NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA SANCHEZ, Petitioner,

V.

THE STATE OF TEXAS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Joshua Sanchez respectfully asks a *Writ of Certiorari* issue to review the opinion and judgment by the Texas Court of Criminal Appeals on the 31st of October 2018.

PARTIES TO THE PROCEEDINGS

The Caption of this case names all Parties to the proceeding below.

VICTOR M. VALDES SANTIAGO, J.D., Ed. D. *
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Question Presented for Review

Whether the interpretation of the Due Process Clause of the *Fifth* and *Fourteenth* Amendments by the Texas Court of Appeals is in conflict with precedents of this Honorable Court.

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The Opinion of the Texas Fourth Court of Appeals denying Mr. Sanchez's his appeal is not reported, but is included as Appendix A. The denial of Mr. Sanchez's Motion for Reconsideration *En Banc* is not reported, but is included as Appendix B. The denial of Mr. Sanchez's Petition for Discretionary Review (PDR) is not reported, but is included as Appendix C. The denial of the Petition for Reconsideration to the Texas Court of Criminal Appeals is not reported but is included as Appendix D. Appendix E includes a copy of section 31.03 (a), (e)(4)(F)(iii) of the *Texas Penal Code*. Appendix F includes a copy of the indictment, 2015-CR-7686.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The denial of Appellant's Petition for Reconsideration by the Texas Court of Criminal Appeals was rendered on 31st of October, 2018. This Petition is filed within 90 days after the denial of the Petition for Reconsideration by the Texas Court of Criminals Appeals. This Court has jurisdiction to Grant *Certiorari* under 28 U.S.C., Section 1254(1).

STATE OF TEXAS STATUTE ENVOLVED

The text of Section 31.03 (a),(e)(4)(F)(iii) of the *Texas Penal Code* is attached to this petition as Appendix E. While the indictment in this case does not

identify the applicable section of the *Penal Code*, the Appellate Court, in foot note number one of its decision, decided that this is the applicable law.

STATEMENT OF THE CASE

This case began on July 27, 2015, when the Petitioner, Joshua Sanchez was charged by a single count indictment alleging that:

> ...On or about the 21st day of August 2013, Joshua Sanchez, hereinafter referred to as defendant, with intent to deprive the owner, D.R. Horton, of property, namely: copper, did then and there unlawfully without the effective consent of the owner, appropriate said property by acquiring and otherwise exercising control over said property, said property being other than real property which had a value of less than Twenty Thousand Dollars ($20,000.00). AGAINST THE PEACE AND DIGNITY of the STATE.
>
> _____
> Foreman of the Grand Jury

Petitioner filed two motions to Quash the Indictment alleging, among other things that the indictment was vague not giving proper notice. That the word copper is not defined in the *Penal Code* and that it is a generic term. In addition, that even though the indictment tracks the statute, it does not give the Defendant proper notice. Furthermore, we argued a violation of the *Eight Amendment* and that the Court is obligated to impose a specific sentence. The sentence is mandatory, not discretionary with the Court and, hence, not individualized, and that the Supreme Court in the past has stricken as unconstitutional mandatory

sentences.

The trial court denied the motions to quash the indictment, however, she indicated: "I respect your arguments, they are very well laid out, but I am denying your Motion for Reconsideration". (Court's hearing dated the 24th day of February 2017, page 7, Court Reporter's transcript).

Petitioner filed a timely Petition for Discretionary Review (PDR) with the Texas Court of Criminal Appeals. The Petition was denied and a Motion for Rehearing was also denied. (Appendix D).

GROUND FOR REVIEW RESTATED

WHETHER the Interpretation of the *Due Process Clause* of the *Fifth* and *Fourteenth Amendment* by the Texas Court of Appeals is in conflict with Precedents of this Honorable Court.

ARGUMENT

The Court of Appeals makes reference to "due process" in, at least, five sections of its opinion. The *Due Process Clause* is found in two Amendments to the United States Constitution, the *Fifth* and the *Fourteenth*. However, the Court of Appeals does not analyze the petitioner's appeal from those perspectives. It only makes reference to the Fifth Amendment in page 3 of its opinion. (Appendix A).

