

In the
Supreme Court
of the
State of California

SUPREME COURT
FILED

MAR - 6 2013

Frank A. McGuire Clerk

Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

PAUL BIANE, MARK KIRK, JAMES ERWIN, JEFFREY BURUM,

Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO
CASE No. E054422,
SAN BERNARDINO COUNTY SUPERIOR COURT
CASE No. FSB 1102102
HON. BRIAN MCCARVILLE, JUDGE

**RESPONDENT JEFFREY BURUM'S MOTION REQUESTING BRIEFING ON
THE ADDITIONAL ISSUE OF THE STATUTE OF LIMITATIONS, OR IN THE
ALTERNATIVE DISMISSAL OF REVIEW OF COUNT 13**

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JEFFREY BURUM

I. INTRODUCTION

Defendant Jeffrey Burum faces seven felony counts based on events that allegedly occurred in 2005 and 2006, culminating in a settlement agreement reached on November 28, 2006 (the “Settlement”), between Colonies Partners, L.P. (“Colonies”), and the County of San Bernardino and San Bernardino County Flood Control District (collectively, the “County”). Because the Indictment was not filed until May 9, 2011 – almost four-and-a-half years later – the statute of limitations had run on all seven of the counts against Mr. Burum.

The People attempted to plead around this time bar by invoking the “discovery rule” of Penal Code sections 801.5 and 803(c). However, the Court of Appeal in *People v. Milstein* (2012) 211 Cal.App.4th 1158, has now clarified that the three-year statute of limitations for the crime of conspiracy – alleged here as Count 1 – is *not* subject to tolling under the discovery rule. The prosecution in *Milstein* filed a petition for review on January 23, 2013, Supreme Court Case No. S208179, which has not been ruled on as of the date of this motion. In light of the *Milstein* ruling, as well as the People’s failure to adequately plead the discovery rule for any of the charges, Mr. Burum now asks this Court to take up the issue of the statute of limitations as part of its review of this case.

Under the California Rules of Court and this Court’s longstanding precedent, this Court has authority to review the statute of limitations, and to order briefing by the parties, even though the issue has not previously been raised in the Petition, the Answer, or the lower courts. Indeed, because a criminal statute of limitations is jurisdictional in nature, counts that are time-barred on the face of the indictment – as are all seven counts here – are jurisdictionally barred as a matter of law and must be dismissed.

Mr. Burum therefore respectfully requests that the Court order the parties to brief the issue of whether all counts against Mr. Burum are time-

barred and, thus, deficient as a matter of law. Alternatively, Mr. Burum requests that the Court dismiss review of Count 13 – a count for which neither side is seeking review – and direct the Court of Appeal to issue a partial remittitur so that Mr. Burum may immediately bring a statute of limitations motion in the trial court seeking dismissal of that count.

II. PROCEDURAL BACKGROUND

Mr. Burum was indicted on May 9, 2011, and charged with seven felony counts, all relating to the \$102 million Settlement reached on November 28, 2006—four-and-a-half years before the Indictment. (Clerk’s Transcript (“Cl. Tr.”) at pp. 1-28; 5:13-15.) On August 19, 2011, the trial court sustained Mr. Burum’s demurrer to five of the seven counts in their entirety, as well as to corresponding target crimes in the conspiracy count. (*Id.* at pp. 253:17-26, 254:5-15, 255:7-28, & 256:1-4.) The People appealed the trial court’s ruling, and Mr. Burum sought a writ of mandate on the counts that were not dismissed. The Court of Appeal accepted Mr. Burum’s writ of mandate, and consolidated it with the People’s appeal. (Order filed Dec. 9, 2011, Court of Appeal Case No. E054738.)

