BRIEF IN SUPPORT OF FEDERAL PETITION FOR WRIT OF HABEAS CORPUS

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STATEMENT OF THE CASE

On November 30, 2004, petitioner Richard Wilmer, Gruber, was convicted of three felonies following a jury trial: (1) procuring or offering for recording in a public office a false or forged "instrument" in violation of Penal Code section 115(a) (six counts); (2) conspiracy to defraud another of property in violation of Penal Code section 182(a)(4); and (3) conspiracy to commit the crime of "use of documents resembling process of court." (Clerk's Transcript [hereafter "CT"] 505-510, 511-529; Reporter's Transcript [hereafter "RT"] 352-360.) Petitioner was sentenced to serve three years, but the sentence was corrected to two years. (Opinion in *People v. Gruber*, 5th DCA no. F047525, page 2, footnote 3.) Petitioner appealed. The California Fifth District Court of Appeal reversed the conspiracy convictions, but affirmed the convictions for violations of Penal Code section 115(a). (See Opinion in *People v. Gruber*, 5th DCA no. F047525.)

Petitioner sought review by the California Supreme Court, arguing that the affirmance by the court of appeal was based on a novel definition of the term "instrument" which deprived petitioner of his due process right to notice of the conduct deemed a crime. (See Petition for Review in Supreme

Court no. S147533.) The petition for review was denied on January 17, 2007, and the denial order was amended January 30, 2007.

This court is respectfully requested to take judicial notice of the entire record on appeal, briefs and opinion in *People v. Gruber*, 5th DCA no. F047525, and the petition for review and orders of the Supreme Court in *People v. Gruber*, Supreme Court no. S147533. Petitioner will refer to the clerk's transcript of the described appellate case by the designation "CT", and to the reporter's transcript by the designation "RT".

The relevant facts leading to the challenged convictions were as follows. The trial court took judicial notice and informed the jury "that something known as the First House of Delegates, District Court 13th Judicial District, California, located on the south side of Tulare County Road J-30, 1/8th mile east of Tulare County J-30 is not a court recognized under the law of the State of California or of Tulare County." (RT 29.) In approximately May, 1999, CHP officer Jean Edmonds pulled over a motor vehicle in which Richard Gruber was riding, and which was being driven by Richard's son Dale Gruber, for failure to display California registration and no license plate identifiable to officer Edmonds. (RT 14-15.) Officer Edmonds had the vehicle towed away. (RT 16-17.)

That night officer Edmonds was served with a subpoena to appear "at a so-called court located here in county of Tulare," and stating that if

she did not appear she would be sued for one million dollars. (RT 17.) She took the document to the legal department at her office and was advised that the document was not a recognizable document, and not a valid court document, and that the court described was not a valid court. (RT 17.) She drove by the address designated and found a house with a walnut grove around it, having two flags in front of it, one of which was an "American flag upside down with thirteen stripes," and one was "another flag which is a First House of Delegates flag." (RT 17-18; CT 330.)

Rene O'Neal was an employee for Randy Bachhofer in May, 1999, and shortly after the vehicle was towed, she was served with a paper directed to Randy Bachhofer, which she thought appeared to be a summons of some type for a court, which she had never heard of even though she had resided in Exeter for her whole life. (RT 25-26.) She went to the location and it appeared to be a home having a yard sale. (RT 26.) She put the document on Randy Bachhofer's desk. (RT 26.)

Approximately two or three months later she again received on behalf of Mr. Bachhofer's company a group of similar papers, which also designated the "13th Judicial District " as a court, bearing titles of "Notice and Demand," and "Order for Entry of Default," and "Abstract of Judgment," and stating an amount of eight hundred thousand dollars. (RT 26-30.) Instead of a license plate, the vehicle which Bachhofer's business

impounded had a paper with numbers on it at the license plate location stating "First House of Delegates, Tulare County, California.") (RT 29-30.) On March 6th, 2000, Bachhofer's company again towed a vehicle driven by Mr. Gruber, with a similar type of license plate. (RT 30.) Mr. Gruber demanded the return of his vehicle, as he had with the first vehicle, and was told he would have to obtain a release from the police department. (RT 30-31.) Mr. Gruber stated that Bachhofer's company "would pay." (RT 31.)

Visalia police officer Roy Dunn testified that he stopped a vehicle with Mr. Gruber inside in March 2000, which appeared to have a home made license plate. (RT 33-34, Exhibit 1.) It had the same language concerning the "First House of Delegates..." (RT 29-34.) The officer cited the driver for driving with no valid California driver's license, unregistered vehicle, and no proof of insurance. (RT 34.) The officer impounded the vehicle, again calling "Crane's Towing," which is Mr. Bachhofer's company. (RT 29-35.) When the officer had asked Mr. Gruber for a driver's license, registration, and insurance, Mr. Gruber handed the officer a piece of paper which had a Polaroid photograph of himself, along with some typing on it, but it was not anything which was issued by the Department of Motor Vehicles to allow operation of a vehicle for a driver's license or registration of a vehicle. (Rt 34-35.) Mr. Gruber also had some type of a

home made document for a vehicle registration and a home made document which he said was his authorization to drive a vehicle. (RT 36.)

Mr. Bachhofer showed up to tow the vehicle himself. (RT 36.) Mr. Gruber made a statement that he already had some type of legal action against Crane's Towing from an earlier incident. (RT 36.) Later, officer Dunn received a document stating that he was being sued in the sum of $250,000.00, gold dollars, lawful money, and for six million dollars, lawful money of the United States of North America, on behalf of Mr. Gruber and against officer Dunn and the Visalia Police Department. (Rt 36-37.) Officer Dunn consulted with the assistant chief of police and they turned it over to the city attorney, who determined that it was not a legal document, not a binding court of competent jurisdiction, not an official Tulare Count document of any kind, or any US document. (RT 37.) This city attorney just held on to the document in case "any further recourse came up." (RT 37.)

Brian Loven, an insurance broker, received copies of the documents in Exhibit 3A, stating "Notice of Demand," and claiming a debt in the amount of $800,000.00 against Mr. Bachhofer, apparently on behalf of Mr. Gruber, bearing signatures of a clerk named Christopher James and "a Judge of Kenneth Richard." (RT 40-41.) The insurance company did not pay on those documents but simply faxed a copy to Mr. Bachhofer and asked him

what he would like Mr. Loven to do with them. (RT 41-42.) The documents appeared to Mr. Loven to be "legal documents." (RT 42.)

Mr. Bachhofer testified that he received a summons in approximately May 1999, after towing the Gruber vehicle to appear at a court called the "First House of Delegates, 13th Judicial District." (RT 44.) Mr. Bachhofer took the documents to his attorney to find out if he should do anything, and after consulting with his attorney, took no action, (Rt 44-45.) In May of 2000, Mr. Bachhofer again towed the Gruber vehicle and Mr. Gruber appeared at his office to ask for the vehicle back. (RT 46.) Mr. Bachhofer's secretary (apparently Rene O'Neal) talked to Mr. Gruber, after which Mr. Bachhofer again contacted his attorney and took no action. (RT 46.)

