IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. WILLIAM FREDERICK MAULTSBY, Petitioner/Appellant.	)	No. S182042 Third District Court of Appeal No. C060532 [Yolo County Superior Court No. 08868]

PETITION FOR REVIEW

UPON AFFIRMANCE BY THE COURT OF APPEAL, IN AND FOR THE THIRD APPELLATE DISTRICT

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT, IN AND FOR THE COUNTY OF YOLO

THE HONORABLE THOMAS WARRINER, JUDGE PRESIDING

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TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes

Constitutions and Rules

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of California:

William Fredrick Maultsby, petitioner and appellant, respectfully petitions for review following the decision of the Court of Appeal, Third Appellate District, per Justice Sims, filed March 16, 2010, dismissing an appeal taken from a jury trial conviction for felony petty theft with a strike prior. A copy of the Court of Appeal's decision is attached.

ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1. Should *People v. Fulton* (2009) 179 Cal.App.4th 1230 be overruled, because a certificate of appealability is not required to challenge admission of a bifurcated prior, for an appeal taken from a judgment after jury trial?

2. Alternatively, should *People v. Fulton* be limited to cases in which the admission sought to be challenged was elicited for no contractual consideration, and not pursuant to a bargain?

3. Is an admission to a strike prior with incomplete *Boykin/Tahl* advisements not knowing and intelligent under the totality of circumstances, and a violation of constitutional due process, where the defendant had no

prior experience with admitting to or standing trial on a strike prior allegation, and the admission was elicited pretrial amid a complex and confusing procedural milieu?

SUMMARY OF REASONS WHY REVIEW SHOULD BE GRANTED

Review by the Supreme Court of a decision of the Court of Appeal should be granted "when necessary to secure uniformity of decision or to settle an important question of law." (Rules of Court rule 8.500, subd. (b)(1).)

This case involves a jury trial conviction for felony petty theft, for which sentence was doubled based on a serious felony prior that petitioner admitted prior to trial. Petitioner's admission to the strike prior was elicited without complete *Boykin-Tahl* advisements, in violation of his constitutional right to due process. (U.S. Const., Amend. XIV; *Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274, 89 S.Ct. 1709]; *In re Tahl* (1969) 1 Cal.3d 122.)

Without reaching the merits, the Court of Appeal dismissed the appeal for lack of a certificate of appealability—even though the judgment is upon a jury trial. In so ruling, the Court of Appeal cited its own recent decision, *People v. Fulton, supra,* 179 Cal.App.4th 1230. *Fulton* paved new ground in holding that a defendant appealing from a jury trial conviction needed a certificate of probable cause to challenge his bifurcated

admission to a prior prison term enhancement. *Fulton* is based on three cases that are not on point: *People v. Perry* (1984) 162 Cal.App.3d 1147, *People v. Williams* (1980) 103 Cal.App.3d 507, and *People v. Thurman* (2007) 157 Cal.App.4th 36. The reasoning and holding of *Fulton* misconstrues Penal Code section 1237.5, in contravention with the fundamental rules of statutory construction. Further, *Fulton* is at odds with *People v. Wagoner* (1979) 89 Cal.App.3d 605, 609-610 [Court of Appeal rejected argument that certificate of probable cause was required to appeal judgment after plea of not guilty by reason for insanity] and *In re Joseph B.* (1983) 34 Cal. 3d 952, 955 [distinguishing "pleas" by defendants from "admissions" by juveniles, and holding Penal Code section 1237.5 inapplicable to juvenile appeals].) Therefore, review should be granted.

Alternatively, if *Fulton* is in any way valid, then its broad and sweeping ambit should be scrutinized and limited so that purely gratuitous admissions, elicited without any measurable benefit to the defendant, are not treated as contracts involving relinquishment of the right to review on direct appeal. It is a fiction to construe such an admission as bargained for—and to hold the defendant to his purported end of that bargain—when in fact he received nothing in exchange for that admission. For that reason too, review should be granted.

