No. 18-7056 ORIGINAL

FILED
OCT 23 2018
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID LEONARD JOHNSON
(Your Name) — PETITIONER

vs.

THE PEOPLE OF CALIFORNIA
— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

CALIFORNIA SUPREME COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAVID LEONARD JHONSON
(Your Name)

(HDSP) P.O. BOX 3030
(Address)

Susanville, CA 96127
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I.

IS THE CRIME OF RECEIVING STOLEN PROPERTY A LESSER INCLUDED OFFENSE OF ROBBERY, AND IF SO, WAS THE TRIAL COURT'S FAILURE TO INSTRUCT ON RECEIVING STOLEN PROPERTY AS A LESSER INCLUDED OFFENSE PREJUDICIAL ERROR?

II.

DID THE PROSECUTION PRESENT SUFFICIENT EVIDENCE APPELLANT'S TWO PRIOR ASSAULT CONVICTIONS QUALIFIED AS STRIKE AND SERIOUS FELONY PRIORS UNDER CALIFORNIA LAW, AND IS ANY DECISION THAT THE PROSECUTION'S EVIDENCE WAS SUFFICIENT INCOMPATIBLE WITH Descamps v. U.S. (2013) 570 U.S. U.S. (133 S.Ct. 2276) BECAUSE IT WOULD REQUIRE JUDICIAL FACT-FINDING BEYOND THE ELEMENTS OF THE PRIOR CONVICTIONS?

LIST OF PARTIES

[XX] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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CASES

CALIFORNIA CODES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[XX] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "A" to the petition and is

[ ] reported at _____; or;
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

The opinion of the FOURTH APPELLATE DISTRICT-DIVISION ONE court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was AUG 29 2018. A copy of that decision appears at Appendix "A".

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CALIFORNIA CONSTITUTION

UNITES STATES CONSTITUTION

RULES OF COURT

OTHER

STATEMENT OF THE CASE

Appellant adopts the procedural and factual background as set forth in the Court of Appeal's Opinion. (Appendix "B" pp. 2-5.)

REASONS FOR GRANTING THE PETITION

Appellant David Johnson respectfully request this Court grant review in the above-entitled case following the unpublished Opinion of the Court of Appeal, Fourth Appellate District, Division One, affirming in part, reversing in part, and remanding with directions the judgement of the Superior Court of San Diego County.

The Opinion of the Court of Appeal was filed and fully exhusted. A copy of the Opinion is attached hereto as Appendix "B"

Review is urgent to settle important issues of law.

ARGUMENT

I.

THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER THE CRIME OF RECEIVING STOLEN PROPERTY IS A LESSER INCLUDED OFFENSE OF ROBBERY UNDER THE STATUTORY ELEMENTS TEST, AND, IF SO, WHETHER THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT APPELLANT'S JURY ON RECEIVING STOLEN PROPERTY AS A LESSER INCLUDED OFFENSE TO THE ROBBERY CHARGE

A. Introduction

Review by this Court is necessary in in order to decide the fundamental legal question of whether the crime of receiving stolen property in violation of Cal. Penal Code §496 is a lesser included offense of robbery in violation of Cal. Penal Code §211 as a matter of California law. As will be shown below, a straightfoward application of the statutory elements test for lesser included offenses establishes that receiving stolen property is a lesser included offense of both robbery and

theft.

Review by this Court is also necessary because numerous prior Court of Appeal decisions have stated that receiving stolen propery is not a lesser included offense of either robbery or theft, and thus the law in California regarding lesser included offenses is current being incorrectly applied in a vast amount of cases. As will shown below, all of these prior decisions were incorrectly decided for two reasons. First, none of these prior Court of Appeal decisions applied the legal requirement test for determining what constitutes a lesser included offense, the statutory elements test, to the current version of Cal. Penal Code § 496. Second, All of these prior decisions were based on a fundamental misconception of California law, namely, that a principal in the theft of property may not be convicted of of the crime of receiving the stolen property, which interpretation of the law has been expressly rejected by the current version of Cal. Penal Code § 496 as amended in 1992.

