BRADY Violations Written Materials

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California Rules of Professional Conduct
Rule 5-110 Special Responsibilities of a Prosecutor
(Rule approved by the Supreme Court, effective Nov. 2, 2017)

The prosecutor in a criminal case shall:

(A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
(E) Exercise reasonable care to prevent persons under the supervision or direction

of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.

(F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) If the conviction was obtained in the prosecutor's jurisdiction,

(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion:

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows or

reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (D) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (F) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of

counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

(Amended by order of Supreme Court, operative Nov. 2, 2017.)
Source: http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules/Rule-5-110

SAMPLE BRIEFS [1]

People v. Harrison (2017) [reversed in part]

- *Brady* error for failure to disclose the existence of video recording of the defendant's interrogation which demonstrated *Miranda* violation.

People v. Martinez & *In re Martinez* (2002) on Habeas Corpus

- The Court of Appeal reversed the judgment and conviction, remanded for a new trial, and granted defendant's petition for writ of habeas corpus. The court held that the prosecution's failure to disclose the witness's convictions violated defendant's due process right.

[1] Posted online on our MCLE materials webpage: http://www.adi-sandiego.com/practice/mcle_materials.asp.

ARGUMENT

I. APPELLANT'S CONVICTIONS MUST BE REVERSED BECAUSE THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY FAILING TO DISCLOSE FAVORABLE EVIDENCE TO THE DEFENSE, IN VIOLATION OF APPELLANT'S FEDERAL DUE PROCESS RIGHTS UNDER *BRADY V. MARYLAND*, AND BECAUSE THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR NEW TRIAL ON THIS BASIS.

A. Introduction.

At the first trial, the prosecution presented the arresting officer's testimony that, after having been advised of his *Miranda* rights, appellant admitted that he had used the firearm at issue during an altercation with his cousin. (2 RT 657.) The jury at the first trial found appellant guilty in counts one and four, but was unable to reach a verdict on counts two and three. (1 CT 125-133; 2 RT 1208-1211, 1224-1233.)

During the retrial on counts two and three, however, the prosecution produced for the first time a video of this police interrogation, which showed that, contrary to the officer's testimony at the first trial, the officers continued to interrogate appellant after appellant had invoked his right to remain silent, such that appellant's admissions were obtained in violation of *Miranda*. (3 RT 4214-4216, 4548-4550.) The trial court subsequently granted appellant's motion to suppress these statements at the retrial on counts two and three (3 RT 4565-4578), which resulted in acquittals on those counts (1 CT 205-208; 3 RT 4844-4849), but denied appellant's motion for a new trial on counts one and four (3 RT 5401-5413).

As detailed below, the prosecutor committed prejudicial misconduct, and violated appellant's federal due process rights (U.S. Const., 5th & 14th Amends.) under *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83

S.Ct. 1194] (*Brady*), by failing to disclose this video to the defense before the first trial, and the trial court consequently erred by denying appellant's motion for a new trial on counts one and four on this basis. Appellant's convictions in counts one and four must therefore be reversed.

B. Proceedings Below.

The arresting officer testified at the preliminary hearing that he read appellant his *Miranda* rights, and that appellant subsequently admitted that he had used the firearm in this incident. (1 CT 20-21.) The arresting officer testified to this point again at the first trial. (2 RT 657.) The prosecution presented no evidence at either the preliminary hearing or the first trial about whether this interrogation had been recorded.

Before the presentation of evidence in the second trial, however, defense counsel asked the prosecutor about an acronym in the police report of the incident: "DICV". (3 RT 4214.) The prosecutor explained that she had known that the police report contained this acronym, and that this acronym signified that the interrogation had been recorded on video. She further explained that there was a video of the interrogation, but that she had not yet requested or produced a copy of that video. (3 RT 4214-4215.) The trial court reserved its ruling on this issue to allow the prosecutor time to produce this video. (3 RT 4216.)

The prosecutor turned this video over to the defense the next day, at which point appellant objected to the admission of his statements to the arresting officer on *Miranda* grounds. (3 RT 4548-4550.) The trial court subsequently held a hearing on this issue and, after reviewing the recording and transcript of this interrogation, excluded appellant's statements to police at the second trial, specifically finding that appellant had invoked his right to remain silent and that the officers nevertheless continued to interrogate appellant after

that, at which point appellant made the admissions at issue. (3 RT 4565-4578; see also 1 CT 237-247 [transcript of recording attached to prosecution's opposition to defense motion for new trial].)

The court also noted at the suppression hearing that the prosecution had presented the officer's testimony about appellant's statements at the first trial, but that the video had not yet been produced at the time. (3 RT 4577-4578.) The prosecutor responded: "I don't think it's appropriate to comment on that right now. But I did not have this video." (3 RT 4578.) Defense counsel then confirmed that, at the first trial, "the officer testified that [appellant] said that he pointed the gun at the alleged victim...that was the way it ended." (3 RT 4578.)

After the jury acquitted appellant in counts two and three at the second trial (1 CT 205-208; 3 RT 4844-4849), appellant moved for a new trial on counts one and four on the grounds that the prosecutor's failure to produce this video before the first trial amounted to a *Brady* violation. (1 CT 211-220 [defense motion for new trial]; see also 1 CT 227-247 [prosecution opposition to motion for new trial], 222-226 [defense reply].) At the hearing on the new trial motion, defense counsel also submitted a copy of the police report, which contained the "DICV" acronym, but which did not otherwise state that the interrogation at issue had been recorded on video. (3 RT 5410; Court Ex. 1.) A copy of this police report is attached hereto as Attachment 1, below [at p. 64]. (Cal. Rules of Court, rule 8.204(d).) The prosecutor also submitted a copy of the video and transcript of the interrogation to the court as part of its opposition to this motion. (1 CT 234-247.) Ultimately, the trial court denied appellant's motion for new trial. (3 RT 5401-5413.)[5]

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C. Applicable Law.

1. Prosecution's Discovery Obligations under *Brady*.

Federal due process imposes a duty on the prosecution to disclose to the defense any evidence that might be exculpatory or favorable to the defense case. (*Brady, supra,* 373 U.S. 83; *People v. Poletti* (2015) 240 Cal.App.4th 1191, 1209; U.S. Const., 5th & 14th Amends.) The prosecution's duty to disclose favorable evidence to the defense under *Brady* includes a duty to discover and produce favorable evidence that is only known to police investigators, and arises even if the defense did not request the evidence at issue. (*People v. Lucas* (2014) 60 Cal.4th 153, 273.) "In order to comply with *Brady*, therefore, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

A prosecutor violates her discovery obligations under *Brady* if (1) the evidence was "favorable" to the defendant, (2) the evidence was "suppressed by the State, either willfully or inadvertently," and (3) the evidence was "material", i.e., its suppression was prejudicial. (*People v. Lucas*, *supra*, 60 Cal.4th at 274.) "Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that *Brady* was

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Appellant's discussion of this issue herein refers to the transcript of the video that was attached to the prosecution's opposition to appellant's motion for new trial which is contained in the Clerk's Transcript (1 CT 237-247). Appellant has also requested that (1) the transcript of the video, marked as Court Exhibit One at the suppression hearing (3 RT 4566), and (2) the video of the interrogation, reviewed by the court at the suppression hearing (3 RT 45734574) and submitted to the court as an attachment to the prosecution's opposition to appellant's new trial motion (1 CT 234-235), be transmitted to this court for review. (Cal. Rules of Court, rule 8.224.)

not satisfied is reversible without need for further harmless-error review." (*People v. Verdugo* (2010) 50 Cal.4th 263, 279.)

Appellate courts "independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.)

2. Motions for New Trial.

A trial court's denial of a motion for new trial is reviewed for an abuse of discretion. (*People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27.) "The abuse of discretion standard is deferential, but it is not empty. It asks in substance whether the ruling in question falls outside the bounds of reason under the applicable law and the relevant facts." (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) A trial court's "discretion is always delimited by applicable legal standards, a departure from which constitutes an abuse of discretion." (*People v. Whitaker* (2013) 213 Cal.App.4th 999, 1007; see also *People v. Uribe* (2011) 199 Cal.App.4th 836, 858 ["exercises of...discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue"]; *People v. Perez* (2015) 223 Cal.App.4th 736, 742 [court's exercise of discretion must be "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."]) As a general matter, a trial court abuses its direction if its decision is "arbitrary, capricious, or patently absurd" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004), or if its decision is based on "impermissible factors...or on an incorrect legal standard." (*People v. Knoller* (2007) 41 Cal.4th 139, 156.)

But where the asserted abuse of discretion is the failure of the trial court to recognize a violation of the defendant's constitutional rights, such as where

a motion for new trial is based on an alleged *Brady* violation, the question of whether the trial court abused its discretion in denying the new trial motion generally depends on the merits of the underlying constitutional claim. (*People v. Hoyos, supra*, 41 Cal.4th at 917, fn. 27.)

D. The Prosecutor's Failure to Produce the Video of Appellant's Interrogation Before the First Trial Amounted to a *Brady* Violation That Requires Reversal.

As will be shown, all of the conditions required for a *Brady* violation are present in appellant's case: (1) the video of appellant's police interrogation was favorable to the defense; (2) the video was suppressed by the prosecution, either willfully or inadvertently; and (3) the video was material to appellant's defense. The prosecution's failure to produce the video of appellant's police interrogation before the first trial consequently amounted to a *Brady* violation, requiring reversal of appellant's convictions in counts one and four.

1. The Evidence Was Favorable to the Defense.

Evidence is favorable for *Brady* purposes if it "either helps the defendant or hurts the prosecution." (*In re Sassounian* (1995) 9 Cal.4th 535, 544.) This includes evidence that is exculpatory, as well as evidence that would impeach the prosecution's witnesses. (*People v. Lucas, supra,* 60 Cal.4th at 274; see also *Amado v. Gonzalez* (9th Cir. 2014) 758 F.3d 1119, 1134.) In other words, "[a]ny evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes." (*Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998, 1012.) The recording of appellant's interrogation was favorable to the defense under this definition because (i) it would have provided the basis for a meritorious motion to suppress appellant's statements, and (ii) it would have been admissible to impeach the arresting officer's testimony.

i. The Recording of Appellant's Interrogation Provided a Basis for a Meritorious Motion to Suppress Appellant's Statements.

The prosecution relied on appellant's statements to police at the first trial. Specifically, the arresting officer testified that appellant admitted using the firearm during an altercation with his cousin. (2 RT 657.) The officer further testified that appellant had been *Mirandized* before he made these statements. (2 RT 657.) But the recording showed that, before making the statements at issue, appellant had invoked his right to remain silent and the officers had nevertheless continued to interrogate him about the incident. Thus, as the trial court correctly concluded at the suppression hearing (3 RT 4565-4578), appellant's statements were obtained in violation of *Miranda*.

Under *Miranda*, "the prosecution may not use statements…stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination…Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used...against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Miranda*, *supra*, 384 U.S. at 444; U.S. Const., 5th and 14th Amends.) "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Id.* at 473-474.)

In appellant's case, after advising appellant of his *Miranda* rights, the arresting officer asked, "do you want to talk about what happened today?...[D]o you want to talk about the handgun that we found?" (2 CT 238.) Appellant replied: "I'm not saying anything." (2 CT 238.) The officer continued: "do you want to write anything?...[I]t's in your best interest to cooperate." (2 CT 239.)

But appellant persisted: "I don't want to say anything." (2 CT 239.) The officer asked again: "You don't want to say anything?" Appellant confirmed: "I don't want to say anything...I'm not being uncooperative...I just don't want to say anything." (2 CT 239.)

By that point, appellant had unequivocally invoked his right to remain silent, and as a result, all questioning should have ceased. (See *People v. Davis* (2009) 46 Cal.4th 539, 585 ["police interrogation must cease once the defendant, by words or conduct, demonstrates a desire to invoke his right to remain silent..."].) But instead, the officers continued to interrogate appellant: "Is that your [car]?...What do they call you?..." (2 CT 239-240.) Appellant responded: "I don't want to be uncooperative...I just...", at which point the officer interjected: "do you want to talk? I read you your rights,...it's in your best interest...to talk about what happened...It's in your best interest to be cooperative....and so far you're not being cooperative." (2 CT 240.)

This approach succeeded in getting appellant to talk: "I'm trying...I just got out of prison...I had a 64 Chevy Impala and I needed [John Doe] to sell it because I need cash..." (2 CT 240-241.) The officer then asked, "this is what the argument was about today?" Appellant replied, "it really wasn't an argument." (2 CT 241.) The officer next asked appellant for his social security number and if appellant had any gang affiliation. Appellant answered: "Why do I have to say anything...I don't have anything to do with any gang relations..." (2 CT 241-242.) The officer eventually returned to asking about the present incident: "when we get back to the station do you want to write about what happened?" Appellant responded: "I don't want to write anything." (2 CT 243.)

The officer then tried a new tactic: "it's in your best interest to cooperate....[R]emember what my sergeant told you in there, he's going to be

at your parole hearing...He's going to read this report..." (2 CT 243.) This threat that appellant's silence would have negative consequences on his parole status caused appellant to talk further: "I don't mind speaking...But alright like..." The officer then interrupted: "I want to talk about what happened today..." (2 CT 243.) At that point, appellant made various statements about how John Doe owed him money for the car that they had sold, how John Doe had refused to give appellant his share of the money, and how appellant had then used a gun during an argument with John Doe about this money. (2 CT 243-247.)

This recording thus confirms, as the trial court ultimately concluded, that appellant's statements were obtained in violation of his *Miranda* rights. (3 RT 4565-4578.) Appellant was in the back of the police car during this questioning, such that he was in custody for *Miranda* purposes at the time (see *People v. Moore* (2011) 51 Cal.4th 386, 394-395 [person is in custody for *Miranda* purposes if he has been "deprived of his freedom of action in any significant way"]), as the prosecutor conceded at the suppression hearing (3 RT 4577), and the officers were expressly asking about appellant's argument with John Doe, such that appellant's statements were made during a police interrogation (see *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S.Ct. 1682, 64 L.Ed.2d 297] [interrogation for *Miranda* purposes means "express questioning or any words or actions on the part of the police...that the police should know are reasonably likely to elicit an incriminating response from the suspect"]).

In response to the *Miranda* warnings, appellant stated multiple times that he did not want to talk to the officers. These statements by appellant were unambiguous (2 CT 239-243 ["I don't want to say anything"; "I don't want to say anything...I'm not being uncooperative...I just don't want to say anything"; "I don't want to write anything"]) and did not contain qualifying language that

might have rendered his invocation equivocal (see *People v. Shamblin* (2015) 236 Cal.App.4th 1, 17-21 ["words like 'probably' and 'I think' indicate to an objective listener that defendant did not have a clear intention to invoke his right"]). The officers nevertheless continued to ask appellant about the incident, and even made the coercive suggestion that, if appellant remained silent, this would have a negative effect on his parole status. (2 CT 238-243.) This continuation of the interrogation was a violation of appellant's rights under *Miranda*, which rendered appellant's statements inadmissible. (*People v. Davis, supra*, 46 Cal.4th at 585 [once defendant invokes right to remain silent, "police interrogation must cease"].)

Nor can it be said that appellant voluntarily waived his right to remain silent after his initial invocation. Police are permitted to interrogate a suspect who has previously invoked his right to remain silent if the suspect voluntarily reinitiates the questioning. (See *People v. Marshall* (1990) 50 Cal.3d 907, 923.) But this rule only applies if the subsequent questioning is initiated by the *suspect.* (See *People v. Bridgeford* (2015) 241 Cal.App.4th 887, 903 (*Bridgeford*).) In *Bridgeford*, for example, the defendant asked for an attorney during his first police interrogation and the questioning ceased. Several hours later, police took the defendant from his home and informed him that a police sergeant wanted to talk with him further. The defendant was handcuffed and searched, and taken back to the police station, where he ultimately confessed to the officers. (*Id*. at 895-899.) The appellate court concluded that these statements were obtained in violation of *Miranda* because the record did not establish that the defendant was the one who initiated the second interrogation. (*Id*. at 900-903.)

The same is true in here. After appellant's initial invocation, the officers continued to question him about the incident and about whether he wanted to

talk, and even implied that appellant would suffer consequences in connection with his parole status if he remained silent. (2 CT 239-243.) It therefore cannot be said that appellant voluntarily initiated a dialogue with the officers after his initial invocation of his right to remain silent. The record thus demonstrates, as the trial court concluded, that appellant's statements were obtained in violation of *Miranda*, and hence were inadmissible.

Indeed, on this record, appellant's statements may even have been involuntarily coerced, in violation of federal due process. Federal and state due process prohibit the admission of involuntary confessions. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176; U.S. Const., 5th & 14th Amends.) "Whether a confession was voluntary depends upon the totality of the circumstances." (*People v. Scott* (2011) 52 Cal.4th 452, 480.) "A statement is involuntary if it is not the product of a rational intellect and free will. The test for determining whether a confession is voluntary is whether the defendant's will was overborne at the time he confessed." (*People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.)

In *People v. Neal* (2003) 31 Cal.4th 63, for example, the defendant repeatedly invoked his right to counsel and to remain silent during a police interrogation, but the interrogating officer nevertheless continued to interrogate the defendant, badgering him, accusing him of lying, and telling him, "this is your one chance...if you don't try and cooperate … the system is going to stick it to you as hard as they can." The defendant made only exculpatory statements in the initial session and was kept in jail overnight. The next morning, the defendant asked to speak to the officer, who met with him and resumed questioning. Ultimately the officer obtained two confessions from the defendant. (*Id*. at 69-77.) The court found that the defendant's initiation of further contact with the officer, as well as the two subsequent confessions, were

the involuntary product of the officer's coercive conduct during the first interrogation, such that due process rendered the defendant's subsequent confessions inadmissible. (*Id*. at 77-86.)

The same is true in appellant's case. After appellant unequivocally invoked his right to remain silent multiple times, the officers continued to interrogate him, and even made numerous coercive statements about how it was in appellant's best interests to talk to the officers and that, if he remained silent, the sergeant would make sure that this was brought up at appellant's "parole hearing". (2 CT 239-243.) This strategy succeeded in getting appellant to make inculpatory statements about the incident. The recording of appellant's interrogation thus shows that appellant's statements were coerced by these comments from the interrogating officer. Appellant's statements were involuntary, and were therefore inadmissible, for these reasons as well.

But irrespective of whether appellant's statements were obtained involuntarily, in violation of due process, the recording of appellant's interrogation plainly demonstrates that the statements at issue were obtained in violation of appellant's *Miranda* rights, as the trial court correctly concluded at the suppression hearing. Had this recording been produced before the first trial, it would likely have resulted in appellant's admissions to the officers being excluded at the first trial, as they were at the second trial. In this way, this recording would have helped the defense case and hurt the prosecution's case. This recording was consequently "favorable" to the defense for *Brady* purposes. (*In re Sassounian, supra*, 9 Cal.4th at 544.)

ii. The Recording of Appellant's Interrogation Was Admissible to Impeach the Police Officer's Testimony.

