

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Appellant,

v.

PAUL BIANE, et al.,

Defendants and Respondents.

Case No. S207250

SUPREME COURT
FILED

DEC 21 2012

Frank A. McGuire Clerk

Deputy

Fourth Appellate District Division Two, Case No. E054422
San Bernardino County Superior Court, Case No. FSB1102102
The Honorable Brian McCarville, Judge

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
I. Burum's novel claim that the statute of limitations for an uncharged crime applies to the charged crimes conflicts with the law and weighs in favor of review.....	1
II. Review should be granted to clarify the circumstances under which a private person is entitled to legislative immunity.....	5
III. The additional issue raised by defendants does not meet the requirements of rule 8.500	5

TABLE OF AUTHORITIES

	Page
CASES	
<i>Crawford v. Imperial Irrigation Dist.</i> (1927) 200 Cal.318	5
<i>D'Amato v. Superior Court</i> (2008) 167 Cal.App.4th 861	5
<i>People v. Diedrich</i> (1982) 31 Cal.3d 263	2
<i>People v. Gurule</i> (2002) 28 Cal.4th 557	2
<i>People v. Whitfield</i> (1993) 19 Cal.App.4th 1652	3
<i>Spaziano v. Florida</i> (1984) 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340.....	2
STATUTES	
Government Code	
§ 1090.....	5
§ 9054.....	5
COURT RULES	
California Rules of Court	
rule 8.500(b).....	6

I. BURUM'S NOVEL CLAIM THAT THE STATUTE OF LIMITATIONS FOR AN UNCHARGED CRIME APPLIES TO THE CHARGED CRIMES CONFLICTS WITH THE LAW AND WEIGHS IN FAVOR OF REVIEW

Citing his own moving papers in the trial court as fact (*see* Answer, at pp. 4-5), Burum claims the prosecutor's sole motivation for charging him as an accomplice to accepting bribes was to "avoid the time-bar posed by the statute of limitation" for another crime he committed – that of offering a bribe. (Answer, at p. 5.) The indictment itself reveals that Burum is simply wrong in his assumption that the aiding and abetting charges were some sort of a prosecutorial consolation prize. Erwin, who is not alleged to have offered any bribes, was charged in the same counts with the same crimes. As to both defendants, and as set forth in detail in the Petition for Review, the charges are based on their conduct which was intended to and did compel the recipients to accept the bribes, including threats, coercion and extortion. While Burum's myopic view of the indictment focuses entirely on his offer of bribes, the indictment itself reveals a far broader factual basis supporting the charges. Like Erwin, Burum is criminally liable for that conduct whether or not he offered any bribes, and there is no support for his assumption that he would not have been charged with these crimes if the crime of offering bribes remained viable.

Burum attempts to use his offer of bribes as a shield, claiming it operates to protect him from liability for everything he did in his effort to coerce the recipients to accept the bribe. In effect, he asks this Court to decriminalize all acts he committed to force or entice the acceptance of his offers, including providing cash, meals, entertainment and a karaoke host to Postmus in China (CT 6, Overt Act 1); offering a monetary benefit to Erwin to assist Burum in getting a favorable settlement amount, and the acts committed by Erwin in furtherance of that agreement including telling Postmus that private investigators were going through his trash, threatening

to expose Postmus's drug use as a way to get him to convince Biane to vote for the settlement, and threatening to expose Biane's indebtedness; (CT 6-7, Overt Acts 5, 7, 8, 9); conducting a campaign against Measure P, a proposal in which Biane had a strong financial interest, to obtain influence over Biane to obtain a settlement of the Colonies lawsuit (CT 6-7, Overt Act 6); engaging in secret shuttle negotiations at a hotel using Erwin and O'Reilly as intermediaries, and having a courier deliver "hit piece" mailers to force a settlement (CT 8, Overt Acts 13 and 14.) In fact, Burum claims that unlike Erwin, who continues to face liability for his involvement in some of these acts, Burum is protected from liability because of his additional act of offering the bribes. He reasons that since he offered the bribes, and the statute of limitations for that crime had run, "any potential charges against Mr. Burum were time-barred." (Answer, at p. 5, emphasis added.) Burum's position is inconsistent with this Court's holdings, and therefore weighs in favor of granting review.

Where a defendant commits crimes for which the statute of limitations has expired, and others for which the statute of limitations has not expired, the only relevant consideration is the statute of limitations that applies to the crime being prosecuted. For example, in *People v. Gurule* (2002) 28 Cal.4th 557, 637-638, this Court said that courts have long permitted felony murder prosecutions even where the statute of limitations has expired on the underlying felony, "for the simple reason that the prosecution is for murder, not for the underlying felony." (*Ibid.*)

Here, defendant is charged with aiding and abetting the receipt of a bribe based on conduct that occurred during the period of limitations for that crime. A defendant's commission of uncharged, time-barred offenses is not a defense to his prosecution and conviction for other crimes which are not time-barred. (Cf. *Spaziano v. Florida* (1984) 468 U.S. 447, 456 [104 S.Ct. 3154, 82 L.Ed.2d 340] *People v. Diedrich* (1982) 31 Cal.3d 263,

283; *People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1658, holding that defendants have no right to jury instructions on time-barred lesser offenses.) There is no support in law or public policy to hold otherwise.

