

No. _____

In the
Supreme Court of the United States

FRANCISCO J. MARTINEZ, Petitioner

v.

ADOLFO GONZALEZ,
San Diego Chief Probation Officer Respondent

On Petition for Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit
19-5540

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should CERTIORARI be granted to review whether the failure to instruct a state jury on lack of scienter could be harmless-beyond a reasonable doubt in this commodities fraud prosecution.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Francisco J. Martinez respectfully petitions the Court for a
writ of certiorari to review the Memorandum Opinion of the United States
Court of Appeals for the Ninth Circuit affirming the district court's denial
of the section 2254 petition for a writ of habeas corpus.

WHY THIS PETITION SHOULD BE GRANTED

This petition should be granted as the as the state court of appeal, unreasonably reversing a trial judge's judgment of acquittal, ruled that the trial court's failure to instruct the jury on the scienter required for two convictions of commodity fraud was harmless error under *Chapman v. California*, 386 U.S. 18, 22 (1967).

Petitioner was an office clerk, ruled the trial judge, after hours of seeing and hearing petitioner testify, and was credible, stated the trial judge, in his testimony that he never misrepresented any facts about commodity trading to the two persons who were the subject of the two convictions.

The state appellate court agreed it was error not to instruct the jury on scienter or "guilty knowledge" and, based only on a trial transcript, disagreed with the trial judge's credibility finding.

Additionally, the state appellate court unreasonably determined the

facts in order to shore up its ruling of harmless error.

As far as this attorney's research reveals, this case is the only California state decision in this area of the state's penal law on commodities fraud. That is additional reason the convictions of petitioner should not be allowed to stand.

OPINIONS BELOW

Cases from Federal Courts:

On March 6, 2020, the Ninth Circuit Court of Appeals, in a three page Memorandum Opinion, affirmed the district court denial of petitioner's habeas corpus petition filed under 28 U.S.C. 2254. (Appendix A, 9th Ckt. Memorandum Opinion.)

The Order of the United States District Court for the Southern District of California denying the petition for a writ of habeas corpus with prejudice and granting a certificate of appealability (COA) was issued on April 12, 2019, Dkt 19, and is Appendix B.

The opinion of the California Court of Appeal is attached as Appendix C.

The Civil Docket of both District Court and Ninth Circuit is appendix D.

JURISDICTION

The Ninth Circuit affirmed the denial of the habeas corpus petition on March 6, 2020.

The jurisdiction of this Court is, thus timely invoked under 28 USC section 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A defendant in a criminal case must have the right to Due Process of Law , and the Fourteenth Amendment to the U. S. Constitution. 28 U.S.C. section 2254(d) provides:

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
 - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in

the State court proceeding.

STATEMENT OF THE CASE

A. State Court Proceedings and those in the Federal District Court

The amended information filed April 4, 2011, charged Mr. Francisco Martinez, Marcellus Lee and Daniel Romero with conspiracy to defraud another of property between April 1, 2004, and September 28, 2006, in violation of Penal Code section 182, subdivision (a)(4); count 6 charged Mr. Martinez, Lee and Romero with grand theft of personal property of B. Lahr and W. McClelland in violation of Penal Code section 487, subdivision (a); count 7 charged Mr. Martinez and Lee and Romero with fraud in offer or sale of commodity on or about September 15, 2004, in violation of Corporations Code section 29536 (Victims B. Lahr and W. McClelland.); count 8 charged Mr. Martinez and Lee and Romero with grand theft of personal property of R. Smith on or about November 4, 2004, in violation of Penal Code section 487, subdivision (a); count 9 charged Mr. Martinez and Lee and Romero with fraud in offer or sale of commodity on or about

November 3, 2004, in violation of Corporations Code section 29536 (victim R. Smith); count 10 charged Mr. Martinez and Lee and Romero with grand theft of personal property of Brian Smith as an agent for Curtis Brown, Paul Cannon, Greg Hughes, Michael Mauch, Greg Sabal and Robert Smith between November 3, 2004 and September 28, 2006, in violation of Penal Code section 487, subdivision (a); count 11 charged Mr. Martinez and Lee and Romero with fraud in offer or sale of commodity between November 3, 2004, and September 28, 2006, in violation of Corporations Code section 29536, (Victim Brian Smith.) (1CT 31-40¹.)

There were four enhancement allegations under sections 186.11, subdivision (a)(2); 186.11, subdivision (a)(3); 12022.6, subdivision (a)(2), and 12022.6, subdivision (a)(3). (1CT 39-40.)

