

1 *Federal Case Proceedings*

2 Petitioner filed his petition for writ of habeas corpus pro se on September 21, 2017, ECF
3 No. 1, and a motion to proceed with the petition in forma pauperis on the same day. ECF No. 2.
4 In forma pauperis status was granted by the court on October 12, 2017. ECF No. 7.
5 Respondent filed an Answer to the petition on December 28, 2017. ECF No. 13. Based on the
6 court's service order, petitioner was directed to file any traverse to such an answer within thirty
7 (30) days of its filing. ECF No. 7 at 2:5-6. No traverse has been filed, and the time for doing so
8 is long past. Thus, the court will address the merits of the petition based upon the filings of the
9 parties as they are found in the record.

10 Petitioner does not object to any of the convictions he received save for grand theft of a
11 firearm. The undersigned will only discuss the firearm issue.

12 *Factual Background*

13 The underlying facts in this case are best explained by the Third District Court of
14 Appeal's review of petitioner's appeal. Lodged Document ["Lod. Doc."] No 1.

15 A jury found defendant Bobby D. John guilty of grand theft of a firearm
16 after he stole a closed safe that contained a handgun. On appeal, defendant argues
17 that theft includes a knowledge requirement that was not proven here and on which
18 the trial court failed to instruct the jury. Because we conclude that the offense of
19 theft by larceny requires simply that the defendant intended to steal the property of
another and does not require that the defendant know what is being stolen, we find
no merit in defendant's argument. For that reason, we affirm.

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21 In the summer of 2011, Lucy May Souza was at her home with her
22 husband, Arthur. Lucy was 80 and Arthur was 90, afflicted with dementia and
23 bedridden. On day, at approximately 12:45 p.m, a man wearing a hard hat came to
24 the Souza's front door. The man told Lucy he was from FEMA and wanted to
25 check the back of her house for seepage from the nearby river. He convinced
26 Lucy to go to her backyard with him. The man spent approximately 10 to 15
27 minutes making a show of inspecting the yard, calling his "supervisor" and
28 moving Lucy around the yard – away from her home – to mark plants she liked
with flags and to look at different parts of the ground. After another telephone
call, the man abruptly turned and ran away. Lucy did not see him again that day.

1 Lucy entered her home to check on her husband and saw that a chest of
2 hers had been opened. Knowing that she normally kept this chest closed, Lucy
3 went to inspect and noticed that the chest's contents had been disturbed. She then
4 went to check on her two safes, where she kept her "important papers and
5 valuables locked up." Both were gone. Apart from important documents and nice
6 jewelry, Lucy and Arthur kept a gun in one of the safes. All told, approximately
7 \$33,000 in property was taken from the Souzas' home.

8 Shortly thereafter, Lucy noticed an article in the Sacramento Bee that
9 recounted a burglary very similar to the one she experienced, and she thought the
10 suspect pictured, defendant, looked similar to the man who stole her safes. After
11 receiving a call from Lucy's grandson, Michael Souza, Sacramento County
12 Sheriff's Department Detective Todd Gooler came to Lucy's house and showed
13 her photographs of six different men. Defendant's photograph was included.
14 After Detective Gooler instructed Lucy on photographic lineups, she identified
15 defendant as the man who claimed to be from FEMA.

16 Defendant was charged with first degree residential burglary from a
17 separate incident. Following an examination hearing, that complaint was
18 consolidated with the complaint concerning the burglary of the Souzas' home, and
19 an information was filed. The charges arising from the incident here included first
20 degree residential burglary; commission of "theft, embezzlement, forgery, fraud
21 and identity theft, with respect to the property of an elder and dependent adult";
22 and grand theft of a firearm.

23 At trial, the court instructed the jury that, in order to find defendant guilty
24 of grand theft of a firearm, "the People must prove that: [¶] 1. The defendant took
25 possession of a firearm owned by someone else; [¶] 2. The defendant took the
26 firearm without the owner's consent; [¶] 3. When the defendant took the firearm
27 he intended to deprive the owner of it permanently; [¶] [and] [¶] 4. The defendant
28 moved the firearm, even a small distance, and kept it for any period of time,
however brief." While deliberating, the jury sent the court a question asking if it
would matter "whether . . . defendant had knowledge or did not have knowledge
that a weapon was in the safe at the time it was stolen?" The court replied that
"[k]nowledge of the contents of the safe at the time it was taken is not an element
of [grant theft of a firearm]." The jury found defendant guilty of all counts. The
court sentenced defendant to an aggregate term of nine years and eight months.

