# A GUIDE TO CHALLENGING TRUE FINDINGS ON OUT-OF-JURISDICTION PRIORS

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## I. Giving Away The Ending

These are among the issues on which appellate defense lawyers have the best chances of significant success – if you know what to look for and how to work with them. This article is intended to be a guide on how one might do that. It is written for all panel attorneys; from the least experienced to the most, it is meant to have something for everybody. It is intended to be detailed, but not definitive (for further explanation, please see the "Site Disclaimer" on this website).

This article's guiding principles are straightforward: Even if an out-of-jurisdiction prior finding might *look like* a California serious felony under Penal Code § 1192.7 ["serious felony"] – the basis of both five-year priors (Pen. Code, § 667, subd. (a)) and "strikes" (Pen. Code, §§ 667, subds. (b)-(j) and 1170.12) – that doesn't automatically mean it *is* one. Even awful-sounding crimes like rape, kidnapping, or murder in another jurisdiction might not be California serious felonies on the evidence in your case.

So you want to try to find discrete areas in which, consistent with your appellate record, the laws governing the conviction in the other jurisdiction at the time of the prior crime are **broader** than California's current laws governing the same or similar offenses, and also broader than any other California serious felony. Put differently, you want to find ways the out-of-jurisdiction crime could have been committed without committing a corresponding California crime listed in section 1192.7, or any other California serious felony.

For example, "robbery" is a serious felony listed in section 1192.7, subdivision (c)(19) (as of this writing), but that only refers to a California robbery. If your client has a "strike" from Jurisdiction A based solely on proof of a 1985 robbery conviction, and the 1985 crime of "robbery" in Jurisdiction A included all thefts in which the defendant carried a weapon, that would have included thefts with a weapon when no victim is present – which in California is not itself a robbery, or any other serious felony.

(This kind of analysis also works with other types of habitual offender statutes; among the many possible examples are the "one-strike law" under Penal Code section 667.61, the prior sex crime law in section 667.6, or even one-year priors under section 667.5, subdivision (b). This article focuses on "strikes" and five-year priors because they're among the most common forms of repeat offender sentence increases we see;

and also to minimize the complexity of this article by limiting its examples to only one California repeat offender statute, Penal Code section 1192.7.)

Find these kinds of examples, and you have an excellent chance at a winning appellate argument. The more the better – it gives you a greater margin for error – but in the end it only takes one to prevail. These types of issues can win far more often than you might think, if you know basic principles on how to set them up. And in the right case, they can get rid of years, or decades, of your clients' prison time.

NOTE: This article assumes the applicability of the current California caselaw on proving out-of-state priors. It does not address constitutional arguments that have been or might be made to challenge any of that caselaw. Its purpose is to provide guidance in dealing with that caselaw on its own terms.

## II. What To Look For, Generally

Here's a quick sketch of how you might go about making these kinds of challenges to out-of-jurisdiction priors. The concepts introduced here will be explained more as the article goes along.

As a matter of terminology, whenever this article mentions the laws of another jurisdiction, that refers to the laws at the time the defendant committed the out-of-jurisdiction prior offense. Whenever the article refers to the laws of California, that refers to laws at the time of the current crime of conviction. This is typical for every analysis of this nature, due to the prohibition against ex post facto laws. Also, citations to subdivisions of Penal Code section 1192.7, the serious felony statute, refer to subdivisions that existed when this article was written (April 2006).

In general, to explore a challenge to an out-of-jurisdiction prior, you'll want to find ways the out-of-jurisdiction crime is broader than the corresponding California serious felony, by looking for sources such as the following:

(1) A more restrictive definition of the crime in California, *i.e.*, an extra required element the other jurisdiction doesn't have (harder to commit in California); or, a more permissive definition of the crime in the other jurisdiction, *i.e.*, an extra alternative element California doesn't have (easier to commit in the other jurisdiction). These can be found by comparing, for example:

(1-a) Statutory elements of the out-of-jurisdiction statute your client was found to have violated, and the corresponding California statute.

(1-b) Underlying elements, such as statutes that are incorporated or cited in either of the statutes in (1a) above.

(1-c) Specialized caselaw meanings of statutory elements in (1a) or (1b) above.

(1-d) Elements in the other jurisdiction, as compared with what does not constitute that crime in California.

(2) Methods of secondary criminal liability; *i.e.*, criminal liability for persons other than direct perpetrators.

(3) Scenarios of unusual or unexpected restrictiveness found in California caselaw that don't exist in the other jurisdiction's caselaw.

(4) Defenses – particularly, methods of negating elements of offenses – that exist in California but not in the other jurisdiction.

If one or more of these comparisons gives you the result you're looking for, then as a necessary last step, you also want to make sure the out-of-jurisdiction crime wouldn't constitute any other serious felony in California.

This might seem like a lot to grasp at first, but with a little practice, it can become second nature. The companion brief to this article illustrates many of the methods above (written in about 1999). Later in this article, I'll analyze the sample brief, to illustrate with real-world examples how issues of this nature can be tackled.

## III. A Hypothetical

Briefing out-of-jurisdiction priors can often be made easier or clearer through the use of hypotheticals. Hypotheticals can help illustrate the legal discussion for the court, and perhaps more importantly, show the court specific situations in which the out-of-state prior could be committed without committing a California serious felony – the type of scenario you want to convince the court would have been possible on the priors trial evidence.

So here's a hypothetical which is loosely taken from an actual case.

Your client had a 1981 murder conviction in (hypothetical) out-of-state Jurisdiction X. He paroled from a life sentence in 2003. Now you have his appeal from a 2005 California drug possession conviction – a guilty plea to the offense, with a

proper jury waiver on the priors trial. The prosecution needed only one priors trial exhibit, a certified copy of the 1981 judgment concisely stating a conviction for murder and the life sentence. Your client got a stipulated two-strikes low-term sentence for the current (2005) case, and his guilty plea appeal is valid for sentencing issues only – but it was a stipulated sentence, and obviously a murder prior is a "strike." So it's time to begin drafting that *Wende* brief, right?

Not quite so fast. How do you know the murder prior is a "strike"?

Turns out it's not. (Hypothetical) Jurisdiction X had a typical felony-murder statute in 1981, in which any homicide in the course of a burglary (among other felonies) was murder. But burglary in Jurisdiction X was defined to include entry into an aboveground open quarry with intent to steal, which isn't in our burglary statutes or necessarily a felony here – for example, it might be trespassing, a misdemeanor. A homicide during such a crime might be the California crime of misdemeanor-manslaughter – involuntary manslaughter, not a serious felony – or if it was a freak accident, possibly no crime at all. The 1981 judgment established only that your client engaged in *some* conduct that was a murder in Jurisdiction X; there is no evidence your client committed the homicide or intended any death. Further, criminal liability for any crime in Jurisdiction X attached not only to perpetrators and aiders and abettors, but also to those guilty of solicitation. Your client's conduct might also have been some other non-serious felony in California, such as solicitation of murder ... or solicitation of petty theft (taking rocks from the quarry, a burglary in X). And the prosecution, with the burdens of proof and production, offered no evidence to the contrary.

