No. 19-5645

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

THOMAS POTTS, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. RESPONDENT'S SUGGESTION THAT THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED RELIES ON FALSE PREMISES

Respondent argues that, even if the question of whether a jury may be offered the option of convicting of robbery based on possession of recently stolen property and any slight corroboration, without regard to the state of the evidence on whether the taking was a robbery, deserves this Court's attention, the instant case would be a poor vehicle for taking it on. Respondent offers three reasons for that conclusion, but each relies on a false premise.

A. While Asserting That the Issue Is of Little Import Because a Superseding Instruction Eliminates Any Error, Respondent Makes No Attempt to Dispute Petitioner's Prior Showing That the Error Remains

Per Respondent, because the pattern instructions in use at Petitioner's trial have been superseded, and the comparable new instruction adds a sentence on reasonable doubt, "the issue in this case [is] of little importance going forward." Br. in Opp. 12. The contention fails to take into account the impact on other jurisdictions of any decision this Court might make. Further, it ignores the California Supreme Court's backlog of death-penalty cases that, like Petitioner's, were tried years before the change went into effect, see Pet. 26. In fact nine of the last ten death-penalty cases decided by that court were tried under CALJIC, the standard instruction set of which the instruction challenged here was a part.[1] Petitioner has already pointed out that the new instruction "both repeats

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[1]The court's website lists, in order of decision, all cases decided. Those issued in the previous 120 days are at <https://www.courts.ca.gov/opinions-slip.htm>; older ones are at <https://www.courts.ca.gov/12717.htm> (viewed 10/31/1). These link to slip opinions and dockets for each matter.

The cases where trials predated CALJIC's replacement are *In re Masters*, No. S130495, Aug. 12, 2019; *People. v Young*, S148462, July 25, 2019; *In re Rogers*, S084292, July 15, 2019; *People v. Mendez*, S129501, July 1, 2019; *People v. Mitchell*, S147335, June 24, 2019; *People v. Rivera*, S153881, May 23, 2019; *People v. Erskine*, S127621, May 23, 2019; *People v. Dalton*, S046848, May 16, 2019; *People v. Bell*, S080056, May 2, 2019. The one case where the new

(continued...)

and somewhat ameliorates the defect in the CALJIC instruction" under consideration here, and that is still likely to lead to unfair and unconstitutional results. Pet. 25–26. As Respondent makes no attempt to answer that argument, Petitioner relies on the analysis in his petition.

B. Petitioner's Eligibility for the Death Sentence Almost Certainly Depended on the Robbery Conviction

Respondent points out that the robbery instruction did not directly affect Petitioner's murder convictions. Further, the murder-in-commission-of-a-robbery "special circumstance" was not the only one that made him death-eligible: the jury's "true" finding on the multiple-murder special-circumstance allegation did so independently. The implication is that any constitutional error making the robbery conviction easier to obtain had no practical effect on Petitioner's sentence.

The jury was instructed, however, pursuant to California law, that the multiple-murder special circumstance required that at least one of the murders be first degree. CT 9: 2672. The jury was also told that any homicide committed during the commission of a robbery is murder of the first degree. CT 9: 2670. It is true that, alternatively, there was a complicated, 286-word instruction giving the jury the option of fixing the crime at first degree if the killing was wilful, deliberate, and premeditated, with each of those terms being separately defined at some length. CT 9: 2669–2670. However, the jurors were told that they should return a first-degree verdict if they unanimously agreed on that degree, regardless of whether they agreed on a theory. CT 9: 2671. So it is highly likely, and certainly cannot be eliminated beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 24 (1967), that some or all jurors—having used the infirm instruction to find that Petitioner committed robbery—voted for the upper degree using the automatic rule that applied in that situation. For that route to a first-degree verdict was far more straightforward than sorting through

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[1](...continued)
CALCRIM instructions were used was *People v. Molano*, S161399, June 27, 2019.

whether the circumstances proved that either killing was wilful, deliberate, and premeditated.