The Court of Appeal's Opinion in the at bar suffered from the same defects as all the prior published decisions on this issue. Unlike many of the past decisions, the Court of Appeal herein recognized that the statutory elements test is the requisite test in California for determining what constituted a lesser included offense. However, the Court of Appeal herein then failed to properly apply that test, and did not identify any element in the lesser crime, crime of receiving stolen property that is not also presented in the greater crime of robbery for purposes of this test. (See Appendix B pp. 10-11.)

Instead, in rejecting appellant's contention that receiving stolen property is a lesser included offense of robbery, the Court of Appeal first stated '[t]he People correctly assert that receiving stolen property does not required proof that the defendant took the property, and argue from this point that the receiving offense is not a lesser included offense to robbery." (Appendix B P. 10.) However, this is a

misapplication of the statutory elements test because the fact that the greater crime of robbery contains an additional element, proof the defendant took the property, that is not required for a conviction of the lesser offese, is what makes robbery the greater offense.

The Court of Appeal additionally relied upon the mistaken interpretation of Califronia law relied on in the past cases, which the Court of Appeal Characterized as "the basis proposition that an act of receiving stolen property is distinct from robbery for purposes of instructing the jury on the two offense. (Appendix B p. 11.) As noted, this interpretation of the law is contrary to the plain language of current Cal. Penal Code §496 as amended in 1992, and the Court of Appeal's premise that a violation of Cal. Penal Code §496 REQUIRES A distinct transaction apart from the theft is legally incorrect.

Finally, if this Court agrees that receiving stolen property is in fact a lesser included offense of robbery, there remains the question whether the

trial court prejudicially erred in failing to istruct appellant's jury in that lesser included offense to the robbery charge based on the evidence herein.

B. Receiving Stolen Property Is A Lesser Included Offense Of Robbery Under The Statutory Element Test

A particular offense is considered a lesser included offense if it satisfies one of two test. The statutory "elements" test is a satisfied if the statutory elements of the greater offense include all the elements of the lesser, so that greater connot be committed without committing the lesser; the "accusatory pleading" test is satisfied if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense, such that the greater offense charged cannot be committed without committing the lesser. (Peole v. Sloan (2007) 42 Cal.4th 110, 117; People v. Reed(2006)38 cal.4th 1224 1227-1228.)

A careful review of both the applicable statutory schemes and applicable case law reveals that receiving stolen

property in violation of Cal. Penal Code §496,(a), is a lessesr included offense of both robbery and theft under the statutory elements test.

For example, current case law makes clear that theft is a lesser included offense of robbery. (People v. Villa(2007) 157 Cal.App.4th 1429,1434;People v Ortega(1998) Cal.4th 698,694,699.) This is so because robbery has the same elements of theft plus the additional element of use of force or fear.(Ibid.)

It has also been held that theft is not a lesser included offense of receiving stolen property, because receiving stolen property does not require the element of taking the property in the first instance.(In re Greg F.(1984)159 Cal.App.3d 466,468-469.)

However, no prior published decision has addressed whether receiving stolen property in violation of the current version of Cal.Penal Code §496,(A), as amended by the legislature in 1992, is a lesser included offense of the crimes of robbery or theft under the legally applicable statutory element test.[2]

A straightfoward application of the statutory elements test establishes receiving stolen property in violation of Cal. Penal Code §496,

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[2] At least three recent cases have mentioned the issue in passing or in other context, but none of these cases actually decided the issue or applied the statutory elements an even these cases discussed the issue in a conflicting manner. (See People v. Spicer(2015)235 Cal.App.4th 1359, 1372 [while discussing a double jeapardy claim, stating without any analysis that it is "well established that receiving stolen property is not a lesser offense or robbery"] People v. Whalen (2013) 56 Cal.4th 1,68['The court further instructed on the crime of receiving stolen property as a lesser offense of robbery. (CALJIC no. 14.65.)"];People v. Valentine (2006) 143 Cal. App 1383, 1387-1388 [defendant conceded receiving stolen property is not a lesser included offense of robbery, but argued he was entitled to an instruction on that crime as a lesser related offense].) Thus, these cases do not resolved the question presented herein. (See People v. Superior Court (Zamudio) (2000) 23 Cal. 4th 183,198 [cases are not authority for propositions not considered].)

subdivision (a), is a lesser included offense of the crime of robbery in violation of Cal. Penal Code §211.

