

Gerald M. Calmese, Petitioner

Vs.

State of Arizona,

Respondent. Appendix Index.

Appendix A: Supreme Court of Arizona Order.

Appendix B: Motion for Special Action

Appendix C: Supreme Court of Arizona Order

Appendix. D: Motion for Special Action

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# Appendix

## (A)

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SUPREME COURT OF ARIZONA

GERALD M. CALMESE,	)	Arizona Supreme Court
	)	No. M-21-0029
Petitioner,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR2010-008080-001
STATE OF ARIZONA,	)	
	)	<b>FILED: 05/19/2021</b>
Respondent.	)	
	)	
	)	

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O R D E R

Gerald Calmese has filed a petition for special action claiming that "there was insufficient evidence presented in the fraudulent schemes and artifices count." Mr. Calmese raised that issue in his appeal. See State v. Calmese, 1 CA-CR 12-0328, 2013 WL 1741713 (Ariz. App. Apr. 23, 2013). The Court of Appeals affirmed Mr. Calmese's conviction and he did not seek review in this Court. Therefore,

IT IS ORDERED that the petition for special action is dismissed.

DATED this 19<sup>th</sup> day of May, 2021.

\_\_\_\_\_/s/  
JOHN R. LOPEZ IV  
Duty Justice

TO:

Gerald Melvin Calmese, ADOC 074142, Arizona State Prison, Tucson -  
Winchester Unit

# Appendix

## (B)

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GERALD M. CALMESE  
ADC074142  
PO BOX 24401  
TUCSON AZ 85734

THE SUPREME COURT OF  
ARIZONA  
CASE NO: CR2010-00800-001

STATE OF ARIZONA  
RESPONDANT  
V.

GERALD M. CALMESE  
PETITIONER

**ARIZONA SUPREME COURT**

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**PG. 1**

**SPECIAL ACTION RULE 4**

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Now comes the petitioner pursuant to Arizona Rule of Special Action Procedures Rule #4. Who hereby files this complaint and petition, seeking relief and redress under A.R.S. § 8-416. § 12-811, to place the above agents and agencies of the State of Arizona on notice. And complies with the Constitutional mandate of Ariz, Const. Art IV/ part 2.

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## Jurisdiction \_\_\_\_\_

Jurisdiction is established with this court, THE Supreme Court of Arizona-by Arizona Constitution and Arizona Law.

The petitioner/plaintiff holds that Arizona Supreme Court is the only court in which his claim can be bought, because it's a matter of Statewide importance. Moreover, with the creation of The Special Action, it has replaced the extra ordinary Writs of A.R.S 13-3961. Subsection C. and Arizona Rules of Criminal Procedures Rule 32. See Davis v. Winkler, 164 Ariz, 342, 793 P.2d99, 51 Ariz, App, Lexis 5(Ariz.Ct.App.1990). And because the Arizona Supreme Court is Versed with Original Jurisdiction of all Extra Ordinary Writs by Ariz, Const, Article 6 section 5 (1). This is the only Court the petitioner has a Constitutional right to be heard by. The petitioner/plaintiff would invite a deprivation of his Constitutional Rights, should be pursue any action by means of the Superior Court. With the court rule 32 or 33 post-conviction relief. Any type of Application or request for relief-however titled- must be treated as a Petition for post-conviction relief, which would allow dismissal of the application Under Ariz. Rules of Crim.Proc.,32.3 or 33.3. And this would be an unnecessary delay. One invited by the petitioner, in violation of Ariz. Const Art 2 section 11. Because by Rule, the Court could preclude or dismiss the petition for being In violation of the 90-day time limit for filing a notice. The petitioner/Plaintiff Also contends that a special action before the Appellate Court would not vindicate his constitutional rights to an unnecessary delayed administrative of justice. With Arizona Appellate Court's jurisdiction being defined by law. See Ariz. Const Arti 6 section 9. It would view the conviction, sentence and judgement of the court according to the law in which the court assumed it could prosecute

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under. And not according to judicial legislation, as defined by all ruling of the Supreme Court of Arizona. And therefore, that jurisdiction would be the wrong means to seek relief. Moreover, according to law, A.R.S. 13-4036 The Supreme Court is ordered to correct a judgement of conviction or sentence. Or may make Any order which is consistent with justice and the rights of the state and the defendant.

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## Statement of The Case

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On December 14, 2010, a Maricopa County Grand Jury Indicted petitioner Gerald Melvin

Calmese, on eight counts of Fraudulent Schemes and Artifice (count 1), and Theft of a Credit

Card by Fraudulent means (counts III, IV, VI, VII, VIII) and Aggravated Taking Identity of

another (count V). R.O.A. at 1, State alleged petitioner committed the offenses (which involved

six victims) on or between February 1, 2009 and September 27, 2010 for pecuniary gain and in

an especially cruel and heinous manner. ID. RT 01-26-2010 pg. 18. After an unsuccessful

settlement conference, petitioner proceeded to trial on January 18, 2012. On January 26, 2012

, the jury returned guilty verdicts on counts I, III-VIII and hung on count II. ID., pg. 15, 16.

Petitioner stipulated to the State's aggravating factor, pecuniary gain and admitted he had five

prior convictions. ID., pg. 4, 19. On May 9, 2012, the judge sentenced the petitioner to serve a

presumptive sentence of twenty years on count I, the maximum of six years on counts III, IV,

VI, and VIII and the presumptive term of fifteen years imprisonment on count V. RT 05-09-2012

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pg. 26-28. The judge order counts I and V to run concurrently with each other and with the

consecutive terms imposed in counts III, IV, VII and VIII. ID,. pg. 28.

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## ARGUMENT

THE EVIDENCE IS LEGALLY INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THE REQUIRED ELEMENTS FOR THE COUNT OF FRAUDULENT SCHEMES FOR WHICH HE WAS CONVICTED.

### ***Standard of Review:***

This Court reviews the sufficiency of the evidence *de novo*. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). The evidence is viewed in the light most favorable to upholding the verdicts and resolve all conflicts in the evidence against the defendant. *See State v. Girdler*, 138 Ariz. 482 (1983). This Court does not reweigh the evidence or determine the credibility of witnesses. *State v. Williams*, 209 Ariz. 228 (App. 2004).

The convictions will be not reversed unless “there is a complete absence of probative facts to support the conviction[s].” *State v. Scott*, 113 Ariz. 423 (1976). “To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury.” *State v. Arredondo*, 155 Ariz. 314 (1987). Sufficient evidence may be either direct or circumstantial, and may support differing reasonable inferences. *State v. Anaya*, 165 Ariz. 535 (App. 1990).

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Sufficient evidence may be either direct or circumstantial and may support differing reasonable inferences. *State v. Anaya*, 165 Ariz 535 (App. 1990).

The trial court is required to enter a judgment of acquittal before the verdict if there is no substantial evidence to warrant a conviction if there is no substantial

evidence to warrant a conviction. *State v. Davolt*, 207 Ariz. 191 (App. 2000).

And if the conviction is based upon a record lacking any relevant evidence of a crucial element of the offense charged, it is constitutionally invalid. *Jackson v. Virginia*, 443 U.S. 307 (1979). And *State v. Watson*, Ariz (2020).

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***Discussion:***

This Court should find that there was insufficient evidence presented in the fraudulent and schemes and artifices count pursuant to the Arizona Supreme Court's holding in *State v. Johnson*, 179 Ariz. 375 (1994), because Calmese made no false representations or pretense to acquire the money from any of the six alleged victims.

A.R.S. § 13-2310 provides that a person violates that statute if the person, "pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises, or material omissions." To establish a violation of § 13-2310, the State must first prove the existence of a scheme to defraud, for example, "some plan, device, or trick to perpetrate a fraud".

*State v. Hass*, 138 Ariz. 413, 423 (1983), quoting *State v. Stewart*, 118 Ariz. 281, 283 (App. 1978). It must then prove that the defendant, knowing the purpose of the scheme, obtained a benefit pursuant to the scheme by means of false or fraudulent pretenses. *State v. Bridgeforth*, 156 Ariz. 60, 64 (1988). The criminal conduct punishable under § 13-2310 is the scheme to defraud, not solely an act committed in furtherance of the scheme. See *State v. Suarez*, 137 Ariz. 368, 373 (App. 1983).

Employee theft does not always constitute fraud, even if committed pursuant to a plan and even if a benefit is obtained." *State v. Johnson*, 179 Ariz. At 381. In *State v. Johnson*, the Arizona Supreme Court reversed a defendant's

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Conviction for fraudulent schemes and artifices artifacts obtained upon evidence obtained upon evidence that the defendant had used a company gas card for personal gain entrusted to him for company use only. The Court explained The difference between theft by embezzlement and fraudulent schemes and Artifices:

Thus, we contrast the fraud statute with the theft statute, A.R.S. §13-1802. Particularly relevant is §13-1802(A)(2). Which codifies common-law embezzlement. Theft by embezzlement occurs when a person “converts for an Unauthorized...use.” *Id.* This, of course, is the essence of employee theft.