In 2000, Mr. Bachhofer decided to sell his business, found a buyer, and entered escrow. (RT 46-47.) There were papers delivered to the escrow company stating there was a judgment against Mr. Bachhofer for $800,000.00 in favor of Mr. Gruber, and a UCC-1 for $800,000.00 signed by Mr. Gruber; Exhibit 5 depicts the copies that were delivered. (RT 47-49.) Mr. Bachhofer stated that he did not owe Mr. Gruber any money. (RT 49.) The documents which were delivered delayed the sale and cost several thousand dollars in attorney's fees to allow the sale to resume. (RT 49.) Mr. Bachhofer had not been aware of the UCC-1 which designated the real

properties as collateral. (RT 50-51.) Mr. Labelle had delivered the documents to Mr. Bachhofer. (RT 51-53.)

Kathleen Vasquez was an employee of the Secretary of State which received UCC-1 filings. (Rt 53-54.) The only requirements in a UCC-1 for filing are the names of the debtor, the creditor, and the payment of a fee. (RT 53-55.) If those fields are filled out the office must accept the UCC-1 for filing. (RT 53-55.)

The documents filed on behalf of Mr. Gruber were the following: UCC-1 number 0303160513, naming Bachhofer as debtor, and Gruber as secured party and designating as collateral "Judgement for $800,000.00 case number 990629-2" (RT 55; CT 653.); UCC-1 number 03316C0404, with the same designees and setting forth a legal description of real property in the "collateral" portion (RT 56; Ct 656.); UCC-1 number 0331660890 listing Richard Barron as debtor and Richard Gruber as secured party, and designating as collateral "Notice of Apparent Liability default Judgement for ten thousand united States of America dollars ($10,000) Secured Party accepts Debtor's signature in accord with UCC §§ 1-201(39), 3-401, and House Joint Resolution 192 of June 5, 1933." (RT 56; Ct 659.); UCC-1 number 0331660884, designating Richard Barron as debtor and Richard Gruber as secured party and listing as collateral "All of debtor's assets, land, and personal property, and all of debtor's interest in said assets, land, and

personal property, now owned and hereafter acquired, now existing, and hereafter arising, and wherever located in the amount of two million United States Dollars ($2,000,000.00)" (Rt 56;CT 662.); UCC-1 number 0333760939 designating Luke and Barron as debtors and Richard Gruber as secured party, and listing as collateral "All of debtor's assets, land, bonds, and personal property, and all of debtor's interest in said assets, land and personal property, now owned and hereafter acquired, now existing and hereafter arising, and wherever located. Secured Party accepts Debtor's signature in accord with UCC §§ 1-201(39), 3-401, and House Joint Resolution 192 of June 5th 1933" (RT 56; CT 665.); another UCC-1 listing Linda Luke as debtor and Richard Gruber as secured party and with the same formula as for collateral. (RT 56-57; CT 668.) The dates of filing were, respectively, January 30, 2003; November 6, 2003; November 6, 2003; November 6, 2003, November 25, 2003; and November 25, 2003. (RT 57-58.) The Exhibit numbers of those documents, respectively, were 12, 13, 14, 15, 16, and 17. (RT 58.)

The purpose of a UCC-1 is to put third parties on notice that there is a claim of a debt. (RT 54.) The State is mandated to file a UCC-1 unless there is some specific reason to reject it. (RT 54 - 55.) If there is some question whether a UCC-1 can be filed, the Secretary of State directs the person to see an attorney. (RT 62.) There is no procedure to revoke an

improper or mistaken UCC-1 filing. (RT 63.) Also, there are no limitations on what you can put into the "collateral" section of the form. (RT 62 - 63.)

While one cannot revoke a UCC-1 which has been filed with the Secretary of State someone could file a termination statement which will go in the file along with the UCC-1. (RT 63.) A termination statement is simply a document which is filed by someone with the Secretary of State - whether it is an avenue to revoke the UCC-1 or change the UCC-1 is something that the Secretary of State does not look into; nothing which has been filed with the Secretary of State gets removed. (RT 63 - 64.) The termination statement is a document stating that a lien has been terminated. (RT 64.) There is a space where a person can write in something concerning the lien and/or how it was terminated. (RT 64 - 65.)

Other documents which might be filed include a UCC-3, which is an amendment to a UCC-1 ("which is kind of the base or the original notice"); and a UCC-5 which is a correction statement, "a document that could be filed" by a person "that believes that the record is either in error or false," and then "they could explain whatever they wanted to explain about it." (RT 67 - 68.) In that way any individual, including an alleged creditor could file a UCC-5 saying that they debt asserted in the UCC-1 no longer existed or it in fact never existed. (RT 67 - 68.) The Secretary of State files judgment

liens, but those require a different form number - the JL-1 rather than the UCC-1. (RT 62.)

The Secretary of State employees do not review the UCC-1 form. (RT 62 - 63.) Theoretically, someone could not even fill out the "collateral" section, but could leave it completely blank, and the Secretary of State would still accept the document. (RT 63.) So long as the UCC-1 documents have names for the debtor and the secured party, they will be filed if a filing fee is provided. (RT 71.) They do not need to be signed by anyone, and it is the same with the UCC-3 or the UCC-5; the Secretary of State accepts the document if the required blanks are filled in and regardless of what the content is. (RT 71 - 72.)

Dale Bruder was an attorney in Visalia who represented the buyer of Bachhofer's business. (RT 74 - 77.) When he became aware of a notice of lien he contacted Bachhofer's attorney because his clients, the buyers, were entitled to receive the property free of liens so they did not want to release the funds until they had proof that any liens were released. (RT 76 - 77.)

Richard Barron was the attorney for Randy Bachhofer. (RT 88 - 89.) Mr. Bachhofer showed Mr. Barron some papers served upon him indicating that he had been sued in the "Thirteenth Judicial District, First House of Delegates." (RT 89.) Mr. Barron looked at the papers and determined that it was not in fact a lawsuit and that Mr. Bachhofer could just disregard the

papers. (RT 89 - 90.) When the UCC financing statements were discovered by the escrow company, Mr. Barron restructured the transaction with the buyers and filed a lawsuit against Mr. Gruber and others for declaratory relief and other remedies, including quieting title to the Bachhofer business which was sold. (RT 92 - 100.)

Mr. Barron was never able to serve Mr. Gruber personally. (RT 99.) Mr. Barron served the other individuals by publication. (RT 100 - 101.) Mr. Barron obtained a default judgment against Mr. Gruber and all of the other defendants. (RT 101 - 104.) There is no evidence in this case that there was a valid proof of service by publication or otherwise, in the file of the civil lawsuit by Bachhofer against Gruber and other reflecting service upon Mr. Gruber at the time the default and default judgment were entered. (RT 98 – 104.)

