SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL A. LAMB, Defendant and Appellant.	Calif. Supreme Court No. S166168 Orange Co. Super. Ct. No. 03CF0441 AUTOMATIC APPEAL

SUPREME COURT
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APPELLANT'S REPLY BRIEF

From a Judgment of the Orange County Superior Court
The Honorable Wm. Froeberg, Judge Presiding

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	Calif. Supreme Court No. S166168
Plaintiff and Respondent,	Orange Co. Super. Ct. No. 03CF0441
v.	
MICHAEL A. LAMB,	AUTOMATIC APPEAL
Defendant and Appellant.	

ARGUMENT

I. CONDUCTING A SECOND PENALTY PHASE TRIAL AFTER THE FIRST PENALTY PHASE JURY FAILED TO REACH A VERDICT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AMENDMENT

The essence of appellant's argument is that the California statute is vastly at odds with the rule in other states and the federal jurisdictions, which permit only a single penalty phase trial, and thus is out of step with evolving standards of decency, the standard by which Eighth Amendment claims are evaluated. Respondent notes that this Court has rejected similar arguments, most recently in *People v. Trinh* (2014) 59 Cal.4th 216, 237-39 and asserts there is no reason to revisit the claim. (RB 62.) *Trinh* recognizes that "the United States Supreme Court has made clear that the Eighth Amendment embodies collective moral judgments about the standards of decency in a civilized society," and appellant has shown that the collective moral judgment in this

country weighs heavily against a mandatory second penalty trial in a capital case. (AOB 95-98.) Citing *Gregg v. Georgia* (1976) 428 U.S. 153, *Trinh* circumvents these collective judgments on the ground that they "do not constrain state legislatures from arriving at differing conclusions concerning the societal benefits of seeking a death sentence [or] of seeking a death sentence multiple times." (*Id.* at 186.) *Gregg v. Georgia* held that "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." (*Id.* at 186.) However, the case did not speak to t he issue here, which is the mandatory setting of a second penalty trial in a capital case.

Moreover, *Gregg v. Georgia* also held that the Eighth Amendment's evolving standard of decency is measured not only by state legislation, but also by the jury, as "a significant and reliable objective index of contemporary values." (*Id.* at 181.) Appellant contends that when a penalty phase jury is unable to reach a verdict, that lack of consensus is an "objective index" of the community values, and must be considered.

Because *Trinh* does not address the particular points made here, appellant submits that it should be reconsidered.

Respondent argues that appellant's argument that the first jury's split verdict[1] should be considered "in effect" a double jeopardy claim. (RB 62-63.) Appellant does

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1 At the first penalty trial, the jury reported itself at an impasse with votes of six to five, with one undecided. (28RT 5677-3.) According to the trial court's recounting at the Penal Code section 190.4 hearing, that reporting was six votes for death, five for life, and one undecided. (42RT 8641.)

not claim, directly or in effect, that double jeopardy is in issue. Appellant's claim rests squarely on the evolving standards of decency component of the Eighth Amendment and on the United States Supreme Court's mandate to consider both legislation and the jury as objective indices of the contemporary values that are key to assessing the constitutionality of a sentencing scheme.

Alternatively, appellant argues that in this case the second penalty trial violated appellant's federal due process rights. (AOB 100-103.) The basis for this claim is that after the first jury deadlocked at six for death, five for life, and on undecided, the prosecutor requested that the trial court "reconsider" its ruling excluding evidence of a supposed escape attempt. The trial court then ruled evidence it had considered insufficient to be suddenly admissible under a faulty rationale. (Arg. II, below & AOB 104-123.) Appellant contends that the result was a fundamentally unfair second penalty trial.

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Respondent argues that the due process claim is without merit because many factors could have resulted in different outcomes in the two penalty phase trials. (RB 63.) However, appellant's claim does not rest on the different outcomes of the two trials *per se*. Rather, appellant points out that the mandatory second trial provision allows or even encourages the maneuvering or maneuvering of the evidence that occurred here. That danger is surely the underlying rationale for the majority rule that allows the prosecution only one attempt at a death sentence.

