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SUPREME COURT  
FILED

MAR 14 2013

Frank A. McGuire Clerk

Deputy

**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

Fourth Appellate  
District, Division Two,  
Case No. E054422

San Bernardino County  
Superior Court, Case  
No. FSB1102102

**OPPOSITION TO 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**

Petitioner opposes Respondent Burum's request to brief the additional issue of the statute of limitations or alternatively to dismiss review of count 13 and instruct the Court of Appeal to issue a partial remittitur. As to count

1 (conspiracy), his request is not ripe, as the factual predicate for Burum's claim regarding the statute of limitations for the crime of conspiracy has not been developed in the lower courts. As to the remaining charges, his analysis is legally flawed. Finally, his request for the alternative remedy of severance is an attempt to circumvent the good cause requirement of Penal Code section 954 which would result in an extraordinary and unnecessary investment of judicial resources.

Petitioner asks this Court to decide whether count 1 (conspiracy) is time-barred based on the recent case *People v. Milstein* (2012) 211 Cal.App.4th 1158, in which the Second Appellate District determined the crime of conspiracy was not subject to the tolling provision of Penal Code section 803, subdivision (c). As Petitioner notes, a petition for review was filed in *Milstein* and has not yet been ruled upon. Thus, the fate of the *Milstein* decision remains undetermined.

The effect of *Milstein* on this case, if any, is appropriately resolved in the trial court. There, based on the unique facts of this case, the parties and the court can determine whether *Milstein* is distinguishable, or requires dismissal of the conspiracy charge or some other appropriate action. The trial court will have the opportunity to review any *Milstein* claim when the remittitur issues and the case proceeds in the trial court. There is no reason to assume the trial court will misapply *Milstein*, or that any error will not be corrected on appeal. Only in those circumstances will the record be fully developed with a reasoned lower court decision for this Court to review.

With respect to the remaining charges, the indictment belies Burum's claim that the discovery tolling provision was not adequately pled. The allegation is spelled out with specificity (CT 25-26) in accordance with the requirements of *People v. Zamora* (1976) 18 Cal.3d 538, 546-547, which Burum acknowledges sets forth the appropriate legal standard.

Burum cites one half of the two part test from *Zamora* to claim all the charges are time-barred on the face of the indictment because the indictment fails to allege that the victim did not have actual notice of circumstances sufficient to make them suspicious of criminal conduct. (Motion at p. 7.) The second half of the *Zamora* test refutes his claim.

The *Zamora* test, in its entirety, provides: “[t]he crucial determination is whether law enforcement authorities or the victim had actual notice of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud.” (*Zamora, supra*, 18 Cal.3d at p. 571, emphasis in original.) Here, the face of the indictment makes it clear that to the extent any victim had notice of circumstances sufficient to make them suspicious of fraud, the circumstances were *not* such as would lead them to make inquiries which might have revealed the fraud. (*Ibid.*)

This case perfectly illustrates the reasons for the second part of the *Zamora* test. Here, there is no clear line separating the victims from the perpetrators. The victims in this massive conspiracy case are the taxpayers of San Bernardino County. Included in that pool of taxpayers are a number of individuals who very likely did have knowledge of facts which would reasonably lead them to suspect criminal activity. These include the defendants themselves (who were presumably taxpaying citizens of San Bernardino County) and the many uncharged named and unnamed coconspirators who participated to various degrees in accomplishing or covering up the settlement.

For example, the indictment alleges that “Postmus engaged the assistance of Aleman, Richman, and Defazio to create two Political Action Committees (PACs) that he secretly controlled for the express purpose of concealing receipt of the bribe of \$100,000 from Colonies.” (CT 5.) Further, the indictment alleges that “On or between January 1, 2005, and

July 12, 2007, BIANE, KIRK, ERWIN and BURUM did unlawfully conspire together and with Postmus and another person, and persons whose identity is known and unknown, ... “ to commit various crimes. (CT 3.) Presumably, the persons described knew of facts indicating criminal conduct, and they are victims, but their knowledge does not constitute discovery under the tolling provision or invalidate the indictment, because the circumstances would not lead them to make inquiries which would reveal the fraud. In fact, the circumstances reveal they would not.