The State relies on the classic element of embezzlement –trust arising from The employment relationship—to argue that whenever employer Trust is Violated, the misrepresentation element of fraud is satisfied. We disagree. There is a difference between fraud and theft. Although breaching a trust Relationship may lead to fraud; it does not do so unless the distinguishing Element of fraud is present. See *Parr v. United States*, 364 U.S. 370.393-94, 80 S.Ct. 1171,1185,4 L.Ed.2d 1277(1960) (holding that commission of Embezzlement did not establish mail fraud conviction). *Johnson*, 179 Ariz. 378-79

In establishing the difference between theft by embezzlement and Fraudulent schemes and artifices, the Court clarified that the betrayal of Implicit trust is insufficient to elevate a theft by embezzlement charge into a fraudulent schemes and artifices charge; rather, the State “must prove specific facts showing that defendant obtained some benefit ‘by means of pretense. “*Johnson*, 179 Ariz. At 379(quoting *Hass*,138Ariz.At423).

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Here, the petitioner arguably received two different benefits:

The first, the credit card and/or credit card numbers that permitted him to obtain various purchases without the owner's consent, the second the items themselves. The question for this court's consideration is whether petitioner's Actions misled his victims in some way to induce them to give him the cards and/or the items purchased. The State produced no such evidence. In fact, in several instances, the victims testified that the petitioner fostered a relationship with them through online 'chatting' sometimes for months before actually meeting in person. RT 03-07-2012 pg.10. Further, that petitioner used various aliases with his victims had nothing to do with their willingness to give him their credit cards. In fact, some of the victims loaned him cash based on his representations that he suffered a temporary financial hardship that had nothing to do with his false identity. Further, the state offered no evidence that petitioner lacked conviction in his relationships with the women, or that he was insincere in his communications with each online. In short, his romantic interests had nothing to do with his later thefts of victim's credit cards. The State failed to prove a fraudulent scheme and therefore the court erred within its findings of guilt.

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II. This Court Should Grant Review Because the Court Incorrectly Decided an Important Issue of Law

(B). The Superior Court Imposed an Unlawful Double Punishment by Sentencing Petitioner to a Consecutive Term on the Theft of a Credit Card by Fraudulent means (counts III, IV, VI, VII, VIII)

(1) The Theft of a Credit Card by Fraudulent means offenses Constituted a Single Act for sentencing Purposes.

(2) Imposing a Term of Consecutive Constitutes a Sentence Under A.R.S. § 13-116.

The petitioner was sentenced to the maximum of six years on counts III, IV, VI, VIII theft of a credit card by fraudulent means. The judge ordered counts I and V to run concurrently with each other and with the consecutive terms imposed in counts III, IV, VII and VIII. ID., pg. 28. The double jeopardy clause of the United States and Arizona constitutions protects criminal defendants from multiple prosecutions and punishments for the same offense. U.S Const. amend. V Ariz. Const. art. 2, § 10 see State v. Eagle, 196 Ariz. 188, 190, 5, 994P.2d 395, 397 (2000) (federal and Arizona double jeopardy clauses generally provide the same protection). Because greater and lesser-included offenses are considered the "same offense," the double jeopardy clauses forbid the imposition of a separate punishment for a lesser crime when a defendant has been convicted and sentenced for the greater offense. see Illinois v. Vitale, 447 U.S. 410, 421, 100 S.Ct 2260 65 L.Ed 2d (1980) State v. Garcia, 235 Ariz 627, 629, 5, 334, P.3d 1286, 1288 (App 2014) State v. Chabolla-Hinojosa, 192 Ariz 360, 362-63, 10-13, 965 P.2d 94, 96-97 (App 1998).

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Statutorily, as in the case at hand, the prohibition of multiple punishments for the same act is codified in A.R.S § 13-116, which provides: " An act or admission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Arizona uses the identical elements test to determine whether a " constellation of facts" constitute a single act which require concurrent sentences.

Under the facts of this case, the fraudulent schemes and artifices offense was the ultimate charge concerning each victim the underlying theft of a credit card charges stem directly from the petitioner's scheme to obtain the pecuniary gain from the victims' by creating the false pretense. The State, in the exercise of its broad charging discretion, chose to charge the petitioner with a single count of fraudulent schemes that encompassed every theft of a credit card he committed. *State v. Peltz*, 242 Ariz. 23, 27 8, P.3d 1215, 1219 (2017) *State v. Via*, 146 Ariz, 108,116, 704,P.2d 238, 246 (1985). ( "[W]here numerous transactions are merely part of a larger scheme, a single count encompassing the entire scheme is proper"). The court must now subtract the evidence necessary to satisfy the elements of the ultimate charge and determine whether the remaining evidence can meet the statutory elements of theft of a credit card, which proof that (1) Petitioner knowingly (2) controlled property of another (3) with the intent to deprive the other person of such property, A.R.S. § 13-1802 (A) (1). Considering the elements of each offense and the facts surrounding both the theft of a credit card and fraudulent schemes and artifices crimes, there is insufficient evidence to

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convict the petitioner of theft of a credit card once the evidence necessary to convict him of fraudulent schemes and artifices charge is subtracted. Under the facts of this case, the petitioner obtained control of the victims' credit cards at the same moment he received a pecuniary gain through his false pretense and misrepresentation. Thus, because the state would be unable to prove theft of a credit card without the evidence required for fraudulent schemes and artifices, the first prong of Gordon test. See *State v. Watson* 459, Ariz P.3d 120 (2020). In this case, the second and third prongs of the Gordon test did not satisfy. Watson could not have obtained the funds from the victims' accounts using fraudulent schemes and artifices without simultaneously committing theft. *Gordon*, 161, ariz., at 315, 778, P.2d at 1211. as for the third prong, the harm to the victims caused by the thefts--that they were deprived of thier property--is the same harm they suffered as a result of the fraudulent schemes and artifices. Based on how the State charged the offense in this case, the petitioner committed a single crime resulting in the commission of a series of crimes. The consecutive term for the theft of a Credit Card charge was, therefore, unlawful double punishment. Under *Watson*, the review of the sentencing proceedings left them unable " to determine ... that the trial court would have imposed the same sentence if it had been aware that consecutive sentences were not available," with that said the appeals court vacated all of Watson's felony sentence and remanded for resentencing. *State v. Viramontes*, 163 Ariz, 334, 340 778, P.2d 67 , 73 (1990).

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### **III. The Use of Prior Convictions**

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The Arizona Supreme Court of Arizona held " a rebuttable presumption" of regularity attaches to prior convictions used to enhance sentence or as an element of a crime. 200 Ariz, 27, 1, 21 P.3d at 846. In holding, the court explained the new procedure to be followed When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime, the State must first prove the existence of the prior conviction. At that time, presumption of regularity attaches to the final judgement. If the defendant presents some credible evidence to overcome the presumption, the State must full fill its duty to establish that the prior was constitutional obtained. See State v. McCann, 200 Ariz 27, 21, P.3d 84 (2001)

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The petitioner was denied the substantive Due Process right created by Gideon to challenge the sentencing guidelines in which the court used to impose the maximum sentence. The process of A.R.S. § 13-703 (p) unconstitutional.

A.R.S. § 13-703((p) mandates that the court informs the parties of its intentions to sentence the defendant to an aggravated or mitigated sentence under H,I, or J of the sentence guidelines. However, the wording goes to negate its previously expressed wording by claiming if the court fails to inform the parties, a party waives its right to be informed unless the party timely objects at the time of sentencing.

When a legislated law creates a right, accompanied by procedural provisions for implementing it, such as the right to be informed of the court's intentions upon aggravating, mitigating or qualifying the accused for an elevated sentencing guideline. The Statutory procedure must be regarded as Rules of The Supreme Court of Arizona, until promulgated by the court. And when so promulgated, The Supreme Court Rule takes precedence over the previously prescribed statutory procedures.

When we look into the origins of the Ariz. Rev. Statute 13-703, The Supreme Court of the United States has a long since held the statute unconstitutional. In as far as it permits the court to find aggravating factors that permit imposing a sentence above the maximum provided by law. which in this case would be the presumptive sentence of the substantive crime. In looking to sentence the petitioner to any time beyond the presumptive sentence of category H, Gideon rights apply. And the court is required to provide the petitioner the procedural safeguards of Gideon v. Wainwright, 372, U.S, 335, 83 S.ct. 792, 9 L.Ed. 2d 799(1963).

The procedural safeguards of Gideon are held to be constitutional rights. In State v. Smith, 203 Ariz, 75, 50 P.3d 825, 379 ariz. Adv. Rep 19T 38-39 (2002). This court held that section 13-703 provides on objective standards to guide the sentencing judge in weighing the

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aggravated and mitigating circumstances and therefore violates the Eighth and Fourteenth Amendments of The United States Constitution and Article II, section 15 of the Arizona Constitution. What's more, the fact that an allegation of a prior conviction enhances a defendant's punishment, means it is considered to be an aggravated offense because it is a repetitive offense. *State v. Pendergroft*, 124 Ariz. 449, 604, P.2d 1160, 1979 Ariz. LEXIS 641 (Ariz. Ct. App. 1979). The aggravated nature of the prior conviction is an integral part of the enhancing statute, and the failure to have the State prove that the enhancement may not be waived by failure to object. *State v. Brydges*, 134 Ariz. 59, 653, P.2d 707, 1982 Ariz. App LEXIS 552 (Ariz. Ct. App. 1982)).

