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Attorneys for the defendant Alex Mendoza

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ALEX KERMITH MENDOZA

DOB 08.26.78,

Defendant.

No. RIF125661

SECOND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COUNT ONE PURSUANT TO PENAL CODE § 1118.1

Date: February 23, 2009
Time: 8:30 a.m.
Dept: 52, Judge Luebs

TO: **RODRIC PACHECO, DISTRICT ATTORNEY FOR THE COUNTY OF RIVERSIDE; DEPUTY DISTRICT ATTORNEY STEPHEN GALLON; DEPUTY DISTRICT ATTORNEY BURKE STRUNSKY; AND THE CLERK OF THE ABOVE-CAPTIONED COURT:**

PLEASE TAKE NOTICE that on Monday, February 23, 2009, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department 52 of the Riverside Superior Court, the defendant, Alex Mendoza, through his attorneys the Public Defender by Supervising Deputy Public Defender Stuart Sachs and Deputy Public Defender Addison Steele will move the

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court to dismiss pursuant to Penal Code § 1118.1 the special circumstance alleged pursuant to Penal Code § 190.2(a)(18).

DATED: February 17, 2009

Respectfully submitted,
GARY WINDOM, PUBLIC DEFENDER

By: _____
R. ADDISON STEELE II
Deputy Public Defender
Capital Defense Unit
Attorney for Alex Mendoza

POINTS AND AUTHORITIES

Penal Code § 1118.1 allows the court to enter a judgment of acquittal after the prosecution has closed its case. Penal Code § 1118.1 reads as follows:

> In a case tried before the jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right.

Also, pursuant to Penal Code § 1118.2, "A judgment of acquittal entered pursuant to the provisions of Section 1118 or 1118.1 shall not be appealable and is a bar to any other prosecution for the same offense.

Mr. Mendoza is not required to state the grounds or direct the court's attention to a particular count, special allegation or special circumstance when making a motion pursuant to Penal Code § 1118.1. See *People v. Cole* (2004) 33 Cal.4th 1158, 1213 and *People v. Belton* (1979) 23 Cal.3d 516, 521. Where defense counsel's statement that he didn't think there was sufficient to convict the defendant was held to be sufficient articulation of the motion for judgment of acquittal. Therefore a nonspecific motion for acquittal requires the trial court to consider all possible claims of insufficiency of the evidence.

The court must consider whether the evidence presented is sufficient to sustain a conviction on appeal. See Penal Code §§ 1118, 1118.1 and *People v. Ainsworth* (1988) 45 Cal.3d 984, 1022. Where the test to be applied in a motion pursuant to Penal Code § 1118.1 is explained as, "Whether from the evidence, including reasonable inferences to be drawn

therefrom, there is any substantial evidence of the existence of each element of the offense charged."

THE COURT SHOULD DISMISS THE SPECIAL CIRCUMSTANCE PURSUANT TO PENAL CODE § 190.2(a)(18) THAT IS ALLEGED AGAINST MR. MENDOZA PURSUANT TO PENAL CODE § 1118.1

The elements of Penal Code § 190.2(a)(18) are as follows:

1. Mr. Mendoza intended to kill Michael V.;
2. Mr. Mendoza also intended to inflict extreme physical pain and suffering on Michael V. while Michael V. was still alive;
3. Mr. Mendoza intended to inflict such pain and suffering on Michael V. for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;

AND

4. Mr. Mendoza did an act involving the infliction of extreme physical pain and suffering on Michael V.

In this case neither the first, second nor third elements have been proven even if the evidence is taken in the best possible light possible for the plaintiff. There has been absolutely no evidence whatsoever offered that Mr. Mendoza had the specific intent to kill Michael V. There has been no evidence offered that Mr. Mendoza had the specific intent inflict extreme physical pain and suffering on Michael V. There has been no evidence at all offered, nor any such theory offered by the plaintiff that Mr. Mendoza was seeking revenge from Michael V. There has also been no evidence offered, nor any such theory offered by the plaintiff that Mr. Mendoza was attempting to extort anything from Michael V. There has also been no evidence offered, nor any such theory offered by the plaintiff that Mr. Mendoza was attempting to persuade Michael V. to do something. For that matter, there has also been no evidence

offered by the plaintiff that Mr. Mendoza had a sadistic purpose for causing whatever injuries he may have caused to Michael V.

