IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. **MICHAEL JEROME SUTTON et al.,** Defendants and Appellants.	S166402 (Motion to Take Judicial Notice on Behalf of Appellant Michael Jerome Sutton Filed Concurrently Herewith)

Second Appellate District, Division Three, No. B195337
Los Angeles County Superior Court, No. BA304502
The Honorable Judith L. Champagne, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS ON BEHALF OF APPELLANT MICHAEL JEROME SUTTON

WILLIAM L. HEYMAN
Attorney at Law
State Bar Number 59021
3152 Big Sky Drive
Thousand Oaks, CA 91360
(805) 493-4112

Attorney for Appellant
Michael Jerome Sutton

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ORDER SPECIFYING THE ISSUES TO BE BRIEFED

The order specifying the issues to be briefed, as set forth in this Court's order filed October 28, 2008 granting appellant's petition for review, states:

> "Were defendants' statutory speedy trial rights violated when defense counsel announced ready but that he might be in another trial, and the court continued trial for six days over defendants' personal objection, and if so, was the error prejudicial?"

STATEMENT OF THE CASE

Appellant, Michael Jerome Sutton, and coappellant Willie [J.] Jackson ("Jackson") were charged with the sale of cocaine base, and appellant was also charged with possession for sale of cocaine base. (Health & Saf. Code, §§ 11352, subd. (a), 11351.5; motion to take judicial notice filed concurrently with appellant's opening brief in the Court of Appeal ("1st MJN"), Exhibit A, p. 1, Exhibit B, p. 1.) The case was dismissed before trial due to the failure to hold a preliminary hearing within the prescribed time limit. (1st MJN, Exhibit B, pp. 2-3; 3d Augmented RT 1-2 ("Augmented RT is hereinafter abbreviated as "ART").)

The case was then refiled, and on September 12, 2006, day 53 of 60, all parties announced ready and trial was set for September 15, 2006, although Jackson's counsel stated that he might be engaged in trial in another case. (1st ART A-1, A-14-A-15, A-17; 1CT 102) When the case was called that day, Jackson's counsel was so engaged. (2d ART 1, 3) The trial court asked Jackson, "Is it agreeable with you that you come back here on September 19th and have your trial within two days of that date?" Jackson replied, "As long as no time is being waived. . . . I don't want to waive time." (2d ART 4) The trial court said that if there was no time waiver, it would "bring them back every day" as the case trailed. (2d ART 5; 1CT 103-104)

On September 18, day 59 of 60, the case was trailed. (2d ART 6-7; 1CT 105-106) However, neither appellant nor Jackson agreed to waive time. (2d ART 7)

On the 60th day, the trial court found good cause to trail the trial because Jackson's counsel was still in trial. (2d ART 12) The court specifically noted, "There's no time waiver here." (2d ART 13)

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On day 61, the trial court found Jackson's counsel's "pro forma" motion to dismiss was not a good faith motion, and it found good cause to trail the matter because Jackson's counsel was engaged in trial. (2d ART 14-17; 1CT 109-110)

On day 62, September 21, 2006, appellant asked, "This doesn't make us waiving time?" The court noted, "You haven't waived one second." (2d ART 21-22)

On day 63, the following exchange occurred:

> "[Appellant]: I'm told you have 60 days to start trial. Sixty days was up yesterday, and we've not waived any time. The minute order –
>
> "The Court: That's excellent. And I found good cause to put your case over.
>
> "[Appellant]: What's the good cause? What's the good cause?
>
> "The Court: The good cause is that one of the lawyers is engaged . . . .
>
> "[Appellant]: Yeah, but the minute order show we never waived any time. I'm confused.
>
> "The Court: You're not confused. You just don't like it.
>
> "[Appellant]: Well, that's a fact.
>
> "The Court: That's a fact. [¶] And you know what my answer to you is? Too bad. . . ."

(2d ART 25-26)

In spite of the fact that neither appellant nor Jackson ever waived time, trial did not commence until day 66. (1CT 120, 123) Appellant's motion to dismiss before trial due to the violation of his rights to a speedy trial was

denied. (1RT 7-8; 1CT 123) (See Pen. Code, § 1382.)[1] Upon conviction, the trial court sentenced appellant to state prison for nine years. (1CT 189-191) Appellant filed a timely notice of appeal. (1CT 194-196)

On March 26, 2008, the Court of Appeal issued an opinion ("Superseded Opn. or the "Superseded Opinion") in which it reversed appellant's conviction because of the violation of his right to a speedy trial under section 1382. (Superseded Opn., pp. 4-13.)

