

No. 18A568

IN THE SUPREME COURT OF THE UNITED STATES

Eric Anderson,

Petitioner

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF CALIFORNIA

DEATH PENALTY CASE

PETITION FOR WRIT OF CERTIORARI

Joanna McKim, Attorney at Law  
SBN 144315  
P.O. Box 19493  
San Diego, CA 92159  
619-303-6897  
joannamckim@cox.net  
Counsel for Petitioner

## QUESTION PRESENTED

Did this trial court's denial of petitioner's severance motion as to co-defendant Randy Lee and its subsequent acquittal of Lee on the conspiracy charge alleged against both defendants violate petitioner's constitutional right to a fair jury trial when petitioner and co-defendant had antagonistic defenses and the trial court's erroneous acquittal of the conspiracy charge for the co-defendant precluded the jury from fairly evaluating petitioner's defense?

## TOPICAL INDEX

PARTIES TO THE PROCEEDINGS	1
INTRODUCTION	1
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
A. Federal Constitutional Provisions	3
B. State Constitutional Provision	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	6
CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR JURY TRIAL IS VIOLATED WHEN THE TRIAL COURT'S ERRORS IN FAILING TO SEVER THE CASE AND ACQUITTING THE CO-DEFENDANT OF CONSPIRACY RESULTED IN A BIASED JURY WHO WAS PRECLUDED FROM FAIRLY CONSIDERING THE CO-DEFENDANT'S ROLE IN THE CONSPIRACY	6
CONCLUSION	22
CERTIFICATION REGARDING WORD COUNT	24
INDEX TO APPENDICES	

Appendix A: Decision of California Supreme Court

Appendix B: Order From California Supreme Court Denying  
Petition for Rehearing

## TABLE OF AUTHORITIES

### CASES

<i>Adamson v. Ricketts</i> (9 <sup>th</sup> Cir. 1988) 865 F.2d 1011 .....	17
<i>Beck v. Alabama</i> (1980) 447 U.S. 625 .....	22
<i>Connecticut v. Johnson</i> (1983) 460 U.S. 73, .....	15, 17
<i>Grisby v. Blodget</i> (9 <sup>th</sup> Cir. 1997) 130 F.3d 365 .....	18
<i>People v. Anderson</i> (2018) 5 Cal.5 <sup>th</sup> 372 .....	16
<i>People v. Massie</i> (1967) 66 Cal.2d 899 .....	22
<i>People v. Odom</i> (1970) 3 Cal. App. 3d 559 .....	18
<i>Sandstrom v. Montana</i> (1979) 442 U.S. 510 .....	17
<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275 .....	15
<i>United States v. Hayward</i> (D.C. Cir. 1969) 420 F.2d 142 .....	17
<i>United States v. Mayfield</i> (9 <sup>th</sup> Cir. 1999) 189 F.3d 895 .....	22
<i>United States v. Tootick</i> (9 <sup>th</sup> Cir. 1991) 952 F.2d 1078 .....	19, 21, 22

### STATUTES

28 U.S.C. § 1257(a).....	2
California Penal Code, § 1118.1 .....	4

**CONSTITUTIONAL PROVISIONS**

California Constitution

Article I, section 7.....	22
Article I, section 15.....	3, 22

United States Constitution

Amend. V.....	22
Amend. VI .....	15, 22
Amend. XIV.....	3, 22

## **PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT**

Petitioner Eric Anderson petitions for a writ of certiorari to review the judgment of the California Supreme Court in his case affirming the convictions and judgment of death.

### **PARTIES TO THE PROCEEDINGS**

The parties to the proceedings in the California Supreme Court included the State of California and petitioner Eric Anderson. There are no parties to the proceedings other than those named in the petition.

### **INTRODUCTION**

Petitioner, Eric Anderson, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the California Supreme Court, filed on June 28, 2018, grant certiorari, vacate the judgment of the California Supreme Court, and remand the case for further proceedings.

## **OPINION BELOW**

The published opinion of the California Supreme Court, which is the subject of this petition, was filed on June 28, 2018 and is attached as Appendix (App.) A. The California Supreme Court's one-page order denying petitioner's petition for rehearing is attached as Appendix B.

## **JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Supreme Court to be reviewed was filed on June 28, 2018. The California Supreme Court denied petitioner's petition for rehearing on September 12, 2018. An extension of time request was made by petitioner within 90 days (Rule 13.1) which this court granted on November 30, 2018, setting forth a filing date by February 9, 2019. This petition is submitted before that date.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### A. Federal Constitutional Provisions

The Fifth Amendment provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law.”

The Sixth Amendment provides: in “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial. . . by an impartial jury.”