With review of the allegations set forth in the record. The trial court failed to inform the defendant of its intentions to sentence the defendant under H, I or J of the sentencing statute. In doing so, the defendant was denied the right to timely object to sentencing guideline enhancement. This violates the requirements of *Gideon v. Wainwright*. Which demands that a defendant be given a right to challenge the Constitutionality of the alleged prior conviction. Neither does it allege that the priors used for enhancement, qualify in accordance with *Burgett v. Texas* or *United States v. Tucker*, 404 U.S. 443, 92 S.Ct 589, 30 L.Ed. 2d 592 (1972) Or even *Strickland v. Washington*, 446 U.S. 668, 104, S.Ct 2052, 80 L.Ed. 2d 674 (1984). Because those requirements were not said to be met. The court abused its discretion to find that they are met. Especially when evidence of Constitutional firmness of those priors has not been presented before it.

The court cannot use an unconstitutional court rule to circumvent this judicially legislated procedure under Ariz. Rules of Crim. Proc. 17.2. The court was required to advise the petitioner

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of his rights upon the finding of guilt, and how he would be open to a stiffer and harsher punishment by admission to those prior convictions. Because the colloquy did not comply with this rule; the stipulation of the prior offense was defective. *State v. Osborn*, 220 Ariz, 174, 550 Ariz. adv. Rep, 3, 204 P.3d 432, 2009 Ariz, App. LEXIS 22(Ct. App 2009).

The trial court's failure to engage in a colloquy with the petitioner was fundamental error, for which relief is appropriate. and because this prejudiced the petitioner because he knew nothing of the prior alleged. Nor could he create a defense to the allegation set forth. This caused the petitioner to be sentenced to a maximum instead of the presumptive. Which in all the substantive crime, Fraudulent schemes and Theft of a credit card carries without being aggravated. See *State v. Carter*, 216 Ariz, 286, 511, Ariz, Adv. Rep. 3, 165 P.3d 687, 2007 Ariz , App LEXIS 163(Ct. App, 2009). The petitioner's sentence is illegal.

## Conclusion

The U.S. Constitution Article 4 holds that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And Congress may by general laws prescribe the Manner in which such Acts Records, and Proceedings shall be proved and the effects thereof.

When looking into this Constitutional mandate. It is clear that any judicial proceedings commenced out-side of those prescribed by The State can't be given full faith. Nor can a mistake of law, or error of fundamental magnitude be waived or the doctrine of laches be attached to glean over the error. This is because a court lacks discretion to make a legal error, *Long v. Carvo*, 131 Ariz, 216,217, 639P.2d 1041, 1042(App 1981)

There is an amalgam of issues that require relief in a multiple suggestion of forms by procedure. Relief from resentencing to possible vacating of sentence. But because this court is required to correct the illegality of the defendant's sentence by A.R.S § 13-4037. Well petitioner submits this petition before this court without any claims as to what relief is suitable, however, the petitioner invokes his right to be present at any hearing held by this court...

For the reasons stated, Calmese asks that based upon the record before that Calmese's fraudulent schemes and artifices conviction should be reversed and a judgment of acquittal entered.

RESPECTFULLY SUBMITTED this 26 day of July 2021


By GERALD M. CALMESE

A handwritten signature in black ink, appearing to read "G. Calmese", written over a horizontal line.

## Certificate of Service

I hereby certify that am original and a copy of the foregoing motion "Special Action" was mailed to the clerk of The Supreme Court 402 Arizona State Court building. 1501 West Washington Phoenix, Arizona 85007 on this day 18 of Feb 2021.

By

  
\_\_\_\_\_  
Gerald M. Calmese



# Appendix (C)

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SUPREME COURT OF ARIZONA

GERALD M. CALMESE,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

) Arizona Supreme Court  
) No. M-21-0041  
)  
) Maricopa County Superior Court  
) No. CR2010-008080-001  
)

**FILED: 06/28/2021**

**O R D E R**

Gerald Calmese has filed a petition for special action claiming that the "indictment is insufficient as a matter of law" and has defects of "duplicity and multiplicity." Mr. Calmese raised these issues in a Rule 32 petition for post-conviction relief, which the superior court dismissed on May 13, 2016, and a special action to the Court of Appeals, case number 1 CA-SA 17-0149. The Court of Appeals declined jurisdiction and this Court denied review, case number CR-17-0257-PR. Therefore,

IT IS ORDERED that the petition for special action is dismissed.  
DATED this 28<sup>th</sup> day of June, 2021.

/s/

JAMES P. BEENE  
Duty Justice

TO:

Gerald Melvin Calmese, ADOC 074142, Arizona State Prison, Tucson -  
Winchester Unit

# Appendix (D)

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Germán M. Calmes  
Doc no. 074142  
Asst Tucson Winchester  
Po Box 24401  
Tucson AZ 85734

## Arizona Supreme Court

STATE of ARIZONA,  
Respondent.

VS.

Germán M. Calmes,  
Petitioner.

CR-2010-00808-001  
1 CA-CR 12-0328

SPECIAL ACTION  
EXTRAORDINARY WRIT

The Petitioner, Germán Calmes, hereby  
Petition the Court and Ask this Court to Grant  
Relief for Foregoing Reasons. Pursuant to  
16.6 (b) of Ariz. R. Crim. Proc. which states  
that a Defendant's the Court shall order  
that a Prosecution be Dismissed upon finding  
that the indictment, information or Complaint  
is insufficient as a matter of law.

ADDITIONALLY, THIS COURT HAS JURISDICTION PURSUANT TO ARIZONA CONSTITUTION, ARTICLE 6 SECTION 9, RULE 4(m) OF THE RULES OF PROCEDURE FOR SPECIAL ACTIONS, AND A.R.S. § 12-120.21 (1992). THIS IS A STATUTORY SPECIAL ACTION IN VIOLATION OF A.R.S. 21-406 AND CRIMINAL CODES, § 13-2702 (SUPP 1997).

THIS PETITION FOR SPECIAL ACTION IS SUPPORTED BY THE ATTACHED MEMORANDUM OF POINTS AND AUTHORITIES.

RESPECTFULLY SUBMITTED THIS \_\_\_\_ DAY OF MAY, 2017

BY (s) GERALD M. CALMES  
DEFENDANT - IN PROPRIA PERSONA

### MEMORANDUM OF POINTS AND AUTHORITIES

#### PROCEDURAL BACKGROUND:

ON DECEMBER 14, 2010 A MARICOPA COUNTY GRAND JURY RETURNED AN INDICTMENT AGAINST THE DEFENDANT, 8 COUNTS IN ALL. ALL OF THE COUNTS IN THE INDICTMENT RELATE TO DEFENDANT AS FOLLOWS: COUNT 1: FRAUDULENT SCHEMES AND ARTIFICES, CLASS 2 FELONY. COUNTS 2, 3, 4, 6, 7, 8: THEFT OF GREAT CASH OR

Obtaining a Credit Card by Fraudulent means. A Class 5 felony. Count 5: AGGRAVATED TAKING IDENTITY of Another, A Class 3 felony. (See Exhibit A)

On January 26, 2012, The Jury/Returned Guilty Verdicts on Counts 1, 3, 4, 5, 6, 7, 8 and a hung on Count 2: ID 15 16

### LAW AND ARGUMENT:

(I.) DEFENDANT'S INDICTMENT is insufficient as a matter of LAW, because it failed to ALLEGU the ESSENTIAL ELEMENTS THAT COULD NOT BE CURED BY THE TRIAL COURT, OR PROSECUTION BY AMENDMENT OR THROUGH JURY INSTRUCTIONS. THE SUPREME COURT HAS STATED, THE VERY PURPOSE OF THE REQUIREMENT THAT A PERSON BE INDICTED BY THE GRAND JURY IS TO LIMIT HIS JURISDICTION TO OFFENSES CHARGED BY A GRAND JURY OF HIS FELLOW CITIZENS ACTING INDEPENDENTLY OF EITHER PROSECUTING ATTORNEY OR JUDGE. (See Exhibit A) COUNT 1: FRAUDULENT SCHEMES AND ARTIFICE, in violation of ARS § 13-2310-13-701-13-702 on or between the 1st of Feb 2009 and the 27th day of Sep 2010 Defendant knowingly

obtain benefits from Victor RzaPecki (and/or other). The Indictment failed to allege all victims which is one of the main essentials for the crime for which the Defendant is charged. Failure to do so constitutes a fatal defect, United States v King 587 F.2d 956, 963 (9th Cir 1978); Russell v United States 369 U.S. 749 771.82 S.Ct 1038, 1051 8 L.ed 2d 240 (1962).

On 18th Day of Oct 2011, The State filed a motion to Amend indictment for Typo - Graphical Error. (See Exhibit B). Indictment was amended to all victims on or between the 1st Day of Feb 2009 and the 27th Day of Sep 2010. The State failed to prove elements of the Accuse as Amended, Pursuant to The States motion. Count 1 was amended to allege that on or between the 1st Day Feb 2009 and the 27th Day of Sep 2010 The Defendant committed Fraudulent Schemes Against Victor RzaPecki and each of the other alleged victims, including Robin Fletcher. The evidence presented at trial and not to the Grand Jury showed that Sep 27 2010 was the date The Defendant was first arrested and he did not meet Robin Fletcher until Nov 2010.

