No. ________

In The

Supreme Court of the United States

DAN LUO,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California For The Sixth Appellate District

PETITION FOR A WRIT OF CERTIORARI

MARLENE THOMASON
Attorney at Law
5160 Birch Street, Suite 100
Newport Beach, California 92660
Telephone: (714) 642-0606
E-Mail: marlene.thomason@zoho.com
Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether charging negligent manslaughter, California Penal Code §192(b), in "building a residence with criminal negligence," and refusing to identify specific overt acts constituting the "building of a residence," which undefined conduct resulted in the death of a construction worker, was unconstitutionally vague, and violated Petitioner's rights under Amendments V, VI, and XIV of the U.S. Constitution.

2. Whether the prosecution's failure to introduce expert testimony that Petitioner's conduct in "building a residence with criminal negligence," fell below the standard of care of those in the industry engaged in similar activities, and resulted in a conviction of Petitioner without proof of the elements of the criminal offense, violating Petitioner's right to due process and a fair trial.

3. Whether the charged crime of "building a residence with criminal negligence," was so vague, ambiguous, and ill-defined, no effective defense could be articulated to a crime that encompassed essentially everything ever done in connection with the building of a residence, thus denying Petitioner the right to effective assistance of counsel, due process, and a fair trial.

4. Whether the instruction to the jury consisting of a 44-page California Occupational Safety and Health Administrative Regulation (hereinafter Cal/OSHA)

QUESTIONS PRESENTED – Continued

administrative regulation relating to best practices in slope stabilization and shoring, as the "law" of the case (App. E), exceeded the jurisdiction of the judicial officer in pronouncing administrative regulations as law, and retroactively criminalized conduct of Petitioner in violation of Article I of the United States Constitution, and Article II, section 3, of the Constitution of the State of California.

5. Whether the criminalization of Cal/OSHA administrative regulations is an unconstitutional assumption of legislative power by the Court, criminalizing conduct without notice to Petitioner, denying Petitioner notice that the entire Cal/OSHA administrative regulatory scheme applied to him, denying Petitioner due process and a fair trial.

PARTIES TO THE PROCEEDINGS

Petitioner and Defendant Below is Dan Luo.

Respondent and Plaintiff Below are People of the State of California.

Defendants Below Who Were Dismissed from the Case, or Abandoned this Appeal: Richard Liu and U.S. Sino, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CALIFORNIA CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OPINIONS BELOW

Petitioner Dan Luo prays that a writ of certiorari issue to review the judgment in favor of the People of the State of California in *People v. Luo* (2017) 16 Cal.App.5th 663. (App. A).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a). The Court of Appeal of the State of California, Sixth Appellate District filed its published decision on October 4, 2017. The Supreme Court of California denied the Petition for Review on January 31, 2018. (App. C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Article I:

"No bill of Attainder or ex post facto Law shall be passed."

U.S. Const. Amend. V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. Amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. Const. Amend. XIV, §1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of California, Article I, §15:

"The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's

> behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel."

Constitution of the State of California, Article II, §3:

> "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

INTRODUCTION

The Court of Appeal for the State of California, Sixth District has ruled expert testimony is not necessary to establish a prima facie case of "construction of a residence with criminal negligence." This ruling contradicts established precedent as set forth in *People v. Penny* (1955) 44 Cal.2d 861. The new standard approved by the Court of Appeal has the practical effect of rendering the crime one of strict liability, allowing the jury to infer criminal negligence from the fact that a fatality occurred, ergo the Petitioner was criminally negligent in not preventing the fatality and had a duty to prevent the fatality.

The Court of Appeal further found the charge of "construction of a residence with criminal negligence" sufficiently specific to put Petitioner on notice of the nature of the charges against him, and failure to specify overt acts in "negligent construction of a residence" did not deprive Petitioner of notice of the charges against him. The creatively vague charging decision affirmed by the appellate court creates the opportunity to charge, "manufacture of an airplane with criminal negligence," or "repair of a motor vehicle with criminal negligence," or the "practice of medicine with criminal negligence," leaving the accused to guess as to specific acts forming the basis of the prosecution, thus depriving every accused the right to know the charges against them.

