

No. .

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

MICHAEL AVILA IN PRO PER - PETITIONER

VS.

5th APPELLATE COURT OF APPEAL, STATE
OF CALIFORNIA; POOLHIGAN P.J., SMITH J.,
AND MEENAN J.

PETITION FOR WRIT OF CERTIORARI
TO FIFTH APPELLATE CIR, CAL. COURT OF APPEAL
THE COURT THAT LAST MADE A ACTUAL RULING ON PETIT-
IONERS CASE WAS 5th APPELLATE CIR. COURT OF APPEAL,
CAL.

IN PRO PER
MICHAEL AVILA # AR2378

CC1 4B 3A 208
P.O. BOX 1906
TEHACHAPI, CA. 93581

QUESTION(S) PRESENTED

- 1.) DID DEFENSE COUNSELS DEFICIENT FAILURES TO OBJECT TO OFFICERS IMPROPER OPINIONS THAT DEFENDANT WAS THE BURGLAR PREJUDICIALLY DENY THE EFFECTIVE ASSISTANCE CONSTITUTIONALLY GUARANTEED BY ARTICLE I, SEC. 15 AND THE 6TH AND 14TH AMENDMENTS?
- 2.) DID THE INSTRUCTION, "A CAMP KEY IS A BURGLARY TOOL" DIRECT A VERDICT, CONTRAVENE APPELLANT'S SIXTH AMENDMENT JURY TO TRIAL BY JURY AND THE 14TH AMENDMENT DUE PROCESS CLAUSE, AND CONSTITUTE STRUCTURAL AND PREJUDICIAL ERROR?
- 3.) DID CUMULATIVE ERRORS PREJUDICIALLY VIOLATE APPELLATES RIGHTS TO A FUNDAMENTALLY FAIR JURY TRIAL AND THE DUE PROCESS GUARANTEED BY THE 6TH AND 14TH AMENDMENTS?

I ASK THE SUPREME COURT REVIEW MATTER AS APPELLATE COURT DENIED REVERSE AND REMAND THO- PETITIONERS CLAIM IS BOUND TO PREVIOUS U.S. SUPREME COURT RULINGS.

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

PETITIONER RESPECTFULLY PRAYS THAT THE WRIT OF
CERTIORARI IS TO REVIEW JUDGEMENT BELOW.

OPINIONS BELOW

1. THE OPINION FOR THE HIGHEST STATE COURT TO
REVIEW IN CALIFORNIA APPEARS AT APPENDIX C.
"ITS A UNPUBLISHED DENIAL OF REVIEW"
2. THE OPINION FOR CALIFORNIA'S APPELLATE COURT
(5TH CIR COURT OF APPEALS) APPEARS AT
APPENDIX A

JURISDICTION

1. THE 5TH CIR APPELLATE COURT DECIDED MY CASE ON JULY 26TH 2017

A TIMELY PETITION FOR REHEARING WAS FOLLOWED IN AUGUST 2018, AND SUBSEQUENT DENIAL - PLEASE SEE APPENDIX C

2. CALIFORNIA SUPREME COURT DENIED CASE REVIEW
SEE APPENDIX C

NOTE: PETITIONER IS PRO SE - OR IN PRO PER W/ A JR HIGH EDUCATION AND RECENTLY PLACED IN LEGAL AREA W/ NO PROFESSIONAL GUIDANCE. BOTH IGNORANCE AND FEAR GUIDE MY HOPE AND PURSUIT, I PRAY YOU BARE W/ ME.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 6th AND 14th AMENDMENT CONSTITUTIONAL DEFICIENCIES REGARDING COUNSEL'S PROVISION AND DEFICIENT FAILURE TO PROVIDE EFFECTIVE COUNSEL GUARANTEED BY ARTICLE 1 SECTION 15
2. PREJUDICIAL JURY INSTRUCTION VIOLATING APPELLATES 6th AND 14th AMENDMENT RIGHTS TO TRIAL BY JURY
3. CUMULATIVE ERRORS PREJUDICIALLY DENIED APPELLATES GUARANTEE OF FUNDAMENTAL FAIR TRIAL AND DUE PROCESS GUARANTEED BY THE 6th AND 14th AMENDMENTS.

STATEMENT OF THE CASE

MICHAEL AVILA (DEFENDANT) STANDS CONVICTED FOLLOWING JURY TRIAL OF FIRST DEGREE BURGLARY, DURING COMMISSION OF WHICH SOMEONE OTHER THAN AN ACCOMPLICE WAS PRESENT IN THE RESIDENCE (PEN. CODE §§ 460, SUBD. (a) 667.5, SUBD. (c) 21; COUNT 1, POSSESSING A BURGLARY TOOL § 466; COUNT 3, AND DELAYING A PEACE OFFICER IN THE PERFORMANCE OF HIS OR HER DUTIES. (§ 148, SUBD. (a) COUNT 4).

AFTER A BIFURCATED TRIAL HE WAS FOUND TO OF SUFFERED 2 CONVICTIONS FOR FELONY CONVICTIONS. § 667, SUBD. (a) THAT WERE ALSO STRIKES id, SUBD. (c) (j) 1170.12 SUBD. (a)-(e) AND TO OF SERVED 4 PRIOR PRISON TERMS. (§ 667.5 SUBD. (b)). HIS MOTION TO STRIKE ONE OF HIS PRIOR CONVICTIONS WAS DENIED AND HE WAS SENTENCED TO A TOTAL OF 11 YRS PLUS 25 YRS TO LIFE, ORDERED TO PAY RESTITUTION AS WELL AS VARIOUS FEES. HE NOW APPEALS (IN PRO SE) RAISING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL & INSTRUCTIONAL ERROR.