Mr. Barron ultimately recorded his default judgment against Mr. Gruber with the Secretary of State. (RT 105.) Mr. Barron learned at some time of the UCC-1s which were filed naming him and his firm. (RT 106 - 107.) Mr. Barron thought he had sent a copy of his judgment to Mr. Gruber with a request that Mr. Gruber sign a form which would vacate the financing statement; Mr. Barron did not receive anything back from Mr. Gruber, so he just recorded the judgment. (RT 105.)

Exhibit 23 is a default affidavit filed by Richard Gruber, apparently in the First House of Delegates, Thirteenth Judicial District. (RT 110.) Based upon the papers received by Mr. Barron from the defendants, which were "nonsensical" and were "sort of legal jibberish (sic)," Mr. Barron took it that "both of these fellows didn't regard the courts of the State of California as courts that they were subject to." (RT 114 - 115, 120 - 121.) Concerning the UCC filings against himself, his law firm and his partner Linda Luke, Mr. Barron filed documents with the Secretary of State indicating that they were not indebted to Mr. Gruber and that the UCC filings were invalid. (RT 124 - 125.)

Craig McDonald was an investigator with the Tulare County District Attorney's Office. He contacted Mr. Gruber to ask him if he had a vehicle towed back in 1999. (RT 136 - 137.) According to investigator McDonald, Mr. Gruber stated that he had been stopped by the Visalia Police Department for having an unregistered vehicle, but that his vehicle was in fact registered because "he had a brand on file with the State, and that the vehicle was taken illegally." (RT 136 - 137.) He went to the tow company to get the vehicle back, but the tow company would not release the vehicle to him, so Mr. Gruber then filed a lawsuit "in the Thirteenth Judicial Court and a hearing was, I guess, done," according to investigator McDonald. (RT 137.) Mr. Bachhofer, the owner of the towing company did not show up, and so there

was then a judgment for $800,000 against Mr. Bachhofer. (RT 137 - 138.) Mr. Gruber did not explain the basis for the $800,000 amount. (RT 138.)

Investigator McDonald was familiar with the "Thirteenth Judicial District courthouse," and identified the picture in Exhibit 2 as depicting the courthouse. (RT 138.) Investigator McDonald asked Mr. Gruber if he had filed a UCC-1 and Mr. Gruber stated that he had. (RT 138 - 139.) Investigator McDonald asked Mr. Gruber if he knew Mr. Labelle, but Mr. Gruber would not answer that question. (RT 139.)

Investigator McDonald talked with Mr. Gruber about the 1849 constitution. (RT 139.) Mr. Gruber told investigator McDonald that in 1849 there was a constitution adopted for the State of California and that subsequently (investigator McDonald thought it was 1869) there was a second constitution for the State of California but nowhere in that second constitution did it state that anything in the prior constitution was invalid. (RT 141.) Therefore, Mr. Gruber believed that the California 1849 constitution is still valid today. (RT 141 - 142.) Therefore, Mr. Gruber felt that he could go by the 1849 constitution rather than the new constitution. (RT 142.)

Mr. Labelle said he filed the UCC-1 financing statement because the UCC office had informed him that to secure a debt that he should file a UCC-1. (RT 155.) He said he was doing that for violation of the copyright

and to stop the court for doing what they were doing. (RT 155 - 156.) Mr. Labelle stated that if there was a problem and he could not file that UCC document, and someone brought it to his attention, he would gladly apologize and remove the documents. (RT 159 - 164.)

In jury instructions, the court stated that the elements of a violation of Penal Code section 115(a) were the following:

> Every person who knowingly procures or offers any false or forged instrument to be filed, registered or recorded in any public office within the state, which instrument, if genuine, might be filed or registered or recorded under any law of the state or of the United States, is guilty of violation of Penal Code Section 115 subdivision (A), a crime. In order to prove this crime, each of the following elements must be proved: We covered this earlier, but I want to do it again. It's important that this be understood. The elements are that the person procured or offered a false or forged instrument to be filed, registered or recorded in a public office in this state. Two, the instrument, if genuine, was one which it was properly filed, registered or recorded. And three, that the person knew that the instrument was false or forged. (RT 344.)

ARGUMENT

I.

THIS PETITION IS APPROPRIATE AND TIMELY.

To be eligible for federal habeas corpus relief under 28 USC section 2254, the petitioner must be in custody pursuant to the judgment of a state court at the time the petition is filed, but the custody requirement is met if the petitioner, like Mr. Gruber, is on parole. (28 USC sections 2241, 2254;

Sperl v. Deukemejian (9th Cir. 1981) 642 F.2d 1154; *Chaker v. Grogan* (9th Cir. 2005) 428 F.3d 1215, 1219.) Federal habeas corpus petitions have a 1-year filing deadline. (28 USC section 2244(d).) The time begins to run from the conclusion of direct review or expiration of the time for seeking review. (*Ibid.*)

In *Bowen v. Roe* (9th Cir. 1999) 188 F.3d 1157, 1158, the Ninth Circuit held that direct review does not conclude under 28 USC section 2244(d) until the expiration of the period during which the petitioner/defendant could apply for a writ of certiorari in the United States Supreme Court, i.e., 90 days after the state supreme court denies review. See also *Smith v. Bowersox* (8th Cir. 1998) 159 F.3d 345, 348 (same); *U.S. v. Schwartz* (9th Cir. 2001) 274 F.3d 1220 (same, federal conviction). Thus, the limitations period does not begin to run in California until 90 days after the date on which the California Supreme Court denies review of the decision of the court of appeal on direct appeal.

In the instant case, the California Supreme Court denied review of the decision of the court of appeal against Mr. Gruber on direct appeal initially on January 17, 2007, and that was followed by an amended order of denial on January 30, 2007. Therefore, the earliest date on which the statute of limitations for federal habeas corpus could run against Mr. Gruber would be April 17, 2008 (1 year and 91 days after January 17, 2007), and the actual

date of final denial of review would presumably be January 29, 2007, the date of the amended order of denial of review. Based on the date of the amended order, the statute of limitations would not expire until January 30, 2008 (1 year and 91 days after January 29, 2007).

A writ of habeas corpus is an extraordinary remedy, constituting a collateral attack on a judgment, the purpose of which is to inquire into unlawful imprisonment or restraint. The availability of habeas corpus is a due process protection for the defendant. (See *People v. Shorts* (1948) 32 Cal.2d 502, 506.) Habeas corpus relief may be granted for the denial of a constitutional right (See *People v. Green* (1980) 27 Cal.3d 1, 44.), and for fundamental jurisdictional error. (*People v. Mutch* (1971) 4 Cal. 3d 389, 396.)