Finally, this petition presents the constitutional due process issue that was raised below but not reached as to the merits. Specifically,

petitioner admitted all of his priors without receiving advisement of the right to confrontation or the right to remain silent. The admission was prejudicial because it was not knowing and intelligent under the totality of circumstances, and was not bargained for or otherwise elicited in exchange for any measurable benefit. Petitioner had never before been in the position of having to admit or deny a strike prior allegation. For that reason, and because the admission was elicited prior to trial, this case is distinguishable from *People v. Mosby* (2004) 33 Cal.4th 353.

Therefore, review should be granted.

STATEMENT OF THE CASE

An information was filed on May 22, 2008, charging petitioner William Fredrick Maultsby with felony petty theft of retail merchandise with a prior conviction (Pen. Code §§ 484, subd. (a), 490.5, subd. (a), and 666) (Count 1). (1 CT 29-31) The information further stated an allegation that petitioner had suffered one prior serious felony (Pen. Code §§ 211, 667, subd. (c) and subd. (e)(1)), and that sentencing enhancements under the Three Strikes law and Penal Code section 667, subdivision (d) should be imposed upon a finding of guilt. (Pen. Code §§ 667, subd. (d), 667.5, subd. (c), 1192.7, subd. (a).) (1 CT 29-31) Petitioner pled not guilty, and a two-day jury trial commenced on July 21, 2008. (1 CT 32, 37)

Bifurcation of the serious felony prior was granted at petitioner's request. (1 CT 37, 1 RT 13) Petitioner also requested bifurcation of the

alleged non-strike theft priors. (1 CT 41-43, 49-51) Ultimately, prior to trial, petitioner admitted the truth of all the alleged priors—including the strike prior. (1 RT 22-23; 1 CT 38, 49-51)

At the conclusion of trial, the jury delivered a guilty verdict on the count of petty theft (Pen. Code § 484) (Count 1). (1 CT 55, 57) Because petitioner had already admitted the priors, the case proceeded to sentencing. (1 CT 55) At the sentencing hearing on November 20, 2008, while denying petitioner's *Romero*[1] motion, the court selected the lower term, doubled, for an aggregate sentence of two years and eight months in state prison, applied pre-sentence credits, and imposed fines and fees under Penal Code sections 1202.4, 1202.45, and 1468.5. (1 CT 114)

Petitioner filed a timely notice of appeal. (1 CT 115-116) After full briefing on direct appeal, the Court of Appeal directed the parties to submit supplemental briefing on the following issue:

> Does defendant need a certificate of probable cause to challenge his admission of a prior strike: (See *People v. Fulton* (C058389; December 2, 2009) __ Cal.App.4th __.)?

On March 16, 2010, the Court of Appeal dismissed the appeal, in a decision holding that the issue raised was not viable pursuant to *People v. Fulton.*

This petition follows.

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[1] *People v. Romero* (1996) 13 Cal.4th 497.

STATEMENT OF FACTS

On January 13, 2008, Elvin Tasby of the Wal-Mart Asset Protection department was working as a plain-clothes security person who roams around the store and observes people, to catch shoplifters. (1 RT 47-50, 59) Tasby saw petitioner go through the theft detection machine and set it off. (1 RT 52-53) Tasby confronted petitioner, identified himself, and asked him to step back through the theft detection machine. (1 RT 53) Petitioner reached inside his jacket and removed a package of nicotine gum. (1 RT 53, 55, 57-58) At Tasby's request, petitioner stepped through the detector again. (1 RT 55) That set off the detector a second time, and petitioner took out another packet of nicotine gum. (1 RT 55-56) Both packets of nicotine gum were Wal-Mart merchandise, with a total retail value of $83.56, for which petitioner did not have a receipt. (1 RT 57-58)

The theft detection machines are placed inside the store, fifteen or twenty feet from the exit door. (1 RT 50-51, 61) There are shopping baskets placed on the door side of the detection devices, so if somebody already inside the store decided to get a basket, that person would have to walk through the detection device in order to get the basket. (1 RT 61)

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO CLARIFY THAT PENAL CODE SECTION 1237.5 DOES NOT APPLY TO AN APPEAL FROM JUDGMENT ENTERED UPON A TRIAL OF THE CHARGED OFFENSES, AND TO OVERRULE *PEOPLE V. FULTON.*

A. The Plain Language of Penal Code Section 1237.5 Indicates That a Certificate of Probable Cause is Required Only in Appeals From Pleas to the Underlying Offenses, and Does not Encompass Admissions of Enhancements.