The Court of Appeal further approved the use of a 44-page administrative regulation of Cal/OSHA as "law" and provided the entire regulation regarding best practices for shoring to the jury as a jury instruction. (Appendix E). This reported case establishes the principle that the judicial officer, at his or her own judgment and discretion, may give an administrative regulation the force and effect of law. The 44-page administrative regulation was never published as law or approved by any legislative body as law, and Petitioner did not have notice of the regulation until it was introduced as a part of the prosecution's case. No reported case supports the creative and spontaneous deployment of administrative regulations as law, at the will of the judge and prosecution having jurisdiction, until *People v. Luo* (2017) 16 Cal.App.5th 663.

STATEMENT OF THE CASE

Following a jury trial in the Superior Court of the State of California, County of Santa Clara, Petitioner was convicted of Involuntary Manslaughter, California Penal Code §192(b), manslaughter in that he "constructed a residence at 814 Calavaras Ridge Drive, Milpitas, with criminal negligence." (App. D); Willful Violation of a Safety Order, Labor Code §6425(a) as set forth in Title of the California Code of Regulations, §1541.1(a), failure to protect an employee in an excavation; Willful Violation of a Safety Order, Labor Code §6425(a) as set forth in Title of the California Code of Regulations, §1541(j)(1), failure to protect an employee from loose rock or soil; Willful Violation of a Safety Order, Labor Code §6425(a) as set forth in Title of the California Code of Regulations, §1541(k)(1), failure to perform daily inspections of excavations. (App. B). Petitioner was sentenced to two-years imprisonment. (App. F).

This case arises from a tragic workplace accident at a construction site in Milpitas California that took the life of a construction worker, Raul Zapata, on January 28, 2012. The property where the accident is located at 814 Calaveras Ridge Drive in Milpitas and was purchased by Wesley Chen through Richard Liu, a local realtor and listing agent of the property. [RR 1727:16-17].

Before closing escrow in the property in June 2010, Richard Liu introduced Dan Luo to Wesley Chen as his "assistant." [RR 1721:25-28; 1732:1-3]. Wesley Chen never discussed any aspect of the property purchase with Dan Luo [RR 1735:16-18; 1745:14-18; 1745:14-17] and he described Dan Luo's function as the person who pours the tea for people. He answered telephones and arranged things. [RR 2348:5-7]. Wesley Chen observed Dan Luo's duties to include helping with real estate paperwork, arranging for conference rooms, coordinating with design professionals, and if he needed tea, he would bring the tea. [RR 2351:1-14]. If Wesley Chen required gopher abatement products delivered to the site, he expected Dan Luo to perform that function, and in fact he did. [RR 2352:1-6].

Witnesses, including the foundation contractor, Polo Perez, general contractor who viewed the job, Joe Loza, [RR 3500:11-23] and others, universally described Dan Luo's job duties as that of a "go-for," a paper pusher who delivered messages, an employee of the realtor/contractor Richard Lui, with no construction experience, English skills at a 5 or 6 on a scale of 10 [RR 3501:25-28; 3502:1-8] and whose only independent decision ever made was that of delivering chocolates to a job site for workers on Christmas Eve. [RR 2542:1-9; 2873:26-28; 2874:1-2; 2730:15-22; 2871:6-8; 2880:23-26]. Dan Luo's job was to deliver messages and "running around doing menial stuff," according to Mr. Loza. [RR 3502:18-23; RR 2893:19-20]. The owner of the residence never negotiated any agreements with Dan Luo, and whenever the owner observed any issue or problem with the job progress or workers, he always addressed those concerns to the general contractor, Richard Liu who was, at all times, the "decision maker." [RR 1843:3-28; 1922:22-25; 1923:2-10; 1941:20-25; 1965:14-21; 2043:7-14]

Richard Liu was the general contractor on the job [RR 1950:3-4]; he made and negotiated all contracts and made all decisions. [Exhibit 163; RR 1766:18-24; 1767:1-7]. The construction contract did not include payment for design professionals, such as the soils engineer or civil engineer; those professionals were paid directly by the homeowner, Wesley Chen. [RR 2253:2-6]. Mr. Chen paid for the soil engineer directly, not through Richard Liu. [RR 1893:2-4]. In addition to paying the soil engineer, Mr. Ting, for the soil report, Mr. Chen also paid for additional services rendered by Mr. Ting for work done during the course of construction relating to his observation of activities on the project. [RR 1908:15-21].

