defendant committed the same criminal act that constituted torture.

On the issue of the appropriate standard of review, counsel’s research on this point reveals that there is a split of authority on the issue. Compare People v. Wolfe, 114 Cal.App.4th 117 (2003), with, People v. Vargas, 91 Cal.App.4th 506 (2001).

In Vargas, the Sixth District held that the appropriate standard of review on an appeal from a judgment where the trial court failed to give the jury a unanimity instruction was whether it was reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Id. at 562, citing People v. Watson, 46 Cal.2d 818, 836 (1956).

In Wolfe, this Court found that the appropriate standard of review was the standard announced by the United States Supreme Court in Chapman and that the issue was whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on evidence establishing the requisite elements of the crime independently of the

force of the misinstruction. Id. at 188, citing Chapman v. California, 386 U.S. 18 (1967). This Court reasoned that, once California had conferred upon a criminal defendant the right to jury unanimity, the federal Constitution therefore demands that each juror be convinced of the defendant's guilt beyond a reasonable doubt. Wolfe, 114 Cal.App.4th at 187. This Court further noted that where a jury is allowed to convict a defendant even if all twelve jurors do not agree that the defendant is guilty of one criminal event, that the prosecution's burden of proof is thereby lowered, and that lowering the prosecution's burden of proof in such a manner violates federal Constitutional law. Id.

We submit that this Court's decision in Wolfe sets forth the correct standard of review in this case, and that this Court should apply the Chapman standard here. We further submit that, even if this Court elects to depart from its previous decision in Wolfe that the Chapman standard applies, and decides to apply the Watson standard, we assert that the lower Court's error was not harmless error.

As noted hereinabove, the People had intended to proceed on the theory that the torture count was supported by all of the acts testified to by Luis N., with the exception of the doghouse incident, which the People indicated they did not intend to proceed on with respect to the torture charge, RT 4-5, and the information had charged the torture count as occurring between February 1, 2004 and March 8, 2004. The People departed from this theory and purported to elect to proceed on the theory that the "torture" was the shocking of Luis N. However, they failed to amend the information to reflect this election, and the lower Court read the torture count as having occurred between February 1, 2004 and March 8, 2004. Not only did Luis N. testify to numerous criminal acts perpetrated against him by Defendant, but the prosecutor, during her

closing argument, on several occasions, tracked the distinct statutory language in the torture statute and related that language back to incidents that had nothing to do with the shocking of Luis N. Accordingly, it cannot be said that all twelve jurors were convinced beyond a reasonable doubt that the same act constituted torture. As the Court stated in People v. Deletto, 147 Cal.App.3d 458 (1983), there are at least two reasons for requiring the giving of CALJIC 17.01 in a case such as this. The first being that some jurors could believe that the defendant committed one act, and some jurors could be convinced that the other act applied. Id. at 471. The second justification for giving CALJIC 17.01 is that it ensures that the jury is aware that all twelve jurors must agree beyond a reasonable doubt on the specific act. Id. at 471-72.

In the instant matter, as noted, several acts could have been used by the jury to support the torture charge, including the shocking, and the kicking, and the striking with the metal pole. Finally, it is of little significance that the jury found the Defendant guilty of "lesser" charges where he was alleged to have committed these acts, since it is not merely the fact that the Defendant performed the acts, but the act was performed with the required specific intent, and that the act resulted in the required great bodily injury required to constitute torture within the meaning of Penal Code § 206. While the jury may have agreed that the Defendant performed the specific acts, such as, by way of example, kicking Luis N. or shocking Luis N., the jury also had to agree that the acts were done with the required specific intent, and that the act resulted in great bodily injury. Under the facts and circumstances of the instant case, it is certainly possible that some of the jurors could have been convinced that, for example, the Defendant harbored the specific intent as to, for example, the shocking, but that the injury was not enough to constitute

great bodily injury, and some of the other jurors could have been convinced that the injury was sufficient with respect to the kicks, but that the evidence was not sufficient to determine that the Defendant had the required specific intent. Thus, in the absence of the CALJIC 17.01 instruction, the jury could have believed that it was proper to return a guilty verdict as to the torture count, even though some of the jurors thought the elements had been satisfied only with respect to the kicks, and the remaining jurors thought the elements of torture had been satisfied only with respect to the shocks. Accordingly, we assert that it cannot be said that the failure to give the CALJIC 17.01 instruction was harmless.

**II. THE PEOPLE PRESENTED INSUFFICIENT EVIDENCE IN SUPPORT OF THEIR ALLEGATION THAT THE DEFENDANT WAS GUILTY OF TORTURE.**

The test for determining, on appeal, whether a verdict is supported by sufficient evidence is well-settled. "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, [the appellate court] must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." People v. Reed, 78 Cal.App.4th 274, 280 (2000)(internal citations and quotations omitted)

"Although [the appellate court] must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the ... jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if

the verdict is supported by substantial evidence, [an appellate court] must accord due deference to the trier of fact and not substitute [its] evaluation of a witness's credibility for that of the fact finder." Id. at 280 (internal citations and quotations omitted). A similar standard of review applies in federal court. Glasser v. United States, 315 U.S. 60, 80 (1942), United States v. Perez, 280 F.3d 318 (3d Cir. 2002).

As noted hereinabove, torture, as defined in Penal Code § 206, has two elements: (1) a person inflicted "great bodily injury," as defined in Penal Code § 12022.7, on the person of another; and (2) the person inflicting the pain did so with the specific intent of causing cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. People v. Pre, 117 Cal.App.4th 413, 419 (2004). We assert that the People presented insufficient evidence in support of the torture count. Since the torture count was alleged as to Luis N. and alleged conduct over a period of time, we will discuss each of the specific alleged acts with respect to Luis N<sup>9</sup>.