The Fourteenth Amendment provides: “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”

### B. State Constitutional Provision

Article I, section 15 of the California Constitution provides in part that “[p]ersons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.”

## STATEMENT OF THE CASE

After denial of petitioner's motion to sever, petitioner and co-defendant Randy Lee were tried before the same jury. Both were charged with first-degree murder and conspiracy to commit robbery and burglary. Brandon Handshoe and Apollo Huhn also were named as co-defendants. (1 CT 28-34.) The trial court denied petitioner's motion to sever the trial; but it allowed Huhn to have a separate jury. (9 CT 810, 1788; 3 RT 600-6-600-9, 600-31.) During jury voir dire, Handshoe changed his plea to guilty. The defense's motion for mistrial and continuance were denied. (10 RT 1601-10; 13 RT 2226-28.)

After the prosecution rested its case, the trial court granted petitioner's motion to strike overt acts one through five (Pen. Code, § 1118.1). (25 RT 4461; 26 RT 4463.) The trial court also granted Lee's motion for acquittal on the conspiracy count (Pen. Code, §1118.1). (26 RT 4598.) Petitioner was convicted of the charges and the jury found true the special circumstances of committing the crime while engaged in a robbery and burglary

and special allegation of personal use of a firearm. (1 CT 28-34; 9 CT 1928-34.) The jury found Lee not guilty of murder. (33 RT 5430.)

The jury returned a penalty verdict of death. (9 CT 1950, 1952; 37 RT 5723.) The trial court denied petitioner's post-verdict motions and sentenced him to death. (9 CT 1954-55; 38 RT 5754-58.) A Commitment Order was filed. (9 CT 1955; 38 RT 5758.)

In the California Supreme Court, petitioner argued prejudicial error in the trial court's failure to sever his case from co-defendant Lee given their antagonistic defenses and its error in removing the issue of conspiracy as to Lee from the jury's consideration; the joinder resulted in a grossly unfair trial. The California Supreme Court found no error and failed to address the prejudice argument made by petitioner in his argument. Petitioner petitioned for rehearing by the California Supreme Court which was denied.

\* \* \* \*

## REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR JURY TRIAL IS VIOLATED WHEN THE TRIAL COURT'S ERRORS IN FAILING TO SEVER THE CASE AND ACQUITTING THE CO-DEFENDANT OF CONSPIRACY RESULTED IN A BIASED JURY WHO WAS PRECLUDED FROM FAIRLY CONSIDERING THE CO-DEFENDANT'S ROLE IN THE CONSPIRACY

Petitioner's defense was that he did not participate in the crimes and that it was Lee who instigated the conspiracy by supplying insider information on the location of the safe in a residence. Lee was the one who identified the house, the one who made the offers to share information, and the one who offered to look after Handshoe's family and put money on his books following his arrest. (22 RT 3787-88; 23 RT 3934.) However, Lee's defense pointed to petitioner, not Lee, as being the mastermind and the one with the plan. The defenses of Lee and petitioner were antagonistic and their cases should have been severed. Despite the substantial evidence supporting the prosecution's theory that Lee was a conspirator, the trial court later dismissed the conspiracy charge against Lee while allowing the charge to remain against petitioner.

With Lee's conspiracy count then gone, jurors had only petitioner as the one designated by the prosecution as the crime's mastermind despite the bulk of the prosecution's case against petitioner relied on Lee's involvement in the conspiracy. The result from the trial court unilaterally deciding Lee was not part of the conspiracy was that petitioner was unable to effectively present his defense; jurors were biased against petitioner's defense theory that Lee was part of a conspiracy to commit burglary.

i. Procedural Background For Erroneous Judgment of Acquittal for Lee

The prosecutor's arguments in his letter brief on the conspiracy show why the judgment of acquittal on the conspiracy count for Lee was error. The prosecutor argued:

In the instant case the evidence supports the People's contention that Lee repeatedly brought this particular victim up to two of the three conspirators who eventually committed that very crime. Lee offered to drive co-conspirators to the victim's home and point it out. Lee suggested how they might commit the offense and

encouraged the others to do the crime. Lee indicated that he wanted 15% of anything the others obtained. All of these actions were before the offense.

After the offense but before Handshoe was identified as a suspect Lee approached Handshoe and said, "you guy's went to the house, didn't you?" When Handshoe claimed not to know what Lee was talking about, Lee went on to say "I saw Brucker was shot[.]" He knew who did the crime because he had been the one to propose and select the victim. Lee also told Handshoe while both were in custody that, "if you keep me out of this I'll put money on your books and take care [sic] of your family." The clear implication is that if Handshoe was being asked to keep Lee out of it, Lee was "in it" to begin with.