Polo Perez, the foundation contractor, walked off the Milpitas job in January 2012 because he was not being paid. [RR 2690:19-23]. Before leaving the job Mr. Perez excavated an un-shored 12-foot dirt wall and undercut an overhang that fell on Raul Zapata three weeks later on January 28, 2012. When Mr. Perez left the job three weeks before the accident, he was confident the wall was stable and if a failure occurred it was an open excavation and workers could escape a possible slope failure. [RR 2692:24-18].

The ledge that failed was created by Polo Perez who testified:

> "Although I was worried about it, I hadn't decided to knock that down yet. And then we had issues with money so, you know, I just – I had to leave." [RR 2707:27-28; 2708:1-3]. "But that was a dangerous place, OKAY." [RR 2708:6].

After Mr. Perez left the job a replacement was identified, Mr. Jose Loza [RT 3260:1-28], who inspected the job accompanied by a friend of thirty-five years whom he had worked with on many jobs, Mr. Carlos Hernandez, a moonlighting union journeyman, skilled in concrete and foundation work. [RR 3277:9-20; 3216:13-15-26]. Mr. Hernandez recalled working in the past as an unlicensed contractor more than a hundred times, [RR 3838:16-22] and did not see this contracting without a license as a crime, just making a living. [RR 3839:12-13].

Dan Luo did not do physical construction work; he would just visit a couple of times a day and leave. [RR 3651:7-8; 4885:7-10]. A worker on the site, Martin Valenzuela, stated he did not know Dan Luo but he saw him on the job two days in the first week and two times the second week. He just watched and on the four times he was on the job in two weeks he sometimes saw him talking to Carlos Hernandez. [RR 4807:18-28; 4808:1-3].

Carlos Hernandez stated:

> Q. Who told you what had to be done?
>
> A. Just following the plans and following what Dan said what had – you know, I mean,

> we just – he just said we had to do the foundation so I just followed the plans.
>
> [RR p. 3657, L18-22]

Faustino Zapata, the brother of the deceased stated Carlos Hernandez directed all work on the job site and he never took any direction whatsoever from Dan Luo. [RR 4933:18-26]. Carlos Hernandez was "El Jefe," the boss, the one who gives commands. [RT 4838:27-28]. Carlos Hernandez gave direction to Raul Zapata [RR 4839:6-9] and Raul Zapata gave direction to Martin Valenzuela. [RR 4839:10-13].

In an interview on the day of the accident, Mr. Hernandez stated to investigators:

> Carlos: No. I don't have the power to send anybody home.
>
> Dave: Okay. Who does?
>
> Carlos: At this particular job I don't think anybody does. Not even Dan because Dan doesn't even know all the people yet. He can probably cut somebody but if he don't want them he can't say – he can say he's too slow or this and that. He doesn't tell that – he doesn't tell that if you – No.
>
> Dave: Has he done that?
>
> Carlos: No.
>
> [RR 4065:17-28; 4066, L1-4]

THE PROSECUTION EXPERT WITNESS

The prosecution called an expert witness, Joe Turner a civil engineer and general contractor who was present on the site of the accident on January 29th and 30th 2012. [RR 4175:8-25; 4178:4-5]. Mr. Turner's experience and credentials in the field of excavation and shoring systems were not disputed, he is clearly the industry's preeminent expert in shoring and is the author of the leading reference book on the subject. [RR 4190:19-28; 4191:1-28; 4200:16-19].