This was intended to be an extreme example. But there are many jurisdictions in this country in which a murder conviction wouldn't necessarily establish a "strike" or five-year prior (serious felony conviction) in California. Which is a key point in challenging out-of-jurisdiction priors ... even for what seem to be the worst crimes, such as murder or rape, never assume anything about the other jurisdiction's laws. Sometimes they can be quite surprising!

## IV. Overview Of The Area

The hypothetical above was also intended to illustrate a central point of this article: Out-of-jurisdiction priors can be a **very** fertile ground for excellent appellate issues – excellent because, among other reasons:

(I) Many such issues can be raised for the first time on appeal, because they're sufficiency of evidence issues. (*See People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262.)

(ii) Prosecutors often don't introduce all the evidence they need; perhaps in part because they often don't have the time or simply don't do needed research in the other jurisdiction's laws, or recognize the need for such research in the depth that's appropriate. Sometimes, it might be impossible for the prosecutor to obtain more than the most basic out-of-state records on a 20-year-old conviction. Or sometimes, prosecutors might be fooled by the awful-sounding name of a prior conviction such as "robbery," "rape" or "murder," and merely assume it's a prior serious felony. And:

(iii) This is an area where a client can get very effective relief – often turning a life sentence into a determinate one, or a long determinate sentence with 20% prison credits into a much shorter sentence with 50% credits. It's an area that can also be ripe for Attorney General concessions, since if they are facing too many solid arguments of this nature in a brief, they might think (usually correctly) that there isn't much they can do. On occasion, the client can even get the ultimate form of relief - being legally entitled to walk out of prison upon issuance of the remittitur. Rather than filing a petition for review, you spend your post-opinion time trying to cajole CDC into letting him out a few days earlier than they wanted. Much more pleasant!

Which means:

(iv) You get a satisfying win which is featured prominently on the CCAP website; your great work becomes known far and wide; and the client thanks you profusely.

These kinds of issues are definitely out there. And there's an easy way to avoid overlooking them:

**Any** time there is an out-of-jurisdiction prior, it's worth immediately beginning the thought process, asking questions such as: What can I, as appellate counsel, do to challenge this prior? Where's the weakness in the DA's proof of a California serious felony, in light of the other jurisdiction's laws? Where's the hole in the chain of legal authority purportedly making this an out-of-state prior that qualifies as a serious felony?

You then hit the books, or the computer database, to find the various laws in the other jurisdiction relevant to the point. It can usually be done in fairly finite time, with nothing out of the ordinary needed for research skills. (After all, we all knew how to research in other jurisdictions when we took legal research in law school, and we're surely better than that now.) If it turns out the effort doesn't succeed, compensation for unbriefed issue time can still be claimed.

The chances are often quite good that the case prosecutor might not have thought about the kinds of considerations we're discussing here – or might not have the

research skills we do as appellate attorneys. Or the prosecutor might just have been saddled with a very old prior in a state that doesn't keep many court records for that long. This is one of the few areas where we actually have some natural advantages on appeal. And in many cases, once we raise the issue with specific reference to the other jurisdiction's relevant laws, there's not much the AG can do.

## V. Overview Of The Caselaw

In adjudicating prior conviction allegations, when there is no evidence of the specific charged act to which a defendant pled guilty, the plea is dispositive only of the least adjudicated elements of the charged offense. (*People v. Guerrero* (1988) 44 Cal.3d 343, 354-355.) "[W]hen the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law." (*People v. Rodriguez, supra,* 17 Cal.4th at p. 262 [quoting *People v. Guerrero, supra,* 44 Cal.3d at p. 355].) In light of *Rodriguez*, this is by now well settled. (*Accord, e.g., People v. Jones* (1999) 75 Cal.App.4th 616, 633-634; *People v. Encinas* (1998) 62 Cal.App.4th 489, 491-492.) Of course, when there is properly admitted trial evidence of facts beyond the least adjudicated elements within the "entire record of conviction" (defined further below), it may generally be used against the defendant (*e.g., People v. Myers* (1993) 5 Cal.4th 1193, 1200-1201). But often, that doesn't happen, for reasons such as those above.

So for example, let's say the properly admitted priors trial evidence reveals only that the defendant was convicted of an offense in violation of a specific statute, the statute can be violated in more than one way, and the defendant doesn't plead guilty to any specific method(s) of violation. In that situation, it must be assumed that defendant pled guilty only to the least method of violation possible; here, any method of violation that wouldn't be a California serious felony.

Analogously, if a statute was ambiguous or its meaning not conclusively established at the time of the prior plea, the plea establishes only the least offense involved in the ambiguity. (*People v. Watts* (2005) 131 Cal.App.4th 589, 594-597.) Even if the prosecution introduces the accusatory pleading into evidence along with the judgment, if there is no substantial evidence that the defendant pled to or was found guilty on that particular accusatory pleading, the plea may establish no more than the least method of committing the offense in the judgment. (*See People v. Rodriguez* (2004) 122 Cal.App.4th 121, 135; *see also, e.g., People v. Jones, supra,* 75 Cal.App.4th at p. 634 [where defendant's prior known to be conviction for a lesser included offense, it could not be determined whether the defendant pled to the precise form of the offense alleged in the accusatory pleading; "strike" finding reversed]; *People*

*v. Cortez* (1999) 73 Cal.App.4th 276, 284 & fn. 6.)

In determining whether a conviction is a prior serious felony under California law, "the trier of fact may look to the entire record of conviction 'but *no further*.' [Citation to *People v. Guerrero, supra*.]" (*People v. Reed* (1997) 13 Cal.4th 217, 226 [italics in original].) As of this writing, the entire record of conviction encompasses "record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*Id*. at p. 223; *People v. Houck* (1998) 66 Cal.App.4th 350, 355-357.) Numerous cases discuss what can be argued to be properly within or outside of the "entire record of conviction," as does another article on the CCAP website (by staff attorney Bill Arzbaecher), so that area won't be belabored here. As a broad overgeneralization, it's enough to say for now that most anything which doesn't officially reflect, among other things: (I) an official judicial pronouncement in the prior case, or (ii) an official governmental record deemed independently reliable for its truth (usually, records that are subject to a hearsay exception for the purposes needed by the prosecution), or (iii) an admission of the defendant, is potentially subject to being found outside of the "entire record" of conviction, based on the caselaw as of the time of this writing. In addition, documents such as certified prison records may be inadmissible under Penal Code section 969b, subdivision (a), to prove the substance (nature) of a prior conviction, as opposed to its existence as a fact. (*People v. Scott* (2000) 85 Cal.App.4th 905, 913-914 & fn. 13; *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1476 [cited with approval in *People v. Martinez* (2000) 22 Cal.4th 106, 116].)