Also, Lee tells Navarette while house [sic] together in jail that "nobody was supposed to get killed[.]" The clear implication of that statement is that Lee was involved in the details of what was supposed to happen.

It is not necessary that the People prove that Lee personally committed an overt act, only that he was a conspirator at the time another conspirator committed one or more overt acts. CALJIC 6.10.5 paragraph 2 is instructive on that issue. Overt acts of disguising [sic], gathering weapons, driving to the victim's home, etc. were done by Anderson, Handshoe and Huhn, but they are attributable under the law to Lee if the jury finds that he was a conspirator in the underlying attempted robbery/burglary. (43 Supp. CT 8917.)

The trial court's discussion of the evidence on the conspiracy showed it made credibility determinations, improper in the context of a Penal Code section 1118.1 motion. Although the prosecutor argued that reasonable interpretations were the province of the jury, the trial court unilaterally decided the issue. It found the evidence could support the jury convicting Lee of conspiracy; however, because of other evidence suggesting an alternative scenario implicating petitioner instead, it would preclude the jury from deciding that issue as to Lee. The trial court stated:

Why would he [Lee] continue to say let's do it or you should do it if there wasn't an agreement? I think the reason here, and I don't want to usurp the role of the jurors at all, that the jury could easily, if this conspiracy count went to them, I think they could easily convict Mr. Lee, but I don't believe on appeal that court of appeals would find there was sufficient evidence, and I think the reason is this thing we talked about yesterday. There is an equally plausible, in fact, possibly more plausible explanation as to how this all came about.

Randy Lee wanted his boys to commit this crime and his boys had cold feet right up until the end of March. . . About that time is when Mr. Anderson comes on the scene. . . you can argue that by the evidence in Counts 3 and 4 and by Mr. Handshoe's statement that he's out at Dictionary Hill a week before and he's out at Medill the day before.

Apollo Huhn has some information that Randy Lee passed along, and it's a logical inference, but only until somebody. .



. who could be a mastermind. . . did they actually utilize that information.” (25 RT 4454- 55.)

The prosecutor tried to explain to the trial court that this was the jury’s decision to make, but to no avail:

My problem with that is an appellate court will not, in my view, ever look at a juror’s decision where a juror has been instructed that you are to determine – you, the jury, are to determine whether there are two reasonable interpretations. I understand that the – what the court says, gee, I think this is a reasonable – reasonable and likely way in which this could have happened.

My point on that on the 1118.1, sir, with all due respect, is that that’s their decision because if a juror – if a jury considers that evidence and those arguments that will be made by counsel, and determines that they don’t feel that there is another reasonable explanation, no appellate court is going to disturb that. (25 RT 4455-56.)

The trial court acknowledged this, but focused on whether there was evidence of an agreement:

I agree with that, but I've given you what I believe are two reasonable interpretations, but I would challenge you to come up with evidence, evidence of an agreement. (25 RT 4456.)

The prosecutor responded:

[t]he jury is entitled to consider conversations before, consequences of the crime, what happened subsequent to the crime and during the crime to determine things that actually can related back to the agreement.

And I suggest to you, your honor, that a jury could infer a – reasonably infer that when this defendant says to Julio Navarette, nobody was supposed to get killed, that that is, if nothing else, an adoption of the fact that he – that there was an agreement when he goes to Brandon Handshoe and says if you keep me out of this, I'll put money on your books and take care of your family, that is an admission that he

was in it, that it was an agreement that he was part of, and I'm entitled to prove that circumstantially. Not just because there was some mutual conduct. Each essentially becoming an overt act.

And I honestly believe, judge, the bottom line here is on an 1118.1, I honestly believe that you cannot, obviously you can, but you should not substitute your own belief of what a reasonable explanation may be because the trier of fact may not feel the same way. (25 RT 4457-58.)

The trial court stated: But it's all pointing against an agreement. See, that's what is really bothersome about you're saying, Judge, let it go to the jury. (25 RT 4458.)

The prosecutor responded:

No, because the agreement that Randy Lee was seeking never involved his own direct participation in going to commit the crime. It never did. You guys can do this and I'll get 15 percent. You guys go to the scene. .You can hold him hostage. You can get in and do the safe. . . He repeated that a number of times. (25 RT 4458-59.)

