Mr. Glenn Sunkett
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In Pro Per

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MENDOCINO

GLENN S. SUNKETT,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Case No's.

MENDOCINO COUNTY SUPER. CT.
NO. SCUKCRCR 09-89877

COURT OF APPEAL
NO. A130086

CALIFORNIA SUPREME COURT
NO. S206250

U.S. DISTRICT COURT of CALIFORNIA
NO. CV14-00069-RS

U.S. 9th Cir. COURT OF APPEAL
NO. 16-17320

UNITED STATES SUPREME COURT
NO. 17-7690

MEMORANDUM OF POINTS AND AUTHORITIES INCLUDED

(EVIDENTIARY HEARING REQUESTED)

INTRODUCTION

Petitioner, Mr. Glenn Sunkett, a prisoner incarcerated inside the California Department of Corrections and Rehabilitation, Kern Valley State Prison, brings before this court a petition for writ of habeas corpus to challenge an illegal restraint of life and liberty, imposed upon him by this Superior Court of Mendocino County. (See, Cal.Pen.Code.Sec. 1473.a).

Herein Mr. Sunkett is making a claim of "actual innocence," as he was wrongfully convicted by this court of four counts of penal code 207(a), kidnapping, and four counts of penal code 236, false imprisonment, because these statute(s), by law and definition, do not proscribe the conduct in this case.

Mr. Sunkett also makes a second claim that he was unlawfully and erroneously sentenced to multiple punishments for one course of conduct, which is prohibited by penal code section 654. This error resulted in a cruel, unusual, and unconstitutional prison term imposed in excess of this Superior Court's jurisdiction. Both claims, if true, violate Mr. Sunkett's 5th, 6th, 8th, and 14th Amendment rights afforded him by the U.S. Constitution, and article 1 section 7 of the California Constitution, which provides due process of law and a fair jury trial.

Herein, Sunkett will demonstrate that this Superior Court violated his constitutional rights and several clearly established Federal and State laws by his use of only the facts adduced at trial, in combination with the case law and penal codes controlling these issues. By petition's end, Sunkett will indeed meet his burden of showing a prima facie case for every claim raised. (See *People vs. Duvall,* (1995) 9 Cal.4th 464, 474-475).

The court should note, neither claim of "actual innocence" or "illegal sentence" were raised on direct appeal by Sunkett's appointed appellate counsel, Mr. Roger Curnow. Although, on direct appeal counsel did challenge the sufficiency of the evidence to support kidnapping. However, herein, Sunkett is not challenging the actual evidence itself, but that the conduct, as the evidence reflects, is not prohibited

by the statute. Further, appellate counsel did not address/raise a 654 sentencing error, or an illegal sentence claim at all on appeal.

Sunkett, in pro-per, sought due diligence and met all tolling deadlines throughout the entire state and federal appeal processes, and had absolutely no other opportunities or additional time to raise these issues to this court, or any other court in a separate petition. Sunkett only submitted his last document, a Rule 60(b), to the Ninth Circuit Court on October 24, 2019. It was only then was he able to begin the research for, and construction of this immediate petition. Sunkett believes that his due diligence on this matter, over a decade after his conviction, is appropriate and reasonable, and that this court has the jurisdiction to review these claims and grant relief if determined necessary. (See *In re Zerbe*, (1964) 60 Cal. 2d. 666, 667-668 [36 Cal. Rptr. 286, 388 p.2d 182], "...A defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibited his conduct." (see also *Mutch* (1971) 4 Cal. 3d. 389, 396 [93 Cal. Rptr. 721, 482 p 2d. 633]; (also *People v. Smith* (2001) 24 Cal. 4th 849, 854, "An unauthorized sentence may be corrected at anytime whether or not there was an objection in the trial court." (also see *In re Reno*, (2012) 55 Cal.4th 428, 490-493; *In re Harris*, (1993) 5 Cal.4th 813, 825-826; *In re Dixon*, (1953) 41 Cal.2nd 755, 759; *In re Smith*, (1911) 161 Cal.208).

It was held in *Briceno v. Scribner*, 555 F.3d 1069 (C.A.9 Cal. (2009); ("A state court's decision is 'contrary to' clearly established federal law, as would entitle a petitioner to federal habeas relief only where the state court arrives at a conclusion 'opposite to' that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of 'materially indistinguishable facts.'" 28 U.S.C.A. sec. 2254(d)."). *Briceno v. Scribner*, 555 F.3d *supra*. (There is an 'unreasonable application of' clearly established federal law, as would entitle a petitioner to federal habeas relief when a state court correctly identifies the governing legal rule... But applies it

'unreasonably' to the facts of a particular case or 'refuse to extend and apply' the principles set forth by the high court in the context where they should apply in a particular petitioner's case.").

CASE BACKGROUND

Petitioner was provided a trial in this court and was convicted by jury on June 29, 2009, of residential robbery, violations of Penal Code sections 211/212.5/213(A)(1)(A) as to each victim alleged (Dusty Miller, Micheal Bennet, Mathew Graves, Max Stover), as well as kidnapping, section 207(a), and false imprisonment, section 236. Petitioner was also convicted of residential burglary of an inhabited dwelling, section 459, two violations of criminal threats, section 422. It was also found that Petitioner was armed, violating section 12022.53(b) and 12022(a), as well as section 12021, felon in possession of a firearm.

Marsden Motions were heard and denied in the trial court on September 30, 2009, October 23, 2009, January 8, 2010, January 22, 2010, and February 24, 2010. addressing Ineffective Assistance of Counsel claims alleged by Petitioner.

On October 15, 2010, the trial court denied Mr. Sunkett's Motion for a new trial and sentenced him to 63 years in State Prison. On this same date, Mr. Sunkett filed a Notice of Appeal.

Also on October 25, 2010, Mr. Sunkett filed a habeas petition in the First Appellate District Court of Appeals in propria persona, addressing I.A.C. claims.

In August 2011, Sunkett's Direct Appeal was filed by appointed appellate attorney Roger Curnow. The appeals court ordered the Opening Brief, and Sunkett's habeas petition, to be joined.

On September 28, 2013, the First Appellate Court affirmed judgment and denied petitioner's direct appeal, as well as petitioner's writ of habeas corpus petition filed In pro-per.

On October 25, 2012, Petitioner filed a Petition for Review in the California Supreme Court. On January 3, 2013, the California Supreme Court summarily denied Sunkett's petition for review without giving opinion.

On January 6, 2014, petitioner filed a federal writ of habeas corpus in the Northern District Court of California. The court found the petition 'mixed', and after, GRANTED Sunkett's motion for a *Rhines* stay, allowing him to return to the state court and exhaust arguments 1, 2, 8, 9, 10, 11, 12. The court denied the defendant's motion to dismiss.

On March 25, 2015 the California Supreme Court summarily denied the habeas petition without opinion on the merits.

On July 20, 2015 the District Court dissolved the stay and ordered the Respondent to answer petitioner's federal habeas petition.

On May 1, 2016 Petitioner filed a traverse to Respondent's answer.