The goal of statutory construction is "to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) The first step is to consider the language of the statute, giving the words their usual and ordinary meaning, in a manner that gives "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.' " (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) To consider one statute in isolation is incorrect. Rather, the Court must read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 222.)

Penal Code section 1237 provides that a defendant may appeal from any final judgment of conviction, except as limited by sections 1237.1 and 1237.5. Section 1237.5 requires that, " upon a plea of guilty or nolo contendere", a defendant must request and obtain a certificate of probable

cause in order for an appeal attacking the validity of that plea to be cognizable. "[A] plea of guilty or nolo contendere" refers to two of the six different types of pleas. (Pen. Code § 1016.) Section 1237.5 plainly applies to "a plea of guilty or nolo contendere", and not to judgments upon any of the other types of pleas.

An admission to a sentencing enhancement is not listed among the six types of pleas, and indeed, does not constitute a plea. Rather, an admission to a sentencing enhancement is an animal unto itself, governed by Penal Code section 1158. If the Legislature had intended to include Penal Code section 1158 "admissions" within Penal Code section 1237.5, then it would have so specified, as it did with pleas of guilty or nolo contendere (Pen. Code §§ 1016, subdivs. (1) and (3)). Penal Code section 1158 admissions to sentencing enhancements are outside the scope of Penal Code section 1237.5.

In *People v. Wagoner,* the Court of Appeal rejected an argument that a certificate of probable cause was required to appeal a judgment after plea of not guilty by reason for insanity. (*People v. Wagoner, supra,* 89 Cal.App.3d at pp. 609-610.) In addition to noting that not guilty by reason of insanity is enumerated separately from pleas of guilty or nolo contendere under section 1016, the Court of Appeal in *Wagoner* reasoned, "the fact that courts have extended the protections afforded a defendant under *Boykin* and *Tahl* to a defendant who pleads not guilty by reason of insanity does

not mean that the insanity plea is identical to a guilty plea for all purposes." (*Id.,* at p. 609; see also *In re Joseph B., supra,* 34 Cal. 3d 952, 955 [distinguishing "pleas" by defendants from "admissions" by juveniles, and holding Penal Code section 1237.5 inapplicable to juvenile appeals].)

In the case at bar, petitioner's "judgment of conviction" is the product of a jury trial, not a plea of guilty or no contest. He was convicted of only one offense, petty theft with a prior. Petitioner's conviction was not based upon the admission of his prior strike, although that was factored into the sentence imposed.

In *People v. Fulton, supra,* 179 Cal.App.4th at pp. 1235-1238, the Third District Court of Appeal held that a defendant needed a certificate of probable cause to challenge his admission to a prior prison term enhancement. *Fulton* is the first case in California to require a certificate of probable cause after a trial of the underlying charges. Its reasoning is based on three cases that are not on point: *People v. Perry, supra,* 162 Cal.App.3d 1147, *People v. Williams, supra*, 103 Cal.App.3d 507, and *People v. Thurman, supra,* 157 Cal.App.4th 36. Although *Perry* and *Williams* both hold that section 1237.5 encompasses admissions of enhancements, these cases involved pleas to the underlying offenses. That procedural context is distinguishable from cases where the jury convicts the

defendant of the underlying crime and the defendant admits the enhancement allegations.

In *Fulton,* the Court of Appeal characterized *Thurman* as being "on point" (*Fulton, supra,* 179 Cal.App.4th at p. 1238), but petitioner submits that *Thurman* is the oddball case that is distinguishable from that normally contemplated as being outside of section 1237.5, and similarly distinguishable from the posture of both *Fulton* and the case at bar. *Thurman* involved a plea agreement with respect to all of the remaining substantive charges after the original trial. Thus, in *Thurman,* even though a trial had been had, the appeal was taken *not* from the trial but from the judgment upon remand, which had been resolved by plea bargain rather than by a new trial.

