IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. **DANNY LEE SKILES** Defendant and Appellant.	No. S180567 Court of Appeal No. G040808 Sup.Ct. No. 08HF0799

PETITION FOR REVIEW

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Pursuant to Rule 8.500 of the California Rules of Court, Petitioner, Danny Lee Skiles, respectfully requests this Court to review the published opinion of the Court of Appeal, Fourth Appellate District, Division Three, affirming the judgment as modified. A copy of the opinion filed on January 11, 2010 is attached as Exhibit A. A copy of the order modifying the opinion filed on January 21, 2010 is attached as Exhibit B.

QUESTIONS PRESENTED FOR REVIEW

1.) WHETHER THE JUDICIAL RECORD OF PETITIONER'S ALABAMA CONVICTION WAS PROPERLY ADMITTED AND AUTHENTICATED WHERE THE "CERTIFIED" COPY IS A FACSIMILE OR PHOTOGRAPHIC COPY?

2.) WHETHER THE CHARGING DOCUMENT OF PETITIONER'S ALABAMA CONVICTION WAS ADMISSIBLE TO PROVE THE TRUTH OF THE FACTS ALLEGED THEREIN?

3.) WHETHER PETITIONER WAS ENTITLED TO A JURY TRIAL ON THE ISSUE OF WHETHER THE ALABAMA CONVICTION INVOLVED PERSONAL INFLICTION OF GREAT BODILY INJURY?

NECESSITY OF REVIEW

This Court recently granted review of the first question presented, whether official records are properly admitted where the "certified" copy is a facsimile or photographic copy, in *People v. Coon* (2009) 173 Cal.App.4th 258. However, petitioner in that case filed a motion to dismiss which was granted on February 3, 2010. The issue presented in *Coon* is identical to the issue in this case and review is necessary for purposes of settling an important question of law. Official records can significantly affect trial results. Here, an exhibit consisting of a faxed copy of purported copies of court records was the sole evidence presented to prove the truth of a sentence enhancement which transformed a two year prison term into a nine year prison term.

The certification requirement of Evidence Code section 1530 is not a minor technicality. Certification resolves important evidentiary and constitutional problems, including those of secondary evidence, authentication, hearsay, and the right to confrontation. (Law Revision Com. com. to Evid. Code, § 1530, 1965 amendment.) Accordingly, Evidence Code section 1530, by its own terms, mandates an original certification attached to copies of public records. (Evid. Code, § 1530.)

In the decision below, the Court of Appeal held that "a *copy* of a certified copy of an official record is admissible...unless there is a genuine dispute concerning its terms and justice requires exclusion of the copy, or admission of the copy would be unfair." (Exhibit B at 1, citing *People v. Atkins* (1989) 210 Cal.App.3d 47, 55 and Evid. Code, § 1521.) The Court of Appeal's reliance on the Secondary Evidence Rule is misplaced. The language and purpose of Evidence Code section 1521 and Evidence Code section 1530 do not allow for such "bootstrapping." (See Evid. Code, §§ 1521, 1530.)

Moreover, under the Court of Appeal's approach, the opponent of the evidence bears the burden of uncovering problems of genuineness, accuracy, and completeness. In many cases, this will be an impossible task, given "the ease with which documents may be made to appear genuine by the use of modern technology." (*Comm. v. Deramo* (2002) 436 Mass. 40, 48 [762 N.E.2d 815, 821], quoting *Mimick v. United States* (8th Cir. 1991) 952 F.2d 230, 231, internal quotation marks omitted.) Indeed, the widespread use of computers, photocopiers, and facsimile machines underscores the vital importance of proper certification. "Whether through inadvertence, mechanical error, or deliberate tampering, another copy of the official record may no longer be identical to the copy that the officer authenticated, and a mere reproduction of the attestation does nothing to confirm the authenticity, accuracy, or completeness of the copy to which it is then attached." (*Deramo*, *supra*, 762 N.E.2d at p. 821.)

In view of the interests at stake and the possibility for error, the supreme courts of at least three other states have established bright-line rules requiring that an original certification or attestation be affixed to the precise copy that the records custodian has compared to the original in the custodian's possession. (See *Deramo*, *supra*, 762 N.E.2d at pp. 819-822; *Kelly v. State* (Ind. 1990) 561 N.E.2d 771, 772-775; *State v. Stotts* (1985) 144

Ariz. 72, 84 [695 P.2d 1110, 1122]; contra *People v. Wall* (2000) 141 N.C.App. 529; *Ex parte Hagood* (Ala. 1999) 777 So.2d 214; *People v. Smith* (1992) 66 Wn.App. 825).) Petitioner respectfully asks this Court to do the same.

Even if an original certification is not required to prove the existence of a prior conviction, the charging document alone is not sufficient to prove the truth of the facts alleged therein. In *People v. Guerrero* (1988) 44 Cal.3d 343, this Court held that a trier of fact may look to the entire record of conviction to determine the nature of the previous crime. The *Guerrero* court, however, did not resolve "such questions as what items in the record of conviction are admissible and for what purpose or whether on the peculiar facts of an individual case the application of the rule set forth herein might violate the constitutional rights of a criminal defendant." (*Id.* at 356, fn 1.)

Here, there were no admissions by petitioner as to the factual basis of the prior plea. He entered a generic plea to "manslaughter" without giving any indication that he admitted to any of the specific facts alleged in the indictment. Without any admissions by petitioner as to the specific facts underlying his guilty plea, there was no basis from which it could be fairly concluded that he pled guilty to personally and directly inflicting great bodily injury. Absent any admissions by petitioner, the Alabama indictment was impermissibly used for the purpose of proving the truth of the matters alleged therein in violation of the rules of evidence and other constitutional limitations.