On December 6, 2016 the District Court denied petitioner's federal habeas corpus petition, and entered judgment on the same date. Also, in the same ruling, the District Court denied "sua sponte" a COA in the District Court.

On December 18, 2016 Sunkett filed a timely notice to appeal judgement in the District Court.

On December 30, 2016 petitioner submitted a motion for reconsideration in the District Court on the grounds that the court was not partial in it's review and based it's ruling on evidence unsupported by the trial record. The District Court denied this motion April, 2017.

On February 10, 2017, petitioner petitioned for COA in the U.S. 9th Circuit Court of Appeal. The Ninth Circuit denied a COA , without written opinion, on August 18, 2017.

On September 10, 2017, petitioner filed a motion for reconsideration in the Ninth Circuit. The Court denied petitioner's motion on November 8, 2017 without opinion.

On February 6, 2018, petitioner filed a Writ of Certiorari in the United States Supreme Court. The High Court denied this writ, without opinion, on April 2, 2018.

On January 18 2018, petitioner filed a writ of Mandamus/Coram Nobis in the Ninth Circuit Court of Appeals. This petition is currently pending in the court.

On October 23, 2019, petitioner filed a Rule 60(b) motion in the Ninth Circuit Court of Appeals. This motion is currently pending in the court.

OVERVIEW OF THE TRIAL EVIDENCE

On July 10, 2008, a home invasion robbery occurred in Fort Bragg, at the home of, Mr. Michael Bennett. Three Intruders, and four victims, Bennett, Max Stover, Mathew Graves, and Dusty Miller were involved. Bennett's 2,500 square foot house was on a 45 acre property, and contained several outbuildings (7 RT 71). The home was isolated approximately 150 feet away from a highway that had neighboring homes on the opposite side of it. (1 RT 71-74). On the property, Bennett operated an illegal

marijuana grow inside of the outbuildings, and at the time of incident, had approximately 150 plants growing about on the premises. (1 RT 86).

On this evening of July 10, Bennett and Stover were approached by the intruders in the driveway of Bennett's home. Bennett was immediately struck with an unidentified object and was knocked unconscious, while Stover was cuffed and led inside the home by one of the intruders. (1 RT 79-81, 111-116). Shortly after, and still unconscious, Bennett was carried inside the house and bound by the hands (1 RT 79-83, 120-122).

Both Graves and Miller were approached by one intruder holding a gun as they were standing inside the kitchen and ordered to sit on the couch in the living room. Stover was then led into the living room and told to sit on the couch next to Graves and Miller, as their hands were then tied with zip ties (1 RT 120-121, 2 RT 222-228, 355-356). The intruders immediately began questioning them about the location of money and/or "dope" on the property. (1 RT 120-121, 2 RT 222-228, 355-356). The witnesses denied having any knowledge of any whereabouts of either money or"dope" on the property. (1 RT 121-122). Minutes later, the intruders moved the victims approximately 25 feet, from the living room, to a conjoining "storage" room, and were told to sit on a platform built inside the room. (1 RT 145, 2 RT 233-235, 363). Two of the intruders then began ransacking the home, while the third intruder kept watch over the victims. During this time, about $300, a tanzinite ring, and a cellular phone was taken from the victims. Moments before their departure, the intruders taped the legs of Stover, Graves, and Miller with duct tape found inside the home. (2 RT 240-241, 369). The intruders told them that they would be back in 20 minutes and locked the victims in the room. (2 RT 241, 369). The intruders did not return to the home.

Within 10-15 minutes after the intruders left the house, Graves and Miller were able to free themselves from the restraints. (2 RT 242,371). Miller then pulled a fan from the wall inside the room, exposing a large pre-cut hole leading to the outside of the premises. She and Graves made their way

through the hole, outside the house, then came back inside the house through the front door to free Stover and Bennett from the room. (2 RT 243, 372-373). Bennett, who was unconscious throughout the robbery, was then taken to the hospital for his injuries and was hospitalized for approximately 30 days.

ADDITIONAL TRIAL FACTS

Sunkett testified on his own behalf against this evidence. Sunkett testified that he was innocent of all charges alleged, and that he was not present at Bennett's residence, and had absolutely no knowledge about, nor any participation in this crime.

QUESTIONS TO RESOLVE

1). In the instant case, does the movement of the victims of approximately 25 feet, from one room to another, inside the victims private residence, suffice in meeting the "substantial distance" requirement as defined in P.C. Section 207(a)?

2). Did the trial court make a determination in the record that all crimes committed in this case, excluding the ex-felon in possession of a firearm, were merely incidental to the objective, robbery?

3). Was the *Daniels* test applied, or correctly applied in this case when determine whether a kidnap legally occurred? And if so, does the first prong of the *Daniels* case fail?

4). Was P.C. 654 applied correctly by the trial court? If not, did the error in the court's method in determining the aggregate result in a sentence imposed with multiple punishments for one course of conduct; prohibited by 654?

5). Does the evidence demonstrate that the 'ex-felon in possession of a firearm,' and the 12021 and 12022's, are independent and had separate intents other than the objective of robbery?

LEGAL STANDING

Petitioner asserts that he has a right to due process, guaranteed him by the fifth amendment; the right to a fair jury trial, guaranteed him by the sixth amendment; the right to be free from cruel and unusual punishment, guaranteed him by the eighth amendment; and the right to due process and equal protection of state laws, guaranteed him by the fourteenth amendment.

Sunkett contends that he has legal standing to raise a claim of "actual innocence" because penal code section 207(a), of which he was convicted, does not prohibit his conductin this case; as well as a second claim that an illegal and unauthorized sentence was imposed in excess of this court's jurisdiction by imposing multiple sentences, contrary to Cal.Pen.Code.Sec. 654. Sunkett believes filing a writ of habeas corpus on both of these issues is the correct remedy, and that moving the court to excuse any possible procedural default is well inside the law and in this court's jurisdiction in this circumstance.

Sunkett asserts that this Superior Court acted in excess of its jurisdiction and powers as defined by constitutional provision, statue, and/or rules developed by courts, and that he "..is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct." (In re *Zerbe* (1964) 60 Cal. 2d 666, 667-668 [36 Cal. Rptr. 286, 388, p. 2d 182]; see *People v. Mitch* (1071) 4 Cal. 3d 389, 396 [93 Cal. Rptr. 721, 482 p. 2d 633] (*Mutch*) [applying same standard]; *In re Early* (1975) 14 Cal. 3d 122, 125 [120 Cal. Rptr. 881, 534 p. 2d 721] (*Early*) [same standard]; *In re Martinez* (2017) 3 Cal. 5th 1216 [226 Cal. Rptr. 3d 315] (*Martinez*) [citing *Zerbe*].

It was held in *In re McInturff,* 37 Cal.2d 876, 880, [236 p.2 574]; "The writ will issue, however, to review an invalid sentence, when, without the redetermination of facts, the judgement may be corrected to 'accord with the only other possible determination in the circumstances.'").

