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CONVICTION OF NON-CHARGED OFFENSES: THE NEW TEST OF *PEOPLE V. COLE*

In criminal trials both the federal and the state constitutional requirements of due process demand that a defendant be notified of the charges against him.[1] The federal requirement of notice is explicit: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."[2] The United States Supreme Court has recognized that reasonable notice of the charges against him is a basic right of each defendant.[3] The California Constitution also provides that each defendant shall be informed of the complaint against him.[4] The California Supreme Court has recognized notice of the charges as being an essential element of due process in a criminal proceeding.[5] Thus, in state criminal procedures, a defendant must be provided with notice of the crime of which he is accused.

Although in most instances the due process requirement of notice is satisfied by the formal charging papers, occasionally, the courts have allowed a conviction of a non-charged offense to stand. While the lack of a formal charge would seem to imply in itself that due process has been violated because there has been no specific notice to the defendant, courts have looked for actual notice to the defendant to decide if

1. U.S. CONST. amend. VI; CAL. CONST. art. 1, § 14. Although both constitutions refer to the need for notice, presumably under Duncan v. Louisiana, 391 U.S. 145 (1968), such a fundamental right would be applicable to all states by operation of the fourteenth amendment. *Duncan* extended the sixth amendment right to trial by jury to state criminal proceedings for serious offenses. The Court briefly reviewed the variety of language in decisions extending Bill of Rights guarantees to state criminal proceedings. In a footnote discussing the "incorporation' debate," the Court defined a fundamental procedure as one that is "necessary to an Anglo-American regime of ordered liberty," and not necessarily one that is "fundamental to fairness in every criminal system that might be imagined." *Id.* at 149-50 n.14.

2. U.S. CONST. amend. VI.

3. *In re* Oliver, 333 U.S. 257, 273 (1948).

4. CAL. CONST. art. 1, § 14 states:

> A person charged with a felony by complaint subscribed under penalty of perjury and on file in a court in the county where the felony is triable shall be taken without unnecessary delay before a magistrate of that court. The magistrate *shall immediately give the defendant a copy of the complaint*, inform the defendant of the defendant's right to counsel, allow the defendant a reasonable time to send for counsel, and on the defendant's request read the complaint to the defendant.

(emphasis added).

5. People v. Cannady, 8 Cal. 3d 379, 389, 503 P.2d 585, 592, 105 Cal. Rptr. 129, 136 (1972): "A defendant cannot be convicted of an offense . . . not charged against him by indictment or information . . . ."

the mandate of due process has been met. There are two different situations in which a conviction of a non-charged offense will not be reversed for lack of notice. First, such a conviction will be upheld if the court finds that the conviction was based on an offense that in some manner is a part of the offense with which the defendant was charged. In this situation, the non-charged offense is often termed a lesser-included offense.[6] Second, such a conviction will be upheld if there is evidence in the record from which the court can find an informal amendment of the charging papers.[7] While allowing these exceptions, until recently the California courts have followed the general rule that a defendant may not be convicted of a non-charged offense.

I. THE CALIFORNIA TESTS

California courts have recognized two tests under which a defendant can be convicted of a non-charged, lesser-included offense.[8] The first of these, the "necessarily-included offense" test, is based on the elements of the crime. If the elements of one crime encompass all the elements of another crime such that the one cannot be committed without also committing the other, the latter offense is said to be necessarily included within the first.[9] This test seems to meet due process requirements because the requisite notice to the defendant can be found in the identity of the elements. California Penal Code section 1159[10] expressly authorizes a jury to convict a defendant of any necessarily included offenses.

The second test for a lesser-included offense has been called the

6. For a general discussion of the lesser-included offense doctrine see Comment, *The Included Offense Doctrine in California*, 10 U.C.L.A. L. REV. 870 (1963).

7. An informal amendment may result in a waiver of an objection to lack of notice because in such a case the defendant impliedly consents to a conviction on the less serious offense. *See* Comment, *Convictions of Unincluded Lesser Offenses: Informal Amendments and Plea Bargains*, 25 HASTINGS L.J. 1075 (1974). *See also* text accompanying notes 58-86 *infra* for examples of informal amendment.