Finally, under California law, manslaughter is not a *per se* a strike. However, it may qualify as a strike if the defendant personally inflicted great bodily injury on another. (Pen. Code §1192.7, subd. (c)(8); 667.5, subd.(c)(8)). The determination of great bodily injury is essentially a question of fact, not of law. *People v. Escobar*, (1992) 3 Cal.4th 740, 750. The Due Process Clause entitles criminal defendants to a jury trial and proof

beyond a reasonable doubt on all factual issues, other than the fact of a prior conviction, that increase the penalty for a crime beyond the statutory maximum. (*Apprendi v. New Jersey*, (2000) 530 U.S. 466; 120 S.Ct. 2348, emphasis added; see also *Cunningham v. California*, (2007) 549 U.S. 270; 127 S.Ct. 856; *Blakely v. Washington*, (2004) 542 U.S. 296; 124 S.Ct. 2531. The distinction between the fact *of* a prior conviction and facts *about* a prior conviction is discussed extensively in *Shepard v. United States*, (2005) 544 U.S. 13. In this case, whether petitioner personally and directly inflicted great bodily injury does not fall within the "narrow exception" to the *Apprendi* rule.

STATEMENT OF THE CASE

A two count felony information charged petitioner, Danny Lee Skiles, with first degree residential burglary (Pen Code §459-460, subd. (a)), and receiving stolen property. (Pen. Code §496, subd. (a)). (CT 105-106.) It was further alleged that petitioner was previously convicted of a serious felony pursuant to Penal Code sections 667subdivisions (a)(d)(e)(1), and 1170.12, subdivision (b). (CT 2.) After a jury trial, petitioner was convicted on both counts and sentenced to two years on count one, doubled as a result of a prior strike, and five years added as a result of the prior serious felony, for a total term of nine years in state prison. (CT 167-170; 189; RT 267-268; 297-300.)

STATEMENT OF FACTS

On November 11, 2007, Saida Hudson and her fiancé, Ishan Basu Kesselman, were living at Motor Inn in Costa Mesa, California. (RT 26.) They lived on the second floor in room 1513. (RT 27, 57.) Hudson and Kesselman left the motel at approximately 6:00 p.m. for about one hour. (RT 28.) Upon arriving back at the motel, Hudson noticed that the her window was open and the screen was in the bushes on the first floor. (RT 29.) She noticed that a camera was missing and called police. (RT 36-37.)

Hudson and her fiancé were friends with petitioner, who also lived at Motor Inn. (RT 53-61.) Hudson testified that two to three hours prior to the burglary, petitioner knocked on her door, but she did not answer. (RT 68-70.) Matthew McCarthy, also a resident at Motor Inn, identified petitioner as being in front of Hudson's room sometime between 5:00 p.m. and 6:00 p.m. (RT 76-77, 105.)

Petitioner was arrested and searched by officer Jerry Padilla at Motor Inn. (RT 142-144.) Padilla found four rings, a watch, and a set of headphones in petitioner's pockets. (RT 143-144.) Padilla also founds checks with Hudson's name on them. (RT 152.) Hudson identified the items as belonging to her. (RT 32-37.) Petitioner's fingerprints were found on the outside of Hudson's window pane, smeared in a westerly direction consistent with pushing the window open from the outside. (RT 111-140.)

ARGUMENT

I. THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING INTO EVIDENCE FAXED COPIES OF COURT RECORDS ON WHICH THE COURT CLERK'S CERTIFICATION WAS ALSO A COPY.

A. Introduction

The trial court prejudicially erred in convicting petitioner of a sentencing enhancement allegation solely on the basis of faxed copies of certified court records. Certification resolves important evidentiary and constitutional problems, including those of secondary evidence, authentication, hearsay, and the right to confrontation. Accordingly, Evidence Code section 1530, by its own terms, requires that an original certification be affixed to the precise copies that the clerk is certifying as genuine, accurate, and complete copies of the originals in the clerk's possession. Furthermore, a non-original certification cannot be admitted as secondary evidence under Evidence Code section 1521. The Evidence Code does not allow such bootstrapping and that

approach places an unfair burden on the defendant by requiring him to uncover issues of authenticity.

B. Background Information

Under the Three Strikes Law, a prior conviction qualifies as a "strike" if it is a "serious felony" as defined in Penal Code section 1192.7, subdivision (c). Similarly, for the five-year enhancement to apply under section 667, subdivision (a)(1), the foreign conviction must include "all of the elements of any serious felony." (Section 667, subdivision (a)(1).)

In 1995, petitioner was convicted of manslaughter in Alabama pursuant to Alabama Code section 13A-6-3. (CT 191-209.) The prosecution alleged that the Alabama conviction is a serious felony pursuant to Penal Code section 1192.7, subdivision (c)(8) which defines a serious felony as one in which a defendant personally inflicts great bodily injury on any person other than an accomplice. (CT 2.) The trial court relied on Exhibit 18, the indictment, for the factual basis of the prior. (CT 207; RT 285-297.) Trial counsel objected because the indictment is a photocopy of the original certification transmitted by facsimile. (CT 207; RT 287-288.) Thus, it does not contain the original signature of the clerk who certified it.

C. Standard of Review

The issue presented is a question of statutory construction: whether a copy of a public record is properly certified within the meaning of the California Evidence Code if the certification is itself a copy. Petitioner's position is that documents cannot be considered "certified" unless the affixed certification is the original certification. Appellate review of a pure question of law is de novo. (*People ex rel. Locyker v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

D. Certification Addresses Multiple Evidentiary and Constitutional Issues, Including Secondary Evidence, Authentication, Hearsay, and the Right to Confrontation.

Because the sentencing enhancements for prior convictions can be proven with court records, certification plays a vital role in ensuring that defendants who face a mandatory enhancement receive a fair trial. (*People v. Cole* (1994) 23 Cal.App.4th 1672, 1677.) Certification is the traditional hallmark of authenticity for copies of public records. (See *In re Kirk* (1999) 74 Cal.App.4th 1066, 1073-1076; *In re Shannon C.* (1986) 179 Cal.App.3d 334, 341-343.) If the copies are not properly certified, they will not be admitted, absent testimony of a qualified records custodian. (*People v. Martinez* (2000) 22 Cal.4th 106, 112, 120-121; *Jacobson v. Gourley* (2000) 83 Cal.App.4th 1331, 1334-1335; *People v. Matthews* (1991) 229 Cal.App.3d 930, 936-941.)

