IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S_____
Plaintiff and Respondent,	)	No. B241236
	)	
vs.	)	
	)	Los Angeles
VINCE E. LEWIS, et al.,	)	Superior Court
	)	No. TA117431
Defendants and Appellants.	)	
	)	

APPELLANT LEWIS'S PETITION FOR REVIEW

From a Decision of the Court of Appeal,
Second Appellate District, Division One,
on Appeal from the Superior Court of the State of California
in and for the County of Los Angeles
The Honorable Ricardo R. Ocampo, Judge

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APPELLANT LEWIS'S PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Vince Lewis respectfully petitions this Court to review the decision of the Court of Appeal, Second District, Division One, affirming his conviction for first-degree murder. The opinion of the Court of Appeal was filed on July 14, 2014, and is appended to this petition. It is cited herein as "Op." There was no petition for rehearing.

ISSUES PRESENTED FOR REVIEW

1. Whether, in assessing whether instructional error is harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, a reviewing court must examine the *entire* record, including evidence that weakens the prosecution's case, and may not look solely at the evidence most favorable to the prosecution and draw only prosecution-favorable inferences?

[The following issues 2 and 3 are presented under Rule 8.508]

2. Whether co-defendant Coronel's text messages were properly admitted against Mr. Lewis over a hearsay objection? Whether the expansive application of the hearsay exception for declarations against penal interest in multi-defendant cases set forth in *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334-336, is consistent with decisions of this Court?

3. Whether Mr. Lewis' trial should have been severed from the trial of his co-defendants?

NECESSITY FOR REVIEW

This Court's intervention is sorely needed to enforce the clearly established federal constitutional law regarding prejudicial error (*Chapman v. California* (1967) 386 U.S. 18, and its progeny), because the Courts of Appeal are routinely failing to apply that law correctly. The problem is a recurring and serious one. The Courts of Appeal are repeatedly failing to adhere to the *Chapman* requirement of review of the entire record. They are not considering aspects of the record and the evidence that are unfavorable to the prosecution or favorable to the defense. The principles are actually long settled, but perhaps because they have been settled for so long, they are in need of reiteration because they appear to have been forgotten. Review is needed to secure uniformity of decision on an important question of law. (Rule 8.500(b)(1).)

This case is not an aberration. While identifying similar cases is extraordinarily difficult – because it is evidence not considered in the Court of Appeal's opinion that is the primary deficiency – examples are sadly numerous. In each of the cases in the following undoubtedly incomplete list, as in the present case, the Court of Appeal found federal constitutional error

to be non-prejudicial by taking an improper prosecution-favorable view of the record, without looking at the evidence as a whole or the closeness of the case overall. The Court of Appeal's improper approach to the question of prejudice under federal constitutional standards in Mr. Lewis's case is symptomatic of a widespread problem with how the Courts of Appeal in general are misapplying those standards.

Defendant & Appellant	**Court of Appeal**	**Appeal**	**Petition for Review**	**Review Denied**
Krukow	1st, Div 5	A118320	S171711	6/10/09
Martinez-Delgado	1st, Div 2	A120175	S173348	7/8/09
Dillon et al.	1st, Div 1	A117853	S174938	9/30/09
Katzenberger	3d	C058883	S178526	2/10/10
Campos	2d, Div 5	B208788	S179121	3/10/10
Washington	2d, Div 4	B209785	S180874	5/12/10
Vang	4th, Div 1	D054343 & D054636	S184212 & S186346	9/15/10[1/]
Beckley et al.	2d, Div 1	B212529	S184480	9/22/10
Booker	2d, Div 3	B214910	S185439	10/13/10
Miller	1st, Div 4	A121646	S186011	10/13/10

1. Review was granted, and this Court concluded that the trial court had not committed error, so this Court did not conduct its own prejudice analysis or review the improper prejudice analysis conducted by the Court of Appeal. (*People v. Vang* (2011) 52 Cal.4th 1038.)

