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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
MAY 28 2013
ALAN CARLSON, Clerk of the Court
BY L. HOYLE, DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. MANUEL ANTHONY RAMOS, JAY PATRICK CICINELLI, Defendants	Case No.: 11CF2575 PEOPLE'S OPPOSITION TO DEFENDANT CICINELLI'S MOTION FOR SEPARATE TRIAL DATE: 6/07/13 DEPT: C-40 TIME: 9:00

INTRODUCTION

On the evening of July 5, 2011, Kelly James Thomas (Thomas) suffered fatal injury at the hands of officers from the Fullerton Police Department. The People have alleged that three officers in particular were criminally complicit in his death: defendant Manuel Ramos, defendant Jay Cicinelli, and Officer Joseph Wolfe.[1]

On May 10, 2012, an information was filed in the instant matter alleging that defendant Manuel Ramos had violated Penal Code section 187 (murder) in the July 5, 2011 death of Thomas. That information also alleged, in count 2, that defendant Ramos and defendant Jay

[1] Joseph Wolfe was separately indicted by the Orange County Grand Jury in Superior Court case number 12ZF0148.

Cicinelli had violated Penal Code section 192(b) (manslaughter) in causing Thomas' death.[2] To be clear, all of the allegations against each defendant in the instant case stem from the same common incident: a joint physical assault on Thomas on the evening of July 5, 2011, the injuries from which caused his death.

On March 7, 2013, defendant Cicinelli filed a motion requesting a separate trial from his co-defendant, Manuel Ramos. As the People shall explain below, defendant Cicinelli's motion should be denied. The joint prosecution of defendants Ramos and Cicinelli is eminently proper and defendant Cicinelli's arguments in support of a separate trial are without merit.

In lieu of reciting the facts of this case again, the People respectfully request to incorporate, by reference, the evidence presented at the preliminary hearing and the statement of facts offered by the People in its opposition to the defendants' section 995 dismissal motions. The People will additionally refer to the relevant circumstances of this case, where appropriate, in the argument sections below.

POINTS, AUTHORITIES & ARGUMENT

I. THE LEGISLATIVE MANDATE AND DECISIONAL AUTHORITY OF PENAL CODE SECTION 1098 REQUIRE A JOINT TRIAL IN THE INSTANT CASE.

The California Legislature has expressed an unambiguous preference for joint trials. (*People v. Lewis* (2008) 43 Cal.4th 415, 452). According to Penal Code section 1098, "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they **must** be tried jointly, unless the court orders separate trials." (Cal. Penal Code §1098 (emphasis added)).[3] "'Under Penal Code section 1098, a trial court *must* order a joint trial as the "rule" and *may* order separate trials only as an "exception."'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 726; quoting *People v. Alvarez* (1996) 14 Cal.4th 155, 190 (italics original)). The "exception" to the "rule" is not warranted here.

[2] Defendant Cicinelli was also separately charged in count 3 with a violation of Penal Code section 149 (assault and battery under the color of authority).

[3] All further statutory references are to the California Penal Code unless otherwise indicated.

"[A] person jointly accused with another does not have a right to a separate trial, but has merely the right to ask for it, and the court is vested with the discretion to grant or deny such a request." (*People v. Simms* (1970) 10 Cal.App.3d 299, 307; *see also, People v. Cummings* (1993) 4 Cal.4th 1233, 1286). However, "[w]hile the court has discretion to grant separate trials, **joint trials are eminently proper** when the underlying charges depend on mutual action, common facts or common evidence." (*People v. Sanchez* (1982) 131 Cal. App. 3d 323, 335 [emphasis added]). In fact, the Supreme Court has repeatedly held that "[a] '**classic case**' for joint trial is presented when defendants are charged with common crimes involving common events and victims." (*People v. Cleveland* (2004) 32 Cal.4th 704, 725-26 [emphasis added]; *see also, People v. Letner* (2010) 50 Cal.4th 99, 150; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40). Accordingly, the instant prosecution not only falls squarely within the ambit of section 1098's joinder mandate but it is also, in fact, a "classic case" for joint trial. Defendants Cicinelli and Ramos are charged with common crimes, involving the exact same event and the very same victim: the July 5, 2011 fatal assault of Kelly Thomas. The underlying charges against both defendants also depend upon their mutual action, common facts and common evidence, rendering their joint trial "eminently proper" as well. (*People v. Sanchez* (1982) 131 Cal. App. 3d 323, 335).