Cal.penal Code 211 Provides; Robbery is 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 robbery are: (1) the defendant took property that was not his or hers; (2) the property was taken from another person's possession or immediate presence; (3) the property was taken against the person's will; (4) the defendant used forced or fear to take the property or to prevent the person from resisting; and (5) when the defendant used force or fear to take the property, the defendant intended to remove it from the owner's possession for such an extended period of time the owner would be deprived of a major portion of the value of the property.(People v. Clark (2011)52 Cal.4th 856 943; see also CALCRIM No. 1600.)

Has been also noted in Cal Supreme Court, "[t]he taking element of robbery itself has two necessary elements, gaining possession of the victim's

property and transporting or carrying away the loot." (People v. Cooper(1991)53 Cal. 3d 1158,1165.) Cal. Penal Code §496,(a), provides in pertinent part: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling or withholding any property from the owner, knowing the property to be stolen or obatained, shall be punished ...

"A principal in the actual theft of the property may be convicted pursuant to this section. however, no person may be convicted both pursuant to this section and of the theft of the same property." Cal.Penal Code,§496, subd.(a).)

Thus, "[U]nder section 496, subd (a), the element of receiving stolen property are (1) stolen property; (2) Knowledge that the property was stolen; and (3) possession of the stolen property.[fn.] (People v. Land (1994)30 Cal.App.4th 220, 223.)" (People v. King(2000) 81 Cal.App. 4th 472, 476.) The crime of receiving stolen property "is completed upon taking

possession of the property with knowledge that is stolen."(Williams v. Superior Court (1978) 81 Cal.App.3d 330,342.)

Applying the statutory elements test, one cannot forcibly take passession of another person's property in a robbery without taking possession of the property with knowledge it is stolen. Thus, receiving stolen propoerty in violation of Cal. Penal Code §496, subd (a), is a lesser included offense of robbery under the statutory elements test.

As noted previously observed by the Court of Appeal, the fact that a particular may not personally take possession of the stolen property has no effect on this analyses because aiders and abettor are liable as principals undere Cal. Penal Code §31.) Thus, similar to the crime of aiding and abetting the operation of a chop shop, a person who aids and abets a robbery has necessarily aided and abetted a receipt of stolen property. (See Ibid.)

For the reasons set forth above, applying the statutory elements test, a person who commits a robbery obtains possession of stolen property and the crime of receiving stolen property is a lesser included offense of robbery.

C. THE SEVERAL PRE-1992 COURT OF APPEAL CASES STATING THAT RECEIVING STOLEN PROPERTY IS NOT A LESSER INCLUDED OFFENSE OF ROBBERY OR THEFT, AS WELL AS THE LONE POST-1992 CASE STATING THE SAME, WERE ALL WRONGLY DECIDED

Several older Court of Appeal cases, interprepreting the Pre-1992 version of Cal. Penal Code, §496, have stated that receiving stolen property in violation of former Cal. Penal Code §496,subd (1), is not a lesser included offense of theft or robbery. (See In re Christopher S.(1985) 174 Cal.App.3d 620,624; People v. Tatun (1962)209 Cal.App.2d179,183;People v. Mora(1956) 139 Cal.App.2d 266,274;In re Stanley(1928)90 Cal.App.132,135.)

However, all of these authorities are upon a mistaken interpretation of the crime of receiving stolen property, namely that a principal in the actual theft of the property may not be convicted of the crime of receiving the stolen property, which is an interpretation of the law that has been expressly rejected by the current statue.

In Stanley, the case which appears to be the genesis of all the above decisions, the Court of Appeal cited two out

of state authorities and held receiving stolen property is not a lesser included offense of robbery because the crime of receiving stolen property "imports a distinct and subsequent transaction, and involving another person, the receiver receiving the property from some other person who had previously obtained it by robbery." (In re Stanley,supra,90 Cal.App at p.135.)

