In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **RICHARD LEON,** **Appellant.**	**CAPITAL CASE** Case No. S056766

Los Angeles County Superior Court Case No. PA012903
The Honorable Ronald S. Coen, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General
STACY S. SCHWARTZ
Deputy Attorney General
State Bar No. 191971
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2252
Fax: (213) 897-6496
Email:DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTRODUCTION

Pursuant to this Court's Order dated July 15, 2013, respondent hereby files its Supplemental Respondent's Brief addressing the additional argument presented by appellant in his Supplemental Opening Brief.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY FROM JULIO CUBE REGARDING THE JAMBI 3 ROBBERIES

In his Supplemental Opening Brief, appellant provides an additional argument as to why the trial court erred in allowing the prosecution to present testimony by Julio Cube, under Evidence Code section 1101, subdivision (b), about two uncharged robberies. Specifically, appellant contends that such evidence was improper because "both a magistrate at the preliminary hearing in this case and the Superior Court judge who ruled on the 995 motion found that Mr. Cube could not identify [appellant] as the person who allegedly robbed his store, Jambi 3 Jewelry, in January and February of 1993." (Suppl. AOB at 2-10.) Appellant's contention is without merit.

A. Relevant Trial Proceedings

In an amended felony complaint filed on October 4, 1993, appellant was charged with two counts of second degree robbery involving Julio Cube. (7CT 1614-1622.) After the preliminary hearing, however, these counts were dismissed by Magistrate Judge Gregg Marcus. (8CT 1775.) Magistrate Marcus explained:

> . . . the Court is going to dismiss Count 20, that's the Jambi robbery, based on insufficient identification by Mr. Cube and his confusion and non-reporting, the fact that there may have been more than one incident and the Court seemed satisfied that Mr. Cube really could not identify [appellant].

> He thought so at one point in time and then confused the robberies to the point where I believe he was totally confused in his testimony.

(6CT 1465.)

Later, on July 12, 1994, defense counsel filed a Motion to Set Aside Information pursuant to section 995. (8CT 1767-1769.) Defense counsel filed another document on February 14, 1995, entitled, "Additional Explication of Issues Raised by Defendant's Motion to Set Aside Information (Penal Code Section 995)." (8CT 1783-1790.)

On April 4, 1995, Judge Judith M. Ashmann held a hearing on the motion. (1-10RT 25-50.) In deciding whether to dismiss Counts 20 and 21 (the Cube robberies), the court stated:

> I'm troubled by the fact that the magistrate seemed to be making a factual finding because he does say based on insufficient identification. To me, that's not just the ramblings of a magistrate judge which I – which I, as a magistrate, used to do at that time as well. So I'm not being critical. . . . [¶] That doesn't seem to be just the musings of the magistrate, but it really seems to be making a factual finding that the identification was insufficient.
>
> I'm concerned, but I also agree that it would be awfully coincidental that the gun turns up in his car, and there are all these other robberies he is identified as having committed.
>
> But I'm concerned about this one because it does look like the magistrate has made a factual finding.
>
> [¶]
>
> I think that – first of all, the evidence itself is weak, and secondly, the statement by the magistrate that it was – I think as to Counts 20 and 21 that the 995 should be granted, that those charges should not have been refiled.

(1-10RT 41-42, 44.)

Later, after the prosecutor indicated that she intended to call Julio Cube to testify about the events of the robberies and the gun that was stolen, the trial court held a hearing pursuant to Evidence Code section 402. (16RT 592.) At the hearing before Judge Ronald S. Coen, defense counsel argued that factual findings were made by Magistrate Marcus "that the identifications were not believeable," and as such, Cube's testimony should be excluded under Evidence Code section 352. (16RT 593-594.) The prosecutor reminded the court that Cube had picked appellant out of a live lineup and photographic lineup and argued that Judge Ashmann did not find Cube to be unbelievable. Rather, Judge Ashmann dismissed the counts because there was insufficient evidence to support a conviction. (16RT 596.)