If the statutory requirements for joinder are satisfied, as they are here, cases may not be severed unless the defendant makes a clear showing of prejudice from a joint prosecution and that a failure to sever would amount to an abuse of discretion. "When…the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying [his] severance motion." (*People v. Mendoza* (2000) 24 Cal.4th 130, 160-161; *see also, People v. Alcala* (2008) 43 Cal.4th 1205, 1220 [requiring a "*clear showing of prejudice*" to establish the court "*abused its discretion,*" italics original]; *People v. Soper* (2009) 45 Cal.4th 759, 774 [same]; *People v. Marshall* (1997) 15 Cal.4th 1, 27 [same]). "A trial court's denial of a motion to sever…," however, "amounts to a prejudicial abuse of discretion **only** if that ruling '**falls outside the bounds of reason**.'" (*People v. Soper* (2009) 45 Cal.4th 759, 774 [emphasis added]; *see also, Alcala, supra*, 43 Cal.4th 1205, 1220; *People v. Ramirez* (2006) 39 Cal.4th 398, 439). As the appellate courts of California have observed, this standard has scarcely ever been met. "[O]ur high court has noted that, 'where the

consolidation meets the test of joinder…'the difficulty of showing prejudice from denial of severance is so great that the courts almost invariably reject the claim of abuse of discretion.'" (*People v. Poon* (1981) 125 Cal.App.3d 55, 69, *citing People v. Matson,* (1975) 13 Cal.3d 35, 39). In fact, "'[t]he statutory policy favoring joint trials has been so consistently applied that cases holding it an abuse of discretion to deny a severance are **virtually nonexistent.**'" (*People v. Rhoden* (1972) 6 Cal.3d 519, 525, fn. 2. [emphasis added]; *see also, People v. Boyde* (1988) 46 Cal.3d 212, 232 [noting absence of cases finding abuse of discretion in denying severance]). Moreover, "[i]f the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder '"resulted in 'gross unfairness' amounting to a denial of due process." ' " (*People v. Letner and Tobin* (2010) 50 Cal. 4th 99, 150, *quoting People v. Avila* (2006) 38 Cal.4th 491, 574–575; *see also, People v. Burney* (2009) 47 Cal.4th 203, 237). In the instant case, the prosecutions against defendants Ramos and Cicinelli satisfy the statutory requirements for joinder and defendant Cicinelli has failed to establish, in any way, how a joint trial would prejudice his right to a fair trial.

II. THE DEFENDANT HAS FAILED TO ESTABLISH A "CLEAR SHOWING OF PREJUDICE" THAT WOULD WARRANT A DEPARTURE FROM THE LEGISLATIVE MANDATE FOR JOINT TRIALS.

Any order for separate trials must be based upon a clear showing that a defendant would be incurably prejudiced by a joint prosecution. While defendant Cicinelli identifies some grounds which *may* warrant a severance in *some* cases, he simultaneously fails to articulate with any specificity how those grounds actually exist *in his case*. He urges that

> [a] severance is proper under the following circumstances: potentially antagonistic defenses [citation]; disparity in the weight of the evidence against each defendant [citation]; evidence potentially prejudicial to the defendant will be admitted at trial, ostensibly against the codefendant [citations]; the codefendant intends to offer evidence harmful to the defendant [citation]; and the jury will be confused by evidence on multiple counts [citations].

(Defendant Cicinelli's "Motion to Sever," p. 5). He then summarily concludes, without explanation, that: "all of these scenarios are highly likely in the matter before the court…" (*Id.*) Such a claim is wholly inadequate to warrant a departure from the rule of joinder. The burden of demonstrating prejudice from a denial of severance is on the one who asserts it and such prejudice must be affirmatively proven. "'A party seeking severance must "clearly establish that

there is a substantial danger of prejudice requiring that the charges be separately tried.'" (*People v. Davis* (1995) 10 Cal.4th 463, 508, quoting *Frank v. Superior Court* (1989) 48 Cal.3d 632, 640). A bare assertion of prejudice, such as the defendant has made here, is clearly not enough. "It is also the law that one asserting prejudice because of a joint trial assumes the burden of proving it. A bald assertion of prejudice is not enough." (*People v. Kemp* (1961) 55 Cal.2d 458, 477).

To his general claim that "all of the[] scenarios" permitting severance are present in this case, defendant Cicinelli also argues that severance is warranted on the basis of his Sixth Amendment right to confrontation and his ability to be ready for trial before defendant Ramos. Collectively, however, his claims are without merit as the People shall explain below.