Section 31.03(a),(e)(4)(F)(iii) of the *Texas Penal Code* consists of two sections. First, the prohibited conduct and second the punishment to be assessed for the violations. (Appendix E).

FUNGIBLE//GENERIC

The first issue is that "Copper", as alleged, is not "real property". Hence it has to be personal property and because "Copper" is found in various forms and for various uses, it is not fungible. In other words, it is a generic term that requires on specific nomenclature to give proper notice to the average defendant.

Interpreting a similar situation, this Court held in *Cole V. Arkansas*, 333 U.S. 196 (1948), that a cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point, and the affirmance of the conviction to rest on another. It gives prosecution free hand on appeal to fill in the gaps of proof by surprise or conjecture. This Court condemned just such practice. However, the Court of Appeals endorses such practice. The court concludes as follows: "The type of copper is an evidentiary fact that need not be pled in the indictment in order to provide sufficient notice of the charged conduct. The Court cites *Livingston V. State*, 739 S.W. 2d 311, 321, Texas Criminal Appeals 1987), however, that case is completely inapplicable to the present case. That case was decided in 1987), and it

involves a gun. More specifically, it indicates that: "while in the course of committing and attempting to commit Robbery of Janet Caldwell, herein after styled the complainant, intentionally cause the death of complainant by shooting her complainant with a gun." *Ibid* at 321.

A totally different fact pattern that does not provide any applicability to our case. However, the case reminds us that, when, as in here the term is not defined by statute, "...is therefore to be taken and understood in its normal use in common everyday language." *Ibid* at 338. In the present case the word 'copper" cannot be used in its normal use in common use in common everyday language. In order to illustrate this point, we respectfully make reference to a *New York Times* article by Matt Phillips of the *New York Times* when he wrote that copper is called "Dr. Copper" because of its ability to predict the direction of the global economy...." See the *San Antonio Express News*, Thursday, August 23, 2018, p. B5. We were not trying to be pedantic or arrogant when we quoted from Bob Woodward's book *FEAR* when he makes reference to copper, Simon & Shuster, p. 309; nor, when we made reference to Albert Camus final work entitled *The First Man*, translated from French by David Hapgord , where he describes various uses of copper. Alfred Al. Knopp, New York: 1995, p. 15, 9, etc.

It was another way to illustrate that copper is a generic term. Another great Author in American Literature also refers to copper in his novel *REDEMPTION.* Please see page Number 34 of the paperback edition, The *New York Times* bestseller, Harper Paper backs. Obviously, copper is a very important mineral. However, and in summary, to say copper without a specific nomenclature after the word copper does not provide adequate notice to a lay person or to an average defendant; therefore, the indictment is constitutionally vague.

***BRADY V. MARYLAND*, 373 U.S. 83 (1963).**

The Court of Appeals in its published opinion in this case made reference to the due process rights under the *Fifth Amendment.* (Appendix A). However, it did not analyze the relevancy of *Brady* and the due process. The defendant, Mr. Sanchez, filed a *Brady* Motion and the trial court granted it. In *Brady V. Maryland* this Honorable Tribunal indicated that *Brady* disclosure consists of exculpatory evidence or impeaching information and evidence that is material to the guilt or innocence or the punishment of a defendant. The Court held that suppression by the Prosecution of evidence favorable to a defendant who has requested it violates due process. The Appellate Court never addressed the issue of due process violation under *Brady.* Because the *Brady* doctrine is a pretrial discovery rule, the defendant raised it prior to trial. Following *Brady*, the prosecutor must disclose

evidence or information that would prove the innocence of the defendant or would enable the defense to move effectively to impeach the credibility of the government witness. Evidence that would serve to reduce the defendant's sentence must also be disclosed by the prosecution.

In order to ensure compliance with *Brady*, this Court repeatedly urged the "careful prosecutor" to favor disclosure over concealment. See *Kyles V. Whitley*, 514 U.S. 419 and *United States V. Agurs*, 427 U.S. 97. Conformity with *Brady* is a continuing obligation of prosecutors.

