IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	No. _____
	)	
Plaintiff and Respondent,	)	Court of Appeal
	)	No. B248671
v.	)	
	)	Superior Court
LISA SEDILLO,	)	No. NA085739
	)	
Defendant and Appellant.	)	
	)	

PETITION FOR REVIEW

APPEAL FROM THE SUPERIOR COURT
OF LOS ANGELES COUNTY

Honorable Arthur Jean, Judge

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

Pursuant to rules 8.500 and 8.508 of the California Rules of Court, appellant Lisa Sedillo respectfully requests this court review the published decision of the Court of Appeal, Second Appellate District, Division One, affirming the judgment of conviction in part, reversing in part, and remanding for a hearing on the timeliness of one of the charges. The decision was filed April 8, 2015. (Ex. A.) Both parties petitioned for rehearing and both petitions were summarily denied on May 4, 2015.

QUESTIONS PRESENTED

In 1992, a man later identified as Eastside Longo (ESL) gang member Carlos Moreno shot up a wake being held in rival gang territory. He then walked to a car which was parked down the block and got in, at which point the driver sped away. Then 16-year-old Lisa Sedillo was initially suspected of being that driver but was not prosecuted after eyewitnesses failed to identify her in a live lineup.

Then in 2010, the Long Beach Police Department obtained permission to wiretap Sedillo's phone based on evidence she was may have been involved in a 2009 murder. The wiretap recorded Sedillo bragging to fellow gang members about having been involved in the 1992 shooting, which led to her being tried for aiding and abetting a murder, five counts of

attempted murder, and one count of shooting at an inhabited dwelling. The jury found Sedillo guilty on all counts, but also found she did not premeditate and deliberate with regard to the murder and attempted murders.

With this background, this case presents the following questions:

1. Was Sedillo prejudiced by the trail court's failure to instruct the jury that an aider abettor must form the intent to render aid prior to or during the commission of the offense, and to explain when the commission of a crime ends for purposes of aiding and abetting? (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164; *Chapman v. California* (1967) 386 U.S. 18, 25; Pen. Code, § 32.)

2. Did the order authorizing the wiretap of Sedillo's phone violate state wiretap law and the Fourth Amendment? (Pen. Code, §§ 629.50, subd. (a)(4)(A), 629.52, subs. (a)-(c) & 629.54, subd. (c).)

3. Did law enforcement reasonably minimize the interception of non-pertinent communications while conducting the wiretap, as required by state law and the Fourth Amendment? (Pen. Code, § 629.58.)

NECESSITY FOR REVIEW

Issue 1: The Court of Appeal recognized the jury should have been instructed that to be guilty as an aider and abettor, Sedillo had to form the intent to render aid before the crimes were completed, and that because the error was "closely related to instructions that completely remove the issue of intent from the jury's consideration," reversal was required unless the error was harmless beyond a reasonable doubt. (Slip Opn., p. 31; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396; *Chapman*, *supra*, 386 U.S. at p. 24.) The court found the error was harmless because CALJIC No. 3.01 is "phrased in the present tense," and so requires that the defendant's intent to aid and abet "had to be formed *before* the defendant acted." (Slip Opn., p. 32 (emphasis original).) For this reason, the court decided, "it is not reasonably likely the jury concluded that defendant only formed the intent to aid Moreno *after* he had shot the victims." (*Ibid.* (emphasis original).) There Court of Appeal's analysis raises three important concerns:

First, in light of the jury's finding that Sedillo did not premeditate and deliberate and the lack of compelling evidence Sedillo knew ahead of time that Moreno planned to kill the victims, the Court of Appeal's determination the jury must have found Sedillo formed the intent to aid and abet before the shooting directly conflicts with *People v. Samaniego* (2009)

172 Cal.App.4th 1148 and is all-but-irreconcilable with this court's reasoning in *People v. Lee* (2003) 31 Cal.4th 613.

In *Samaniego,* the Court of Appeal (2d. Dist., Div. 2) held that where the jury was properly instructed on aiding and abetting, including CALCRIM No. 401's requirement that "*Before or during the commission of the crime,* the defendant intended to aid and abet the perpetrator in committing the crime," (emphasis added) a finding the defendant directly aided and abetted a murder necessarily means the jury found the defendant premeditated and deliberated. (*Id.* at pp. 1165-1166.) This is because, according to the *Samaniego* court, "It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (*Id.* at p. 1165.) Similarly, this court has explained that one who "acts with knowledge of the direct perpetrator's intent to kill and with a purpose of facilitating the direct perpetrator's accomplishment of the intended killing" also "necessarily acts with a mental state at least approaching deliberation and premeditation." (*Lee*, *supra,* 31 Cal.4th at p. 624.) If *Samaniego* is correct, then it cannot be true that this jury, which found Sedillo did *not* premeditate, believed she formed the intent to aid and abet a murder before the shooting. (*Samaniego, supra,* at pp. 1165-116.) Similarly, if *Lee* means what its plain language

suggests, then it is hard to imagine that if the jury found Sedillo formed the intent to help Moreno commit murder prior to the shooting, all twelve jurors would also have found she did not premeditate and deliberate. (*Lee, supra,* at p. 624.) In short, the Court of Appeal's determination the error was harmless beyond a reasonable doubt implicitly rejects *Samaniego's* and *Lee's* reasoning that the jury's findings with regard to premeditation and deliberation are inconsistent with a belief Sedillo formed the intent to aid and abet murder prior to the shooting.

