SUPREME COURT COPY

SUPREME COURT OF THE STATE OF CALIFORNIA

S076785

PEOPLE OF THE STATE OF CALIFORNIA ,

Plaintiff and Respondents,

v.

PEDRO RANGEL, Jr.,

Defendant and Appellant.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MADERA

Honorable JOHN W. DeGROOT, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

(AUTOMATIC APPEAL)

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

STATUTES

OTHER AUTHORITIES

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. PEDRO RANGEL, Jr., Defendant and Appellant.	S076785

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

Appellant was granted supplemental briefing in light of recent opinions which have treated the issue of separation of powers raised in the Opening Brief as already decided, despite the lack of any opinion of this Court which discusses the separation of powers issue.

In spite of yet another opportunity to address the issue, respondent continues with the tactical decision to avoid the discussion. Respondent insists that "ap-

pellant's interpretation of [*People v. Birks* (1998) 19 Cal.4th 108] is incorrect, and his claim is, therefore, without merit."

Appellant's interpretation of *Birks* is that the Court in *Birks* did not decide the question whether trial court discretion to instruct on lesser related offenses is necessary as a matter of separation of powers. "We need not finally resolve the separation of powers issue here. It is enough to invoke the established principle that when reasonably possible, courts will avoid constitutional or statutory interpretations in one area which raise '"serious and doubtful constitutional questions"' [citations] in another." (19 Cal.4th at 135.)

The separation of powers issue, with respect to the trial court's independent discretion to instruct on lesser related offenses, remains to be addressed. It has not been discussed by this Court. Apparently respondent disagrees with this, but does not say why. Respondent does not address the separation of powers issue or cite to any opinion of this Court or the Court of Appeal which discusses it (as opposed to treating the issue as already decided).

Respondent has again abandoned the field in this very important controversy. With no argument to counter directly, appellant will confront the arguments which could or might be made to determine the limits of trial court authority to instruct on lesser related offenses.

First, there is the concern that the prosecution may be forced to contradict a charge on which it has no pre-trial notice. However, since 1990, California has

had reciprocal discovery (see Penal Code §§ 1054 et seq.; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356). Therefore, the prosecution will necessarily have notice of any evidence which develops in the defense case which might support instruction on a lesser related offense. Notice through discovery is constitutionally adequate.[1]

The only significant exception is evidence which comes from the defendant's own testimony, which is not subject to discovery. (Penal Code § 1054.3 (a)(1).) In the present case the defendant did not testify. His pre-trial statement to police, which exposed him to liability as an accessory but not as a principal, was introduced by the prosecution. It was well understood throughout the trial that the defendant would claim that he helped in his son's escape but was not present at the shooting. On this record, lack of notice cannot be a legitimate concern.

Second, the stage of the proceedings is always a paramount concern in separation of powers analysis. Where the charging decision has been made and the case has advanced into the disposition phase, the judicial branch has exclusive au-

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[1] "In addition to the advance notice provided by the information and preliminary examination, the cases observe that defendant may learn further critical details of the People's case through demurrer to the complaint or pretrial discovery procedures. (See *People v. Jeff* [1988] 204 Cal.App.3d [309] at p. 342; *People v. Martinez* [1988] 197 Cal.App.3d [767] at pp. 779-780 [dis. opn.]; cf. Pen. Code, § 1002 et seq. [demurrer procedure]; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535-538 [discovery procedure].)" *(People v. Jones* (1990) 51 Cal.3d 294, 317-318; emphasis added.)

thority. See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 [no prosecutorial permission required for trial court to reduce the sentence at sentencing by dismissing a prior Strike allegation]; *People v. Superior Court (On Tai Ho)* (1974) 11 Cal.3d 59 [district attorney could not disapprove trial court's decision, following a pre-trial hearing, to grant diversion]; *Esteybar v. Municipal Court* (1971) 5 Cal.3d 119 [district attorney could not veto magistrate's pre-trial decision to reduce a wobbler to a misdemeanor]; *People v. Tenorio* (1970) 3 Cal.3d 89 [district attorney could not preclude trial court from exercising discretion to strike an allegation of a prior conviction for the purpose of sentencing].

As noted by this Court in *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 554, "[s]uch decisions are based upon the principle that once the decision to prosecute has been made, the disposition of the matter is fundamentally judicial in nature. A judge wishing to exercise judicial power at the judicial stage of a proceeding never should be required to '"bargain with the prosecutor"' before doing so. [citing *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 83]." *Manduley* held that it was within the prosecutor's prerogative to charge a juvenile initially in adult court without a fitness hearing, even though the judge's sentencing discretion would ultimately be truncated. *Davis* held that the prosecutor's initial decision to charge a "wobbler" offense as a felony precluded the trial court's later authority to grant drug diversion, consistent with separation of powers.