The question isn't whether or not I can prove by direct evidence that yes, on the 14<sup>th</sup> he was still there involved in the crime. He is shopping this crime that got- conspiracy is an ongoing deal. It starts here and ends up at the completion of the crime. And my point is, can a jury reasonably infer that he did the very things that he offered to do, that he did drive them by, that he did identify the location of the home. And then can you or can the trier of fact in this case, the jury, look at his behavior afterwards and use that to establish that yes, circumstantially, he's talking about the same place, the same victim, wanting something for the offense, wanting the offense to be done and yes, lo and behold, he makes these comments both to Navarette and to Handshoe after the crime. (25 RT 4459.)

ii. The Trial Court Erred When It Dismissed The Conspiracy Count Against Lee

The trial court erred and the error resulted in a denial of a fair trial for petitioner. Not only did substantial evidence exist to send the conspiracy issue as to Lee to the jury, as even argued by the prosecutor, the trial court invaded the province of the jury in

deciding the issue, effectively directing a verdict of guilty for petitioner.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....” This includes the right to have the jury, rather than the judge, reach the requisite finding of “guilty.” (U.S. Const. Amend. VI; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277.)

Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, the judge may not direct a verdict for the State, no matter how overwhelming the evidence. (*Connecticut v. Johnson* (1983) 460 U.S. 73, 84.)

The purpose of Penal Code section 1118.1 is to ensure speedy acquittals of criminal charges which are unsupported by substantial evidence, not to interfere with the jury process. (*People v. Odom* (1970) 3 Cal. App. 3d 559, 565 [“We believe that we must view this case in its proper perspective and in light of the obvious purpose of section 1118.1, which is not to interfere

with the jury process but to insure speedy acquittals of criminal charges which are not supported by substantial evidence.”].)

Here, the trial court’s ruling plainly benefitted Lee; but it prejudiced petitioner’s defense, leaving him as the sole mastermind by removing from the jury the question of conspiracy as to Lee.

In its opinion, the California Supreme Court stated that:

We need not decide whether the trial court correctly acquitted Lee of the conspiracy charge. Lee’s defense was different than defendant’s, but not antagonistic in a way that prejudiced him. Contrary to defendant’s argument, the jury’s acceptance of Lee’s defense would not preclude it from acquitting defendant. The jury could easily judge Lee’s guilt and defendant’s guilt separately. (*People v. Anderson* (2018) 5 Cal.5<sup>th</sup> 372, 387.)

If it had been the jury who had accepted Lee’s defense, no issue would exist. Yet, the trial court was the one who accepted Lee’s defense despite substantial evidence showing Lee instigated

the conspiracy to commit the burglary at Brucker's residence. The effect was to remove the issue from the jury in deciding petitioner's case, effectively directing a guilty verdict for petitioner. The trial court is prohibited from directing a verdict of guilty. (*Connecticut, supra*, 460 U.S. at p. 84.) This prohibition has been held to apply to jury instructions that fall short of directing a verdict but have the same effect by eliminating other relevant considerations for the jury. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144 [error in instruction that had the effect of the court taking from the jury "an essential element of its function"].)

iii. Because The Cases Were Joined And Tried Before The Same Jury, The Error In Granting Co-Defendant Lee A Directed Verdict On The Conspiracy Charge Had A Grossly Unfair Impact On The Jury's Ability To Fairly Consider Petitioner's Defense

Consistent with the Eighth Amendment requirement of heightened reliability in capital cases, severance motions in capital cases should receive heightened scrutiny for potential prejudice. (See *Adamson v. Ricketts* (9<sup>th</sup> Cir. 1988) 865 F.2d 1011,

1023.) In addition, even if a motion to sever was properly denied at the time it was made, reversal is required where the joinder actually resulted in gross unfairness amounting to a denial of due process. (*Grisby v. Blodget* (9<sup>th</sup> Cir. 1997) 130 F.3d 365, 370 [evaluating whether joinder with co-defendant rendered defendant's trial fundamentally unfair].)

Whether the trial court correctly acquitted Lee of the conspiracy charge is directly related to the question of whether the joinder of defendants was ultimately prejudicial. The trial court making its own decision in favor of acquitting Lee (25 RT 4456, 4458) invaded the province of the jury in deciding the issue. (*People v. Odom, supra*, 3 Cal. App. 3d 559, 565.) The jury was ultimately precluded from having an unbiased consideration of petitioner's defense which was based on the prosecution's case-in-chief, showing that Lee was the one who instigated the conspiracy. For the prosecution to have built its case against Lee, using Lee's role in it to prove petitioner also was guilty of the charge and then the trial court removing the question of Lee's role from the jury prejudiced petitioner's efforts to show that Lee



was the one involved in the conspiracy, the mastermind; petitioner was not.

