

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA,)

Plaintiff and Respondent,)

vs.)

JOHN ANTHONY GONZALES,)
MICHAEL SOLIZ,)

Defendants and Appellants.)

No. SO75616

Los Angeles County
Superior Court

No. KA033736

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

The Honorable Robert W. Armstrong, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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DEATH PENALTY

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INTRODUCTION

As appellant explained in his supplemental opening brief, the relevance to the instant case of this Court's decision in *People v. Gay* (2008) 42 Cal.4th 1195, is that it reinforces appellant's position that errors related to the lingering doubt defense he proffered in his penalty retrial resulted in prejudice. *Gay* reaffirmed that evidence creating a lingering doubt as to the defendant's guilt of an offense is not only admissible at a penalty retrial (*Id.* at p. 1211), such evidence -- when considered under proper instruction -- can also be of critical importance to a fair and reliable penalty determination.

Respondent contends that *Gay* has no application to the instant case, because its operative facts differ from those of the instant case. However, respondent's reading of this Court's opinion is too narrow. *Gay* stands for the proposition that in a penalty retrial the defendant cannot be arbitrarily deprived of his right to present, and have the jury consider, a defense of lingering doubt, and that reversal is required when a "combination of evidentiary and instructional errors presents an intolerable risk that the jury did not consider all or a substantial portion of the penalty phase evidence." (*Id.*, at p. 1226.)

The errors discussed below and in both appellant's original and supplemental opening briefs, individually and cumulatively "crippled" his defense. (*Id.* at p. 1223.) Reversal of appellant's death sentences is therefore required.

XIII.

THE TRIAL COURT ERRONEOUSLY RESTRICTED APPELLANT FROM CONDUCTING VOIR DIRE CONCERNING THE WILLINGNESS OF THE PROSPECTIVE JURORS TO CONSIDER LINGERING DOUBT AS A MITIGATING FACTOR

Appellant should have been permitted to voir dire the prospective jurors concerning their willingness to apply the concept of lingering doubt. Because the identity of the shooter of Skyles and Price was “the heart of the penalty phase defense” in this case (*People v. Gay, supra*, 42 Cal.4th at p. 1223), appellant was entitled to determine whether the prospective jurors were willing to consider such a defense despite appellant’s conviction by a previous jury. (*People v. Williams* (1981) 29 Cal.3d 392, 410 [reasonable question about potential juror’s willingness to apply particular doctrine of law should be permitted when judge is satisfied that doctrine likely to be relevant at trial].)

Respondent argues that because *Gay* did not involve a restriction of voir dire, it is inapplicable to the instant case. (RSB 6.) However, *Gay* both underscores the relevance of lingering doubt as a mitigating factor under California’s sentencing scheme (42 Cal. 4th at pp. 1217-1224), and makes clear that trial courts may not restrict or impede the jury’s consideration of evidence supporting a lingering doubt defense. More importantly, in both the present case and *Gay*, the trial courts’ respective rulings were based upon the erroneous view that it is inappropriate in a penalty retrial for the defense to

challenge the findings made by the jury in the previous trial. (24RT 3028; *People v. Gay*, *supra*, 42 Cal.4th at p.1215.)¹

In the instant case, the court not only barred the defense from exploring whether prospective jurors could impartially consider lingering doubt in reaching their penalty decision, these jurors were also repeatedly told during the jury selection process that appellant's guilt had already been determined and that they would not "re-decide" that issue. (See e.g. 24RT 2988, 3044, 25RT 3111, 3121-3122, 7CT 1578.) The distinction between "re-deciding" whether someone is guilty and weighing lingering doubt as a factor in mitigation for sentencing purposes, is subtle. It is utterly unrealistic to expect people who have no legal training or understanding of death penalty jurisprudence to independently comprehend that subtle, but important, distinction.

