

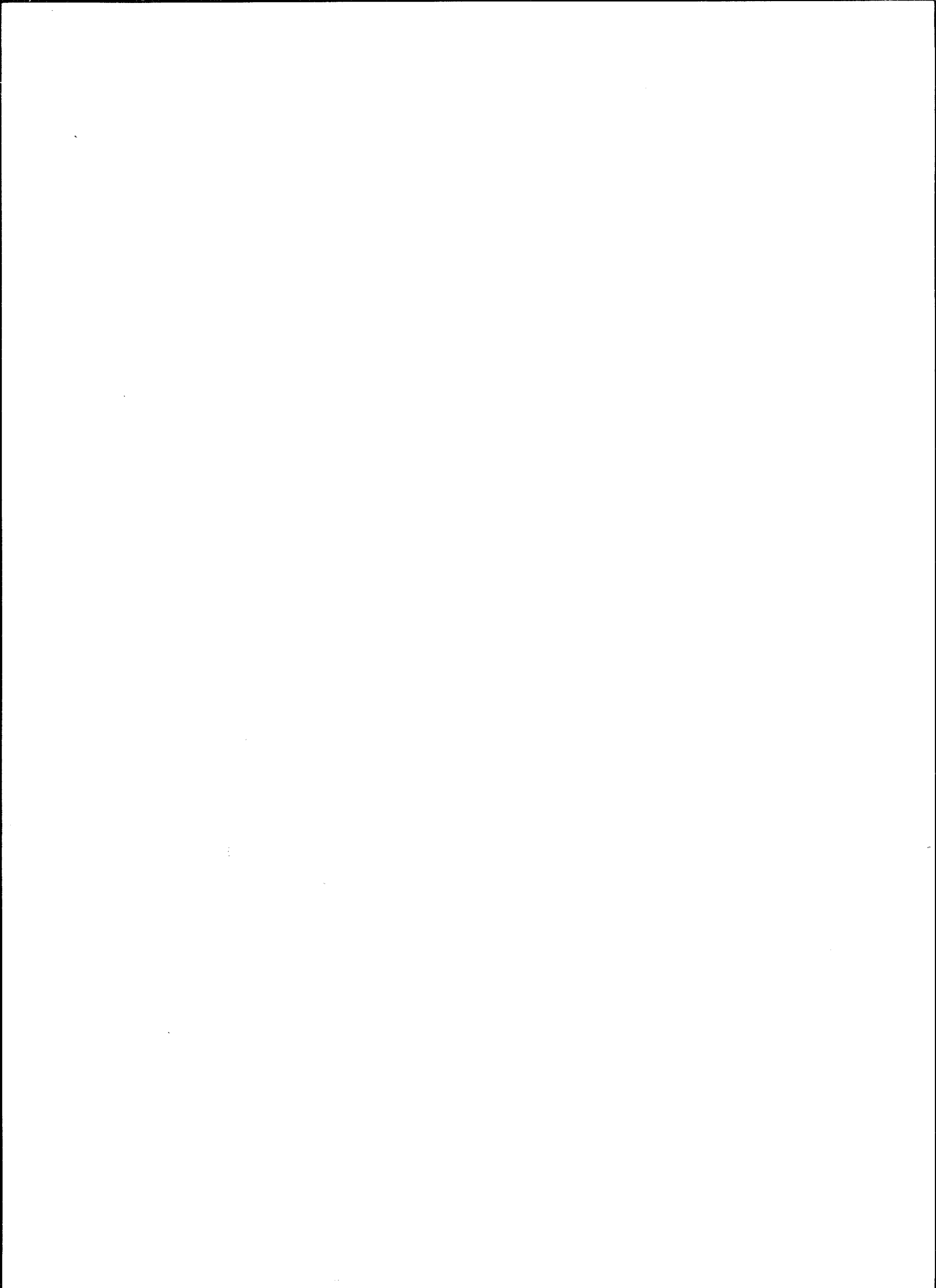
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

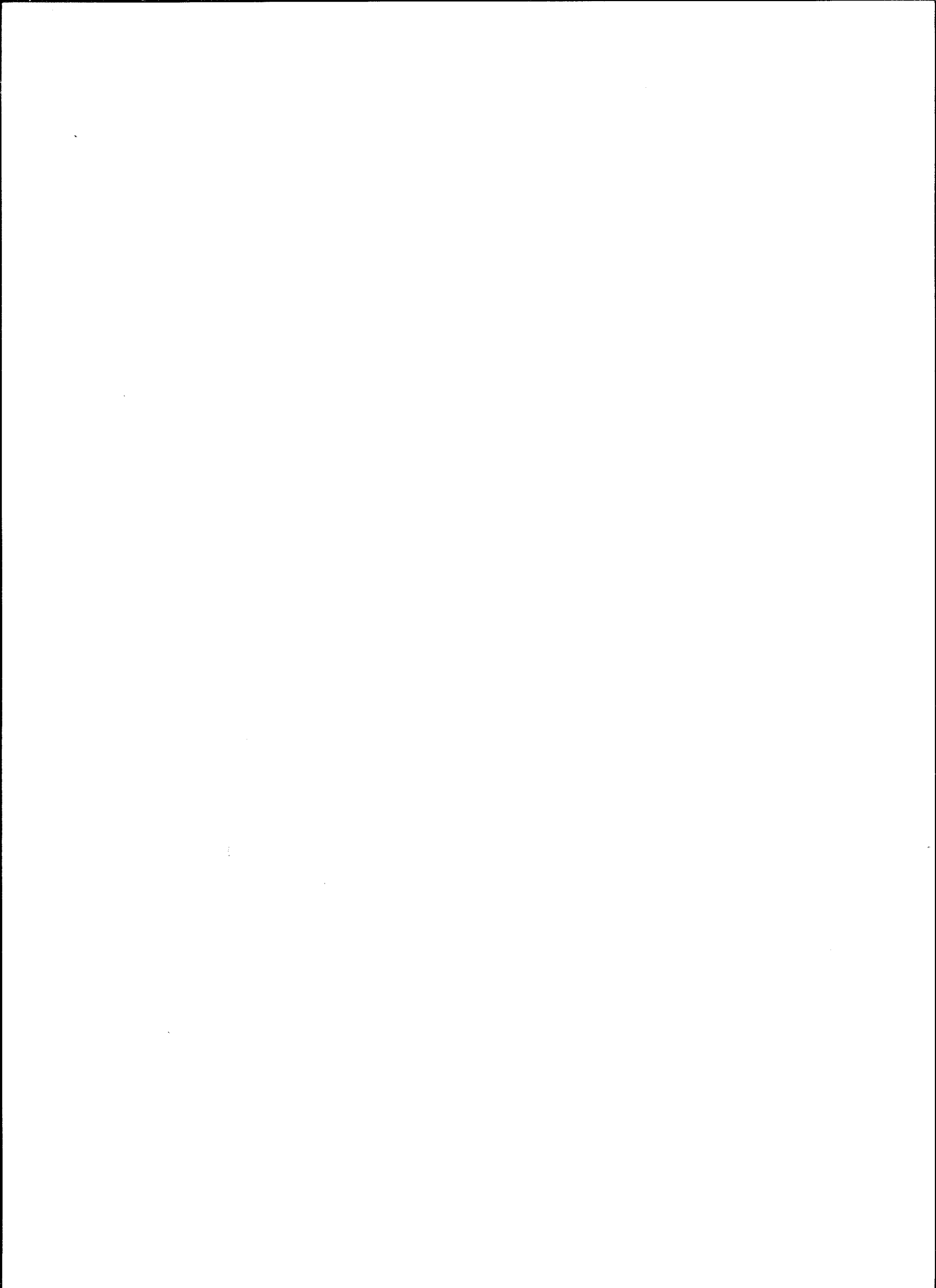
PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	No.
Plaintiff and Respondent,	)	
	)	Court of Appeal No. A125019
v.	)	
	)	Napa County Superior Court
HAROLD DANIEL SCHULTZ,	)	No. CR138779
Defendant and Appellant.	)	
_____	)	