It was held in *Neal v. The State of California,* 55 Cal.2d 11; 357 p.2d 839; 9 Cal. Rptr. 607. (1960); ("Cal.Pen.Code.Sec. 2487(1), limits the review of erroneous judgments by habeas corpus cases

in which the conviction and sentence imposed were in excess of the jurisdiction of the court. The crucial question, therefore, is whether the court acted in excess of it's jurisdiction by imposing multiple sentences, contrary to P.C. Sec 654, and affirming multiple prosecutions which is prohibited by section 654.

An attack by habeas corpus on wrongful conviction and multiple sentences is a collateral attack on the judgement. Therefore, a writ of habeas corpus will issue to review a claim of 'actual innocence' and an invalid sentence when, 'without re-determination of any facts', the judgement may be corrected to accord with the only possible determination in the circumstances. Where the facts are undisputed and the only question as to the issue of multiple punishment is the applicability by different provisions of the code, "habeas corpus is a proper remedy to review that issue." (See *Neal v. The State of California*, 55 Cal.2d supra.).

In regard to any time-bars or any other procedural default the court may consider while reviewing this petition, petitioner offers *Gonzales v. Abbott*, 967 f. 2d 1499, 1504 (11th Cir. 1992), where procedural default was excused under actual-innocence exception because petitioner's claims, if true, rendered conviction void and could not be a legal cause of imprisonment. (Amended by 986 F. 2d 461 (11th Cir. 1993)). In *Carrier*, 477 U.S. at 495, the court stated that the procedural default would be excused even in the absence of cause, "when a constitutional violation has probably resulted in the conviction of one who is actually innocent.

Courts have already decided that the review of actual-innocence claims and illegal sentencing issues on habeas corpus are so vital to our justice process that the Supreme Court made exceptions to the so-called *Waltreus* rule which stated that a writ of habeas corpus will not issue for a claim that was raised and rejected on appeal. (*Waltreus* (1965) 62 Cal. 2d 218, 225 [42 Cal. Rptr. 9, 397, p. 2d 1001].

Two of those Court enacted exceptions relevant to Mr. Sunkett's case are:

1). Where the claimed constitutional era is both clear and fundamental,

and strikes the heart of the trial process... an opportunity for a third chance at judicial review (trial, appeal, post appeal, habeas corpus) [is] justified."

2). Review of a previously litigated claim is justified where the trial court acted in excess of jurisdiction and there was no material dispute as to the facts.'"

Further, in any circumstance where this Superior Court considers whether these claims were raised previously at some point on federal or state appeal and may now possibly be barred, Sunkett offers *Harris, Supra,* 5 Cal. 4th at p. 834; and *Zerbe, id* at p. 840 (quoting p.668), respectfully, in support of the two exceptions listed above pertinent to the *Waltreus* rule. So even in the event that this court finds these claims were previously raised and rejected on appeal, Supreme Courts have decided that the third chance judicial review is justified if they claimed constitutional error is both clear and fundamental, and where a trial court acted in excess of his jurisdiction with no material dispute as to the facts.

Without a re-determination of the facts in the record of this case, and to afford petitioner due process of law, petitioner brings this writ of habeas to this court, in effort to have this court correct the judgement in accord with the only other possible determination in the circumstances.

If Sunkett succeeds in showing a prima facie case for habeas relief, any failure by this court to properly address this claim of actual-innocence and correct this wrongful conviction as well as the illegal sentence would result in a fundamental miscarriage of justice. (*Schlup v. Delo,* 513 U.S. 298, 327, 115 S.Ct. 851, 867, 130 L. Ed 2d 808, 836 (1995).

CALIFORNIA PENAL CODE SECTION 207(a)

P.C. 207(a) reads:

Every person who forcibly, or by any other means of instilling fear, steals, or takes, or holds, detains, or arrest any person into another

country, state, or county, or into another part of the same county,

is guilty of kidnapping.

The language is clear here that a substantial distance must be covered across or out of a city, county, state, or country to satisfy a conviction for kidnap under 207(a).

However, courts have employed the two prong *Daniels* test in deciding asportation. (See *People v. Daniels, supra,* 71 Cal. 2d). The two prongs are:

1). The movement of the victims must not be merely incidental to the commission of the robbery.

2). The movement must substantially increase the risk of harm to the victim beyond that inherent to the crime of robbery.

The courts have devised this two-prong *Daniels* test in order to avoid the imposition of the severe punishment of life imprisonment for a defendant convicted for robbery when the robbery was essentially a standstill robbery in which the defendant moved the victim only a few feet in order to more successfully carry out the robbery.

Note: In order to convict a defendant of P.C. 207(a) kidnapping**,** the defendant must have**,** by force**,** moved the victim(s) for a substantial distance**,** out of or across the county, state, or country. In addition, both prongs of the *Daniels* test are required to be met in order for the crime to result in a conviction. (*In re Early, supra,* 14 Cal. 3d at pp. 127-128)(also *People v. Hoard, supra,* 103 Cal. App 4th, 604-605).

PETITIONER'S 1ST CLAIM

Sunkett claims that this court failed to properly evaluate the evidence against what is legally necessary to convict a defendant of penal code 207(a) kidnapping, 'beyond a reasonable doubt.' Sunkett claims that this court wrongfully convicted him of at least four felony counts of p.c. 207(a) kidnapping, and that he is actually innocent of this crime because the statue does not prohibit his conduct in this case.

(*In re Zerbe*, (1964) 60 Cal. 2d 666, 667-668 [36 Cal. Rptr. 286, 388 p. 2d, 182]. See *People v. Mutch*, (1971) 4 Cal. 3d 389, 396 [93 Cal. Rptr. 721, 482, p. 2d 633].

Sunkett claims that the movement of the four victims of approximately 25 ft, all inside the private home of Michael Bennett, from the living room, to a storage room, does not meet the 'substantial' movement required of 207(a) kidnapping (out of the state, county, to another part of the same county, or out the country), to suffice for a conviction "Beyond A Reasonable Doubt."

Sunkett asserts that courts have long held, that for forcible movement of a victim(s) to be substantial within the meaning of the law of kidnapping, the distances involved must be far in excess of what is present in this case. (*People v. Camden*, (1976) 16 Cal. 3d 808 **(Miles)**; *In re Early*, (1975) 14 Cal. 3d 122 **(10 to 13 Blocks)**; *People v. Milan*, (1973) 9 Cal. 3d 185 **(Miles)**; *People v. Beamon*, (1973) 8 Cal. 3d 625 **(15 Blocks)**. The shortest distance that cases have ever held to be substantial was a full city block. (*People v. Thornton*, (1974) 11 Cal. 3d 738, 768.

In addition to the distance here being 'trivial', Sunkett insists that both *Daniels* prongs, in combination, when given a proper review, cannot be met in this case. (*In re Early, supra*, 14 Cal. 3d at pp. 127-128)(see *People v. Hoard, supra*, 103 Cal. App 4th, 604-605)(also *People v Washington*, (2005) 127 Cal. App. 4th 290, 301). This Superior Court, at trial, has already held that the objective of the conduct was robbery and that the kidnapping "was incidental to the robbery or simply a means of allowing the intruders to accomplish robbery." (7 RT 1764). Therefore this court itself established failure in the first prong of the *Daniels* test.