Defendant & Appellant	Court of Appeal	Appeal	Petition for Review	Review Denied
Lewis[2/]	3d	C056876	S204103	9/12/12
Huezo	2d, Div 5	B233864	S204962	10/17/12
Aguilar	5th	F061462	S209226	5/15/13
Mercado	2d, Div 3	B223451	S211241	8/14/13
Estrada	2d, Div 3	B235543	S211538	8/21/13

The plainly improper approach used to affirm Mr. Lewis' conviction and deny him the benefit of *People v. Chiu* (2014) 59 Cal.4th 155 and deny him his right to jury trial manifests a recurring problem. Settled law is being ignored on a widespread basis. Review is called for. There is a strong need for this Court to intervene and to put a halt to the regular misapplication of the *Chapman* principles by the Courts of Appeal.

STATEMENT OF THE CASE

The facts and the course of proceedings are stated at Op. 2-6 and LAOB 1-9.[3/] In summary, a young female gang member, Darsy "Mickey" Noriega, was to be disciplined for consorting with a member of a rival gang. The evidence showed that other female gang members intended to beat the victim, although more ambiguous and more hypothetical evidence would support a conclusion that she was at risk of being killed. Mr. Lewis drove the intended perpetrators and the intended victim on a beer run. Two of the young women were pregnant, and they stopped so that one of them could urinate in a dark

2. Not the present appellant and petitioner.

3. Mr. Lewis's opening brief in the Court of Appeal is cited "LAOB," to distinguish it from the briefs of his co-appellants.

alley. While Mr. Lewis waited in the car, co-defendant Mirian "Mimi" Herrera shot and killed Darsy Noriega.

The case against Mr. Lewis for murder went to the jury on alternative theories of direct aiding and abetting (which would have required proof of his specific intent to aid in a killing) and natural and probable consequences liability (which could be established by an intent to aid in an assault).[4/] The jury found him guilty of first-degree murder, in a general verdict not specifying the theory of liability. While his appeal was pending, *People v. Chiu* (2014) 59 Cal.4th 155, held that the natural and probable consequences theory would not support a first-degree conviction. The Court of Appeal received supplemental briefing concerning *Chiu*. Rather than reversing the first-degree conviction as this Court did in *Chiu*, the Court of Appeal found the instructional error harmless beyond a reasonable doubt, citing only the evidence favorable to the prosecution and concluding that every reasonable juror would have found that Mr. Lewis specifically intended to aid in a killing, and would have found him guilty of first-degree murder on a theory of direct aiding and abetting. (Op. 19.)

RELATED CASE

Co-defendant Ariana Coronel – also a non-triggerperson convicted on an aiding and abetting theory – submitted a petition for review on July 25, 2014, seeking review of the same Court of Appeal opinion. No. S220153.

* * * * *

4. The jury was also instructed on a conspiracy theory, but that theory does not figure in the issue presented here.

ARGUMENT

1. REVIEW SHOULD BE GRANTED TO MAKE CLEAR THAT, WHEN DETERMINING WHETHER INSTRUCTIONAL ERROR IS PREJUDICIAL, *CHAPMAN v. CALIFORNIA* REQUIRES AN APPELLATE COURT TO ASSESS THE ERROR IN LIGHT OF THE ENTIRE RECORD, AND NOT JUST WITH REFERENCE TO THOSE FACTS AND INFERENCES FAVORABLE TO THE PROSECUTION
[Issue 7 in the Court of Appeal opinion]

A. *Introduction*

In this case tried prior to *People v. Chiu* (2014) 59 Cal.4th 155, the instruction on natural and probable consequences liability, CALCRIM No. 403, referred only to "murder" and said nothing about the degrees of murder. (2 CT 506.) The instruction permitted a conviction of first-degree murder on a natural and probable consequences theory. *Chiu* holds that this was error.