Evidence is also favorable for *Brady* purposes if it could have been used to impeach a witness for the prosecution. (See *People v. Lucas, supra,* 60

Cal.4th at 273-274.) The recording of appellant's interrogation was favorable for *Brady* purposes in appellant's case for this additional reason: it would have been admissible to impeach the arresting officer's testimony.

In determining the credibility of a witness, the jury may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the witness's testimony. (Evid. Code, § 780.) This includes evidence showing "the existence or nonexistence of any fact testified to" by the witness. (Evid. Code, § 780, subd. (i).) Extrinsic evidence establishing that some portion of a witness's testimony is false is thus generally admissible to attack the credibility of that witness. (See *People v. Doolin* (2009) 45 Cal.4th 390, 439 [impeaching testimony describing defendant's prior sexual misconduct admissible to attack defendant's testimony about his good attitude toward women]; *People v. Eubanks* (2011) 53 Cal.4th 110, 114 [extrinsic evidence regarding how defendant punished her nephew admissible to impeach defendant's testimony that she acted caringly toward her children].)

At the first trial, the arresting officer testified that appellant made the statements at issue after he had been properly advised of his *Miranda* rights. (2 RT 657.) But the recording of the interrogation showed that, in fact, appellant invoked his right to remain silent, and the officers nevertheless continued to interrogate him after that. This recording thus contradicted the officer's testimony about what occurred during this interrogation, such that the recording would have been relevant and admissible to attack the credibility of the officer's testimony under Evidence Code section 780. This recording would even have cast a doubt on the credibility of the remainder of the officer's testimony, including his description of where the gun was found (2 RT 649-654) and his denial that he and other officers were lying to make certain that appellant would be convicted (2 RT 659). After all, if the officer's account of

the interrogation was untrue, then the rest of his testimony could also have been fabricated. The recording of appellant's interrogation was therefore "favorable" to the defense for *Brady* purposes for this reason as well.

2. The Evidence Was Suppressed by the Prosecution.

Evidence has been "suppressed" for *Brady* purposes if the prosecution did not produce the evidence at any point up to or during the trial (*People v. Lucas, supra,* 60 Cal.4th at 274), and if the defendant was not aware of the evidence and could not have obtained it through the exercise of due diligence (*People v. Salazar, supra,* 35 Cal.4th at 1049). The "good or bad faith" of the prosecutor in failing to produce the evidence at issue is not relevant to this determination. (See *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1381 ["it does not matter whether such a prosecutorial failure [to disclose favorable evidence under *Brady*] is intentional, negligent or inadvertent".)

This recording of appellant's police interrogation was not produced or mentioned by the prosecution at any point during the preliminary hearing or the first trial that resulted in appellant's convictions in counts one and four. When appellant raised this issue for the first time at the second trial, the prosecutor explained that she had not produced this recording of appellant's interrogation, even though she had known that the police report of the incident contained the acronym "DICV", which meant that the interrogation had been recorded. (3 RT 4214-4215.) Defense counsel confirmed that he had not been aware of the existence of this video until he had asked the prosecutor at the second trial about the meaning of this acronym. (3 RT 4214-4215.)

Nor could appellant have obtained the recording through the exercise of due diligence. The police report does not expressly state that the interrogation had been recorded, or that video or audio recordings of appellant's statements existed. (See Court Ex. 1 [police report submitted at motion for new trial]; see

also Attachment 1, below [at p. 64].) The report instead summarily states that the officers advised appellant of his *Miranda* rights, that appellant waived them, and that appellant then admitted using the firearm during the dispute. The report further states that the arresting officers were available to testify regarding appellant's statements. This section of the report likewise omits any reference to there being a recording of appellant's statement.

The only reference in the police report evidencing that a video existed is the following: "Our DICV was activated during the initial detention of [appellant]..." (Court Ex. 1.) This cryptic acronym cannot excuse the prosecution's failure to produce this video. Defense counsel confirmed at the hearing on appellant's motion for new trial that he was unaware of the meaning of this acronym: "I didn't know what a DICV was. This acronym was never identified...This is apparently new technology. I never heard of it before. I simply didn't know...Now I know, but I didn't know that." (3 RT 5406.) The report itself does not define this acronym. The appellate record contains nothing to suggest that this acronym had been defined elsewhere in the discovery that had been provided to the defense. It does not even appear that this acronym has ever been used or defined in any published California or federal case. In other words, this is not an acronym that is so commonly used and known that the defense can fairly be charged with knowledge of its meaning. It therefore cannot be said that the recording at issue could have been obtained through the exercise of due diligence on the part of the defense, so as to excuse the prosecution's failure to produce this video.

The prosecution was also not excused from producing this video simply because the defense did not request it. Rather, the prosecution is required under *Brady* to disclose all favorable evidence to the defense, *even in the absence of a defense request.* (*People v. Lucas, supra,* 60 Cal.4th at 273.) Nor did the

prosecutor's unawareness of this video during the first trial excuse her failure to produce it, because the prosecutor is obligated under *Brady* to *learn* of the existence of all favorable evidence that is in the possession of the investigating police agency. (*People v. Salazar*, *supra*, 35 Cal.4th at 1042.) This video was in the possession of the investigating police agency, and as a result, even if this court gives the prosecutor the benefit of the doubt on this point, and concludes that she was actually unaware that the video existed until this issue was first raised at the second trial, such that her failure to produce this video before or during the first trial was innocent and inadvertent, the prosecutor nevertheless failed to perform her duty under *Brady* to learn of the existence of this recording and to then turn it over to the defense before the first trial. (*Ibid*.)

In sum, since this video was not produced by the prosecution until after the first trial, this evidence was "suppressed" for *Brady* purposes.

3. The Evidence Was Material.

Evidence is "material" under *Brady* if "there is a reasonable probability its disclosure would have altered the trial result." (*People v. Verdugo, supra,* 50 Cal.4th at 279.) In this context, "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." (*People v. Hoyos*, *supra*, 41 Cal.4th at 918.) "Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies." (*People v. Verdugo, supra,* 50 Cal.4th at 279.) "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*In re Brown* (1998) 17 Cal.4th 873, 886.) The materiality of withheld evidence must therefore "be evaluated in terms of how the result of the proceeding would have been

different" if the evidence had been produced. (*People v. Hoyos, supra,* 41 Cal.4th at 919.)

The suppressed recording of appellant's interrogation was material in appellant's case because, as detailed above, it would have resulted in the exclusion of appellant's statements to police. This is not mere speculation in appellant's case; once this recording had been produced at the second trial, the trial court actually *did* suppress appellant's statements. But without this recording, the prosecutor was able to present appellant's admissions at the first trial. The jury at appellant's first trial thus heard uncontradicted testimony from the arresting officer that appellant admitted using the firearm during an argument with John Doe.

The admission of appellant's otherwise inadmissible statements to police had a substantial impact on the outcome of the first trial. As the high court has recognized, "[a] defendant's confession is like no other evidence. It is probably the most probative and damaging evidence...and...a jury may be tempted to rely on it alone in reaching its decision." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 280 [111 S.Ct. 1246, 113 L.Ed.2d 302].) State courts have echoed this concern: "[c]onfessions, as a class, will almost always provide persuasive evidence of a defendant's guilt and as such, confessions often operate as a kind of evidentiary bombshell which shatters the defense." (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 884.) "Therefore, the erroneous admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial under the traditional harmless-error standard." (*Ibid*.)

In appellant's case, the first jury would have been far more likely to give appellant the benefit of the doubt if it had not been permitted to hear testimony about appellant's inadmissible statements to police. It follows from the above-

noted observations about the nature of confessions in general that, had appellant's admissions been suppressed, there is at least a reasonable chance that the outcome of the first trial would have been more favorable to appellant.

And even if the recording would not have resulted in the suppression of appellant's statements, the recording would have demonstrated that the arresting officer's version of the interrogation was untrue. Had the jury been allowed to hear this evidence, the jurors may very well have been skeptical of the entirety of the officer's testimony. In such a situation, the jurors would have been far more likely to give appellant the benefit of the doubt as to all of the charges.

It also bears emphasis that, aside from appellant's statements to police, the remaining evidence of appellant's guilt in counts one and four was far from overwhelming. The prosecution presented no physical evidence to show that appellant used the firearm, and there was no recording or corroboration from third parties as to what was said between appellant and John Doe. Rather, aside from appellant's inadmissible statements to police, the entirety of the prosecution's case was based on John Doe's testimony. But if the first jury had been inclined to believe all of John Doe's testimony, then it would likely have convicted appellant in counts two and three as well. Instead, the first jury's inability to reach of verdict on counts two and three strongly suggests that the jurors did not all believe John Doe's version of the incident. Had appellant's statements been properly suppressed, or had the arresting officer's version of the interrogation been impeached with this recording, the jurors may have found, for example, that the evidence supported reasonable interpretations that appellant was merely demanding his money from John Doe and was not threatening him, or that John Doe fabricated the part about appellant using a gun to make the incident seem more severe than it actually was. So long as the

jury believed that any such innocent interpretations were "reasonable", then the jurors would have been obligated to give appellant the benefit of the doubt and find him not guilty on those counts. (See 1 CT 90; CALJIC No. 2.01.) But once the jury heard uncontradicted and otherwise inadmissible testimony that appellant effectively confessed to these counts, the jury was all but certain to convict appellant.

The likelihood of a more favorable result is further evidenced by the first jury's questions and readback requests. The jury at the first trial first asked for a readback of the arresting officer's testimony about where he found the gun, and about what appellant said when he was confronted with the gun. (2 RT 718, 901-905; 1 SUP CT 1.) The prosecutor specifically noted that this request included a request for a readback of appellant's "verbal statement that was made post-*Miranda* at the scene." (2 RT 903.) The first readback accordingly included a readback of the arresting officer's testimony regarding the statements by appellant at issue. (2 RT 903-905.) This request demonstrates that the jury considered appellant's statements to police–or more specifically, the officer's version of appellant's statements–to be an important part of their determination of the case. If the jurors believed that appellant's statements to police were inconsequential to the outcome, then they would not have requested that these statements be read back during deliberations.

After that, the first jury asked for a readback of John Doe's testimony. (2 RT 907-908; 1 SUP CT 4.) But had the jurors been inclined to accept as true the entirety of John Doe's account of the incident, then this readback would also have been unnecessary. This request thus similarly demonstrates that the jury was struggling with whether to believe the entirety John Doe's account. This too evidences the importance of appellant's statements to police to the jury's determination at the first trial.

Next, the jury asked for legal instructions about how to use the evidence that John Doe had been subpoenaed by the prosecution, and about what to do if the jury could not reach an agreement. (2 RT 1201-1206; 1 SUP CT 5.) The first part of this question again signifies that the jury was scrutinizing John Doe's testimony. If the jury was simply accepting John Doe's testimony at face value, this question, like the readback requests discussed above, would have been unnecessary. Also noteworthy is that the second question does not specify what the jury's disagreement was about. The jury might have been referring to a disagreement about counts two and three, in which the jury was ultimately unable to reach a verdict, but the jury might also have been referring to a disagreement about counts one and four. Either way, this question is further proof that the jury was not simply accepting the truth of the prosecution's evidence. At least some jurors must have believed that at least some part of the prosecution's case had not been proven, and this was after the jury had already heard the officer's uncontradicted testimony about appellant's inadmissible statements. If these statements had properly been removed from the jury's consideration, or if the officer's version of events had been impeached by the recording, the jurors may very well have resolved their disagreements in appellant's favor.

After the jury returned its verdicts in counts one and four, and was instructed to continue deliberating on counts two and three, the jury submitted a note explaining its disagreement: "Some of the jury (a majority) maintain that the evidence does not demonstrate guilt beyond a reasonable doubt because: (1) there are inconsistencies – John Doe first said he called 911 and then corrected that he called his mom. Also, John Doe shifted from reflecting he was not afraid to 'I guess' to afraid for others. (2) There is a lack of corroborating evidence – specifically, the officer's testimony references an 'altercation with

the cousin but not which altercation nor what specifically happened. (3) The witness is not, on the issue of the gun, believable–some jurors maintain that a reasonable person would be afraid. Second, John Doe had concern for his family but then left them at the house to go to his mom's place. Last, that John Doe called his mom first versus immediately/directly calling 911." (1 SUP CT 6.)

This question provides unique insight into the jury's evaluation of the prosecution's case. The jury specifically found that John Doe's account was not entirely believable, as evidenced by his inconsistencies about whether he called 911 or whether he called his mother, as well as his testimony about whether he was afraid. The jurors also astutely noted the inconsistency in John Doe's testimony that he was afraid for the safety of his family but that he nevertheless left the family in the home instead of warning the family or remaining and calling 911. In addition, this question, like the previously discussed readback requests, references the officer's testimony about appellant's statements. This again signifies that the jury considered the officer's testimony about these statements to be an important, if not determinative, piece of evidence.

This record from the first jury thus demonstrates that the jurors did not view the prosecution's evidence as overwhelming. And this was after appellant's inadmissible statements had been admitted. Given the jury's noted skepticism of John Doe's account, the most likely explanation for the guilty verdicts in counts one and four is appellant's otherwise inadmissible statements to police. Had the prosecution complied with its *Brady* obligations and produced the video of appellant's statements before the first trial, appellant's statements would almost certainly have been suppressed. Had these statements been taken out of the equation, the jurors could easily have given appellant the

benefit of the doubt on all of the counts, as at least some jurors did on counts two and three. And even if the recording didn't result in the suppression of appellant's statements, it would have raised a doubt as to the credibility of the entirety of the officer's testimony by showing that his version of the interrogation was untrue. This would have left the jury with John Doe's testimony, which the jurors specifically explained was not entirely credible. (1 SUP CT 6.)

In assessing the materiality of this evidence, this court also has the benefit of being able to compare the outcomes of the first trial and the second trial. In the first trial, the officer's testimony about appellant's statements were admitted into evidence and the jury convicted appellant in counts one and four. In the second trial, by contrast, appellant's statements were excluded and the jury acquitted appellant in counts two and three. Indeed, the second jury returned its not guilty verdicts in counts two and three after fewer than three hours of deliberation. (See 3 RT 4801, 4837-4839 [a.m. session began at 10:50 a.m.; deliberations commenced at end of a.m. session; lunch recess taken at 11:53 a.m.; jury returned not guilty verdicts at 2:56 p.m.]) This is consistent with the above-quoted observations about the damaging effect of confessions on a defendant's case in general, and further demonstrates the importance of this evidence to the outcome of appellant's case.

There is thus a reasonable probability, sufficient to undermine confidence in the outcome, that, had the prosecution properly produced this recording before the first trial, the outcome of the first trial would have been more favorable to appellant. At the very least, there is reasonable chance that either the exclusion of appellant's statements or the impeachment of the officer's testimony which would have resulted had the prosecution properly produced this evidence before the first trial would have caused at least some

jurors to give appellant the benefit of the doubt and find that the prosecution had not met its burden of proving all of the elements of counts one and four, as they did with counts two and three. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 519-521 [hung jury is a "result more favorable"].) This evidence was therefore "material" for *Brady* purposes.

The prosecution's failure to produce this recording before the first trial amounted to a *Brady* violation for these reasons. Accordingly, appellant's convictions in counts one and four must be reversed.

E. The Trial Court Erred by Denying Appellant's Motion for New Trial on this Basis.

The trial court also erred in denying appellant's motion for new trial on the ground that the prosecutor committed a *Brady* violation by failing to disclose this video of appellant's interrogation before the first trial. Reversal is required for this reason as well.

Although the denial of a new trial motion is generally reviewed for an abuse of discretion, where the asserted abuse of discretion is the failure of the trial court to recognize violations of the defendant's constitutional rights, such as where a motion for new trial is based on an alleged *Brady* violation, the determination of whether the trial court abused its discretion includes an analysis of the underlying constitutional claim. (*People v. Hoyos*, *supra*, 41 Cal.4th at 917, fn. 27.) Since appellant's new trial motion was based on an asserted *Brady* violation, the trial court's ruling on appellant's new trial motion should not be reviewed under a deferential abuse of discretion standard. It must instead be reviewed in light of the merits of the underlying *Brady* claim. This is because a trial court's "discretion is always delimited by applicable legal standards, a departure from which constitutes an abuse of discretion." (*People v. Whitaker, supra,* 213 Cal.App.4th at 1007 .) If the *Brady* claim was

meritorious, then the trial court's denial of appellant's motion for new trial was legally incorrect, such that this ruling was an abuse of discretion.

Appellant's *Brady* claim was meritorious for the reasons detailed above (Section I(D), above [at pp. 21-38]): (1) this recording was favorable to the defense because it showed that appellant's admissions were obtained in violation of *Miranda* and also was admissible to impeach the arresting officer, (2) this recording was suppressed by the prosecution, in that the prosecutor failed to produce this recording until after the first trial, and (3) this recording was material because without appellant's statements to police, or alternatively with this evidence to impeach the officer's credibility, the prosecution's case would have been substantially weaker. For these same reasons, by denying appellant's new trial motion, the trial court misapplied the law governing the asserted *Brady* violation. It follows that the trial court's denial of appellant's new trial motion was an abuse of discretion. (See *People v. Knoller, supra,* 41 Cal.4th at 156 [trial court abuses discretion if decision is based on "an incorrect legal standard"]; see also *People v. Uribe, supra,* 199 Cal.App.4th at 858 [trial court's exercise of discretion "must be...guided by legal principles and policies appropriate to the particular matter at issue"].)

It also bears emphasis that the trial court focused on irrelevant factors in evaluating appellant's new trial motion. (See *People v. Knoller, supra,* 41 Cal.4th at 156 [trial court abuses discretion by basing decision on "impermissible factors"].) The trial court noted that appellant did not raise a *Miranda* objection at the first trial, and mistakenly believed that this point "should resolve the issue." (3 RT 3 5402.) This point did not resolve the issue, however, because the suppressed evidence is what showed the existence of the *Miranda* violation in the first place. If appellant had raised a *Miranda* objection before the video had been produced, the objection would likely have been

overruled given the state of the record at the time. Appellant's failure to raise a *Miranda* objection at the first trial was therefore irrelevant to the *Brady* analysis.

The trial court then stressed that the defense did not make a discovery request before the first trial. (3 RT 5405.) But a defense request is not required to trigger the prosecution's duty under *Brady* to disclose favorable evidence to the defense. (See *People v. Lucas*, *supra*, 60 Cal.4th at 273 [*Brady* material must be disclosed to defense "even though there has been no request by the accused"].)

The court next stated that this video "doesn't go to guilt or innocence technically..." (3 RT 5407.) But the determination of whether evidence is favorable for *Brady* purposes does not depend on whether the evidence relates to factual guilt or innocence. The question is whether the evidence would help the defense case or hurt the prosecution's case. (*In re Sassounian*, *supra*, 9 Cal.4th at 544.) This video would have helped the defense case and hurt the prosecution's case here because it would have provided the basis for a meritorious motion to suppress appellant's inculpatory statements to police, or at the very least would have been admissible to impeach the arresting officer.

