

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____)	California Supreme Court
PEOPLE OF THE STATE OF CALIFORNIA)	No. S169750
)	
Plaintiff and Respondent,)	
)	Superior Court
v.)	No. BA244114
)	
TIMOTHY J. McGHEE,)	
)	
Defendant and Appellant.)	
_____)	

APPEAL FROM THE LOS ANGELES
COUNTY SUPERIOR COURT

The Honorable Robert J. Perry, Judge

SUPREME COURT
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APPELLANT'S REPLY BRIEF

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California Supreme Court

DEATH PENALTY

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APPELLANT'S REPLY BRIEF

Argument

I

The trial court prejudicially erred by discharging a qualified and unbiased juror who was deliberating based on the evidence presented.

Appellant argues the trial court erred by finding that Juror No. 5 had an anti-police bias and failed to deliberate. (23 RT 4679.) Instead, that juror simply accepted the defense theory of the case. (AOB 72.)

The police actions in the present case

At trial, the defense established that the investigating detectives contaminated the investigation by coaching the state's key witnesses and offering incentives that no reasonable person could pass up. (21 RT 4352, 4346-4348, 4355-4356, 4374, 4397-4398.)

The level of coaching by the officers is unprecedented in the case law. The witnesses were all gang members, most of whom were high at the time of the alleged incidents or had acknowledged that they did not see the crimes take place, and they were promised and received life changing benefits in exchange for testimony that helped the prosecution.

Gabriel Rivas, the key witness in the Cloudy Martin killing, acknowledged that Detective Teague spent two hours in an unrecorded "preinterview" providing him with details of the crime he should describe when the formal recorded interview began. (13 RT 2662-2663.) Teague essentially told him what to say during the recorded interview.

Mark Reccio was the primary witness in the Ryan Gonzalez killing. He also provided a recorded interview that followed a 90 minute "preinterview" by Detective Teague. (14 RT 2845-2846.)

Duane Natividad was in the car when Margie Mendoza was

killed. He told police he didn't see the shooter, but the detectives presented him with a photo lineup and repeatedly pointed to appellant's photo suggesting that he shot Mendoza. (16 RT 3421, 3438, 3449.)

Juan Rodarte was the primary witness in the uncharged killing of Christina Duran. Detective Teague questioned him about charges he was facing and insisted that Rodarte implicate appellant in Duran's murder. (34 RT 6906.) Teague said he didn't care if Rodarte lied, as long as he implicated appellant. (34 RT 6906.)

Pedro Sanchez was interviewed several times by the detective who always mentioned appellant's name and showed him appellant's photo, but Sanchez still couldn't identify appellant. (12 RT 2462.)

Perhaps the best example of the officers' absolute willingness to break all of the accepted rules for investigating crimes, was shown by their actions in providing all police reports and "murder books" to two prison inmates serving life terms, offering release from prison in exchange for their testimony consistent with the information provided by the police. (2 RT 53-55.) Neither of the witnesses testified, but the evidence supports appellant's claim that the police investigating the case were not involved in a search for the truth. Instead, the police were staging a production where witnesses would say what the officers

directed them to say, in exchange for enormous benefits.

Benefits offered by police

Further evidence of the unreliability of the witness testimony was demonstrated by the tangible benefits the police offered in exchange for their incriminating testimony.

Mark Gonzalez was a key witness in the Cloudy Martin case, and he was given immunity relating to his own murder charge in exchange for incriminating testimony against appellant. (16 RT 3330-3331.)

Wilfredo Reccio was a key witness in the Ryan Gonzalez killing and was facing multiple life terms or a death sentence for a double murder he was believed to have committed. (14 RT 2819-2830.) Charges were never filed in that case, and Teague even offered him food, clothing, housing, dental care, and \$5,000 to sweeten the deal. (14 RT 2842, 2868-2869.)

Gabriel Rivas was a crack cocaine and crystal methamphetamine addict who had been arrested for a probation violation, and reported he would have said anything to get back on the street to obtain drugs. (13 RT 2660-2661.) The deputy district attorney acknowledged the prosecution used the drug charge as leverage to get an incriminating statement in this case, and Detective Teague told Rivas those charges

would be dropped if he implicated appellant. (13 RT 2660-2661; 26 RT 5132.)