Evidence Code section 1530 provides the mechanism for admission into evidence of a "purported copy of a writing in the custody of a public entity." (Evid. Code, § 1530, subd. (a).) To ensure the trustworthiness of the "purported copy," the rule insists on two safeguards: that "[t]he copy purports to be published by the authority of" the public entity, and that "the copy is attested or certified as a correct copy . . . by a public employee." (*Ibid.*) Evidence Code section 1531 further requires that "[f]or the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be."

As the Law Revision Commission comment explains, section 1530 addresses three evidentiary problems. (See Law Revision Com. com. to Evid. Code, § 1530, 1965 amendment.) These are: (1) the admissibility of duplicates under the Secondary

Evidence Rule, Evidence Code section 1520 et seq.; (2) the need for authentication of both the original document and the copy under Evidence Code section 1400 et seq.; and (3) the hearsay rule, Evidence Code section 1200, in that a records custodian's signed certification is an out-of-court statement offered to prove the truth of the matter, namely that the copies are true and complete copies of original documents. (*Id.*; *In re Shannon C.*, *supra*, 179 Cal.App.3d at pp. 341-342 [describing Section 1530 as the codification of "an exception" (for public records) to the Secondary Evidence Rule].)

Furthermore, a separate issue not directly addressed by Evidence Code section 1530 is the hearsay problem of using court records to prove the truth of the matters stated therein. (*In re Shannon C.*, *supra*, 179 Cal.App.3d at p. 342.) Evidence Code section 1280, in combination with the device of judicial notice, will generally resolve this hearsay issue. (*Id.* at pp. 341-343; *People v. Abelson* (1980) 104 Cal.App.3d Supp. 16, 19-20.) However, the certification requirement of Evidence Code section 1530 is also implicated, because the safeguard of certification helps to ensure the trustworthiness of the matters asserted in the content of the court records. (*In re Kirk*, *supra*, 74 Cal.App.4th at p. 1075.) Indeed, if an "official record of conviction" is used, certification under Evidence Code section 1530, subdivision (a), may in itself satisfy the requirements of Evidence Code section 1280. (See Evid. Code, § 452.5, subd. (b).)

Finally, "certification operates to protect the rights to confrontation and cross-examination possessed by individuals facing a deprivation of liberty . . . ." (*In re Kirk*, *supra*, 74 Cal.App.4th at pp. 1075-1076; *Matthews*, *supra*, 229 Cal.App.3d at pp. 936-941.)

In sum, certification bears a heavy burden in that it resolves multiple evidentiary

concerns. Without proper certification, copies of public records lack adequate authentication, violate the Secondary Evidence Rule and the hearsay rule, and impermissibly impinge the constitutional rights to cross-examination and confrontation. (Evid. Code § 1530; *In re Kirk*, *supra*, 74 Cal.App.4th at pp. 1075-1076.)

E. The Plain Language of Evidence Code Section 1530 Requires an Original Certification.

The Evidence Code allows copies of public records to be admitted without the testimony of a records custodian provided that the copies are certified or attested as correct copies. (Evid. Code, § 1530.) The certification process requires that "the attestation or certificate must state in substance that the copy is a correct copy of the original." (See Evid. Code, § 1531.) Where a statute does not specifically define a term, the common meaning applies. (*William Lyon Co. v. Franchise Tax Bd.* (1992) 4 Cal.App.4th 267, 276.) Black's Law Dictionary, like Evidence Code section 1530, uses "certified copy" and "attested copy" interchangeably. (See Evid. Code, § 1530; Black's Law Dictionary 127-128, 228 (6th ed. 1990). Black's Law Dictionary provides the most complete definition in its entry for "attest," stating that "[a]n 'attested' copy of a document is one which has been examined and compared with the original, with a certificate or memorandum of its correctness, signed by the persons who have examined it." (*Id.* at pp. 127-128.)

Here the foundational requirements for admitting the indictment were not met; "[b]y definition, an official cannot 'attest' to the accuracy or completeness of a copy that the official has never seen and that the official's agency did not produce. . . . Merely making a copy of the original attestation along with a copy of the

underlying record does not serve the purpose of the attestation requirement, as the copied attestation no longer signifies that the official in question is vouching for the authenticity of the copy that has just been made." (*Deramo*, *supra*, 762 N.E.2d at p. 821.)

Here, the clerk's deputy who signed the certification must be the same deputy who made the copies, either by printing out the documents from a computer or by photocopying documents from the case file. By affixing the certification stamp and adding his or her signature, the deputy clerk was attesting that the copies that came off the computer or out of the photocopy machine were full, true and correct cop[ies] of the original on file (Evid. Code, § 1531.) However, the deputy clerk never saw the copies that came from the prosecutor's facsimile machine and therefore could not have attested to their accuracy.

In sum, the only "copy" authorized by Evidence Code section 1530 is the copy of the actual public record. Nothing in the rule allows the certification to be a copy. Indeed, the common meaning of "certified copy" or "attested copy" forecloses the use of a copied certification or attestation. Evidence Code section 1530 requires that an original certification be affixed to the precise copy that the custodian is certifying as genuine, accurate, and complete. Contrary to the suggestion of the Court of Appeal, the challenging party does not have the burden of proving that the document is not authentic. Particularly here, where the document in question is the sole basis of depriving petitioner of his liberty.

F. A Copy of a Certified Copy of an Official Record Is Not Admissible Under the Secondary Evidence Rule.

In the decision below, the Court of Appeal held that "a *copy* of a certified copy of an official record is admissible...unless there is a genuine dispute concerning its terms and justice requires exclusion of the copy, or admission of the copy would be unfair." (Exhibit B at 1, citing *People v. Atkins* (1989) 210 Cal.App.3d 47, 55 and Evid. Code, § 1521.) The Court of Appeal's reliance on the Secondary Evidence Rule is misplaced. Section 1530 specifically addresses – and resolves – problems of both secondary evidence and authentication for public records. (Law Revision Com. com. to Evid. Code, § 1530, 1965 amendment; *In re Shannon C.*, *supra*, 179 Cal.App.3d at pp. 341-342 [describing Section 1530 as the codification of "an exception" (for public records) to the Secondary Evidence Rule].) Thus, the more general Secondary Evidence Rule does not apply to the situation at hand. (*Action Apartment Assoc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1246 [as a rule of statutory construction, a specific provision prevails over a general provision relating to the same subject].)

