A GUIDE TO CHALLENGING TRUE FINDINGS ON OUT-OF-JURISDICTION PRIORS
– SAMPLE BRIEF –

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C. Evidence Relating To The Prior Conviction

The evidence relating to the prior conviction consisted of a single exhibit (Exhibit 6), comprised of Texas court documents from the 1990 Texas robbery conviction. The 1990 judgment stated only that appellant entered into a plea bargain in which he pled guilty to second-degree robbery, with no enhancement or deadly weapon use findings, and received 10 years probation. (CT 113J-113K.)[1] The corresponding Texas indictment alleged that appellant "did . . . intentionally and knowingly while in the course of committing theft of property and with intent to obtain and maintain control of said property, threaten and place Carolyn Bernhart in fear of imminent bodily injury and death. . . ." (CT 113S.)

There was no other evidence relevant to the acts underlying the 1990 robbery conviction. The only other evidence in the trial of the prior conviction allegations was a rolled fingerprint card (PX 7), forensic technician testimony on prints (RT 209-213), and some documents on subsequent revocation of appellant's probation which shed no light on the nature of the underlying robbery. (CT 113A-113I, 113P-113R.)

For ease of reference, appellant reproduces the relevant Texas statute son second-degree robbery and theft, below.[2]

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[1] The absence of a deadly weapon in the Texas robbery case is also evident because appellant was convicted of robbery under section 29.02 (CT 113J), which is the statute proscribing robberies without the use of a deadly weapon. A defendant who is convicted of robbery with serious bodily injury or use of a deadly weapon would instead be convicted under Texas Penal Code section 29.03 (subdivision (a)(2)).

[2] Texas Penal Code section 29.02 ["Robbery"] states:

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another;

or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

Since the Texas robbery statute (quoted above) refers to the Texas crime of theft, appellant also quotes relevant portions of the Texas theft statutes, also from the Texas Penal Code:

§ 31.02. Consolidation of Theft Offenses

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.

§ 31.03. Theft [excerpted in pertinent part]

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent;

(2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or

(3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another. . . .

§ 31.01. Theft [definition of "effective consent" in § 31.03(b)(1) above]

(3) "Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if:

(A) induced by deception or coercion;

(B) given by a person the actor knows is not legally authorized to act for

D. Insufficiency Of The Evidence

1. A Texas Robbery Does Not Require Theft From The Victim's Person Or Immediate Presence, As A California Robbery Does

An essential element of a California robbery is that the taking of property must be from the victim's "person or immediate presence." (Pen. Code, § 211.) Property is within a victim's "immediate presence" if it is "so within [the victim's] reach, inspection, observation, or control, that he could, if not overcome by violence or prevented by fear,

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the owner;

(C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions;

(D) given solely to detect the commission of an offense; or

(E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property.

§ 1.07. Definitions [definition of "coercion" in § 31.01(3)(A) above]

(9) "Coercion" means a threat, however communicated:

(A) to commit an offense;

(B) to inflict bodily injury in the future on the person threatened or another;

(C) to accuse a person of any offense;

(D) to expose a person to hatred, contempt, or ridicule;

(E) to harm the credit or business repute of any person; or

(F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

retain his possession of it." (*People v. Harris* (1994) 9 Cal.4th 407, 415-416.) That includes "an area within which the victim could reasonably be expected to exercise some physical control over the property." (*Ibid*.) The Texas theft and robbery statutes have no such requirement.

Our Supreme Court explained the person/immediate presence requirement for robbery, and provided an illustrative scenario which would not satisfy that requirement, in a recent capital appeal:

> A taking can be accomplished by force or fear and yet not be from the victim's immediate presence. For example, a person might enter the victim's home and there, by the use of force or fear, compel the victim to reveal the combination of a safe located many miles away in the victim's office. The culprit at the victim's house could then relay the combination to a confederate waiting in or near the office, who could use it to open the safe and take its contents before the victim could reach the office or otherwise interfere with the taking. In such a case, the criminals would have accomplished the taking by force or fear and yet not have taken property from the person or immediate presence of the victim. The perpetrators of the taking would be guilty of several offenses--conspiracy, burglary, assault, and grand theft at the least--but they would not be guilty of robbery as defined in section 211 because the taking would not be from an area over which the victim, at the time force or fear was employed, could be said to exercise some physical control.