On April 14, 2011, the jury returned verdicts as to Mr. Martinez as follows: Guilty of two commodities fraud/corporation code counts, 9 and 11; not guilty of count 6, grand theft and count 7 commodities

¹ References to the record are as follows: RT means Reporter's Transcript, CT means Clerk's Transcript; Volume nrs appear in front. 18RT has an ER all to itself.

fraud/corporations code; the jury was deadlocked as to count 1(conspiracy), counts 8 and count 10, (grand theft). (1CT 251; 17RT 2770-2771.) Three enhancement allegations as to Mr. Martinez were found true. Those enhancements were 186.11, subdivision (a)(2) [>\$500,000], 186.11, subdivision (a)(3) [>\$100,000], and 12022.6, subdivision (a)(2) [>150,000]. The enhancement under section 12022.6, subdivision (a)(3), alleging total losses to victims being over one million dollars was found not true. (17RT 2773-2774; 4CT 983.)

Mr. Martinez's Motions for New Trial and that of his co-defendants (4CT 926, Augment with Supplemental Memorandum filed on 01/10/2013 and granted on 01/29/2013) were heard beginning on November 2 and continuing for three days. (18RT 2786 et seq 2ER90-338.)

The results for Martinez in the order in which they occurred were as follows:

1. A New Trial was granted as to count 11 [Commodities Fraud, Brian Smith). (18RT 2792-2808; 2ER96-112);
2. As to count 9 [Commodities Fraud, Bob Smith], it was dismissed by

the judge applying “the equivalent of an 1181 motion now.” (18RT 2808, lines 24-26; 2ER112);

3. As to count 11 (Commodities Fraud/Brian Smith), the court reviewed the Martinez testimony and that of Brian Smith and dismissed this count for insufficient evidence. (18RT 2827-35; 2ER131-139.)
4. As to the deadlocked counts, 1, 8 and 10, the judge first focused on count 8 [grand theft from Bob Smith] and dismissed for “insufficiency or legal bases.” (18RT 2975; 2ER280);
5. Counts 1 [conspiracy] and 10 [grand theft, Brian Smith as agent] were dismissed as to Martinez on the basis of insufficiency of the evidence and in, the alternative, the interests of justice under section 1385, “looking at the facts in this case and looking at this defendant.” (18RT 3025; 2ER330.)

There were no charges remaining against Mr. Martinez .

The People timely appealed from the new trial orders and dismissals on December 29, 2011. (3CT 657-658.)

The Court of Appeal issued its opinion on March 7, 2014, reversing

the trial court's dismissals and permitting retrials on all of those dismissals and reinstating appellant's convictions on counts 9 and 11.

On October 3, 2014, the trial court, now Judge Deddeh replacing Judge Allard, who was removed from the case by the Court of Appeal, reinstated the jury's guilty verdicts as to appellant for counts 9 and 11 and the court reinstated counts 1, 8 and 10 which were hung as to appellant and the prosecutor was free to re-try those counts. (2RT 20, 21, 22; 1CT 269.)

A motion to the new trial judge to decide undecided issues in the motion for new trial, failure to act as 13th juror, was denied.(2RT18-20, Oct. 2, 2015.)

On November 25, 2014 appellant was placed on probation on the condition that he serve one year in county jail which was not stayed and various conditions of probation which were stayed pending appeal. (1RT 51-52.) The remaining hung counts against Mr. Martinez (1, 8 and 10) were dismissed by the prosecutor when a motion for bail pending appeal was denied on December 15, 2014.

An amended notice of appeal that Mr. Martinez was appealing after a jury trial and sentence after remand following appeal was filed on December 5, 2015. (1CT 152.01.)

Petitioner's appeal resulted in a concession of respondent, and the CCA at page 31 of its opinion, 1ER52, that the jury should have been instructed on scienter as to the commodity fraud charges. That error was found to be harmless by the CCA.

A petition for review to the California Supreme Court was denied on 6-28-2017. 1ER19.

A petition for writ of habeas corpus under 28 U.S.C. section 2254 was filed on 8-31-2017 and amended on 9-1-2017. ECF1-2, 1ER84.

The petition was denied on 4-12-2019 and a certificate of appealability was issued. 1ER4-18.

STATEMENT OF FACTS

A. Preliminary Statement

The CCA statement of facts deserves no presumption of correctness as it was replete with errors and omissions. Every sentence set forth below

is tied to the record of trial. The CCA opinion is not.

Appellant Martinez was only convicted of two counts of fraud in the sale of commodities, section 29536.

