S202790

4TH PETITION

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	F057736
Plaintiff and Respondent,	)	
	)	
v.	)	(Super Ct. No. BF122135A,
	)	BF122135B & BF122135C)
COREY RAY JOHNSON, et al.,	)	
	)	
Defendants and Appellants.	)	
	)	

APPELLANT DAVID LEE, JR.'S PETITION FOR REVIEW

OF DECISION OF THE COURT OF APPEAL
FIFTH APPELLATE DISTRICT

Appeal from the Superior Court of Kern County
Honorable Gary T. Friedman, Judge Presiding

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By appointment of Court of Appeal
Under the Central California Appellate
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APPELLANT DAVID LEE, JR.'S PETITION FOR REVIEW

Pursuant to rule 8.500 of the California Rules of Court (rules), appellant David Lee, Jr. petitions for review of the partially published decision of the Court of Appeal, Fifth Appellate District, filed April 26, 2012, affirming and modifying the judgment. Appellant is concurrently filing joinders in the petitions for review of co-appellants Corey Johnson and Joseph Dixon. Attached as Appendix A is a copy of the Court of Appeal's opinion (opinion). On May 24, 2012, the Court of Appeal denied appellant's petition for rehearing.

ISSUES PRESENTED FOR REVIEW

1. Does Penal Code section 654 permit punishment on appellant's conviction of conspiracy to murder and on his convictions of murder, absent an indication the jury's conspiracy finding was based on a conspiracy to murder a victim different from the victims of the murder convictions, or does the multiple punishment violate appellant's Sixth Amendment right to a jury determination of the crimes he committed?

2. Was Dupree Jackson, an ordinary gang member, who had participated in only one gang shooting, qualified to testify as an expert regarding the specific practices of his gang during shootings and to rely on hearsay, or did this violate appellant's Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to a fair trial?

3. Did the trial court prejudicially err, in violation of appellant's Fourteenth Amendment right to a fair trial, in admitting evidence of appellant's alleged statement to a co-defendant during a court break?

4. Did the trial court prejudicially err, in violation of appellant's Fourteenth Amendment right to a fair trial, by permitting gang experts to testify that appellant had a gang tattoo and the tattoo indicated appellant's involvement in prior shootings or criminal activity, absent an adequate foundation for such testimony?

5. Did the admission of evidence that appellant had a relationship with a woman who owned a car similar only in color to the car used in one of the shootings violate appellant's Fourteenth Amendment right to a fair trial?

6. Did the trial court err, in violation of appellant's Fourteenth Amendment right to a fair trial, in permitting impeachment of Kevin Griffith, an important defense witness, with evidence never produced by the prosecution?

7. Did the trial court err, in violation of appellant's Fourteenth Amendment right to a fair trial, by admitting Sara Agustin's testimony that she had discussed appellant's gang role and activities with his girlfriend?

8. Does Penal Code section 1127a's requirement that an instruction must be given that the testimony of an in-custody informant be viewed with caution and close scrutiny apply only to statements heard by the informant in jail, or to all the informant's testimony, and did the trial court's limiting addendum to CALCRIM No. 336 violate appellant's Fourteenth Amendment right to a fair trial?

9. Did the trial court err by denying appellant's motion under *People v. Marsden* (1970) 2 Cal.3d 118 for substitute counsel for purposes of making a new

trial motion, in violation of appellant's Sixth and Fourteenth Amendment rights to the effective assistance of counsel?

10. Did the trial court's failure to sever appellant's trial from that of his codefendants violate appellant's Fourteenth Amendment right to a fair trial?

11. Did the errors in this case cumulatively prejudice appellant's Fourteenth Amendment right to a fair trial?

NECESSITY FOR REVIEW

A grant of review to resolve the issues raised in this petition is necessary to settle important issues of law pursuant to rule 8.500 (b)(1) and to remedy errors that denied appellant a fair trial. In particular, arguments I, II, V, and VIII below raise important and unsettled issues of law upon which guidance is needed by the lower courts. Argument XI addresses the cumulative prejudice to appellant's Fourteenth Amendment right to a fair trial based on the multiple errors in this case, including five errors found by the Court of Appeal. This petition also is necessarily presented to preserve the issues for possible federal court review. (See *O'Sullivan v. Boerckel* (1999) 526 U.S. 838.)

STATEMENTS OF THE CASE AND FACTS

Appellant adopts the opinion's statements of the case and facts and additionally refers to the relevant facts below.

The evidentiary portion of trial lasted over three months. (3 C.T. 886-888; 8 C.T. 2296-2297.)

ARGUMENT

I.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER AN APPELLATE COURT CAN UPHOLD A RULING UNDER PENAL CODE SECTION 654 BASED ON ITS DETERMINATION THAT THERE WAS SUFFICIENT EVIDENCE TO FIND A SPECIFIC CONSPIRACY TO MURDER A SPECIFIC VICTIM, ABSENT A SHOWING THE JURY FOUND THE SAME MURDER TO BE THE OBJECT OF THE CONSPIRACY

In connection with appellant's argument that Penal Code section 654[1] required staying punishment on count 9, conspiracy, the opinion, pages 300-308, takes the legally unsupportable position that appellant can be sentenced for both murder and conspiracy to murder because there is sufficient evidence to support a finding of a conspiracy to murder David Taylor (Fumes), although nothing shows the jury unanimously agreed appellant was guilty of conspiring to murder Fumes, as opposed to a victim of one of the charged crimes.

Proving a conspiracy to commit a crime requires jury unanimity as to the victim of the target crime. (See *People v. Lucas* (1997) 55 Cal.App.4th 721, 740-741.) A court is not entitled to guess at what crime the jury found the defendant committed. (See, e.g., *People v. Diedrich* (1982) 31 Cal.3d 263, 280-283.)

