IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD LEON, Defendant and Appellant.	No. S056766 Los Angeles County Superior Court No. PA012903

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

The Honorable Ronald S. Coen

MICHAEL J. HERSEK
State Public Defender

ALISON PEASE
Cal. State Bar No. 91398
Senior Deputy State Public Defender

770 L Street
Suite 1000
Sacramento, California 95814
Telephone: (916) 322-2676
Fax: (916) 327-0459
E-mail: pease@ospd.ca.gov

Attorneys for Appellant
RICHARD LEON

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Plaintiff and Respondent,	)	Los Angeles County Superior Court
v.	)	No. PA012903
RICHARD LEON,	)	
Defendant and Appellant.	)	

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

INTRODUCTION

This supplemental brief presents one additional claim in appellant's automatic appeal. The claim is numbered IIIA because it is related to Argument III in the opening brief.

IIIA.

BECAUSE OF PROCEDURAL IRREGULARITIES, THE TRIAL JUDGE ERRED IN ALLOWING THE TESTIMONY OF JULIO CUBE PURSUANT TO EVIDENCE CODE SECTION 1101, SUBDIVISION (B)

In Argument III of his opening brief (AOB at 89-111) and of the reply brief (ARB at 49-57), Mr. Leon argued that the trial judge erred in allowing the prosecution to present the testimony, under Evidence Code section 1101, subdivision (b), of Julio Cube about two uncharged robberies. As the following discussion will show, there are additional reasons why this evidence should not have been admitted into evidence at Mr. Leon's guilt phase trial.

A. The Trial Judge Improperly Overruled a Fellow Superior Court Judge's Determination

The trial judge's decision to allow the prosecutor to present the testimony of Julio Cube about two robberies was improper because both a magistrate at the preliminary hearing in this case and the Superior Court judge who ruled on the 995 motion [1] found that Mr. Cube could not identify Mr. Leon as the person who allegedly robbed his store, Jambi 3 Jewelry, in January and February of 1993. (AOB at 89-91.)

Originally, Mr. Leon was charged with two second degree robberies of Julio Cube in Counts 20 and 21 of the complaint in this case. (7 CT 1614-1615.) Because Mr. Cube's testimony at the preliminary hearing was so confused—he could not even remember when the second robbery occurred and did not report it to the police — the magistrate dismissed these two counts of robbery. (8 CT 1775.) The stated reason for dismissing the

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[1] A motion made pursuant to Penal Code section 995.

counts at the preliminary hearing was that there was "insufficient identification" and that Cube "really could not identify the defendant." (6 CT 1465.) Subsequently, Judge Asheman, the Superior Court judge who heard and granted in part appellant's 995 motion to set aside portions of the information, upheld the magistrate's finding – as a factual finding – that Julio Cube could not identify Mr. Leon as the man who allegedly robbed him twice. (1-10 CT 41-44.)

When Judge Coen, the trial judge, rejected Mr. Leon's argument at trial that the decision of Judge Asheman precluded the prosecutor from using the two alleged robberies of Julio Cube as other crimes evidence under Evidence Code section 1101, subdivision (b), he acted improperly. In ruling for the prosecution on this evidentiary issue, the trial judge offered alternative theories. First, he criticized Judge Asheman's ruling that insufficient identification was a factual finding and not a legal finding. Second, he asserted that even if it were a factual finding and thus would preclude the refiling of the charges, that ruling would not mean the prosecutor could not present evidence of those robberies under section 1101, subdivision (b). (16 RT 604.) Judge Coen's reasoning was faulty in several respects.

Magistrate Marcus's finding that Julio Cube could not identify appellant as the person who robbed him was a factual finding. Appellate courts in California have held repeatedly that the identity of a perpetrator is a question of fact. (*People v. Hinson* (1969) 269 Cal.App.2d 573, 578; see also *People v. Smith* (1963) 223 Cal.App.2d 388, 393; *People v. Daniels* (1963) 223 Cal.App.2d 441, 443; *People v. Hornes* (1959) 168 Cal.App.2d 314, 319, and *People v. Austin* (1961) 198 Cal.App.2d 669, 672.) This Court has also found that " the credibility of witnesses at the preliminary

examination, of course, is a question of fact within the province of the committing magistrate to determine, and neither the superior court nor an appellate court may substitute its judgment as to such question for that of the magistrate." (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 667.) The magistrate's finding that Mr. Cube could not identify Mr. Leon as the robber was, in effect, a credibility determination. Therefore, it was Judge Asheman, not the trial judge, who was correct in determining that Magistrate Marcus's finding that Julio Cube could not identify appellant as the person who robbed him was a factual finding. Moreover, Judge Asheman properly granted Mr. Leon's 995 motion to set aside the robbery charges (counts 20 and 21) involving Mr. Cube.