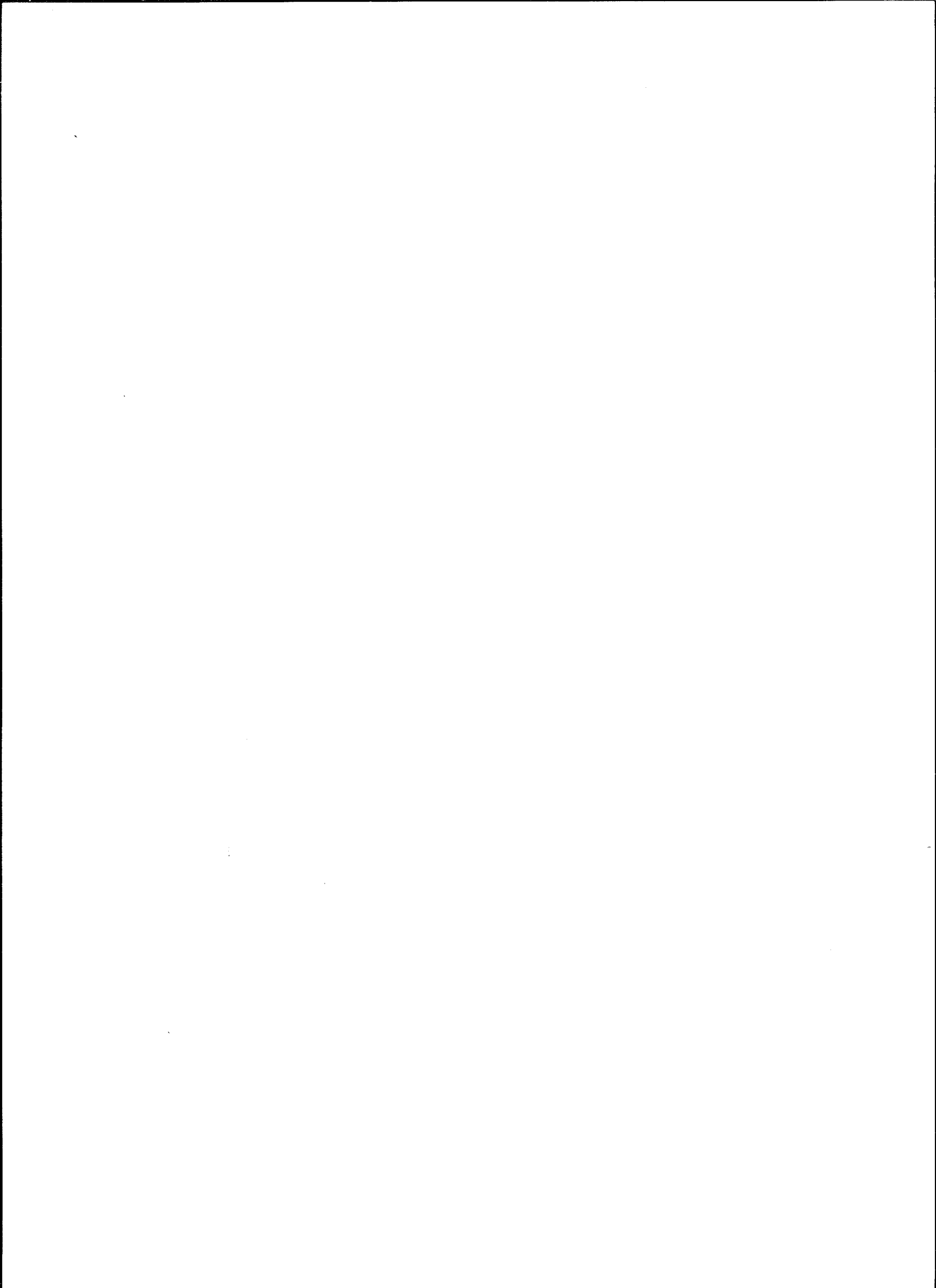
**PETITION FOR REVIEW OF DECISION  
OF THE COURT OF APPEAL, FIRST  
APPELLATE DISTRICT, DIVISION ONE**

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Case System







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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	No.
Plaintiff and Respondent,	)	
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v.	)	
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HAROLD DANIEL SCHULTZ,	)	No. CR138779
Defendant and Appellant.	)	
_____	)	

**PETITION FOR REVIEW**

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

Petitioner and appellant, Harold Daniel Schultz, respectfully petitions for review of the decision of the First District Court of Appeal, Division One, filed on July 30, 2010, on grounds that review by this Court is necessary to ensure uniformity of opinion in the courts on the issue of whether a defendant may be convicted of a violation of Penal Code section 484b /1, diversion of construction funds, where the evidence does not show that he diverted funds from one client's project to another's.

1/ All non-specified statutory references herein are to the Penal Code.



## ISSUE PRESENTED

**MAY A DEFENDANT BE CONVICTED OF  
A VIOLATION OF PENAL CODE SECTION  
484B, DIVERSION OF CONSTRUCTION FUNDS,  
WHERE THE EVIDENCE DOES NOT SHOW  
THAT HE DIVERTED FUNDS FROM ONE  
CLIENT'S PROJECT TO ANOTHER'S?**

## STATEMENT OF THE CASE

Petitioner seeks review of the decision of the Court of Appeal filed on July 30, 2010 (see Appendix "A"), affirming his conviction by the Napa County Superior Court of one count of violating section 484b, diversion of construction funds.

### Trial Court Proceedings

On September 24, 2008, the Napa County District Attorney filed an information charging appellant with count one, a felony violation of section 368, subd. (d), theft from an elder; count two, a felony violation of section 487, subd. (a), grand theft; count three, a felony violation of section 484b, diversion of construction funds; and count four, a misdemeanor violation of Business and Professions Code section 7159.5, subd. (a) (3), charging an excessive down payment.

Following presentation of the prosecution case in a court trial, the trial court, on March 23, 2009, granted petitioner's motion to dismiss counts one and two, pursuant to section 1118. On March 24, 2009, the court found petitioner guilty of counts three and four.

Appellant filed a premature notice of appeal on May 21, 2009.

On June 4, 2009, the trial court sentenced appellant to three years of formal probation, with the conditions including that he serve 30 days in the county jail and pay restitution to the victim in the amount of \$40,320.00.