However, six days later and on its own motion, the Court of Appeal granted a rehearing, ordering the parties to submit supplemental briefing addressing section 1050.1. Ultimately, the Court of Appeal reversed itself on the speedy trial issue and affirmed appellant's conviction, in an opinion filed July 30, 2008 ("Opn." or the "Opinion").

STATEMENT OF APPEALABILITY

This appeal is from a judgment that finally disposes of all issues between the parties. This appeal is authorized by section 1237.

STATEMENT OF FACTS

A. Prosecution Case

On May 31, 2006, at about 7:00 p.m., Los Angeles Police Officer Anthony Jackson was working undercover as part of a narcotics buy team on Ceres Avenue. (1RT 32, 34, 49, 53) He saw Jackson standing alone on the sidewalk, counting money. (1RT 53-54) Jackson walked toward the officer,

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[1] Unless otherwise specified, all further section references herein are to the Penal Code.

asking what he wanted. (1RT 54, 86) The officer said, "A 20," and Jackson responded, "Let me see your money." (1RT 55-56, 86) The officer asked if he had "the rock." (1RT 56, 86) Jackson replied that he had to go get it. (1RT 56, 86)

The officer followed Jackson to the sidewalk, where he was told to wait, while Jackson continued to the far side of a waist-high dome tent against the wall, where Jackson met with appellant. (1RT 56-61, 87) Appellant took the cap off a white bottle, took out an off-white item, and gave it to Jackson, who went to the officer and said, "Give me your money." (1RT 58-61, 89, 97, 103) Jackson was given a prerecorded $20 bill; he gave the off-white item to the officer, who signaled that the buy was complete, walked away, and placed the item in a ziplock baggie. (1RT 50, 56, 61-63, 64, 102-103)

Plainclothes point officer Hector Diaz observed the undercover buy and observed Jackson walk back and hand an item to appellant; Diaz then radioed for additional officers to make the arrest. (1RT 105, 108-109, 111-115, 117-118, 120-122, 123, 128)

Jackson was searched and $14 was recovered from his pants pockets. (1RT 134) Officer Ramirez took an off-white solid in cellophane and an off-white solid in a white plastic container from appellant's pants pockets and gave those items to a detective. (1RT 160-162, 165-166) $44 was also recovered from appellant, including a $20 bill. (1RT 140-141, 152) The serial number of the $20 bill matched the prerecorded bill. (1RT 142, 144, 171-172, 175-176, 181) Officer Jackson opined in effect that appellant intended to sell the items recovered from him. (1RT 80)

L.A.P.D. criminalist Tsega analyzed the items and formed an opinion that the items recovered each contained less than a gram of cocaine in the form of cocaine base. (1RT 65-69, 154, 196, 198-201)

B. Defense Case

Appellant denied being on Ceres Avenue on May 31, 2006. (1RT 216, 221, 224) He had only two tens, a five, and three ones; he did not have a $20 bill on his person when he was taken into custody. (1RT 218, 223-224) He did not have in his pocket the off-white substance, and he did not have a plastic container. (1RT 223) They did not find a bindle of crack cocaine in his right front pants pocket, and they did not find a bottle in his left rear pants pocket. (1RT 228-229, 232) He had previously been convicted of possession for sale of cocaine base. (1RT 223)

Jackson denied being in the area of Ceres Avenue on May 31, 2006, denied giving item one to Officer Jackson, denied having a conversation with Officer Jackson regarding the sale of rock, and denied approaching appellant near a tent. (1RT 235, 243, 247, 249-250) He had previously been convicted of sale of a controlled substance, commercial burglaries, and sale of a substance falsely represented to be a controlled substance; he was on probation for possession of narcotics. (1RT 239, 243)

ARGUMENT

I.