Thereafter, in Tayle, the Court of Appeal stated that receiving property did not constitute a lesser included offense [to in that case a burglary charge] because former Cal.Penal Code §496, Subd (1), required "an intent knowledge to receive property which was stolen by 'another,'" (People v. Tyler(1968)258 Cal. App.2d 661,667, emphasis added.) Similarly, in Christopher S., the Court of Appeal stated receiving stolen property in violation of former Cal. Penal Code §496, subd (1), did not qualify as a lesser included offense to larceny because the crimes "are quite distinct," the crime of receiving property applies to "the 'fence, not the thief," and "[t]he actual thief cannot receive from himself the fruit of

larceny.' [Citation.]" (In re Christopher S., supra, 174 Cal.App.3d at p.624.) Similarly, in Tatum, the Court of Appeal stated, "In our view, [former section 496 subd (1)] is directed at those who knowinly deal with thieves and with their stolen goods after the theft has been committed," the crime of theft is "essentially different" from receiving stolen property, and concealing or withholding stolen property by the thief himself is "not envisaged by section 496."(People v. Tatum,supra,209 Cal.App.2d at p. 183.)Finally in Mora, the Court of Appeal stated with citation to Stanley, but without any further analysis, the receiving stolen property is not a lesser included offense of robbery because"the elements of the two offenses are different.) (People v. Mora,supra,139 Cal.App.2d at P 274, citing In re Stanley, supra, 90 Cal. App.132.)

However, the premise of each of the above decisions, that the thief and the person receiving the stolen property must be two different people, is not longer valid. As amended in 1992, Cal.Penal Code §496 now expressly provides: "A principal

in the actual theft of property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property."(Cal.Penal Code § 496,subd,(a), as amended by Stats. 1992, ch.1146, § 1,p.5374.) As explained by California Supreme Court in Allen, prior to the 1992 amendement to Cal. Penal Code §496, there had developed a common law rule prohibiting dual convictions for both theft and receiving stolen property that was founded on the idea that is "Logically impossible for a thief who has stolen an item of property to buy or received that property from himself.")People v. Allen(1999)21 Cal.4th 846,854 .) The 1992 amendement was an effort to eliminate the portion of this common law rule providing that a person could not be the thief and the receiver of the same property.(Id. at p.853.) That rule had created problems because it allowed defendants to escape conviction for receiving stolen goods in situations where the prosecution failed to show that the defendant was not the thief.(Ibid.) The first sentence of the 1992 amendement "

"effectively abrogate[d]" this common law rule, while the second sentence of the amendment re-affirmed the portion of the rule prohibiting dual convictions for theft and receiving the same property.(Id .at p.857.) Based on this common law rule, the line of cases from Stanley to Christopher S, cited above all reasoned that a violation of former Cal.Penal Code §496, subd (1), was not a lesser included offense to any theft related crime because a violation of Cal. Penal Code §496 required a distinct and separate transaction apart from theft, and interpreted Cal.Penal Code §496 to require a receipt of stolen property from a third party who was the actual thief of the stolen property.

As our Legislature has now made clear this interpretation of Cal.Penal Code § 496,subd (a), is incorrect, and a thief may be convicted of receiving the property he stolem he just connot be convicted of both offenses.

The rule urged by appellant also harmonizes the original portion of the common law rule prohibiting dual convictions for stealing and receiving the same property, later expressly incorporated

into the same statue by the Legislature in 1992, the rule generally authorizing multiple convictions for an act that violates multiple statures under Cal.Penal Code §954, and the rule prohibiting multiple convictions for both greater and lesser included offenses. (See Cal.Penal Code, §954;People v. Medina(2007)41 Cal. 4th 685,702.)

Thus, the statutory scheme, properly harmonized and viewed as a whole, provides that theft is a lesser included offense of theft and robbery, a defendant who commits either a theft or a robbery can be properly convicted of that offense, and also be convicted of violating Cal. Penal Code §496,subd(a), bases on his taking possession of that stolen property, but cannot be convicted of both robbery of theft and receiving the propety. In other words, based on the prosecutor's exercise of its charging discretion and the evidence of the case involving stolen property, the jury may be presented with options or robbery, theft, and receiving stolen property, and the defendant may be convicted of any of those three offenses, but only one of those offenses.