The Court of Appeal's published opinion is inconsistent with the language and purpose of both the Secondary Evidence Rule and Evidence Code section 1530. (See Evid. Code, §§ 1520-1522, 1530); Matthew Bender & Co., Cal. Evidentiary Foundations (2007), Chapter 7 Secondary Evidence Rule, § N[1] (questioning validity of the *Atkins* holding).) Under the Secondary Evidence Rule, "[t]he content of a writing may be proved by otherwise admissible secondary evidence," including by duplicates. (Evid. Code, § 1521, subd. (a); *Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118, 1123.) The rule addresses the admissibility of a "writing" that has some substantive relevance to issues in the particular case. (*Ibid.*) Certification, in contrast, is not evidence in that sense, but is rather a device that renders the substantive

evidence admissible by resolving issues of secondary evidence and authentication. (*Ibid.*; Evid. Code, § 1530.)

In *Kelly v. State*, the Supreme Court of Indiana established a bright-line rule requiring that an original certification be affixed to copies of public records admitted without the testimony of a records custodian. (*Kelly*, *supra*, 561 N.E.2d at pp. 772-775.) In so holding, the Indiana high court rejected the state's argument that a non-original certification was admissible so long as the defendant raised no issue as to the authenticity of the originals. (*Id.* at pp. 773-774.) The court acknowledged that Indiana's best evidence rule allowed the admission of duplicates of documents to the same extent as an original, absent any unfairness or questions of authenticity. (*Id.* at p. 774.) The court reasoned, however, that "while copies of public records can themselves be admissible if their authenticity is properly certified, the certifications themselves do not constitute public records and photocopies are not acceptable." (*Id.* at p. 773.)

The need for authentication is one of the reasons why the Secondary Evidence Rule cannot be used to render a copied certification acceptable. "Nothing in [the Secondary Evidence Rule] excuses compliance with Section 1401 (authentication)." (Evid. Code, § 1521, subd. (c).) When a copy of an original is proffered, both the original and the copy must be authenticated. (Law Revision Com. com. to Evid. Code, § 1401, 1965 amendment.) An original certification may authenticate both the copy to which it is attached and the underlying original. (*Ibid.*) Indeed, Evidence Code section 1401(b) states: "Authentication of a writing is required before secondary evidence of its content may be received in evidence." If the certification is itself a duplicate, there is nothing to authenticate the copy of the certification. In sum, a copied certification is not admissible as secondary evidence under the Secondary Evidence Rule.

G. Copies of Certified Copies Are Inadmissible Even When There Are No Apparent Issues of Authenticity or Accuracy.

The Court of Appeal suggests a fact-specific approach in which copies of certified copies are admissible so long as the opponent of the proffered evidence does not raise some issue of the authenticity, accuracy or completeness of the copies. (Exhibit B at 2.) That does not provide enough protection, particularly for criminal defendants who possess a constitutional right to confrontation. (U.S. Const., 6th Amend; Cal. Const., art. I, § 15.) For instance, "The cover page of a stack of copied records may bear an original attestation, but that original attestation, once having been copied, can be attached to anything." (*Deramo*, *supra*, 762 N.E.2d at p. 821.) In addition, the accuracy of modern photocopying technology may actually make it more difficult for defendants to uncover potential problems with the proffered copies. "'[T]he ease with which documents may be made to appear genuine by the use of modern technology' only serves to underscore the need for proper attestation." (*Deramo*, *supra*, 762 N.Ed.2d at p. 821, quoting *Mimick v. United States* (8th Cir. 1991) 952 F.2d 230, 231.)

In view of the interests at stake and the possibility for error, the supreme courts of at least three other states have established bright-line rules requiring that an original certification or attestation be affixed to the precise copy that the records custodian has compared to the original in the custodian's possession. (*Deramo*, *supra*, 762 N.E.2d at pp. 819-822 [Massachusetts]; *Kelly*, *supra*, 561 N.E.2d at pp. 772-775 [Indiana]; *Stotts*, *supra*, 695 P.2d at p. 1122 [Arizona]; *State v. McCallum* (2009) 2009 Ohio 1424, P23 [2009 Ohio App. Lexis 1248, P16-17] [exhibit was not properly authenticated where the certification was a photocopy and also in the incorrect form].) As noted by the Indiana high court: "Our failure to insist upon such original certificate would invite at

least carelessness and at worst deceitfulness in the marshalling of evidence with a resulting lack of reliability of judgments and the possibility of substantial injustice." (*Id.* at p. 775.)

A per se rule requiring an original certification is not impractical or unduly burdensome. The Evidence Code already makes significant concessions to practicality. For example, the Evidence Code permits the admission of photographic copies of public records without the testimony of a records custodian. (Evid. Code, §§ 1280, 1530, 1531.) Certification is the device that makes these concessions acceptable by resolving such vital evidentiary concerns as best evidence, authentication, and hearsay. To allow the certification itself to be a copy, in furtherance of still more practicality, simply goes too far. It would not be impractical or unduly burdensome to require that copies of public records bearing an original certification be placed in the U.S. mail or delivered by hand. (*Kelly*, *supra*, 561 N.E.2d at p. 775 ["The resulting burden upon the proponent is minimal."].)

H. A Deprivation of Liberty on the Basis of Faxed Copies of Documents Violates Petitioner's Constitutional Rights to Confrontation and Cross-Examination.

Admission of the faxed court records violated petition's right to confront witnesses against him guaranteed by the Sixth Amendment to the federal Constitution and by article I, section 15, of the California Constitution. "The right of cross-examination is an essential safeguard of a fair trial and a major reason for the confrontation rule is to give the defendant the opportunity to cross-examine." (*People v. Dickinson* (1976) 59 Cal.App.3d 314, 320, citing *Pointer v. Texas* (1965) 380 U.S. 400 [13 L.Ed.2d 923, 85 S.Ct. 1065].) Petitioner had no opportunity to pose any questions concerning the accuracy of the original and of the copy of the proffered document. The only assurance of trustworthiness is the clerk's certification. When

that certification is itself a copy, the rights to confrontation and cross-examination under the federal and state constitutions are violated. (U.S. Const., 6th Amend; Cal. Const., art. I, § 15.) If the erroneously admitted document had been excluded, the sentencing allegation would not have been proven. Thus, petitioner is entitled to a reversal of the judgment under either the beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension, *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]; or, if this court finds an error of law only, under the standard pronounced in *People v. Watson* (1956) 46 Cal.2d 818, 836.

