Supreme Court of California
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S272627

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

RODNEY TAUREAN LEWIS,
Defendant and Appellant.

Fourth District Court of Appeal, Division Three, No. G060049
Santa Clara County Superior Court No. B136626,
Hon. Vincent J. Chiarello

MOTION TO DEFER FURTHER BRIEFING AND DECISION PENDING RESOLUTION OF *IN RE LOPEZ* (S258912)

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MOTION TO DEFER FURTHER BRIEFING
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"[A]fter granting review, the court may order action in the matter deferred until the court disposes of another matter." (Cal. Rule of Court 8.512(d)(2).) Appellant hereby moves the Court to defer further briefing and resolution of this case pending disposition of *In re Lopez*, S258912 (review granted January 15, 2020), on the grounds that the outcome in *Lopez* will affect resolution of this matter.

I.   Relevant issue to be decided in *Lopez*

"Alternative-theory" error occurs "when a court instructs on two theories of guilt, one correct and the other incorrect." (*People v. Aledamat* (2019) 8 Cal.5th 1, 7 [citation omitted].) Such error requires reversal of a conviction unless "the error was harmless beyond a reasonable doubt." (*Id.* at p.13.) In *Lopez*, this Court will decide how to determine whether alternative-theory error was harmless in cases where the record indicates the jury considered the incorrect legal theory. Specifically, *Lopez* raises the following question:

> [W]hen the record contains indications that the jury
> considered a legally invalid theory, are such
> indications dispositive in a reviewing court's
> assessment of whether it is clear beyond a reasonable

doubt that the jury based its verdict on the invalid theory, such that the court should not hold the error harmless based on its view of the strength of the evidence in favor of a legally valid theory?

(*In re Lopez*, Petitioner's Opening Brief on the Merits, 11 [filed May 20, 2020].) Briefly stated, the *Lopez* petitioner argues that where the record indicates the jury considered a legally invalid theory, the instructional error is not harmless, and reversal is required. (*Id.* at 14.) The Attorney General contends that the analysis turns not on what theory the jury actually considered but on "whether the strength of the evidence remove[s] any reasonable doubt as to what that jury would have done absent the error." (*In re Lopez*, Answering Brief on the Merits, 51 [filed August 18, 2020].)

II. The harmless error analysis in this case will be governed by the Court's decision in *Lopez*.

Appellant was charged with kidnapping with intent to commit rape under Penal Code § 209(b)(1). The trial court instructed the jury that it could convict if it found Appellant "used physical force *or deception* to take and carry away an unresisting person with a mental impairment." (*People v. Lewis* (2021) 72 Cal.App.5th 1, 11 [emphasis in original]). The Attorney General agrees "that it was improper for the trial court to

instruct the jury it could find that appellant asported Doe by force 'or deception'" but contends any error was harmless. (Respondent's Opening Brief on the Merits, 29.)

At Appellant's trial, the prosecutor relied heavily on the improper theory of deceit in opening statement and in arguments to the jury.[1] This Court has explained that a prosecutor's reliance on an invalid legal theory is an indication that the jury considered it and that alternative-theory error is thus not harmless. (*In re Martinez* (2017) 3 Cal.5th 1216, 1226-27 [finding alternative-theory error not harmless in part because "the prosecutor argued the [improper] theory to the jury at length during closing argument and rebuttal"]; *Aledamat, supra,* 8 Cal.5th at p.12 [discussing *Martinez*'s harmless-error analysis and noting that the prosecutor "relied heavily on the invalid theory in argument to the jury"].)

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[1] (*See* 4 RT 923 [prosecutor telling jurors in opening that Appellant told a "string of well-placed lies" to induce her to leave with him]; 12 RT 3325, 3356 [arguing in closing that Appellant "plied her with the perfect ruse" and that kidnapping "can be through deception"]; 12 RT 3356 [arguing for guilty verdict on the grounds that Appellant "deceives Suzanne into thinking he has her phone"]; 12 RT 3358 [arguing that Appellant's "intention is clear by his deception"].)

In its opening brief in this case, the Attorney General asserts that "harmless error analysis … does not ask what the jury actually did but what a jury would have done absent the error." (Respondent's Opening Brief on the Merits, 41.) The Attorney General treats this as a settled proposition of law and proceeds to argue that the evidence would have compelled a properly-instructed jury to convict. (*Id.*) But it is not a settled proposition. How to conduct harmless error analysis in the face of record evidence that the jury relied on an improper theory is precisely the question this Court will decide in *Lopez.* If the Court agrees with the *Lopez* petitioner, the indications here that the jury considered the incorrect theory are dispositive, and the error was not harmless. Only if the Court agrees with the Attorney General's position in *Lopez* will the harmless error analysis in this case turn on a review of the trial evidence.

/ / /

Lopez is fully briefed, and the Court's decision there will determine the harmless error analysis to be undertaken in this case. Appellant therefore respectfully requests that the Court defer further briefing and decision on this matter pending resolution of *Lopez.*

Dated: July 11, 2022   Respectfully submitted,

                        /s/ August Gugelmann
                     Edward W. Swanson
                     August Gugelmann
                     SWANSON & McNAMARA LLP
                     Attorneys for Rodney Lewis

PROOF OF SERVICE

I declare that I am employed in the County of San Francisco. I am over the age of eighteen years and not a party to this cause. My business address is 300 Montgomery Street, Suite 1100, San Francisco, California. Today, I served the foregoing MOTION TO DEFER FURTHER BRIEFING AND DECISION to the parties in this case by transmitting a true copy via this Court's TrueFiling system.

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

Executed on July 11, 2022.

                           /s/ August Gugelmann
                           August Gugelmann

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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STATE OF CALIFORNIA Supreme Court of California	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** Supreme Court of California

Case Name: **PEOPLE v.**
LEWIS
Case Number: **S272627**
Lower Court Case Number: **G060049**

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/s/August Gugelmann
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Gugelmann, August (240544)
Last Name, First Name (PNum)