Habeas corpus may be used following an unsuccessful appeal, even as to issues which were not raised by the prior appeal, in the case of claims raising fundamental error, lack of fundamental jurisdiction, pure questions of law that demonstrate that the trial court acted in excess of jurisdiction, or changes in the law affecting the petitioner. (See *In re Harris* (1993) 5 Cal.4th 813, 829 footnote 8, 834, 834-835.) A post-appeal petition may raise any claim involving fundamental fairness striking at the heart of the trial process. (*Ibid.*)

In general, habeas corpus will lie where criminal proceedings were fundamentally unfair, or to review an "important" question of law which could not otherwise be reviewed. (See *In re Bell* (1942) 19 Cal. 2d 488, 494.) Thus, habeas corpus, as a supplement to appeal and sometimes despite failure to appeal, has become a common method of post-conviction review of criminal proceedings. (*Id.* at p. 495; See also *In re James* (1952) 38 Cal. 2d 302, 309.)

In the instant case, the primary issues to be raised by the petitioner were issues raised on appeal and in a petition for California Supreme Court review. It was appropriate to exhaust the appellate remedies before invoking habeas corpus. Furthermore, the rationale of the court of appeal in affirming showed that the court was adopting a novel and unprecedented definition of the term "instrument" in Penal Code section 115(a), impacting petitioner's constitutional due process right to prior notice of the parameters of criminalized conduct. The fact that the California Supreme Court did not grant review does not suggest that the court of appeal was right, nor that petitioner was wrong. It is well established that denial of review by the California Supreme Court is not to be construed as an expression of opinion by the California Supreme Court on the correctness of the court of appeal's opinion. (See *Trope v. Katz* (1995) 11 Cal.4th 274, 287 footnote 1.)

Federal habeas relief lies for violations of the United States Constitution or federal laws of treaties. (28 USC section 2254(a).) The California state court system has failed to protect petitioner, and petitioner therefore has had no choice but to seek federal enforcement of his federal Constitutional rights. Mr. Gruber's conviction, and its affirmance on direct appeal, are predicated on a completely unprecedented "definition" of the term "instrument," under California Penal Code section 115, contradicting pre-existing California law.

If Mr. Gruber's conviction is permitted to stand - based upon the disavowal of a definition which has been well established since 1980, and the adoption without notice of a new and unprecedented definition - then Mr. Gruber stands convicted without any means of knowing that his conduct constituted, or could possibly constitute, a crime. Such a result violates a defendant's right to due process, and offends basic concepts of fairness.

One must be able to know, with reasonable certainty, when he has happened on an area of conduct forbidden by law. Without a fair **opportunity** - via understandable statutory language - to comprehend the character of the forbidden conduct, United States citizens are subject to prosecution under the analytical equivalent of an *ex post facto* law. The criminality of one's conduct has been first established **after** the conduct has been consummated - one is convicted even though one never had an

opportunity to conform one's conduct to the law, simply because there was no way of knowing that the conduct would *post facto* (after the fact) be denounced as a crime.

In *Connally v. General Const. Co.*, (1926) 269 U.S.385, 391, the United States Supreme Court, in discussing the due process requirement of legislative specificity, stated:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.

In Mr. Gruber's case, there was no notice whatsoever given by the statute that the word "instrument" could refer to all manner of documents, and include documents which historically have not been included within the category "instrument." Accordingly, the *ad hoc* expansion of the term "instrument" in this case has deprived petitioner of his constitutional right to due process of the law. He was not provided with fair warning of what would constitute criminal conduct under Penal Code section 115(a).

II.

PETITIONER COULD NOT CONSTITUTIONALLY BE CONVICTED OF VIOLATION OF PENAL CODE SECTION 115(a) BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THAT HE "KNEW" THE UCC-1 DOCUMENTS WERE "FALSE" OR "FORGED."

A judgment must be supported by substantial evidence in light of the whole record. (See *People v. Jones* (1990) 51 Cal 3d 294, 313.) The concept of "substantial evidence" has been defined as follows:

> ...[I]f the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case. (*Estate of Teed* (1952) 112 Cal. App. 2d 638, 644.)

The test in a substantial evidence challenge to a criminal conviction has been expressed as follows:

> The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (Citations) On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. *(Citation.)*
>
> Although we must ensure the evidence is reasonable, credible and of solid value nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.

> *(Citation.)* Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of witness's credibility for that of the fact finder. *(Citations)* (*People v. Jones* (1990) 51 Cal. 3d 294, 314; emphasis added.)

It can be seen that the primary focus of the substantial evidence test is on the existence or non-existence of particular evidentiary facts. The appellate court is directed to give deference to the trial court in giving weight to the evidence and in believing or disbelieving witnesses. What is at issue here, however, is the legal significance of the facts. In such a case, the appellate court is equally as well situated as the trial court to evaluate that legal significance. The interpretation and applicability of a statute is normally viewed as a question of law. (See *Estate of Madison* (1945) 26 Cal.2 453, 456.)

In the instant case, the violations of Penal Code section 115(a) all required that the defendant have **knowledge** that in submitting the subject UCC documents he was submitting instruments which were "false" or "forged," and were not "genuine." (RT 343-344.) Since such state of mind cannot be directly perceived, it is necessary to evaluate it based on circumstantial evidence, and for that reason the court gave a jury instruction equivalent in substance to CALJIC no. 2.02. (RT 328-330.)

Where circumstantial evidence is relied upon to prove specific intent or a mental state, the jury is instructed not to find the defendant guilty unless the

proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent, but (2) cannot be reconciled with any other rational conclusion. (CALJIC no. 2.02.) Stated differently, if the circumstantial evidence is reconcilable with the hypothesis that the appellant was innocent, then it was the duty of the trier of fact to adopt the interpretation of that evidence which pointed to appellant's innocence. (*Ibid.*) "Circumstantial evidence is defined as evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn." (CALJIC no. 2.00.) Here, Mr. Gruber's state of mind was sought to be established based on circumstantial evidence since there was no direct proof that Mr. Gruber had knowledge that the documents were "false" or were "forged," or were not "genuine." There also was no direct evidence that Mr. Gruber had knowledge that the UCC-1 documents constituted "instruments."

Where circumstantial evidence is used to attempt to prove specific intent, or for that matter any other particular state of mind, the trier of fact has the same duty to assume innocence if the circumstances are consistent with innocence. (CALJIC no. 2.02.) Thus, if as a matter of law there is a reasonable interpretation of the circumstantial evidence which would point to petitioner's

innocence, then the jury did not comply with the duty of the trier of fact under the standard jury instructions, and the conviction should be reversed. If the jury instructions are to have any meaning whatsoever they should be enforced. When CALJIC No. 2.02 states that circumstantial evidence can only be used to prove specific intent where it "cannot be reconciled with any other rational conclusion," judges and juries are obligated to follow that precept.

The UCC-1 documents at issue were efforts by petitioner Gruber to memorialize his claim against the named individuals based upon Mr. Gruber's assertion of tort liabilities. Mr. Gruber obtained a "judgment" in the courthouse which he believed was the proper courthouse, and the proper judicial system, pursuant to the California Constitution of 1849. There seems to be little question that his belief was genuine. He expressed it when consulted regarding it and he quite candidly discussed his view with the investigating officer.