A. THE KICKS THAT LUIS DESCRIBED DO NOT CONSTITUTE TORTURE.

Luis testified that, in February or March 2004, that Defendant kicked him. RT 97, 102. He testified that Defendant was wearing pointy boots and that Defendant kicked him in the leg near his knee six times or

---

<sup>9</sup> We assert, though, that, since the People represented to the trial court that they were "electing" to proceed on the theory that the electric shocks were what constituted torture, that the People should be precluded from arguing in this Court that the torture charge can be supported by any acts other than the purported shocking of Luis N. We discuss the other allegations hereinafter in the event that the Court should determine that the other alleged acts can be used to support the torture charge.

less. RT 98-99. Luis stated that the kicks were hard and that he fell to the ground. RT 99. His leg became swollen and he could not walk very well and that his leg still hurt in June 2004 at the time of the preliminary examination. RT 99-100, 102.

In reviewing Luis' testimony with respect to the kicks, while he did testify that the Defendant kicked him repeatedly in the leg, he never gave any testimony as to why the Defendant was kicking him. As the Court noted in People v. Pre, 117 Cal.App.4th 413, 420-21 (2004), although the extent of an injury can be probative of intent, the severity "of a victim's wounds is not necessarily determinative of intent to torture since severe wounds may be inflicted as a result of an explosion of violence or an act of animal fury rather than an intent to inflict pain for revenge, extortion, persuasion, or other sadistic purpose." Id. (internal citations and quotations omitted). In support of this assertion, the Pre Court cited to People v. Davenport, 41 Cal.3d 247, 268 (1985), and noted "that the Supreme Court had reversed convictions based on a torture-murder theory in spite of the extreme gruesomeness of the crime where the evidence showed that the killing resulted from an explosion of violence or an act of animal fury produced when inhibitions were removed by alcohol." Pre, 117 Cal.App.4th at 421 (internal citations and quotations omitted).

Here, the People failed to elicit any testimony from Luis N. with respect to why the Defendant was allegedly kicking him. Luis N. never gave any testimony concerning what was happening before or during the time that the Defendant was allegedly kicking him. While Luis N. testified that Defendant kicked him several times and that Luis N. had pain and swelling on his leg where he was kicked, it cannot be said that



these facts, standing alone, support the conclusion that the Defendant had the requisite intent as required by Penal Code § 206.

B. LUIS' DESCRIPTION OF BEING STRUCK WITH A METAL STICK IS NOT SUFFICIENT TO CONSTITUTE TORTURE.

Luis N. testified that he was struck on the back with a metal stick by the Defendant and that the Defendant was angry at the time. Luis testified that the blow left a mark on his back and that he had trouble walking for two days after the blow.

It is respectfully submitted that this testimony is insufficient to support the torture conviction. While Luis testified that Defendant was mad at the time he struck Luis with the stick, it is asserted that such testimony is insufficient to support the conclusion that the Defendant harbored the required specific intent, and, in fact, tends to support the conclusion that the Defendant's alleged actions were the product of an "explosion of violence" or an "act of animal fury" as opposed to the product of an intent to inflict pain for revenge, extortion, persuasion, or other sadistic purpose as is required to support a torture charge. Accordingly, the blow to the back that Luis testified he suffered is insufficient to support a torture charge.

C. THE BLOWS WITH THE WET ROPE ARE INSUFFICIENT TO CONSTITUTE TORTURE.

Luis also said that, in or around the end of February 2004, Defendant hit him in his back with a wet rope. Luis stated that Defendant hit him because Luis took a chain off his bicycle. Luis stated that Defendant struck him in the back approximately four times with the rope

and that his back hurt for approximately one hour after being struck, and that his back hurt for days thereafter if the area was touched. It is asserted that this testimony is insufficient to demonstrate the Defendant intended to cause Luis "cruel and extreme pain" and, furthermore, that the extent of the injuries, as testified to by Luis, were insufficient to constitute great bodily injury.

Initially, while the blows with the rope, as testified to by Luis, were done in retribution for Luis' having taken the chain off of his bicycle, there is no indication that the blows were inflicted with the intent of inflicting "cruel and extreme" pain upon Luis. While it is certain that the blows were calculated at causing Luis pain, it cannot be said that the pain was "cruel and extreme" within the meaning of Penal Code § 206. While Luis testified that the pain lasted for one hour after the blows, and that the area where the blows were inflicted hurt for four days, Luis never indicated that the blows caused any bleeding, bruising, or broken bones, or that Luis was in any way disabled as a result of the blows, or that he required any medical attention as a result of the blows. Accordingly, it cannot be said, based upon this record, that the Defendant's actions were done with the specific intent of causing Luis "cruel and extreme pain."

Similarly, the injuries testified to here were not sufficient to constitute great bodily injury. While it is true that the determination of whether a victim suffered great bodily injury is a question of fact for a trier of fact to decide, *see People v. Escobar*, 3 Cal.4th 740, 750 (1992), the evidence supporting the trier of fact's decision must still be substantial. *People v. Martinez*, 171 Cal.App.3d 727 (1985).

In *Martinez*, the Court reversed the jury's finding that a robbery victim suffered great bodily injury within the meaning of Penal Code §

12022.7. The evidence revealed that the victim was wearing heavy clothing and that, when the defendant stabbed him in the middle of his back, he suffered a minor laceration type injury and was not taken to the hospital, as were other victims. The Court held that the injury testified to did not amount to a great bodily injury. Id. at 550-51.

While it is true that abrasions, lacerations, and bruising can constitute great bodily injury, People v. Hale, 75 Cal.App.4th 94, 108 (1999); Luis never testified that he received any bodily injury as a result of the blows with the wet rope. Accordingly, we assert that the evidence is insufficient to support the charge that the blows with the wet rope constituted torture.

D. THE BLOW WITH THE WRENCH WAS INSUFFICIENT TO CONSTITUTE TORTURE.

Luis also testified that a "while" before he went to the police in March 2004, that Defendant hit him once on the right side of his head with a wrench. He testified that he was bleeding a little bit and that the Defendant cleaned the injury up. He testified that the Defendant was mad when he struck Luis with the wrench, but that Defendant was not mad while he was cleaning Luis' injury up.