A reviewing court uses the same legal standards as those above (*People v. Reed, supra,* 13 Cal.4th at p. 226; *People v. Houck, supra,* 66 Cal.App.4th at pp. 355-357), and considers the whole record of evidence presented to the trier of fact in the priors trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329; *People v. Cuevas* (1995) 12 Cal.4th 252, 261.) Since sufficiency of evidence issues are limited to evidence presented at trial, only evidence actually presented at the priors trial can be considered on appeal. (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 607; *People v. Encinas, supra,* 62 Cal.App.4th at p. 492; *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1371-1373; *see generally, e.g., Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766 [reviewing court limited to evidence that was before trier of fact]; *Schumpert v. Tishman Co.* (1988) 198 Cal.App.3d 598, 601, fn. 2 [same].)

In cases where the "entire record of conviction" in evidence goes further than the mere conviction itself, and encompasses specific acts beyond the least adjudicated elements of the offense of conviction, those specific acts may be considered under some circumstances. (*E.g., People v. Hayes* (1992) 6 Cal.App.4th 616, 623-625.) Even then, however, if the least adjudicated elements plus the permissible specific acts from

the out-of-jurisdiction prior conviction don't necessarily add up to a California serious felony, the methods of analysis in this article may still work.

Often, the "entire record of conviction" will contain either no evidence of such specific acts, or fragmentary evidence that doesn't overcome evidentiary insufficiency. An excellent California Supreme Court case finding insufficiency of evidence of a charged prior, due to evidence that was too fragmentary to constitute substantial evidence, is *People v. Rodriguez, supra,* 17 Cal.4th at pp. 261-262.

For simplicity, this article assumes a case where the evidence at the priors trial established only the least adjudicated elements of a prior out-of-jurisdiction conviction.

## VI. A Sample Priors Argument, For Discussion

### A. General Discussion

Let's look at the companion sample briefing. It was taken from an actual appeal in a rather heinous sex crimes case, where there were no viable appellate issues on the main trial. But, the priors trial was a different matter. Appellate counsel raised **six** (sub)issues challenging sufficiency of evidence of the priors, each on different legal grounds; the AG conceded two and didn't address the other four; the court accepted the concession; and the appellant ended up with over half of his sentence eliminated.

A table of contents has been created for and is attached to the sample brief excerpt, so you can see and find the captions of the six (sub)arguments at a glance.

What do all six of the sample brief arguments have in common? It's the central theme of this article: Each finds a different basis on which current California robbery law is narrower or more restrictive than the Texas robbery law at the time of the alleged prior – or, the same thing from the opposite view, on which the prior Texas robbery law is broader or more permissive than California robbery law – in a way that would have permitted the Texas conviction for "robbery" not to be a current robbery or any other serious felony in California. Each argument then contends there's no substantial evidence to show that this divergence did not exist. Most of the sample brief arguments use either hypotheticals or example scenarios from actual caselaw, including Texas caselaw, to illustrate the legal analysis for the court.

The sample argument was in a case where the proof at trial was only that the defendant had a Texas robbery conviction in 1981. Robbery is, of course, a serious felony in section 1192.7, subdivision (c)(19) – but that's a **California** robbery. Whether an out-of-jurisdiction robbery is necessarily a California robbery, or any other California

serious felony, is a much different question. It's at this point that good lawyering takes over, and issues like this become challenging and even enjoyable – especially when they turn into victories, as they can surprisingly often.

In this discussion, I will use two terms created for the occasion: "Required elements" of an offense, and "alternative elements." Both are what they sound like: "Required elements" are elements that, on a given set of facts, must **all** be present for the offense to be committed; in a statute, those are sometimes (though not always) separated by the word "and," or merely by commas or semicolons. An example is Penal Code section 211, the robbery statute. "Alternative elements" are elements that are different possible ways of committing the same offense on a given set of facts; in a statute, those are sometimes signaled when the word "or" appears in the list of elements; but again, not always. An example is the felony assault statute, Penal Code section 245, subdivision (a); another example, without the word "or," is the 1981 version of Texas Penal Code section 31.03 which is discussed later. Many statutes, such as Penal Code section 211, contain a combination of both.

More required elements make a statute more difficult to violate, as more is required to violate it. More alternative elements make a statute easier to violate, as there are more possible ways to violate it. We want to look for specific areas of comparison where the out-of-jurisdiction law is easier to violate, so those will be areas where the other jurisdiction has more alternative elements or fewer required elements.

I use these terms to help keep track of what we're looking for ultimately – ways in which the out-of-jurisdiction statute can be broader than the corresponding California statute. Two of the easiest ways this can happen are:

(1) The California law has at least one required element that the out-of-jurisdiction statute doesn't, which makes it harder to commit that crime in California; or

(2) The out-of-jurisdiction law has at least one alternative element that the California statute doesn't, which makes it easier to commit that crime in the other jurisdiction.

Although you want to be comparing statutes, it's not enough to see the words of statutes on paper; you also have to make sure you know what those words mean. We can't assume <u>any</u> word or phrase describing a crime (*e.g.*, robbery, burglary, rape, murder, etc.) means the same in the other jurisdiction in California. That's one of the keys to doing these types of arguments: It's inadvisable to assume anything at all about the other jurisdiction's laws. The more you undertake to find out for yourself, by looking at statutes and even caselaw in both jurisdictions, the better your chances of success.

B. The Primary Analysis: Comparing The Out-Of-Jurisdiction Prior To The Closest California Serious Felony

1. Comparison Of Statutory Elements

To help keep everything straight, it's often useful to begin with the most basic comparison, comparing apples to crabapples – in other words, comparing the statutory elements of the out-of-jurisdiction prior to the closest, most analogous serious felony in California. Here, that would involve comparing the basic elements of the 1981 Texas robbery law, to the elements of the corresponding California robbery law as of the time of the current offense of conviction.

So appellate counsel in the sample brief began with a basic step – going to the law library or on line to find the Texas robbery statute at the time of the prior. It's often fairly easy to tell what version was in effect at the time of the prior (here, 1981), by looking at the statutory history printed after the end of the statute, and determining what the statute said at the time of the last amendment before the prior. A less artistic (but often equally effective) method is to look up caselaw in that jurisdiction from shortly before the time of the prior. Many judicial opinions discussing a statute will quote the statute or pertinent parts.

In the sample brief, the out-of-jurisdiction prior conviction is a 1981 Texas robbery conviction, Texas Penal Code section 29.02. The corresponding California serious felony is robbery, Penal Code section 211. The statutory elements in Penal Code section 211 are:

1. Felonious taking of personal property,
2. In possession of another,
3. From the person or immediate presence,
4. Against his will, and
5. Accomplished by means of force or fear.

The statutory elements of the 1981 Texas robbery statute, Texas Penal Code section 29.02, are:

I. Theft as defined in Chapter 31,
ii. Intent to obtain or maintain control of the property, and
iii-A. Intentionally, knowingly, or recklessly causing bodily injury to another; or
iii-B. Intentionally or knowingly threatening or placing another in fear of imminent bodily injury or death.