Furthermore, Mr. Gruber filed documents such as "Non-Statutory challenges" against multiple judicial officers. (See, for example, CT 64 - 70.) He rejected opportunities to participate in the defense of the case by consistently informing the trial judge that he was declining the court's "offer." (See, for example, RT 12, 22 - 23.) His various writings were portrayed as "nonsensical

legal gibberish." The "court" relied upon by Mr. Gruber was not hidden, but in fact was clearly identified and a picture of the building was Exhibit 2 in evidence.

Each and every piece of evidence admitted in this action was reasonably consistent with the view that Mr. Gruber believed that he had the right to do what he did in terms of the UCC filings. Since there are no significant material facts inconsistent with the notion that Mr. Gruber believed he was acting within his legal rights - presumably under the 1849 California Constitution - there was a failure to sufficiently establish that he knew that his UCC filings were "false".

Under CALJIC no. 2.02, where the circumstantial evidence may be reasonably interpreted in a manner which is reconcilable with Mr. Gruber's innocence - the lack of the required state of mind - the court must do so. In such instance, the trier of fact is bound by law to adopt an interpretation of the evidence that points to the defendant's innocence. (CALJIC no. 2.02.) Where the jury was bound by law to adopt the interpretation of the evidence that pointed to defendant's innocence, but failed to do so, the verdict was constitutionally defective.

There is a constitutional mandate of a *presumption of innocence* in this country. In *People v. Stanley* (1995) 10 Cal.4th 763, 793, the California Supreme Court qualified its acknowledgment that the jury is the fact finder by pointing out that the jury must act **reasonably**. The Court said, "If the circumstances **reasonably** justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might **also** reasonably be reconciled with a contrary finding, does not warrant a reversal of the judgment." (*Id.* at pp. 792-793.) Thus, where the reviewing court does believe "The circumstantial evidence might be reasonably reconciled with the defendant's innocence, **the appellate court shall and must reverse** unless the jury's finding to the contrary was **reasonable**."

The mere fact that the jury is the fact finding entity - subject to reasonable supervision by the courts - does not justify a reviewing court in "rubber-stamping" a jury's failure to follow an important instruction. Thus, where circumstantial evidence is relied upon to prove an element to a crime - such as knowledge or intent - and where such evidence is reasonably reconcilable with the hypothesis of innocence of the defendant, if the jury does not acquit, then the jury is not acting reasonably.

That is different from the situation discussed by the Supreme Court in *People v. Stanley, supra,* where a jury might determine - **depending upon the facts found** - that circumstantial evidence was not reasonably reconcilable with innocence, **and that determination was reasonable**. In that event, where the jury acted reasonably, the mere fact that such evidence might **also** - **depending upon the facts found** - be reconciled with innocence, does not compel reversal.

In *People v. Stanley*, the appellant did not attempt to explain to the appellate court how the circumstantial evidence was reconcilable with a hypothesis of innocence. (*People v. Stanley, supra,* 10 Cal.4th at pp. 792-793.) In the instant case, in contrast, petitioner has pointed out above and in appellate briefs how the circumstantial evidence is reasonably reconcilable with innocence.

The evidence, in fact, reflected that appellant specifically told investigator McDonald why he had acted as he did, stating that he believed that the 1849 California Constitution was still valid today, that he could go by that Constitution, and that his filings in the "First House of Delegates, 13th Judicial District," and other actions (such as the "registration of his vehicle" because "he had brand on file with the State") were permissible because Mr. Gruber felt that

he could rely on the 1849 Constitution rather than the new Constitution. (RT 136-142.)

Even Mr. Barron acknowledged that, based upon the papers he received from appellant and his co-defendant, it appeared that "both of these fellas didn't regard the courts of the State of California as courts that they were subject to." (RT 114-115, 120-121.) Given the direct evidence that Mr. Gruber believed he had the right to do the things he did, the circumstantial evidence - which never included any proof that Mr. Gruber did not believe in what he was doing - was manifestly reconcilable with innocence.

This was not a case in which the circumstantial evidence might only be "arguably reconcilable" with innocence. Here, there is no question that the circumstances were reasonably reconcilable with Mr. Gruber's sincerity regarding the views he expressed. There was no evidence that he said or did anything which would suggest that he did not sincerely believe he was acting within his rights under the 1849 state constitution.

The concept that a trier of fact may not find an ultimate fact to be proved on circumstantial evidence which is reasonably reconcilable with innocence is "a most important rule governing the use of circumstantial evidence." (See

Conservatorship of Walker (1987) 196 Cal.App.3d 1082, 1096.) **The rule is part of the general doctrine requiring proof beyond a reasonable doubt of guilt, and clarifies the application of that doctrine to a case in which guilt may be inferred from a pattern of incriminating circumstances**. (*Id.* at p. 1095.) Thus, it is the burden of proof beyond a reasonable doubt which triggers the application of the evidentiary principles regarding the limited efficacy of circumstantial evidence. (*Id.* at p. 1097.)

The necessity for distinguishing between direct and circumstantial evidence arises out of the demands of the criminal law, to give meaning to the presumption of innocence. (*Ibid.*) Therefore, since CALJIC No. 2.02 states that circumstantial evidence may only be used to prove state of mind "where it **cannot be reconciled** with **any other** rational conclusion," the court should require the trial judge and jury to follow that precept. Since the jury did not do so in the instant case, and thus did not comply with its duty as trier of fact under the standard jury instructions, the conviction of appellant does not rest upon substantial evidence, appellant has been deprived of due process (the presumption of innocence unless proved guilty beyond a reasonable doubt), and this petition should be granted

III.

PETITIONER COULD NOT CONSTITUTIONALLY BE CONVICTED OF VIOLATION OF PENAL CODE SECTION 115(a) BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THAT THE UCC-1 DOCUMENTS WERE "FALSE" OR "FORGED" AT ALL.

Penal Code section 115 indicates that documents are "false" where they are not "genuine" - the documents, if "genuine" must be legally entitled to be filed. The obvious target of the code section has to do with documents which are "false" in the sense that they are not what they purport to be. In the instant case, the UCC financial statements were in fact exactly what they purported to be - efforts to memorialize Mr. Gruber's claim against the individuals involved based upon his assertion of tort liabilities.

The documents simply asserted Mr. Gruber's claims against the designated individuals. The "judgment" referenced in some of the documents was not identified as to court, and bore a "number" presumably associated only with the Thirteenth Judicial District. The other UCC-1 filings either failed to state the basis of the liability or recited a formula consisting of quasi-legal terminology which some may find difficult to decipher.

The documents were not wills which were forged, temporary restraining orders which were improperly altered, or false depictions of a Tulare County Superior Court judgment which did not exist. One may contend that Mr. Gruber did not have a meritorious claim of liability against the individuals involved. That, however, is a distinct issue from the issue of whether the documents themselves were false or forged.