In this case, the prosecutor did not proceed on the basis that there was one overriding and ongoing conspiracy to kill multiple victims, but on the basis that the jury should agree unanimously on the shooting that formed the basis of the conspiracy to murder. The jury was told it could rely on a conspiracy to shoot Fumes, which was uncharged, or a conspiracy to commit one of charged shootings. (61 R.T. 11110-11111, 11113-11114.) Appellant was convicted of, and punished for, all the alleged murders and attempted murders. There is no dispute that section 654 prohibited appellant from also being sentenced for a conspiracy to commit these same crimes.

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[1] Subsequent sections references are to the Penal Code unless otherwise indicated.

Although it is unknown whether the jury found appellant guilty of a conspiracy to murder Fumes, the Court of Appeal has taken the position it need not know because there is sufficient evidence to support this finding. No authority supports this position. The Court's holding usurps the jury's required function of determining guilt or innocence and violates appellant's Sixth Amendment right to a jury determination.

The opinion, page 302, correctly states that the question is one of law. However, the question of law is: what conspiracy to murder did the jury find appellant committed. In some cases, an appellate court might be able to rely on other jury findings in the case or the finding of an overt act to determine whether the jury found the defendant guilty of conspiring to commit a particular crime, because those findings are tied *only* to that particular crime. Appellant's is not such a case. The jury's findings do not show its verdict of a conspiracy to murder was based on a conspiracy to murder Fumes. No overt act found by the jury is tied only to Fumes. (10 C.T. 2731-2738, 2746-2753.)

The Court of Appeal reasons from other cases that it can make essentially what is a jury determination, but these cases are inapposite and provide no reason to override the fundamental principle that only a jury can determine what crimes the defendant committed. The opinion, pages 305-306, heavily relies on *People v. Cooks* (1983) 141 Cal.App.3d 224 (*Cooks*), but *Cooks* was prosecuted as an ongoing conspiracy by Black Muslim defendants, who went on a shooting rampage to kill white people over an extended period of time, and the verdicts and overt acts found by the jury showed the jury found the victim of the charged murder was not the only victim of the ongoing conspiracy. (*Id.* at pp. 242-257, 263-277, 313, 317.) Appellant's case was not prosecuted as an ongoing conspiracy. The jury was told it could rely on one of the charged murders or attempted murders to return a verdict of conspiracy to murder.

II.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER AN ORDINARY GANG MEMBER, WHO HAD PARTICIPATED IN ONLY ONE GANG SHOOTING, WAS QUALIFIED TO TESTIFY AS AN EXPERT REGARDING THE SPECIFIC PRACTICES OF HIS GANG DURING SHOOTINGS AND RELY ON HEARSAY, OR WHETHER THIS VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS

Appellant argued that the trial court erred by permitting Dupree Jackson to testify to cell phone practices during gang walk-up shootings because Jackson was not an expert and he lacked sufficient personal knowledge to testify regarding this subject. The opinion, pages 183-187, finds no error based on the proposition that the trial court, although not explicitly stating, permitted Jackson to testify as a gang expert. Even if the trial court ruled on this basis, Jackson did not qualify as a gang expert regarding the practices of the Country Boy Crips, a large gang with many subsets, particularly as to their cell phone practices during walk-up shootings. (54 R.T. 9806-9809, 9813.)

Appellant has found no case finding it proper for a gang member to testify as a gang expert, particularly so as to introduce hearsay purportedly from other gang members. Gang experts typically are police officers with extensive training and experience regarding gangs. (See, e.g., *People v. Olguin* (1994) 31 Cal.app.4th 1355, 1370-1371.) It is an astounding proposition, backed by no case authority, that an ordinary gang member can testify as an expert about all of a gang's practices, even when that member has no substantial experience with the practice in question. Jackson testified he had been involved in only one gang shooting as the driver of a car. (40 R.T. 7290.) His testimony was based on hearsay purportedly from other gang members about cell phone practices, but he was far from the type of expert witness who had the ability, background and expertise to evaluate information, particularly hearsay, on the subject. (See 1 Witkin, Cal. Evid. 4th (2000) Opinion, § 44, p. 575 [listing types of experts].)

Jackson was not even a leader or high-ranking member in the gang, who might have set gang policy. He was an ordinary gang member, not an expert in anything. The Legislature did not contemplate that the requirements of Evidence Code section 720, subdivision (a) could so easily be met. By a parity of reasoning, being a member of a large group would constitute expertise in everything members of that group did based on hearsay reports of others.

Because appellant had no ability to refute Jackson's opinion, despite its lack of foundation, or to cross-examine the hearsay declarants upon whom Jackson relied, and the opinion so heavily bolstered the prosecution's claim that appellant used his cell phone to communicate with the shooters and was the driver in the shooting incidents, the error violated appellant's Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to a fair trial. (See (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 737, 739; *Randolph v. California* (9th Cir. 2004) 380 F.3d 1133, 1147.)

III.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT PREJUDICIALLY ERRED, IN VIOLATION OF APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL, IN ADMITTING EVIDENCE OF A STATEMENT APPELLANT ALLEGEDLY MADE TO COREY JOHNSON DURING A COURT BREAK

The trial court permitted evidence to be introduced that after Sara Agustin had testified extensively about Johnson's horrible abuse of her, appellant said to Johnson during a court break that "you should have called me and we both should have beaten her ass together." (33 R.T. 5874.) The opinion, pages 172-178, incorrectly finds the evidence was relevant and Evidence Code section 352 did not require its exclusion. The opinion, pp. 175-176, states the evidence was relevant to explain the past relationship between Johnson and appellant as showing they had such a close relationship that Johnson could have called on appellant to help him deal with Agustin and to show behavior consistent with gang membership. The evidence was irrelevant because, while the statement might reflect appellant's mental state at the time he said it, it did not shed any light on his mental state or behavior at the time of the crimes. Nor did making an offhand comment of frustration to a codefendant give rise to a reasonable inference that appellant was behaving in a manner consistent with being a gang member. A defendant in a non-gang case might just have easily made this same statement after being harmed by a witness's testimony.