In contrast, defendant Maultsby pled not guilty to the offense with which he was charged, and he never changed that plea. He admitted the prior strike, which in turn affected the length of his sentence—but he would have had no sentence at all but for the guilty verdict on the charged offense after a jury trial. His appeal plainly falls within Penal Code section 1237, and outside of section 1237.5. Therefore, no certificate of probable cause should be required for petitioner Maultsby to challenge the validity of his gratuitous admission to the strike prior, which had already been bifurcated and which was elicited with no *Boykin/Tahl* advisements.

B. Alternatively, the Rule of Lenity Dictates That the Statute be Interpreted in Petitioner's Favor.

If logic holds that section 1237.5 is less than plain as to its scope, then it must be construed narrowly, in petitioner's favor, under the rule of lenity. (*People v. Canty, supra,* 32 Cal.4th at p. 1277.)

If there is any ambiguity as to the meaning of "a plea of guilty or nolo contendere" for which a certificate of probable cause is required under section 1237.5, the rule of lenity dictates interpretation in favor of the appealing defendant. (*People v. Wagoner, supra,* 89 Cal.App.3d at p. 610 [reasoning that section 1237.5 is to be construed narrowly].) It is unfair to deprive petitioner Maultsby of review on the merits of the legitimacy of his gratuitous admission to the strike prior. Up until now the customary practice in California has been to refrain from requesting certificates of probable cause for cases following a trial, where the issue concerns an admission to an enhancement. Prior to the recent publication by this Court of *People v. Fulton*, no case in California has ever applied section 1237.5 to limit any facet of an appeal taken from a conviction upon a trial of the underlying charges.

C. The Apparent Intent of the Legislature in Enacting Penal Code Section 1237.5 was to Prevent Unnecessary Record Preparation in Appeals From Guilty Pleas.

If the wording of the statute is ambiguous, the Court then may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day*, *supra*, 25 Cal.4th at p. 272.) "In such circumstances, we choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences." (*Ibid.*)

In *People v. Panizzon* (1996) 13 Cal.4th 68, this Court held that strict compliance with Penal Code section 1237.5 comported with the legislative objective of promoting judicial economy. The court reasoned that the purpose for requiring a certificate of probable cause was to promote judicial economy by discouraging frivolous or vexatious appeals following guilty pleas. (*People v. Panizzon, supra,* 13 Cal.4th at pp. 75-76.) As explained similarly in *People v. Hoffard,* "Section 1237.5 is intended as a practical way of economizing judicial resources by screening out wholly frivolous guilty plea appeals before time and money are spent preparing the

record and the briefs for consideration by the reviewing court." (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1179.)

In the instant case, petitioner appeals from the judgment of conviction following a jury verdict. In all cases where a defendant appeals from a conviction after a jury or court trial, the appellate record will necessarily be prepared and, in many cases, counsel appointed, the record reviewed for error, and briefs prepared. In those cases involving an admission on an enhancement allegation, it would be a waste of judicial resources to require in addition that the defendant petition the trial court for a certificate of probable cause and that the trial court determine whether a certificate should issue.

People v. Fulton establishes a new rule in California that forces defendants to seek certificates of probable cause in order to appeal validity of admissions that occurred in the larger context of a jury trial. In setting such a rule, *People v. Fulton* misconstrues Penal Code section 1237.5, in contravention with the fundamental rules of statutory construction. *Fulton* is at odds with the holding and reasoning of other cases, and not governed by the authorities that it purports to rest upon. It should be overruled.

Therefore, review should be granted.

II. ALTERNATIVELY, *PEOPLE V. FULTON* SHOULD BE LIMITED TO CLARIFY THAT IT DOES NOT APPLY TO CASES IN WHICH THE ADMISSION WAS ENTIRELY GRATUITOUS, AND NOT PART OF A PLEA-BARGAIN OR ANY OTHER KIND OF CONTRACT.

Fundamentally, the Third District Court of Appeal's extension of Penal Code 1273.5 in *People v. Fulton* appears to be driven by the problem of defendants "trifling with the courts by attempting to better the bargain on appeal." (*People v. Fulton, supra,* 179 Cal.App.4th at p. 1238, citing *People v. Hester* (2000) 22 Cal.4th 290, 295 and *People v. Cuevas* (2008) 44 Cal.4th 374, 383.) The Court of Appeal reasoned that defendant Fulton had obtained a benefit—dismissal of allegation that he suffered a prior prison term in connection with a 1996 violation and three 2003 convictions—in exchange for admission to a separate prior prison term allegation in connection with a 1998 violation. (*People v. Fulton, supra,* 179 Cal.App.4th at p. 1238.)