II. THE CHARGING DOCUMENT OF PETITIONER'S ALABAMA CONVICTION WAS NOT ADMISSIBLE TO PROVE THE TRUTH OF THE FACTS ALLEGED THEREIN.

Where the statute under which the defendant was previously convicted may be violated in different ways, some of which would not qualify as a "strike," the prosecution must establish the prior offense "involved conduct which satisfies all of the elements of the comparable California serious felony offense." (*People v. Myers* (1993) 5 Cal.4th 1193, 1195; *People v. Purata,* (1996) 42 Cal.App.4th 489, 493). In determining whether a conviction in another jurisdiction qualifies as a "strike," the court may consider the entire record of the prior conviction, including documents which reliably reflect the conduct for which the defendant was convicted, subject to the rules of evidence and other statutory limitations. (*Id.* at 1201; *People v. Jones,* (1999) 75 Cal.App.4th 616, 632-633; *People v. Purata, supra,* 42 Cal.App.4th at 493). Where the record of the prior conviction does not establish the facts of the offense, the court will presume the conviction was for the least adjudicated elements of the charged offense. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262; *People v. Jones, supra,* 75 Cal.App.4th at 632; *People v. Cortez* (1999) 73 Cal.App.4th 276, 280). If, based on those elements, the prior conviction does not have the elements of the comparable

California serious felony, that conviction may not be used as a "strike." (*People v. Jones, supra,* 75 Cal.App.4th at 635; cf. *People v. Rodriguez, supra,* 17 Cal.4th at 262; *People v. Cortez, supra,* 73 Cal.App.4th at 280).

In *People v. Guerrero* (1988) 44 Cal.3d 343, this Court held that a trier of fact may look to the entire record of conviction to determine the nature of the previous crime. The *Guerrero* court, however, did not resolve "such questions as what items in the record of conviction are admissible and for what purpose or whether on the peculiar facts of an individual case the application of the rule set forth herein might violate the constitutional rights of a criminal defendant." (*Id.* at 356, fn 1.) In *People v. Smith* (1988) 206 Cal.App.3d 340, 345, fn. 7 the court noted the charging allegations are hearsay, but admissible to explain defendant's admissions in the Tahl form. In *Smith*, defendant specifically admitted on the Tahl form that the burglary was residential, and made the same admission again at sentencing. Here, there were no admissions by petitioner as to the factual basis of the plea. He entered a "generic" plea to "manslaughter" without giving any indication that he admitted to any of the specific facts alleged in the indictment. (CT 197-198.)

The trial court erred when it considered the indictment, standing alone, to prove the truth of the matters alleged therein. (Evid. Code §1200.) Petitioner's guilty plea does not constitute an admission to all of the facts alleged in the indictment. (*People v. Harrell* (1989) 207 Cal.App.3d 1439, 1444 [clerk's minutes stated that defendant pleaded guilty to burglary "as charged in the information"]; *People v. Moenius* (1998) 60 Cal.App.4th, 820, 825 [guilty plea specified the degree of charge].) The record does not contain any written or oral admissions by petitioner supporting the factual basis for his plea. (*People v. Riel* (2000) 22 Cal.4th 1153, 1205-1206.) Without any admissions by petitioner as to the specific facts underlying his guilty plea, the trial

court had no basis from which it could fairly conclude that petitioner personally and directly inflicted great bodily injury.

III. PETITIONER WAS ENTITLED TO A JURY TRIAL ON THE ISSUE OF WHETHER THE ALABAMA CONVICTION INVOLVED PERSONAL INFLICTION OF GREAT BODILY INJURY.

The Due Process Clause entitles criminal defendants to a jury trial and proof beyond a reasonable doubt on all factual issues, other than the fact of a prior conviction, that increase the penalty for a crime beyond the statutory maximum. (*Apprendi v. New Jersey*, (2000) 530 U.S. 466; 120 S.Ct. 2348 (*Apprendi*). See also *Cunningham v. California*, (2007) 549 U.S. 270; 127 S.Ct. 856; *Blakely v. Washington*, (2004) 542 U.S. 296; 124 S.Ct. 2531. "'[I]t is unconstitutional . . . to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Apprendi, supra*, 530 U.S. at 490, quoting *Jones v. United States*, (1999) 526 U.S. 227, 252-253 (conc. opn. of Stevens, J.).)

Apprendi left open "a narrow exception" to its broad rule. *Id.* at 490. In *Almendarez-Torres v. United States*, (1998) 523 U.S. 224 (*Almendarez-Torres*), decided two years earlier, the Court held in a 5-4 decision that a judge could sentence a defendant to a term higher than that attached to the charged offense on the basis of a prior felony conviction. The *Apprendi* majority, consisting of the four *Almendarez-Torres* dissenters and Justice Thomas, acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, . . ." *Apprendi, supra,* 530 U.S. at 489-490. However, the *Apprendi* majority found it unnecessary to overrule *Almendarez-Torres.* Instead, it reconciled and limited *Almendarez-Torres* on two grounds: (1) in *Almendarez-Torres,* the defendant admitted the prior convictions, and (2) the "fact" of a prior conviction carried with it procedural safeguards. (*Id.* at

488.) These two factors "mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." (*Ibid.*)

Under California law, manslaughter is not a *per se* a strike. However, it may qualify as a strike if the defendant personally inflicted great bodily injury on another. (Pen. Code §1192.7, subd. (c)(8); 667.5, subd.(c)(8)). The determination of great bodily injury is essentially a question of fact, not of law. (*People v. Escobar*, (1992) 3 Cal.4th 740, 750.) Nonetheless, the trial court found that the 1995 conviction qualified as a strike based solely on the language in the charging document. (RT 285-297.) This judicial fact-finding – which resulted in five year sentence enhancement, violated petitioner's federal constitutional right to have the issue submitted to a jury and proved beyond a reasonable doubt. Whether petitionr personally and directly inflicted great bodily injury does not fall within the "narrow exception" to *Apprendi*'s rule. Indeed, as *Apprendi* emphasized, *Almendarez-Torres* involved no contested factual issues at all because the defendant admitted his prior convictions for aggravated felonies. (*Apprendi, supra,* 530 U.S. at 488.)