Compare the two. Are there any required elements in California that don't appear to exist in Texas, or more alternative elements (options), for committing the offense in Texas? Either scenario makes it easier to commit a robbery in Texas than in California – and that's what you're looking for. That can present grounds for challenging the true finding, because then the least adjudicated elements in a Texas robbery would not be a California robbery. If they also wouldn't be any other California serious felony, you have your argument.

One example might be Element 3 in California, "person or immediate presence," a required element. Nothing in the Texas statute suggests an "immediate presence" requirement. In that sense, the Texas statute is broader than the California statute, since it can be violated in ways that wouldn't be a California robbery (or any other California serious felony).[1] To use a real-world example, a Texas robbery might be done by a nonverbal, gestured threat of force 1000 feet from later-stolen property, in a way that wouldn't be robbery in California. (*See People v. Hayes* (1990) 52 Cal.3d 577, 629, discussed in the sample argument.) (I used a nonverbal, gestured threat of force as an example because a verbal threat might be a crime under Penal Code section 422, which is now a serious felony under section 1192.7 (subdivision (c)(38)).)

That's the approach used in Issue 1 of the sample brief, which briefs the "immediate presence" issue: It's a required element in California, it isn't an element at all under the Texas robbery statute, and thus it presents a way in which the appellant could have received a Texas robbery conviction without committing an act that was a California robbery. The writer then comes up with scenarios to show it wouldn't necessarily be any other California serious felony either. One is all that's needed.

The sample brief was written long before the opinion in *People v. Rodriguez, supra,* 122 Cal.App.4th 121. But the result was the same – a Texas robbery doesn't have the "immediate presence" requirement that exists under California robbery law, so evidence of a Texas robbery (1981 in the sample brief, 1976 in the *Rodriguez* case cited in this paragraph) was not itself sufficient to prove a California serious felony. (*See id*. at pp. 129-131.)

This is also the approach used in Issue 5 of the sample brief, an argument on the "intent to permanently deprive" element. That wasn't a required element under the

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[1] To be thorough, one might then want to check the Texas caselaw to make sure their courts hadn't created an "immediate presence" requirement. If they did, it's far better for the appellant's attorney to find the flaw at the outset, than make an unsupportable argument and have the Attorney General or the court find it.

Texas robbery statute, but according to then-published caselaw based on an AG concession, it was a required element in California. So this presented another way in which the appellant, on that caselaw, could have received a Texas robbery conviction without committing an act that was a California serious felony.

That the California Supreme Court held otherwise at some later point[2] makes no difference – the issue was arguable (and a winner) on published authority at the earlier time of the sample AOB, which was all that mattered. But it's also a good reason why the brief did well to have multiple types of arguments – if one lost for any reason, others would still be there.

This type of approach can also be used if the situation requires analysis of elements defined in the California serious felony statute (rather than the more common situation, elements of a crime listed in the serious felony statute). To use an example found in caselaw, "bank robbery" is a serious felony under section 1192.7, subdivision (c)(19), and "bank robbery" is specifically defined for California serious felony purposes in section 1192.7, subdivision (d). That definition shows the statute's intent to encompass the crime of federal bank robbery by force or fear. But if one reviews the federal bank robbery statute, 18 U.S.C. section 2113, one finds it covers far more conduct than is defined in section 1192.7, subdivision (d), and much of it is conduct that wouldn't be robbery, bank robbery, or any other serious felony in section 1192.7. A violation of the federal bank robbery statute thus might not be covered by section 1192.7, subdivision (d), and in the right case could be found not to be a serious felony.

Appellate counsel won with such an analysis in *People v. Jones, supra,* 75 Cal.App.4th 616. In *Jones*, the priors evidence included (I) a judgment that said the defendant was convicted under 18 U.S.C. section 2113, subdivision (a), as a lesser included offense of the indictment, and (ii) a fingerprint card that listed the conviction as one for "bank robbery." 18 U.S.C. section 2113 is entitled "Bank robbery and incidental crimes," but subdivision (a) of section 2113 includes what would be several different

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[2] This ground, and the published AG concession in the *Crawford* opinion on which it relied, were later nullified by the California Supreme Court in *People v. Avery* (2002) 27 Cal.4th 49. (The case in the sample brief preceded *Avery* ... but not by much!) Which serves further to illustrate the importance of finding multiple grounds whenever possible: Even the seemingly clearest winner is potentially vulnerable to falling apart during the appeal, just as the published *Crawford* concession later fell apart in light of *Avery*. On the other hand, even if an issue like this is eventually fated to lose in someone else's California Supreme Court case, it still might be won in yours before the California Supreme Court decides it is review-worthy.

crimes under California law, some of which – including crimes that could be roughly described as bank burglary – would not be serious felonies.[3] The Court of Appeal held the reference to "bank robbery" on the fingerprint card wasn't shown to be more than a reference to section 2113 as a whole. (*Jones, supra,* 75 Cal.App.4th at pp. 632-633, citing *People v. Reed, supra*, 13 Cal.4th at p. 223.) The court thus reversed the true finding, on the ground that the "entire record of conviction" in the trial evidence did not provide legally sufficient evidence that the federal "bank robbery" conviction was actually a federal bank robbery as defined by section 1192.7, subdivision (d), or any other serious felony. (*Jones, supra,* 75 Cal.App.4th at pp. 632-634.)

This is one of the most valuable techniques for challenging out-of-jurisdiction priors. It can win cases all by itself. And as the next sections will show, other techniques for challenging out-of-jurisdiction priors are merely refinements of this one.

2. Comparison Involving Incorporated (Required) Elements

That term is also created specifically for this article. I'll define "incorporated elements" as required elements of a different statute which is incorporated into the statute at hand in some way. This might be done, for example, by use of a phrase like "as defined in ..."; or, simply by reference to another underlying crime which – at least in some circumstances – has to be committed in order for the main crime to be committed. Incorporated elements are always required elements.

For example, the crime in Penal Code section 210.5 specifically incorporates Penal Code section 236. So for purposes of this discussion, if we were looking at section 210.5, the elements of section 236 would be "incorporated elements." (In fact, Penal Code section 211 also has incorporated elements, though they're a bit harder to

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[3] A small point for technical accuracy: Jones's counsel conceded the entire first paragraph of section 2113, subdivision (a) always encompassed crimes that were serious felonies in California. (*Jones, supra,* 75 Cal.App.4th at p. 632.) But that might not have been true; a bank extortion by phone, letter, or email from a distant location seems to fall under federal section 2113, subdivision (a), but not under California section 1192.7, subdivision (d), as the intimidation would not be part of a taking "from the person or presence of another." Jones' counsel's concession appeared not to have spotted this disparity, as the concession was apparently directed to a different issue (one of specific intent) which was settled in the California appellate courts years before. Still, Jones's counsel – as he obviously knew – could also rely on other methods of violating section 2113, subdivision (a) which clearly were not serious felonies in California, so even a concession that might have been slightly overbroad did no harm.

spot. We'll get there in a little while.)