In the present case the Court of Appeals, while making reference to due process violations, ignored the prosecutors' duty under *Brady*. The prosecutor, for the first time at sentencing, disclosed to the defendant and to the trial Court the dollar amount involve in the case. It was only $1,200.00. The failure to disclose amounted to prosecutorial misconduct.

CONSTITUTIONALITY OF THE THEFT STATUTE-Appendix E

The Appellate Court concludes that Mr. Sanchez's challenged the constitutionality of the theft statute, "but was not raised in the trial court and Therefore was not preserved for appellate review." (See Appendix A). This is an inaccurate finding. The record is clear, in both, the original motion to quash the indictment and in the motion for reconsideration the points were made very clear.

Furthermore, it was argued that the prosecutor had too much discretion as to the section of the statute to pursue, either the basic theft statute or under subsection F.

An argument was made to the trial court that there were three possible statutes available to the prosecutor. The basic theft statute section 31.03, indicates that, if the amount stolen is "$500 or more but less than $1,500;" is a Class A misdemeanor. (See Appendix E, the section identified by the court of Appeals as the applicable law). However, under the current version of the code, 2018-2019, is "(3) a Class A misdemeanor if the value of the property stolen is $750 or more but less than 2,500".

The evidence presented at sentencing identifies the theft with the range of punishment, a class A misdemeanor. There was no other evidence presented, except that the claimant wanted $1,200.00 restitution. The prosecutor made the decision to charge the act as a felony and not as a misdemeanor. The equal protection of the law was not observed.

Again, under *Brady* this Court has held that the U.S. Constitution requires that prosecutors turn over to the defense evidence that tends to show the defendant is not guilty or deserves a lesser punishment. The failure to disclose "*Brady*

material" is one common form of prosecutorial misconduct. This behavior also frequently violates professional rules. For example *ABA Model Rules* 3.4, 3.8 and 8.4.

MANDATORY MINIMUM SENTENCES

The Court of Appeals found as follows: "Joshua Sanchez appeals the trial court's denial of his pre-trial motion to quash the indictment charging him with theft of property, to wit: copper, with a value less than $20,000... Tex. Penal Code Ann. Section 31.03 (a),(e)(4)(F)(iii)." (Appendix E).

> The Court continues as follows: The type of copper is an evidentiary fact that needs not be pled in the indictment in order to provide sufficient notice of the charged conduct... Besides providing notice of the specific conduct allegedly committed by Sanchez, the indictment's identification of the stolen property as "copper" and its allegation that the value of the copper is "less than $20,000" serves to inform the defendant of the degree of offense alleges... (the property-value range for theft is a "jurisdictional element" characterizing the offense as a felony or misdemeanor, rather than" an element of the offense itself". The statute designates the degree of the theft offense as a state jail felony based on the type and value of the property stolen-in this case, copper with a value less than $20,000. See *Tex. Penal Code Ann.* Section 31.03 (a),(e)(4)(F)(iii).... *Ibid* at 5-6

The Appellate Court makes reference to a "range for theft which is jurisdictional element"; however, in the charge of theft of copper, there is no range. In the present case, theft of copper is automatically a state jail felony requiring a mandatory minimum sentence. The trial court does not have any

alternative. When the trial court finds that the stolen property is copper, the inquiry ends. It cannot deviates; it does not have the discretion to determine the type of copper not the value of the copper.

Obviously, the range for the theft is a jurisdictional element. Section 31.03 of the *Texas Penal Code*, is clear in this respect. It begins with class C misdemeanor and concludes with first degree felony. However, in the specific Section of the *Penal Code*, the trial court is limited to look at copper with a value of less than $20,000.00. It is automatically a state jail.

In *United State v. Booker*, 543 U.S. 220, (2005) this court held that: "It is well-established that the Constitution requires the prosecution to prove every element of a crime beyond a reasonable doubt and guarantees the defendant's right to have a jury determine offense elements unless waived." These related rights, protected by the *Sixth Amendment* and the *Due Process Clause* of the *Fifth* and *Fourteenth Amendments* are sacrosanct and are against mandatory minimum sentences.