It was undisputed that appellant and Johnson were friends during the time of the crimes, but purely speculative that Johnson would have called on appellant to deal with Agustin, and the statement to the extent it reflected the two men's relationship was cumulative of other evidence. (30 R.T. 5375, 5386; 31 R.T. 5403, 5458; 46 R.T. 8439; 53 R.T. 9623, 9677-9679.) The statement ultimately only served the purpose of impermissible character evidence that appellant was prone to violence with gang members. Appellant's comment showed anger at Agustin during trial for her testimony against him, but did not indicate that the relationship between

the two men one-and-a-half years earlier would have led to appellant's harming Agustin or indicate appellant's mental state at the time of the charged crimes.

Although the opinion, page 178, finds *People v. Leon* (2001) 91 Cal.App.4th 812, 816 (*Leon*), inapposite, the point of *Leon* is that evidence of a defendant's conduct during trial must be relevant to a defendant's intent at the time of the charged crime. This was not the case here. If comments that one "should have" done something can be offered to prove behavior, people are going to be convicted for making comments upon which they never acted or intended to act. In cases where a defendant makes a statement that he "should have" or "would have" done something, the statement is only relevant when it goes to show his intent in a later action. (See, e.g., *People v. Deloney* (1953) 41 Cal.2d 832, 836-838.)

Evidence Code section 352 required exclusion of the evidence of appellant's comment, which was cumulative of stronger and more direct evidence of the relationship between the two men, giving it less probative value. (See *Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.app.3d 768, 774; *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.) The claim that the evidence was relevant to show behavior consistent with gang membership is nothing but an improper propensity argument. Juxtaposed against the minimally probative value of this evidence was the great harm to appellant. The jury had just heard a whole day of testimony about Johnson's monstrous abuse of Agustin. To then hear that appellant said he wished he had taken part in her beating is exactly the type of evidence to inflame a jury to believe appellant was violent and predisposed to commit the charged crimes.
In closing arguments, the prosecution argued that appellant's statement to Johnson showed the nature of their relationship, namely that they committed crimes together. (60 R.T. 11087; 61 R.T. 11325.)

The error violated appellant's Fourteenth Amendment right to due process because it rendered appellant's trial fundamentally unfair by suggesting he was prone to violence. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 229; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1386.)

IV.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT PREJUDICIALLY ERRED, IN VIOLATION OF APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL, BY PERMITTING THE PROSECUTION'S GANG EXPERTS, WITHOUT ADEQUATE FOUNDATION, TO TESTIFY THAT APPELLANT HAD A GANG TATTOO AND THAT THE TATTOO INDICATED APPELLANT'S INVOLVEMENT IN PRIOR SHOOTINGS OR CRIMINAL ACTIVITY

Expert testimony about appellant's tattoo of a gun and bullet strikes was irrelevant to the issue whether appellant was a Country Boy Crip or to any other issue in this case because the gang experts could not tie the tattoo, nor their claim that bullet strikes on tattoos correlate with involvement in prior shootings or criminal activity, to the Country Boy Crips or appellant's prior actions. This issue is discussed in the opinion, pages 197-205, and is closely related in terms of prejudice to two errors found by the Court of Appeal, the evidence elicited in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) that appellant fancied himself as a shooter (see opinion, pages 205-211) and the error in admitting expert testimony that gang members enjoy killing (see opinion, pages 211-216).

The opinion, page 203, states appellant's tattoo was relevant, though not commonly seen on African-American gang members and not by itself connecting appellant to the Country Boy Crips, because the tattoo corresponded to evidence appellant's moniker was Gunner. Neither Sherman nor Williamson could link the tattoo to the Country Boy Crips, nor establish the tattoo was even a gang tattoo. They testified a gun tattoo by itself could not be equated with a gang tattoo. (14 R.T. 2038; 55 R.T. 9963.)

The possible correlation between appellant's alleged moniker and his tattoo does not transform the tattoo into a gang tattoo. Whether the tattoo, on its own, is a gang tattoo or whether "Gunner," on its own, is a gang moniker are separate issues, but the correlation itself does not make it more or less likely that appellant was affiliated with the Country Boy Crips or any gang. At the most, the tattoo simply

lends support to the assertion that the name Gunner was associated with appellant, but the fact that the tattoo would not help to determine whether Gunner was a gang moniker shows that the correlation between the two does not help validate the opinion that it was a gang tattoo, let alone a Country Boy Crips tattoo.

Unlike the gang tattoos of appellant's codefendants, appellant's tattoo did not conform to tattoos of the Country Boy Crips. Regardless of whether Sherman and Williamson had the proper foundation to testify regarding gangs in general, they still must have had a reasonable factual basis for the specific opinion that appellant's tattoo was a Country Boy Crips tattoo, as well as their testimony regarding the meaning of the bullet strikes on the tattoo. (See *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 529-530.) Neither Sherman nor Williamson could back up his assertion regarding the bullet strikes by pinpointing a single source for his claimed knowledge. (10 R.T. 882, 895; 14 R.T. 2036-2037.) Nor, despite his efforts, could Sherman come up with any correlation between the number of bullet strikes on appellant's tattoo and appellant's history. (10 R.T. 882. 884-885.)