All the evidence in this case, in the light most favorable to the plaintiff indicates, shows no sadistic purpose to any injuries that were inflicted upon Michael V.

THE DEGREE OF INJURIES THAT HAVE BEEN PROVED DO NOT MEET THE THRESHOLD ESTABLISHED FOR A CONVICTION TO SURVIVE APPELLATE REVIEW.

The statutes for the substantive crime of torture pursuant to Penal Code § 207, torture murder pursuant to Penal Code § 189, and the torture special circumstance pursuant to Penal Code § 190.2(a)(18) all lack any indication of what degree of injury is needed to qualify any particular crime as a torture, therefore the courts have had to interpret cases to determine what degree of injury and what indication of intent is sufficient to survive appellate review.[1]

The progression of the interpretation of these statutes start with *People v. Bender* (1945) 27 Cal.2d 164; *People v. Heslen* (1945) 163 P.2d 21 and *People v. Tubby* (1949) 34 Cal.2d 72. Those three cases from the 1940s are the foundation for the torture analysis. *People v. Anderson* (1968) 70 Cal.2d 15, *People v. Steger* (1976) 16 Cal.3d 539, and *People v. Walkey* (1986) 177 Cal.App.3d 268, are part of the progression of the line of torture cases. In all three of those cases the torture aspect of the jury verdicts did not survive appellate review. In two of those cases, *Steger* and *Walkey*, are almost factually identical to Mr. Mendoza's case and *Anderson* is actually much more gruesome than *Steger* and *Walkey*.

In *Bender*, sometime from May 15, 1944 to May 17, 1944, the defendant Stephen Bender beat and strangled his wife to death in their apartment in Los Angeles. Mr. Bender was convicted by jury of first degree murder and sentenced to death. The California Supreme Court modified the judgment to second degree murder finding the facts of the case did not

[1] The substantive crime of torture pursuant to Penal Code § 107 does have somewhat of a definition of the degree of injury needed for a particular allegation to qualify as torture, however that definition is "great bodily injury" which in turn has a statutory definition that lacks specificity so as the courts have had to determine what degree if injury constitutes "great bodily injury."

support a first degree conviction and rejected the plaintiff's argument that the blows to the head and strangulation of the decedent were torture. The court explained its holding with regard to torture as follows:

> The evidence, as a matter of law, is insufficient to prove torture. The killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer.
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> People v. Bender (1945) 27 Cal.2d 164; 163 P.2d 8.

In *Heslen*, on July 15, 1944, the defendant Frank Heslen had an argument with his wife in a bar in Sacramento that was full of patrons. The argument degenerated into Mr. Heslen chasing his wife behind the bar, then back to the front of the bar, getting a paring knife that was behind the bar, grabbing his wife and cutting her throat killing her. Mr. Heslen was convicted by jury of first degree murder and sentenced to death. The California Supreme Court found that, "From the nature of the homicide act and circumstances surrounding it there is clearly sufficient upon which to find malice and hence a case of second-degree murder." The case was remanded back to the trial court for a new trial, before it got there the plaintiff filed a Petition for Rehearing at which it motioned to modify the verdict from first degree murder to second degree murder, Mr. Heslen did not object to the modification ending his case with a second degree murder conviction.[2] In its holding the court cited and quoted *Bender* and then went on to explain its analysis as follows:

> Implicit in that definition [of torture] is the requirement of an intent to cause pain and suffering in addition to death. That is, the killer is not satisfied with

[2] The modification of the judgment to second degree murder is found at *People v. Heslen* (1946) 27 Cal.2d 520. The original case is only found in the Pacific Reporter at *People v. Heslen* (1945) 163 P.2d 21. A LEXIS search using the Pacific Reporter incorrectly links to *People v. Bender* (1945) 27 Cal.2d 164. It appears that original *Heslen* case cannot be retrieved on LEXIS and can only be found in the physical Pacific Reporter.

killing alone. He wishes to punish, execute vengeance on, or extort something from his victim, and in the course, or as the result of inflicting pain and suffering, the victim dies.