#### Court of Appeal Proceedings

In its decision issued on July 30, 2010, the First District Court of Appeal, Division One, noted precedent that the legislative purpose behind section 484b was "to prevent any possibility of homeowner harm resulting from the diversion of construction funds. The statute should be read as preventing the use of one construction project's funds for another project on the grounds that such use leaves open the possibility of harm to the homeowner if the business is short on cash and unable to complete the job at a later date." (Citing People v. Worrell (1980) 107 Cal.App.3d 50, 55.) "The statute thus prevents a contractor from finishing old jobs with new money ..." (Id. at p. 56; see also People v. Wooten (1996) 44 Cal.App.4th 1834, 1847 [section 484b criminalizes the diversion of construction funds from one project to another".])" (Slip Op., at pp 3-4.)

The Court of Appeal held, however, that “it is equally clear from the case law that criminal diversion includes simply pocketing money received for a project without providing the services or materials for which the payment was made, as could be found to have occurred here.” (Slip Op., at p. 4.)

No petition for rehearing was filed.

### ARGUMENT

“All authorities agree that the major consideration in interpreting a criminal statute is the legislative purpose. Hence the court will usually inquire into the evils which prompted its enactment and the method of elimination or control which the Legislature chose.” (Witkin & Epstein, California Criminal Law, “Introduction to Crimes,” section 18, p. 41, and cases cited therein.) “In the construction of a statute the first cardinal rule is to ascertain, if possible, the intent of the legislature.” (In re Application of Davis (1936) 18 Cal.App.2d 291, 293.)

Section 484b states, “Any person who received money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully fails to apply such money for such purpose by either willfully failing to complete the improvements for which funds were provided or willfully failing to pay for such services, labor, materials or equipment provided incident to such construction, *and willfully diverts the funds to a use other than that for which the funds were received*, shall be guilty of a public offense ...” (Section 484b; emphasis added.)

The Court of Appeal, like the trial court, read section 484b to mean that ceasing work on a construction project without good cause, and pocketing money advanced by the client for that project, is criminal conduct. This decision ran counter to well-established precedent holding that section 484b is meant to apply only to situations in which a contractor diverts one client's funds to another client's project.

This Court clearly stated, in the first case in which section 484b was subjected to appellate review, that the Legislature's purpose in enacting it "was to punish for fraudulent conversion and not for failure to comply with contractual obligation." (People v. Howard (1969) 70 Cal.2d 618, 623.) In its decision, the court below noted that Howard was a case in which "the defendant 'and an associate had a practice of anticipating expected profits and of paying themselves commission and 'supervision' fees, thus stripping their venture of funds to complete the projects.'" (Slip Op., at p. 4, citing People v. Howard, *supra*, 70 Cal.2d at 621.) However, besides disregarding this Court's analysis of the Legislature's intent in enacting section 484b, the court below minimized the fact that the Howard defendants commingled their clients' funds. (Ibid., at p. 402.) It is the commingling of funds that the Legislature intended to punish with this specific statute, not the type of general theft punished by other laws.

Similarly, the Court of Appeal cites People v. Butcher (1986) 185

Cal.App.3d 929, 938, in support of its affirmance, even though, as the court concedes, “the defendant used the proceeds of a progress payment *to cover expenses on another project* and to purchase a Porsche.” (Slip Op., at p. 4.) A defendant charged under section 484b may incidentally use client funds for his own benefit, but this does not alter the principal recognized in all of the case law that the thrust of the statute is to prevent commingling of funds between projects. Butcher does not indicate that purchase of the car, by itself, would have been a violation of section 484b, rather than of section 487, grand theft, which specifically addresses theft of a large sum of money.

The same point must be made about the final case cited by the Court of Appeal, People v. Thompson (1995) 36 Cal.App.4th 843, where the defendant had used client funds for personal purposes, but also had diverted funds to other construction projects. (Ibid., at p. 852.) The issue of whether diversion to personal use alone would support a conviction under section 484b simply was not raised.

Other cases support petitioner’s argument that his conduct, while possibly giving rise to civil litigation, was inappropriate for criminal prosecution.

In People v. Stark (1994) 26 Cal.App.4th 1179, two doctors contracted with the defendant to build a medical facility. They subsequently received calls from subcontractors and materialmen saying that they were not being paid. When the

doctors confronted the defendant, he “informed the doctors he had been experiencing financial difficulties on other jobs and some of the money from the medical building had been spent to defray costs incurred for those jobs.” (Ibid., at p. 1181.)

In People v. Worrell (1980) 107 Cal.App.3d 50, the defendant commingled funds from different clients in a single joint account, from which he drew money for both the victims’ project and others. (Ibid., at p. 53.) As in the other cases on section 484b, the court held that the statute “should be read as preventing the use of one construction project’s funds for another project on the grounds that such use leaves open the possibility of harm to the homeowner if the business is short on cash and unable to complete the job at a later date.” (Ibid., at p. 55.)

People v. Wooten (1996) 44 Cal.App.4th 1834, is particularly instructive, as the defendants, contractors who used their clients’ money for personal aggrandizement, but did *not* apply the funds to other clients’ projects, were convicted of grand theft under section 487, but not of violating section 484b. (Ibid., at p. 1839.) In conformity with the other courts that have analyzed section 484b, the Wooten court stated that the statute “criminalizes the diversion of construction funds *from one project to another.*” (Ibid., at p. 1847; emphasis added.)

The Legislature has distinguished between those disputes over money or

property that may be prosecuted under the criminal law, and those which give rise only to civil liability. Section 511, for example, states, "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title proffered in good faith, even though such claim is untenable."

Petitioner herein took funds from his client; they had a dispute over the quality of his work; he refused to continue on the job or to return the money. (See Slip Op., at p. 2.) This is the stuff of lawsuits. The client instead took the dispute to the District Attorney, who decided to prosecute petitioner under section 484b even though there was absolutely no evidence that petitioner had other projects to which he might have applied the client's funds . If section 484b may be held to support such a prosecution, it gives a sympathetic party in a dispute with a contractor an inordinately powerful tool for obtaining redress without the expense of civil litigation. Petitioner respectfully asks this Court to decide whether the Legislature contemplated such use of section 484b.

## CONCLUSION

The Court of Appeal's affirmance of petitioner's conviction under section 484b should be reversed.

For this reason, petitioner prays that:

1. Review be granted by this Court; and,
2. This Court grant such other and further relief as it deems just.

DATED: September 4, 2010

Respectfully submitted,



Frank H. Free  
Attorney for Petitioner and Appellant  
Harold Daniel Schultz

## CERTIFICATION OF WORD COUNT

I, Frank H. Free, attorney for petitioner and appellant Harold Daniel Schultz, certify under penalty of perjury that, according to the computer program on which it was produced, this brief contains approximately 1,870 words.

Executed this 4<sup>th</sup> day of September, 2010, at Oakland, California.



Frank H. Free



## APPENDIX "A"

Filed 7/30/10

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

FILED  
COURT OF APPEAL FIRST APPELLATE DISTRICT

DIVISION ONE

JUL 30 2010

DIANA HERBERT, CLERK  
DEPUTY CLERK

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
HAROLD DANIEL SCHULTZ,  
Defendant and Appellant.

A125019

(Napa County  
Super. Ct. No. CR138779)

Defendant Harold Daniel Schultz contracted with a homeowner to remodel a kitchen and a bathroom, and add a room to the house. Defendant left the project uncompleted after receiving significant payments from the homeowner. After a court trial he was convicted of diversion of construction funds (Pen. Code, § 484b)<sup>1</sup> and receiving an excessive down payment (Bus. & Prof. Code, § 7159.5, subd. (a)(3)). Imposition of sentence was suspended. Defendant was granted probation and ordered to pay \$40,320 in restitution to the victim.