In the entirety of Mr. Turner's testimony, he never identified Dan Luo as having had any duty to the victim, or as having fallen below the standard of care in the community with respect to any duty to the victim, or as having breached any duty at all. Mr. Turner never testified that any act or failure to act by Dan Luo caused or contributed to the death of Raul Zapata. [RR 4175-4441]. Mr. Turner was the only expert called by the prosecution on these issues and no other testimony of any witness was introduced with respect to any duty owed by Dan Luo with respect to any act relating to "construction of a residence" with criminal negligence.

Mr. Turner testified a general contractor must have an Illness and Injury Prevention Program (IIPP) and make sure it is followed. [RR 4364:24-28; 4265:1-3]. It is the responsibility of the contractor to make sure his employees are safe and protected. [RR 4268:27-28; 4269:1-4]. He further testified Cal/OSHA regulations with respect to excavations only apply when an employee enters the excavation. A contractor can dig excavations and holes all they want without Cal/OSHA proscribed shoring as long as employees do not enter the excavation. [RR 4269:14-22]. He stated the contractor is responsible for the means and methods of the excavation work and the safety plan [RR 4302:28; 4303:1-3] and it is the responsibility of the general contractor to put someone on the project that is experienced with the work that is taking place and understands the means, methods and process of prosecuting the project. [RR 4333:20-26]. He further testified an excavation safety plan is the contractor's responsibility. [RR 4452:2-13]. The contractor is the one with the license so it is his duty to protect the workers. [RR 4453:17-20].

The defense was prohibited from asking Mr. Turner his opinion, based upon his training, skill, experience, and all the documents and records he reviewed in this case, as to who constructed the residence in question. The court sustained the prosecution's objection to the question because the expert witness lacked "personal knowledge" and it was inadmissible opinion and speculative. [RR 4475:4-23]. Based upon witness descriptions of Dan Luo's duties, Mr. Turner would describe his function in construction terms as a "go-for" or maybe an apprentice. [RR 4475:24-28; 4476:1-28].

No testimony was introduced as to the standard of care and responsibilities and duties of Dan Luo with respect to this project, whether his conduct fell below any standard of care and whether he had a duty to assure compliance with any applicable safety regulations on this job site. No testimony was offered by Mr. Turner to the effect that Dan Luo fell below the standard of care with respect to "consulting with a soils engineer" or facilitating communication between the owner, contractors, and design professionals as an assistant to the general contractor.

ARGUMENT

I. No Corpus Delicti Was Defined Or Established, And No Jury Instruction Given Defining Construction Of A Residence With Criminal Negligence, And The Criminal Agency Causing Harm.

Petitioner sought to compel the prosecution to specify acts constituting "construction of a residence", requests denied by the court and prosecution. No jury instruction defined "construction of a residence" for the jury, or for the defense. Petitioner was denied the right to examine the prosecution expert witness as to the meaning of "construction of a residence" as it applied to Petitioner, denied the right to know the charges against him, and denied the right to counsel to prepare a defense against "unknowable" charges. Every element of the crime charged must be proven beyond a reasonable doubt, but the essential element of "construction of a residence" is vague, ambiguous and was never defined. "The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." (*Johnson v. United States* (2014) 135 S.Ct. 255).

The jury was left to assume the 44-page Cal/OSHA regulations applied to Petitioner and Petitioner was assumed to know about these regulations and presumed to have a duty to insure these regulations were implemented, whether or not he knew of the regulations. This was a strict liability crime. (*State v. Prince* (1948) 53 N.M. 15, 189 P.2d 993; *Adamson v. California* (1947) 332 U.S. 46, 53).

States may not interfere with those rights that are "implicit in the concept of ordered liberty" and may not disregard those "immutable principles of justice which inhere in the very idea of a free government." (*Palko v. Connecticut* (1937) 302 U.S. 319, 325; *Twining v. New Jersey* (1908) 211 U.S. 78). In refusing to uncloak the theory of the prosecution case, criminal negligence was presumed because an accident occurred and voluminous administrative regulations existed which, if observed by someone, would presumably have prevented the fatality. A workplace death, and the doctrine of res ipsa loquitur, results in the presumption of the elements of duty, care and breach by Petitioner, all of which denied Petitioner a fair trial and due process. "Two of the most basic premises of our criminal justice system – the presumption of innocence and the duty of the prosecution to prove guilt beyond a reasonable doubt – are embodied in §1096 of the Penal Code. . . ." (*People v. Belton* (1979) 23 Cal. 517, 520). Elements of the charged offense must be proven, not presumed.