Count 9 involved Robert Smith, who never testified and count 11 involved Brian Smith who did testify and was the financial advisor of Robert Smith. The factual statement will be limited to those two individuals. First, some background is necessary.

B. Overview of Foreign Currency Exchange (“Forex”)

Foreign currency is as much of a commodity as corn or pork bellies. A foreign currency exchange consists of buying one country's currency with another country's currency. (3RT 161-162.)

The federal government oversees the Forex market through the Commodities Exchange Act implemented by the Commodities Futures Trading Commission (CFTC.) (3RT 154,157.) The National Futures Association (NFA) is a registered futures association formed by private industry to regulate its members and is overseen by the CFTC. (*Id.*) The prosecution called a Vice President of the NFA and former CFTC employee

to explain Forex to the jury. (3RT 154-155.)

In a Forex market, private individuals trade currency in order to speculate on price. The private party trades with a Futures Commissions Merchant (FCM) who must be registered with either the CFTC or the NFA. (3RT 163-164.) The private party either buys from or sells to the FCM. (3RT 182.)

Forex is an extremely volatile market. (3RT 169.) A trader, whether private party or FCM can leverage the transaction by using borrowed money, buying on margin, to buy or sell currency. Both profits and losses are magnified greatly by buying and selling on margin. (3RT 199.) If the customer or private party makes money on the trade, the FCM loses and vice versa. (3RT 164, 166-67, 182-83.)

FCMs can also make money by charging commissions and fees for the trades. Those amounts are even higher when the trade is conducted on margin as the fees are calculated on the entire units of currency purchased. (3RT 200-201.)

There are other parties which can be involved in the actual Forex

transaction. An “introducing broker” of ‘IB’ is a sales agent for the FCM. (3ORT 183.) The IB solicits customers to open accounts with a particular FCM. (3RT 183, 186.) The IB is not a party to the actual underlying Forex trade. (3RT 183, 186.) The IB has no access to or control over the customer’s money. (3RT 195.) IB’s are typically compensated by the FCM through the FCM’s fees for trading. (3RT 183-184, 186.)

The customer can also engage a “trading advisor” to trade on the customer’s behalf. (3RT 195-196.) The customer and trading advisor would enter into an agreement authorizing the trading advisor to make trades using the customer’s money on deposit with the FCM. (3RT 196.) The agreement with the customer typically authorizes the FCM to send the trading advisor any fees earned on the trades. (3RT 196.) Trading advisors can also be compensated on an incentive basis where they earn a percentage of the customer’s profits. (3RT 197.) They could also receive per trade commissions or fees. (3RT 197.)

C. Prosecution Case

Mr. Martinez Was Found Guilty of Counts 9 and 11, Commodity Fraud, the Listed Victim, Robert Smith, Never Testified But His Agent, Brian Smith Did.

There was no testimony at all from Robert Smith, at trial or at a preliminary examination. Robert Smith was listed as the victim in count 9, fraud in offer or sale of a commodity. The facts concerning Robert Smith's investment came from Brian Smith, no relation, who was Robert Smith's agent.

Brian Smith had been a financial advisor for 15 years at the time of his testimony. (7RT 921.) He had no formal experience in Forex currency markets but as he came to seriously study them in the middle of the decade preceding the trial, specifically in 2004, not for himself but for his clients, (7RT 923) he concluded they were "high risk, very fast, very, very liquid. We typically use a pyramid to describe investment risks. Things at the very top, near the tip, would be considered highest risk; . . . I would put the Forex currency markets near the very top of the risk strata." (7RT 922-23.)

In 2004 Brian Smith was introduced to Kingdom Advisors, a Forex trading company, at a meeting which was a Forex trading program attended by appellants Lee, Romero and petitioner Martinez. (7RT 924.) He had been told of Kingdom Advisors by an acquaintance who told Brian Smith he knew some people who had been “doing very, very well in Forex currency trading and I might like to learn about it.” (7RT 925.) The meeting was in late 2004 or early 2005 in a building not far from the courthouse and Lee, Romero and petitioner Martinez spoke. (7RT 925-926.)

A return of 6% a month was discussed as a “possibility”. If it had been guaranteed, Smith would not have put much credence in it. (7RT 928.)

Mr. Martinez never described his experience of trading in Forex. (7RT 932.)