John Perez, an important witness in the police ambush case, had also been arrested but never faced charges after he testified against appellant. (14 RT 2977-2979.)

And again, relevant to the present issue is the detective's offer of "get-out-of-prison-free" cards for the life prisoners who were given the murder books prior to being interviewed — even though those witnesses were ultimately not called to testify. (2 RT 53-55.)

The witnesses' drug use at the time of the crimes

The defense argued at trial that the state's key witnesses should not be believed for various reasons, including the fact that so many of them were high at the time of the shootings.

Mark Gonzalez was a methamphetamine addict who was high at the time of the police ambush he allegedly viewed. (16 RT 3309, 3314-3315.)

Erica Rhee, Duane Natividad and Monica Miranda were the primary witnesses to the Margie Mendoza shooting. Rhee and Natividad acknowledged they were high on methamphetamine at the time of the killing. (16 RT 3436; 33 RT 6689.) Miranda didn't testify

that she was high at the time of the killing, but she acknowledged that she was an addict who was high when she testified earlier in the case, and admitted that she lied to the police about appellant's involvement. (19 RT 3777, 3782-3784.)

Pedro Sanchez and Juan Cardiel acknowledged they were high on acid at the time of the shooting in their case. (12 RT 2417, 2451, 2453.)

So the defense presented a strong case that the state's witnesses should not be believed and the police cheated while investigating and preparing the case.

This wasn't a case where police overstepped their authority a bit, or performed their duties aggressively. Rather, it's a case where the police officers showed a complete disdain for the law and established guidelines for law enforcement. Juror No. 5 refused to convict a person after this vast misconduct by the police officers who were tasked with investigating the case. Despite the police misconduct, the court ruled that Juror No. 5 was biased against police in general and could not give the prosecution a fair trial. (23 RT 4647.)

Juror No. 5's participation in the deliberations

The record shows that Juror No. 5 disagreed with the others, and two jurors were so frustrated they wrote a note saying Juror No. 5 "was

not capable of making a fair decision... using speculation as facts and has no rational explanation as to why he feels the way he does, other than saying every prosecution witness was coached and lying..." (15 CT 3753.)

But most of the jurors questioned by the court reported that Juror No. 5 was in fact deliberating.

Juror No. 4, the foreperson noted that Juror No. 5 had not "shut down. He's not not talking." (23 RT 4592-4593.)

Juror No. 2 said No. 5 was "leery" of the state's witnesses but not biased. It wasn't that he had a police bias "it's more just a disbelief of the witnesses." (23 RT 4605.)

Juror No. 6 said there was no bias and "Everyone is open-minded." (23 RT 4608.)

Juror No. 3 said No. 5's position was a product of his belief that the police coached the witnesses. (23 RT 4620,4623.)

Juror No. 7 said No. 5 took a narrow view of the evidence but there were "healthy discussions." (23 RT 4626.)

Juror No. 8 said No. 5 was hard-headed at the beginning but then opened up and was "talking more." (23 RT 4630.) He just didn't believe the witnesses because they had been coached. (23 RT 4629, 4631.)

Juror No. 12 said No. 5 had an “anti-police bias” because he believed the witnesses had been coached. (23 RT 4631-4633.)

So the record shows that while there was debate during the deliberations, and the pro-prosecution jurors reported the problem as a general police bias, Juror No. 5 was in fact engaged in the deliberations.

Respondent’s argument

Respondent argues the trial court properly found Juror No. 5 was not fairly deliberating on the evidence, and that he had demonstrated a disqualifying bias. (Respondent’s Brief (RB) 58.)

Respondent admirably calls the court’s attention to *People v. Armstrong* (2016) 1 Cal.5th 432, published after the opening brief in this case. In *Armstrong*, a juror (No. 5) was discharged for failing to deliberate based upon the observations of a single juror who noted Juror No. 5 was looking at her book and sending text messages on her cell phone during deliberations. (*Id.* at p. 451.) The court also found that while the juror initially had an open mind, she failed to “deliberate further” once reaching an opinion based on the evidence. (*Id.* at pp. 451-453.)