On October 31, 2012, the Court of Appeal affirmed in part and reversed in part the trial court’s ruling. (Order filed Oct. 31, 2012, Court of Appeal Case No. E054422.) It held that Mr. Burum could not be charged with aiding and abetting or conspiring to commit bribery (Counts 4, 5, 7, 8, and corresponding target crimes in Count 1) or the alleged conflict of interest violation (Count 11 and corresponding target crime in Count 1). (Cl. Tr. at pp. 38-39.) But it held that Mr. Burum could be charged with aiding and abetting and conspiring to violate Penal Code section 424 (Count 13 and corresponding target crime in Count 1) and conspiring to violate Government Code section 9054 (Count 1). (*Id.* at pp. 39-40.)

On December 11, 2012, the People filed a Petition for Review of the Court of Appeal's ruling. Specifically, the People sought review of the following two issues relating to Counts 1, 4, 5, 7, 8, and 11:

1. Can a bribe offerer be charged with conspiracy to commit bribery, and aiding and abetting the receipt of a bribe, where his conduct satisfies the elements of those crimes?
2. Can a private person be charged with aiding and abetting a criminal conflict of interest violation?

(Pet. at p. 1.) Mr. Burum filed his Answer to the Petition for Review on December 19, 2012, and in doing so sought review of the following additional issue relating to Count 1:

3. Is Government Code section 9054 unconstitutional, either as void for vagueness or as an impermissible prior restraint on free speech?

(Answer at p. 12.) Neither the People nor Mr. Burum sought review of the Court of Appeal's ruling on Count 13, the alleged violation of Penal Code section 424. This Court granted review on February 13, 2013.

III. ANALYSIS

A. The Court Should Order Briefing on Whether the Charges Against Mr. Burum Should Be Dismissed As Time-Barred

As a general matter, the parties' briefs and arguments before this Court are limited to the issues raised in the petition for review and the answer to the petition. (Cal. Rules of Court, rules 8.520, subd. (b)(3).) The Court, however, is not so limited, and "may decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." (Cal. Rules of Court, rule 8.516, subd. (b)(2); see also Rule 8.520, subd. (a)(2).) This is true even for issues not previously raised in the trial court or the Court of Appeal. (*Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1078 ["This court is empowered to decide issues necessary for the proper resolution of the case

before it, whether or not raised in the courts below.”].) If the Court determines that its review should include issues outside the scope of the petition and answer, it may order the parties to brief and argue those issues. (Cal. Rules of Court, rule 8.516, subd. (a)(1).)

Here, the Court should expand the scope of its review to address a threshold jurisdictional issue: Whether all of the charges brought against Mr. Burum are time-barred as a matter of law under the relevant statutes of limitations. As this Court explained 80 years ago, “the state, through its legislature, has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter.” (*People v. McGee* (1934) 1 Cal.2d 611, 613, overruled on other grounds in *Cowan v. Superior Court* (1996) 14 Cal.4th 367.) “It follows,” *McGee* explains, “that where the pleading of the state shows that the period of the statute of limitations has run, and nothing is alleged to take the case out of the statute, for example that the defendant has been absent from the state, *the power to proceed in the case is gone.*” (*Id.* at 613-14, emphasis added.) In short, “[t]he statute of limitations in a criminal case is jurisdictional in nature.” (*Williams v. Superior Court* (1978) 81 Cal.App.3d 330, 342.) Thus, “[u]nless the factual basis for the indictment includes some evidence that the prosecution is not barred, *the indictment must be set aside.*” (*Id.*, emphasis added.)

Given the jurisdictional nature of the statute of limitations – and the key public policy concerns it protects (see *People v. Zamora* (1976) 18 Cal.3d 538, 546-47) – the courts have “repeatedly held that a defendant may assert the statute of limitations at any time.” (*People v. Williams* (1999) 21 Cal.4th 335, 339.) This rule reflects “the fundamental principle of our law that ‘the power of the courts to proceed’—i.e., their jurisdiction over the subject matter—cannot be conferred by the mere act of a litigant, whether it amount to consent, waiver, or estoppel [citations], and hence that

the lack of such jurisdiction may be raised for the first time on appeal.’ [Citations]” (*Id.* at 340; see also *In re Demillo* (1975) 14 Cal.3d 598, 601 [vacating conviction even though statute of limitations arguments were raised for the first time on habeas corpus].¹)

While Mr. Burum will not fully brief the substantive statute of limitations issues in this Motion, the following is an overview of the arguments he will raise should the Court order the requested briefing. As will be seen, considering these arguments now will serve judicial efficiency and protect Mr. Burum’s right to a timely resolution of the charges against him, because all seven counts brought against Mr. Burum are time-barred on the face of the indictment and should be dismissed.