Expert witness testimony was essential to establish construction of a residence with criminal negligence. (*People v. Penny* (1955) 44 Cal.2d 861, 879-880). The prosecution was required to present evidence sufficient to prove each element of the tort of negligence and failed to do so, and in fact, the decision of the lower Court confirms there is no need to do so. (*Garabedian v. Superior Court* (1963) 59 Cal.2d 124; *Barber v. Superior Court* (1991) 1 Cal.App.4th 793, 795).

"[T]he purpose of expert testimony, to provide an opinion beyond the common experience, dictates that the witness possess uncommon, specialized knowledge." (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547). "Building a house" is a process beyond the common knowledge of the average person and therefor opinion testimony from a qualified expert on the subject should not only have been allowed, but, under the circumstances of this case, required.

In negligence cases, "(if) the matter in issue is one within the knowledge of experts only and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case." (*Miller v. County of Los Angeles Flood Control District* (1979) 8 Cal.3d 689, 702). Since criminal negligence is determined pursuant to general principles of negligence, then in order to prove the charge of non-vehicular involuntary manslaughter, the prosecution must present expert testimony on the issue of (a) what duty (or standard of care) Dan Luo owed as an assistant or apprentice to an unlicensed general contractor; (b) whether Dan Luo's conduct breached or violated the standard of care of an assistant or apprentice to an unlicensed general contractor in constructing the residence at 814 Calaveras Ridge Drive; and (c) if Dan Luo's conduct breached or violated the standard of care of an assistant or apprentice, how he did so, that is, by what specific acts or failures to act.

The decision of the Court of Appeal of the Sixth District of the State of California stands for the proposition that "negligent construction of a residence" is a matter within the common knowledge of laymen, and not the proper subject of expert testimony because the expert does not possess personal knowledge and his testimony would be mere speculation. The laymen of the jury were provided with source documents regarding the proper means and methods of slope stabilization, shoring and other associated regulations as contained in the 44-page jury instruction of Cal/OSHA regulations (App. E), and invited to make their own judgment as to the applicability of those regulations to the facts in the criminal case before them, and the responsibility of the defendants before them to know and comply with those regulatory schemes. The factual scenario before the court is no different than a doctor charged with involuntary manslaughter in administering propofol to a rock star with criminal negligence. It is unimaginable to simply provide the jury with a copy of the Physicians' Desk Reference Book on drugs and let them decide whether the accused met the industry standard of care in practicing medicine. It is unimaginable a physician would be charged with being a criminally negligent doctor without specifying the overt act of negligence relating to the practice of medicine.

Petitioner was convicted without due process in that he was never notified of the charge against him in that the "criminal negligence" of building a house was never defined enabling him to formulate a defense, and cross-examine and confront witnesses on this standard. In the absence of any expert witness to testify that Petitioner acted below the standard of care, or even to define that standard of care applicable to Petitioner in his capacity as a "go-for" to the general contractor, defendant was convicted without the prosecution proving each element of the charged crime.

II. Petitioner Was Not Notified Of The Charges Against Him Or Afforded An Opportunity To Present A Defense To Those Charges.

The prosecution refused to specify overt acts constituting "building of a house with criminal negligence," resulting in the death of a construction worker, thereby depriving Petitioner of the right to know the charges against him and present a defense. As a matter of fundamental fairness, the accused is entitled to notice as to which of his acts the prosecution claims were criminally negligent. (*People v. Foster* (1931) 117 Cal.App. 439; *People v. Salvato* (1991) 234 Cal.App.3d 782, 881).