8. *See* People v. St. Martin, 1 Cal. 3d 524, 536, 463 P.2d 390, 396-97, 83 Cal. Rptr. 166, 172-73 (1970):

> Two different types of necessarily included offenses have been recognized in this state. First, where one offense cannot be committed without committing another offense, the latter offense is a necessarily included offense. Second, a lesser offense is necessarily included if it is within the offense specifically charged in the accusatory pleading, as distinguished from the statutory definition of the crime.

(citations omitted). *See also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 541-43 (1963).

9. *In re* Hess, 45 Cal. 2d 171, 174, 288 P.2d 5, 7 (1955).

10. "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." CAL. PENAL CODE § 1159 (West 1980).

"accusatory pleading" test. Under this test, the defendant may be convicted of any offense revealed by the specific facts alleged in the indictment or information.[11] This test also seems to meet due process requirements by requiring actual, if not formal, notice to the defendant. The defendant is given notice of the crimes against which he must defend himself from the facts that he must refute in the accusatory pleadings.

In addition to these two tests, California appellate courts have also affirmed a defendant's conviction of a non-charged offense if there is evidence of an informal amendment of the charging papers. Thus, if the record reveals that the defendant agreed to the lesser charge by requesting an instruction on the offense or by other active behavior, he may not later complain of lack of notice. In these cases, the defendant's behavior either shows that he has had the proper notice or that he has waived such notice.[12]

In June 1979, a California Court of Appeal broadened the basis on which a conviction of a non-charged offense can be upheld. In effect, the new test bypasses the traditional concepts of lesser-included offenses, and informal amendments to create a new category in which non-charged offense convictions may be upheld. This new test can be characterized as the "lack of objection" test.

II. *PEOPLE V. COLE*

The lack of objection test was announced in *People v. Cole*.[13] One of the defendant's contentions on appeal was that his conviction for assault with a deadly weapon[14] was improper because it is not a lesser-included offense of the crime with which he was charged, assault with intent to commit murder.[15] From the evidence at trial, one can sympa-

11. People v. Marshall, 48 Cal. 2d 394, 309 P.2d 456 (1957). In this case, the defendant was charged with robbery under the Penal Code, but was convicted of felony auto theft under § 503 of the Vehicle Code. The court decided that, "Because the information charged defendant with taking 'an automobile,' he was put on notice that he should be prepared to defend against a showing that he took that particular kind of personal property." 48 Cal. 2d at 405, 309 P.2d at 463.

12. *See* text accompanying notes 58-70 *infra*.

13. 94 Cal. App. 3d 854, 155 Cal. Rptr. 892 (1979).

14. The defendant was convicted of a violation of CAL. PENAL CODE § 245(a) (West Supp. 1976), assault with a deadly weapon. He was charged with violating CAL. PENAL CODE § 217 (West Supp. 1976) (amended 1978), assault with intent to commit murder.

15. 94 Cal. App. 3d at 860, 155 Cal. Rptr. at 895. The other issues on appeal were the propriety of the lower court's denial of the defendant's motion for a new trial based upon newly discovered evidence, *id.* at 859, 155 Cal. Rptr. at 894, a claimed error in the jury finding that the defendant used a firearm, *id.* at 864, 155 Cal. Rptr. at 898, a proposed striking of a section of the minute order, *id.* at 865, 155 Cal. Rptr. at 898, and a claimed

thize with the court's reluctance to overturn the conviction. The evidence indicated that the defendant had argued with the victim, a customer in a bar that the defendant was managing for his common-law wife. After the argument, the defendant went behind the bar, got a handgun, came up behind the victim, shot him in the back of the head, and then, while the victim fell to the floor, struck him over the head with the handgun. The victim was treated at a hospital for a gunshot wound to the back of his head and for a laceration on his forehead. The defendant was charged by information with one count of assault with intent to commit murder, enhanced with a firearm use allegation[16] and a great bodily injury charge, and with one count of possession of a concealable firearm by a felon. He pleaded not guilty to both counts and denied the great bodily injury charge and the firearm use allegation. Trial was by jury.[17]

As the court recognized, under either of the two traditional tests for upholding such convictions as a lesser-included offense, the conviction could not stand.[18] Under the necessarily included offense test, the elements of assault with a deadly weapon are not all included in the offense of assault with intent to commit murder. As another court said on the same issue, "Not every assault with intent to commit murder implies the employment of a deadly weapon."[19] Similarly, the accusatory pleading test was not met because the prosecutor did not allege as part of the formal accusation that the defendant used a deadly weapon in the assault. The use enhancement allegation is insufficient in itself to provide this part of the accusation.[20] Although there has been no Cali-

improper enhancement of the penalty. *Id.* Only the latter two issues were decided in defendant's favor.

