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June 16, 2011

Frederick K. Ohlrich
Court Administrator and Clerk of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Ronald Bruce Mendoza* - S065467

Dear Mr. Ohlrich:

On May 20, 2011, the Court set a June 20 deadline for the submission of letter briefing on the question of how Penal Code section 1252 relates to this case.[1] Appellant's position is that section 1252 may not be used by the state to obtain review of the trial court's finding that the evidence was insufficient to support the lying-in-wait special circumstance.

PENAL CODE SECTION 1252 DOES NOT PROVIDE A BASIS FOR THE STATE TO OBTAIN APPELLATE REVIEW WHEN A TRIAL COURT HAS FOUND THE EVIDENCE INSUFFICIENT TO SUPPORT A SPECIAL CIRCUMSTANCE

Most commonly, the state has three potential avenues for obtaining review of a trial court ruling in a criminal case: 1) file notice of appeal pursuant to section 1238; 2) seek review by way of writ of mandate; or 3) seek review by way of section 1252 when a defendant has appealed and the state seeks the type of review contemplated by that statute. Here, the state did not file a notice of appeal; the state failed to seek review by way of writ of mandate; and the type of ruling it seeks to review is one that falls outside the purview of section 1252.

Section 1252 provides in pertinent part: "On an appeal by a defendant, the appellate court shall, in addition to the issues raised by the defendant, consider and pass upon all rulings of the trial court adverse to the State which it may be requested to pass upon by the Attorney General." Although this statute is broadly worded, it does not supercede the other forms of review; rather, it serves as a vehicle for the state to obtain

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[1] All further statutory references are to the California Penal Code unless otherwise noted.

appellate review when other avenues are foreclosed to it and the type of review being sought is that contemplated by the statute itself. Its real reason for existence is to enable the state to obtain review of allegedly erroneous rulings by the trial court in order to obtain an affirmance of the conviction which is being appealed by a defendant. (*People v. Braeseke* (1979) 25 Cal.3d 699-701 (hereafter *Braeseke*).) Permitting the state to use this statute in the manner that it proposes is unauthorized by law and would be a perversion of the scheme set up for orderly review of a trial court's rulings.

Nevertheless, respondent relies on *Braeseke*, and asserts that it may obtain appellate review of the trial court's determination of evidentiary insufficiency because such is necessary to obtain affirmance of the judgment of conviction. (Respondent's May 4, 2011 letter brief, p. 3) It is true that in *Braeseke* this Court agreed that a reviewing court may pass upon a trial court evidentiary ruling where the state does not have a right to appeal "in order to secure an affirmance of the judgment of conviction." (*Braeseke, supra*, 25 Cal.3d at p. 701.) However, the rationale of *Braeseke* does not contemplate that a reviewing court be permitted to utilize section 1252 to reinstate a special circumstance finding where the trial court has determined it is insufficient as a matter of law.

In *Braeseke*, the trial court ruled that a first confession was inadmissible, but that the rest of the evidence against appellant was admissible. On appeal, the defendant argued the trial court erred in not suppressing the rest of the evidence on the ground that it was the product of the first unlawfully obtained confession. The state, however, challenged the propriety of the ruling that the first confession was inadmissible, arguing it was entitled to seek such review under section 1252. The *Braeseke* court held that the state had a right to have the appellate court pass upon the trial court's ruling regarding the first confession, stating:

> Since an appeal by the People is not authorized in this instance, an interpretation of section 1252 as precluding review of the order suppressing the initial confession would result in that order being binding on us even if clearly erroneous. Such a result would be patently unreasonable here *where defendant's challenge to the admissibility of the subsequent confession and other evidence is premised on the validity of the ruling* that the first confession was inadmissible.

(*Braeseke*, *supra,* 25 Cal.3d at p. 700; emphasis added.)

Thus, in *Braeseke*, the defendant sought review of a ruling dependent on or inextricably linked to another ruling of the trial court. Seeking to limit the power of the reviewing court from addressing the first ruling would be "patently unreasonable." That

is not the case here, where appellant has not made any issue on appeal *dependent on* the trial court's ruling regarding insufficiency of the evidence to prove the lying-in-wait special circumstance. Therefore, review of the trial court's ruling is not authorized under *Braeseke's* interpretation of section 1252, and would violate the statutory scheme limiting the state's right to appellate review.