For the reasons set forth hereinabove, it is respectfully asserted that this testimony is insufficient to constitute torture. Initially, there was no testimony as to why the Defendant hit Luis with the wrench, other than the Defendant was angry, which is insufficient to establish the required specific intent to cause "cruel and extreme" pain. Furthermore, Luis testified that there was only one blow and that Defendant was angry when he struck the blow, but that he was not angry thereafter when he was helping to clean Luis' injury. This further demonstrates that the

Defendant's alleged actions were the product of "explosion of violence or an act of animal fury" and not the product of an intent to cause cruel and extreme pain.

Finally, the injury testified to by Luis was not sufficient to constitute great bodily injury. Here, Luis testified that the resulting injury "hurt" and that it was bleeding "a little bit, kind of." RT 117. It is respectfully submitted that this injury is similar to the "minor laceration" injury that was discussed in People v. Martinez, 171 Cal.App.3d 727 (1985), and that the injury was not sufficient to constitute a great bodily injury within the meaning of Penal Code § 12022.7. Luis never stated that he was hospitalized, and never stated that the wound was not able to be effectively treated at home with first aid. Furthermore, the evidence at trial tended to show that the injury resulted in a wound or cut that completely healed as of the time of trial. As such, this injury was not sufficient to constitute great bodily injury.

E. THROWING THE BICYCLE FRAME WAS INSUFFICIENT TO CONSTITUTE TORTURE.

Luis also testified that, on approximately February 25, 2004, the Defendant threw a bicycle frame at Luis and that Luis was struck on the arm by the bicycle frame, which hurt Luis and caused him pain. Luis testified that, at this time, Defendant was angry because bicycles were broken. Luis further indicated that he received an injury to his arm that bled "a little bit." RT 118-119. Although the testimony revealed that the injury healed by the time of trial, it was present at the time that Luis met with the police on March 8, 2004. RT 118-119.

As discussed hereinabove, there was insufficient evidence presented that the Defendant intended to cause Luis "cruel and extreme

pain” based upon the facts testified to here. Additionally, there was insufficient evidence that the Defendant intended to cause Luis any pain other than as a result of an explosion of violence or an act of animal fury rather than an intent to inflict pain for revenge, extortion, persuasion, or other sadistic purpose. This is especially so here, because Luis testified that Defendant was angry because the bicycle was broken, but never indicated that Luis was responsible for breaking the bicycle or that the Defendant thought that Luis was responsible.

Additionally, it is submitted that the injury testified to by Luis was insufficient to constitute great bodily injury. Here, while the injury was visible twelve days after the alleged incident, the injury had healed by the time of trial. Also, all Luis testified to was the fact that he bled “a little bit” as a result of the Defendant’s alleged conduct. Defendant asserts that this testimony is insufficient to constitute great bodily injury within the meaning of Penal Code § 12022.7.

F. THE SHOCKS WERE INSUFFICIENT TO CONSTITUTE TORTURE.

Luis also testified that he was fixing bicycles in the backyard with his brother, Martin when Defendant called Luis into the garage and closed the garage door. Once Luis was in the garage, Defendant became angry and told Luis to remove his socks and shoes. Luis said that Defendant tied Luis’ hands and feet so that he could not move. Defendant then put water on Luis’ feet and on the cement floor under his feet. Luis said that Defendant tied wires around each of Luis’ wrists and that the wires were then hooked up to an electric outlet. Luis testified that, when Defendant would touch the two wires together, Luis would receive a shock. He testified that, when he was shocked, he would

“shiver” and move and that the shocks hurt “everywhere.” Luis testified that Defendant would hold the wires together a little bit each time and that Defendant would ask Luis questions about who broke Defendant’s screwdriver and Luis would respond each time that he did not know who did it and then Defendant would shock Luis. Luis went on to state that he could not scream because the Defendant wrapped tape around Luis’ head two times. Luis stated that he was shocked approximately four to six times by Defendant. Luis stated that, on one of those shocks, Defendant shocked him for a long time and that this shock hurt more. Luis said that Defendant then untied him and told him to get out of the garage. Luis stated that he had trouble walking after the shocks and that it hurt him to walk, and that he had red marks on his wrists. Luis said that he could not walk well and that it hurt for him to walk for the rest of that day. Luis stated that the day following the shocks, that he felt “regular” and that the red marks were also gone from his wrists the next day<sup>10</sup>.

We assert that the injuries here do not constitute great bodily injury within the meaning of Penal Code § 12022.7, and, accordingly, the acts here testified to by Luis cannot constitute torture within the meaning of Penal Code § 206.

Initially, Luis testified that it hurt him to walk for the rest of the day and that he had red marks on his wrists. Luis further indicated that he felt “regular” the next day. It is respectfully submitted that these injuries do not rise to the level of great bodily injury, and that the injuries testified to were mild to moderate injuries. Here, while Luis

---

<sup>10</sup> Dr. Weissman testified that Luis had a mild muscle spasm in his neck and that muscle spasms can be caused by electric shocks, however, he never testified that the specific spasm he found on Luis was caused by electricity. Furthermore, Dr. Weissman never testified that Luis’ spasm caused him any pain or disability.

testified that he had trouble walking as a result of this incident, he testified that he was symptom free by the following day. He testified that the red marks on the skin of his wrists had completely disappeared by the following day. Luis was never hospitalized as a result of these injuries and Luis was never required to undergo any medical treatment as a result of these injuries. Furthermore, other than the red marks on his wrists, there was no testimony that Luis received any burns or other physical injuries. Accordingly, it is respectfully submitted that the injuries testified to here do not rise to the level of great bodily injuries, and, as such, there is insufficient evidence to support the torture conviction.

