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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ESPERANZA ISABEL VALVERDE et al.,

Defendants and Appellants.

H034263
(Santa Clara County
Super. Ct. No. 211048)

Defendants Esperanza Isabel Valverde and Herman Michael Covarrubias were convicted by jury trial of numerous counts. Valverde was convicted of 24 counts of grand theft (Pen. Code, §§ 484, 487, subd. (a)) [counts 1, 2, 3, 5, 6, 7, 12, 15, 19, 21, 23, 24, 26, 28, 29, 31, 33, 36, 37, 38, 41, 43, 44, and 46], nine counts of committing a fraudulent notarial act on a deed of trust (Gov. Code, former § 8214.2) [counts 8, 11, 13, 16, 22, 25, 30, 45, and 47], and seven counts of forgery (Pen. Code, § 470, former subd. (d)) [counts 14, 17, 18, 34, 35, 39, and 40]. Covarrubias was convicted of 19 counts of grand theft [counts 5, 12, 15, 19, 21, 23, 24, 26, 28, 29, 31, 33, 36, 37, 38, 41, 43, 44, and 46] and three counts of forgery [counts 20, 39 and 40]. The jury found true

excessive taking allegations under Penal Code section[1] 12022.6 and section 186.11 as to both defendants.

On appeal, defendants jointly contend that (1) the trial court erred in denying their request for discovery, and in excluding evidence, of mortgage industry practices, (2) the section 12022.6 and section 186.11 enhancement findings are not supported by substantial evidence, (3) the trial court prejudicially erred in failing to instruct on the technical meaning of the word "loss" in connection with the section 12022.6 enhancement allegations, (4) count 5 is not supported by substantial evidence, (5) the sentences imposed by the trial court were abuses of discretion, and (6) they are entitled to have their conduct credit calculated under the revised version of section 4019 that took effect while their appeal was pending. Valverde additionally asserts that (1) counts 7 and 47 are not supported by substantial evidence, (2) the trial court prejudicially erred in failing to instruct on one of the elements of the fraudulent notarial act offenses, and (3) the trial court erred in imposing restitution on a count on which she was acquitted. We affirm the trial court's original judgment.[2]

I. Factual Background

Valverde and her husband Covarrubias were mortgage brokers. A prospective borrower engages the services of a mortgage broker to work with wholesale lenders on the borrower's behalf. The wholesale lender's loan representative works directly with the broker, not the borrower. The broker submits a loan application and other documentation on behalf of the borrower to the wholesale lender's loan representative. This

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[1] Subsequent statutory references are to the Penal Code unless otherwise specified.

[2] The trial court amended its judgment to award additional conduct credit. We conclude that this award was erroneous, vacate the amended judgment, and reinstate the original judgment.

documentation is then forwarded to the wholesale lender's loan underwriter, who makes the decision whether to fund the loan. The purpose of the underwriting process is to ensure that the borrower will be able to repay the loan.

This case involved five wholesale lenders: Argent Mortgage Corporation (Argent), BNC Mortgage (BNC), Downey Savings and Loan (Downey), WMC Mortgage (WMC), and World Savings (World). These lenders relied on the information on the loan applications and documentation submitted by brokers to determine whether the borrowers would be able to repay the loans. Where the application was for a "stated income" loan, the lender relied on the broker to ensure that the borrower's stated income was accurate.[3] Typically, the underwriter would issue a conditional loan approval that required further documentation. The loan would not actually be funded until the conditions were met.

Because the broker's fees are funded from the total loan amount, the borrower ends up paying those fees. Typically the broker's fee is 1 percent of the loan amount, but it may legally be as high as 5 percent. The wholesale lender may require a longer prepayment penalty period if the broker's fee is high in order to ensure that the lender profits from the loan. The borrower on a refinancing transaction had the legal right to cancel the transaction within three days after signing the documents.

Defendants acted as brokers on numerous transactions with these five wholesale lenders. These were subprime loans. Subprime loans include stated income loans, loans to borrowers with poor credit scores, and loans with high loan-to-value ratios. Many of the borrowers represented by defendants did not speak or read English, could not read the documents (which were always in English), and did not understand the details of the transactions. Defendants lied to these borrowers about the amounts of their fees and misrepresented the terms of the loans. Valverde notarized backdated deeds of trust in

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[3] Some of the wholesale lenders offered only stated income loans, while others offered a variety of loan types.

order to prevent the borrowers from exercising their rights to cancel refinancing transactions. Defendants prepared and submitted loan applications that misrepresented the borrowers' income and assets, and forged documents to support those applications.

II. Procedural Background

Defendants were jointly charged by indictment with 19 counts of grand theft [counts 5, 12, 15, 19, 21, 23, 24, 26, 28, 29, 31, 33, 36, 37, 38, 41, 43, 44, and 46] and two counts of forgery [counts 39 and 40]. Valverde alone was charged with an additional seven counts of grand theft [counts 1, 2, 3, 6, 7, 9, and 10], 12 counts of committing a fraudulent notarial act on a deed [counts 8, 11, 13, 16, 22, 25, 27, 30, 32, 42, 45, and 47], and five counts of forgery [counts 14, 17, 18, 34, and 35].[4] Covarrubias alone was charged with one count of forgery [count 20]. The indictment also alleged excessive taking allegations under sections 186.11 and 12022.6 against both defendants.

After lengthy deliberations, the jury returned verdicts finding defendants guilty of nearly all of the counts. On count 3, Valverde was found guilty as to only the lender but not the borrowers. She was also acquitted of counts 9 and 10, which were grand theft counts, and counts 27, 32, and 42, which were fraudulent notarial act counts. Valverde was convicted of the remaining counts. Covarrubias was convicted of all of the charged counts. The enhancement allegations were found true as to both defendants, as was a probation-related excessive taking allegation.

In May 2009, Valverde was sentenced to 23 years and eight months in state prison. She was awarded 67 days of actual custody credit and 32 days of conduct credit. Covarrubias was sentenced at the same time to 19 years and eight months in state prison.

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[4] Count 4, which was another grand theft count against Valverde, was dismissed at the commencement of trial.

He was awarded 61 days of actual custody credit and 30 days of conduct credit. Both of them timely filed notices of appeal.

In February 2010, defendants filed motions seeking additional conduct credit under the newly revised version of section 4019 that had taken effect in January 2010. The prosecution conceded that defendants were entitled to the additional credit they sought. In April 2010, the trial court granted defendants' motions and awarded Valverde an additional 34 days of conduct credit and Covarrubias an additional 30 days of conduct credit.

III. Discussion

A. Discovery and Exclusion of Evidence

1. Background

In June 2008, prior to trial, Valverde filed a motion to compel discovery. She sought to compel the prosecution to "disclose evidence obtained during the investigation of ACC Capital Holdings Corporation ('ACCCH') and its subsidiaries . . . ." Her motion asserted that Argent, which was one of the lender victims of some of the grand theft counts, was a "subsidiary" of ACC Capital Holdings Corporation (ACCCH). Valverde contended that "evidence obtained during [an] investigation of ACCCH" was "materially favorable to her defense" because it would refute "the contention that Argent is a victim" of Valverde's conduct.

Her motion was based on the fact that the State of California and various district attorneys, not including the Santa Clara County District Attorney, had brought a civil action in 2006 against ACCCH and various other entities, not including Argent, alleging that they had made misrepresentations to consumers, obtained inflated appraisals, and fabricated information on loan applications. A multi-state settlement was reached without ACCCH or the other entities admitting any fault. ACCCH and the other entities

agreed to pay restitution of $295 million to consumers who had obtained loans from them between 1999 and 2005 and $30 million to the states. They also agreed to not make misrepresentations in the future, to change their appraisal practices, and to not make misrepresentations on loan applications.

The prosecution opposed Valverde's motion on the grounds that (1) the information sought was "not material and has no bearing on" Argent's conduct, and (2) the information was not in the prosecution's possession because the civil action had not been brought by anyone on the "prosecution team," as it had been brought by states and the district attorneys of other counties. The court denied the motion without explanation.

After trial commenced, the prosecution filed a motion in limine seeking exclusion of evidence of "fraudulent conduct by Ameriquest Mortgage Company," an ACCCH subsidiary that was not involved in any of the charged offenses. This motion was prompted by the defense's mention of "Ameriquest" in their opening statements. The prosecution had objected during the opening statements, but its objection had been overruled. The prosecution argued that such evidence would be irrelevant and should be excluded under Evidence Code section 352 because it would confuse the jury. Defendants opposed the motion on the ground that the evidence in question would be relevant to the credibility of the prosecution's witnesses and to "the issue of lenders' reliance on loan submissions."

Before the trial court ruled on the prosecution's motion, Tami Carnes, who had worked for Argent throughout the relevant period, and had previously worked for Ameriquest, began her testimony. She testified on direct that Argent is a wholesale lender. Argent's parent company is ACCCH. Carnes testified that Argent relied on the information on the loan application to determine the borrower's "credit worthiness." Argent depended on the broker "to do the due diligence on the information" that the broker provided to Argent. Her testimony was interrupted due to scheduling difficulties.

Before Carnes resumed her testimony, the court held a hearing on the prosecution's motion. The court repeatedly asked Valverde's trial counsel: "What evidence do you have through discovery or other purposes that business practice [of Ameriquest] was the business practice of Argent . . . ." The court noted that the motion to exclude was aimed solely at evidence concerning Ameriquest, not evidence concerning Argent. "THE COURT: You can ask her [Carnes] about the lending practices at Argent. [¶] MR. UBHAUS [Valverde's trial counsel]: I want to ask her about the lending practices when she was at Ameriquest." "THE COURT: . . . You can't even ask about Ameriquest unless [and] until the witness says that Argent followed the same practices of Ameriquest." "THE COURT: But why would you make any argument that the other lenders accepted anything less than what they should have or they didn't rely on the information? [¶] MR. UBHAUS: That's something we'll do two months from now. [¶] THE COURT: But why would you be able to do it at all? [¶] MR. UBHAUS: I don't know."

The court ruled "that the defendants are precluded from arguing or asking questions to show the alleged misconduct of other lenders again until relevance of that is shown." "[A]bsent a further showing of relevance, again there will not be argument that other lenders engaged in unlawful conduct . . . ." The court "preclude[d] the defendants from asking questions about Ameriquest's lending practices or referring to the litigation that other prosecution or other agencies filed against ACC Holdings Corporation or the settlement in that case until there's a requisite showing that Argent followed the same lending practices as Ameriquest." Valverde's trial counsel responded to this ruling by saying that he "assume[d]" that he could "explore with Ms. Carnes her employment relationship, the relationship between Ameriquest and Argent without getting into it." The court responded: "Well, again, the foundation showing actually have the same lending practices." Valverde's trial counsel responded: "Right. I understand."

After this ruling, Carnes resumed her testimony. On cross by Valverde's trial counsel, Carnes testified that "Ameriquest and Argent . . . were completely different systems, different executives, different presidents, different HR, different buildings. I don't know -- after I left in 2000 with Ameriquest -- I don't know what Ameriquest did . . . ." She denied that she was "familiar with what happened at Ameriquest." "I only dealt with Argent loans." Carnes explained that her work at Ameriquest was "in the back end. I didn't work in the branch office at Ameriquest." She "did certain underwriting for a particular product of loans" at Ameriquest. Carnes had never done any underwriting for Argent.

Out of the presence of the jury, during a break in Carnes's testimony on cross, the court reiterated: "the defendants are required to show that Ameriquest's lending practices were the same as Argent's lending practices before going into . . . Ameriquest's lending practices . . . ." The court offered to hold an Evidence Code section 402 hearing, but Valverde's trial counsel declined. "[I]n light of Ms. Carnes' answer, she doesn't know anything about Ameriquest's lending practices, it would be a pointless exercise." On redirect, Carnes reaffirmed that Argent relied on the documentation submitted by the brokers. She also confirmed that she was familiar with Argent's underwriting policies.

2. Analysis

Defendants argue that the trial court's discovery ruling and its evidentiary ruling violated their rights to due process and "to present a defense." They claim that the information sought by the discovery motion and excluded by the court's ruling on the prosecution's motion would have shown an "industry practice" of "making loans to unqualified borrowers," which would have rebutted evidence that the lenders in this case relied on defendants' misrepresentations, an element of the grand theft counts, and would have supported an assertion that defendants lacked the specific intent to steal because it could be inferred that they were aware of this "industry practice." They maintain that the

court's orders precluded the presentation of evidence about "the prevalence of lending to unqualified borrowers" and "evidence that Ameriquest had been accused by many states of inflating income to qualify borrower's [*sic*] for loans and had paid $320 million to settle that lawsuit." We find no merit in these contentions for the simple reason that the information sought by the discovery motion and the evidence excluded by the trial court was not relevant or material to any of the issues before the jury.

Defendants argue that information sought by the discovery motion that ACCCH and its retail lender subsidiaries "regularly made loans to unqualified buyers using income and asset information known to the lender to be false" would have been "both exculpatory and had impeachment value." In their view, it would have been exculpatory because it would "tend to show" that defendants' misrepresentations "did not cause the lenders to make loans that would not otherwise have been made and that appellants did not intend to mislead the lenders." It would have had impeachment value "because it contradicted the lenders' contentions that it was their policy to rely on brokers' representations in making the loans."

"[N]o discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (§ 1054) The prosecution is required to provide to the defense "[a]ny exculpatory evidence" in its possession. (§ 1054.1.) Information need not be disclosed if it lacks any "discernible exculpatory value." (*People v. Webb* (1993) 6 Cal.4th 494, 520.) We review the trial court's discovery ruling for abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 979, abrogated on another point as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

The flaw in defendants' argument is that none of the information sought by the discovery motion concerned any of the lenders in this case or even any wholesale lenders at all, and therefore it had no "discernible exculpatory value." Every one of the lenders in

this case was acting as a wholesale lender in the course of its interactions with defendants. Wholesale lenders do not deal directly with borrowers, but deal solely with brokers. The information sought in the discovery motion concerned solely *retail* lenders, who lend directly to borrowers and do not deal with brokers. The alleged misconduct at issue in the civil action concerned only the direct interactions between retail lenders and borrowers. The misrepresentations at issue in this case to which defendants claimed the information sought was relevant were by brokers, not lenders or borrowers, to wholesale lenders, not retail lenders or borrowers. There was simply no basis for a belief that information about the alleged practices of retail lenders vis-à-vis borrowers would lead to exculpatory evidence relevant to the practices of wholesale lenders vis-à-vis brokers. Consequently, the trial court did not err in denying the discovery motion.

As to the court's evidentiary ruling, defendants contend that "industry practice" evidence would have been admissible to rebut the prosecution's alleged reliance on the "assum[ption]" that "if the bank made the loan, it must have relied on [defendants'] representations." This broad contention ignores the narrowness of the trial court's ruling. The trial court's order excluded evidence concerning the lending practices of Ameriquest, one of ACCCH's retail lender subsidiaries, because there had been no foundational showing that any of the wholesale lenders involved in this case engaged in similar practices. The court's order left open the possibility that such evidence could be admitted if defendants made the requisite foundational showing, which defendants conceded they could not make.

The other aspect of the trial court's evidentiary ruling was its exclusion of evidence that "other lenders" engaged in unlawful practices absent a foundational showing of relevance. "We review for an abuse of discretion a trial court's exclusion of evidence." (*People v. Brady* (2010) 50 Cal.4th 547, 558.) Defendants never made any attempt to lay a foundation for the admission of evidence that the misconduct of lenders

uninvolved in this case had any relevance to the conduct of the lenders who were involved in this case. Due to the absence of such a foundation, the trial court did not abuse its discretion in excluding evidence that had not been shown to have any probative value and that would have been confusing to the jury and unduly time consuming. (Evid. Code, § 352.)

Valverde contends in her reply brief that the trial court's ruling wrongfully prevented defendants from "call[ing] experts to testify to the practices of the subprime mortgage industry." The trial court's evidentiary ruling did not preclude defendants from seeking admission of expert testimony *if* they first made the requisite foundational showing of relevance. Defendants never suggested below that they desired to present *expert testimony* on this issue, and they rejected the court's offer of an Evidence Code section 402 hearing at which they would have had an opportunity to make a foundational showing of relevance of whatever evidence they sought to admit. Nor did they ever suggest that they were prepared to present any evidence regarding the "industry practice[s]" of wholesale lenders, which were the only lender practices at issue in this case. Defendants' appellate arguments do not establish that the trial court's ruling was erroneous.

B. Excessive Taking Enhancements

The jury found true, and the trial court imposed sentences for, enhancements under both section 12022.6, former subdivision (a)(4) and section 186.11, former subdivision (a)(2) as to each defendant.[5] Defendants challenge the sufficiency of the evidence to support these enhancements, and they also contend that the trial court's instruction on the

[5] The section 12022.6 enhancement produced a four-year term for each defendant, while the section 186.11 enhancement led to a three-year term for each defendant.

section 12022.6 enhancement allegations was prejudicially inadequate.[6] Although their challenge is posited as one to the sufficiency of the evidence, defendants' contentions actually revolve around their interpretation of the word "loss" in section 12022.6. Thus, the issue is one of statutory construction.

The substantive offenses occurred in 2002, 2003, and 2004. The 1998 version of section 12022.6 was in effect at that time.[7] It provided: "When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows: [¶] (1) If the loss exceeds fifty thousand dollars ($50,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year. [¶] (2) If the loss exceeds one hundred fifty thousand dollars ($150,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years. [¶] (3) If the loss exceeds one million dollars ($1,000,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of three years. [¶] (4) If the loss exceeds two million five hundred thousand dollars ($2,500,000), the court, in addition and consecutive to the punishment prescribed for the

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[6] At the end of the CALCRIM No. 3220 instructions on the section 12022.6 enhancements, the trial court added the following special instruction: "Loss includes any dispossession of property, which includes letting defendant or another person take ownership of the property." While *defendants* do not challenge this special instruction, the concurring and dissenting opinion (the dissent) focuses significant attention on what it sees as the invalidity of this special instruction. (Conc. & dis. opn., *post*, at pp. 23, fn. 10, 28, fn. 12.)

[7] Section 12022.6 was amended in 2007 to change the various dollar amounts. (Stats. 2007, ch. 420, § 1.)

felony or attempted felony of which the defendant has been convicted, shall impose an additional term of four years." (§ 12022.6, former subd. (a); Stats. 1998, ch. 454, § 2.)

The original version of section 12022.6, enacted in 1976, made no mention of "loss." It applied to a "taking or damage" in excess of various specified amounts. (Stats. 1976, ch. 1139, § 305.5.) The statute was amended in 1977 to include the "takes, damages, or destroys . . . and the loss exceeds" language that it now contains and contained at the time of defendants' offenses. (Stats. 1977, ch. 165, § 93.) The 1977 legislation was part of an omnibus bill, and there is no indication that it was intended to change the meaning of the statute.

Section 186.11 at the time of defendants' offenses provided: "Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3)." Paragraph 2 provides for an additional term of two, three, or five years if the crimes "involve[] the taking of" more than $500,000. This additional term is in addition to that under section 12022.6. Paragraph 3 provides that, if the crimes "involve[] the taking of" more than $100,000 and less than $500,000, the punishment will be that imposed by section 12022.6. (§ 186.11, former subd. (a); Stats. 2001, ch. 854, § 21.)