Indeed, in this case as in *Gay*, the trial court *itself* believed that the prior guilt determination precluded the jury in the penalty retrial from questioning whether appellant was the actual killer. Ruling that it was improper to permit voir dire concerning potential jurors' willingness to apply the concept of lingering doubt, the court stated, "we've tried to tell this whole jury that the whole matter of guilt was

¹ Not only does this Court's opinion in *People v. Gay* appear to overrule its decision in *in re Gay* (1998) 19 Cal.4th 771, 814, insofar as it holds that "the defendant may not retry the guilt phase of the trial in an effort to create [lingering] doubt" (see *People v. Gay*, *supra*, 42 Cal.4th at p. 1228, conc. opn. Werdegar, J.), it further appears to disapprove the Court's holding in *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238, that in a penalty phase retrial the defendant's guilt is to be "conclusively presumed as a matter of law because the trier of fact [has] so found in the guilt phase."

behind them.” (24RT 3028.)² Not only was this a legally erroneous reason for precluding the requested voir dire, it illustrates how the court’s repeated admonition that appellant’s guilt had already been determined likely misled the jurors to believe they could not consider doubt as to whether appellant was the shooter in reaching their sentencing decision. If the trial court itself was unable to distinguish between re-litigating guilt and weighing lingering doubt as a mitigating factor, surely the jurors were also unable to do so.

Respondent further contends that voir dire concerning lingering doubt would have been superfluous, because the prospective jurors were asked whether they would automatically vote for death merely because defendants had already been found guilty. (RSB 9-10.) However, just because a juror would not automatically vote for death, does not mean that he or she would be willing to fairly consider lingering doubt. A prospective juror could say that he or she would not automatically vote for death, but still be unwilling to consider particular mitigating factors.³

² The court’s erroneous understanding of the law was also reflected by its refusal to give appellant’s requested lingering doubt instruction. The court ruled that such an instruction was improper in a penalty retrial which had “absolutely nothing” to do with the guilt determination. (33RT 4351, 32RT 4191-4192.)

³ One example of this would be a juror who either does not believe that mental illness is real, or feels that it does not extenuate criminal behavior. Such a juror could not be fair and impartial in a case where the penalty phase defense centers around the defendant’s mental illness. Similarly, a juror might be willing to consider mental illness as a mitigating factor, but be unwilling to consider a lingering doubt defense simply because the defendant had been previously found guilty beyond a reasonable doubt.

Respondent additionally seeks to distinguish the instant case from *Gay*, because unlike *Gay*, there was no exclusion of evidence showing that appellant was not the actual killer, and appellant was permitted to raise the issue of lingering doubt in his opening statement and closing argument. However, whether or not appellant was permitted to present evidence or argument in support of his lingering doubt defense has no bearing on the question of whether he should have been allowed to voir dire the jurors concerning their willingness to consider lingering doubt as a mitigating factor. Moreover, while the court herein did not state that appellant's guilt had been "conclusively proven" as the court stated in *Gay*, it nevertheless repeatedly told the jurors that appellant's guilt had already been determined.

In any event, the trial court restricted voir dire based upon the same improper ground that formed the basis of the trial court's erroneous rulings in *Gay*. Because the trial court's error makes it impossible to determine from the record whether any of the actual jurors held disqualifying views the error cannot be dismissed as harmless. (*People v. Cash* (2002) 28 Cal.4th 703, 723.) Reversal of the penalty judgment is therefore required.

XIV.

THE TRIAL JUDGE'S IMPROPER TESTIMONY AS A WITNESS "CRIPPLED" APPELLANT'S LINGERING DOUBT DEFENSE

Appellant has established that the trial judge violated appellant's statutory and constitutional rights when the judge interrupted co-defendant John Gonzalez's testimony to take "judicial notice" of the physical impossibility -- which the judge knew from his "own experience" -- of converting a gun into an automatic by removing the spring behind the trigger. (32RT 4305.)⁴

In his supplemental opening brief appellant argued that the trial court's improper intervention had a devastating effect on appellant's lingering doubt defense similar to that resulting from the exclusion of evidence supporting the defendant's lingering doubt defense in *People v. Gay, supra*, 42 Cal.4th at p. 1223.⁵ In *Gay*, this Court stated: "Although the trial court's evidentiary rulings did not entirely preclude defendant from advancing [a lingering doubt] defense, those rulings surely crippled it." (*ibid.*) The same can be said of the trial court's error in the instant case.