(See Exhibit B Pg 2) The State states: 1) Defendant has been on notice that his "fraud" was Against These Victims from the Grand Jury Transcripts and the Police Reports. 2) Every Victim of the Fraud Schemes is also a listed victim in the other charged Accounts of the indictment. The Grand Jury Transcripts never mention other victims (RT Grand Jury CR201000808001 Dec 14, 2010) AS YOU SEE THERE WAS NEVER MENTIONED OF OTHER VICTIM, JUST VICTOR PZEPACKI.

The Amendment to the indictment Required the State to Prove the Defendant Committed the Fraud Schemes Against Robin Fletcher and each of the other Victims on or between the 1st Day of Feb 2009 and the 27th Day of Sep 2010. And because no evidence was offered to sustain the allegation to the Grand Jury with respect to ms Fletcher and each of the other victims within these dates, Defendant argues that it is the duty of both Trial Court and Prosecutor to Review the Indictment for Defects to see if it will hold a Conviction. If not, Resubmit the Indictment back to the Grand Jury. United States v Cruikshank 92 US 542, 558 Led 588.



TO ALLOW THE STATE PROSECUTOR OR COURT TO MAKE A SUBSEQUENT GUESS AS TO WHAT WAS IN THE MINDS OF THE GRAND JURY AT THE TIME THEY RETURNED THE INDICTMENT WOULD DEPRIVE THE DEFENDANT OF A BASIC PROTECTION THAT THE GRAND JURY WAS DESIGNED TO SECURE, BECAUSE THE DEFENDANT COULD THEN BE CONVICTED ON THE BASIS OF FACTS NOT FORN BY, AND PERHAPS NOT EVEN PRESENTED TO THE GRAND JURY THAT INDICTED HIM. RUSSELL, 369 U.S. AT 770 & SET 1038. Jeffers v. United States 392 F.2d 749 752-53 (9th Cir 1968). THE DEFECTS IN DEFENDANT'S INDICTMENT DEPRIVED BOTH THE STATE OF ARIZONA, AND TRIAL COURT OF JURISDICTION TO SENTENCE THE DEFENDANT IN ANY MATTERS IN HIS CASE. AS ALL SAID JURISDICTION IN THIS MATTER IS ILLEGAL AND VOID. NO SANCTIONS CAN BE IMPOSED ABSENT PROOF OF JURISDICTION; Shannon v. Alaska 98 LEd 1511, 74 SET 768 (1954); Baskin v. Lockyer 441 US 471 60, LEd 21, 464 99 SET 1831 (1979).

II) THE STATE PRESENTED INSUFFICIENT INDICTMENT OF DOUBT AND MULTIPLICITY, AND DEFENDANT TO AND COMPEL ELECTIONS ON COUNTS 1, 2, 3, 4, 6, 7, 8

OR IN THE ALTERNATIVE TO DISMISS ALL COUNTS. THE SEPARATE COUNT FOR EACH OFFENSE LANGUAGE OF RULE 8(C) REQUIRES THAT EACH COUNT OF AN INDICTMENT CONTAIN ONLY ONE OFFENSE, AND A SINGLE OFFENSE BE CHARGED ONLY ONCE IN AN INDICTMENT. SEE GENERALLY I.C. WRIGHT FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d SECTION 141 (1982). THE FIRST OF THESE REQUIREMENTS GUARD AGAINST "DUPPLICITY" SEE UNITED STATES V. UCD OIL CO. 546 F.2d 833 835 (9th Cir 1976). DUPPLICITY OCCURS WHEN AN INDICTMENT CHARGES TWO OR MORE SEPARATE AND DISTINCT OFFENSES IN A SINGLE COUNT. SEE; UNITED STATES V. SMITH, F.2d 145357 (9th Cir Dec 4, 1989); U.S. V. Buchman 255 F.3d 415, 423-25 (7th Cir 2001); D'Amico V. U.S., 522 U.S. 1173 (2008); U.S. V. NATTIER, 127 F.3d 655 658 (8th Cir 1997).

III.) THE GUARD AGAINST "MULTIPLICITY" SEE UNITED STATES V. DOUGLAS, 780 F.2d 1472, 1477 n: (9th Cir 1986). MULTIPLE INDICTMENTS ARE GENERALLY IMPROPER BECAUSE THEY MAY PREJUDICE THE DEFENDANT OR RESULT IN MULTIPLE SENTENCE FOR A SINGLE OFFENSE IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE. U.S. CON. AMEND 5.

State v. Powers; 200 Ariz 123 915.23 P.3d 668, 670 (App 2001); U.S. v. Kerley 544 F.3d 172, 178-79 (2d Cir 2008); U.S. v. Miller; 576 F.3d 531 (5th Cir 2009); U.S. v. Parker, 508 F.3d 434, 439-40 (7th Cir 2007); U.S. v. Bonilla, 579 F.3d 1233, 1242-43 (11th Cir 2009); State v. Brown; 217 Ariz 617, 620 917, 177 P.3d 878, 881 (App 2008). Furthermore, the ban on multiplicity protects Defendant's rights under the Double Jeopardy Clause of the Fifth Amendment. Since a Defendant is put in jeopardy whenever he or she is made to stand trial on an indictment charging the same offense in more than one count. See United States v. Reed; 639 F.2d 896, 904 (2d Cir 1981); United States v. Fiore; 821 F.2d 127, 130 (2d Cir 1987). In this case here, the State failed to test whether each charge require proof of a fact which the other does not. And the State uses the same evidence in all charges to convict. This clearly violates the analysis under the test announced by the Supreme Court in Blockburger v. United States, 726 F.2d 546, 547-48 (9th Cir 1984), United States v. Kennedy, 726 F.2d 548. In the Defendant's case, the Defendant submits that counts 1, 2, 3, 4, 6, 7, 8 of the indictment are

"MULTIPLETS". NOTE: The Same Action as All The Counts incorporates by Reference each of The Overt Acts Alleged. Counts 1, 2, 3, 4, 6, 7, 8 Alleged The Same Offense - See; U.S. V. Anderson 872 F.2d 1508 1520 (11th Cir 1989). In This Case The Only Remedy For Sentence Resulting From Multiplicity is To Vacate All Sentence and Remand For Resentencing, 278 F.3d 880 (9th Cir 2002). Blockburger V. U.S.; 284 U.S. 299 304 (1932). In The Defendant's Case, The State Proved every element necessary to obtain a Conviction under Counts 2, 3, 4, 6, 7, 8. Thus all The Counts are Presumed to be The Same offense under Blockburger. It Certainly nothing in The Legislative history of The Export Administration Act Suggest That The Presumption Arising under Blockburger Should be ignored. Therefore, The Court erred in Convicting The Defendant on The indictment with multiplicity which is Illegal Sentence and "miscarriage of Justice". United States V. Reed 639 F.2d 896 904; United States V. Fiore 821 F.2d 127 130 (2d Cir 1987).

#### IV.)

Defendant contends under the Due Process Clause of the Fifth Amendment, the Prosecution is Required to Prove beyond a Reasonable Doubt every Element of the Crime with which a Defendant is charged. See, Sullivan v. LA, 508 U.S. 275 278 (1993). The Statute Protects Three Interests. First, it Protects Defendant's Liberty Interest. See: Winship, 397 U.S. at 363. Second, it Protects from Stigma of Conviction. Id. Third it Encourages Community Confidence in Criminal Law by Giving "Concrete Substance" to the Presumption of Innocence. Id. at 363-64. The Reasonable Doubt Requirement Applies to Elements that Distinguish a more Serious Crime from a less Serious one, as well as those Elements that Distinguish Criminal from NonCriminal Conduct.

Defendant contends the State failed to Prove all elements of Counts 1, 2, 5 in the indictment Beyond a Reasonable Doubt, even with the use of same Evidence. In this instant case, Defendant has focused the specific Factors:

1.) Defendant was charged with six counts of Theft of Credit Card or obtaining a Credit Card by Fraudulent means. Count 2 was hung Dismissed. The victim in Count 2 was named in Count 1 of the indictment and was found Guilty of fraudulent schemes with the use of the same evidence against the Defendant. The basis of the charges was, Defendant commit fraudulent schemes by the means of misrepresentation to steal victims Credit Card. If Defendant is not found Guilty of Theft of Credit Card as in Count 2, how can he be found Guilty in Count 1? So how can the Prosecution have it both ways If Can't, this violates the Due Process clause of the Fifth Amendment of a more serious crime from a less serious one of the indictment.

2.) The elements of the case-in-chief in Count 1 of the indictment, state Prosecution evidence that Defendant misrepresented himself in a fraudulent manner to various women in attempt to steal their Credit Card. (See Appellee's Answering brief) (see RT 1-19-2012 at 31). Defendant contends, how can you Scheme someone you never met? (RT 1-19-2012 at 32).