In *re Winship* 397 U.S. 358 (1970), this court held that "the *Due Process Clause* protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Ibid at 364. Subsequently, in *Mullaney v. Wilbur*, 421 U.S. 684 (1975)

this court explained that W*inship* applies not only to those that are essential to establishing guilt or innocence, but also to these facts that establish degree of criminal culpability.

THE EIGHTH AMENDMENT

Mandatory minimum sentences violate the Eight Amendment's protection against cruel and unusual punishment. This Court in *Solen v. Helm*, 463 U.S. 277 (1983) held that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Ibid at 290. The defendant in *Solem* was sentenced to life imprisonment without parole for passing a bad check after having been convicted of three non-violent prior offense, a sentence permitted by a North Dakota recidivisms sentencing statute. This Court held the sentence was unconstitutionally disproportionate to the gravity of the offense. *Ibid* at 303. In so holding, *Solem* established a three-part proportionality analyses for determining whether a sentence is cruel and unusual: the court must:

(1) Consider the "gravity of the offense and harshness of the penalty";
(2) "compare the sentences imposed on other criminals in the same jurisdiction" to determine if more serious crimes are subject to the same or lessor penalties; and
(3) "compare the sentences imposed for commission of the same crime in other jurisdictions." (*Ibid* at 290-92).

In applying the *Solem* standards we find that the Petitioner's alleged offence is not a crime in any other jurisdiction. Even in Texas, the theft of copper was not a separate crime. The theft of copper was treated as any other theft. And in this case, it would have been a Class A misdemeanor, with a different penalty and statute of limitations. And, in other jurisdictions, such as Canada, the ruling on mandatory minimums by the Supreme Court was that it is unconstitutional.

In summary, the mandatory minimum established by Section 31.03 (a),(e)(4)(F)(iii) is unconstitutional as it was applied to the petitioner. Class A misdemeanor, with a different penalty and as statute of limitations. And, in other jurisdictions, such as Canada, the ruling on mandatory minimums by the Supreme Court of Canada held that it was unconstitutional.

CONCLUSION

In summary, the mandatory minimum, established by Section 31.03 (a),(e)(4)(F)(iii) is unconstitutional as it was applied to the Petitioner. The review of this case by this court is imperative to provide guidance as to the meaning of the *Due Process Clause* of the *Fifth* and *Fourteenth Amendments* and to enforce its previous rulings that mandatory minimum sentences are not in consonance with the principle of individualizes sentencing.

The issue urgently requires clarification by the highest court in the land. The court below decided the federal law question. At all times, the prosecutor knew the actual amount of damages claimed by the complainant; however, such information, $1,200.00, was only disclosed to the defendant at sentencing. The amount claimed made it a misdemeanor depriving the district court of jurisdictional and *Brady* violation.

PRAYER

For these reasons, Sanchez asks that this Honorable court Grant a *Writ of Certiorari* and review the refusal of the Texas Court of Criminal Appeals to provide guidance as to the Constitutional issues involved in the present case.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing (PETITIONER'S PETITION FOR *WRIT OF CERTIORARI*) has been delivered to the Bexar County Criminal District Attorney via email at daappealsdivision@bexar.org, and to the Honorable Soule, State Prosecuting Attorney at information@spa.texas.gov, on this the 30th day of January 2019.

VICTOR M. VALDES SANTIAGO, J.D., Ed.D.

APPENDIX - A

APPEAL NO. 04-17-00128-CR
JOSHUA SANCHEZ, PETITIONER,
V.
THE STATE OF TEXAS, RESPONDENT
DECISION BY THE FOURTH COURT OF APPEALS
DATED JANUARY 24, 2018

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00128-CR

Joshua **SANCHEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR7686
Honorable Lorina I. Rummel, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: January 24, 2018

AFFIRMED

Joshua Sanchez appeals the trial court's denial of his pre-trial motion to quash the indictment charging him with theft of property, to wit: copper, with a value less than $20,000. *See* TEX. PENAL CODE ANN. § 31.03(a), (e)(4)(F)(iii) (West 2011).[1] We affirm the trial court's judgment.