This court found the evidence did not support the trial court’s findings. First, the evidence suggesting that Juror No. 5 looked at her

book or cell phone during deliberations was “*de minimus*.” (*Id.* at p. 452.) Moreover, no failure to deliberate is shown where a juror refuses to change her mind during deliberations, as this is an indication that the juror views the evidence differently from the way others view it. (*Id.* at p. 453.)

Respondent seeks to distinguish *Armstrong* by suggesting that the trial court in that case only spoke with five jurors, unlike the trial court in the present case who spoke with all 12 jurors. (RB 60.) Moreover, in *Armstrong*, unlike the present case, the court did not refer to the note calling the court’s attention to the problem. (RB 61.) Appellant suggests these are not meaningful distinctions, and that *Armstrong* supports the present claim that Juror No. 5 was deliberating when discharged.

Regarding bias, respondent suggests that Juror No. 5 was not simply disregarding all of the witnesses who had been coached, he was disregarding all of the prosecution witnesses. (RB 58-59.) So respondent argues that in a case where the police coached most of the witnesses, a juror who refuses to find guilt beyond a reasonable doubt is biased for not considering the testimony of any remaining witnesses who might not have been coached.

Juror No. 5's bias, if any, was against the police officers who cheated in this case by offering freedom to junkie gang members facing life terms on pending murder cases, on the condition that they implicate appellant. The officers even supplied the potential witnesses with the pertinent facts. This was not a bias in the sense of prejudging the case. (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 72-73.)

This was a case where the allegedly offending juror reasonably found the state's case lacked credibility. The better question might be how the pro-prosecution jurors were not questioned for pro-police bias in the face of this scandalous presentation of evidence, where the offending officers "retired" before trial, and could not to be questioned because of claimed disabilities. (13 RT 2685-2686, 2692-2693.)

Respondent suggests Juror No. 5 did not hold the defense witnesses, some of whom had suffered prior convictions, to the same standard as the prosecution witnesses. (RB 59.) But the state has the high burden of convincing the jurors beyond a reasonable doubt as to a defendant's guilt, and where the state presents coached or otherwise unreliable witnesses it doesn't meet its burden simply by showing the defense witnesses may have suffered prior convictions. The prosecution obviously believed it needed to present the tainted witnesses in order to

meet its burden, or it otherwise would have excluded them.

Respondent argues Juror No. 5 had a disqualifying bias due to the fact that he rejected the state's case due all of the improprieties.

This is not a case like *People v. Barnwell* (2007) 41 Cal.4th 1038, where the juror was shown to have a bias against police officers in general. Here, the police told the state's key witnesses what to say, and agreed to dismiss pending murder charges against Mark Reccio, Mark Gonzales, Wilfredo Reccio, and they dismissed charges against drug addict Gabriel Rivas who would have done anything to get back on the street to get his drugs, and John Perez.

Respondent claims that despite the massive problems with the way the police handled the key witnesses in this case, Juror No. 5 was biased against all police. But the record shows Juror No. 5 took the reasonable position that he did not believe the state's witnesses who were coached and endorsed by police in this case.

The evidence showed the police cheated, the state's witnesses were gang members and drug addicts who were incentivized to implicate appellant, and that Juror No. 5 refused to convict because of these facts. Moreover, while there was disagreement and pressure on Juror No. 5 during deliberations, he continued discuss the evidence.

The record did not show by a demonstrable reality (or any standard) that he had failed or refused to deliberate. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) He simply disagreed with the others in a case where the police had repeatedly overstepped its lawful authority. His discharge was improper and requires reversal of the judgment.¹

II

The state committed outrageous government conduct by coaching the gang member witnesses, telling them what to say and conditioning substantial benefits on testimony implicating appellant.

Appellant argues the police misconduct in repeatedly manufacturing evidence by coaching the informants on what to say during recorded interviews, and telling witnesses to select appellant's photo from a lineup constitutes outrageous government conduct in violation of appellant's right to due process. (AOB 83.) Moreover, this evidence tampering also constitutes prosecutorial misconduct because it was done by members of the prosecution team. (AOB 95.)

