IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. RICHARD LEON, Defendant and Appellant.	No. S056766 Death Penalty Case Los Angeles County Superior No. PA012903

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

The Honorable Judge Ronald S. Coen

MICHAEL J. HERSEK
State Public Defender

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

Office of the State Public Defender
770 L Street, Suite 1000
Sacramento, CA 95814

Telephone: (916) 322-2676
Fax: (916) 327-0459
Email: pease@ospd.ca.gov

Attorneys for Appellant
RICHARD LEON

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATUTES

RULES

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 REPLY BRIEF

INTRODUCTION

In argument III of his opening brief (AOB at 89-111) and reply brief (ARB at 48-57), appellant Richard Leon contended that the trial judge erred in allowing the prosecution to call Julio Cube to testify about two robberies, the charges for which had been dismissed from this case. In a supplemental appellant's opening brief ("SAOB"), filed on July 15, 2013 and containing one argument (Argument IIIA), Mr. Leon made an additional claim in support of his contention that the admission of the testimony of Mr. Cube was improper. Respondent filed its supplemental brief ("RSB") on December 12, 2013, to which Mr. Leon herein replies.

ARGUMENT

In Argument IIIA of his supplemental opening brief, Mr. Leon argued that in addition to the fact that it was prejudicial error to admit the testimony of Julio Cube about two robberies under Evidence Code section 1101, subdivision (b), there were procedural irregularities involved in this ruling by the trial judge.

I. Dismissal of the Jambi 3 Jewelry Store Robbery Charges was Based on a Factual Finding that Mr. Cube Could not Identify Appellant as the Robber

Mr. Leon was originally charged with two counts of second degree robberies of Mr. Cube at his store, Jambi 3 Jewelry. (7 CT 1614-1615.) However, because his testimony at the preliminary hearing was so "confused," the magistrate, Gregg Marcus, dismissed these counts, stating:

> [T]he 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 the Mr. Cube really could not identify the defendant. 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. . . the court will also dismiss court 21, that's the Jambi Jewelry robbery. . .

(6 CT 1465.)

Subsequently, defense counsel filed a motion, pursuant to Penal Code section 995, to set aside the information. (8 CT 1767-1769, 1783-1790.) The superior court judge hearing that motion, Judith M. Ashmann, granted the defense motion as to Counts 20 and 21, upholding the

magistrate's finding, as a factual finding,[1] that Mr. Cube's identification was not sufficient. Judge Ashmann 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 which I – what 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. . . .**It's a credibility finding**.

(1-10 RT 41-42, emphasis added.)

Judge Ashmann also observed:

> 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 re-filed.

(1-10 RT 44.)

At the trial of this case, the prosecutor stated her intention to present the testimony of Mr. Cube, and the defense objected. At a 402 hearing, defense counsel argued:

> [t]he People are bringing in evidence of two crimes which they cannot charge. And it is so prejudicial, so little probative [sic] to merely establish, if it does at all, that he got the gun. The problem I have is that the later evidence the case shows him with a gun and corroborates that evidence. And essentially what we have, we have two uncharged robberies which cannot be charged in this case due to the magistrate's filing,

---

[1] As noted in the supplemental opening brief (SAOB at 3), California appellate courts routinely treat the identity of a perpetrator as a question of fact. (See, e.g., *People v. Hinson* (1969) 269 Cal.App.2d 573, 578.)

> which will be used obviously in a negative way and be extremely prejudicial.

(16 RT 595.)

While he never addressed defense counsel's objection that Cube's testimony should be excluded under Evidence Code section 352 as insufficiently probative and unduly prejudicial, the trial judge, Ronald Coen, discussed the statements and findings of both Magistrate Marcus and Judge Ashmann regarding the Jambi 3 Jewelry charges. (16 RT 601-603.) In Judge Coen's view, his colleague, Judge Ashmann, had "confused" the meaning of the magistrate's findings. The trial judge opined that the finding of insufficient identification is a "legal ruling" rather than a factual finding. (16 RT 603.) Judge Coen further found:

> 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* (1994) 7 Cal.4th 380, *such evidence will be allowed for purposes of intent and common design or plan.*

(16 RT 604; italics added.)