Defendant argues that he was erroneously convicted of diverting construction funds because no evidence was presented that he diverted money received under the contract to another project, which he contends is a requirement of Penal code section 484b. This argument lacks merit and we affirm the judgment.

<sup>1</sup> Unless otherwise indicated, subsequent statutory references are to the Penal Code.

## I. BACKGROUND

Defendant entered into a contract with Luella Petree in December 2005 under which she was to pay him \$45,000 for the improvements to her home. The contract provided for payment of \$10,000 upon execution, and four bi-weekly installment payments of \$8,750 beginning on January 13, 2006. Ms. Petree made the \$10,000 down payment, and installment payments of \$8,750 by checks dated January 20 and January 31, 2006, giving defendant \$27,500 of the \$45,000 due under the contract. Petree testified that when defendant asked for another payment after finishing work on March 11, 2006, she refused and asked him to meet the next day with her and her family. She "felt we needed to get things straight as to why I kept paying him and nothing was getting done." Defendant said, "No, we're not going to have a meeting. You violated the contract. I'll see you in court." Defendant was "very angry when he left" the home, and did no further work on the project.

Petree reported the matter to the Contractor's State Licensing Board (CSLB). CSLB investigator Robin Caton, citing the threat to defendant's license and the potential for criminal prosecution, repeatedly asked defendant to submit receipts for his expenditures on the project, but he provided no documentation. CSLB industry expert David Jackness examined defendant's work and deemed it of "not a very high quality"; Napa Building Inspector Dan Kavarian testified that the work was not up to industry standards. Dennis Dunne, the contractor Petree originally hired for the project, also described defendant's work as "substandard." Dunne performed some excavation work before withdrawing from the project and refunding the money Petree had paid him. Dunne placed the value of the labor and materials defendant furnished to Petree at between \$4,000 and \$5,000. Petree's daughter testified that a motion activated security camera on the premises recorded defendant's arrivals and departures, and the tape showed that defendant spent 55 hours on the project.

Defendant testified that he spent seven or eight 30- to 40-hour weeks working on the project, and that he had no other projects going at the time. He had lost the daily log where he recorded his hours. Four and one-half to five of the weeks were spent doing

termite work, which he performed pursuant to a verbal agreement with Petree. He did not mention the termite work to the CSLB because they did not ask him about it. He furnished over \$4,000 worth of materials to the project, and he attempted many times to contact Caton to give her receipts for the materials, but Caton “was impossible to nail down.”

The prosecutor argued in closing that “[t]he job was left incomplete as a result of his leaving the site in the manner that he did and he kept the money thus diverting it to his own use.”

## II. DISCUSSION

Section 484b provides in pertinent part: “Any person who receives money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully fails to apply such money for such purpose by either willfully failing to complete the improvements for which funds were provided or willfully failing to pay for services, labor, materials or equipment provided incident to such construction, and wrongfully diverts the funds to a use other than that for which the funds were received, shall be guilty of a public offense . . . .”

Defendant contends that wrongful diversion of funds within the meaning of the statute is limited to situations where the defendant has diverted construction funds from one project to another. If that were true, then defendant should have been acquitted of the section 484b charge because no such diversion occurred here—he did not have any other projects when he was working for Petree and taking her money.

Precedent establishes that the type of diversion defendant describes is indeed criminal under the statute. Section 484b’s “legislative purpose . . . is to prevent any possibility of homeowner harm resulting from the diversion of construction funds. The statute should be read as preventing the use of one construction project’s funds for another project on the grounds that such use leaves open the possibility of harm to the homeowner if the business is short on cash and unable to complete the job at a later date.” (*People v. Worrell* (1980) 107 Cal.App.3d 50, 55.) “The statute thus prevents a contractor from finishing old jobs with new money . . . .” (*Id.* at p. 56; see also *People v.*

*Wooten* (1996) 44 Cal.App.4th 1834, 1847 [“section 484b criminalizes the diversion of construction funds from one project to another”].)

But it is equally clear from the case law that criminal diversion includes simply pocketing money received for a project without providing the services or materials for which the payment was made, as could be found to have occurred here.

*People v. Howard* (1969) 70 Cal.2d 618, 621 (*Howard*), for example, affirmed a conviction under section 484b where the defendant “and an associate had a practice of anticipating expected profits and of paying themselves commissions and ‘supervision’ fees, thus stripping their venture of funds to complete the projects.”

In *People v. Butcher* (1986) 185 Cal.App.3d 929 (*Butcher*), the defendant used the proceeds of a progress payment to cover expenses on another project and to purchase a Porsche. The court held that a contractor is entitled to payment for “bona fide costs of the project.” (*Id.* at p. 938.) If the contractor has earned a progress payment by providing services and materials to the project, and can thus “lawfully recoup” the amount of the payment, then “he may use the recoupment as he likes, i.e., to purchase a Porsche or to fund another construction project.” (*Ibid.*) Conversely, if the payment has not been earned, then the contractor would presumably be guilty of conversion whether the proceeds are used for a Porsche or for another project.

Our point is also apparent from the discussion in *People v. Thompson* (1995) 36 Cal.App.4th 843. There, the prosecution presented three distinct theories of diversion, that the defendant had: (1) diverted funds to other projects; (2) accepted payment for a fixture he did not purchase; and (3) taken money for personal use. The defendant offered different defenses to each theory, including, as to the third theory, that “he was entitled to his personal draws.” (*Id.* at p. 852.) Under these circumstances, the defendant was entitled to a unanimity instruction to insure that the jury agreed on which criminal diversion had occurred. (*Id.* at pp. 845–846.) The court’s analysis establishes that diversions of project funds for personal use, as well as diversions for use on other projects, violate the statute.

The limitation on section 484b that defendant proposes is not supported by either the language or the rationale of the statute. The statute broadly prohibits diversion for “a use other than that for which the funds were received,” not any specific use such as the one defendant identifies. “The interest section 484b seeks to protect is the economic security provided by a direct transmutation of construction funds into project assets.” (*Butcher, supra*, 185 Cal.App.3d at p. 938.) The statute must be read to prohibit any diversion “to a use other than bona fide project costs.” (*Ibid.*) Whether that diversion is to buy a Porche or fund another project is immaterial from the standpoint of the victim. In either case, the defendant has failed to use the entrusted funds for their intended purpose, and committed a “fraudulent conversion” the statute was enacted to punish. (*Howard, supra*, 70 Cal.2d at p. 623.)

### III. CONCLUSION

The order for probation is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

---

Dondero, J.

*People v. Schultz, A125019*

PROOF OF SERVICE

I am an active member of the State Bar of California. My business address is 160 Franklin Street, Suite 207, Oakland, California 94607. On September 4, 2010, I served copies of the attached "Petition for Review" on the following, by placing a true copy thereof, with postage prepaid, in the United States Mail, at Oakland, California, addressed as follows:

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ATTN: Hon. Diane M. Price  
825 Brown Street  
Napa, CA 94559

Harold Daniel Schultz  
5861 17<sup>th</sup> Avenue  
Sacramento, CA 95820

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 4<sup>th</sup> day of September, 2010, at Oakland, California.