Section 186.11 was originally enacted in 1995. (Stats. 1995, ch. 794, § 1.) It originally applied only to the "taking of" more than $500,000.[8] (*Ibid*.) It was quickly

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[8] The Legislature that enacted the original version of section 186.11 equated "taking" and "loss." (Sen. Com. on Crim. Proc., Rep. on Sen. Bill No. 950 (1995-96

repealed and reenacted to lower that amount to $100,000. (Stats. 1996, ch. 431, § 2.) The only significant amendment of section 186.11 occurred in 2007, long after defendants' offenses.

Defendants contend that the jury's findings on the enhancement allegations are not supported by any evidence that their offenses caused a "loss" exceeding $500,000 (under section 186.11) or $2.5 million (under section 12022.6). They maintain that the "face amount" of the loans made by the lenders to the borrowers, which they concede exceeded $2.5 million, was not equivalent to the lenders' "loss" because the lenders received security for those loans that exceeded the amounts of the loans. Defendants concede that "there was a 'taking' of the loan amount," but they argue that the loan amounts must be offset against the security, resulting in no "loss." Defendants also contend that, because the word "loss" has, in their view, a technical meaning of "*net* loss," the trial court prejudicially erred in failing to specially instruct the jury on this technical meaning.[9]

"'When construing a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law."' [Citations.] '[W]e begin with the words of a statute and give these words their ordinary meaning.' [Citation.] 'If the statutory language is clear and unambiguous, then we need go no further.' [Citation.] If, however, the language supports more than one reasonable construction, we may consider 'a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [Citation.] Using these extrinsic aids, we 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the

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Reg. Sess.) as amended Apr. 17, 1995, p. 2 [bill would apply "where there is a loss to a victim" of a certain amount].)

[9] Because we reject defendant's interpretation of the word "loss" in section 12022.6, it naturally follows that no instruction on that incorrect interpretation was required.

general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.) "Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.)

The language of section 12022.6 does not support defendants' argument that "loss" means "net loss." Section 120226.6, former subdivision (a)(4) applies where "any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction . . . [and] the loss exceeds" $2.5 million. The statute contains no requirement that a taking "result in" a "loss." Instead, the statute plainly uses the word "loss" to describe the level that must be exceeded only because "loss" is a general term that may be applied to the amount *taken* from the victim *or* the amount of loss the victim suffered due to *damage or destruction of property*.[10] By using the general term "loss" to describe both the amount of a taking and the harm to the victim whose property was not taken but damaged or destroyed, the Legislature gave every indication that it intended the statute to apply as *broadly* as possible. It gave no indication that it intended for the scope of the statute to be restricted to a victim's "net loss." Had the Legislature intended to limit the statute's reach to a victim's "net loss," it easily could have inserted the word "net" before loss. It did not do so. The language means what it says.[11] It is axiomatic that a victim

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[10] We therefore reject the dissent's assertion that section 12022.6 requires that the "taking must ***also*** *result in a 'loss.'*" (Conc. & dis. opn., *post*, at p. 29, italics & boldface added.)

[11] The rule of lenity, upon which the dissent relies, is inapplicable since the statutory language, construed in light of the legislative history, is not reasonably susceptible to defendants' interpretation. (*People v. Cruz* (1996) 13 Cal.4th 764, 783 ["ambiguities are not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent."]; see also *In re Michael D.* (2002) 100 Cal.App.4th 115, 125.)

loses what is taken. Section 12022.6 applies where the value of the property taken from the victim or damaged or destroyed exceeds a certain level.

Nor can it be credibly argued that the 2007 amendment of section 186.11 supports a conclusion that section 12022.6's use of the word "loss" was intended to mean "net loss." The 2007 amendment of section 186.11 was prompted by the Second District Court of Appeal's decision in *People v. Frederick* (2006) 142 Cal.App.4th 400 (*Frederick*). *Frederick* involved a claim by the defendants that a count charging them with filing a false income tax return did not itself involve a taking *and* could not be aggregated with their other offenses under section 12022.6 because it was not part of their "'common scheme or plan.'" (*Frederick*, at pp. 422-423.) The Court of Appeal agreed with the defendants that this count could not be aggregated with the others because it involved separate acts at a different time against a different victim. (*Frederick*, at p. 423.)

Although *Frederick* did not involve section 186.11 and did not credit the defendants' argument that filing a false tax return was not a "taking," the Legislature decided to amend section 186.11 in 2007 due to "'significant debate as to whether failing to file or filing a false tax return fits within the "taking" definition.'" (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1199 (2007-2008 Reg. Sess.) as amended Apr. 12, 2007, pp. 4-5.) The amendment was intended to confirm that section 186.11 applies to a loss even where there was no direct "taking." (*Ibid*.) The Legislature intended that its 2007 amendment of section 186.11 would *equate* "taking" and "loss," which it considered declarative of existing law. (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1199 (2007-2008 Reg. Sess.) as amended June 19, 2007, pp. H, M.)

The Legislature's 2007 amendment of section 186.11 provides not the slightest support for defendants' contention that the Legislature intended for section 12022.6's reference to "loss" to mean "net loss." First, because the Legislature's 2007 action

occurred years *after* defendants' crimes, it had no impact even on the version of section 186.11 that applied to them, let alone on the relevant version of section 12022.6, which was unaffected by this amendment. Second, the legislative history of the 2007 amendment is unmistakably clear that the purpose of the amendment was to ensure that section 186.11 was interpreted *expansively* so that even a loss that did not arise from a taking would qualify. Nothing in the legislative history of the 2007 amendment of section 186.11 suggests that the Legislature intended to thereby demonstrate that the scope of section 12022.6 was *limited* so that a taking of the requisite amount alone would not be enough unless there was also a *net* loss. The Legislature's intent was plainly to equate a taking and a loss so that even a loss without a taking would meet the requirements of section 186.11. Since section 12022.6 already applied to more than just takings (that is, damaged or destroyed property), it was not vulnerable to the same problem that the Legislature feared section 186.11 might be vulnerable to. To the extent that we can draw any inference from the Legislature's 2007 amendment of section 186.11 with regard to the intent of its earlier enactment of language in section 12022.6, it is that the Legislature intended that "loss" be equivalent to "taking," which does not support defendants' contention.

Defendants place undue reliance on the California Supreme Court's decision in *People v. Crow* (1993) 6 Cal.4th 952 (*Crow*). In *Crow*, the defendant had aided and abetted Acosta, the mother of his children, in her fraudulent taking of welfare benefits from the county. He was convicted of aiding and abetting the taking, and a section 12022.6 enhancement was found true based on a loss exceeding $25,000. He challenged the sufficiency of the evidence to support the enhancement. His claim was that the prosecution was required to prove (and had not proved) that, had there been no fraud, Acosta would have received more than $25,000 *less in welfare benefits*, since, he claimed, she still would have been entitled to some welfare benefits. "According to

defendant, the net amount that he and Acosta gained as a result of their fraudulent acts was less than $25,000." (*Crow*, at p. 961.)

The California Supreme Court rejected his contention but accepted its premise. "Any money that the government would have been obligated to pay had the fraud not occurred is not attributable to the fraud, and thus is not a 'loss' arising out of the criminal offense." (*Crow*, *supra*, 6 Cal.4th at p. 962.) Nevertheless, the evidence was sufficient to support the enhancement. "By proving that, [due to the fraud], the county paid out more than $25,000 in food stamps and welfare benefits, the prosecution met its burden of showing that the victim's loss exceeded $25,000 within the meaning of Penal Code section 12022.6, subdivision (a). If . . . some of that money would have been paid [regardless of the fraud], and as a result the amount of the county's loss did not exceed $25,000, it was defendant's burden to show this." (*Crow*, at pp. 962-963.)

While *Crow*, like this case, concerned the determination of the amount of the "loss" under section 12022.6, *Crow*, unlike the case before us, concerned the possibility that not all of the total amount of welfare benefits received by Acosta had been *fraudulently taken*, since Acosta might have been entitled to a portion of that amount in the absence of the fraud. Here, on the other hand, defendants do not dispute that the entire "face amount[s]" of the loans were *fraudulently taken* from the lenders. Instead, their claim is that the undisputed amount of the fraudulent *taking* from the lenders should be *offset* by the security that the lenders received as part of these transactions in determining the lenders' *loss*. *Crow* simply does not speak to this issue, so it provides no support for defendants' contention.

Defendants also misplace reliance on *U.S. v. Goss* (5th Cir. 2008) 549 F.3d 1013 (*Goss*). *Goss* did not concern a sentencing enhancement allegation found true by a jury. Instead, the issue in *Goss* was whether, under a provision of the federal sentencing guidelines that was used in the "advisory sentencing-range calculation," the amount of

loss to the victims should be based on the total amount of the mortgages that Goss fraudulently obtained from the victims or should instead be reduced by the collateral received by the lenders. (*Goss*, at p. 1015.) The sentencing guideline in question provided that the calculation should be based on the "*greater* of *actual* or intended loss." (*Goss*, at p. 1015, second italics added.) Actual loss was expressly defined as "'reasonably foreseeable pecuniary harm that *resulted* from the offense,'" while intended loss was defined as "'the pecuniary harm that was intended to result from the offense.'" (*Goss*, at p. 1016, italics added.) The guidelines also expressly provided that, "'[i]n a case involving collateral pledged or otherwise provided by the defendant', *loss shall be reduced by* '*the fair market value of the collateral* at the time of sentencing'." (*Goss*, at p. 1015, original italics omitted, italics added.) The sentencing guidelines handbook generally adopted a "'net loss approach'" and provided that collateral pledged by a victim would also be credited against loss. (*Goss*, at p. 1017.)

The prosecution in *Goss* argued that the *intended* loss should be utilized in the calculation, which would disregard the value of the collateral, while Goss argued that the intended loss was zero because he intended that the collateral would fully secure the loans, and, due to the collateral, the actual loss would be limited to "broker fees and improper payments" he received. (*Goss*, *supra*, 549 F.3d at p. 1015.) The district court accepted the prosecutor's argument, and Goss appealed. (*Goss*, at p. 1016.) On appeal, the Fifth Circuit held that ordinarily, under the sentencing guidelines, the collateral should be deducted from the loss unless, due to the particular facts of the case, deduction of the collateral would be unfair. (*Goss*, at p. 1017.)

Nothing in *Goss* is relevant to the issue before us. The federal guidelines at issue in *Goss* explicitly used the term "actual loss" and so defined that term as to make clear that "actual loss" referred to the "net loss" *after the deduction of collateral*. Here, the Legislature did not use the term "actual loss," did not define the term "loss" that it did

use, and provided no basis for even an inference that it intended for the term loss to refer to "net loss" after the deduction of any collateral. *Goss* does not help us determine the meaning of section 12022.6 or section 186.11.

Case law interpreting section 12022.6 also does not support defendants' argument. In *People v. Bates* (1980) 113 Cal.App.3d 481, 484 (*Bates*), the burglars were immediately apprehended, and all of the loot was returned to the victim. (*Bates*, at p. 483.) The court held that the burglars' taking of the property nevertheless constituted a "loss" within the meaning of section 12022.6. (*Bates*, at pp. 483-484.) "The word 'loss,' as used in section 12022.6 in the context of the *taking* of property, therefore includes *any dispossession* which constitutes theft of the victim's property." (*Bates*, at p. 484, italics added.) Similarly, in *People v. Ramirez* (1980) 109 Cal.App.3d 529 (*Ramirez*), the court rejected the defendants' argument that section 12022.6 applied "only if the victim's *ultimate out-of-pocket loss* exceeds" the statutory amount. (*Ramirez*, at p. 539, italics added.) "To interpret the statute in the manner suggested by appellants would be to attribute to the Legislature an intent to depart radically from well-established law that the recovery of stolen property by the victim is no defense to crime and is only relevant in mitigation of punishment when the defendant voluntarily returns it prior to being charged." (*Ramirez*, at p. 539.)

Since, in *Bates* and *Ramirez*, very temporary dispossessions of funds followed by complete recoveries of those funds were found sufficient to support section 12022.6 enhancements, it must also be true that defendants' taking of the loan amounts (a permanent dispossession) satisfied section 12022.6 even if the lenders might ultimately be able to recover all of their losses someday through the sale of the collateral.

Defendants' challenge to the section 186.11 enhancements also lacks merit. Section 186.11, as it read at the time of defendants' crimes, did not refer to any amount of "loss" but explicitly to "the taking of" more than $500,000. (§ 186.11, former subd. (a).)

Since defendants concede that they committed a taking of the face amounts of the loans, which exceeded $2.5 million, they lack any basis for a challenge to the section 186.11 enhancements.

C. Substantial Evidence Challenges to Individual Counts

Three counts are challenged on the ground that they are unsupported by substantial evidence. Our standard of review is well established. "'[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People* v. *Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319.) "[The] appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People* v. *Reilly* (1970) 3 Cal.3d 421, 425; accord *People* v. *Pensinger* (1991) 52 Cal.3d 1210, 1237.) "Evidence is sufficient to support a conviction only if it is substantial, that is, if it '"reasonably inspires confidence"' [citation], and is 'credible and of solid value.'" (*People v. Raley* (1992) 2 Cal.4th 870, 890-891.)

1. Count 5: Lender's Reliance on False Tax Returns

Both defendants challenge the sufficiency of the evidence to support count 5. Count 5 was a grand theft count where the victims were borrowers Joseph and Yolanda Hidalgo and lender BNC. Defendants were convicted as to both the borrower and lender victims. They contend that there could not have been reliance by BNC because the false tax returns submitted by Valverde were not received by BNC until after the loan had been approved.[12]

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[12] Defendants do not challenge the evidence that they stole from the Hidalgos. Valverde contacted Joseph in April 2004 and "said we were due to refinance[]." The

The Hidalgos refinanced their home in April 2004 using defendants as their brokers. Covarrubias signed the application, but the Hidalgos never met with Covarrubias but only with Valverde. This was a full documentation loan for $433,500 with an 85 percent loan-to-value ratio. The application stated that Yolanda's employment was "Baby-Sitting Services" and that her monthly income was $11,300. This was false. Neither Joseph nor Yolanda Hidalgo had ever told Valverde that Yolanda made that much money. Yolanda had "no business" in 2004. Yolanda babysat their grandchildren and made just "a little bit of money" for that. Joseph was retired and received a $1,500 a month pension. He also worked part time. Their total yearly income was around $30,000.

Because this was a full documentation loan, BNC required two years of income tax returns. The loan would not be funded until the underwriter or funder had verified that two years of income tax returns had been submitted to support the application. Two years' tax returns were submitted to BNC on April 9, 2004. These were false tax returns. In fact, the Hidalgos were subject to a $20,000 tax lien for failing to file their returns. They had not filed tax returns in three years. The fake 2002 income tax return showed a false income for the Hidalgos of $120,352. The fake 2003 income tax return falsely showed business income of $137,249 for Yolanda.

BNC sold all of the loans it made. If BNC funded a loan based on false tax returns, BNC would be unable to sell the loan and would have to repurchase it. Although

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Hidalgos were "a couple of months behind on our payments with World Savings, and she could save us from foreclosure." They met with Valverde twice. Valverde told them that their house would be foreclosed upon unless they refinanced. Valverde assured them that they would be able to pay the increased payments with the $30,000 that they would receive from the refinancing, and they could refinance again in a year. Although the monthly payments on the refinanced loan would be $2,900, which was more than they earned, they believed Valverde and signed the documents for the refinance in order to avoid losing their home. The Hidalgos were "shocked" and "outraged" to later learn that Valverde had charged them $22,000 for the refinancing.

the Hidalgos' loan was given "final approval" by BNC on April 4, the loan was not funded until April 14, 2004. Receipt of the tax returns was a condition on the loan, and BNC would not fund a loan until the conditions were met. BNC's representative testified at trial: "[L]oan approval is using the information that we have at the time of making that decision. We condition for items that are going to help support the decision. Funding is when all of those conditions or items are in." BNC "rel[ies] on all the information for the conditions that are met before funding the loan."

We can see no inadequacy in the proof that BNC relied on defendants' misrepresentations. Since there was testimony that BNC would not fund the loan until it had received tax returns supporting the loan, the jury could have reasonably concluded that the false tax returns submitted by defendants in support of the loan before it was funded were relied upon by BNC in deciding to fund the loan. The fact that the conditional approval occurred earlier is immaterial, as there was substantial evidence that BNC would not have funded the loan in the absence of the false tax returns.

2. Count 7: Borrowers' Reliance

Valverde challenges the sufficiency of the evidence to support count 7, a grand theft count involving borrowers Sergio Barajas and Teresa Eslava and lender World. Valverde was found guilty as to both the borrowers and the lenders, and she claims that reversal is required because there was no evidence that Barajas relied on her false statements.

Valverde enticed Barajas to meet with her by telling him that "she was not going to charge me for refinancing. That the bank was going to pay her." Barajas did not really believe her, because "I know that in here, you have to pay for everything." Nevertheless, Valverde insisted that this was the case. Although Barajas remained doubtful, he and his wife Teresa Eslava met with Valverde twice. On the first occasion, Valverde asked them to sign some papers. She made a host of misrepresentations to them. She told Barajas

that the interest rate on his loan would be 1 percent for the first year and would never exceed 6 percent. In fact, the 1 percent rate applied for only the first month.

At the second meeting, Valverde had more documents for them to sign. Barajas wanted to know what the documents said, but Valverde told them to "hurry up" and sign the documents because she needed to leave. The signing of the documents occurred in a period of less than 10 minutes. The documents were in English, a language Barajas did not understand. Valverde did not explain any of the documents to them.[13] Valverde also directed Barajas and Eslava to "sign with a date a few days before . . . ." They were not given a copy of the documents; about two weeks later, they received a copy in the mail.

Although they had wanted to take only $10,000 out in the refinance, they received a check for $34,000. Valverde charged them $8,000 for the refinance. There was a prepayment penalty that Valverde had never mentioned, which they had not had on their previous loan. The new loan amount was $230,000, which was $43,000 higher than their previous loan, which had been a fixed rate loan. Barajas repeatedly tried to call Valverde about these discrepancies, but he was unable to make any meaningful contact with her.

At trial, Barajas was asked: "So if you knew that [Valverde] was going to charge you $8,000 to refinance, would you have gone through with the loan with [her]?" He responded: "I think so if she would have tell me the truth because we already had planned to get the loan because if it was not -- if it wouldn't had been with her, then it would have been with somebody else."

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[13] Valverde never gave them anything in writing telling them how much the refinance would cost, what their interest rate would be, or what their payments would be. The loan application Valverde prepared had false income and asset information on it. The loan application falsely stated that Barajas's income was $7,100 per month. Valverde does not contend that there was insufficient evidence of the lender's reliance on her misrepresentations.