16. The use of a firearm during the commission of a felony invokes CAL. PENAL CODE § 12022.5 (West 1980), which provides:

> Any person who personally uses a firearm in the commission or attempted commission of a felony, shall, upon conviction of such felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he has been convicted, be punished by an additional term of two years, unless use of a firearm is an element of the offense of which he was convicted.
>
> The additional term provided by this section may be imposed in cases of assault with a deadly weapon under Section 245.

17. 94 Cal. App. 3d at 857-59, 155 Cal. Rptr. at 893-94.

18. *Id.* at 861-62, 155 Cal. Rptr. at 896.

19. People v. Ramos, 25 Cal. App. 3d 529, 538, 101 Cal. Rptr. 230, 235 (1972). The Attorney General admitted that assault with intent to commit murder does not include all elements of assault with a deadly weapon. The *Cole* court does not discuss this test but merely states that case law supports the view that the elements are not the same. 94 Cal. App. 3d at 861, 155 Cal. Rptr. at 896.

20. *Id.* at 862, 155 Cal. Rptr. at 896.

fornia Supreme Court ruling on the issue, the appellate courts, with one exception,[21] have held that a firearm use allegation may not be used to determine whether a lesser offense is included in the accusation.[22] The courts have given two reasons for so holding. First, a use allegation is not part of the charge of an offense but is the means provided by the legislature for increasing the penalty when a firearm is used in committing the offense.[23] Second, holding otherwise would necessitate giving a jury instruction on assault with a deadly weapon in all cases in which the use allegation is present.[24]

Unable to use either of the traditional tests of a lesser-included offense to uphold the conviction, the *Cole* court turned to a 1960 decision by the California Supreme Court, and through a reinterpretation of that case, upheld the defendant's conviction.

III. *PEOPLE V. COLLINS*

People v. Cole reinterprets *People v. Collins*.[25] In *Collins*, the defendant was accused of forcible rape, but was convicted of a specific type of rape, statutory rape.[26] The information did not include the fact

21. The only case that possibly indicates otherwise is People v. Gray, 91 Cal. App. 3d 545, 154 Cal. Rptr. 555 (1979):

> Defendant admits the existence of authority holding that the firearm use and bodily injury allegations are not part of the accusation. Penal Code sections 954, 969c, 969d, and 12022.7 (which govern the lodging of enhancement charges) indicate that the firearm use and bodily injury allegations become part of the allegations of the information which was not discussed in either *Wilson* or *Orr*, ... However, we do not need to resolve this issue here for the reasons discussed below.

91 Cal. App. 3d at 557 n.14, 154 Cal. Rptr. at 562 n.14 (citations omitted). Although the court did not decide the issue, it indicated a preference for considering the use enhancement allegation as part of the accusation. Justice H. C. Brown had previously expressed a similar view in People v. Wilson, 62 Cal. App. 3d 370, 377, 132 Cal. Rptr. 813, 817 (1976) (dissenting opinion) ("Under the test that looks at the facts against which defendant must defend, no reason exists to ignore what is obviously stated . . . ."). Nevertheless, the court in *Cole*, composed of the same panel which decided *Gray*, did not follow this reasoning but, instead, created an entirely new test.

22. *See, e.g.*, People v. Henry, 14 Cal. App. 3d 89, 92, 91 Cal. Rptr. 841, 842-43 (1970) (defendant had an additional penalty imposed under CAL. PENAL CODE 12022.5 (West 1970) (most recent amendment 1977) after being convicted of first degree robbery); People v. Orr, 43 Cal. App. 3d 666, 673-74, 117 Cal. Rptr. 738, 742-43 (1974) (defendant unsuccessfully contended, among other complaints, that the court should have given a sua sponte instruction on exhibiting a firearm because of the use enhancement allegation).

23. 14 Cal. App. 3d at 92, 91 Cal. Rptr. at 842-43.

24. People v. Benjamin, 52 Cal. App. 3d 63, 72, 124 Cal. Rptr. 799, 805-06 (1975) (defendant unsuccessfully contended that a sua sponte instruction of assault with a deadly weapon should have been given at his trial for murder).