The Court of Appeal held the error harmless beyond a reasonable doubt. (Op. 19.) Its analysis of the question of prejudice is inconsistent with *Chapman v. California* (1967) 386 U.S. 18, and its progeny, including *People v. Mil* (2012) 53 Cal.4th 400, 417-419, and calls for a grant of review.

Mr. Lewis was not the actual killer, what CALCRIM No. 400 calls "the perpetrator." (2 CT 504.) The instructions set forth three potential theories of liability for Mr. Lewis: direct aiding and abetting; natural and probable consequences; and conspiracy.

Given *Chiu*, the natural and probable consequences doctrine is a legally insufficient theory on which to base a conviction of first-degree murder. When the jury is instructed on a legally insufficient theory, reversal is required "absent a basis in the record to find that the verdict was actually based on a valid ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129, referring to *People v. Green* (1980) 27 Cal.3d 1, 69-70.) That finding must be made beyond a reasonable doubt. (*Chiu*, 59 Cal.4th at p. 167.) It is not sufficient

that the verdict *could have been* based on a valid ground; principles related to assessing the sufficiency of the evidence cannot be imported into this inquiry. There is no basis on which a reviewing court can confidently conclude beyond a reasonable doubt that the first-degree verdict against Mr. Lewis was actually based on a ground other than natural and probable consequences.

B. *The Facts and the Prosecutor's Argument Establish that the Instructional Error was Prejudicial, Not Harmless Beyond a Reasonable Doubt*

To convict Mr. Lewis of first-degree murder on a direct aiding and abetting theory, the prosecution would have been required to prove that Mr. Lewis knew that Mirian Herrera intended to commit a murder, that he intended to facilitate, promote or encourage her to commit a murder, and that his own mental state with respect to the intended murder manifested wilfulness, deliberation, and premeditation. (2 CT 505; *Chiu*, 59 Cal.4th at pp. 166-167, referring to *People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118.)

In finding the instructional error harmless beyond a reasonable doubt, the Court of Appeal cited only the evidence which would have supported this theory, but did not mention the contrary evidence:

> "The undisputed facts of this case provide strong evidence of guilt. The evidence established that Lewis was the gang's shot-caller, that only the shot-caller could authorize the killing of a gang member, that Lewis called a gang meeting that Noriega was required to attend, that he made up the story about needing to buy beer and that he drove Herrera, armed with a gun, to a dark alley where she shot Noriega."

(Op. 19.) Initially, the issue here is not "guilt," but the level of culpability – guilt of what? "[S]trong evidence of guilt" begs the question.

There was substantial evidence that the target crime was an assault, not murder. If the jury credited this evidence, the first-degree verdict against Mr.

Lewis rests on the now-forbidden natural and probable consequences theory, and not on a permissible theory of direct aiding and abetting. The Court of Appeal erred by not taking this evidence into account or even referring to it in the course of finding the instructional error harmless:

Amy Aleman, without whom the prosecution would have had no case against Mr. Lewis, testified that she believed that the eventual victim, Darsy "Mickey" Noriega, "was going to get violated." (3 RT 2457.) The prosecutor elicited from her that "violated" means being beaten for a predetermined number of seconds. (3 RT 2458.) She confirmed this understanding on cross-examination. (3 RT 2515, 2529-2530.) She testified that "people always walk away from violations." (3 RT 2529.) Aleman testified that she did not see a gun before the shots were fired. (3 RT 2466, 2522.)[5/]

Gilbert Mendoza told the police that Mickey was going to get a violation. (2 CT 391, 394.) In the statement of the facts elsewhere in its opinion, the Court of Appeal itself recognized that "Mendoza gave varying descriptions of a 'violation.'" (Op. 5.) "At one point he agreed with the interviewer that 'a violation is essentially a physical beating'; that they are 'common'; and that 'people get violated all the time' and 'walk away.' [3 RT 2174; see also 2 CT 391.] Later, however, Mendoza said that a violation could involve a shooting or a stabbing. [2 CT 394.]" (Op. 5.) Mendoza also testified