In conclusion, fundamental fairness and the national consensus against retrials in capital cases rendered appellant's second penalty trial invalid in violation of the Eighth Amendment. The error is structural and requires vacating appellant's death sentence and imposing a sentence of life without possibility of parole.

II. THE ERRONEOUS ADMISSION OF EVIDENCE OF APPELLANT'S ALLEGED PARTICIPATION IN A CONSPIRACY TO SMUGGLE WEAPONS AND INSTRUMENTS OF ESCAPE INTO THE JAIL, AND TO ESCAPE FROM JAIL, EVIDENCE DEEMED INADMISSIBLE BY THE SAME JUDGE AT THE FIRST PENALTY TRIAL, VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL BY JURY AND A RELIABLE SENTENCING DETERMINATION

A. The Evidence of Appellant's Alleged Participation in a Conspiracy to Smuggle Weapons into the Jail Was Erroneously Admitted.

Appellant contends that the trial court erred in admitting evidence of the alleged conspiracy at the penalty trial, where the evidence of appellant's participation in a conspiracy to smuggle weapons and escape tools in to the jail was legally insufficient. The result was an unreliable penalty determination requiring reversal of appellant's sentence of death.

After hearing the prosecution's "conspiracy" evidence in the first trial, the trial court struck it on the ground that the "gulf was too large" to "connect the dots" of the supposed conspiracy to appellant. (25RT 5060-61.) After the hung verdict at penalty phase, the trial court changed course and declared that the evidence once considered "insufficient" now "needed to come in." (28RT 5790-96.) Appellant contends that the trial court's initial ruling was correct. An analysis of the evidence proves it so.

The essence of a conspiracy is the agreement; proof of the agreement does not require evidence of a formal agreement but here must be some manifestation of a mutual understanding. (*People v. Johnson* (2003) 57 Cal.4th 250, 264.) This manifestation can be proved through circumstantial evidence, that is, evidence from which a principal fact can be inferred. An inference is a deduction of fact that may "logically and reasonably be drawn from another fact or group of facts." (Evid. Code, section 600(b).) For such an inference to be

drawn the circumstantial facts must so "'so connected with the fact sought, as to tend to produce a persuasion of its truth." (Witkin, 1 *California Evidence* (4th ed.) Circumstantial Evidence, section 1, p. 322.)

Respondent runs afoul of these principles by pointing to circumstantial facts (involving Wolfe and Witak) insufficiently connected with the fact sought to be proven (appellant's agreement to smuggle escape weapons). Respondent claims that there was "powerful circumstantial evidence" in support of a finding that appellant was part of an "ongoing conspiracy" to smuggle weapons and escape tools into the jail. (RB 64, 72.) However, labeling the evidence "powerful" does not make it so.

Respondent relies on these facts as tending to show appellant's participation in a conspiracy:

1. Wolfe (sometimes called "Walsh" by respondent), as appellant's friend and a PENI associate "would have been motivated" to assist appellant. Monika Witak, also a friend, "had a motive to help" appellant. (RB 70.)ver, there was no evidence that Witak and Wolfe knew each other or that they had ever communicated with each other. The fact of their friendship with appellant does not lead logically or reasonably to the conclusion that they entered into a conspiracy, or more to the point, that appellant did.

2. On February 10, 2003, Witak wrote a letter to appellant stating she did what he asked and she could not "force him" to "pack his ass" and that she had the other part ready. (RB 70.) On February 12, 2003, Wolfe was released from custody; two days later a warrant for his arrest issued for a parole violation. (RB 71.)

Because Witak reported this information to appellant *two days before* Wolfe was released from prison, her letter does not lead logically or reasonably to an inference that she had asked Wolfe to assist in a conspiracy to smuggle escape weapons to appellant. As stated, there was no evidence Witak had written to or visited Wolfe in prison at any time.

3. On February 19, 2003, Wolfe was arrested with hacksaw blades, a baggie of marijuana, a syringe and some methamphetamine. (RB 71.) Wolfe was with a woman named Laurice Sloan (and not with Witak). Wolfe's possession of contraband does not lead logically or reasonably to an inference that he was on his way to smuggle those weapons to appellant in jail. There was a warrant out for him, and had he shown up at the jail, he would have been arrested.