Respondent doesn't contest any of the allegations of misconduct,

¹ The prosecutor's offer to appellant of a life without parole sentence if he agreed to waive this appeal is circumstantial evidence that he lacked confidence in the court's decision to discharge the holdout juror. (24 RT 4742-4744.) This discussion followed the trial court's acknowledgment that "throwing the juror off" might later be found to be reversible error. (24 RT 4736.)

and instead argues the issues are forfeited for the lack of an objection in the trial court. (RB 64.)

However, a defendant can raise for the first time on appeal a constitutional issue, or a pure question of law which is presented by undisputed facts. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277.) And the court has the inherent supervisory power to correct deliberate misconduct when no other remedy can restore fairness. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 883.)

Respondent next argues on the merits, that whether the defense of outrageous government conduct even exists in California is an “open question.” (RB 64; citing *People v. Smith* (2003) 31 Cal.4th 1207, 1227.)

Appellant asks this court to explicitly find that the defense does apply in this state, and the present case shows a perfect example of it. The police engaged in witness tampering, and the subornation of perjury in trying to convince unreliable gang members with questionable knowledge of the facts to testify against appellant. The police assumed appellant was guilty of the charged crimes, but couldn't offer any convincing proof without manufacturing evidence. The state's decision to proceed in this manner does great damage to the credibility of our criminal justice system, and appellant requests this court apply

the defense of outrageous government conduct.

Respondent mistakenly suggests appellant simply seeks to have this court reweigh the evidence. (RB 66; citing *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Not so. Appellant asks the court to apply a legal doctrine to the illegal police actions that respondent doesn't challenge.

Appellant further asks this court to find that by turning a blind eye to this activity, the prosecution committed misconduct. (See *People v. Dekraai* (2016) 5 Cal.App.5th 1110, where the court approved of the recusal of the entire DA's office given its implicit or explicit participation in the sheriff's department's confidential informant program.)

Finally, appellant asks this court to find that prosecuting a capital defendant with such manufactured evidence violates the heightened reliability requirement of the Eighth and Fourteenth Amendments. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Respondent offers no argument to this claim.

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III

The police coerced the statement of Gabriel Rivas and the admission of the statement violated appellant's right to due process.

Appellant argues the police coercion of the testimony of Gabriel Rivas violated his right to due process under *People v. Badgett* (1995) 10 Cal.4th 330, 343-345. (AOB 101-110.) Again, Rivas was strung out on crack cocaine and crystal methamphetamine, and was in custody on an assault charge. (13 RT 2658-2661.) He testified that he would have done anything at the time to get back on the street and obtain drugs. (13 RT 2661.) So the police provided him with the details of the Cloudy Martin killing, including the number of shots fired, the number of guns used in the shooting, and Rivas then repeated those details in his recorded statement. (13 RT 2662-2663.)

Respondent again offers no challenge to the facts, but claims the issue has been forfeited for the lack of an objection. (RB 68.) However, given that the facts are not in dispute, this court has the authority to rule on the constitutional issue presented. (*People v. Vera*, supra, 15 Cal.4th at pp. 276-277.) Appellant respectfully asks that the court address the important issue that was produced by the misconduct of the state agents.

On the merits, respondent argues there was no coerced statement because the police simply offered Rivas benefits in exchange for his cooperation, and this is a common and accepted practice. (RB 69.) Respondent further argues that Rivas was equivocal when describing the police coaching, and he also suggested his testimony was influenced by rumors he heard on the street. (RB 70.) That the facts planted by the police were supported by unsubstantiated rumors on the street (that could also have been spread by the police) does not rebut a claim of coercion. Such evidence is inherently unreliable and inadmissible.

Finally, contrary to respondent's claim, the fact that the defense cross-examined Rivas about the coerced statements did not negate the violation. (RB 70.) The police coerced the statement of a drug addict sitting in jail by offering to let him go if he gave a recorded statement with the incriminating facts they provided him.

Respondent argues that any error committed was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24. This is so, according to respondent because Mark Gonzalez testified that appellant admitted participating in the Cloudy Martin killing. (RB 72.) But Gonzalez's testimony was also suspect as he was a violent drug dealer who was given immunity in his own murder case in exchange for his testimony

against appellant. (16 RT 1330-1331.) The state seeks to corroborate the testimony of an unreliable incentivized snitch with the testimony of another incentivized snitch. The state offered Gonzalez (who was facing life in prison) his complete freedom if he testified against appellant. This is hardly overwhelming evidence of guilt independent from the constitutional violation as respondent suggests.