Since the robbery verdict facilitated the upper-degree verdict, and that verdict was a prerequisite to the multiple-murder finding, Respondent's contention that Petitioner was death-eligible independent of any robbery finding fails.[2]

C. Under California Law, the Claim Was Preserved

Respondent adds that Petitioner did not object to the instruction at trial, while acknowledging that the state court reached the merits of the claim. Br. in Opp. 12. The California Supreme Court's adjudicating the merits is no accident; under a long line of its precedents, the right to appeal instructional error affecting a defendant's substantial rights need not be preserved by objection. E.g., *People v. Dunkle*, 36 Cal.4th 861, 928–929 (2005); *People v. Hinton*, 37 Cal.4th 839, 861 (2006). Moreover, a defendant need not make a futile objection, App. 31, and several authorities had already upheld the instruction at issue here by the time of Petitioner's trial. *People v. Holt*, 15 Cal.4th 619, 677 (1997); *People v. Johnson* 6 Cal.4th 1, 37–38 (1993); *People v. Anderson* 210 Cal.App.3d 414 (1989). Respondent cites neither authority nor argument for the proposition that this Court will, in a certiorari case, impose a preservation requirement that state courts consider unnecessary.

II. IT VIOLATES DUE PROCESS TO EFFECTIVELY INSTRUCT THAT POSSESSION OF STOLEN PROPERTY PLUS ANY SLIGHT CORROBORATION WHICH"TENDS TO CONNECT THE DEFENDANT WITH" A TAKING MAY SUBSTITUTE FOR PROOF BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS THE THIEF, THAT HE USED FORCE AGAINST THE OWNER TO TAKE THE PROPERTY, AND THAT HIS INTENT TO STEAL DID NOT ARISE AS AN AFTERTHOUGHT WHEN THE VICTIM WAS ATTACKED FOR OTHER REASONS

The parties disagree on whether the disputed instruction is one that benefits defendants

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[2]The robbery conviction may well have had an impact on the jury's penalty choice as well. The instructions were peppered with directives that make it clear that California law regards a homicide committed in the course of a robbery especially heinous. CT 9: 2670–2671. Moreover, the jury was told to take into account any special circumstances that had been proven, in choosing death or life without parole. CT 10: 2887–2888.

because it begins by stating the obvious fact that the jury may not infer guilt of robbery from knowing possession of recently-stolen property alone, Br. in Opp. 3, or whether it is one that undermines the prosecution's burden. There is, however, no dispute that it treats such evidence as nearly enough, i.e., as being the primary evidence which only required "corroboration" for guilt be to inferred, that the corroboration need only be "slight," and that it gave several examples of corroboration which pertained only to identity of the thief, not whether the theft occurred via robbery. Pet. 4, n. 1 ; Br. in Opp. 3–4 & n.1. There is no way that such evidence amounts to proof beyond a reasonable doubt. Compare *United States v. Jones*, 418 F.2d 818 (8th Cir. 1969) (robbery verdict not supported by substantial evidence where possession, false explanation of possession, and suspicious behavior left "the government attempt[ing] to justify the conviction for the aggravated offense on the same evidence that is only equally consistent with guilt of a lesser crime," i.e., receiving stolen property). *Id*. at 824.

A. The Instruction Directly Undermines the Requirement of Proof Beyond a Reasonable Doubt of Each Element of the Offense

Petitioner's argument, while framed under two aspects of this Court's doctrine regarding a defendant's due-process rights, is simply that a rational jury would understand the instruction as the prosecutor did: "One of the examples they give [in the instruction] is simply we have to show not only that he had the stolen property, but he had the opportunity to steal it. And that meets our burden [of proving robbery]." RT 11: 2379–2380.

Petitioner has argued that opportunity to steal does not *necessarily* even prove that the defendant who possessed stolen goods was the thief, as opposed to one to whom the thief gave or sold some of the stolen goods.[3] Moreover, like possession after the theft, opportunity sheds no light

[3]If a bicycle was stolen from a front porch and found in the possession of someone who lived nearby, the instruction would advise the jury that it could convict the possessor on that (continued...)

whatsoever on how the thief took the property, and if he or she took it on some prior occasion or decided to take took it opportunistically and spontaneously after attacking its possessors for other reasons. See Pet. 14–16. The latter was a particularly noteworthy possibility here because of the frenzied manner of the attacks, one likely to create a huge commotion, in a residential neighborhood in the early evening, and leave the attacker all bloodied when it was still light out, when doing so cut off a significant source of petitioner's income. See Pet. 6. But the prosecution even had to rule out the possibility that Petitioner took the two items of jewelry which he pawned on some prior occasion by stealth while doing his housekeeping work, given his *modus operandi* with another housekeeping client of taking only one piece and hoping she would just think he lost it. App. 10. Possession plus opportunity to steal shed no light on that question, either.