Finally, in deciding this issue, the court returned to its original reasoning: "there was no [*Miranda*] objection that was interposed during the first trial on the case. And I think that that pretty much resolves the issue. So I'll deny the motion for new trial." (3 RT 5413.) But if the trial court's logic were correct, this would create an end run around *Brady*. The prosecution could selectively withhold evidence that would provide the basis for a meritorious objection to inculpatory evidence that the prosecution intends to present at trial, and then argue that the defense forfeited a claim about the prosecution's suppression by failing to object to the evidence that was admitted, even though

the facts showing the basis for the objection were not known to the defense because they had been suppressed by the prosecution.

In other words, the trial court did not properly analyze appellant's *Brady* claim. The *Brady* analysis in this situation must focus on the effect that the suppressed evidence would have had on the admissibility of the evidence that the prosecution presented. In appellant's case, the defense would not have known that there was a reason to object to appellant's statements on *Miranda* grounds until the prosecutor produced the video that showed the *Miranda* violation at the second trial. The trial court was consequently incorrect in concluding that appellant's failure to raise a *Miranda* objection at the first trial, before the video had been produced, is the point that resolved the asserted *Brady* violation. (3 RT 5413.)

The trial court's evaluation of appellant's *Brady* claim at the hearing on appellant's new trial motion thus focused on impermissible factors and an incorrect legal standard, such that the court abused its discretion in its ruling on this issue. (*People v. Knoller, supra,* 41 Cal.4th at 156.)

But regardless of the flaws in the trial court's reasoning, since the underlying *Brady* claim was meritorious for the reasons stated above (see Section I(D), above [at pp. 21-38]), the trial court erred by denying appellant's motion for new trial. (See *People v. Hoyos, supra,* 41 Cal.4th at 917, fn. 27 [review of denial of motion for new trial includes review of merits of underlying constitutional claim].) Appellant's convictions in counts one and four must be reversed for these reasons as well.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Court of Appeal
	) No.
Plaintiff and Respondent,	)
	) Superior Court
v.	) No.
	)
MARTINEZ,	)
	)
Defendant and Appellant.	)
	)

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Daniel J. Didier, Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

Mr. Martinez, appellant, appeals from judgment, entered after a jury trial, which finally disposes of all the issues between the parties and is authorized by Penal Code[1] section 1237, subdivision (a).

[1] All future statutory references are to the Penal Code unless otherwise indicated.

STATEMENT OF THE CASE

On May 26, 1998, the government filed a two count information against Mr. Martinez, alleging he violated section 487, subdivision (a) [grand theft–count one] and section 503 [fraudulent appropriation of property of another–count two] on April 1, 1998. In addition, the information alleged Mr. Martinez had suffered three prior strike convictions within the meaning of sections 667, subdivisions (d) and (e)(2) and 1170.12, subdivisions (b) and (c)(2) for convictions occurring in Texas from 1976: case numbers, [robbery], [aggravated robbery with weapon-gun], and [aggravated robbery with weapon-gun]. Finally, it was alleged Mr. Martinez had served three prior prison-terms within the meaning of section 667.5, subdivision (b): one from 1976, [Texas conviction]; one from 1985, [Texas conviction]; and one from 1996, [federal conviction]. (Clerk's Transcript, hereinafter "CT," pages 59-61.)

That same day, Mr. Martinez executed a *Faretta*[2] Waiver Form (CT 70-72), and the court granted his motion to proceed in pro per.[3] (CT 92.)

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[2] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

[3] In addition, the court granted him special privileges in the county jail so that he could prepare his defense (CT 62-69); however, the court denied Mr. Martinez's separate motion for payment for legal runner D.T.. (CT 93-99.) Mr. Martinez's motion for reconsideration of this request was

Jury trial began on July 14, 1998; a jury was empaneled that morning, and opening arguments and the testimony of the first witnesses were heard that afternoon. Jury trial on the prior conviction allegations was bifurcated. (CT 149-151.) Testimony of the remaining witnesses continued the following day. In the morning, the court allowed the prosecution to amend the information, over Mr. Martinez's objection, to include additional language in the descriptive text of count one. (CT 216 [clerk's minutes].) In the mid-afternoon, after hearing closing argument and being instructed by the court, the jury issued a not guilty verdict on count one–grand theft (CT 211, 219 [verdict form]; 216-217 [clerk's minutes]) and a guilty verdict on count two–fraudulent appropriation of property of another. (CT 212, 220 [verdict form]; 216-217 [clerk's minutes].) Immediately thereafter, proceedings on the bifurcated prior conviction allegations were begun. (CT 217-218 [clerk's minutes].) The following day, the jury returned true findings on all allegations as charged. (CT 246 [clerk's minutes]; 234, 248 [verdict form–

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denied. (CT 104-107.) And a subsequent request for authorized compensation for legal runner services and expenses was also denied. (CT 108-113; 130.) Mr. Martinez made a motion to set aside the information pursuant to section 995 (CT 116-129) and a motion to reduce the crimes alleged to misdemeanors (CT 131-135); these motions were denied. (CT 144.) On August 17, 1998, it was discovered Mr. Martinez had never received a "pro per packet" when his pro per status was granted, and the court ordered the packet be proved to Mr. Martinez. (CT 257.)

1985 prior prison-term allegation from Texas judgment]; 235, 249 [verdict form–1996 prior prison-term allegation from federal judgment]; 236, 250 [verdict form–1976 prior prison-term allegation from Texas judgment]; 237, 251 [verdict form–strike conviction:]; 238, 252 [verdict form–strike conviction:]; and 239, 253 [verdict form–strike conviction:].)

Mr. Martinez then moved for a new trial pursuant to section 1181 based on the fact that the district attorney had failed to disclose witness J.E. had suffered a prior felony conviction. (CT 258-264, 288-304 [written motions].) Mr. Martinez also made a motion to dismiss the prior conviction allegations under section 1385 and the conviction on count two because of (1) insufficient evidence and (2) double jeopardy violations. (CT 306-339 [written motion].)

On August 28, 1998, the court heard Mr. Martinez's oral motion for a new trial and to dismiss the prior conviction allegations; it denied the motions. (CT 340 [clerk's minutes].) Thereafter, the court imposed a 25-year-to-life sentence for the conviction on count two, struck the punishment for the prior conviction allegations under section 667.5, subdivision (b)–the prior prison term allegations–and ordered Mr. Martinez to pay a $1,000.00 restitution fine and $6,000.00 in victim restitution. (CT 340-341 [clerk's minutes]; 343 [abstract of judgment].) Mr. Martinez filed a written notice of

appeal on September 3, 1998 (CT 344-347) and a second written notice of appeal on September 30, 1998. (CT 350-355.) The trial court ordered the clerk's transcript and reporter's transcript be prepared.[4] (CT 356-357.)

Mr. Martinez's request to proceed on appeal in pro per was denied by this court. On January 12, 2000, the United States Supreme Court ruled an appellant does not have a federal constitutional right to represent himself on direct appeal. (*Martinez v. Court of Appeal of California, Fourth Appellate District* (2000) 528 U.S. 152 [120 S.Ct. 684, 145 L.Ed.2d 597].)

STATEMENT OF FACTS

A. PROSECUTION CASE

Mr. L.M. is a criminal defense attorney, who has been in practice for thirty-nine years and has an office in Santa Ana. He moved to the Santa Ana office around the beginning of 1998. (Reporter's Transcript, hereinafter "RT," pages 80-81.) Mr. J.E.[5] has worked with Mr. L.M. for approximately

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[4] The trial court and district attorney filed a statement under Penal Code section 1203.01. (CT 348-349.) Mr. Martinez objected to this statement. (CT 366-368 [written objection].)

[5] During the preliminary hearing, the reporter transcribed the spelling of this witness's name as " ". (CT 34.) However, during trial, the reporter transcribed the spelling of this witness's name as " ". (RT 62.) For consistency, this brief will use the later spelling, indicated at trial.

eight years and currently works with him in the Santa Ana office. He runs the office, as well as works as an interpreter and an investigator.[6] (RT 62-63.) Mr. J.E. is also authorized to receive money for other services besides bail bonds, including retainers and payment for services. When he receives the cash, he writes a receipt and holds the money in his pocket until he can give it to Mr. L.M.. (RT 63-64; 72.) Mr. L.M. then keeps it in his pocket, as there are no secure facilities in the office in which to keep cash. (RT 84-85.)

It is not customary for Mr. L.M.'s office to accept money from clients to help defendants secure release from jail on bail. Normally, the client will be referred to a bail-bonds man that they know and may be easier to work with; sometimes, Mr. L.M.'s office will call the bail company. Generally, most bonding companies require ten percent of the bond as premium, i.e., ten percent of the bond in cash and proof of collateral for the value of the bond. (RT 63; 81-82; 84.)

In January 1998, Mr. J.E. hired Mr. Martinez to do some research for Mr. L.M.'s firm and to help around the office. (RT 65, 83.) Mr. L.M. did not authorize Mr. Martinez to deal with clients directly, nor did he authorize Mr. Martinez to take cash from clients or to advise clients. (RT 83-84.)

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[6] On cross-examination, Mr. J.E. denied he had ever been convicted of a felony. (RT 70.)

In March 1998, Jane Doe hired Mr. L.M. to represent her boyfriend, who had been arrested in Los Angeles. She met with Mr. J.E. on March 27th and paid him $2,500.00 cash for the representation. (RT 36-38; 52; 85.) Shortly thereafter, both Mr. J.E. and Mr. L.M. left on vacation. Mr. Martinez had access to the office during their absence and was supposed to answer the telephone and take messages. (RT 66.) Mr. A.H., a paralegal and friend of Mr. J.E.'s, was not working at the office during this period and was not allowed to sleep in the office. (RT 73-74.) However, he had a key to the office. In addition, Mr. R.C. also had access to the office. (RT 90-91.)

On March 31st, Jane Doe called Mr. L.M.'s office to ask about bailing her boyfriend out of jail. She spoke with Mr. Martinez and asked for Mr. J.E.. After telling her Mr. J.E. was not there, Mr. Martinez said he was in charge of the cases. Learning this information, Jane Doe asked if she could get her boyfriend out of jail on bail. Mr. Martinez said he would help her and asked for her boyfriend's booking number, so he could discover the amount of the bail. She gave him the number and they finished their conversation. (RT 38-39; 42.) In a later telephone call, Mr. Martinez told Jane Doe he needed $6,000.00 to bail out her boyfriend. (RT 39-40.)

Jane Doe then gathered the money from her boyfriend's family and friends. (RT 41.) The following morning, April 1st, Jane Doe went to Mr.

L.M.'s office with her boyfriend's uncle, John Doe. They met with Mr. Martinez in Mr. L.M.'s office. After talking about the case, Jane Doe gave Mr. Martinez the six thousand dollars. He wrote out a receipt and indicated he needed to leave in order to beat traffic to the Orange County Jail. (RT 42-47; 57-59.) She did not see Mr. Martinez again until her testimony at trial. (RT 52.)

Jane Doe's boyfriend was not released from jail that day or the following day. (RT 46-48.)

* * *

Towards the end of his vacation, Mr. J.E. called the office and spoke with Mr. Martinez. Mr. Martinez reported that everything was fine. There was no mention during the conversation of Jane Doe coming to the office and there was no mention during the conversation of $6,000.00. (RT 74-75, 78.) When Mr. J.E. returned from vacation to Mr. L.M.'s office, he found no notes or messages indicating Jane Doe had paid $6,000.00 cash to bail her boyfriend out of jail. (RT 68.) When Mr. L.M. returned from vacation, he too did not find any notes or messages indicating Jane Doe had come in and left $6,000.00 to be paid towards her boyfriend's bail. (RT 86.) Mr. Martinez had stopped showing up for work; he had not been fired. (RT 67; 87.)

Jane Doe called Mr. L.M.'s office and spoke with Mr. J.E.. She asked him what had happened about her boyfriend's bail. When Mr. J.E. learned she had given money to Mr. Martinez, Mr. J.E. said that he was not a lawyer and asked her why she gave him the money. Mr. J.E. was upset; it was the first time he had heard about the money.[7] (RT 51; 67-68.)

On April 6th, Jane Doe made a police report about the missing money. (RT 48-49.) On April 7th, Officer T.G. was assigned to review Jane Doe's complaint. He interviewed Jane Doe and then went looking for Mr. Martinez at the Villager Inn where Mr. Martinez was registered to be staying in room 218 until April 10th. There was no answer to his knock at the hotel room. He also went to Mr. L.M.'s office and received no answer to his knock there.[8] (RT 96-97.) The following day, Officer T.G. and an investigator staked out Mr. Martinez's room at the Villager Inn and arrested Mr. Martinez as he left the hotel room carrying a duffle bag. (RT 97-99.) Approximately $300.00 was seized from Mr. Martinez. (RT 113.)

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[7] Mr. J.E. changed the locks on the door to Mr. L.M.'s office on April 7th. (RT 75, 78.)

[8] Mr. J.E. did not speak with any investigator about the incident. Although an investigator's card was left through the mail slot, Mr. J.E. gave the card to Mr. L.M.. (RT 77; 110.) Mr. L.M. spoke with the investigator on the telephone. (RT 89; 109.) The only knowledge Mr. L.M. had about the $6,000.00 dollars came from Mr. J.E.. (RT 93.)

After being read his *Miranda*[9] rights, Mr. Martinez told Officer T.G. that he had been hired as an office assistant to answer the telephone, take messages and do paralegal work. While Mr. L.M. and Mr. J.E. were on vacation, Mr. Martinez said he was left to attend to office duties and client matters. He said he had helped with bail issues in the past and took Jane Doe's $6,000.00 to bail out her boyfriend; he gave her a receipt for the money. He told her that he had friends at a bail bonds office and he could get a good price on the bail collateral. Because the bail bonds company information was not left for him in the office, he looked in the L.A. County yellow pages for a bail bonds office. After making several calls, he found a company that would take care of the bond. He then gave the $6,000.00 to a courier who represented the bail bond company and gave the courier a receipt for the money. He did not have a receipt from the courier. Mr. Martinez had neither the name for the courier or the bail bonds company. (RT 100-104.) However, he had left post-it notes on Mr. J.E.'s desk containing information about the receipt of the money and the transaction with the bail bonds company. He placed no notes in the file. (RT 106-107.)

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[9] *Miranda* v. *Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

Later, Mr. Martinez said that he had found on his desk the name of the bail bonds company that Mr. L.M.'s office used–H & H Bail Bonds Company, but that he had not used that company. Mr. Martinez also indicated that the bail was reduced to $80,000.00 and that even though Jane Doe had asked if she needed to pay additional money, he told her no extra money was needed. (RT 104-105.)

At the time of the trial, Jane Doe had never received the six thousand dollars back; she had never been contacted by a bail bonds man; and her boyfriend had not been released from jail on bail. (RT 51; 55.)

B. DEFENSE CASE

Mr. L.L.R. is an attorney who has an office right next door to Mr. L.M.'s office. He met Mr. L.M. and Mr. J.E. in 1995. They have worked together on some cases. (RT 145-147.) Mr. Martinez has answered the telephone for Mr. L.L.R., when he had to leave the office, and has served two people for Mr. L.L.R.. (RT 149.) During Mr. L.M.'s and Mr. J.E.'s vacation, from March 27th through April 6th, Mr. A.H. and Mr. R.C. were working in Mr. L.M.'s office. (RT 148-149; 151.) On some occasion, Mr. L.L.R. has had problems with collecting money due to him from Mr. J.E.; but he eventually received the money. (RT 148; 151-152.)

Mr. L.L.R.'s wife, Ms. R.C., assists her husband by working as a receptionist/typist in his office. (RT 153.) At times, Mr. Martinez had worked in Mr. L.L.R.'s office; and at those times, he had keys to their office. Nothing was ever stolen out of the office and clients never complained about Mr. Martinez regarding money problems. (RT 156.) During Mr. L.M.'s and Mr. J.E.'s vacation, when Mr. Martinez ran Mr. L.M.'s office, she saw other people working in the office, including Mr. A.H. and others. (RT 154-155.)

Another attorney, Ms. C.D., knows Mr. L.M. and Mr. Esquivel. Mr. Martinez worked in Mr. L.M.'s office, as well as Mr. A.H. and Mr. R.C., and a woman named Ms. D.T.. (RT 157-158.) Mr. Martinez has performed some work for Ms. C.D., serving documents. (RT 160.) During the time frame of Mr. L.M.'s and Mr. J.E.'s vacation, Ms. C.D. found Mr. A.H. alone in the office. (RT 160.)

Ms. C.D. works with Mr. L.M.'s office, and prior to the move of Mr. L.M.'s office to their current address, she shared some space in an office with Mr. L.M.. (RT 158.) During the time she has worked with Mr. J.E., he has brought money to her from clients and there have been some problems with that. (RT 159.)

Mr. Martinez also testified in his defense. During his employ at Mr. L.M.'s office, his duties included research, basic office responsibilities, and attending to clients. There were many clients and a lot of money coming into

the office. Many times, he would hold some of the money for Mr. L.M. or Mr. J.E.. (RT 165.)

During Mr. L.M.'s and Mr. J.E.'s vacation, Mr. Martinez was left to tend to the responsibilities of the office and the clients. Money was brought into the office and kept there. He also received money from Jane Doe to make bail for her boyfriend. (RT 165.) Both Mr. J.E. and Mr. L.M. each called in to the office. Mr. Martinez informed Mr. J.E. about clients who had contacted the office and about the money Jane Doe had brought in for bail. Mr. J.E. told Mr. Martinez to put the money she had brought into the cabinet located behind Mr. L.M.'s desk, where the money is usually kept, and to wait until he returned. (RT 165-167; 173.) When Mr. L.M. called, Mr. Martinez told him that he would leave the money in the office and he would be taking a short vacation, as he had been working two weeks straight. (RT 167.)

Mr. Martinez then left to Fresno, to visit family. When he returned to the office, the locks had been changed. Although he repeatedly called the office and left messages on voice-mail for Mr. J.E., no one ever answered at the office. (RT 167.) On Thursday, when he was arrested, he was preparing to return to Fresno to drop his fiancèe off there, as she lived there. (RT 167168.) When he was arrested, he did not know what to tell the investigator, because he had not yet spoken to Mr. J.E. or Mr. L.M.. Although he

repeatedly asked to speak with them, to find out what was happening, the investigator did not allow him to do so. (RT 168.) Because he did not know what information either Mr. J.E. or Mr. L.M. wanted him to divulge, because of attorney-client privilege, he did not know what to tell the investigator. So, he told the investigator he had given the money to a courier; but he testified that he never gave the money to a courier. (RT 169-172.) Although he knew the bail was set at $600,000.00 dollars, and was told by the bail bonds company that he needed ten percent of the bail for the bond, he had miscalculated when he asked Jane Doe for $6,000.00 dollars. (RT 172-173.) He did not steal the money. (RT 168-169.)