Valverde focuses on this one sentence of Barajas's testimony and contends that he conceded that he had not relied on Valverde's false statements. Barajas's testimony was not such a concession. He was not asked if he relied on Valverde's false statements. Instead, he was asked if he would have "gone through with the loan" with Valverde if he had been aware of the fee she was charging for the refinancing. He did not give a simple affirmative response. He said "I think so . . . ." But he was not asked if he had relied on Valverde's other misrepresentations, including the amount of cash they would receive and the interest rate on the loan.

Our standard of review is highly deferential. A rational jury could have reasonably deduced that, notwithstanding Barajas's testimony that he probably would have gone through with the loan if Valverde had told him the truth about her fee, he actually relied on her multiple lies about not only her fee, but also the interest rate, and the amount of cash they would receive, when he actually decided to proceed with the transaction. The jury could have found that Barajas's response to the hypothetical question posed at trial did not rebut the obvious and reasonable inference that he had in fact relied on Valverde's various misrepresentations.

3. Count 47: Identity of Notary

Valverde challenges the sufficiency of the evidence to support count 47, which charged her with a fraudulent notarial act in connection with the deed of trust for the loan obtained by borrowers Braulio and Sylvia Rodriguez. Valverde contends that she could not be convicted of this count because the evidence conclusively established that she was not the notary on the deed of trust in question.

"A notary public who knowingly and willfully with intent to defraud performs *any notarial act in relation to a deed of trust* on real property consisting of a single-family residence containing not more than four dwelling units, with knowledge that the deed of trust contains any false statements or is forged, in whole or in part, is guilty of a felony."

(Gov. Code, former § 8214.2, italics added.) Valverde's contention is that there was no evidence she performed "any notarial act in relation to" the Rodriguezes' deed of trust.

The testimony at trial established that both Valverde and her brother Cesar Valverde Ponte were present when the deed of trust was signed by the Rodriguezes. Sylvia testified: "[Valverde] gave us the documents to sign." Ponte, who was sitting next to Valverde, "said he didn't want to get involved in any way," "that she was going to help us, that he didn't know anything." Although the signing of the documents occurred on July 12, Valverde "told us to sign . . . with a previous date, an earlier date. We signed but we put the 7th, but we were with her on the 12th signing." Sylvia testified that she signed the deed of trust, but someone else put the date July 7, 2004 on the deed. Sylvia testified that Ponte was not doing anything during the signing but "was keeping [Valverde] company. That's all." Ponte "didn't say anything. He was just there." Sylvia could not recall if she had signed a notary book, but she did recall that *Ponte* did not "have a book for [her] to sign." Sylvia testified that the signature in Ponte's notary book was not hers. The jury found Valverde guilty of this count but acquitted Ponte of this same count. The jury also found Valverde guilty of grand theft from the Rodriguezes and WMC, but acquitted Ponte.

The jury could have reasonably deduced from Sylvia's testimony that the entry in Ponte's notary book relating to the Rodriguez deed of trust had been made by Valverde, rather than Ponte. Since Ponte expressly told Sylvia that he wanted nothing to do with the transaction and then did and said nothing during the signing, a reasonable inference could be drawn that he did not act as a notary during the transaction, particularly since he did not have Sylvia sign his notary book. It was Valverde who conducted the entire proceedings, and the fact that the signature in the notary book was forged and bore the false date that Valverde insisted upon strongly supported a reasonable inference that Valverde was the person who had performed the fraudulent notarial act even though the

information was entered in Ponte's notary book and purported to have been performed by Ponte. Substantial evidence supports the count 47 conviction.

D. Instructions on Fraudulent Notarial Act Counts

The fraudulent notarial act statute applies only to deeds of trust concerning "real property consisting of a single-family residence containing not more than four dwelling units . . . ." (Gov. Code, former § 8214.2.) Valverde, who was convicted of nine counts of committing a fraudulent notarial act [counts 8, 11, 13, 16, 22, 25, 30, 45, and 47], contends that the trial court's instructions on these counts were inadequate because they failed to require the jury to find that the "single-family residence[s]" in question did not contain "more than four dwelling units."

Valverde is correct in contending that the court's instructions failed to include the statutory requirement that the "single family residence contain[] not more than four dwelling units." The jury instructions on these counts provided: "A notary public who, knowingly and willfully with intent to defraud performs any notarial act in relation to a deed of trust on real property consisting of *a single-family residence*, with knowledge that the deed of trust contains any false statement or is forged in whole or in part, is guilty of a violation of Government Code section 8214.2, a crime. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. Defendant is a notary public; [¶] 2. Defendant knowingly and willfully with intent to defraud; [¶] 3. Performed a notarial act in relation to a deed of trust on the real property consisting of *a single-family residence*; [¶] 4. Defendant acted with knowledge that the deed of trust contains a false statement or is forged in whole or in part; and [¶] 5. The false statement or forged

portion is material. [¶] A statement is material if it is important to the matter at issue."[14] (Italics added.)

Nevertheless, this omission could not have prejudiced Valverde. The requirement that the "single-family residence" contain "no more than four dwelling units" is perplexing. By definition, a single-family residence ordinarily has only a single dwelling unit. For instance, the Santa Clara County Code defines a single family residence as "One dwelling unit." (Santa Clara County Code, § 2.10.030.) Though the Government Code does not define "'single-family residence'" for the purposes of Government Code section 8214.2, it does defines "'single-family residence'" in another article as "a dwelling unit for one family." (Gov. Code, § 54236, subd. (c).) State and local laws permit a "second" dwelling unit ancillary to a single-family residence, but we are aware of no state or local law that permits a third, fourth, or *fifth* dwelling unit as *part of* a single family residence. (Santa Clara County Code, § 4.10.340; Gov. Code, § 65852.2.) Thus, the very idea of a single-family residence with more than four dwelling units is inconceivable. The jury's findings under the trial court's instructions that the properties were single-family residences necessarily established that these properties did not have more than four dwelling units. Indeed, the jury could not have reached any other conclusion as no evidence whatsoever was presented to the jury that any of the single-family residences in question had more than a single dwelling unit, let alone five dwelling units, and defendant did not contest this element of these counts. For these reasons, we conclude that the trial court's instructional omission was harmless beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 505 [instructional omission on "peripheral" issue that was uncontested did not contribute to jury's verdict and therefore was harmless beyond a reasonable doubt].)

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[14] The court read a substantively identical instruction to the jury, with the omission of the last two sentences, at the commencement of trial.

E. Imposition of Prison Terms

Both defendants challenge their sentences as abuses of discretion.

1. Background

The probation report recommended the terms that the court ultimately imposed. Defendants asked the trial court to strike the enhancements, or alternatively the punishment for the enhancements, on the ground that there was no evidence that the lender-victims had suffered an actual loss. They argued that "there was no loss or intended loss at the time of the transaction." Defendants expressly declined to assert any other basis for their request that the court strike the enhancements or the punishment for them.[15] The prosecutor acknowledged that the court had discretion to strike the punishment for these enhancements, but she argued that it should not do so because there were multiple victims, a lengthy period of misconduct, and a large amount of money taken.

The prosecutor argued that defendants were deserving of the lengthy prison terms recommended in the probation report because they took advantage of more than 20 individual victims, and the misconduct took place over a two-year period and was of increasing seriousness. The prosecutor acknowledged each defendant had one mitigating factor, no criminal history or an insignificant criminal history, but she relied on the multiple aggravating factors: sophistication and planning; taking advantage of a position of trust; the length of time the misconduct continued for; the number of victims; and the number of offenses.

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[15] "THE COURT: Is there any other basis for the request or any invitation to consider striking those enhancements? [¶] MR. UBHAUS: No."

Valverde's trial counsel argued that she should be granted probation because the lenders had lost nothing and the borrowers "didn't qualify" for the loans they received.[16] "Valverde's participation in this, it was simply what everybody was doing." He argued that Valverde "has lost far, far, far more than anybody who was a victim in this case." The disposition he sought was probation "with substantial community service" and a fine. Valverde's trial counsel asserted that the probation department's recommended sentence would be disproportionate to the offenses and the offender. Covarrubias's trial counsel joined in those arguments and also asserted that the sentence recommended by the probation department "is one which ensures that there will be no restitution in the case."

The court concluded that there was no basis for finding this to be an unusual case where probation should be granted. It explained that it had considered the criteria in California Rules of Court, rule 4.413(c), and "[t]he evidence before the court indicates that the statutory limitation on probation is not overcome." The court also concluded that defendants "would pose a threat to public safety if granted probation."

The court imposed the sentence recommended in the probation report and endorsed by the prosecutor. Valverde was sentenced to 23 years and eight months in state prison, while Covarrubias was sentenced to 19 years and eight months in state prison. The court expressly stated that it had considered the mitigating factor that defendants had no prior record or an insignificant prior record, but it had found multiple aggravating factors: the victims were "particularly vulnerable" because they did not speak English and trusted defendants; consecutive sentences could have been imposed, but were not, for some counts that involved separate loans to a single victim; "the manner in which the crime was carried out indicates planning, sophistication or professionalism"

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[16] With regard to restitution, the defense argued that little or no restitution was appropriate because the borrower-victims "shouldn't have been able to refinance," and the lender-victims "didn't suffer any loss."

and was "distinctively worse than other crimes of its nature . . . ." The court selected consecutive terms "because of the separate nature of the offenses . . . ." Although it recognized that it had discretion to do so, the court refused to dismiss or strike the excessive taking enhancements or the punishment for them.

2. Analysis

Valverde claims that her prison sentence was an abuse of discretion because she was a first time offender and her incarceration will prevent her from making restitution. She also contends that the court's imposition of prison terms for the excessive taking enhancements was an abuse of discretion because the "loss" was "imaginary." She maintains that the trial court abused its discretion in failing to strike the enhancements under section 1385. Covarrubias makes similar arguments. He asserts that his sentence was an abuse of discretion because none of the lenders "suffered an actual loss," he posed no threat to public safety, and his prison sentence will prevent the victims from obtaining restitution.

To the extent that defendants are challenging the trial court's refusal to grant them probation, their challenge has no merit. Probation was prohibited here unless the court found this to be an "unusual" case. "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person convicted of a crime of theft of an amount exceeding one hundred thousand dollars ($100,000)." (§ 1203.045, subd. (a).) "The decision whether to grant or deny probation is reviewed under the abuse of discretion standard. [Citations.] 'An order denying probation will not be reversed in the absence of a clear abuse of discretion. [Citation.] In reviewing the matter on appeal, a trial court is presumed to have acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary. [Citations.]'" (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.) Thus, we must uphold the trial court's decision to deny

probation unless it was irrational or arbitrary for the court to conclude that this was *not* an unusual case where the interests of justice would be best served by a grant of probation.

Defendants victimized more than 20 borrower-victims over a two-year period. Using fraud, forgery, and coercion, they preyed upon these vulnerable individuals who came to them seeking to improve their financial situation. These unsophisticated individuals placed their trust in defendants, and ended up paying exorbitant fees to defendants to obtain loans that often worsened their financial situation. The fact that defendants persisted in their scheme for so long despite the complaints of the borrower-victims reflects that they do pose a danger to the community. It follows that the trial court had a strong foundation for its conclusion that this was not the unusual case where the interests of justice merited a grant of probation despite the statutory prohibition. None of the criteria in California Rules of Court, rule 4.413(c) apply here. This case was only unusual in the sense that defendants had victimized so many people over such a long period of time. We find no abuse of discretion in the court's denial of probation.

Defendants' challenge to the length of their prison terms is two-pronged. First they claim that, because they lack a significant criminal history and their incarceration will not enhance their ability to make restitution, the court was obligated to impose less lengthy prison terms. "It is established law that the severity of the sentence, within the statutory limits confided to the trial court, rests in its sound discretion." (*People v. Fritz* (1970) 11 Cal.App.3d 523, 527.)

Citing sections 6227 and 6228, they claim that the court should have considered sending them to a restitution center. A defendant is not eligible to be sent to a restitution center unless the sentence does not exceed three years.[17] (Former § 6228.) Given the

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[17] After defendants were sentenced, the statute was amended to change the eligibility criteria to make eligible those defendants with sentences not exceeding five years. (§ 6228.) Even if the amended statute had been in effect at the time of sentencing, the

massive scope of defendants' offenses, the trial court's decision that neither defendant would be adequately punished by a sentence of just three years, and therefore they were ineligible to be sent to a restitution center, was not an abuse of discretion.[18]

The absence of a prior criminal history does nothing to neutralize the extent of their criminality, which involved many, many offenses against more than 20 victims over a two-year period. This was not an isolated event but a sophisticated criminal enterprise. The trial court's determination that the many aggravating circumstances outweighed this single mitigating circumstance was well supported by the record and was not an abuse of discretion.

Nor was there any abuse of discretion in the trial court's determination that the need to impose appropriate punishment on defendants outweighed the impact that their incarceration might have on their ability to make restitution to the victims. Since hundreds of thousands of dollars in restitution was awarded to the victims, and defendants, as convicted felons, would not be able to practice their profession, the possibility that they could make significant inroads on their restitution obligation was minimal. Meanwhile, their complex and longstanding criminal scheme suggested that their freedom would more likely lead to further offenses rather than to recompense for their many victims.

Their remaining contention is that the court should have stricken the two excessive taking enhancements because there was no "real loss." We have already rejected their claim that these enhancement allegations lacked evidentiary support. Our review of a trial court's decision under section 1385 is limited to deciding whether the ruling was an

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trial court would not have abused its discretion in deciding that a prison term of just five years would be inadequate punishment for either defendant.

[18] Covarrubias asserts that the court "fail[ed] to exercise its discretion," but the presumption from a silent record is that the trial court properly exercised its duties. (*In re Julian R.* (2009) 47 Cal.4th 487, 498-499.)

abuse of discretion. (*People v. Orin* (1975) 13 Cal.3d 937, 945.) We see no abuse of discretion here. Enormous sums of money were involved in defendants' offenses. Even just the amounts that defendants themselves reaped were in the hundreds of thousands of dollars. The mere fact that some of the victims may have been able to recover some of their funds does not minimize the culpability of defendants for these takings. The trial court could reasonably conclude that defendants should be fully punished for the excessive monetary scope of their offenses.

F. Restitution

Valverde challenges the trial court's award of restitution to Sergio Sanches, the victim of count 11. She claims that the restitution awarded arose out of the acts alleged in counts 9 and 10, upon which she was acquitted.

1. Background

Counts 9 and 10 charged Valverde with grand theft from Sanches. Count 11 charged Valverde with committing a fraudulent notarial act on Sanches's deed of trust. Sanches testified at trial that in 2003 he refinanced two different properties, first the Lavonne property and then the Nugget property, using Valverde's services. Count 11 pertained solely to the Lavonne deed of trust.

When Sanches met with Valverde to discuss refinancing the Lavonne property, she did not tell him what the terms of the new loan or his payments would be or what she would charge as her fees. He testified that Valverde did not say anything to get him to trust her, "I just trusted her." When he went to sign the documents for the Lavonne loan, he asked Valverde to explain them, but she said he could "see afterwards on the copies . . . ." The documents were in English, and Sanches could not understand them. Valverde put false dates on the documents. Her notarization of the deed of trust said it was signed on April 18, 2003, but Sanches actually signed it and the other papers a few

days after the 18th. Valverde did not tell Sanches about his three-day right to cancel the transaction. Sanches signed Valverde's notary book. Valverde did not provide Sanches with copies of the documents; she said he would receive the documents in the mail. The new loans on the Lavonne property actually had higher interest rates and higher payments than the loans they replaced.

Sanches did not receive the documents in the mail, and his telephonic and personal attempts to contact Valverde were unsuccessful. A month or more later, he went to the title company and finally obtained copies of most of the documents. When he "read the papers," he realized that she "charged me too much." Sanches testified that he would not have obtained the new loans if he had known that his payments would increase or known how much Valverde was charging him. His payments on the Lavonne property went up about $500 a month. Sanches was unable to make the payments on the Lavonne and Nugget properties, and he was forced to sell them. He had to pay a prepayment penalty when he sold the Lavonne property.

At the time of sentencing, the court entered a general restitution order in favor of Sanches as to count 11 and set the matter for a restitution hearing. At the restitution hearing, Sanches sought an award of $27,399.48. This amount represented all of the fees Sanches had paid in connection with obtaining the Lavonne loan. The court granted Sanches's request and awarded him $27,399.48 in restitution plus interest in connection with count 11.

2. Analysis

Valverde claims that "[t]here is no evidence that Sanche[s] suffered loss as a result of Valverde's act of notarizing a false deed of trust." "Here, there is no evidence that notarizing the false deed of trust had anything to do with Sanche[s]'s decision to refinance his property on the terms stated by Valverde." She cites a case holding that, "in the nonprobation context, a restitution order is not authorized where the defendant's only

relationship to the victim's loss is by way of a crime of which the defendant was acquitted." (*People v. Percelle* (2005) 126 Cal.App.4th 164, 180 (*Percelle*).)

"'[A] trial court's determination of the amount of restitution is reversible only if the appellant demonstrates a clear abuse of discretion. . . . In determining the amount of restitution, all that is required is that the trial court "use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious." [Citations.] The order must be affirmed if there is a factual and rational basis for the amount. [Citation.]'" (*People v. Prosser* (2007) 157 Cal.App.4th 682, 689-690.)

Valverde's reliance on *Percelle* is misplaced. The trial court's restitution award to Sanches was not based on count 9 or count 10, the counts on which she was acquitted, but on count 11, a count on which she was convicted. Count 11 concerned Valverde's use of a false date in her notarization of the deed of trust for the Lavonne loans. Sanches's testimony established that he would not have proceeded with the transaction if he had known that the loans would increase his payments. By refusing to give Sanches copies of the documents and using a false date on the deed of trust, Valverde deprived Sanches of the opportunity to cancel the transaction. Had Sanches cancelled the transaction, he would have avoided paying the fees associated with the transaction. Therefore, the trial court had an adequate "'factual and rational basis for the amount'" of restitution that it awarded to Sanches in connection with count 11. We reject Valverde's contention.

G. Conduct Credit

Both defendants contended in their opening briefs that they were entitled to additional conduct credit under the revised version of section 4019. While this case was pending on appeal, the trial court entered an amended judgment awarding the additional

conduct credit that defendants sought. The Attorney General then contended that the trial court had erred in doing so. In *People v. Brown* (2012) 54 Cal.4th 314, the California Supreme Court held that the amended version of section 4019 applies only prospectively and does not thereby violate defendants' equal protection rights. Consequently, we will vacate the trial court's amended judgment and reinstate its original judgment.

IV. Disposition

The trial court's amended judgment awarding additional conduct credit is vacated, and the trial court's original judgment is reinstated and affirmed. The trial court shall forward a certified copy of its original judgment to the California Department of Corrections and Rehabilitation.

_____
Mihara, J.

I CONCUR:

_____
Bamattre-Manoukian, Acting P. J.

DUFFY, J.,* Concurring and Dissenting—

This is a significant decision. The issues defendants have presented are likely to recur, given the reported scale and volume of mortgage-related illegalities that occurred during the years of California's real estate bubble, illegalities that became apparent following the collapse of the housing market. Accordingly, I have given my own cast to each claim presented even if it is also treated in the majority opinion.