The statute indicates that there is only a violation where the documents, if "genuine," were subject to filing. The reference is to fake documents, not documents which assert non-meritorious claims. There is a distinction between those two types of documents. If it were a crime to assert a non-meritorious claim, then 50% of the litigants who go to trial in this county could theoretically be charged with violating Penal Code section 115. There are many instances, for example, where people file Lis Pendens claims against real property, without a proper basis for doing so. Those documents are not considered "false or forged," but are simply rejected as setting forth non-meritorious legal positions. The UCC-1 filings by Mr. Gruber fall within that category.

Additionally, there was insufficient evidence to establish appellant's guilt because the financing statements, "if genuine" (as discussed above, they were

"genuine" because they were what they purported to be) were not "legally entitled" to be filed or recorded under the Uniform Commercial Code. The Uniform Commercial Code specifically excludes tort liabilities from the coverage of such financing statements pursuant to Commercial Code section 9104 and the holding of the court in *Bluxome Street Associates v. Fireman's Fund Ins. Co.* (1988) 206 Cal.App.3d 1149, 1156.) Therefore, UCC-1 financing statements based upon tort liabilities are not "legally entitled" to be filed whether or not the Secretary of State chooses to accept them.

IV.

PETITIONER COULD NOT CONSTITUTIONALLY BE CONVICTED OF VIOLATION OF PENAL CODE SECTION 115(a), SINCE THE UCC-1 DOCUMENTS SUBMITTED TO THE SECRETARY OF STATE DID NOT CONSTITUTE "INSTRUMENTS" WITHIN THE MEANING OF PENAL CODE SECTION 115(a).

The UCC-1 documents at issue do not meet the definition of "instrument" applicable to Penal Code section 115(a). For many years the term "instrument" in Penal Code section 115 was defined as "an agreement expressed in writing, signed, and delivered by one person to another, transferring the title to, or creating a lien on,

real property, or giving a right to a debt or duty." (See *People v. Fraser* (1913) 23 Cal.App. 82, 84-85; *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682-683.)

In *Generes*, *supra*, the court considered whether recording a false grant deed whereby an individual who did not own the property described in the deed purported to convey it to herself would constitute a violation of Penal Code section 115, and the defendant contended the subject deed was not an "instrument" because it did not constitute an "agreement" and there could be no delivery "from oneself to oneself." (*Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682-683.) The court in *Generes* consulted the holding in *Hoag v. Howard* (1880) 55 Cal.564, 565, defining "instrument" as "some written paper or instrument signed and delivered by one person to another, transferring the title to, or creating a lien on property, or giving a right to a debt or duty." (*Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 683.) The court held that an instrument did not need to be an agreement, nor did it require delivery for its validity. (*Ibid.*)

Subsequent to *Generes*, it has been made emphatically clear, in *People v. Soriono* (1992) 4 Cal.App.4th 781, 783-784, that an "instrument" still has to be a "writing which transfers title to or creates a lien on real property or gives a right to a debt or duty." The UCC-1 form does not create a lien and does not give a right to a

debt or a duty. The UCC-1 form does not transfer title. All the UCC1 form does is give "notice" of the existence of a claim or security interest. As such, while the filing of the document may sometimes be necessary to "perfect" a security interest, the document does not itself create such security interest The security interest is created by a contract or by operation of law - not by a UCC-1 filing.

In each and every case in which documents were deemed "instruments," those documents actually created or gave rise to an interest, right or duty. Thus, fishing activity reports were deemed "instruments" in *People v. Powers* (2004) 117 Cal.App.4th 291, 297, because they compelled government action in setting fishing limits and thus "created" duties and obligations with regard to fishing. In *Generes v. Justice Court, supra,* 106 Cal.App.3d at p. 684, a false easement was deemed an "instrument," since the easement created and transferred an interest (i.e., the right to use real property) in property. In *People v. Tate* (1997) 55 Cal.App.4th 663, 667, a work referral form created a right to credit for satisfaction of a term of probation and thus was deemed a "instrument." In *People v. Parks* (1992) 7 Cal.App.4th 883, 887, a temporary restraining order was an "instrument" because it created and imposed rights and duties. In each of those cases the documents themselves fell squarely within the definition of "instrument" in *People v. Soriono.* In no published case has

a UCC-1 ever been deemed to be an "instrument" within the meaning of Penal Code section 115.

The UCC-1 is nothing more than a notice in the same way that a lis pendens is a notice. A lis pendens may be recorded to give notice to the public that a person has a claim against real property. However, a lis pendens is not an instrument. (See *Plaza Freeway Limited Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616, 622, quoting from *People v. Fraser* (1913) 23 Cal.App. 82, 86.) The role of the UCC-1 in "perfecting" a security interest becomes utterly meaningless unless there is a preexisting security interest, created by some other document or transaction, which is protected and recognized under the Uniform Commercial Code. While a perfected security interest may have priority over an unperfected security interest under the Commercial Code, an unperfected security interest is not null and void but remains a security interest. (See *People v. Green* (2004) 125 Cal.App.4th 360, 377.)

While *Generes* did away with the "agreement" and "delivery" requirements established in *People v. Fraser, Generes* did not do away with the requirement, recognized in *People v. Soriono* (1992) 4 Cal.App.4th 781, 783, that an "instrument" must still be "a writing which transfers title to or creates a lien on real property, or gives a right to a debt or duty." A lis pendens does not qualify as such. A UCC

financing statement does not qualify as such either. *People v. Soriono*, in fact, cited *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682-684, for the proposition that an "instrument" must be "a writing which transfers title to or creates a lien on real property, or gives a right to a debt or duty."

People v. Soriano (1992) 4 Cal. App. 4th 781, 783-784, reversed the conviction of a defendant who had pled guilty to a violation of Penal Code section 115 for filing a "forged instrument, to wit, a death certificate." It was squarely held - and agreed by the parties - that "Soriano's guilty plea was defective because a death certificate is not an 'instrument' within the meaning of Penal Code section 115, i.e., a writing which transfers title to or creates a lien on real property, or gives a right to a debt or duty." (*People v. Soriano* (1992) 4 Cal.App.4th 781, 783.)

Furthermore, a UCC-1 financing statement, even though filed, may be completely unnecessary and "superfluous" to the creation of a valid lien. (See *Bluxome Street Associates v. Fireman's Fund Ins. Co.* (1988) 206 Cal.App.3d 1149, 1156; *Cetenko v. United California Bank* (1982) 30 Cal.3d 528, 533, footnote 5.) A common example of a case in which a UCC-1 financing statement is superfluous, because the security interest provisions of the UCC do not apply, occurs in the instance of any claim arising out of tort. (*Bluxone Street Associates v. Fireman's*

Fund Ins. Co. (1988) 206 Cal.App.3d 1149, 1155 - 1156.) In the instant case, the UCC-1 filings were superfluous, because it was undisputed that they were filed based upon **the tort claims** of petitioner Gruber against Bachhofer and others. (*Ibid.*)

In other words, the UCC-1 filings were not "legally entitled" to be filed or recorded under the Uniform Commercial Code - which excludes tort liabilities from the coverage of such financing statement pursuant to Commercial Code section 9104 and the holding of the court in *Bluxome Street Associates v. Fireman's Fund, supra.* **Where the "instrument" involved was not legally entitled to be filed or recorded, the recordation of a false or forged instrument is not actionable under Penal Code section 115.** (*People v. Powers* (2004) 117 Cal.App.4th 291, 295.) This is because the code section, by its express terms, limits prosecution for filing "false or forged instruments" to "those instruments" which, "if genuine might be filed, registered, or recorded" under state or federal law. (*Ibid.*) The test, therefore, for actionability is not simply whether the Secretary of State customarily accepts documents regardless of how they are filled out - as Ms. Vasquez testified. The test is whether the instruments are properly "filed, registered, or recorded" under state or federal law.