Brian Smith recommended to his friend Bob Smith that Bob invest \$100,000 into the Forex. (7RT 939.) Brian Smith was an introducing broker (IB) of Bob Smith to the Forex trading done by Kingdom Advisors. “I had

relationships with investors, I could bring investors to Kingdom Advisors." (7RT 941.) Bob Smith invested \$100,000 and for three or four months in the latter part of 2004 and early part of 2005 he made 6% a month and Brian Smith earned a commission. These results validated to Brian Smith what he had been told. (7RT 941-42.) After those four months, profits stopped. (7RT 945.) Brian Smith urged his friend Bob Smith to "hang in there." Despite this stoppage of profits, Brian Smith had ideas of bigger profits in Forex and formed a new business called Olympia Capital Management and a sub entity called Olympia Management Fund. The object was to bring in investors whose Forex accounts would be managed by Kingdom Advisors and the three individuals he had met, Lee, Romero and Martinez. Brian Smith wanted to build a bigger business and bring in more investors and more money. (7RT 948.) Most of his communications were with Mr. Romero. (7RT 949.)

Although profits ceased in early 2005, Brian Smith brought in six other investors who invested a total of \$460,000 in the Olympia Expansion in late 2005. (7RT 954.)

By late 2005 or early 2006, “colossal losses” had wiped out 70% of these investments. The losses occurred in a period of one or two days. (7RT970- 971.)

Brian Smith was in shock and he picked up the phone to call Mr. Romero and found out that a not-even-21 year old trader, Josh Nyland, was responsible for these losses. (7RT 972-973.) Nyland had abandoned the stop loss protection and taken on more and more risk in order to try to recoup the losses and instead had compounded them. (7RT 975.)

Brian Smith’s clients had lost at least \$300,000 (7RT 978) but Smith decided to invest what was left in a new Forex company whose operation Mr. Romero and Lee explained to him. It was called a Forex Commodities Merchant (FCM) which operated as “the house” and made money from the trades instead of being at the mercy of traders. His friend Bob Smith invested another \$100,000 into a new company, unrelated to this case, but that was ultimately lost. (7RT 981-982).

Brian Smith submitted a document to Kingdom Advisors designed to

prevent Nyland from doing any more trading with Brian Smith's funds.

(7ORT 983.) As late as December 2005, Brian Smith's investor's funds were being deposited for trading with Gain Capital. (7RT 986.)

1. Cross Examination of Brian Smith by Martinez's Attorney Mr. McCabe

Mr. Romero did most of the talking at the first meeting with Kingdom Advisors.(8 RT 1051.) The next meeting was dominated by Mr. Lee. (8RT 1052.) Smith did not remember Martinez saying much of anything that day. (8RT 1052-53.) When he was arranging to deposit Bob Smith's money with Kingdom Advisors, Brian Smith only spoke to Romero. Romero, for Kingdom Advisors, signed the joint venture investing agreement for Bob Smith's money.(8RT 1053.) Brian Smith came to rely on Romero for status reports. Brian Smith never understood Martinez's role in this venture. (*Id.*) When the returns on Bob Smith's investment stopped after four months, Brian Smith mainly contacted Romero and Lee and could not get any substantive information from Mr. Martinez so he stopped focusing on him.

When Brian Smith established Olympia Expansion, the person with which he negotiated the written agreement with Kingdom Advisors was Romero. (8RT 1055.) Martinez never signed that agreement. (8RT 1056.)

When the “colossal losses” occurred Smith did talk to Mr. Martinez who had nothing to offer by way of explanation which “was consistent with how the relationship had been going for several months”. (8RT 1058.)

Mr. Martinez was never involved in the FCM or Clearinghouse, TradeCo, that Brian Smith set up with Romero and Lee.

Brian Smith agreed that his statement at the preliminary exam that Mr. Martinez never made any misrepresentations with respect to Kingdom Advisors was also accurate today. (8RT 1062-63.)

The prosecutor, on redirect, asked Brian Smith if he felt comfortable recommending to his investors that they invest in Forex. Smith answered “Oh Yes.” When asked “Why?” by the prosecutor, Smith responded “Because Bob Smith had been paid several times, although his payments became very sporadic and stopped. Because I thought we could resume that level of performance, and that caused me to ramp up the Olympia

fund." (8RT 1148.) The prosecutor elicited from Brian Smith that he was comfortable with the level of risk to which his investors were exposed . (8RT 1154.)

The prosecutor then focused on Smith's dealings with Mr. Martinez:

Q. Were you aware of –were you ever made aware, rather , of what Mr. Martinez's duties and activities with Kingdom Advisors were on that day-to-day basis?