Apprendi unequivocally establishes a due process right to a jury on those factual issues that have not previously been resolved through a process that included a jury and reasonable doubt protections. (*Apprendi, supra,* 530 U.S. at 488 [excluding fact of prior conviction because fact had already been determined through process subject to "procedural safeguards"]; *Jones v. United States, supra,* 526 U.S. at 249 [recognizing that no jury right attaches to fact of prior conviction because "unlike virtually any other consideration used to enlarge the possible penalty for an offense – a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees."].)

The distinction between the fact *of* a prior conviction and facts *about* a prior conviction is discussed extensively in *Shepard v. United States*, (2005) 544 U.S. 13. The question in that case was whether a federal sentencing court could impose an enhanced term based on a prior state court conviction for burglary if there were a dispute over the exact nature of the earlier crime, and that dispute was not resolved by a jury. Writing for the plurality, Justice Souter observed that "the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." (*Id.* at 24.) In his concurring opinion, Justice Thomas went further and argued that *Almendarez-Torres* should be squarely overruled, noting that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." (*Id.* at 27., conc. opn. of Thomas, J.)

The plurality opinion in *Shepard*, in combination with the concurring opinion of Justice Thomas, confirms that the only evidence that may be considered by the trier of fact, when determining whether a prior conviction qualifies as a strike, are those portions of the record that establish facts actually or necessarily found in convicting the defendant, or facts that the defendant actually or necessarily admitted in pleading guilty. As noted by the trial court in this case, a conviction for manslaughter in Alabama does not *necessarily* establish that petitioner personally inflicted great bodily injury. (CT 209; RT 285-286.) Likewise, since there was no jury trial, there is no record establishing that petitioner was *actually* found guilty of personally inflicting

great bodily injury. Nor can it be said that petitioner actually or necessarily admitted to every fact alleged in the indictment because there was no factual basis established for the plea. (CT 197-198; RT 286-287.)

The Ninth Circuit has said that "[w]hile it is true that [defendant] Gill's Three Strikes sentence is based on his 1976 conviction, that conviction will not support his sentence without proof of the additional fact of personal use of a deadly weapon. . . . [T]hat determination presents a distinct issue. . . . The 1976 conviction for violation of California Penal Code section 245(a)(1) embraced the *possibility* that Gill used a deadly weapon, but did not require proof that he *personally* used such a weapon. The charge that Gill personally used a deadly weapon introduced a new factual issue at the Three Strikes hearing." *Gill v. Ayers*, (9th Cir. 2002) 342 F.3d 911, 919 and fn.7 (citations omitted). Likewise, petitioner's guilty plea to manslaughter only embraces the *possibility* that he personally inflicted great bodily injury. The facts alleged in the indictment which would have established personal infliction of great bodily injury were neither proved, nor admitted.

CONCLUSION

For the foregoing reasons, Petitioner urges this court to review his case, and ultimately to reverse the conviction.

Dated: February 21, 2010

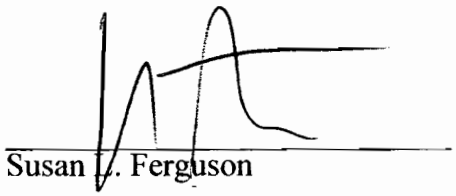
Respectfully submitted

Susan L. Ferguson
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that the foregoing PETITION FOR REVIEW uses a 13 point font and contains 6,220 words, as counted by WordPerfect Version 11, the processing program used to generate this petition.

Dated: February 21, 2010



Susan L. Ferguson

EXHIBIT A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY LEE SKILES,

Defendant and Appellant.

G040808

(Super. Ct. No. 08HF0799)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed as modified.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part I.

Appellant Danny Lee Skiles was convicted of burglary and receiving stolen property. He had previously been convicted of manslaughter in Alabama, and based on that conviction, the trial court found true the allegation Skiles had suffered a serious felony for purposes of the "Three Strikes" law. (Pen. Code, §§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)[1] Skiles contends there is insufficient evidence to support the court's finding in this regard, and he was denied his constitutional right to a jury trial on that allegation. He also claims the court erred in failing to stay his sentence for receiving stolen property and by limiting his presentence custody credits. As the Attorney General concedes, Skiles' sentencing claims are valid, and therefore we will modify the judgment to stay the receiving count and award him proper presentence credit. In all other respects, we affirm.

FACTS

Saida Hudson returned to her Costa Mesa motel room one night to find it had been burglarized. Skiles had been seen in the area around the time of the burglary, and his fingerprints were found on one of Hudson's window panes. Upon his arrest, he was found with several items that were taken in the burglary.

The jury convicted Skiles of residential burglary and receiving stolen property, i.e., the items taken in the burglary. Then, upon finding that Skiles' Alabama manslaughter conviction constituted a serious felony under California law, the court sentenced him as a second strike offender to concurrent four-year terms for his crimes. Based on the Alabama prior, the court also added a five-year enhancement pursuant to section 667, subdivision (a)(1), bringing Skiles' combined term of imprisonment to nine years.

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1 All further statutory references are to the Penal Code, unless noted otherwise.

I

Although a defendant can be *convicted* of both burglary and receiving stolen property taken during the burglary, he cannot be *punished* for both offenses. (§ 654, subd. (a); *People v. Allen* (1999) 21 Cal.4th 846, 865-867.) Accordingly, as the Attorney General concedes, the trial court should have stayed Skiles' sentence for receiving stolen property. (*Ibid.*) We will modify the judgment to correct this error.