Since the subject UCC-1 financing statements were attempts to memorialize tort-based liabilities, they were not "legally entitled" to be filed or recorded and hence could not be the subject of prosecution under Penal Code section 115. There cannot be a conviction and sentence for a crime that does not exist. (See *People v. Soriano* (1992) 4 Cal.App.4th 781, 785; *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1704.) Thus, the convictions of petitioner cannot stand, and this petition should be granted.

V.

PETITIONER COULD NOT CONSTITUTIONALLY BE CONVICTED OF VIOLATION OF PENAL CODE SECTION 115(a), SINCE THE AFFIRMANCE OF PETITIONER'S CONVICTION BY THE FIFTH DISTRICT COURT OF APPEAL WAS BASED ON A NOVEL DEFINITION OF THE TERM "INSTRUMENT," WHICH WAS CONTRARY TO CALIFORNIA PRECEDENT.

In affirming appellant's conviction for violation of Penal Code section 115, the court of appeal so broadened the terms and coverage of the statute that virtually any incorrect or inaccurate document could be used as a basis for criminal prosecution. The opinion of the court of appeal acknowledged that the filing of a false or forged instrument is not actionable under Penal Code section 115 if "the instrument was not legally entitled to be recorded." (Opinion, p. 14.) The opinion

also acknowledged that appellant contended that the documents he filed "were not legally entitled to be recorded because he used them to attempt to secure an alleged debt arising from tort, which he claims is excluded from coverage of the financing statement by Commercial Code section 9104." (*Ibid.*)

However, the opinion reasoned that the "entitlement to filing" requirement was met in the instant case simply because the document attempted to be filed bore the title "UCC-1." The reasoning was that, "The test is whether a law authorizes the recording of the instrument, not whether there was a legal basis for recording the instrument." (*Ibid.*) The opinion cited *People v. Harrold* (1890) 84 Cal. 567, 569-570, for the proposition that no law authorizes the recording of an assignment of interest in letters of patent in the office of the county recorder, and thus Penal Code section 115 was inapplicable - since even if the instrument were genuine it would not be entitled to be recorded under the law of the state. (Opinion, pp. 14-15.) Then, the opinion reasons that the entitlement to filing requirement is met in the instant case, because "the law authorizes the filing of UCC-1s in the Secretary of State's office." (Opinion, p. 15.)

Under that reasoning, the filing of literally anything on a UCC-1 form would meet the requirement that the document be entitled to be filed in the Secretary of

State's office. One could draft a philosophical essay and print it in the paragraphs of the UCC-1 form and meet the requirement as construed in the court of appeal's opinion, since, after all, the law authorizes the filing of a "UCC-1" form in the office of the Secretary of State. Such reasoning is flawed and constitutes a misanalysis of the requirement that the "instrument" the subject of the Penal Code section 115 charge be "entitled to be filed" if "genuine."

Appellant set out a claim for liability based upon tort in the UCC-1 form presented to the Secretary of State. Let us assume that the content of such UCC-1 form was completely true and genuine. Let us assume that the liability appellant listed in his UCC-1 form had resulted from a jury trial in the Tulare County Superior Court and that the judgment was duly, properly, and regularly entered by the superior court in favor of the appellant and against the defendants - based upon a finding of liability in tort. If that were the case, then no one could argue that the UCC-1 presented to the Secretary of State on behalf of appellant was not "genuine."

However, even if such document were agreed by all to be completely "genuine," it nevertheless would not be entitled to be filed as a UCC-1 with the Secretary of State. This is because tort liabilities are excluded from the coverage of the UCC-1 financing statements pursuant to Commercial Code section 9104 and the

holding of the court in *Bluxome Street Associates v. Fireman's Fund Ins. Co.* (1988) 206 Cal.App.3d 1149, 1156. The fact that unsuitable content is set forth on a UCC-1 form, does not justify the conclusion that such content thereby becomes an instrument "entitled to be filed" with the Secretary of State.

Taking the above flaw in the reasoning of the opinion to an extreme degree, assume that appellant obtained a blank UCC-1 form from the Secretary of State and proceeded to set forth a completely true and genuine account of a birthday party given for him when he turned seven years old. He then submits the document for filing with the Secretary of State. Although completely true and genuine, clearly such a document is not entitled to be filed with the Secretary of State - **whether or not it is set forth on a UCC-1 form.** However, under the reasoning of the appellate court opinion in petitioner's appeal, such document would be entitled to be filed simply because "the law authorizes the filing of UCC-1s in the Secretary of State's office." (Opinion, p. 15.)

Appellant submits that the opinion's analysis is incorrect. Setting forth a tort liability within a UCC-1 form does not create a document "entitled to be filed" with the Secretary of State. Tort liabilities are outside the coverage of the Uniform Commercial Code. Where the "instrument" was not legally entitled to be filed or

recorded, the filing thereof cannot be actionable under Penal Code section 115. (*People v. Powers* (2004) 117 Cal.App.4th 291, 295.)

The opinion then reviews the California holdings defining the word "instrument." The opinion quotes from a Washington case, *State v. Price* (1980) 94 Wash.2d 810 [620P2d 994], which was discussed in a California case, *People v. Powers* (2004) 117 Cal.App.4th 291, 295. The opinion states that in *Price* the Washington court determined that a document required or permitted to be filed is an instrument if: (1) The claimed falsity relates to a material fact represented in the instrument; and (2a) The information contained in the document is of such a nature that the government is required or permitted by law, statute or valid regulation to act in reliance thereon; or (2b) The information contained in the document materially affects significant rights or duties of third persons, when this affect is reasonable contemplated by the expressed or implied intent of the statute or valid regulation which requires the filing, registration, or recording of the document. (Opinion, p. 17.)

The opinion then proceeds to apply this Washington test to the UCC-1 financing statements filed by appellant. The opinion reasons that the documents were "false in a material fact" because "Gruber had no security interest in any property of

the 'debtors' listed as collateral and none of the 'debtors' had authorized the filing of the statements." (Opinion, p. 18.) Actually, Gruber claimed that the "debtors" were liable to him based on a theory of tort, which would mean that he could not have a "security interest" under the Commercial Code because, as earlier discussed, such liability is outside the scope of the Commercial Code. That is the reason why the documents were not entitled to be filed in the first place. There was no falsity - Mr. Gruber set out his claim and the basis of his claim. The problem is that the courts in California do not recognize the legal validity of Mr. Gruber's position, not that he "lied" or made "false statements" concerning the basis of his claim.