1. Count 1 Is Time-Barred on the Face of the Indictment

Count 1 alleges a conspiracy, which is subject to a three-year limitations period running from the last overt act. (Pen. Code § 801; *Milstein*, 211 Cal.App.4th at 1165 [“[T]he three-year statute of limitations has long been applied to the offense of criminal conspiracy and commences with the last overt act committed in furtherance of the conspiracy.”]; *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1401 [explaining that “criminal conspiracy has a three-year statute of limitations, irrespective of the underlying offense”].) Here, the People allege that the last overt act occurred on July 12, 2007. (Cl. Tr. at p. 11:1-4.) Thus, on the face of the Indictment, the statute of limitations for Count 1 expired no later than July 12, 2010—almost a year before the Indictment was filed.

To avoid this time-bar, the People tried to invoke the discovery rule set forth in Penal Code sections 801.5 and 803(c). (Cl. Tr. at pp. 25:8-26:15.) Under Section 801.5, the statute of limitations is expanded to four

¹ Moreover, if an appellate court “cannot determine from the available record whether the action is barred, ... it should remand for a hearing.” (*Williams*, 21 Cal.4th at 341.)

years for any offense that is “described in subdivision (c) of Section 803.” Then, under both Section 801.5 and Section 803(c), this four-year limitation period is tolled until “discovery” of the offense charged.

However, as the Court of Appeal recently clarified in *Milstein*, the discovery rule does *not* apply to conspiracy. (*Milstein*, 211 Cal.App.4th at 1168.) In *Milstein*, the trial court agreed with the People that the four-year statute of limitations and the discovery provisions of Sections 801.5 and 803 applied to “*all crimes, including conspiracy, that involve fraud....*” (*Id.* at 1163.) But the Court of Appeal reversed, recognizing that conspiracy is *not* one of the offenses specifically enumerated in Section 803(c), and rejecting the argument that conspiracy falls under the general catch-all language in the first paragraph of Section 803(c). (*Id.* at 1165-1168.) While recognizing that Section 803(c) has been found to apply to various crimes not specifically enumerated, the court noted that *no* case has ever found that it “encompasses conspiracies to commit those underlying offenses.” (*Id.* at 1167-1168.) To the contrary, “[i]rrespective of whether intent to defraud is a material element of, or the core purpose behind, a criminal conspiracy, California courts consistently have recognized that *conspiracy is a separate and distinct crime from the offense that is the object of the conspiracy and is governed by a separate and distinct statute of limitations.*”² (*Id.* at 1168, emphasis added.)

The *Milstein* court ultimately held that, “based on the distinct nature of the crime of conspiracy and the legislative history of the relevant

² Indeed, the very nature of the crime of conspiracy precludes the application of the catch-all language of Section 803(c). Conspiracy is an inchoate crime which “does not require the commission of the substantive offense that is the object of the conspiracy.” (*Milstein*, 211 Cal.App.4th at 1166.) Thus, regardless of the alleged predicate crime, the elements for the crime of conspiracy do *not* include “fraud,” “breach of fiduciary obligation,” or “misconduct in office” such that Section 803(c) would apply.

statutory provisions,” the three-year statute of limitations for the crime of conspiracy is *not* subject to tolling. (*Id.* at 1166.) Thus, under *Milstein*, the statute of limitations for Count 1 against Mr. Burum expired nearly a year before the Indictment was filed.