In admitting the evidence, the trial court ruled as follows:

> In this case Judge Ashmann is confusing the statement of the magistrate. The magistrate found an insufficient identification to hold [appellant] to answer as to that particular count. That is a legal ruling regardless of what Judge Ashmann termed it.
>
> 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 versus Ewoldt . . . such evidence will be allowed for purposes of intent and common design or plan.

(16RT 603-604.)

Following the court's ruling, Cube testified that on two different occasions appellant came into the Jambi 3 jewelry store where he worked and robbed him. According to Cube, during the first robbery, appellant stole a Walther handgun. (16RT 662-663, 666-667.) The same handgun

was used in the robbery-murders at Jack's Liquor and the Sun Valley Shell Station, and ultimately found in appellant's car. (26RT 1689-1691, 27RT 1827-1832.)

B. Despite Magistrate Marcus's Ruling, Judge Coen Properly Allowed Cube To Testify About The Jambi 3 Robberies

The decision whether to admit other-crimes evidence rests within the discretion of the trial court. (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.) The truth of a prior uncharged act and defendant's connection to it are preliminary factual issues which must be decided before the prior misconduct can be deemed admissible; if the prior act and defendant's connection to it are not established by a preponderance of the evidence, the prior act is irrelevant to prove the fact for which it is being offered. (*People v. Garelick* (2008) 161 Cal.App.4th 1107, 1115.) Evidence of another offense, to be properly admissible under the exceptions to the general rule, need not prove all the elements of the other offense beyond a reasonable doubt. It must, however, be substantial and of such a nature as to arouse more than mere suspicion. (*People v. Albertson* (1944) 23 Cal.2d 550, 579.)

When evaluating an error in the admission of prior-crimes evidence, an appellate court determines whether it was reasonably probable that a result more favorable to the defendant would have resulted had the prior-crimes evidence not been admitted. (*People v. Williams* (2009) 170 Cal.App.4th 587, 612.)

Here, appellant contends that the trial court erroneously allowed Cube to testify about the robberies at the Jambi 3 store pursuant to Evidence Code section 1101 because a fellow superior court judge had already made a factual finding that Cube could not identify appellant as the person who robbed him. Appellant's contentions are without merit.

First, contrary to appellant's argument, Magistrate Marcus did not make a determination, as a matter of fact, that the robberies were not committed by appellant. In *Jones v. Superior Court* (1971) 4 Cal.3d 660 (*Jones*), the California Supreme Court discussed the difference between a magistrate's legal and factual findings at a preliminary hearing. The Court explained that if a magistrate makes "material factual findings" that prove fatal to the offense by negating any possibility that it occurred, the prosecution may not ignore those findings and refile charges. (*Id.* at p. 666.) The crux of the *Jones* decision is the distinction between a magistrate's factual findings inimical to the charge, and a magistrate's legal conclusion regarding the sufficiency of the evidence presented. In the former situation, the magistrate determines as a matter of fact there is no possible evidentiary support for the charge. In the latter, the magistrate accepts and considers the evidence amassed by the prosecution, but concludes that it is insufficient to establish the probable cause required to justify inclusion of the offense in the holding order. (*Id.* at pp. 665-666.) A factual finding binds the prosecutor from refiling the charge in superior court; a legal conclusion does not. The People may refile a transactionally related charge if they can satisfy the superior court that the evidence is legally sufficient to support probable cause, notwithstanding the magistrate's legal conclusion to the contrary. (*People v. Farley* (1971) 19 Cal.App.3d 219, 220-221.)

Here, the magistrate judge at the preliminary hearing did not make a "factual finding" in failing to hold appellant to answer the charges regarding the Jambi 3 robberies. Rather, as found by Judge Coen, Magistrate Marcus reached a legal conclusion that the evidence did not add up to reasonable cause to believe that the robberies had been committed by appellant. In other words, the magistrate simply concluded that the evidence was insufficient.