C. PRIOR CONVICTION ALLEGATION TRIAL

At the beginning of the bifurcated jury trial on the prior conviction allegations, the prosecution offered four packets to be marked: People's number three, including documents relating to case number , case number , case number , and case number (RT 227-229); People's number four, including the Orange County booking sheet and fingerprints of appellant (RT 229); People's number five, including documents relating to case number (RT 230); and People's number six, including documents relating to case number . (RT 230.) Mr. S.B., a latent fingerprint examiner, testified that no two

persons have the same fingerprint. Each person's fingerprint, which is formed at approximately the third month of gestation, is unique. (RT 231-235.)

The morning of the trial, Mr. S.B. reviewed People's exhibits three through six. He compared all the fingerprint evidence of these documents and concluded, with the exception of one document--page 7 of Exhibit three-which was of too poor quality to view the fingerprint detail, they were all made by the same person. (RT 236-239.) At the end of the presentation of evidence, these exhibits were entered into evidence. (RT 242.) After deliberation, the jury found all alleged priors to be true. (RT 264-268.)

ARGUMENT

I.

MR. MARTINEZ'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SET FORTH IN *BRADY V. MARYLAND* (1963) 373 U.S. 83, WERE VIOLATED WHEN THE PROSECUTOR FAILED TO DISCLOSE MATERIAL EVIDENCE BEARING ON THE CREDIBILITY OF PROSECUTION WITNESS J.E.. REVERSAL IS REQUIRED.

During the trial, on cross-examination, Mr. Martinez asked Mr. J.E.--a prosecution witness--if he had ever been convicted of a felony. Mr. J.E. replied in the negative. (RT 70.) The following day, Mr. Martinez made a

formal request for Mr. J.E.'s "rap sheet". The prosecutor indicated it would be quicker to run a "CTS"; and that procuring a "rap sheet" would take some time. Mr. Martinez indicated the "CTS" alternative was acceptable, and a brief recess occurred. (RT 142-143.) Thereafter, Mr. Martinez began to present his defense. (RT 145.) After both sides had rested (RT 177), and a jury instruction discussion, the court asked the prosecutor whether she had received any further information about Mr. J.E.'s felony conviction. The prosecutor replied that there were many subjects in the "CTS" data-base with the name " ", and they were trying to ascertain Mr. J.E.'s date of birth so as to locate his records. (RT 178-179.) The court then mused whether the information should have been divulged to Mr. Martinez under the discovery statute and opined, on the record, that it could not conclude one would have thought ahead of time that Mr. J.E.'s testimony or his credibility would be critical to the case. (RT 179.) After the court asked whether it should delay the trial or proceed, Mr. Martinez responded the trial could go forward and the issue could be raised later. And, the prosecutor agreed that the information, if secured before the jury was sent to the deliberation room, could be presented to the jury in the form of a stipulation. (RT 180.) This information, however, was never presented to the jury. (RT 180-220.)

Before imposition of judgment, Mr. Martinez made a motion for new trial based on the fact that Mr. J.E. perjured himself as to the existence of any prior felony convictions and the prosecution had not complied with its duty under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] to divulge the existence of Mr. J.E.'s prior felony conviction. (CT 288-302 [written motion]; 258-264 [supplemental motion–with declaration of Mr. J.B.].) Orally, Mr. Martinez stressed the supplemental motion and attached declaration of Mr. J.B. were sufficient evidence to demonstrate Mr. J.E. had perjured himself and had indeed suffered a prior felony conviction. (RT 276-277.) Moreover, Mr. Martinez indicated Mr. J.E.'s credibility was critical to Mr. Martinez's defense, as Mr. Martinez argued it was in fact Mr. J.E. who had taken the money from the office. (RT 277.) The trial court denied the motion. (RT 277.)

A. Substantive Law.

In *Brady v. Maryland, supra,* the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland, supra,* 373 U.S. at p. 87 [failure to divulge co-perpetrator's statement, even though requested, was improper].) The

High Court recognized this rule as furthering the right of a fair trial. "This principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly." (*Ibid.*) Subsequently, in *United States v. Agurs* (1976) 427 U.S. 97 [96 S.Ct. 2392, 49 L.Ed.2d 342], the High Court found that to ensure the defendant's right to a fair trial, the prosecution has the obligation to divulge evidence favorable to the accused even in the absence of a request. (*Id.* at p. 107.)

More recently, in *United States v. Bagley* (1985) 473 U.S. 667, 676 [105 S.Ct. 3375, 87 L.Ed.2d 481], recognizing the *Brady* rule applied not only to exculpatory evidence, but also to impeachment evidence, as "[s]uch evidence is 'evidence favorable to an accused,' [citation] so that, if disclosed and used effectively, it may make the difference between conviction and acquittal," the High Court set forth the standard by which to evaluate the effect of the nondisclosure, that is, whether reversal of the judgment is required.

> Consistent with 'our overriding concern with the justice of the finding of guilt,' [citation] a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. . . .

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

(*Bagley, supra*, 473 U.S. at pp. 677, 682; see also *In re Sassounian* (1995) 9 Cal.4th 535, 544-545.) Thus, unlike the standard "error" and "prejudice" rubrics of appellate review, a finding of materiality of the nondisclosed evidence automatically constitutes a finding of prejudicial error. (*In re Sassounian, supra,* 9 Cal.4th at pp. 545-546, fn. 7.) In making this evaluation, the "totality of the circumstances" are to be evaluated. (*Bagley, supra,* 473 U.S. at p. 683.)

B. Evidence Of Mr. J.E.'s Prior Felony Conviction Was Material, As It Tended To Impeach His Credibility and Mr. Martinez Relied Upon the Defense That It Was Mr. J.E., and Not Mr. Martinez, Who Took The Money From Mr. L.M.'s Office.

The evidence demonstrates Mr. J.E. suffered a prior conviction for issuing a check with insufficient funds in violation of Penal Code section 476a. (CT 264, declaration of attorney Mr. J.B..) Because of the inherent dishonesty of this crime, issuing a check even though the defendant knows there are not sufficient funds to support it, the crime expresses a "readiness to do evil" and is, therefore, one of "moral turpitude" which Mr. Martinez could have used to impeach Mr. J.E.. (*People v. Castro* (1985) 38 Cal.3d 301, 314; *People v. Chavez* (2000) 84 Cal.App.4th 25 [crimes of moral

turpitude are crimes in which dishonesty is an element, i.e. fraud or perjury, or which exhibit a general "readiness to do evil"]; see *People v. Flanagan* (1986) 185 Cal.App.3d 764, 771 [forgery is a crime of moral turpitude]; *People v. Almarez* (1985) 168 Cal.App.3d 262, 267 [same].) Therefore, under *Brady*, the prosecution had a duty to divulge this information to Mr. Martinez.[10] The pertinent inquiry at this point is whether the prosecution's failure to disclose this information resulted in constitutional error--an unfair trial; that is, whether the evidence was material.

This case hinged on credibility. It was undisputed Mr. Martinez took the $6,000.00 dollars from Jane Doe. The question the jury had to answer was what happened to this money. The prosecution's case theorized Mr. Martinez took the money for personal use; however, Mr. Martinez's defense propounded a different scenario: he left the money in a safe place in Mr.

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[10] During its second discussion on the matter, in considering whether there had been a discovery violation, the trial court opined it could not conclude that one would have thought before trial that the information about Mr. J.E. would be critical to the case. (RT 179.) However, the trial court was mistaken. During the preliminary hearing, at which Mr. J.E. testified (CT 1-58), it was clear Mr. Martinez began to lay the defense that Mr. J.E. had taken the $6,000.00 as it was being held in Mr. L.M.'s office. (CT 29 , 31 [investigator testified he never investigated the possibility Mr. J.E. took the money and never questioned Mr. J.E.] and 45-47 [cross-examination of Mr. J.E.].)

L.M.'s office and it was Mr. J.E. who took the money. Mr. Martinez presented defense witnesses who attested to his credibility and who also indicated that there had been some problems collecting money from Mr. J.E.. (RT 148, 151-152 [Mr. L.L.R.] and 159 [Ms. C.D.].) Thus, Mr. J.E.'s credibility was a key issue for the jury to assess.

Although the prosecution was able to impeach Mr. Martinez's testimony with the fact he had been convicted of felony in 1996, its very last question to Mr. Martinez, and very last piece of testimony the jury heard (RT 176) before receiving instruction, Mr. Martinez was not similarly able to impeach Mr. J.E. because the prosecution had not provided him with information concerning Mr. J.E.'s prior felony conviction. Instead, Mr. J.E.'s denial that he had ever been convicted of a felony (RT 70) was allowed to remain uncontested in front of the jury.

In light of the fact that Mr. J.E.'s credibility was at issue and was crucial to the determination of Mr. Martinez's guilt, the suppression of this crucial evidence that further contested Mr. J.E.'s credibility undermines the confidence in the jury's decision. Mr. J.E.'s credibility regarding some of his monetary dealings was questioned by two witnesses. It is reasonably probable that had the jury also known about Mr. J.E.'s prior felony

conviction, a reasonable doubt would have been placed in the jury's minds and the result would have been different. Accordingly, reversal is required.

II.

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDINGS THAT MR. MARTINEZ SUFFERED THREE PRIOR STRIKES WITHIN THE MEANING OF PENAL CODE SECTIONS 667, SUBDIVISIONS (b) THROUGH (i) AND 1170.12.

Mr. Martinez insisted on his right to have a jury determine the truth of the prior conviction allegations. (RT 117.) After a bifurcated jury trial,[11] the jury found true that Mr. Martinez had suffered several prior convictions, including: a prior conviction for robbery, Texas case number (CT 239); a prior conviction for aggravated robbery with weapon–gun, Texas case number (CT 237); and a prior conviction for aggravated robbery with weapon–gun, Texas case number (CT 238). The language of the jury's verdicts indicated these prior convictions were within the meaning of Penal Code section 667, subdivisions (d) and (e)(2)[12], i.e., prior strike convictions.

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[11] Before the trial on the substantive offenses began, the trial court granted Mr. Martinez's request to bifurcate the trial of the prior conviction allegations. (RT 19.)

[12] As the Three Strikes legislative scheme is consistent with the Three Strikes electorate scheme that created Penal Code section 1170.12 (*People v. Hazelton* (1997) 14 Cal.4th 101, 109, fn. 3) to avoid needless duplication, this brief will only refer to the legislative scheme.

Although the court itself did not make any explicit finding that these prior convictions did indeed qualify as strike prior convictions, this finding is implicit in the court's imposition of sentence under the Three Strikes statutory scheme. (RT 289-291; CT 340-341.) The court erred in finding these out of state priors constituted prior strike convictions, as there was insufficient evidence as a matter of law the crimes Mr. Martinez committed in Texas, as defined by the Texas statutes, constituted the particular felonies set forth in either Penal Code section 667.5, subdivision (c) or Penal Code section 1192.7, subdivision (c), such that they constituted strike prior convictions.

The government must prove the existence of a prior conviction allegation by proof beyond a reasonable doubt. (*People v. Brucker* (1983) 148 Cal.App.3d 230, 241, citing *People v. Lizarraga* (1974) 43 Cal.App.3d 815, 820.) To assess the sufficiency of the evidence to support the finding these three Texas prior convictions were strike convictions, well-settled rules of appellate review are employed. "The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] The

same standard applies to the review of circumstantial evidence." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560] .)

Foreign convictions qualify as strike prior convictions only under certain circumstances, set forth in the Penal Code; namely, where

> A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(§§ 667, subd. (d)(2) and 1170.12, subd. (b)(2).)

In *People v. Woodell* (1998) 17 Cal.4th 448, 452-453 and *People v. Ridriguez* (1998) 17 Cal.4th 253, 261-262, the Supreme Court approved the use of the record of conviction, as set forth in *People v. Guerrero* (1988) 44 Cal.3d 343, in the determination whether a prior foreign conviction qualifies as a strike prior conviction. A review of the records submitted in this case reveals no rational trier of fact would find Mr. Martinez's prior Texas convictions are strike priors.

A. Texas case number –Robbery.

1. Facts introduced to prove this prior crime constituted a strike prior conviction.

To prove that this prior conviction constituted a strike prior conviction,

the government introduced the indictment[13] (CT 409), waiver of right to jury trial (CT 410), written waiver of constitutional rights (CT 411-415), the clerk's minutes from the guilty plea[14] (CT 378, 416-417) and sentencing (CT 379), and a certification of the Transcript of Original Judgment, Sentence, Etc. (CT 380).

2. Because the government did not prove any asportation occurred during the commission of this crime, it does not qualify as a strike prior conviction.

For this crime to qualify as a strike prior conviction, the Texas conviction must include all the elements of a violent or serious felony, respectively defined under Penal Code section 667.5, subdivision (c) or Penal

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[13] The indictment alleged

> on or about the [¶] 23RD day of September, A.D., 1975, MARTINEZ, JR., hereinafter called defendant, did then and there intentionally and knowingly threaten and place hereinafter called complainant, in fear of imminent bodily injury and death while the said defendant was in the course of committing theft of property, namely: LAWFUL MONEY OF THE UNITED STATES OF AMERICA from said complainant, the owner of said property, without the effective consent of the said complainant, and said acts were committed by said defendant with the intent then and there to obtain and maintain control of the said property;

(CT 409.)

[14] The minutes of the guilty plea indicate that, as part of the plea, Mr. Martinez admitted all the acts and allegations in the indictment charging the robbery count are true and correct. (CT 412-413.)

Code section 1192.7, subdivision (c). Under California law, a robbery conviction is a strike prior conviction under Penal Code sections 667, subdivision (d)(2) and 1192.7, subdivision (c)(19). Robbery in California is set forth in Penal Code section 211 as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The crime of robbery has the element of the taking of the property–gaining possession– and the element of asportation–carrying away. (*People v. Hill* (1998) 17 Cal.4th 800, 852.) Thus, in California, if there is no asportation, there is no robbery.

Robbery is defined in the Texas Penal Code section 29.02, which read at the time of Mr. Martinez's crime:

> (a) A person commits an offense, if in the course of committing theft as defined in Chapter 31 of this Code and with intent to obtain or maintain control of the property, he:
> (1) intentionally, knowingly or recklessly causes bodily injury to another; or
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.
> (b) An offense under this section is a felony of the second degree.

(*Taylor v. State* (Tex.Crim.App. 1982) 637 S.W.2d 929, 930, fn. 1.) Texas Penal Code section 31.03 defined theft in pertinent part as:

> (a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.
> (b) Appropriation of property is unlawful if:

> (1) it is without the owner's effective consent;
> (2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or
> (3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.

A review of Texas law demonstrates that at the time of Mr. Martinez's 1975 Texas robbery conviction, asportation was not required to commit a theft. (*Barnes v. State* (Tex.Crim.App. 1974) 513 S.W.2d 850, 851; *Krause v. State* (1947) 151 Tex.Crim. 197 [206 S.W.2d 257, 258]) and therefore not required to commit a robbery. (*Woods v. State* (1949) 153 Tex.Crim. 457 [220 S.W.2d 644, 646, citation omitted]["'Robbery is but an aggravated species of theft. It was not necessary to show that he carried the property away in order to complete the offense. . . . The offense of robbery is complete when the property is taken into possession as a result of an assault and with the intent to appropriate.'"].)

Under *Guerrero*, a review of the record of conviction submitted by the government (CT 378-380; 409-417), does not demonstrate the asportation element was satisfied in this case. Nothing in the documents reveals a taking was committed by Mr. Martinez. Rather, the language of

the indictment[15] merely references Mr. Martinez's acts were committed "while the said defendant was in the course of committing a theft of property . . . from said complainant." (CT 409.) And, Mr. Martinez's written waiver[16] (CT 411-414) merely indicated "all the acts and allegations in said indictment (Count No. One (1) of said indictment) charging the offense of robbery are true and correct . . . ." (CT 413.) When the language of this indictment is compared with that in *People v. Hayes* (1992) 6 Cal.App.4th 616, the insufficiency of the evidence presented by the government is apparent.

In *Hayes*, the Court of Appeal evaluated whether defendant's Texas robbery, committed in 1971, constituted a prior serious felony conviction. To make this determination, the appellate court reviewed the indictment submitted by the government, which alleged defendant "did unlawfully and willfully make an assault upon the person of [the victim] and . . . by said assault and by violence to the said [victim] by putting the said [victim] in fear of life and bodily injury, did then and there fraudulently take from the

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[15] *People v. Smith* (1988) 206 Cal.App.3d 340, 345 [charging document and *Tahl* forms may be admitted to prove conduct of prior conviction].

[16] *People v. Carr* (1988) 204 Cal.App.3d 774, 778 [change of plea form that indicated defendant was pleading guilty to a "residential" burglary and indicating defendant admits he "enter[ed] an inhabited dwelling in the daytime with the intent to commit theft. . ." admissible to prove nature of prior conviction].

person and possession, and without the consent and against the will of said [victim] fiftysix dollars. . ." (*Hayes, supra,* 6 Cal.App.4th at p. 624.) Defendant pleaded guilty to the charge as contained in the indictment. (*Ibid.*) The reviewing court highlighted certain language of the indictment, specifically "did and there fraudulently *take from the person and possession, and without the consent and against the will* of said [victim] fifty-six dollars" and found this language established defendant had asported or carried away the money. (*Ibid.*, italics original.)

Thus, unlike the indictment evaluated in *Hayes*, the indictment in the instant case does not use any language indicating a "taking" had occurred. Rather, the aggravated acts which transformed the crime to a robbery merely occurred "while said defendant was in the course of committing a theft of property." (CT 409.) From the language used, the fact of asportation/carrying away, however minimal, cannot be established. Accordingly, a rational trier of fact reviewing this evidence would not find beyond a reasonable doubt that the documents submitted by the government established the element of asportation.[17] Consequently, the finding this prior conviction is a strike prior cannot be sustained.

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[17] Moreover, because of the government's failure to prove any asportation occurred, or was indeed actually intended by Mr. Martinez when

B. Texas case number –aggravated robbery
Texas case number –aggravated robbery

1. The facts introduced to prove constituted a strike prior conviction.

To prove the truth of this prior conviction allegation, the government introduced the indictment[18] (CT 391), waiver of right to jury trial (CT 392),

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he committed this prior Texas robbery, the government similarly failed to prove that these acts constituted the crime of attempted robbery, which is also a strike prior conviction. (See *People v. Bonner* (2000) 80 Cal.App.4th 759, 764 [for crime of attempted robbery, the government must prove the specific intent to commit the robbery and the direct be ineffectual act done towards its commission]; former § 1192.7, subd. (c).)

[18] The indictment alleged:

> on or about the [¶] 11th day of OCTOBER, A.D., 1975, MARTINEZ, JR., hereinafter called defendant, did then and there intentionally and knowingly threaten and place , hereinafter called complainant, in fear of imminent bodily injury and death, by using and exhibiting a deadly weapon, namely: A GUN, while the said defendant was in the course of committing a theft of property, namely: LAWFUL MONEY OF THE UNITED STATES OF AMERICA, from said complainant, the owner of said property, without the effective consent of the said complainant, and said acts were committed by the said defendant with the intent then and there to obtain and maintain control of the said property;

(CT 391.)

guilty plea form[19] (CT 395-399), clerk's minutes of the judgment (CT 381, 394) and sentence. (CT 382, 393.)