Next, the Court of Appeal's opinion overstates how completely CALJIC No. 3.01 conveys what jurors need to know about when an aider and abettor needs to form the intent to aid the perpetrator. Where, as here, the evidence presents a question about when the defendant formed the requisite intent, there are two important principles the instructions needs to convey: 1) that the requisite intent to render aid "must be formed *prior to or during* 'commission' of [the] offense;" and 2) that "[f]or purposes of determining aider and abettor liability, the commission of a [crime] continues until all acts constituting the offense have *ceased*." (*Cooper*, *supra,* 53 Cal.3d at p. 1164 (emphasis original).) That is, not only must the jury be told the defendant has to form the intent to aid and abet *before* the offense ends, but it also must be told *when* the offense ends for purposes of aiding and abetting liability. CALJIC No. 3.01 only arguably (and then only

implicitly) touches on the former concept; it does nothing to clarify the latter.

For example, if a defendant is accused of driving her friend away from the scene after the friend robbed a convenience store, jurors who are instructed with CALJIC 3.01 may reasonably assume that if the defendant formed the intent to render aid after the loot was taken but before the friend reached a place of temporary safety, then she satisfied the temporal element because the robbery was still in progress at that point. (See *People v. Jardine* (1981) 116 Cal.App.3d 907, 919-922 [holding that aiding and abetting liability for robbery extends through the escape].) This would, however, be wrong as a matter of doctrine. (*Cooper*, *supra*, 53 Cal.3d at pp. 1167, 1170, fn. 14 [aiding and abetting liability for robbery does not extend through the escape and disapproving of *Jardine*].) To avoid this problem in a murder case like this one, the instructions need to tell jurors that a murder ceases to be ongoing once the victim dies, so jurors will understand that if the defendant formed the intent to help the perpetrator get away after the victim passed, she can only be liable as an accessory after the fact. (*People v. Celis* (2006) 141 Cal.App.4th 466, 473-474 [after the victim dies, what would have been aiding and abetting murder turns into being an accessory after the fact]; Pen. Code, § 32.) Such an instruction was necessary in this case because the evidence supported an inference the victim was likely

dead by the time Moreno returned to the car and Sedillo drove him away. (AOB:126-127; ARB:64.) The Court of Appeal's opinion, however, implies that even without being told, jurors who are given nothing more than an unmodified version of CALJIC No. 3.01 will somehow determine that aiding and abetting liability terminates the moment the fatal act has been committed. (Slip Opn., p. 32.)

Finally, the Court of Appeal's prejudice analysis evinces a failure to evaluate the whole record when determining the effect of the error. (*People v. Aranda* (2012) 55 Cal.4th 342, 367 [*Chapman* analysis requires consideration of the whole record]; *Chapman, supra,* 386 U.S. at p. 24.) And in light of the acknowledged "skimpy" evidence of what occurred before the shooting (Slip Opn., p. 31), and the jury's finding Sedillo did not premeditate, the opinion also fails to heed the requirement that where, as here, different portions of the record support contrary inferences about the effect of the federal a constitutional error, reversal is required. (*People v. Jackson* (2014) 58 Cal.4th 724, 794 (conc. & dis. opn., Liu, J.) ["an error cannot be found harmless under *Chapman* even when a reviewing court is not convinced but is genuinely unsure that there is a reasonable possibility that the error affected the verdict"].)

For all of these reasons, review is necessary to secure uniformity of decision and settle an important question of law. (Rule 8.500, subd. (b)(1).)

Issue 2: Because federal wiretap law establishes minimum standards for the admissibility of evidence procured through electronic surveillance and state law cannot be less protective of privacy than the federal act (*People v. Leon* (2007) 40 Cal.4th 376, 383-384), cases construing the federal act guide California courts' interpretation of our state wiretap law. (*People v. Jackson* (2005) 129 Cal.App.4th 129, 146-147; 18 U.S.C. §§ 2510-2520; Pen. Code, § 629.50 et. seq.) And because state trial courts are bound to follow California Court of Appeal decisions which conflict with decisions of the lower federal courts, when a state court decision regarding wiretaps is inconsistent with the federal authorities, this court should be especially keen to make sure our court got it right. (*People v. Bradley* (1969) 1 Cal.3d 80, 86 [state courts not bound by lower federal authority, even on federal questions]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [superior courts are bound by California Court of Appeal decisions].) This concern takes on special importance when the state court decision grants law enforcement broader authority or requires less scrutiny of their conduct, since if the state Court of Appeal is wrong, trial courts will be compelled to follow a rule which violates federal law and potentially the Fourth Amendment. Two aspects of the Court of Appeal's decision upholding admission of the wiretap evidence in this case leave state law out-of-step with the federal authorities in a way which should cause this court concern.

The first is the Court of Appeal's upholding the wiretap order against a claim there was no probable cause to believe Sedillo was guilty of Villagrana's murder, *nor the numerous other crimes which the order allowed police to investigate*. (Slip Opn., pp. 17-18; AOB:38; Pen. Code, § 629.52, subs. (a)-(c).) The wiretap application sought permission to tap the phones of both Sedillo and Ruhani Bustamante. (Def. Ex. A, Wiretap Application ("W.A."), pp. 8-9.) The application's statement of probable cause described nine separate murders and attempted murders which law enforcement wished to investigate through use of the wiretap. (Slip Opn., p. 13; W.A., pp. 3-6, 22-60.) Of these, the application only claimed there was probable cause to believe Sedillo was involved in one of those crimes, the murder of Esaul Villagrana. (W.A., pp. 61-67.) The other crimes were linked to Bustamante, but not Sedillo. (*Ibid.*)

The order authorizing the wiretap, however, was worded so broadly that it allowed both Bustamante's and Sedillo's phones to be monitored to obtain evidence of *all* the crimes listed in the application. (Def. Ex. D, Wiretap Authorization Order ("W.O."), pp. 1-4.) Thus, the order allowed law enforcement to tap Sedillo's phone to try to uncover evidence of crimes which law enforcement had no reason to believe she had committed, based on a finding of probable cause that Bustamante had committed them. The order also authorized the interception of communications relating to an

alleged "ongoing pattern of felonious criminal gang activity in violation of Penal Code section 186.22," without further specifying what particular crimes were being committed, by whom, when, where, etc. (W.A., p. 5; W.O., p. 4.)

