Supreme Court No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

———— ♢ ————

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANTHONY LEE LEWIS,

Defendant and Appellants.

———— ♢ ————

On Review of an Opinion and Decision of the Court of Appeal
Fourth Appellate District, Division Two, Case No. E058643
Reversing the Judgment of the Superior Court
County of Riverside Case No. RIF096243
Hon. Becky L. Dugan, Judge

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PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and respondent, vs. ANTHONY LEE LEWIS, Defendant and appellant.	No. _____ Court of Appeal No. E058643 Superior Court No. BF116677B

Review of an Opinion and Decision of the Court of Appeal, Fourth Appellate District, Division Two, Case No. E058643, reversing the Judgment of the Superior Court, County of Riverside Case No. RIF096243, Hon. Becky L. Dugan, Judge.

PETITION FOR REVIEW

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THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and respondent, vs. **ANTHONY LEE LEWIS,** Defendant and appellant.	**No. _____** Court of Appeal No. E058643 Superior Court No. RIF096243

PETITION FOR REVIEW

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

Anthony Lewis respectfully petitions for review following a decision and opinion filed August 20, 2014, by the Court of Appeal for the Fourth Appellate District , Division Two, of the State of California. The Court of Appeal reversed the judgment in Riverside County Superior Court criminal action number RIF096243. Respondent's petition for rehearing was denied on September 10, 2014**.**

QUESTIONS PRESENTED

1. Proposition 36, the Three Strikes Reform Act, provides for resentencing of an applicant currently serving a third strike sentence unless specified criteria were present. When a trial judge finds the applicant meets those criteria and re-sentences to the two strike term provided by the Reform Act, and the record supports that finding, and the Court of Appeal agrees that the record has no evidence to the contrary, do the normal rules of appellate review apply or may the appellate court reverse with directions that the prosecution present additional evidence, despite appellate agreement the "armed" exception was not proven and the applicant otherwise qualifies?

2. If the question above is answered affirmatively, may the prosecution appeal the judge's re-sentencing after the defendant has been found eligible, suitable for release, and released? Numerous cases related to the applicant's right to appeal are on hold pending a lead case.

NECESSITY FOR REVIEW

Review should be granted because this case presents an important question of law regarding the power of the trial court to make valid decisions on sufficient evidence versus the power of an appellate court to reverse such decisions because the People *might* have some other evidence which would permit them to prevail where they previously failed.

Review should be granted because the disposition conflicts not only with the trial court's findings but also with the opinion's own discussion.

Review should be granted because the implications of appellate court reversals based on speculation and apparent unhappiness with the outcome but not on any legal ground introduces uncertainty, undermines the adversary system, conflicts with the balance and function of the separation of branches of government, and carries penalties akin to Double Jeopardy as well as inefficiencies at that policies such as collateral estoppel are designed to avoid. It clearly conflicts with the policy of finality of a valid judgment.

Review should be granted because the decision and reasons for the reversal conflict with established case standards of appellate review.

STATEMENT OF THE CASE AND FACTS

On April 5, 2002, sentence was pronounced in case RIF096243 against Respondent, Mr. Anthony Lewis, on two concurrent misdemeanors and one felony enhanced by two previous serious felony convictions, for a prison term of twenty-five years to life pursuant to the Three Strikes Law (Pen. Code §§ 667(e)(2)(A), 1170.12) concurrently with 180 days jail time. (CT 1-3.) The felony commitment offense was possession of a firearm by a person previously convicted of a felony (Pen. Code § 12021(a)(1)). (CT 3.)

The misdemeanors were served, and on December 3, 2012, after service of over ten years of prison, Respondent filed a motion for recall of his felony "third strike" sentence and for resentencing as authorized by Proposition 36 on November 6, 2012, which enacted Penal Code section 1170.126 as part of its reformation of the Three Strikes Law. Attached were documents demonstrating Respondent's self-help efforts, including anger management, education in auto body and paint vocational trade, and work, all predating November 2012. (CT 4-13.)

The district attorney was notified and the public defender was appointed on December 12, 2012. (CT 14.) The matter was continued on January 18 and February 22, 2013. (CT 15, 16.)