Respondent contends that *Gay* is inapplicable because the error complained of in the instant case was not the exclusion of exculpatory evidence, or an admonition by the trial court that the jury should disregard defense counsel's statement that the defendant was not the shooter because the defendant's guilt had been

⁴ See AOB 144-145; ARB 58-67; and Supplemental AOB 8-11.

⁵ Supplemental AOB 9-10.

conclusively proven. (RSB 15.) This misses the point. In *Gay*, this Court reaffirmed that evidence showing the defendant was not the actual killer is critical mitigation evidence that might well persuade a jury vote for a life sentence. Given the importance of such evidence, the Court recognized that a trial court's obstruction or interference with a defendant's ability to fully present a lingering doubt defense is prejudicial error. That is precisely what occurred in this case.

Appellant's lingering doubt defense rested entirely upon Gonzalez – both his tape-recorded discussion with Berber, and his testimony in the second penalty trial. That Gonzalez's testimony was critical to the jury's decision whether or not appellant should receive the death penalty, is demonstrated by its request to have it read back to them during deliberations. Moreover, Gonzalez' description of the details of the crime – including the reason why there were so many shots fired – was central to the jury's assessment of his credibility as a witness.

The trial court's improper "expert testimony" deeming Gonzalez's explanation "physically impossible," thus created an "intolerable risk" that the jury discredited appellant's evidence that he was not the shooter on the basis of these statements. (*People v. Gay, supra*, 42 Cal.4th at p. 1226.) As in *Gay*, appellant's lingering doubt defense had "particular potency," given the lack of physical evidence linking appellant to the shooting, and the weakness of the prosecution's eyewitness identification testimony.⁶ (*Ibid.*) In light of

⁶ Appellant and Gonzalez look alike (1RT 29), and all of the eyewitnesses picked appellant from a photographic line-up that did not include any photos of Gonzalez. (13RT 1652-1658.) Although Judith Mejorado identified appellant as the shooter in her preliminary

the fact that the first jury voted seven to five for life sentences for appellant on the Skyles/Price murders, there is a substantial likelihood that the second jury's verdict was influenced by the court's improper remarks. The error was therefore highly prejudicial and requires reversal.

hearing testimony, at trial she stated that her testimony had been coerced by threats to take away her child and to jail her brother, and that she did not actually know the name of the shooter. (14RT 1695-1735.) Carol Mateo and her brother, Jeremy Robinson, made their identifications from a distance of about 50 feet, late at night from a moving car after seeing the suspect for only three to five seconds. (12RT 1456-1467; 13RT 1513, 1569-1570.) Jeremy Robinson was unable to identify appellant in court as the shooter (13RT 1575.) Alejandro Mora, the gas station attendant, acknowledged that he only saw the shooter from the side and never saw his face. (13RT 1624, 1628-1629.)

XV.

APPELLANT'S LINGERING DOUBT DEFENSE WAS UNFAIRLY AND PREJUDICIALLY UNDERCUT BY THE PROSECUTOR'S IMPROPER CROSS-EXAMINATION OF GONZALEZ

Respondent contends that because *People v. Gay, supra*, did not involve prosecutorial misconduct, it has no bearing on appellant's claim that the prosecutor committed prejudicial misconduct in questioning Gonzalez about whether the eyewitnesses were lying. (RSB 17.) Again, respondent has missed the point. *Gay* makes clear that a defendant in a penalty retrial has the right to present a lingering doubt defense, and that error which undermines the presentation of such a defense is prejudicial.

Appellant has established in previous briefing that the prosecutor's cross-examination of Gonzalez was legally improper. (See AOB 162-163; ARB 68-77.) Appellant relied on the Gonzalez testimony to create lingering doubt that he shot Skyles and Price. The improper cross-examination skewed the jury's evaluation of this critical testimony and distorted the penalty determination by creating a false aura that the jury would have to find that all of the prosecution witnesses lied.

