S209975

Supreme Court No. S209975

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Petitioner, v. FLOYD LAVENDER III and MICHAEL JAMES GAINES, Defendant-Respondent.	CA No. D057655 Imperial County Case No. JCF21566 (Prior related case S204813)

APPEAL FROM IMPERIAL COUNTY SUPERIOR COURT
HONORABLE DONAL DONNELLY, JUDGE

APPELLANT GAINES' ANSWER TO PETITION FOR REVIEW IN THE SUPREME COURT AFTER THE UNPUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, REVERSING THE JUDGMENT

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

INTRODUCTION

In 2010, Michael Gaines and his cousin, Floyd Lavender, were convicted of torturing, kidnapping and killing a teen runaway in 2003, based on highly conflicted testimony from four drug-using witnesses to the alleged torture and kidnapping who never reported their ordeal to police. In July 2012, the Court of Appeal, Fourth Appellate District, Division One, reversed the convictions, finding them irreparably tainted by juror discussions describing the defendants' failure to testify as proof of their guilt. That same month, the Attorney General petitioned for rehearing, arguing for the first time ever in the case that the Court of Appeal could not reverse the convictions without an

additional evidentiary hearing on the juror misconduct claims, even though Mr. Gaines had properly filed juror and investigator declarations in support of his misconduct claim; the district attorney had successfully argued against a hearing in 2010; and the Attorney General had previously asserted in its appellate briefs that no hearing was necessary. The Court of Appeal denied rehearing, so the Attorney General asked this Court to require the case be remanded for an evidentiary hearing.

This Court refused to require that an evidentiary hearing be held; instead, it granted review and transferred the case back to the Court of Appeal with directions to consider three cases in which remands for further proceedings had been required. After considering supplemental briefing from both parties, the Court of Appeal issued a second opinion in March 2013, again reversing the convictions and explaining in detail why the cases cited by this Court's remand order did not require an evidentiary hearing in this case.

Unhappy with the result, the Attorney General has filed its second petition for review in this case, presenting exactly the same question it presented in its prior petition. The petition presents no split of authority or important question of law. This Court previously left the determination of when an evidentiary hearing must be held to the discretion of the trial court. (*People v. Hedgecock* (1990) 51 Cal.3d 395.) The opinion in this case no way

contradicts or undermines *Hedgecock*.

Because the petition here seeks nothing more than a different result, and because – as the Court of Appeal explained in its March 2013 opinion – requiring the defendants to "reinvent the wheel" at an evidentiary hearing years after the trial would be patently unfair [slip op. at 41-42], this Court should deny review.

STATEMENT OF THE CASE

For purposes of this petition, the opinion accurately states the facts and procedural history relating to the issues presented here.

ARGUMENT

PETITIONER'S CLAIM DOES NOT MERIT REVIEW

Four and a half years after a teen runaway's lifeless body was found in an Imperial County irrigation ditch, Michael Gaines and Floyd Lavender were charged with her kidnapping, torture and murder. Another two years after that, the two men were convicted, based on bizarre and wildly contradictory testimony from witnesses who supposedly used methamphetamine with the girl during her final hours yet who never contacted police about the all-night horror show of violence and torture they claimed to have experienced before the teen was killed.

Mr. Gaines and Mr. Lavender both exercised their Fifth Amendment

privilege not to testify. In direct contradiction of the trial court's instructions, at least one juror and perhaps as many as four jurors discussed the defendants' failure to testify and commented that the omission constituted substantive evidence of their guilt. Based on this misconduct, the Court of Appeal, Fourth Appellate District, Division One, concluded that Mr. Gaines and Mr. Lavender deserved a new trial.

Petitioner sought review, and on October 24, 2012, this Court directed the Court of Appeal, Fourth Appellate District, Division One, to reconsider its decision in light of *People v. Bryant* (2011) 191 Cal.App.4th 1457; *People v. Von Villas* (1992) 11 Cal.App.4th 175; and *People v. Perez* (1992) 4 Cal.App.4th 893. In a thoughtful, well-reasoned opinion, the Court of Appeal analyzed each of those cases closely and found on March 6, 2013, that no further jury misconduct hearing is necessary. It once again reversed Mr. Gaines' convictions and ordered a new trial, explaining that "because the evidentiary landscape here was devoid of forensic certainties and therefore turned entirely on close and substantial credibility assessments of the veracity of prosecution witnesses whose testimony was at best in disarray," the prosecution had failed to rebut the presumption of prejudice arising from the misconduct. [Slip op. at 38.]

Having lost twice in the Court of Appeal, petitioner has filed its second

petition in this Court asking it to order a new juror misconduct hearing rather than a new trial. Petitioner does not and cannot successfully rebut the lower court's explanation of why this case presents a starkly different procedural history than those remanded for further proceedings in *Perez, Von Villas* and *Bryant.* Neither can petitioner satisfactorily explain why it fought tooth and nail to prevent an evidentiary hearing until the Court of Appeal ruled against it in 2012, in violation of judicial estoppel principles.

More than 20 years ago, this Court made clear that a trial court faced with conflicting evidence in support of a juror misconduct claim ***may but need not*** order an evidentiary hearing to resolve material conflicts in the evidence. (*People v. Hedgecock* (1990) 51 Cal.3d 395.) Since that time, no case has set forth any broad rule delineating when a trial court abuses its discretion for failing to conduct such a hearing. Rather, the courts have addressed a variety of discrete factual scenarios and have sent cases back for hearings only a few times, when the trial court's procedures for adjudicating juror misconduct claims were found wholly inadequate. (E.g., *People v. Perez, supra*, 4 Cal.App.4th at p. 905 [no juror declarations filed and motion for new trial only made after court said, in response to request for funding to interview jurors, that it would assume all 12 jurors would agree misconduct occurred]; *People v. Von Villas, supra*, 11 Cal.App.4th at pp. 251-253 [no

jurors signed affidavits but parties stipulated investigator would testify that jurors told him about misconduct]; *People v. Bryant, supra*, 191 Cal.App.4th 1476 [neither party presented declarations signed under penalty of perjury].)