On many points, the majority and I agree about the resolution of defendants' claims. We do not agree, however, on the definition of a loss under Penal Code section 12022.6. In my view, the majority's view is not easily squared with our Supreme Court's decision in *People v. Crow* (1993) 6 Cal.4th 952, or with the rule of lenity that applies to ambiguous criminal statutes. Federal decisions lend additional support to an interpretation in defendants' favor. Therefore, as regards the section 12022.6 assessment, I respectfully dissent from the majority's analysis and conclusion.

INTRODUCTION

A jury convicted defendants Esperanza Isabel Valverde and Herman Michael Covarrubias of fraudulent behavior in their role as mortgage brokers. Defendants claim that there was insufficient evidence for the jury to impose certain convictions and find true white-collar financial crime enhancement allegations. They further claim that the trial court made two erroneous evidentiary determinations when it disallowed discovery in one ruling and excluded evidence of mortgage industry lending practices in the other, and that it failed to instruct the jury on the definition of a loss, should have sentenced them to shorter sentences, and erred in calculating certain credits against their sentences.

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* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

For their part, the People claim that the court was too generous in awarding presentence conduct credits.

As stated, I agree in part and disagree in part with these contentions. I would, accordingly, modify the judgment in part and affirm it otherwise.

PROCEDURAL BACKGROUND

A jury convicted defendants of multiple crimes arising out of fraud they committed as mortgage brokers.

Valverde was convicted of 24 counts of grand theft (Pen. Code, §§ 484, 487, subd. (a))[19], nine counts of notarizing a false trust deed (Gov. Code, § 8214.2), and seven counts of forgery (§ 470, former subd. (d); Stats. 1998, ch. 468, § 2, pp. 3256-3257). Covarrubias was convicted of 19 counts of grand theft and three counts of forgery. The jury found true two excessive-taking and property-loss enhancement allegations for each defendant. One fell under section 186.11, former subdivisions (a)(1) and (a)(2) (Stats. 2001, ch. 854, § 21, p. 6974) (taking of more than $100,000 under former subdivision (a)(1), and more than $500,000 under former subdivision (a)(2)). The other fell under section 12022.6, former subdivision (a)(4) (Stats. 1998, ch. 454, § 2, p. 3231) (taking of property resulting in a loss greater than $2.5 million).

The trial court sentenced defendants to prison, Valverde for 23 years and eight months and Covarrubias for 19 years and eight months.

FACTS

On appeal, defendants do not dispute most of their convictions. "To support a conviction of theft . . . by false pretenses, it must be shown that the defendant made a false pretense or representation with intent to defraud the owner of his property, and that the owner was in fact defrauded." (*People v. Ashley* (1954) 42 Cal.2d 246, 259.) In the main, defendants do not contest that they committed such acts and that such results

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[19] All statutory references are to the Penal Code except as otherwise indicated.

occurred. In light of defendants' appeal from only certain convictions and from the white-collar financial crime enhancement findings, I will present only limited facts.

I. *Prosecution Case*

In the early 2000's, defendants owned Summit Mortgage One, a mortgage brokerage firm. They committed mortgage loan fraud against a number of borrowers and lenders, misrepresenting loan terms and costs to borrowers, deceiving lenders with regard to borrowers' financial standing, and forging loan documents. The original and corrected iterations of the first amended indictment alleged that one or more of the two defendants in this appeal committed these crimes between July 1, 2002, and July 31, 2004.

Borrowers testified that they had been contacted by defendants about refinancing their mortgages and that defendants misled them about the terms of the new loans.

Borrowers testified that defendants did not make it possible for them to review loan documents adequately. Sometimes their conduct was passive, as when defendants, aware that a borrower could not read English, did not translate the documents. In other cases, their misconduct was active. Valverde would cover the documents' pages so that they could not be read, or flip through them too quickly. One borrower's brother attempted to read the documents, but Valverde took them away. Borrowers were instructed to leave the documents undated or write on them a date different from the date of signing. Borrowers were not informed of their right to rescind the transaction within three days under a federal Truth-in-Lending Act regulation (12 C.F.R. § 226.23(a)(3)). Defendants would fail to give the borrowers the loan documents in a proper fashion.[20]

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[20] By "borrowers," I mean some but not necessarily all borrowers in some but not necessarily all transactions. In other words, defendants did not necessarily engage in every dubious act or omission with every borrower. There was evidence that Valverde sometimes and/or to some extent followed proper procedure. Joseph P. Hidalgo testified that during a refinancing transaction in 2001, before the period of the crimes charged, Valverde "explained about the . . . Truth in Lending and the three-day notice for cancellation . . . on the documents as far as I can recall." Valverde repeated this advice in

At times, defendants would fail to disclose broker's fees and interest rates, prepayment penalties, and/or the correct loan amount. The fees could be exorbitant and the results financially unappealing. In one case, defendants brokered a loan to Oscar Alaniz that included paying off two prepayment penalties of $9,703 and $2,695 and included other costs that normally accompany a refinancing. For this expenditure of $12,398 in prepayment penalties alone, Alaniz would save $6,228 over the three-year period during which the mortgage would have a fixed rate. For this service, defendants charged Alaniz fees of $14,092. Alaniz testified that if he had known of the foregoing terms, he would not have undertaken the transaction, but that Valverde did not, in the words of the prosecutor asking the question, "explain . . . that you were paying $26,490 in September '03 to save" "$6,228 over the next three years?"

Defendants also gave false information to lenders.

Many of the falsifications involved misrepresentations of a borrower's financial position or employment history.[21] Two falsified tax returns submitted in support of one particular loan resulted in the forgery charges in counts 39 and 40.

The record contains indications that certain borrowers also engaged in fraud regarding these transactions. Three witnesses invoked their Fifth Amendment rights and testified only after use immunity was granted.

II. *Defense Case*

Defendants relied on cross-examinations of prosecution witnesses and did not present a case-in-chief.

2004, when the Hidalgos refinanced again, a transaction leading to charges against defendants. Sergio Raúl Barajas Estrada also testified that Valverde alerted him to his right to rescind the transaction within three days.

[21] Describing various trial exhibits, the People assert that evidence introduced at trial also shows that defendants altered prospective borrowers' original documents and, evidently to obscure the alterations, sent photocopies to the lenders.

DISCUSSION

I. *Evidentiary Rulings*

Defendants claim that their convictions must be reversed because the trial court erroneously denied Valverde's motion to discover documents in a People of the State of California lawsuit against ACC Capital Holdings Corporation and various subsidiaries of that parent (hereafter sometimes the ACCCH entities). The subsidiaries, Ameriquest, Town & Country Credit Corporation, and AMC Mortgage Services, Inc., offered retail loans. They were involved in the lawsuit from the filing of the complaint to the final settlement.

Another subsidiary of ACCCH Holdings, though not a defendant in the People's civil lawsuit, was Argent. Argent was one of the lenders victimized by defendants. Unlike its retail-lender sister subsidiaries that were involved in the lawsuit, Argent was a wholesale lender (i.e., a lender that funds loans through the intermediation of mortgage brokers like defendants) in the residential real estate market.

In a second evidentiary issue, defendants claim that the trial court erroneously granted the People's motion that they not be allowed to introduce evidence of the lending practices of ACCCH Holdings and its subsidiaries other than Argent.

A. *Background*

In counts 15, 21, 23, 24, 26, 28, and 44, the jury convicted each defendant in this appeal of committing grand theft against Argent.

To establish the element of reliance required for a false pretenses conviction, the prosecution summoned Tami Carnes, an executive for Argent at the time the company existed (its assets were acquired by another concern after the events leading to this prosecution), to testify about Argent's business practices. She provided lengthy testimony. As relevant here, she testified about Argent's reliance on information provided by mortgage brokers, including defendants. Carnes testified, in response to repeated

questions by all parties, that Argent relied on statements made in the loan applications and furnished to Argent by defendants when deciding whether to fund the loans.

After acknowledging that Argent's loans tended to be sold to investors in tranches, i.e., "loans that met the requirements and criteria that certain investors were looking for," Carnes testified that Argent relied on the brokers' and borrowers' representations because negative consequences would occur if the loan documentation contained misrepresentations.

The prosecutor asked, "Does Argent rely on the employment and information in the 1003 [loan application] in funding the loan?" Carnes answered "Yes." Later, this exchange occurred: "Does Argent rely on the documents submitted on a Full Doc [full-documentation] loan in funding the loan?" "Yes."

"[I]f there [are] any originating issues on the loan," Carnes testified, "Argent may be forced to buy back that loan from an investor. Or if Argent finds through an investigation that there's any fraudulent [*sic*] or misrepresentation, they have an obligation under the reps and warrants of the contract with the investor that they sell to that they are to buy back those loans." "If there's misrepresentation on any document that's not true and accurate or if Argent is notified by a lawsuit that [a] borrower's making allegations that information is not true, there's several different things. [¶] If we find an appraisal over value to property, if we found the owners signed an Owner Occupancy Statement saying they were going to live in the property and found that they're not living in the property, we have an obligation to our reps and warrants. We have to purchase that loan back because we sold it to the investor with the terms. And if the investor has the property he thinks is owner occupied and it's not, then we have to buy it back."

"Reps and warrants" meant representations and warranties, including the "obligation to our pooling contract with the investors . . . that if we find any information not to be true and accurate, we have to repurchase the loan back."

Defense counsel asked Carnes, "if a borrower lies on that 1003 [loan application], that's not relevant to your inquiry as to who is responsible?" "We both hold the borrower and the broker accountable," she answered.

On cross-examination, which was undertaken by counsel for several defendants, defense counsel had difficulty challenging Carnes's testimony. This was not for want of trying.[22] "This 1003 [loan application] is received by Argent; is it not?" defense counsel asked. "If it's an Argent loan, yes," Carnes replied. "And is it relied—it is relied upon by Argent, correct?" "Correct." Later, there were these exchanges: "So you had indicated that Argent would rely upon an Occupancy Agreement. It would also rely upon a 1003 [loan application]?" defense counsel asked. "Correct," Carnes answered. "[W]e rely on the broker to provide true and accurate information to us. We rely on the broker that information on the 1003 [loan application] is accurate information." "And you rely on the broker who relies on the borrower, correct?" "That's their customer. That is who[m] they work with." "We trust what the broker's going to send is true and accurate information," Carnes later testified in response to a question from defense counsel, and counsel could not undermine that assertion.

Toward the end of cross-examination, one defense attorney acknowledged that Carnes's testimony about reliance was difficult to controvert: "I know everything is

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[22] One defense attorney asked Carnes, "I notice that in a number of the loan files that we've looked at through all the various lenders and these borrowers, . . . that there are a lot of people that are engaged in landscaping." Carnes acknowledged that this occupational category was "definitely a concern we found in our investigation." Counsel asked, "Was there a . . . program at Argent where certain job categories could support certain levels of stated income, for example, a landscaper, $10,000, a baby-sitting service, $9,000?" Carnes admitted that Argent had no such safeguard. The figures counsel was quoting appear to refer to certain borrowers' statements of their monthly income, so that, if counsel was describing other testimony accurately, a landscaper would be claiming to earn $120,000 a year and the operator of a baby-sitting service $108,000 a year. I note, however, that the figure from the baby-sitting service appears to have involved a mortgagee other than Argent.

dependent upon the broker. That's who[m] you rely [on], and you've made that clear; and that's not my question right now."

B. *Analysis*

At bottom, defendants' claims consist of (1) claims under state law that the trial court erred in (a) denying a discovery motion that sought to obtain information gleaned from the People of the State of California lawsuit against Argent's sister corporations and corporate parent and (b) granting the prosecution's motion to limit the introduction of the ACCCH entities' lending practices other than those of Argent itself, and (2) constitutional claims that the foregoing rulings denied them their rights to present a defense and to a jury determination of their guilt under the United States Constitution.

1. *Inapposite Claim*

Before turning to those claims, I first address defendants' claim that the foregoing proceedings created a *Brady* violation, i.e., an infringement of their due process rights as established in *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

Brady is inapposite in this direct appeal and it was inapposite when presented to the court below. Under *Brady*, " 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' [Citation.] Thus, under *Brady* and its progeny, the state is required to disclose to the defense any material, favorable evidence. [Citations.] Favorable evidence includes both evidence that is exculpatory to the defendant as well as evidence that is damaging to the prosecution, such as evidence that impeaches a government witness." (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1471.) A *Brady* claim on direct appeal (as opposed to an allegation of a *Brady* violation on habeas corpus, which may rest on pleading facts that the proponent intends to prove later through discovery, affidavits, or other means) cannot have any operative effect unless the claimant shows the reviewing court and showed the trial court that the prosecution, or other entities whose knowledge is

imputed to the prosecution, withheld material and favorable evidence. (See *id*. at pp. 1469-1471 [defense counsel discovered *Brady*-implicating evidence before the trial court lost jurisdiction and raised a *Brady* claim in a new-trial motion]; *People v. Verdugo* (2010) 50 Cal.4th 263, 280-281 (*Verdugo*) [trial proceedings uncovered a discovery violation under section 1054.1, permitting a *Brady* claim on appeal]; see also generally *id*. at pp. 282-290.) Defendants' complaint is that the trial court's actions denied them the possibility of uncovering such evidence and that defendants know of no such evidence but are wondering whether any might exist. A *Brady* claim cannot lie in such circumstances. This is not to say, of course, that defendants had an obligation to ask the prosecution or other *Brady*-implicated agencies to turn over *Brady* material. " 'Pursuant to *Brady*, *supra*, 373 U.S. 83, the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request (*id*. at p. 87), a general request, or none at all.' " (*Verdugo*, *supra*, at p. 279.) But the record on appeal must show the existence of material that could at least be controverted as being, or not being, *Brady* material. That does not occur here.

2. *Discovery Claim*

Defendants claim that the trial court erred in denying Valverde's discovery motion to have the authorities furnish her with any information learned during the pursuit of the People of the State of California's lawsuit against the ACCCH entities that would show that Argent did not rely on defendants' representations in making the loans.

The People of the State of California, comprising the Attorney General, the California Corporations Commissioner, and six district attorneys, were the plaintiff in the lawsuit in question. The defendants were the ACCCH entities, i.e., ACCCH and its subsidiaries Ameriquest, Town & Country Credit Corporation, and AMC Mortgage Services, Inc. As mentioned, those subsidiaries offered retail mortgage loans. The complaint alleged, as relevant here, that the ACCCH subsidiaries (which the complaint referred to collectively as the Ameriquest Parties) misrepresented loan terms to

consumers and then provided loans to them with more onerous provisions, misleadingly told consumers that they could soon refinance and obtain better terms, failed to disclose information about points and fees, misrepresented adjustable rate and prepayment penalty terms, told prospective borrowers that they had worse credit ratings than they did, obtained inflated appraisals on residential property, and, of particular note, "engaged in acts and practices which resulted in fabricated and/or inflated income information [of] consumers, and/or nonexistent or inflated amounts of assets [of] prospective borrowers on loan applications." According to Valverde's discovery motion, a nationwide settlement of similar allegations led to a permanent injunction and final judgment in the People of the State of California civil lawsuit.

Valverde's discovery motion regarding the foregoing lawsuit contended that, like the Ameriquest Parties, "Argent is a subsidiary of ACCCH. The evidence obtained by the People and other settling states clearly justified a settlement of $295,000,000 against ACCCH based on its lending practices. . . . [T]his evidence . . . is materially favorable to her defense and will hurt the prosecution by refuting the contention that Argent is a victim . . . ."

The trial court considered the parties' papers on the discovery question and mentioned a "discussion about that." The parties, however, have not informed this court where any such discussion appears in the reporter's transcript. The court then denied the motion without further comment.

Under section 1054 et seq., a criminal "defendant generally is entitled to discovery of information that will assist in his defense or be useful for impeachment or cross-examination of adverse witnesses. [Citation.] A motion for discovery must describe the information sought with some specificity and provide a plausible justification for disclosure." (*People v. Prince* (2007) 40 Cal.4th 1179, 1232 (*Prince*).)

"Section 1054.1 (the reciprocal-discovery statute) 'independently [of *Brady*, *supra*, 373 U.S. 83] requires the prosecution to disclose to the defense, . . . certain

categories of evidence "in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies." ' [Citation.] Evidence subject to disclosure includes '[s]tatements of all defendants' (§ 1054.1, subd. (b)), '[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged' (*id*., subd. (c)), any '[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts' (*id*., subd. (f)), and '[a]ny exculpatory evidence' (*id*., subd. (e)). 'Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)' [Citation.]

"Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court 'may make any order necessary to enforce the provisions' of the statute, 'including, but not limited to, immediate disclosure, . . . continuance of the matter, or any other lawful order.' (§ 1054.5, subd. (b).) The court may also 'advise the jury of any failure or refusal to disclose and of any untimely disclosure.' (*Ibid*.)" (*Verdugo*, *supra*, 50 Cal.4th at pp. 279-280.)

With regard to the duties of a trial court: "No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties." (§ 1054.5, subd. (a); compare § 1054, subd. (e) [acknowledging the additional applicability of federal constitutional rights and other express statutory provisions in this regard].)

With regard to our duties on review, we review the trial court's negative ruling on Valverde's discovery motion for abuse of discretion. (*Prince*, *supra*, 40 Cal.4th at p. 1232.) Under that deferential standard, and given the state of the record, the court's ruling must be sustained.[23]

Defendants were charged with theft from Argent by false pretenses. "To support a conviction of theft for obtaining property by false pretenses, it must be shown: (1) that the defendant made a false pretense or representation, (2) that the representation was made with intent to defraud the owner of his property, and (3) that the owner was in fact defrauded in that he parted with his property in reliance upon the representation." (*Perry v. Superior Court* (1962) 57 Cal.2d 276, 282-283.)[24]

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[23] I also reject defendants' appurtenant constitutional claims, which are claims of additional legal consequences of the trial court's purportedly erroneous ruling. These claims are not forfeited. (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 990, fn. 5; see also *id*. at pp. 997, 1000, 1024, 1029, 1031, 1055.) In such a case, however, "rejection on the merits of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we therefore provide none." (*Id*. at p. 990, fn. 5.)

[24] *People v. Ashley*, *supra*, 42 Cal.2d 246, states that "[t]he false pretense or representation must have materially influenced the owner to part with his property, but the false pretense need not be the sole inducing cause." (*Id*. at p. 259.) However, no decision I have been able to locate has, before or since *Ashley*, defined "materially" (*ibid.*) or otherwise clarified this holding in any significant manner. (See, e.g., *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1412; *People v. Whiteside* (1922) 58 Cal.App. 33, 40; *People v. Griesheimer* (1917) 176 Cal. 44, 51-52.) The closest decisional law comes to being helpful in this regard is a statement in *People v. Whight* (1995) 36 Cal.App.4th 1143: "no prosecution will lie where the complainant parted with his property to the accused from some cause other than such false representation[,] since to constitute this offense the representation must have been a material element in proximately causing the complainant to part with his property *and without which he would not have done so*. . . .' " (*Id*. at p. 1152, italics added; accord, *People v. Conlon* (1962) 207 Cal.App.2d 86, 95.)