G. FORCING LUIS TO SLEEP IN THE DOGHOUSE DID NOT CONSTITUTE TORTURE.

For similar reasons as discussed hereinabove, we assert that forcing Luis to sleep in the doghouse was insufficient to constitute torture<sup>11</sup>. As an initial matter, we assert that there is insufficient evidence that the Defendant would have intended that Luis suffer "cruel and extreme" pain. While there may have been an intent to cause pain, it

---

<sup>11</sup> We would submit that the People waived the ability to argue that forcing Luis to sleep in a doghouse constituted torture when they asserted, during the proceedings at the Penal Code § 995 motion, that their theory was that the "torture" constituted the "physical abuse" of Luis. RT 4, 5. Additionally, the lower Court found, during the Penal Code § 995 motion hearing, that the evidence surrounding Luis' being forced to sleep in a doghouse were insufficient to constitute "torture" in the absence of any injury that flowed from that incident, and the prosecutor did not in any way contest the lower Court's determination, but merely reiterated her position that the "torture" related to the physical abuse allegations. RT 3-5. This issue is discussed briefly in the event, arguendo, that this Court determines that the issue is properly before this Court on appeal.

cannot be said that the pain was cruel and extreme. Additionally, the record is devoid of any reference to any injuries that Luis suffered as a result of being placed in the doghouse. While Dr. Weissman testified that Luis suffered fungal infections to his feet, and the Doctor testified that the infections could be caused by cold, there were no assertions that the infections were caused by Luis' sleeping in the doghouse. For instance, Luis was never asked by the prosecutor whether he noticed infections on his feet and when he noticed the infections. We assert that this defect is fatal to a showing that the Defendant's actions of directing Luis to sleep in the doghouse were what caused any infection to Luis' feet.

### **III. THE COURT FAILED TO PROPERLY INSTRUCT THE JURY ON THE ELEMENTS OF TORTURE.**

The federal Constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment, require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime. Therefore, a trial court's failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction unless it can be shown "beyond a reasonable doubt" that the error did not contribute to the jury's verdict. People v. Sengpadychith, 26 Cal.4th 316, 324-25 (2001), People v. Davis, 36 Cal.4th 510, 567-68 (2005).

Initially, the crime of torture requires proof, beyond a reasonable doubt, that a defendant, with the required specific intent, inflicted great bodily injury, as that term is defined in Penal Code § 12022.7, on the person of another. Penal Code § 206.

The CALJIC that relates to Penal Code § 206 is CALJIC 9.90, which was given to the jury by the lower Court, CT 465, and which



defines great bodily injury simply as “a significant or substantial physical injury.” CALIC 9.90. We assert that this definition is not sufficient, inasmuch as it does not conform to the language of CALJIC 17.20, which defines great bodily injury for purposes of cases charging a special allegation pursuant to Penal Code § 12022.7. In CALJIC 17.20, great bodily injury is defined as “a significant or substantial physical injury.” CALJIC 17.20 goes on to state that “[m]inor, trivial or moderate injuries do not constitute great bodily injury.” Id.

Thus, even though Penal Code § 206 defines great bodily injury by specifically referring to Penal Code § 12022.7, inexplicably, CALJIC 9.90, which defines the elements of torture, does not provide the jury with the elements of great bodily injury embodied in CALJIC 17.20.

It is asserted that the Defendant was prejudiced by the exclusion of the language that minor, trivial, or moderate injuries do not constitute great bodily injury. This is so for the reasons discussed hereinabove with respect to the sufficiency of the evidence, and that the jury could have found that the injuries Luis N. testified to were moderate, however, they were never instructed that moderate injuries do not constitute great bodily injury for purposes of Penal Code § 206.

Additionally, the Defendant was prejudiced by virtue of the fact that BOTH CALJIC 9.90 and CALJIC 17.20 were given to the jury in this case. CT 436, 465. Here, Defendant was not only charged with torture, but, as to one of the child beating counts, there was attached a special allegation pursuant to Penal Code § 12022.7. Therefore, given that the jury was given both CALJIC 9.90 and CALJIC 17.20, there is a strong possibility that the jury could conclude that the injury required to support a torture conviction would be less than the injury required to support a finding of “true” as to the Penal Code § 12022.7 allegation,

when, in fact, the state of the law is such that minimum injury required is the SAME for both a conviction under Penal Code § 206, and a finding of "true" as to a special allegation under Penal Code § 12022.7. Accordingly, we assert that the lower Court erroneously instructed the jury as to the definition of great bodily injury required to support a Penal Code § 206 conviction, and, additionally, that the lower Court's error does not constitute harmless error.

**IV. IF, ARGUENDO, THE DEFENDANT'S TORTURE CONVICTION WAS PROPER, THE LOWER COURT'S SENTENCE IMPROPERLY IMPOSED CONSECUTIVE SENTENCES AS TO THE CHILD BEATING AND CHILD NEGLECT COUNTS.**

"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." Penal Code § 654(a). Penal Code § 654(a) "precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of [Penal Code § 654(a)] depends on the 'intent and objective' of the actor. If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of

an otherwise indivisible course of conduct.” People v. Cleveland, 87 Cal.App.4th 263, 267-68 (2001).

As our Supreme Court has held, objections to a sentence on Penal Code § 654(a) grounds are generally not waived for failure to object in the Court below. People v. Hester, 22 Cal.4th 290, 295 (2000). The rationale behind this rule is that a trial Court exceeds its jurisdiction if it fails to properly stay a sentence pursuant to Penal Code § 654(a). Id.

As noted hereinabove, although the lower Court was under the impression that the torture count related only to one discreet incident, the shocking of Luis N. with electricity, the information, and the instructions to the jury reflected that the torture count was plead as a continuing crime, and that the jury’s finding, on its face, reflects that the act was a continuous act commencing on or about February 1, 2004 and ending on March 1, 2004. If this Court agrees, notwithstanding our arguments, supra, that the torture conviction is proper, then, we assert that the lower Court erred in imposing consecutive sentences on the remaining counts that were applicable to Luis N.

