IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

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| PEOPLE OF THE STATE OF CALIFORNIA<br>Plaintiff and Appellant,<br><br>vs.<br><br>ANTHONY LEE LEWIS,<br>Defendant and Respondent. | Case No. E058643<br><br>Superior Court of Riverside County Case No. RIF096243 |

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Appeal from a judgment of the Superior Court
for the County of Riverside, Case Number RIF096243
Hon. Becky L. Dugan, Judge of the Superior Court

# RESPONDENT'S PETITION FOR REHEARING

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Independent Case System

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RESPONDENT'S PETITION FOR REHEARING

The opinion reversed the order reducing the term from a third strike sentence to a second strike sentence and remanded with directions to "allow the trial court to examine the evidence adduced at trial [of the commitment offense] to determine and state on the record whether the prosecution's case was based on the theory that defendant was guilty of possession of a firearm based on evidence consistent with this opinion." The opinion also directed the trial court after that examination to "act on defendant's resentencing petition in a manner consistent with this opinion." (Op. 19 [disposition].) Appellant petitions for rehearing.

DISCUSSION OF REASONS FOR REHEARING

I. THE OPINION CONTRAVENES THE NORMAL RULES OF APPELLATE REVIEW.

With great respect, and without concession of other aspects of this litigation, hereby reasserted, respondent Mr. Lewis requests rehearing because:

A. Background

The respondent was acquitted of felony assault when the commitment jury found him guilty of the lesser included misdemeanor of simple assault. Under the prosecution's charges and stated theory of the defendant ". . . demanding money at gunpoint . . . pointing a firearm at the victim, forcing her into the bedroom . . ." (Op. 3, fn 3 [with a hung jury on robbery and burglary without retrial]), the specific acquittal of the greater offense of assault with a firearm could only mean that the jury unanimously rejected the prosecution theory and found he was not armed with a firearm in the commission of the misdemeanors.

As to the appellant People's stated theory that "police recovered a loaded firearm from under defendant's mattress in a later search of his house" (Op. 3, fn 3), assuming *arguendo* that was the basis for the felony conviction of possession of a firearm by a person previously convicted of a felony, the situation is somewhat more complex.

The respondent established a prima facie case of eligibility for relief when he demonstrated that his commitment offense was for possession of a firearm, not for being armed or using the firearm, by a person previously convicted of a felony. (Op. 10.) Although the appellant People's position has been changing throughout the course of the case, the strongest position appears to be that the respondent would still not be eligible if he were "armed" "during the commission of the current offense." (Op. 10.)

However, as the opinion points out, there is no evidence in the record of respondent having ready access to or physical possession of the

firearm under his mattress (at least at the time he was discovered to be in possession of it).[1] (Op. 16.)

That is, the only evidence in the record (whether on appeal or by writ) is that he was by unanimous jury verdict acquitted of being armed at the time of the misdemeanors, possession alone is not disqualifying, and there is no evidence that he was armed in the commission of the offense of possession. The trial court, after permitting the People to change their theory to one of ineligibility, providing an opportunity for the People to be heard in writing and orally, and again after announcing its tentative decision, understandably found Mr. Lewis eligible. This Court after full briefing and oral argument, similarly found the record inadequate to preclude eligibility.

B. Discussion

The normal rule is that an appellate court generally is not the forum in which to develop an additional factual record, especially when the evidence was not available at the time of the trial court proceedings. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207-1208.) It is unclear why this Court has decided to reverse to afford the prosecution another opportunity to present evidence it had every chance to present earlier. The message appears to be (a) that this Court has information about or is

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[1] While respondent specifically continues to maintain that there must be a "tethering" to some other offense (lest the constructive possession doctrine swallow both the statutory description of "armed" and the statutory description of "current offense" and the statutory requirement of "during the commission"), for purposes of this rehearing position only he will assume *arguendo* he is incorrect for the reasons pointed out by the opinion.

speculating on the previous trial evidence which is at odds with the trial court's determination, or (b) that the trial court is to be discouraged from releasing any applicant without a review of the full transcripts and pleadings of the earlier case despite a record showing eligibility with no additional facts to preclude it. Respondent does not believe the Court would engage in ex parte activity or use groundless speculation as a basis for its decision, and respondent sees no discussion of what would amount to a new issue that a trial court cannot simply rely on the information supplied by the parties but must *sua sponte* examine the pleadings and evidence at the commitment offense trial.

The normal rule is also that findings of the trial court based on substantial evidence are conclusive on appeal. (*People v. Benford* (1959) 53 Cal.2d 1, 6.) In this instance eligibility depends (even assuming *arguendo* the opinion's other conclusion that no pleading or proof requirement rests on the prosecution) upon the *absence* of the defendant having been "armed" rather than in possession at the time of the offense. As this Court has acknowledged, there is no evidence in the record that the respondent was armed. The Superior Court ruled correctly.

Rehearing is respectfully requested.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to rehear and reconsider this case and that the judgment be affirmed.

Dated: September 1, 2014. Respectfully submitted,

Mark L. Christiansen, SB#41291

Attorney for Anthony Lee Lewis

Certification: This brief does not exceed 25,500 words (Cal. Rules of Court, rule 8.360(b)). It contains 973 words by computer count, excluding covers, tables, this certification, and the proof of service.

______________________

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DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury as follows: I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is: PMB 513, Suite D, 44489 Town Center Way, Palm Desert, CA 92260. On September 4, 2014, I mailed from Palm Desert, California, a copy of the attached RESPONDENT'S PETITION FOR REHEARING addressed to the person(s) named below at the address(es) shown with postage fully prepaid, and I sent copies by e-Service on Appellate Defenders and e-Submission to Court of Appeal at the indicated electronic addresses.

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on September 4, 2014, at Palm Desert, California.

________________________
Mark Christiansen