The Victim Victor RzePcki in Count 1 of The indictment stated he never knew The Defendant And his Credit Card was Absolutely in his Possession (RT 1-23-2012 AT 33, 34, 35). Joe Corrado Another Victim named in Count 1 of The indictment, ALSO states he did NOT know The Defendant OR never met him, (1-19-2012 AT 49-50). So how Can You Convict The Defendant on The Count of Fraudulent Schemes When The basis of Case-in-Chief was to meet women and Gain Their Trust And Steal Their Credit Cards. Finally, The omission from The Jury instructions of any Element that The Prosecution must Prove beyond Reasonable Doubt may Require Reversal of The Defendant's Conviction. See U.S. V. Gaudin, 515 U.S. 506 522-23 (1995). (Court's Failure to Submit issue of materiality to Jury in Prosecution for making false statements Deprive Defendant of Right to Demand That Jury Find him Guilty of Every Element of Crime Charged). Once Again The State Court have it both ways.

3.) With Regard to Count 5. The State Forces to Prove more than one instance of The Defendant Possessing "Personal Identifying Information" as That The Term is Defined

AR ARS § 13-2001 (b) AND 18 U.S.C.A § 1028  
Section 7 (AR ARS 2001 § 8. see United States v. Gaither  
423 Fed Appx 719 2011 WL 996345 (CA 9 (Cal) ).

While The Legislature Could have Defined  
"Personal Identifying Information" AS ANY OF  
The information in The Definition (ARS § 13-2001 (b)  
in ANY Format, The Legislature instead Chose  
To Limit "Personal identifying information" To  
Two Formats: Written Document, AND elec-  
tronic Data. The evidence Presented in Trial  
Did not Suffice To Prove That The Defendant  
Possesses more Than one Written Document  
Containing information of The Type included  
in The Definition.

IV.)

Under U.S. Const. Amend VI. The Sixth  
Amendment Provides That The Jury Guaranteed  
To The Defendant To be impartial. The Trial  
Court is Responsible For ensuring That.  
During The Proceedings, Trial Judge informed  
The Prosecution And Counsel That, "He" Takes  
A Pottery Class With Juror no. 15 (RT 1-23-2016  
AT 4.) The Trial Judge Should Have Recused  
himself Due To A Bias Juror, OR Put An  
Alternative in Place of Juror 15. This Violated  
Defendant's Constitutional Rights To A Fair Trial.



## Conclusion

Based on the foregoing, Defendant  
Respectfully Request That This Court:

1.) Vacate All Counts Based on Facts  
and The Law. And Presentation of Claim.  
See TAYLOR V. MASSACHUSETTS 366 F 3d 992, 1000 (Am Cir 2004)

2.) Find That The Defendants Unconstitutional  
Conviction and Sentence was imposed in  
Violation of The Constitution and Laws  
of Arizona and The United States and must  
be Vacated

Respectfully Submitted This Day of May 2017

By /s/ Gerald M. Calmesca  
Defendant-in Propria Persona

## Certificate of Service

I hereby certify that I am sending original and a copy of the foregoing motion "Special Action - Extraordinary writ" was mailed to The Supreme Court Clerk at Arizona State Courts Building 1501 W. Washington, Suite 402 Phoenix Az 85007 on this 1st day of June 2021

mailed by: \_\_\_\_\_  
Gerald M. Calmes

WILLIAM MONTGOMERY  
MARICOPA COUNTY ATTORNEY

Thomas Marquait  
Deputy County Attorney  
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Telephone: (602) 506-7259  
[mcaomic2@mcao.maricopa.gov](mailto:mcaomic2@mcao.maricopa.gov)  
Firm #: 00032000  
Attorney for Plaintiff

Electronically Filed

OCT 18 2011

Initials: RS

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

v.

Gerald Melvin Calmese

Defendant.

No. CR2010-008080-001

MOTION TO AMEND INDICTMENT FOR  
TYPOGRAPHICAL ERROR

Assigned to the Master calendar

The State of Arizona, pursuant to Rule 13.5, Arizona Rules of Criminal Procedure, moves to amend the Indictment to the following:

- (i) Count 1 should state: GERALD MELVIN CALMESE, on or between the 1<sup>st</sup> day of February, 2009 and the 27<sup>th</sup> day of September, 2010, pursuant to a scheme or artifice to defraud, knowingly obtained a benefit from VICTOR RZEPECKI, LYNN DESTEFINO, JOE CORDOVA, MONICA STRIPLIN, BRITT MORTENSEN, AND ROBIN FLETCHER in violation of A.R.S. § 13-2310, 13-304, 13-701, 13-702, 13-702.02, and 13-801.

MEMORANDUM OF POINTS AND AUTHORITIES

The indictment is a charging document that provides notice to Defendant of the charges against him. An indictment is not evidence. See RAJI Standard Criminal 21. Also, pursuant to Rule 13.5, Arizona Rule of Criminal Procedure:

The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.

Arizona courts are generally quite liberal in allowing amendments, provided that the amendment does not lead to a charge of a different crime. State v. Williams, 108 Ariz. 382, 387, 499 P.2d 97, 102 (1972) (citing State v. Suarez, 106 Ariz. 62, 470 P.2d 675 (1970)). "A technical or formal defect in a charging document may be remedied whenever such defect is presented." State v. Bruce, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). In determining the propriety of amending an indictment to conform to the evidence, the court must consider whether allowing the amendment would violate two important rights of Defendant: (1) Defendant must have been put on notice of the charges against him with ample opportunity to prepare to defend against them; and (2) acquittal of the amended charge must provide a double jeopardy defense to a subsequent prosecution on the original charge. State v. Barber, 133 Ariz. 572, 577, 653 P.2d 29, 34 (App. 1982). Both prongs are satisfied here as these requested amendment is a very minor change to the Indictment that the Indictment, police reports, and accompanying evidence clearly explain. Further, amending the indictment will inoculate defendant from being indicted for fraudulent schemes and artifices against the listed victims in the future, as he will have a double jeopardy defense to raise.

It appears that the indictment in this case simply contains a typographical error. Count 1 currently states that victims of the fraud scheme are Victor Rzepecki "and others". The "and others" was handwritten into the indictment before the grand jury returned a true bill. The indictment should have contained the names of the "others", which are listed in the other counts of the indictment as victims of theft of credit card. Undersigned counsel charged the case, and has reviewed his charging submittal form. It contains the names listed in the proposed amendment above; the legal assistant who actually typed up the indictment simply made a mistake and forgot to include everyone.\* Defendant has been on notice that his fraud was against these victims from the grand jury transcript and the police report, which makes it exceptionally clear that he is charged with conducting a fraudulent scheme against each of these victims.

Significantly, every victim of the fraudulent scheme is also a listed victim in the other charged counts of the indictment. Defendant clearly has notice that he has to defend against his actions involving these victims. The evidence of the fraudulent scheme is the same as the

evidence of the theft of credit card counts. That evidence includes videos and receipts of fraudulent transactions that defendant made with the victims' credit cards. Therefore, defendant would suffer no prejudice from this technical amendment as he has been preparing to defend against the charges that he used these victims' credit cards without their consent for several months.

Amending the indictment would also present defendant with an absolute defense to future indictments from fraudulent schemes and artifices against these victims, as required by Barber. If the amendment is not granted, the State could easily indict defendant for that crime against each of the victims. Allowing the amendment is actually to his benefit as it precludes the State from indicting him for that crime again after being tried in the case at bar.

Defendant has more than adequate notice of what his charges are and the elements that the State must prove from the police report and the grand jury transcript. The indictment, as it stands now, does not correctly reflect the proper names of the victims, but that is simply a typographical error. A defect may be considered formal or technical when an amendment of the indictment does not change the nature of the offense or prejudice the defendant in any way. Id. (where an amendment to the indictment that corrected the name of the corporation involved in the securities transaction did not change the nature of the offense involved, there was no prejudice to the defendant in granting the motion). Here, the proposed amendment does not change the nature of the offense or prejudice the defendant, and accordingly, is a technical and/or formal amendment. Defendant certainly cannot point to any prejudice suffered.

For these reasons, the State respectfully requests that this Court grant its Motion to Amend the Indictment.

Submitted October 18, 2011

WILLIAM G. MONTGOMERY  
MARICOPA COUNTY ATTORNEY

BY /s/ \_\_\_\_\_  
/s/Thomas Marquoit,  
Deputy County Attorney

Copy of Motion mailed/hand-delivered  
\_\_\_\_th day of October, 2011  
To:

Master Calendar  
Motions Judge

Stephen Mercer, Attorney at Law  
Defense counsel  
P.O. Box 20672  
Mesa, AZ 85277-0672

BY /s/ \_\_\_\_\_  
/s/Thomas Marquoit  
Deputy County Attorney

WILLIAM G. MONTGOMERY  
MARICOPA COUNTY ATTORNEY

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DR 200991431279-Phoenix Police Department

DR 201001273255-Phoenix Police Department

DR 201001660305-Phoenix Police Department

DR 20103230427-Mesa Police Department

CA2010039865

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA

Plaintiff,

vs.

GERALD MELVIN CALMESE aka JERRY ISAHA  
CALMESE

Defendant.