The information submitted to the jury charged in Counts II, IV<sup>12</sup>, V, VI, VII, VIII that the Defendant committed acts of abuse against Luis N., and the evidence adduced at trial revealed that Luis N. suffered some harm with respect to each of those counts<sup>13</sup>. Furthermore, there was no

---

<sup>12</sup> Count IV was the Count that the jury convicted the Defendant of a lesser misdemeanor charge of violating Penal Code § 273a(b), and impliedly acquitted the Defendant of the more serious violation of Penal Code § 273a(a). The lower Court imposed a sentence of 120 days concurrent to the other time it imposed. RT 892. We assert that a concurrent sentence is not proper where a Penal Code § 654(a) stay should have been implemented. See People v. Pearson, 42 Cal.3d 351, 358 (1986).

testimony or evidence produced that the Defendant had multiple or simultaneous objectives with respect to the conduct charged in the instant matter. In fact, as noted above, the prosecutor had argued to the jury that the Defendant had one objective – to control the children in the home for a “sadistic” purpose. Accordingly, we assert that, if the Court permits the torture conviction to stand, that the lower Court erred in imposing consecutive counts with respect to the child beating and child neglect counts that related to Luis N.

**V. DEFENDANT’S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE ASKED THE JURY TO RETURN A VERDICT OF GUILTY AS TO TWO OF THE COUNTS CHARGED AGAINST DEFENDANT.**

U.S. Const. amend. VI guarantees that in “all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” See also Cal. Const. Art. I, § 15. In practical terms, this means that a defendant in a criminal case has the right to effective representation at all stages of a criminal case. United States v. Cronin, 466 U.S. 648, 654-55 (1984); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970). Claims of ineffective assistance of counsel in a criminal case are measured by well-settled principles. “A defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be expected of reasonably competent

---

<sup>13</sup> Count II presumably relates to the allegations that Luis N. was placed in the doghouse. While there was no testimony that the Defendant ever struck Luis in connection with placing him in the dog house, there was testimony to the effect that Luis was not given sufficient food or clothing and shelter during that time, and Dr. Weissman testified that Luis was undernourished and suffering from a fungal infection that could have been caused by exposure to the elements.

attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." People v. Cudjo, 6 Cal.4th 585, 616 (1993). See also Strickland v. Washington, 466 U.S. 668, 687 (1984). Cases in California have recognized that the right to effective representation extends to opening statements and closing arguments. See People v. Welch, 20 Cal.4th 701, 754 (1999).

Here, it is respectfully submitted that Defendant's trial counsel rendered ineffective assistance of counsel when he argued that the jury should find Defendant guilty of two of the counts charged against him. During closing arguments, Defendant's trial counsel made the following statement, "What [Defendant's wife] told you when she came into court and told you that, 'Yeah, we did that, made them stay in that room. It was a mistake. It was a mistake what we did.'" RT 791. Counsel continued that, "[Defendant] told you the truth about that. He admitted to the police that day on March the 8th, 'Yeah, I did it. It was wrong.'" RT 791. Counsel then conceded before the jury that the Defendant is "probably guilty of Counts 2 and 3. That's for you to decide. But for everything else, he's not." RT 791-792.

In spite of the fact that counsel stated that Defendant was "probably guilty" of Counts 2 and 3, and that this issue was for "[the jury] to decide," the final statement that counsel made to the jury was, "And I ask you to find him guilty of putting those boys in that room, Count 1, I think Count 3. But for everything else - the rape, the torture - he didn't do that. He did not do that. He's not guilty of those. Thank you." RT 805.

It is respectfully submitted that, under the facts of this case, counsel rendered ineffective assistance of counsel and that the Defendant was prejudiced thereby.

During the defense case-in-chief, the Defendant's counsel called the Defendant's wife and the Defendant to testify, and asked both of them numerous questions concerning the time that Luis N. and Martin N. allegedly spent in the doghouse. Defendant's wife testified that she would check on the boys during the time they were in the doghouse. RT 638. She stated that it was chilly at night but that the boys had cloths and jackets to keep them warm. RT 638-639. She said that, although it was chilly and drizzling sometimes, it was dry in the doghouse and she would check on the boys every two hours when they were in the doghouse. RT 640. The Defendant testified that he did make the boys sleep in the doghouse, but that the boys had cloths and shoes to keep them warm. RT 679. The Defendant denied ever putting mud in the doghouse. RT 679.

It is asserted that, in eliciting this testimony on the one hand, and in asking the jury to return verdicts of guilty on the other hand, that Defendant's trial counsel did irreparable harm to the Defendant's credibility and presented a position that was wholly inconsistent with the position that the Defendant's witnesses were credible and that the People's witnesses were not to be believed, since it would be difficult, indeed for the jury to try to find that the Defendant was telling the truth about not striking Luis N. or sexually abusing Yesenia N., when the Defendant testified that he took steps to keep the boys safe and warm when they were outside in the doghouse and yet counsel was arguing to the jury that Defendant was guilty of the counts that related to that conduct. This error was compounded by the fact that trial counsel did not

even urge the jury to consider returning verdicts on the reduced charges that were submitted to them with respect to those two counts. See RT 844 (both Penal Code § 273a(a) and Penal Code § 273a(b) charges were submitted to the jury as to the Counts that defense counsel requested the jury to return guilty verdicts on).

If counsel's theory was that the Defendant was culpable as to the two counts by the mere fact that Defendant ordered the boys to sleep in the doghouse, and counsel concluded that the jury would likely convict Defendant based upon that fact alone, it was incumbent upon counsel to at least point out the fact that the boys were given warm clothing and that the Defendant and/or his wife checked up on the boys throughout the night to make sure that they were safe, and to ask the jury to consider the reduced misdemeanor counts of a violation of Penal Code § 273a(b).

It is submitted that counsel's request to the jury that they convict the Defendant of two felony counts of violating Penal Code § 273a(a) constituted conduct that fell below an objectively reasonable performance and that the Defendant suffered prejudice thereby, inasmuch as the jury found the Defendant guilty of those felony counts. Additionally, it is submitted that, if counsel's belief was that the jury would find Defendant guilty of child neglect merely because of the fact that Defendant admitted that he made the boys sleep in the doghouse, it was ineffective assistance for counsel to fail to ask the jury to consider the alternative lesser included misdemeanor offenses of violating Penal Code § 273a(b), and the Defendant suffered prejudice as a result.