Respondent also suggests overwhelming evidence of guilt was established by the rap lyrics appellant had written, which glorified “execution style murder.” (RB 72.) But the author of the lyrics (assuming it was appellant) indicated they were pure fiction, and didn’t establish his state of mind at the time of the killing. (See *People v. Zepeda* (2008) 167 Cal.App.4th 25, 35.) This was hardly overwhelming evidence of appellant’s guilt in the Cloudy Martin murder.

Respondent also notes the toolmark evidence recovered from the crime scene was matched with the toolmark evidence found in the Pedro Sanchez and Juan Cardiel shooting, and both identified appellant as their attacker. (RB 72.) Both of those witnesses were high on LSD at the time of that incident, and the police repeatedly tried to get the men to identify appellant but neither did, and appellant was acquitted of those charges. (12 RT 2452-2453, 2521.)

This was far less than overwhelming evidence of guilt, and not close to meeting the state's burden of establishing that the conviction of appellant in the Cloudy Martin incident was "surely unattributable" to the error in coercing the testimony of Gabriel Rivas. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

IV

The admission of Rivas's videotaped statement also violated appellant's right of confrontation where the detective who took the statement had lost his memory and could not be questioned.

Appellant argues the introduction of Rivas's statement also violated his confrontation clause rights under *Crawford v. Washington* (2004) 541 U.S. 36, because he never had a chance to cross-examine Detective Teague who had lost his memory and could not be questioned. (AOB 110.)

Respondent argues the issue is forfeited for the lack of an objection. (RB 73.) Appellant again asserts this is a fundamental constitutional issue where the facts are uncontested and may be addressed by this court. (*People v. Vera, supra*, 15 Cal.4th at pp. 276-277.)

Respondent next argues there was no confrontation clause violation because appellant was able to cross-examine Rivas. (RB 73-

74.) Respondent contends that because the state did not offer a statement from Teague, appellant had no constitutional right to cross-examine him. (RB 74.) Respondent misses the point: the state's case on the Cloudy Martin charges was based largely on statements Teague made to Rivas in an earlier untaped "coaching" session. As Rivas himself stated, what he knew about the Cloudy Martin murder was based on "coaching" by Detective Teague. (13 RT 2662-2665.) Under these circumstances, it is obvious that Teague was a material witness to the circumstances and reliability of Rivas' subsequently taped account of the murder. Appellant repeats his claim that he had a right to confront Teague about those statements for the reasons provided in the opening brief.

V

The trial court violated appellant's right of confrontation by admitting Christina Duran's videotaped interview at both phases of the trial.

Appellant argues the trial court violated his Sixth Amendment confrontation clause rights by admitting Christina Duran's videotaped police interview at the guilt and penalty phase trials. (AOB 114.)

The trial court admitted the statement under Evidence Code section 1350, after finding appellant had a motive to kill Duran, and

that he either killed her or had someone else do it. (5 RT 916-917.)

Appellant argues the court's ruling violated *Giles v. California* (2008) 554 U.S. 353, which held the forfeiture-by-wrongdoing doctrine does not trump a defendant's Sixth Amendment rights unless the prosecution establishes defendant's purpose in killing the witness was to prevent her from testifying. (*Id.* at p. 368.)

Respondent first argues the issue is forfeited because the defense failed to assert at trial that Duran gave her statement in exchange for leniency. (RB 85.) However, the issue was fully litigated, and is properly before this court.

Respondent claims that it's not improper to offer benefits to a witness, and in fact, it's a common practice. (RB 85.) While it is a common practice, offering leniency to someone facing criminal charges, in this case murder, certainly reflects on the reliability of the statement. In the present case, Duran was arrested in connection with the Margie Mendoza murder, gave a statement implicating appellant and was then released with a promise that the police would do everything they could to help her, but couldn't guarantee anything specific. This promise was relevant to the reliability of her statement.

Respondent next argues, on the merits, that the trial court