Since the state makes no claim it had a right to appeal the trial court's ruling, the proper method for challenging it would have been to file a writ of mandate in the court of appeal under Code of Civil Procedure section 1085.[2] "Generally a writ will lie when there is no plain, speedy, and adequate alternative remedy." (*Munroe v. Los Angeles County Civil Service Com'n.* (2009) 173 Cal.App.4th 1295, 1301; see *People v. Superior Court of Orange County* (1967) 67 Cal.2d 929, 930 [petition for writ of mandate proper vehicle for vacating trial court order declaring mistrial and obtaining order directing trial court to record jury verdict]; *People v. Superior Court* (2011) 193 Cal.App.4th 989, 991 [state obtained writ of mandate from appellate court setting aside trial court's order that separate penalty phase jury be impanelled in capital case].)

Rather than having pursued the arguably proper remedy, the state now attempts to make up for its failure by utilizing section 1252. This Court has recognized that once the state fails to follow the appropriate method for obtaining relief, it will not be permitted to make up for that failure by seeking the same relief via an inappropriate avenue. In *People v. Drake* (1977) 19 Cal.3d 749, the state urged this Court to consider its opening brief as a petition for writ of mandamus if the Court found that an appeal was not the proper remedy. The Court found that appeal was not the proper remedy, and declined to consider the pleading as a petition for writ of mandate because the delay in seeking relief via that avenue made it inappropriate to do so during the appellate process. (*Id.* at p. 758.) Here, the state having failed to pursue the proper avenue for relief, seeks to employ section 1252 as a method for review. Just as this Court, under the authority of *Drake*,[3] would deny relief if the state sought to have its reply brief considered as a petition for writ of mandate on this issue, it should reject the state's attempt to utilize section 1252 in

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[2] Subdivision (a) of section 1085 of the Code of Civil Procedure reads: "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person."

[3] *People v. Drake*, *supra*, was superseded by statute on another point, but remains good law for the proposition cited by appellant. (See *People v. Statum* (2002) 28 Cal.4th 682, 690.)

the same manner. (See also *People v. Burke* (1956) 47 Cal.2d 45, 54 [section 1252 does not authorize review when state could have appealed from trial court order]; *People v. Zelver* (1955) 135 Cal.App.2d 226, 236-237 [same].)

If this Court were to interpret section 1252 as a means by which the state might seek review of the trial court's insufficiency finding on the special circumstance, it would be violating that maxim of statutory construction which provides that a statute cannot be read to abrogate the effect of another statute, but must be read "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529-530.) Permitting review of the trial court's ruling under section 1252 would abrogate this principle because it would allow the state to obtain review despite its failure to follow the proper procedures for obtaining such review.[4]

Ultimately, appellant asserts that even if the state had properly sought this remedy it would have failed. Respondent believes that section 1385.1 prevented the trial court from taking the action that it did. (RB 47-56.) Respondent misconstrues the purpose behind section 1385.1. This section was added to the Penal Code via Proposition 115 for the purpose of abrogating this Court's holding in *People v. Williams* (1981) 30 Cal.3d 470. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, fn. 17.) *Williams* specifically endorsed the view that a trial court could exercise its discretion under section 1385 for the purpose of ameliorating the punishment otherwise demanded by a special circumstance finding. In other words, it recognized that a trial court had the power to strike a special circumstance in order to ensure that the punishment fit both the crime and the perpetrator. (*People v. Williams*, *supra*, at pp. 477, 489.) Proposition 115 was passed to remove this type of sentencing discretion from the trial court. (See *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1281-1285 [unauthorized for trial court to strike special circumstance in order to make sentence fair and proportionate].)

The trial court in this case did not seek to exercise this type of discretion, nor was the sentence altered by the trial court's action, as were the sentences in *Williams* and *Johnwell*. In this case, the trial court acted to fulfill the federal constitutional mandate that no conviction be permitted to stand unless supported by sufficient evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; see *People v. Ochoa* (1998) 19 Cal.4th 353, 413-414 [same standard applies to proof of special circumstance].) This stands in sharp contrast to *Johnwell*, where the trial court stated specifically its ruling was not based upon a problem with the sufficiency of the evidence, but was being made solely to address the propriety of the sentence. (*People v. Johnwell*, *supra*, 121 Cal.App.4th at p.

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[4] This respect for the review process is paramount, even when it may cause the state to "' suffer a wrong without a remedy.' [Citation.]" (*People v. Williams* (2005) 35 Cal.4th 817, 822-823.)