On March 6, 2013, the District Attorney on behalf of the State filed an opposition. (CT 17.) The Opposition noted the previous history of the case included jury verdicts finding the felony and also finding violations of lesser included misdemeanor offenses of simple assault (Pen. Code § 240) and child endangerment unlikely to cause bodily harm (Pen. Code § 273a(b)). (CT 18.) Apparently the felony was based upon a handgun found under the defendant's mattress in a search apart from the misdemeanor offenses. (CT 18.) This opposition set forth the district attorney's view of

the defendant's misdeeds and criminal history (primarily as a juvenile). (CT 18-23.) At this point in the case, the opposition was based upon an allegation that the defendant posed an unreasonable risk to society. (CT 23-24.) It specifically was not based on the issue raised in the opening brief and indeed *the opposition conceded: "The defendant in the case at bar appears eligible for resentencing under section 1170.126 subdivision (e)."* (CT 24.)

On March 8, 2013, Respondent filed a Memorandum setting forth the defendant's view of his accomplishments and clarifying the details of the prosecution's initial Opposition. (CT 27.)

The memorandum summed up that there were no major or violent incidents during the last twelve years of incarceration, that there was very strong support from family and friends (who were also willing to accept Mr. Lewis into their homes, assist with his reintegration into society, and find job opportunities), and the underlying felony conduct in this case did not result in any serious injuries and the "strike priors" were such only due to Penal Code section 186.22(b)(1) [gang activity] enhancements. (CT 27-28.) Another continuance followed. (CT 26.)

On April 8, 2013, the Respondent's mother, Sharon Kenner addressed the court and the proceedings were continued to April 25. (CT 29.)

Ms. Kenner explained she was Respondent's mother and noticed that in the twelve years he had gone into prison as a child and had grown into a man who knew better and wanted to join society as a good citizen. He was no longer the person he was but had changed greatly. She would provide him with a home. (RT 1-2.)

An unidentified person who was there for moral support confirmed

Ms. Kenner had talked about how Respondent had changed and about her excitement to have him come home. (RT 2.)

On April 25, 2013, Mr. Lewis filed a brief on the question of eligibility (CT 32-36), and the district attorney filed a supplemental opposition to the petition (CT 37-44). *The opposition now was on the basis that the offense disqualified Mr. Lewis.* (CT 37-44.) A hearing was held before the Honorable Becky Dugan, and both parties presented their positions. The petition was granted, and the indeterminate third strike life term was reduced to the upper term of three years which was doubled to six years plus the court added the prior prison term for a total of seven years. Credits for local and actual prison custody time were granted for a total far in excess of seven years. The Department of Corrections and Rehabilitation was directed to compute its conduct credits. Mr. Lewis was released onto parole. (CT 30, 45-46.)

At the hearing, the court observed that the People had in their original opposition permitted the court to "cross the first bridge" of eligibility and originally had opposed release on the merits. The People had later filed their opposition based *on the premise that Penal Code section 12021 was not eligible*. The court further observed that Mr. Lewis was actually convicted of a misdemeanor assault and a misdemeanor violation of section 273a, neither of which were serious felonies. *His felony was possession of a firearm found under a bed or some hidden place separately from the crime itself.* "So I think for this particular case, we can say he wasn't armed or used a firearm at the time of the offense, at least no jury so found." (RT 3.)

"I'm also convinced, as far as eligibility, that 1170.126 does not include exclusion based just on 12021, because it says it has to be pled and

proved *and it has to be armed or used [to create ineligibility]*." (RT 3, emphasis added.) Despite its consideration of the People's supplemental brief, the court remained "comfortable in finding that 12021 itself does not exclude *based on the interesting facts of this case and the charge itself*." (RT 3-4, emphasis added.)

On the merits, the court recognized the prosecutor set forth legitimate concerns about Mr. Lewis past conduct at an early age. However, eleven years passed during which he had done a number of things to rectify his behavior. These included studies in auto painting and a Bible fellowship. Additionally, he had two very rare recommendations from correctional officers who had known Mr. Lewis for a lengthy time, three years in one instance, and had found him to be respectful, appropriate, a hard worker, and not a problem at all. (RT 4.)