In *Perry v. Superior Court*, *supra*, 57 Cal.2d 276, the court stated that a misrepresentation was material when, from the victim's standpoint, it "would influence

The People argue that they proved all of the foregoing elements. Obviously, however, evidence is exculpatory within the meaning of section 1054.1, subdivision (e), if it negates or weakens the proof of an element of a charged crime. Even if the People presented a sufficient case that defendants stole by false pretenses, defendants were, in turn, entitled to negate or weaken the People's proof by creating a reasonable doubt about one or more elements of the false pretenses charges.

Defendants have argued that many loans funded in the United States during the previous decade were so-called liar loans, that many mortgage brokers and lenders processed the papers for those loans with indifference to the borrowers' financial positions, and that it is possible that there was no reliance by Argent on the documents defendants submitted to Argent, no matter how questionable the documents may have been. Indeed, it is their very questionability that raises doubts about whether Argent was serious about relying on them, no matter what the testimony was.

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her in arriving at a decision as to lending money." (*Id*. at p. 284.) The necessary degree of influence, however, was not therein described, except by reference to the facts of the case, and this brief reference does not furnish a useful definition of materiality.

CALJIC No. 14.11 defines materiality as follows: "In order for [a] false pretense or representation to be material in inducing an owner to part with property with intent to divest him or herself of title, the owner must rely wholly *or in part* on that pretense or representation, and he or she must act in that reliance." (Italics added.) This reference to partial reliance, however, is imprecise; it does not specify how great the influence of a partial reliance on a misrepresentation must be. If a lender is acting 99 percent because it thinks it can profit by securitizing loans and selling them to investors and one percent because of the statements on loan documents—especially statements that are dubious in light of common experience, the borrower's history, or internal inconsistencies—then I would question whether the misrepresentation can be material within the meaning of *People v. Ashley*, *supra*, 42 Cal.2d at page 259, and other cases.

In the absence of definitive decisional authority, I conclude that CALCRIM No. 1804 defines materiality properly: "The false pretense must be an important factor, but it does not have to be the only factor the owner [or agent] considers in making the decision." Its "important factor" standard makes sense of the rule set forth in *People v. Ashley*, *supra*, 42 Cal.2d at page 259.

Against this view, the prosecutor argued to the trial court, during the parties' discussion of the motion to exclude evidence about the ACCCH entities' loan practices, as follows: "If the lender didn't care, then why did they bother asking for broker agreements? Why did they bother asking if the person was licensed by [the Department of Real Estate]? Why did they ask[ ] for submission of documents? Documents submitted to them contained false verification, false tax returns. They had no involvement in submitting those. The broker submitted those to them, and they had reason to believe on it [*sic*] because they had a broker agreement with the broker that says: I will not submit fraudulent loans. I will not submit false information. . . . And that's why they relied. If they didn't care, they wouldn't have gone through the whole formality of asking for things." The People distill this argument on appeal: "The reason for the lenders' strict documentary requirements is obvious: in making six- and seven-figure loans, a lender needs to know whether the borrowers can repay."

Defense counsel replied before the trial court that this was an untenable view, because "they're selling these loans off. They wanted to create a package. They create a package. The point is on the other side, Ameriquest is doing exactly the same thing, and they're selling them off. If they're doing these practices themselves, then clearly all this other stuff is a smoke screen." On appeal, defendants reiterate this observation.

Defendants have the better of this argument. It is a quaint and unrealistic view that lenders in the United State residential mortgage market earnestly and painstakingly evaluated and throughout the lending process utterly relied on ability-to-repay documentation during the historical period in which these events occurred. Rather, in the period of loose lending that contributed to the housing market collapse of recent years, a collapse that precipitated a global economic crisis that endures, lenders were not necessarily concerned with a borrower's ability to pay as long as the lender could sell the loan to investors, some overseas and many with inadequate information about the strength of the securities they were buying:

"[T]he fraudulent and abusive mortgage lending tactics that have been documented were facilitated and even provoked by the securitization of mortgage loans. First, securitization removed two important risks customarily associated with mortgages, namely (1) the risk of the lender's bankruptcy, and (2) the risk of debt-unenforceability because of some illegality in the origination of the loan. The decoupling of these risks from securitized mortgage loans rendered the securitizers and investors indifferent to the business practices of originators, no matter how flagrant, abusive, and ultimately unsustainable they were. Second, originators' compensation depended on both the volume of loans they originated and on the unfavorability of the terms of those loans. Originators collected up-front fees from borrowers, thereby encouraging them to drive up costs. In addition, they collected 'outside of closing' fees from securitizers that were based on loan terms, including interest rates, prepayment and other penalties, and loan amounts. As a result, aggressive originators sought to close many loans with large principal amounts and with terms that were expensive for the borrowers (and thus lucrative for securitizers and investors). Because originators sold these loans within months or sometimes even days, they were not concerned with ensuring a borrower's ability to repay the debt. Third, securitizers and investors—who did bear the risk of borrower defaults and thus could reasonably have been expected to perform adequate due diligence to ensure the long-term viability of loans they purchased—devised convoluted and unprecedented loan terms that, at least in the medium run, turned defaults from sources of loss to sources of massive profits. Indeed, mortgage loan unaffordability was central to the rate of the mortgage market's growth in recent years, as it directly led to millions of refinances by borrowers who were unable to keep up with their rising mortgage payments, which in turn ultimately led to the market's crash. [¶] The mortgage industry did not always suffer from these infirmities. Traditionally, mortgage loan originators, typically savings and loan associations, held the vast majority of loans they made in their portfolios until those loans were fully paid, often years after origination.

This meant that lenders were committing substantial amounts of capital, for long periods of time, to each loan they made. When a borrower defaulted on her loan, the originating lender bore the cost of collection and any resulting loss. Consequently, lenders carefully scrutinized every borrower's ability to repay a proposed loan, required substantial equity (a down payment in the case of a purchase money loan—the most common kind of mortgage loan at the time), and lent on terms that could reasonably be expected to be affordable to the borrower in the long run." (Vazire, *Smoke and Mirrors: Predatory Lending and the Subprime Mortgage Loan Securitization Pyramid Scheme* (2009) 30 Pace L. Rev. 41, 43-44, fns. omitted.)

In these circumstances, it was not necessarily true in the time frame with which this case is concerned that the lenders "need[ed] to know whether the borrowers can repay," contrary to the People's view. What lenders may have needed to know was not whether borrowers could repay, but whether the borrowers could be made to look like they could repay for as long as it took to sell the loans, which ultimately became packaged as mortgage-based securities. If so, then as long as defendants gave them any plausible-appearing (or even implausible) document packages, that sufficed.

Thus, Argent's witness may have painted an idealized picture of the company's goals and standards and the constraints under which it operated. Then again, Argent may have been without fault; I express no opinion on the question.

Nevertheless, the trial court did not abuse its discretion in denying defendants the roundabout method by which they sought to ferret out any unsavory practices of Argent that might be helpful to their case. Defendants have not identified an indication in the record that they tried to discover such information directly from Argent, which ought to have been more fruitful.

The trial court noticed this angle of defendants' pursuit of evidence. It asked: "What evidence do you have through discovery or other purposes that [that] business practice"—i.e., the practices of "the other entities"—"was the business practice of

Argent?" Defense counsel responded, "I have to ask Ms. Carnes, who worked there, isn't it a fact these are the same business practices that are engaged in at Argent, that what you're giving us here is a load of hooey, that in the industry these are known as liar loans. Those are liar loans for a reason. Same thing was being done at Ameriquest and same at Argent. [¶] . . . [W]e've asked to have the District Attorney's Office get this information from the people who have it but that's—" There the argument ended, after the prosecutor responded, "there's no showing that Argent did any of that stuff . . . . And they have no evidence showing that Argent did not rely on it."

The trial court and the prosecution were correct. The court could reasonably conclude that defendants needed to pursue discovery against Argent directly before they could ask for authority to engage in more tangential discovery methods.

3. *Evidence Regarding Lenders Related to Argent*

Defendants' next contention is that the trial court abused its discretion in granting the prosecution's motion, over their objection, to exclude evidence that the ACCCH subsidiary Ameriquest engaged in improper lending practices.

"On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence . . . .' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

Defense counsel wanted to question witnesses about Ameriquest's lending practices. As explained, Ameriquest, unlike Argent, lent directly to residential homebuyers. Argent, by contrast, worked with mortgage brokers. Defendants appear to contend that the trial court excluded them from asking witnesses whether Argent was focused on generating loans no matter how unlikely an applicant's prospects for paying a mortgage, so that Argent did not rely on defendants' representations about applicants' creditworthiness. But the court ruled that defendants could question the relevant witness about Argent. "[Y]ou can ask . . . Ms. Carnes," the employee in question, "about the

Argent practices," the court stated. "You can ask her about the practices of Argent," the court repeated. It demurred only to counsel's insistence that "I think I ought to be entitled to ask her about the practices that went on when she was at Ameriquest."

On this record, which includes a long and considered discussion between the trial court and the parties about this issue, it is evident that the court's ruling did not fall outside the bounds of reason. The court allowed defendants to question the relevant witness about Argent's attitude toward loan applications, and that was a reasonable limitation on cross-examination, one that would keep the jury focused on Argent. For the same reason, I discern no violation of defendants' constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution to present a defense or to a jury determination of their culpability. (See *ante*, p. 1, fn. 23.)[25]

II. *Amount of Loss*

Defendants claim that there was insufficient evidence to support jury findings that they took property and/or caused a loss exceeding $500,000 under section 186.11 and $2.5 million under section 12022.6, and that therefore the true findings on the enhancement allegations to those effects, which resulted in the trial court's increasing

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[25] In addition, defendants appear to present a closely related claim that the trial court improperly removed from the trier of fact's consideration the question whether they intended to steal from lenders. Specifically, they appear to assert that the court's ruling granting the prosecution's motion to exclude evidence denied them the opportunity to prove, and the jury an opportunity to decide, that they lacked any intent to steal from Argent or other lenders.

Any such claim is unfounded. Even if certain lenders were intent on deceiving investors who did not know the true financial strength of the mortgage-based securitized portfolios that lenders or intermediaries were marketing to them, that would not relieve defendants of liability for their own intent to steal from lenders and/or borrowers. Defendants admit that they forwarded documents to lenders that they knew to be unsupported by the financial facts. Perhaps certain lenders defendants stole from would not vigorously scrutinize the false information defendants were furnishing them as long as they could extract gains from investors, but that would not relieve defendants of liability for their own thefts.

each defendant's prison term by seven years, must be stricken. Unlike the majority, I agree with defendants' contentions in part and disagree with them in part.

The prosecutor argued to the jurors that they could determine the truth of these allegations by totaling the sum of the face value of all of the mortgages that defendants brokered fraudulently. "What the evidence in this case shows is that the defendants originated over $10 million in fraudulent loans. For which they received over $400,000 in commissions. This is a table, a summary, of the loan amounts that add up to the $10 million, and you can see the different victims or borrowers related to these counts." The prosecutor stated with additional precision, "when you add up all the loan amounts, it comes out to $10,079,575, [with] total loan commissions of $423,598."[26]

The prosecutor also discussed the instructions on sections 12022.6 and 186.11 that the jurors would soon be considering:

"You also have an instruction on an allegation. That's Penal Code section 12022.6(a)(4). And what this requires you to do is to look at the crimes that are alleged . . . . [¶] [I]n the commission of the crimes, in this case the grand theft, defendant took property. And when the defendant acted, he or she intended to take the property. And the loss caused by the defendants[']' taking was greater than $2.5 million.

"So—so first you have to find the defendant, either . . . Esperanza Valverde or Herman Covarrubias guilty of the grand theft. Once you find that, you can look at the different counts involving grand theft in which they are charged.

"And you can add together the taking, which is the cause of the lenders or the borrowers to either obligate themselves on the loan or the lenders to part with their

[26] During defendants' sentencing hearing, however, the prosecutor argued to the trial court that the loans had a total face amount of about $8 million. As for the commissions, in sentencing memoranda the prosecutor provided different totals, calculating the commissions' value to be $378,069 for Valverde and $316,911 for Covarrubias.

money. And you add that together, and if it comes up to more than $2.5 million, then you will make a finding as to this allegation.

"And you have to find that the defendant intended to take the property in each crime and each crime arose from a common scheme or plan. So to make it easy for you, for example, if you go through the loans [that] involved just the lenders, if you add up—if you think that the defendants defrauded the lenders as to those loans—if you add them up, and if they exceed $2.5 million, then you can make the finding as to this count. And the minimum requirement is $2.5 million.

"The next allegation is [section] 186.11. . . . And this requires that the defendant committed two or more related felonies, [in] which fraud was a material element of at least two related felonies, and the related felonies involved a pattern of related felony conduct. The pattern of related felony conduct involved the taking of more than $500,000.

"So this analysis is pretty similar to the one I just talked to you about before, the [section] 12022.6. But this one just requires that you find it meets the $500,000 requirement. And the two related felonies, again, grand theft being a related felony and fraud as a material element of it—if you find them guilty of the grand theft then you may make this analysis to see if it meets the $500,000.

"And usually on these loans—I mean, you get one or two loans and you've met the $500,000 because a lot of these loans were [in the $300,000] or $400,000 range.

"And then the definition of pattern or related felony conduct is engaging in at least two felonies that have the same or similar purpose, result, principals, or victims, or methods of commission and they're not isolated events. And fraud is a material element of grand theft and forgery."

As the parties were discussing the wording of the proposed instructions, the prosecutor, engaging in reasoning that comports with the reasoning of the majority in this decision, commented: "Your Honor, a loss is not a loss. A loss is the taking or parting

with the property." The trial court replied, "I understand," but noted that it anticipated that the defense would argue to the contrary, "based on the evidence."

The trial court evidently agreed with the prosecutor in principle, however, because it instructed[27] on the section 12022.6 allegations as follows:

"If you find either defendant . . . guilty of the grand theft by false pretense charges or of attempting to commit grand theft by false pretense, you must then decide whether the People have proved the additional allegation that the value of the property taken was more than $2,500,000.

"To prove this allegation, the People must prove that:

"1. In the commission or attempted commission of the crime, the defendant took property;

"2. When the defendant acted, he or she intended to take the property;

"AND

"3. The loss caused by the defendant's taking the property was greater than $2,500,000.

"If you find the defendant guilty of more than one crime, you may add together the loss from each crime to determine whether the total loss from all the crimes was more than $2,500,000 if the People prove that:

"A. The defendant intended to and did take property in each crime;

"AND

"B. Each crime arose from a common scheme or plan.

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[27] I quote the written version of the instructions in this opinion. The trial court stated that it would give the jury copies of the written instructions for use during deliberations and the record offers no reason to doubt that it did so. In these circumstances (*People v. Wilson* (2008) 44 Cal.4th 758, 802) "[t]o the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control." (*Id*. at p. 803; accord, *id*. at p. 804.)

"The value of property is the fair market value of the property.

"The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

"Loss includes any dispossession of property, which includes letting defendant or another person take ownership of the property."[28]

The foregoing instruction follows the pattern instruction, CALCRIM No. 3220, except, significantly, for the last paragraph, a modification to the pattern language that endorsed the prosecution's (and evidently also the trial court's) view of how loss should be evaluated.[29] I was unable to locate in the voluminous record any explanation of how this language came to be included, and the parties, in supplemental briefing that this court requested, acknowledge that the record does not appear to contain one. The People call to our attention that the clerk's minutes memorialize the taking place of unreported discussions about the instructions. Presumably this language was arrived at during one of them. Eventually, my research disclosed that it is derived from the final sentence in *People v. Bates* (1980) 113 Cal.App.3d 481, 484. I wish to emphasize that discussions regarding jury instructions should always be reported.

Regarding section 186.11, the trial court instructed:

"If you find the defendant Herman Covarrubias or defendant Esperanza Valverde guilty of the crimes charged in Counts 5, 12, 15, 19, 21, 23, 24, 26, 28, 29, 31, 33, 36, 37,

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[28] The majority opinion states that defendants "do not challenge this special instruction." (Maj. opn., *ante*, p. 12, fn. 6.) Rather, however, that is the basis of defendants' section 12022.6 claim.

[29] In light of this modification, I reject at the threshold defendants' claim that the trial court erred by failing to define *loss* in instructing the jury on principles applicable to the sections 186.11 and 12022.6 allegations. The court did define *loss*, albeit not in a way that favored defendants.

38, 41, 43, 44, [and] 46 [i.e., grand theft] or of attempting to commit those crimes, you must then decide whether the People have proved the additional allegation that the defendant engaged in a pattern of related felony conduct that involved the taking of more than $500,000.

"To prove this allegation, the People must prove that:

"1. The defendant committed two or more related felonies, specifically grand theft or attempted grand theft by false pretense;

"2. Fraud was a material element of at least two related felonies committed by the defendant;

"3. The related felonies involved a pattern of related felony conduct;

"AND

"4. The pattern of related felony conduct involved the taking of more than $500,000.

"A pattern of related felony conduct means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events.

"Related felonies are felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.

"Fraud is a material element of grand theft or attempted grand theft by false pretense.

"The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved."

Evidently the jury, in finding true on verdict forms that each defendant "took property of a value exceeding two and a half million dollars . . . within the meaning of Penal Code section 12022.6(a)(4)" and that "the pattern of related conduct by the

defendant . . . involved the taking of more than five hundred thousand dollars . . . within the meaning of Penal Code sections 186.11(a)(1) and (a)(2)," accepted the prosecutor's argument that it need only total the face value of the mortgages funded. The findings could not have been based solely on the commissions, which totaled either $423,598 for the defendants combined or $378,069 for Valverde and $316,911 for Covarrubias, according to the prosecutor. The court denied defendants' motions to strike these enhancements or strike the punishment for them in the interests of justice (§ 1385).

A. *Standard of Review*

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

B. *Section 12022.6 Discussion*

In 2002 through 2004, when according to the amended indictment defendants committed their crimes, section 12022.6 provided in pertinent part:

"(a) When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows:

"[¶] . . . [¶]

"(4) If the loss exceeds two million five hundred thousand dollars ($2,500,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of four years.

"(b) In any accusatory pleading involving multiple charges of taking, damage, or destruction, the additional terms provided in this section may be imposed if the aggregate losses to the victims from all felonies exceed the amounts specified in this section and arise from a common scheme or plan. All pleadings under this section shall remain subject to the rules of joinder and severance stated in Section 954.

"(e) For the purposes of this section, the term 'loss' has the following meanings:

"(1) When counterfeit items of computer software are manufactured or possessed for sale, the 'loss' from the counterfeiting of those items shall be equivalent to the retail price or fair market value of the true items that are counterfeited.

"(2) When counterfeited but unassembled components of computer software packages are recovered, including, but not limited to, counterfeited computer diskettes, instruction manuals, or licensing envelopes, the 'loss' from the counterfeiting of those components of computer software packages shall be equivalent to the retail price or fair market value of the number of completed computer software packages that could have been made from those components." (Former section 12022.6; Stats. 1998, ch. 454, § 2, pp. 3231-3232.)