A. THE DEFENDANT'S MISCELLANEOUS AND GENERAL CLAIMS OF PREJUDICE ARE INADEQUATE TO WARRANT A SEVERANCE AND ARE WITHOUT MERIT.

Defendant Cicinelli argues that "[p]otentially antagonistic defenses" and the fact that a "codefendant intends to offer evidence harmful to the defendant" are bases warranting severance. (Defendant Cicinelli's "Motion to Sever," p. 5). Yet he fails to fulfill his burden of establishing what antagonistic defenses actually exist in *this* case and how they would incurably prejudice his ability to obtain a fair trial. In fact, he offers no evidence nor explanation whatsoever on the issue. A motion for severance has to be supported by evidence showing the likelihood of prejudice from a joint trial under the particular circumstances of the case. And an application without such a showing, such as the defendant's here, is wholly inadequate. (*People v. Kemp* (1961) 55 Cal.2d 458, 477).

Assuming for the sake of argument that the defendants had antagonistic defenses, that fact alone would not warrant severance. "Antagonistic defenses alone do not compel severance." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286). "'[E]ven if the defendants are hostile or attempt to cast the blame on each other.'" (*People v. Souza* (2012) 54 Cal.4th 90, 111, quoting *People v. Hardy* (1992) 2 Cal.4th 86, 168).

> Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is **so prejudicial that the defenses are irreconcilable**, and the jury will unjustifiably infer that **this conflict alone demonstrates that both are**

> **guilty**. [Citation]. If there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. [Citation].

(*People v. Souza* (2012) 54 Cal.4th 90, 111, [internal quotations omitted, emphasis added]).

In the instant case, there has been no showing of what the purported antagonistic defenses of the defendants will be or how they are so irreconcilable that a jury would necessarily conclude from this conflict alone that both are guilty. Moreover, there is ample, independent evidence of defendant Cicinelli's guilt given the fact that the entire encounter between the defendant and Thomas was both audio and video recorded. Accordingly, there is no basis for severance on the alleged ground of inconsistent defenses.

Interpreting the federal joinder statute, the United States Supreme Court has similarly held that antagonistic defenses alone do not mandate severance. (*Zafiro v. United States* (1993) 506 U.S. 534, 538). The Court noted:

> Joint trials "play a vital role in the criminal justice system." [Citation]. They promote efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." [Citation]. For these reasons, we have repeatedly approved of joint trials. [Citations].

(*Id.* at 537-38). Although the Court recognized that the federal statute allows for severance if prejudice is shown, "the [federal appellate] courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses." (*Id.* at 538). "The low rate of reversal may reflect the inability of defendants to prove a risk of prejudice in most cases involving conflicting defenses." (*Id.*) The Court then continued to state that

> when defendants properly have been joined...a district court should grant a severance...only if there is a **serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.**

(*Id.* at 539 [emphasis added]; *see also People v. Coffman* (2004) 34 Cal.4th 1, 40 [characterizing the standard in *Zafiro* as a "helpful mode of analysis of severance claims."]). Still, even when prejudice is shown, "less drastic measures [than severance], such as limiting instructions, often will suffice to cure any risk of prejudice." (*Id.*) Again, even under this standard, defendant Cicinelli has failed to make the requisite showing.

Defendant Cicinelli also argues that "the jury will be confused by evidence on multiple counts" and that evidence prejudicial to him, namely the first several minutes of the video-recorded incident, will be introduced against defendant Ramos in a joint trial. This, he contends, warrants his severance. (Defendant Cicinelli's "Motion to Sever," p. 5-6). Once again, however, the defendant fails to articulate in any way why a joint prosecution would be too confusing for a jury or how the introduction of the entire video evidence would compromise his ability to obtain a fair trial. If anything, the opposite is actually true. The video evidence, in its entirety, unambiguously depicts the separate conduct of each defendant in the incident. Nevertheless, even where the potential for confusion or prejudicial evidence exists in a joint trial, severance is the last option, not the first resort.

As noted, less drastic measures, such as proper jury instruction, will ordinarily suffice to cure any risk of prejudice or confusion. The Court in *People v. Chambers* (1964) 231 Cal.App.2d 23, the case cited by defendant Cicinelli in support of his request on this ground, actually confirms the People's position. There the Court held that the receipt of "damaging evidence…admissible against one defendant but not against others" is not a circumstance demanding separate trials. (*People v. Chambers* (1964) 231 Cal.App.2d 23, 33). Instead,

> [t]he prevailing California theory is that the jury may be effectively admonished to confine the evidence to the defendant against whom it is offered and to exclude it in weighing guilt of the defendant against whom it is inadmissible. [Citations].