2. The facts introduced to prove constituted a prior strike conviction.

To prove the truth of this prior conviction allegation, the government introduced the indictment[20] (CT 400), waiver of right to jury trial (CT 401), the guilty plea form[21] (CT 404-408), the clerk's minutes of the judgment

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[19] In the guilty plea form, the written stipulated statement that supports the entry of the plea tracks the language of the indictment. (CT 396.)

[20] The indictment alleged:

> on or about the [¶] 25th day of SEPTEMBER, A.D., 1975, MARTINEZ, JR., hereinafter called defendant, did then and there intentionally and knowingly threaten and place , hereinafter called complainant, in fear of imminent bodily injury and death, by using and exhibiting a deadly weapon, namely: A GUN, while the said defendant was in the course of committing theft of property, namely: LAWFUL MONEY OF THE UNITED STATES OF AMERICA, from said complainant, the owner of said property, without the effective consent of the said complainant, and said acts were committed by the said defendant with the intent then and there to obtain and maintain control of the said property;

(CT 400.)

[21] Unlike the guilty plea form of the other aggravated robbery , the guilty plea form of the instant prior conviction did not contain the repetition of the language of the indictment as stipulated evidence in

(CT 375, 402) and sentence (CT 376, 403), and a certification of the Transcript of Original Judgment, Sentence, Etc. (CT 377.)

> 3. These two foreign prior convictions do not qualify as strikes under Penal Code section 1192.7, subd. (c)(19) because the government did not prove asportation occurred during the commission of these crimes.

The same analysis set forth above also applies to the determination whether sufficient evidence was introduced to prove the two Texas aggravated robbery prior convictions qualify as strike prior convictions.

As discussed above, under California law, a robbery conviction is a strike prior conviction under Penal Code sections 667, subdivision (d)(2) and 1192.7, subdivision (c)(19). Robbery in California requires the element of asportation. (*People v. Hill*, *supra*, 17 Cal.4th at p. 852.) Thus, in California, if there is no asportation, there is no robbery.

Aggravated robbery was defined at the time of Mr. Martinez's two prior convictions in Texas Penal Code section 29.03, as a robbery committed by a person who "(1) causes serious bodily injury to another; or [¶] (2) uses or exhibits a deadly weapon." (*Walker v. State* (Tex.Crim.App.

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support of the plea. Instead, the form referenced an exhibit, which was not introduced in the instant trial. (CT 405.)

1976) 543 S.W.2d 634, 636; *Taylor v. State, supra,* 637 S.W.3d. at p. 930, fn. 1.)

A review of the records of conviction submitted by the government (Texas case number : CT 381-382; 391-399/Texas case number : CT 375-377; 400-408), does not demonstrate the asportation element was adjudicated or established in these two prior convictions. As in the indictment of the robbery prior conviction discussed above, the indictments of the aggravated robbery convictions do not use any term indicating a taking had occurred by the time Mr. Martinez committed these crimes. Rather, they indicate the acts were committed "while the said defendant was in the course of committing a theft of property . . . from said complainant. . . ." (CT 391 [ ] and 400 [ ].) And, as is apparent from the discussion above, a theft is complete before any asportation of property at issue occurs. Accordingly, the language used in these indictments does not reveal any taking had occurred at the time the theft was completed. While there is no factual basis submitted in support of the later aggravated robbery, the one submitted in support of the former merely repeats this charging language. (CT 396: .)

Consequently, a rational trier of fact reviewing the documents submitted to the jury to prove these prior convictions would not find, beyond

a reasonable doubt, that the prior convictions were strike priors on the basis they were equivalent to California robberies.[22]

> 4. A foreign strike prior must be a "particular felony" listed in Penal Code section 1192.7, subdivision (c), not a conduct offense. Accordingly, these two prior convictions cannot qualify as strike priors under Penal Code section 1192.7, subdivision (c)(24)[any felony in which the defendant personally used a dangerous or deadly weapon].

Under the operation of Penal Code sections 667, subdivision (d)(2), a foreign prior conviction constitutes a strike prior if the offense "includes all the elements of the *particular felony* as defined in . . subdivision (c) of Penal Code section 1192.7." Mr. Martinez asserts that the use of this language: "particular felony" reflects the intent of the Legislature to specifically limit foreign strike priors to those foreign convictions which are equivalent to the particular felonies listed in Penal Code section 1192.7. This limitation necessarily excludes those subdivisions describing criminal

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[22] Similarly, as noted in the prior discussion addressing the fact that the prior Texas robbery did not constitute a strike prior conviction, with respect to Mr. Martinez's two aggravated robberies, because the government did not prove the element or even Mr. Martinez's intent of asportation, the government also failed to prove that these prior Texas aggravated robberies constituted the California crime of attempted robbery. (See *People v. Bonner, supra*, 80 Cal.App.4th at p. 764 [for crime of attempted robbery, the government must prove the specific intent to commit the robbery and the direct be ineffectual act done towards its commission]; former § 1192.7, subd. (c).)

conduct,[23] which do not describe "particular felon[ies]", from qualifying a foreign prior conviction as a strike conviction.

Analysis of this question proceeds under well-established rules of statutory construction.

> "[T]he interpretation and applicability of a statute is a question of law." [Citation.] In reviewing petitioner's claim, we are guided by well settled rules of statutory interpretation. The most fundamental of these rules is that where the statute is clear, the 'plain meaning' rule applies. The Legislature is presumed to have meant what it said, and the plain meaning of the language governs. [Citation.] "If the language is clear and unambiguous there is no need for construction, nor is it

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[23] See e.g., *People v. Jackson* (1985) 37 Cal.3d 826, 832, wherein the Supreme Court stated when considering whether a prior second-degree burglary conviction could be treated as a "burglary of a residence" so as to support an enhancement under Penal Code section 667, subdivision (a):

> Paragraphs (18) and (24) [of Penal Code section 1192.7] describe nonviolent criminal conduct. . . . We give effect to this intent by construing paragraphs (18) and (24) as referring not to specific criminal offenses, but to the criminal conduct described therein. . . .

The High Court then rejected defendant's argument that because there was no crime, per se, of burglary of a residence, he could not receive an enhancement for his prior second-degree burglary. Rather, the court reasoned commission of a prior offense involving this conduct could result in a serious felony enhancement as the Legislature specifically included this described conduct in its list of serious crimes which merited enhanced punishment. (*Id.* at pp. 831-832; overruled on another point by *People v. Guerrero, supra*, 44 Cal.3d 343, 355, as recognized in *People v. Burton* (1989) 48 Cal.3d 843, 863.)

necessary to resort to indicia of the intent of the Legislature. . . ." [Citation.]

(*Dean v. Superior Court (Lever)*(1998) 62 Cal.App.4th 638, 641.) While the Legislature, in enacting the Three Strikes law, could have used the expansive, general language found in Penal Code section 667, subdivision (a), which indicates enhancement of the current sentence for a prior serious felony conviction is appropriate if the defendant has a prior "serious felony" conviction,[24] it did not. Instead, the Legislature chose to use the qualified term: "particular" to modify the noun felony.[25] Based on the plain meaning of this word, the term "particular felony" denotes a specific criminal felony offense listed in the two enumerated Penal Code sections and does not describe general criminal conduct, such as that set forth in Penal Code section 1192.7, subdivision (c)(24). Consequently, in order for a foreign prior felony conviction to qualify as a strike prior, it must be equivalent to

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[24] In Penal Code section 667, subdivision (a), the Legislature authorized enhancement for "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or any offense committed in another jurisdiction which includes all of the elements of any serious felony."

[25] Webster's New Collegiate Dictionary defines "particular" as: "**1** of, relating to, or being a single person or thing . . . **3**: of, relating to, or concerned with details . . . **4 a**: distinctive among others of the same general category. . . b: being one unit or element among others. . . ." (Webster's 8th New Collegiate Dict. (1981) p. 829.)

a specific felony listed in Penal Code section 667.5, subdivision (c) or Penal Code section 1192.7, subdivision (c). If a foreign prior felony conviction is equivalent only to criminal conduct described in these subdivisions, and not to one of the enumerated felonies, the foreign prior conviction does not qualify as a strike prior conviction.

Indeed, the language defining a foreign prior strike conviction is in direct contrast to that defining a strike prior conviction for a prior crime committed in California. In this context, Penal Code section 667, subdivision (d)(1), the Three Strikes law defines a strike prior as:

> (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state.

Had the Legislature intended for the same definition applied to California prior convictions to be applied to foreign prior convictions, it would have used the same words. Instead, Penal Code section 667, subdivision (d)(2) does not use the general terms "violent felony" or "serious felony" as employed in Penal Code section 667, subdivision (d)(1), nor, as discussed above, does it use the general term "serious felony" as employed in Penal Code section 667, subdivision (a)(1). Rather, the Legislature employed the restrictive adjective "particular." Consequently, a foreign prior felony conviction will only qualify as a strike prior conviction if the adjudicated elements of the prior conviction are equivalent to the specific, particular

felonies listed in Penal Code sections 667.5, subdivision (c) and 1197.2, subdivision (c), and not if they are equivalent to the general criminal conduct described in these subdivisions.

While this court may question the legislative wisdom of creating two different definitions of strike prior convictions, one for prior California convictions and one for prior foreign convictions, "[t]he role of the judiciary is not to rewrite legislation to satisfy the court's, rather than the Legislature's, sense of balance and order." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333.) Accordingly, this court must therefore leave it to the Legislature to reconsider the wisdom of its statutory definitions.

The fact that one California Supreme Court case has considered whether a prior foreign conviction qualifies as a strike prior conviction under Penal Code section 1192.7, subdivision (c)(24) [“Any felony in which the defendant personally used a dangerous or deadly weapon”] (*People v. Woodell* (1998) 17 Cal.4th 448, 453 [then set forth in Penal Code section 1192.7, subdivision (c)(23)]), does not contradict Mr. Martinez’s argument, as the issue presented herein was not considered by the High Court in that case, and “[i]t is well settled that a decision is not authority for an issue not considered in the court’s opinion.” (*People v. Heitzman* (1994) 9 Cal.4th 189, 209.)

Accordingly, because Mr. Martinez's prior Texas aggravated robberies do not constitute any of the particular felonies enumerated in Penal Code sections 667, subdivision (c) or 1192.7, subdivision (c), they do not qualify as strike prior convictions.

> 5. Neither aggravated robbery qualifies as a strike prior conviction under Penal Code section 1192.7, subdivision (c)(24)[any felony in which the defendant personally used dangerous or deadly weapon].
>
> a. Under Penal Code section 1192.7, subdivision (c)(24), the term "felony" requires the foreign conviction to have elements equivalent to any California felony. Because these two prior aggravated robbery convictions do not have the equivalent elements of any California felony, they do not constitute strike priors.

Even if the Three Strikes law allows for foreign prior convictions to qualify as strike priors when they are "conduct offenses" listed under Penal Code section 1192.7, the government has failed to prove Mr. Martinez's prior Texas aggravated robbery convictions satisfied the statutory definition of the conduct offense.

Penal Code section 1192.7, subdivision (c)(24) defines a serious felony as "[a]ny felony in which the defendant personally used a dangerous or deadly weapon." Thus, under the operation of Penal Code section 667, subdivision (d)(2), a foreign prior conviction constitutes a strike prior if the

offense includes all the elements of Penal Code section 1192.7, subdivision (c)(24): a felony wherein defendant personally used a dangerous weapon.

As discussed above, a review of the record of conviction of Mr. Martinez's two prior Texas aggravated robberies reveals that, because of the lack of the asportation element discussed above, neither conviction would classify as a "felony" under California law–for if the government proved in California every act that it proved in Texas, because of the lack of the asportation element, Mr. Martinez would not be convicted of a crime. Thus, in reviewing the evidence, no rational trier of fact would find, beyond a reasonable doubt, that these prior crimes constituted any California felony.

Further, the government never submitted any other theory under which the acts Mr. Martinez committed constituted a "felony" under California law. Indeed, it cannot, as the Texas prior convictions only reveal that certain limited elements were adjudicated. For example, the Texas prior convictions would not constitute a terrorist threat under Penal Code section 422, because none of the elements proven in Texas demonstrate that any statement was made during the course of the incident. (Pen. Code, § 422.) Further, the Texas prior convictions would not constitute an assault with a firearm under Penal Code section 245, subdivision (a)(2), for a review of the records of conviction does not prove the gun used in the offenses was operable or even loaded, a requirement under California law (*People v. Orr*

(1974) 43 Cal.App.3d 666, 671-672), but not under Texas law defining an aggravated robbery.[26] Consequently, because the government failed to prove Mr. Martinez's two prior Texas aggravated robberies were equivalent to any California felony conviction, there is insufficient evidence to support the finding the two prior aggravated robberies constituted strike priors.

b. Even if the foreign crimes do qualify as felonies in California, the records of conviction of the two Texas aggravated robberies do not demonstrate Mr. Martinez personally used a firearm, as required to prove a strike prior under Penal Code section 1192.7, subdivision (c)(24).

Assuming that the records of conviction do show Mr. Martinez committed acts which would constitute a felony in California, these two

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[26] Texas case law demonstrates that commission of an aggravated robbery in Texas by "using and exhibiting a deadly weapon, namely, A GUN" (CT 391, 400), does not require the gun employed to be operable. The conviction merely establishes that the deadly weapon was one within the meaning of Texas Penal Code section 1.07, subdivision (a)(11): "(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or [¶] (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." (*Walker v. State* (Tex.Crim.App. 1976) 543 S.W.2d 634, 636.) Thus, the firearm need not be operable at the time of the Texas robbery in order for the use and exhibition of the gun to elevate the crime to an aggravated robbery. All the government must prove is that the gun, at one point, was designed, made or adapted for the purpose of inflicting death or serious bodily injury. (*Toy v. State* (Tex.Crim.App. 1993) 855 S.W.2d 153, 159 [a firearm need not be serviceable in order to qualify as a deadly weapon].) And, there is nothing in the appellate record to demonstrate Mr. Martinez "used" the gun as a bludgeon during the 1975 aggravated robberies. (See *People v. Orr* (1974) 43 Cal.App.3d 666, 672.)

prior Texas aggravated robbery convictions still do not constitute strike priors because the government failed to prove, beyond a reasonable doubt, that Mr. Martinez personally used the gun during their commission. Penal Code section 1192.7, subdivision (c)(24), requires the weapon use to be personal, not vicarious, if the crime is to qualify as a serious felony. Thus, liability for a prior crime based on aiding and abetting another principal who was the person that used the deadly weapon will not suffice to constitute a strike prior conviction. (*Woodell, supra,* 17 Cal.4th at p. 453.)

Mr. Martinez's prior aggravated robbery convictions alone do not establish he personally used a gun to commit the robberies as his liability for these crimes could have been predicated upon vicarious liability. (See e.g., *Michel v. State* (Tex.Crim.App. 1992) 834 S.W.2d 64, 67-68; *Taylor v. State* (Tex.Crim.App. 1982) 637 S.W.2d 929, 933-934 [defendant liable for aggravated robbery of victim based on vicarious liability theory].) Under Texas law, Mr. Martinez could have been convicted of the crimes of aggravated robbery had he merely aided another person while that other person participated in the robbery and held the gun. (Tex. Pen. Code section 7.02.)

Moreover, a review of the records of conviction of each of these prior crimes demonstrates that a rational trier of fact could not have found

personal use of the gun by Mr. Martinez beyond a reasonable doubt. Neither the indictment (CT 391) nor the factual basis (CT 396) of the Texas prior aggravated robbery conviction , indicates Mr. Martinez personally used the gun in order to effectuate the robbery. Similarly, the indictment (CT 400) of the Texas prior aggravated robbery conviction 75-CR2950, does not indicate Mr. Martinez personally used the gun in order to effectuate the robbery. Rather, the information in both cases leaves open a reasonable doubt whether Mr. Martinez was liable for these offenses on the theory of direct perpetration. Because of the existence of the reasonable possibility Mr. Martinez was convicted of these Texas aggravated robberies based on vicarious liability, there is insufficient evidence to support the finding these two prior convictions constituted strike priors.

* * *

Because none of the evidence introduced by the government [27] establishes the elements necessary to prove these prior Texas convictions for

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[27] Any reliance on the probation report, prepared for the instant case (CT 276), to demonstrate the facts of the prior conviction is unavailing. First, the report is certainly not part of the record of conviction of the prior Texas convictions, as it was prepared after the instant conviction was secured, not for the court to use at the original sentencing on the robbery conviction or the aggravated robbery convictions. Second, even if it was appropriate to rely on this report, the statements in the report-- narration by the probation officer—are hearsay and therefore inadmissible to prove the nature of the

robbery and aggravated robbery constituted strike prior convictions, Mr. Martinez's sentence must be vacated.

III.

THE TRIAL COURT DEPRIVED MR. MARTINEZ OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO HAVE THE JURY DECIDE THE FACTUAL QUESTION WHETHER HE PERSONALLY USED A FIREARM DURING THE COMMISSION OF THE TEXAS AGGRAVATED ROBBERIES, A FACTUAL FINDING NECESSARY TO TRANSMOGRIFY THE PRIOR CONVICTIONS INTO STRIKES AND TO INCREASE THE MAXIMUM EXPOSURE OF HIS SENTENCE.

Although California, by statute, authorizes a defendant the right to a jury trial on prior conviction allegations (*People v. Wiley* (1995) 9 Cal.4th 580, 589; Pen. Code, §§ 1025 and 1158), the right is limited. In *Wiley*, the Supreme Court held that the statutory right does not encompass the right to jury determinations of factual questions "relating to prior convictions alleged for purposes of sentence enhancement." (*Wiley, supra,* 9 Cal.4th at p. 589 [determination whether prior convictions were "brought and tried separately" within the meaning of Penal Code section 667, subdivision (a) is a judicial function].) Further, the court opinion determined there is no federal

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prior conviction. (*People v. Reed* (1996) 13 Cal.4th 217, 230-231, cert. den. *sub nom. Reed v. California* (1996) 519 U.S. 873 [117 S.Ct. 191, 136 L.Ed.2d 128].)

constitutional right to have the jury determine the truth of a prior conviction allegation. (*Id.* at p. 585.)

More recently in *People v. Kelii*, the Supreme Court held the statutory right does not encompass the right to jury determination of factual questions relating to whether a prior conviction qualifies as a "strike" prior within the meaning of Penal Code section 667, subdivision (d). (*People v. Kelii* (1999) 21 Cal.4th 452 [determination whether prior burglary conviction involved the burglary of a residence was properly a judicial function].) Rather, it is the jury's function to determine whether the defendant actually "suffered" the prior conviction, apparently "leav[ing] the jury little to do except to determine whether these documents [admitted to establish the prior conviction] are authentic and, if so, are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged." (*Kelii, supra*, 21 Cal.4th at pp. 458-459.)[28]

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[28] However, the California Supreme Court is currently considering related issues in *People v. Gonzalez* (1999) 73 Cal.App.4th 885, review granted November 17, 1999, S081855, and in *People v. Epps* (1999) 73 Cal.App.4th 1332, review granted November 17, 1999, S082110. In *Epps*, on April 12, 2000, the court also expanded review to include the effect of the 1997 amendments to Penal Code section 1025 on appellant's right to a jury trial on prior conviction allegations.