(*People v. [Blufford] Hayes* (1990) 52 Cal.3d 577, 627.)[3]

There are obviously many other possibilities for a theft by fear, outside of the victim's immediate presence, as well. A second such possibility was raised on the facts of *Hayes* itself: In *Hayes*, the defendant killed the victim on the premises of the motel which the victim managed, in a room 107 feet from the manager's living quarters where the property taken by the defendant was located. The Supreme Court held that whether these

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[3] Nothing in the evidence of the Texas conviction indicates that the acts underlying the conviction involved anyone's house.

facts satisfied the "immediate presence" element was a question for a property instructed jury, because "a reasonable finder of fact could conclude either that the property was not so distant as to be beyond the victim's control and protection, or that it was too distant to be in the victim's immediate presence at the time the force was used." (*Id*. at pp. 628-629.)

By contrast, if either of the above scenarios—or any other where the theft might not have been in the victim's immediate presence—had occurred in Texas, there would have been no "immediate presence" question. A taking from the victim's "immediate presence" is simply not required for a Texas robbery.

In this case, nothing in the evidence against appellant precluded the possibility that the underlying taking (or attempted taking, which can also underlie a robbery conviction, *see post*, p. 12) was outside of the victim's immediate presence. Therefore, there was no evidence to show that the Texas robbery conviction was based on conduct which would have amounted to the serious felony of robbery, or any other serious felony, in California. The evidence proved only conduct which could have been any of a number of non-robbery offenses in California, such as conspiracy, nonresidential burglary, assault or grand theft. It went no farther.

As a result, the evidence was legally insufficient to show that the conduct underlying the Texas robbery conviction would have been a serious or violent felony in California. The true findings on the "strike" and five-year prior allegations should be stricken.

2. A Robbery Conviction In Texas Can Be Obtained Based On Conduct That Would Be Extortion In California, Which Is Not A Serious Or Violent Felony Under California Law

A second means by which a Texas robbery would not support a California serious felony allegation is if the "robbery" is essentially an extortion perpetrated by fear of

immediate bodily injury. That is a robbery in Texas, but it is no more than extortion and possibly assault in California, especially where (as here) there is no evidence of a weapon or bodily injury. Neither extortion nor assault, without a great bodily injury, weapon or similar finding—none of which existed in appellant's case—is a serious felony in California. Thus once again, a Texas robbery conviction is not a California serious felony.

In California, an extortion involves taking property from another by force or fear, but with his or her consent. (Pen. Code, § 518; *People v. Torres* (1995) 33 Cal.App.4th 37, 50.) By contrast in a California robbery, the victim has the opposite state of mind, since robbery involves taking property from another by force or fear, but against his or her will. (Pen. Code, § 211; *People v. Torres, supra,* 33 Cal.App.4th at p. 50.) A California extortion is thus not a California robbery, because extortion requires consent, while robbery requires lack of consent. (*People v. Torres, supra,* 33 Cal.App.4th at p. 50.)

The difference is illustrated (*inter alia*) in *People v. Peck* (1919) 43 Cal.App. 638, where the defendant claimed the evidence was legally insufficient to support an extortion conviction because the evidence showed a robbery rather than an extortion. The Court of Appeal held the evidence supported a conclusion that the taking—which involved the victim telling a co-defendant where to find the money—was with the victim's consent, though the defendant held a gun to the victim's face and threatened to kill him. The victim agreed the defendant could have the money as a sort of guaranty ("forfeit") of the victim's good faith that he would not try to get the defendant arrested. Under those circumstances, the Court held, the crime was extortion and not robbery. (*Id*. at pp. 642-646.)

Many California extortions would qualify as robberies in Texas. The definition of "theft" in Texas expressly includes extortion. (Tex. Pen. Code, §§ 31.02, 31.03.) In turn,

a theft (including though not limited to extortion) committed or attempted by means of fear of immediate bodily injury is a robbery. (Tex. Pen. Code, §§ 29.01, 29.02; *see also post*, p. 12 [for discussion of how a Texas robbery conviction can be based on a mere attempted theft, with no completed taking].) Thus, an extortion perpetrated by putting the victim in fear of immediate bodily injury—for example, the one in *People v. Peck, supra*—would be a theft by fear, *i.e.* a robbery, in Texas. But it would not be a robbery in California.