People v. Heslen (1945) 163 P.2d 21.

In *Tubby*, on September 13, 1948, the defendant Thomas Tubby was drinking heavily while at work "near Orland [Glenn County, California] as a ranch hand and almond knocker." At 3:30 in the afternoon, he went home and beat his elderly stepfather to death for no apparent reason. Mr. Tubby was convicted by jury of first degree murder by torture and sentenced to death. The California Supreme Court modified the judgment to second degree murder finding the facts of the case did not support a first degree conviction and rejected the plaintiff's argument that the severe beating of the decedent was torture. The *Tubby* court cited and quoted the language from both *Bender* and *Heslen* and also further explained its holding:

> In determining whether the murder was perpetrated by means of torture the solution must rest upon whether the object of the attack, either for the purposes of revenge, extortion, persuasion, or to satisfy some other untoward propensity. The test cannot be whether the victim merely suffered severe pain since presumably in most murders severe pain precedes death.

People v. Tubby (1949) 34 Cal.2d 72; 207 P.2d 51.

In *Anderson*, on December 7, 1962, the defendant Robert Anderson stabbed to death his roommate's ten year-old daughter whom he had previously repeatedly molested. Sometime between when the decedent got home from school and 4:30 in the afternoon, Mr. Anderson inflicted 61 "wounds ranging over the entire body from the head to the extremities." The girl's "torn and blood-soaked clothes were found near the body and in an adjoining room. Her dress appeared to have been ripped off; the crotch had been cut out of the panties." Mr.

Anderson was convicted by jury of first degree murder by torture and sentenced to death. The California Supreme Court found that giving the torture murder instruction was error. Quoting *People v. Eggers* (1947) 30 Cal.2d 676, the found that, "It is error to give an instruction which, although correctly stating a principle of law, has no application to the facts of the case." The court quoted both *Bender* and *Tubby* and further explained its ruling as follows:

> . . . the evidence in the instant case shows only an explosion of violence without the necessary intent that the victim should suffer. Although a cigarette butt was found in one of the victim's wounds, the flesh was not burnt; the presence of the butt alone cannot support the conclusion that defendant intended to "cause cruel suffering."
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> *People v. Anderson* (1965) 63 Cal.2d 351; 46 Cal.Rptr. 763, 406 P.2d 43.

In *Steger*, the defendant Cheryl Steger killed her three year-old stepdaughter. "The evidence disclose[d] the fatal injury, a subdural hemorrhage covering almost the entire left half of the brain, was undoubtedly caused by trauma. The child's body was also covered from head to toe with cuts, bruises and other injuries, most of which could only have been caused by severe blows." There was "hemorrhaging of the liver, adrenal gland, intestines, and diaphragm; a laceration of the chin; and fractures of the left cheek bone and right forearm." Ms. Steger was convicted by jury of first degree murder by torture. The California Supreme Court modified the judgment to second degree murder finding the facts of the case did not support a first degree conviction, found that, "that the evidence at [Ms. Steger's] trial was insufficient to justify a jury instruction on murder by means of torture." The court rejected the plaintiff's argument that the severe beating of the child was torture. The court considered and rejected lower appellate court rulings where those courts "inferred the presence of 'specific intent to cause cruel suffering' almost exclusively from the severity of the wounds on the

victim's body."[3] The court cited and quoted *Heslen*, *Bender*, *Tubby* and *Anderson* further explained its reasoning:

> It is clear from the foregoing analysis that on the record of the case at bar defendant cannot be guilty of first degree murder by torture. Viewed in the light most favorable to the People, the evidence shows that defendant severely beat her stepchild. But there is not one shred of evidence to support a finding that she did so with cold-blooded intent to inflict extreme and prolonged pain. Rather, the evidence introduced by the People paints defendant as a tormented woman, continually frustrated by her inability to control her stepchild's behavior. The beatings were a misguided, irrational and totally unjustifiable attempt at discipline; but they were not in criminal sense willful, deliberate, or premeditated. The court went on to make its ruling absolutely clear.
>
> All we hold is that here the prosecution did not prove defendant murdered her stepchild with willful, deliberate, and premeditated intent to inflict extreme and prolonged pain. It follows that the trial court erred in giving an instruction on torture murder.