APPELLANT'S STATUTORY SPEEDY TRIAL RIGHTS WERE VIOLATED WHEN COAPPELLANT'S TRIAL COUNSEL ANNOUNCED READY BUT THAT HE MIGHT BE IN ANOTHER TRIAL, AND THE COURT CONTINUED TRIAL FOR SIX DAYS BEYOND THE 60-DAY LIMIT, OVER COAPPELLANT'S AND APPELLANT'S PERSONAL OBJECTION; AND THE ERROR WAS PREJUDICIAL

A. Summary of Argument

Section 1382 requires that if the defendant's trial has not begun within 60 days after his arraignment, unless good cause to the contrary is shown, the action must be dismissed, with certain exceptions that did not apply here. In this case, trial began on day 66 of 60 (e.g., 1CT 106, 123), and neither defendant waived time (1st ART A-1-A-18; 2d ART 1-29).

Appellant and Jackson were charged jointly (1CT 37-38, 115-116), and there is a statutory preference for joint trials under section 1098, which is assisted by section 1050.1 when there is good cause to delay the trial of one of the defendants and the prosecutor makes a motion under that statute. However, that statutory preference cannot trump the incarcerated defendant's above statutory right to a speedy trial where the sole reason for the delay is, as here, the incarcerated codefendant's appointed attorney's engagement in another trial (*People v. Johnson* (1980) 26 Cal.3d 557 ("*Johnson*"), *Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884 ("*Sanchez*"), *People v. Escarcega* (1986) 186 Cal.App.3d 379 ("*Escarcega*"), and *Arroyo v. Superior Court* (2004) 119 Cal.App.4th 460 ("*Arroyo*")), except, perhaps, where there

are extraordinary circumstances for the delay, which were not present here.

Section 1050.1, on which the Court of Appeal indirectly relied, does not provide good cause in this case and should not weigh against appellant, because it did not become operative, in that good cause was not shown to continue Jackson's trial and, as an independent reason, the prosecution never made the required motion under that statute. Thus, even if there was good cause to delay Jackson's trial (which there was not), there was not good cause to delay appellant's trial.

When the statutory speedy trial issue is raised on appeal, prejudice must be shown, and it is shown under *Johnson* where, as here, the case, having been once dismissed under section 859b, cannot be refiled a second time, because of section 1387. Therefore, the judgment in this case must be reversed as to appellant, notwithstanding that the delay was for only six days; but if, here, it is nonetheless determined that prejudice is not shown, then defense counsel rendered ineffective assistance of counsel in not bringing a writ prior to trial, because, had he done so, under *Johnson* and earlier authority prejudice would not have had to be shown.

On this speedy trial issue, the Court of Appeal reached the correct decision in the Superseded Opinion and went astray in the Opinion.

B. Discussion

1. The Speedy Trial Statute; Related Authority

Section 1382, subdivision (a), paragraph (2) provided in 2006, and continues to provide, in relevant part that the court, unless good cause to the contrary is shown, shall order the action to be dismissed "[i]n a felony case, when a defendant is not brought to trial within 60 days of the defendant's arraignment on an indictment or information . . . ." That paragraph (2) further

provides in part and in effect that an action shall not be dismissed under that paragraph if (A) the defendant expressly enters a general waiver of the 60-day trial requirement or (B) the defendant requests or consents, expressly or impliedly, to the setting of a trial date beyond the 60-day period.

Section 1382 interprets the state constitutional right to a speedy trial. (*Johnson*, at p. 561; see Cal. Const., art. I, § 15; see also § 1050, subd. (a).)

"What constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court." (*Johnson*, at p. 570.) The determination of the trial court will not be disturbed on appeal, absent a showing of an abuse of that discretion. (*Sanchez*, at p. 889.) If the defendant seeks relief prior to the commencement of trial, he is not required to affirmatively show that he has been prejudiced by the delay. (*People v. Wilson* (1963) 60 Cal.2d 139, 151.) But if the defendant seeks on appeal to predicate reversal of a conviction upon denial of his right to speedy trial, he must show not only an unjustified delay in bringing his case to trial but also that the delay caused prejudice. (*Johnson*, at p. 574.)

2. There Was Not Good Cause as to Appellant for the Delay; *Johnson*, *Sanchez*, *Escarcega*, and *Arroyo*

In *Johnson*, the defendant was represented by the public defender, at whose request the case was repeatedly continued over the defendant's express objection, resulting in the commencement of trial 144 days after charges were filed. The defendant raised a speedy trial claim in the trial court but did not seek pretrial appellate intervention. (*Johnson*, at p. 561.) This Court held in part that:

> "in the case of an incarcerated defendant, the asserted inability of the public defender to try such a defendant's case within the statutory period because of conflicting obligations to other

clients does not constitute good cause to avoid dismissal of the charges."