In his supplemental opening brief, Mr. Leon argued that in admitting the testimony of Julio Cube the trial judge violated principles of comity by effectively overruling the finding of a fellow superior court judge. Respondent counters in his supplemental brief ("RSB") that the trial judge properly admitted this evidence under section 1101. (RSB at 4.) First, citing this Court's decision in *Jones v. Superior Court* (1971) 4 Cal.3d 660, respondent claims that Magistrate Marcus's finding that Mr. Cube's

identification of appellant was insufficient was not a factual finding but a finding of legal insufficiency. (RSB at 5.)

Respondent's reliance on the *Jones* decision is misplaced. The focus of the analysis in *Jones* was whether the prosecution could file, under Penal Code section 739, an information against a defendant which included charges involving either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate. (*Id.* at p. 664.) This analysis was done in the particular factual context of *Jones*, where two defendants sought a writ of prohibition to prevent the superior court from proceeding further on an information against them.

The two defendants, petitioners in the matter before the Court of Appeal, had been charged with rape, oral copulation and sodomy of a 17 year-old girl. After a three day preliminary hearing, the magistrate found the complainant had willingly engaged in sexual intercourse with the two defendants and that no acts of oral copulation or sodomy had taken place. (*Id.* at pp. 663-664.) However, the magistrate ordered the defendants be held to answer on the offense of statutory rape, an offense not included in the original complaint. The prosecution thereafter filed an information charging the defendants with rape, oral copulation and sodomy but not statutory rape. The defendants unsuccessfully moved, under section 995, to set aside the information.

On review, this Court sided with the defendants, on the ground that:

> . . . since the magistrate found, as a matter of fact, that [the complainant] consented to intercourse and no acts of oral copulation or sodomy occurred, it follows that those offenses were not shown by the evidence to have been committed (Pen. Code, § 739) and should not

have been included in the information.

(*Id.* at p. 666.)

There is nothing in the *Jones* decision which supports respondent's position here. Certainly, the decision does not stand for the broad proposition put forth by respondent – that magistrate's factual findings are limited to a determination that there is possible evidentiary support for a charge. (SRB at 5.) The court in *Jones* did not deal with the issue presented here: an insufficient and thus not credible identification of a defendant by a complainant. As argued in the opening brief, the *Jones v. Superior Court, supra,* 4 Cal.3d at p. 667, does stand for the proposition that the credibility of witnesses at a preliminary hearing is a question of fact for the magistrate and neither a superior court or an appellate court may substitute its judgment for that of the magistrate. (SAOB at pp. 3-4.)

II. Admission of Mr. Cube's Testimony Would Have Been Proper Only if the Jurors Were Informed That the Robbery Charges had Been Dismissed Due to an Inadequate Identification

Respondent cites *People v. Griffin* (1967) 66 Cal.2d 459, 464, for the proposition that "competent and otherwise admissible evidence of another crime is not made inadmissible by reason of the defendant's acquittal of that crime." (SRB at 6.) However, respondent fails to acknowledge an important proviso contained in *Griffin* regarding the admission of such evidence. That is, this Court in *Griffin* found that the trial court erred in excluding evidence that appellant had been acquitted of the crime now being used as other crimes evidence:

> Regardless of its probative value, evidence of other crimes always involves the risk of serious prejudice, and it is therefore always 'to be received with extreme caution.' [citation] Indeed, for this very reason some courts have concluded that an acquittal so attenuates the weight that may

> properly be given evidence of another crime as to require the exclusion of such evidence altogether. [citations] Our rule does not go that far, but instead is fair to both the prosecution and the defense by assisting the jury in its assessment of the significance of the evidence of another crime with the knowledge that at another time and place a duly constituted tribunal charged with the very issue concluded that he was not guilty.

(*Id.* at p. 466.)

The Court of Appeal reaffirmed this principle in *People v. Mullens* (2004) 119 Cal.App.4th 648 in the context of the admission of evidence of a prior sexual crime under Evidence Code section 1108. In *Mullens*, the appellate court concluded that the trial court did not abuse its discretion in admitting as propensity evidence that defendant had french-kissed a 13 year- old girl; however, it did prejudicially err in excluding evidence that the defendant had been found not guilty of committing a previously charged sex crime based on that incident. The appellate court stated in *Mullens*:

> In sum, *Griffin, supra*, 66 Cal.2d 459, and its progeny, as they pertain in this case, stand for the proposition (hereafter the *Griffin* rule) that if a trial court permits the prosecution to present evidence that the defendant committed one or more similar offenses for which he or she is not charged in the current prosecution, the trial court must also allow the defense to present evidence of the defendant's acquittal, if any, of such crimes, and failure to allow such acquittal evidence constitutes error.