CR 2010 - 008080 - 001 DT

518 GJ 182

INDICTMENT

COUNT 1: FRAUDULENT SCHEMES AND  
ARTIFICES, A CLASS 2 FELONY

COUNT 2: THEFT OF CREDIT CARD OR  
OBTAINING A CREDIT CARD BY FRAUDULENT  
MEANS, A CLASS 5 FELONY

RECEIVED

JAN 11 2011

- ) **COUNT 3:** THEFT OF CREDIT CARD OR
- ) OBTAINING A CREDIT CARD BY FRAUDULENT
- ) MEANS, A CLASS 5 FELONY
- ) **COUNT 4:** THEFT OF CREDIT CARD OR
- ) OBTAINING A CREDIT CARD BY FRAUDULENT
- ) MEANS, A CLASS 5 FELONY
- ) **COUNT 5:** AGGRAVATED TAKING IDENTITY OF
- ) ANOTHER, A CLASS 3 FELONY
- )
- ) **COUNT 6:** THEFT OF CREDIT CARD OR
- ) OBTAINING A CREDIT CARD BY FRAUDULENT
- ) MEANS, A CLASS 5 FELONY
- ) **COUNT 7:** THEFT OF CREDIT CARD OR
- ) OBTAINING A CREDIT CARD BY FRAUDULENT
- ) MEANS, A CLASS 5 FELONY
- ) **COUNT 8:** THEFT OF CREDIT CARD OR
- ) OBTAINING A CREDIT CARD BY FRAUDULENT
- ) MEANS, A CLASS 5 FELONY

The Grand Jurors of Maricopa County, Arizona, accuse GERALD MELVIN CALMESE aka JERRY ISAHA CALMESE, on this 14th day of December, 2010, charging that in Maricopa County, Arizona:

**COUNT 1:**

GERALD MELVIN CALMESE, on or between the 1st day of February, 2009 and the 27th day of September, 2010, pursuant to scheme or artifice to defraud, knowingly obtained a benefit from ~~and/or other~~ VICTOR RZEPECKI, by means of fraudulent pretenses, representation, promises, or material omissions, in violation of A.R.S. §§ 13-2310, 13-701, 13-702, and 13-801.

**COUNT 2:**

GERALD MELVIN CALMESE, on or between the 1st day of February, 2009 and the 29th day of April, 2010, without the consent of LYNN R DESTEFINO, knowingly controlled the credit card of LYNN R DESTEFINO, in violation of A.R.S. §§ 13-2102, 13-2101, 13-1802, 13-1804, 13-701, 13-702, and 13-801.

**COUNT 3:**

GERALD MELVIN CALMESE, on or between the 26th day of August, 2009 and the 27th day of August, 2009, without the consent of JOE CORDOVA, knowingly controlled the credit card of JOE CORDOVA, in violation of A.R.S. §§ 13-2102, 13-2101, 13-1802, 13-1804, 13-701, 13-702, and 13-801.



**COUNT 8:**

GERALD MELVIN CALMESE, on or about the 16th day of November, 2010, without the consent of ROBIN FLETCHER, knowingly controlled the credit card of ROBIN FLETCHER, in violation of A.R.S. §§ 13-2102, 13-2101, 13-1802, 13-1804, 13-701, 13-702, and 13-801.

"A True Bill"  
("A True Bill")

WILLIAM G. MONTGOMERY  
MARICOPA COUNTY ATTORNEY

/s/   
/s/ THOMAS MARQUON  
DEPUTY COUNTY ATTORNEY

TM:sc/OK

Date: December 14, 2010

Mary Johnston  
RAYLENE JOHNSTON  
FOREPERSON OF THE GRAND JURY

# Appendix (E)

---

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

Gerardo Calmes — PETITIONER  
(Your Name)

VS.

State of Arizona — RESPONDENT(S)

**PROOF OF SERVICE**

I, Gerardo Calmes, do swear or declare that on this date, July 16, 2021, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Mark Brondovich  
Arizona Attorney General  
\_\_\_\_\_  
\_\_\_\_\_

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

Executed on July 16, 2021

[Signature]  
(Signature)

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA  
PROCEEDINGS BEFORE THE 518TH GRAND JURY

In re the Investigation of:

GERALD CALMESE.

518 GJ 182

SUPERIOR COURT NUMBER:  
CR 2010-008080-001

REPORTER'S TRANSCRIPT OF GRAND JURY PROCEEDINGS

December 14th, 2010  
Phoenix, Arizona

10 DEC 27 PM 4:24

FILED

MICHAEL JEANES, CLERK  
BY: B. Rios  
DEP

PREPARED BY:

M. LISA EDGAR, R.P.R., C.P.,

CERTIFIED COURT REPORTER

ARIZONA C.S.R. NUMBER 50273

PREPARED FOR:

MARICOPA COUNTY SUPERIOR COURT

ORIGINAL

A P P E A R A N C E S

DEPUTY COUNTY ATTORNEY:

Jon Wendell

518TH GRAND JURY:

Yolanda Fritsch

Elena Lily Gresham - absent

Grand Jury Foreperson Mary Landa

Grand Jury Clerk Richard Toleu

Jameika Manradge - absent

Grand Jury Alternate Foreperson Raylene Johnston

Ellen Charney (replaced J. Ramsey)

Rosemarie Arndt

William Jen (replaced M. Cousins)

Jessica Robles (replaced K. Schuken) - absent

William Sayers, Junior (replaced S. Flores) -  
absent

Katrina Ross

Catherine Bernales

Karen Rocha (replaced S. Madrid)

Stephen Locklin, Senior (replaced K. Haman)

Todd Daniels (replaced I. Allen) - absent

1 MR. WENDELL: This is 518 Grand Jury Number 182.  
2 This is the investigation of Gerald, G-e-r-a-l-d, Melvin  
3 Calmese, C-a-l-m-e-s-e, also known as Jerry, J-e-r-r-y, Isaha,  
4 I-s-a-h-a, Calmese, C-a-l-m-e-s-e, for the alleged offenses of  
5 fraudulent schemes and artifices --

6 GRAND JUROR FRITSCH: Say again.

7 ~~MR.~~ MR. WENDELL: -- fraudulent schemes and artifices  
8 is alleged to have occurred on or between February 1st and  
9 September 27th -- I'm sorry -- on or between February 1st, 2009  
10 and September 27th of the year 2010, involving alleged victim  
11 victor -- see, this one would even blow you away I'm sure --  
12 R-z-e-p-h-e-c-k-i -- Rzephecki -- Rzephecki -- yeah, whatever.  
13 That's not a good German name; is it?

14 All right. Also theft of credit card alleged to  
15 have occurred on or between February 1st of 2009 and April 29th  
16 of 2010, the alleged victim being Lynn, L-y-n-n, R. Destefino,  
17 D-e-s-t-e-f-i-n-o, and theft of credit card, alleged to have  
18 occurred on or between August 6th of -- 26th rather, August  
19 26th of 2009 and 27th of 2009, alleged victim being Joe  
20 Corodova, C-o-r-o-d-o-v-a, and theft of credit card, alleged to  
21 have occurred on or about September 6th of the year 2009, the  
22 alleged victim being Monica, M-o-n-i-c-a, Striplin,  
23 S-t-r-i-p-l-i-n, aggravated taking an identity of another  
24 alleged to have occurred on or between August 17th and  
25 September 27th of the year 2010, theft of a credit card-alleged

1 to have occurred on or between August 17th and August 22nd of  
2 the year 2010, again involving alleged victim, Victor  
3 Rzephecki.

4 I don't have to spell it again, do I?  
5

6 THE COURT REPORTER: No.

7 MR. WENDELL: Okay. Theft of a credit card  
8 alleged to have occurred on or about August 20th of the year  
9 2010 involving alleged victim, Britt, B-r-i-t-t, Mortensen,  
10 M-o-r-t-e-n-s-e-n, and theft of credit card alleged to have  
11 occurred on or about November 16th of the year 2010 involving  
12 alleged victim Robin Fletcher, F-l-e-t-e-c-h-e-r.

13 Do any of the Grand Jurors need me to go over the  
14 allegations again since they are fairly lengthy?

15 THE GRAND JURY: (No oral response.)

16 GRAND JUROR ARNDT: You said theft of a credit  
17 card, Monica Striplin, something like that, and then after that  
18 you said identity of another.

19 who does that refer to.

20 MR. WENDELL: Taking the identity of another may  
21 involve a variety of victims. ~~It~~ It's not actually listed in the  
22 ~~Indictment~~ Indictment, those actual victims are, because it can be  
23 numerous.

24 GRAND JUROR ARNDT: Oh.

25 MR. WENDELL: It also can be -- under the statute  
it can be real people or fraudulent people, counterfeit people.

1 GRAND JUROR ARNDT: Okay.

2 MR. WENDELL: So we -- so we tend not to list --  
3 GRAND JUROR ARNDT: Okay. Not one person?

4 MR. WENDELL: Right.

5 GRAND JUROR ARNDT: Okay.

6 MR. WENDELL: Additional questions regarding the  
7 allegations?

8 THE GRAND JURY: (No oral response.)

9 MR. WENDELL: Okay. Let the record reflect that  
10 all of the Grand Jurors are present with the exception of Grand  
11 Jurors Sayers, Robles, Daniels, Manradge and Gresham.