[1] Statute in effect at the time of the offense.

ANALYSIS

Sanchez raises three issues on appeal, arguing the indictment was vague and failed to provide him with adequate notice in violation of his due process rights, and that the Penal Code statute defining the offense is unconstitutional in that it fails to state a range of possible punishment and fails to define the word "copper." *See* TEX. PENAL CODE ANN. § 31.03(e)(4)(F)(iii). Sanchez's second and third issues challenge the constitutionality of the theft statute, but were not raised in the trial court and therefore were not preserved for appellate review. TEX. R. APP. P. 33.1(a); *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (a defendant may not raise a facial challenge to the constitutionality of a statute for the first time on appeal; it is a forfeitable right); *State v. Empey*, 502 S.W.3d 186, 190 (Tex. App.—Fort Worth 2016, no pet.) (pre-trial motion to quash is limited to facial challenges to constitutionality of statute).

In his first issue on appeal, Sanchez argues the trial court erred in denying his motion to quash because the indictment was too vague and failed to provide him adequate notice of the charged conduct so he could adequately prepare a defense, in violation of his due process rights under the Fifth Amendment. U.S. CONST. amend. V. We review a trial court's denial of a pre-trial motion to quash an indictment de novo. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007).

In all criminal prosecutions, an accused is guaranteed the right to demand the nature and cause of the action against him. TEX. CONST. art. I, § 10. This constitutional mandate requires that the charging document itself convey adequate notice from which the accused may prepare his defense, and the adequacy of the State's allegation must be tested by its own terms. *State v. Moff*, 154 S.W.3d 599, 601 (Tex. 2004). The Texas Code of Criminal Procedure also provides guidelines relating to the sufficiency of an indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 21.02 (West 2009) (listing the requirements of an indictment); *id.* art. 21.03 (West 2009) ("Everything should

be stated in an indictment which is necessary to be proved."); *see also id.* arts. 21.04-.09 (West 2009) (requirements regarding certainty, intent, venue, names, ownership of property, and description of property). An indictment is deemed sufficient if it charges "the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment." *Id.* art. 21.11 (West 2009).

When a pre-trial motion to quash is filed, the trial court analyzes the face of the indictment to determine whether it states the facts necessary to show that the offense was committed, to bar a subsequent prosecution for the same offense, and to give the defendant sufficient notice of the precise offense charged against him. *Id.* arts. 21.04, 21.11; *DeVaughn v. State*, 749 S.W.2d 62, 67 (Tex. Crim. App. 1988); *State v. Newton*, 179 S.W.3d 104, 107–08 (Tex. App.—San Antonio 2005, no pet.). The charging instrument must be specific enough to inform the accused of the nature of the accusation against him, in plain and intelligible words, so that he may understand the charge against him and prepare a defense. *State v. Mays*, 967 S.W.2d 404, 406 (Tex. Crim. App. 1998). A motion to quash should only be granted when the language describing the defendant's conduct is so vague or indefinite that it denies the defendant effective notice of the acts he allegedly committed. *DeVaughn*, 749 S.W.2d at 67. "Subject to rare exceptions, an indictment which tracks the language of the penal statute will be legally sufficient and the State need not allege facts which are merely evidentiary in nature." *Id.*; *see also Newton*, 179 S.W.3d at 107-08.

In his brief addressing his first issue, Sanchez does not specify in what manner he contends the indictment is deficient and fails to provide him with adequate notice of the charged offense. As in his written motion to quash, Sanchez simply argues that the indictment is too vague to provide him with fair notice and violates his due process rights. At the trial court hearing, Sanchez