Once you've done the work in (1) above, compared statutory elements between the prior in the other jurisdiction and the corresponding California crime, you would then determine whether either of those statutory elements (the other jurisdiction's or California's) has any incorporated elements. This makes obvious sense: Incorporated elements are elements of a crime just like the elements expressly set forth in the main statute; they merely take an extra step or two to find. Sometimes, though, that extra step or two can be what wins the issue, because the DA might have looked only at the main statutes and not thought to look at the incorporated elements.

Now back to the sample brief. As is often the case, the relevant out-of-jurisdiction statute referred to other statutes; specifically here, to "theft as defined in chapter 31" of the Texas Penal Code. So the writer went to Chapter 31 – again, as of the date of the prior – and determined what the theft statutes said too. Both the relevant Texas robbery statute and the relevant Texas theft statutes are quoted in a long footnote in the sample argument, a technique that can help the Court of Appeal and its research clerks find the out-of-jurisdiction statutes easily and quickly.

The first element of the Texas robbery statute is "theft as defined in Chapter 31." That makes all of the elements of "theft as defined in Chapter 31," as they existed in 1981, incorporated elements in the Texas robbery prior.

So the obvious question must be answered: What, exactly, are the elements of "theft as defined in Chapter 31?" Answering that question, one finds an interesting statute, section 31.02:

> Theft as defined in Section 31.03 constitutes a single offense superseding the separate offenses previously known as theft, theft by false pretext, conversion by a bailee, theft from the person, shoplifting, acquisition of property by threat, swindling, swindling by worthless check, embezzlement, extortion, receiving or concealing embezzled property, and receiving or concealing stolen property.

These are all alternative elements of a Texas robbery, because a Texas robbery requires a Texas theft, and a Texas theft can be committed in any one of the many alternative ways listed in section 31.02. And remember from earlier – a lot of alternative elements in the other jurisdiction's law is **good**, because it makes for a lot of different ways to violate the other jurisdiction's law. If one or more of those ways would **not** be a robbery or other serious felony in California, that's another appellate argument.

California's robbery law, Penal Code section 211, also has incorporated

elements. We can't see them so well in section 211, but they're clearer in the basic Supreme Court caselaw on robbery: Robbery is a larceny (theft) accomplished by force or fear, which makes larceny always a lesser-included offense of robbery. (*People v. Davis* (2005) 36 Cal.4th 510, 562; *People v. Ortega* (1998) 19 Cal.4th 686, 694.) The elements of larceny are thus incorporated elements in robbery in California.

So we know that a California robbery always requires commission of the incorporated crime of larceny. Comparing this with "Chapter 31" in Texas, we might ask: Would any of those alternative elements in Texas section 31.02 – which, as discussed earlier, is expressly incorporated into the Texas robbery statute (section 29.02) – **not** constitute a crime of larceny under California law? If so, those Texas section 31.02 alternative elements could not underlay a California robbery, because a California robbery must be based on larceny. So a Texas robbery based on such a section 31.02 alternative might not be a serious felony in California.

Some of these section 31.02 underlying offenses – including embezzlement (*see* Cal. Pen. Code, § 490a) – are clearly larcenies in California. They could therefore underlie a California robbery.

But there are also forms of taking in Texas section 31.02 above which don't fall within California's larceny statutes. Two examples would be extortion, a violation of California Penal Code section 518; or receiving stolen property, a violation of California Penal Code section 496. Both are forms of taking someone else's property. But as Penal Code section 490a indicates, they are different from any crime called "larceny" in California – and a "larceny" is required in California for there to be a robbery.

The analysis above shows that it's important to know not only the statutory language on the elements of the California offense, but also what is **not** the California offense. That makes it easier to spot examples where an out-of-jurisdiction offense might have same name as a California serious felony, yet encompass conduct that is not a California serious felony.

We now apply this knowledge to see how sample brief Issue II apparently came to be – the writer took the laundry list of theft crimes in Texas Penal Code section 31.02, and looked for at least one that would not larceny in California.

The example in the sample briefing is the California crime of extortion. Extortion in California is close to robbery, but as the sample argument shows, it has one very different element: Robbery is based on larceny (theft), which is a taking against the victim's will, *i.e.*, without consent. Extortion, by contrast, is an unlawful taking by force or fear or under color of official right, but *with* consent. "'Robbery and extortion are not

the same. '[T]he two crimes are distinguished by the fact that in extortion the property is taken with the victim's consent whereas in robbery, it is taken against his will.' [Citation omitted.]" (*People v. Chacon* (1995) 37 Cal.App.4th 52, 63.)

This might not have been immediately obvious to those who've never had an extortion case. But it can easily be spotted either by a comparison of the robbery and extortion statutes, a quick review of annotations of the extortion statute (there aren't many) looking for one that discusses robbery, or a computer search for cases that compare robbery and extortion. Starting from the statute, the plain language of the robbery statute (section 211) lists an "against his will" element; the extortion statute (section 518) does not. Therefore, the "against his will" element shouldn't exist for extortion. A computer search or brief scan of section 518 annotations confirms this, by reference to opinions such as *In re Stanley E.* (1978) 81 Cal.App.3d 415, 420-421, and the *Chacon* opinion above.

Logically then, since an extortion in California cannot be a larceny, it cannot underlay a California robbery. The writer of the sample brief even found an opinion which specifically held that an extortion is not a robbery; as shown above, there were others too. Furthermore, one can easily commit an extortion without committing any other serious felony listed in section 1192.7.

Since a Texas robbery conviction **can** be based on an act of extortion which is usually not a serious felony in California, and since one could easily commit an extortion without committing any other serious felony listed in section 1192.7, the sample case correctly used this basis to argue insufficiency of evidence that the Texas robbery conviction was a "strike." The least adjudicated elements of a Texas robbery, one of which could be an extortion, did not necessarily establish a California robbery or other serious felony.

There seem to have been other similar possibilities the sample brief could have used. For example, receiving stolen property is also in the laundry list of alternative theft elements in Texas Penal Code section 31.02, and thus is also an incorporated alternative element in a Texas robbery. However, since receiving stolen property is not a crime of larceny in California, a California robbery cannot be based on receiving stolen property. Thus, it appears again that specified conduct which would be a Texas robbery would not be a California robbery, and would not be any other serious felony either.

As mentioned earlier, an illustrative scenario can sometimes be useful to help show how such a legal analysis works in a particular case. Here, let's say X brings an accomplice as a getaway driver to buy some unique rings X knows to be stolen (but

which he didn't steal). After the purchase, the malefactors get into X's car, and the driver starts it. A bystander runs up to the car, bangs on X's window, and yells "That's my neighbor's ring, it was stolen in a burglary! Give it to me or I'll call police!" X's driver panics, and focused on getting away and not thinking of the bystander, he speeds away, knocking the bystander down and causing a painfully scraped elbow that heals in due course. That seems to constitute receiving stolen property by recklessly causing bodily injury – a Texas robbery, under Texas Penal Code section 29.02, subdivision (a)(1), and section 31.02. (It would be helpful to double-check some Texas caselaw to make sure that analysis really works.) In California, it's not robbery, because (among other reasons) the crime of receiving stolen property is not a crime of larceny (*see* Pen. Code, § 496, subd. (a); *People v. Allen* (1999) 21 Cal.4th 846, 854), and thus cannot underlie a California robbery (*see* above). It doesn't appear to be any other California serious felony either, since the scraped elbow doesn't seem to fall under California Penal Code section 1192.7, subdivision (c)(8) – X didn't personally inflict it, and it doesn't appear to be great bodily injury anyway.