DATED: September 4, 2010

  
FRANK H. FREE



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION ONE**

PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	
	)	Court of Appeal
v.	)	No. A125019
	)	
HAROLD DANIEL SCHULTZ,	)	Napa County Superior Court
Defendant and Appellant.	)	No. CR138779
_____	)	

**APPELLANT'S REPLY BRIEF**

Appeal from the Judgment of the Napa County  
Superior Court, the Honorable Diane M. Price, Presiding

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<u>People v. Wooten</u> (1996) 44 Cal.App.4th 1834	3
<u>People v. Worrell</u> (1980) 107 Cal.App.4th 50	3

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION ONE**

PEOPLE OF THE STATE	)	
OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	
	)	
v.	)	Court of Appeal
	)	No. A125019
	)	
HAROLD DANIEL SCHULTZ,	)	Napa County Superior Court
Defendant and Appellant.	)	No. CR138779
_____	)	

**APPELLANT’S REPLY BRIEF**

Respondent asserts that the language of Penal Code section 484b /1, which prohibits diversion of construction funds, is “plain and unambiguous,” and that a reviewing court need look no further in determining the Legislative purpose. (Respondent’s Brief, at p. 13.) The statutory language is plain and unambiguous that a contractor must have *diverted* the funds to another use; as the case law makes abundantly clear, section 484b is not violated if the contractor fails to meet a contractual obligation by quitting a job and keeping moneys paid. For that conduct, a civil lawsuit is the appropriate remedy.

1/ All statutory references are to the Penal Code.

Respondent cites People v. Stark (1994) 26 Cal.App.4th 1179, 1182, for the proposition that “[t]here is no requirement in section 484b that the accused divert the funds for use on another project.” (Respondent’s Brief, at p. 12.) Stark actually epitomizes the problem that the Legislature sought to combat. Two doctors contracted with the defendant to build a medical facility. They subsequently received calls from subcontractors and materialmen saying that they were not being paid. When the doctors confronted the defendant, he “informed the doctors he had been experiencing financial difficulties on other jobs and some of the money from the medical building had been spent to defray costs incurred for those jobs.” (Ibid., at p. 1181.)

People v. Thompson (1995) 36 Cal.App.4th 843, cited by respondent (at p. 12), also supports the view that the diversion must be from one project to others, rather than to the defendant’s personal use. A couple contracted with the defendant to build a house. It subsequently turned out that the defendant had used funds provided by them to pay laborers on other projects. (Ibid., at pp. 848.) His conviction was reversed because the trial court failed to give a unanimity instruction. (Ibid., at pp. 803-804.) There is nothing in the decision to suggest that simply keeping money for himself would make a contractor criminally, rather than civilly, liable. To the extent that respondent reads the case otherwise (Respondent’s Brief, at p. 13), respondent is wrong.

Similarly, in People v. Worrell (1980) 107 Cal.App.3d 50), defendant contracted to build a home. Defendant deposited funds received from the victims into a joint account, from which he drew money for both the victim's project and others. (Ibid., at p. 53.) As pointed out in appellant's Opening Brief (at p. 6), the reviewing court found that section 484b "should be read as preventing the use of one construction project's funds for another project on the grounds that such use leaves open the possibility of harm to the homeowner if the business is short on cash and unable to complete the job at a later date." (Ibid., at p. 55.)

People v. Wooten (1996) 44 Cal.App.4th 1834, quoted in Appellant's Opening Brief (at p. 6) for the proposition that "Penal Code section 484b criminalizes the diversion of construction funds *from one project to another*" (Ibid., at p. 1847; emphasis added), is instructive in that the defendants, who took money from their victims but were not accused of using it on other projects, were convicted under section 487, grand theft, and not under section 484b. (Ibid., at p. 1839.)

Finally, in the seminal case of People v. Howard (1969) 70 Cal.2d 618, the defendant contracted to perform several home improvement jobs, obtained down payments and progress payments from the various victims, and commingled the money. (Ibid., at p. 402.) In upholding section 484b's constitutionality against an attack that it created an "imprisonment for debt," the Court held that the

Legislative purpose was not, as the defendant maintained, to impose a criminal penalty for failure to comply with a contractual obligation; it was, rather, “to punish for a fraudulent conversion.” (Ibid., at p. 623.) Appellant herein arguably failed to comply with a contractual obligation when he walked off the job; there is no evidence in the record that he also used funds provided by Ms. Petree on other projects. He therefore did not violate section 484b, and his conviction under that statute must be reversed.

#### CONCLUSION

For the reasons set forth herein and in his Opening Brief, appellant’s conviction under section 484b, diversion of construction funds, must be reversed.

DATED: June 3, 2010

Respectfully submitted,

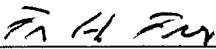


Frank H. Free  
Attorney for Appellant Harold  
Daniel Schultz

**CERTIFICATION OF WORD COUNT**

I, Frank H. Free, attorney for appellant Harold Daniel Schultz, declare under penalty of perjury that, according to the computer program on which it was produced, this brief contains approximately 900 words.

Executed this 3<sup>rd</sup> day of June, 2010, at Oakland, California,

  
\_\_\_\_\_  
Frank H. Free

PROOF OF SERVICE

I am an active member of the State Bar of California. My business address is 160 Franklin Street, Suite 207, Oakland, California 94607. On June 3, 2010, I served copies of the attached "Appellant's Reply Brief" on the following, by placing a true copy thereof, with postage prepaid, in the United States Mail, at Oakland, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 3<sup>rd</sup> day of June, at Oakland, California.

DATED: June 3, 2010

  
\_\_\_\_\_  
FRANK H. FREE



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

Plaintiff and Respondent,

v.

**HAROLD DANIEL SCHULTZ,**

Defendant and Appellant.

Case No. A125019

Napa County Superior Court, Case No. CR138779  
The Honorable Diane M. Price, Judge

**RESPONDENT'S BRIEF**

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## STATEMENT OF THE CASE

An information filed September 24, 2008 in the Napa County Superior Court charged appellant Harold Schultz with one count each of theft, embezzlement, forgery or fraud from an elder (Pen. Code § 368, subd. (d)<sup>1</sup> – Count 1), grand theft of personal property (§ 487, subd. (a) – Count 2), diversion of construction funds (§ 484b – Count 3), and charging or receiving an excessive down payment (Bus. & Prof. Code § 7159.5, subd. (a)(3) – Count 4). (CT 35-36.)

Following a court trial, on March 24, 2009, appellant was convicted of diversion of construction funds (Count 3) and charging or receiving an excessive down payment (Count 4). (CT 64.) The court had earlier dismissed Counts 1 and 2 pursuant to section 1118. (CT 63.)

Appellant filed his notice of appeal on May 21, 2009. (CT 73.) On June 4, 2009, the trial court suspended imposition of sentence and placed appellant on probation for three years. (ACT 2-3.)

## STATEMENT OF FACTS

Seventy-nine-year-old Luella Petree lived at 191 Chelsea Avenue in Napa with her daughter Robin Simmons and Ray Wetterlaund. (19RT 913, 998, 1022.) In 2005, Petree entered into a contract with Dennis Dunne, a general contractor and owner of Dunne-Right Remodeling, to add a room to Petree's house and to remodel the kitchen and bathroom. (19RT 1046.) Dunne was going to do the job for \$31,000 and his bid included a schedule of progress payments, a normal business practice for contractors. (19RT 1046; ACT 10.) Each payment was tied to the completion of a particular piece of work. (19RT 1046-1047.) He obtained the necessary permits and he would pay for the expenses until the progress payments were made.

