CAVEAT: This sample is provided to demonstrate style and format. It is not intended as a model for the substantive argument, and therefore counsel should not rely on its legal content which may include research that is out-of-date.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN DOE, Defendant and Appellant.	2d Crim. B012345 (Sup.Ct.No. KA012345)

APPEAL FROM THE JUDGMENT OF

THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE DANIEL S. LOPEZ, JUDGE

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I

THE FAILURE TO INSTRUCT ON ATTEMPTED THEFT WAS ERRONEOUS AND REQUIRES REVERSAL

Respondent's first contention is that, regardless of whether the defense evidence showed an attempted theft, the court wasn't obliged to instruct on attempt because that might have led to a conviction of nothing more than attempted petty theft which "would in essence improperly allow the jury to modify appellant's conviction to one of attempted petty theft, contrary to the intent of the People in prosecuting appellant for petty theft with a prior" (Respondent's Brief [hereafter "RB"] at pp. 7-8).

To state this contention is to demonstrate its absurdity. The People's presumed intent that a defendant be convicted of the crime charged can in no way truncate the defendant's right to have the jury instructed on -- and permitted to convict of -- lesser crimes shown by the evidence. (*People* v. *Geiger* (1984) 35 Cal.3d 510; *People* v. *Edwards* (1985) 39 Cal.3d 107.) Where, as here, the lesser crime in question is included within the crime which the People have opted to charge, all the defendant need show for entitlement to the instruction is that "there is

evidence from which a jury composed of reasonable persons *could* conclude the defendant was guilty of the lesser crime." (*People* v. *Wickersham* (1982) 32 Cal.3d 307, 325; *People* v. *Flannel* (1979) 25 Cal.3d 668, 684; emphasis added.) Respondent confuses the People's right to select the initial charge with a right to preclude conviction of anything lesser. Such confusion should have been finally laid to rest by *Geiger*.

Respondent's second contention is that appellant wasn't entitled to instruction on attempted theft because the defense evidence showed not attempted theft but, rather, no crime at all (RB 8-9). Although respondent acknowledges appellant's testimony of placing several cameras inside a bag and carrying them two feet before abandoning his intent to steal them, respondent asserts that this version of events shows that appellant "abandoned the intent to steal even before an attempt occurred" (RB 9). Not so. An attempt to commit theft is shown by intent to commit the theft combined with any direct act done towards its commission (see CALJIC No. 6.00; *People* v. *Dillon* (1983) 34 Cal.3d 441, 453). Here, appellant's testimony showed the requisite intent, plus brief movement of the property. That was enough. (*In re Victor F.* (1980) 112 Cal.App.3d 673; *People* v. *Lorenzo* (1976) 64 Cal.App.3d Supp. 43 [both finding attempted theft from intent plus unequivocal acts short of moving the property at all.) The cases cited by respondent at RB 9, which are the same appellant has relied on in his opening brief, show not that appellant abandoned his criminal intent before *attempting* a theft, but that he abandoned it before *completing* the theft (see AOB 8-12). By respondent's logic, there would be no middle ground at all between completed theft and no crime.

Finally, respondent correctly states, but woefully misunderstands, the *Sedeno* prejudice test (RB 9-10). According to respondent, that test is satisfied simply by the jury's choice to convict of the charged crime in lieu of finding the defendant not guilty (RB 10). If that were the test, then failure to instruct on lesser included offenses would *invariably* be harmless, since the jury *always* has the option of finding the appellant not guilty. Respondent's mistake apparently stems from overlooking that the test requires any finding of harmlessness to be

premised on a demonstration that "the question posed by the omitted instruction was resolved by the jury under *other*, properly given instructions." (RB 9, quoting *People* v. *Sedeno* (1974) 10 Cal.3d 703, 721; emphasis added by appellant.) Here, no *other* instructions were given, i.e., none that asked the jury to decide whether appellant had gone so far as to attempt a theft but not gone far enough to complete it. (See, *Geiger*, *supra*, 35 Cal.3d at p. 532 [harmlessness under *Sedeno* requires a "finding necessarily made in another context that would permit a conclusion that defendant's evidence and his theory of the case were necessarily rejected by the jury."]; see also, e.g., *People* v. *Ramkeesoon* (1985) 39 Cal.3d 346 [failure to instruct on theft as a lesser related offense of robbery not rendered harmless by jury's decision to convict of robbery and felony-murder rather than acquit]; *People* v. *Glenn* (1991) 229 Cal.App.3d 1461 [failure to instruct on involuntary manslaughter not rendered harmless by jury's choice to convict of voluntary manslaughter rather than to acquit].)

Respondent's three contentions are frivolous. For the reasons stated in the opening brief, the failure to instruct on attempted theft was reversible error.