(*Johnson*, at p. 562.) This Court also stated that an attorney does not enjoy the prerogative of weighing the rights of one client against those of another (*Johnson*, at p. 568), that a defendant who is incarcerated pending trial suffers particular harm when he is denied his right to trial within the statutory period (*Johnson*, at p. 569) and that:

> "In 1901 this court in *In re Begerow* (1901) 133 Cal. 349, 355 . . . , stated that the purpose of the state constitutional protection of the right to a speedy trial is 'to protect those accused of crime against possible delay, caused either by willful oppression, or the neglect of the state or its officers.' '[T]he state or its officers,' we must observe, includes not only the prosecution, but the judiciary and those whom the judges assign to represent indigent defendants; 'oppression' or 'neglect' may include the failure to provide the facilities and personnel needed to implement the right to speedy trial."

(*Johnson*, at p. 571.)

This Court stated further that the defendant's right to a speedy trial may be denied by failure to provide enough public defenders "or appointed counsel" (*Johnson*, at p. 571) and that "the state cannot rely upon the obligations an appointed counsel owes to other clients to excuse its denial of a speedy trial to the instant defendant" (*Johnson*, at p. 571). This Court concluded:

> "[T]he state is in no position to deny a defendant his right to a speedy trial because the state is unable to provide counsel who can bring the case to trial within the statutory limits. If the state wants to incarcerate a citizen it cannot do so in violation of the state's own obligations and in violation of its own self-imposed

conditions of confinement. The state must be a model of compliance with its own precepts."

(*Johnson*, at p. 580.)

The Court of Appeal endeavored to distinguish *Johnson* on its facts (Opn., at pp. 8-10). However, that attempt is puzzling. In *Johnson*, trial counsel was unavailable on the date set for trial, March 23, 1977, because he was engaged in trial in another case. (*Johnson* at p. 563 and fn. 2.) Trial began on June 27, 1977, 144 days after the information was filed. (*Johnson* at p. 565.) At the time, the 60 days began to run under section 1382 from the filing of the information. (*Johnson*, at p. 563.) It would thus appear that the information was filed on or about February 3, 1977, although, because the defendant was arraigned on February 2, 1977 (*Johnson*, at p. 563), apparently the information may have been filed on February 2, 1977, in which event the 60th day was April 3, 1977, a Sunday. It was not indicated how long the trial in which trial counsel was engaged on March 23, 1977 lasted; it may still have been ongoing on April 4, 1977. (*Johnson*, at p. 563 and fn. 2.) So that appears to be a distinction without a difference. In the case at bar, Jackson's counsel was unavailable for trial on day 60 of 60, September 19, 2006, because he was engaged in trial in another case. (2d Augmented RT 8-11) In *Johnson*, what delay, if any, the other two cases referred to by trial counsel on March 23, 1977 contributed to the delay beyond the 60th day occasioned by the trial in which trial counsel was engaged on March 23, 1977 was not indicated. (*Johnson*, at p. 563 and fn. 2.) Here, Jackson's (as well as appellant's) trial was in effect delayed so Jackson's counsel could try another case ahead of it. There is no indication in *Johnson* that the above other two cases so referred to on March 23, 1977 were of importance in this Court's holdings in *Johnson*. Thus, *Johnson* is not reasonably distinguishable.

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The Court of Appeal stated that Johnson's trial counsel in *Johnson* was engaging in case management, to Johnson's detriment. (Opn., at p. 10.) But Jackson's counsel was also engaging in case management, on September 12, 2006 (1st ART A-1, A-14-A-15) and afterward, which eventuated in being to Jackson's (and appellant's) detriment.

The Court of Appeal also stated that Jackson's counsel was actually in trial in another matter and was not delaying this matter so that he could try other cases ahead of it. (Opn., at p. 10.) That statement is self-contradictory, unless the word "cases" was intended to be significant, but why more than one case's being put ahead of trial in this case must be required for relief is not apparent. A scheduling conflict is a scheduling conflict, regardless of how many cases are involved. Again, in this case, on September 12, 2006, when the parties announced ready, Jackson's counsel was not engaged in trial in another case. (1st ART A-1, A-14-A-15, A-17.)