(*People v. Mullens, supra*, 119 Cal.App. 4th at pp. 664-665.)

In this case, Mr. Leon was not acquitted of the two robbery charges involving Jambi 3 Jewelry store; rather, those charges were dismissed by a Superior Court judge pursuant to section 995. In *People v. Jenkins* (1970) 3 Cal.App.3d 529, the Court of Appeal found that the reasoning of

the "Griffin rule" applied to evidence that the defendant had not been prosecuted for the prior crime offered as other crimes evidence. In the *Jenkins* decision, the appellate court explained how the rule in *Griffin* applied even though the issue was not an acquittal but a failure to prosecute:

> Although the *Griffin* case is distinguishable from the present case in that there the rejected evidence was acquittal for the other similar offense, while here the proffered evidence was that defendant had not been prosecuted for the similar offense, we apprehend that the rationale of *Griffin* is equally applicable to the present case. In *Griffin* it was held that competent and otherwise admissible evidence of another crime is not made inadmissible by reason of the defendant's acquittal of that crime [citation], but the proof of the acquittal was also admissible to weaken and rebut the prosecution's evidence of the other crime. Accordingly, the gist of the holding in *Griffin* is that since "evidence of other crimes always involves the risk of serious prejudice, and it is therefore always 'to be received with 'extreme caution',' any competent or otherwise admissible evidence tending to weaken and rebut the evidence of the other crime should be admissible.

(*People v. Jenkins, supra*, 3 Cal.App.3d at pp. 533-535, emphasis added.) [2]

In this case, for purposes of assessing the trial court's admission of Mr. Cube's testimony, the Court should apply the reasoning of *People v. Jenkins, supra,* to the determination of Judge Ashmann at the section 995 hearing and treat her dismissal of the Cube robbery charges as equivalent to an acquittal. As the trial judge in this case acknowledged, Judge Ashman's

---

[2] See also the decision of the Rhode Island Supreme Court in *State v. Tobin* (R.I. 1992) 602 A.2d 528, 533, where the appellate court found that the trial court had committed reversible error when it admitted evidence of other sexual crimes but failed to instruct the jury that a grand jury had refused to indict the defendant for this alleged sexual misconduct.

ruling "would preclude the refiling of that count [s] as it would be binding on all subsequent judges or all reviewing courts." (16 RT 604.)

The holdings of *Griffin, supra*, and another decision cited by respondent, *People v. Beamon* (1973) 8 Cal.3d 625, do not require a finding for respondent on this issue as the jury in this case did not learn that charges against Mr. Leon had been dismissed because the magistrate had found, and this finding was upheld by a Superior Court judge, that the identification of Mr. Leon as the robber was not credible and therefore not sufficient to allow the prosecution to proceed further with those charges.

III. This Court Should Reconsider its Rule Allowing the Prosecution to Introduce, Under Evidence Code Section 1101, Evidence of Crimes of Which a Defendant has Been Acquitted, and by Extension, Crimes that Have Been Dismissed under Penal Code section 995

This Court has repeatedly acknowledged that evidence of other crimes is extremely prejudicial and should be admitted only after "extremely careful analysis" and if it has "substantial probative value." (See, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 404). Given the Court's longstanding concern about the potential for undue prejudice created when other crimes evidence is admitted, it is illogical and contradictory to allow evidence of other crimes of which the defendant has been acquitted or, as in this case, have been previously dismissed, pursuant to section 995, against the defendant based on a factual finding by a magistrate after a preliminary examination.

Courts in other jurisdictions have either found such other crimes evidence to be per se inadmissible or have created significant barriers to its admission. For example, in *State v. Perkins* (Fl.1977) 349 So.2d 161, 163, the Florida Supreme Court held that under the Florida

Constitution, it was "fundamentally unfair to a defendant to admit evidence of acquitted crimes." The *Perkins* decision relied upon the decision in *Wingate v. Wainwright* (5th Cir. 1972) 464 F.2d 209, where the Court of Appeals wrote:

> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit.