These examples are similar, in that they again ask: How is the out-of-jurisdiction crime broader than the corresponding California crime? And: Does that extra breadth enable the out-of-jurisdiction crime X to be based on a legal or factual scenario that isn't a California serious felony? **Any** such legal or factual scenario will do, since there is insufficient evidence at trial to show that such a non-serious felony scenario didn't take place, and the least adjudicated elements of the out-of-jurisdiction crime aren't necessarily a California serious felony.

3. Comparison Involving Persons Who Can Be Criminally Liable (Secondary Liability)

Of course, a person can be criminally convicted for acts other than directly committing the crime himself. For example, in California and most other jurisdictions, aiders and abetters are just as criminally liable as perpetrators. As a result, a California verdict or judgment for aiding and abetting a robbery doesn't list the crime as "aiding and abetting robbery." It merely specifies the crime of robbery, because an aider and abetter is just as guilty as a perpetrator.

However, in some jurisdictions, accessories after the fact are **also** as criminally liable as perpetrators. But California is not one, and accessory after the fact (Pen. Code, § 32) is not a serious felony in California. So too for solicitation (Pen. Code, § 653f); some jurisdictions punish solicitation just like aiding and abetting or perpetration, but California does not, and very few solicitations are serious felonies in California.

Thus, in a jurisdiction where accessory after the fact or solicitation are also deemed legal equivalents of perpetration (just as in California, aiding and abetting is), a criminal conviction could well be for conduct that isn't a serious felony in California – even if the conviction is for a crime that has exactly the same substantive elements as the same-named crime in California.

We saw an example in "A Hypothetical" near the beginning of this article. Because Hypothetical Jurisdiction X deemed persons to be equally guilty of a crime if they committed it by direct perpetration, aiding and abetting, **or** solicitation, the 1981 murder conviction in X could have been for a solicitation of murder – not itself a California serious felony, even if the elements of murder in X were identical to the elements of murder in California. It could be quite a coup to win an appeal for insufficiency of evidence of a "strike" where your client's prior conviction was for murder!

So it is worth looking at the out-of-jurisdiction's criminal statutory scheme to determine the different methods by which criminal liability can attach generally to offenses. Again, the idea is to find ways in which the out-of-jurisdiction's statutory scheme permits criminal liability more broadly than California's, where the difference would implicate a crime that is not necessarily a serious felony in California.

Sample Brief Argument IV does exactly that. The writer apparently looked for general statutes governing criminal liability in Texas, and found sections 7.01 and 7.02, "Parties to Offenses" and "Criminal Responsibility for Conduct of Another." These established that a person who solicits an offense in Texas is just as criminally liable as a person who commits one – so that a Texas conviction for most offenses, including the robbery prior in the sample brief, could be a conviction for a mere solicitation which is not a serious felony in California.

(The sample brief also went so far as to find Texas caselaw confirming what is true in most jurisdictions – that when a defendant is found guilty of a crime based on secondary liability, the indictment, verdict, or judgment need not specify the precise form of criminal liability; it only has to name the underlying crime, so that one usually can't tell from a judgment alone whether the conviction was based on secondary criminal liability, or if so, what form of liability it was. A California court is likely to presume that's true anyway, so perhaps this portion of the sample brief was an excess of caution, but there's no harm in being cautious with so many years of the client's life at stake.)

Prudently, it appears the writer's research also extended to whether there was a separate crime of solicitation in Texas. Apparently there is, but it only extends to

certain exceptionally serious crimes, and the robbery at issue – which was never established to have involved a weapon – wasn't one.

Once the writer figured out that a 1981 Texas robbery conviction could be obtained for conduct that was merely solicitation of robbery in California, the rest was straightforward . Furthermore, solicitation of robbery is not a serious felony in California. Consequently, the least adjudicated elements of the 1981 Texas robbery conviction were not a California robbery, or any other California serious felony.

4. Comparison Involving Criminal Liability For The Offense Of Conviction, As Established By Caselaw

This part of the discussion involves knowledge of caselaw which couldn't necessarily be deduced from statutes alone. But they show how a little creativity, and a solid knowledge of California criminal law, can go a very long way. Few if any DAs in the state would be likely to think of the legal grounds discussed here. And they too establish a key point of this article - when trying to find an area of disparity where the out-of-jurisdiction offense is broader than a California serious felony, it helps to find as many as possible, but it only takes one to prevail.

Issue III in the Sample Brief capitalizes on a crevice in California's robbery laws, on the basic issue of intent. If a defendant intends to take a victim's property before imposing force or fear against the victim, and then takes the property, that is clearly robbery. But if a defendant only forms the intent to take the property after imposing force, that isn't robbery in California. And there are various ways a scenario of this nature wouldn't be a serious felony at all in California; two are discussed in the Sample Brief. (The writer probably should have explained briefly why the two factual scenarios weren't any form of serious felony, not merely why they weren't robbery, but the argument was well made nonetheless.)

Knowing this crevice in California law, the writer might then have asked: "Since I know of a little exception in California robbery law that isn't obvious, something caselaw established is **not** robbery in California, does that same exception exist in Texas?" If not – here, if it doesn't matter in Texas when the defendant forms the intent to take the property – then that's another area where the out-of-jurisdiction crime is broader than the California crime. And that's another appellate argument.

So the writer would then have gone to the Texas caselaw to find the analogous law there. The result would be Sample Brief Issue III, which explains that it didn't matter under Texas law when the intent to take property was formed: If a 1981 Texas defendant took another's property, and that taking was facilitated by an unlawful use of

force or fear whenever applied, that constituted a Texas robbery. The appellant in the Sample Brief could have pled guilty to robbery based on exactly that kind of scenario, but it wouldn't be a serious felony in California.

As a result again, the least adjudicated elements of the Texas robbery do not constitute robbery in California, or any other serious felony.

Issue VI in the Sample Brief may be somewhat obscure, but if that had been the only argument available, the obscurity could still have made the difference of years in the appellant's life. It appears to be a perfectly valid argument – the writer, by whatever means, found yet another unexpected exception in the caselaw, another place where California had a crevice in its general criminal liability. The crevice was tiny, but Texas didn't have it, so the size of the crevice didn't matter. Thus once again, Texas's criminal liability for robbery was broader than California's, and conduct that constituted a robbery in Texas would not necessarily have been a serious felony in California. As unlikely as that scenario might be, the prosecution's evidence failed to established that it was impossible on the bare-bones evidence in the priors trial.