Finally, appellant notes that one post-1992 case has also stated that it is "well established that receiving stolen property is not a lesser included offense of robbery." (See People v. Spicer. supra.235 Cal.App.4th at p.1372.) However. Spicer. which made that statement in the context of addressing a doble jeopardy claim. contains no analysis of the lesser included offense issue. and in support of the above quoted statement. contains only a bare citation to Mora. (See People v. Spicer.235 Cal.App.4th at p.1372. citing People v. Mora.supra.139 Cal.App.2d at p.274. However. as explained above. Mora as well as the other older cases making similar statetements when interpreting the pre-1992 version of Cal. Penal Code §496. did not actually applied the statutory elements test in addressing the issue. and were all based on the mistaken belief that a principal in the actual theft of the property may not be convicted of the crime of receiving stolen property. which interpretation of the law has been desavowed in the current statue.

D. THE COURT OF APPEAL'S DECISION (OPINION) IN THIS CASE

In this case, the Court of Appeal appropriately recognized that the statutory elements test applies as a matter of California law when determining what constitutes a lesser included offense. (Appendix B pp. 8-9.) However, in rejecting appellant's argument that receiving stolen property is a lesser included offense of robbery, the Court of Appeal did not actually apply that test, ans did not identify a single element that is present in the crime of receiving stolen property that is not also present in the crime of robbery. (See Appendix B pp. 10-11.) Rather, the Court of Appeal first stated that receiving stolen property is not a lesser included offense of robbery because "receiving stolen property does not require proof that the defendant took the property." (Appendix B pp. 10.) However, this is a misaplication of the statutory elements test, and the fact that the greater crime of robbery contains an additional taking element that is not required for a convicion of the lesser is what makes robbery the greater

offense. The statutory elements test is satisfied if the lesser. so that the greater connot be commited without also commiting the lesser. (People v. Sloan, supra, 42 Cal.4th at p.117;Peoplev. Reed supra, 38 Cal.4th at pp. 1227-1228.) Thus, properly understood and applied, the fact that the greater crime of robbery requires an additional element, namely, proof the defendant took the property from the victim, that is not required for the lesser crime of receiving stolen property is of no moment. The Court of Appeal additionally relied upon the same mistake interpretation of California law contained in the past cases, which the Court of Appeal herein characterized as "the basic proposition that an act of receiving stolen property is distinct from robbery for purposes of instructing the jury on the two offenses ." (Appendix B p. 11.) As noted, this interpretation of the law is contrary to the plain language of current Cal. Penal Code § 496 as amended in 1992, and the Court of Appeal's premise that a violation of Cal.Penal Code §496 requieres a distinct transaction apart from the

theft is legally incorrect.

E. TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT APPELLANT'S JURY ON RECEIVING STOLEN PROPERTY AS A LESSER INCLUDED OFFENSE TO THE ROBBERY CHARGE

The prosecution's evidence establishing appellant's identity as the person who commited the robbery of Gardini in her hotel room was not overwhelming. Gardini was the only person who identified appellant as being the robber, and there was no fingerprint, DNA, or other forensic evidence that tied appellant to the robbery in the hotel room. Much of the prosecution's case against appellant was based upon the fact he was found in possession of some of the items stolen from Gardini, includung her iPhone and computer, four days later on September 25, 2011. The hotel manager, Lieras, testified that on the night of the robbery just before the police were called, he hear a loud female scream and then about a minute later observed a Black man with "crazy" big hair similar to dreadloks and with "wild eyes"hurriedly running past him trying to exit the hotel

as fast as possible. (2 R.T.pp.260=270, 280,287.)Lieras believed this man was connected to the incident involving Gardini and he so advised the police. (2 R.T. p.287.) Appellant has at all times very short hair, and nothing that would resemble long hair much less dreadlocks. (See 1 R.T.p.12;2 R.T.p.294 [photograph of appellant introduced as Exhibit 56].) In appellant's defense, defense counsel argued appellant was clearly not the person who Lieras saw running out of the hotel immediately after the incident, and further argued that Gardini was a prostitute, was a methamphetamine user, and could not be trusted. (See 3 R.T.pp.464-471,480-482,487-488.) Based upon this evidence, including the clear evidence of appellant's possession of some of the stolen property four days after the robbery, but uncertain evidence as to whether he was the person who took the property at the hotel, the failure to instruct on receiving stolen property as a lesser included offense to the robbery charge was prejudicial error.