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REASONS FOR GRANTING THE PETITION

ON FEB 2, 2015, 9pm UNIFORMED DEPUTY ERIC VOLLMER (VOLLMER) WAS DRIVING MARKED PATROL CAR IN RESIDENTIAL AREA WHEN HE SAW HISPANIC MALE (MARCOS BARRIOS) IN DARK CLOTHING ON BLUE BICYCLE FACING EASTBOUND (1RT 52-53) BARRIOS LOOKED UP SAW VOLLMER & HIS VEHICLE, TRAVELLED EAST ON HIS BICYCLE, TURNED NORTH, AND WENT OUT OF SIGHT. (1RT 53). VOLLMER NOTICED ANOTHER BICYCLE IN A GRASSY AREA, STOPPED AND THINKING BARRIOS MIGHT BE LOOKOUT FOR NEARBY SUSPICIOUS ACTIVITY, WALKED TOWARDS BICYCLE. (1RT 54-55).

VOLLMER NOTICED OPEN GARAGE DOOR W/ INTERIOR LIGHT ON, WALKED TO THE FRONT OF THE HOUSE AND SAW 2 CARS PARKED IN DRIVEWAY SIDE BY SIDE AND FRONT PORCH LIGHTS ON. A SUBJECT INSIDE THE GARAGE HAD ON A GRAY HOODED SWEATSHIRT. VOLLMER APPROACHED, SAW SOMEONE STANDING INSIDE THE GARAGE BENT DOWN TOWARD A CARDBOARD BOX, AND ALLEGED TO RECOGNIZE THE FACE FROM PREVIOUS CONTACT / DISCUSSIONS. (1RT 77-80); 122-125. AVILA WHEN ARRESTED WORE POPULAR HOODED GRAY SWEATSHIRT & BLUE JEANS. (1RT 80-81; 85 126; 144; 154).

VOLLMER WALKED FROM LEFT TO RIGHT SIDE OF DRIVEWAY NEAR THE CAR PASSENGER SIDE, HOPING TO GET CLOSER UN-DETECTED & MUST HAVE MADE SOME NOISE AS ITS THEN ALLEGED AVILA LOOKED AROUND NOTICED VOLLMER, TURNED EXITED THE GARAGE AND EVASIVED VOLLMER. VOLLMER SEMI FOLLOWED AROUND SHERIFF'S OFFICE WHERE AS AVILA ALLEGEDLY

STOOD FACING VOLLMER FROM 5 FEET & TOOK OFF RUNNING
1RT 90-93; 125; 136; 140 VOLLMER ALLEGES TO OF CAUGHT
VIEW OF AVILA'S FACE A SECOND TIME (1RT 94-95). IT
IS FURTHER ALLEGED AVILA DISCARDED ITEMS FROM HIS
SWEATSHIRT POCKET (1RT 98). IT'S THEN ALLEGED AVILA
RAN ONE BLOCK & DISAPPEARED THROUGH AN OPENING AT A
DEADEND CUL-DE-SAC IN THE RESIDENTIAL AREA. (1RT 100).

THERE IS NO REASON VOLLMER DID NOT ADDRESS AVILA
BY NAME (1RT 136-137) VOLLMER BROADCAST A DESCRIPTION
OVER THE RADIO, HISPANIC MALE, WHITE HAT, GRAY SWEATSHIRT
AND BLUE JEANS. (1RT 104-105) VOLLMER ALLEGES HE KNEW
WHO IT WAS, DID NOT KNOW WHY HE DID NOT GIVE MICHAEL
AVILA'S NAME, AND GAVE WHAT HE HAD IN THE SPUR OF
THE MOMENT. (1RT 139; 141; 165-166). AVILA WAS 5'6", 5'7", 140
TO 150 PDS. (1RT 118)

OFFICER TIMOTHY DAVIS HEARD THE RADIO BROADCAST
OF A BURGLARY IN PROGRESS AND DESCRIPTION OF HISPANIC
MALE W/ GRAY HOODY AND WHITE HAT. (1RT 177) DAVIS
WENT TO THE AREA IN 30 SECONDS, SAW SOMEONE MATCHING
THE DESCRIPTION & RUNNING/JUMPING FENCES, BROADCAST
THE LOCATION TO VOLLMER AND TRIED UNSUCCESSFULLY TO
CUT THE PERSON OFF THROUGH THE ALLEYS (1RT 179-182).

DAVIS SAW HISPANIC MALE IN HIS REARVIEW MIRROR IN
A GRAY HOODED SWEATSHIRT RUNNING TOWARD APARTMENTS).
DAVIS MADE A U-TURN, RECOGNIZED AVILA RUNNING AND
SAW HIM W/ BARRIOS AS THEY MET ANOTHER GROUP OF
PEOPLE AT THE BOTTOM OF THE APTS STAIRCASE. DAVIS

CLAIMS TO OF RECOGNIZED AVILA BY HIS STATURE AND PRIOR CONTACTS. (IRT 187) DAVIS EXITED HIS PATROL CAR RUNNING TOWARDS AVILA, LOUDLY STATING HE WAS AN OFFICER AND TO STOP. AVILA RAN UP THE STAIRCASE (IRT 188) DAVIS TOOK AVILA INTO CUSTODY, DOWN THE STAIRS, SEARCHED HIM AND FOUND A SHAVED GM VEHICLE KEY IN HIS RIGHT FRONT POCKET (IRT 193; 195) DAVIS WROTE NO REPORT OF HIS LIMITED INVOLVEMENT.