As for the second *Daniels* prong, Sunkett claims that the leaving of the victims bound and locked inside the storage room as the intruders made their escape, was inherent in the crime of robbery, and these circumstances does not automatically suffice in meeting the "substantially increase the risk of harm" factor. Sunkett contends that Mr. Bennett's residence was a private, secluded residence, on private property, which itself was surrounded buy tall and vast vegetation. The movement inside this home did

not remove the victims out of public visibility nor did it decrease detection. The risk did not increase because the lack of detection was already established by the robbery occurring inside the house. In addition, the main crime of robbery had already been established before the movement, and afterward, there were no additional crimes committed or injuries sustained to the victims once they were moved 25 feet from one room to the next. Even more, the victims made their escape from the storage room within 15 minutes after the intruders departed through a pre-cut hole in the wall without experiencing any additional or 'heightened' harm to life.

However, In *re Crumtpton, supra,* held that asportation to avoid detection or to facilitate escape are not included in the test for kidnapping. Movement for the purpose of hiding the victim(s) from public view may also not satisfy the "increased risk" component of the *Daniels* test.

Sunkett claims that the jury, in finding him guilty, failed to follow the jury instructions of Calcrim 252 and Calcrim 1215, which informs the jury that kidnap requires proof of intent, and that all necessary elements required in P.C. 207(a) be met.

Sunkett asserts that after the fact, the trial court failed in it's duty to review the jury's verdict(s), and resolve any legal questions in accordance with the statute(s), and verify whether all elements of P.C. 207(a) kidnap, and all other charges, were legally proven "Beyond A Reasonable Doubt." (See *Williams v. Taylor*, (2000) 529 U.S. 362, 402-403; [The state courts cannot be said to have come to their decision based on a reasonable determination of facts or by a reasonable application of clearly established federal law.]). As a result of the courts failure to correctly apply P.C. 207(a), and conduct a *Daniels* test in this case, then legally dismiss the 207(a)'s, and quite possibly the 236's, Sunkett was wrongfully convicted on these eight felony counts.

Argument.

Cases decided as recently as January 6, 2020, have reversed kidnapping convictions were movement of the victim(s) was merely incidental to the robbery; see (See Exhibit A, at p.36 *People v. Taylor*, Cal. App. 3d 162*;* case attached). One key point favoring Mr. Sunkett's argument here in this case, is that the trial court has already held that the 207(a) kidnappings were "incidental to the objective of robbery." (7 RT 1763). This, if anything, completely bars the first prong of the *Daniels* test from being met. The trial court also cited *Perez*, 22 Cal. 3d 545 as an example in support of its determination, as well as *Re Ponce* 65 Cal. 2d 341. (7 RT 1763). The court explained that both cases precluded punishment for acts "incidental" to the main objective of the defendant. (7 RT 1763). In Sunkett's case, the court stated:

> "The ex-felon in possession of a weapon, in the Court's mind, seems to be independent and have a separate objective, so it would be consecutive; but otherwise, the other crimes all appear to be incidental to the objective of robbery." (7 RT 1764).

Note, prior to making this determination, the court instructed the jury with Calcrim 252 and explained to them that kidnapping and false imprisonment require criminal intent (5 RT 1212). The court instructed:

> "For you to find a person guilty of these crimes or to find the allegations true, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act on purpose..." (7 RT 1212).

The court went on to instruct the jury with Calcrim 1215 stating:

> "In order for the defendant to be guilty of kidnapping the other

person must be moved or made to move a distance beyond that merely incidental to the commission of robbery." (5 RT 1223).

Once the jury rendered guilty verdicts on four counts of P.C. 207(a), the court at some point, had a duty to correct the jury's verdict(s), and at the least, dismiss the four counts of penal code 207(a) kidnap, because the trial evidence did not prove a kidnapping was committed with wrongful intent, nor was the movement more than incidental to the commission of the robbery; and the court established that fact itself. Therefore, the statute(s) do not prohibit the conduct, and the Court can no longer hold that these convictions are legal and just. The moving of the victims, by the courts own analysis, was not intentional, and "was merely incidental to the commission of the robbery."

In re Early (1975) 14 Cal. 3d 122 summarized this issue stating, "section 207, of course, differs from section 209 in that violation can occur in the absence of an "associated crime..." When an associated "crime" is involved, there can be no violation of section 207 unless the asportation is more than incidental to the commission of that crime." Federal due process and the 14th amendment require that the trier of fact find every element as proven beyond a reasonable doubt and that the evidence is sufficient to support such a finding. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 477; *Jackson v. Virginia, supra,* 433 U.S. at pp. 317-320; *Moore v. Parke, supra,* 148 F. 3d 705; U.S. Const. 14th Amend).

But even aside from that, the movement of the victims in general was only an approximate 25 feet. This distance is just not "substantial" according to the requirements of P.C. 207(a). Any jurist of reason would find it extremely difficult to produce a scenario where 25 feet of movement, all inside the confines of a person's home, could be converted into something of a "substantial distance" that would equate to movement outside the county, to another part of the same county, out of the state, or out of the country. (See P.C. 207(a)). And there is an abundance of case law that would prohibit such an attempt.

(*People v. Williams, supra,* 2 Cal. 3d p. 901)(movement inside enclosure or the same premises is not "asportation into another part of the same county.").

The Supreme Court in *People* v. *Caudillo* (1978) 21 Cal. 3d 562, held that the forcible taking of the victim for an unspecified distance, from an elevator, to a storage room, to an apartment was not substantial movement within the meaning of section 207. The Court held that "It is settled law that the kidnapping offense must involve a movement which is more than that which would be regarded as trivial, slight, or insignificant."

Caudillo rejected a suggestion that *People v. Stender,* (1975) 47 Cal. App. 3d 413, 423, (200 feet) authorizes consideration of factors other than actual distance as determinative of what constitutes efficient movement of a victim to constitute the offense of kidnapping pursuant to section 207(a).

In *People v. Sheldon,* (1984) 48 C. 3d 935, 952, the court considered the movement of the victim from the garage adjoining her home, through the hall, kitchen, dining room, and den, and found that this movement was insufficient.

Case law has long held that for forcible movement of the victim to be substantial within the meaning of the law of kidnap, the distances involved must be far in excess of that what is present in this case. (*People v. Camden,* (1976) 16 Cal. 3d 808 **(Miles),** In re Early, (1975) 14 Cal. 3d 122 **(10 to 15 Blocks)**; *People v. Lara* (1974) 12 Cal. 3d 903 **(Miles)**; *People v. Stanworth* (1974) 11 Cal. 3d 588, 602-604 **(From one quarter mile to 5 to 10 Miles)**; *People v. Milan* (1973) 9 Cal. 3d 185 **(Miles)**; *People v. Beamon* (1973) 8 Cal. 3d 625 **(15 Blocks);** *People v. Thornton* (1974) 11 Cal. 3d 738, 768 **(One city block).**

Sunkett does recognize however, that the Supreme Court in *People v. Martinez,* (1999) 20 Cal. 4th, held that a jury may consider such factors as whether that movement increase the risk of harm, decreased detection, increased danger in a victim's escape attempt, and enhanced the opportunity to commit additional crimes.