In prison he had a serious disciplinary action for having a broken spoon, metal desk handle, and metal plate which have the potential to be turned into weapons. But, he also did not have any violent incidents in prison. Mr. Lewis did not have even mutual combat incidents in prison. (RT 4.) The court considered that there were some administrative issues, but did not find any of them to cause concern about dangerousness to the community. (RT 4-5.) "So while I am somewhat concerned about his past, I am comfortable in saying that I do not think a 36-year-old and his behavior in the last few years in prison that he is likely to reoffend, as far as a violent incident." (RT 5.)

The court then invited the People to put whatever they wanted on the record. The district attorney asked for a ruling on eligibility, and the court noted that it had done so after reading the pleadings. The district attorney also stressed that the "resentencing statute does not contain a pleading and

proof requirement." The court acknowledged the comment or the People's knowledge of its disagreement or both. (RT 5.) On dangerousness, the People argued the pre-commitment conduct and the parts of things which could potentially be made into prison weapons. The court acknowledged the concerns. (RT 5-7.) "And I have considered those, and as I've said before, if I had a crystal ball, it would be so nice, but I don't. I would note, though, that his serious offenses are when he was 17 years old. He's now 36. He has had no gang involvement in prison whatsoever. He's had no fights in prison as a result of a gang." He had grown up to be an adult, and he fit the qualifications of section 1170.126. (RT 7.)

The court then denied probation, resentenced Mr. Lewis to the upper term doubled plus the prison term and two concurrent misdemeanors for an aggregated seven year term. (RT 8.) Credits were noted, the court directed that the prison do their calculation of good time, and an amended abstract was ordered. Because his time in custody had been much longer than the credits, he was ordered to report to the parole authority if directed to do so. (RT 8.)

The district attorney filed a notice of appeal and election of record on April 30, 2013. (CT 17-18.)

The district attorney then raised the issue of whether there was a pleading and proof requirement at the time of the prior offenses, and at that time the issue was very much open, and Respondent argued the other side. The Court of Appeal resolved that issue in favor of the appellant.

ARGUMENT

A. <u>The Opinion and Trial Judge Agree that Mr. Lewis Was Eligible and that There Was No Evidence of an Exception.</u>

The opinion is candid and honest in stating:

> "***There is no evidence in this record to show that defendant [Respondent, Mr. Lewis] was armed with the firearm during his commission of the current offense, i.e., that he had ready access to the firearm during this offense.***
> The record here does not show the prosecution proved that defendant not only possessed the firearm, but also that he was armed with the firearm. We will therefore remand the matter to allow the trial court to examine the evidence adduced at trial to determine and state on the record whether the evidence shows that defendant was guilty of possession of a firearm by a felon because he had actual physical possession of the firearm." (Op. 16, emphasis added.)

Respondent agrees with this statement's factual first two sentences; they are supported, and the information provided at the hearing further has affirmative proofs in the form of a jury verdict and in that the gun later found in defendant's house was not accompanied by indicia of arming. The final sentence and disposition seem to state that because the prosecution evidence was insufficient to overcome Mr. Lewis's eligibility, the district attorney's office should have an opportunity to avoid the result of eligibility and should be able to reopen by effectively retrying the commitment case itself in hopes the trial judge finds something to change her mind. Respondent strongly disagrees with the procedure and its implications for the underlying principles and policy for the courts of California.

Respondent's two previous felonies were serious ("strike priors") because at that time he was found to have a gang allegation. The case on which is was currently held at the time of his application for relief ("commitment case") was having possession of a firearm after the previous felony convictions. In the current commitment, he was charged with ". . . demanding money at gunpoint . . . pointing a firearm at the victim, forcing her into the bedroom . . . ." (Op. 3, fn 3.) However, the jury found him guilty of the lesser included offense of assault rather than the charged assault with a firearm, unanimously acquitting him of the element of being armed with a firearm. (Pen. Code § 245(a)(2); *People v. Colantuono* (1994) 7 Cal.4th 206, 223 fn 1; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 514-519; cf., *Keeble v. United States* (1973) 412 U.S. 205, 208 [93 S.Ct. 1993, 1995, 36 L.Ed.2d 844, 847].)