VOLLMER RESPONDED AND TOOK CUSTODY OF BARRIOS AND AVILA (IRT 106-107) AVILA WAS WEARING GRAY HOODED SWEATSHIRT, BLUE JEANS, NO HAT. (IRT 107) SWEAT WAS DRIPPING OFF AVILA'S HEAD. THE TEMPERATURE OUTSIDE WAS IN MID 50^S - OFFICERS CLAIMED AVILA'S BREATHING RYTHM WAS INDICATION OF INDIVIDUAL PERSUED. DAVIS TRANSPORTED BOTH SUBJECTS TO SUBSTATION (IRT 116-117).

VOLLMER RETURNED TO THE AREA ALLEGEDLY RECEIVING AUTOMOTIVE CLEANER FROM GRASS W/IN 20 MINUTES OF THEIR DISCARDMENT, CLAIMING WET GRASS PREVENTED OPPORTUNITY TO FINGERPRINT AND RETURNED SAID CLEANER TO ALLEGED BURGLER HOME OWNER WHO IDENTIFIED THE ITEMS (IRT 116-118) 148; 158-159). VOLLMER DID NOT RETRIEVE BIKE, PHOTOGRAPH OR PRINT. (IRT 150). VOLLMER CLAIMS AT SUBSTATION HE ASKED OTHER OFFICERS TO RETRIEVE BIKE WHICH BY THEN WAS GONE.

LATER THAT NIGHT VOLLMER ARRESTED AVILA, WHERE AVILA ADMITTED HE DID NOT OWN A VEHICLE OR LICENSE.

ANTHONY GOMEZ, THE ALLEGED VICTIM RESIDED W/ HIS PARENTS AND SISTER RECALLED A FEBRUARY EVENING WHEN

HE HEARD A NOISE IN HIS GARAGE THAT HE PRESUMED TO BE HIS MOTHER WASHING (IRT 203-206) GOMEZ WENT INTO THE GARAGE NOTICED THE LIGHT OFF, GRABBED A FLASHLIGHT TO ILLUMINATE THE DARKENED GARAGE AND THEN NOTICED VOLINER APPROACHING THE RESIDENCE. (IRT 205; 206; 212) VOLINER ASKED IF HE LIVED THERE, SAID A SUSPECT LEFT THE HOUSE W/ SOME ITEMS HE ASKED TO BE IDENTIFIED. THE LARGE GARAGE DOOR WAS OPEN (IRT 206-207) VOLINER TOOK HIM TO A GRASSY AREA WHERE GOMEZ CLAIMED A ARMOR ALL BOTTLE AND GLOSS FROM A \$30.00 CARWASH KIT. THESE ITEMS HE CLAIMED WERE LAST SEEN INSIDE A BOX IN HIS GARAGE (IRT 208-209; 213) A BIKE WAS ON THE GROUND AND THE 'DRY' ITEMS WERE 'RETURNED' TO GOMEZ. (IRT 213-214).

1
DEFENSE COUNSEL'S DEFICIENT FAILURES TO OBJECT TO OFFICERS IMPROPER OPINION THAT DEFENDANT WAS THE BURGLAR PREJUDICIALLY DENIED THE EFFECTIVE ASSISTANCE CONSTITUTIONALLY GUARANTEED BY ARTICLE 1, SEC 15 AND THE 6th AND 14th AMENDMENTS

A. THE FACTUAL BACKGROUND

VOLINER TESTIFIED, WITHOUT DEFENSE OBJECTION DEFENDANT'S POST DETENTION PHYSICAL APPEARANCE INDICATED

THAT HE WAS THE FLEEING PERPETRATOR.

Q. AND WHEN YOU FIRST SAW HIM AT THOSE APT'S, DID YOU NOTICE ANYTHING ABOUT HIM PHYSICALLY THAT CAUGHT YOUR ATTENTION?

A. YOU COULD--- AS WE APPROACHED, I MEAN, YOU COULD SEE THE SWEAT DRIPPING OFF HIS HEAD. AND YOU COULD TELL, JUST BY THE CHEST AND STOMACH MOVEMENT, THAT HE WAS BREATHING HEAVILY.

Q. WHAT DID THAT INDICATE TO YOU?

A. THAT HE WAS, OBVIOUSLY, THE SUBJECT THAT JUST RAN FROM US AND THAT WE WERE PURSUING (IRT 108)

DAVIS TESTIFIED, WITHOUT DEFENSE OBJECTION, THAT DEFENDANT'S POSSESSED KEY WAS "A BURGLARY TOOL":

Q. NOW BASED ON YOUR TRAINING AND EXPERIENCE, DID YOU FORM AN OPINION IN THIS CASE AS TO WHAT THE KEY WAS THAT YOU FOUND IN THE DEFENDANT'S POCKET?