The federal law relating to this issue, however, is currently in flux in light of the United States Supreme Court's recent opinion in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. Previously, in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350], a bare majority of the High Court found recidivist conduct that increases punishment constitutes a sentencing factor, not an element of a crime, which need not be pleaded in an information.[29] (*Almendarez-Torres, supra,* 140 L.Ed.2d at pp. 365-371.) To arrive at this result, the majority of the court reasoned that recognizing recidivism as an element of a crime "would mark an abrupt departure from a longstanding tradition of treating recidivism as 'go[ing] to the punishment only.'" (*Id.* at pp. 368-369.)

However, after the *Apprendi* decision, the continued viability of the rationale underlying the rule set forth in *Almendarez-Torres* is questionable. In *Apprendi*,[30] defendant's sentence for possession of a firearm for unlawful

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[29] Justice Breyer authored the majority opinion, in which Justices O'Connor, Kennedy, Thomas, and Chief Justice Rehnquist joined. (*Almendarez-Torres v. United States, supra,* 523 U.S. at p. 226.) Justice Scalia filed a dissent in *Almandarez-Torres*, in which Justices Stevens, Souter, and Ginsburg joined. (*Id.* at pp. 248-271 (dis. opn. of Scalia, J.).)

[30] Justice Thomas changed his mind from the analysis set forth in *Almendarez-Torres* and in *Apprendi*, he concurred with the lead opinion

purpose was increased above the 10-year statutory maximum [the court imposed a 12-year sentence] after the trial court found, under the state's statutory hate crime enhancement scheme, by a preponderance of the evidence that defendant's crimes were committed with a purpose to intimidate based upon race. (*Apprendi, supra,* 147 L.Ed.2d at p. 442.) On appeal, defendant argued his due process right and right to a jury trial under the Sixth and Fourteenth Amendments were violated when his sentence was increased based upon a factual finding made by the trial court, and not the jury, and made based upon the preponderance of the evidence, and not based upon proof beyond a reasonable doubt.

The High Court agreed, finding the hate crime statutory scheme presented an additional element to the underlying offense rather than a mere sentencing factor, because the hate crime scheme increased the statutory maximum punishment. "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and

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written by Justice Stevens and joined by Justices Scalia, Souter, and Ginsburg. (*Apprendi, supra,* 147 L.Ed.2d at p. 442.) Indeed, Justice Thomas wrote a concurring opinion in *Apprendi* wherein, in light of the historical recognition that recidivism constituted an element of a crime, he questioned the propriety of the majority's position in *Almendarez-Torres*, in which he had joined, and the continued validity of that opinion. (*Id.* at pp. 460-475.)

the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not–at the moment the State is put to proof of those circumstances–be deprived of protections that have, until that point, unquestionably attached." (*Id.* at p. 451.) Thus, recognizing the Sixth Amendment right to jury trial and the Fourteenth Amendment right to due process "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt,'" (*id.* at p. 447, quoting *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444]), the court concluded "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 147 L.Ed.2d at p. 455.)

Although the *Apprendi* court indicated that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested" (*id.* at p. 454, footnote omitted), it took care to indicate that defendant did not contest the viability of the prior case and limited *Almendarez-Torres* to its unique factual situation. (*Id.* at pp. 454-455.)

In the instant case, Mr. Martinez submits, his constitutional rights were violated when he was denied the right to a jury determination, not regarding whether he suffered a prior conviction ("the fact of the prior conviction" (*Apprendi*, *supra*, 147 L.Ed.2d at p. 455)), but regarding the facts underlying the prior conviction. Thus, this case presents a scenario left open by *Apprendi*. As noted previously, Mr. Martinez insisted on his right to a jury trial with respect to the prior conviction allegations. (RT 117.) Under the reasoning set forth in *Apprendi*, because the Three Strikes sentencing scheme increases the statutory maximum penalty for Mr. Martinez's substantive crime, he has a Sixth and Fourteenth Amendment right to a jury trial as to the factual question whether his prior convictions constitute strike priors.

Therefore, in order for these allegations to constitute strike priors, Mr. Martinez is entitled to have the jury, and not the court, make the necessary factual findings. For example, for the prior conviction allegations to qualify as strikes under section 1192.7, subdivision (c)(19) [robbery], the jury must find, beyond a reasonable doubt, that there was asportation of the goods taken during the commission of the Texas crimes. Or, for the prior conviction allegations to qualify as strikes under section 1192.7, subdivision (c)(24) [personal use of a dangerous or deadly weapon], the jury must find,

beyond a reasonable doubt, that Mr. Martinez personally used a gun during the commission of the Texas crimes. Because the jury was required to make neither finding in the prior conviction allegation trial, rather the instruction given to the jury simply directed the jury to determine whether Mr. Martinez had suffered the prior conviction allegations (RT 252-253; CT 229-230; CALJIC No. 17.26), the trial violated Mr. Martinez's Sixth and Fourteenth Amendment rights.

Because the trial court violated Mr. Martinez's rights by failing to instruct on an element of the charged offense, reversal is required under *Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 114 L.Ed.2d 35], unless the government can show the error is harmless beyond a reasonable doubt. (See *Chapman* v. *California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 17 L.Ed.2d 705].) In the instant case, the government cannot meet this burden. The evidence submitted by the government is unclear to demonstrate either that Mr. Martinez's acts constituted asportation during the commission of the prior Texas robbery and aggravated robberies or that Mr. Martinez personally used a gun during the commission of the aggravated robberies.

It cannot be said beyond a reasonable doubt that, based upon the record of conviction, the government proved, beyond a reasonable doubt,

the facts necessary to transmogrify the prior Texas crimes into California strikes; i.e., the evidence neither showed Mr. Martinez personally used a firearm during the commission of the prior crimes nor did it show that, in committing the prior crimes, asportation occurred. Although the government submitted the factual basis of the aggravated robbery: (CT 396), which merely tracked the language of the charging indictment, it did not submit a factual basis of the aggravated robbery: . (CT 405.) And, even the factual basis of the former aggravated robbery does not establish, beyond a reasonable doubt, that Mr. Martinez personally used a firearm during the commission of this crime. Moreover, there was no factual basis for the robbery: . (CT 412.) Besides the indictments submitted, and the single repetition of the indictment as part of the plea in , no other evidence was submitted by the government that remotely attempted to demonstrate the facts of the underlying crimes. Accordingly, the government did not demonstrate that Mr. Martinez satisfied the asportation element such that these foreign crimes qualified as California robberies. Reversal of Mr. Martinez's sentence is required.

IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO INSTRUCT ON ALL THE ELEMENTS OF EMBEZZLEMENT.

It is well settled that trial courts "have a sua sponte duty to instruct on 'the general principles of law relevant to and governing the case.' [Citation.] 'That obligation includes instructions on all of the elements of a charged offense' [citation]. . . ." (*People v. Rubalcava, supra,* 23 Cal.4th at pp. 333-334.) "This duty is not always satisfied by a mere reading of wholly correct, requested instructions. [Citation.] A trial court has a sua sponte duty (1) to instruct on general principles of law relevant to issues raised by the evidence [citation]; and (2) to give explanatory instructions when terms used in an instruction have a technical meaning peculiar to the law [citation]. A defendant has a constitutional right to have the jury determine every material issue presented by the evidence, and a denial of that right constitutes a miscarriage of justice regardless of the strength of the prosecution's case." (*People v. Shoals* (1992) 8 Cal.App.4th 475, 489-490.) This requirement ensures a defendant's due process rights under the Fourteenth Amendment of the United States Constitution are enforced and a defendant is not convicted based upon proof on each element below a

reasonable doubt. (*In re Winship* (1970) 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368].)

In this case, count two charged the crime of embezzlement. (§ 503; CT 59.) An element of embezzlement is the existence of a fiduciary relationship between the defendant and the victim. (*People v. Threestar* (1985) 167 Cal.App.3d 747, 758; 2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 590.) A fiduciary relationship, and therefore duty, "arises whenever trust and confidence are reposed by a person in the integrity and fidelity of another" (*Threestar, supra,* at p. 758) and that other person voluntarily accepts or assumes the trust and confidence. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 417.)

To define embezzlement, the court instructed with CALJIC No. 14.07, which describes the fiduciary relationship element of the crime to be proven as follows: "1. A relation of trust and confidence existed between two persons." (CT 197.) Mr. Martinez submits that the language of the instruction fails to convey the requirement of a fiduciary relationship by failing to define the technical parameters of trust and confidence that characterize a fiduciary relationship, that is, the trust and confidence in the

"loyalty" (*GAB, supra,* 83 Cal.App.4th at p. 417) or in the "integrity and fidelity" (*Threestar, supra,* 167 Cal.App.3d at p. 758) of another.

The ordinary meanings of the terms "trust" and confidence" refer to mental states which may occur in ordinary business relationships. Accordingly, an ordinary juror would not necessarily understand the language of CALJIC No. 14.07 to refer to the specific, technical trust and confidence definitive of a fiduciary relationship. Indeed, this crucial point of the definition of the fiduciary relationship, explaining the technical aspect of the trust and confidence characteristic of such a relationship, is omitted from CALJIC No. 14.07 and was not explained to the jury in any other instruction. Rather, upon instruction with CALJIC No. 14.07, an ordinary juror would only understand the "trust" and "confidence" referenced in the instruction to refer to the normal trust and confidence expected in any business deal. Consequently, the trial court erred in instructing the jury with CALJIC No. 14.07 and failing to give the jury the proper, technical definition of a fiduciary relationship. Because the language used by the court did not inform the jury of the technical definition of this element of embezzlement, Mr. Martinez's failure to bring the error to the court's attention does not constitute waiver of the issue. (*Shoals, supra,* 8 Cal.App.4th at p. 490.)

It cannot be said the trial court's error is harmless beyond a reasonable doubt. While Jane Doe did have a relationship with Mr. Martinez, it cannot be said beyond a reasonable doubt, based upon the evidence presented, that she trusted his integrity and fidelity. Indeed, Jane Doe indicated the amount Mr. Martinez had asked for–$6,000.00–seemed odd, as it was quite low in relation to the actual bond set. But Mr. Martinez told her he knew the bail bonds man. (RT 40-41.) Thus, it appears Jane Doe did not trust Mr. Martinez's "integrity and fidelity" but his ability to get her boyfriend out of jail, despite the normal rules. Accordingly, reversal is required. (*Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 114 L.Ed.2d 35]; *Chapman* v. *California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 17 L.Ed.2d 705].)

V.

THE 25-YEAR-TO-LIFE SENTENCE FOR MR. MARTINEZ'A NON-VIOLENT FELONY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT OF THE FEDERAL CONSTITUTION.

Mr. Martinez was convicted of a single felony count: fraudulent appropriation of property. The three prior convictions which formed the basis for the Three Strikes sentence were one Texas robbery and two Texas aggravated robbery convictions he suffered in 1976, more than twenty years before he committed the instant crime. The court sentenced Mr. Martinez to a term of 25-years-to-life for the fraudulent appropriation in addition to his criminal history. Under the circumstances of his case, the punishment is one which "shocks the conscience," is unconstitutional, and requires reduction by this Court.

Under the Three Strikes law, Mr. Martinez is not eligible for parole until he serves 25-years in prison.[31] Given the nature of the current offense, in light of Mr. Martinez's history, the sentence of 25-years-to-life violates the Eighth Amendment proscription of punishment which is extreme and

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[31] In *In re Adrian Ben Cervera* (1999) 74 Cal.App.4th 766, review granted November 23, 1999, S075310 (oral argument heard December 5, 2000), the high court is considering whether a defendant sentenced to 25-years-to-life under the three strikes law is allowed custody credits.

grossly disproportionate to the offense. (See *Riggs v. California* (1999) 525 U.S. 1114 [119 S.Ct. 890, 142 L.Ed.2d 789].)

In *Harmelin v. Michigan* (1991) 501 U.S. 957, 994-996 [111 S.Ct. 2680, 115 L.Ed.2d 836] (plur. opn. of Scalia, J.), the portion of the lead opinion on which a majority of justices agreed determined that the mandatory nature of defendant's life without possibility of parole sentence was not cruel and unusual punishment in violation of the Eighth Amendment. Justice Scalia, joined only by Justice Rehnquist, concluded that the Eighth Amendment does not contain a guarantee against disproportionality for noncapital offenses. (*Id.* at p. 965 (plur. opn. of Scalia, J.).) However, seven of the justices in concurring and dissenting opinions stated that the Eighth Amendment prohibits punishment which is extreme and grossly disproportionate to the offense which is the subject of the conviction. (*Harmelin v. Michigan*, *supra*, 501 U.S. at pp. 996-1001 (conc. opn. of Kennedy, J.); *id.* at pp. 1009-1021 (dis. opn. of White, J.); *id.* at pp. 10281029 (dis. opn. of Stevens, J.).)

The *Harmelin* plurality opinion by Justice Kennedy, and joined by Justices O'Connor and Souter, recognized that the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime." (*Id.* at p. 1001 (conc. opn. of Kennedy, J.).) While a comparative

analysis may not always be relevant to the proportionality review, the plurality did not find the *Solem* factors irrelevant. (*Id.* at p. 1005.) To determine gross disproportionality, the analysis first looks to the severity of the crime and the severity of the sentence, thus determining if there is an "inference of gross disproportionality." Once this inference is established, "the proper role for comparative analysis of sentences [intrajurisdictional and interjurisdictional analyses], then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime. This conclusion neither 'eviscerate[s]' Solem, nor 'abandon[s]' its second and third factors. . . ." (*Ibid.*)

Since the *Harmelin* decision, the federal circuit courts have been applying a gross disproportionality test in determining Eighth Amendment challenges to punishments imposed for non-capital offenses. (See, e.g., *Cacoperdo v. Demosthenes* (9th Cir. 1994) 37 F.3d 504, 507-508; *United States v. Munoz* (1st Cir. 1994) 36 F.3d 1229, 1239; *United States v. Cupa-Guilen* (9th Cir. 1994) 34 F.3d 860, 864-865; *United States v. Frieberger* (8th Cir. 1994) 28 F.3d 916, 920; *United States v. Fisher* (5th Cir. 1994) 22 F.3d 574, 579-580; *United States v. Angulo-Lopez* (10th Cir. 1993) 7 F.3d 1506, 1510; *United States v. Sarbello* (3d Cir. 1993) 985 F.2d 716, 724; *McGruder v. Puckett* (5th Cir. 1992) 954 F.2d 313, 316-317.) Under that

analysis, the sentence imposed in this case violates the Eighth Amendment to the United States Constitution.

Mr. Martinez's current offense of fraudulent appropriation is a wobbler offense, punishable by sixteen-months, two-years, or three-years in state prison or by one-year in county jail when the Three Strikes law is not applied to it. (§§ 487, 489, 504, and 514.) Not only is this offense quite mild with respect to other crimes defined by the Legislature, but the offense as actually committed in this case was not aggravated; no weapons or violence were involved and Jane Doe was never placed in any potential danger.

Yet the Three Strikes law mandates the sentence of 25 years to life - the same sentence mandated for first degree murder -- for this non-violent offense which did not result in physical harm to anyone. Moreover, the prior convictions which form the basis for the application of the Three Strikes law in this case occurred approximately twenty years before the current offense and did not involve the infliction of injury upon the victims. Mr. Martinez's intervening crimes have involved property offenses, two written threats to federal judges (one of which was executed so that Mr. Martinez would have standing to challenge the Three Strikes law (CT 278-279)), and one incident involving a physical threat. (CT 276-278.) Given

the quality of these prior crimes, and the non-serious nature of the current offense, a sentence of 25 years-to-life is grossly disproportionate to Mr. Martinez's culpability.

Because of the disproportionality of the sentence in this case, the application of the Three Strikes Law in this case violates the Eighth Amendment. Reversal of the sentence is required.

VI.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURORS, PURSUANT TO CALJIC NO. 17.41.1, THAT THEY WERE OBLIGATED TO REPORT TO THE TRIAL COURT ANY IMPROPER THOUGHTS EXPRESSED BY ANY JUROR DURING DELIBERATIONS. THIS INSTRUCTION INTERFERED WITH THE JURY'S INDEPENDENT DELIBERATIONS, THEREBY DEPRIVING APPELLANT OF A FAIR TRIAL IN VIOLATION OF THE SIXTH AMENDMENT.[32]

The trial court instructed[33] the jury pursuant to CALJIC No. 17.41.1, a relatively new "anti-nullification" instruction on juror misconduct which orders each juror to advise the court of any improper thoughts expressed by fellow jurors during deliberations, as follows:

> The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or]

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[32] The validity of this instruction was addressed by the Court of APpeal in *People v. Engelman*, formerly published at (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, S086462; however, briefing in this case is ordered held pending disposition of related issues in *People v. Metters* (1998) 61 Cal.App.4th 1489, review granted June 10, 1998, S069442, and *People v. Cleveland*, review granted June 30, 1999, S078537. In addition, the California Supreme Court is considering a related issue in *People v. Williams*, review granted February 18, 1998, S066106.

[33] Although Mr. Martinez did not object to the giving of this instruction, because it affects his substantial rights, this court may consider the propriety of the instruction on appeal. (Penal Code section 1259.)

> any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

(RT 197-198; CT 205.) This instruction raises serious constitutional concerns by improperly interfering with the deliberation process and the secrecy of jury deliberations. By requiring jurors to report other jurors who intend to rely on "improper" factors in reaching a verdict, the instruction unduly intrudes on the sanctity of and has a chilling effect on the deliberative process. Additionally, it invites jurors to single out and report unpopular voters with the potential effect of violating a criminal defendant's constitutional right to a unanimous verdict by suggesting a means of having minority or hold out jurors removed from the panel. The instruction deprives a defendant of his Sixth Amendment right to a fair trial.

A. CALJIC No. 17.41.1 Precludes the Free and Open Discussion Essential to the Deliberative Process.

Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment to the United States Constitution and article 1, section 16, of the California Constitution. (*People v. Oliver* (1987) 196 Cal.App.3d 423, 429.)

> The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system. . . [¶] "Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled. The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a

> thoroughgoing exchange of ideas and impressions. For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience."

(*United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606, 618-619, quoting Note, *Public Disclosures of Jury Deliberations* (1983) 96 Harv. L.Rev. 886, 889, footnotes omitted.) Indeed, in *Clark v. United States* (1933) 289 U.S. 1, 13 [53 S.Ct. 465, 77 L.Ed. 993], Justice Cardozo wrote: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." For these reasons, inquiry into the subjective mental processes of jurors has traditionally been forbidden.

In California, such an inquiry is prohibited by statute. Evidence Code section 1150, limits the scope of inquiry into the deliberation process and prohibits the introduction into evidence of the mental processes of jurors to impeach a verdict. In this context courts have

> emphasize[d] that, when considering evidence regarding the jurors' deliberations, a trial court must take great care not to overstep the boundaries set forth in Evidence Code section 1150. The statute may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations. In rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that

> statement is admissible. [Citation omitted.] But when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150.