(*Id.*) In fact, "in the absence of a strong showing to the contrary it is to be presumed that such instructions sufficiently protect[] [a defendant's] right to a fair trial," thereby obviating the need for separate prosecutions. (*People v. Pike* (1962) 58 Cal.2d 70, 85 [joint trial where evidence received admissible only to one defendant]; *see also, People v. Santo* (1954) 43 Cal.2d 319, 332 [same]).

In the context of a capital case, the Supreme Court has similarly recognized the sufficiency of jury instructions to ensure individualized consideration of multiple defendants and to maintain joinder. In *People v. Taylor* (2001) 26 Cal.4th 1155, for example, the defendant contended that the court had erred in failing to sever his trial from that of his codefendant, to enable to jury to make an individualized penalty determination. The Court, however, rejected his contention and affirmed the trial court's denial of severance. The Court observed:

> The penalty phase jury was instructed to consider the evidence separately as to each defendant, and not consider as evidence against one defendant any evidence admitted only against another. Moreover, the jury was told to "decide separately the question of the penalty as to each of the defendants," the same instruction given in the *Ervin* case. [Citation]. These instructions were adequate to ensure individual consideration of penalty as to each defendant. In the absence of a showing that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant, we can find no abuse of discretion in failing to sever the trial or order separate penalty phase juries.

(*People v. Taylor* (2001) 26 Cal.4th 1155, 1174 [internal citation omitted]). Likewise here, there is nothing to indicate that a jury would be unable or unwilling to give defendant Cicinelli the individualized assessment to which he is entitled merely because he is jointly tried with defendant Ramos.

Among his final, generalized claims, defendant Cicinelli argues that severance is warranted here because defendant Ramos is charged with second degree murder, whereas he is only charged with involuntary manslaughter. This, he contends, will cause "a prejudicial spill over" from defendant Ramos "and influence…how the jury views Defendant Cicinelli." (Defendant Cicinelli's "Motion to Sever," p. 6). In identical fashion to his prior claims, however, defendant Cicinelli fails to support this argument with any explanation of how the difference in degree of homicide charged against him verses defendant Ramos would prejudice his ability to obtain a fair trial. The rule that defendants may be tried together where their offenses meet the statutory requirements for joinder "applies even though one defendant is charged with fewer crimes than the other." (*People v. Stathos* (1971) 17 Cal.App.3d 33, 41 *disapproved of on other grounds by In re Earley* (1975) 14 Cal.3d 122).

> Section 1098 provides for joint trials of two or more defendants who are charged jointly with any public offense. The fact that [defendant] is charged with only one of the crimes **does not** render the joinder improper or deprive the court of discretion to deny a motion for severance since there is a joint charge as to one of the crimes and a common element of substantial importance in the commission of all of them. [Citations].

(*People v. Chapman* (1959) 52 Cal.2d 95, 97-98 [internal citations omitted, emphasis added]; *see also, People v. Pike* (1962) 58 Cal.2d 70, 84-85 [same]; and *People v. Spates* (1959) 53 Cal.2d 33, 36 [same]).

As stated, this is a "classic case" for joinder – the defendants are charged with common crimes, arising from the same event, involving the identical victim. (*People v. Letner* (2010) 50 Cal.4th 99, 150). California courts have repeatedly upheld the joinder of defendants even where there were additional crimes charged against one defendant which were **wholly unrelated** to the crime he shared with his codefendant. In *People v. Champion* (1995) 9 Cal.4th 879, for example, two defendants were jointly tried before the same jury in a capital case on a double murder resulting in death verdicts for both defendants. One of the defendants was also tried for a separate murder charged in the same information. The Supreme Court held that the trial court did not err in permitting joinder of the defendants' cases for trial despite defendant Champion's protestations that joinder was likely to lead to prejudicial association. (*People v. Champion* (1995) 9 Cal.4th 879, 904-906). Similarly in *People v. Chambers* (1964) 231 Cal.App.2d 23, joined defendants were charged with one common assault, but only the co-defendant was charged with three additional assault charges, all against the same victim, but on three separate and distinct occasions. The defendant too claimed that the evidence of the separate assaults his co-defendant committed on the victim was prejudicial to his case. Again, however, the court explained that a "jury may be effectively admonished to confine the evidence to the defendant against whom it is offered and to exclude it in weighting guilt of the defendant against whom it is inadmissible." (*People v. Chambers* (1964) 231 Cal.App.2d 23, 33). In the absence of a strong showing to the contrary, such an instruction sufficiently protects the defendant. (*Id.*)