At the time of defendants' crimes, former subdivisions (a)(1) and (a)(2) of section 186.11, punished a "taking" but not a "loss." (Stats. 2001, ch. 854, § 21, p. 6974.) The current version of section 186.11, subdivisions (a)(1) and (a)(2), differentiates between takings and losses and provides that either may be punished. The difference between the version of section 186.11 applicable to defendants and the current version is shown in italics that represent a change the Legislature made in 2007 (Stats. 2007, ch. 408, § 1, pp. 2882-2883 (West 2007)):

"(a)(1) Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of, *or results in the loss by another person or entity of*, more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3). This enhancement shall be known as the aggravated white collar crime enhancement. The aggravated white collar crime enhancement shall only be imposed once in a single criminal proceeding. For purposes of this section, 'pattern of related felony conduct' means engaging in at least two felonies that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics, and that are not isolated events. For purposes of this section, 'two or more related felonies' means felonies committed against two or more separate victims, or against the same victim on two or more separate occasions.

"(2) If the pattern of related felony conduct involves the taking of, *or results in the loss by another person or entity of*, more than five hundred thousand dollars ($500,000), the additional term of punishment shall be two, three, or five years in the state prison." (§ 186.11.)

As noted, defendants argue that, with regard to the impact of their misdeeds on the lenders, the jury should have been instructed to determine only actual losses, i.e., losses offset by the value of secured property (that is, the homes on which the lenders obtained first deeds of trust in exchange for funding the mortgages on them) as collateral, and not allowed to evaluate loss by adding up the face values of the transactions. Had the jury been properly instructed, defendants maintain, there would not have been sufficient

evidence of losses of more than $500,000 and $2.5 million, so due process principles require setting aside the verdicts.

Defendants' role was twofold in these crimes. With regard to commissions gleaned as a result of fraudulent mortgage brokering, according to various statements by the prosecutor, either defendants together received $423,598 or, separately, Valverde received $378,069 and Covarrubias $316,911. The fraudulent loans themselves, according to the prosecution, had a face value of approximately $8 million to $10 million, but defendants did not receive any of that money. Instead, the mortgagees lent it to mortgagors and in return received first deeds of trust on residential real property. Defendants assert that the record shows that the value of the property exceeded the value of the loans, so that the mortgagees' losses were zero. The People rely on a view that as long as defendants brokered transactions in which mortgagees were deceived, they are criminally liable for the face amount of transactions—a view endorsed by the trial court's special instruction on the section 12022.6 allegation: "Loss includes any dispossession of property, which includes letting defendant or another person take ownership of the property."[30]

The trial court erred in adopting this view of the law and instructing the jury accordingly. With regard to section 12022.6, the Legislature has penalized any "person [who] takes, damages, or destroys any property in the commission or attempted commission of a felony" (§ 12022.6, subd. (a)) but only if such taking results in, as relevant here, a "loss [that] exceeds two million five hundred thousand dollars" (*id*., former subd. (a)(4); Stats. 1998, ch. 454, § 2, p. 3231). Defendants' grand theft convictions rest on their taking property in the sense of subjecting the mortgagees to the risk of making loans to uncreditworthy mortgagors, i.e., defendants "jeopardize[d] their

[30] See *ante*, page 23, footnote 28.

financial stability to the full amount of the loan requested." (*U.S. v. Tedder* (5th Cir. 1996) 81 F.3d 549, 551.) But a white-collar financial crime sentence enhancement under section 12022.6 requires that any such grand-theft taking must also result in a "loss." (§ 12022.6, former subd. (a)(4); Stats. 1998, ch. 454, § 2, p. 3231.) The question is whether a "loss" occurred.

The majority opinion characterizes the issue as follows: "Defendants also contend that, because the word "loss" has, in their view, a technical meaning of '*net* loss,' the trial court prejudicially erred in failing to specially instruct the jury on this technical meaning." (Maj. opn., *ante*, p. 14.) Having begun with the premise that "net loss" is a technical, i.e., rather unusual and unexpected, term, the opinion concludes in the next sentence: "The language of section 12022.6 does not support defendants' argument that 'loss' means 'net loss.' " (*Ibid.*)

I cannot agree with the idea that *net loss* is an arcane technical term that the Legislature would have had to specify if that is what it meant by "loss." A "reference to losses obviously suggest[s] only a net . . . rather than a gross income figure" (*Klein's Estate v. C. I. R*. (2d Cir. 1976) 537 F.2d 701, 704); i.e., *net* is implicit. "[T]he term 'loss' means loss actually incurred." (*N.L.R.B. v. Cowell Portland Cement Co*. (9th Cir. 1945) 148 F.2d 237, 246.) A loss is "the disappearance or diminution of value, usually in an unexpected and relatively unpredictable way." (Black's Law Dict. (9th ed. 2004) p. 1029.) A taking, conversely, is "[t]he act of seizing an article . . . with an implicit transfer of possession or control." (*Id*. at p. 1591.)

The majority do not go quite as far as the prosecutor, who contended before the trial court that "a loss is not a loss." But like the prosecutor, the majority believe that a loss may consist of a gross accumulation of payouts and returns that can never offset even in the narrow circumstances I propose here. Moreover, the majority reason that a loss is both a loss and a taking. I believe, however, that a loss is simply a loss, i.e., a net loss.

It is questionable to say that it "is axiomatic that a victim loses what is taken" (maj. opn., *ante*, pp. 15-16). For one thing, when a statute uses different terms, as does section 12022.6, the rule of statutory construction is that the Legislature meant different things. When " 'different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning.' " (*Kleffman v. Vonage Holdings Corp*. (2010) 49 Cal.4th 334, 343; accord, *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1071.) The Legislature could have said, "If the amount of the taking exceeds two million five hundred thousand dollars," but it did not; it said, "If the loss exceeds two million five hundred thousand dollars . . . ." (§ 12022.6, subd. (a)(4).)

Moreover, section 12022.6 is a white-collar crime statute and must rest on modern economic principles. The economic question is whether the victim loses value. Here, the lenders lost none, any more than one would "lose" the value of a gold-wrapped candy coin to a would-be swindler who is attempting to defraud the seller by paying $20 for what the actor thinks is a real gold coin. "[T]he usual method of calculating the loss is to ascertain the amount by which a thing's original cost exceeds its later selling price." (Black's Law Dict., *supra*, at p. 1030.)

The United States Supreme Court takes a different view from the majority opinion on this type of question. To repeat, the majority believe that the word *loss* means both a taking and a loss. Similarly, in *Taniguchi v. Kan Pacific Saipan, Ltd*. (2012) __ U.S. __ [132 S. Ct. 1997], the federal high court considered an argument that the word *interpreter*, as set down in the federal Court Interpreters Act, means both *interpreter* and *translator*. The court demurred.

"For respondent," the court began, "the general definition suffices to establish that the term 'interpreter' ordinarily includes persons who translate the written word. Explaining that 'the word "interpreter" can reasonably encompass a "translator," ' the Court of Appeals reached the same conclusion. [Citation.] We disagree." (*Taniguichi v.*

Kan Pacific Saipan, Ltd., *supra*, __ U.S. at p. __ [132 S. Ct. at p. 2003].) "That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense," the court continued. (*Ibid.*) "[O]ther usages, although acceptable, might not be common or ordinary." (*Id*. at p. __ [132 S. Ct. at p. 2003].) As stated, a "reference to losses obviously suggest[s] only a net . . . rather than a gross income figure" (*Klein's Estate v. C. I. R*., *supra*, 537 F.2d 701 at p. 704). That would appear to be the ordinary meaning of *loss*.

Further, the rule of lenity applies in defendants' favor. That rule calls for resolving an issue in a criminal defendant's favor even " ' "if two reasonable interpretations of the statute stand in relative equipoise." ' " (*People v. Cornett* (2012) 53 Cal.4th 1261, 1271.) Conversely, it does not apply when " ' "a court 'can fairly discern a contrary legislative intent.' " ' " (*Ibid.*) The majority opinion emphatically states that the legislative intent is unequivocal. I do not share this view, because as far as I can discern, the fact that "the Legislature did not use the term 'actual loss,' did not define the term 'loss' that it did use, and provided no basis for even an inference that it intended for the term loss to refer to 'net loss' after the deduction of any collateral" (maj. opn., *ante*, pp. 19-20) points to, at best for the majority's conclusion, ambiguity rather than the majority opinion's certainty that the Legislature cannot possibly have meant *net loss* in its use of the term *loss*. Even under the majority's perception, the rule of lenity would apply in defendants' favor.

My conclusion is a narrow one involving only real property for which there is a wide-ranging, organized, relatively stable, and relatively liquid market—property worth as much as or more than the loan amounts—and not the type of property not having those advantages and/or that is likely to permanently depreciate. (See *post*, p. 1, fn. 33.) It would be rare for a lender to engage in a residential mortgage transaction in which the security for the loan was worth less than the loan amount, and the People have not

pointed to any transaction in which this occurred.[31] From the parties' description of the record, the loans were fully secured by title to property of equal or greater value at the time of the transactions. In such circumstances, there is no net loss under section 12022.6 as far as the face amount of the loan is concerned and hence liability under that statute must be predicated on something other than the transactions' face value.

In addition to the language of section 12022.6 itself, which in my view requires both a taking and a loss, meaning a net loss, i.e., a loss of value overall, another statute suggests that the Legislature likely intended that there be an actual loss before a criminal actor may be punished under section 12022.6.

To return to first principles, section 12022.6 mentions both a taking and a loss.[32] In 2007, the Legislature showed in its amendment to section 186.11 that it viewed takings and losses differently when it penalized not only fraudulent takings but losses that occurred as a result. What before was a proscription against "the taking of more than five hundred thousand dollars" (Stats. 2001, ch. 854, § 21, p. 6974) became "the taking of, or . . . the loss by another person or entity of, more than five hundred thousand dollars" (§ 186.11, subd. (a)(2)). The 2007 amendment to section 186.11 was prompted by the

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[31] Defendants identify evidence that lenders involved in this case did not lend money exceeding the value of the real estate collateral. World Savings's loans were for no more than 80 percent of the property value and the testifying employee believed that "most were well below 80 percent." At 95 percent and 85 percent loan-to-value standards respectively for loans involved in this case, two other victimized lenders also had cautious lending practices. According to the testimony of defendants' office employee Yesenia Morales, a loan processor, Argent would lend an amount equaling the property's full value but not above it. Such loans may also have required private mortgage insurance, although the record is silent on that point.

[32] *People v. Ramirez* (1980) 109 Cal.App.3d 529, commented that "[t]he term 'loss' may have been used in [section 12022.6] because it more aptly describes the circumstances when property is damaged or destroyed as distinguished from taken." (*Id*. at p. 539, fn. 3.) *Ramirez* offers no support for this idea, however, and the decision notes that it was unable to locate any "legislative history which is helpful in construing the intention of this section." (*Id*. at p. 539.)

Legislature's desire to make clear that section 186.11 is "to be applied to those who take money whether it be directly or indirectly (i.e., causing a loss through filing a false income tax return) caused by their fraudulent transactions." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1199 (2007-2008 Reg. Sess.) Apr. 17, 2007, p. 5.) It acted in response to *People v. Frederick* (2006) 142 Cal.App.4th 400, which had held that "the crime of filing a false income tax return is not part of a common scheme or plan to take property within the meaning of section 12022.6, subdivision (b)." (*Frederick*, *supra*, at p. 423.)

Although the change thus was prompted by the Legislature's desire to clarify that under section 186.11 there can be a loss without a taking, the resultant language also provides additional support for the view that there can be a fraudulent taking without an accompanying loss under section 12022.6. It is not difficult to envision such situations, as in the case of the gold-wrapped candy coin or when a swindler, thinking a coin is made of base metals, overstates its face value to an uninformed buyer at a flea market, but subsequent investigation reveals that the coin is silver and the bullion value is higher than the amount the victim paid.

Also bearing on the point, and entitled to more deference than the majority opinion is willing to yield, is *People v. Crow*, *supra*, 6 Cal.4th 952. A jury convicted Crow of welfare fraud under an aiding and abetting theory and fixed the loss at more than $25,000, resulting in a one-year sentence enhancement under the version of section 12022.6, subdivision (a), then in effect. (*Id*. at pp. 956, 960-961.) Crow, like defendants here, asserted on appeal that the evidence was insufficient to show a loss of that magnitude because the person he was aiding and abetting would have received some welfare benefits had she applied legitimately for them. (*Id*. at pp. 960-961.) The Supreme Court agreed that "the defrauded agency's 'loss' should be calculated by subtracting the amount the government would have paid had no acts of fraud occurred from the amount the government actually paid. Any money that the government would

have been obligated to pay had the fraud not occurred is not attributable to the fraud, and thus is not a 'loss' arising out of the criminal offense." (*Id*. at p. 962.)

The People, like the majority, contend that *Crow* is distinguishable. The People assert that this is not a case in which "no acts of fraud occurred" (*People v. Crow*, *supra*, 6 Cal.4th at p. 962)—i.e., defendants had no entitlement to anything, whereas Crow's codefendant was entitled to some welfare benefits. Thus, in their view, *Crow* stands for the proposition that when "a defendant obtains money through false pretenses, an excessive-taking enhancement should be based on the full amount of [the] money taken, unless the defendant affirmatively proves that he was entitled to a portion of the money. In this case, most of the loans generated by appellants' fraud were secured by deeds of trust, but appellants introduced no evidence at trial that the properties had been sold through foreclosure. Moreover, appellants assume [that] the foreclosure sale of the properties would have generated enough money to fully repay the loans, but it is fair to assume that property values in California declined substantially between 2004 (when many of the loans were made) and 2008 (when appellants were tried)." However, Valverde is correct to observe that "*Crow* stands for the general rule that the loss cannot be measured simply by reference to the face amount of the fraudulent transaction." I agree that *Crow* endorses a net loss rather than gross transactional amount calculation method for assessing a loss.[33]

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[33] Several decisions that the People cite in support of their view are inapposite. (*People v. Frederick*, *supra*, 142 Cal.App.4th at pp. 421-422; *People v. Counts* (1995) 31 Cal.App.4th 785, 788-791; *People v. Mellor* (1984) 161 Cal.App.3d 32, 34-35, 38-39; *People v. Loera* (1984) 159 Cal.App.3d 992, 999-1000; *People v. Bates*, *supra*, 113 Cal.App.3d at p. 484; *People v. Ramirez*, *supra*, 109 Cal.App.3d at pp. 539-540; *People v. Randono* (1973) 32 Cal.App.3d 164, 173; *People v. Ross* (1972) 25 Cal.App.3d 190, 195 (*per curiam*); *People v. Williams* (1956) 145 Cal.App.2d 163, 166-167; *People v. Bryant* (1898) 119 Cal. 595, 597-598.)

Some of the foregoing decisions differ in that there was no exchange of one type of marketable property for another type of it at the outset, but only, in some cases, a

Similarly, in *U.S. v. Goss* (5th Cir. 2008) 549 F.3d 1013, a federal sentencing guidelines case, the court concluded that the defendants, who had been convicted in a mortgage-based fraud scheme similar to the one at issue here, were entitled to set off the value of the property to which the lenders obtained title against the loan amounts, albeit for considerations that may or may not apply here.

I agree with *Goss* regarding its result. The court concluded that the defendants were entitled to set off the value of the property to which the lenders obtained title against the loan amounts. *Goss* stated that when there is "neither evidence that [the actor] intended to cause the loss of the loans, nor evidence of his intent that they be repaid" (*Goss*, *supra*, 549 F.3d at p. 1018) as long as there is no evidence that the actor was " 'consciously indifferent or reckless' about the repayment of the loans as to impute to him the intention that the lenders should not recoup their loans, whether by payment from the borrowers or through recovering the collateral in the event of default" (*ibid.*), "for loss-calculation purposes, loan collateral is to be deducted from the total value of the loan" (*id*. at p. 1017). "This determination rests" (*id*. at p. 1018) in part on "the common-sense notion that, generally, the value of real, immovable property will be recoverable should the owner default" (*ibid.*).

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recovery by the authorities of some or all of the proceeds of fraudulently acquired or stolen property. The decisions held that the value of property recovered after a theft or the breaking up of a fraudulent scheme or made available to victims during its existence could not be used to offset the takings calculation under section 12022.6. In addition, they involved types of property such as automobiles, money, cashier's checks, gold nuggets, and calling cards that do not apply here. Others among the foregoing decisions did not address sections 186.11 or 12022.6 and/or discussed generalized takings rather than section 12022.6 losses. This case is different from all of them. Defendants did not cause both a taking and a loss for purposes of section 12022.6 in brokering fraudulent real-property transactions to the extent that the mortgagees received first deeds of trust on the type of real property for which there is a wide-ranging, organized, relatively stable, and relatively liquid market—property worth as much as or more than the loan amounts—and not the type of property not having those advantages and/or that is likely to permanently depreciate.

Goss's reasoning about the evaluation of intent, conscious indifference and recklessness applies here. In this case, there is no evidence that defendants, despite their fraudulent misrepresentations, intended to broker loans that could not be repaid and that were defectively secured by property that would not make the lender whole in the event of default.

I disagree with *Goss*, *supra*, 549 F.3d 1013, however, about how to assess the valuation of any losses. *Goss* held that a trial court should engage in a chronologically based fact-finding process to set the valuations: a "fact-intensive" (*id.* at p. 1019) "loan-by-loan inquiry" (*ibid.*).

Such an inquiry may well be proper for restitution purposes under Civil Code section 3343, where " 'however clumsy the appellant may think that the method is, it is the best one so far as known to the law.' " (*Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 753.) Criminal defendants, however, are differently situated.[34] Leaving aside the complications in criminal court of engaging in *Goss*'s fact-intensive inquiry, to apply a rule that takes into account depreciation in the value of property following a criminal act would be constitutionally questionable. Plainly, a sentence enhancement that increases the term of confinement constitutes increased punishment. (See *People v. Izaguirre* (2007) 42 Cal.4th 126, 133.) One type of "impermissible ex post facto law is one which

[34] Civil Code section 3343 is nevertheless of tangential interest here. Section 3343 provides that when a fraudulent property transaction has caused a loss, the fraudfeasor is to reimburse the victim for the victim's loss, but only to the extent of "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received" (*id*., subd. (a)) along with such appurtenances as, e.g., opportunity costs (*id*., subd. (a)(3)) and incidental losses (*id*., subds. (a)(1), (a)(2)) that in the context of a fraudulent residential real property transaction might include such things as appraisal fees. "[A]ctual value" for purposes of section 3343 means market value. (*Bagdasarian v. Gragnon*, *supra*, 31 Cal.2d at pp. 753-754.) Section 3343 is additional evidence of a legislative intent to assess losses arising out of fraudulent property transactions according to the immediately consequent net loss, not the face value of the transaction.

'makes more burdensome the punishment for a crime, after its commission.' " (*Ibid.*, quoting *Collins v. Youngblood* (1990) 497 U.S. 37, 42.) To apply such an enhancement on the basis of facts arising after the commission of the crime likely would violate due process principles analogous to the constitutional provisions that the state may not impose punishment ex post facto (U.S. Const., art. 1, § 10, cl. 1; Cal. Const., art. 1, § 9). (See *People v. Sandoval* (2007) 41 Cal.4th 825, 855; *People v. Reyes* (1998) 19 Cal.4th 743, 754; *People v. King* (1993) 5 Cal.4th 59, 79.) *U.S. v. Goss*, *supra*, 549 F.3d 1013, does not appear to have contemplated this problem—perhaps the parties did not raise it.