12 To assist you in determining whether or not  
13 probable cause -- probable cause exists in this matter, it may  
14 benefit you to take a look at A.R.S. Sections 13-105, 13-2310  
15 covers fraudulent schemes and artifices, 13-2101, 2102, 1801,  
16 1802 and 1804 cover theft of credit card, and the other  
17 statutes would be 13-2001 and 2009 reference aggravated taking  
18 the identity of another.

19 Now, all of these were previously read to the  
20 Grand Jury with all Grand Jurors present on October 22nd of the  
21 year 2010, and copies of these statutes are available for the  
22 Grand Jury to use in their deliberations.

23 Are there any Grand Jurors who would like to have  
24 any of these statutes re-read or clarified at this time?

25 THE GRAND JURY: (No oral response.)



1 MR. WENDELL: I take it by your silence that is  
2 not the case.

3 We have already discussed the alleged victims.  
4 Your witness today will be Detective Miaso of the Phoenix  
5 Police Department.

6 Those admonitions read to you earlier regarding  
7 persons disqualified from serving as Grand Jurors are  
8 applicable.

9 Are there any Grand Jurors to whom those  
10 admonitions apply?

11 THE GRAND JURY: (No oral response.)

12 MR. WENDELL: I take it by silence that is not the  
13 case.

14 GRAND JURY FOREPERSON LANDA: We are about to  
15 consider the matter of 518 Grand Jury Case 182 and the  
16 investigation involving the individual named.

17 The usual admonition applies.

18 MR. WENDELL: Come, young lady; come. It is time.

19 (CARRIE MIASO entered the proceedings.)

20 DETECTIVE MIASO: I just saw you guys; didn't I?  
21 I will stop here this time.

22 (CARRIE MIASO was duly sworn by the Grand Jury  
23 Foreperson.)

24  
25 CARRIE MIASO,

1 called as a witness herein, having been first duly sworn, was  
2 examined and testified as follows:  
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E X A M I N A T I O N

BY MR. WENDELL:

Q. would you state your name for the record, please?

A. My name is Carrie Miaso, last name is M-i-a-s-o, serial number 7169.

Q. And with regard to your duties, were you involved in the investigation of -- I guess for lack of a better term -- the activities of an individual by the name of Gerald Melvin Calmese dating back into 2009?

A. Yes. Yes, I was.

Q. Now, through your investigation did you find evidence to indicate that Mr. Calmese has been known by other names?

A. Many other names, yes.

Q. Is one of those Jerry Isaha Calmese?

A. Yes.

Q. And is another Quinton, Q-u-i-n-t-o-n, Lewis, L-e-w-i-s?

A. Yes.

Q. Through this investigation did you in fact speak with an individual by the name of the Rhonda Destefino?

A. I -- I personally did not speak to -- to Rhonda.

Q. Did members of your department do so?

1 A. Yes, Rhonda was spoken -- spoken to.

2 Q. And did she advise that she knows an individual by the  
3 name of Quinton Lewis?

4 A. Yes.

5 Q. How is it that she became aware of or met Quinton  
6 Lewis?

7 A. I'm not sure how she actually met him. She said she  
8 met him early in the year of 2009, like February of 2009.

9 Q. Okay. At some point in time in the spring of 2009, in  
10 particular I guess calling your attention go to April of 2009,  
11 did Ms. Destefino believe that Mr. Lewis was involved in the  
12 use of her credit card without her permission?

13 A. Yes.

14 Q. And why is it that she believed that?

15 A. She had some fraudulent charges on her credit card.  
16 The credit card company associated Quinton, in this case  
17 Gerald, with those charges by a phone number and by his own  
18 admissions to the credit card company and also to Rhonda.

19 X He admitted that he had used the -- the credit  
20 card.

21 Q. And aside from -- aside from the admissions that he  
22 made to Ms. Destefino, did investigators -- and I'm assuming  
23 it's investigators from the bank; is that correct?

24 A. I think -- I think that's the fraud investigators from  
25 the bank, yes.

1 Q. Okay. Did they also speak with him on the phone?

2 A. Yes, they spoke with him on the -- or somebody claiming  
3 to be him was on the phone saying, yes, he made those charges  
4 and actually wanted to pay the balance on them. X

5 Q. Okay. Now, with regard to that situation did they do  
6 an investigation?

7 Did that investigator actually do an investigation  
8 with regard to the telephone number of the person that they  
9 were speaking with?

10 A. They -- they had the photo -- the phone number that was  
11 captured on their caller I.D. and that was Quinton's or  
12 Gerald's phone number.

13 Q. Did it actually come back to Quinton Lewis or did it  
14 come back to Gerald Calmese?

15 A. I would not be able to offer testimony on that part.

16 Q. Okay. And did Ms. Destefino eventually identify Gerald  
17 Calmese as being the individual that she knows as Quinton Lewis  
18 out of a photographic lineup?

19 A. Yes, she did.

20 Q. And I'm assuming that the photographic lineup, the  
21 known photograph was that of Gerald Calmese, Gerald Melvin  
22 Calmese?

23 A. Yes.

24 Q. Additionally, does -- or did your department receive  
25 information from an individual by the name of Joe Corodova?

1 testimony on that.

2 Q. Okay. But either the credit card or credit card number  
3 was being used?

4 A. Correct. Yes.

5 Q. And had Joe, during this interview, reported that he  
6 was aware of Mr. Calmese, that he had ever met Mr. Calmese?

7 A. I -- I honestly don't know. I won't be able to offer  
8 testimony on that.

9 I do -- I do know that his card was used, I  
10 believe, at the C.V.S. Pharmacy. While it was being used at  
11 the C.V.S. Pharmacy the pharmacy -- the employee at the  
12 pharmacy grew suspicious of the transaction and was actually  
13 holding the card so that would tell me that the card was in his  
14 possession, in Gerald's possession.

15 Q. Okay.

16 A. Um --

17 Q. Did that staff member of C.V.S. -- were they shown a  
18 photographic lineup including a photograph of Mr. Calmese?

19 A. Yes, they were.

20 Q. Did they identify Mr. Calmese as the individual who was  
21 involved in this particular transaction --

22 A. Yes.

23 Q. -- on the 26th?

24 A. Yes, they did.

25 Q. Now, in your investigation of Mr. Corodova's credit

1 card or credit card number, did you also determine that there  
2 was either an attempt or a completed use of that particular  
3 credit card at a Safeway on the 27th?

4 A. Yes, there was.

5 Q. Okay. And with regard to that though there was no --  
6 at this point in time there has been no identification of the  
7 individual who actually used it other than Mr. Corodova  
8 indicating that that person did not have permission?

9 A. That's correct, yes.

10 Q. Through your investigation did you determine that an  
11 individual by the name of Monica Striplin knows Gerald Melvin  
12 Calmese?

13 A. I believe so, yes.

14 Q. And with regard to that situation, how are you aware of  
15 how Ms. Striplin met Mr. Calmese?

16 A. I would have to refresh my memory on that --

17 Q. That's okay.

18 A. -- on how they met.

19 Q. Did she indicate at some point in time that they dated  
20 off an on?

21 A. Yes.

22 Q. And did she report to your department that on September  
23 6th of 2009 her credit card was used without her consent?

24 A. Yes.

25 Q. Did she also report that -- well, strike that. I

1 apologize.

2 Was video of that particular transaction obtained  
3 I guess from both Circle K and also Albertson's?

4 A. Yes.

5 Q. And in looking at that video -- have -- have you  
6 reviewed that video?

7 A. I have not reviewed it personally, no.

8 Q. Do you know if Ms. Striplin has had a chance to review  
9 that video?

10 A. I do not know that.

11 Q. Did someone who is aware of Mr. Calmese and his  
12 features review that video?

13 A. Yes, I believe so.

14 Q. And did they identify Mr. Calmese as the individual in  
15 the videos using the card at both Circle K and Albertson's?

16 A. Yes.

17 Q. Now, has Ms. Striplin ever been shown a photographic  
18 lineup for identifying -- identification purposes in this  
19 particular case?

20 A. I -- I -- I really honestly don't remember --

21 Q. Okay.

22 A. -- if she had or not.

23 Q. Okay. With regard to -- I -- I guess I'm skipping  
24 ahead slightly to, I guess -- well, strike that.

25 On September 27th of the year 2010 did officers of

1 Q. Okay. And did she know him by the name of Gerald  
2 Calmese or --

3 A. I think she knew him as Gerald, yes.

4 Q. Okay. Did she -- was she confronted with the fact that  
5 he had this information regarding her credit card?

6 A. Yes, I --

7 Q. And what did she advise with regard to his permission  
8 or her permission actually for his having it?

9 A. He had no permission to have her credit card number  
10 whatsoever.

11 Q. Now, you indicated also that you obtained actual credit  
12 cards during the search warrant belonging to a Peggy Smith; is  
13 that correct?

14 A. Yes, that is correct.

15 Q. And with regard Ms. Smith, I'm assuming that she was  
16 also contacted?

17 A. Yes, I -- I actually spoke to her in person.

18 Q. Did she also -- was she aware that Mr. Calmese had  
19 these credit cards?

20 A. She was not aware that he had the credit cards and she  
21 does not know who he is nor did she give him permission to have  
22 them.

23 Q. Does she know how the credit cards came up missing?

24 A. She does not.

25 Q. Additionally, was there identifying information found



1 regarding an individual by the name of Victor Rzephecki?