The record of the hearing also shows the police recovered a gun from under a mattress in the defendant's house. Appellant and the Court of Appeal agreed the People's theory was that the gun was recovered from under "defendant's mattress in a later search of his house." (Op. 3, fn 3.) But, as the Court of Appeal correctly found, that merely established a form of possession, and that possession is not the same as being armed. (Op. 11-15.)[1]

As the opinion points out, Mr. Lewis's commitment offense is not itself a serious or violent felony. It is only if he was armed in its

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[1] The opinion does reject Respondent's alternate theory that there must be a separate "tethering" non-firearm based offense. (Op. 14-16, also citing *People v. White* (2014) 223 Cal.App.4th 512, 522, rev. den.) In view of the absence of evidence of arming, with which the opinion agrees (op. 16), that becomes important only if the lack of evidence of arming were somehow not critical.

commission. (Op. 9-10.) No evidence was presented that would constitute arming. (Op. 16.)

The trial judge and the appellate court have found that there is no evidence in the record to warrant a finding of ineligibility.

The district attorney was permitted by the trial judge to change the People's position from a specific concession of eligibility to its opposite, and to file written materials (which it did and were inadequate to persuade the fact finder or reviewing court). The judge, before final ruling, also gave notice of his tentative finding of eligibility and that Mr. Lewis was not a risk to the public (RT 3-5), and asked if the district attorney had anything further (RT 5). The appellant district attorney had every opportunity to present all of its evidence and arguments.[2]

Thus, after a full and fair hearing, there was nothing to indicate the defendant was armed and both lower courts so found. As a result, the judgment should, it is respectfully believed, have been affirmed because he

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[2] Respondent also notes that the district attorney was notified on December 12, 2012, and there were two in-court appearances before appellant filed his first Opposition on March 6, 2013 (CT 14-17), yet in that he conceded, "The defendant in the case at bar appears eligible for resenting under section 1170.126 subdivision (e)." (CT 24.) There was another appearance on March 8, 2013 (CT 26), and it was on that date that Mr. Lewis filed his memorandum on the question of safety in response to the then-opposing theory (CT 27). There was yet another appearance on April 8, 2013 (CT 29), and on the final date, April 25, 2013, which was also the date of the hearing and re-sentencing, the district attorney filed his supplemental opposition based on eligibility (CT 37) and Respondent filed his brief in support (CT 32). Appellant's position at the trial level was that the gun being relied upon was the one rejected by the jury at the trial. (CT 39-40.) Appellant had over five months of opportunity to put on any evidence he had, had ample notice, and certainly had a full and fair opportunity to put on anything else he might have had.

was found eligible with no exception shown.

B. The Disposition Order Telling the Trial Judge to Try Again to Find an Exception By Taking Further Evidence Conflicts With Deeply Ingrained Policies of Justice, Encouraging Litigants to Prepare, and Finality, As Well As Avoiding Increased Workloads on the Trial Court Based on Speculation or Matters Not Shown By The Record.

As pointed out in *Stone v. Superior Court, supra,* re-trying a person after they have successfully obtained relief through valid proceedings on a supported record is fraught with damage to the system of justice. *Stone* quoted from "*Green v. United States* (1957) 355 U.S. 184, 187-188 [2 L. Ed. 2d 199, 204, 78 S. Ct. 221, 61 A.L.R.2d 1119]: 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" (*Stone v. Superior Court, supra*, 31 Cal.3d at p. 515.)

The Court of Appeal decision is simply that it did not like the result and wanted the hearing reopened. "Public policy requires that pressure be brought upon litigants to use great care in preparing cases for trial and in ascertaining all the facts. A rule which would permit the re-opening of cases previously decided because of error or ignorance during the progress of the trial would in a large measure vitiate the effects of the rules of res judicata.' (Rest., Judgments, § 126, com. a.)" (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 472.) "Inroads on the concept of finality tend to undermine confidence

in the integrity of our procedures. See, e. g., F. James, Civil Procedure 517-518 (1965). Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice." (*United States v. Addonizio* (1979) 442 U.S. 178, 184, fn. 11 [99 S.Ct. 2235, 2240, 60 L.Ed.2d 805, 811].)