25. 54 Cal. 2d 57, 351 P.2d 326, 4 Cal. Rptr. 158 (1960).

26. The charge was violation of subdivision 3 of former CAL. PENAL CODE § 261, and the conviction was of subdivision 1 of the same section. This code section was amended in

that the victim was fifteen years old, but the evidence of her age was undisputed at the preliminary hearing and at the trial, which was without a jury.[27] In upholding the conviction in a short opinion, the court outlined the considerations that led to its decision: (1) Initially, the court noted that the subdivisions of the penal code section "do not state different offenses but merely define the different circumstances under which an act of intercourse constitutes the crime of rape."[28] (2) Then, the court acknowledged that "[a]n accused should be advised of the charge against him in order that he may have a reasonable opportunity to prepare and present his defense,"[29] and interpreted this as requiring notice before trial of any variation in the subsection charged. (3) Finally, the court stated that "[t]he decisive question in the present case is whether the variance was of such a substantial character as to have misled defendants in preparing their defense."[30] The court found that in *Collins* the defendants were not misled because the attorney for one defendant had stated at the preliminary hearing that the evidence showed only statutory rape. In addition, the defendants did not claim that they could have disputed the age of the prosecuting witness.[31]

In reaching its decision, the court in *Collins* acted consistently with the California tests for upholding convictions of non-charged offenses. Although the subdivision was not specifically charged, by interpreting the statute as prohibiting one crime, rape, and as enumerating the ways in which that crime could be committed, the court implied that the crime was actually charged. Having been charged with the crime, the defendant only needed notice before the trial of any variation in the specifics to be proved. Furthermore, there was some defense participation related to the alternative of a statutory rape conviction. Thus, the aggregate facts in *Collins* place the case within the traditional tests.

A. Cole*'s Analysis*

The court in *People v. Cole* analyzed the facts of *People v. Collins* selectively. When restating the facts of the case that it presumably deemed significant, the discussion omitted several crucial elements.[32] The discussion did not include the fact that the defense attorney had

1970 to eliminate the statutory rape subsection. That act is now a violation of CAL. PENAL CODE § 261.5 (West 1980).

27. 54 Cal. 2d at 58, 351 P.2d at 327, 4 Cal. Rptr. at 159.

28. *Id.* at 59, 351 P.2d at 328, 4 Cal. Rptr. at 160.

29. *Id.*

30. *Id.*

31. *Id.* at 60, 351 P.2d at 328, 4 Cal. Rptr. at 160.

32. 94 Cal. App. 3d at 862, 155 Cal. Rptr. at 897-98.

expressed the view at the preliminary hearing that the evidence showed only the offense of which the defendant was ultimately convicted. The *Cole* opinion also omitted the fact that the trial was without a jury.[33] The court instead pointed out that the close relationship between assault with intent to commit murder and assault with a deadly weapon is comparable to the relationship between the statutory subdivisions of the crime in *People v. Collins*.[34]

Continuing its analysis, the *Cole* court focused its attention on the third factor discussed in the *Collins* decision: "The crux of the *Collins* decision is that variance between the offense charged and a lesser offense of which a defendant is ultimately convicted will be deemed material only if the defendant was misled to his prejudice and prevented from preparing an effective defense."[35] In applying this standard to the case before it, the *Cole* court stated that the testimony at the preliminary hearing gave the defendant early notice that the assault with which he was charged involved a deadly weapon. It emphasized that the defendant did not claim on appeal that he would have relied on a different defense had the charge been otherwise.[36] Finally, citing *People v. Ramos*[37] for the proposition that by his conduct at trial a defendant can waive his right to complain, the court noted that defense counsel made no objection when the trial judge announced his intent to instruct on the lesser offense.[38] Using this analysis, the court in *People v. Cole* has bypassed the concept of lesser-included offenses and negated the requirement of waiver-like behavior.[39] Neither of these situations was present. The conviction was seemingly affirmed solely on the basis of lack of objection. In order to appreciate the full implications of the analysis of *Collins* in *Cole*, it is instructive to compare that analysis with others that have been made.