Furthermore, Evidence Code section 352 required exclusion of the evidence, which had little or no probative value as to whether appellant was a Country Boy Crip, but the testimony, particularly that bullet strikes correlate with criminal activity, was greatly prejudicial to appellant, as his tattoo had four bullet strikes. (9 R.T. 822.) The evidence was propensity evidence likely to inflame the jury against appellant. (See *People v. Thompson* (1980) 27 Cal.3d 303, 314.) The prosecution argued the evidence to insinuate appellant was a violent gang member involved in prior shootings. (60 R.T. 10957, 10968-10969, 11088.)

The error violated appellant's Fourteenth Amendment right to a fair trial and lowered the prosecution's burden of proof by permitting appellant to be convicted based on impermissible and highly prejudicial propensity evidence and evidence lacking a proper foundation. (See *McKinney v. Rees, supra,* 993 F.2d at pp. 1384-1388; *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 373-375.)

V.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT PREJUDICIALLY ERRED, IN VIOLATION OF APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL, IN ADMITTING EVIDENCE OF A BURGUNDY CAR OWNED BY A FRIEND OF APPELLANT, WHEN THIS CAR DID NOT MATCH THE CAR USED IN THE REAL AND PLANZ SHOOTING

The opinion, pages 187-197, rejects appellant's argument that the trial court erred by admitting evidence that Shannon Fowler owned a burgundy 2006 Toyota Corolla around the time of the Real and Planz shooting. However, aside from its color, Fowler's car did not match the description given by multiple eyewitnesses of the car used in the shooting, and the evidence only served to confuse the jury and create the illusion that Fowler's car was used in the shooting, which in turn, explained away the prosecution's problem of not being able to connect any of the defendants to the type of car used in the Real and Planz shooting. The Court of Appeal takes the position that although no evidence established Fowler's car was used in the shooting, the descriptions did not eliminate that possibility, and the jury could have inferred appellant had access to Fowler's burgundy car. The opinion, page 196, does acknowledge that "the prosecutor went too far in arguing [Detective] Heredia found out Fowler's car was the one used in the shooting."

The overwhelming consensus from multiple eyewitnesses was that the car used in the shooting, which was clearly described by them, was distinctly different from Fowler's car. Bonner, the victim of the shooting, could only say that the car was burgundy and had tinted windows, and the car Bonner saw appellant in earlier that day did not have tinted windows. (27 R.T. 4687-4688, 4779; 28 R.T. 4853, 4857-4858, 4862.) Bonner testified he knew about cars and was very specific that the car he saw appellant in earlier was not a Toyota. (48 R.T. 8805.)

Even if the law of relevance could be stretched to consider Fowler's car as relevant evidence just because it was burgundy, and it was possible that every eyewitness misidentified the suspect car in the exact same way, the evidence was still

irrelevant because Fowler's car was not appellant's car, and it was only speculation to infer appellant was driving the car at the time of the shooting. A burgundy car is so common that virtually everyone knows someone with a burgundy car or can be linked to a burgundy car.

The opinion, pages 193-195, analogizes to cases holding that a defendant's *possession of a weapon* that might have been used in a crime is relevant unless the specific weapon used in the crime is identified and the weapon possessed by the defendant is different. To broaden these holdings to permit admission of evidence that a defendant had access to a car that only matches the suspect car in color eviscerates the requirement that evidence must be relevant and not speculative. In *People v. Farnam* (2002) 28 Cal.4th 107, 156-157, relied upon in the opinion, pages 194-195, the defendant was found in possession of a knife two months after the homicide, and forensic evidence showed the knife's blade was similar to the slit in the screen door used to gain entry to the victim's residence and the knife could have been used to cut the telephone cords at the residence. Having a connection with someone who owns a car only similar in color to a car used in a crime is far different from possessing a weapon that cannot be excluded as having been used in a crime.

The opinion, page 196, reaches the equally untenable conclusion that Evidence Code section 352 did not require exclusion of the evidence based on an inaccurate assessment that there was little danger of prejudice. The prejudice was great. The evidence was presented extensively through multiple witnesses and photos and impeachment evidence, which gave the evidence the veneer of relevance and reliability. There was great likelihood of confusion by the jury given the huge amount of evidence presented in this extended trial in which the testimony about Fowler's car followed the testimony about the Real and Planz shooting by a month. (26 R.T. 4602; 46 R.T. 8361.) When the trial judge allows in evidence of a burgundy car, and the prosecution spends significant time on this issue over defense objection, the jury is going to perceive the evidence as highly relevant.

The prosecution set up an elaborate system of smoke and mirrors to make this evidence appear relevant and as incriminating as possible. The prosecution spent a good deal of time setting up and playing a jail call between appellant and a woman identified as Fowler to impeach Fowler. (46 R.T. 8374-8384; 47 R.T. 8737, 8726-8727, 8742; 7 C.T. 1921-1956.) But the matters of impeachment were irrelevant, only serving to make Fowler look like a liar and cast a pall of insincerity and criminality over her testimony about her burgundy car, making her and the car seem complicit in the crime, when they had no connection to the crime. The prosecution continued to drop irrelevant information about how the car was involved in some other criminal incident with Fowler's boyfriend, which again, only served to confuse the jury by making this car seem wrapped up in crime. (46 R.T. 8373-8374; 48 R.T. 8770-8773, 8775-8776.) Then, the prosecution introduced evidence about how the car's new owner had tinted the windows (48 R.T. 8776), but the fact that Fowler's car had acquired tinted windows over a year after the shooting had no relevance.

The error in not excluding this misleading evidence violated appellant's Fourteenth Amendment right to a fair trial. (See *People v. Partida* (2005) 37 Cal.4th 428, 439; *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919-920.) The evidence prejudiced appellant in the determination of the charge of attempted murder of Bonner, but also on the other charges, given the weaknesses in the prosecution's case against appellant, because the jury's conclusion that appellant was the driver in one shooting incident supported the prosecution's claim that appellant was a driver for the gang and in the other shootings.