A magistrate's function at a felony preliminary hearing is to determine whether or not there is "sufficient cause" to believe the defendant is guilty of the charged offense. (Cal.Pen. Code, §§ 871, 872.)[2] If the magistrate has made express factual findings and dismissed the charges for lack of probable case, the superior court is bound by those findings if supported by substantial evidence. On the other hand, if the magistrate dismissed the charges without making factual findings, the superior court reviews the dismissal as a question of law. (*People v. Childs* (1991) 226 Cal.App.3d 1397, 1406, citing *People v. Slaughter* (1984) 35 Cal.3d 629,

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The record shows that on June 20, 1994, after a six-week preliminary hearing, Magistrate Marcus dismissed counts 20 and 21 because Cube "really could not identify the defendant." (6 CT 1465; 8 CT 1775.) Thereafter, on July 5, 1994, defense counsel filed a motion to set aside information under Penal Code section 995; this motion included, inter alia, a request that counts 20 and 21 of the information be dismissed based on the findings of Magistrate Marcus at the preliminary hearing. (8 CT 1788-1789.)

638-642.)

Section 995 provides that, upon a defendant's motion, an information shall be set aside by the court in which the defendant is arraigned if the defendant has been committed without reasonable or probable cause after a preliminary hearing. (*Id.*, subd. (a)(2)(B).) A superior court judge ruling on a section 995 motion may not substitute his or her judgment for that of the committing magistrate concerning the weight of the evidence or the credibility of the witnesses. (*People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 835.)

Judge Asheman correctly applied these principles when she heard appellant's 995 motion. That is, she recognized that Magistrate Marcus's finding that Julio Cube could not identify Mr. Leon as the man who robbed him was a factual finding which had to be upheld because it was supported by substantial evidence. The record indeed establishes that there was substantial evidence to support the magistrate's factual finding that Julio Cube could not identify appellant as the man who robbed him.[3]

At the preliminary hearing, Julio Cube's description of the man who robbed him twice was both vague and at times contradictory. Cube testified that he was looking down when the robber entered his store on January 12, 1993. (6 CT 1280-1281.) When he first came into the store, the man pushed Mr. Cube and then put a knife in Cube's stomach. (6 CT 1299-1300.) The robber asked for money and then told Mr. Cube to open the cash register and the safe. (6 CT 1282-1283.) The man put his hand into the safe and took out an envelope with money in it and a handgun. (6 CT 1284.)

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Mr. Cube's testimony at the preliminary hearing in this case are found at pages 1280 to 1326 of Volume 6 of the Clerk's Transcript.

The robber then directed Mr. Cube to lie or sit down on the floor; he also warned Cube not to follow him or he would kill him. (6 CT 1289-1290.) After the man left the store, Mr. Cube called the police. (6 CT 1290.)

Mr. Cube testified that about a week before the preliminary hearing, he viewed a six-person live lineup. He picked out one person in that line-up but he wrote in his notes that he was not one hundred percent certain about the identification because of the passage of time and the fact that he had been afraid during the robbery. (6 CT 1291.) Mr. Cube testified that all he could remember about the robber was that he was Caucasian, about 5'10" or 5'9" tall and was wearing a baseball cap. (6 CT 1291-1292.)

On cross-examination, Cube stated that, because he was so scared, "I cannot even look at the person. I just glanced once in awhile (sic) just to make some recollection if something happened." (6 CT 1303.) During the time when the robber was feeling around in the safe, Mr. Cube was focused on whether the man would find the gun because he was afraid he might use it to kill him. (6 CT 1308.) Although Mr. Cube did remember that the robber was wearing a dark maybe black jacket and a dark blue baseball cap, he could not remember the color of the man's hair or the style other than it was long enough to reach below his ears. (6 CT 1311.) Cube could not remember anything unusual about the person's face because

> I was scared, like I said. I cannot–with that length of time he just go in split second and go. Around five minutes.

(6 CT 1313.)

Mr. Cube agreed that because he was afraid and because he was focused on other things he did not have a very good chance or much time to look at the robber. (6 CT 1315.)