In any event, *Jones* addresses the effect of a magistrate's dismissal of charges at a preliminary hearing on a prosecutor's ability to refile the charges. At its heart, the case concerns the *prosecution* of a charge that has been dismissed. It does not concern, as appellant would suggest, the effect a magistrate's dismissal of charges has on the *admissibility* of other crimes evidence under Evidence Code section 1101. Indeed, it is well settled, that "competent and otherwise admissible evidence of another crime is not made inadmissible by reason of the defendant's acquittal of that crime. [Citations.]" (*People v. Griffin* (1967) 66 Cal.2d 459, 464 (*Griffin*).)

In *Griffin*, the defendant was charged with murdering a woman after he attempted to rape her, and a mistrial was declared when the jury failed to reach a verdict. (*Griffin*, *supra*, 66 Cal.2d at p. 461.) During the retrial, the trial court admitted evidence that the defendant had committed a subsequent rape attempt involving another woman, and the jury found him guilty of murder. (*Id.* at pp. 461, 463.) The defendant appealed, contending that the trial court erred in admitting evidence of the subsequent rape attempt, on the ground he had been acquitted of that alleged subsequent offense. (*Id.* at p. 464.) The Court disagreed, noting that under settled law competent and otherwise admissible evidence of another crime was not made inadmissible by reason of the defendant's acquittal of that crime. (*Id.* at p. 465.)

In *People v. Beamon* (1973) 8 Cal.3d 625 (*Beamon*), the California Supreme Court reaffirmed its decision in *Griffin*. In *Beamon*, which involved a prosecution that arose out of the hijacking of a liquor delivery truck, a jury convicted the defendant of robbery and kidnapping for the purpose of robbery. (*Beamon*, *supra*, 8 Cal.3d at pp. 629-630.) The trial court had permitted the prosecution to present evidence that the victim had suffered a similar hijacking by the same defendant 18 months before the current crimes were committed, but had also admitted evidence that the

defendant had been tried and acquitted of criminal charges filed in connection with that previous hijacking. (*Id.* at p. 630.) On appeal, the defendant claimed that the trial court prejudicially erred by admitting evidence of the previous highjacking. (*Id.* at p. 632.) Citing *Griffin*, *supra*, 66 Cal.2d at page 464, the *Beamon* court upheld the admission of the evidence of the prior hijacking under Evidence Code section 1101, subdivision (b), stating: "[T]he evidence relating to the prior hijacking of the victim's liquor truck was not rendered inadmissible by reason of the fact that defendant had been acquitted of the crimes charged in connection therewith. [Citation.]" (*Beamon*, *supra*, 8 Cal.3d at p. 633.)

Despite such well-settled law, appellant contends that Judge Coen nevertheless violated "principles of comity" in allowing Cube to testify about the Jambi 3 robberies. (See AOB 7-10.) It is often said as a general rule that one trial judge cannot reconsider and overrule an order of another trial judge. (*People v. Woodard* (1982) 131 Cal.App.3d 107, 111.) There are important public policy reasons behind this rule. "For one superior court judge, no matter how well intentioned, 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." (*In re Alberto* (2002) 102 Cal.App.4th 421, 427.) The rule also discourages forum shopping (*People v. Superior Court* (*Scofield*) (1967) 249 Cal.App.2d 727, 734) conserves judicial resources (*People v. Clark* (1992) 3 Cal.4th 41, 119), and prevents one judge from interfering with a case on-going before another judge (*Williams v. Superior Court* (1939) 14 Cal.2d 656, 662).