In *Sanchez*, the reviewing court held that the rule stated in *Johnson* is equally applicable where delay beyond the statutory period is caused by the unavailability of appointed counsel for a codefendant rather than the defendant's's own appointed counsel. (*Sanchez*, at p. 890.) The court observed that the cause of the delay is the same – failure of the state to provide the facilities and personnel needed to implement the right to speedy trial – and that the result is identical:

> "the right of an in-custody defendant demanding a speedy trial is subordinated to the convenience of appointed counsel and the criminal justice system as he remains confined beyond the time prescribed until the system will accommodate him."

(*Sanchez*, at p. 890.) In *Sanchez*, the defendant's trial was continued beyond the statutory period, over his objections, on the ground that the deputy public defender representing a jointly charged codefendant was unavailable because

he was engaged in and assigned to other "must go" criminal trials. (*Sanchez*, at p. 887.)

The court in *Sanchez* also discussed whether the legislative preference for joint trial embodied in section 1098 constituted "good cause" to overcome the defendant's right to trial within the 60-day period. (*Sanchez*, at pp. 991-893.) It concluded:

> "[O]n balance, whatever unspecified 'interests of justice' might be promoted by a joint trial in the underlying prosecution, the state interest cannot be permitted to subordinate the conflicting right of petitioner to a trial within the 60-day period."

(*Sanchez*, at p. 893.) The court found that this result was compelled on two grounds: First, under the rationale in *Johnson*, the state must not be permitted to "'deny a defendant his right to a speedy trial because the state is unable to provide counsel who can bring the case to trial within the statutory limits.'" (*Sanchez*, at p. 893, quoting *Johnson*, at p. 580.) To allow the state to avoid that clear pronouncement by claiming a conflicting, nonabsolute right to a joint trial, in what appeared to be a standard burglary prosecution, would render the defendant's right meaningless. Second, while the preference for joint trial stated in section 1098 serves judicial economy and the convenience of the court and counsel, it cannot subordinate the defendant's state constitutional right to a speedy trial without a showing of exceptional circumstances. (*Sanchez*, at p. 893; see *Escarcega*, at p. 386, fn. 4.)

The Court of Appeal distinguished *Sanchez* (Opn., at pp. 10-11) on the ground that it mirrors more closely the facts in *Johnson* than those in the instant case, even though the Court of Appeal found that the delay in *Sanchez* may have been only one day more than the delay in the instant case (Opn., at p. 10, fn. 11). However, the only distinction in *Sanchez* is apparently that a

codefendant's trial counsel, who was engaged in another trial on December 28, 1981 (the date set for trial), was also assigned to two other trials. (*Sanchez*, at p. 887.) It is not indicated in *Sanchez* whether either of those two other trials was responsible for any delay beyond that occasioned by the trial in which he was engaged on December 28, 1981. (*Sanchez*, at pp. 887-888.) That distinction thus appears to be also without a difference. Thus, *Sanchez* is not reasonably distinguishable.

The Court of Appeal disregarded the holding in *Sanchez* that the preference for joint trial stated in section 1098 cannot subordinate the defendant's state constitutional right to a speedy trial without a showing of *exceptional* circumstances. (*Sanchez*, at p. 893.) The reviewing court in *Sanchez* required an order dismissing the information as to the petitioning defendant (*Sanchez*, at p. 893), so it obviously did not find "exceptional circumstances," and there are none in the instant case.

In *Escarcega*, the Court of Appeal found that the defendant's right to a speedy trial was abridged where the sole reason for the delay, requested by the defendant's appointed private counsel, was that counsel's congested calendar (he was engaged in another trial) and the record was bare of any indicia of "extraordinary circumstances" that would justify delay due to that counsel's congested calendar – that at a minimum, the definition of the term "exceptional circumstance" envisions an unforeseeable, unique, or nonrecurring event or situation, and such facts were not present. (*Escarcega*, at pp. 383-384, 386-387.) The reviewing court quoted the above statement in *Johnson* that "the state cannot rely upon the obligations which an appointed counsel owes to other clients to excuse its denial of a speedy trial to the instant defendant." (*Escarcega*, at p. 386.)