A. Not really, no.

Q. Did you have any idea what he was doing there?

A. Again, in the earlier meetings he amplified what Mr. Romero would say. Following that, his role, as it concerned me in my business, was less and less. I concluded that I could not get action or primary information from Mr. Martinez especially after TradeCo started.

(8RT 1154.)

On re-cross by Mr. McCabe, Brian Smith stated that he saw no evidence of Mr. Martinez having control over the money "which you and your investors had put into these ventures." He saw no evidence that Mr. Martinez had any control over disbursements or of any of the funds. (8RT 1167.)

D. Defense Testimony

How Mr. Martinez Got Into Forex

46 years old at the time of trial, Mr. Martinez was unemployed for the two years after his arrest in this case. (13RT 2046.) He was doing some television work for Cable Christian Ministries when he met John Romero, father of co-appellant Daniel Romero, at a chapter meeting of the Full Gospel Businessmen's Fellowship International, South, a men's Christian group. (*Id.*) Both were members of that group and Martinez's wife's Aunt wanted to invest money to help Martinez so Martinez arranged for the Aunt to make a loan of \$330,000 to John Romero (13RT 2047, 2130) to invest. All of that money was lost. (13RT 2047.)

Feeling responsible for his wife's Aunt and having them both see him as a complete failure, he had to do whatever he could to make it up to them. His wife's Aunt was a senior citizen on limited income and Martinez and his wife had to provide some sort of income for the Aunt to survive. Martinez and his wife had not been able to buy a home and bring her into it and provide for her in the way it had been planned, so as a

result, the Aunt lived in a mobile home and Martinez and his wife paid the Aunt's monthly expenses. Martinez, at the time of his testimony had paid back about \$60,000 of the \$330,000 that was lost. (13 RT 2048.)

After the loss of his wife's Aunt's money, Martinez went to work for Kingdom Advisors. Martinez had met Daniel Romero through his father, John. Daniel was running Kingdom Advisors and Martinez worked in the satellite dish part of that company, in sales. The satellite business had to close when John Romero borrowed money from it and there was no money left to operate. It was after that failure that Martinez joined with Kingdom Advisors in Forex trading. (13RT 2049-50.)

There were two entities, Kingdom Advisors Inc. and Kingdom Advisors LLC. (13RT 2050.) The way it came about that Martinez was listed as Vice President of Kingdom Advisors LLC was due to a person who set up Kingdom Advisors LLC. That person was Rick Lonnie, an agent in Nevada who functioned as a compliance officer and it was Lonnie who put Martinez down as a vice president for Kingdom Advisors LLC. Martinez was not an officer of Kingdom Advisors Inc. He had no

ownership in either Kingdom Advisors Inc., or Kingdom Advisors LLC.

(13RT 2051.)

With respect to the operation of the office, Mr. Martinez was a clerk.

(13RT 2061.) He only had authority to make payments out of the bank account with permission from Mr. Romero. He never got bank statements on any Kingdom Advisor accounts. He had signatory authority on the bank accounts, he did not do the books. At first, Daniel Romero's wife Tabitha did the books, then Daniel took over. (*Id.*) Martinez could log into the trading account but he had no authority over the trades or the way in which they were conducted. (*Id.*)

Marcellus Lee was picked as a trader after Lee presented documentation about his success in Forex trading. He presented charts and profit growth scales to illustrate his success. (13RT 2064.)

The initial trades of Marcellus Lee were successful. It was not until four or five months later that Lee's trading began to fail. (13RT 2066.)

Mr. Martinez was not sure when Brian Smith came on the scene. He knew Brian Smith came in to talk to Kingdom Advisors during that initial

period of success. (13RT 2066.)

Kingdom Advisors LLC was formed just before TradeCo was formed. TradeCo was an FCM which was formed. (7RT 977, 13RT 2070-2073.) Forming TradeCo was the reason for forming the LLC. Mr. Martinez's position with TradeCo was sales and marketing. Martinez contacted "introducing" brokers (IBs) and convinced them to do business with TradeCo. He had no contact with any prospective investors with respect to the venture.

With respect to the operation of the physical plant of TradeCo, he was a clerk in the office and managed it as well and oversaw the employees that they had and was responsible for filing or responding to emails and any requests by anybody to the website. (13RT 2073.)

He had no access to funds of TradeCo. He was not a signatory on any account of TradeCo.

Concerning his compensation during these years, he was supposed to be paid a salary. He got \$1300 a month which was raised to \$1500 a month. (13RT 2075.) During his entire tenure with Kingdom Advisors and

TradeCo he only received \$29,182. (13RT 2100.)