A. YES

Q. WHAT WAS THAT OPINION?

A. THAT IS A BURGLARY TOOL USED TO BREAK INTO VEHICLES." (IRT 196)

B. DEFENSE COUNSEL'S DEFICIENT FAILURES TO OBJECT TO OFFICERS' INAPPROPRIATE OPINION THAT DEFENDANT WAS THE FLEEING, PURSUED BURGLAR AND HIS KEY WAS THE BURGLARY TOOL DENIED APPELLATE THE EFFECTIVE ASSISTANCE CONSTITUTIONALLY GUARANTEED, BY ARTICLE I, SEC. 15 AND THE 6TH AND 14TH AMENDMENTS

THE SEMINAL CASE OF PEOPLE V. TORRES (1995) 33 CAL. APP. 4TH 37 TORRES, HELD THAT A WITNESS MAY NOT EXPRESS OPINIONS ON DEFENDANTS GUILT, THE DEFINITION OF CRIMES, AND WHETHER A CRIME HAS BEEN COMMITTED. (ID. AT PP 43-48) SOME TOPICS, INCLUDING DEFENDANTS GUILT OR INNOCENCE, THE DEFINITION OF A CRIME, AND WHETHER A CRIME HAS BEEN COMMITTED, "ARE CATEGORICALLY OFF LIMITS TO EXPERT TESTIMONY." (PEOPLE V. BROWN (2016) 245 CAL. APP 4TH 140, 157.)

A WITNESS MAY NOT EXPRESS AN OPINION ON DEFENDANTS GUILT OR INNOCENCE BECAUSE SUCH INADMISSIBLE OPINIONS "ARE OF NO ASSISTANCE TO THE TRIER OF FACT." (TORRES, SUPRA, 33 CAL. APP 4TH AT P. 47.) RESTATED, "THE TRIER OF FACT IS AS COMPETENT AS THE WITNESS TO WEIGH THE EVIDENCE AND DRAW A CONCLUSION ON THE ISSUE OF GUILT." (IBID.)

OPINION EVIDENCE ON A STATUTE'S MEANING IS INADMISSIBLE FOR TWO REASONS. FIRST, LEAVING THE DEFINITION OF

STATUTORY TERMS TO BE PROVED OR DISPROVED IN EVERY CASE WOULD LEAD TO GREAT UNCERTAINTY IN THE ADMINISTRATION OF JUSTICE. (TORRES, SUPRA, 33 CAL APP 4th AT P 46.)

SECOND, IT IS THE TRIAL JUDGES DUTY TO INSTRUCT THE JURORS ON THE GENERAL PRINCIPALS OF LAW PERTINENT TO THE CASE. (IBID) "IT IS NOT THE COMMON KNOWLEDGE OF THE JURY WHICH RENDERS THE WITNESS OPINION UNNECESSARY, BUT THE SPECIAL KNOWLEDGE OF THE JUDGE." (IBID, CITATION OMITTED)

A WITNESS MAY NOT EXPRESS AN OPINION WHETHER A CRIME HAS BEEN COMMITTED BECAUSE MOST CRIMES ARE NOT SUFFICIENTLY BEYOND COMMON EXPERIENCE THAT THE JURY NEEDS AN EXPERT TO DETERMINE WHETHER THEY HAVE BEEN COMMITTED. (TORRES, SUPRA 33 CAL. APP. 4th AT P. 47) THE JURY IS COMPETENT TO DETERMINE FROM THE EVIDENCE AND THE COURTS INSTRUCTION WHETHER DEFENDANT HAD FELONIOUS INTENT. (IBID) EXPRESSING OPINIONS WHAT CRIMES WERE COMMITTED IS TANTAMOUNT TO EXPRESSING THE DEFENDANT IS GUILTY. (IBID AT P. 48) DEFENSE COUNSELS DEFICIENT FAILURES TO OBJECT TO OFFICERS OPINIONS UNREASONABLY DENIED APPELLANT THE EFFECTIVE ASSISTANCE CONSTITUTIONALLY GUARANTEED BY ARTICLE I, SEC 15, AND THE 6th AND 14th AMENDMENTS. (PEOPLE V. TORRES, SUPRA 33 CAL. APP 4th AT PP 48-49; PEOPLE V DONALDSON (2001) 93 CAL. APP. 4TH 916, 931, 932; STRICKLAND V. WASHINGTON (1984) 466 U.S. 668, 687, 688).

VOLUNTERS INADMISSABLE TESTIMONY THAT AVILA WAS WAS OBVIOUSLY FLEEING PERPETRATOR WHO WAS PERSUADED IMPROPERLY OPINED THAT DEFENDANT WAS GUILTY OF BURGLARY.

TORRES SUPRA 33 CAL. APP. 4TH AT PP 43, 46-47) VOIWMERS INADMISSABLE OPINION WAS OF NO ASSISTANCE TO THE TRIAL OF FACT. THE JURORS WERE AS COMPETANT AS VOIWMER TO WEIGH THE CIRCUMSTANCIAL EVIDENCE AND DRAW AN INFERENCE ON APPELLANTS GUILT OR INNOCENCE. (Ibid) DAVIS' INADMISSABLE TESTIMONY THAT DEFENDANT POSSESSED KEY WAS "A BURGLARY TOOL" INPROPERLY OPINED BOTH THAT THE CRIME OF POSSESSION OF BURGLARY TOOLS HAD BEEN COMMITTED AND THAT DEFENDANT WAS "A BURGLAR" GUILTY OF BURGLARY (PEOPLE V TORRES, SUPRA, CALAPP 4th AT PP 43-48; PEOPLE V. BROWN, SUPRA, 245 CAL. APP. 4TH AT P. 157; SEE ALSO PEOPLE V. KILL EBREW (2002) 103 CAL. APP. 644, 658 ["DARBER SIMPLY INFORMED THE JURY OF HIS BELIEF OF THE SUSPECTS KNOWLEDGE AND INTENT ON THE NIGHT IN QUESTION, ISSUES PROPERLY RESERVED TO THE TRIER OF FACT. DARBER'S BELIEFS WERE IRRELEVANT."] STRICKLAND V. WASHINGTON SUPRA 466 U.S. AT PP 687, 688.)