In a footnote, the Court of Appeal dispensed with its own opinion in *Escarcega*, by noting a dictum in *Greenberger v. Superior Court* (1990) 219

Cal.App.3d 487, 495 relating to a statement in *Escarcega*, at p. at p. 386, fn. 4 about preference for a joint trial of jointly charged defendants. (Opn., at p. 11, fn. 12.) However, the Court of Appeal in *Escarcega* also quoted *Johnson*, at p. 575 ["calendar conflict on the part of defense counsel or the trial court cannot routinely serve to justify denial of a motion to dismiss when trial is postponed beyond the statutory period"] (*Escarcega*, at p. 386).

Also, the Court of Appeal disregarded its own statement in *Escarcega* that "[i]n the absence of 'extraordinary circumstances'" congested calendar of defense counsel as explanation for delay "cannot constitute a sufficient excuse." (*Escarcega*, at p. 386.) Thus, *Escarcega* is not reasonably distinguishable. Furthermore, although citing a dictum in *Greenberger* as indicated above, the Court of Appeal omitted the statement in *Greenberger* that "good cause is not shown by . . . overburdened appointed counsel." (*Greenberger v Superior Court*, *supra*, 219 Cal.App. 3d at p. 495, citing *Johnson*, *Sanchez*, and *Escarcega*.)

Moreover, the statement in *Escarcega* that the Court of Appeal found overly broad (Opn., at p. 11, fn. 12) was quoted with approval in *Arroyo* (*Arroyo*, at p. 465).

As indicated above, in *Escarcega*, the Court of Appeal found that there was no indication in the record of "extraordinary circumstances" that would justify delay due to appointed counsel's congested calendar. (*Escarcega*, at p. 387.) Likewise, there were no such extraordinary circumstances in the case at bar. It is commonplace for trial counsel to handle multiple cases concurrently, and trials frequently drag on for various reasons.

In *Arroyo*, in which the record demonstrated that maintaining joinder was the sole reason for continuing the defendant's trial (*Arroyo*, at p. 467), the reviewing court held that the statutory preference for joint trials does not trump a defendant's statutory right to a speedy trial (*Arroyo*, at p. 465).

The Court of Appeal distinguished *Arroyo* on the basis that it did not involve the unavailability of codefendant's counsel due to his present engagement in trial on another matter. (Opn., at p. 11.) However, in *Arroyo*, the defendant's trial was delayed beyond the statutory period only so he could be jointly tried with a codefendant. (*Arroyo*, at p. 462.) The reviewing court in *Arroyo* stated: "The People contend this statutory preference for joint trials trumps a defendant's statutory right to a speedy trial. It does not." (*Arroyo*, at p. 465, citing *Sanchez*, at p. 893; *Escarcega*, at p. 386, fn. 4.) *Arroyo* is thus not reasonably distinguishable.[2]

In the case at bar, appellant was arraigned on July 21, 2006 (1CT 69-70), the 60th day under section 1382, subdivision (a), paragraph 2 was thus September 19, 2006, the trial was trailed for six days beyond that 60th day and did not commence until September 25, 2006 (1CT 112, 114, 122-124), appellant never waived time (1CT 69-70, 72, 75-76, 102, 104, 106, 108, 110, 112, 114, 122; 1st ART A-1-A-18; 2d ART 1-29),[3] Jackson was represented by appointed counsel (1CT 4, 67, 71, 103, 105, 107, 109, 111, 113, 119, 125), appellant and Jackson were in custody throughout the above period of July 21 through September 25, 2006 (1CT 4, 68, 70-73, 75, 102-114, 119, 121-122, 124, 126), and the reason given by the trial court for the above trailing of the trial was that good cause was found because Jackson's counsel was engaged

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[2] In the recent case of *Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, this Court stated that "appointed defense counsel lacks authority to waive his or her client's statutory speedy trial rights when the client personally *objects* to a continuance and the sole reason for the continuance is defense counsel's obligation to another client. [Citations.]" (*Id.* at p. 969, italics in original.)