4. On February 22, 2003, Witak attempted to visit appellant in jail; she had a note in her possession saying there was a manhunt and she was being

watched. (RB 71.) The note is too vague and general to support an inference that she was being watched because of the alleged conspiracy.

5. In May of 2003, Wolfe wrote a letter to appellant saying that his mother had called "Stell" as he requested; Witak's middle name is Izabella. (RT 71.) Because this letter was written two months after the conspiracy alleged to have occurred "on or about February 19, 2003,"[2] the letter shows nothing other than a possible connection to Witak. The chain of inferences is too long and tenuous to support the inference sought by respondent. First, one would have to conclude that Stell was the same person as Stella, that Stella was the same person as Monika Izabella Witak, and then, if Wolfe's mother called Witak sometime prior to May of 2003, that the mere fact of a phone call logically and reasonably supports an inference that Wolfe, Witak and appellant entered into a conspiracy two months earlier. Even assuming *arguendo* that it did, the letter does not support an inference that the conspiracy was to smuggle escape weapons into jail.

6. Appellant had "constructive possession of a metal shank" on February 19, 2003, and there was "evidence of a tool capable of cutting metal having been used on or before *June 22, 2005*," in appellant's cell, and *on May 30,*

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[2] See 3CT 641 [Notice of Aggravating Evidence]; see also 10CT 2436 [jury instruction alleging conspiracy "on or about February 19, 2003."

2006, appellant had "constructive possession of a copper-colored shank." (RB 72; emphasis supplied.)

Respondent contends that these facts "could be viewed as the ongoing conspiracy's success." (RB 72.) The supposed later or ultimate "success" of a conspiracy not proven does not prove the conspiracy. Appellant's "constructive possession" of a shank on February 19, 2003, the day of Wolfe's arrest, tends to negate an inference that Wolfe was acting in accordance with the alleged conspiracy to smuggle weapons into the jail that day. That the officers found shanks on a regular basis proves only the obvious, i.e., the well-known fact that shanks are routinely found in jails and prisons.

The facts recited by respondent might raise a "strong suspicion" that there was a conspiracy to smuggle something into the jail; but "[s]uspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 324,[3] quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Respondent cites *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 164, which upheld a conviction based on "circumstantial evidence and the reasonable inferences drawn therefrom." (RB 75.) However, the defect in the prosecution's

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3 *People v. Thompson* was overruled on other grounds in *People v. Scott* (2011) 42 Cal.4th 452, 470.

case here was not that it depended on circumstantial evidence, but *that the reasonable inferences from that circumstantial evidence* did not amount to substantial evidence in support of a conspiracy. To counter appellant's argument that the evidence did not show violent criminal activity in which appellant participated, respondent argues as an *ipse dixit* that the "conspiracy also included a plan to smuggle weapons" into the jail. (RB 75.) However, even assuming *arguendo* that the evidence showed an agreement to smuggle weapons into the jail, there is no evidence from which it can be logically inferred – without speculation – that the plan was to smuggle weapons as opposed to other forms of contraband.

In short, respondent has strung together bits and pieces of circumstantial evidence that can be said to support appellant's participation in the alleged conspiracy "only by arbitrary application of a series of tenuous hypotheses." (*People v. Reyes* (1974) 12 Cal.3d 486, 500 [reversing defendant's conviction because the evidence against him consisted of entirely tenuous circumstantial evidence].) As the trial court explained at the beginning: the "gulf [i]s too large" to "connect the dots." (25RT 5060-61.)

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B. The Erroneous Admission of the Challenged Evidence Prejudiced Appellant.

Respondent submits that any error in admitting the evidence should be viewed as harmless under a state standard for prejudice. (RB 79.) Appellant contends that because the evidence was extremely prejudicial but irrelevant, its admission violated his federal due process rights. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Estelle v. McGuire* (1991) 502 U.S. 62, 70-74 [error rendering trial fundamentally unfair may violate federal due process].) Nonetheless, the error was prejudicial under any standard of review. Even assuming *arguendo* some marginal relevance, the many and tenuous links in the chain of inferences rendered it insufficiently reliable under the Eighth Amendment, which requires a higher degree of scrutiny and an "acute need for reliability" in capital sentencing. (See AOB 99 and cases cited therein.)