This Court recently affirmed that a "negotiated plea agreement is a form of contract, [to be] interpreted according to general contract principles." (*People v. Feyrer* (3/25/2010, no. S154242) __ Cal.4th __, 2010 Cal. LEXIS 2062 at p. 18 (quoting *People v. Segura* (2008) 44 Cal.4th 921, 929-920 and *People v. Shelton* (2006) 37 Cal.4th 759, 767.) In contrast, an admission is *not* a contract where it was elicited without any negotiation or exchange of benefit. Therefore, the policy interests and attendant logic that prohibit defendants from challenging admissions for

which they also received bargained-for benefits do not apply to gratuitous admissions.

Unlike defendant Fulton, petitioner Maultsby's admission to the strike prior allegation was entirely gratuitous. It was elicited amidst procedural confusion concerning the desire to avoid informing the jury of the theft prior, after all priors had already been bifurcated. Unlike the admission to the theft prior, the admission to the strike prior was not entered in exchange for any specified benefit. The prosecution did not relinquish or offer anything in connection with this admission, and a remand would put the prosecution at no disadvantage. (See *People v. French* (2008) 43 Cal.4th 36, 45-46. "[D]efendant's claim, if successful, would not deprive the People of the benefit of the plea agreement, because they still would have the opportunity to convince the trial court . . ." (*Ibid.*)

Petitioner Maultby's admission to the strike prior was a product of confusion, not a product of a bargain. He is not trifling with the court. *Fulton* should be limited to cases in which defendants seek to challenge admissions for which they had actually received some measurable benefit. Here, nothing was bargained for, nothing was gained by the defense or relinquished by the prosecution, and the case proceeded with the jury trial. A defendant in this position should be permitted to challenge the validity of a bifurcated prior on direct appeal, without having to obtain a certificate of

probable cause. Therefore, *Fulton* should be limited, and review should be granted.

III. IN THE ABSENCE OF PROPER *BOYKIN/TAHL* ADVISEMENTS, PETITIONER WAS DENIED DUE PROCESS AND HIS ADMISSION TO THE STRIKE PRIOR WAS NOT KNOWING AND INTELLIGENT UNDER THE TOTALITY OF CIRCUMSTANCES; THEREFORE, REVIEW SHOULD BE GRANTED.

A. Petitioner's Admission to All of his Priors was Elicited Without Advisement of the Right to Confrontation or the Right to Remain Silent.

Before accepting a criminal defendant's admission of a prior conviction, the trial court must advise the defendant of three distinct constitutional rights: (1) the right to a jury trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses. (*Boykin v. Alabama, supra,* 395 U.S. at p. 243, see also *In re Yurko* (1974) 10 Cal.3d 857, 863 [applying requirement of judicial advisements under *Boykin-Tahl* to admissions of prior conviction allegations].)

Judicial advisement of the direct consequences of a defendant's plea is constitutionally required. (*Boykin v. Alabama*, *supra*, 395 U.S. at pp. 243-244.) Further, the federal courts have held that a plea entered without full awareness of its direct consequences cannot be knowing and voluntary. (*Carter v. McCarthy* (9th Cir. 1986) 806 F.2d 1373, 1375.) Therefore, a

prejudicial *Boykin-Tahl* error violates constitutional due process. (*Id.,* at p. 1376.)

The court must "specifically and expressly" enumerate each of the rights, "employ the time necessary to explain adequately and to obtain express waiver of the rights involved" prior to acceptance of a guilty plea, and ensure that an adequate record be available for possible review. (*In re Tahl, supra*, 1 Cal.3d at p. 132.) These formalities are to ensure that the defendant's plea to the truth of a prior conviction is voluntary, knowing and intelligent. (*People v. Howard* (1992) 1 Cal.4th 1132, 1178-1179; *North Carolina v. Alford* (1970) 400 U.S. 25, 31 [27 L.Ed.2d 162, 91 S.Ct. 160], as cited in *People v. Mosby, supra,* 33 Cal.4th at p. 356.)