Because Gonzalez's testimony and surreptitiously recorded confession comprised the sum and substance of appellant's lingering doubt defense, the prosecutor's improper cross-examination created an "intolerable risk" that the jury was unfairly biased in its evaluation of Gonzalez's testimony. (*People v. Gay, supra* 42 Ca. 4th at p. 1226.) Similar to error discussed in the previous argument, given the weakness of the prosecution's case against appellant coupled with

the fact that the previous jury, having not been exposed to the improper cross-examination, voted seven to five in favor of life sentences, not only can respondent not show that the misconduct had no influence on second jury's verdict (*Chapman v. California* (1967) 386 U.S. 18, 24), it is also reasonably probable that absent the prosecutorial misconduct, some, if not all, of the members of the second jury would have voted for life without the possibility of parole. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant's death sentences must therefore be reversed.

XVII.

BECAUSE THE JURY WAS TOLD THAT IT WAS NOT SUPPOSED TO RE-DECIDE GUILT, A LINGERING DOUBT INSTRUCTION SHOULD HAVE BEEN GIVEN IN THIS CASE

Respondent argues that *People v. Gay* does not change the law with respect to lingering doubt instructions; i.e., that it does not hold that a trial court must give a lingering doubt instruction, if requested, in a penalty retrial in which the defendant presents evidence indicating that he or she did not actually commit the murder for which he or she has been sentenced to death. (RSB 18.) Because a lingering doubt instruction was given in *Gay* (42 Cal.4th at p. 1225), the Court did not have occasion to address that issue. What the Court held, however, is that the trial court in *Gay* abused its discretion when it refused to clarify what appeared to the jurors in that case to be a discrepancy between the lingering doubt instruction they were given, and what they had previously been told by the trial court – that the defendant’s guilt had been “conclusively proven.” (*Id.* at pp. 1225-1226.)

Respondent points out that cases decided by this Court after *Gay* have held that there is no duty to instruct a penalty phase jury on lingering doubt. However, *none* of the cases cited in respondent’s supplemental brief involved a penalty retrial in which, as in the instant case, the trial court had repeatedly told the jury that the defendant’s guilt had already been established and that it was only there to decide the penalty to be imposed. Indeed, the scenario herein is analogous to that in *Gay*; in both cases the jury was misled

to believe that it had no choice but to accept that the defendant was the actual killer.

In *Gay*, the Court found that it was error for the trial court to have left the jurors with the impression that they could not weigh as a mitigating factor any doubt they might have as to whether the defendant shot the victim. (42 Cal.4th at pp. 1224-1226.) As discussed in a previous argument, the distinction between “re-deciding” whether someone is guilty and weighing lingering doubt as a factor in mitigation for sentencing purposes, is subtle. It is utterly unrealistic to expect people who have no legal training or understanding of death penalty jurisprudence to independently comprehend that subtle, but important, distinction. Even the trial court herein was confused about this, when it ruled that giving a lingering doubt instruction was “appropriate” in the first trial, but would be “inappropriate” in a penalty retrial. (32RT 4190-4192.)

Notwithstanding the fact that appellant in the penalty retrial was permitted to introduce evidence that Gonzalez – not appellant – shot Skyles and Price, and was permitted to argue that he was not the shooter, defense counsel was *not* permitted to tell the jury how it might use that evidence, i.e., that lingering doubt could be considered a mitigating factor. (32RT 4191.) It is more likely that the jury followed the trial judge’s admonition that guilt had already been established. In any event, nothing in the record “suggest[s] that the jury understood how to weigh the evidence that was admitted.” (*People v. Gay, supra*, 42 Cal.4th at p. 1225.)

Appellant understands that under California law, a lingering doubt instruction is not required as a matter of course, and he is not asking this Court to change the law in this regard. Rather, appellant

is simply asking that the law as stated in *Gay* be applied to his case. In both cases, the trial court misled the jury into believing that any evidence regarding lingering doubt was irrelevant, and in both cases the defense was precluded from giving any explanation of how lingering doubt evidence might be considered. Under these very narrow circumstances, a proper lingering doubt instruction was not only permissible, but essential. Without such an instruction, appellant's entire penalty defense was effectively invalidated.