(*Id.* at p. 212.)

Similarly, in *State v. Wakefield* (Minn.1979) 278 N.W.2d 307, 309, the Minnesota Supreme Court held that "under no circumstances is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense." The *Wakefield* decision also noted "that once the state has mustered its evidence against a defendant and failed, the matter is done." (*Ibid*; see also *State v. O'Meara* (Minn. Ct. App. 2008) 755 N.W.2d 29, 33-35.)

The Tennessee Supreme Court has taken a similar view concerning the admissibility of evidence of crimes for which a defendant has been acquitted. In *State v. Holman* (Tenn.1981) 611 S.W.2d 411, the defendant was charged with theft of a wrist watch. Over a defense objection, the trial court allowed the prosecution to introduce evidence that the defendant had previously stolen another wrist watch in the same manner but refused defendant an opportunity to prove that he had been acquitted for the previous crime. The Tennessee Supreme Court reversed the conviction, reasoning that for such other crimes evidence to have any relevance the jury would have to infer that the defendant was guilty of the prior crime and no such inference can properly be drawn given his acquittal of that crime. (*Id.* at p. 413.) In *Holman,* the Tennessee Supreme Court ruled that evidence of

a crime for which a defendant has been acquitted can never be admissible as evidence of a prior crime in a trial, despite its relevance on issues other than propensity. (*Ibid*; see also *State v. Shropshire* (Tenn.Crim.App. 2000) 45 S.W.3d 64, 76, holding that "an acquittal precludes the possibility of an inference that the defendant committed the crime.")

In *State v. Scott* (N.C. 1992) 413 S.E.2d 787, the North Carolina Supreme Court adopted a per se rule that evidence of a crime for which a defendant has been acquitted is never admissible in a subsequent criminal trial. The *Scott* case involved convictions for kidnaping, rape and a "crime against nature" (oral sex). Over defense objections, the prosecution was allowed to call a witness to testify about another sexual assault allegedly committed by defendant Scott; however, he had been acquitted of the charges brought in connection with the rape of this witness.

The North Carolina Supreme Court held:

> We conclude that evidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value depends, as it did here, upon the proposition that defendant in fact committed the prior crime. To admit such evidence violates, as a matter of law, Evidence Rule 403.[3] . . .When the intrinsic nature of the evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under the rule as a matter of law. The evidence at issue here is of that sort.

(*Id.* at pp. 788-789.)

---

[3] North Carolina Evidence Rule 403, which is identical to Federal Rule of Evidence 403, essentially mirrors California Evidence Code section 352. That is, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

Other courts have also found that the introduction of other crimes evidence should be excluded if a defendant has been acquitted of these crimes, or, alternatively, if such evidence is admitted the jury must be told that the defendant has been acquitted of those charges. (See, e.g., *State v. Little* (Ariz. 1960) 350 P.2d 746, 762; *Moore v. State* (Ga. 1985) 333 S.E.2d 605, 608; *People v. Acevedo* (N.Y. 1987) 508 N.E.2d 665, 672.) Based on the reasoning of all of the above-described decisions from other jurisdictions, Mr. Leon urges the Court to reassess its rule allowing the admission of prior acquitted or dismissed other crimes evidence.

IV. The Introduction of Mr. Cube's Testimony Constituted Prejudicial Error

Respondent argues that even if the trial judge erred in admitting, as other crimes evidence under section 1101, subdivision (b), the testimony of Julio Cube regarding two robberies which had been dismissed, such error was harmless. Citing the evidence presented of ten robberies and two robbery murders charged in this case, respondent claims that there is not a reasonable probability that an outcome more favorable to appellant would have occurred absent the error. (RSB at 8-9.)