The instant case does not remotely implicate the prejudice that could be introduced where one defendant is charged with crimes unrelated to the other defendant. Here, both defendants are charged with the same offense, the homicide of Kelly Thomas on July 5, 2011, arising out of their common action. The fact that defendant Ramos is alleged to have acted with malice in the commission of that homicide, and therefore committed murder, whereas defendant Cicinelli is alleged to have acted with criminal negligence, and therefore committed manslaughter, is wholly inadequate to establish an incurable prejudice to defendant Cicinelli that would warrant a severance.

B. THE DEFENDANT HAS FAILED TO ESTABLISH HOW A JOINT TRIAL WOULD COMPROMISE HIS CONSTITUTIONAL RIGHT TO CONFRONTATION.

Defendant Cicinelli also moves this court to grant him a separate trial arguing that "[t]he tenants of *Aranda-Bruton* should persuade this court to sever the matters..." because the People may "attempt to utilize the out of court statements of defendant Ramos..." (Defendant Cicinelli's "Motion to Sever," p. 4). This claim too amounts to nothing more than an inadequate bald assertion of prejudice in the absence of any evidence or explanation of how it might actually be true *in his case*.

"The *Aranda/Bruton* rule bars admission in a joint trial of one defendant's out-of-court confession that **powerfully and facially incriminates** a codefendant...[Citations]." (*People v. Smith* (2005) 135 Cal.App.4th 914, 921-922). Indeed, "the positive authority of *Bruton*...extends only to confessions that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant defendant." (*People v. Fletcher* (1996) 13 Cal.4th 451, 455-56). This rule of exclusion, however, has no application to non-hearsay statements or to non-testimonial statements that fall within an exception to the hearsay rule. The admission of a non-testifying defendant's statement for a purpose other than the truth of the matter stated does not violate a codefendant's Sixth Amendment right of confrontation and therefore does not trigger the mandate of *Aranda-Bruton*. (*Tennessee v. Street* (1985) 471 U.S. 409, 413-414; *see also, Crawford v. Washington* (2004) 541 U.S. 36 59, fn. 9 [Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."]). Additionally,

> if the statement is *admissible* against the codefendant under a hearsay exception, and its admission otherwise survives confrontation analysis, then the jury may consider it against the codefendant; no reason exists for severance or redaction. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 331-332, 68 Cal.Rptr.2d 61 (*Greenberger*).)

(*People v. Smith, supra,* 135 Cal.App.4th at 922). Therefore, the *Aranda-Bruton* rule might be implicated in the instant case if defendant Ramos had made a testimonial statement which was offered by the People for the truth of the matter asserted and which both powerfully and facially incriminated defendant Cicinelli. In his motion for severance on this basis, however, defendant Cicinelli has not identified any such statement (or *any* statement for that matter) which might fall within the ambit of the *Aranda-Bruton* rule.

Even assuming, *arguendo*, that defendant Cicinelli could identify a statement by defendant Ramos which would be subject to the limitations of *Aranda-Bruton*, a severance is not mandated. If editing the codefendant's statement can effectively delete inculpating references to the other defendant, without prejudice to the declarant, a severance motion may be denied.

> When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court...can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant.

(*People v. Aranda* (1965) 63 Cal.2d 518, 530; *see also, People v. Johnson* (1989) 47 Cal.3d 1194, 1229 [severance may be denied on basis of effective editing]; *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1648 [editing is common and accepted solution to *Aranda-Bruton* problem]; *People v. Garcia* (2008) 168 Cal.App.4th 261, 281, 282, 85 C.R.3d 393 [no reversible error in denying motion to sever where defendant's statement was sanitized as to references to codefendant]). Even where effective redaction is not possible, however, a severance is not automatically required. Instead, the People may elect to forgo the introduction of the offending statement in order to jointly try the defendants. Accordingly, defendant Cicinelli's mere invocation of the term "*Aranda-Bruton*" is wholly inadequate to earn him the separate trial he seeks.

C. THE DEFENDANT'S READINESS TO PROCEED TO TRIAL BEFORE HIS CO-DEFENDANT IS NOT A LEGALLY ADEQUATE BASIS TO SEVER IN THIS CASE.