**VI. THE TRIAL COURT ERRED IN JOINING THE SEXUAL ABUSE COUNTS RELATING TO YESENIA WITH THE CHILD ABUSE COUNTS RELATING TO MARTIN AND LUIS.**

“An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.” Penal Code § 954. “[T]he court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.” Id.

In reviewing the provisions of Penal Code § 954, it is clear that, under the circumstances of the instant matter, that, in order for the sexual abuse and child abuse counts to be joined, they either had to be “connected together in their commission,” or be “different offenses of the same class of crimes or offenses.” It is asserted that the sexual abuse crimes and the child abuse crimes were neither connected in their commission, nor were they different offenses of the same class of crimes or offenses, and, accordingly, the lower court erred in granting the prosecution’s motion to join those respective counts.

A. THE SEXUAL ABUSE AND CHILD ABUSE COUNTS WERE NOT “CONNECTED TOGETHER IN THEIR COMMISSION.”

Our Supreme Court has held that offenses can be “connected together in their commission” if there is a “common element of substantial importance in their commission.” People v. Valdez, 32 Cal.4th 73, 119 (2004). Thus, for instance, in Valdez, the Supreme Court held that the trial court did not err in joining charges of escape and



murder, where the defendant was charged with escaping from custody after returning from court after arraignment on the murder charges. The Supreme Court held that the defendant's escape from custody was an apparent attempt to avoid prosecution on murder charges. Id.

As noted, there must be some connection between the two alleged offenses. In Walker v. Superior Court, 37 Cal.App.3d 938, 941 (1974), the defendant was charged with robbery and with possession of a weapon by a felon. The defendant was connected to the robbery by fingerprints recovered at the scene and was arrested over one hundred days later. At the time of his arrest, law enforcement recovered a pistol. There was no evidence presented that the pistol was used in the robbery. The Court of Appeal held that it was an abuse of discretion under these circumstances to order that the defendant stand trial on both the robbery charge and the weapon charge. Id. at 943. See also People v. Sandana, 233 Cal.App.2d 24, 30 (1965)(error to join drug possession charge and rape charge where only connection between drug and rape was that defendant possessed drug at time of rape and court holds that this fact falls far short of establishing necessary causal connection or transactional relationship between counts).

In the instant matter, the prosecution had argued that the offenses were connected together because the Defendant would lock the boys out of the house or keep them out of the house in order to facilitate the sexual assaults. Additionally, the prosecution argued that the offenses were connected because Yesenia N. was privy to some of the assaults committed against the boys and that this was relevant to her fear of the Defendant.

Initially, as to the assertion that locking the boys out of the house somehow connected the two charges, it should be noted that the evidence

adduced showed that, during the alleged sexual assaults, the Defendant would enter the room where Yesenia was and close the door and close the blinds. The Defendant would then allegedly commit the assaults and, on at least two occasions testified to by Yesenia, the Defendant would stop the rape and leave the room when Yesenia told him that she heard someone coming. If the Defendant had locked the boys out of the house, he would have no reason to think that anyone was coming, "and, therefore, it cannot be said that the Defendant locked the boys out of the house for the purpose of facilitating the rapes. Additionally, the evidence adduced clearly showed that the Defendant would lock the boys out of the house for periods of time much longer than "necessary" to complete the alleged rapes. Here, the testimony of both Luis and Martin was that they were forced to sleep outside in the doghouse all night for roughly one week, and yet, there was no evidence that showed that the Defendant would spend the night in Yesenia's room raping her. Put simply, there was no evidence that tended to show that the Defendant's motivation for directing the boys to spend the night in the doghouse was for the purpose of giving him an opportunity to commit the alleged rapes against Yesenia.

Similarly, there was no evidence that the Defendant's violent acts against Martin and Luis were done for the purpose of instilling fear in Yesenia so that he could rape her. Yesenia testified that the rapes were accomplished by the Defendant's use of physical force and by the fact that the Defendant was stronger and heavier than Yesenia was. There was no evidence to the effect that, for instance, the Defendant would get Yesenia to submit to his advances by telling her that he would do to her what he had done to Luis or Martin. Put simply, the rapes were accomplished by virtue of the fact that the Defendant was stronger and

heavier than Yesenia. For these reasons, it is respectfully asserted the child abuse and sexual abuse charges were not "connected together in their commission".

B. THE DEFENDANT WAS PREJUDICED BY JOINDER OF THE SEXUAL ABUSE AND CHILD ABUSE OFFENSES.

Offenses that are of the same "class" of offenses or crimes or have "common characteristics" may be joined. Penal Code § 954, Price v. Superior Court, 25 Cal.4th 1046, 1054 (2001). Joinder is permissible under Penal Code § 954 even if the offenses are not related or connected in any way in their commission. People v. Walker, 47 Cal.3d 605, 621 (1988). For instance, in Walker, our Supreme Court held that robbery and murder charges stemming from two separate incidents were properly joined as being offenses in the same class of offenses. If evidence relating to one offense is admissible in proving the other offense, severance is generally not warranted. Id. (evidence of both incidents cross-admissible to prove identity), People v. Ruiz, 44 Cal.3d 589, 605 (1988). However, severance may be appropriate where the evidence is not cross-admissible. See Williams v. Superior Court, 36 Cal.3d 441 (1984). Evidence of cross-admissibility is not the only factor for a court to consider in determining whether to join offenses. The other factors include whether some of the charges are unduly inflammatory, whether a weak case will be bolstered by joinder with a stronger case, and whether one of the charges carries the death penalty. People v. Arias, 13 Cal.4th 92, 127 (1996).

On appeal, an appellate court reviews a trial court's decision with respect to a motion to join or sever for an abuse of discretion and will

reverse where the defendant makes a clear showing of prejudice from the joinder. People v. Price, 1 Cal.4th 324, 388 (1991). Even where the trial court's decision to join two cases was correct at the time it decided the motion, an appellate court will still reverse a judgment of conviction where the joinder actually resulted in "gross unfairness" amounting to a denial of due process. People v. Mendoza, 24 Cal.4th 130, 162 (2000), People v. Grant, 113 Cal.App.4th 579, 587 (2003).