C.

THE DEFICIENT PERFORMANCE PREJUDICIALLY UNDERMINED CONFIDENCE IN THE OUTCOME

THE DEFICIENT PERFORMANCE PREJUDICIALLY UNDERMINED CONFIDENCE IN THE OUTCOME. (STRICKLAND V. WASHINGTON, SUPRA 466 U.S. AT PP 687, 694.) DAVIS INPROPER OPINIONS PREJUDICIALLY INFORMED THE JURY BOTH THAT THE CRIME OF POSSESSION OF BURGLARY TOOLS HAD BEEN COMMITTED AND AUIKA WAS A BURGLAR GUILTY OF BURGLARY. VOIWMERS INPROPER OPINIONS PREJUDICIALLY INFORMED THE JURY THAT

AVILA WAS OBVIOUSLY THE FLEEING, PURSUED BURGLAR.
CONFIDENCE IN THE OUTCOME WAS PREJUDICIALLY UNDERMINED
WHICH REQUIRES REVERSAL *Idid*; *PEOPLE V. DONALDSON*, *SUPRA*,
93 CAL. APP 4TH AT P. 932.

II.

THE PREJUDICIAL INSTRUCTION THAT "A BUMP KEY IS A BURGLARY TOOL" FURTHER VIOLATED APPELLATES SIXTH AND 14TH AMENDMENT RIGHTS TO TRIAL BY JURY AND THE DUE PROCESS CLAUSE

A. THE FACTUAL BACKGROUND.

DAVIS SEARCHED AVILA INCIDENT TO ARREST AND FOUND "A SHAVED KEY OR A BUMP KEY" IN HIS FRONT, RIGHT PANTS POCKET. (1RT 190-191; 192) THE GM VEHICLE KEY APPEARED SHAVED DOWN PRETTY FAR IN THE RIGHT SECTION AND WAS SHAVED DOWN A LITTLE BIT IN THE LAST SECTION (1RT 192-193; 194) DAVIS HAD EXPERIENCE AND RECEIVED TRAINING HOW TO IDENTIFY BURGLARY TOOLS, SPECIFICALLY A SHAVED KEY, THROUGH THE ACADEMY, FTO, AND OTHER DEPUTIES AND PERSONALLY SAW SHAVED KEYS IN THE FIELD AND ON INDIVIDUALS 20 TIMES. (1RT 193; 194-195) THE TYPICAL CHARACTERISTICS OF A SHAVED KEY WERE "EXACTLY WHAT IT IS. ITS SHAVED." (1RT 193) A SHAVED DOWN KEY HAD WEAR MARKS, LIKE BRUSH MARKS FROM SAND PAPER OR SOME SANDING TOOL. (1RT 194) THEY CONSISTANTLY LOOK SHAVED DOWN. (1RT 195) A SHAVED KEY WAS USED TO GET INTO AND STEAL CARS EASILY AND ALSO TO GET INTO A BUILDING OR HOUSES (1RT 193; 195-196) IT WAS MORE QUIET AND DID NOT DRAW AS MUCH ATTENTION AS BREAKING A CAR WINDOW OR PRYING SOMETHING OPEN (1RT 195) DAVIS OPINED THAT THE

KEY FOUND IN AVILA'S POCKET WAS "A BURGLARY TOOL USED TO BREAK INTO VEHICLES." IT WAS ALSO CONSIDERED A "BUMP KEY". THE WORDS, ""BUMP KEY" AND "SHAFTED KEY" WERE USED INTERCHANGEABLY. THEY WERE THE SAME THING. (1R+ 196)

THE TRIAL COURT CHARGED THE JURY ON ITS OWN MOTION ON COUNT THREE'S POSSESSION OF BURGLARY TOOLS AS FOLLOWS:

" DEFENDANT IS CHARGED IN COUNT 3 WITH POSSESSION OF BURGLARY TOOLS IN VIOLATION OF PC SEC. 466, A MISDEMEANOR. TO PROVE THAT THE DEFENDANT IS GUILTY OF THIS CRIME, THE PEOPLE MUST PROVE THAT, ONE, THE DEFENDANT WILLFULLY AND UNLAWFULLY POSSESSED A BUMP KEY; AND, TWO THE DEFENDANT HAD THE INTENT TO USE THE BURGLARY TOOL TO BREAK AND ENTER INTO A BUILDING OR VEHICLE.

- A BUMP KEY IS A BURGLARY TOOL." (2R+315; CT. 55; EMPHASIS ADDED.)

B. THE INSTRUCTIONAL ISSUES ARE COGNIZABLE

THE APPELLATE COURT MAY ALSO REVIEW ANY INSTRUCTION GIVEN, EVEN THOUGH NO OBJECTION WAS MADE THERETO IN THE LOWER COURT, IF THE SUBSTANTIAL RIGHTS OF THE DEFENDANT WERE AFFECTED THEREBY." (§ 1259).