argued more specifically that the indictment failed to provide him with adequate notice because the "on or about" date was "too close to the statute of limitations," the value allegation of "less than $20,000.00" contained no minimum value, and the type or quality of "copper" was not specified. In the sections of his brief addressing his second and third issues challenging the constitutionality of the statute, Sanchez mentions that "less than $20,000" also "includes a penny," and that "copper" is found in various forms and its value depends on "how it is processed and the usage of [the] copper;" therefore, both terms are too vague to provide adequate notice. Even construing Sanchez's first issue liberally to include those arguments, they would fail.[2] Due process does not require the State to lay out its case in the indictment, only that the defendant must be informed of the specific conduct that allegedly violates the statute. *Moff*, 154 S.W.3d at 603. The indictment alleges that Sanchez committed theft by unlawfully appropriating property without the effective consent of the owner, D.R. Horton, with the intent to deprive the owner of the property, and that the value of the property, "namely: copper," was less than $20,000.00. As such, it sufficiently tracks the statutory language. *See* TEX. PENAL CODE. ANN. § 31.03(a), (e)(4)(F)(iii); *see also DeVaughn*, 749 S.W.2d at 67; *Newton*, 179 S.W.3d at 107-08. The type of copper is an evidentiary fact that need not be pled in the indictment in order to provide sufficient notice of the charged conduct. *Livingston v. State*, 739 S.W.2d 311, 321 (Tex. Crim. App. 1987). Besides providing notice of the specific conduct allegedly committed by Sanchez, the indictment's identification of the stolen property as "copper" and its allegation that the value of the copper is "less than $20,000" serves to inform the defendant of the degree of offense alleged. *See Campbell v. State*, 5 S.W.3d 693, 699 (Tex. Crim. App. 1999) (the property-value range for theft is a

[2] Sanchez cites no legal authority in support of either argument. *See* TEX. R. APP. P. 38.1(i); *see also McIntosh v. State*, 307 S.W.3d 360, 365 (Tex. App.—San Antonio 2009, pet. ref'd) (issue is inadequately briefed when appellant fails to cite legal authority in support of argument).

"jurisdictional element" characterizing the offense as a felony or misdemeanor, rather than "an element of the offense itself"). The statute designates the degree of the theft offense as a state jail felony based on the type and value of the property stolen — in this case, copper with a value less than $20,000. *See* TEX. PENAL CODE ANN. § 31.03 (e)(4)(F)(iii); *see also id.* § 12.35 (West Supp. 2017) (specifying the range of punishment for a state jail felony).

Because the indictment appropriately tracks the statutory language that defines the offense of theft of copper and identifies the offense as a state jail felony, it provides Sanchez with adequate notice of the offense charged against him and satisfies the requirements of due process. *See Moff*, 154 S.W.3d at 602; *see also Roberts v. State*, 278 S.W.3d 778, 791-92 (Tex. App.—San Antonio 2008, pet. ref'd). We therefore overrule Sanchez's first issue.

Based on the foregoing reasons, we affirm the trial court's judgment.

Rebeca C. Martinez, Justice

DO NOT PUBLISH

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-17-00128-CR

Joshua **SANCHEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR7686
Honorable Lorina I. Rummel, Judge Presiding

BEFORE JUSTICE ANGELINI, JUSTICE MARTINEZ, AND JUSTICE ALVAREZ

In accordance with this court's opinion of this date, the trial court's judgment is AFFIRMED.

SIGNED January 24, 2018.

Rebeca C. Martinez, Justice

APPENDIX - B

APPEAL NO. 04-17-00128-CR
JOSHUA SANCHEZ, PETITIONER,
V.
THE STATE OF TEXAS, RESPONDENT
DECISION BY THE FOURTH COURT OF APPEALS
DATED MARCH 15, 2018, DENYING MOTION FOR EN BANC RECONSIDERATION.

COURT OF APPEALS

FOURTH COURT OF APPEALS DISTRICT
CADENA-REEVES JUSTICE CENTER
300 DOLOROSA, SUITE 3200
SAN ANTONIO, TEXAS 78205-3037
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KEITH E. HOTTLE,
CLERK OF THE
COURT

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March 15, 2018

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111 Soledad, Suite 300
San Antonio, TX 78205
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 04-17-00128-CR
Trial Court Case Number: 2015CR7686
Style: Joshua Sanchez
v.
The State of Texas

Enclosed please find the order which the Honorable Court of Appeals has issued in reference to the above styled and numbered cause.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,
KEITH E. HOTTLE, CLERK

Jamie Osio
Deputy Clerk, Ext. 53262

cc: Nicholas LaHood (DELIVERED VIA E-MAIL)

Fourth Court of Appeals
San Antonio, Texas

March 15, 2018

No. 04-17-00128-CR

Joshua **SANCHEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR7686
Honorable Lorina I. Rummel, Judge Presiding

ORDER

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

The court has considered the appellant's motion for en banc reconsideration, and the motion is DENIED.