B. Analysis of Other Cases

1. The single offense concept

One of the first cases construing *People v. Collins* was *People v. Leech*,[40] which was expressly disapproved in *Cole*.[41] In *People v.*

33. *See* text accompanying notes 71-80 *infra*.
34. 94 Cal. App. 3d at 863, 155 Cal. Rptr. at 897.
35. *Id.*
36. *Id.* at 863-64, 155 Cal. Rptr. at 898.
37. 25 Cal. App. 3d 529, 101 Cal. Rptr. 230 (1972). Contrast the discussion of *Ramos* in the text accompanying notes 46-51 *infra* with *Cole's* interpretation.
38. 94 Cal. App. 3d at 864, 155 Cal. Rptr. at 898.
39. *See* text accompanying notes 56-70 *infra* for a discussion of waiver-like behavior.
40. 232 Cal. App. 2d 397, 42 Cal. Rptr. 745 (1965).

Leech, the charge was assault with a deadly weapon[42] but the conviction was of displaying a weapon in a rude and offensive manner.[43] The evidence at the preliminary hearing had been sufficient to support a conviction of offensive display, but the court still reversed the conviction. The prosecution had urged that *People v. Collins* be used to uphold the conviction. The court, however, said that the key to the *Collins* decision was that the subdivisions of the statute were merely a recitation of the various ways to commit the same offense. The case at bar involved two different offenses and, therefore, *People v. Collins* was held inapplicable.[44] The court held that the evidence presented at the preliminary hearing could not be used to augment the pleading when the offenses were different.[45] Thus, the evidence at the preliminary hearing of guilt of the non-lesser-included offense was irrelevant. The petition for rehearing was subsequently denied by the California Supreme Court.[46] *Leech* is consistent with the California tests for upholding convictions of non-charged offenses.

The California courts of appeal have consistently followed this "single-offense" interpretation of *Collins*. The first district in *People v. Escarcega*[47] explained *Collins* as allowing the preliminary hearing evidence to support the conviction on the theory that there was "but *one offense*."[48] The second district, in *People v. Baca*,[49] explained in a note that the case at bar was governed by *Collins* because, as in *Collins*, the case involved a single crime that can be committed in two ways.[50] In

41. "We are of the opinion that the narrow interpretation accorded to the *Collins* decision by *Leech* and its progeny ignores the underlying reasoning of the *Collins* case and exalts form over substance." 94 Cal. App. 3d at 863, 155 Cal. Rptr. at 897.

42. CAL. PENAL CODE § 245 (Deering 1961) (most recent amendment 1976).

43. CAL. PENAL CODE § 417 (Deering 1961) (amended 1977).

44. 232 Cal. App. 2d at 398-99, 42 Cal. Rptr. at 747.

45. *Id.* at 399-400, 42 Cal. Rptr. at 747.

46. April 14, 1965. *Id.* at 400, 42 Cal. Rptr. at 747.

47. 43 Cal. App. 3d 391, 117 Cal. Rptr. 595 (1974). The defendant was charged with assault with a deadly weapon. He requested and was refused an instruction on exhibiting a deadly weapon.

48. *Id.* at 396-97 n.1, 117 Cal. Rptr. at 598 n.1 (emphasis in original).

49. 247 Cal. App. 2d 487, 55 Cal. Rptr. 681 (1966). The case involved an accusation of assault on a police officer in violation of CAL. PENAL CODE § 245(b) (West Supp. 1965) (most recent amendment 1976) and a conviction of assault by means of force likely to produce bodily injury in violation of CAL. PENAL CODE § 245 (West Supp. 1965) (most recent amendment 1976).

50. 247 Cal. App. 2d at 491 n.3, 55 Cal. Rptr. at 684 n.3: "Here, the offense involved was that of aggravated assault on a police officer—an offense which . . . may be committed in either of two ways . . . . The present case, therefore, is governed by the principles expounded in *People v. Collins*, and not by those set forth in *Leech*." (citation omitted).

another second district case, *People v. Puckett*,[51] the prosecution urged that the evidence at the preliminary hearing augmented the information to provide notice to the defendant. The court, however, approved of the *Leech* limitation of *Collins* to single-offense cases and reversed the conviction.[52] The fourth district, in *People v. Tatem*,[53] noted as the distinguishing feature of *People v. Collins* its single offense concept.[54] The single offense interpretation of the *Collins* case is in accord with the general principle the courts follow of using a lesser offense test to uphold convictions of a non-charged offense. Thus, when disapproving the interpretation of *Collins* in "*Leech* and its progeny"[55] the *Cole* court not only disapproved a long line of cases from a variety of California jurisdictions[56] but also departed from the lesser included offense doctrine.