He was never paid on a regular basis because often there was no money. He was paid whenever Kingdom Advisors had the ability to pay him.

When Kingdom advisors was unable to pay him he did some freelance work. He worked with stage production, camera, video work, and he belonged to an organization where he was listed by his skills in the media. So whenever they needed somebody to set up the stage for a concert or set up lighting or needed a camera person or lighting director, Mr. Martinez, who was listed by his expertise, would get calls and it would be a day job or it could be a convention where he was there for three days. He was basically moonlighting doing these things. (13RT 2075.)

Mr. Martinez remembered an initial meeting with Brian Smith in which he and Mr. Romero were present. Martinez remembered a meeting at which Mr. Lee presented his trading philosophy to Mr. Smith in his presence. (13RT 2077.)

Martinez never participated in any negotiations with Brian Smith regarding the terms of his investment. Martinez was never consulted by Brian Smith about a particular investment whether or not Smith should put money into Kingdom Advisors.

Martinez never had anything to do with the investment which Mr. Smith made. Martinez did not have access to the funds or the trading records. (13RT 2082.)

He did not recall when Mr. Lee was substituted out with respect to trading with Brian Smith's investments.

Martinez did remember at some point when Josh Nyland was trading Mr. Smith's account. Mr. Martinez remembered the losses Brian Smith suffered on his account and Smith asking who was trading his account. Martinez and Romero spoke with Nyland and asked him to contact Mr. Smith to explain himself and they had a subsequent conversation about that and Martinez was not a participant in that conversation. The information Martinez received might have come from

Romero or from Nyland. (13RT 2083.)

Martinez remembers Daniel Romero and himself meeting with Mr. Smith at McDonald's. Brian Smith was very angry and upset with Josh Nyland and Smith said that Josh Nyland had promised Smith that he would try to help Smith catch up with his losses. Martinez had no role in selecting Josh Nyland as the trader for Brian Smith's investment, it was Daniel Romero.

From Martinez's memory, Mr. Lee was not happy about Brian Smith's losses and Daniel offered Lee to supervise Nyland and thereby be compensated for overseeing Nyland's trading.

Martinez was a participant in discussions at which this modification was discussed. He can't remember the dates; it would've been after the initial losses from Mr. Lee or else Nyland would not have been substituted. Martinez remembered events better than dates. (13RT 2084.)

Mr. Nyland was never successful in trading accounts on behalf of Kingdom Advisors, he never made money. (13RT 2085.)

Martinez was not present at any meeting at which Brian Smith's

participation in TradeCo was discussed. He became aware from Mr. Romero as to Brian Smith's continued involvement with TradeCo. Romero told him that Mr. Smith was going to be investing in the startup of TradeCo. Martinez was not a participant in any negotiations involving Mr. Smith with respect to exactly what he was going to get out of his investment in TradeCo.

At some point Martinez terminated his relationship with TradeCo right after the audit by the NFA. That would have been maybe 2005 or 2006. He severed his relationship with TradeCo because he didn't believe it would be a successful venture. He had "been in relationship with these two gentlemen in trying to do business that just didn't seem to be successful and I just needed to earn a living doing something else." (13RT 2102.)

Martinez had a discussion with Mr. Romero about trying to make good on the losses which had been suffered for investors. Both of them felt bad that people had lost money, in particular friends as well, and that they

wanted to make it up to them. (*Id.*)

After severing his relationship with Kingdom Advisors and TradeCo, he heard from Mr. Romero of an investigation by the CFTC, the commodity futures trading commission. Martinez has never been contacted by the CFTC or interviewed by them; his deposition was never taken, no documents were requested of him. (13RT 2104.)

Mr. Martinez stated that he never, during the course of any of the events which they had reviewed in his testimony, made a knowingly false representation to anyone regarding Kingdom Advisors.

He never knowingly made any misrepresentation to any prospective investor regarding the success of Kingdom Advisors or regarding gains from their investments. He never made any representations to any investor guaranteeing they would not lose their investment. (13RT 2106.)

To his recollection he did not remember ever stating that funds would be safeguarded because of the operation of the stop- loss provision.

The same questions were asked with respect to TradeCo and all

received negative answers.

At one point he advised an investor to withdraw his investment. (13RT 2107.) That was Juan Flores; it was right during or before the National Futures Association (NFA) audit of TradeCo.

Mr. Martinez was concerned about Flores's investment in the startup and Martinez told him he that he didn't think TradeCo would be successful in the long-term. (13RT 2107-2108.)