(*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419.)

CALJIC No. 17.41.1, however, improperly invites the trial court to become involved in the subjective reasoning process of the jurors and pointedly tells each juror that he or she is not guaranteed privacy or secrecy. The instruction requires jurors to watchdog each other's decision making process and to report on the procedure, including jurors' consideration of possible punishment or jury nullification. At any time, the deliberations might be interrupted and a fellow juror might repeat his or her words to the court and allege some impropriety, real or imagined, which the juror believes occurred in the jury room. The instruction unnecessarily promotes intrusions into the deliberative process and, more importantly, creates a police-state atmosphere in the jury room.

Moreover, the plain meaning of the language of the instruction necessarily involves prohibited inquiry into the subjective mental processes of jurors. By requiring jurors to report other jurors who express an intent to rely upon "improper" factors in reaching a verdict, CALJIC No. 17.41.1 institutionalizes a practice state and federal appellate courts have

consistently condemned as an impermissible intrusion into the thought processes of jurors and interferes with the deliberation process.

For example in *People v. Hill* (1992) 3 Cal.App.4th 16, 26, the court reviewed whether jurors improperly considered the defendant's possible sentence in reaching a verdict. The defendant presented affidavits of three jurors indicating they heard that if the defendant was convicted of conspiracy to commit first degree murder, he would only get six months in jail. One juror testified she changed her vote to guilty because of this information. (*Id*. at p. 27, disapproved on other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582.) The Court of Appeal affirmed the trial court's denial of a motion for new trial based upon juror misconduct, finding that "evidence that the jurors misunderstood the judge's instructions, were influenced by an improper remark of a fellow juror, assented under an erroneous belief that the judge would use clemency or had the legal right to vary the sentence, or had been influenced by inadmissible evidence is simply of no legal significance. [Citation.] In short, under both the common law and Evidence Code section 1150, the jurors' motives, beliefs, misunderstandings, intentions, and the like are immaterial." (*Id*. at p. 30.)

Federal courts have held similarly. For example in *United States v.*

Thomas, supra, 116 F.3d 606, 623, the Court of Appeals noted that, although a juror who intends to disregard or "nullify"' applicable law is subject to dismissal, the possibility of jury nullification is a "lesser evil" than "broadranging judicial inquisitions into the thought processes of jurors." The court cautioned against the dangers of investigating complaints of jury misconduct during deliberations stating: "As a general rule, no one — including the judge presiding at a trial — has 'a right to know' how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror." (*Id.* at p. 618.) The court found that "[w]here the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations," a court should "err in favor of the lesser of two evils protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity." (*Id.* at p. 623.) In fact, attempts to more carefully monitor the conduct of jurors during deliberations "entails an unacceptable breach of secrecy that is essential to the work of juries in the American system of justice." (*Ibid*.)

While a jury has a duty to follow the law, the United States Supreme Court has recognized the important safeguard the jury represents against corrupt or overzealous prosecutors, and potentially biased, compliant judges. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 155-156 [88 S.Ct. 1444,

20 L.Ed.2d 491].) CALJIC No. 17.41.1 implicitly tells the jury it has no power of nullification, since any juror whose vote of conscious reflects an intent to disregard the law will be duly reported and perhaps sanctioned. Moreover, the instruction chills the necessary give and take essential to the deliberative process inherent in a jury system.

> Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint.

(*People v. Collins* (1976) 17 Cal.3d 687, 693; cert. den. *sub nom. Collins v. California* (1977) 429 U.S. 1077 [97 S.Ct. 820, 50 L.Ed.2d 796].) These reactions and interactions cannot take place unless there is an atmosphere of trust which encourages candor. In requiring each juror to act as an informant, CALJIC No. 17.41.1 does just the opposite: it creates an environment of suspicion that fosters circumspection. The instruction constitutes a serious threat to the delicate and heretofore sustained equipoise between upholding the law and asserting the conscious of the community.

The instruction expressly informs jurors there is no guarantee of privacy or secrecy during deliberations. Further, CALJIC No. 17.41.1 not only signals jurors that the nature of their participation in the deliberative

process is subject to disclosure but also causes potential concern regarding any consequences that might result from such a disclosure. (See *People v. Dillon* (1983) 34 Cal.3d 441, 490 [“As far as the average lay juror is concerned, failure to follow the court’s instructions invites legal sanctions of some kind and unless the juror is willing to risk a fine, fail, or heaven knows what, he or she feels bound to follow the instructions.”](conc. opn. of Kaus,J.).) The instruction therefore has a chilling effect upon speech in a forum in which "free and uninhibited discourse" is absolutely imperative. (*Attridge v. Cencorp Div. of Dover Technologies Intern., Inc.* (2nd Cir. 1987) 836 F.2d 113, 116.)

B. CALJIC No. 17.41.1 Impinged Upon Mr. Martinez’s Right to a Unanimous Verdict.

A criminal "defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged." (*People v. Jones* (1990) 51 Cal.3d 294, 305; Cal. Const, art. I, § 16; U.S. Const. 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343 [100 S.Ct. 2227, 65 L.Ed.2d 175][due process clause entitles a defendant to the application of favorable state law].) But CALJIC No. 17.41.1 prompts some jurors to forgo independent thought for fear concerns he or she may have regarding the quality of the state's evidence may be viewed as a refusal to deliberate.

A holdout juror may be reluctant to stand her ground for fear she may be reported as a "nullifier" and removed from the panel.

In *People v. Gainer* (1977) 19 Cal.3d 835, the Court addressed the propriety of the "*Allen* charge"[34] which, in part, advises a split jury that the dissenters should question their opinions because they are in the minority. The Court held such an instruction was improper and, as a judicially declared rule, disapproved of it. (*Gainer, supra,* at pp. 852, 856-857.) One reason was because it urged minority jurors to reconsider their views and to acquiesce to the majority. (*Id.* at pp. 848-851.) "The open encouragement given by the charge to such acquiescence is manifestly incompatible with the requirement of independently achieved jury unanimity." (*Id.* at p. 849.) The mandatory reporting requirement of CALJIC No. 17.41.1 stifles expressions of independent thought in the jury room and, in that sense, has a coercive effect on all jurors to "go with the flow ." Thus, like the disapproved "*Allen* charge," it exerts an impermissible pressure on jurors in the minority to acquiesce to the majority and similarly should be deemed improper.

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[34] *Allen v. United States* (1896) 164 U.S. 492, 501 [17 S.Ct. 154, 41 L.Ed. 528].

C. CALJIC No. 17.41.1 Falsely Creates the Impression That Jurors Will Be Sanctioned for Exercising Their Power to Nullify.

A jury has the power "to ignore the evidence and the law and to acquit if that is what it chooses to do." (*People v. Nichols* (1997) 54 Cal.App.4th 21, 24, citing *People v. Fernandez* (1994) 26 Cal.App.4th 710, 714 and *People v. Dillon, supra*, 34 Cal.3d at p. 490 (conc. opn. of Kaus, J.); *People v. Baca* (1996) 48 Cal.App.4th 1703, 1707.) "A jury's power to nullify a verdict has been part of the Anglo-American common law heritage since *Bushell's Case* (1670) 124 Eng.Rep. 1006 [6 Howell's State Trials 999] . . . ." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1444; see *People v. Dillon, supra*, at p. 491 (conc. opn. of Kaus, J.).)

A jury's power to acquit where the law may dictate otherwise has been called a "fundamental necessity of a democratic system" (*United States v. Moylan* (4th Cir. 1969) 417 F.2d 1002, 1005) and has been recognized as "a necessary counter to case-hardened judges and arbitrary prosecutors' [fn.] . . . ." (*United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1116.) It is a check on governmental power that has been historically significant in the development of the Sixth Amendment right to a jury trial. (See *Jones v. United States* (1999) 526 U.S. 227, 244-248 [119

S.Ct. 1215, 143 L.Ed.2d 311](maj. opn. of Souter, J.); *Duncan v. Louisiana* (1968) 391 U.S. 145, 156 [88 S.Ct. 1444, 20 L.Ed.2d 491].)

Although juries have the power of nullification, trial courts are not required to instruct them that they have the power. (*People v. Nichols, supra*, 54 Cal.App.4th at pp. 24-25; *People v. Baca, supra*, 48 Cal.App.4th at p. 1707; *People v. Fernandez, supra*, 26 Cal.App.4th at pp. 714-715.) However, the fact that jurors need not be informed of their power of nullification does not mean that the court is permitted to discourage them from exercising, or even considering and discussing, that power under threat of sanctions. (See *People v. Dillon, supra*, 34 Cal.3d at pp. 492-493 (conc. opn. of Kaus, J.); *People v. Sanchez, supra*, 58 Cal.App.4th at p. 1457 (dis. opn. of Johnson, J.), citing *Bushell's Case, supra*, 124 Eng. Rep. 1006.)

Nevertheless, CALJIC No. 17.41.1 does just that. Its directive that any juror's intentions to disregard the law be reported strongly implies that any discussion, consideration, or exercise of jury nullification is prohibited and will be punished. Such an implication is a misrepresentation of the law. (See *Duncan v. Louisiana, supra*, 391 U.S. at p. 157 ["[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."]; *People v. Dillon, supra*, 34 Cal.3d at

p. 490 (conc. opn. of Kaus, J.) ["[T]he essence of the jury's power to 'nullify' a rule or result which it considers unjust is precisely that the law cannot touch a juror who joins in a legally unjustified acquittal or guilty verdict on a lesser charge than the one which the proof calls for . . . ."].)

D. Conclusion.

CALJIC No. 17.41.1 improperly allows the trial court to hear reports of jurors' subjective mental processes. For the reasons above discussed, the trial court erred in providing this instruction to the jury.

The error cannot be regarded as harmless since the instruction impeded each individual juror's role as independent fact finder. The instruction interferes with the independence of the jury deliberations in violation of a defendant's right to a fair trial in violation of the Sixth Amendment, thereby creating a "structural defect" in the proceedings. Reversal is required. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275; 309-310 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *People v. Cahill* (1993) 5 Cal.4th 478, 502.)

VII.

THE ABSTRACT OF JUDGMENT SHOULD BE AMENDED TO REFLECT THE TRIAL COURT'S STRIKING OF THE THREE PRIOR PRISON TERM ENHANCEMENTS IN THE INTERESTS OF JUSTICE.

In sentencing Mr. Martinez, the trial court dismissed the prior prison term enhancements under Penal Code section 667.5, subdivision (b) "in the interests of justice." (RT 287-288, 289 [tentative sentence] and 291 [adoption of tentative as final sentence].) The abstract of judgment, however, includes those enhancements. (CT 343.) Appellant respectfully requests this court direct the trial court to amend the abstract of judgment to reflect the trial court's dismissal of the enhancements in the interest of justice by omitting them from the abstract of judgment and to forward an amended abstract of judgment to the Department of Corrections. (§§ 1213, 1216.)

CONCLUSION

Because the trial court violated Mr. Martinez's right to due process under *Brady v. Maryland* and under the Fourteenth Amendment to properly instruct the jury, not only with the elements of the offense, but also with instruction that chills the jury's deliberative process, a reversal of his single substantive violation is required. At a minimum, a reversal of his Three Strikes sentence is required, not only because the government presented insufficient evidence to demonstrate Mr. Martinez's prior Texas convictions constituted strike prior convictions, but also because the trial court improperly denied Mr. Martinez the right to a jury trial on the factual question of the nature of these prior convictions and because the 25-year-to-life sentence is grossly disproportionate to Mr. Martinez's culpability and violates the federal constitution.

Dated: January 4, 2001

Respectfully Submitted,

APPELLATE DEFENDERS, INC.

_____

Cindi B. Mishkin, Staff Attorney
Attorneys for Appellant and Defendant

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FOURTH APPELLATE DISTRICT

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MARTINEZ, Petitioner, v. E.R., Warden.	)	Direct Appeal: Court of Appeal #G Superior Court No.
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	)	

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Daniel J. Didier, Judge

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE DAVID G. SILLS, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE:

By this verified petition for writ of habeas corpus, petitioner Martinez, through his counsel Appellate Defenders, Inc., requests issuance of a

writ of habeas corpus ordering the Superior Court of Orange County to reverse his conviction. Because the government violated petitioner's due process rights and failed to reveal relevant and material discovery concerning impeachment evidence of its witness, Mr. J.E., the current conviction violates petitioner's due process rights under the Fourteenth Amendment of the United States Constitution and *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215].

I.

Petitioner is confined and restrained at California State Prison, Los Angeles, California, by the Department of Corrections, pursuant to a judgment of the Superior Court of Orange County, number .[1]

[1] This writ is being filed in conjunction with petitioner's case on direct appeal, Court of Appeal number G . Because of the similarity of the issue raised in this writ to an issue raised in the direct appeal, a formal request for consolidation will be made. In the expectation this consolidation request will be granted and in order to save copying costs and avoid the filing of substantial exhibits in support of this writ, although counsel recognizes a petition for writ of habeas corpus must be a complete document in and of itself, this writ will not include as supporting exhibits the copies of transcripts that are contained in the record of the direct appeal. Instead, the writ will refer to the appropriate pages of the appellate record. Where the point stated is supported by evidence outside the appellate record, counsel has attached exhibits for support.

II.

On April 13, 1998, the government filed a two count complaint against Mr. Martinez, alleging he violated Penal Code[2] section 487, subdivision (a) [grand theft–count one] and section 503 [fraudulent appropriation of property of another–count two] on April 1, 1998. In addition, the complaint alleged Mr. Martinez had suffered two prior strike convictions within the meaning of sections 667, subdivisions (d) and (e)(2) and 1170.12, subdivisions (b) and (c)(2). (Exhibit "A," attached hereto and incorporated by reference.)

III.

On May 3, 1998, Mr. Martinez–acting in pro per–filed a request for informal discovery, including "The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial." (Exhibit "B," attached hereto and incorporated by reference, page 3.)

IV.

On May 26, 1998, the government filed a two count information against Mr. Martinez, alleging he violated section 487, subdivision (a) [grand theft–count one] and section 503 [fraudulent appropriation of property of another–count two] on April 1, 1998. In addition, the information alleged Mr. Martinez

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

had suffered three prior strike convictions within the meaning of sections 667, subdivisions (d) and (e)(2) and 1170.12, subdivisions (b) and (c)(2) and had served three prior prison-terms within the meaning of section 667.5, subdivision (b). (Clerk's Transcript, hereinafter "CT," pages 59-61.)

V.

That same day, Mr. Martinez executed a *Faretta*[3] Waiver Form (CT 70-72), and the court granted his motion to proceed in pro per. (CT 92.)

VI.

After jury trial, which began on July 14, 1998 when the jury was empaneled, the jury issued a not guilty verdict on count one–grand theft (CT 211, 219 [verdict form]; 216-217 [clerk's minutes]) and a guilty verdict on count two fraudulent appropriation of property of another. (CT 212, 220 [verdict form]; 216-217 [clerk's minutes].) Immediately thereafter, proceedings on the bifurcated prior conviction allegations were begun. (CT 217-218 [clerk's minutes].) The following day, the jury returned true findings on all allegations as charged. (CT 246 [clerk's minutes]; 234-253 [verdict forms].)

[3] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

VII.

Mr. Martinez then moved for a new trial pursuant to section 1181 based on the fact that the district attorney had failed to disclose witness Mr. J.E. had suffered a prior felony conviction. (CT 258-264, 288304 [written motions].) Mr. Martinez also made a motion to dismiss the prior conviction allegations under section 1385 and the conviction on count two because of (1) insufficient evidence and (2) double jeopardy violations. (CT 306-339 [written motion].)

VIII.

On August 28, 1998, the court heard Mr. Martinez's oral motion for a new trial and to dismiss the prior conviction allegations; it denied the motions. (CT 340 [clerk's minutes].) Thereafter, the court imposed a 25year-to-life sentence for the conviction on count two, struck the punishment for the prior conviction allegations under section 667.5, subdivision (b)–the prior prison-term allegations–and ordered Mr. Martinez to pay a $1,000.00 restitution fine and $6,000.00 in victim restitution. (CT 340-341 [clerk's minutes]; 343 [abstract of judgment].)

IX.

Mr. Martinez filed a written notice of appeal on September 3, 1998 (CT 344-347) and a second written notice of appeal on September 30, 1998. (CT 350-355.) Mr. Martinez's request to proceed on appeal in pro per was denied by this court. On January 12, 2000, the United States Supreme Court ruled an appellant does not have a federal constitutional right to represent himself on direct appeal. (*Martinez v. Court of Appeal of California, Fourth Appellate District* (2000) 528 U.S. 152 [120 S.Ct. 684, 145 L.Ed.2d 597].)

X.

Counsel for petitioner was appointed by this court on January 12, 1999. (Exhibit "C," attached hereto and incorporated by reference.) The opening brief was filed on January 8, 2001. Among the issues raised therein, it is argued the prosecution violated petitioner's due process rights under the Fourteenth Amendment because it failed to disclose material evidence bearing on the credibility of prosecution witness Mr. J.E.. (AOB pp. 16-22.)

XI.

On September 12, 2001, this court requested additional briefing on the single issue of whether an abuse of discretion occurred in the hearing and denial of the motion for new trial. (Exhibit "D," attached hereto and incorporated by

reference.) Counsel for petitioner filed supplemental briefing on October 10, 2001.

XII.

On October 11, 2001, Deputy Attorney General E.V. contacted petitioner's appellate counsel by telephone and revealed that she, E.V., had arranged for Mr. J.E.'s rap sheet to be run, as his date of birth had been provided in petitioner's motion for new trial. (CT 290, at line 9.) She informed appellate counsel that Mr. J.E. had three prior convictions for violations of section 496a, but these counts had been reduced to misdemeanors and thereafter dismissed. (Exhibit "E," declaration of Cindi Mishkin, attached hereto and incorporated by reference, ¶¶ 1-5.)

XIII.

Thereafter, Deputy Attorney General E.V. contacted appellate counsel again on October 23, 2001, and informed her of other information contained in Mr. J.E.'s rap sheet. Not only did Mr. J.E. have the convictions out of Los Angeles County that had been revealed in the October 11th telephone call, but there was also an arrest in San Andreas (Calaveras County) on July 3, 1984, for a violation of Health and Safety Code sections 11351 and 11350, with no indicated disposition. And on March 8, 1985, four counts charged against Mr. J.E. (2 of Health and Safety Code section 11250 and 1 of Health and Safety

Code sections 11352 and 11351) were dismissed in that county pursuant to section 1385. (Exhibit E, ¶ 6.) In addition, there was an arrest in Santa Ana (Orange County) on March 3, 1998 for a violation of Penal Code section 273.5; but there was no disposition. And on October 29, 1998, Mr. J.E. was convicted of misdemeanor assault–with an allegation of section 273.5 having been dismissed. (Exhibit E, ¶ 7.)

XIV.