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5. A short time after the shooting, Mirian Herrera told Aleman that the shooting had to be done, because Ms. Noriega had been spending time in other hoods. (3 RT 2483-2484; 2 CT 433.) Aleman testified both that Mr. Lewis was and was not present when she was told this. (3 RT 2483-2484, 2525-2528, 2544; see 5 RT 3328-3329.) Given that this occurred after the shooting, and that it is unclear whether or not Mr. Lewis was present when this was said, this evidence does not rule out the possibility that the jury relied on the natural and probable consequences theory rather than direct aiding and abetting of murder.

that you can walk away from a violation, but if you get "taken out of the hood," you don't walk away from that. (3 RT 2181.) Mendoza described what was going to happen to Mickey as a violation, not as being "taken out of the hood."

Text messages from co-defendant Ariana Coronel prior to the offense referred to "Mickey getting the boot" or being taken "outta the hood." (P.Ex. 4 at 17-18; ACT 81-82.) Particularly in light of Aleman's testimony, jurors could reasonably conclude that these messages manifested an intent to expel Mickey from the gang and not to kill her.

The prosecution's gang expert, Winston Lee, opined that gang members who associated with rival gang members could be either beaten or killed. (5 RT 3363-3364.) In response to a hypothetical question, he said that the murder would not have happened if Mr. Lewis had not authorized it. (5 RT 3402.) There is no basis in the record on which the Court of Appeal could have properly concluded that all the jurors necessarily credited the latter hypothetical testimony over the testimony from witnesses with first-hand knowledge of what was actually being planned, and necessarily relied on a theory of direct aiding and abetting.[6/]

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6. The third theory on which the jury was instructed, conspiracy, is not a legally sufficient theory of first-degree murder in light of *Chiu*. The conspiracy instruction, like the natural and probable consequences instruction, defined the target crime as assault with force likely to produce great bodily injury. (2 CT 508.) The conspiracy instruction defined "natural and probable consequence" in the same way as did the instruction on the natural and probable consequences of aiding and abetting. (2 CT 509.) The law concerning "natural and probable consequences" is applied interchangeably in conspiracy cases and aiding and abetting cases. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 261 [aiding and abetting], referring to *People v. Kauffman* (1907) 152 Cal. 331 [conspiracy].) It follows from *Prettyman* that *Chiu* also precludes *first-degree* murder liability as a natural and probable (continued...)

The prosecutor's argument does not support the Court of Appeal's conclusion of harmless error. Indeed, in one important particular the prosecutor's argument cuts against the Court of Appeal's conclusion.

The prosecutor told the jurors they did not have to agree on a theory of murder. Some could find direct aiding and abetting of murder, while some could find the target crime was assault but that murder was a natural and probable consequence. (5 RT 3672-3673.) The prosecutor argued that Mr. Lewis and Ms. Coronel were guilty of murder as direct aiders and abetters, but conceded that the jurors could find that an assault was contemplated. (6 RT 3906, 3921.) He argued that under any theory the appropriate verdict would be first-degree murder, a proposition which is not true after *Chiu*. (6 RT 3929.) It cannot be said with certainty that the entire jury rejected the natural and probable consequences theory. If even one juror relied on that theory, the judgment must be reversed as Mr. Lewis was not convicted unanimously under a legally permissible theory.

Most importantly, the prosecutor argued that an aider and abetter was "equally guilty" with the perpetrator (5 RT 3671) and displayed a PowerPoint slide which used the same phrase (Ct.Ex. 7 at p. 3). This phrase originally appeared in CALCRIM No. 400 but was deleted because of its misleading nature. (See *People v. Loza* (2012) 207 Cal.App.4th 332, 348-356 [counsel ineffective for failing to object to this language]; *People v. Nero* (2010) 181 Cal.App.4th 504, 517-518.) The version of CALCRIM No. 400 given in this

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6. (...continued)
consequence of a conspiracy to commit a non-homicide crime.