Petitioner was not given the judicial advisements to which he was entitled.

At the start of trial, petitioner moved in limine for bifurcation of both the strike prior allegation and the non-strike theft priors. The court started by taking those two categories of priors one-by-one.

First the court considered the request to bifurcate the strike prior. (1 RT 13) The prosecution had no objection, and promptly upon granting that facet of the motion, the court elicited waiver of the petitioner's right to a jury trial of the strike prior. (1 RT 13) This portion of the record reads as follows:

DEFENSE COUNSEL: Yes, your Honor. My request

in [motion in limine] number three is a request for bifurcation pursuant to *People v. Calderon*, since priors are not elements of the offense.

The only elements of the offense in 484 do not include the prior convictions, so I am asking the Court to bifurcate.

THE COURT: Any objection?

DISTRICT ATTORNEY: Well, are we talking about the bifurcation of the strike?

THE COURT: Yes.

DISTRICT ATTORNEY: Then no, no objection.

* * * * *

THE COURT: Well, dealing first with the enhancement for the prior felony conviction, the request to bifurcate is granted.

Is he, at this point, waiving his right to a jury, should it get to that point or not?

DEFENSE COUNSEL: Just a moment.

(Discussion off the record.)

DEFENSE COUNSEL: Yes, your Honor.

THE COURT: All right. So that takes care of that part.

(1 RT 13)

Following bifurcation of the prior "strike", and still prior to jury voir dire, the court addressed petitioner's request that the non-strike theft prior allegations be omitted from the reading of the information to the jury. (1 RT 13-14.) That was resolved upon petitioner's offer to admit the non-strike theft priors. The court elicited petitioner's admission to the non-

strike theft priors and then further elicited petitioner's admission to the strike prior.

This portion of the record reads as follows:

> DISTRICT ATTORNEY: I spoke with Ms. Jessee [defense counsel] over the lunch hour and, while I was prepared to argue against the *Calderon* case based on its applicability to our particular crime, I did read several cases that seemed to follow Ms. Jessee's approach, so I do believe that the Court can, in fact—
>
> No, it was not my understanding that the defendant was admitting the priors.[2]
>
> THE COURT: I was going to clarify that after I read the materials.
>
> Is it true then, Ms. Jesse that the defendant is admitting to the alleged prior convictions described in lines 2 through 14, basically, with the exception of December 14th?[3]
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And he is inherently in that, he's also admitting to the enhancement for the prior felony under 667(c) and 667(e)(1)?
>
> DEFENSE COUNSEL: He is admitting the enhancement as alleged under that—in that Enhancement a.
>
> THE DEFENDANT: Yes, sir.

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[2] The further briefing provided after the lunch recess stated that petitioner "*again* offers to admit the allegation of the prior offenses so that no mention of them come before the jury." (1 CT 51, italics added.) There is no indication on the record that such offer had been stated previously, and the colloquy here reflects that any such offer prior to that point was not understood by the district attorney or the court.

[3] The priors in lines 2 through 14 relate to the Penal Code section 666 allegation. Earlier, an alleged theft prior from December 14, 2001 was orally stricken, at the prosecutor's request. (1 RT 12; 1 CT 30)

(1 RT 22)

Petitioner's earlier waiver of a jury trial on the bifurcated strike prior implicitly acknowledges awareness of the right to a jury trial. But no mention was made at any time of the privilege against self-incrimination or the right to confrontation, or that those rights were applicable to prior strike allegations. Thus, petitioner's admission to his strike prior was upon inadequate *Boykin-Tahl* advisements. Judgment should be reversed with a remand limited to a new trial of the strike prior allegation.

B. **Federal Constitutional Dimension.**

Judicial advisement of the direct consequences of a defendant's plea is constitutionally required. (*Boykin v. Alabama*, *supra*, 395 U.S. at pp. 243-244, U.S. Const., Amend. XIV.) Further, the federal courts have held that a plea entered without full awareness of its direct consequences cannot be knowing and voluntary. (*Carter v. McCarthy, supra,* 806 F.2d at p. 1375.) Acceptance of a plea without advisement of its direct consequences constitutes a violation of due process. (*Id.,* at p. 1376, *People v. Mosby, supra,* 33 Cal.4th at p. 359.)