Sedillo argued in the Court of Appeal that even if there was probable cause to believe she was involved in Villagrana's murder, the wiretap was invalid because it allowed law enforcement to monitor her conversations for evidence of crimes the other eight crimes as well. (AOB:48-49; ARB:14-15; Pen. Code, § 629.52, subs. (a)-(c); see 18 U.S.C. 2518, subs. (1)(b) & (3)(a) [wiretaps must be supported by probable cause to believe target committed a particular offense and must be limited to communications regarding that offense]; U.S. Const., Amend. IV.) Sedillo also claimed that the wiretap order could not properly be based on allegations she was involved in unspecified crimes which violated Penal Code section 186.22, since an order so broad violates the particularity requirements of the state wiretap law and the Fourth Amendment. (AOB:31-34, 48-49; ARB:15; Pen. Code, § 629.50, subd. (a)(4)(A) [application must contain "details as to the particular offense that has been, is being, or is about to be committed"]; Pen. Code, § 629.54, subd. (c) [order must contain "A particular description of the type of communication sought to be intercepted, and a statement of the illegal activities to which it

relates"]; see 18 U.S.C. § 2518, subds. (1)(b) & (3)(a) [imposing particularity requirements].)

The Court of Appeal did not think any of this was a problem, finding, "probable cause existed to order the wiretap of defendant's phone," because "the affidavit established defendant was a high-level member of ESL and involved in overseeing its drug trade and would rely on murder as a way of enforcing the gang's hegemony in its territory." (Slip Opn., p. 18.)

The federal courts, however, would likely disagree that probable cause to believe Sedillo collected "taxes" for ESL or was involved in Villagrana's murder would justify the wiretap order issued in this case. In a federal court the application would be viewed as an attempt to, "obtain an overly broad wiretap authorization for one offense as a pretext for gaining information with respect to offenses for which probable cause could not be established or for which wiretap authorization would be unavailable." (*United States v. Masciarelli* (2d Cir. 1977) 558 F.2d 1064, 1067; 18 U.S.C. 2517(5).) Moreover, the federal courts require the validity of a wiretap be considered independently as to each target (See *United States v. Carneiro* (9th Cir. 1988) 861 F.2d 1171, 1176-1177; *United States v. Brone* (9th Cir. 1986) 792 F.2d 1504, 1507), so they would not agree that Bustamante's apparent guilt for various target offenses allowed Sedillo's phone to be monitored for evidence of those crimes. Because the Court of

Appeal's opinion imposes considerably less stringent restrictions on the scope of wiretap orders than do the federal courts, this issue presents an important question of law which requires resolution. (Rule 8.500, subd. (b)(1).)

Issue 3: The standard the Court of Appeal applied for determining whether law enforcement took reasonable steps to minimize the interception of non-pertinent communications also varies substantially from what the federal authorities require. (See Pen. Code, § 629.58 [wiretaps must be conducted so as to "minimize the interception of communications not otherwise subject to interception under this chapter"]; 18 U.S.C. 2518, subd. (5) [same].) Here, the prosecution called two of the thirteen call monitors to testify about minimization efforts, one of whom testified there were no set guidelines for minimizing calls and that monitors all just relied on their common sense in deciding when to stop listening to calls. (Slip Opn., pp. 19-20.) The witness did not even recall whether monitors were told what crimes were being investigated, other than that they were gang related. (1RT:114.) The Court of Appeal, relying on a monitor's assertion that the subjects would speak in coded language along with the fact that law enforcement's purpose was to investigate ongoing gang activity, said this was enough to establish the government's minimization efforts were reasonable. (Slip Opn., p. 20.) In so holding, the court did not engage in any

serious inquiry into the objective evidence of what communications were actually intercepted and what minimization actually occurred. (*Id.* at pp. 19-20; cf. AOB:58-69.) In essence, the Court of Appeal's opinion says that as long as law enforcement claims the targets were using coded language and that monitors didn't intentionally listen to non-pertinent conversations, the minimization requirement has been satisfied.

The federal authorities take quite a different view. According to the federal courts, "the decision on the suppression motion must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions. (*United States v. Scott* (D.C. Cir. 1975) 516 F.2d 751, 756.) "The touchstone in assessing minimization is the objective reasonableness of the interceptor's conduct." (*United States v. Uribe* (1st Cir. 1989) 890 F.2d 554, 557.)

To determine whether law enforcement's conduct was objectively reasonable, the federal courts require an examination of what minimization *actually* occurred relative to factors such as the number, length, and nature of the calls, whether coded language was used, the breadth of the investigation, and whether the non-minimized calls occurred early in the surveillance. (*United States v. Yarbrough* (10th Cir. 2008) 527 F.3d 1092, 1098.) Although not determinative in and of themselves, statistical details of wire intercepts "provide a starting point for [a court's] analysis of the

government's conduct." (*United States v. Armocida* (3d. Cir. 1975) 515 F.2d 29, 43.)

To the extent trial courts will conduct suppression hearings based on the example set by the Court of Appeal, the scrutiny they apply will fall far short of that required by federal authorities and probably the Fourth Amendment. (*United States v. Daly* (8th Cir. 1976) 535 F.2d 434, 440-441 [failure to reasonably minimize the interception of non-pertinent conversations violates the Fourth Amendment's particularity requirement].) For this reason, this issue presents an important question of law which needs to be resolved. (Rule 8.500, subd. (b)(1).)