Burum suggests the absence of any post-*Wolden* case where a bribe giver was charged with aiding and abetting the receipt of a bribe means the charging theory is unique to this case. (Answer, at p. 12.) Not so. The absence of published cases on the subject simply means the charging scheme used here has not been challenged on appeal. Considering the complex factual scenario which gives rise to such charges, Burum is correct in his assertion that the issue may not present itself again for a long time. That is precisely why the time is right for this Court to provide some guidance now.

The indictment here alleges facts sufficient to support accomplice liability against both Burum and Erwin which go well beyond the mere offer of a bribe. Those facts illustrate why a categorical exclusion to accomplice liability for bribe offerers does not and should not exist.

Burum is correct that *Wolden* did not rely on Wharton's Rule, but he fails to point out that the Court of Appeal mistakenly thought it did. (Exhibit A, pp. 16-17 [*Wolden* . . . involves application of the principle that [w]here the cooperation of two or more persons is necessary to the commission of the substantive crime, and there is no ingredient of an alleged conspiracy that is not present in the substantive crime, then the persons necessarily involved cannot be charged with conspiracy to commit the substantive offense and also with the substantive crime itself. [Citations.] This is the 'concert of action rule' or Wharton's Rule."].) The Court of Appeal also erroneously concluded that "*Wolden* is not limited to [Penal Code] section 1111", (Exhibit A, at p. 16), because the few cases which have cited *Wolden* over the past 45 years have all involved

accomplice testimony under Penal Code section 1111, in contrast to accomplice liability under Penal Code section 31, which is the issue here.

Burum claims he is anxious to “present this case to a jury so that Mr. Burum can defend himself against the charges levied by the People and vindicate his good name and reputation.” (Answer, at p. 3.) The People share his interest in moving this case forward to trial, and seek to protect their right to try Burum on every charge supported by the evidence.

Burum claims “all that future prosecutors need to do to avoid the result reached by the Court of Appeal here, like every other prosecutor post – *Wolden*, is to bring timely charges under the appropriate statute.” (Answer, at p. 12.) Burum’s argument unfairly shifts responsibility for the length of the investigation from himself to the prosecution team. The indictment alleges conduct by Burum that spanned more than four years, and involved an enormous, complex and intricate conspiracy with acts that occurred on two continents and included the bribery of two public officials and a public employee, months of efforts to compel them to accept the bribes, and additional acts to cover up his payment of those bribes. The length of the investigation was a direct result of Burum’s elaborate scheme to conceal his crimes, which necessitated a lengthy, painstaking and methodical investigation. Through their diligence, investigators ultimately discovered evidence of a multitude of crimes committed by a number of individuals. Only those that are not time-barred were charged.

Review should be granted to clarify that the expiration of the statute of limitations as to any of those crimes does not preclude prosecution for other crimes for which the statute of limitations has not run, and to protect the People’s right to a fair trial by permitting them to try Burum for all the crimes he committed.

II. REVIEW SHOULD BE GRANTED TO CLARIFY THE CIRCUMSTANCES UNDER WHICH A PRIVATE PERSON IS ENTITLED TO LEGISLATIVE IMMUNITY

Burum claims review is unnecessary on the issue of whether private persons can aid and abet a violation of Government Code section 1090, because, in his view, *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861, established a blanket prohibition on accomplice liability under Government Code section 1090. (Answer, at p. 10.) But *D'Amato* created only a limited exception for public officials with no financial interest in the contract. (*Id.* at p. 876.) *D'Amato* is based on the Separation of Powers doctrine, and principles of legislative immunity which prevent inquiry into the state of mind of public officials engaged in legislative activity. The Court of Appeal significantly expanded legislative immunity to cover private persons with a financial interest in the contract. Review is necessary to clarify the boundaries of that rule.

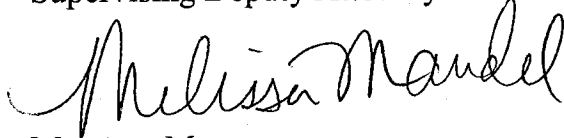
III. THE ADDITIONAL ISSUE RAISED BY DEFENDANTS DOES NOT MEET THE REQUIREMENTS OF RULE 8.500

Burum asks this Court to grant review of the Court of Appeal's holding that Government Code section 9054's prohibition against improper influencing is not unconstitutionally vague. That request should be denied, because, as Burum acknowledges, the Court of Appeal relied on this Court's interpretation of "improper influence" from *Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal.318, 321-322, finding the term was limited to personal, secret or sinister influences, and was therefore not unconstitutionally vague. (Answer, at p. 13.) Burum has failed to identify any conflict in the law, any competing interpretation, or any reason to question this Court's prior decision that the language is constitutional.

Accordingly, the issue fails to comply with the requirements for review as set forth in California Rules of Court, rule 8.500(b).

Dated: December 20, 2012 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY TO ANSWER TO PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 1,621 words.

Dated: December 20, 2012

KAMALA D. HARRIS
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A handwritten signature in black ink that reads "Melissa Mandel". The signature is written in a cursive, flowing style.

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Paul Biane, et al.**

No.: **S207250**

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 that same day in the ordinary course of business.

On December 20, 2012, I served the attached **REPLY TO ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **December 20, 2012** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

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 20, 2012, at San Diego, California.

Bonnie Peak

Declarant

Bonnie Peak

Signature