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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA,)	
)	
Plaintiff and Respondent,)	No. Z123456
)	
v.)	Sup.Ct.No. X123456
)	
JOHN SMITH,)	
)	
Defendant and Appellant.)	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

Honorable Merry Goodlaw, Judge

PETITION FOR REHEARING

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PETITION FOR REHEARING

TO: THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT, DIVISION EIGHT:

Appellant John Smith respectfully petitions this Honorable Court for a rehearing in the above-entitled matter after decision of this court filed , affirming the judgment. A copy of the opinion is attached as Appendix A for the Court's convenience. The reasons why a rehearing should be granted are set forth below.

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ARGUMENT

REHEARING SHOULD BE GRANTED BECAUSE THIS COURT IMPROPERLY DECLINED TO CONSIDER THE PROSECUTOR'S IMPROPER ARGUMENT IN ASSESSING THE PREJUDICE ENGENDERED BY THE GIVING OF AN INAPPLICABLE JURY INSTRUCTION

This Court agreed with appellant that the trial court improperly gave CALJIC 2.51 on motive because it was not supported by the evidence presented in this case. (Slip opn. pg. 7-8.) Thereafter, however, this Court concluded that the error was not prejudicial. (Slip opn. pg. 8) In reaching this conclusion, this Court stated:

“The prejudice to appellant, if any, came from the prosecutor’s use of that instruction as a platform to argue that appellant sold drugs because he was out of work and needed money. However, appellant did not object to that argument and so has waived any claim of prosecutorial misconduct on appeal. [Citation]”

Appellant agrees that the failure to object waived any claim of prosecutorial misconduct. Such waiver, however, is irrelevant to the discussion. Appellant did not argue that prosecutorial misconduct required reversal of the judgment. Rather, appellant argued that the instructional error required reversal, and that “the jury argument of the district attorney tips the scales in favor of finding prejudice....” (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071.)¹

Appellant’s assertion here was that the jury was misinstructed, and the misinstruction prejudiced appellant because the prosecutor used the instruction to urge the jury to make improper use of the evidence. Had the court not erroneously given the

¹In *Minifie*, the argument of the prosecutor might also have been characterized as misconduct because the prosecutor there was arguing about the lack of evidence which he had successfully moved to exclude. (See *People v. Varona* (1983) 143 Cal.App.3d 566, 570.) Yet, the *Minifie* court did not indicate that either an objection to the argument or a misconduct issue was raised there.

instruction, the jury would not have had the mechanism for misusing the evidence as urged by the prosecutor.

While failing to object to error which could be cured with a timely objection may preclude an appellant from raising the error on appeal, it does not make the error go away. It does not make the fact of the argument disappear or the impact that the argument may have had on other issues non-existent. *People v. Avena* (1996) 13 Cal.4th 394, 442, the case cited by this Court, does not hold otherwise. Rather, *Avena* merely holds that failure to object to prosecutorial misconduct waives the misconduct issue on appeal. Accordingly, appellant did not waive the prejudice engendered by the giving of the instruction which enabled the prosecutor to misuse it in argument to the jury.

Therefore, this Court should grant rehearing to consider the prejudicial impact of the erroneous jury instruction in light of the argument made by the prosecutor urging the jury to apply the instruction to evidence of poverty.

CONCLUSION

For the foregoing reasons, appellant respectfully urges this court to grant a rehearing in the instant case.

DATED: May 3, 2004

Respectfully submitted,

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WORD COUNT CERTIFICATION
People v. John Smith

I certify that this document was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 699 words.

SUZAN E. HIER