C. The Decision Below Conflicts With Cases Establishing the Standard of Appellate Review and With Appellate Powers.

Due Process (U.S. Const., Amend. XIV) requires that one litigant not be given special advantages. (See, e.g., *Green v. Georgia*(1979) 442 U.S. 95, 97 [60 L.Ed.2d 738, 99 S.Ct.2150] [uneven application of the hearsay rule]; *Webb v. Texas* (1972) 409 U.S. 95, 98 [34 L.Ed.2d 330, 93 S.Ct. 351 [uneven admonishment to witness for either side]; *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1175 [uneven treatment of motions in limine]; cf. *Hathorn v. Lovorn* (1982) 457 U.S. 255, 263 [72 L.Ed.2d 824, 102 S.Ct. 242)

The factual findings of the trial court are presumed to be correct if supported by the evidence in the appellate record. *(People v. Johnson* (1980) 26 Cal.3d 557, 562; accord *People v. Edelbacher* (1989) 47 Cal.3d 983, 1019.) On review of the judgment, the court must presume in support of the judgment the existence of any facts which the factfinder might reasonably infer from the evidence. (See, e.g., *People v. Edelbacher, supra,* 47 Cal.3d at p. 1019; *People v. Bean* (1988) 46 Cal.3d 919, 934.) As stated by the Court of Appeal, everyone in this case agreed that the only disqualifying factor at issue was whether the defendant was armed with a firearm. (Op. 10.) As the trial judge found, and the court below agreed, there was no evidence he was armed with a firearm.

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). (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. The Court of Appeal after full briefing and oral argument, similarly found the record inadequate to preclude eligibility.

The opinion in footnote 2 indicates that the parties disagreed regarding the facts underlying the charges and convictions as a reason to give the People the opportunity to put on further evidence. As pointed out, there is no disagreement about the fact the record does not show ineligibility. As pointed out, disputes over factual matters are determined under the substantial evidence rule. As pointed out, on any scenario shown in this case, there was no evidence Mr. Lewis was armed, and both courts so found. The jury *unanimously* rejected the theory that he was armed at the time of the robbery. Mere possession of a firearm under a mattress, although not commendable, particularly by an ex-felon, is not arming. Mr. Lewis under the Reform Act has been fully punished for that crime. He has served out his punishment and been found rehabilitated sufficiently not to be a danger to society.

The opinion at page 14 in discussing and rejecting respondent's position that there must be some criminal act to which the gun possession can be tied, complains that there is no accusatory pleading and no trial transcript in this record. It is the duty of litigants to supply a record establishing their position. In any event, the accusatory pleading would be of no assistance because there is an affirmative jury unanimous finding that the defendant was not armed during the robbery and there also is no

evidence that he was armed with the gun under the mattress. In short, leaving aside all the other problems, the accusatory pleading would be of little help where there was no guilty plea. As for the trial transcript, leaving aside the cost to the taxpayers and the delay in resolution of the application while one is obtained, retrial of something which was never tried in the first place ("arming" versus "possession) in order to set aside a formal sentencing following a hearing at which the interested party (the People) did not introduce it while they could, certainly borders on double jeopardy.

The rule is that an appellate court generally is not the forum in which to develop an additional factual record, especially when the evidence was available at the time of the trial court proceedings. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207-1208.) Respondent has no doubt that the district attorney was aware that the accusatory pleading and trial transcript can be part of the "record of conviction" to place before the trier of fact.[3] But, the People made no effort to place anything more before the trial judge, despite the opportunity to do so. The opinion below, honest and clear though it is, has the effect of re-opening and instructing the prosecution to try again and to do a better job, and of suggesting the trial judge should come to a different conclusion more in line with the prosecution. The Reform Act was

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[3] "To allow the trier of fact to look to the entire record of the conviction is certainly reasonable: it promotes the efficient administration of justice and, specifically, furthers the evident intent of the people in establishing an enhancement for 'burglary of a residence' -- a term that refers to conduct, not a specific crime. To allow the trier to look to the record of the conviction -- but no further -- is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial." (*People v. Guerrero* (1988) 44 Cal.3d 343, 355 [243 Cal.Rptr. 688, 695, 748 P.2d 1150, 1157].)

written with trust in the trial judges, this opinion indicates they should be prosecutors and insist upon any possible evidence that might form a basis for ineligibility. If the trial transcript failed, would it be necessary to again reverse to introduce the appellate court's views on the previous case in its opinion?[4] Essentially, the Court of Appeal did not like the result, rejected the evidence, rejected the trial judge, and told the district attorney to try again, in contravention of the established rules of appellate review or the facts as found by the trial judge.