2 A. Rzephecki.

3 Q. Rzephecki?

4 A. Rzephecki. Yes.

5 Q. Okay.

6 A. If I remember the name.

7 Q. And with regard to Mr. Rzephecki, what exactly was  
8 found with respect to his identifying information?

9 A. Mr. Rzephecki is how I got involved in this  
10 investigation. He filed a police record. His credit card  
11 number was used at Jiffy Lube and at a Lens Crafters here in  
12 Phoenix and in Maricopa County. He did not know Mr. Calmese,  
13 did not give him permission to use his credit card number.

14 I went to Jiffy Lube and I went to Lens Crafters  
15 where I was able to have Gerald positively identified by  
16 employees in a photo lineup at both locations as the one who  
17 used the credit card.

18 Q. With regard to that situation, with regard to Mr.  
19 Rzephecki or his credit card number, did he report that those  
20 transactions at Lens Crafters and Jiffy Lube took place August  
21 17th and 20th?

22 A. Yes.

23 Q. I'm sorry; 22nd?

24 A. Yes. Yes.

25 Q. Now, you indicated that a photographic lineup was shown

1 to the staff. I apologize; did you indicate Jiffy Lube or Lens  
2 Crafters?

3 A. Yeah. I showed it to an employee at Jiffy Lube that  
4 dealt with Mr. Calmese and I showed it to two different  
5 employees at Lens Crafters, one who was able to positively  
6 identify Mr. Calmese as being the one involved in the  
7 transaction.

8 Q. Okay. Now, I apologize; did anyone -- you indicated  
9 that one person at Lens -- at Lens Crafters was able to  
10 identify him and one was not?

11 A. That's correct. Yes.

12 Q. Was it shown to more than one person at Jiffy Lube?

13 A. No, just the one.

14 Q. And they did identify him?

15 A. Yes.

16 Q. Did they have any information or through the  
17 transactions that were done with regard to Mr. Rzephecki's  
18 credit card or credit card number, was the name Gerald Calmese  
19 used during those transactions?

20 A. Those transactions at the Jiffy Lube, was Quinton Weeks  
21 was the name --

22 Q. I'm sorry --

23 A. -- at the Jiffy Lub.

24 Q. Weeks?

25 A. Weeks.

1 Q. W-e-e-k-s?

2 A. That's correct.

3 Q. Okay.

4 A. The name at Lens Crafters was Quinton Calmese.

5 Q. Okay. Through your investigation -- I'm sorry.  
6 And I'm assuming that Mr. Rzephecki was also  
7 contacted?

8 A. Yes, I spoke to him.

9 Q. And is he aware of or does he know Gerald Calmese?

10 A. Doesn't know who he is or how he got his credit card  
11 number.

12 Q. Was he aware -- and it was just a credit card number  
13 itself; is that correct?

14 A. Yes, that's correct.

15 Q. Additionally, did you have contact with a Britt  
16 Mortenson?

17 A. I did not have contact with Britt.

18 Q. Okay. Did other officers either of your department or  
19 another local department contact her?

20 A. Yes.

21 Q. And during that contact did she in fact indicate that  
22 she met Mr. Calmese at a local club and actually went out with  
23 him four or five times?

24 A. Yes.

25 Q. With regard to that situation, did she know him as

1 Gerald Calmese?

2 A. I don't know.

3 Q. Okay. And on or about August 20th of the year 2010 did  
4 she report to a local police agency that her credit card was  
5 used at a Circle K, Albertson's, Fry's and QT without her  
6 permission?

7 A. Yes.

8 Q. Was video surveillance obtained with regard to all four  
9 of those transactions?

10 A. Yeah, I believe so.

11 Q. Okay. And did someone who was aware of Mr. Calmese's  
12 stature or physical description have a chance to review those  
13 videos?

14 A. Yes.

15 Q. And did they in fact identify Mr. Calmese as the  
16 individual involved in those particular transactions?

17 A. Yes.

18 Q. With regard to an individual by the name of Robin  
19 Fletcher, did you have contact with Robin Fletcher?

20 A. I did, yes.

21 Q. And did she report that she knows Gerald Melvin  
22 Calmese?

23 A. Yes, she did.

24 Q. Does she know him by the name Gerald Melvin Calmese?

25 A. I don't recall. Actually I'm kind of confused.

1 Q. Do you recall how it was that they met?

2 A. Yeah. She met -- she met Gerald while they were  
3 driving down the road on Union Hills and they pulled over and  
4 into the QT and started talking. That's how she met him.

5 Q. Okay. And did she indicate she dated him for a period  
6 of time?

7 A. Yes.

8 Q. Did she also report her credit card number apparently  
9 was used on or about November 16th of 2010 at Fry's and also at  
10 Albertson's?

11 A. It was actually used. It was her actual credit card.  
12 It was used at Fry's and Albertson's at the Red Box video  
13 rental inside the Albertson's.

14 Q. Okay. Now, did she also during the interview indicate  
15 that prior to that actual incident in November that she had  
16 caught Mr. Calmese in a compromising situation with regard to  
17 her purse?

18 A. The -- the day the card was used she saw him going  
19 through -- it wasn't her purse. It was her school bag, her  
20 school bag.

21 Q. Oh. Okay.

22 A. So --

23 Q. And were videos obtained from both Fry's and  
24 Albertson's?

25 X A. Yes.

1 Q. And does the individual involved in these two  
2 transactions appear to be Mr. Calmese?

3 A. Yes.

4 Q. Additionally, did Ms. Robinson -- I'm sorry -- did Ms.  
5 Fletcher identify Mr. Calmese as the individual that we're  
6 talking about as the individual she met and dated, et cetera,  
7 from a photographic line-up including a known photograph of Mr.  
8 Calmese?

9 A. Yes, she did.

10 Q. During interview with Mr. Calmese, did he admit to  
11 using Mr. Rzephecki's card, credit card, at a Jiffy Lube?

12 A. He did admit it.

13 Q. Did he also indicate, quote, that he always, quote,  
14 wants to take the easy way out, unquote?

15 A. Yes. I'm sorry. Yes, he did.

16 MR. WENDELL: Are there any additional factual  
17 questions for the detective?

18 THE GRAND JURY: (No oral response.)

19 MR. WENDELL: I take it by your silence there are  
20 none.

21 Detective, if you'll step out, I admonish you that  
22 Arizona law prohibits you from discussing your testimony with  
23 anyone other than prosecution.

24 THE WITNESS: Thank you.

25 MR. WENDELL: See you.

1 (CARRIE MIASO left the proceedings.)

2 MR. WENDELL: Are there any legal questions?

3 THE GRAND JURY: (No oral response.)

4 MR. WENDELL: I take it by your silence there are  
5 none.

6 with such, we will step outside and allow you to  
7 deliberate with regard to your options.

8 (Whereupon, the Deputy County Attorney and the  
9 court reporter were excused from the Grand Jury room, were  
10 subsequently recalled into the Grand Jury Room, and the  
11 following proceedings were had:)

12 GRAND JURY FOREPERSON LANDA: The Grand Jury would  
13 like a Draft Indictment, please.

14 MR. WENDELL: The County Attorney's Office has  
15 presented a Draft Indictment for your consideration.

16 I'll remind you that the admonitions read to you  
17 earlier regarding Draft Indictment are applicable.

18 (Whereupon, the Deputy County Attorney and the  
19 court reporter were excused from the Grand Jury room, were  
20 subsequently recalled into the Grand Jury Room, and the  
21 following proceedings were had:)

22 GRAND JURY FOREPERSON LANDA: The Clerk will read  
23 the findings of the Grand Jury.

24 GRAND JURY CLERK TOLEU: The Grand Jury with 11  
25 members present and only members of the Grand Jury present

1 deliberated upon evidence, and with 11 jurors voting, by a vote  
2 of 11 to zero returned a true bill.

3 (A recess was taken. The following Grand Jurors  
4 are present for returns: GRAND JURY FOREPERSON MARY LANDA,  
5 GRAND JURY CLERK RICHARD TOLEU, GRAND JURY ALTERNATE FOREPERSON  
6 RAYLENE JOHNSTON, GRAND JUROR ELLEN CHARNEY, GRAND JUROR  
7 ROSEMARIE ARNDT, GRAND JUROR WILLIAM JEN, GRAND JUROR KATRINA  
8 ROSS, GRAND JUROR KAREN ROCHA, and GRAND JUROR STEPHEN LOCKLIN.

9 whereupon, Commissioner Pamela Svoboda, Deputy  
10 County Attorney Jon Wendell and the Grand Jury Clerk entered  
11 the Grand Jury room and the following proceedings took place:)

12  
13 RETURN OF INDICTMENT  
14

15 GRAND JURY FOREPERSON LANDA: Your Honor, Case 518  
16 GJ 182; a true bill.

17 My signature appears on the Indictment endorsing  
18 it a true bill.

19 MR. WENDELL: Your Honor, this is a warrant  
20 request. The State is asking the subject be held non-bondable  
21 in that he committed numerous of these offenses in this  
22 particular Indictment at the time that he was on release in a  
23 separate offense or separate cases, that being also his current  
24 whereabouts presently are unknown, but in  
25 CR 2010-106358-001 DT the subject is charged with theft of