But it is important to note, that the allowance of these factors must be considered in addition to the main factor, actual distance, which must be evaluated and determined first. The Supreme Court cautioned that although the jury is allowed to take into account considerations in addition to actual distance, that these "contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance."

Sunkett also acknowledges that cases since *Martinez* have held that short distance sufficed for kidnapping when the movement substantially changes "the context of the environment." (*People v. Diaz* (2000) 78 Cal. App. 4th 243, 247). The short distance in question in the *Diaz* case was approximately 150 to 300 ft. But most importantly, it should be noted, that the movement occurred in a public place, where the victim was moved from a visible Street location to a completely dark portion of an adjacent park were a chance of detection was minimized. (*Id. a*t p. 248). *People v. Shadden* (2001) 93 Cal. App. 4th 164, and *People v. Corcoran* (2006) 143 Cal. App. 4th 272, 279, held similar rulings where short distances sufficed for asportation because the victims were moved around in a public area to a more isolated location that decreased public visibility and detection.

California courts have even concluded that movement of a victim 15ft from outside an apartment building to the inside of the victim's apartment satisfied that particular asportation requirement because it increased the risk of harm to the victim. (*People v. Arias,* 193 Cal. App. 4th at 1435; citing *Shadden*, movement of the victim 9 feet to the back of a store satisfied the asportation requirement).

But notice that the movement in these four cases, as well as practically all case law that authorizes short distances, occurred when the victims were moved away from public visibility to avoid detection. The movement here, as well as all the crimes committed in this case occured on a large parcel of private property, and inside Bennett's home on that property. Each victim's hands were tied prior to their being moved from one room to another, and their feet were bound once they were placed in the storage room. At least two of the intruders were already in commission of the robbery prior to the movement, while

one intruder, after the movement, remained in the storage room with the victims to watch over them. Once the robbery was complete, the intruders locked the victims inside the storage room and left the home. 15 minutes later, the victims freed themselves and escaped through a pre-cut hole in the wall.

Sunkett agrees, that had this crime occurred in a public place, where it were likely that the victims could be seen or rescued by others, then the movement may have possibly increased the risk of harm and decreased detection. However, this is not what occurred here. The 'conduct' evidence in this case is insufficient in proving that moving these victims 25 feet inside the home, from the living room to the adjoining storage room, and the locking of the victims inside the room as the intruders escaped, did no "substantially increase the risk of harm" of that which already existed.

In *People v. Martinez* (1984) 150 Cal. App. 3d 579, 198 Cal. Rptr. 565, the court reviewed the history of kidnapping and kidnapping for robbery, and reiterated the holding in the *Daniels* case. The Court ruled that: "...consistent with the purpose, the courts have treated multi-victim robberies no different than single-victim robberies, and have held that movements which are incidental to a multi-victim robbery and which fail to substantially increase the risk of harm do not establish kidnapping of any sort."

The *Martinez* court added, "The *Daniels* court stated: "We hold that the intent of legislature in amending penal code section 209 in 1951 was to exclude from its reach... those [robberies] in which movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself."

Everything the victims were made to experience in this case are considered by the courts, to be common action(s) normally found and expected in the crime of robbery, especially if the crime occurs inside the victim's home.

> "It is a common occurrence in robbery, for example, that the
>
> victim be confined briefly at gunpoint or bound and detained,

or moved into and left in another room or place."

(*People v. Daniels, supra,* 71 Cal. 2d at p. 1139.

The California Supreme Court noted in *Daniels*: "[T]he direction of the criminal law has been to limit the scope of kidnapping statute, with its very substantially more severe consequences to true kidnapping situations and not to apply it to crimes which are essentially robbery, rape, or assault and in which some confinement or asportation occurs as a subsidiary incident." (*People v. Daniels, supra,* 71 Cal. 2d at p. 1137, citations ommitted). When during a robbery a defendant moves his victim around the premises in which he finds him-whether it is a residence or business or other enclosure-generally this movement will not be a kidnapping for the purpose of robbery under penal code 207(a) or 209. (*People v. Daniels, supra,* 71 Cal. 2d at p. 1140).

Daniels should make it clear to this court that the detention or asportation elements, according to the evidence in this case, do not meet that of which is required in the second prong of the *Daniels* test, nor the contextual factors allowed in *Martinez*. Much of the law finding that there was a 'substantial' increase in harm occurred in rape cases, where by the very nature of the crime of rape, there is serious bodily harm, which bodily harm factor is not present in robbery.

Summary.

Thus far, Sunkett has presented this court with a reasonable, and quite strong prima facie case for relief, by use of case law and trial facts, demonstrating that the moving of the victims 25 feet, inside a private residence, does not suffice for establishing the "substantial distance" factor as defined by the statute. To add, the trial court itself has already established that the kidnapping(s) were incidental to the commission of robbery (7 RT 1764). This fact alone requires reversal; see Exhibit A, at p.36 *People v.*

Taylor, 2020. However, even further, Sunkett reasonably demonstrated that the movement did not substantially increase the risk of harm, according to the Court's holding in *Daniels*.

Case law has made it quite clear that each of these three elements; 'substantial' distance, intent, and 'increased risk factor', have to be proven "Beyond A Reasonable Doubt," as necessary, to find him guilty of 207(a) kidnapping. Therefore, the verdicts rendered by the jury on these charges should have been overturned by the trial court after the fact because the trial court's own determination of the facts prohibits the first prong of the *Daniels* test from being met. Thus, Sunkett's conviction must be reversed because it has already been determined that the conduct in this case is not proscribed by the statute. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 477; *Jackson v. Virginia, supra,* 433 U.S. at pp. 317-320; *In re Winship, supra,* 397 U.S. 358; U.S. Const. 14 Amend.).

Federal due process and the fourteenth amendment requires that the trier of fact find every element as proven 'Beyond A Reasonable Doubt' and that the evidence is sufficient to support such a finding. (*Apprendi v. New Jersey, supra; Jackson v. Virginia, supra; Moore v. Parke, supra,* 148 F. 3d 705; U.S. Const. 14 Amend.).

Under Federal due process requirements, the standard on review is whether, after reviewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to justify a rational trier of the facts to find the essential elements of the crime Beyond A Reasonable Doubt. (*Jackson v. Virginia, supra*)(The same standard applies under the California Constitution; see *People v. Johnson, supra*).

Substantial evidence is evidence that is reasonable, credible, and of solid value necessary in assisting a trier of fact in its duty to render a conclusion 'Beyond A Reasonable Doubt.' (*People v. Johnson* (1980) 26 Cal. 3d 357, 358).

Well it can be said with confidence that this case is significantly lacking the "substantial evidence" "of solid value" required to uphold such a conviction and all of it's penalties against Mr. Sunkett. But in

dereliction of its duty, during a critical time in the trial/sentencing phase(s), the trial court simply failed to properly construe the facts, or simply ignored them, and failed to conduct a review or legal investigation, on record, than would demonstrate that the court correctly applied the proper legal standards of review and cite the controlling case law that could effectively satisfy the verdicts.