The Attorney General also admits the trial court erred in limiting Skiles' presentence custody credits under section 2933.1. That section imposes a 15 percent limitation on conduct credit awarded to defendants who are convicted of certain violent felonies, such as burglary of an inhabited dwelling. (§§ 2933.1, subd. (a); 667.5, subd. (c)(21).) However, no one was home when Skiles burglarized Hudson's motel room, and there is no other basis for a credit limitation in his case. Therefore, we will modify the judgment to award Skiles proper conduct credit for the time he served in jail prior to sentencing.

II

The remaining issues relate to the trial court's true finding on the prior serious felony allegation. Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny, Skiles contends he was entitled to have a jury decide whether his Alabama conviction constituted a serious felony for purposes of the Three Strikes law. However, while *Apprendi* dictates generally that defendants be afforded jury trials on facts that lead to a sentencing increase beyond the prescribed statutory maximum, it does not apply to factual determinations relating to prior convictions. (*Id.* at p. 490; *People v. McGee* (2006) 38 Cal.4th 682, 709.) As our Supreme Court explained in *McGee*, this exception to the right to jury "is not limited simply to the bare *fact* of a defendant's prior conviction, but extends as well to the *nature* of that conviction, thereby permitting sentencing courts to determine whether the prior conviction is the type of conviction (for example, a conviction of a 'violent' felony) that renders the defendant subject to an

enhanced sentence." (*People v. McGee, supra*, 38 Cal.4th at p. 704; see also *People v. Black* (2007) 41 Cal.4th 799, 819 [reaffirming *McGee* on this point].) Therefore, Skiles was not entitled to have a jury decide whether his Alabama conviction constituted a serious felony for purposes of the Three Strikes law. No Sixth Amendment violation has been shown.

Skiles also contends the offense for which he was convicted in Alabama, i.e., manslaughter, does not qualify as a serious felony.[2] The list of felonies that qualify as "serious" for purposes of the Three Strikes law is set forth in section 1192.7, subdivision (c). (See § 667, subd. (d)(2).) That list includes voluntary manslaughter, but it does not include involuntary manslaughter. (§ 1192.7, subd. (c)(1).) This is important because, as more fully explained below, Skiles' Alabama manslaughter conviction arose from his reckless operation of a motor vehicle and is thus akin to the involuntary form of that offense. However, for purposes of section 1192.7, subdivision (c), a serious felony also includes "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice . . . ." (§ 1192.7, subd. (c)(8).)

None of this was lost on the trial court. In fact, it expressed a keen awareness of this statutory framework. And ultimately, it determined Skiles' manslaughter conviction constituted a serious felony because, during its commission, Skiles personally inflicted great bodily injury on a person other than an accomplice within the meaning of section 1192.7, subdivision (c)(8.)

Skiles asserts this was error. Relying on *People v. Cook* (1984) 158 Cal.App.3d 948, he argues the Legislature's failure to specifically include the crime of involuntary manslaughter in subdivision (c) of section 1192.7 precludes the conclusion that his Alabama prior constitutes a serious felony for purposes of that provision. However, the *Cook* decision "has been effectively superseded as authority by the

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2 Skiles did not raise this contention until oral argument, which makes it untimely (*People v. Pena* (2004) 32 Cal.4th 389, 403), but we will consider it nonetheless for the sake of judicial economy.

Supreme Court's opinion in *People v. Equarte* (1986) 42 Cal.3d 456 [] and by the Second District's subsequent opinion in *People v. Brown* (1988) 201 Cal.App.3d 1296 []." (*People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1692.) As the law now stands, a felony that is not specifically included on the list of enumerated offenses in section 1192.7, subdivision (c) will nonetheless be considered a serious felony under that section "if in the commission of the crime the defendant personally inflict[ed] great bodily injury on any person other than an accomplice. [Citation.]" (*People v. Gonzales, supra*, 29 Cal.App.4th at p. 1694.)

That brings us to the heart of Skiles' appeal, namely that there is insufficient evidence to support the trial court's finding he personally inflicted great bodily injury on a person other than an accomplice in committing his Alabama offense. The state's evidence on this issue included a certified copy of the grand jury's true bill in the Alabama case. That document, which was included in exhibit 16, shows that in 1995, Skiles was indicted on charges of manslaughter (count 1), driving under the influence of alcohol (count 2), and vehicular homicide (count 3). Exhibit 16 also includes a "Case Action Summary" sheet, akin to a minute order, and Skiles' plea agreement. These documents evidence the fact that Skiles pleaded guilty to the manslaughter charge in count 1 in exchange for a 10-year prison sentence and a dismissal of the remaining charges.

However, none of these documents contains a factual description of the charges. Exhibit 16 did include one other document, a certified copy of a single page of the indictment, but the only charge set forth and described on that page is the vehicular homicide charge alleged in count 3. The factual basis for the manslaughter count is not described on that page or in any of the other documents included in exhibit 16.

Recognizing this, the prosecution introduced another page of the indictment as part of a subsequent exhibit, exhibit 18. This document contains the factual and legal basis for counts 1 and 2. As to count 1, the manslaughter charge, the document states

Skiles "did recklessly cause the death of Jason Troy Latham by failing to yield the right of way to . . . Latham by running a red light and did thereby cause the motor vehicle which he was driving to strike a motor vehicle being operated by . . . Latham, in violation of 13A-6-3 (a)(1) of the Code of Alabama [defining manslaughter as recklessly causing the death of another], against the peace and dignity of the State of Alabama."

Unlike the documents in exhibit 16, however, this particular document was a *copy* of the original certified copy of the Alabama indictment. Defense counsel objected to the document on this basis, but the trial court overruled the objection and found the prosecution had proven beyond a reasonable doubt that, in committing manslaughter in Alabama, Skiles personally inflicted great bodily injury on a person other than an accomplice. Therefore, it determined the crime qualified as a serious felony under California law and enhanced Skiles' sentence accordingly.

Skiles renews that objection, contending the indictment page included in exhibit 18 was not properly authenticated because it is a *copy* of the original certified copy. While the document includes a certification stamp and the signature of Alabama court clerk Missy Homan Hibbett, Skiles questions whether the certification is legitimate because the initials "DM" appear next to Hibbett's signature. He argues these "mysterious" initials raise considerable doubt as to who actually certified the exhibit and whether that person actually had the authority to do so.