OTHER ISSUES

The following issues are raised to preserve them for federal review (Rule 8.508):

4. Did the trial court err in admitting Sedillo's boasts about having engaged in unprovoked assaults against rival gang members and their infant children?

5. Was Sedillo prejudiced by the admission of evidence her phone was the target of a court-authorized wiretap?

6. Did the trial court err in taking judicial notice that Moreno had been convicted of the same murder and attempted murders for which Sedillo was being tried?

7. Did the trial court err in excluding evidence that shortly after the shooting, eyewitness Louis Foch told his ex-wife the getaway driver was a male?

8. Did the trial court err in excluding photographs taken before and after the shooting which showed Sedillo's hair was inconsistent with eyewitness descriptions of the driver?

9. Did the trial court err in excluding evidence that around the same time Sedillo was bragging about having been involved in the shooting, she was also falsely telling people she had cancer?

10. Was there sufficient evidence Sedillo aided and abetted the charged crimes?

11. Was Sedillo prejudiced by the cumulative effect of the errors?

STATEMENT OF THE CASE AND FACTS

For purposes of this petition, Sedillo adopts the procedural history and facts as set forth in the Court of Appeal's opinion (pp. 2-7), with the following additions: The voluminous wiretap evidence is summarized in pages 27-29, 39-41, and 58-69 of Sedillo's opening brief. The appendix to the opening brief also contains a list of every call of over two minutes which law enforcement deemed non-pertinent but failed to minimize. In addition, Defense Exhibit A contains the wiretap application and order,

Defense Exhibit B is the redacted affidavit purporting to provide probable cause for the wiretap, and Defense Exhibit D includes all the monitors' summaries ("line sheets") for intercepted calls.

ARGUMENT

I. Sedillo was prejudiced by the trail court's failure to instruct the jury that an aider abettor must form the intent to render aid prior to or during the commission of the offense, and to explain when the commission of a crime ends for purposes of aiding and abetting

As the Court of Appeal recognized, the "skimpy evidence on events leading up to the shooting" created a duty to instruct the jury that Sedillo had to form the intent to aid and abet the crime prior to the shootings. (Slip Opn., p. 31.) The court went wrong, however, in finding the failure to do so was harmless. (Slip Opn., p. 32; *Chapman, supra,* 386 U.S. at p. 24.)

As already discussed, the jury's acquitting Sedillo of first degree murder and finding the attempted murders were not premeditated strongly suggests jurors did not believe she formed the intent to aid and abet the crimes until after the shooting. (*Samaniego, supra,* 172 Cal.App.4th at pp. 1165-1166; *Lee, supra,* 31 Cal.4th at p. 624.) The Court of Appeal's acknowledgment that there was little evidence of what took place before the shooting is yet more reason it should have found the error prejudicial. (Slip Opn., p. 31.) Finally, the lack of any instruction telling the jury when the

crimes ceased to be ongoing for aiding and abetting purposes belies the Court of Appeal's suggestion that because CALJIC No. 3.01 is phrased in the "present tense," jurors would somehow have decided Sedillo formed the intent before the shooting rather than at some later point, such as after Moreno returned to the car. (AOB:129-130; See Slip Opn., p. 32.) The Court of Appeal therefore erred in finding Sedillo was not prejudiced, and this court should grant review to settle this important question of law. (Rule 8.500, subd. (b)(1).)

II. The wiretap order violated state law and the Fourth Amendment.

As already discussed, the wiretap application alleged and purported to provide probable cause to believe Sedillo was involved in the murder of Esaul Villagrana. (Slip Opn., p. 13 W.A., pp. 61-67.) Yet the order authorized Sedillo's phone to be tapped for evidence of nine different shootings as well as unspecified ongoing criminal activities of ESL. (Slip Opn., p. 13; W.A., pp. 3-6; W.O., pp. 1-4.)

By allowing law enforcement to listen to Sedillo's conversations to investigate crimes for which there was no probable cause to believe she was involved, the order violated state law and the Fourth Amendment. (*Carneiro, supra,* 861 F.2d at pp. 1176-1177; *Brone, supra,* 792 F.2d at p. 1507; Pen. Code, § 629.52, subs. (a)-(c).) So, too did the order's allowing law enforcement the broad latitude to tap her phone for evidence of

anything which could be deemed "criminal activity as delineated within Penal Code section 186.22 et. seq." (*Groh v. Ramirez* (2004) 540 U.S. 551, 557 [a warrant that fails to conform to the Fourth Amendment's particularity requirement is invalid]; *Masciarelli, supra,* 558 F.2d at p. 1067; Pen. Code, §§ 629.50, subd. (a)(4)(a) & 629.54, subd. (c).) The overbroad order allowed law enforcement to listen in on any conversations which appeared to be at all gang related; indeed one of the monitors testified this is precisely what law enforcement did. (1RT:114; see 186.22, subd. (b)(1) [any felony committed for the benefit of, at the direction of, or in association with any criminal street gang falls under § 186.22].) This court should grant review to settle this important question of law. (Rule 8.500, subd. (b)(1).)

III. Law enforcement failed to reasonably minimize the interception of non-pertinent calls.

The Court of Appeal summarized the testimony of the two monitors who testified about minimization efforts. (Slip Opn, pp. 14-15, 19.) Their testimony established there were no set guidelines for minimization of non-pertinent calls (*Id.* at p. 19), but they asserted there was a lot of "code" being spoken and that the monitors did not intentionally try to intercept non-pertinent communications. (*Id.* at pp. 14-15, 19.) What is missing from the Court of Appeal's analysis is an assessment of the objective evidence of what minimization actually occurred. (*Id.* at pp. 19-20.)