1282.) That is the type of situation section 1385.1 was meant to address, not the situation presented by the ruling in this case.[5]

PERMITTING THE STATE TO OBTAIN REVIEW IN THIS FASHION VIOLATES APPELLANT'S DUE PROCESS RIGHTS

In California, the Legislature has determined that the state may not obtain appellate review of trial court rulings, even where an injustice may occur, unless specifically authorized to do so under certain circumstances. Since the state did not file a notice of appeal in this case, we may assume that such circumstances do not exist. As discussed above, it may have been proper for the state to utilize a petition for writ of mandate to seek review of the trial court's order, but it similarly failed to pursue that remedy. Now, the state seeks to expand the bases of any right it may possess to obtain review of the trial court's ruling finding evidentiary insufficiency for the lying-in-wait special circumstance by utilizing section 1252. This section, however, does not provide the necessary statutory authorization for this type of review. Since a defendant has an entitlement to have the state enforce its procedural protections and requirements in a consistent fashion, permitting the state to obtain this review would be a denial of that protected right and violate appellant's right to due process.

This is so because "appellate review at the request of the People necessarily imposes substantial burdens on an accused, and the extent to which such burdens should be imposed to review claimed errors involves a delicate balancing of the competing considerations of preventing harassment of the accused as against correcting possible errors.' [Citation.]" (*People v. Williams, supra*, 35 Cal.4th 817, 822-823.) For this type of claim, the statutory scheme for review required the state to raise the claimed error at a far earlier point in the proceedings. To require appellant to defend against the state's claim at this late stage is undue harassment.

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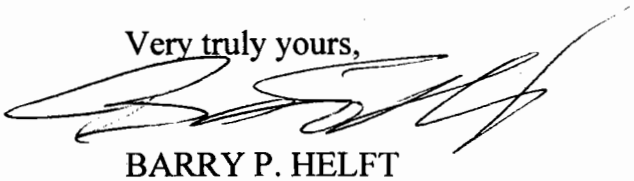
[5] Appellant acknowledges that the trial court specifically referred to section 1385 when making its ruling. The reason for the ruling, however, was not that the trial court intended to ameliorate the punishment in any way–indeed it was not ameliorated by the trial court's action–but rather that the evidence was insufficient to prove the special circumstance. (RT 18:2875, 2913.) Thus, this situation is analogous to that existing when a trial court makes the correct ruling but bases it upon incorrect reasoning. In that instance, an appellate court will affirm. (*People v.* Mason (1991) 52 Cal.3d 909, 944 [reviewing court reviews trial court's ruling and not its reasoning]; People *v. Evans* (1967) 249 Cal.App.2d 254, 262.) As appellant points out in his reply brief, the trial court had the authority to take its action under other provisions of the law. (Reply, pp. 3-5.) This being so, it is the reasoning of the court that is important, not whether the court inadvisedly used the wrong tool to reach a result that was otherwise within its power to reach.

A ruling permitting the state to raise this issue for the first time in the respondent's brief would be an arbitrary application of the law. Such an arbitrary deprivation of a state law entitlement violates the Due Process Clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [liberty interests protected by the Due Process Clause arise from two sources, the Due Process Clause itself and the laws of the States].) "Where a statute indicates 'with language of unmistakable mandatory character' [e.g., by use of the word 'shall'] that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." (*Ford v. Wainwright* (1986) 447 U.S. 399, 428 (conc. opn. of O'Connor, J.).) This principle also applies to judicial holdings. (*Green v. Catoe* (4th Cir. 2000) 220 F.3d 220, pp. 228-229.) To permit the state to obtain review by raising this issue for the first time in its answering brief to Appellant's Opening Brief on Appeal would violate the statutory scheme for appellate review and run afoul of the judicial holdings interpreting that statutory scheme. As a consequence, it would deprive appellant of due process of law.

Very truly yours,



BARRY P. HELFT
Chief Deputy State Public Defender

DENISE KENDALL
Assistant State Public Defender

DECLARATION OF SERVICE

Re: People v. Ronald Mendoza

Los Angeles Superior Court No. KA032117
Supreme Court No. S065467

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a copy of the attached:

LETTER BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

BLYTHE J. LESZKAY
Office of the Attorney General
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RONALD BRUCE MENDOZA
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Clerk, Capital Appeals Unit
ADDIE LOVELACE
Los Angeles County Superior Court
210 W. Temple St. Room M-3
Los Angeles, CA 90012

Each said envelope was then, on June 16, 2011, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 2011, at San Francisco, California.

DECLARANT