Therefore, petitioner's constitutional due process rights were violated in the elicitation of his admission to the strike prior, without complete *Boykin-Tahl* advisements.

C. Under the *Mosby* Totality of Circumstances Standard, Appellant's Admission to the Strike Prior Allegation was not Knowing and Intelligent.

The incompleteness of *Boykin-Tahl* advisements alone does not warrant reversal. (*People v. Howard, supra,* 1 Cal.4th at p. 1178.) A reviewing court "must examine the record 'of the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances." (*People v. Mosby, supra,* 33 Cal.4th at p. 361, citing *People v. Allen* (1999) 21 Cal.4th 424, 438.)

Under the totality of circumstances in the case at bar, petitioner Maultsby's admission to the strike prior was not knowing and intelligent for several reasons.

First, petitioner had no prior experience with admitting to or standing trial on a strike prior allegation. Thus, this case is distinguishable from *People v. Mosby, supra,* 33 Cal.4th at p. 353, 364. Defendant Mosby had prior experience in pleading guilty in the past to the very same conviction he was now admitting, which was the subject of the appeal. (*Mosby, supra,* 33 Cal.4th at p. 365.) In contrast, petitioner Maultsby had never before found himself having to defend against a strike prior allegation. (1 RT 134 [district attorney acknowledging that appellant Maultsby had never before had to face a prior strike allegation]; see also 1 RT 126 [prior cases were misdemeanors or, in one case, a wobbler reduced

to a misdemeanor pursuant to Penal Code section 17, subdivision (b)].) This procedural posture was new to Maultsby. A similar distinction was found compelling in *People v. Christian* (2005) 125 Cal.App.4th 688, 697-698.

Second, petitioner Maultsby's admission to the strike prior was elicited pretrial, when he lacked the perspective of the entire proceedings yet to unfold. The formalities of *Boykin-Tahl* advisements occurred pretrial, in the context of petitioner's effort to protect the viability of his defense by seeking bifurcation and ultimately negotiating to ensure that damaging components of the information would not be read to the jury. In *Mosby,* this Court found it significant that defendant Mosby's admission was elicited after a contested jury trial, thus, it was not conceivable that he was unaware of his constitutional rights at the time he made the admission. (*People v. Mosby, supra,* 33 Cal.4th at p. 364.) In contrast, petitioner Maultsby's admission to his priors, including the challenged admission to the strike prior, all occurred *prior* to trial. The timing is particularly significant here because, at that stage, petitioner's focus was on the need to protect viability of his defense, which he had yet to present.

Third, petitioner Maultsby's admission to the strike prior was elicited in context of a confusing and protracted set of arguments as to what the limits of petitioner's legal right to bifurcation were. Petitioner was entitled to a bifurcated trial of the strike prior, without having to admit that

allegation. (*People v. Calderon* (1994) 9 Cal.4th 69.) Accordingly, that bifurcation had been requested and granted prior to the admission of any priors.

In contrast, upon admission to the theft priors, a defendant is certainly entitled to have the allegation of those theft priors omitted from the reading of the information to the jury where the charge is petty theft with a prior petty theft. *(People v. Bouzas* (1991) 53 Cal.3d 467 [theft priors not an "element" of petty theft with a prior felony conviction].) Upon citation to *People v. Bouzas* in further briefing after the lunchtime recess, the prosecution conceded this point. (1 RT 22, 1 CT 49-51) Petitioner then stated his admission to the non-strike theft prior, and all that remained was to hone the specific language from the information that would be read to the jury. (1 RT 22-23)

Petitioner's offer to admit the non-strike theft priors did not entail admission of the strike prior. (1 CT 49-51) By then he had secured bifurcation of the theft prior. (1 RT 13) Nevertheless, upon eliciting admission of the non-strike theft prior, the court went on to elicit petitioner's admission of the strike prior. (1 RT 22) Given the gratuitous nature of this admission, combined with the complexity of the proceedings in which it was elicited, the admission was not a voluntary, knowing and intelligent relinquishment of petitioner's right to remain silent and confront witnesses in a challenge to that allegation.