This also constitutes a fundamentally unfair procedure and denies equal protection to Mr. Lewis when others similarly situated will have the

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[4] This seems to be possible in the finding of prior convictions since it may establish what the defendant was convicted of. (People v. Woodell (1998) 17 Cal.4th 448 [71 Cal.Rptr.2d 241, 950 P.2d 85].) Here, the nature of the conviction was clear–possession–and respondent would not have agreed the opinion would be admissible beyond that bare fact, if it had been introduced. There seems to possibly be such an unpublished opinion, E031449, People v. Lewis, 2003 Cal. App. Unpub. LEXIS 2934(Cal. App. 4th Dist.Mar. 26, 2003). A review of that opinion shows the charges on the acquitted robbery case to have been "first degree robbery (§ 211/212.5), residential burglary (§ 459), assault with a firearm (§ 245, subd. (a)(2)), and felony child endangerment (§ 273a, subd. (a)). As noted above, the jury only convicted defendant of two lesser included offenses of misdemeanor assault (§ 240) and misdemeanor child endangerment (§ 273a, subd. (b))." (Id.) The defendant admitted the gun found under the mattress in his bedroom was his. It was found by the police when they searched his bedroom at the time of his arrest. (Id.) Again, there is no sign that he was armed with it at the time of his arrest. The defense at the trial claimed the gun was obtained because rival gang members had threatened the defendant and his family and had fired into the house. However, there is no showing the gun was readily available to Mr. Lewis at the time it was found. Quite likely, the People did not bring up any of this because they acknowledged it was inadequate, not only by initially conceding eligibility but more so by not producing even this opinion or the trial transcripts as a part of the record.

benefit of the standards. (See, M.L.B. v. S.L.J. (1996) 519 U.S. 102 [117 S.Ct. 555, 136 L.Ed.2d 473] [convergence in appellate procedure case].)

While the injustice is plain and the constitutional problems are of interest, this case is particularly important because it involves a clear conflict between the appellate and trial courts and constitutes a apparent deviation from neutrality and policy. When the Petition for Rehearing pointed out the internal inconsistency and the problem of not following established procedure, the court below did not modify its opinion, and particularly did not modify its agreement that the armed factor was not present. This leads appellant, who respects the judges on the opinion, to speculate that the court below was aware this petition would be filed to clear up or expand its powers.

CONCLUSION

For the foregoing reasons, it is respectfully requested this Court grant review, reverse the Court of Appeal, and affirm the trial judge's decision to reduce the possession to a doubled term.

Dated: September 24, 2014.

Respectfully submitted,

Mark L. Christiansen, SB# 41291
Attorney for the appellant/petitioner

Certification: This petition contains 8400 words or less. It contains ____ words as counted by the program used to prepare it and excluding the covers, captions, signature block, this certification, the appendix, and the proof of service.

_____
Mark L. Christiansen

APPENDIX

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 29, 2014, I mailed from Palm Desert, California, a copy of the attached RESPONDENT'S PETITION FOR REVIEW 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.

Mr. Mr. Anthony Lee Lewis
3881 Fifth Street, Apartment 3
Riverside, CA 92501

Riverside County Superior Court
attn: Honorable Becky Dugan, Judge
4100 Main Street
Riverside, CA 92501

Deputy District Attorney Emily R. Hanks
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Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501
Also submitted via online form at: http://www.courts.ca.gov/9408.htm#tab18464

I declare under penalty of perjury that the foregoing is true and correct.
Executed on September 29, 2014, at Palm Desert, California.

_____
Mark Christiansen