Appellant explained in the Opening Brief that the admission of the conspiracy prejudiced him at penalty phase because (1) this Court has acknowledged that erroneous admission of escape evidence may weigh heavily in the penalty determination; (2) the first jury failed to reach a penalty verdict based on the same aggravating evidence as the second jury heard *except* for the evidence of the attempted conspiracy to escape, which was stricken in the first

penalty phase; (3) and the second penalty jury had a difficult time reaching a verdict. (AOB 121-123.)

Respondent agrees that "erroneously admitted escape evidence may 'in some cases' 'weigh heavily in the jury's determination of penalty. (RB 79-80, quoting *People v. Gallego* (1990) 52 Cal.3d 115, 196.) Nonetheless, respondent argues that this "is not such a case" because the conspiracy evidence was "relatively insignificant" compared to the other aggravating evidence, and the prosecutor's argument accounted for only nine pages out of a 149-page closing argument. (RB 80.)

Respondent relies on *People v. Jackson* (1996) 13 Cal.4th 1164, 1233, which is inapposite because in *Jackson*, in contrast to this case, the challenged evidence of an Oregon escape in Oregon was deemed *cumulative* to evidence of the defendant's participation in a Riverside County jail escape in which a guard was restrained and robbed; thus in *Jackson*, the cumulative evidence would not have "'weighed heavily'" in the penalty determination. (RB 81.) This case is very different. The conspiracy evidence was not cumulative, yet it was obviously extremely important and of great significance to the prosecution at trial, given the efforts to seek its admission in the second penalty trial after the trial court had ruled it inadmissible in the first penalty trial. (See e.g., *Yohn v. Love* (3d Cir.

1996) 76 F.3d 508, 523, fn. 28 [rejecting state's harmless error argument because it downplayed the importance of the evidence prosecutor fought so hard to be admitted at trial].) As this Court stated in *People v. Cruz* (1964) 61 Cal.2d 861, 868, "[t]here is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it." (Cf. *Singh v. Prunty* (9th Cir. 1998) 142 F.3d 1157, 1163 ["In the adversarial process, the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case."].)

Here, the prosecutor considered the conspiracy to escape evidence essential at the second penalty trial. Based on the cited authorities, respondent's argument as to the insignificance of the evidence should be rejected.

Appellant points out that the evidence of the alleged conspiracy was the only difference between the evidence presented to the deadlocked jury and the final penalty jury. Respondent labels appellant's claim as "speculation" that "does not demonstrate prejudice," although he cites no authority to support his assertion.[4] (RB 81.) Appellant refers the Court to *People v. Frazier* (2001) 89 Cal. App. 4th 30, 39, which held that "[t]he fact defendant was tried twice before on

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[4] The Court of Appeal refused to accept an argument unsupported by citation to authority in *People v. Beltran* (2000) 82 Cal.App.4th 693, 697, fn. 5 ("Respondent contends, without discussion, citation to authority or citation to the record, that Beltran 'conceded' the issue below and has therefore waived it. As a result, we deem the waiver issue waived."

nearly identical evidence is itself a strong indication the People's evidence was not overwhelming." (See also *People v. Ross* (2007) 155 Cal.App.4th 1033, 1055 [finding it more than reasonably probable, and considerably more than an abstract possibility, that the defendant would have achieved a more favorable results in the absence of the errors, relying first on the fact that the jury in the first trial was unable to reach a verdict].) A prior jury deadlock is especially persuasive evidence of prejudice, where no similar error occurred at the earlier trial. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099-1100 [differing results of the two trials showed substantial and injurious effect on the jury verdict].).

Accordingly, appellant's argument is not speculation but is based on precedent. The fact that the prior deadlocked penalty trial based on the same evidence – other than that relating to the conspiracy -- indicates both that the prosecution's case against appellant for death was not overwhelming, and that the challenged evidence strengthened it.

In sum, the case for death was close, as evidenced by the first jury deadlocking at five votes for one sentence, six for the other, and one juror