A person convicted of robbery in Texas thus could be guilty of what would be no more than extortion in California, which is not a serious or violent felony. Nothing in the evidence against appellant precluded that possibility either. As a result, once again, the evidence is insufficient to prove the Texas robbery conviction was a serious or violent felony. The "strike" and five-year prior findings should be stricken.

3. A California Robbery Requires A Contemporaneous Intent To Commit Theft, While A Texas Robbery Does Not

Another essential requirement for a robbery in California is a contemporaneous intent to commit theft. In other words, the intent to steal must be formed either before or during a use of force or fear against the victim. If the intent to steal is formed after a use of force or fear, then there is no robbery. (*People v. Holt* (1997) 15 Cal.4th 619, 675; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055-1056; *People v. Kelly* (1991) 1 Cal.4th 495, 529-530.)

One example would be for robbery by force, based on an assault (or homicide). If a person got into a fight with a victim, incapacitating him or her, and only after that formed the intent to steal, the California crime of robbery is not committed. The same principle would apply for a use of fear before formation of the intent to steal. Thus as another

example, a large drunken man might get angry at a perceived insult, frighten the victim so much that (s)he passes out, spot the victim's wallet or watch, and storm off with the property. That too is not a robbery in California, due to the requirement of intent to steal contemporaneous with the use of force or fear.

However, a robbery in Texas does not have this requirement. In Texas, a robbery conviction may be obtained if the intent to steal is formed at any time before, during or after a use of force or fear. As long as the use of force or fear actually facilitated the theft, the Texas crime of robbery is committed. (*Turner v. State* (1946) 150 Tex. Crim. 90, 94 [198 S.W.2d 890, 890]; *Alaniz v. State* (1944) 147 Tex. Crim. 1, 4 [177 S.W.2d 965, 967].)

Here, as discussed *ante*, p. 1, there was no evidence appellant used a weapon in his Texas offense, he was not convicted of a robbery by means of a weapon, and there is no evidence of the method of commission of the offense. As a result, the least adjudicated elements of appellant's Texas robbery conviction involved the intent to steal being formed at any time. For the reasons above, those elements do not prove a California robbery. They prove at most an assault without a deadly weapon or serious bodily injury, plus a theft. That is not a violent or serious felony in California.

For these reasons as well, the evidence is insufficient to prove the prior serious felony conviction required for a "strike" or five-year prior.

4. A Charge And Conviction For Robbery In Texas Can Be Based On An Act Constituting A Mere Solicitation, Which Is Not True In California

Solicitation of a crime is not a serious or violent felony in California, as no solicitation offenses are included in Penal Code sections 667.5 or 1192.7(c). Thus, conduct which would merely constitute solicitation in California, not rising to an attempt, is not a serious

or violent felony.

There are many sets of acts which, based on the evidence against appellant, could have resulted in a conviction for robbery in Texas but would have been only solicitation in California. As a result, the evidence does not rise to proving a serious or violent felony in California.

In California, if a defendant solicited one or more others to commit a robbery, that would make him guilty of soliciting a robbery under Penal Code section 653f(a). But it would not necessarily make him guilty of a robbery or attempted robbery. In California, a person can be guilty of soliciting an offense but not guilty of the completed offense. (*People v. Burt* (1955) 45 Cal.2d 311, 314.) Therefore, if a defendant commits an act constituting solicitation of what in California would be a robbery, that does not necessarily mean the defendant aided and abetted the robbery under California law.[4] (*Accord People v. McNamara* (1951) 103 Cal.App.2d 729, 736-737 [defendant convicted of conspiracy to commit forgery, but acquitted of the completed forgery offenses which were committed by others].)

By contrast, under what Texas calls the "law of parties" (that state's term for derivative criminal liability), a person who merely solicits an underlying crime is as criminally culpable for the crime as the person who commits it. (Tex. Pen. Code, §§ 7.01,

[4] Appellant does not contend that an act of solicitation can never amount to an attempt. He states only that without further facts beyond the mere existence of a defendant's act of solicitation and an offense committed by the solicitee or someone else other than the defendant, it is impossible to conclude that the solicitation rose to the level of an attempt.

7.02 (a)(2).)[5] As a result, solicitation does create derivative criminal liability for the underlying offense in Texas. In other words, a defendant can be convicted of robbery in Texas if (i) he merely solicits another person to commit an act which constitutes a robbery in Texas, and (ii) the other person then commits the act constituting robbery, without the participation or assistance of the defendant.[6]

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[5] Texas Penal Code section 7.01 ("Parties to Offenses"), states:

(a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

(b) Each party to an offense may be charged with commission of the offense.