This is fatal to the court's analysis as the validity of minimization efforts does not turn on the presence or absence of bad faith, but necessarily requires an assessment of the objective evidence of law enforcement's conduct. (*Yarbrough, supra,* 527 F.3d at p. 1098; *Uribe, supra,* 890 F.2d at p. 557; *Armocida*, *supra*, 515 F.2d at p. 43; *Scott*, *supra*, 516 F.2d at p. 756.)

The objective evidence shows the efforts law enforcement *actually* undertook to minimize the interception of non-pertinent calls was unreasonable. In less than two months, there were 378 non-pertinent calls of over two minutes in duration which law enforcement monitored without minimizing a single time. (See AOB:appendix; Def. Ex. D.) And there were more in the last week of the wiretap (55) than the first (39). (*Ibid.*; see *United States v. Brown* (5th Cir. 2002) 303 F.3d 582, 604 ["[T]he government may reasonably intercept more calls during the initial phase of an investigation, when the precise scope of and participants in the criminal scheme have not yet been identified"].)

These unminimized calls included many conversations which were obviously non-pertinent from the outset. These included calls to an administrator at Sedillo's daughter's school, a conversation between Sedillo's son and his grandmother, a call to Sedillo's mother about Sedillo's health problems, Sedillo navigating the DMV's automated phone

system, and a call in which Sedillo talked about her daughter's wedding plans. (Def. Ex. D, pp. 2962, 5708, 9020, 9782, 11581.)

Perhaps most telling, Detective Carr, the Attorney General certified agent in charge of the operation, was responsible for the following three line sheets, all of which represent unminimized, non-pertinent calls:

> *March 7 (9 min. 38 sec):* "Sedillo called into voicemail with t.v. show voices in the background, listens to the last voicemail message left and a new greeting after numerous attempts." (Def. Ex. D, p. 2290.)
>
> ---
>
> *March 10 (22 min., 22 sec):* "Lisa said Joe said something but she was unable to understand." (Def. Ex. D, p. 2721.)
>
> ---
>
> *April 20 (48 min., 51 sec):* "SEDILLO to HUERO
> Social conversation." (Def. Ex. D, p. 9888.)

In short, an objective analysis of the minimization which actually occurred shows law enforcement's actions were unreasonable. This court should grant review to settle this important question of law. (Rule 8.500, subd. (b)(1).)

IV. The admission of Sedillo's boasts about having engaged in unprovoked assaults against rival gang members and their infant children constituted a prejudicial due process violation.

Over objection, the prosecution introduced evidence of Sedillo's conversation with a fellow gang member in which she bragged about having been a violent teenager. (2RT:446-447.) Specifically, Sedillo bragged that she would see female rival gang members at the mall and would walk up to them and hit them, and would even throw their babies out of their carriers. (2CT:341-343.)

These assaults were not sufficiently similar to the charged crimes to be probative of intent or identity. (See, *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403; Evid. Code, § 1101, subd. (b).) Even assuming the evidence had some marginal relevance, it could not possibly have been substantial enough to justify admitting evidence of an uncharged assault. (*Ewoldt, supra,* at p. 404 ["uncharged offenses are admissible only if they have *substantial* probative value."] (italics original).) Nor could it have outweighed the inherent prejudice stemming from uncharged offense's "produce[ing] an over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts," and "breed[ing] a tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other

offences." (*People v. Lopez* (2011) 198 Cal.App.4th 698, 715 (internal quotations and citations omitted).)

The erroneous admission of evidence violates due process when the "evidence is so extremely unfair that its admission violates 'fundamental conceptions of justice.'" (*Dowling v. United States* (1990) 493 U.S. 342, 352.) This occurs only "if there are *no* permissible inferences the jury may draw from the evidence." (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384 (emphasis original).) Here, there was no legitimate value to the evidence of Sedillo's past violence, and such evidence is quintessentially inflammatory and likely to cause jurors to irreparably prejudge a defendant.

The prosecutor acknowledged the People's case depended in large part on believing Sedillo's claims that she had been involved in the shooting. (3RT:668-669.) And this evidence was hardly compelling, since everything Sedillo said about the crime could have learned from the newspaper or Detective Cable, she could not even say how she participated, and she got important details wrong, such as whether the gun had been found. (2CT:327, 332, 339-340; 3RT:477, 487, 596-597.) That Sedillo may have falsely boasted about her involvement was supported by the gang expert's testimony that she would have gained respect and protection by being associated with the murder, and with the nearly "made" Mexican Mafia member Moreno. (3RT:568, 571-572, 575, 579-580.) As a result,

evidence lending plausibility to the idea that then-16-year-old Sedillo would have been willing to help kill six rival gang members for no apparent reason made it much easier to credit her boasts. The error requires reversal. (*Chapman, supra,* 386 U.S. at p. 24.)

V. The admission of evidence that Sedillo's phone was tapped as part of a court-authorized wiretap investigation constituted a prejudicial due process violation.

The Court of Appeal correctly concluded that Detective Carr's testimony that Sedillo's phone was the subject of a wiretap was irrelevant and "created a strong implication that defendant was already engaged in criminal activity." (Slip Opn., at pp. 23-24; *United States v. Cunningham* (7th Cir. 2006) 462 F.3d 708, 712.) While there was no permissible inference to be drawn from the evidence, the likely inference jurors did draw, that Carr and a judge had evidence and believed Sedillo was guilty, was fundamentally unfair and violated Sedillo's right to due process. (*Dowling, supra,* 493 U.S. at p. 352.)