2. Informal amendment or waiver

The second traditional test used to determine whether to affirm a conviction of a non-charged offense is whether there is some kind of positive evidence in the record that the defendant was aware of the lesser charge and the need to defend against it. Often, this ground alone is used to affirm such convictions. As indicated, through this positive evidence the courts find assurance that the defendant has not been denied due process, but has had prior notice of the charge against him, or not having this notice, has chosen to waive his right to notice. Most cases using this test rely on actual defense participation in the court's

51. 44 Cal. App. 3d 607, 118 Cal. Rptr. 384 (1975).

52. *Id.* at 612, 118 Cal. Rptr. at 888.

53. 62 Cal. App. 3d 655, 133 Cal. Rptr. 265 (1976). The case involved a charge of burglary in violation of CAL. PENAL CODE § 459 (West 1970) (amended 1977, 1978) and a conviction of theft under CAL. PENAL CODE § 484(a) (West 1970).

54. 62 Cal. App. 3d at 658, 133 Cal. Rptr. at 266-67. *Tatem*, like *Collins*, was submitted on the transcript of the preliminary hearing. Unlike the defendant in *Collins*, however, the defendant in this case moved to dismiss after hearing the trial court's conclusion but before judgment was pronounced, on the ground that the information did not charge him with the crime for which the court was about to convict him. The court of appeal reversed on the ground that the conviction was for a non-charged, non-lesser-included offense. *Id.* at 658-59, 133 Cal. Rptr. at 266-67. Presumably, under *Cole* such a motion is now essential in order to preserve the issue for appeal. The reasoning in the *Tatem* decision focuses not on the denial of the defendant's motion, but on the nature of the crimes. Other lower court decisions have been reversed when there was no objection by the defendant at the trial court level. *See, e.g.*, People v. Leech, 232 Cal. App. 2d 397, 42 Cal. Rptr. 745 (1965); People v. Escarcega, 43 Cal. App. 3d 391, 117 Cal. Rptr. 595 (1974); People v. Puckett, 44 Cal. App. 3d 607, 118 Cal. Rptr. 384 (1975).

55. 94 Cal. App. 3d at 863, 155 Cal. Rptr. at 897.

56. In summary, *Leech* has been expressly followed in the first, the second, and the fourth districts. Until *Cole*, it had not been expressly disapproved.

instruction on the lesser offense. A typical case, cited in *People v. Cole*,[57] is *People v. Ramos*.[58]

a. amendment or waiver in jury trials

Like *People v. Cole*, *People v. Ramos* involved a defendant charged in the information with assault with intent to commit murder[59] and convicted after a jury trial of assault with a deadly weapon.[60] The appellate court in *Ramos* found that "assault with a deadly weapon is not a lesser necessarily included offense within Penal Code section 217."[61] Thus, it does not meet the first test of lesser-included offenses. Furthermore, the court in *Ramos* agreed with the court in *Leech* that the evidence from a preliminary hearing "could not be used to augment the charge so as to make assault with a deadly weapon a lesser included offense within the offense charged."[62] Thus, the preliminary hearing could not supplement the accusatory pleading to permit a finding that the defendant was given notice. Despite these findings, the court upheld the conviction because the "[d]efendant's own actions not only show that he realized that he was put to the task of defending against the alternate charge of assault with a deadly weapon, but also show that he wanted the jury to think that that offense was all that he really was defending against."[63] The defendant had requested a jury instruction on the elements of assault with a deadly weapon.[64] Thus, the court affirmed the conviction on the theory that there was an informal amendment to the information to which the defendant had consented.[65]

The defendant's conduct in *Ramos* could also be considered the equivalent of a waiver of his constitutional right to be notified of the charge against him.[66] It is, of course, possible to waive one's constitutional rights. The general test for a waiver of a fundamental constitu-

57. 94 Cal. App. 3d at 863-64, 155 Cal. Rptr. at 898.

58. 25 Cal. App. 3d 529, 101 Cal. Rptr. 230 (1972). This element is also found in *Collins*. *See* text accompanying note 31 *supra*.

59. CAL. PENAL CODE § 217 (West 1966) (amended 1976, 1978).

60. CAL. PENAL CODE § 245 (West 1966) (most recent amendment 1976).

61. 25 Cal. App. 3d at 538, 101 Cal. Rptr. at 235.

62. *Id.* at 537 n.4, 101 Cal. Rptr. at 234 n.4.