VI.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT ERRED, IN VIOLATION OF APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL, IN PERMITTING IMPEACHMENT OF AN IMPORTANT DEFENSE WITNESS WITH EVIDENCE NEVER PRODUCED BY THE PROSECUTION

Kevin Griffith, an eyewitness to the Real and Planz shooting, testified that later on the night of the shooting, he saw the car used in the shooting and called 911. He was positive it was the same car. The car, which was stopped by the police, was occupied by three black males who were not the defendants. The opinion, pages 240-243, rejects appellant's argument that to convince the jury that Griffith was mistaken in his testimony, the prosecution engaged in improper impeachment concerning the distance from which Griffith had observed the shooting and that the trial court erred in allowing the impeachment.

The error was not forfeited, for when the prosecution asked, "Would it change your opinion if you knew that your daughter said you were 80 to 90 yards away from the intersection when it happened?" Johnson's counsel objected that this was hearsay and the prosecution could call the daughter if they would like. (57 R.T. 10310.) The meaning of the objection was clear: the defense objected to asking Griffith about a claim not supported by evidence. In addition, the issue is cognizable on appeal because appellant argued that any forfeiture was due to ineffective assistance of trial counsel. (U.S. Const., 6th and 14th Amends.)

The improper questioning cast doubt on the accuracy of Griffith's perception of the car, a perception that if believed by the jury would have exonerated appellant of involvement. Griffith had no reason to lie to the police. The error in permitting the prosecution to indicate it had information Griffith observed the shooting from a far greater distance than he had testified violated appellant's Fourteenth Amendment right to a fundamentally fair trial. (*See Estelle v. McGuire, supra,* 502 U.S. at p. 70; *Jammal v. Van de Kamp, supra,* 926 F.2d at pp. 919-920.)

VII.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT PREJUDICIALLY ERRED, IN VIOLATION OF APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL, IN ADMITTING SARA AGUSTIN'S TESTIMONY THAT SHE HAD DISCUSSED APPELLANT'S GANG ROLE AND ACTIVITIES WITH APPELLANT'S GIRLFRIEND

The opinion, pages 169-173, incorrectly rejects appellant's argument that the trial court erred by permitting Agustin to testify, over defense hearsay and relevancy objections, that she spoke with appellant's girlfriend about appellant's role and activities in the gang and to testify regarding appellant's relationship with his girlfriend. The challenged evidence was cumulative to a vast amount of evidence showing Johnson's connection to the Country Boy Crips, and the only real effect and purpose of the evidence was to prove appellant was involved in gang activities and had a role by showing Agustin had talked to appellant's girlfriend about this subject. The evidence also denigrated appellant as a man who treated his pregnant girlfriend poorly. The prosecution in closing arguments noted appellant's many girlfriends and brought up how appellant would not give Roseburr the title of girlfriend even though she was pregnant with his child. (60 R.T. 10957.) With the other errors in this case, the error violated appellant's Fourteenth Amendment right to a fair trial and was prejudicial by damaging the jury's view of appellant and supporting the prosecution's claim that appellant was a Country Boy Crip, who participated in criminal gang activities.

VIII.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE MODIFICATION OF CALCRIM NO. 336, WHICH COVERS THE TESTIMONY OF AN IN-CUSTODY INFORMANT, TO APPLY TO DUPREE JACKSON'S TESTIMONY ONLY REGARDING STATEMENTS HE HEARD IN JAIL, WAS ERRONEOUS AND VIOLATED APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

Jackson was an important prosecution witness on several points. He was also an in-custody informant, testifying that while in jail with Dixon, Dixon made statements about the crimes. Appellant agued in the Court of Appeal that the trial court erred in giving CALCRIM No. 336 by adding a sentence that required the jury only to view Jackson's testimony regarding the jail statements, not his entire testimony, with care and close scrutiny. This addendum was erroneous and had the effect of negating the required caution and close scrutiny with which the jury was required to view all of Jackson's testimony.

The opinion, pages 283-287, incorrectly holds that section 1127a's requirement that an instruction be given that the "testimony of an in-custody informant should be viewed with caution and close scrutiny" can exclude testimony of the informant that is not based on in-custody conversations. No case holds that section 1127a is so limited.

In appellant's case, the other instructions on credibility did not negate this error because CALCRIM No. 336 led the jury to believe it need only view the in-custody statements relayed by Jackson with special caution and close scrutiny. This was the only specific instruction solely governing Jackson's testimony.

The erred violated appellant's Fourteenth Amendment right to a fair trial and was prejudicial, as Jackson's credibility was critical to the prosecution's case against appellant. (See *Middleton v. McNeil* (2004) 541 U.S. 433, 437; *United States v. Rockwell* (3rd Cir. 1986) 781 F.2d 985, 991.)

IX.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT PREJUDICIALLY ERRED BY DENYING APPELLANT'S *MARSDEN* MOTION FOR SUBSTITUTE COUNSEL FOR PURPOSES OF MAKING A NEW TRIAL MOTION, IN VIOLATION OF APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL

The opinion, pages 317-326, rejects appellant's argument that the trial court abused it discretion under *People v. Marsden, supra,* 2 Cal.3d 118 (*Marsden*), when it denied appellant's request for substitute counsel to make a new trial motion to argue that the denial of appellant's severance motion had denied him a fair trial and to argue ineffective assistance of counsel based on serious allegations that counsel had failed to produce important defense witnesses and evidence. The opinion, pages 325-326, holds the trial court's ruling was reasonable, but the ruling was not, because the trial court only inquired of counsel about some of appellant's claims and ignored claims that were significant and not based on factors observable in the courtroom. Contrary to the opinion's conclusion, the trial court's comments and quotations from Justice Baxter's concurring opinion in *People v. Smith* (1993) 6 Cal.4th 684, 700, 703, show the trial court mistakenly believed it was not appropriate to grant a *Marsden* motion to bring a new trial motion predicated on acts or omissions of counsel that did not occur in the courtroom. (63 R.T. 11709-11710.)