On October 25, 2001, Deputy Attorney General E.V. again contacted appellate counsel by telephone and indicated that she–Ms. E.V.–would request Mr. J.E.'s court records from Calaveras and Los Angeles Counties, but she would not request the records of the section 273.5 allegation because it occurred after the trial in Mr. Martinez's case. (Exhibit E, ¶ 9.) Written confirmation and clarification of the information transmitted by Deputy Attorney General E.V. to appellate counsel is contained in E.V.' letter dated October 26, 2001. (Exhibit "F," attached hereto and incorporated by reference; Exhibit E, ¶ 10.)

XV.

On November 1, 2001, Deputy Attorney General E.V. contacted appellate counsel and indicated that Calaveras County was unable to locate files back as far as Mr. J.E.'s case in 1984-1985. And, on November 26, 2001,

Deputy Attorney General E.V. contacted appellate counsel and indicated the District Attorney's records of the matter did not exist. (Exhibit E, ¶ 11.)

XVI.

Los Angeles court records show that Mr. J.E. pleaded guilty to three felony counts of violating section 476a, subdivision (a) on January 26, 1988. Probation was thereafter served. On April 13, 1992, the convictions were reduced to misdemeanors and were dismissed pursuant to section 1203.4. (Exhibit "G," court documents, attached hereto and incorporated by reference, pages 15 [clerk's minutes of plea], 16-24 [reporter's transcript of plea], 33 [clerk's minutes of probation order], 68 [disposition information].)

XVII.

Santa Ana court records show that on March 5, 1998, before jury trial in petitioner's case, which began on July 14, 1998, Mr. J.E. was charged with two counts of violating the Penal Code: section 273.5, subdivision (a) [corporal injury–spouse] and section 242 [battery]. Protective orders were thereafter sought and granted in April, May, September, and October 1998. On October 29, 1998, a plea was entered and probation was granted. At present time, a bench warrant has issued for Mr. J.E.'s arrest relating to this case. (Exhibit "H," court documents, attached hereto and incorporated by reference.)

XVIII.

Although Mr. Martinez had requested discovery in documents filed on May 3, 1998, during the pendency of his case, the District Attorney never informed him that Mr. J.E. had any prior conviction or had ever been arrested for any crime. (Exhibit I, declaration of Martinez, attached hereto and incorporated by reference.)

XIX.

Appellate counsel received the documents relating to Mr. J.E.'s Los Angeles convictions on November 5, 2001 and received those relating to Mr. J.E.'s Orange County arrest and conviction in mid-December 2001. (Exhibit E, ¶¶ 8 and 12.)

XX.

To ensure a defendant's right to a fair trial and due process under the United States Constitution, the government is obliged to divulge evidence that is favorable to the accused, both exculpatory evidence and impeachment evidence, and material to the issues of guilt, even in the absence of a request. (*Brady v. Maryland, supra,* 373 U.S. at p. 87 [failure to divulge co-perpetrator's statement, even though requested, was improper]; *United States v. Agurs* (1976) 427 U.S. 97 [96 S.Ct. 2392, 49 L.Ed.2d 342][obligation to disclose evidence favorable to the accused exists even in the absence of a request]; *United States v.*

Bagley (1985) 473 U.S. 667, 676 [105 S.Ct. 3375, 87 L.Ed.2d 481][duty to disclose exculpatory evidence applies also to impeachment evidence]; *In re Sassounian* (1995) 9 Cal.4th 535, 544-545.)

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility" may require a new trial. (*Giglio v. United States* (1972) 405 U.S. 150, 154 [92 S.Ct. 763, 31 L.Ed.2d 104].) This duty extends to the revelation not only of prior felony convictions, but also of charges pending against prosecution witnesses (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842) and any prior misdemeanor misconduct/convictions the government witness may have. (*People v. Santos* (1994) 30 Cal.App.4th 169, 178-179.)

"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*Bagley, supra,* 473 U.S. at pp. 682.)

XXI.

The prosecutor's duty to disclose favorable evidence extends not only to favorable evidence within her knowledge, but also to "such evidence possessed by investigative agencies to which the prosecutor has reasonable access." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380.) Thus, the prosecutor has

"the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf . . . .'" (*In re Brown* (1998) 17 Cal.4th 873, 879, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437 [115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490].) In this case, even if the prosecutor did not personally know of Mr. J.E.'s prior conduct, the government had a duty to reveal this information once it determined it would use Mr. J.E.'s testimony in an attempt to convict petitioner.

XXII.

The evidence that the prosecution failed to disclose in the instant case, Mr. J.E.'s prior Los Angeles felony convictions,[4] his prior misconduct in Calaveras county,[5] and his currently pending charges in Orange County,[6] was favorable to

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[4] Evidence of these prior convictions was admissible under section 28, subdivision (d) of the California Constitution, which declares that: "relevant evidence shall not be excluded in any criminal proceeding. . . ." (See Appellant's Supplemental Reply Brief, pages 5-12.)

[5] Mr. J.E.'s conduct underlying the Health and Safety Code sections 11351 and 11352 charges was that of moral turpitude, evidencing an intent to corrupt others (*People v. Castro* (1985) 38 Cal.3d 301, 371), and was thus admissible as impeachment evidence. (See *People v. Standard* (1986) 181 Cal.App.3d 431, 435 [possession of marijuana for sale]; *People v. Dossman* (1985) 171 Cal.App.3d 843, 848-849 [possession of controlled substance for sale]; *People v. Navary* (1985) 169 Cal.App.3d 936, 949 [sale/transportation of heroin].)

[6] The crime of Penal Code section 273.5 [spousal abuse] is one of moral turpitude (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398) and admissible for impeachment evidence. (*Castro, supra,* 38 Cal.3d at p. 314.)

petitioner in that it provided direct impeachment evidence attacking Mr. J.E.'s credibility and thereby undermines the confidence in the outcome of the verdict. This case hinged on credibility. It was undisputed Mr. Martinez took the $6,000.00 dollars from Jane Doe. The question the jury had to answer was what happened to this money. The prosecution's case theorized Mr. Martinez took the money for personal use and relied on Mr. J.E.'s testimony to provide an important link in its case tending to show that it was petitioner who had taken the money. However, Mr. Martinez's defense propounded a different scenario: he left the money in a safe place in Mr. L.M.'s office and it was Mr. J.E. who took the money. Mr. Martinez presented defense witnesses who attested to his credibility and who also indicated that there had been some problems collecting money from Mr. J.E.. (RT 148, 151-152 [Mr. L.L.R.] and 159 [Ms. C.D.].) Thus, Mr. J.E.'s credibility was a key issue for the jury to assess. Because this newly discovered evidence goes to the heart of Mr. J.E.'s credibility, and demonstrates that he committed perjury (§ 118) when he answered petitioner's question whether he had ever been convicted of a felony in the negative (RT 70), it undermines confidence in the outcome of the trial.

XXIII.

The fact that petitioner has filed a prior petition for writ of habeas corpus[7] does not invalidate the instant action as a successive petition. The information presented herein, which was in the possession of the government and not available to defense counsel until the government chose to reveal it, could not have been discovered earlier. And, it has taken counsel only two months to prepare the petition once all the court documents had been gathered and reviewed. Accordingly, good cause justifies the delay in asserting the instant claims and this petition is appropriately raised as soon after the discovery of the relevant information as possible. (*In re Clark* (1993) 5 Cal.4th 750, 775.)

XXIV.

This petition is being presented in the first instance to this court, under its original habeas corpus jurisdiction, because petitioner's direct appeal and accompanying record on appeal are presently pending before this court.

WHEREFORE, petitioner respectfully requests that this court:

1. Take judicial notice of the record on appeal in *People v. Salvador Martinez*, Court of Appeal number G (Evid. Code, §§ 452, subd. (d)(1), 459), which record is referred to herein;

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[7] The petition was assigned Court of Appeal number G . It was denied on March 16, 2001. (Exhibit J, court order, attached hereto and incorporated by reference.)

2. Consolidate this petition for consideration with petitioner's direct appeal now pending in this court (Court of Appeal No. G);

3. Take judicial notice of its own file in *In re Salvador Martinez*, Court of Appeal number G ;

4. Issue a writ of habeas corpus reversing the judgment under which petitioner is restrained or issue an order to show cause to the Director of the Department of Corrections to inquire into the legality of petitioner's present incarceration;

5. In the event this court believes an evidentiary hearing is necessary, appoint a special referee to hold such hearing and appoint counsel to represent petitioner therein;

6. Grant petitioner whatever further relief is appropriate and in the interest of justice.

Dated: February 15, 2002 Respectfully submitted,

APPELLATE DEFENDERS, INC.
by: Cindi B. Mishkin
State Bar No. 169537
Attorney for Petitioner

VERIFICATION

I, Cindi B. Mishkin, declare as follows:

I am an attorney admitted to practice before the courts of the State of California and have my office in San Diego County.

I am the attorney for petitioner herein and I am authorized to file this petition. His issue is properly raised by this Petition for Writ of Habeas Corpus.

Petitioner is unable to make this verification due to his confinement at California State Prison at Los Angeles, and because I am more familiar with some of the matters alleged, I am filing this petition pursuant to Penal Code section 1474. I drafted the foregoing Petition for Writ of Habeas Corpus and know the contents thereof.

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

Executed this 15th day of February, 2002, at San Diego, California.

Respectfully submitted,

Appellate Defenders, Inc.
Cindi B. Mishkin
CA State Bar #169537
Attorney for Petitioner
Martinez

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Although petitioner requested informal discovery on May 3, 1998, the government did not reveal to him that Mr. J.E. had any prior convictions or had even been arrested for a crime. It was not until Assistant Attorney General E.V. obtained Mr. J.E.'s rap sheet and then told petitioner's appellate counsel about some information contained therein, on October 23, 2001, that petitioner learned of the precise impeachment evidence the government had failed to reveal before trial. Thereafter, on November 5, 2001, petitioner's appellate counsel received the court documents of Mr. J.E.'s prior convictions from Los Angeles county. In mid-December 2001, petitioner's appellate counsel received the court documents of Mr. J.E.'s criminal action in Orange county. The government's failure to reveal this favorable evidence, which was material given the key role prosecution witness J.E. played in the trial below, until late 2001 constitutes error under the Due Process Clause of the Fourteenth Amendment and *Brady v. Maryland, supra,* 373 U.S. 83. Reversal of petitioner's conviction is therefore necessary.

I. HABEAS CORPUS IS A PROPER VEHICLE FOR THE PRESENTATION OF PETITIONER'S CLAIM

The claims asserted in this petition are essentially the same as those asserted in the first issue of petitioner's direct appeal, Court of Appeal case number G . However, this petition includes matters outside the appellate record, i.e., the evidence that the government failed to reveal to petitioner before trial and did not reveal until October 2001, and the circumstances of the government's revelation. As a result of this additional evidence, presentation of these issues herein is appropriate. (*In re Carpenter* (1995) 9 Cal.4th 634, 646; *In re Bower* (1985) 38 Cal.3d 865, 872.) "Under the due process clause of the Fourteenth Amendment to the United States Constitution, a prisoner may seek relief in habeas corpus on the ground that the prosecution did not disclose evidence." (*In re Sassounian* (1995) 9 Cal.4th 535, 543.)

In proper cases the reviewing court may consider a petition for a writ of habeas corpus in conjunction with an appeal. (*People v. Pena* (1972) 25 Cal.App.3d 414, 423.) When, as here, petitioner in a habeas corpus action requests consolidation of a writ proceeding with a pending appeal, the proper procedure is to grant consolidation and issue an order to show cause. *(People v. Frierson* (1979) 25 Cal.3d 142.) Because the factual underpinnings of and legal arguments raised in the petition for writ of habeas corpus are

virtually identical to those of the direct appeal, consolidation would promote the conservation of judicial resources and would save the costs required to duplicate the appellate record to support the petition for writ of habeas corpus. Thus, in the interest of justice and judicial economy, petitioner seeks consolidation of this petition with his pending appeal.

II. THE GOVERNMENT VIOLATED PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND AS SET FORTH IN *BRADY v. MARYLAND* (1963) 373 U.S. 83, WHEN THE PROSECUTOR FAILED TO DISCLOSE MATERIAL EVIDENCE BEARING ON THE CREDIBILITY OF KEY PROSECUTION WITNESS J.E., THE MAN PETITIONER ACCUSED OF HAVING ACTUALLY COMMITTED THE CRIME FOR WHICH PETITIONER STOOD TRIAL.

To ensure a defendant's right to a fair trial and due process under the United States Constitution, the government is obliged to divulge evidence that is favorable to the accused, both exculpatory evidence and impeachment evidence, and material to the issues of guilt, even in the absence of a request. (*Brady v. Maryland, supra,* 373 U.S. at p. 87 [failure to divulge co-perpetrator's statement, even though requested, was improper]; *United States v. Agurs* (1976) 427 U.S. 97 [96 S.Ct. 2392, 49 L.Ed.2d 342][obligation to disclose evidence favorable to the accused exists even in the absence of a request]; *United States v. Bagley* (1985) 473 U.S. 667, 676 [105 S.Ct. 3375, 87 L.Ed.2d 481][duty to disclose

exculpatory evidence applies also to impeachment evidence]; *In re Sassounian* (1995) 9 Cal.4th 535, 544-545.)

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility" may require a new trial. (*Giglio v. United States* (1972) 405 U.S. 150, 154 [92 S.Ct. 763, 31 L.Ed.2d 104]; *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463 [murder conviction reversed when it was shown the state had failed to reveal the correctional file of its key witness that raised serious questions about the witness's credibility].) This duty extends to the revelation not only of prior felony convictions, but also of charges pending against prosecution witnesses (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842) and any prior misdemeanor misconduct/convictions the government witness may have. (*People v. Wheeler* (1992) 4 Cal.4th 284; *People v. Santos* (1994) 30 Cal.App.4th 169, 178-179.)

"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*Bagley, supra,* 473 U.S. at pp. 682.)

The prosecutor's duty to disclose favorable evidence extends not only to favorable evidence within her knowledge, but also to "such evidence possessed by investigative agencies to which the prosecutor has reasonable access." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380.) Thus, the prosecutor has "the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf . . . .'" (*In re Brown* (1998) 137 Cal.4th 873, 879, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437 [115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490].) In this case, even if the prosecutor did not personally know of Mr. J.E.'s prior conduct, the government had a duty to reveal this information once it determined the government would use Mr. J.E.'s testimony in its attempt to convict petitioner.

The evidence that the prosecution failed to disclose in the instant case: Mr. J.E.'s prior Los Angeles felony convictions,[8] his prior misconduct in Calaveras county,[9] and his charges in Orange County which were pending at the time of

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[8] Evidence of these prior convictions was admissible under section 28, subdivision (d) of the California Constitution, which declares that: "relevant evidence shall not be excluded in any criminal proceeding. . . ." (See Appellant's Supplemental Reply Brief, pages 1-17. To conserve resources, petitioner will not repeat those arguments here; nevertheless, they apply with equal force not only to the direct appeal, but also to this collateral action.)

[9] Mr. J.E.'s conduct underlying the Health and Safety Code sections 11351 and 11352 charges was that of moral turpitude, evidencing an intent to corrupt others (*People v. Castro* (1985) 38 Cal.3d 301, 371), and was

petitioner's trial, [10] was favorable to petitioner in that it provided direct impeachment evidence attacking Mr. J.E.'s credibility.

Most importantly, this evidence significantly undermines the confidence in the outcome of the verdict. This case hinged on credibility. It was undisputed Mr. Martinez took the $6,000.00 dollars from Jane Doe. The question the jury had to answer was what happened to this money. The prosecution's case theorized Mr. Martinez took the money for personal use and relied on Mr. J.E.'s testimony to provide an important link in its case tending to show that it was petitioner who had taken the money. However, Mr. Martinez's defense propounded a different scenario: he left the money in a safe place in Mr. L.M.'s office and it was Mr. J.E. who took the money. Mr. Martinez presented defense witnesses who attested to his credibility and who also indicated that there had been some problems collecting money from Mr. J.E.. (RT 148, 151-152 [Mr. L.L.R.] and 159 [Ms. C.D.].) Thus, Mr. J.E.'s credibility was a key issue for the

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thus admissible as impeachment evidence. (See *People v. Standard* (1986) 181 Cal.App.3d 431, 435 [possession of marijuana for sale]; *People v. Dossman* (1985) 171 Cal.App.3d 843, 848-849 [possession of controlled substance for sale]; *People v. Navary* (1985) 169 Cal.App.3d 936, 949 [sale/transportation of heroin].)

[10] The crime of Penal Code section 273.5 [spousal abuse] is one of moral turpitude (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398) and admissible for impeachment evidence. (*Castro, supra,* 38 Cal.3d at p. 314.)

jury to assess. Without the newly discovered evidence, Mr. J.E. testified at trial under a false aura of veracity.

Because this newly discovered evidence goes to the heart of Mr. J.E.'s credibility, and demonstrates that he committed perjury (§ 118) when he answered petitioner's question whether he had ever been convicted of a felony in the negative (RT 70), it undermines confidence in the outcome of the trial. Not only does this newly discovered evidence reveal that Mr. J.E. had several prior incidents involving conduct of moral turpitude, which tends to reflect poorly on his credibility, but the newly discovered evidence shows that Mr. J.E. did not respect his oath to testify truthfully. Given this consideration, confidence in Mr. J.E.'s testimony that fingered petitioner for the commission of the crime and deflected attention from his own responsibility is lacking. The suppression of this information undermines the confidence in the verdict. Because the evidence attacked Mr. J.E.'s credibility, whereas during trial Mr. J.E.'s credibility was unblemished, it is reasonably probable that Consequently, reversal is appropriate.

Finally, the fact that petitioner has filed a prior petition for writ of habeas corpus[11] does not invalidate the instant action as a successive petition. The

[11] The petition was assigned Court of Appeal number G . It was denied on March 16, 2001. (Exhibit J, court order, attached hereto and incorporated by reference.)

information presented herein, which was in the possession of the government and not available to defense counsel until the government chose to reveal it, could not have been discovered earlier. And once the relevant court documents were gathered, counsel prepared the instant petition within two months. Accordingly, good cause justifies the delay in asserting the instant claims and this petition is appropriately raised as soon after the discovery of the relevant information as possible. (*In re Clark* (1993) 5 Cal.4th 750, 775.)

CONCLUSION

For the reasons stated herein, the government violated Mr. Martinez's right to due process when it failed to reveal crucial discovery going to the credibility of one of its key witnesses. Because this evidence undermines the confidence in the verdict, reversal is required.

Dated: February 15, 2002 Respectfully submitted,

Cindi B. Mishkin, Staff Attorney

Attorney for Defendant and Petitioner

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MARTINEZ, On Habeas Corpus.	)	Court of Appeal No.
MARTINEZ, Petitioner, v. E.R., Warden.	)	Direct Appeal: Court of Appeal #G Superior Court No.
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	)	

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Daniel J. Didier, Judge

PETITION FOR WRIT OF HABEAS CORPUS

APPELLATE DEFENDERS, INC.

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