Even if *Chiu* is not directly extended to conspiracy, the instruction on the conspiracy theory does not save the first-degree verdict against Mr. Lewis because, as discussed in text, the record does not rule out the possibility that the jury's verdict was based on the unquestionably forbidden natural and probable consequences theory of aiding and abetting.

case did not include the offending language (2 CT 504), but the damage was done by the prosecutor's arguments, oral and visual. *Chiu* makes even more clear than prior precedent that it is simply not true that the accomplice to murder is "equally guilty." With no instruction on the point, and with no way for the jury to know that the prosecutor's argument was legally erroneous, it can be assumed that the jury that reached the verdicts the prosecutor asked for accepted the prosecutor's argument on this point. Where instructions are deficient, "ill-advised remarks by the prosecutor may compound the trial's defects." (*People v. Morales* (2001) 25 Cal.4th 34, 48.)

C. *The Court of Appeal's Analysis was Seriously Inconsistent with the Chapman Prejudice Standard*

Chiu holds that natural and probable consequences liability cannot support a conviction of first-degree murder under any circumstances. Mr. Lewis's jury was instructed that it could. "Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Chun* (2009) 45 Cal.4th 1172, 1201, cited in *Chiu*, 59 Cal.4th at p. 167.)

In *People v. Mil* (2012) 53 Cal.4th 400, this Court pointed out that "our task in analyzing the prejudice from the instructional error [of constitutional dimension] is whether any rational factfinder could have come to the opposite conclusion" than the jury reached at the trial under review. (*Id.* at p. 418.) Using this standard, the Court reversed a conviction because "the record could have supported a finding" in favor of the defendant on the issues affected by the error, that is, because "a rational juror, given [a trial free of the constitutional error], could have had a reasonable doubt" about the defendant's guilt. (*Id.* at pp. 417, 419, citing *Neder v. United States* (1999) 527 U.S. 1, 19; see

also *People v. Jackson* (2014) 58 Cal.4th 724, 789-808 [dis. opn. of Liu, J.].) The Court of Appeal's approach in the present case cannot be reconciled with *Mil* or *Neder*.

In applying the *Chapman* constitutional test for prejudice, "[t]he question is whether, *on the whole record* . . . the error . . . [is] harmless beyond a reasonable doubt." (*Rose v. Clark* (1986) 478 U.S. 570, 583 [internal quotation marks omitted, emphasis added]; accord, *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259 ["The question, however, is not whether the legally admitted evidence was sufficient to support the [verdict], which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."] [internal quotation marks omitted].) It is entirely inappropriate to look only to the prosecution-favorable evidence in order to reach a conclusion that the evidence of guilt is overwhelming. A conclusion of harmless error is appropriate only if the evidence is "overwhelming *and* uncontested." (*People v. French* (2008) 43 Cal.4th 36, 53 [emphasis added].) As the Supreme Court has held, "the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 330-331.) As another court put it, "When a jury must choose which of two opposing versions to credit, it simply cannot be said that the evidence is overwhelming." (*State v. Frost* (1999) 158 N.J. 76, 87 [727 A.2d 1, 6].)

By crediting only the evidence and inferences most favorable to the prosecution, the Court of Appeal was, in essence, engaging in factfinding, assessing credibility, and weighing competing inferences. Under the Sixth Amendment right to a jury trial, however, these functions are given exclusively to the jury. A defendant has a "Sixth Amendment right to have essential facts

found by a jury beyond a reasonable doubt," and thus "it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial." (*Dillon v. United States* (2010) 560 U.S. 817, 828; *Cavazos v. Smith* (2011) 132 S.Ct. 2, 4.[7]) Thus, the Court of Appeal's approach to the record when reaching its conclusion of no prejudice was fundamentally wrong. The Court of Appeal reached conclusions that were not required to be made by Mr. Lewis's actual jury, and did not do so by reference to any jury considering the entirety of the evidence under proper instructions. The Court of Appeal disregarded the evidence favorable to Mr. Lewis that an actual, properly-instructed jury would have been required to take into account.