26 The statute under which defendant was convicted defines grand theft, in
27 pertinent part, as "theft committed [¶] . . . [¶] [w]hen the property taken is [a]
28 firearm." (Pen. Code, § 484, subd. (d)(2).) In turn, theft is defined as applying to

1 one “who shall feloniously take, carry, lead, or drive away the personal property of
2 another” (Pen. Code § 484, subd. (a).) Defendant contends that because
3 Penal Code section 484, subdivision (a) does not specifically include a mens rea
4 element, this court should construe the statute to require that defendant knew, at
5 the time of the theft, that he was taking a gun. We disagree. The substantive
6 requirements of theft by larceny are well established. (*People v. Davis* (1998) 19
7 Cal.4th 301, 305.) “[Theft by larceny] is committed by every person who (1) takes
8 possession (2) of personal property (3) owned or possessed by another, (4) by
9 means of trespass and (5) *with intent to steal the property*, and (6) carries the
10 property away.” (*Id.* at p. 305, italics added.) “The intent to steal is the intent . . .
11 to permanently deprive the owner of possession.” (*Ibid.*) Theft by larceny
12 requires only that defendant intended to steal the property of another; there is no
13 requirement that he knew what he was stealing.

14 In support of his argument, defendant points to *People v. Taylor* (2001) 93
15 Cal.App.4th 933. In that case, we considered a statute prohibiting possession of a
16 cane sword that did not explicitly include a mens rea element. (*Id.* at pp. 937-938.)
17 We looked to whether possession of a cane sword could be considered a public
18 welfare offense for which no scienter is required and concluded that because of the
19 “obscure nature of its unlawful characteristic . . . , we infer the Legislature
20 intended a scienter requirement of actual knowledge that the cane conceals a
21 sword.” (*Id.* at p. 941.) Defendant contrasts *Taylor* with *In re Jorge M.* (2000) 23
22 Cal.4th 866, in which our Supreme Court held that a statute prohibiting possession
23 of an unregistered assault weapon did not require actual knowledge (*id.* at pp. 869-
24 870) because “a person who knowingly possesses a semiautomatic firearm
25 reasonably should have investigated and determined the gun’s characteristics” (*id.*
26 at p. 885). Defendant argues that because the locked safe here “involved an
27 inherent obscurity . . . like the blade in the . . . cane sword” and because [g]rant
28 theft of a firearm is a serious felony offense,” we should apply the logic of *Taylor*
and *Jorge M.* to hold that to be convicted of grand theft of a firearm, defendant
must have had actual knowledge that he was stealing a gun.

In *People v. Campbell* (1976) 63 Cal.App.3d 599, we addressed a situation
very similar to the one here. In *Campbell*, the defendant was found guilty of,
among other things, grand theft of a firearm. (*Id.* at p. 603.) A woman left her
purse in her car and the defendant stole the purse. (*Id.* at pp. 606-607.) The purse
contained a semiautomatic pistol. (*Id.* at p. 606.) The defendant appealed his
conviction, arguing that “theft requires the specific intent to steal . . . [and s]ince
there is no evidence that [the] defendant had specific intent to steal the firearm . . . ,
the conviction for grand theft cannot stand.” (*Id.* at p. 615.) We disagreed. “The
evidence admits of no doubt that defendant intended to steal *the purse*. In doing

1 so, we are of the view that he intended to steal *the contents* of the purse. In this
2 case the gun We conclude that the defendant was properly convicted of grand
3 theft of the gun.” (*Ibid.*) Just as in *Campbell*, the facts here clearly support the
4 jury’s finding, pursuant to the trial court’s proper instructions, that defendant “took
5 possession of a firearm owned by someone else; [¶] . . . without the owner’s
6 consent; [¶] [with intent] to deprive the owner of it permanently; [¶] [and] [¶]
7 moved it” That defendant did not have knowledge that he was stealing a gun
8 is immaterial. There is no risk here, as there was in *Jorge M. and Taylor*, “of
9 punishing innocent possession” (*People v. Taylor, supra*, 93 Cal.app.4th at p. 941)
10 and, as such, there is no need to imply an additional mens rea element of intent to
11 steal. The jury found that defendant intended to permanently deprive the Souzas
12 of their gun. This satisfies the mental state requirement of the offense of theft.