The Court of Appeal found the error was harmless for no other reason than that Sedillo "made sufficient statements regarding her culpability for the shootings with which she was charged to support the jury's verdicts. (Slip Opn., p. 24; cf. *Chapman, supra,* 386 U.S. at p. 24.) But the jury did not find Sedillo's statements to be ironclad proof of her guilt, which we know because the jury asked for readback of Foch's

testimony about who he saw driving the getaway car. (2CT:436; *In re Hill* (2011) 198 Cal.App.4th 1008, 1029 [jury's request for readback of a witness's testimony showed his testimony "played an important part in the jury's deliberations."].) In consideration of the record as a whole, the error was prejudicial. (*Chapman, supra,* at p. 24.)

VI. The trial court's taking judicial notice Moreno was convicted of murder and five attempted murders constituted a prejudicial denial of due process.

The Court of Appeal acknowledged that evidence Moreno had been convicted of the same murder and attempted murders for which Sedillo was being tried was inadmissible as proof of Sedillo's guilt and that the jury was never told it could not use the evidence for that purpose. (Slip Opn., p. 25.) The court held, however, that that the evidence was properly admitted because it was "necessary to explain to the jury the context of defendant's bragging in the wiretapped conversations." (*Ibid.*) But this premise is belied by the court's subsequent assertion that any error was harmless in part because Sedillo "made numerous references to Moreno's conviction" in her wiretapped statements. (*Ibid.*) It was therefore unnecessary to take judicial notice of the convictions in order to prove that Moreno was serving time for his role in the crime.

On the other hand, by taking judicial notice of the convictions, the trial court implied that the charges were true – that is, that Moreno was in fact guilty of the murder and five attempted murders. (Evid. Code, § 452.5.)

Evidence of an alleged co-participant's convictions is extremely unfair because it, "not only results in the danger that the jury will improperly infer guilt by association, it also significantly undercuts the defendant's right to have a jury's verdict based only upon evidence that is presented in open court and is thereby subject to scrutiny by the defendant." (*United States v. Landron-Class* (1st Cir. 2012) 696 F.3d 62, 70.) Taking judicial notice of Moreno's convictions therefore violated due process. (*Dowling*, *supra*, 493 U.S. at p. 352.)

The defense contested whether the prosecution had proved Moreno was actually the shooter, and other than Sedillo's claims that she helped him, the evidence on this point was far from compelling. (2RT:333, 342-346, 349, 351-352, 370-382, 386, 396.) Moreover, taking judicial notice Moreno was convicted of murder and attempted murder implied he, and by association Sedillo, had the requisite mental state for the charged crimes. For these reasons, the error was prejudicial. (*Chapman*, *supra*, 386 U.S. at p. 24.)

VII. Exclusion of evidence Foch told his ex-wife moments after the shooting that the getaway driver was a male constituted a prejudicial denial of Sedillo's Sixth Amendment and due process rights.

Before calling Savell to the stand, defense counsel alerted the court and prosecutor that he intended to elicit testimony that her ex-husband, Foch, had told her moments after the shooting that the getaway driver was a male. (3RT:580-582.) This corroborated Foch's testimony for the prosecution at Moreno's 1995 trial, which the defense later had read into the record. (3RT:600.) The prosecution's lone objection was that the statement Foch made to Savell had not been timely disclosed. (3RT:581.) The trial court was explicit that this was the reason it excluded the testimony; it did not say it was excluding the evidence for being cumulative. (3RT:581-582; cf. Slip Opn., p. 26.) The trial court made no findings as to whether the failure to disclose this single statement was willful, whether the prosecution was prejudiced, or whether lesser sanctions would have been effective. (3RT:581-582.)

A defendant's Sixth Amendment right to present witnesses in his own defense may be offended by "the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness." (*Taylor v. Illinois* (1988) 484 U.S. 400, 409.) And discovery rules restricting a criminal defendant's right to present evidence, "may not be arbitrary or

disproportionate to the purposes they are designed to serve. [Citation.]" (*Michigan v. Lucas* (1991) 500 U.S. 145, 151.) A constitutional violation does not require the complete exclusion of a defense witness; due process is offended by when the rule has "infringe[d] upon a weighty interest of the accused and [is] arbitrary or disproportionate to the purposes [it is] designed to serve." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 319-320 (internal quotations omitted).)

The excluded evidence was the only contemporaneous identification of the driver as well as the only testimony corroborating the defense's lone identification witness. As a result, arbitrarily precluding Sedillo from putting on this testimony infringed on a weighty interest of the accused and violated the constitution. (*Holmes, supra,* 547 U.S. at pp. 319-320.)

The import of Foch's account cannot be understated: if he saw a male driving the getaway car, then Sedillo was not guilty. Memories fade over time, and an identification made shortly after the incident is significantly more reliable, and therefore persuasive, than one made years later. (*Idaho v. Wright* (1990) 497 U.S. 805, 820.) By excluding Foch's contemporaneous identification, then, the trial court excluded a uniquely reliable identification of the getaway driver, leaving the defense to rely on the far inferior transcript from Moreno's trial.

It also appears the jury found Foch's account especially important to its decision, as his was only testimony jurors asked to have read back during deliberations. (2CT:436; *Hill, supra,* 198 Cal.App.4th at p. 1029.) Jurors specifically wanted to hear "the part on [the] car" and "who was in it." (2CT:436.) For these reasons, the error was prejudicial. (*Chapman, supra,* 386 U.S. at p. 24.)

VIII. The exclusion of photos of Sedillo taken before and after the date of the shooting and which showed she did not match eyewitness descriptions of driver constituted a prejudicial denial of due process.

Three prosecution witnesses gave descriptions of the person who was, or may have been, the getaway driver. Alarcon said the driver had thin shoulder-length hair. (2RT:252; 436-438.) Ramirez said the driver's hair "was not black." (2RT:457.) A few minutes before the shooting, Maria Huizar saw a white car drive in front of her home, with a male passenger and a driver with blondish shoulder-length hair. (2RT:406, 408, 412.)