The denial of appellant's *Marsden* motion violated appellant's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. (See *People v. Smith, supra,* 6 Cal.4th at p. 695.) Appellant presented sufficient indications he did not receive effective assistance to warrant appointment of substitute counsel, and his case should be remanded for appointment of counsel to make a new trial motion.

X.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT PREJUDICIALLY ERRED, IN VIOLATION OF APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL, IN DENYING APPELLANT'S MOTION FOR SEVERANCE OF HIS TRIAL FROM THAT OF HIS CODEFENDANTS

The opinion, pages 92-98, rejects appellant's argument that the trial court abused its discretion in denying appellant's pretrial motion for severance. Appellant argued there was grave danger that appellant would be prejudiced by a spillover effect from inflammatory and extensive evidence of his codefendants' past violence, including domestic abuse and prior shootings that were only admissible against them. The evidence against Johnson and Dixon was significantly stronger and more damaging than the evidence against appellant.

The opinion, page 97, states the Court of Appeal cannot "reject, out of hand, Lee and Dixon's claims that joinder resulted in such unfairness as to violate due process," and that jurors are presumed to follow limiting instructions, but "there can be no doubt in the present case that these matters sometimes were complex." The opinion, pages 97-98, promises to assess whether the failure to sever in fact affected the trial's fairness after analyzing the claimed errors and discussing cumulative prejudice. The promised assessment comes in a single paragraph on page 317, which simply states that gross unfairness did not occur and the record does not show the jurors were unable or unwilling to follow the limiting instructions or confused.

The Court of Appeal's assessment is incorrect. It is unrealistic to believe that the jury was able to segregate the evidence and extract such pervasive and prejudicial testimony concerning appellant's codefendants from determining appellant's guilt, especially in the context of a trial that was overlong, confusing, and mismanaged. The failure to grant severance resulted in gross unfairness to appellant, violating his Fourteenth Amendment right to a fair trial, and the error was not harmless beyond a reasonable doubt. (See *People v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 906-907.)

XI.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE MULTIPLE ERRORS IN THIS CASE, INCLUDING FIVE FOUND BY THE COURT OF APPEAL, CUMULATIVELY PREJUDICED APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

A. Introduction

The opinion, pages 316-317, briefly discusses the issue of cumulative prejudice based on the errors found by the Court of Appeal, but shows no recognition that appellant is in a much different evidentiary position than his codefendants in that the evidence against appellant was significantly weaker, states that some trial errors were trivial and some not, but does not elucidate which were which, and engages in virtually no analysis of cumulative prejudice. The evidence linking appellant to the charged crimes as the driver of the cars was problematic and depended mainly on questionable hearsay evidence from witnesses with motives to lie. Nor were the many trial errors just the result of the prosecutors' having "an unfortunate tendency to overprove their case." There were serious and pervasive errors, which cumulatively prejudiced the verdicts against appellant in denial of his Fourteenth Amendment right to a fair trial.

The Court's discussion of cumulative error states that appellant received a fair trial, but does not analyze the cumulative effect of the error for prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24. This is required because at least one error found by the Court of Appeal, the *Miranda* error, violated the federal Constitution. (See *In re Rodriguez* (1981) 119 Cal.App.3d 457, 470; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

B. The Multiple Errors Cumulatively Prejudiced the Case Against Appellant

Within the context of the weaknesses of the case against appellant, the errors set forth in the arguments above, the errors set forth in his co-appellants' petitions for

review in which appellant has joined, and the following errors, found by the Court of Appeal, denied appellant a fair trial.

1. The Error in Admitting Evidence of Dixon's Prior Bad Acts

The opinion, pages 129-144, holds that the trial court abused its discretion in admitting evidence of Dixon's involvement in the 2001 shootings and allowing the jury to consider the evidence for any purpose as to the charged murders and attempted murders. The opinion, page 144, holds the evidence was admissible solely regarding the gang charge and enhancements and states the jury would have been able to follow limiting instructions to consider the evidence only for this purpose. The opinion, page 145, finds the error did not affect appellant on the basis that the jury instructions and the prosecution's statements indicated that the evidence of Dixon's prior crimes could only be used against Dixon.

The problem with this analysis is that it is unrealistic to believe that the jury was able to use this evidence and not have it influence its determination of appellant's guilt. The evidence was extensive and inflammatory. In what essentially amounted to a trial within a trial, eight witnesses were called to testify regarding the shooting behind Dixon's 2001 manslaughter conviction and his involvement in another 2001shooting. Although the court did give limiting instructions and tried to limit the evidence to Dixon, this was not just some small amount of evidence, and the court itself became confused at times against whom the evidence was being admitted. (24 R.T. 4188-4191.) Sometimes, the court failed to notify the jury that the evidence was limited to Dixon until halfway through a witness's testimony. (See, e.g. 25 R.T. 4479-4480.)

This was not the type of case where an admonishment could negate the harm to appellant, given appellant's association with Dixon in the gang context of this case. The worse appellant's codefendants looked, the worse appellant looked, and in a situation where the jury is uncertain about a defendant's guilt, the jury is much more likely to convict him of violent crimes if they think he associates with violent people, as they are more likely to think the defendant then capable of doing such

things. In a trial that lasted some four months, it would have been nearly impossible for an average juror to keep all the evidence straight. The taint of prejudicial association was pernicious because the jury likely confused evidence without properly segregating it as to the correct defendant and purpose, resulting in the likelihood appellant was convicted because of his prejudicial association with his codefendants and their prior misdeeds rather than on the merits of the case against him.