63. *Id.* at 539, 101 Cal. Rptr. at 235-36.

64. *Id.* at 539, 101 Cal. Rptr. at 236.

65. *Id.*

66. For recent reviews of waiver and forfeiture of constitutional rights, see Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050 (1978); Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

tional right is found in *Johnson v. Zerbst*:[67] "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[68] The United States Supreme Court has identified a "person's right to reasonable notice of a charge against him" as "basic in our system of jurisprudence."[69] By requesting an instruction on a charge, the defendant is, in effect, acknowledging that the facts may show he committed that offense and that he knows that the charge could have been brought against him. Thus, his action can be construed as a waiver of the right to go through the entire process again on this alternate crime. It is more difficult to see that the mere lack of an objection, as in *Cole*, is behavior constituting a waiver. The absence of an objection does not indicate that the right has been intentionally relinquished or that the right was even known.

Other decisions affirming the conviction of a non-charged but not lesser-included offense after a jury trial likewise stress the defendant's affirmative conduct. The fifth district court of appeal affirmed a battery conviction on a murder charge in *People v. Mayes*.[70] The majority opinion stressed that "the defendant actually requested the court to submit the battery issue to the jury . . . ."[71] The dissent argued for reversal, presumably in spite of this request, because the offense was non-charged and non-lesser-included.[72] Similarly, a divided court in the second district affirmed a conviction for displaying a weapon in a rude and offensive manner on a charge of assault with a deadly weapon in *People v. Rasher*.[73] The majority stressed that before trial the defendant had submitted a requested instruction on the lesser offense.[74] The dissent would have reversed because at the end of the trial the defendant withdrew his request.[75] Taken as a group, these cases indicate that in a jury trial if the defendant shows by his conduct that he agreed to the non-charged, non-lesser-included offense, he thereby waives his right to complain on appeal. The decision in *Cole* is not consistent with these cases because the defendant in *Cole* did not show by any affirmative behavior that he had waived his right.

67. 304 U.S. 458 (1938).
68. *Id.* at 464.
69. *In re* Oliver, 333 U.S. 257, 273 (1948).
70. 262 Cal. App. 2d 195, 68 Cal. Rptr. 476 (1968).
71. *Id.* at 201, 68 Cal. Rptr. at 481.
72. *Id.* (Conley, P.J., dissenting).
73. 3 Cal. App. 3d 798, 83 Cal. Rptr. 724 (1970).
74. *Id.* at 801-02, 83 Cal. Rptr. at 726-27.
75. *Id.* at 805-08, 83 Cal. Rptr. at 729-31 (Thompson, J., dissenting).

b. amendment or waiver in non-jury trials

A few California cases seem to offer a more relaxed standard by which to determine whether the defendant's behavior amounted to a waiver. These cases were all submitted, however, on the basis of their preliminary transcripts. The importance of the difference between a jury trial and a non-jury trial was stressed in *People v. Powell*.[76] This case was submitted on the transcript of the preliminary examination, which contained evidence sufficient to support the conviction of the non-charged offense. The defendant's failure to object to the lesser offense was found to imply his consent to it because had he objected at that point in the proceedings there still existed a procedure to amend the information.[77] When distinguishing *People v. Leech*,[78] a decision written by the same district and division of the court of appeal, the court said, "Where the trial is by jury there is no practicable way of amending the information after the jury has made known its decision to find the defendant guilty of the lesser but nonincluded offense."[79]

Similar decisions can be explained on this basis. Thus, in *People v. Chandler*[80] the record showed that the defendant knew the range of possible offenses involved and actually had discussed the lesser charge with his attorney.[81] The court affirmed the conviction. In *People v. Hensel*[82] the defendant had participated in discussions about the lesser offenses and had asked for a reduction to an offense that contained the same key element as the non-charged offense about which he was complaining on appeal.[83] Again, the court affirmed the conviction. The case permitting the least overt behavior by the defendant when affirming the conviction after submission on the preliminary hearing transcript is *People v. Francis*.[84] In this case the court emphasized that the defense counsel thanked the trial judge for the conviction on the

76. 236 Cal. App. 2d 884, 46 Cal. Rptr. 417 (1965).

77. *Id.* at 888, 46 Cal. Rptr. at 420.

78. 232 Cal. App. 2d 397, 42 Cal. Rptr. 745 (1965).