The only picture of Sedillo the prosecution admitted into evidence was a DMV photo which Alarcon and Ramirez identified as the driver in 1993. (Pros. Ex. 2.) The photo does not show how long Sedillo hair was, and there was no evidence of when it was taken. (*Ibid.*)

To show that Sedillo had long, thick black hair around the time of the shooting, the defense sought to introduce four photos of her holding her

young child. (3RT:513-515.) The reason Sedillo's child was in the photos was because the child's age proved when each photo was taken. (3RT:513; Def. Ex. DD, 1-4.)

The prosecutor objected, his sole reason being that the 20-year-old photos were unduly prejudicial because they showed Sedillo "holding a child." (3RT:513.) The court agreed, finding the photos "far more prejudicial than probative," saying, "I think the People's blown up photographs and the mugshot are more than adequate." (3RT:513.)

A. Excluding the photographs was an abuse of discretion.

The trial court's exclusion of the evidence could only be justified if the danger of undue prejudice substantially outweighed the photos' probative value. (Evid. Code, § 352.) And although this was the court's stated justification for excluding the evidence, that decision was patently unreasonable.

This trial was primarily about the driver's identity, and the excluded photos showed Sedillo looking very different than the description given by the prosecution eyewitnesses. Moreover, that the jury had seen a DMV photo, which was used in the photo lineup and which the prosecution admitted in its case-in-chief, was an insufficient basis to exclude defense evidence. The notion the jury could decide how Sedillo looked based only on the photos the prosecution wanted it to see was beyond the bounds of

reason. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [defendant has a right to submit the prosecution's case to meaningful adversarial testing].)

Balanced against the importance of the photos to Sedillo's defense, the mere fact she was holding a baby could not justify excluding them. First, jurors already knew Sedillo had a baby, since over defense counsel' s objection, they were treated to her accounts of haven taken that baby to the mall, setting her on the floor, then slapping and spitting on rivals, before throwing *their* babies down the floor. (2CT:341-343.) Second, any sympathies which might have been generated 20 years earlier would have been mitigated, since Sedillo was now 36-year-old, and the child was an adult. Finally, and most important, the child's presence in the photos served an important function – it dated the photographs.

B. Exclusion of the evidence violated due process.

Sedillo's defense turned on mistaken identity, and the excluded photographs were the only documentary evidence showing she did not match the description of the driver, both shortly before and soon after the shooting. So the evidence was "central to the [her] claim of innocence." (*Crane, supra,* 476 U.S. at pp. 690-691.) Just as important, by excluding the photos, the court ensured only the DMV photo, which the prosecution wanted jurors to see, and the live lineup photos, taken by law enforcement after Sedillo was a suspect, would be the only objective record of how

Sedillo looked. By preventing the defense from presenting its own version of this crucial evidence, the trial court deprived Sedillo "of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" (*Ibid.*)

C. The error was prejudicial.

Had this evidence been admitted, the jury would have been faced with the reality that before and after the shooting, Sedillo's hair did not match the description given by the only prosecution witnesses who saw the driver. Since the jury's request for readback of Foch's testimony (2CT:436) implies jurors were not entirely convinced by Sedillo's boasts about having been involved, the exclusion of this evidence was prejudicial. (*Chapman, supra,* 386 U.S. at p. 24.)

IX. The exclusion of evidence Sedillo was falsely telling people she had cancer around the same time she was bragging about having been involved in the shooting constituted a prejudicial denial of due process.

Registered nurse Leilani Rodriguez Knopp, who discharged Sedillo from the hospital on April 14, 2010, testified at a pretrial hearing. According to Knopp, Sedillo was diagnosed with gastritis, i.e. stomach irritation, she verbalized understanding of her discharge instructions, and left the hospital ambulatory and with stable vital signs. (1RT:168-171.) There was no mention in Sedillo's discharge paperwork that she

complained of or was diagnosed with cancer. If there had been a cancer diagnosis, Sedillo would have been admitted and seen by a follow-up specialist rather than discharged. (1RT:171-172.)

Yet in phone calls between April 11, 2010 and April 14, 2010, Sedillo told six different people she had been diagnosed with cancer and would need a hysterectomy. (2CT:278-303; Def. Ex. B-G.) One of these people was Brito, whom Sedillo had bragged to just a few weeks earlier about having been involved in the shooting. (Def. Ex. B.)

A. The trial court excluded the evidence.

The trial court heard Knopp's testimony and reviewed transcripts of the calls, and correctly understood the evidence was admissible subject to Evidence Code section 352. (1RT:185.) The court excluded the evidence, though, believing it was "not clear" Sedillo was telling lies, rather than misunderstanding her diagnosis. (1RT:195-196.) The court theorized she "conflate[d] [what she had been told] with cancer," which did not make her "a liar." (1RT:198.)

In the court's view, Sedillo's telling people she had cancer and needed a hysterectomy when she had been told nothing of the sort would have been, "subject to confusion and misinterpretation by a jury," and did not show that Sedillo "is a chronic liar." (1RT:204.) Indeed, the court went so far as to say the evidence "has nothing to do with the case" and was

"irrelevant," in that it no way tended to prove Sedillo was dishonest. (1RT:204-205.)

The defense unsuccessfully renewed the motion to admit the evidence at the end of the prosecution's case-in-chief. (2RT:447.)