Mr. Cube also testified about a second robbery that occurred about a

month after the first and which he did not report to the police. (6 CT 1318.) He claimed that the second robbery was by the same person, but this belief was based on the fact that the person was the same height and because he said the same words, "Give me the money." (6 CT 1321-1322.) Cube agreed that there was nothing distinctive about the man's voice. (6 CT 1324.) He also testified that he was not certain that the same man robbed him both times. (6 RT 1321.)

B. The Trial Judge Violated Principles of Comity When he Essentially Overruled a Fellow Superior Court Judge's Finding That the Magistrate had Made a Factual Finding That Must be Affirmed Because it was Supported by Substantial Evidence

In ruling at the 402 hearing that the prosecution could call Julio Cube to testify at Mr. Leon's guilt phase trial despite the fact that the two robbery charges involving him had been dismissed, Judge Coen made the following remarks about Judge Asheman's ruling:

> Even if it were a factual finding, that would preclude the refiling of that count as it would be binding on all subsequent judges or all reviewing courts. However, that would not estop the presentation of evidence pursuant to Evidence Code section 1101, subdivision (b). However, my holding was that that was a legal ruling in any event, regardless of the outcome of the 995. As such, based upon *People v. Ewoldt* [citation omitted], such evidence will be allowed for purposes of intent and common design or plan.

(16 RT 604.)

Strictly speaking, collateral estoppel did not apply in this case.[4]

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[4] In *People v. Garcia* (2006) 39 Cal.4th 1070, 1077, this Court stated that, as a general rule, "There are five threshold requirements [for collateral estoppel]: 1) the issue to be precluded must be identical to that decided in (continued...)

Nonetheless, it was not proper for Judge Coen to reject Judge Asheman's determination that the preliminary hearing magistrate had made a factual finding that Julio Cube could not identify Mr. Leon as the man who robbed him. As the Court of Appeal noted in *People v. Riva* (2003) 112 Cal.App. 4th 981, it is a general rule that

> . . . one trial judge cannot reconsider and overrule an order of another trial judge. There are important public policy reasons behind this rule. "For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court."

(*Id.* at p. 991, citations omitted.)

Further, for reasons of comity and public policy, trial judges should avoid reversing or modifying other trial judges' rulings absent a highly persuasive

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[4](...continued)
the prior proceeding; 2) the issue must have been actually litigated at that time; 3) the issue must have been necessarily decided; 4) the decision in the prior proceeding must be final and on the merits; and 5) the party against whom preclusion is sought must be in privity with the party to the former proceeding." Because the issue decided by Judge Asheman at the 995 hearing was not "identical" to the issue before Judge Coen in the 402 hearing regarding the admissibility of the proposed testimony of Mr. Cube, collateral estoppel was not applicable. The function of the superior court in a motion to dismiss under section 995 is to review the sufficiency of the evidence based on the record made before the magistrate at the preliminary hearing. (*People v. Crudgington* (1979) 88 Cal.App.3d 295, 299.) By contrast, the issue before the judge conducting a 402 hearing regarding contested proposed testimony about other crimes evidence is to determine whether such evidence meets the criteria for admission under Evidence Code section 1101(b) and whether, under Evidence Code section 352, its probative value outweighs its potential to cause undue prejudice. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Bolin* (1998) 18 Cal.4th 297, 320.)

reason for doing so. (*Id.* at p. 992.)

Similarly, in *People v. Barros* (2012) 209 Cal. App. 4th 1581, the Court of Appeal noted that while a criminal court generally has the authority to correct its own prejudgment errors, that rule does not apply when the reconsideration is accomplished by a different judge. The power of one judge to vacate an order made by another judge is limited because it would mean that the second judge would be acting as a one-judge appellate court. (*Id.* at pp. 1597-1598; see also *In re Alberto* (2002) 102 Cal.App.4th 421, 427.)

In this case, Judge Coen had no basis for rejecting Judge Asheman's finding that Magistrate Marcus, in his decision to dismiss the two robbery counts involving Julio Cube, had made a factual finding that Mr. Cube could not identify Mr. Leon as the perpetrator. In deciding the 995 motion Judge Asheman was bound by that factual finding, and Judge Coen, when faced with the prosecutor's request to admit the testimony of Cube as "other crimes" evidence under section 1101(b), should have felt so bound himself. This is particularly true since the burden of proof on the prosecution at a preliminary hearing is so much less than the burden on it for admission of other crimes evidence under section 1101(b).