Consequently, there is insufficient evidence of all necessary elements required to convict a defendant for the offense of 207(a), and Sunkett was wrongfully convicted and sentenced to a hefty prison term for these charges. Therefore, under Federal due process and the 14th amendment, the conviction(s) must be reversed. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 [147 L. Ed. 2d 435, 120 S.Ct. 2348]; *Jackson v. Virginia,* (1979) 433 U.S. 307, 317-320 [99 S. Ct. 2781, 2788-2789, 61 L. Ed. 2d 560]; *Moore v. Parke* (7th Cir. 1998) 148 F. 3d 705; *People v. Johnson* (1980) 26 Cal. 3d 557, 576.).

CALIFORNIA PENAL CODE SECTION 654

The purpose of section 654 is, "...to ensure that punishment is commensurate with a defendant's criminal culpability." [citations.], *People v. Alvarado,* (2001) 87 Cal.App.4th 178, 196.

Section 654 states, "An act (or) omission which is made punishable in different ways by different provisions of this code may be under either of such provision, but in no case can it be punished under more than one; an acquittal (or) conviction, and sentence under either one 'bars a prosecution for the same act (or) omission under any other.'").

"Where an offense cannot be committed without necessarily committing another offense, 'the latter is a necessarily included offense.'"). "The proscription of .P.C. 654, against multiple punishment of a single act is not limited to necessarily included offenses.").

"If only a single act is charged as the basis of multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not... Necessarily included offenses. 'It is the singleness of the [act] not of the offense, that is determinative.'").

"Whether a course of conduct is divisible and therefore give rise to more than one act within the meaning of section 654, depends on the 'intent and objective of the actor.' If all offenses were incident to one objective, a defendant may be punished for any [one] of such offenses, 'but not for more than one.").

Penal Code 654, relating to acts made punishable by different provisions of the code, may be applied not only where there is only one 'act' in the ordinary sense, but also where a course of conduct violates more than one statute. The problem is whether it comprises a divisible transaction which can be punished under more than one statute." (See *Neal v. The State of California*, 55 Cal.2d supra, at p. 4-22).

PETITIONER'S 2ND CLAIM

Sunkett claims that this court erred in the formula for calculating and determining which offense in this case was the most serious offense to sentence him under, issued him multiple punishments thereafter, and provided an unlawful conviction and sentence that is not commensurate with the intent and objective of his culpable criminal actions.

Sunkett maintains, as this court itself has already determined (with the exception of firearm possession), that all of the offenses committed in this case were incidental to the objective of 'robbery.' (7 RT 1764). Anything opposite of that, was never determined and established by a jury. Based on that, and according to the 654 analysis, the court then had a duty to impose sentence under the most serious of the "singular" crimes by legislative fiat. The single act of robbery, 3/6/9, carried a total of 19 years (with 10yr. enhancement), while the single act of kidnapping, 3/5/8 carried a total of 18 years (with 10yr. enhancement). The court erred when it made count 5, the 207(A) kidnapping, the principal term,

when it considered the "cumulative" effect of the kidnapping charges as a group, then tallied the penalties of all four acts of the 207(a) kidnapping, together to determine that this charge should be the principal term. It then imposed an unauthorized sentence under its unlawful and unsupported analysis, by punishing Sunkett to the multiple kidnappings which grossly inflated the prison term.

The court then erred a second time when it determined that the 12021 and 12022's were independent, and had a separate objective to the robbery (7 RT 1763-1764). However, it can be reasonably inferred by all trial evidence, that the firearms were brought to better effectuate the robbery. There are no substantial facts that indicate that the assailants had a separate motivation in arming themselves other than to carry out and/or better effectuate the robbery. Having the opportunity, the trial court at no point offered any points in evidence or provide the record with an explanation supporting it's opinion as to how and why it found the 12021 and 12022 to be independent and had a separate objective than robbery. In it's failure to do so, the court did not provide Sunkett with a valid legal analysis, supported by case law and information, that he could then have an opportunity to investigate and question, then move the court if deemed necessary. Unfortunately, Sunkett's appellate counsel, Roger Curnow, was ineffective and failed in his due diligence to thoroughly review Sunkett's trial and sentencing transcripts, locate these errors and discussion, and raise them to the Appellate Court. This in turn was a disservice to Sunkett because he failed to have this issue raised on direct appeal for the Appellate Court to review and potentially correct at a much earlier date than now.

Argument.

It was held in *People v. Perry*, 154 Cal.App.4th 1521; 65 Cal. Rptr.3d 654 (2007); "The moment at which a defendant committed all of the elements of an offense is immaterial in applying Penal code section 654." [HN5]; "P.C. 654, prohibits punishment for (2) crimes arising from a single, indivisible course of conduct." 'If all of the crimes were merely incidental to, or were the means of accomplishing

or facilitating one objective, a defendant may be punished only once.' If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or parts of an otherwise indivisible course of conduct."

The distinction between an act of violence against the person that violates more than one statute, and such an act that harms more than one person is well settled. Section 654 is not applicable where one act has two results, each of which is an act of violence against the person of a separate individual. (See *People v. Brannon*, 70 Cal.App. 225, 233, 235-236).

In the instant case, Sunkett was charged with several different crimes, all resulting from a single act and/or a course of conduct that is incident to one objective that violates more than one statute. The single act and course of criminal conduct that the record reflects in this case is robbery. The robbery carried a penalty of 19 years, which was the most serious crime committed in this case by legislative fiat. However, the court chose the 207(a) kidnapping as the most serious charge by adding up the terms of all four kidnapping charges 'together' to determine the aggregate, then found P.C. 12021 and 12022 (ex-felon in possession of a firearm), independent and had a separate motivation than 'robbery' (not kidnapping it made the aggregate).

654 instructs courts to look at each charge <u>singularly</u> to figure out which crime is the most serious, then add in the enhancements, then concurrency, consecutive, and so on. But this court instead used the analysis under P.C. 1170.1, <u>before</u> using P.C. 654 to determine what offense was the most serious. This was not the requirement. The court actually acted in reverse without a legal basis to do so. Sunkett challenged whether the court had a legal standing to support its formula. The court was asked:

"Was there any case in particular that the court was drawing from"

to support this method of analysis?

The court responded:

"No," and that it was making such an analysis based on

"Research materials," "Seminar materials I've gone to."

(7 RT 1770).

The court further showed that it did not have legal basis to support such an analysis or formula when it stated that all cases it had cited thus far on this issue were merely examples of separate objectives, "not in terms of how sentencing should be conducted." (7RT 1770).

In terms of the kidnapping, when applying 654 correctly, P.C. 207(a) is not the more serious punishment or principal here when it is evaluated correctly and "singularly" as 654 instructs.