ADDITIONALLY THE TRIAL COURT HAS A SUA SPONTE

OBLIGATION TO INSTRUCT THE JURORS ADEQUATELY AND CORRECTLY AS THE OFFENSES ELEMENTS TO AN EXTENT NECESSARY TO ENABLE THEM TO PERFORM THEIR FUNCTION IN CONFORMITY W/ THE APPLICABLE LAW (PEOPLE V SANCHEZ (1950) 35 CAL 2D 522, 528; PEOPLE V LOVE (1980) 111 CAL APP. 3D SUPP. 1, 22)

C. INSUFFICIENT EVIDENCE SUPPORTED THE ERRONEOUS "BUMP" KEY INSTRUCTION) WITH THE EVIDENCE ADDUCED WAS OF A "BANK" KEY.

DAVIS TESTIFIED THAT HE FOUND A "BANK" KEY. (127 191) THE OBJECT WAS CONSIDERED A "BANK" KEY 127 192-196) INSUFFICIENT EVIDENCE SUPPORTED THE ERRONEOUS "BUMP" KEY INSTRUCTION) WITH EVIDENCE WAS ADDUCED OF A "BANK" KEY.

D. THE "BUMP" KEY INSTRUCTION) WAS ERRONEOUS AS A MATTER OF LAW BECAUSE THE SHARDED KEY WAS NOT THE SAME AS AND LEGALLY INTERCHANGEABLE WITH A BUMP KEY

SECTION 466.5 THREE REQUIRED ELEMENTS HAVE

BEEN STATED TO BE 1.) DEFENDANT'S POSSESSION (2.) A TOOL

WITHIN STATES PUNITIVELY (3) WITH THE INTENT TO USE THE

TOOL FOR FELONIOUS PURPOSES OF STEALING AND FURNISHING

(PEOPLE V DIAZ (2012) 207 CAL APP. 4TH 396, 400; PEOPLE V

SOUTHARD (2007) 152 CAL APP. 4TH 1079, 1084-1085.)

SECTION 466 REFERS TO POSSESSION OF A PICKLOCK, CROW KEYBIT, CROWBAR, SCREWDRIVER, VISE GRIP PLIERS, WATER PUMP PLIERS, SLIDE HAMMER, SLIM JIM, TENSION BAR, LOCK PICK GUN, TUBULAR LOCK PCK, BUMP KEY FLOOR SAFE PULL, MASTER KEY CERAMIC OR PORCELAIN SPARK PLUG CHIPS OR PIECES OR OTHER INSTRUMENT ~~FOR~~ OR TOOL...."

ALSO, THE STATUTE APPLIES TO EVERY PERSON WHO SHALL KNOWINGLY MAKE OR ALTER OR SHALL ATTEMPT TO MAKE ALTER, OR REPAIR ANY INSTRUMENT OR THING...." THUS THE TOOLS MENTIONED WITHIN THE STATES PURVIEW SPECIFICALLY INCLUDE MASTER KEY AND "BUMP KEY" AND MORE GENERALLY REFERENCE "OTHER TOOL OR INSTRUMENT" AND ANY KEY." WHILE THE STATUTE ENCOMPASSES THE ELEMENT ACT OF "POSSESSION," IT ALSO INCLUDES "MAK[ING]" OR "ALTER[ING]" AND ANY KEY," BUMP KEY," AND "ANY KEY" CAN COME WITHIN STATUTES PURVIEW AND CAN BE POSSESSED, MADE, ALTERED OR REPAIRED.

SIMPLEY STATED, APPELLATE CONTENDS THAT THE SHAVED KEY WAS NOT LEGALLY THE SAME AS AND INTERCHANGEABLE WITH A "BUMP KEY" AS A MATTER OF LAW. "THE BUMP KEY, WHICH IS ESSENTIALLY A STANDARD KEY WITH ALL OF THE CUTS SHAVED DOWN TO THE MAXIMUM DEPTH, CAN BE INSERTED ALL THE WAY INTO A LOCK. THE LOCK CAN THEN BE OPENED BY KNOCKING THE BACK OF THE BUMP KEY ~~THAT~~ WITH ANY TOOL THAT WILL APPLY ENOUGH FORCE SUCH AS A HAMMER." WIKSELL, "CHAPTER 119: BUMP KEYS BREAK INTO THE PENAL CODE (2008) 40 McGEORGE L. REV. 498, 498, FNS OMITTED) ONE

CAN MAKE A BUMP KEY BY FILING DOWN ALL THE CUTS ON A REGULAR KEY TO THEIR DEEPEST DEPTHS. (Id at p 499, FN OMITTED) ADDITIONALLY, "MANY WEBSITES SELL BUMP KEYS." (Id) BECAUSE THE SHAVED KEY WAS NOT NECESSARILY A BUMP KEY, I.E. A BUMP KEY CAN BE PURCHASED LEGALLY, DOES NOT NEED TO BE SHAVED, IS CUT DOWN TO MAX DEPTH, AND IS USED BY INSERTING AND KNOCKING (BUMPING) ITS BACK WITH ANOTHER TOOL THAT APPLIES ENOUGH FORCE, THE TRIAL COURT'S INSTRUCTION ON A BUMP KEY WAS ERRONEOUS AS A MATTER OF LAW

E. THE ERRONEOUS INSTRUCTION THAT "[A] BUMP KEY IS A BURGLARY TOOL" DIRECTED A VERDICT CONTRARY TO THE 6TH AND 14TH AMENDMENTS.