Respondent's only attempt to meet this argument (and the prosecution's actual use of the instruction) is to quote conclusory assertions in which the court below has summarily rejected the concerns raised by Petitioner. Thus Respondent quotes a statement from *People v. Prieto*, 30 Cal.4th 226, 248 (2003) that the instruction does not address the burden of proof, directly or indirectly. Br. in Opp. 7. Petitioner anticipated the argument: "the instruction need not address the burden of proof directly to impact it; it does so by telling the jury the requirements for finding guilt of the specified charges. Any such statement *is* an explication of the burden of proof." Pet. 18. Respondent supplies no answer.

Respondent then quotes the lower court's flat declaration—in another case—that the instruction does not absolve the prosecution of its burden. Br. in Opp. 7. The court said something similar here: "[T]here was no suggestion in the challenged instruction that the jury need not find that all of the elements of robbery (or theft) had been proved beyond a reasonable doubt." App. 43. There

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[3](...continued)
basis alone, though clearly someone else could have stolen it and sold it to the defendant.

was, however, no reference to those elements in the instruction, and the jury was led to believe that it had an alternative route to conviction: possession plus slight corroboration. See, e.g., *People v. Grimes*, 1 Cal.5th 698, 731 (2016) (the instruction expresses the rule on what is sufficient "to warrant conviction"), quoted at Pet. 16–17, n. 15. As also noted prevously, Pet. 17, n. 16, the prosecutor observed that the instruction meant that possession plus the opportunity to steal "meets our burden." RT 11: 2379–2380. If possession and slight corroboration are sufficient, there is in fact no need to find that the property was taken by force, pursuant to an earlier intent, and from the personal possession of the victims. I.e., certain key elements of robbery need not have been proven beyond a reasonable doubt. Quoting the lower court's assertion that the instruction did not absolve the prosecution of its burden is not enough to disprove the point, but that is all Respondent does.

Respondent's only other attempt to counter the claim that the instruction supplies a way to convict of robbery that is an alternative—an easier one—to finding each element proven to the requisite degree of certainty is to assert that, "as the California Supreme Court recognized, the instruction functions in a way that is '"generally favorable to defendants."' [Citation.] Here, it forbade the jury from drawing an inference against Potts unless the jury found corroborating evidence." Br. in Opp. 7. The characterization is inaccurate. The instruction did caution that possession of the ring and pendant Petitioner pawned were not sufficient to prove that Petitioner obtained them by robbing the Jenkses, but that is something any juror would recognize without that instruction. *And* it stated with utmost clarity that possession plus, e.g., an opportunity to steal were enough. This end-run around proving the actual elements of robbery was neither favorable to Petitioner nor consistent with due process.

B. The Instruction Offers the Jury an Irrational Permissive Inference

Petitioner also pointed out that the instruction offered the jury an irrational permissive inference, one in which the fact inferred, i.e., that there were no reasonable doubts as to Petitioner's

guilt of robbery, versus theft or receiving stolen property, was not made more likely than not by the predicate facts, citing *Leary v. United States*, 395 U.S. 6, 36 (1969), and *Ulster County Court v. Allen*, 442 U.S. 140, 165–167 & n. 28 (1979). Pet. 16. Absent much more evidence covering a number of different factual elements, one who possesses stolen property is no more likely to have forcibly robbed its owners of it than to have received it from the actual thief, stolen it while the owners were away, or decided to take what he could after succumbing to a murderous rage.[4] Adding "slight" corroboration does not change that picture, especially if only the fact tended to be shown by possession—the identity of the thief—is corroborated (e.g., by opportunity to steal).[5]

Respondent's threefold answer avoids this fundamental defect in the instruction.