The governing principle is analogous to the rule that "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People v. Wilson* (1967) 66 Cal.2d 749, 763; accord, *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.) That rule is also rooted in the Sixth Amendment right to trial by jury on every material issue presented by the evidence. (*Wilson*, 66 Cal.2d at p. 764.)

None of these settled principles was acknowledged by the Court of Appeal in Mr. Lewis' case, let alone applied there. Instead, by cherry-picking the facts and viewing the record in the light most favorable to the prosecution, the Court of Appeal's approach effectively assumed the answer to the

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7. *See also, e.g.*, *Blakely v. Washington* (2004) 542 U.S. 296, 308 ("the Sixth Amendment . . . limits judicial power . . . to the extent that the claimed judicial power infringes on the province of the jury"); *Apprendi v. New Jersey* (2000) 530 U.S. 466, 483-484 (discussing "the [constitutional] requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt"]; *United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 446 ("ultimately the decision on the issue of intent must be left to the trier of fact alone"); *Davis v. Alaska* (1974) 415 U.S. 308, 317 (describing jury as "sole judge of the credibility of a witness").

prejudice question. The Court of Appeal did not mention the evidence that Mr. Lewis was *not* a direct aider and abetter of murder. It is certainly possible that a properly-instructed jury would have come to view the case as the Court of Appeal did, but no rational jury could properly come to that conclusion without considering all of the evidence and inferences that were before the jury, those favorable to the prosecution and those unfavorable.

"The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [emphasis in original].) The Court of Appeal here drew the inferences most favorable to the prosecution from the evidence, then concluded, not surprisingly, that a juror who drew all those inferences would have convicted Mr. Lewis even if instructions conforming to *Chiu* had been given.

A reasonable juror could see the evidence more than one way on the question whether Mr. Lewis intended a killing or a beating. An analysis of prejudice consistent with the Constitution must account for that reality. But the Court of Appeal cited only the evidence most favorable to the prosecution. (Op. 19.) This is an issue of instructional error. It does not concern the sufficiency of the evidence to go to the jury, the one possible appeal issue on which it would be appropriate to assess the facts in that manner.

A case will never appear close to someone who accepts all of one party's evidence and none of the other party's. The principle that reversal is called for when the case is close (*People v. Briggs* (1962) 58 Cal.2d 385, 407) would be rendered meaningless if the closeness of the case were tested only from the vantage point of a juror who draws all the inferences most favorable to the prosecution. The U.S. Supreme Court put it this way:

> "[O]ne must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record."

(*Kotteakos v. United States* (1946) 328 U.S. 750, 764.) Justice Stevens called these words "a passage that should be kept in mind by all courts that review trial transcripts." (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 642 (conc. opn.).)

The Court of Appeal failed to keep that premise in mind. The result was federal constitutional error on the question of prejudice.

D. *Remedy*

Unless the judgment is reversed in its entirety on some other ground, the appropriate remedy is as set forth in *Chiu*: "Regarding the remedy, the Court of Appeal reversed the first degree murder conviction, allowing the People to accept a reduction of the conviction to second degree murder or to retry the greater offense. That disposition is also appropriate under our decision. If the People choose to retry the case, they may seek a first degree murder conviction under a direct aiding and abetting theory." (59 Cal.4th at p. 168.)