THE INSTRUCTION THAT "[A] BUMP KEY IS A BURGLARY TOOL" WAS ERRONEOUS. "THAT THE PERPETRATOR BREAKS INTO OR ENTERS A PROPERTY, OR ATTEMPTS TO DO SO, AND HAPPENS TO HAVE ACCESS TO A TOOL THAT MAY BE USED IN THE COURSE OF THE BURGLARY IS NOT ENOUGH. THE TOOL MUST BE FOR THE PURPOSE OF BREAKING, ENTERING, OR OTHERWISE GAINING ACCESS TO THE VICTIM'S PROPERTY." (PEOPLE V. DIAZ, SUPRA 208 CAL. APP. 4TH AT P. 404, ORIGINAL EMPHASIS) RESTATED, IT IS NOT THE ENUMERATED NATURE OF THE TOOL OR INSTRUMENT THAT MAKES IT A "BURGLARY" TOOL. RATHER, IT IS THE INTENT FELONIOUSLY TO BREAK OR ENTER ANY BUILDING RAILROAD CAR, AIRCRAFT OR VESSEL, TRAILER COACH

OR VEHICLE." (§ 466) THAT TRANSFORMS THE INSTRUMENT INTO A BURGLARY TOOL. STATED DIFFERENTLY, MERE POSSESSION OF AN INSTRUMENT DOES NOT SUSTAIN A SECTION 466 CONVICTION, ABSENT THE FELONIOUS INTENT (COOK V. SUPERIOR COURT (1970) 4 CAL. APP. 3d 822, 829; PEOPLE V. DIAZ, SUPRA 207 CAL. APP. 4th AT P. 404

FURTHERMORE, THE ERRONEOUS INSTRUCTION DIRECTED A VERDICT CONTRARY TO THE 6th AND 14th AMENDMENTS. A TRIAL JUDGE MAY NOT DIRECT A VERDICT OF GUILTY, NO MATTER HOW CONCLUSIVE OR OVERWHELMING THE EVIDENCE. PEOPLE V. FIGUEROA (1986) 41 CAL. 3d 714, 724; SULLIVAN V. LOUISIANA (1993) 508 U.S. 275, 277; UNITED STATES V. MARTIN LINEN SUPPLY CO. (1977) 430 U.S. 564, 572-573; BROTHERHOOD OF CARPENTERS V. UNITED STATES (1947) 330 U.S. 395, 408.) NO FACT, EVEN AN UNDISPUTED FACT OR ELEMENT, CAN BE DETERMINED BY THE JUDGE (PEOPLE V. FIGUEROA SUPRA 41 CAL. 3d. AT P. 24; PEOPLE V. LAWSON (1987) 189 CAL. APP. 3d. 741, 747.) THE RULING PROHIBITED VERDICTS DIRECTED AGAINST AN ACCUSED EMANATES FROM THE 6th AMENDMENT RIGHT TO TRIAL BY JURY AND THE 14th AMENDMENT DUE PROCESS GUARANTEE. PEOPLE V. FIGUEROA, SUPRA, 41 CAL. 3d AT P. 725; PEOPLE V. LAWSON SUPRA 189 CAL. APP. 3d AT P. 746; SULLIVAN V. LOUISIANA SUPRA 508 U.S. AT PP 277-278.)

THE 6th AMENDMENT RIGHT TO TRIAL BY JURY REFLECTS THE FRAMERS' "FUNDAMENTAL DECISION ABOUT THE EXERCISE OF OFFICIAL POWER - A RELUCTANCE TO ENTRUST PLEBARY POWERS OVER THE LIFE AND LIBERTY OF THE CITIZEN TO ONE

JUDGE OR TO A GROUP OF JUDGES." (DUNCAN V. LOUISIANA (1968) 391 U.S. 145, 156) THIS RIGHT INCLUDES, "OF COURSE AS IT'S MOST IMPORTANT ELEMENT, THE RIGHT TO HAVE THE JURY, RATHER THAN THE JUDGE, REACH THE REQUISITE FINDING OF GUILT." (SULLIVAN V. LOUISIANA, SUPRA 508 U.S. AT P. 277, CITATION OMITTED.) FOURTEENTH AMENDMENT DUE PROCESS FURTHER REQUIRES THE PROSECUTOR TO PROVE EVERY NECESSARY, ELEMENTAL FACT BEYOND REASONABLE DOUBT. (IN RE WINDSHIP (1970) 397 U.S. 358, 364; SULLIVAN V. LOUISIANA, SUPRA, 508 U.S. AT PP. 277-278.) THE ERRONEOUS INSTRUCTION DIRECTED A VERDICT ON COUNTS THREE FELONIOUS INTENT ELEMENT CONTRARY TO THE SIXTH AMENDMENT JURY TRIAL GUARANTY AND THE 14TH AMENDMENT DUE PROCESS CLAUSE. (PEOPLE V. FIGUEROA, SUPRA, 41 CAL. 3d. AT PP 734, 741.; SULLIVAN V. ~~THE~~ LOUISIANA, SUPRA, 508 U.S. AT PP 277-278; DUNCAN V. LOUISIANA SUPRA 391 U.S. AT P 156; IN RE WINDSHIP SUPRA 397 U.S. AT P 364; BROTHERHOOD OF CARPENTERS V. UNITED STATES SUPRA 330 U.S. AT P 408.