This court now, must not overlook the fact that the prosecution has already proven, and the trial court established, that the motivation and intent here was robbery, and that the kidnapping was an indivisible tool used in the course of the robbery. It was not a separate and distinct motivation because it was used from the start. It was not a kidnapping that turned into a robbery. It was a robbery that that included, as this court determined, a kidnapping to better effectuate the robbery itself.

Simply, the robbery was the sole objective, and was the more serious punishment according to legislative fiat. However, the court used an illegal method of combining the kidnapping of Mr. Bennet, with a kidnapping of Mr. Stover, with a kidnapping of Mr. Graves, with a kidnapping of Ms. Miller, to determine the aggregate in this case and get the highest sentence.

Note, each crime of kidnap was a separate crime committed against seperate people, hence the four charges. But the courts method in making its determination was erroneously conducted in reverse. The court basically started its method at the end of the process with P.C. 1170, and worked its way backward to P.C. 654, in an attempt to give Sunkett the highest sentence possible. However the correct sentencing strategy would be to start with 654, and end with 1170. Had the court read the very first sentence in the CEB, section 37.50, it would have learned that, "The sentencing court must consider the Penal Code section 654 issue before determining whether to impose concurrent or consecutive

sentences.". This court bypassed 654 and considered, first, P.C. 1170, consecutive sentencing, to reach the aggregation.

Summary.

Simply put, this court incorrectly applied P.C. 654 by failing to follow the method instructed in the CEB for sentencing defendants in a manner that ensures punishment is commiserate with his criminal culpability. The trial court had several opportunities during the sentencing phase to show it had a legal backing and genuine confidence in its method of analysis, but it failed to do so. (7 RT 1767, 1784, 1785).

It should be noted, that even the prosecutor in this case, initially believed that the correct process was choosing a 'single' count as it applies to each victim in determining the aggregate. (7RT 1775).

As for the 12021 and 12022, and the ex felon in possession of a firearm, the jury did not indicate whether they found these offenses to be independent and that they carried a different act or motivation for each count. Additionally, the court during no point in the proceedings, did it attempt to demonstrate how or why it found these offenses to be independent and had separate objectives that warranted the court to impose consecutive sentencing.

The evidence in the record supports that the 207(a), the 12021, 12022, and the ex-felon in possession of a firearm, all occurred under one course of conduct and were not indivisible motivations; nor were they "factually" proven to be independent by the jury, or this court. The moving of the victims (kidnap), and the presence of the gun which was never used in separate crimes or different places, were clearly conducted under one indivisible course of conduct, and were merely tools used to better effectuate the robbery itself. This court had already decided, in its mind, that all crimes appeared to be incidental to the robbery. The contradiction and confusion in deciding this issue started with the errors in the court's method and process in determining 654. The courts manner in deciding the aggregate term by

considering the four kidnapping charges 'commulatively' instead of 'singularly', as they apply to each victim, furthered the 654 violation contributed to the confusion.

DEMONSTRATION

Sunkett provided a reasonable demonstration as to (1) why he is actually innocent of P.C. 207(a), (2) that the sentence imposed upon him is illegal and unauthorized, and (3) the multiple convictions are in excess of this court's jurisdiction. Sunkett provided an abundance of case law governing P.C. 207(a), and 654, that supports his claim(s).

In summary, Sunkett has relied on the evidence established, and shown that the conduct in this case was not proscribed in P.C. 207(a). The statute mandates movement must be substantial, outside the country, state, or county, or into another part of the same county.

People v. Williams, supra, states that movement inside enclosure or the same premises is not "asportation into another part of the same county."

People v. Caudillo, held that "It is settled law that the kidnapping offense must involve a movement which is more than that which would be regarded as trivial, slight, or insignificant."

People v. Daniels, supra, held "It is a common occurrence in robbery, for example, that the victim be confined briefly at gun point or bound and detained, or moved into and left in another room or place." When during a robbery a defendant moves his victim around the premises in which he finds him-whether it is a residence or business or other enclosure-generally this movement will not be a kidnapping for the purpose of robbery under P.C. 207 or 209. (*Daniels, supra,* 71 Cal. 2d at. p. 1140).

As far as the two prong *Daniels* test applies, this court has already failed the first prong of the *Daniels* test by determining that the kidnapping charges were incidental to the robbery. (7 RT 1764).

The *Daniels* court stated, "We hold that the intent of legislation in amending penal code section 209 in 1951 what was to exclude from its reach...those [robberies] in which movements of the victim are

merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessary present in the crime of robbery itself."

The second prong is moot if the first prong can not be met. *Daniels* requires both prongs to be met, in addition to the distance being "substantial," to convict a defendant of P.C. 207(a) kidnapping. (*In re Early, supra,* 14 Cal. 3d at pp. 127-128; also *People v. Hoard, supra,* 103 Cal. App. 4th, 604-605).

In terms of the sentencing error/illegal sentence, Sunkett has shown that Cal.Pen.Code.Sec 1170.1.(a), describes sentencing for more than one crime charged. It states: "The aggregate term of imprisonment...(shall) be the sum of the principal term for the primary offense, the subordinate term for additional offenses, and any additional term imposed for applicable enhancements."

Cal.Pen.Code.Sec. 1170.1.(a)(3), states:. "In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified, unless the convicted person is given any other disposition provided by law."

It was held in *People v. Knowles,* 35 Cal.2d 175, 187 [217 p.2d 1], 'If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated. If only a single act is charged as the basis of multiple convictions, only one of the convictions can be affirmed, notwithstanding that the offenses are not necessarily included offenses.'

It was held in *Neal v. The State of California,* supra, 'Where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.'

In the instant case, petitioner was charged with robbery (count 1), and a conviction was affirmed on that charge. Petitioner secondarily, was charged with 207(a) kidnap (counts 5,6,7,8), and convictions

were affirmed on these counts. The latter under California law, is a necessarily included offense. Both convictions, affirmed on a single act and/or course of conduct, is in violation of law, and thus, deprives petitioner of due process, and the right to a jury trial, under Cal.Const.Art. 1, sec 7, and the U.S.Const. 4th and 6th Amendments, on which course of conduct and/or act constitutes the above offense(s).

PREJUDICE

A defendant/petitioner bears the burden of persuading the reviewing court that it is reasonably probable that a more favorable result would have occurred, in the absence of the error. (See *People v. Watson,* (1956) 46 C2d 818, 836, 299 p2d 243).

Sunkett asserts that the wrongful conviction of P.C. 207(a), and the multiple convictions that were affirmed in violation of section 654, caused him to be illegally confined in California state prison for a term of 63 years. Sunkett was prejudiced by (1) the court's failure to properly evaluate whether the statute, 207, proscribed the conduct found in the evidence, (2) the sentencing court abused it's discretion when it combined then designated four counts of 207(a), kidnapping), as the primary offense, contrary to law, and (3) the evidence on record does not rise to the threshold of being equivalent to substantiate that particular provision as shown in petitioner's claims, contentions, and assertions. Sunkett claims that had the court dismissed the four 207(a) charges, after the jury verdicts, due to insufficient evidence, and had not tried to circumvent the preclusion of multiple punishment prohibited by section 654, when it affirmed multiple convictions based on the same act or course of conduct, then Sunkett would have only been sentenced to state prison for a term of approximately 24 years or less. (estimate).