This is an excellent example of how worthwhile it is to know the California statute, and accompanying caselaw, as thoroughly as possible. The sample argument, once again, showed a solid grounding in what did **not** constitute robbery in California, as well as what did. Knowing specific out-of-the-ordinary scenarios that did **not** constitute robbery in California, the attorney then did the needed research to see if those scenarios would constitute robbery in Texas. They did. So the sample brief had two more appellate arguments – six, all told. Facing that, the AG gave up.

Often, these types of small crevices can be found where one jurisdiction's laws have either an exception or a specialized definition. And as the above shows, even a small crevice defined by caselaw can turn out to be big enough to drive a truck through.

A fine example from published California opinions is the challenge to the Texas priors in *People v. Rodriguez, supra,* 122 Cal.App.4th 121. There, it appears Texas's residential burglary law was broader than California's in only one very small area – an apartment that was customarily used as a residence, but happened to be vacant at the time because one tenant had moved out and the next hadn't moved in, would qualify as a residence for a Texas residential burglary. The Court of Appeal held that this specialized definition was enough to require reversal all three of the four "strike"/five-year prior findings that were based on Texas residential burglaries or attempted residential burglaries. (*Id*. at pp. 131-137.) Rodriguez's counsel then managed to get a reversal on the fourth prior as well, a 1974 Texas robbery prior, on another legal basis in which Texas law was broader than the corresponding California law; this is discussed

in section (B)(1) above.

It might have at first seemed impossible that Rodriguez's appellate counsel could take his client out from under the "three-strikes law," since his client had four prior serious felony convictions. But when all was said and done, every one of those "strikes" and five-year priors was reversed. A better example of success through principles described in this article would be difficult to find.

5. Comparison Of "Defenses" (Negation Of Elements)

Finally, although it is not covered in the sample brief, a recent unpublished opinion from the Sixth District suggests another variation on this same theme – comparing California caselaw with the out-of-jurisdiction caselaw, to determine if California recognizes an extra *defense* that the other jurisdiction does not. If California recognizes an extra "defense" – particularly the type of "defense" that merely negates an essential element of the crime – that can be similar to a situation where the California crime has an extra incorporated element. As discussed earlier in this Article, that is a type of situation which can create excellent opportunities for challenging out-of-jurisdiction prior serious felony findings.

The unpublished Sixth District opinion was *People v. Roberts* (No. H028135, Jan. 20, 2006), which of course cannot be cited as authority, but is here used only as an illustration of this type of analysis. (A petition for review in *Roberts* is pending as of this writing.)

*Roberts* involved a 1987 New York robbery prior. Robbery is defined similarly in New York and California, with one small but significant difference: California recognizes a very limited "claim of right defense" in robbery cases, while New York recognizes none.

Specifically in California robbery cases, the common-law doctrine of "claim of right" remains valid in part: If a defendant takes specific property from another by force or fear, s/he is still not guilty of robbery if it was legally the defendant's property to begin with, or if the defendant reasonably believed in good faith that it was. The rationale is that two of the essential elements of theft – and thus of robbery (which is merely an aggravated form of theft) – are (I) the defendant must have taken property belonging to another, and (ii) the defendant must have had the intent to do so (*see, e.g., People v. Photo* (1941) 45 Cal.App.2d 345, 353); but the "claim of right defense" negates one or more of those elements, because such a defendant either is reclaiming his own property, or seeking to reclaim property s/he reasonably believes is his or her own. The California Supreme Court recently limited the doctrine in robbery cases to a defendant

retaking specific property, in *People v. Tufunga* (1999) 21 Cal. 4th 935 (which reversed on that basis). But in light of *Tufunga*, a portion of the common-law "claim of right defense" remains intact in robbery cases, negating either the ownership or intent elements of the underlying theft. (*See Tufunga, supra,* 21 Cal.4th at p. 950.)

By contrast, in New York, no part of the common-law "claim of right defense" remains intact in robbery cases. New York's highest court so held as a matter of statutory construction in *People v. Green* (2005) 5 N.Y.3d 538 [841 N.E.2d 289, 807 N.Y.S.2d 321], on the basis that its Legislature had specifically codified "claim of right" for nonforcible theft (larceny), but had not done so for forcible thefts (robbery or extortion). The New York court specifically distinguished California's *Tufunga* case on this ground. (*Green*, 5 N.Y.3d at p. 544, fn. 4 [841 N.E.2d at p. 293, fn. 4, 807 N.Y.S.2d at p. 325, fn. 4].)

Consequently, if the evidence in the priors trial shows a 1987 New York robbery conviction but provides no facts underlying the conviction, then the defendant may have committed the prior New York robbery under facts that would not establish the elements of a current California robbery; namely, facts that would support a "claim of right defense" in California but not in New York. If the entire record of conviction does not provide any substantial evidence to the contrary, then there may be insufficient evidence to support the prior serious felony conviction allegation. That is exactly what happened in *Roberts*, and what the Court of Appeal held there.

As noted above, this type of analysis is most likely to be effective in cases where the "defense" is actually no more than the negation of an element of a crime. In those kinds of cases, the defendant has no burden of proof; rather, the prosecution has the burden of negating the "defense" beyond a reasonable doubt, once facts are in evidence that if believed would establish the defense or raise a reasonable doubt. Other examples include mistake of fact (for *malum in se* offenses) (*In re Jennings* (2004) 34 Cal.4th 254, 276-277); accident (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390); unconsciousness (*People v. Hardy* (1948) 33 Cal.2d 52, 63-66); alibi (*People v. Costello* (1943) 21 Cal.2d 760, 765-766); good-faith belief in consent to sexual activity (*People v. Mayberry* (1975) 15 Cal.3d 143, 155-156); good-faith belief in age of majority, as a defense to a charge of a sex crime with a minor (*People v. Hernandez* (1964) 61 Cal.2d 529, 534-535); good-faith belief in divorce, as a defense to bigamy (*People v. Vogel* (1956) 46 Cal.2d 798, 801); compassionate use in marijuana cases (*People v. Mower* (2002) 28 Cal.4th 457, 481); the statute of limitations (*People v. Zamora* (1976) 18 Cal.3d 538, 565, fn. 27); and self-defense or defense of others, whether perfect or imperfect (*People v. Randle* (2005) 35 Cal.4th 987, 994, 996-997; *In re Christian S.* (1994) 7 Cal.4th 768, 773; *People v. Roe* (1922) 189 Cal. 548, 560-561).

(*See generally, e.g.,* discussions in *People v. Mower, supra,* 28 Cal.4th at p. 479 & fn. 7 [also citing other examples], *People v. Tewksbury* (1976) 15 Cal.3d 953, 964, and *People v. Figueroa* (1975) 41 Cal.3d 715, 721.)

Technically, these might not really be "defenses" (as is discussed in the next paragraph); but for these purposes, it doesn't matter what one calls them. If California has an extra legal doctrine ("defense") negating an element of a crime, which didn't exist in the other jurisdiction at the time of the prior offense, that is functionally the same as California having an extra incorporated element in the crime, or the prior conviction being defined more broadly in the other jurisdiction than in California. As this article has discussed, that kind of situation can be an excellent basis for challenging out-of-jurisdiction priors.