(c) All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.

Section 7.02 of the Texas Penal Code ("Criminal Responsibility for Conduct of Another") states [emphasis added]:

(a) A person is criminally responsible for an offense committed by the conduct of another if:

> (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or
>
> (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

[6] There is no separate crime of solicitation in Texas which would have any relevance to this case. The Texas crime of criminal solicitation (Tex. Pen. Code, § 15.03) applies only when the offense solicited is capital murder or an offense of the first-degree (which would include robbery with a deadly weapon, *see* Tex. Pen. Code, §

Also, in Texas, there is no requirement that an indictment name the specific form(s) of derivative criminal liability which the prosecution might wish to prove. (*Swope v. State* (Tex. Ct. Crim. App. 1991) 805 S.W.2d 442, 445; *Pitts v. State* (Tex. Ct. Crim. App. 1978) 569 S.W.2d 898, 900.) In other words, a person can be convicted in Texas under an indictment charging "robbery" or the basic statutory elements of robbery, based on any conduct that would legally create criminal liability for robbery in Texas, which includes solicitation.

The result, again, is that a charge and conviction of a robbery in Texas can be based on what in California would be a mere solicitation, and that is not a serious or violent felony. On that basis alone, the "strike" and five-year prior findings cannot stand.

Beyond that, a Texas robbery conviction does not even require a completed robbery. In Texas, a mere attempt to commit a theft by force or fear constitutes the crime of robbery, not merely attempted robbery.

Texas Penal Code section 29.02 (reprinted *ante*, fn. 4, p. 1) states that a person commits robbery when he inflicts bodily injury or uses fear "in the course of committing theft as defined in chapter 31." In turn, "'In the course of committing theft' means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft." (Tex. Pen. Code, § 29.01 [emphasis added].) The result is that if a person inflicts bodily injury or uses fear in an attempt to commit a theft, he has committed robbery under section 29.02. A completed theft is not required for a Texas robbery conviction. (*Maldonado v. State* (Tex. Ct. Crim. App. 1999) 998 S.W.2d 239, 243;

29.03(b)). Here by contrast, appellant's Texas prior conviction was only for robbery in the second degree. (Tex. Pen. Code, § 29.02(b).)

Watts v. State (Tex. Ct. Crim. App. 1974) 516 S.W.2d 414, 415.)

As a result, a person can be charged with and convicted of robbery in Texas merely for soliciting a robbery involving a theft which is attempted but never completed, because (i) solicitation creates criminal liability for an offense, and (ii) the offense of robbery requires only an attempted theft. By contrast in California, if a defendant merely solicits someone else to commit a robbery, without more, and the other person ends up committing an attempted robbery in which the defendant is not actually involved, the defendant can be convicted of no more than solicitation of robbery under section 653f(a). That is not a serious or violent felony.

Once again, the result is that the least adjudicated elements of a Texas robbery would amount to no more than solicitation of robbery in California. Since solicitation of robbery is not a violent or serious felony, a Texas robbery conviction without more is insufficient to prove a "strike" or five-year prior.

There was no more here. The true findings on the "strike" and five-year prior allegations should be reversed.

5. A California Robbery Requires The Specific Intent To Deprive The Owner Of Property Permanently, While A Texas Robbery Does Not

The issue in this section—that an out-of-state conviction based on the same type of theft statute did not prove a California larceny, because of differences in the required intent to deprive—was conceded by the Attorney General in *People v. Crawford* (1997) 58 Cal.App.4th 815, 819. *Crawford* involved Oregon theft statutes (Ore. Rev. Stat., §§ 164.005, 164.015) which define theft similarly to the Texas definition for purposes of the issue here, the required intent to deprive.

The result that the Attorney General conceded in *Crawford* should be the result here. A prior Texas theft conviction—and thus *a fortiori*, a prior Texas robbery conviction—does not prove a California larceny. A California larceny is required for a California robbery. Consequently, a prior Texas robbery conviction does not prove a California robbery. There is insufficient evidence to support a "strike" or five-year prior finding in this case.