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<sup>1</sup> Unless otherwise specified, all further section references are to the Penal Code.

(19RT 1047.) Pursuant to the contract and the law, Petree paid Dunne a deposit of \$1,000 at the time of the signing of the contract, the maximum allowed. (19RT 1047-1048; ACT 10.)

Dunne excavated the footings for the addition but he was very busy. (19RT 914, 1047.) Appellant, a relative of Petree's, is married to Petree's son-in-law's sister, approached Petree and asked if he could do the remodel. (19RT 914, 963.) Even though he had excavated the footings, Dunne agreed to refund Petree the \$1,000 deposit. (19RT 1047-1048.) Petree and appellant agreed to cut down the remodel plan and instead of redoing the entire kitchen, it was decided to only remodel half of the length of the kitchen. (19RT 914, 999.)

Petree signed a contract with appellant on December 15, 2005. (19RT 917, ACT 1.) Appellant asked for, and received a down payment of \$10,000 for the project. (19RT 917, ACT 1.) The contract price for the entire project was \$45,000. In addition to the \$10,000 deposit, the contract with appellant specified four bi-weekly payments of \$8,750 each on January 13, 2006, January 27, 2006, February 10, 2006, and February 24, 2006. (ACT 1.) The contract specified a start date of January 3, 2006, and a completion date of February 28, 2006. (ACT 1.) The completion date was important to Petree because she had to take everything out of the kitchen and had to cook in the living room. (19RT 942.)

In the first month of work following the signing of the contract, appellant managed to build some forms and pour some cement. (19RT 918.) While the contract called for the job to be finished by February 28, 2006, Petree knew the winter weather may have slowed things down and was patient with appellant. (19RT 962.) However, she became concerned when March arrived and nothing had been done. (19RT 962.) Her house was a mess and everything in her kitchen was now stored in the living room. (19RT 963.) Appellant never showed Petree any permits for the

work. (19RT 918.) Appellant did not buy or install a pocket door for the kitchen. (19RT 919.) Appellant never purchased or installed any of the cabinetry or countertops. (19RT 919.) Appellant told Petree that he was going to replace the kitchen sink and stove and she purchased them with her own money for him to install. Appellant never installed either item. (19RT 920.) Appellant also did not install a stack washer and dryer. (19RT 920.) Appellant was also going to install a tub and he opened the bathroom wall and placed a tub there. However, Petree's son-in-law discovered that appellant had not replaced the old pipes to the tub and asked appellant to take the tub out while he installed new pipes. (19RT 921.) Petree purchased all the materials for the project and appellant did not use any of the money given him for materials. (19RT 921.) Appellant also did not remove any of the construction debris from the building site. (19RT 922.)

Appellant asked Petree for each of the \$8,750 bi-weekly payments. (19RT 922; ACT 13.) Petree paid appellant each of the payments. (19RT 923, 961.) The only work that was done between the signing of the contract and the first payment was the pouring of the forms off Petree's back door. (19RT 923.) By the time Petree gave appellant the second check, appellant had only performed what he described as some dry rot work. (19RT 924.) Appellant also did demolition work, removing ceramic tile from the walls and floor and leaving them in the backyard. (19RT 926.)

On March 11, 2006, appellant came to the property with another man and put the bathtub in. (19RT 927.) However, Petree's son-in-law told appellant to remove it so some new pipes could be installed. (19RT 927.) At 10:15 p.m., as he prepared to leave, appellant came to the house and demanded another check. (19RT 928.) Petree had written a check out for appellant but the property was still a big mess. (19RT 928.) Petree was very dissatisfied with the work and said she would not give him the check

until they had a meeting. (19RT 929.) She felt that they needed to find out why she kept paying him but nothing was getting done. (19RT 929.) She therefore asked appellant for a meeting with her and Robin Simmons and Ray Wetterlaund. (19RT 929-930.) She asked appellant if he could return the next day for the meeting. Appellant became angry and said, "No, we're not going to have a meeting. You violated the contract. I'll see you in court." (19RT 930-931.)

Appellant's reaction to Petree's request for a meeting made her very uncomfortable. (19RT 931.) Appellant had a key to the house and knew where Petree had hidden another key on the property. (19RT 931.) Petree was afraid of appellant and she went outside and retrieved the other key. (19RT 931.) Robin Simmons reviewed the security cameras she had installed on her mother's property to track appellant's movements. (19RT 1002.) The cameras revealed that appellant had only worked sporadically on the project. (ACT 40-41.)

Despite appellant's threat that he would see Petree in court, she never received any formal notice of cancellation of the contract. (19RT 932-933.) Appellant did call Petree numerous times. Petree was scared to pick up the phone and recorded them instead. (19RT 933.) Appellant was very angry on the phone. (19RT 965.) On March 12, 2006, after she received these calls from appellant, Petree sent a letter to appellant in which she expressed dismay at appellant walking out on her. She stated that she only wanted to have a meeting and was not going to refuse to pay him. (ACT 12.) Petree stated that she was not happy with how the project has progressed. She had given appellant \$27,500 and appellant has not given her any receipts and not made much progress on the job. (ACT 12.) The contract stated that the job would be substantially completed by February 28, 2006 but instead, all Petree had was a subfloor and a half-finished bathroom where she cannot even take a shower. The bathtub was far from being completed in a

professional manner and there was not even a drain for the tub. "I am feeling unsure of your workmanship. Please contact me so we can resolve this." (ACT 12.)

When Petree gave appellant the checks, she trusted appellant to remodel her kitchen and to do the build-on. (19RT 935.) Instead, appellant had torn the back door off its track, making it difficult for Petree to get through. However, he did nail the subfloor on. (19RT 936.) Petree could only do some patch-up work but was unable to finish any of the work or to repair damage done by appellant because she no longer had any money left. (19RT 940.)

Robin Caton, an investigator for the Contractors State Licensing Board, took the complaint regarding Petree's property. (19RT 968.) Caton first inspected the Petree property. (19RT 971.) He observed that there had been no work done in the kitchen; there was a small framing that had been done for the addition and just a little bit of work in the bathroom. There was a great deal of work left undone. (19RT 972.) He then interviewed both Petree and appellant in September, 2006. (19RT 970.) Caton was concerned about the amount of money Petree had spent and how little work had actually been done. (19RT 971.) He informed appellant that it appeared as if he received too much money and asked him for receipts since it looked as if he had not done much work. (19RT 971.) Appellant became very defensive and Caton asked appellant to provide him with an accounting of the expenses he had incurred. (19RT 971-972.) Appellant never provided Caton with an accounting even though Caton called him a couple of times and warned appellant that he was going to take administrative action against his license as well as pursue criminal action for receiving money and not doing work. (19RT 972.)

Caton also reviewed the contract between Petree and appellant. The \$10,000 down payment far exceeded the amount permitted by law. (19RT



973.) The maximum down payment allowed by law in this case would have been \$460. (19RT 976.) Moreover the payment schedule required payment every two weeks regardless of whether any work had been done. (19RT 973.) Contractors are supposed to pay for their materials so that the homeowner does not have a lien put on their home. (19RT 975.) Petree was also never informed about how much money had been paid for materials or where any of the money she had paid went. (19RT 976.)