79. 236 Cal. App. 2d at 888, 46 Cal. Rptr. at 420.

80. 234 Cal. App. 2d 705, 44 Cal. Rptr. 750 (1965). The defendant had been charged with robbery and was convicted of grand theft.

81. *Id.* at 709, 44 Cal. Rptr. at 752.

82. 233 Cal. App. 2d 834, 43 Cal. Rptr. 865, *cert. denied*, 382 U.S. 942 (1965).

83. *Id.* at 839, 43 Cal. Rptr. at 868. The defendant was charged with oral copulation and convicted of lewd or disorderly conduct in a public place. The defendant had requested that the court reduce his offense to a violation of § 650.5 of the Penal Code (West 1970) ("A person who wilfully and wrongfully commits any act which . . . openly outrages public decency, . . .").

84. 71 Cal. 2d 66, 450 P.2d 591, 75 Cal. Rptr. 199 (1969).

lesser, although non-charged, offense instead of the greater charge.[85] Thus, in convictions following submission on the preliminary hearing transcript there does seem to be a less stringent standard by which to find a defendant's acquiescence. The relative informality of the proceedings and the ease with which the information could be amended if there were an objection make this a logical situation. In *People v. Cole*, however, the trial was by jury.

c. amendment or waiver absent in People v. Cole

Under the circumstances of a jury trial, the court has always looked for positive conduct, as opposed to passivity, on the part of the defendant before upholding the conviction of a non-charged and non-lesser-included offense.[86] In *Cole*, the defendant did nothing to encourage the inclusion of the lesser offense instruction. The court's only comment on his behavior was that he did not object.[87] From the record revealed by the court, it is impossible to suggest why there was no objection. Until this decision, no objection was necessary to preserve for appeal the issue of a non-charged offense conviction.[88] There is in *Cole* no evidence of an implied amendment or of a waiver. Thus, Cole cannot be explained on the basis of the last of the traditional tests for upholding convictions of non-charged offenses.

IV. CONCLUSION

From the foregoing discussion it is clear that the *Cole* interpretation of *Collins* is not in accord with the view taken of that case by the other California appellate courts. *Cole* can not be explained on the basis of a lesser-included offense, nor does it conform with other cases that upheld convictions of non-charged, non-lesser-included offenses on the basis of an implied amendment or waiver. Thus, although the decision appears on its face to expand the existing tests for upholding convictions of non-charged offenses, it does not. It offers a new test.

The new test that *Cole* sets up is quite broad: a conviction will be upheld if (1) there was evidence presented at the preliminary hearing that could have made the defendant aware of other possible crimes he may have committed; and (2) he makes no objection to the giving of an instruction on any of those crimes. This interpretation of *Cole*, if ap-

85. *Id.* at 74, 450 P.2d at 596, 75 Cal. Rptr. at 204.
86. *See* text accompanying notes 60-76 *supra.*
87. *See* text accompanying note 38 *supra.*
88. *See* note 54 *supra.*

plied by the courts, could lead to two direct effects on the present criminal trial system.

The first effect is of a practical nature. Applying the test of *People v. Cole* shifts the issue from a straightforward test of the due process consideration of notice to the nebulous issue of counsel's competency. The standard for judging counsel's competency was stated in *People v. Pope*[89] as being whether "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates" and whether "counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense."[90] A failure to object to a non-charged lesser offense now raises a bar to that issue on appeal and brings into question the competency of the defendant's counsel. The question the appellate court must answer shifts from "Was the defendant given the required notice?" to "Why didn't the trial counsel object?" Shifting the subject of the question from a well-defined area with many established precedents to an area of law still requiring interpretation is certain to lead to many appeals.

More important, however, is the effect *People v. Cole* may have on the issue of what constitutes due process. Carrying the reasoning in *People v. Cole* to its logical conclusion could lead to a change in criminal procedures. The first steps still would involve a charge of a crime and some preliminary evidence of that crime. Next would come the trial. At the last stage of that trial, however, a broad interpretation of *Cole* would open the door to an opportunity for the prosecutor to recharge the defendant with any other appropriate crimes with relative impunity. The traditional and constitutional procedure in our system has always been—first the charge, then the trial. The change suggested by *People v. Cole* violates that due process requirement.

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89. 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979).
90. *Id.* at 425, 590 P.2d at 866, 152 Cal. Rptr. at 739.