People v. Steger (1976) 16 Cal.3d 539; 128 Cal.Rptr. 161, 546 P.2d 665.

In *Walkey*, On February 17, 1983, the defendant Frederick Walkey beat to death his paramour's two year-old son. Sometime between 5:00 and 6:30 in the evening, Mr. Walkey inflicted "17 different bruises, abrasions and lacerations . . . two bite marks . . . [caused his] abdomen [to be] tense and distended due to a large hemorrhage. . . . [Inflicted] a severe penetrating blow, crushing and tearing open the intestines. The cause of death was related to this blow." Mr. "Walkey failed to seek medical attention for the child. Further, expert medical testimony established [the decedent's] injuries were inflicted with 'extreme force.'" Mr. Walkey

[3] The court considered and rejected *People v. Misquez* (1957) 152 Cal.App.2d 471; *People v. Lawhon* (1963) 220 Cal.App.2d 311; *People v. Butler* (1962) 205 Cal.App.2d 437; *State v. Kountz* (1972) 108 Ariz. 459.

was convicted by jury of first degree murder by torture and sentenced to 25 years to life in prison. The Court of Appeals found that giving the torture murder instruction was error and modified the judgment by reducing the degree of the murder from first degree to second degree. The Walkey court extensively quoted *Steger* including in part of its explanation of its ruling:

> The People argue [Mr.] Walkey had the requisite deliberate and premeditated intent to torture [the decedent] because [Mr.] Walkey resented taking care of [the decedent] and had been seen spanking him. The People further point to evidence [Mr.] Walkey got upset and yelled at [the decedent] when the child had a toilet training accident. However, this evidence merely shows the beatings [Mr.] Walkey inflicted on [the decedent] were "a misguided, irrational and totally unjustifiable attempt at discipline; but they were not in a criminal sense willful, deliberate, or premeditated." (*People v. Steger, supra,* 16 Cal.3d at p. 548.)
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> The court further explained:
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> Such explosive violence on the part of the abusing adult, without more, does not support a torture murder theory. [Mr.] Walkey's intent may have been to punish [the decedent] after becoming frustrated or angry because [the decedent] misbehaved or had difficulty being toilet trained. However, the record dispels any hypothesis [Mr.] Walkey's primary purpose was to cause [the decedent] to suffer.

People v. Walkey (1986) 177 Cal.App.3d 268; 223 Cal.Rptr. 132.

Absolutely no intent to kill by means of torture has been presented by the plaintiff in this case. Absolutely no intent to torture has been presented in this case. The state of the record as it is now cannot survive appellate review.

CONCLUSION

For all the reasons stated in this motion, the first degree murder allegation for both intent to torture and for premeditation and deliberation, as well as the torture special circumstance should be dismissed pursuant to Penal Code § 1118.1.

Dated: February 23, 2009

Respectfully submitted,
GARY WINDOM, PUBLIC DEFENDER

By: _____
R. ADDISON STEELE II
Deputy Public Defender
Capital Defense Unit
Attorney for Alex Mendoza

PROOF OF SERVICE

I, Addison Steele, declare:

I am a citizen of the United States and an employee of the County of Riverside; I am over the age of eighteen years and not a party to the within-entitled action.

That on February 23, 2009, I served a copy of the within:

MOTION TO DISMISS PURSUANT TO PENAL CODE § 1118.1

To be served on the following:

Executive Officer/Clerk
Riverside Superior Court
Riverside, California 92501

Rod Pacheco
4075 Main Street
Riverside, CA 92501

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

Executed February 23, 2009, at Riverside, California.

Addison Steele, Declarant
Deputy Public Defender
Capital Defense Unit
Attorney for Alex Mendoza