F. THE STRUCTURAL ERROR REQUIRES COUNT THREE'S REVERSAL

A DIRECTED VERDICT VIOLATED SIXTH AMENDMENT RIGHT TO TRIAL BY JURY, WAS STRUCTURAL ERROR, AND REQUIRES COUNT THREE'S REVERSAL. (PEOPLE V. LAWSON, SUPRA, 189 CAL APP. 3d AT P 754; SULLIVAN V. LOUISIANA, SUPRA, 508 U.S. AT PP 281-282

G. THE PREJUDICIAL ERROR CONTRIBUTED TO COUNT ONE'S BURGLARY VERDICT.

THE PREJUDICIAL ERROR CONTRIBUTED TO COUNT ONE'S BURGLARY VERDICT. (CHAPMAN V. CALIFORNIA (1967) 386 U.S. 18, 24.) THE PROSECUTOR EXPLOITED THE INSTRUCTION TO ARGUE THE "BUMP KEY" "IS A BURGLARY TOOL." (2 RT 265) BURGLARY TOOLS FOUND IN A DEFENDANT'S POSSESSION SOON AFTER THE OFFENSES COMMISSION CONSTITUTE A LINK IN THE CHAIN OF CIRCUMSTANCES WHICH TEND TO CONNECT THE DEFENDANT WITH THE COMMISSION OF THE PARTICULARLY CHARGED BURGLARY. (PEOPLE V. DARLING (1989) 210 CAL. APP 3D. 910, 912-913.) THE TRIAL COURTS DIRECTED VERDICT THAT A BUMP KEY WAS "A BURGLARY TOOL CIRCUMSTANTIALLY BRANDED DEFENDANT "A BURGLAR" AND PREJUDICIALLY IDENTIFIED HIM AS THE BURGLAR PERPETRATOR. COUNT ONE SHOULD BE REVERSED. (CHAPMAN V. CALIFORNIA, SUPRA 386 U.S. AT P. 24.

PREJUDICIAL CUMULATIVE ERRORS VIOLATED APPELLATES CONSTITUTIONAL RIGHTS TO THE FUNDAMENTALLY FAIR TRIAL AND DUE PROCESS GUARANTEED BY THE 6th AND 14th AMENDMENTS

THE CUMULATIVE EFFECT OF THE PREVIOUSLY DISCUSSED AND FULLY INCORPORATED ERRORS PREJUDICIALLY DENIED APPELLANTS RIGHT TO A FUNDAMENTALLY FAIR TRIAL. PEOPLE V. CICCIA (2002) 97 CAL. APP. 4th 785, 795 ["WE THEREFORE CONCLUDE THE COMBINED EFFECT OF THE TWO ERRORS SUBSTANTIALLY IMPAIRED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL."] PEOPLE V. WOODS (2006) 146 CAL. APP. 4th 106, 117 [CUMULATIVE EFFECT ASSESSED UNDER CHAPMAN STANDARD WHEN SOME ERRORS WERE OF FEDERAL CONSTITUTIONAL MAGNITUDE].)

ADDITIONALLY, THE ERRORS CUMULATIVE PREJUDICE INFECTED APPELLATES TRIAL WITH FUNDAMENTAL UNFAIRNESS, DEPRIVED HIM OF A FAIR TRIAL AND THE DUE PROCESS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS AND HAD A SUBSTANTIAL AND INJURIOUS INFLUENCE ON THE TANTED VERDICTS (CHAMBERS V. MISSISSIPPI (1973) 410 U.S. 284, 302-303; O'NEAL V. MCANINCH (1995) 513 U.S. 432, 435, 436, 437, 438, 440, 445; PARLE V. RUNNELS (9th CIR 2007) 505 F.3d 922, 927-928, 929, 934-935.) THE ERRORS WERE SUBSTANTIAL." (KILLIAN V. POOLE (9th CIR 2002) 282 F.3d 1204, 1211, CERT DEN. 537 U.S. 1179.) THE OFFICERS' IMPROPERLY OPINED THAT DEFENDANT WAS THE FLEEING, PURSUED BURGLAR AND HIS

KEY WAS THE BURGLARY TOOL. THE INSTRUCTION DIRECTED UNCONSTITUTIONALLY THAT A BUMP KEY WAS A BURGLARY TOOL AND DEFENDANT WAS A BURGLAR. THE ERRORS STRUCK AT "THE HEART OF THE DEFENSES CASE" (PARLE V. RUMMELS, SUPRA, 505 F.3d at p 934) THAT HE WAS NOT THE BURGLAR. BOTH ERRORS ORIGINATING FROM THE POLICE AND TRIAL COURT THAT THE APPELLATE WAS THE BURGLAR HAD "AN INHERENT SYNERGISTIC EFFECT" (CARGLE V. MULLIN (10th CIR 2003) 317 F.3d 1196, 1221.) REVERSAL IS REQUIRED OF COUNTS ONE AND THREE. (CHAMBERS V. MISSISSIPPI, SUPRA, 410 U.S. AT PP 302-303; O'NEAL V MCANINCH, SUPRA, 513 U.S. AT PP 435, 436, 437, 440, 445; PARLE V. RUMMELS, SUPRA 505 F.3d AT PP 927-928, 929, 934-935; CARGLE V. MULLIN, SUPRA, 317 F.3d AT P 1221; KILLIAN V. POOLE SUPRA, 282 F.3d AT 1211

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL AVILA

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