Many acts are involved in the process of construction of a residence and the prosecution must elect, or identify, which of the many tasks, duties and responsibilities the Petitioner failed to perform with criminal negligence. This process is similar to the doctrine of election, which protects two procedural rights of the criminal defendant in cases where the evidence tends to show a larger number of offenses than have been charged: the right to a unanimous jury verdict and the right to be advised of the charges. (*People v. Gordon* (1985) 165 Cal.App.3d 839, 866; *People v. Dunnahoo* (1984) 152 Cal.App.3d 561, 570-571; *People v. Castro* (1901) 133 Cal. 11; and *People v. Diedrich* (1982) 31 Cal.3d 263, 281).

The prosecution presented its case over a two-month period and introduced thousands of documents. From the mountain of testimony regarding the minutia of hundreds of acts and decisions made by many people over approximately two years, it was impossible to know which of the many acts was the basis of the prosecution, which of the acts Petitioner had a duty to perform, and what testimony of any witness related to the undefined act of criminal negligence. The refusal to identify the basis of the charge of criminal negligence made it impossible to cross-examine witnesses on acts forming the basis of the alleged criminal negligence.

The prosecution theory of the case was a vague and ambiguous moving target preventing Mr. Luo from developing a defense to a theory of the case the prosecution refused to reveal, and when doing so in argument before the trial court, argued inconsistent theories that evolved during the two-month long trial.

Since it is impossible to know whether a jury would have accepted a defense which it never had occasion to consider, the conclusion is inescapable that the effect of the instructional omission is "necessarily unquantifiable." (See *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740-741 [structural error found where the defense was precluded from presenting its "theory of the case"]; *United States v. Sarno* (9th Cir. 1995) 73 F.3d 1470, 1485 ["failure to instruct a jury upon a legally and factually cognizable defense is not subject to harmless error analysis."] The Sixth Amendment to the United States Constitution commands that the defendant has the right to have the jury fully consider his theory of the case. When that right is abridged, per se reversal is required. Defendant was never able to formulate a defense to charges that were not defined.

III. Defendant Was Denied Due Process Of Law.

The prosecution failed to prove, or even offer testimony, on an essential element of the crime of "negligent construction of a residence" in that negligence was presumed, and no expert testimony was offered on the acts alleged to have been criminally negligent.

Petitioner has a right under the Sixth Amendment of the United States Constitution to be informed of the "nature and cause of the accusation" against him. (*United States v. Gayle* (11th Cir. 1992) 967 F.2d 483, 485; see also *United States v. Hooker* (4th Cir. 1988) 841 F.2d 1225, 1230).

When the crime is so vague and ambiguous that the crime is anything the prosecution wants it ". . . would place the rights of the citizen, which were intended to be protected by the constitutional provision at the mercy or control of the court or prosecuting attorney, for if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court in regard to the prerequisite of an indictment in reality no longer exists." (*Ex Parte Bain* (1887) 121 U.S. 1, 13).

The burden upon the prosecution to identify specific acts by Petitioner constituting criminal negligence is slight. There is no rational or reasonable justification for the refusal to identify specific acts, other than the fact the Petitioner would have an opportunity to offer a coherent defense to specific acts.

IV. Petitioner Was Denied The Right To Confront Witnesses.

The "construction of a residence" as applied to Petitioner, an unlicensed office assistant to the general contractor, is a term beyond the general experience of the laymen and is a term of art that must be defined. No evidence showed Petitioner ever picked-up a hammer. Evidence was introduced that the owner of the property, Wesley Chen, constructed the residence as the "owner/builder," a designation suggesting Mr. Chen was the builder.

The prosecution failed to introduce expert testimony on an essential element of the charge against Petitioner, "negligent construction of a residence," and that Petitioner's conduct fell below the standard of care of those in the industry engaged in "construction of a residence." In fact, Petitioner was prevented from questioning an expert witness regarding his opinion as to whether Petitioner was constructing the subject residence, as that term is commonly understood in the industry.

Without definition of the act Petitioner was alleged to have committed, duty to act cannot be identified. Petitioner was not a licensed contractor and his duties cannot be defined by virtue of his licensing status. Much like a legal assistant is to a licensed attorney, a front office assistant is to a licensed physician, Petitioner's duties are defined by those who testified in this case, he was a "gofer," and the contractor's eyes and ears on the job.