2. Counts 4, 5, 7, 8, 11, and 13 Are Also Time-Barred on the Face of the Indictment

The remaining counts against Mr. Burum are also time-barred on the face of the Indictment. Counts 4, 5, 7, 8, 11, and 13 allege offenses that are “described in” Section 803(c), and thus are subject to the four-year statute of limitations provided by Section 801.5, rather than the three-year limitations period of Section 801. Nevertheless, because all six offenses are alleged in the Indictment to have been committed no later than November 29, 2006 (the day after the Settlement was approved), the statute of limitations for these counts expired no later than November 29, 2010—six months before the indictment was filed. (See Cl. Tr. at pp. 13-17.)

As with Count 1, the People tried to plead around this time-bar based on the discovery rule. (*Id.* at pp. 25:8-26:15.) But to do so successfully, the People needed to allege the following: “(1) the date on which the offense was ‘discovered’; (2) how and by whom the offense was ‘discovered’; (3) lack of knowledge, both actual or constructive, prior to the date of ‘discovery’; [and] (4) the reason why the offense was not ‘discovered’ earlier.” (*Zamora*, 18 Cal.3d at 564, fn. 26.) Vague or conclusory allegations are insufficient, as specific *facts* must be alleged establishing these factors. (See *id.* at 564-65; *People v. Lopez* (1997) 52 Cal.App.4th 233, 245.)

The People failed to meet this burden, particularly with regard to constructive knowledge, where “[t]he crucial determination is whether law enforcement authorities *or the victim* had actual notice of circumstances sufficient to make them suspicious of [criminal conduct]. . . .” (*Zamora*, 18

Cal.3d at 571-72, emphasis added; see also *People v. Bell* (1996) 45 Cal.App.4th 1030, 1061 [“[A]n offense is discovered when *either the victim or law enforcement* learns of facts which, when investigated with reasonable diligence, would make the person aware a crime had occurred.”] Emphasis added.) In cases involving fiscal crimes against a government entity, the legally-defined “victim” is any public official or employee occupying a supervisory position with the responsibility to oversee that entity’s fiscal affairs, and who thus has a duty to report a suspected crime to law enforcement authorities. (*People v. Moore* (2009) 176 Cal.App.4th 687, 695; *Lopez*, 52 Cal.App.4th at 247-248.)

Here, the alleged victims were any County officials or employees who oversaw the County’s fiscal affairs and had a duty to report suspected crime to law enforcement—*e.g.*, the non-indicted County Supervisors, the County’s Chief Administrative Officer, and the County’s Controller and Auditor. (See *Moore*, 176 Cal.App.4th at 695.) It was the People’s burden to allege facts showing that these individuals lacked actual or constructive knowledge of the alleged crimes. Instead, the Indictment *only* addresses the purported lack of knowledge by law enforcement. (Cl. Tr. at pp. 25-26.) This is patently insufficient, as actual or constructive knowledge of the alleged offenses by the purported *victims* would trigger the limitation period regardless of law enforcement’s knowledge. (*Zamora*, 18 Cal.3d at 571-72.) To hold otherwise would allow victims to prolong the statute of limitations indefinitely simply by waiting to report an alleged crime, a result directly counter to the Legislature’s intent in enacting appropriate limitations periods. (See *id.* at 546-47.) The complete absence of any factual allegations regarding the purported victims’ knowledge therefore precludes reliance on the “discovery rule” to toll the statute of limitations. (*Id.* at 564.) Counts 4, 5, 7, 8, 11, and 13 are thus time-barred as a matter of law.

3. Reviewing the Statute of Limitations Issue Will Serve Judicial Economy and Protect Mr. Burum's Constitutional Right to a Speedy Trial

Prompt review of whether the charges against Mr. Burum are jurisdictionally barred by the relevant statutes of limitations will also serve judicial efficiency and economy. Because these counts are time-barred on the face of the Indictment, the courts no longer have power to proceed in the case. (*McGee*, 1 Cal.2d at 613-14.) As such, further adjudication of the substantive charges prior to resolving this jurisdictional question would only serve to place unnecessary strain on the Court's limited resources, and undue burden on the defendants. (See *People v. Betts* (2005) 34 Cal.4th 1039, 1051-52 [recognizing that treating jurisdiction as a "threshold matter" serves the interests of judicial efficiency and economy].)