Constitutional considerations counsel that losses for purposes of section 12022.6 must be assessed according to the value of the loan and the property's market value at the time of the transaction. Because the parties here do not point to any evidence that the loan-to-value ratio was more than one-to-one for the transactions at issue here, there were no losses exceeding $2.5 million for section 12022.6 purposes.

However, defendants acknowledge that the commissions the borrowers paid constitute a loss. As stated, the prosecutor arrived at various totals for the commissions: either $423,598 for both defendants or $378,069 for Valverde and $316,911 for Covarrubias. Defendants acknowledge the accuracy of the $378,069 figure, adding that they have calculated the amount attributable to the section 186.11 counts to total $317,913. Defendants do not address the figure for Covarrubias, but of course that means they do not dispute its accuracy.

At the time of the crimes, paragraphs (1) through (3) of former subdivision (a) of section 12022.6 provided as follows: "(1) If the loss exceeds fifty thousand dollars ($50,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year. [¶] (2) If the loss exceeds one hundred fifty thousand dollars ($150,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an

additional term of two years. [¶] (3) If the loss exceeds one million dollars ($1,000,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of three years." (Stats. 1998, ch. 454, § 2, p. 3231.) Because all of the possible total commission amounts are between $150,000 and $1,000,000, the correct enhancement provision is paragraph (2) of former subdivision (a) of section 12022.6. (*People v. Jones* (1993) 5 Cal.4th 1142, 1151, fn. 3.)

A reviewing court may, in these circumstances, affirm a judgment but modify it to impose the lower enhancement. This has been done in the case of a weapon enhancement. (*People v. Allen* (1985) 165 Cal.App.3d 616, 627 (*Allen*); see also *People v. Neal* (1984) 159 Cal.App.3d 69, 73 (*Neal*) [declining to modify a judgment but recognizing the authority to do so].) "Where a reviewing court finds insufficient evidence that a defendant committed the crime of which he was convicted but finds overwhelming evidence that he committed a lesser included offense, the court is empowered to reduce the conviction to the lesser offense. [Citations.] Although the weapon enhancement provisions here are not strictly 'crimes' or 'offenses,' we see no reason why the same rationale should not apply to them." (*Allen*, *supra*, at p. 627.) Of course, this is possible only when "the information puts the defendant on notice that a sentence enhancement will be sought, and further notifies him of the facts supporting the alleged enhancement." (*Neal*, *supra*, at p. 73.) In this case, defendants were notified in the corrected first amended indictment that the prosecution would be seeking enhanced punishment based on a taking exceeding $2.5 million. Defendants knew they could defend against that allegation and hence could also defend against an allegation that they took between $150,000 and $1 million. To modify the judgment, with the effect of reducing defendants' sentences by two years, would be the correct course of action in these circumstances.

C. *Section 186.11 Discussion*

The section 186.11 enhancement is broader than the section 12022.6 enhancement, however, and exposes criminal actors to more potential liability because it is phrased in the disjunctive: the enhancement may be imposed if a criminal actor either commits a fraudulent taking or causes a loss through fraud. Even the less broad superseded version that applies to defendants exposes them to liability for a taking alone; no loss is required, and therefore the silver coin analogy does not apply in the case of section 186.11. The trial court noticed this distinction. It said to counsel, "isn't it correct that Penal Code Section 186.11(a)(1) [*sic*: § 186.11, former subd. (a)(2)] requires patterns of related felony conduct involving taking more than 500,000 dollars . . . ? It didn't refer to a loss." As long as there was sufficient evidence that defendants committed grand theft and met section 186.11's white-collar financial crime requisites, they cannot complain of their subjection to the provision's imposition of an extended prison term. The section 186.11 enhancements properly rest on defendants' taking some $8 to $10 million in property in that defendants put the lenders "at risk to jeopardize their financial stability to the full amount of the loan requested." (*U.S. v. Tedder*, *supra*, 81 F.3d at p. 551.)

D. *Conclusion*

For the reasons stated, I would modify the judgment with regard to defendants' section 12022.6 enhancements, with the effect of reducing defendants' sentences by two years, while affirming it with regard to their section 186.11 enhancements.

III. *Sufficiency of Evidence for Convictions on Certain Counts*

Defendants claim that the evidence was insufficient to convict them on certain counts.

Under the federal Constitution's due process clause, there is sufficient evidence to support a criminal defendant's conviction if, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S.

307, 319.) The same standard applies under article I, section 15, of the California Constitution. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1083, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) This test "does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson*, *supra*, at pp. 318-319.)

A. *Count Five (Both Defendants)*

Both defendants claim that the evidence is insufficient to sustain their grand-theft convictions on count five, a transaction involving their brokering of a mortgage between Joseph and Yolanda Hidalgo as the mortgagors and BNC Mortgage as the mortgagee. The jury found that defendants committed grand theft against the Hidalgos and BNC.

The Hidalgos wanted to refinance their house, which they had bought in 1973, and defendants brokered the transaction. Defendants contend that BNC Mortgage proceeded to fund the mortgage before they submitted any false tax returns in support of the Hidalgos' application and there was no causal connection between any misrepresentations by them and BNC Mortgage's approval of the loan. Specifically, the Hidalgos' loan was approved on April 1, 2004, even though the file was missing certain items required for the full-documentation loan that the Hidalgos were seeking, including their tax returns. BNC received the tax returns only on April 8 or April 9 of 2004, so even if defendants falsified them, BNC did not rely on the forged tax returns, as required for defendants' grand theft convictions with regard to BNC on count five.

The People argue in response that BNC's employee testified that the Hidalgos' loan was only conditionally approved on April 1, 2004, contingent on receipt of the required documentation, and that it was not approved for funding until April 14, 2004, five days after BNC received the allegedly falsified tax returns from defendants. The

People also argue that BNC received from defendants the loan application and a credit report for the Hidalgos before the contingent approval of the loan, and that to the extent either of these items contained false information BNC was a victim of grand theft.

The People are correct. BNC's employee testified that BNC relied on all aspects of the loan application in considering and contingently approving full-documentation loan requests, including the applicants' income. The Hidalgos' full-documentation loan application, she testified, was prepared by Covarrubias on behalf of defendants' mortgage brokerage firm, and it declared that Yolanda Hidalgo operated a concern called Hidalgo Baby-Sitting Services, whose monthly income was $11,300. Joseph Hidalgo testified that this was false: there was no such business and his wife (whose previous paid baby-sitting had been more modest remuneration from the county, perhaps $1,800 to $2,600 per month, for baby-sitting their grandchildren) had no income at all from baby-sitting at the time.

Any substantial reliance suffices as evidence to sustain defendants' grand-theft convictions on count five against their due process challenge. As noted, "to constitute this offense the representation must have been a material element in proximately causing the complainant to part with his property and without which he would not have done so. . . .' " (*People v. Whight*, *supra*, 36 Cal.App.4th at p. 1152.) Moreover, as the People observe, a single misrepresentation suffices to support a charge, and hence a conviction, of theft by false pretenses. (*People v. Kassab* (1963) 219 Cal.App.2d 687, 690.) The jury could reasonably infer from the evidence that if defendants had not misrepresented Yolanda Hidalgo's financial situation—stating that she had an income of $11,300 a month from baby-sitting when she had no income from that source at all—BNC would not have approved the loan. Although the parties' combined descriptions of the chronology of the submission of the Hidalgos' tax returns and the contingent and final loan approvals are in line with the BNC employee's testimony, that chronology is beside the point, because the jury could reasonably infer that BNC relied on the false income statement from the

outset. Defendants make much of BNC's asserted negligence in handling the tax returns, but that is immaterial as long as BNC's reliance on the income declaration was "an important factor" (CALCRIM No. 1804) in approving the loan. The same may be said of Covarrubias's contention regarding the Hidalgos' credit report, namely that the report was substandard and BNC must have been negligent in failing to consider it when deciding to fund the Hidalgos' loan. As long as defendants' false statement that Yolanda Hidalgo was earning $11,300 a month from a nonexistent baby-sitting service was an important factor in the contingent approval of the loan—something the jury could infer from the evidence—BNC's missteps cannot relieve defendants of criminal liability on count five.

B. *Count Seven (Valverde Only)*

Valverde claims there was insufficient evidence to sustain her grand-theft conviction on count seven, in which the jury found her guilty of grand theft against Sergio Raúl Barajas Estrada, his wife Teresa Eslava, and World Savings, because Barajas testified that he would have undertaken the refinancing defendants offered him even if they had fully disclosed all of the transaction's material terms.

According to the evidence, Valverde told Barajas that the lender would pay defendants' commission for brokering the loan, the interest rate for the loan's first year would be one percent, and that Barajas could take $10,000 out in cash, which was all that he wanted. In addition to these affirmative misrepresentations, Valverde did not disclose that the loan would carry a prepayment penalty. Barajas, who could not read or write in English, was indignant when he discovered, after the refinancing took place, that he, not the lender, was being assessed defendants' $8,000 commission; the teaser one-percent interest rate applied for the first month only; there was a prepayment penalty that Valverde had not mentioned; and he was taking out $34,000 in cash, not the $10,000 he had requested, which increased the encumbrance on the house by an additional $24,000.

Valverde points out that Barajas testified as follows on direct examination by the prosecutor:

"Q. So if you knew that Esperanza [Valverde] was going to charge you $8,000 to refinance, would you have gone through the loan with Esperanza?

"A. I think so if she would have tell me the truth because we already had planned to get the loan. Because . . . if it wouldn't had [*sic*] been with her, then it would have been with somebody else.

"[¶] . . . [¶]

"Q. If you had known that you were going to have a prepayment penalty for three years, would you have gone through with the loan?

"A. Well, as I said, if she would have told me the truth, I think yes."

As I interpret Barajas's testimony, he would have accepted these two terms, which plainly are material, but only if Valverde had disclosed the loan's terms completely, which she did not. There were other unexpectedly onerous terms, such as a teaser interest rate that was in effect for only one month instead of the one year Valverde promised and a cash payment to Barajas of $24,000 more than he wanted, which encumbered his house by that much more.

The part of Barajas's testimony to which Valverde refers is odd, because it implies that he would have accepted the refinancing offer if the terms had been fully disclosed even under all of the disadvantages it contained. The implication is, however, both ambiguous and questionable, because elsewhere Barajas testified that he complained to Valverde about one surprise that accompanied the perfected loan, namely the excess $24,000 cash payout, and that he was unhappy about the one-month limitation on the one percent teaser rate. In any event, the misrepresentation about the payout suffices to preserve the conviction against Valverde's due process challenge because, as noted, a single misrepresentation suffices to support a charge, and hence a conviction, of theft by false pretenses. (*People v. Kassab*, *supra*, 219 Cal.App.2d at p. 690.) If that were not enough, Barajas also testified that the prepayment penalty, which Valverde had not disclosed, was an important term:

"Q. Was that something that would have been important for you to know?

"A. Of course. Yes." "Because if in the future I wanted to refinance again, . . . then I had to pay until the prepayment penalty time was over."

Considering Barajas's testimony as a whole, I am satisfied that he relied on at least one of Valverde's misrepresentations to his detriment. Valverde argued in connection with her challenge to the sufficiency of the evidence on count five that "where the proven facts give equal support to two inconsistent inferences, neither is established." (*People v. Brown* (1989) 216 Cal.App.3d 596, 600.) Unlike the case on which *Brown* relied, however, namely *Allen*, *supra*, 165 Cal.App.3d at page 626, there is no equipoise here: the tenor of Barajas's testimony is that he relied on at least some, even if not all, of Valverde's misrepresentations to his financial detriment. In addition, *Allen* was abrogated by the court that decided it. (*People v. Berry* (1993) 17 Cal.App.4th 332, 339.)

C. *Count 47 (Valverde Only)*

The jury convicted Valverde of what she characterizes as the act of "notarizing a false deed of trust" in count 47. She argues that the evidence is insufficient because it "shows that a different Valverde acted as the notary in this transaction; Cesar Valverde, not Esperanza, notarized the document."

The transaction was brokered by defendants with WMC Mortgage on behalf of Braulio and Silvia Rodriguez. The mortgagee's employee testified that the Rodriguez loan file showed a notarized deed of trust dated July 7, 2004:

"A. . . . This is the Deed of Trust.

"Q. And what is a Deed of Trust?

"A. The Deed of Trust is your deed to the property.

"Q. Is that Deed of Trust notarized?

"A. Yes, it is.

"[¶] . . . [¶]

"Q. Do you show a notary on that document?

"A. I do.

"Q. What is it?

"A. Cesar Valverde.

"Q. What is the date that it was notarized?

"A. July 7, 2004."

Silvia Rodriguez testified that she signed the deed of trust not on July 7 but July 12 of 2004. Neither she nor her husband dated it, although Valverde had instructed them to backdate it to July 7. According to the People, exhibit 297, the deed of trust, marked for identification and introduced into evidence, shows handwritten entries of July 7, 2004, on the loan documents, including the deed of trust. "The inevitable inference," the People maintain, "is that Valverde backdated all documents, including the deed of trust, to prevent the Rodriguezes from exercising their right to rescind the loan." (See 12 C.F.R. § 226.23(a)(3).)

Count 47 of the indictment charged: "The Grand Jury of the County of Santa Clara, State of California, hereby accuses Esperanza Isabel Valverde and Cesar Valverde Ponte, of a felony, namely: a violation of Government Code section 8214.2 [knowingly performing notarial act on false or forged trust deed], in that on or about July 12, 2004, in the County of Santa Clara, State of California, the said defendants did knowingly and willfully with intent to defraud, perform a notarial act in relation to a deed of trust on real property consisting of a single-family residence, with knowledge that the deed of trust contains any false statements or is forged in whole or in part. (Braulio and Silvia Rodriguez)." (Capitalization changed.)

Former section 8214.2 of the Government Code (Stats. 1984, ch. 1397, § 4, pp. 4906-4907) provided: "A notary public who knowingly and willfully with intent to defraud performs any notarial act in relation to a deed of trust on real property consisting of a single-family residence containing not more than four dwelling units, with

knowledge that the deed of trust contains any false statements or is forged in whole or in part, is guilty of a felony." There is no published case law construing this section.[35]

The jury found Esperanza Valverde guilty on this charge, but acquitted Cesar Valverde Ponte of it.

Initially before this court, the People argued that "Valverde was guilty of notarial fraud, even if she did not personally notarize the deed of trust, because she committed a false notarial act with the intent to defraud"—i.e., she backdated the deed of trust knowing that it would be notarized. The People asserted that "Rodriguez testified that [Esperanza] Valverde had conducted the entire loan signing process." In addition, they assert that Cesar Valverde Ponte told them he was not participating in the financial aspects of the transaction. The evidence shows this to be the case although, in Valverde's favor, the evidence also shows that the Rodriguezes' meeting was with both Valverdes, Cesar Valverde Ponte was present in the room while Esperanza Valverde went through the documents, and the notarial acknowledgment was by Cesar Valverde Ponte.

The People initially concluded that "the jury reasonably may have concluded that Valverde had forged Cesar Valverde Ponte's name on the notary line. That conclusion draws circumstantial support from the fact that although the Rodriguezes' signatures ostensibly appear in Cesar Valverde Ponte's notary book, Silvia Rodriguez did not recognize either signature at trial." The People also stated with regard to the exhibits that, unusually in light of Cesar Valverde Ponte's normal practice, the "relevant page of [his] notary book . . . does not include any information in addition to signatures, e.g., the date, the signers' names and address, etc." The majority opinion adopts this reasoning.

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[35] The language quoted here survives in the current version of Government Code section 8214.2. The difference is that the Legislature later divided the statute into two subdivisions, making the language quoted here subdivision (a) and adding a subdivision (b), which is not relevant to this case.

Neither of those theories—i.e., that Valverde committed a notarial act even if she did not notarize the deed of trust, or that she committed a notarial act if she forged Cesar Valverde Ponte's name on the signature line—is tenable.

The second theory may be dismissed as speculative. The People have pointed to nowhere in the record that would furnish sufficient evidence of such a forgery. It may be that Cesar Valverde Ponte performed all notarial duties during the transaction in question but overlooked to enter the usual information in his notary's journal. Evidence of missing data fields in Cesar Valverde Ponte's notarial journal cannot reasonably be said to equate to evidence that Esperanza Valverde filled in the journal entry. The majority opinion states, "The jury could have reasonably deduced from Sylvia [Rodriguez]'s testimony that the entry in Ponte's notary book relating to the Rodriguez deed of trust had been made by Valverde, rather than Ponte." (Maj. opn., *ante*, p. 26.) Not so, however, in the absence of any relevant testimony about Cesar Valverde Ponte's signature in the notary book. The jury could only have found Valverde guilty on this basis if it speculated that she must have signed the entry. Even the People have tacitly acknowledged, in the final round of supplemental briefing this court requested from the parties, that this notion does not hold water.

The first theory requires more consideration about the meaning of a "notarial act" under Government Code section 8214.2, subdivision (a). Undertaking that task, I find insufficient evidence that Valverde personally performed any proscribed "notarial act."

As is usually the case with broad statutory language unaccompanied by further definitions, the term "notarial act" (Gov. Code, § 8214.2, subd. (a)) is ambiguous. The parties' different interpretations of the clause are therefore unsurprising. When faced with an ambiguous statute, of course, reviewing courts often try to discern a more precise meaning by examining any useful legislative history, although it is not uncommon for such legislative histories to contain little or nothing of use. In this case, however, the parties have not described the legislative history of Government Code section 8214.2, as

is their duty if they wish for us to rely on it one way or another. (See *Saari v. Smith Barney, Harris Upham & Co., Inc.* (9th Cir. 1992) 968 F.2d 877, 880; *Middlesex Cty. Sewerage Auth. v. Sea Clammers* (1981) 453 U.S. 1, 27-28, fn. 11 (conc. & dis. opn. of Stevens, J.).)

Other authority, however, advises us that a "notarial act" (Gov. Code, § 8214.2, subd. (a)) means more than just any act. An act not intrinsically notarial that one notary public happens to perform does not become notarial solely by reason of a remote and attenuated connection to another notary public's notarial actions.

The statute itself proscribes acts done by "[a] notary public" (Gov. Code, § 8214.2, subd. (a)), and it is one section of a chapter dealing with the qualifications, roles, duties, functions, and operations of notaries public in this state. This suggests that the proscribed act must be tied to a notary public's functions as a notary public. A nonnotarial act that is merely incidental to another notary public's notarial actions does not meet that standard.