II

APPELLANT IS ENTITLED TO A SENTENCING REMAND UNDER PEOPLE V. SUPERIOR COURT (ROMERO) (1996) 13 CAL.4TH 497

Respondent first contends that *Romero* remand may not be ordered on a silent record, but only on one that affirmatively shows the trial court believed it lacked discretion to dismiss strikes (RT 11-16). This is wrong for the following reasons:

First, it is contrary to the controlling authority of *Romero* itself. The Supreme Court has stated that strikes defendants are entitled to reconsideration of their sentences by the trial court *unless*

> "*the record shows that the sentencing court was aware that it possessed the discretion to strike* prior felony conviction allegations without the concurrence of the prosecuting attorney and did not strike the allegations without the concurrence of the prosecuting attorney and did not strike the allegations, or if the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*People* v. *Superior Court (Romero)*, *supra*, 13 Cal.4th 497, 530, fn. 13; emphasis added.)

In this part of *Romero*'s footnote 13, which remained unchanged in the Court's subsequent modification, the Court placed the burden on the opponent of remand to point to a record showing awareness of discretion, rather than, as respondent would have it, on the proponent of remand to show a lack of such awareness. Although respondent acknowledges a split of authority in the Courts of Appeal on this question, it fails to acknowledge the controlling authority of *Romero* itself.

Also, the case respondent relies on for analogy is distinguishable (*People* v. *Mack* (1986) 178 Cal.App.3d 1026, discussed at RT 11-14). In *Mack*, there was no controlling Supreme Court opinion entitling defendants to remand upon silent records; *Mack* relied upon the defendant's failure in that case to ask the trial court to strike (a failure which did not occur here); and the presumption that trial courts follow the law which *Mack* also relied upon was unrebutted in that case while thoroughly rebutted in the strikes context. As recently observed in the strikes

case *People* v. *DeGuzman* (1996) ___ Cal.App.4th ___ (96 Daily Journal D.A.R. 12001),

> "'It is generally presumed that a trial court has followed established law [citation], but this presumption does not apply where the law in question was unclear or uncertain when the lower court acted [citations].' [Citation omitted.] For example, following sentencing of the defendant in *People* v. *Chambers* [citation omitted], the Supreme Court determined that trial courts had authority to dismiss special circumstance findings. Noting that a remand for resentencing would be appropriate in a case in which the trial court indicated that it wanted to strike the finding but believed it was without power to do so, the court also considered a situation similar to the instant case. The court stated that where the law had not established that the discretion existed, 'and in the absence of any suggestion in the record that the trial court exercised its discretion, the usual presumption that the trial court considered the various alternatives and acted correctly . . . can have no logical application.' [Citation omitted.]"

Respondent's second contention is that remand need not be ordered because the trial court's refusal to reduce appellant's offense to a misdemeanor logically demonstrates that it would also refuse to dismiss his strike (RT 16). Appellant anticipated and answered this contention in his opening brief, where he explained (at greater length than summarized here) that the refusal to reduce to a misdemeanor signified nothing more than the court's belief that appellant's punishment should exceed 365 days in county jail, a belief fully consistent with dismissing the strike (AOB 14-15). Respondent offers no argument to the contrary.

Finally, respondent contends that remand should not be ordered because dismissal of the strike by the trial court would be an abuse of discretion (RT 17-19). Respondent relies on appellant's record of one nonviolent strike plus several petty non-violent offenses, and the court's imposition of a midterm in lieu of a high term sentence. On the present record, appellant feels this contention is specious, but will answer it briefly:

First, in the face of the defendant's record in *Romero*, which was *more* serious than appellant's here, the Supreme Court held that the trial court was entitled to exercise its discretion to dismiss a strike. In *People* v. *Trausch* (1995) 36 Cal.App.4th 1239, no abuse of discretion was found by a trial court's reduction of a *four*-strike defendant's conviction to a misdemeanor. It follows that there is no basis for holding that dismissal of appellant's strike

would necessarily be an abuse of discretion.

Second, contrary to respondent's characterization, the trial court's imposition of a midterm sentence was not a grant of "leniency" (RT 18) but, rather, the presumptive sentence set by the legislature (Pen. Code, § 1170, subd. (b)). If anything, the selection of the midterm *supports* the idea that dismissal of the strike might be appropriate, since it shows that the trial court did not find appellant's crime to be aggravated (Id.).

Third, respondent chooses a curious case to rely on for analogy (*People* v. *Courtney* (1985) 174 Cal.App.3d 1004, discussed at RT 18-19). *Courtney* is a highly aggravated case, for all the reasons respondent cites at RB 19; *none* of those reasons exist in appellant's case. On the contrary, appellant has pointed to multiple reasons why this case is deserving of some leniency (AOB 15) and respondent disputes none of them.

In sum, respondent proposes tests for remand which would exclude all applicants. This is contrary to both the letter and spirit of *Romero*. Respondent's arguments should be addressed to the Legislature; under the current law, appellant is entitled to a remand.

CONCLUSION

For the reasons set forth in Argument I of appellant's opening brief and reply briefs, the conviction in count 1 should be reversed and remanded for new trial; for those set forth in Argument II, the case should be remanded for a new sentencing hearing.

Dated: October 30, 1996

Respectfully submitted,

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PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is *. I am employed by a member of the bar of this court.

On *, I served the within

APPELLANT'S REPLY BRIEF

in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed * at *, California.

_____
*