Dan Kavarian, Senior Building Inspector for the City of Napa, testified that there were two building permits on file for the Petree property, both listing the contractor as Dunne-Right Remodeling. (19RT 981-982.) There was no record of a change in contractors for the remodeling. (19RT 983.) It is the responsibility of the contractor to update the permit records when the contractor changes. (19RT 984.) When Kavarian inspected the property, there were no walls or roof to inspect. There was a wood deck that had been built with the floor framing and the insulation and the plywood had already been put together without any inspections. (19RT 986.) The building inspectors should have been called out for the underfloor inspection. (19RT 986.) The subfloor had been laid without inspection of the underfloor. (19RT 988.) Kavarian looked under the floor joists when he came to the property and described the workmanship as not up to industry standards. (19RT 989, 991-992.) In fact, he had never in his experience inspected floor joists and subflooring of this quality. (19RT 989.)

Ray Wetterlaund, who lived on Petree's property and who worked in pumping and plumbing, testified that appellant asked him to pump out the water from the foundation before he poured the concrete because it was filling up with water. (19RT 1023.) Appellant did not pay Wetterlaund to do this nor did he retain Wetterlaund as a subcontractor. (19RT 1023.) Wetterlaund also purchased copper pipes and a new faucet and drain for

appellant to install in the bathroom. (19RT 1024.) Appellant did not reimburse Wetterlaund for the material nor did he pay Wetterlaund for the time he spent in procuring the items. (19RT 1024.) After appellant abandoned the project, Wetterlaund had to screw the shower enclosure to the walls of the house. There was no siding on the house and no sheetrock around the shower. (19RT 1025.) Appellant had torn out the plaster walls to install the shower. The shower was unusable. (19RT 1025.) There were also large amounts of debris all over the yard. (19RT 1026.) Appellant had old carpeting covering the entire backyard that had to be hauled away as well as a lot of scrap wood, tile, and plaster. (19RT 1026.)

David Jackness, an investigator for the Contractors State Licensing Board, inspected the Petree property in August, 2006. (19RT 1029-1030.) He estimated that it took less than an hour to remove the siding and trim for the project. (19RT 1031.) The remodel had no visible foundation vents and the floor was pieced together using larger sheets and small strips. (19RT 1031.) The platform subfloor felt very spongy. (19RT 1032.) Jackness's inspection of the bathroom uncovered ceramic tile missing from the floor; a window that was removed and covered up with oriented strand board; a bathtub that did not have overflow and drain connections. (19RT 1032-1033.) After examining the entire project at the site, Jackness was of the opinion that what work that was done was of poor quality. (19RT 1035.) He estimated the foundation work for construction of the floor in the backyard to be between \$900 and \$1,350. Some of that work had been done by Dennis Dunne earlier. (19RT 1037.) Jackness estimated the value of the work to complete the tub installation to be approximately \$650. (19RT 1037.) He testified that it would cost \$18,000 to do the kitchen project. (19RT 1037.)

The original contractor, Dennis Dunne, returned to the Petree property several times after appellant left. (19RT 1048.) He observed the void

between the tub and the tile flooring. There was about two inches of difference between the old floor and the new tub. (19RT 1048.) There was fungus left in the flooring; the mortar was wet and there was no paper underneath the mortar, which contributes to fungus and dry rot. (19RT 1049.) Dunne was opinion that the form board in the substructure pier should have been removed because it is conducive to fungus and termite infestation. (19RT 1049.) Dunne also found that foliage was growing up into the substructure. (19RT 1050.) The tub insert was not sitting on the ground and that could have contributed to the cracks in the tub. The insert is no longer usable. (19RT 1051.) Appellant removed flooring that is now infested with mold and dry rot. (19RT 1051.) The sliding door in the kitchen needed to be replaced. During the remodel, appellant should have removed, framed and water-proofed the sliding door. (19RT 1052.)

Dunne also observed that the 18-inch crawl space under the house was a mere 14 to 16 inches. (19RT 1053.) "It's substandard work. That's all I could say." (19RT 1053.) There was also no ventilation in the crawl space as required by the building code. (19RT 1055.) Appellant did not use any new lumber in the bathroom and kitchen addition. (19RT 1055.) He used salvaged lumber. (19RT 1055.)

When Dunne first entered into the contract with Petree, he had estimated it would cost \$31,000. (19RT 1056.) He opined that the value of the work by appellant in forming and pouring the footings was between \$2,500 to \$3,000, and about \$4,000 to \$5,000 for work on the bathroom, demolishing the wall, pulling out the bathtub, pulling out the tile, purchasing a new tub insert, new framing and framing the wall. (19RT 1056.)

**A. Defense Case**

Appellant testified that he asked Mrs. Petree if he could take over the home improvement job from another contractor in November, 2005. (20RT

1088.) The Petree home was in poor condition. (20RT 1089.) Appellant entered into a contract with Mrs. Petree on December 15, 2005. He claimed there was a page missing from the contract which related to the \$10,000 down payment. (20RT 1090-1091.) According to appellant the bank was threatening to take the \$20,000 back from Petree and she needed to have the project underwritten immediately because of the default in the loan. (20RT 1091.) There was language in the missing page that talked about time being of the essence. (20RT 1091.) Appellant interpreted the language in the contract that prohibited a down payment not to exceed \$1,000 or 10 percent of the contract price, whichever is less, to permit a down payment in excess of that amount if the parties agree to it. (20RT 1093-1094.)

Appellant began work on the remodeling project immediately upon signing the contract. (20RT 1094.) The size of the project had been cut in half and appellant spent 60 hours drafting a new set of plans for it. (20RT 1095-1097.) These new plans were approved by an architect right after the new year. (20RT 1097-1098.) Appellant no longer has the plans because he gave them to Mrs. Petree as ordered by the Contractors State License Board. (20RT 1098-1099.) After approval of the plans, appellant ordered the materials needed to form the concrete. (20RT 1101.) He then re-excavated the footings by himself. (20RT 1102.) He spent \$1,200 for the concrete. (20RT 1104.) Appellant estimated that he spent close to \$2,300 to \$3,000 for the costs associated with the foundation. (20RT 1106-1107.)

Appellant spent up to 80 hours working on the project from excavating the foundation to putting down the subfloor. (20RT 1112-1113.) He also spent a great deal of time dealing with the bad weather and removing water and mud from the project. (20RT 1113-1114.) After finishing the subfloor, appellant performed termite work at the site. (20RT 1114.) He had to jack up certain portions of the house, remove the kitchen

floor and replace it, repair a portion of the house near the garage, fix the back wall in the bathroom area. (20RT 1114-1117.) The termite work took four to five weeks to complete, working 40 hours a week. (20RT 1120.) It cost appellant \$300 in materials. (20RT 1120.)