1. The Jury's Freedom to Decide the Predicate Fact Is Irrelevant

First, the jury was "free to decide for itself whether Potts had actually possessed jewelry stolen in the crime." Br. in Opp. 6. This has no bearing on whether—once the jury decided that uncontested fact—it was permissible to conclude from it and slight corroboration that he robbed the Jenkses. The instructional defect was offering the conclusion, not compelling a finding on the premise.

2. A Connection Between Possession and Taking Is Not Enough

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[4]As noted in the petition,

> If the perpetrator was petitioner, he may have shown up seeking work, or an advance against future work, to ameliorate his financial straits, been rebuffed in a manner he experienced as provocative (e.g., Fred's offering him the three or four dollars found with his body), flown into a rage, struck Shirley when she reacted to the attack on Fred, and taken valuables after both were incapacitated or dead.

Pet. 10–11. Petitioner pointed this out in the proceedings below. See App. 21–23.

[5]Petitioner recognizes that, if a prosecutor were somehow to charge robbery but present evidence of only possession and an opportunity to steal furtively, a jury would be unlikely to convict, even if told it could. The real issue generally arises in cases like this one, where no one is available to testify that there was a robbery (or burglary) and the circumstantial evidence might or might not be sufficient to convince a jury that there was.

Second, assuming that there is "an obvious 'connection . . . in "common experience,"' *County Court of Ulster County,* 412 U.S. at 171, between possession of stolen property and a taking of that property which occurred soon before," Br. in Opp. 6, such a connection says nothing about the nature of the conduct which resulted in the taking, i.e., whether it was simple theft or robbery. Moreover, the language Respondent quotes is from an opinion which explains that the "connection in common experience" is "a second standard for judging the constitutionality of criminal presumptions," in addition to "the constitutional requirement that the State be put to its proof." *Ulster County Court v. Allen*, *supra*, 442 U.S. at 170, *supra*,l, J., dissenting.[6]

3. Because the Prosecution Could "Rely Entirely on the Presumption," a Rational Connection Under the Facts of the Case Is Insufficient

Respondent is on slightly firmer ground with its last point: "[I]t cannot be said that 'under the facts of [this] case, there [was] no rational way the trier could make the connection.'" Br. in Opp. 6–7, quoting *Ulster County Court* at 157. That case upheld a jury instruction "that, with certain exceptions, the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle." *Id.* at 143. Notably, the presumption disappeared if there was any evidence contradicting that conclusion. *Id.* at 161, n. 20. The Court reasoned that only "if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference[,] . . . is there any risk that an explanation of the permissible

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[6]The majority opinion also emphasizes the role of the reasonable-doubt standard:

> The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

Ulster County Court v. Allen, *supra*, 442 U.S. at 156.

inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination." *Id.* at 157. Relying on this holding, Respondent argues that there was enough other evidence that Petitioner committed robbery. Br. in Opp. 6–7.

The Court in *Ulster* explained the approach it took. Where the prosecution can "rest its case entirely on a presumption[,] . . . the fact proved . . . [must be] sufficient to support the inference of guilt beyond a reasonable doubt." *Id.* at 167. However, "[a]s long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary* [*v. United States*, *supra*] [i.e., "more likely than not"].[7]" *Ibid.* Here, as the prosecutor stated, RT 11:2379–2380, the instruction did permit him to rely entirely on the presumption to prove Petitioner guilty of robbery, as long as there was slight corroboration. Thus the case is among those where the reasonable-doubt standard applies. Respondent's claim, therefore, that, considering all the evidence, the jury could rationally find that the prosecution proved beyond a reasonable doubt that Petitioner actually robbed the Jenkses—even if true[8]—fails to negate the proposition that the challenged instruction gave it an unconstitutionally easier way to resolve the question before it. Cf. *Connecticut v. Johnson*, 460 U.S. 73, 85–86 (1983) ("An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied

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[7]The opinion assumes that the distinction between the two situations is demarcated by whether the inference or presumption is one the jury is mandated to make or permitted to make. *Ulster County Court v. Allen*, *supra*, 442 U.S. at 167. Here, however, it is clear that—even though the inference of guilt is only permissive—the situation is one where the prosecution could "rest its case entirely on the presumption." *Ibid.*