13
14 *Discussion*

15 As set forth in the introduction, petitioner believes that he cannot be convicted of grand
16 theft with respect to a firearm unless he knew he was stealing a firearm. He asserts that to hold
17 otherwise establishes the lack of sufficient evidence to convict him, and, in addition or in the
18 alternative, he posits that not informing the jury of this specific intent “requirement” violates his
19 due process right. See e.g. *Ho v. Carey*, 332 F.3d 587 (9th Cir. 2003).

20 However, as held in his own Court of Appeal case (citing state law authority), there is no
21 specific intent requirement under state theft law to the effect that one must know he is stealing the
22 specific item of a firearm. In addressing the question of the requisite intent required for
23 defendant’s conviction for stealing a firearm housed in a safe where he could not be aware it was
24 housed at the time of the taking, the Third District Court of Appeal stated “the facts here clearly
25 support the jury’s finding, pursuant to the trial court’s proper instructions, that defendant “took
26 possession of a firearm owned by someone else; [¶] . . . without the owner’s consent; [¶] [with
27 intent] to deprive the owner of it permanently; [¶] [and] [¶] moved it That defendant did not
28 have knowledge that he was stealing a gun is immaterial.” Thus the appellate court found the
statute in question to require only the intent to complete the act of theft without regard to whether
the thief specifically desired the specific thing stolen.

As the Supreme Court held in a per curiam opinion that reversed a decision of the Sixth
Circuit of Appeals, a state court’s determination of the scope of its criminal statute, even if

1 “announced on direct appeal of the challenged conviction” for the first time “binds a federal court
2 sitting in habeas corpus. Bradshaw v. Richey, 546 U.S. 74, 76 (2005), *citing* Estelle v. McGuire,
3 502 U.S. 6, 67-68 (1991); Mulaney v. Wilbur, 421 U.S. 684, 691 (1975). In Bradshaw the
4 defendant was convicted of aggravated murder when a child was killed in a fire he set explicitly
5 to kill his ex-girlfriend and her boyfriend on a theory of “transferred intent.” 546 U.S. at 74.
6 The Sixth Circuit had held that to apply this theory would result in an unconstitutional conviction
7 as it believed state law at the time of the act was contrary to what the Ohio Supreme Court had
8 held it was. This case relies on the argument adopted by the Circuit Court, but overruled by the
9 Supreme Court. The Ninth Circuit Court of Appeals has applied this rule on numerous occasions,
10 *see e.g.*, Medley v. Runnels, 506 F.3d 857-865 (9th Cir. 2007)(the elements of a state crime are
11 determined by state law); Jeffries v. Blodgett, 5 F.3d 1180, 1194 (9th Cir. 1993)(the state bears the
12 sole responsibility of defining the elements of its criminal offenses); Mendez v. Small, 298 F.3d
13 1154, 1158 (9th Cir. 2002)(the state courts have the last word on the interpretation of state law).

14 Thus, no matter how petitioner posits his issue, an asserted lack of evidence to show that
15 he knew he was stealing a firearm, or a violation of due process in jury instructions because the
16 prosecution was relieved of proving an element of the crime, his theory flounders upon state law
17 to the contrary. That is what distinguishes this case from Ho v. Carey; in Ho it was undisputed in
18 the appellate opinion that the jury instruction at issue was contrary to state law.

19 *Conclusion*

20 In light of the foregoing IT IS HEREBY RECOMMENDED that:

- 21 1. Petitioner’s petition for a writ of habeas corpus should be denied;
- 22 2. No Certificate of Appealability should issue;
- 23 3. The Clerk of the Court should close this case.

24 These findings and recommendations are submitted to the United States District Judge
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty (30) days
26 after being served with these findings and recommendations, petitioner may file written
27 objections with the court and serve a copy on all parties. *Id.*; *see also* Eastern District of
28 California Local Rule 304(b). Such a document should be captioned “Objections to Magistrate

1 Judge's Findings and Recommendations." Any response to the objections shall be filed with the
2 court and served on all parties within ten (10) days after service of the objections. Id. Rule
3 304(d). Failure to file objections within the specified time may waive the right to appeal the
4 District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951
5 F.2d 1153, 1156-57 (9th Cir. 1991).

6 Dated: November 19, 2018

7 /s/ Gregory G. Hollows
8 UNITED STATES MAGISTRATE JUDGE
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