In a final effort to earn severance, defendant Cicinelli claims that he should be awarded a separate trial because he could be prepared to proceed to trial in July whereas his co-defendant cannot. (Defendant Cicinelli's "Motion to Sever," p. 7-8). Assuming *arguendo,* that this is true, the timing of counsels' readiness is not a basis for severance, particularly at this juncture in this case.

The statutory preference for joint trials was actually "enhanced by two provisions of Proposition 115 adopted at the June 1990 election." (*People v. Morganti* (1996) 43 Cal.App.4th 643, 672). One of those provisions was the adoption of Penal Code section 1050.1. (*Id.* at fn.

25). In scenarios where one counsel is prepared to proceed to trial and another is not, section 1050.1 expresses a clear preference for maintaining joinder. Section 1050.1 provides in full that:

> [i]n any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time."

(Cal. Penal Code §1050.1).

> Thus, when, as here, two defendants are jointly charged in an information and the trial court continues the trial as to one of the defendants for good cause, section 1050.1 provides that the continuance of the trial as to that defendant constitutes good cause to continue the trial "a reasonable period of time" as to the other defendant in order to permit the defendants to be tried jointly.

(*People v. Sutton* (2010) 48 Cal.4th 533, 558). Section 1050.1 only provides for severance of joint trials where it would be "**impossible** for all defendants to be available and prepared **within a reasonable period of time**." (Cal. Penal Code §1050.1 [emphasis added]).

Defendant Cicinelli's ability to proceed to trial before defendant Ramos would not warrant a severance in this case. A continuance of defendant Ramos' case pursuant to Penal Code section 1050 would authorize a continuance of defendant Cicinelli's trial under section 1050.1, so as to maintain joinder. Moreover, there is no evidence to suggest at this stage that it would be impossible for both defendants to be available and prepared for trial within a reasonable period of time. On the contrary, while defendant Cicinelli claims he could proceed to trial in mid-July, defendant Ramos has indicated he would be prepared to proceed to trial in mid-October. (See Declaration of Keith Bogardus, attached hereto). A span of only three months, particularly when the defendants are both out-of-custody, is certainly a reasonable period of time. Accordingly, there is no basis for severance on this ground and defendant Cicinelli's request should be denied.

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CONCLUSION

For the foregoing reasons and upon the above cited points and authorities, the People respectfully request that this court deny defendant Cicinelli's motion to sever in all respects.

Dated this 28th day of May, 2013.

Respectfully submitted,
TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

By: _____
KEITH BOGARDUS
Senior Deputy District Attorney

DECLARATION

I, KEITH BOGARDUS, hereby declare:

1. That I am an attorney licensed to practice law in the State of California;
2. That I am one of the attorneys responsible for representing the People in this matter;
3. That on Wednesday, May 22, 2013, I engaged counsel for defendant Ramos, Mr. John Barnett, in an e-mail correspondence regarding this matter during which he indicate a mid-October trial setting was agreeable to him.

I declare under penalty of perjury that the foregoing is true and correct. Dated this 28th day of May, 2013, at Santa Ana, California.

KEITH BOGARDUS
SENIOR DEPUTY DISTRICT ATTORNEY

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 401 Civic Center Drive West, Santa Ana, CA 92701.

On Tuesday, May 28, 2013, I served the within PEOPLE'S OPPOSITION TO DEFENDANT'S CICINELLI'S MOTION FOR SEPARATE TRIAL on interested party in said action by placing a true copy thereof enclosed in a sealed envelope, postage thereon fully prepaid, in the United States mail at Santa Ana, CA 92701, addressed as follows:

MICHAEL SCHWARTZ, Esq.
367 North Second Avenue
UPLAND, CA 91786

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on May 28, 2013, at Santa Ana, California.

Joanne Aguinaga
Attorney Clerk

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 401 Civic Center Drive West, Santa Ana, CA 92701.

On Tuesday, May 28, 2013, I served the within PEOPLE'S OPPOSITION TO DEFENDANT'S CICINELLI'S MOTION FOR SEPARATE TRIAL on interested party in said action by placing a true copy thereof enclosed in a sealed envelope, postage thereon fully prepaid, in the United States mail at Santa Ana, CA 92701, addressed as follows:

JOHN D. BARNETT, Esq.
1 CITY BOULEVARD, SUITE 500
ORANGE, CA 92868

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on May 28, 2013, at Santa Ana, California.

Joanne Aguinaga
Attorney Clerk