As the Court of Appeal noted in *Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846, "the showing required at a preliminary hearing is exceedingly low." The function of the magistrate is to determine whether or not there is "sufficient cause" to believe the defendant is guilty of the charged offense. Sufficient cause means "reasonable and probable cause" or "state of facts as would lead a [person] of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of guilt of the accused." (*People v. Uhlemann* (1973) 9 Cal.3d 662, 666-667.)

In California, when the prosecution wants to introduce, pursuant to Evidence Code section 1101, subdivision (b), evidence of other crimes committed by the defendant, it must prove those crimes by a preponderance of the evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1245, fn. 2.) The preponderance burden of proof is a more rigorous standard than the probable or sufficient cause burden on the prosecution at a preliminary hearing. (*Ortega v. Superior Court* (1982) 135 Cal.App.23d 244, 256, fn. 6)[5] Accordingly, in this case, since the prosecution could not meet the very low burden of proof at the preliminary hearing that appellant had committed two robberies of Julio Cube, the trial judge should not have admitted Mr. Cube's testimony as other crimes evidence at the guilt phase of this capital trial since the burden there was preponderance of the evidence, a much higher burden of proof.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in Argument III of both the opening brief and the reply brief, the trial judge erred in admitting the testimony of Julio Cube as "other crimes" evidence under Evidence Code section 1101 (b). Not only was the admission of this

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[5] See also *State v. Clark* (Utah 2001) 20 P.3d 300, 304, where the Utah Supreme Court held that the probable cause burden of proof at a preliminary hearing is lower than the preponderance of evidence standard. In *United States v. Arvizu* (2002) 534 U.S. 266, in a case involving the propriety of a vehicle stop, the Supreme Court wrote:

> Although an officer's reliance on a mere "hunch" is insufficient to justify a stop [citation omitted], the likelihood of criminal activity *need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.*

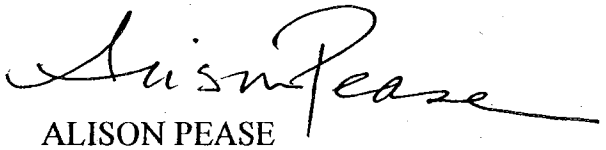
(*Id.* at p. 27; italics added.)

evidence improper under California's evidentiary rules, but it violated Mr. Leon's constitutional rights to due process and a fair trial because this evidence tainted the trial by lightening the State's burden of proof and allowing the jury to convict Mr. Leon based, at least in part, on evidence of criminal propensity which had limited probative value while being unduly prejudicial. The State cannot prove beyond a reasonable doubt that the improper testimony of Mr. Cube did not affect the convictions and death sentence in this case. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Nor can the State show that if this evidence had not been introduced, the jury would not have returned a verdict more favorable to Mr. Leon. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, his convictions and death sentence must be reversed.

Dated: 1 July 2013

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



ALISON PEASE
Senior Deputy State Public Defender

Attorneys for Appellant,
RICHARD LEON

DECLARATION OF SERVICE BY MAIL

Case Name: *People v. Leon*
Case Number: **Superior Court No. Crim. PA012903**
Supreme Court No. S056766

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, CA. I served a copy of the following document(s):

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4-EB-48L
San Quentin, CA 94964

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Stacy S. Schwartz
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Habeas Corpus Resource Center
Kevin Bringuel
303 Second Street, Suite 400 South
San Francisco, CA 94107

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 1, 2013, at Sacramento, California.

DENISE A. ARMENDARIZ

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD LEON, Defendant and Appellant.	No. S056766 Los Angeles County Superior Court No. PA012903

CERTIFICATE OF WORD COUNT FOR APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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The Honorable Ronald S. Coen

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ALISON PEASE
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Senior Deputy State Public Defender

770 L Street
Suite 1000
Sacramento, California 95814
Telephone: (916) 322-2676
Fax: (916) 327-0459
E-mail: pease@ospd.ca.gov

Attorneys for Appellant
RICHARD LEON

DEATH PENALTY

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v.	)	No. PA012903
RICHARD LEON,	)	
Defendant and Appellant.	)	

CERTIFICATE OF WORD COUNT FOR APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

I, Alison Pease, am the Deputy State Public Defender assigned to represent appellant Richard Leon, in this automatic appeal. I directed a member of our staff to conduct a word count of appellant's supplemental opening brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 3,019 words in length excluding the tables and this certificate.

DATED: July 3, 2013

Alison Pease
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

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