There are some instances, especially in large and unwieldy trials, where it is impossible to expect jurors to be able to properly segregate and apply evidence. (See *People v. Beihler* (1961) 198 Cal.App.2d 290, 298; *United States v. Lewis* (9th Cir. 1985) 787 F.2d 1318, 1323.) And given the lack of "firm judicial supervision and strong, carefully drawn instructions," "judicial cliches carving jurors' minds into autonomous segments may waver and fail." (*People v. Chambers* (1965) 231 Cal.App.2d 23, 33.) This is such a case. Appellant was prejudiced and cumulatively so by the evidence of Dixon's involvements in two prior shootings.

2. The *Miranda* Error Regarding Appellant's Tattoo

The opinion, pages 205-211, find that the evidence of appellant's post-arrest reaction to questions about his firearm tattoo and its significance were admitted into evidence in violation of *Miranda*, but finds the error harmless beyond a reasonable doubt. On the contrary, the evidence harmed appellant greatly by indicating appellant fancied himself as a shooter and likely had involvement in prior shootings. The opinion, page 211, concludes that even if the jury inferred that appellant fancied himself as a shooter, the jury would not have concluded appellant was tacitly admitting complicity in the charged offenses, or that appellant had been involved in other shootings, because the gang expert Sherman did not testify that appellant, unlike Johnson and Dixon, was involved in other shootings. Although the jury may not have concluded appellant was admitting complicity in the charged offenses, the jury would have believed appellant had been involved in prior shootings or at a minimum, viewed them as something he wanted to do.

Williamson's testimony gave content to appellant's reaction to Williamson's questions as showing appellant fancied himself as a shooter and was incriminating himself in at least this regard. Williamson testified he told appellant he liked the tattoo and asked if the pistol showed appellant fancied himself as a shooter, and said he did too, and appellant "kind of smiled at me." (14 R.T. 2034.) Williamson then said he was counting the bullet strikes and asked whether that stood for four or five shootings or kills, and appellant at that point turned, faced straight ahead with a non-emotional, solemn look on his face and said nothing further. (14 R.T. 2034-2035.) Williamson was implying that appellant, after essentially indicating he fancied himself as a shooter, reacted in this manner because appellant was unwilling to incriminate himself further.

Williamson further testified that he had learned through his training and experience that tattoos of firearms on individuals indicate they fancy themselves as shooters, and that although a firearm tattoo alone would not have piqued his interest, seeing one with bullet strikes caught his attention. (14 R.T. 2035.) According to Williamson, bullet strikes tend to signify shootings or killings in which the person has been involved. (14 R.T. 2038, 2046.) Beyond this, Sherman testified that the gun on the tattoo itself may or may not have had significance, but the bullet strikes made it a gang tattoo with the strikes referencing shootings or other criminal activity, and the tattoo was a badge of honor of doing something criminal. (55 R.T. 9963.)

The jury would have thought that in the context of the gang experts' testimonies, appellant had admitted he fancied himself as a shooter and that appellant probably had connection to prior shootings or wanted to be involved in shootings. This was highly incriminating propensity evidence, likely to inflame the jury against appellant. (See *People v. Thompson, supra,* 27 Cal.3d at p. 314.) Any evidence appellant was involved in prior shooting incidents, especially four such incidents, or favored such action, would make the jury more inclined to believe the prosecution's claim that appellant was involved in the shootings in this case.

Furthermore, it is commonly believed by the public that criminals are seldom caught for all their crimes, and the fact that Sherman did not identify other shootings in which appellant participated would not have dispelled this common belief or the significance of appellant's tattoo, as confirmed by appellant's reactions to Williamson, as indicating appellant's propensity to be involved in shootings.

The improperly admitted testimony was highly harmful to appellant and contributed to prejudice from the other errors in this case.

3. The Error in Admitting Expert Testimony That Gang Members Enjoy Killing

The opinion, pages 211-216, holds that the trial court erred by admitting Sherman's expert testimony that enjoying killing people is what comes with being a gang member, but holds the testimony was not prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) and did not render appellant's trial unfair.

The prosecution elicited this testimony because appellant did not fit the profile of a typical gang member or someone who would engage in violence, as appellant was educated and a respiratory therapist. The improper questions immediately followed questioning of why someone with a job and education would join a gang and were designed to harm appellant because of his profession and education. (30 R.T. 5384; 46 R.T. 8446; 55 R.T. 10134.) The improper testimony provided an explanation for appellant's participation in crimes that appeared out of character for him, that is, he would enjoy such activity and it just came with the territory. In other words, gang members such as appellant, despite seemingly being productive members of society, are really just thrill-seeking criminals.

The admission of this inflammatory evidence violated appellant's Fourteenth Amendment right to a fair trial. (See *McKinney v. Rees, supra,* 993 F.2d at pp. 1384-1388.) One would be hard pressed to find testimony more inflammatory than a gang expert's opinion that enjoying killing people is an inherent part of being a gang member. (See *United States v. Amaral* (9th Cir. 1973) 488 F.2d 1148, 1152 [expert testimony has "aura of special reliability and trustworthiness"].) It is hard to imagine

how appellant could not but be damaged in the eyes of the jury. The prosecution elicited the evidence to convince the jury that if it concluded appellant was a gang member or he associated with gang members, he should be regarded as the type of person who would be involved in the charged shootings because killing people is part of being a gang member, and further, that the jury should not be concerned that appellant did not appear to be the typical gang member because gang members kill people for enjoyment and excitement. This testimony contributed to prejudice from the other errors in this case.