Furthermore, whether or not the content of the document is true or false has nothing to do with the innate character of the document. A non-instrument can be "false," just as an instrument can be "false." **Truth or falsity does not convert a non-instrument into an instrument** - yet the opinion adopts that criterion as the basis for determining whether or not a document is an "instrument."

Next, the opinion indicates that the information contained in the UCC-1 "materially affects the significant rights of third persons since [UCC-1s] create priorities in the collateral listed in the statements as against creditors and transferees who come after perfection of the security interest." (Opinion, p. 18.) The opinion

further states, "Moreover, the statement can materially alter the rights of a purported debtor as a practical matter by making it more difficult to freely sell to other parties the property subject to the financing statement as graphically illustrated in *Bachhofer's* case." Based thereon, and on the first criterion discussed above, ("falsity"), the opinion finds that the UCC-1 financing statements were "instruments" within the meaning of Penal Code section 115. (Opinion, p. 18.)

The opinion's reasoning overlooks the fact that the contents set forth on the UCC-1 forms in this case could not possibly "create priorities in the collateral listed in the statements as against creditors and transferees who come after perfection of the security interest." This is because the liability recited is not a liability within the scope of the Commercial Code. The liability recited in the documents filed on behalf of Gruber was based upon tort - not upon a commercial transaction within the scope of the Commercial Code. Since such liability was not entitled to be recorded under the Commercial Code, the submission of a document setting forth such liability *could not* "create priorities" under the Commercial Code.

Moreover, the prong of the "test" used by the opinion only applies to documents materially affecting significant rights or duties of third persons "when this effect is reasonably contemplated by the express or implied intent of the statute or

valid regulation which **requires** the filing, registration, or recording of the document." (Opinion, p. 17; emphasis added.) First, since the liability asserted was based upon tort, the memorialization of such liability on a UCC-1 form could not create a document entitled to be filed with the Secretary of State. Second, it is even more obvious that there was no law or regulation which **required** the filing of any UCC-1 form. Without a **requirement** of filing - the UCC-1 forms cannot be "instruments" **even under the test used in the State of Washington.**

The opinion in the instant case disavowed *Soriano* on the theory that because the parties had agreed in *Soriano* that a death certificate was not an instrument, the *Soriano* court "did not reach the issue, therefore, of whether that definition remained viable." (Opinion, p. 19, fn.8.) The court in *Soriano,* however, clearly did recognize that California law defined the term "instrument" as reflected in *Generes* - which required "a writing which transfers title to or creates a lien on real property, or gives a right to a debt or duty."

The opinion established a completely new "definition" of the term "instrument," contradicting existing California law. If Mr. Gruber's conviction is permitted to stand - based upon the court of appeal's disavowal of a definition which has been well established ever since *Generes* was decided in 1980 - then Mr. Gruber

was convicted without any means of knowing that his conduct constituted a crime. One must be able to know, with reasonable certainty, when he has happened on an area of conduct forbidden by law. In *Connally v. General Const. Co.*, (1926) 269 U.S.385, 391, the Court, in discussing the due process requirement of legislative specificity, stated:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

In *Grayned v. City of Rockford*, (1972) 408 U.S. 104, 108-109, it was stated:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.
>
> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

In Mr. Gruber's case, there was no notice whatsoever given by the statute that the word "instrument" could refer to all manner of documents, and include documents which historically have not been included within the category "instrument." Accordingly, the ad hoc expansion of the term "instrument" in this case has deprived petitioner of his constitutional right to due process of the law. He was not provided with fair warning of what would constitute criminal conduct under Penal Code section 115(a).

The Legislature presumably believed there was a difference between an "instrument" and a "document." Under the definition adopted in the opinion, any document would qualify as an "instrument" if it were false, relating to a material fact, and materially affected rights or duties of third persons. However, the Legislature originally did not see fit to impose criminal liability for the filing of false documents which may have an effect on third parties. The Legislature was only concerned with the filing of false "instruments." California Penal Code section 526, prohibiting the use of documents resembling court process, targets all documents. That is not the case for Penal Code section 115, which limits its application to "instruments" only. Mr. Gruber's conviction, therefore, should be overturned based upon the improper, ad hoc, expansion of the term "instrument," such that neither Mr. Gruber nor any citizen could know what

conduct would violate the law. Mr. Gruber was plainly denied due process of the law, and this petition should be granted.

Finally, it should be noted that the definition adopted by the Court of Appeal in its opinion goes beyond even the Washington test, which was limited to documents materially affecting rights or duties of third persons, where such documents were ***required*** to be filed. Under the opinion in the instant case, the fact that the document must be "required to be filed" was completely eliminated from the mix. No one claims that a UCC-1 document is ***required*** to be filed under any statute or regulation. Nonetheless, the Court of Appeal used the Washington definition to apply to UCC-1 documents, which are **not** documents which any statute ***requires*** to be filed. Thus, the Court of Appeal's opinion in the instant case went far beyond even the definition used in the State of Washington.

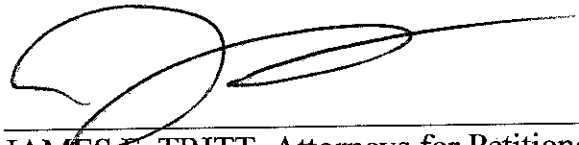
CONCLUSION

Petitioner stands convicted based upon a new definition of the term "instrument" which goes well beyond established California law. He could not have known that his conduct would be deemed criminal, since never before had a UCC-1 or similar notice been considered an "instrument" within the meaning of Penal Code section 115(a). He has been denied the most basic form of due process – a reasonable opportunity to know what is prohibited. He has been subjected to arbitrary, *ad hoc* and *ex post facto* application of a statute which, as newly interpreted in the unpublished opinion of the court of appeal, is unconstitutionally vague. For these and all other reasons mentioned above, this petition should be granted and petitioner should be afforded all appropriate relief, including the vacation of his criminal convictions.

Dated: 9/16/08

Respectfully submitted,

LAW OFFICES OF TRITT & TRITT



JAMES F. TRITT, Attorneys for Petitioner

PROOF OF SERVICE
[CCP Sections 1010-1013a]

I am employed in the County of Fresno, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 6067 North Fresno Street, Fresno, CA 93710. On March 15, 2005 I served the foregoing document(s) as:

"PETITION FOR HABEAS CORPUS, BRIEF IN SUPPORT OF PETITION FOR HABEAS CORPUS, CIVIL CASE COVER SHEET"

I am "readily familiar" with the business practice of the law office of TRITT & TRITT, A Professional Corporation, whereby the mail is sealed, given appropriate postage and placed in a designated collection area. Each day's mail is collected and deposited into a United States mailbox after the close of the day's business.

( ) **BY HAND**: by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

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See Attached Mailing List

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

Executed on April 16, 2008, at Fresno, California.

James F. Tritt

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