In addition, Government Code section 8214.21 provides in pertinent part: "A notary public who willfully fails to provide access to the sequential journal of notarial acts when requested by a peace officer shall be subject to a civil penalty not exceeding two thousand five hundred dollars ($2,500)." This implies that the Legislature contemplated that notarial acts are those susceptible of being recorded in a notary's sequential journal, i.e., the volume in which the notary records "all official acts performed as a notary public." (*Id*., § 8206, subd. (a)(1).) The People stated in their initial filings in this court that it was in Cesar Valverde Ponte's notary journal book that the memorialization of the notarization of the deed of trust occurred. This is part of their initial theory that Valverde's role was to either forge a date on the document (but that would be an act that has no connection to a notary's sequential journal or any other notarial act) or to forge an entry in Cesar Valverde Ponte's notary journal (but that is a hypothesized act for which, contrary to the majority opinion's notion, there is no meaningful evidence).

Also helpful regarding the scope of notarial acts is a North Carolina statute that defines notarial acts in that state. "Notarial act, notary act, and notarization" all mean the same thing: "The act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under G.S. 10B-20(a)." (N.C. Gen. Stat. Ann. § 10B-3, subd. (11) (West 2010).) These functions are further defined in subdivision (b) of the referenced statute: "A notarial act shall be attested by all of the following: [¶] (1) The signature of the notary, exactly as shown on the notary's commission. [¶] (2) The legible appearance of the notary's name exactly as shown on the notary's commission. The legible appearance of the name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible. [¶] (3) The clear and legible appearance of the notary's stamp or seal. [¶] (4) A statement of the date the notary's commission expires. The statement of the date that the notary's commission expires may appear in the notary's stamp or seal or elsewhere in the notarial certificate." (*Id*., § 10B-20, subd. (b) (West 2010).)

The North Carolina statute sets forth the common understanding of the type of acts traditionally considered notarial, and is useful in understanding Government Code section 8214.2 given that our Government Code has no equivalent definitions.

I would conclude from the foregoing considerations that Valverde could be guilty of a fraudulent notarial act as the direct actor only if there is sufficient evidence that she notarized the deed of trust knowing information in it to be false, falsified the notarization of that document, or falsified an entry in a notary journal (whether hers or Cesar Valverde Ponte's). The People do not point to any meaningful evidence that any of these acts occurred. The evidence is that Cesar Valverde Ponte performed all notarial functions, although the jury acquitted him of the charge that he violated Government Code section 8214.2.

Nevertheless, for reasons the People advance in their final round of supplemental briefing, there is a more persuasive reason to affirm the judgment against Valverde on count 47. There is sufficient evidence that she was liable as an aider and abettor, if not the direct perpetrator. "Principals include those who 'aid and abet' in the 'commission of a crime.' (§ 31.) 'Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea.' [Citation.] We have defined the required mental states and acts for aiding and abetting as: '(a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Thompson* (2010) 49 Cal.4th 79, 116-117.) The jury was instructed in sufficiently similar terms under CALCRIM Nos. 400 and 401. On the basis of aider and abettor liability, but on it only, Valverde's challenge does not persuade.

IV. *Validity of Government Code Section 8214.2 Instruction (Valverde Only)*

Valverde next contends, regarding the verdicts that she violated Government Code section 8214.2, that the trial court infringed on her rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by omitting to instruct the jury on all of the elements of the offense.

As noted, former section 8214.2 of the Government Code (Stats. 1984, ch. 1397, § 4, pp. 4906-4907) provided: "A notary public who knowingly and willfully with intent to defraud performs any notarial act in relation to a deed of trust on real property consisting of a single-family residence containing not more than four dwelling units, with knowledge that the deed of trust contains any false statements or is forged in whole or in part, is guilty of a felony."

The instruction that the trial court gave stated "a single-family residence" instead of "a single-family residence containing not more than four dwelling units."[36] Valverde perceives the truncation to be constitutionally objectionable.

Omitting an element of an offense from an instruction is reviewable for error under *Chapman v. California* (1967) 386 U.S. 18. The United States Supreme Court "concluded in *Chapman* . . . that constitutional errors can be harmless. . . . In a series of post-*Chapman* cases . . . we concluded that various forms of instructional error are not structural but instead trial errors subject to harmless-error review. See, e.g., *Neder v. United States*, 527 U.S. 1 (1999) (omission of an element of an offense) . . . ." (*Hedgpeth v. Pulido* (2008) 555 U.S. 57, 60-61.) Bearing in mind that there is a degree of murkiness about the standard of review,[37] *Hedgpeth* provides sufficient direction to enable analysis of Valverde's claim in terms of prejudice for federal constitutional error under *Chapman*.

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[36] As before, I quote and consider the written version of the instruction. (See *ante*, p. 22 fn. 27.)

[37] The United States Supreme Court has undertaken different approaches regarding the relation of due process to error with or without prejudice. One view is that either there is a due process violation or there is not, such a violation being generally understood, with regard to trial errors, to be some defect that rendered the trial fundamentally unfair (see *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790). Thus if there is a due process violation, " '[i]t is unnecessary to add a separate layer of harmless-error analysis . . . .' " (*Kyles v. Whitley* (1995) 514 U.S. 419, 436, fn. 9.) "[O]nce a reviewing court applying [a review for materiality] has found constitutional error there is no need for further harmless-error review." (*Id*. at p. 435.) Elsewhere, however, our federal high court has intertwined the consideration of prejudice and due process violations. "[I]f Banks succeeds in demonstrating 'cause and prejudice,' he will at the same time succeed in establishing the elements of his . . . due process claim." (*Banks v. Dretke* (2004) 540 U.S. 668, 691.) Still elsewhere the federal high court has implied that an inquiry into both a due process violation and prejudice is valid appellate procedure. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 187 ["we therefore express no opinion on whether the prosecutor's actions amounted to a due process violation, or whether any such violation would have been prejudicial"].) The applicable standard may depend on the type of due process claim; for example, the due process claim addressed in *Kyles* contains a materiality component and prejudice analysis may well be superfluous.

"The State bears the burden of proving that an error passes muster under [the *Chapman*] standard" of prejudice. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 630.) Under *Chapman*, the state must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (*Chapman v. California*, *supra*, 386 U.S. at p. 24). " 'To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error.' " (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

Under the *Chapman* test, Valverde is not entitled to reversal. These were residential loans on homes. Valverde does not point to any place in the record suggesting that one of these homes contained more than four "dwelling units," however they might be defined.[38] Therefore, the state has shown any error to be harmless beyond a reasonable doubt. That is to say, the state has established "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (*Chapman v. California*, *supra*, 386 U.S. at p. 24); in other words, it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (*Neder v. United States*, *supra*, 527 U.S. at p. 18.) Any error in failing to include the four-dwelling-unit clause was harmless.

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[38] Conceivably a home containing a main residence and four in-law units might fall outside the statute's ambit. Such a configuration would be, however, rare. Conversely, it is hard to imagine that, for example, a large Victorian house subdivided into rental units would still be considered a single-family residence. In any event, for reasons stated in the text, there is no need to explore the legislative history of Government Code section 8214.2 to acquire a greater understanding about the nature of the dwellings the Legislature had in mind.

V. *Exercise of Discretion in Imposing Long Prison Terms*

Defendants claim that in light of the facts of the case, their potential to reimburse their victims for financial losses if they are able to work productively, and the fact that certain perceived losses were not losses at all, the trial court abused its discretion in sentencing them to terms of approximately two decades in prison.

A trial court's decision to impose a particular sentence is reviewed for abuse of discretion and will not be disturbed on appeal "unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) The trial court is presumed to have acted to achieve " ' "legitimate sentencing objectives" ' " (*ibid.*) unless the party attacking the sentence is able to overcome the presumption with a clear showing of abuse. (*Id*. at pp. 376-377.) In exercising its sentencing discretion, the trial court may consider any relevant factors, including " 'the nature and circumstances of the offense . . . .' [Citations.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.)

I find no abuse of discretion. Defendants behaved fraudulently with regard to loans whose face value was millions of dollars. They contributed to economic turbulence in this region by manipulating loans to the detriment of borrowers, lenders, the financial industry, and ultimately the local economy. They had a small role in a large-scale disruption that precipitated an international economic crisis whose effects linger in the United States and Europe. In addition, the trial court showed great care in deciding defendants' sentences, stating on the record that it had read a plethora of documents, including probation reports, the parties' written submissions, letters containing character references on behalf of Valverde, and a San Jose Mercury News article that defendants submitted. The court further stated that it had considered the aggravating, mitigating, and consecutive-sentencing factors that the California Rules of Court provide for trial courts to use in imposing sentence. (Cal. Rules of Court, rules 4.421, 4.423, 4.425.) It noted that the crimes involved planning and sophistication, took advantage of vulnerable

victims who spoke Spanish better than English, and involved abusing a position of trust vis-à-vis the borrowers. It did not abuse its discretion.[39]

VI. *Restitution to One Mortgagor (Valverde Only)*

Valverde claims that the trial court erred in awarding $27,399.48 in restitution to a mortgagor, Sergio Sanches, given that she was acquitted of some charges of defrauding that individual.

Sanches testified through an interpreter. He began by explaining that he speaks little English and cannot read or write it and that he has not settled on whether his last name should be spelled Sanchez or Sanches—"[s]ometimes they use the S, sometimes they use the Z," he told the jury. He had not taken classes to understand the nature of real estate transactions or loans, and at the time he and his wife María met with Valverde he "was having some problems with credit card debt."

Sanches told Valverde that he earned slightly less than $2,000 a month from his car-towing business. Although Sanches's customers paid him in cash and he paid no taxes on his income, the monthly payment on the Sancheses' current loan was slightly more than his entire income. Valverde told the Sancheses that she would "charge a little" to refinance their home loan. Valverde also brokered the refinancing of a rental property that Sanches owned.

When Sanches "got the copies of the papers, she [*sic*] read the papers and she charged me too much." (This testimony regards the first loan, for the Sancheses' residence, and the first reference to "she" may refer to María Sanches; Sanches could not read the documents himself.) Valverde told Sanches that the new loan would have no prepayment penalty, but the refinanced loan came with one of perhaps $13,000 or

[39] I note Covarrubias's argument, joined in by Valverde in her reply brief, that the jury's section 12022.6 findings may have undergirded the court's entire sentencing decision, not just its decision to impose the section 12022.6 enhancement. I do not, however, read the record as showing that this occurred.

$14,000 that the Sancheses were forced to pay when they were obliged to sell that residence. (After these events, the Sancheses lost their rental property as well.) Valverde overcharged Sanches for the other refinancing also.

When Valverde and Sanches met to sign the loan documents for the refinancing of the Sancheses' residence, she told him to backdate them. On direct examination, the prosecutor showed Sanches the deed of trust for the Sancheses' residence and she and Sanches engaged in this colloquy:

"Q. . . . Mr. Sanches, do you recognize this signature on this page?

"A. Yes.

"Q. Whose signature is that?

"A. It's mine.

"Q. And on the next page . . . there's a Notary Acknowledgement [*sic*]. This says that you appeared before Esperanza Valverde on April 18, 2003.

"Do you recall meeting with Esperanza and signing the paperwork on April 18, 2003?

"A. Yes.

"Q. Now, earlier you said you were told to put down the date of [April] 18 but you recall being there on the 20's. So were you actually meeting with Esperanza Valverde on April 18, 2003?

"A. No, it was a different date. It was a different date.

"Q. So you were not meeting with Esperanza on April 18, 2003?

"A. No, I don't believe so."

The jury convicted Valverde of notarizing a false trust deed for the Sanches transaction. (Gov. Code, § 8214.2.) However, it acquitted Valverde of two charges of grand theft from Sanches.

"We will consider the trial court's explicit or implicit factual considerations regarding the amount of a restitution award for abuses of discretion. The law is well

settled in this regard. 'In reviewing a trial court's restitution order, we will not overturn its decision unless it constitutes an abuse of discretion. [Citations.] . . . An abuse of discretion will not be found if there is a factual or rational basis for the amount of restitution ordered.' [Citation.] '[T]he court's discretion in setting the amount of restitution is broad, and it may use any rational method of fixing the amount of restitution as long as it is reasonably calculated to make the victim whole.' " (*People v. Brunette* (2011) 194 Cal.App.4th 268, 276.) "However, no court has discretion to make an order not authorized by governing law . . . ." (*Ibid.*)

People v. Foster (1993) 14 Cal.App.4th 939, 944-947, superseded by statute on other grounds as stated in *People v. Birkett* (1999) 21 Cal.4th 226, 238, 244, held: "A property owner's statements in the probation report about the value of her property should be accepted as prima facie evidence of value for purposes of restitution." (*Foster*, *supra*, at p. 946.) The court that decided *Foster* reaffirmed its view in *People v. Gemelli* (2008) 161 Cal.App.4th 1539, stating that "the trial court is entitled to consider the probation report, and, as prima facie evidence of loss, may accept a property owner's statement made in the probation report about the value of stolen or damaged property." (*Id*. at p. 1543.)

Although Valverde was acquitted of two charges of grand theft from Sanches, the mortgagor for whom the trial court ordered restitution, she was, as noted, convicted of notarizing a false trust deed (Gov. Code, § 8214.2) to the Sancheses' residence.

I have been unable to locate in the lengthy probation officer's reports or anywhere else in the record an itemized calculation of restitution for the Sancheses' transactions involving Valverde. The record does contain, however, the trial court and parties' discussion about restitution, in which the court stated that the amount due Sanches was $27,399.48. The court, the prosecutor, and counsel for defendants engaged in the following colloquy:

"[The Court:] We set this for a further restitution hearing on three claims: [¶] First, count 11, involving the victim[ ] Mr. Sergio Sanchez [*sic*]."

"Beginning, first, with count 11: I did receive a one-page statement from a Christina Palomino—it's a form from the Office of the District Attorney, Bureau of Investigation. And it describes a certain investigation. And it's dated June 5th, 2009. And attached to that are certain computations and certain documentation concerning the loan for Mr. Sanchez.

"And, Ms. Dang, I understand this is a report of a contact between Ms. Palomino and Mr. Sanchez concerning the request for restitution?

"Ms. Dang [the prosecutor]: That is correct, Your Honor. And this is also provided to the defense and to [the] probation department.

"The Court: And I understand that Mr. Sanchez is requesting restitution in the amount of $27,399.48 based on the attached computation?

"Ms. Dang: That is correct, Your Honor.

"The Court: Is Mr. Sanchez here today?

"Ms. Dang: No, he's not.

"The Court: Thank you. Is there any objection to the claimed amount of restitution on behalf of either Ms. Valverde or Mr. Covarrubias?

"Mr. Picone: Yes, Your Honor. I would just submit the prior arguments we've made on behalf of Ms. Valverde.

"The Court: I understand.

"Mr. Ben Williams: Correct, Your Honor. Submitted on prior arguments.

"The Court: All right. Thank you.

"I have reviewed the documents, in detail, and I am going to award restitution. This is an award against Ms. Valverde only in favor of Mr. Sanchez on count 11 in the amount of $27,399.48, and that is based on the total of the following items: [¶] A loan origination fee of $16,880; [¶] a loan origination fee on the second loan of $4,220; [¶] an

appraisal fee of $350; [¶] a credit report fee of $30; [¶] a tax service fee of $75; [¶] a document preparation fee of $250; [¶] a document preparation fee of $200; [¶] a flood certification fee of $16; [¶] a second flood certification fee of $16; [¶] an administration fee of $1,500; [¶] a processing [fee] of $950; [¶] a processing fee on the second loan of $250; [¶] an underwriting fee of $495; [¶] a review appraisal fee of $100; [¶] an escrow fee of $567.88; [¶] a loan packaging fee of $50; [¶] a wire transfer processing fee of $10; [¶] lender's title policy of $1,083.60; [¶] lender's title policy on the second loan of $100; [¶] an endorsement fee of $25; [¶] a messenger service fee of $75; [¶] a—an overnight courier fee of $20; [¶] and a recording fee of $136."

" ' "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment." [Citation.] It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's contentions on appeal. [Citation.] If no citation "is furnished on a particular point, the court may treat it as waived." [Citation.]' " (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1446-1147, fn. 9.) Thus, the trial court's recitation of these amounts may be relied on as authoritative, even though I cannot locate the document on which it is based and defense counsel may have had a disagreement about the calculation of the requested restitution amount. Moreover, Valverde does not contest on appeal that the restitution amount has a factual foundation. She argues only that it lacks support in the verdicts. Accordingly, I will assume that there is a factual basis for the award.

As long as the record contains " ' " 'a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.' " [Citations.]' " (*People v. Taylor* (2011) 197 Cal.App.4th 757, 761.) Based on Sanches's testimony, the trial court could reasonably have found, without abusing its discretion, that the Sancheses would not have incurred their losses had Valverde not directed Sanches to falsify the deed of trust, because without that falsification, they might have found someone else to arrange the loan under more

reasonable terms, or, given Sanches's precarious financial situation, he might not have been able to obtain new loans but been forced to relinquish the Sancheses' properties, as they were obliged to do later.

VII. *Presentence Conduct Credit*

Defendants claim that the trial court erred in not awarding additional days of conduct credit for presentence confinement under an ameliorative change in section 4019 (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010). Their original sentences were handed down on May 4, 2009. At the time, Covarrubias received 30 days' conduct credit; he now claims entitlement to 60 days. Valverde received 32 days' conduct credit; she now claims entitlement to 64 days. On February 4, 2010, a few days after the new law became effective, Valverde filed a motion to apply the new law's ameliorative sentencing scheme. On February 23, 2010, Covarrubias followed suit. The prosecution conceded that defendants were entitled to additional credit. On April 29, 2010, contrary to defendants' factual recitations on appeal, the court awarded additional days of conduct under the new law—indeed, it gave Valverde 66 days' credit rather than the 64 days she argues for on appeal.

The People argue that, notwithstanding the prosecution's concession before the trial court, defendants are not entitled to the additional credits and that the court's award of additional credits must be reversed.

This reversal of the state's position does not work a waiver or forfeiture on appeal and this court may entertain the People's claim. The People are entitled generally to appeal from unlawful sentences, with certain exceptions not relevant here. (§ 1238, subd. (a)(10).) When a sentence "could not lawfully be imposed under any circumstance in the particular case" (*People v. Scott* (1994) 9 Cal.4th 331, 354), a reviewing court may "intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*Ibid.*) Thus, even though the prosecution conceded defendants' claim before the trial court, the People are not

estopped from having an unauthorized sentence corrected on appeal if the court's error was purely legal. (*People v. Carranza* (1996) 51 Cal.App.4th 528, 532-533.)

Our Supreme Court recently decided that the version of section 4019 that applies to a criminal defendant is the one that was in effect when the defendant was sentenced. (*People v. Brown* (2012) 54 Cal.4th 314.) Accordingly, the majority opinion's disposition is correct regarding this issue.

MY VIEW OF THE PROPER DISPOSITION

I would modify the judgment with regard to the jury's findings that defendants' conduct fell within the ambit of former subdivision (a)(4) of section 12022.6. I would direct the trial court to enter judgment that defendants instead violated former subdivision (a)(2) of section 12022.6 (Stats. 1998, ch. 454, § 2, p. 3231), to modify the sentences accordingly with the effect of reducing them by two years for each defendant, to amend the abstract of judgment, and to forward a certified copy of that document to the Department of Corrections and Rehabilitation.

In all other respects, I would affirm the judgment.

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Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.