Finally, Mr. Burum has a constitutional right to a speedy resolution of the charges brought against him. The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." This same right is also conferred under article 1, section 15 of the California Constitution, which provides a criminal defendant "the right to a speedy public trial...." (See also Pen. Code § 1382 [requiring dismissal when, *inter alia*, "a defendant is not brought to trial in a superior court within 60 days after the finding of the indictment or filing of the information ..."]; *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 89 [recognizing that "section 1382 constitutes... a legislative determination that a trial delayed more than 60 days is prima facie in violation of a defendant's constitutional right"].)

By taking up the question of whether the relevant statutes of limitation have divested California courts of jurisdiction to decide any of the charges against Mr. Burum, the Court will protect these important constitutional rights. If instead Mr. Burum is forced to wait until these

counts are returned to the trial court before he is permitted to raise the statute of limitations, a ruling in his favor would likely lead to yet another lengthy round of appellate review triggered by the People. This would further delay his ability to reach trial on any counts that might somehow survive the statute of limitations. Given that these charges have already been pending for nearly two years, and are based on actions and events dating back nearly a decade, such delay would even further compromise Mr. Burum's constitutional rights. For this additional reason, the Court should expand its scope of review to include the statute of limitations.

B. Alternatively, the Court Should Dismiss Review of Count 13 and Instruct the Court of Appeal to Issue a Partial Remittitur

As discussed above, this Court has the authority to review any issues relating to the charges on appeal even if not raised in the Petition or the Answer. The Court also has the authority, however, to dismiss review of particular issues, and to direct the Court of Appeal to issue a partial remittitur as to those issues. (See *Crawford v. Weather Shield Mfg., Inc.* (Cal. 2007) 67 Cal.Rptr.3d 753 [partially dismissing review as to particular issues, and directing the Court of Appeal to issue a partial remittitur].)

Here, neither the People nor Mr. Burum seek review of Count 13 (allegedly aiding and abetting a violation of Penal Code section 424). Thus, if the Court decides not to expand the scope of its review to include the statute of limitations, Mr. Burum respectfully requests that review of Count 13 be dismissed, and that the Court of Appeal be instructed to issue a partial remittitur as to Count 13 only. Returning this count to the trial court would enable Mr. Burum to immediately raise the statute of limitations and obtain prompt dismissal of the time-barred Count 13.

IV. CONCLUSION

For all of the foregoing reasons, and in the interest of justice, Mr. Burum respectfully requests that the Court issue an order requesting the

parties brief and argue the issue of whether the statute of limitations bars the charges brought against Mr. Burum. Alternatively, Mr. Burum requests that the Court dismiss its review of Count 13, and instruct the Court of Appeal to issue a partial remittitur as to that count.

Respectfully submitted,

Dated: March 5, 2013

ARENT FOX LLP

By: 

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Attorneys for Respondent

JEFFREY BURUM

PROOF OF SERVICE

I am a citizen of the United States. My business address is ARENT FOX LLP, 555 West Fifth Street, 48th Floor, Los Angeles, CA 90013. I am employed in the county of Los Angeles where this service occurs. I am over the age of 18 years, and not a party to the within cause.

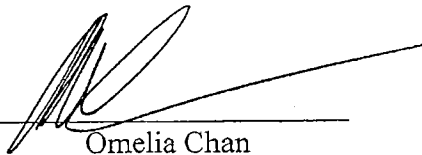
On the date set forth below, according to ordinary business practice, I served the following document described as:

**RESPONDENT JEFFREY BURUM'S MOTION
REQUESTING BRIEFING ON THE ADDITIONAL ISSUE OF THE
STATUTE OF LIMITATIONS, OR IN THE ALTERNATIVE
DISMISSAL OF REVIEW OF COUNT 13**

BY U.S. MAIL. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business. On this date, I placed the document in envelopes addressed to the persons stated on the attached service list and sealed and placed the envelopes for collection and mailing following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 5, 2013, at Los Angeles, California.



Omelia Chan

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