[8]In his appeal to the court below, Petitioner argued insufficiency of the evidence of assaults planned to carry out robbery, given, *inter alia*, the weakness of poverty as a motive to kill, given that many people need money but few murder to obtain it, and the witnesses who established Petitioner's need said nothing about desperation; Petitioner's recent history of non-violent theft; his knowledge that he could obtain very little money from pawning jewelry; the difficulty, gruesomeness, and risk of detection of the manner of the killings; and the use of objects—a tool he always carried and a knife or knives from the victims' kitchen—available with no planning or preparation. See App. 18 et seq.

upon the presumption rather than upon that evidence") (plur. opn.).

C. Other Instructions Could Not Cure the Error

Respondent's final substantive point is that the jury was told to consider the instructions as a whole and that it was instructed, *inter alia*, on the elements of robbery and the prosecution's burden of proving each beyond a reasonable doubt. Br. in Opp. 6–7, 11. Taking into account the entire jury charge does not change the analysis, given that the instruction specifically states that possession plus slight corroboration is enough to convict. See *People v. Grimes*, *supra*, 1 Cal.5th at 731 (the instruction expresses the rule on what is sufficient "to warrant conviction"); RT 11: 2379–2380 (prosecutor's remarks). Rational jurors would not assume that the instructions stressed by Respondent meant that the challenged instruction was incorrect and that they should ignore it. Rather, they would follow an obvious path to reconciling all of the instructions: treat the specific instruction on a permissible (and simpler) way to convict of robbery as either an exception to the more general instructions or an explication of their application to the robbery allegations. See Pet. 17 (arguing that the judicial maxim that the particular controls over the general is also a common-sense principle that jurors would intuitively apply). Respondent would have this Court assume that jurors would instead mentally redraft the infirm instruction to say what it *should* say. This is inconceivable.

See also *United States v. Carter*, 522 F.2d 666, 679–680 (D.C. Cir. 1975) (a permissive inference gave the jury a route to conviction short of examining all the elements of the charged offense); *United States v. Rubio-Villareal*, 967 F.2d 294, 300 (9th Cir. 1992) (general instructions on how to determine guilt do not cure giving of an erroneous permissive-inference instruction).

Respondent fails to show that the instruction is proper, and it is not.

III. THERE IS A JURISDICTIONAL SPLIT ON THE QUESTION PRESENTED

A. There Is No Authority for Respondent's Claim That Any Inference-From-Possession Instruction Is Legitimate if Pertaining to a Theft-Related Crime and Other Instructions Correctly State the Prosecution's Burden

Respondent argues that there is no question for this Court to settle, that the cases cited in the petition "do not establish any disagreement" among the courts that have considered the propriety of instructions relating possession of recently stolen property to a robbery charge. Br. in Opp. 9. Respondent surveys the cases listed by Petitioner and seeks to reconcile them as "reflect[ing] two requirements that are consistent with the decision below: Inferences from stolen property must be tied to crimes which feature the taking of property as an element, and the instructions as a whole must correctly convey the prosecution's burden of proof." Brief in Opp. 9.

Accurate or not, the characterization is irrelevant. That those restrictions may be necessary does not make them sufficient. Respondent has failed to controvert Petitioner's showing that different jurisdictions reach different results because they disagree on the applicability of a third restriction, the one at the heart of this case. Courts are coming down on both sides of the question of whether or not an instruction offering an inference from the possession of stolen property—where some kind of a taking, not merely unlawful possession, is charged—must somehow caution the jury that, while it may infer the identity of the taker from the defendant's possession of the property, all the actual elements of the offense charged must also be separately proved beyond a reasonable doubt.

Thus California, Illinois, Florida, and Arizona, at least, permit the kind of instruction given here. *People v. Duckins*, 59 Ill.App.3d 96, 375 N.E.2d 173 (1978); *People v. Powloski*, 311 Ill. 284, 142 N.E. 551 (1924); Wilkins v. Sec'y, Dept. of Corrections, Case No. 4:14-cv- 154-WS-GRJ, 12 (N.D. Fla. Feb. 16, 2017); *State v. Rhymes* 107 Ariz. 12, 480 P.2d 662 (1971). See Pet. 20–22.