There can be little doubt that the trial court's refusal to instruct the jury that they *could* consider lingering doubt as a factor in mitigation was prejudicial error. Having been given a lingering doubt instruction in the first penalty trial, seven of the 12 jurors who found appellant guilty of first degree murder voted for sentences of life without the possibility of parole. Under the circumstances, there is a reasonable probability that appellant would not have been sentenced to death had a lingering doubt instruction been given in the penalty retrial. Appellant's death sentences must therefore be reversed.

XXV.

CUMULATIVE ERROR CRIPPLED APPELLANT'S LINGERING DOUBT DEFENSE

Respondent asserts that any errors implicating appellant's lingering doubt defense did not rise to the "level of the combination of multiple prejudicial errors at issue in *Gay*." (RSB 21.) Respondent is wrong. Regardless of whether each error standing alone undermined appellant's lingering doubt defense, the multiple errors in combination emasculated it.

As demonstrated by the seven to five split in favor of life in the first penalty trial, appellant's lingering doubt defense had "particular potency." (*People v. Gay, supra*, 42 Cal.4th at p. 1226.) However, the court's improper comment challenging the veracity of Gonzalez's testimony together with the prosecutor's improper "are [the eyewitnesses] lying" cross-examination of Gonzalez, unfairly influenced the jury to discredit his claim of sole responsibility for the Skyles/Price murders. These errors coupled with (1) the trial court's repeated admonition that appellant's guilt had already been decided, and (2) the court's refusal to instruct the jury, or permit defense counsel to explain during argument, that lingering doubt is a legitimate mitigating factor, created "an intolerable risk" that the second jury did not consider lingering doubt as to whether appellant had in fact been the shooter as a reason not to sentence him to death. The fact that the majority of jurors in the first trial – where none of these errors occurred – felt that life without the possibility of parole was the appropriate sentence for appellant, is strong evidence that but for the combined errors, the result of the second penalty trial would have been different. For this reason, reversal is required.

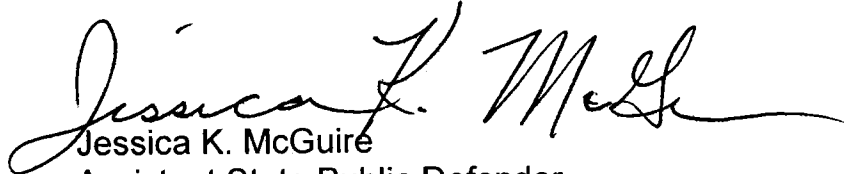
CONCLUSION

For all of the foregoing reasons, and those stated in his previously-filed briefs, appellants death sentences must be reversed.

Dated: November 12, 2009

Respectfully submitted,

Michael J. Hersek
State Public Defender

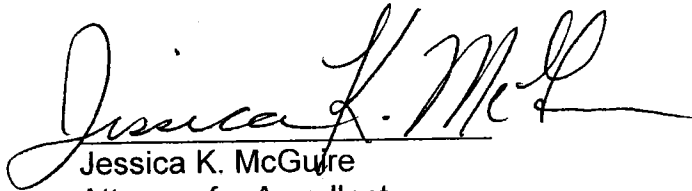

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**CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))**

I am the Assistant State Public Defender assigned to represent appellant, Michael Soliz in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of the computer generated word count I certify that this brief, excluding the tables and certificates is 3, 306 words and 15 pages in length.

Dated: November 12, 2009

A handwritten signature in black ink, appearing to read "Jessica K. McGuire", with a long horizontal flourish extending to the right.

Jessica K. McGuire
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Soliz*
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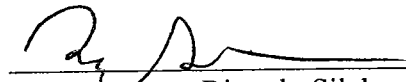
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 12, 2009, at Sacramento, California.



Ricardo Silahua