In *United States v. Tootick* (9<sup>th</sup> Cir. 1991) 952 F.2d 1078, Frank and Tootick were jointly tried and convicted of assault resulting in serious bodily injury. They appealed arguing error in the trial court's failure to sever their cases. (*Id.* at p. 1080.) The principle defense of each defendant was that the other alone committed the assaults. Frank swore that he drove to an isolated spot at the side of a hill and remained in the car while Tootick stepped out with Hart and stabbed him. Frank testified that he watched in horror as codefendant Tootick repeatedly stabbed Hart. Because only Frank and Tootick were present when Hart was attacked, and because there was no suggestion that Hart injured himself, the jury could not acquit Tootick without disbelieving Frank. Each defense theory contradicted the other in such a way that the acquittal of one necessitated the conviction of the other. (*Id.* at p. 1081.) The Ninth Circuit decided that the joint trial of Frank and Tootick resulted in reversible prejudice with respect to each defendant. The jury could not have been able to assess the guilt or innocence of the defendants on an individual and

independent basis. The court pointed out that counsel portrayed Frank as the sole guilty party. The jury heard inflammatory testimony against Tootick. The prosecutor's closing argument rested on the logical impossibility of accepting both defendant's versions. There were no limits placed on the defendants' respective counsel as "they acted as unsanctioned prosecutors during the course of the trial." (*Id.* at pp. 1082-85.)

Here too, the trial court erred, resulting in a violation of petitioner's constitutional rights to a fair and unbiased jury trial. Petitioner's defense was based on the prosecution's evidence showing that Lee instigated the plot to burgle Brucker's house. Lee's defense was that petitioner was the mastermind behind the crimes and Lee had no part in it. (15 RT 2336; 29 RT 5158-59.) The jury's acceptance of Lee's defense, finding he was not guilty of murder and the withdrawal of the conspiracy charge, meant that petitioner was left as the only alleged mastermind of the crime and likely shooter. (30 RT 5190-96, 5233-43; 33 RT 5430.) Additionally, two of the most crucial witnesses in the prosecution's case, Peretti and Handshoe, supported the theory that petitioner, not the other defendants, was the mastermind of

the crimes. Their testimony was partially or entirely beneficial to Lee and Huhn. Although Huhn had a separate jury, Peretti and Handshoe testified before both juries simultaneously. With counsel for Huhn and Lee supporting the credibility of these witnesses, the trial had three prosecutors instead of one against petitioner –clearly unfair to petitioner. No different than in *United States v. Tootick, supra*, co-defendants’ counsel were given free rein to act as unsanctioned prosecutors during the course of the trial, i.e., without the limits imposed on government prosecutors. “The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor.” (*Id.* at p. 1082.) Petitioner was left trying to attack the credibility of these significant witnesses alone with the co-defendants joining forces against him to buttress their credibility. The trial court’s failure to sever the case and directed verdict for Lee on the conspiracy charge precluding the jury from fairly deciding Lee’s role in the conspiracy, implicating petitioner’s constitutional right to a fair jury trial. (*Beck v. Alabama* (1980))

447 U.S. 625, 637-638; U.S. Const. Amend. V, VI, XIV; Cal. Const. Art. I, §§ 7, 15.)

In sum, the trial court prejudicially erred in directing a verdict for Lee on the conspiracy charge when both defendants had the same jury. In usual circumstances, such a decision cannot be appealed. Yet, in this case, because Lee and petitioner had the same jury, the error in directing a verdict for Lee undermined petitioner's trial and the neutrality of the jury; jurors could not fairly decide the case against petitioner.

The error violated petitioner's constitutional right to due process, a fair trial by an unbiased jury, and fair and reliable guilt and penalty determination. (*United States v. Mayfield* (9<sup>th</sup> Cir. 1999) 189 F.3d 895, 900; *United States v. Tootick* (9<sup>th</sup> Cir. 1991) 952 F.2d 1078, 1082-85; *People v. Massie* (1967) 66 Cal.2d 899, 913; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; U.S. Const. Amend. V, VIII, XIV; Cal. Const. Art. 1, §§ 7, 15.)

## CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for writ of certiorari.

Dated: Jan. 25, 2019

Respectfully submitted,

---

Joanna McKim, SBN 144315  
Counsel for the Petitioner

Certification Regarding Word Count

The word count in petitioner's petition for writ of certiorari is 3843 words according to my Microsoft Word program. (United States Supreme Court, Rule 33.)

I declare under penalty of perjury that this statement is true.  
Executed on Jan. 25, 2019 at San Diego, California,

Signature: \_\_\_\_\_, Name: Joanna McKim - 144315  
P.O. Box 19493  
San Diego, CA 92159  
(619) 303-6897