With respect to the named and unnamed uncharged coconspirators, as well as any other taxpayers who are alleged to have played a role in the crime (such as Aleman, Richman and Defazio, as set forth above), they are “victims”, but they are also alleged to have had some involvement in either the crime itself or the coverup. Many other victims may have had knowledge of facts indicating criminal conduct, but not under circumstances which would lead them to make inquiries revealing the fraud. For example, assuming (without conceding) the lawyers representing the county had such knowledge, the attorney client privilege prevented them from revealing those facts, so (although they may be victims) they had no duty to report. In fact, the law prevented them from reporting or making inquiries which would reveal the criminal conduct.

The second half of the *Zamora* test makes it clear that a victim’s knowledge of facts indicating criminal activity does necessarily lead to a duty to report. There is no legal requirement that the victim’s absence of knowledge be pled or proved. However, if such a rule exists, this indictment suffices.

The indictment alleges that intermediaries were used to accomplish negotiations at the Doubletree Hotel, and that payment of bribes was made to PACs secretly controlled by Postmus, Biane, Erwin and Burum. (CT 5, 8-13.) These facts and the indictment as a whole sufficiently set forth the

secrecy and coverups involved in the crimes which prevented both law enforcement and taxpayers from learning the facts.

Burum's statute of limitations claims rely on disputed issues of fact which have not yet been resolved. For example, Burum argues the People did not meet their burden of proving constructive knowledge with respect to when the offense was discovered (Motion at pp. 7-8), but this claim requires conclusions about the adequacy of evidence before the grand jury, and the grand jury record is not before this court, nor has any lower court yet reviewed the record or determined the facts.

Finally, Burum's request to sever a single count (count 13) from a 29-count indictment with an instruction to the Court of Appeal to issue a partial remittitur should be denied for several reasons. First, Kirk and Erwin are charged in count 13 along with Burum, but they have not joined his request for severance. Second, while the crime charged in count 13 (Pen. Code, § 424, Misappropriation of Public Funds) is not under review, count 1 is under review and includes a conspiracy to commit a violation of Penal Code section 424. Third, the request attempts to circumvent the good cause requirement of Penal Code section 954, and granting it would result in an enormous and unnecessary waste of judicial resources.

Where offenses are joined under Penal Code section 954, the court may, "in the interests of justice and for good cause shown, [] in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." There is no good cause here, and the interests of justice weigh against granting the request.

The misappropriation of public funds charged in count 13 is based on the transfer of \$102 million of public money to Colonies Partners in the guise of a lawsuit settlement. The settlement was part of a massive conspiracy which led to the 29-count indictment against four defendants.

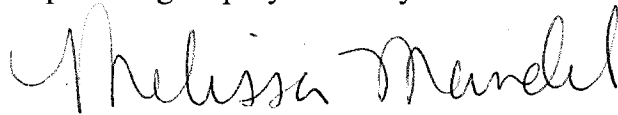
Trial on these charges will be lengthy, involving many witnesses and a substantial amount of evidence. Granting a severance on count 13 will necessitate duplicate trials, as the evidence establishing count 13 is the same evidence required to prove the remaining charges. No good cause for proceeding piecemeal can be shown.

Based on the foregoing, Petitioner respectfully requests Burum's motion be denied.

Dated: March 13, 2013

Respectfully submitted,

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**DECLARATION OF SERVICE BY U.S. MAIL**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On March 13, 2013, I served the attached **OPPOSITION TO 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 placing a true copy thereof enclosed in a sealed envelope 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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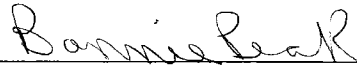
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 13, 2013, at San Diego, California.

Bonnie Peak  
Declarant

  
Signature