Under the totality of these circumstances, therefore, it cannot be presumed or inferred that petitioner's waiver of his right to a bifurcated trial of the strike prior was knowing and intelligent. This case is distinguishable from *People v. Mosby.* It would be helpful to the lower courts, and to criminal defendants, to understand more clearly how far *Mosby* extends. Therefore, review should be granted.

CONCLUSION

For the foregoing reasons, this petition for review should be granted.

Respectfully submitted,

Dated: April 20, 2010

/s/ signature on original
Meredith Fahn
Counsel for Petitioner,
WILLIAM FREDRICK MAULTSBY

COUNSEL'S CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court rule 8.504, subdiv. (d), counsel for petitioner certifies that, with the exception of this certificate, any attachment permitted under rule 8.204, subsection (d), the Court of Appeal's opinion, and the proof of service, this petition for review has 5,285 words, which does not exceed 8,400 words, as determined by the word count of the computer program used to prepare this brief.

Dated: April 20, 2010

/s/ signature on original
Meredith Fahn
Counsel for Petitioner,
WILLIAM FREDRICK MAULTSBY

Filed 3/16/10 P. v. Maultsby CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM FREDERICK MAULTSBY, Defendant and Appellant.	C060532 (Super. Ct. No. 08868)

On January 13, 2008, as defendant William Fredrick Maultsby left a Wal-Mart store, he set off a theft detector and was detained by an asset protection employee. Defendant removed a package of nicotine gum from his jacket. At the employee's request, defendant stepped through the detector and again set it off. Defendant removed another package of nicotine gum from his jacket. The two packages of gum were the store's merchandise and worth $83.56. Defendant did not have a receipt.

A jury convicted defendant of petty theft (Pen. Code, § 484).[1] Prior to trial, defendant admitted a prior felony conviction for robbery in 1991 within the meaning of the Three

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[1] Undesignated statutory references are to the Penal Code.

Strikes Law and admitted prior theft convictions, including the 1991 robbery, for purposes of section 666. Sentenced to state prison, defendant appeals, contending his admission to the strike prior was obtained absent complete advisements (*Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274]; *In re Yurko* (1974) 10 Cal.3d 857, 863.) Defendant failed to obtain a certificate of probable cause. (§ 1237.5)

In *People v. Fulton* (2009) 179 Cal.App.4th 1230, this court recently decided that a defendant could not attack the validity of his admission of a prior prison term allegation without a certificate of probable cause. (*Id.* at p. 1237.)

Defendant makes two arguments as to why *Fulton* does not control his case.

First, he contends *Fulton* is wrongly decided. We do not agree.

Second, he contends *Fulton* is distinguishable, because in *Fulton* the admission of the prior prison term occurred in connection with a plea bargain, whereas in the instant case, there was no plea bargain. However, in *Fulton*, before discussing the plea bargain, we held, "We conclude that Penal Code section 1237.5 applies to an enhancement allegation to which a defendant has entered a plea." (*People v. Fulton, supra,* 179 Cal.App.4th at p. 1237.) Later, we said, "*Further,* defendant is trifling with the courts by attempting to better the bargain on appeal. [Citation.]" (*Fulton, supra,* 179 Cal.App.4th at p. 1238, italics added.) Thus, the fact that the

admission of the prior prison term in *Fulton* occurred in a plea bargain was a "further" reason for affirming the judgment.

Fulton controls this case.

DISPOSITION

The appeal is dismissed.

SIMS, Acting P. J.

We concur:

HULL, J.

CANTIL-SAKAUYE, J.

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action, and my business address is 1702-L Meridian Avenue #151, San Jose, CA 95125. I am counsel for petitioner. On the date stated below of execution of this proof of service, I served the attached **PETITION FOR REVIEW** to the following parties hereinafter named by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

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(Appellant)

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For Delivery to Presiding Judge:
Hon. Thomas Warriner

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

Executed this 20th day of April, 2010, at San Jose, California.

/s/ signature on original
Meredith Fahn