* * * * *

2. CO-DEFENDANT ARIANA CORONEL'S TEXT MESSAGES SHOULD NOT HAVE BEEN ADMITTED AGAINST MR. LEWIS AT A JOINT TRIAL; THE ERROR WAS PREJUDICIAL [Issue 3 in the Court of Appeal opinion]

Co-defendant Ariana Coronel's text messages before and after the shooting of Darsy Noriega were admitted over objection and were an important part of the prosecution's case against all the defendants, not just Ms. Coronel. The judge erred in concluding that these messages were admissible against Mr. Lewis as declarations against penal interest (Evid. Code, § 1230) and as co-conspirator declarations (Evid. Code, § 1223). The error was prejudicial to Mr. Lewis. The Court of Appeal nevertheless affirmed. (Op. 11-13.)

The statements admitted into evidence appear in Plaintiff's Exhibit 4. (ACT 64-91.) The statements prior to the shooting are at ACT 73-83 and the statements after the shooting are at ACT 84-86.

The courts below relied on the expansive application of the hearsay exception for declarations against penal interest in multi-defendant cases set forth in *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334-336. (2 RT 623-629; Op. 12-13.) *Greenberger* is inconsistent with the relevant precedents of this Court, *People v. Lawley* (2002) 27 Cal.4th 102, 152-154, and *People v. Duarte* (2000) 24 Cal.4th 603, 611-612. This Court has never followed *Greenberger* or cited it with approval. The sole citation to this passage of *Greenberger* in this Court's reports came in a one-justice separate opinion in *Lawley*. (27 Cal.4th at p. 174 [conc. opn. of Brown, J.].) The Court in *Lawley* was told by a colleague that they should have followed *Greenberger* and reached the opposite result than the majority actually did.

Mr. Lewis presents this issue for this Court's review under Rule 8.508. (LAOB 10-17; LARB 1-5; Op. 11-13.)

* * * * *

3. MR. LEWIS' TRIAL SHOULD HAVE BEEN SEVERED FROM THE TRIAL OF HIS CO-DEFENDANTS [Issue 1 in the Court of Appeal opinion]

In an attempt to prevent the error and prejudice discussed in the immediately preceding argument, Mr. Lewis moved prior to trial to sever his trial from that of his co-defendants. (1 CT 220-250.) Ms. Herrera did likewise. (1 CT 199-204.) The judge concluded that the question was dependent on the admissibility of Coronel's text messages against the other defendants. (ART B3; see also 3 CT 584 & 6 RT 4505 [motion for new trial].) The Court of Appeal held that severance was not required. (Op. 6-7.)

Argument 2, immediately *supra*, is incorporated herein by reference. This issue is carried by the admissibility issue discussed in argument 2. If it was not error to admit Coronel's text messages against Mr. Lewis, then Mr. Lewis cannot claim to have been prejudiced by the joint trial.

Mr. Lewis presents this issue for this Court's review under Rule 8.508. (LAOB 18-20; LARB 6-8; Op. 6-7.)

* * * * *

CONCLUSION

Review should be granted. The judgments of the Court of Appeal and the Superior Court should be reversed.

Respectfully submitted August 20, 2014.

ROBERT D. BACON
Attorney for Vince E. Lewis

CERTIFICATE OF PETITION LENGTH
(Rule 8.504(d)(1))

This petition contains **4,766** words.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

ROBERT D. BACON

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Lewis et al., No. S_____, No. B241236*

I, the undersigned, declare as follows:

I am over the age of 18 years and not a party to this case. My business address is: PMB 110, 484 Lake Park Avenue, Oakland, California 94610.

On August 21, 2014, I served **APPELLANT LEWIS' PETITION FOR REVIEW** by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing the envelope in the U.S. Mail at Oakland, California, with postage fully prepaid. There is delivery service by U.S. Mail at each of the places so addressed, and there is regular communication by mail between the place of mailing and each of the places so addressed.

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On the same day, I delivered an electronic copy of the same document to the Clerk of the Second District Court of Appeal through the electronic submissions portal on that court's website.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on August 21, 2014, at Oakland, California.

/s/ Robert D. Bacon