Here, it is asserted that forcing Defendant to stand trial on the child abuse charges and the sexual abuse charges at the same time was an abuse of discretion, and, alternatively, even if the determination was not an abuse of discretion at the time the order was made joining the actions, the joinder resulted in gross unfairness to the Defendant amounting to a denial of due process.

As an initial matter, we assert that it would have been doubtful that all of the evidence of child abuse would have been cross-admissible in a trial on the rape charges. For instance, acts of physical abuse allegedly committed by the Defendant against Luis N., such as the shocking of Luis N., the bicycle incident, the wrench incident, the braided rope incident, and the metal stick incident, it is asserted, would not be cross-admissible in a trial on the sexual abuse charges. Here, there was no testimony from Yesenia that she saw any of these alleged acts by the Defendant, or that she was motivated to submit to the alleged rapes by virtue of the fact that the Defendant committed these specific acts against Luis N. While some of the information admissible on the child abuse issues could have been relevant to issues presented in the sexual

abuse allegations,<sup>14</sup> it is submitted that these most severe allegations of child abuse would not have been cross-admissible in a trial on the sexual abuse allegations.

On the issue of the relative strength of the two cases, we ask the Court to consider the fact that a much stronger case, the child abuse case, was joined with a much weaker case, the sexual abuse case, and that the nature of the charges in the child abuse case would have poisoned the jury against the Defendant given the unduly inflammatory nature of the child abuse allegations.

In reviewing the facts of the child abuse case, it is readily apparent that the evidence in support of that count was strong and was supported not only with the testimony of the alleged victims, but also by physical exhibits that tended to corroborate that testimony. For instance, the People introduced photographs that were consistent with Luis' testimony that he was abused. Those photographs included photographs of Luis' injuries as well as photographs of the garage where Luis said that he was abused. Also, the People introduced items Luis said were used to abuse him, such as, by way of example, the rope that Luis said was used to tie him during the shocking incident, and the rope that Luis said the Defendant used to hit him, and the bucket Luis said was similar to the bucket that Defendant used to put water on Luis' feet before shocking him. The People also introduced testimony that tended to show

---

<sup>14</sup> For instance, it may have been relevant to some of the rape counts that Luis and Martin were locked outside of the home in the doghouse, such that Defendant and Yesenia were alone in the home during the relevant times. It may also have been relevant to the issue of "force or fear" that Yesenia had allegedly seen Defendant strike her brothers with belts and the like in the past.

that those objects were found in the Defendant's garage, and that Luis helped police locate various items.

Furthermore, the People introduced photographs of the doghouse where the boys testified that they were told by Defendant to sleep. Additionally, as to the allegations relating to the electric shocks, the People called an electrical contractor to testify that the diagram Luis drew of how the Defendant allegedly shocked him would, in fact, have shocked someone and was consistent with a basic switch circuit, thereby further corroborating Luis' testimony that he was abused by the Defendant. The People also introduced testimony from a friend of Luis' and this testimony tended to corroborate Luis' assertion that Defendant struck Luis with a metal stick or bar. Also, the People introduced testimony from a neighbor who testified how the boys were subservient to the Defendant, and that, during the time that Luis and Martin said that they were in the doghouse, the Defendant's dogs were running out in the front yard and were not in the back yard where they usually were. Furthermore, the neighbor testified that, when she confronted the Defendant about this situation, the Defendant ignored her and continued to spray the area near the doghouse with a hose, which further corroborated Luis and Martin's testimony. In addition, as to Luis N. a medical doctor was called by the People to corroborate Luis' assertions that he was abused and the medical doctor testified that, in his expert opinion, Luis was abused and/or neglected.

The nature of proof as to the child abuse allegations is completely contrary to the proof submitted in support of Yesenia N.'s assertions that she was raped repeatedly by the Defendant. Here, while the People did call Yesenia herself who described the alleged sexual assaults, there was no other evidence submitted that tended to corroborate her allegations.

For instance, no medical evidence was submitted that tended to show that Yesenia had been the victim of repeated sexual assaults. While medical evidence was proffered by the People in support of Luis' allegations, no medical evidence was submitted in support of Yesenia N's allegations. The only witness who could be said to have "corroborated" Yesenia's allegations was Esmerelda Nicasio, who testified that, on one occasion, Defendant came into her room late at night and sat on her bed and, when she told him to leave, he left and laughed as he was leaving. Such testimony hardly provides the type of corroborative evidence that was available with respect to the allegations with respect to Luis and Martin.

Not only was the evidence uncorroborated with respect to the allegations of rape by Yesenia, evidence was introduced by the defense that tended to show that Yesenia's behavior was wholly inconsistent with someone who had been raped. The defense introduced, either through cross-examination, or through calling its own witnesses, evidence that tended to show that Yesenia had been given numerous opportunities to disclose the alleged rapes to law enforcement or social workers and that she did not do so. While Yesenia did testify that she did not disclose the information to the officer she initially spoke with because the officer was male and she felt uncomfortable with him, the defense called several female social workers to testify that Yesenia never told them anything about being raped by Defendant. In fact, evidence was adduced at trial that showed that the first person Yesenia told that she was raped was the Deputy District Attorney that prosecuted the Defendant. RT 503. While Yesenia testified that she told the Deputy DA because the Deputy DA was "a girl," RT 503, this claim was undercut by the testimony of several female social workers that all testified that they

asked Yesenia whether Defendant sexually abused her and Yesenia said nothing to them about being sexually abused by Defendant. Furthermore, the defense elicited testimony that tended to show that, after the alleged rapes occurred, Yesenia requested that Defendant take her to visit friends or to visit her mother, and the Defendant took her to these places and that Yesenia went with the Defendant voluntarily in his truck, in spite of the fact that no one else would be with her in the truck with the Defendant.