Petitioner's incomplete but illustrative survey of contrary holdings found that at least New York, Colorado, the Court of Appeal for the District of Columbia Circuit, North Carolina, and

Tennessee either prohibit using such an instruction related to a robbery charge at all or else call on trial courts to make clear that unexplained possession only goes to the issue of identity, while the other elements of the offense must still be separately proven. *People v. Baskerville*, 60 N.Y.2d 374, 380, 384, 469 N.Y.S.2d 646 (1983); *People v. Hampton*, 758 P.2d 1344, 1355 (Col. 1988); *Pendergrast v. United States*, 416 F.2d 776, 790–791 (D.C. Cir. 1969); *State v. Hickson*, 25 N.C.App. 619, 621, 214 S.E.2d 259 (1975); *State v. Foust*, 482 S.W.3d 20, 53–55 (Tenn.Crim.App. 2015); see also *United States v. Carter*, 522 F.2d 666 (D.C. Cir. 1975). Pet. 22–25.

B. The Jurisdictions Requiring Proof That the Crime Was a Robbery Are Implicitly But Intentionally Protecting Defendants' Due-Process Rights

Respondent's only critique of Petitioner's showing of a jurisdictional divide—aside from the two-requirements claim—is that neither *Baskerville*, *Hampton*, *Pendergrast*, nor *Hickson* explicitly based its holdings on the Constitution.[9] Br. in Opp. 10, nn. 6, 7; 11, nn. 8, 9.

The problem is that—stripped of the complex argumentation into which legal briefing tends to descend—it is a no-brainer that, *if it is not proven beyond a reasonable doubt that a taking was a robbery, proving that a defendant was the taker does not prove that he or she committed robbery*. Thus the courts that recognize the logical error in holding otherwise do not necessarily engage in a deep constitutional analysis. With something that simple, courts sometimes just do the right thing without excess explanation. Even if there is no widespread and explicit constitutional dispute, there

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[9]Respondent also maintains that the California instruction is consistent with one approved in *State v. Hickson*, *supra*, 25 N.C.App. 619, because California's *general* instructions on inferring facts from circumstantial evidence caution that "before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on whch the inference necessarily rests must be proved beyond a reasonable doubt." Br. in Opp. 11, n. 9, citing RT 11:2336–2337. As applicable here, that language meant only that Petitioner's jury would have to be persuaded beyond a reasonable doubt that he possessed the two items of jewelry and of some other "slight corroboration," not that there was a robbery. The North Carolina instruction, on the other hand, permitted an inference that the defendant was the robber only "if and when it is established that there was an armed robbery." 25 N.C.App. at 621,

remains an implicit one, with real results for real defendants, like Petitioner. Clearly a court that, for example, prohibited use of an instruction permitting an inference of robbery from the fact of possession because it "might be understood to relieve the state of its burden of proving beyond a reasonable doubt all the elements of robbery," *Wells v. People*, 197 Colo. 350, 592 P.2d 1321 (1979),[10] is coming down on the other side of the question presented in the instant case, based on an awareness of a defendant's due-process rights regarding the burden of proof.

Similarly, in *Pendergrast v. United States*, the Court of Appeal for the District of Columbia Circuit drafted a model instruction for robbery cases, due to the frequency with which the issue comes up in trials and the court's "acute awareness of the pitfalls encounterable" in charging on the subject. *Pendergrast v. United States*, *supra*, 416 F.2d at 790. As Respondent observes, the opinion "did not, however, identify any particular aspect of its model instruction as constitutionally required." Br. in Opp. 10. True, but in crafting that instruction, the court took pains to add—to the instruction presented in the defendant's appeal—that an inference of guilt from unexplained possession is permitted if "warranted by the evidence as a whole" and that the burden of proving every element of robbery beyond a reasonable doubt remains with the government. Then it says, in literally three different ways, that only if every essential element of robbery has been proven to that standard, may unexplained recent possession be used to infer that the defendant was the robber. *Id.* at 790–791. One would be hard-pressed to argue (a) that the court would approve of an instruction inviting conviction of robbery based merely on possession of recently stolen property, if slightly corroborated in some way, (b) that its disapproval would be unrelated to the reasonable-doubt