For all of the reasons set forth in appellant's opening brief (AOB at 89-111) and reply brief (ARB at 49-59), respondent is mistaken. After joining ten counts of robbery (including two felony murders) in this one case, the prosecutor still insisted on calling as her first witness the complainant in two robberies the charges of which had been dismissed because that complainant could not identify Mr. Leon as the robber at the preliminary examination. The trial judge admitted the evidence of the Cube robberies under the rubric of intent and common design or plan; however, if the ten robbery counts in this case did not provide more than sufficient

evidence of intent and/or common plan or design, the evidence of the dismissed robberies certainly could not accomplish that. This was particularly true because the first Cube robbery did not involve use of a gun or other co-perpetrators while the ten robbery counts did. Moreover, given the facts of the case, the intent of the perpetrators in these ten robberies could not reasonably be questioned; it was the identity of the perpetrators that was disputed. And the inability of Mr. Cube to identify Mr. Leon as the person who robbed him was the basis for dismissing the Cube robbery counts. That is, Cube's identification of appellant at the preliminary hearing was so tentative and unreliable that it did not meet the very low standard which requires the prosecution to show "sufficient cause" to hold defendant for trial on a criminal charge.

Given all these facts, what was the real purpose of the prosecutor in calling Mr. Cube to testify as her first witness at the guilt phase of Mr. Leon's trial? The answer is found in how she used Mr. Cube's evidence in her closing argument to the jury at the guilt phase. The prosecutor used Mr. Cube as a symbol in her emotional appeal to the jurors to convict Mr. Leon. According to her, Mr Leon wasn't just a robber but a criminal who even violated the "criminal code" by engaging in "cruel and unnecessary violence." (30 RT 2147-2148.) Citing Mr. Cube, the prosecutor told the jury:

> . . . the violence in that case is so unnecessary. I don't know whether you noticed but that [sic] Mr. Cube was disabled. He had one hand that was disfigured. He was a man of only five feet four inches tall. He was a man of 110 pounds. And the robber came back twice, once sticking a knife in his belly as he says, and the other time sticking a gun in his neck. Examples of excessive violence in this case. Unnecessary cruelty towards the victims. . .

(30 RT 2149.)

The trial judge erred in admitting the testimony of Julio Cube. A magistrate hearing Cube's testimony at the preliminary examination found that his identification of Mr. Leon as the man who robbed him was not credible. The Superior Court judge who decided the 995 motion correctly found this was a factual finding by the magistrate, thus prohibiting the prosecution from trying Mr. Leon for the Cube robberies. The trial judge erred in allowing Mr. Cube to testify about those dismissed charges on the ground that his testimony was evidence of intent and common design or plan because such evidence was plainly cumulative and also highly prejudicial, particularly given the fact that prosecutor used Mr. Cube's disability and small stature as a basis for making an improper emotional appeal to the jury at the guilt phase. The prosecution cannot establish beyond a reasonable doubt that the improper Cube evidence did not affect the convictions and death sentence in this case. *Chapman v. California* (1967) 386 U.S. 18, 24.) Nor can the prosecution show that if this evidence had not been introduced, the jury would not returned a verdict more favorable to Mr. Leon. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

//

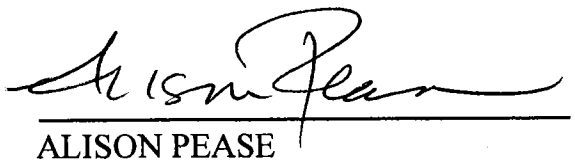
//

For all of the foregoing reasons, Mr. Leon's convictions and death sentence must be reversed.

DATED: January 13, 2014

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



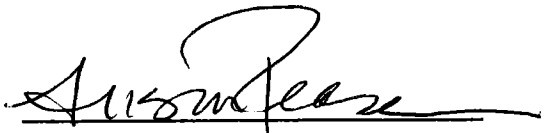
ALISON PEASE
Senior Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630 (b)(2)

I, Alison Pease, am the Deputy State Public Defender assigned to represent appellant Richard Leon in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 4,016 words in length excluding the tables and this certificate.

Dated: January 13, 2014



Alison Pease
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: People v.Richard 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, California 95814. I served a copy of the following document(s):

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

by enclosing them in an envelope and
/ / depositing the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ X / placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on January 13, 2014, as follows:

Richard Leon,#K-25900
CSP-SQ
4-EB-48L
San Quentin, CA 94964

Attorney General's Office
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 January 13, 2014, at Sacramento, California.

Saundra Alvarez