It is much less likely, however, that this analysis would also extend to true affirmative defenses – i.e., defenses which assume the existence of every element of the charged crime, but allege a legally established exemption from criminal punishment that exists on public policy grounds. In those situations, a California defendant generally has the burden of proof. (*See* discussion in *People v. Mower, supra,* 28 Cal.4th 457, 480-481 & fns. 8-9 [giving examples].) Two of the best-known California examples are entrapment (*People v. Benford* (1959) 53 Cal.2d 1, 8-9) and insanity (Evid. Code, § 522; *People v. Hernandez* (2000) 22 Cal.4th 512, 522). For a defendant to succeed with such an argument, a California court would have to find, for example, that no post-1979 prior conviction from Montana could be a California serious felony – or could constitute a prior conviction under any California statute – on the ground that there was no insanity defense in Montana. That seems unlikely as a practical matter, and even more so if one takes into account the basic language of prior conviction cases, which refers to whether the "least adjudicated elements" of the prior conviction would constitute a serious felony in California. (*E.g., People v. Rodriguez, supra,* 17 Cal.4th at pp. 261-262.) Since a true affirmative defense admits all the elements of the charge, it wouldn't seem to have any effect on the issues discussed in this Article.

Still, true affirmative defenses are relatively rare, and the term "defenses" is most commonly used for legal doctrines that negate elements of offenses, such as "claim of right." That is also how the term is used in the unpublished Sixth District *Roberts* opinion. (*See also Tufunga, supra,* 21 Cal.4th at p. 950 ["a claim-of-right defense can negate the *animus furandi* element of robbery where the defendant is seeking to regain specific property in which he in good faith believes he has a bona fide claim of ownership or title"].) Used in this element negating sense, "defenses" may bee fully appropriate for challenges to out-of-jurisdiction priors; if the other jurisdiction did not recognize a defense (doctrine negating an element) to the offense of conviction at the time of the crime, but California does recognize a defense to the corresponding crime

today.

C. The Last Step: Making Sure The Out-Of-Jurisdiction Prior Isn't Any Other California Serious Felony

If you've compared your client's out-of-jurisdiction prior to the closest analogous California serious felony, and found ways in which the out-of-jurisdiction prior is broader such that it might have been committed in a way that wouldn't be a California serious felony, you're most of the way home.

But there is one last essential step: It's also crucial to compare the out-of-jurisdiction prior to the rest of the California serious felony statute, to make sure the out-of-jurisdiction prior wouldn't be any other California serious felony either.

If for example, robbery in the other jurisdiction included any theft in which the defendant threatened immediate violence against the victim, with theft defined as it is in California, such a theft could be done over the telephone which wouldn't be robbery in California. But that might not do any good, because the threat would still be a California criminal threat in violation of Penal Code section 422, which is itself a serious felony under section 1192.7, subdivision (c)(38).

Similarly, if the other jurisdiction's statutes deemed first-degree burglary to include any burglary where defendant personally used a dangerous or deadly weapon, that wouldn't necessarily be a California first-degree burglary (a serious felony under section 1192.7, subdivision (c)(18)). But it wouldn't matter for a prior first-degree burglary conviction in the other jurisdiction, because a California serious felony also includes any felony in which the defendant personally used a dangerous or deadly weapon (section 1192.7, subdivision (c)(23)).

Or as another example, if a crime constitutes first-degree murder in the other jurisdiction, it does no good to point out scenarios in which the crime wouldn't be first-degree murder in California, if those scenarios would all involve conscious disregard for human life and thus would be second-degree murder in California. Murder is always a serious felony in California no matter what the degree (section 1192.7, subdivision (1)).

In all of these hypotheticals, even though there are a lot of ways in which the underlying out-of-jurisdiction offense is broader than the corresponding California offense, the least adjudicated elements of the out-of-jurisdiction conviction would still constitute a different California serious felony at all times. An appellate argument thus could not succeed on those grounds.

So it's **vital** to make sure that after running the types of comparisons between corresponding crimes described earlier, you also run a comparison between the out-of-jurisdiction crime and everything else in section 1192.7, before you finally make a legal argument challenging an out-of-jurisdiction prior. Check the whole list.

It helps to have a thorough understanding of section 1192.7 to make such determinations, especially the "catchall" provisions or the more common crimes in section 1192.7. But once again, as with the comparisons discussed in section (B) above (as well as the hypothetical in Part III above), you may have an appellate argument if you can find even a single situation in which the out-of-jurisdiction prior could be committed without necessarily committing any California serious felony.

As before, it doesn't matter if the crevice in the prosecution's proof is large or small. Either way, if you've shown that the least adjudicated elements of the out-of-jurisdiction crime not only don't necessarily establish the corresponding California serious felony, they don't necessarily establish any other California serious felony either, you have your appellate argument. (Again, this discussion assumes for simplicity that the evidence at the priors trial established only the least adjudicated elements of the prior out-of-jurisdiction conviction.)

Since the method of analysis should by now be fairly clear, this last illustrative example will show how another tiny crevice could turn out to be as good as a big one.

Let's say your client has a first-degree burglary conviction from hypothetical Jurisdiction Z, where first-degree burglary is limited to one where the defendant personally used a dangerous weapon or personally inflicted great bodily injury, with definitions of each that are the same as California's. It might at first seem that a prior serious felony finding must be true, because that appears to be a serious felony under section 1192.7, either subdivision (c)(8) or (c)(23). But if you're looking carefully at section 1192.7, you might spot the portion of subdivision (c)(8) that says "other than an accomplice," and ask yourself: Is this exception a crevice in the law that might help? Under Jurisdiction Z's law, could a defendant get a first-degree burglary conviction for personally inflicting great bodily injury on an accomplice? The answer in this illustrative example is yes (since I made up the example, I get to make up the answer), and the least adjudicated elements of the out-of-jurisdiction conviction – including personal infliction of great bodily injury on anyone at all, whether nonaccomplice or accomplice – do not constitute a California serious felony.

**Coda**

Since I gave away the ending at the beginning, I won't repeat it here. But I do

want to add one last point: Don't be afraid of 'getting your hands dirty' (to use a garden-variety metaphor). Specifically, don't be afraid of researching in the other jurisdiction's statutes or caselaw, even if it requires a trip to the law library. Other jurisdictions' statutes are usually as well indexed and annotated as ours (and in most jurisdictions, there are a lot fewer of them); and if you know generally what you're looking for, finding the key statute(s) shouldn't be too daunting. Once you find the key statute(s), their annotations are an excellent guidepost to finding caselaw – which, again, is a lot less extensive in most jurisdictions than in California. If you're working on a computer database, you can go through the same process if you find it helpful, with also the added advantage of word-based searches as needed.

With a little diligent work, you can reap wonderful rewards for your client in these kinds of cases. And we'll all have the pleasure of seeing your name in the "Victories" section of CCAP's website ... with congratulations and thanks for a job well done!