Here, however, simply put, Judge Coen did not overrule or reconsider Magistrate Marcus's or Judge Ashman's rulings. Indeed, Judge Coen's determination regarding Cube's testimony concerned the *admissibility* of other crimes evidence – not the possibility that appellant

could be prosecuted for such crimes. Furthermore, Judge Coen correctly explained that, even if Magistrate Marcus had made a factual finding regarding appellant's role in the robberies, Cube's testimony would still be admissible as other-crimes evidence. (See *Griffin, supra*, 66 Cal.2d at p. 464.) Accordingly, principles of comity and public policy did not prevent the trial court from allowing Cube to testify about the Jambi 3 robberies.

C. Any Alleged Error Was Harmless

Regardless, as explained in the respondent's brief, even if the evidence was admitted erroneously, any such error was harmless, as appellant would not have obtained a more favorable verdict had the evidence been excluded. The erroneous admission of uncharged acts of misconduct is not cause for reversal unless there is a reasonable probability an outcome more favorable to the defendant would have resulted in the absence of the error. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1323-1324; *People v. Walker* (2006) 139 Cal.App.4th 782, 808; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see also Evid. Code, § 353, subd. (b).)

Here, evidence of appellant's guilt with respect to the other crimes was overwhelming. No fewer than 16 witnesses identified appellant as the perpetrator of the 10 robberies and murders. (17RT 724-728, 769, 775-776; 18RT 822-824, 858, 860-861, 879-880; 19RT 966-968; 20RT 994-1001, 1031, 1062-1064, 1088-1090; 21RT 1176-1179, 1190-1191, 1193, 1203-1205; 22RT 1272-1275; 23RT 1377, 1379, 1381, 1422, 1430, 1475; 24RT 1513-1516, 1518, 1582-1584; 26RT 1700-1707, 1773, 1775-1776; 28RT 1915-1920, 1962.) In many instances, appellant was selected from photographic and live lineups, and later identified by witnesses in court. Additionally, appellant was found in possession of the Walther handgun taken from the first Jambi 3 robbery, which was later tied to two other crimes, and appellant's palm print was recovered from the crime scene at

H&R Pawnshop. (22RT 1246-1248; 26RT 1689-1691; 27RT 1827-1832.) Accordingly, an outcome more favorable to appellant was not reasonably probable absent the admission of the Jambi 3 robbery evidence. (See *People v. Walker*, *supra*, 139 Cal.App.4th at p. 808.)

CONCLUSION

For all these reasons and for the reasons set forth in the respondent's brief, the trial court properly admitted Cube's testimony regarding the Jambi 3 robberies.

Dated: December 10, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General

STACY S. SCHWARTZ
Deputy Attorney General
Attorneys for Respondent

LA1996XS0006
51414334.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 2,455 words.

Dated: December 10, 2013

KAMALA D. HARRIS
Attorney General of California

STACY S. SCHWARTZ
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE
CAPITAL CASE

Case Name: **People v. Richard Leon** No.: **S056766**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 11, 2013, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

On December 11, 2013, I caused an original and thirteen (13) copies of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at **350 McAllister Street, First Floor, San Francisco, CA 94102-4797** via US mail.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 11, 2013, at Los Angeles, California.

E. Obeso
Declarant

Signature

LA1996XS0006
51415644.doc

SERVICE LIST

Case Name: **People v. Richard Leon** Case No.: **S056766**

Alison Pease
Senior Deputy State Public Defender
770 L Street, Suite 1000
Sacramento, CA 95814
Counsel for Appellant Richard Leon

Honorable Ronald S. Coen, Judge
Los Angeles County Superior Court
Clara Shortridge Foltz Justice Center
210 West Temple Street
Los Angeles, CA 90012

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Maria Elena Arvizo-Knight
Death Penalty Appeals Clerk
Los Angeles County Superior Court
Criminal Appeals Unit
Clara Shortridge Foltz Justice Center
210 West Temple Street, Room M-3
Los Angeles, CA 90012

Jacquelyn Lacey
Chief Deputy District Attorney
Los Angeles County District Attorney's Office
210 West Temple Street, Room 18-109
Los Angeles, CA 90012

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814 E-15

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