While certainly the uncorroborated testimony of an alleged victim of a sex crime is sufficient to prove the charge, that fact does not address the issue present here, i.e., the prejudice that the Defendant suffered as a result of the joinder of the extremely weak sexual abuse case with a much stronger child abuse case. We assert that the prejudice is apparent not only from the fact that this weaker case was joined with the much stronger case, but also by the nature of the allegations in the child abuse case. Here, the child abuse allegations, taken on their face, are certainly as severe as one can imagine.

The testimony alleged that the Defendant engaged in repeated acts of abuse and neglect against both Luis and Martin, with Luis bearing the brunt of the abuse. The facts of the abuse alleged are summarized hereinabove, and need not be recited again here. That the allegations against the Defendant with respect to the child abuse case were severe and, as such, would have brought a severely negative reaction and prejudice against the Defendant by lay jurors can be evidenced best from the statements and testimony of Robert Nagels. Mr. Nagles testified at trial that he was a twenty plus year veteran of the Riverside County Sheriff's Department and was assigned as a detective to investigate *allegations involving sexual and physical abuse against children and*



sexual abuse against women and that he was assigned to this case. RT 364-366. After the Defendant was convicted, Mr. Nagels was asked by the Probation Officer to comment, and, in response to that query, Mr. Nagels told the Probation Officer that he had "worked a long time in law enforcement, and this case was one of the most egregious cases of child abuse and torture he has ever seen." CT 495 (emphasis added). Mr. Nagels told the probation officer that the "witness testimony brought tears to his eyes during the trial." CT 495. One can only imagine that, if the testimony of the children as to the "child abuse and torture" was sufficiently moving to literally bring tears to the eyes of a hardened law enforcement officer who had certainly been exposed to such allegations on a daily basis during his twenty plus year career, that such testimony would have certainly inflamed the passions of lay jurors against this Defendant such that the minds of the jurors would have been poisoned against the Defendant by the time Yesenia N. testified about the rape allegations toward the end of the People's case-in-chief.

Accordingly, for these reasons, we assert that the charges of child abuse and sexual abuse were improperly joined and that, in the alternative, even if they were properly joined at the time of the order, the effect of the joinder resulted in a denial of due process to the Defendant.

### CONCLUSION

Wherefore it is respectfully prayed that the judgment of conviction entered in the Court below be reversed, and that the Defendant receive such other, further, and different relief as to this Court seems just, proper, and equitable.

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by the rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating a civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

FILED
OCT 13 2011
CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

I (a) PLAINTIFFS

Javier Maldonado Perez

DEFENDANTS

C. Gibson

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Kings
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Javier Maldonado Perez
PO Box 3471
Corcoran CA 93212
V-86534

ATTORNEYS (IF KNOWN)

11 CV 2385 IEG WMC

2254 1983
FILING FEE PAID
Yes No
IFP MOTION FILED
Yes No
COPIES SENT TO

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business in This State
Incorporated and Principal Place of Business in Another State
Foreign Nation

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

Table with columns: CONTRACT, REAL PROPERTY, PERSONAL INJURY, CIVIL RIGHTS, PRISONER PETITIONS, TORTS, LABOR, PORFEITURE/PENALTY, LABOR, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories and checkboxes.

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- 1 Original Proceeding
2 Removal from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See Instructions):

JUDGE

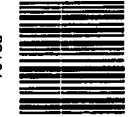
Docket Number

DATE 10/13/11

SIGNATURE OF ATTORNEY OF RECORD
SKHoeostenbach

Handwritten signature of SKHoeostenbach

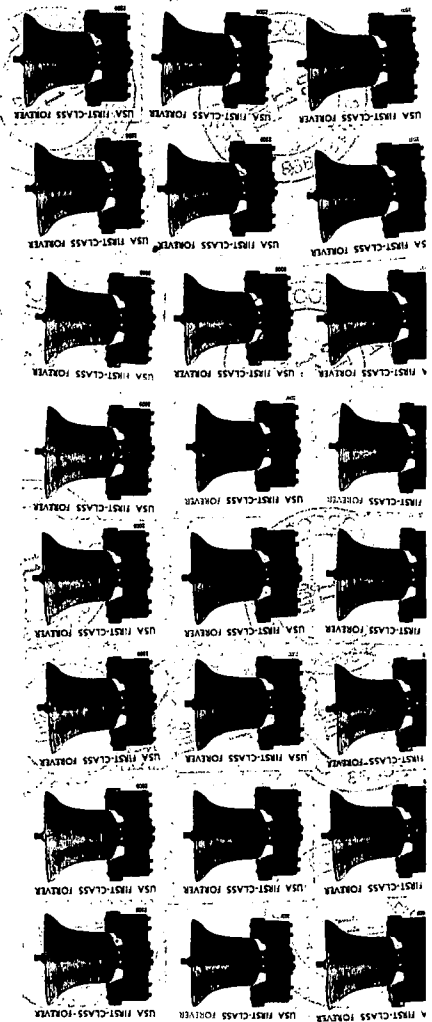
Danver Muldoon Perez, 1/01-211  
ESP CDR - 3601-237  
P.O. Box 3474  
Corcoran, CA 93212



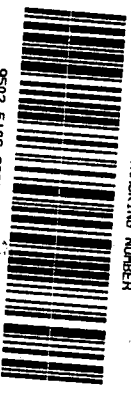
1006

92101

U.S. POSTAGE  
PAID  
CORCORAN, CA  
DEC 11 11  
PM 11:11  
\$0.00  
0005385-01



USPS TRACKING NUMBER



9502 5106 3385 1284 5309 85

Privileged  
Communication

United States District Court  
For The Southern District  
Federal Office Building  
980 Front Street, Suite 4250  
San Diego, CA 92101-8900

BRIGGS  
CORPORATION

**PRIORITY**  
MAIL  
UNITED STATES POSTAL SERVICE  
Visit us at usps.com

Label 107, January 2008

RW

10-6-11