ARGUMENT

II.

THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELEY, WHETHER THE PROSECUTION PRESENTED SUFFICIENT EVIDENCE APPELLANT'S TWO PRIOR ASSSULT CONVICTIONS QUALIFIED AS STRIKE AND SERIOUS FELONY PRIORS UNDER CALIFORNIA LAW, AND IS ANY DECISION THAT APPELLANT'S CONVICTIONS CONSTITUTE STRIKES INCOMPATIBLE WITH DESCAMPS V. U.S.(2013) 570 U.S. (133 S. CT.2276) BECAUSE IT WOULD REQUIRE JUDICIAL FACT FINDING BEYOND THE ELEMENTS OF THE ACTUAL PRIOR CONVICTION FINDINGS

A. Introduction

The prosecutor alleged appellant possessed three prior strike convictions and two serious felony prior convictions. The three strikes alleged were for a 1995 assault conviction in violation of Cal.P.C. §245, subd (a)(1), in case No. TA040857, a 2002 robbery conviction in case No.TA065809, and a 2002 assault conviction in violation of Cal.P.C. §245, subd (a)(1), also in case No TA065809. The two serious felony priors were for the 1995 assault conviction in case No. TA065809. (1 C.T.-pp. 18-19.)) Bases on his current convictions and the trial court's true finding on the above prior conviction allegations appellant was sentenced to a Three

Strikes term of 25 years to life plus 17 years.(2 C.T.pp.359-360,455-457.)

Appellant maintains that as a matter of existing California law, the prosecution presented insufficient evidence his two prior assault convictions qualfied as strike and serious felony priors. Moreover, any conclusion to the contrary is also incompatible with Descamps v.U.S (2013)570 U.S. (133 S.Ct.2276)because it would require judicial fact finding beyond the elements of the actual prior covictions. This Court currently has under review in multiple cases the issue of whether a trial court's decision that a defendant's prior conviction constituted a strike was incompatible with Descamps (2013)570 U.S. (133 S.Ct.2276) because the trial court relied on judicial fact-finding beyond the elements of the actual prior conviction.(See People v. Gallardo (S231260, rvw. granted 2/17 16); People v. McCaw (S236618, rvw. granted 10/19/16 [briefing deferred pending decision in People v. Gallardo].) See Attachment "C".

Appellant respectfully requests this Court grant review to determine whether

the prosecution presented insufficient evidence appellant's two prior assault convictions qualified as strike and serious felony priors under California law, and whether any conclusion to the contrary is incompatible with Descamps v. U.S.(2013)570 U.S. (133 S.Ct.2276) because it would require judicial fact-finding beyond the elements of the actual prior conviction. Alternatively, appellant requests this Court grant review and order further briefing deferred pending this Court's decision in any other case similar as to petitioner's case.

B. THERE WAS INSUFFICIENT EVIDENCE APPELLANT'S ASSAULT CONVICTIONS QUALIFIED AS STRIKE AND SERIOUS FELONY PRIORS UNDER CALIFORNIA LAW

1. Proceeding in the trial Cort

As proof appellant's 1995 assault conviction in case No. TA040857 qualified as a prior strike and serious felony prior under California law, the prosecution introduced several documents. These documents included an information charging appellant in Count One with the

following : "the crime of ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON, in violation of CAL.PENAL CODE §245(a)(1), a Felony, was committed by DAVID LEONARD JOHNSON, who did willfully and unlawfully commit an assault upon Robert Sheue with a deadly weapon, to wit, baseball bat, and by means of force likely to produce great bodily injury." The information further provided notice "the above offense was a serious felony within the meaning of Cal. Penal Code 1192.7 (c)(23)." (1 C.T.pp.54-55.) The prosecution further submittes appellant's change of plea hearing in that offense. (1 C.T.pp.59-66.) This change of plea hearing disclosured appellant pleaded no contest to Count One. (1 C.T.pp.59-63.) The prosecution do not seek and the trial court did not obtained a factual basis for appellant's plea, other than defense counsel's stipulation that there was a factual basis for appellant's plea (1 C.T.p.64.)