The Court of Appeal here correctly and carefully determined which evidence should have been admitted at the misconduct hearing, then properly exercised its independent judgment (*People v. Nesler* (1997) 16 Cal.4th 561, 582) to find the prosecution did not rebut the presumption of prejudice. [Slip op. at 18-38.] Both of the Court of Appeal's opinions in this case were based on the specific facts before it, including the strength of the evidence presented against Mr. Gaines, and neither created new law nor contradicted existing law.[1]

Petitioner claims the Court of Appeal here "sidestepped the broader proposition" advanced by *Perez, Von Villas* and *Bryant*, by supposedly failing to acknowledge that some allegations of juror misconduct require evidentiary

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[1] Petitioner seems to insinuate that the Court of Appeal did something nefarious by disagreeing with *People v. Perez* in an unpublished opinion. (See Pet. Rev. at 4.) First, this criticism is unwarranted given the fact that petitioner never requested that the opinion be published. Second, this Court should note that no evidentiary hearing was ever held in *Perez*. On remand, after affidavits were actually produced, the trial court found it unnecessary. (*Perez v. Marshall* (S.D. Cal. 1996) 946 F.Supp. 1521, 1537.) Indeed, a closer look at the remand order in *Perez* shows it did not require the trial court to hold a hearing but only required further proceedings consistent with its ruling that the trial court cannot adjudicate a motion for new trial based on an assumption that all twelve jurors would admit committing misconduct.

hearings. [Pet. Rev. at 4.] Not so. It simply found that no hearing was necessary to resolve the claim here. None of the opinions cited by petitioner holds that an evidentiary hearing ***must*** be held any time there is a conflict in the evidence. Indeed, any such holding would directly contradict this Court's holding in *Hedgecock,* which grants trial courts the discretion to order hearings when faced with contradictions. (*Hedgecock*, *supra*, 51 Cal.3d at p. 415.)

In examining this case and the facts before it, the Court of Appeal correctly explained that: (1) the prosecution's declarations claiming to clarify the defense declarations failed to explain the discrepancies between them [slip op. at 20, fn. 21]; (2) because jurors here expressly linked the defendants' failure to testify to adverse inferences of guilt, the foreman's act of quashing the discussion would be unlikely to "have any curative effect on a jury that has already evinced a willingness to disregard the court's instructions" [slip op. at 37, fn. 31]; (3) the evidence in this case was so conflicted in every regard that it would be difficult for the prosecution to rebut the presumption of prejudice [slip op. at 34-38][2]; and (4) it would be unfair to order a hearing now "because

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[2] Neither *Perez*, nor *Von Villas,* nor *Bryant* involved such flimsy and conflicted facts as this case involved. *Perez* involved an inmate-on-inmate assault eyewitnessed by a guard; *Von Villas* involved two police officers who were hired to kill a man and against whom the woman hiring them testified; and *Bryant* involved a distinctive-looking defendant who was arrested minutes after he stole a car at gunpoint and was identified by the victims immediately.

the defense in this case, having 'proved *once* that the trial was unfair, [should nearly] three years later [not be] require[d] to prove it again.'" [Citations omitted.] [Slip op. at 48.]

By challenging the Court of Appeal's holding that the prosecution here failed to rebut the presumption of prejudice, petitioner asks this Court to break new ground and strip the appellate courts of their authority to reject unsupported factual determinations and to independently determine the prejudice arising from the misconduct.

In sum, petitioner seeks review in this Court to try to obtain a different result, not because the opinion below broke new ground or created a conflict among the Courts of Appeal. Even petitioner's quest for a different result is misplaced, since the Court of Appeal correctly and appropriately followed the law. This case thus is not appropriate for review under Rule 8.500(b).

This Court should deny review.

CONCLUSION

For the foregoing reasons, Mr. Gaines respectfully requests that this Court deny the Attorney General's petition for review.

Respectfully submitted,

Dated: May 1, 2013 By:

REBECCA P. JONES
Attorney for Defendant-Respondent
GAINES

CERTIFICATE OF COMPLIANCE

I, Rebecca P. Jones, counsel for Michael Gaines, certify pursuant to the California Rules of Court that the word count for this document is 2,254 words, excluding the tables, this certificate, and any attachment permitted under rule 8.360. This document was prepared in Word Perfect and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Diego, California, on May 1, 2013.

Respectfully submitted,

REBECCA P. JONES
Attorney for Defendant GAINES

People v. LAVENDER et al.
Case No. S209975

PROOF OF SERVICE
C.C.P. 1013a, 2015.5

I declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States and employed in the City and County of San Diego. I am over the age of eighteen (18) years and not a party to the within above-entitled action; my business address is 3549 Camino del Rio South, Suite D, San Diego, California 92108; on this date I mailed APPELLANT GAINES' ANSWER TO PETITION FOR REVIEW addressed as follows:

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The above copies were deposited in the United States mail, first class postage prepaid, at San Diego, California. I declare under penalty of perjury that the foregoing is true and correct. Executed May 2, 2013, at San Diego, California.

REBECCA P. JONES