[10] *Wells* is the "Colorado precedent" applied in *People v. Hampton*, *supra*, 758 P.2d at 1354, that Respondent states "did not rely on due process grounds." Br. in Opp. 10, n. 7. Together, the two Colorado cases mean that an instruction that it is acceptable to instruct that the identity of one charged with an unlawful taking may be inferred from possession but that conviction of aggravated robbery also required proof of the other elements of that offense, while an instruction permitting an inference of guilt of robbery from possession is infirm.

standard, or (c) that it did not recognize its due-process duty to enforce the use of that standard.

In the current context, the lack of explicit constitutional analysis in cases ruling contrary to California's and other states' holdings does not negate the existence of a constitutional disagreement.

C. Respondent Inaccurately Seeks to Distinguish the Other Two Cases Cited as Contrary to California's Approach

With a "See, e.g." cite, Respondent cites *State v. Foust*, *supra*, 482 S.W.3d 20, for the proposition that none of the cases cited by Petitioner "establish any disagreement" with the California rule. Br. in Opp. 9, n. 5. Yet Respondent does not dispute—or acknowledge—the reason *Foust* was cited: that the instruction which it upheld "inform[ed] the jury that it could reasonably infer, from possession, that the defendant committed a robbery only if it first found beyond a reasonable doubt that the defendant gained possession through theft 'and you also find beyond a reasonable doubt that the theft could only have been accomplished through robbery' [482 S.W.3d at 53–54]," along with numerous other cautions not given in California. Pet. 24. The court does not *state* its disagreement with an instruction like that given here, but, again, one would be hard-pressed to argue that Tennessee courts would permit the California instruction.[11]

The last of the cases discussed by both parties is *United States v. Carter*, *supra*, 522 F.2d 666, which Petitioner cited as usefully analogous, although there the crimes likely associated with

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[11]What Respondent portrays as congruence with the California approach is the *Foust* court's citation of *State v. James*, 315 S.W.3d 440 (Tenn.2010), for the proposition that a possession instruction can apply to robbery, for, as *Foust* mentions, the *James* court cited the CALJIC instruction in dispute here. But the purpose of the *James* footnote citing the California instruction was to support its suggestion that a possession instruction should require some corroboration on the identity issue, as California does.

The propriety of the CALJIC's instruction's shortcuts was not before either Tennessee court. In contrast to the California instruction, the one approved in *James* stated that if it was proven beyond a reasonable doubt that the defendant gained possession through theft and that the theft could only be accomplished through burglary, an inference that the defendant committed burglary was permissible but not required. *State v. James*, *supra*, 315 S.W.3d at 446–447, 454 & n. 13.

a theft were not, like robbery, normally considered theft-related. Pet. 24. *Carter* holds that a supposed inference, where the fact of possession does not logically imply a likelihood that the defendant committed the charged offense, is impermissible. Thus an instruction permitting an inference of guilt "of the crimes charged" was error because it "sanctioned inferences that the jury might not have felt to be warranted by the evidence, absent the instruction." *Id*. at 679–680.

The failure of evidence of possession to tend to show commission of a charged offense is what *Carter* has in common with the instant matter. Respondent seeks to distinguish the case, believing that it illustrates only that the scope of "[i]nferences from stolen property must be tied to crimes which feature the taking of property as an element . . . ." Br. in Opp. 9. But the *Carter* opinion neither states nor applies any such principle. Rather, it analyzes specifically whether possession supports an inference of guilt of each of the crimes charged, period. It therefore gives no rationale for Respondent's version of the line demarcating those crimes of which possession of recently stolen property implies guilt from those which it does not. Nor does Respondent supply its own rationale for its supposed rule automatically including all theft-related offenses as permissible.

Respondent's assertion that "[t]hese cases raise no conflict with the decision below," Br. in Opp. 11, is unfounded.

CONCLUSION

For the reasons presented in the petition, it should be granted.

DATED: October 31, 2019

Respectfully submitted,

/s/

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