The prosecution further submitted appellant's abstract of judgement in that case which indicated appellant was convicted in Count One via guilty plea

to a violation of Penal Code §245(a)(1), "ASLT GRT BDLY INJ/WPN." (1 C.T.p.73.)

As proof appellant's 2002 assault conviction in case No. TA065809 qualified as a prior strike and serious felony prior under California law, the prosecution also introduced several documents. These documents included a felony complaint charging appellant in Count Two with the following: "the crime of ASSAULT WITH DEADLY WEAPON, BY MEANS LIKELY TO PRODUCE GBI, in violation of California Penal Code §245(a)(1), a Felony, was commited by DAVID JOHNSON and WILLARD N. BEASLY, who did willfully and unlawfully commit an assault upon ALEJANDRO MORALES with a deadly weapon, to wit, tire iron, automatic weapon, and by means of force likely to produce great bodily injury."(1 C.T.p.212.)

The prosecution further submittted a copy of the preliminary hearing trans - cript for the case.(1 C.T.pp.177-200.)

However, appellant did not plead guilty in that case, and instead had a jury trial. The prosecution did not submit a copy of the information in that case. The jury's verdict further indicated the jury found appellant guilty "of

the crime of ASSAULT WITH DEADLY WEAPON OR BY MEANS LIKELY TO PRODUCE GREAT BRODILY INJURY upon victim Alejandro Morales, in violation of Cal. Penal Code §245(a)(1), a felony, as charged in Count 2 of the information."(1 C.T.p.176.)

The prosecution additionally submitted a transcript of the comments made by the court and counsel during appellant's sentencing hearing.(1 C.T.pp.228-238.)

Finally, the prosecution submitted a copy of appellant's abstract of judgement from the case which indicated appellant was convicted if Count Two by jury of a violation of Cal. Penal Code §245,(a)(1), " ASLT DEALY WEAPN/INST. "(1 C.T.p.240.)

The only other evidence relied upon by the prosecution in this case as proof of the prior strike and serious felony priors was that in another case in 1998, case No. TA051266, appellant admitted he had one prior strike conviction as part of a plea agreement, (See 4R.T.p.534; 1 C.T.p.166 [minute order of plea in case No. TA051266].)

Appellant waived his right to a jury trial and requested a court trial on his

prior conviction allegations. (3 R.T.pp. 504-508.) During the subsequent court trial, appellant maintained neither of his assault convictions qualified as strikes/serious felony priors, while the prosecution argued they both did.(3 R.T. 532-536.) The trial court found they both qualified as strike and serious felony priors. (3 R.T.pp.538-541.) Thereafter, the trial court sentence appellant under the Tree Strikes law to a total prison term on 17 years plus 25 years to life based on the existence of three strike priors and two serious felony priors, plus four prison priors. (2 C.T. pp.359-360,455-457.)

2. THE PROSECUTION INTRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT APPELLANT'S 1995 AND 2002 ASSAULT CONVICTIONS QUALIFIED AS STRIKE AND SERIOUS FELONY PRIORS

The prosecution's evidence did not establish appellant's 1995 and 2002 assault convictions qualified as strike and serious felony priors, (People v. Woodell (1998) 17 Cal.4th 448[prior serious and violent felony findings subject to review for sufficient evidence]; Jackson v. virginia (1979)443 U.S.307,317-319[99 S.

Ct. 2781, 61 L.Ed.2d 560][the federal constitution requires state court convictions be supported by sufficient evidence]: U.S. Const., Amends. V,XIV; Cal. Const..art. 1,§15.) A conviction for assault is ordinarly not a serious or violent felony under California Law. (See Cal.Penal.Code §§667.5,(c); 1192.7 (c).) Appellant's two prior convictions at issue were for assault in violation of Cal. Penal. Code §245,(a)(1). At the time of his convictions, this statue proscribed the commission of an assault with a deadly weapon or "by any means of force likely to produce great bodily injury."(Cal.Pen. Code§245(a)(1).)