Appellant also did a temporary hookup of the bathroom plumbing. (20RT 1119.) According to appellant in addition to these things he had done, he also built Petree a deck, handrail and steps to feed her cat. (20RT 1119.) That took about 10 hours of work and about \$125 worth of materials. (20RT 1119.) Appellant spent an additional day and a half removing and replacing the gutters and downspouts and it cost him \$175 in materials. (20RT 1121.) He also repaired the eaves on the house. (20RT 1121.) That took a little more than a day and cost \$25. (20RT 1122.) Finally, appellant claimed he installed a French drain for Mrs. Petree around the entire perimeter of the new foundation. (20RT 1123.) That took a few days and cost a few hundred dollars. (20RT 1123.)

Appellant estimated he worked seven to eight weeks on the job, working 30 to 40 hour weeks. He put in approximately \$4,000 worth of materials. (20RT 1124.) However, when appellant approached Petree for the next scheduled payment, Petree refused to pay up. (20RT 1124.) Appellant brought out the contract and reminded Petree of the scheduled payments. (20RT 1125.) Petree said, "I won't pay you." Instead, she wanted to have a meeting with her daughter and granddaughter. (20RT 1125.) Appellant thereafter filed a Stop Work Notice. (20RT 1125.) Petree responded in a letter that she was not happy with the progress of the work and did not know why appellant had left the job. She also stated that she did not say she was not going to pay him, only that she wanted to have a meeting. (20RT 1125.) Appellant attempted to reconcile with Petree and called her on numerous occasions. (20RT 1125.)

Appellant testified that his contract specified for payments to be made on certain dates and was not dependent on phases of work being completed. (20RT 1126.) Moreover, he had arranged with Petree to do the termite work that was outside the scope of the contract. (20RT 1127.) That agreement was never reduced to a writing or a contract. (20RT 1129.)

On cross-examination, appellant admitted that he never bothered to put the permit in his own name. (20RT 1132.) He claimed that he submitted a copy of the Stop Work Notice to his attorney and that he gave a copy to the Contractors State Licensing Board. (20RT 1133.) However, he never mentioned anything about termite work when interviewed by the State Contractors Licensing Board. (20RT 1133.) He never provided the investigator with any receipts. (20RT 1133.)

Appellant explained that he did not have a meeting with Petree and her family because they waited 40 days to let him know that they were unhappy with his work. They should have asked for a meeting much earlier. (20RT 1134.) He believed that Petree was breaching her contract. (20RT 1134.)

Appellant had been paid \$27,000 up to the point where he walked away. (20RT 1134.) The contract was for \$45,000. (20RT 1134.) Petree had written appellant three checks that he had already cashed. (20RT 1137.)

## **ARGUMENT**

### **I. APPELLANT WAS PROPERLY CONVICTED OF VIOLATING PENAL CODE SECTION 484b**

Appellant contends that he cannot be convicted of violating section 484b because that statute was not intended to apply to his situation where there is no evidence that he diverted any funds from the Petree project to another project. There is no merit to appellant's claim.

Section 484b provides, in pertinent part:

Any person who receives money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully fails to apply such money for such purpose by either willfully failing to complete the improvements for which funds were provided or willfully failing to pay for services, labor, materials or equipment provided incident to such construction, and wrongfully diverts the funds to a use other than that for which the funds were received, shall be guilty of a public offense . . . .

Section 484b was enacted in 1965. It appears to be directed generally at persons in the construction and building improvement field who fail to use construction funds for the payment of laborers and materialmen on the project. (*People v. Howard* (1969) 70 Cal.2d 618, 620-621.)

The crime of diversion of construction funds is committed by receiving money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully failing to apply such money for those purposes either by failing to complete improvements for which the funds were provided or by willfully failing to pay for the services, labor, materials or equipment incident to the construction, and wrongfully diverting the funds to another use than for which they were provided.

(*People v. Thompson* (1995) 36 Cal.App.4th 843, 851.)

There is no requirement in section 484b that the accused divert the funds for use on another project. "The only 'act' described by Penal Code section 484b is the wrongful diversion, i.e., 'a diversion to a use other than bona fide project costs' [citation], of funds accepted for one or more of the specific purposes set forth in Penal Code section 484b. Nothing in section 484b suggests that when the defendant wrongfully diverts the funds that he intend to do a further act or to achieve a future consequence." (*People v. Stark* (1994) 26 Cal.App.4th 1179, 1182.)

To violate the statute all that is required is the wrongful diversion of the funds, which means not applying the funds for the purpose for which they were disbursed, and that the diversion be the cause of at least one of the described failures.

(*Id.* at pp. 1183-1184.)

In *People v. Howard, supra*, 70 Cal.2d at p. 621, the California Supreme Court affirmed a conviction under section 484b where it concluded that although the defendant had used some of the project payments for project costs, “the evidence established that he and an associate had a practice of anticipating expected profits and of paying themselves commissions and ‘supervision’ fees, thus stripping their venture of funds to complete the projects.” In *People v. Thompson, supra*, 36 Cal.App.4th at p. 852, the court reversed a 484b conviction because the jury was not given a unanimity instruction when some jurors could have convicted the defendant for wrongfully misdirecting the funds to pay other accounts and suppliers, for misusing the money for a dumbwaiter, or for wrongfully taking money for himself. In other words, the defendant could have been properly convicted because he diverted the money for his own *personal* use.

There is simply no requirement for a conviction under section 484b that the defendant divert the money to another project. All that is required is that he divert the money from the project at hand; i.e., “to a use other than that for which the funds were received. . . .” (§ 484b.) The language of 484b is plain and unambiguous. “If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).” (*People v. Shabtay* (2006) 138 Cal.App.4th 1184, 1190.) “We give the words of the statute ‘a plain and commonsense meaning’ unless the statute specifically defines the words to give them a special meaning. [Citations.] If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction.” (*MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083.)



Here, the evidence shows that appellant received money to complete a remodeling project for Mrs. Petree. It also shows that appellant failed to apply the money given to him by Mrs. Petree for the project and instead wrongfully diverted the money for some use other than for the project. Appellant took the money from Mrs. Petree and after doing very little work, abandoned the project and kept all the money given to him. Appellant was properly convicted of violating section 484b.

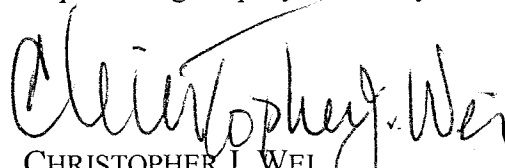
### CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: May 19, 2010

Respectfully submitted,

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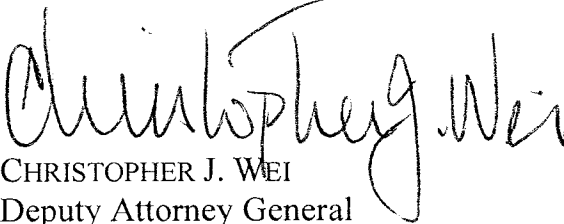
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**CERTIFICATE OF COMPLIANCE**

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 4,371 words.

Dated: May 17, 2010

EDMUND G. BROWN JR.  
Attorney General of California

  
CHRISTOPHER J. WEI  
Deputy Attorney General  
Attorneys for Respondent

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **People v. Schultz**

No.: **A125019**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 20, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Frank H. Free  
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The Honorable Gary Lieberstein  
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Attention: Executive Director  
First District Appellate Project  
730 Harrison St., Room 201  
San Francisco, CA 94107

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 20, 2010, at San Francisco, California.

\_\_\_\_\_  
B. Wong  
Declarant

\_\_\_\_\_  
  
Signature