4. Improper Impeachment of Defense Witness Theodore Richard, Whose Testimony Discredited Dupree Jackson

The opinion, pages 230-240, finds that the trial court erred under Evidence Code section 352 by permitting the prosecutor to cross-examine Richard concerning the facts and circumstances underlying his prior convictions, which were used to impeach his credibility, especially with evidence concerning whether Richard was wanted by the FBI for a period of time, whether he sold drugs with a group of people, and the information contained on his wanted poster, but finds the error harmless under *Watson, supra*, 43 Cal.4th at p. 686. However, this error contributed to cumulative prejudice and violation of appellant's Fourteenth Amendment right to a fair trial by eroding the credibility of Richard, whose testimony undermined the entire testimony of Jackson, one of the prosecution's two main witnesses against appellant.

5. The Error in Charging the Defendants with Conspiracy to Participate in a Criminal Street Gang and in Admitting Evidence Because of This Crime

The opinion, pages 308-316, holds that the defendants could not properly be charged with conspiracy to actively participate in a criminal street gang, and thus, the verdicts on count 9 as to this charge must be vacated. The discussion acknowledges there is another issue--that evidence was admitted solely because of this invalid charge--but the opinion does not address the issue of prejudice from this other evidence. The opinion, page 309 notes:

> During the course of trial, some evidence that otherwise would have been limited to one or two of the defendants or as to purpose — or that might not have come in at all — was admitted against all defendants or for an unlimited purpose due to the existence of the conspiracy charge. Neither the prosecutor nor the court always specified which crime alleged as an object of the conspiracy was the basis for finding the evidence relevant or otherwise admissible. It is apparent, however, that some of the evidence was admitted against all three defendants pursuant only to the charged conspiracy to actively participate in a criminal street gang.

The prejudice from this charging error is significant. The prosecution was permitted to elicit extensive evidence that had nothing to do with appellant under the invalid charge of conspiracy to participate in a gang. Because the prosecution broadly defined the three defendants and any other gang members as co-conspirators to the ongoing crime of conspiracy to participate in a gang with no fixed goal, the prosecution was permitted to introduce evidence relating to any of those alleged co-conspirators against appellant, regardless of whether appellant participated in or even knew of their activities.

Throughout trial, the prosecution continuously elicited inadmissible evidence against appellant pursuant to the invalid charge, most notably during the testimony of Agustin, and the court repeatedly overruled defense objections. (30 R.T. 5363-5364, 5380-5381; 31 R.T. 5428-5429, 5435-5439, 5442-5443, 5453-5455, 5458, 5464-5465, 5469, 5471, 5475-5476, 5480-5481, 5486, 5503.) The testimony that was admitted for this purpose included testimony detailing Johnson's drug dealing trade and testimony that Johnson agreed to put out a hit on a rival drug dealer. (31 R.T. 5429-5433, 5434-5439, 5441-5443.) There was no evidence appellant was involved in these activities or even knew about them.

C. Conclusion

This is not a case where the prosecution just had an unfortunate tendency to overprove its case, nor was the evidence against appellant overwhelming. The prosecution used inadmissible evidence for the very reason that its case against

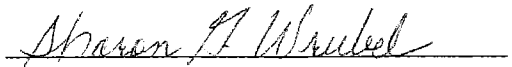
appellant was problematic. Even considering only those errors found in the opinion, the prosecution was permitted to prejudice the jury's view of appellant with the following: guilt by association based on evidence of violence and criminality perpetrated by his codefendants; expert testimony that appellant had confirmed that his tattoo meant he fancied himself as a shooter and was involved in prior shootings, or at least, favored such shootings; expert testimony that enjoyment of killing people is intrinsic to being a gang member, which explained why a productive member of society such as appellant would engage in the instant shootings; protecting the credibility of Jackson, a key prosecution witness against appellant, by improper impeachment of Richard; and eliciting extensive evidence that had nothing to do with appellant under the invalid charge of conspiracy to participate in a gang. Without the cumulative impact of the errors in this case, it is unlikely appellant would have been convicted of the charged crimes. He did not receive a fair trial.

CONCLUSION

Appellant requests this Court to grant review of his case and to reverse the judgment.

Dated: June 5, 2012

Respectfully submitted,



SHARON G. WRUBEL
Attorney for Appellant David Lee, Jr.

CERTIFICATE OF WORD COUNT

I, Sharon G. Wrubel, counsel for appellant David Lee, Jr., certify under penalty of perjury that this petition contains 8,363 words, as counted by Microsoft Word.

Executed on June 4, 2012, at Pacific Palisades, California.

Sharon G. Wrubel

SHARON G. WRUBEL
Attorney for Appellant David Lee, Jr.

Appendix A

Court of Appeal's Opinion[1]

[1] The copies of this petition include only the opinion's first page as approved in advance by this Court.

Filed 4/26/12

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. COREY RAY JOHNSON et al., Defendants and Appellants.	F057736 (Super. Ct. No. BF122135A, BF122135B & BF122135C) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant Corey Ray Johnson.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Kevin Dixon.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant David Lee, Jr.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, only the Introduction, the first paragraph of part III and section B. of part III of the Discussion, and the Disposition are certified for publication.

PROOF OF SERVICE BY MAIL

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I am over 18 years of age, employed in the County of Los Angeles, California, and am not a party to the subject action. My business address is: Post Office Box 1240, Pacific Palisades, CA 90272. On June 4, 2012, I served the within Appellant David Lee, Jr.'s Petition for Review by placing a true copy thereof enclosed in a sealed envelope with postage prepaid, in the United Sates mail in Pacific Palisades, California, addressed as follows:

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

Executed on June 4, 2012, at Pacific Palisades, California.

Sharon G. Wrubel