B. Excluding the evidence was an abuse of discretion.

The trial court was unreasonable in finding the evidence had no relevance or that it would have been overly confusing to the jury. The threshold for relevance was not whether Sedillo's false statements undeniably proved she was a "chronic liar," it was simply whether they had "any tendency in reason to prove or disprove the truthfulness" of her claims about being involved in the murder. (Evid. Code, § 780.) Since jurors could reasonably infer Sedillo's falsely telling people she had cancer and needed major surgery demonstrated dishonest character, the statements were relevant. (*Id.* subd. (e).) So any ambiguity in what Sedillo may have known about her condition went to the evidence's weight, not its admissibility. (See, *People v. Avery* (1950) 35 Cal.2d 487, 492.)

Not only was the evidence relevant, it was relevant to a crucial issue. The prosecution did not even have enough evidence to charge Sedillo until she boasted to her friends about having been involved. So the fact Sedillo may have been making up other important facts about her life at the same time she made those incriminating claims could have dramatically changed

jurors' impression of this case. Given the importance of Sedillo's credibility, "Evidence Code section 352 could not justify abridging her "due process right of a defendant to a fair trial and his right to present all relevant evidence of *significant* probative value to his defense." (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553 (emphasis original).)

As for potential prejudice, the danger of confusing or misleading the jury was minimal and could have been avoided through a limiting instruction. (*People v. Foster* (2010) 50 Cal.4th 1301, 1332.)

C. Exclusion of the evidence violated due process.

Because Sedillo's false statements about having cancer would have impeached her boasts about being involved in the shooting, which the prosecution claimed amounted to a confession to these crimes, the evidence was "central to the [her] claim of innocence." (*Crane, supra,* 476 U.S. at pp. 690-691.) Moreover, the excluded conversations were the only evidence of whether Sedillo was a trustworthy historian of her own life, and so excluding it denied her "of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" (*Ibid.*) Exclusion therefore violated due process.

D. The error was prejudicial.

The prejudice from excluding this evidence is obvious: statements by an out-of-court declarant which provided the prosecution's strongest evidence was presented to the jury without any meaningful way for that jury to assess the declarant's truthfulness. Had jurors known Sedillo was making false statements about something as serious as having cancer and needing reproductive organs removed, there is a strong possibility they would have had qualms about believing her boasts about having helped Moreno commit a murder 18 years earlier. Since Sedillo's credibility was crucial to the prosecution's case, exclusion of the defense's only impeachment evidence cannot be considered harmless. (*Chapman, supra*, 386 U.S. at p. 24.)

X. There was insufficient evidence Sedillo intended to aid and abet murder or shooting at an inhabited dwelling.

Viewing the evidence in a light most favorable to the prosecution, the first evidence of Sedillo's involvement in the shooting was Alarcon's testimony that Sedillo was sitting in the driver's seat of a car, one-half block from Myrtle and 20th Street, while Moreno was shooting at the victims. (2RT:250-251, 284.) There was no evidence of what occurred prior to that moment.

There was, therefore, no evidence of what, if anything, Moreno and Sedillo discussed prior to the shooting, so there was no basis to infer what exactly Sedillo believed Moreno intended to do. Although 18 years later Sedillo boasted about having been Moreno's partner in crime, she did not say how she was involved, or what she knew about Moreno's intentions prior to the shooting. (Peo. Ex. 23-26.) That is, Sedillo's statements did nothing more than suggest she was somehow involved in the crimes that day – which would be equally true if she were only an accessory after the fact.

On this record, the only point at which jurors might reasonably have inferred Sedillo learned the full scope of Moreno's criminal purpose was when he got in the car to make his escape. But by then the shooting had stopped, Bandel had likely died from his injuries, and so all of the crimes had already been completed. (2RT:379, 404, 418-419.)

Because there is insufficient evidence Sedillo formed the intent to commit the crimes prior to or during the commission of the offenses, the convictions violate due process and must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 314.)

XI. The cumulative effect of the errors rendered the trial fundamentally unfair.

Even when no single error compels reversal, the cumulative effect of the errors may so require if they resulted in a fundamentally unfair trial. (*Spencer v. Texas* (1967) 385 U.S. 554, 563-564.) Here, the lopsided evidentiary rulings and instructional errors rendered the trial unfair. The trial court excluded photographic and eyewitness evidence suggesting Sedillo did not match the description of the driver, allowed inadmissible testimony likely to unfairly prejudiced the jury, and then misinstructed the jury on a critical element of aiding and abetting. Under the circumstances the cumulative effect of the errors warrants reversal. (*Spencer*, *supra*, at pp. 563-564; *Chapman*, *supra*, 386 U.S. at p. 24.)

CONCLUSION

For the foregoing reasons, Sedillo urges this court review her case to settle important questions of law and resolve differences in the lower courts. (Rule 8.500, subd. (b)(1).) As to Issues 4 through 11, review should be granted or the issue should be deemed exhausted for purposes of federal review. (Rule 8.508.)

Respectfully submitted,

May 8, 2015

/s/David Andreasen_____
DAVID ANDREASEN, SBN 236333
Attorney for Lisa Sedillo

WORD COUNT CERTIFICATION

I certify that this document was prepared on a computer using Microsoft Word, and according to that program this document contains 8,198 words.

/s/David Andreasen_____
DAVID ANDREASEN

PROOF OF SERVICE BY MAIL

Re: Lisa Sedillo, Court Of Appeal Case: B248671, Superior Court Case: NA085739

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 22 Alta Dr., Petaluma CA. On May 8, 2015, I served a copy of the attached Petition for Review (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 8th day of May, 2015.

Eric Vanderville
(Name of Declarant)

(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Lisa Sedillo, Court Of Appeal Case: B248671, Superior Court Case: NA085739

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 22 Alta Dr., Petaluma CA. On May 8, 2015 a PDF version of the Petition for Review (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 8th day of May, 2015 at 10:00 Pacific Time hour.

Eric Vanderville
(Name of Declarant)

(Signature of Declarant)