[3] Various minute orders indicate that appellant waived statutory time or made a motion to have the trial on a certain date (1CT 102, 106, 108, 110, 112), but in fact appellant never waived statutory time or made such a motion (1st ART A-1-A-18; 2d ART 6-22).

in trial (1CT 112, 114; 2d ART 18, 21-23, 25-26). Based on the foregoing authorities, that was not good cause to postpone the commencement of appellant's trial (e.g., *Johnson*, at pp. 562, 569-572, 580; *Sanchez*, at pp. 890, 893).

Therefore, the trial court abused its discretion in not granting appellant's motion to dismiss on lack of a speedy trial. The trial court based its ruling apparently on the previous judge's finding good cause to trail due to Jackson's counsel's being engaged in another matter. (1RT 8)

It could be argued that, contrary to what is stated in the minute orders (1CT 112, 114), appellant did not object to the trailing of the trial beyond the 60th day (2d ART 18-27). However, any such argument would be meritless. Although neither defense counsel nor appellant expressly objected to the trailing of the trial, neither defense counsel nor appellant waived time. (2d ART 18-27) Certainly the prosecutor was incorrect in stating (1RT 7) that on each and every occasion when defense counsel "was asked if he wanted to waive time for the convenience or because his co-counsel was in fact in trial he did." (2d ART 1-27) At the hearing on September 21, 2006, the trial court stated to defense counsel, "You're trailing because [Jackson's counsel] is engaged" and defense counsel stated, "That's correct, Your Honor." (2d ART 19) However, that was merely a reflection of what the trial court was doing – a bit earlier, the trial court had (a) confirmed that Jackson's counsel was still engaged, (b) told Jackson's counsel that he could return to his trial court, and (c) asked defense counsel if he wanted to remain or he wanted it to let him go also and then it would bring appellant and Jackson out (they were at that time on their way to the courthouse from Wayside) and indicate to them it was "trailing it." (2d ART 18-19) It was thus the trial court's decision to trail the trial. Defense counsel's above statement ("That's correct, Your Honor") could not reasonably be construed as a consent by defense counsel to trailing the trial

because Jackson's counsel was engaged in another trial. It was simply a confirmation that the trial court was trailing the trial for that reason.

When appellant arrived at that September 21st hearing, he made it clear that he was concerned to preserve his speedy trial rights, by inquiring, "This doesn't make us waiving time?" (2d ART 21) The trial court responded in part: "You haven't waived one second." (2d ART 22) Also, at the next day's hearing, there was the exchange between appellant and the trial court quoted above in subdivision B of this part I, in which appellant stated that he was confused and that he was told "you have 60 days to start trial. Sixty days was up yesterday, and we've not waived any time," the trial court stated, "That's excellent" and that it had found good cause to put appellant's case over, and appellant asked, "What's the good cause? What's the good cause?" (2d ART 25-26)

Although under the language of section 1382 permitting a postponement at the request of the defendant or with his consent, express or implied, the failure of a defendant or his counsel to make timely objection to a postponement constitutes implied consent to the postponement (*Johnson*, at p. 567, fn. 7), in the instant case appellant's above inquiries and statements to the trial court preclude any finding of implied consent. As shown by the above quotations ("You haven't waived one second." (2d ART 22); "That's excellent." (2d ART 26)) and other statements by the trial court referred to above in subdivision B of this part I to the effect that there was no time waiver, the trial court was well aware that appellant was not waiving time. Consent is inferred from silence (*Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, 969), but, as shown above, appellant was not silent.

The Court of Appeal found that appellant did not waive time. (Opn., at p. 7, fn. 7.)

3. Penal Code Section 1050.1

(a) Introduction

As indicated above, shortly after the Superseded Opinion was filed, the Court of Appeal granted a rehearing on its own motion and ordered supplemental briefing addressing section 1050.1. Section 1050.1 was not mentioned in the Superseded Opinion. (Superseded Opn., at pp. 4-13.) In the Opinion, the Court of Appeal cited no cases on the speedy trial issue that it did not cite in the Superseded Opinion, with the exception of three cases that it cited only in footnotes: *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 780 (Opn., at p. 9, fn. 9), which the Court of Appeal indicated was strongly criticized by the *Johnson* majority (Opn., at p. 9, fn. 9), and *A.A. v. Superior Court* (2003) 115 Cal.App.4th 1, 4, 6 and *In re Samano* (1995) 31 Cal.App.4th 984, 995 (Opn., at p. 13, fn. 14), which latter two cases the Court of Appeal cited in connection with its discussion of section 1050.1 (Opn., at p. 13, fn. 14). It appears, therefore, that the Court of Appeal was greatly influenced by section 1050.1 in reaching a conclusion in the Opinion opposite to its holding in the Superseded Opinion that the preference for a joint trial does not here trump appellant's right to a speedy trial (Superseded Opn., at p. 7). Section 1050.1 will thus be analyzed below in some detail.