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED AS THE STATE COURT'S DECISION UPHOLDING THE TWO CONVICTIONS OF COMMODITIES FRAUD IN THIS CASE IS BASED ON AN UNREASONABLE HARMLESS ERROR- BEYOND- A- REASONABLE- DOUBT RULING DUE TO THE LACK OF A SCIENTER OR "GUILTY KNOWLEDGE" INSTRUCTION

Appellant reiterates that only two charges of commodity fraud are in issue for Robert Smith (Count 9) and Brian Smith (Count 10). The evidence that somehow appellant defrauded those two persons is not only

insufficient, it simply does not exist. Brian Smith testified that he invested in Forex because it was doing so well in the early stages of his investments of Robert Smith's money. He never relied on ANYTHING that appellant Martinez said and he had enough experience in Forex to know it was an very risky investment, at the top of the risk pyramid.

Appellant re-asserts, in this petition for rehearing, what the CCA already conceded as constitutional error, the failure of the trial judge to instruct the jury on the scienter, or "guilty knowledge" of any fraudulent scheme.

But the CCA found that error to be harmless beyond a reasonable doubt on the basis of alleged falsehoods by appellant that Forex was profitable. There were no falsehoods. Forex *was* profitable in the early stages of Brian and Robert Smith's investment as Brian testified.

But how did the CCA get around the hurdle of the trial judge making a favorable credibility ruling of appellant after appellant testified? It was easy. The CCA simply ignored that credibility finding and made one of

their own, that appellant was a liar.

Here is what the trial judge said about appellant after all the evidence was in, verdicts rendered and post trial motions being argued:

To set the stage for the judge's credibility ruling, the prosecutor made the statement: "Well I did not find Mr. Martinez that credible."(18RT 3023.) And the trial judge, who had listened to weeks and weeks of testimony including that of Mr. Martinez responded as follows, *at length*:

The Court: I did.

The Court: The Court did. Here's the reason why. This is where, once again, I think the Court disagrees with the People's assessment. Mr. Martinez was nothing more than, basically, almost a person who was picking up the phone. He reported to Mr. Romero. And I will tell you, the Court has always viewed Mr. Romero and Mr. Lee different from Mr. Martinez and Ms. Strickland.²they were in different camps, so far as the court was concerned. One, contrary to what I understand the People saying, I did find Mr. Martinez, frankly, to be credible. I did. He was nothing more than somebody whose name was used by Mr. Romero. And in fact, Mr. McCabe is right. When Mr. Martinez began hearing from people about what was going on, he's the only person who acted to basically tell investors—I think he told one investor, "Get out." He

²Charges against Ms. Strickland were dismissed at the close of the prosecution's case.

didn't gain from this financially.

And so it is true—and I know there that was really—it it's interesting in this case. The People really—because they didn't have much else, really had to basically say, well, his name is on these documents, to really support your entire theory as to why he's guilty. And frankly, the only reason why his name was on these documents is because Mr. Romero pretty much put the paperwork together and said, "sign it." And he did.

I made the comment before, he did not have the inner workings and inner knowledge that Mr. Romero had and Mr. Lee had. He was really on the outside. When he did have knowledge, he basically spoke out.

(18 RT 3024)

The CCA at pages 32 and 33 (1ER53-54) conclude the conceded error of lack of a *mens rea* instruction was harmless because "Romero, Martinez and Lee knowingly made false reports and omitted to correct misleading statements to their victims". But there is no mention in the opinion that the only "victims" in the two counts, 9 and 11 were the Smith investors and that Brian Smith testified he knew exactly what he was investing in, very risky FOREX and could point to no misrepresentations by Martinez at all.

In the middle of page 32, the CCA lumps Martinez in with “the defendants”.

At page 33 (1ER54) of the CCA is a flat false statement that in 2004, when the meeting with Brian Smith occurred, the FOREX investment was not profitable. Smith’s testimony, set forth at pages 49-51 of the opening brief, shows that was totally a false statement by the CCA. The profitable returns encouraged Brian Smith to tell Bob Smith to invest more money in FOREX. The record set forth above shows that stop losses were abandoned by Nyland, the novice trader and catastrophic losses resulted. In the middle of page 34 (1ER55) of the CCA opinion again appears the statement the defendants knowingly made material misrepresentations and omitted to state material facts which would have made their “not misleading”. Again petitioner is lumped in with “defendants” and there is nothing to support the conclusion he misled Brian Smith who in turn misled Bob Smith to invest in FOREX, Brian Smith’s testimony made that clear.