Rebeca C. Martinez, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 15th day of March, 2018.

Keith E. Hottle
Clerk of Court

APPENDIX C
PD- 0353-18
APPEAL NO. 04-17-00128-CR
JOSHUA SANCHEZ V. THE STATE OF TEXAS
INDICTMENT NUMBER 2015-CR-7686
DECISION BY THE TEXAS COURT OF CRIMINAL APPEALS REFUSING PETITION FOR DISCRETIONARY REVIEW

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

8/22/2018 **COA No. 04-17-00128-CR**
SANCHEZ, JOSHUA **Tr. Ct. No. 2015CR7686** **PD-0353-18**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

VICTOR M. VALDES
111 SOLEDAD
SUITE 300
SAN ANTONIO, TX 78205
* DELIVERED VIA E-MAIL *

APPENDIX D
PD- 0353-18
APPEAL NO. 04-17-00128-CR
JOSHUA SANCHEZ V. THE STATE OF TEXAS
INDICTMENT NUMBER 2015-CR-7686
DECISION BY THE TEXAS COURT OF CRIMINAL APPEALS, DATED 10/31/2018, REFUSING REHEARING OF THE PETITION FOR DISCRETIONARY REVIEW

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

10/31/2018
SANCHEZ, JOSHUA **Tr. Ct. No. 2015CR7686** **PD-0353-18**
On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

VICTOR M. VALDES
111 SOLEDAD
SUITE 300
SAN ANTONIO, TX 78205
* DELIVERED VIA E-MAIL *

APPENDIX E
PD- 0353-18
APPEAL NO. 04-17-00128-CR
JOSHUA SANCHEZ V. THE STATE OF TEXAS
INDICTMENT NUMBER 2015-CR-7686
COPY OF SECTION 31.03(a)(e)(4)(F)(iii) OF THE TEXAS PENAL CODE

(10) "Elderly individual" has the meaning assigned by Section 22.04(c).

(11) "Retail merchandise" means one or more items of tangible personal property displayed, held, stored, or offered for sale in a retail establishment.

(12) "Retail theft detector" means an electrical, mechanical, electronic, or magnetic device used to prevent or detect shoplifting and includes any article or component part essential to the proper operation of the device.

(13) "Shielding or deactivation instrument" means any item or tool designed, made, or adapted for the purpose of preventing the detection of stolen merchandise by a retail theft detector. The term includes a metal-lined or foil-lined shopping bag and any item used to remove a security tag affixed to retail merchandise.

(14) "Fire exit alarm" has the meaning assigned by Section 793.001, Health and Safety Code.

History of Pen. Code §31.01: Acts 1973, 63rd Leg., ch. 399, §1, eff. Jan. 1, 1974. Amended by Acts 1975, 64th Leg., ch. 342, §9, eff. Sept. 1, 1975; Acts 1985, 69th Leg., ch. 901, §2, eff. Sept. 1, 1985; Acts 1993, 73rd Leg., ch. 900, §1.01, eff. Sept. 1, 1994; Acts 1997, 75th Leg., ch. 165, §30.237, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 432, §1, eff. Sept. 1, 2003; Acts 2011, 82nd Leg., ch. 323, §1, eff. Sept. 1, 2011.

ANNOTATIONS

Newman v. State, 115 S.W.3d 118, 121 (Tex.App.—Texarkana 2003, no pet.). "In the employer-employee context, an unlawful appropriation occurs when an employee exercises unauthorized control over property belonging to the employee's employer. Theft does not occur until a fiduciary acts in some way inconsistent with his or her lawful authority. But when the employee decides ... to unlawfully deprive the lawful owner of the property, such employee acts in an unauthorized capacity. In short, unlawful appropriation occurs at that moment in time when the employee breaches the trust that employee's employer placed in her or him. The line between lawful and unlawful activity by an employee, therefore, is a question of the employee's scope of authority."