The trial court's constitutional authority over instructions on lesser related offenses is so powerful that the trial court may refuse to instruct even where the prosecution and the defense agree to the reading of lesser related offense instructions. (See *People v. Hall* (2011) 200 Cal.App.4th 778, 782 ["The ultimate decision of whether to give an instruction on an uncharged lesser related offense should not be removed from the trial court. [citing *People v. Lam* (2010) 184 Cal.App.4th 580, 583]."])

The constitutional discretion to instruct on lesser related offenses rests with the trial court because the decision to instruct comes well after "the decision to prosecute has been made." Trials evolve in unexpected ways. Some of the original charges brought by the prosecutor may not survive for submission to the jury, because in the view of the trial court they are not supported by substantial evidence. (See Penal Code § 1118.1.) There may or may not be instructions on lesser included offenses, depending on whether the trial court deems that there is sufficient evidence to support them – this too is not foreseeable at the time of charging because the prosecutor cannot foresee the exact manner in which the evidence may emerge at trial. (See *People v. Barton* (1995) 12 Cal.4th 186 [instructions on uncharged lesser included offense may be given over defense objection], and see *People v. Reed* (2006) 38 Cal.4th 1224, 1231[conviction of multiple charged crimes is based on statutory elements test, not by accusatory pleadings test controlled by the prosecution].) All of these decisions are strictly within the purview

of the trial court, which evaluates the evidence from the uniquely unbiased position of a neutral decision maker.

And so it is with lesser related offenses. By the end of a contested jury trial, the parties may be so engrossed that they each fail to recognize the significance of evidence which supports a lesser related offense, and/or the relative weakness of evidence which supports the charged offense. This is understandable, indeed almost inevitable, because the weight of the evidence at trial tends to change in unexpected ways. Witnesses may change their testimonies, or may not be as credible as expected. Even when the evidence is fully understood before trial and there are no surprises at trial, the parties may still misjudge the weight and effect of the evidence.

In these situations it is crucial that the jury not be given an all-or-nothing choice, where the jury is forced to convict on less-than-adequate evidence, for fear of letting a guilty person go free, or where it is obliged to acquit even in the face of overwhelming evidence that the defendant was actually guilty of a lesser related offense.[2]

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[2] A party has " 'no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth.' [quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 533.]" (*People v. Barton* (1995) 12 Cal.4th 186, 204.)

Finally, there is no question that there was substantial evidence of accessory liability on this record. Appellant tried to help his son by creating a false videotape for purposes of an alibi; he gave the evidence from the shootings, guns and clothing, to Juan Ramirez for disposal; he took Little Pete to his brother Frank's house in Fresno and then to several local motels, and then drove him out of state where they were both apprehended.

Conversely, the evidence of principal liability was dubious. Jesse Rangel, a hunted fugitive, started the chain of accusations which put appellant on the scene, in an effort to escape responsibility for his own involvement. Jesse was stalking Juan Uribe in the days before the shooting. Witnesses described two younger assailants at the scene – who must have been Little Pete and Jesse – and any reasonable jury would have concluded that there was a significant likelihood that Jesse was actually guilty of the murders.

Richard Diaz was admittedly on the scene. When he came to fear that he was going to take sole responsibility for the shootings, he gave a statement which conformed to Jesse Rangel's story (and which led to Diaz' immediately and complete release from the capital murder charges).

The final link was Cindy Durbin. She had consistently and insistently identified Jesse Rangel, but when she learned that Jesse was not going to be charged she naturally took the path of least resistance and changed her identification to the other defendant in the courtroom, who was appellant.

With this evidence before them, there was reason for the jury to doubt the murder case, and reason to settle on an accessory verdict instead. The jury was not likely to acquit a person who was as deeply implicated in the cover-up as appellant. A detached judge would therefore have exercised his or her discretion to give accessory instructions. A reasonable jury would not have allowed itself to be stampeded into a murder verdict if there had been another reasonable alternative consistent with the evidence.

Appellant has thus been prejudiced by the lack of instructions on accessory, and the conviction must be reversed.

CONCLUSION

For the foregoing reasons, appellant's conviction must be reversed for failure to consider and deliver an instruction on accessory to murder as a lesser related offense.

Date: March 2, 2012

Respectfully submitted,

CHARLES M. BONNEAU
Attorney for Appellant

STATEMENT OF COMPLIANCE

Pursuant to Rule 8.520 (d), Cal. Rules of Court, the foregoing Brief is in Times New Roman font, 13-point, and contains a word count of 1,788.

Date: March 2, 2012

CHARLES M. BONNEAU
Attorney for Appellant

CASE NAME: **PEOPLE v. RANGEL**
CASE NO.: **S076785**
COURT: **SUPREME COURT OF CALIFORNIA**

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of Sacramento, California. I am over the age of eighteen years and not a party to the within cause; my business address is 331 J Street, Suite 200, Sacramento, CA 95814.

On the dated below I served the APPELLANT'S SUPPLEMENTAL REPLY BRIEF on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on _____, at Sacramento, California.

_____