A. Appellate Courts Cannot Second -Guess a Trial Court's Credibility Findings

The law could not be more clear as to the above proposition. *People v. Martinez*, 127 Cal.App. 4th 1156, 1162 (2005). “Because we cannot second-guess the trial court’s credibility findings, we are obligated to assume the court disbelieved Martinez’s³ testimony...”

No reviewing court can second guess a trial court’s credibility finding because the trial court sees the witness testify, hears the witness testify, sees the emotions of the witness and all those other indicia of truth or falsehood which a cold record cannot convey.

The CCA statement at 1ER53-54 that the “defendants”, lumping appellant in with the major players in the FOREX investments, knew the FOREX investments were losers when Brian Smith was at a meeting to decide to invest, not only was unreasonable, it was flat out false. Smith knew that FOREX was very, very risky and if others had lost money that was to be expected in a risky investment. He testified as a matter of fact

³ A different Martinez

that on a pyramid of risk, FOREX was at the top. (7rt 9223-23.)

Essentially, to put this writer's own label on Forex, it was the Emperor of all Risk.

That was clearly stated by Brian Smith, the "victim" of Count 10, the only other commodity fraud charge in issue here and the prime mover behind Robert Smith's investment.

Brian Smith testified he convinced Robert Smith to invest \$100,000 from Bob Smith and for three or four months in the latter part of 2004 and early part of 2005 he made 6% a month and Brian Smith was paid a commission. These results validated to Brian Smith what he had been told. 7RT 941-942; 7SER933. He told Bob Smith to "hang in there". 7RT 947; 7SER938.

The problem with both the CCA opinion is that it seems to be totally ignored that appellant Martinez was only convicted of the Robert Smith and Brian Smith counts. As pointed out in the trial testimony at 7RT941-42, it was Brian Smith's four or more months of *success* with Kingdom

Advisors which caused him to ever increase his friend Robert's stake in what he knew was the riskiest of all investments, FOREX.

Here is where 2254(d) (2) is applicable, in this issue of lack of scienter.

In *Rodriguez v. McDonald*, 872 F.3d 908 at 919 the Ninth Circuit found an unreasonable determination of the facts overrode that CCA presumption of correctness. That court stated at page 919 "Accordingly, this court is bound for the most part by the factual findings of the California Court of Appeal and the Los Angeles County Superior Court, as those *findings are based on those credibility determinations....*(emphasis added.)

As pointed out in the excerpt of the discussion between prosecutor and trial judge above, the trial judge believed appellant Martinez and said so at length.

The judge believed appellant's sworn testimony before the jury about how there was no siphoning of money to his account, those were his paltry payments for many months of employ.

Those credibility rulings cannot

CONCLUSION

Certiorari must be granted in this case because the lack of a scienter instruction, for this appellant's jury, with these facts, makes appellant a poster boy for the absolute need of a jury to decide whether he had guilty knowledge of false representations to Brian Smith. That Brian Smith, who was so eager to invest other people's money and get paid for it, that his eagerness, through his candid testimony, fairly jumps off the reporter's transcript page.

This case is additionally nationally important because a state appellate court overrode and disregarded a trial judge's extensive credibility findings which, with the testimony of the "victim" Brian Smith, exonerated appellant from those two counts of commodity fraud.

Additionally, one does not have to be a stock market expert to know that stop losses are used regularly and not the evil falsehood portrayed by the CCA.

The catastrophic losses only occurred when the new trader on the block took off those stop loss guards and got deeper and deeper in the hole trying to regain the massive losses being suffered in early 2005 after the earlier gains.

One can just picture the pandemonium in his brain as he looked up at the board and saw the money disappear.

There might have been a civil case of negligence here against the co-defendants but certainly not the criminal case against this office boy/clerk, appellant Martinez.

Certiorari should be granted.

Respectfully submitted,
/s/ Charles R. Khoury Jr.
Appointed counsel for appellant

October 5, 2020

IN THE
SUPREME COURT OF THE UNITED STATES

MARTINEZ v. GONZALEZ

PROOF OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and not a party to this action and that on this 5th Day of October 2020, a petition for In Forma Pauperis Status and petition for Certiorari with volume of exhibits, were e- mailed to the email of counsel for the Respondent ryan.peeck@doj.ca.gov

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

Respectfully submitted,
/s/CHARLES R. KHOURY JR.

Executed on October 13, 2020

By: _____
/S/CHARLES R. KHOURY JR.
Attorney for PETITIONER