A tsunami of testimony and documentation was introduced by the prosecution at trial all of which was conceivably relevant because it related to building a house and conceivably irrelevant because it did not relate to specific acts of criminal negligence associated with building a house that Dan Luo had a duty to perform. "Presenting cumulative or barely relevant evidence can render a trial fundamentally unfair." (*People* *v. Bojorquez* (2002) 104 Cal.App.4th 335). This trial was fundamentally unfair to Dan Luo.

The particular act and duty to act by Petitioner was not defined in the prosecution's case, or jury instructions. The failure to do so has resulted in the conviction of Mr. Luo without due process in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Art. I, §§7, 15, of the Constitution of the State of California.

Constitutional issues are generally reviewed independently. (*People v. Cromer* (2001) 24 Cal.4th 889, 894). This is true even if the issue appears to have a factual component. For example, whether a witness is unavailable under California Evidence Code §240, which would permit certain hearsay evidence to be admitted, is reviewed independently because it implicates the defendant's Sixth Amendment right to confrontation. (Id. at pp. 897-903). The degree of protection is greatest when a nexus to the Constitution can be found.

Dan Luo was charged with building a residence with criminal negligence. The defense was precluded from asking Mr. Turner's opinion, based upon his training, skill, experience, and all the documents and records he reviewed in this case, as to who constructed the residence in question. The defense was precluded from eliciting testimony from Mr. Turner that Dan Luo was not building a house in any sense that required him to have a contractor's license under the building or labor codes. Because the evidence was uncontroverted that Dan Luo had no license or training in construction, without this testimony he would have been automatically guilty in the jury's eyes for building a house without a license. All evidence in the case was uncontroverted that Dan Luo never picked up a hammer or a nail, but the defense was not permitted to elicit testimony from Mr. Turner as to who, ***according to the standard in the construction industry***, was building the house – namely the general contractor U.S. Sino Investment. Thus, the defense was precluded from asking Mr. Turner what duties attached, according to the standard in the construction industry, to the person or persons who were building the house. Because Dan Luo was not charged with any specific act or failure to act with respect to "building a house," no expert testimony was offered with respect to any specific wrongful or criminally negligent act or commission by Petitioner. The court sustained the prosecution's objection to the question because the expert witness lacked "personal knowledge" and it was inadmissible opinion and speculative. [RT p. 4475, L4-23]. Based upon witness descriptions of Dan Luo's duties Mr. Turner would describe his function in construction terms as a "go-for" or maybe an apprentice. [RT p. 4475, L24-28, p. 4476, L1-28].

The Confrontation Clause of the Sixth Amendment of the United States Constitution, and Article I, §15 of the Constitution of the State of California is violated when the court denies the accused the right to cross-examine a key witness on a material element of the charged offense.

V. Administrative Regulations Did Not Provide Notice To Petitioner Of Prohibited Conduct And Potential Criminal Liability.

The law is unknowable when any and all administrative regulations can be transformed into criminal violations at the will and sole discretion of the judge and prosecutor having jurisdiction of the person of the defendant. The Supreme Court has long held that criminally enforced regulations are held to the same notice requirements as a criminal statute, with the regulations effectively reading as a criminal code; criminal liability can attach only to those who violate clearly prescribed regulatory duties. (*M. Kraus & Bros., Inc. v. United States* (1946) 327 U.S. 614, 621-622). Regulations that do not impose duties upon supervisors (or indeed impose them upon different persons, such as the employer) cannot be criminally enforced against a supervisor. See *United States v. Smith* (9th Cir. 1984) 740 F.2d 734 (holding that FDA recordkeeping regulations of the time that "only impose affirmative duties on drug manufacturers and the sponsors of clinical investigations," and "do not impose a clear duty on investigators to maintain accurate records," cannot be criminally enforced against investigators).

How is any worker on a construction job site to know an administrative regulatory scheme is law, and applies to him? There is a process in California for administrative rules to be published in the California Regulatory Notice Register, a process not followed with respect to the 44-page Cal/OSHA regulation applied as the law of the case, to Petitioner. Theoretically, that process would describe the regulation and its application to workers on a construction site. We have no way of knowing what mechanism could have been used to potentially provide notice to a target of criminal prosecution, we only know that no process was followed, administrative regulations were simply provided to the jury in the form of an instruction as the law of the case.