In California, a theft, and thus a robbery, requires the specific intent to deprive the owner of property permanently. (*People v. Marshall, supra,* 15 Cal.4th at p. 34.) In Texas, there is no such requirement: A robbery can be based on intent to deprive the owner of property nonpermanently, if the defendant intends to withhold the property "for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." (Tex. Pen. Code, § 31.03, subd. (a).) Again, the California robbery statute has an essential element which the Texas robbery statute does not.[7]

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[7] Relevant here is Texas Penal Code section 31.01(a)(2), which states: "'Deprive' means: [¶] (A) to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner. . . ." (In this context, "deprive" refers to the basic Texas theft statute, Texas Penal Code section 31.03(a) [quoted *ante*, fn. 4, p. 1], which states: "A person commits an offense [of theft] if he unlawfully appropriates property with intent to deprive the owner of property." The basic Texas robbery statute, Texas Penal Code section 29.02 [quoted *ante*, fn. 4, p. 1], requires a use of force or fear "in the course of committing theft as defined in Chapter 31.")

Texas Penal Code section 31.01(a)(2), the statute quoted above which defines "deprive," refers to a "major portion of the value or enjoyment of the property." A corresponding statute on "Value," section 31.08, states:

(a) Subject to the additional criteria of Subsections (b) and (c), value under this chapter is:

(1) the fair market value of the property or service at the time and place of

As Texas cases make clear, the “major portion of value or enjoyment” definition of intent to commit theft, under Texas law, is a synonym for an intent to effect a type of temporary deprivation:

> The former penal code required, in robbery and theft cases, proof that the defendant intended to appropriate the property permanently. [Citation.] The present definition of "deprive" includes the withholding of property from the owner not only "permanently," but also "for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner ...." V.T.C.A. Penal Code, Section 31.01(3)(A). [fn om.] The statutory level of harm to ownership rights has been lowered to include prolonged withholdings as well as permanent ones, yet the law under the present Penal Code continues to be that a theft conviction cannot be obtained on proof that the defendant intended only a temporary withholding of the property. [Citations.] The only change made by the present Penal Code is that the concept of temporary withholding has been reduced, from anything less than permanent, to something shorter than "for so extended a period of time that

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> the offense; or
>
> (2) if the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the theft.
>
> (b) The value of documents, other than those having a readily ascertainable market value, is:
>
> (1) the amount due and collectible at maturity less that part which has been satisfied, if the document constitutes evidence of a debt; or
>
> (2) the greatest amount of economic loss that the owner might reasonably suffer by virtue of loss of the document, if the document is other than evidence of a debt.
>
> (c) If property or service has value that cannot be reasonably ascertained by the criteria set forth in Subsections (a) and (b), the property or service is deemed to have a value of $500 or more but less than $1,500.
>
> (d) If the actor proves by a preponderance of the evidence that he gave consideration for or had a legal interest in the property or service stolen, the amount of the consideration or the value of the interest so proven shall be deducted from the value of the property or service ascertained under Subsection (a), (b), or (c) to determine value for purposes of this chapter.

> a major portion of the value or enjoyment of the property is lost to the owner."

(*Griffin v. State* (Tex. Ct. Crim. App. 1981) 614 S.W.2d 155, 158; *accord, e.g., Thomas v. State* (Tex. Ct. Crim. App. 1988) 753 S.W.2d 688, 691 [quoting *Griffin* above, in case where defendant had rental car for several weeks beyond return date and put 12,000 miles on it; noting that whether evidence showed intent to deprive temporarily of a major portion of value or enjoyment was irrelevant at that time, because State had only alleged intent to deprive permanently].)

In short, under Texas law, a robbery can be committed via an intent to deprive the victim of property temporarily, by the statutory theft provision for intent to deprive the victim of a "major portion of value or enjoyment" in Texas Penal Code section 31.03(a). By contrast under California law, a robbery cannot be committed via an intent to deprive a victim of property temporarily; an intent to deprive permanently is required.[8]

Thus once again, the least adjudicated elements of a Texas robbery do not amount to a robbery in California. They might amount to an assault, unlawful vehicle deprivation,

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[8] Appellant does not contend that no intent to deprive a victim of a major portion of a property's value or enjoyment could ever be a theft or robbery in California. It is possible that there are some situations in which it could be, depending possibly on how major the portion actually was, or whether the intent involved deprivation of a large enough portion of both enjoyment and value (since the Texas statute reads in the disjunctive, not the conjunctive), or something similar. Appellant need not speculate here, because such hypotheticals would be irrelevant to this case. Appellant's sole concern here is that Texas law makes clear that robbery can be committed by some types of intent to deprive temporarily (as discussed in cases such as *Griffin* and *Thomas* above), and California law makes clear that robbery cannot be committed by any intent to deprive temporarily. Since the evidence in this case doesn't show what type of intent to deprive appellant's Texas robbery conviction was based on, the least adjudicated elements of a Texas robbery do not prove a California serious or violent felony.

or the like, but they would not be robbery.