State v. Bartee, 894 S.W.2d 34, 40 (Tex.App.—San Antonio 1994, no pet.). "The property subject to theft ... includes 'anything capable of being possessed or owned, whether tangible or intangible, and whether inherently valuable or merely representative of something of value.' [I]n dealing with property subject to theft, we are dealing with a broad general definition without exclusions."

PEN §31.02. CONSOLIDATION OF THEFT OFFENSES

Theft as defined in Section 31.03 constitutes a single offense superseding the separate offenses previously known as theft, theft by false pretext, conversion by a bailee, theft from the person, shoplifting, acquisition of property by threat, swindling, swindling by worthless check, embezzlement, extortion, receiving or concealing embezzled property, and receiving or concealing stolen property.

History of Pen. Code §31.02: Acts 1973, 63rd Leg., ch. 399, §1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, §1.01, eff. Sept. 1, 1994.

ANNOTATIONS

Noel v. State, 769 S.W.2d 366, 368 (Tex.App.—San Antonio 1989, no pet.). "Although any of the [offenses listed in §31.02] constitute theft ..., upon proper motion, an accused, to prepare his defense, is entitled to know how he had allegedly taken the property...."

PEN §31.03. THEFT

(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.

(c) For purposes of Subsection (b):

(1) evidence that the actor has previously participated in recent transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the actor's plea of not guilty;

(2) the testimony of an accomplice shall be corroborated by proof that tends to connect the actor to the crime, but the actor's knowledge or intent may be established by the uncorroborated testimony of the accomplice;

(3) an actor engaged in the business of buying and selling used or secondhand personal property, or lending money on the security of personal property deposited with the actor, is presumed to know upon receipt by

(10) "Elderly individual" has the meaning assigned by Section 22.04(c).

(11) "Retail merchandise" means one or more items of tangible personal property displayed, held, stored, or offered for sale in a retail establishment.

(12) "Retail theft detector" means an electrical, mechanical, electronic, or magnetic device used to prevent or detect shoplifting and includes any article or component part essential to the proper operation of the device.

(13) "Shielding or deactivation instrument" means any item or tool designed, made, or adapted for the purpose of preventing the detection of stolen merchandise by a retail theft detector. The term includes a metal-lined or foil-lined shopping bag and any item used to remove a security tag affixed to retail merchandise.

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APPENDIX F
PD- 0353-18
APPEAL NO. 04-17-00128-CR
JOSHUA SANCHEZ V. THE STATE OF TEXAS
COPY OF THE INDICTMENT NUMBER 2015-CR-7686

Defendant: JOSHUA SANCHEZ
JN #: 1625974-1
CLERK'S ORIGINAL

Address: 608 WEST OAK, UNIVERSSAL CITY, TX 78148

Complainant: D.R. HORTON

CoDefendants:

Offense Code/Charge: 239978 - THEFT ALUM/BRONZE/COPPER <$20,000

FILED
_____ O'CLOCK _____ M
JUL 27 2015
DONNA KAY McKINNEY
DISTRICT CLERK
BEXAR COUNTY, TEXAS
BY Gilbert Campos
DEPUTY

GJ: 590349 **PH Court:**
Court #: 144th **SID #:**768860 **Cause #:** 2015-CR-7686
Witness: State's Attorney

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS, the Grand Jury of Bexar County, State of Texas, duly organized, empanelled and sworn as such at the July term, A.D., 2015, of the 175 Judicial District Court of said County, in said Court, at said term, do present in and to said Court that in the County and State aforesaid, and anterior to the presentment of this indictment:

on or about the 21st Day of August, 2013, JOSHUA SANCHEZ, hereinafter referred to as defendant, with intent to deprive the owner, D.R. HORTON, of property, namely: copper, did then and there unlawfully, without the effective consent of the owner, appropriate said property by acquiring and otherwise exercising control over said property, said property being other than real property which had a value of less than Twenty Thousand Dollars ($20,000.00);

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Foreman of the Grand Jury