The reasonable probability of a different result will exists if this court reviews the claims presented herein, in accord with the only possible determination in the circumstances, that must then be applied correctly to the convictions that this petition has incurred a liability in.

If the 207(a) convictions are reversed, or the error in the violation of 654 is stricken, and if this court applied the holding in *Neal v. The State of California,* and *People v. Alvarado,* to correct the error in accord with the only possible determination in the circumstances, and ensure the punishment is commensurate with the petitioner's alleged criminal culpability, then a reasonable probability of a different, more favorable result in a lesser sentence based on this same single act/course of conduct, will take place. (See *People v. Watson,* (1956) 46 C2d 818, 836, 299 p2d 243).

STATE AND FEDERAL DUE PROCESS VIOLATIONS

It was held in *Tidwell v. Marshall,* 526 F.Supp. 2d 1031 (C.D.Cal.2007), "Procedural due process questions are examined in two steps. The first asks whether there exists a 'liberty or property interest,' which has been interfered with by the state. And the second examines whether the procedures attendant...upon that deprivation were constitutionally sufficient." U.S.C.A. Const. Amend. 14th.

Sunkett claims and asserts that he has a 'cognizable liberty interest' in the Cal.Con.Art. 1, sec. 7 (due process clause); the U.S.Const. 14th Amendment (due process clause), and the U.S.Const. 6th Amendment right to a jury trial.

"Liberty interest may arise from either the due process clause itself, or from state law. State law includes statutes, codes, and regulations." (See *Madrid v. Gomez,* 899 F.Supp. 1146(N.D.Cal.1995).).

Sunkett's 'liberty interest' in California's law is a state statute and code, section 654, preclusion on multiple convictions from a single [act] that was charged as the basis of petitioner's multiple convictions based on a single act, in this case. "It is the singleness of the act and not the offense that is determinative." (See *People v. Knowles,* 35 Cal.2d 175, 187 [217 p.2d 1], (19-20); *Neal v. State of California,* 55 Cal.2d 18 [HN5]; Cal.Const.Art. 1, sec. 7 (due process clause).

Sunkett's 'liberty interest' in the United States Constitutional 6th Amendment right to a jury trial, is considered one of the 'fundamental' rights conferred by the United States Constitution. (See *Sullivan v.*

Louisiana, (1993) 508 U.S. 275, 281, 124 L.Ed.2d 182, 113 S.Ct. 2078; "Therefore, an error that results in a complete or constructive denial of the right to a jury trial may be considered a 'structural defect in the Constitution of the trial mechanism within the meaning of *Arizona v. Fulminante*, (1991) 499 U.S. 279, 309, 113 L.Ed.2d 302, 111 S.CT. 1246: which requires reversal without a finding of prejudice."

Sunkett's 'liberty interest' in the 6th Amendment of the U.S. Constitution was interfered with when the court denied this petitioner due process of law by forgetting the 'burden of proof' required to convict petitioner of the crimes charged. The required proof of certain elements needed to substantiate P.C. 207(a), and the multiple convictions of the provisions violated, does not exist in the facts of the record. Nor, is the burden of proof used in consistency with California law and mandates. The court record did not hold the record nice, clear, and true between the state and petitioner during the sentencing phase of his trial process. (See *Tuney v. Ohio*, 273 U.S. 510, 532 (1927); U.S.Const. 6th and 14th Amendment, right to jury trial and due process.

Sunkett asserts that the 'procedures attendant' upon these constitutional deprivations were not constitutionally sufficient due to the trial court abusing it's discretionary power, by going above and beyond the limitations of the legal principles governing the subject herein, by depriving him the basic protection and procedural safeguards against harassment. This then rendered the sentencing phase of the trial process fundamentally unfair, which resulted in state and federal constitutional violations.

In California, due process is required whenever government takes any 'deprivatory actions' against an individual, regardless of whether there is a 'liberty or property interest' that federal law would recognize. (See *Toussaint v. McCarthy*, 801 F.2d 1080, 1096 (9th Circuit. 1986; (citation.)).

California law on discretionary rulings: When the determination of a legal issue is entrusted to the trial court's discretion, a reviewing court... "will find error only if the court has abused it's discretion when it has made a decision that 'falls outside the bounds of reason." (See *e.g. People v. Desantis*, (1992) 2 4th 1198, 1226).

It was held in *City of Sacramento v. Drew*, (1989) 207 Ca3d 1287, 1297, that "the 'scope' of discretion always resides in the particular law being applied, and that an action that transgresses the confines of the applicable principles of law is outside the scope of discretion,' therefore an abuse of discretion." (207 Ca.3d at p.1297).

The court in *People v. Jacobs,* (2007) 156 Ca4th 728, 738, stated that a Court's discretion is subject to the 'limitations of the legal principles governing the subject of it's action' and to reverse where no reasonable basis for the action is shown." In *In re Anthony M.* (2007) 156 Ca4th 1010, 1016, the court stated that a court abuses it's discretion when it acts contrary to law."

EXCESS OF THIS COURT'S JURISDICTION

This court acted in excess of it's jurisdiction in affirming multiple convictions based on a single act. As well, it acted in excess of it's jurisdiction in abusing it's discretionary power, by taking an action that transgresses the confines of the applicable principles of law. It further acted in access of it's jurisdiction by imposing and enforcing a conviction where the defendants conduct was not proscribed by the statute, and a sentence mandated by two different provisions of law that the record in this case fails in establishing all elements of the violation. Even more, this court forgot the 'burden of proof' required to sustain even one of the convictions. Also, it acted in excess of it's jurisdiction when it deprived petitioner of his procedural right to a jury trial, thus depriving petitioner of his procedural right to due process and the basic protections and procedural safeguards from harassment in the sentencing phase of the trial process (when the court had an affirmative duty to hold the balance nice, clear, and true.

The word jurisdiction is not limited to it's conventional meaning of jurisdiction of the cause and parties, when the right to review a decision by a prerogative writ is the question for decision. (See *In re Bell,* 19 Cal.2d 488, 494[122 p.2d 22].).

"A court may have jurisdiction of the cause of action and of the parties, 'but it may lack the authority or power to act in the case except in a particular way.'. Under such circumstances, it is now generally held that the court had no jurisdiction." (See *Fortenbury v. Superior Court*, supra, at pp. 407-408).

CONCLUSION

Mr. Glenn Sunkett respectfully request that this court grants this writ of hebeas corpus by extending and applying the principles set forth by the U.S. Supreme Court's 'binding precedents,' and California's 'binding precedents' in the context where they should apply, in order to afford him his constitutional right to due process of law.

This petitioner prays that this court grant this writ of habeas corpus, and/or grant an order to show cause on any ground, and/or order an evidentiary hearing on any ground, and/or modify the judgement in accord with the only possible determination in the circumstances, and/or grant any and all relief deemed appropriate in the interest of justice. Thank you.

Respectfully Submitted,

April 15, 2020

Mr. Glenn S. Sunkett

In pro-se