The evidence is again insufficient to sustain true findings on the prior conviction allegations. The "strike" and five-year prior should be reversed.

6. A Texas Robbery Conviction Can Be Based On Derivative Criminal Liability Based Solely On The Acts Of Police Agents Or Informants, Which Is Not Possible In California

The Texas robbery laws are also broader than California's in yet another way, because Texas permits a robbery conviction based on derivative criminal liability merely because the defendant intends to commit an act which would render him criminally liable under the Texas "law of parties" (*see ante*, p. 10). That is so even if—unbeknownst to him—the actual crime cannot be committed because the "principal" is only pretending to be a principal, and is actually a police officer or informant. Texas caselaw makes this clear. (*Boyer v. State* (Tex. Ct. Crim. App. 1991) 801 S.W.2d 897, 899; *Tate v. State* (Tex. Ct. Crim. App. 1991) 811 S.W.2d 607, 608.) So does Texas statute, since Texas Penal Code section 7.03—on which *Boyer v. State, supra,* relied—expressly provides that a criminal prosecution may be brought successfully under those circumstances.[9]

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[9] Texas Penal Code section 7.03 ["Defenses Excluded"] states [emphasis added]:

> In a prosecution in which an actor's criminal responsibility is based on the conduct of another, the actor may be convicted on proof of commission of the offense and that he was a party to its commission, and it is no defense:
>
> (1) that the actor belongs to a class of persons that by definition of the offense is legally incapable of committing the offense in an individual capacity; or
>
> (2) that the person for whose conduct the actor is criminally responsible has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

That is not possible in California. By law in California, a defendant cannot be guilty of aiding and abetting a police officer or police informant acting in that capacity, since the latter are not committing a crime. (*People v. Collins* (1878) 53 Cal. 185, 186-187; *see also, e.g., People v. Brigham* (1989) 216 Cal.App.3d 1039, 1050-1051 [aiding and abetting liability is derivative, and requires that the underlying offense actually be committed].)

The California rationale for nonculpability is that if the police officer or informant commits an otherwise criminal act at the behest of the defendant, it is not a crime because there is no actual criminal intent on the part of the principal, and the defendant cannot be guilty of aiding and abetting a non-crime. (*People v. Collins, supra,* 53 Cal. at pp. 186-187.) Under Texas law, by contrast, this makes no difference: "Under the law of parties, as long as the conduct of the informant results in the 'commission of an offense,' and appellant solicited that conduct, then a conviction may be had. The conduct of the informant which resulted in the commission of the offense does not require that he be 'criminally responsible' for that offense." (*Boyer v. State, supra,* 801 S.W.2d at p. 899.)

For this reason too, nothing in the evidence precludes the possibility that appellant's 1990 robbery conviction was for an act that constituted robbery in Texas, but did not constitute robbery in California. In addition, nothing in the evidence established that appellant committed any other California serious or violent felony, given that the record does not establish that he committed a California robbery as discussed in this section.

Thus once again, the evidence is legally insufficient to support the true findings, and the "strike" and five-year prior should be stricken.

E. Conclusion

Because there is legally insufficient evidence to support the prior serious felony

conviction findings, they must be reversed, both under state law (*People v. Johnson, supra,* 26 Cal.3d at pp. 576-578) and the Fourteenth Amendment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) In addition, and to like effect, the "two-strikes" and five-year prior sentences must be vacated under the Fourteenth Amendment, which prohibits imposition of a sentence not conforming to the requirements of state law. (*Board of Pardons v. Allen* (1987) 482 U.S. 369, 377-379 [107 S.Ct. 2415, 96 L.Ed.2d 303]; *Wasko v. Vasquez* (9th Cir. 1987) 820 F.2d 1090, 1091, fn. 2.)

For all of the above reasons, the judgment should be reversed in part, and the "strike" and five-year prior findings stricken, along with their corresponding sentences.