We disagree. Not only are certified copies of official records admissible to prove the nature of a prior conviction, any "*copy of a certified copy* of an official record is admissible unless there is a genuine question as to the authenticity or contents of the original, or it would be unfair to admit the copy in lieu of the original. [Citations.]" (*People v. Coon* (2009) 173 Cal.App.4th 258, 263, italics added; see also Evid. Code § 1521, subd. (a) [under the secondary evidence rule, a copy of a writing may be used to prove its contents unless there is a genuine dispute concerning its terms and justice requires exclusion of the copy, or admission of the copy would be unfair].)

The indictment page included in exhibit 18 is a copy of a certified copy of an official document from the Circuit Court of Alabama. Although the initials of an unidentified person appear next to the signature of the certifying clerk, there is no genuine question as to the authenticity, contents or material terms of the writing. As the trial court below noted, the indictment page in exhibit 18 is similar to, and internally consistent with, the indictment page in exhibit 16, which is of unquestioned authenticity. Indeed, both pages of the indictment are from the same court, have the same date and are certified by the same court clerk.

Moreover, we know from the undisputed documents in exhibit 16 that Skiles was not only indicted for vehicular homicide, but manslaughter and driving under the influence of alcohol, as well. Because the indictment page in exhibit 18 relates to those very counts, it is logical to presume that page is an authentic representation of counts 1 and 2 of the indictment. (See *People v. Coon, supra,* 173 Cal.App.4th at p. 264 ["A writing can be authenticated by circumstantial evidence and by its content."].) And, as we can think of no reason why it would be unfair or unjust to admit that page of the indictment into evidence, we uphold the trial court's decision to do so. (*Id.* at pp. 262-264 [upholding the admission of copies of certified copies of court documents to prove the defendant was on bail at the time he committed the present offenses]; *People v. Atkins* (1989) 210 Cal.App.3d 47, 53-55 [upholding the admission of copies of certified copies of prison records to prove the defendant had served a prior prison term].)

The only remaining question is whether the trial court could use the substance of the indictment sheet included in exhibit 18 as proof that, in committing manslaughter in Alabama, Skiles personally inflicted great bodily injury on a person other than an accomplice. The answer is yes. The trial court may consider the entire record of the prior conviction in determining whether the prior involved a qualifying offense for purposes of sentencing enhancement. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262.) That includes any charging documents filed in the previous case. (*People*

v. Henley (1999) 72 Cal.App.4th 555, 560.) More particularly, the trial court may consider the indictment or information pertaining to the crime in question if the defendant pleaded guilty to that offense. (*People v. Hayes* (1992) 6 Cal.App.4th 616, 624; *People v. Longinetti* (1985) 164 Cal.App.3d 704, 706.)

Here, the record shows Skiles pleaded guilty to "count 1 of the indictment, manslaughter." And that count, as set forth in exhibit 18, alleged that Skiles ran a red light and drove his car into a vehicle being operated by the victim, Latham. Count 1 further alleged that in so doing, Skiles recklessly caused the death of Latham. Based on this record, there is sufficient evidence to support the trial court's finding that Skiles' conduct constituted a serious felony for purposes of the Three Strikes law. There is no reason to disturb this finding.

DISPOSITION

Skiles' sentence is modified pursuant to section 664 to stay execution of sentence on count 2, receiving stolen property. In addition, his presentence conduct credit is modified to 152 days, based on 305 days of actual custody, bringing his presentence credit total to 457 days. The clerk of the superior court shall prepare an amended abstract of judgment reflecting these modifications and send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.

EXHIBIT B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY LEE SKILES,

Defendant and Appellant.

G040808

(Super. Ct. No. 08HF0799)

ORDER MODIFYING OPINION; NO CHANGE IN JUDGMENT

It is hereby ordered that the opinion filed herein on January 11, 2010, be modified in the following particulars:

1. On page 6, delete the last full paragraph that begins with "We disagree" and replace with the following paragraph:

"We disagree. A certified copy of an official record can be used to prove the contents of the record. (Evid. Code, § 1530; *People v. Delgado* (2008) 43 Cal.4th 1059, 1066 [noting that a "common means of proving the . . . nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding"].) In addition, a *copy* of a certified copy of an official record is admissible for this purpose, unless there is a genuine dispute concerning its terms and justice requires exclusion of the copy, or admission of the copy would be unfair. (Evid. Code, § 1521, subd. (a); *People v. Atkins* (1989) 210 Cal.App.3d 47, 53-55.)"

2. On page 7, delete the second full paragraph which begins with "Moreover, we know" and replace with the following paragraph:

"Moreover, we know from the undisputed documents in exhibit 16 that Skiles was indicted not only for vehicular homicide, but also for manslaughter and driving under the influence of alcohol. Because the indictment page in exhibit 18 relates to those very counts, it is logical to presume that page is an authentic representation of counts 1 and 2 of the indictment. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383 [a writing can be authenticated by circumstantial evidence or its content].) And, as we can think of no reason why it would be unfair or unjust to admit that page of the indictment into evidence, we uphold the trial court's decision to do so. (*People v. Atkins, supra,* 210 Cal.App.3d at pp. 53-55 [upholding the admission of prison records which were accompanied by a copy of a certification from the custodian of the records].)"

3. On page 8, in the first line of the disposition, delete "section 664" and replace with "section 654."

This modification does not effect a change in judgment.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1417 N. Fairview Street, Burbank, Ca 91505.

On February 22, 2010, I caused the foregoing PETITION FOR REVIEW to be served on:

Office of the Attorney General
Stephanie Chow, Esq.
110 West A Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266

Anita P. Jog, Esq.
Appellate Defenders Inc.
555 West Beech Street
San Diego, CA 92101

Danny Skiles, G-31296
T.C.C.F/N.A. #67
415 W.S. Hwy. 49 North
Tutwiler, MS 38963

[] BY FACSIMILE

[ ] BY U.S. MAIL as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on February 22, 2010, at Burbank, California.

Susan L. Ferguson