An assault with a deadly weapon is a strike offense. (See People v. Fox(2014) 224 Cal.App.4th 424,434, fn.8:Cal.Pen. Code, §1192.7(c)(31).)
On the other hand, an assault by means of force likely to cause great bodily injury is not, by itself, a strike offense. (Ibid.)

The record of appellant's conviction submitted by the prosecution was otherwise silent as to the nature of appellant's offense, and it was therefore

insufficient as a matter of law to establish appellant's convictions qualified as a serious felony. (see people v. Jones(1999)75 Cal.App.4th 616,634-635 In case No. TA065809, the prosecutor submitted the felony complaint, but not the information, and thus the record does not disclose what the actual charged were at trial.(See 1 C.T.p.212.) However, in this case, appellant exercised his right to a jury trial, and thus the preliminary hearing transcript does not establish either the evidence of the offense for which he was convicted at trial. Moreover, the jury's verdict form in case No. TA065809 finding appellant guilty in Count Two states appellant was convicted of "assault with a deadly weapon or by means likely to produce great bodily injury," and was therefore insufficient. The shorthand notation in his abstract of judgement subsequently prepare by the court refering to his conviction as "ASLT DEALY WEAPN/INST" is similarly of no moment because appellant was convicted in this case by a jury, not the court.

Finally, the comments made by the court and counsel at appellant's sentencing hearing constituted hearsay, they

did not amount to adoptive admissions on behalf appellant, and such subsequent statements are insufficient to establish the facts of the prior conviction. (See People v. Thoma (2007) 150 Cal.App.4th 1096,110-1102[post-conviction statements made by the judge at sentencing hearing are hearsay. the failure of the defendant to challenge those statements does not constitue an adoptive admission by the defendant, and only admissions made prior to the conviction may be relied upon in determining whether a prior conviction qualifies as a strike].) The above rule set forth in Thoma is particularly opt in a case involving a jury trial such as this one in which neither the court nor counsel was privy to the jury's deliberations. As set forth above, the record of conviction submitted by the prosecution with respect to appellant's no contest plea in case No. TA040857 and his conviction by jury trial in case No. TA065809 merely establishes that appellant pleaded no constest to and was convicted by jury of, repectively, the offense of aggravated assault

in violation of Cal. Penal Code §245.(a)(1). As a result. the trial court herein should have presumed the prior conviction were for the least offense punishable under the law, which was an assault by means likely to produce great bodily injury, and therefore did not qualify as strike and serious felony priors. (Se People v. Rodriguez, supra, 17 Cal.4th at pp. 261-263; People v. Cortez, supra, 73 Cal.App.4th at pp. 280-284: People v. Jones, supra, 75 Cal.App.4th at pp. 631-635.)

The fact that appellant admitted in a plea agreement in a subsequent criminal case in 1998 that his 1995 conviction qualified as a strike under California law was also insufficient for two reasons. First, it is the trial court's duty in the case to determine whether a prior conviction constitutes a strike or serious felony as a matter of law, not the defendant's duty of a possible inept trial counsel in a prior proceeding. Second, a subsequent admission by a defendant after his guilty plea is of no moment and connot be relied upon by the trial court in making this determination As held by the California's Court of

Appeal, "only admissions made prior to the acceptance of a defendant's guilty plea and be relied upon in determining whether a prior conviction qualifies as a strike. Admissions made after acceptance of the plea do 'not reflect the facts upon which [the defendant] was convicted,' (People v. Trujillo [2006] 40 Cal 4th.4th[165,]180.)"(People v. Thoma,supra, 150 Cal.App.4th at p. 1102.) Because the alleged admission by the defendant in that case was made after the defendant's guilty plea, the trial court was precluded from relying upon it in determining whether the defendant's prior conviction qualified as a strike (Ibid.)

Finally, although the record is not entirely clear as to exactly which documents and what facts the trial court relied upon in concluding appellant's assault conviction qualified as strike and serious felony priors (see 3 R.T.pp 538-541), appellant urges that any findings in this case that the prosecution's evidence was sufficient is incompatible with Descamps v. U.S.supra, 570 U.S._(133 S.Ct. 2276) because it

would required judicial fact-finding beyond the elements of the actual prior convictions.

For all of the above reasons, appellant respectfully requests this Court grants review in full.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David Leonard Jhonson

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