The decision of the Court of Appeal of the State of California stands for the proposition all administrative regulations of all administrative agencies are law, laws just waiting to be deployed in the form of jury instructions. Are these administrative regulations only laws when they are offered to a jury? If so, once the prosecution announces the intention to utilize administrative regulations as jury instructions, as the "law" of the case, the prosecution has in effect, retroactively criminalized whatever he asserts is prohibited by those administrative regulations in violation of Article I of the U.S. Constitution.

Providing the jury with a 44-page administrative regulation as the law of the case did not provide the accused with advance notice of the existence of such a "law," because the administrative regulation was not elevated to the status of a law until after the commission of the violation of the administrative regulation, and only then when it was approved by the Court as an instruction to the jury as the law of the case. Petitioner had no notice when the behavior in question took place that such an after-made, ex post facto, law applied to him. The elevation of the Cal/OSHA regulation to the status of "law" after the presentation of evidence is fundamentally unfair and rendered the trial a farce.

VI. Improper Assumption Of Legislative Power By The Court.

Article II, §3 of the Constitution of the State of California provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." This provision is mandatory and prohibitory. (*State Bd. of Educ. v. Levit* (1959) 52 Cal.2d 441). The vesting clause is exclusive and the legislature cannot delegate legislative power. (*People ex rel. Smith v. Judge of the Twelfth Dist*. (1861) 17 Cal. 547, 556). Judicial power is to interpret the law and to resolve specific controversies with final judgments. As the Court stated in *Lockyer v. City and Cnty. of S.F.* (2004) 33 Cal.4th 1055, "the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality." The trial court exceeded its jurisdiction and abused its discretion by presenting as law, 44-pages of administrative regulations crafted by Cal/OSHA. Only the legislature may craft laws, not the judicial branch of government.

The stream cannot rise above its source; the jurisdiction to declare the administrative regulations provided to the jury as law cannot be greater than the jurisdiction of Cal/OSHA to unilaterally declare all regulations it promulgates as law. If a 44-page best practices regulation on sloping, shoring and slope stabilization can be provided by the court to the jury as the law of the State of California, any administrative pronouncement can be used for the same purpose. Various California Labor Code sections address workplace safety violations and provide a process to address willful violations within the criminal justice system. No provision exists enabling the judicial branch to make its own judgment as to particular regulations that deserve to be elevated to the status of a penal violation, and presented to a jury as law of the case.

The jury was instructed the administrative regulation was law, without any consideration or implementation of that regulation by any member of the executive branch. The 44-page administrative regulation was presented as the law of the case without any other guidance as to the extent to which Petitioner was subject to knowing about the regulation, or that in fact his knowledge of the regulation or any aspect of construction was required to find him criminally negligent for any departure from the best practices described in the regulation. Petitioner was convicted of "construction of a residence with criminal negligence" based upon a failure to follow guidance described in the 44-page jury instruction, guidance that was not elevated to the status of law until presented to the jury as an instruction.

The unilateral decision of the judicial branch to declare administrative regulations as law materially impairs the core powers of the legislative branch make law. The use of Cal/OSHA regulations as law did not proscribe a process of review, implementation or publication before these regulations were presented to the jury as law. Petitioner had no notice laws reflected in this jury instruction existed, because no such laws in fact exist. In declaring the Cal/OSHA administrative regulation as law the trial court exceeded its jurisdiction and abused its discretion in making law, not interpreting the law, in violation of the Constitution of the State of California, Article II, §3.

CONCLUSION

For all the reasons set forth above, Petitioner respectfully requests this writ of certiorari be granted.

Respectfully submitted,

MARLENE THOMASON
Attorney at Law
5160 Birch Street, Suite 100
Newport Beach, California 92660
Telephone: (714) 642-0606
E-Mail: marlene.thomason@zoho.com
Attorney for Petitioner