(b) Provisions and Decisions

Section 1050.1 was adopted by initiative (Proposition 115, section 22) at the June 5, 1990 primary election and became operative on June 6, 1990. (*Tapia v. Superior* Court (1991) 53 Cal.3d 282, 286, 299; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340.) It has never been amended. It provides as follows:

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> "In 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."

Section 1050.1 was never referred to during any of the proceedings in the superior court relating to the unavailability of Jackson's counsel for trial in this case and the consequent trailing of that trial or appellant's ensuing motion for dismissal. (1st ART 1-18; 2d ART 1-29; 1RT 7-8) Nor was section 1050.1 referred to in any of the minute orders relating to those proceedings. (1CT 102-114, 122-124)

Nine published California cases have referred to section 1050.1: *People v. Standish* (2006) 38 Cal.4th 858, 873; *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 984; *Tapia v. Superior Court*, *supra*, 53 Cal.3d at p. 299; *Raven v. Deukmejian*, *supra*, 52 Cal.3d at p. 343; *Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, *passim*; *Arroyo*, at pp. 463-465, 467 & fn. 2; *A.A. v. Superior Court*, *supra*, 115 Cal.App.4th 1, *passim*; *People v. Morganti* (1996) 43 Cal.App.4th 643, 672, fn. 25; and *In re Samano*, *supra*, 31 Cal.App.4th 984, *passim*. However, of those nine cases, only *Arroyo* involved

the applicability of section 1050.1 to a statutory (60-day) speedy trial issue,[4] and in *Arroyo*, section 1050.1 was conceded by the People to be inapplicable (*Arroyo*, at pp. 464, 467, fn. 2) and was found to have been erroneously relied on by the trial court, because section 1050.1 requires that the defendant's or codefendant's trial have been continued for good cause shown, and in that case (*Arroyo*) the codefendant's trial was never continued for good cause; rather, it was being set for the first time on the last day for the defendant's trial to begin (i.e., day 60 of 60) (*Arroyo*, at p. 464).

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[4] Of the other eight of those nine cases, *People v. Standish* considered whether the defendant was entitled to be released from custody on his own recognizance when his preliminary examination was continued for good cause, and, if so, whether failure to grant that release denied him a substantial right (38 Cal.4th at p. 863); *Yoshisato v. Superior Court* considered whether, and to what extent, the amendments made to section 190.2 by Proposition 115 should be given effect (2 Cal.4th at p. 981); *Tapia v. Superior Court* considered whether Proposition 115's provisions should be applied to prosecutions of crimes committed before its effective date (53 Cal.3d at p. 286); *Raven v. Deukmejian* considered whether Proposition 115 was invalid because of the manner in which it was presented to the voters (52 Cal.3d at p. 340); *Ramos v. Superior Court* considered whether a preliminary hearing can be continued beyond 60 days in the absence of a personal waiver in view of section 859b (146 Cal.App.4th at p. 722); *A.A. v. Superior Court* considered whether section 1050.1 applies to a juvenile proceeding (115 Cal.App.4th at p. 6); *People v. Morganti* considered whether the codefendants' antagonistic defenses compelled severance (43 Cal.App.4th at p. 671); and *In re Samano* considered in effect whether two defendants were entitled to be released on their own recognizance pursuant to section 859b when the preliminary hearing was continued beyond 10 court days (31 Cal.App.4th at pp. 987-988).

(c) The First Sentence of Section 1050.1 Is Inoperative Because Good Cause Was Not Shown to Trail or Continue Jackson's Trial

Good cause was not shown to trail or continue Jackson's trial, and therefore there could not be good cause under section 1050.1 to trail or continue appellant's case.

By its own terms, the first sentence of section 1050.1 is operative only if "the court . . . , *for good cause shown*, continues the . . . trial of one or more defendants . . . ." (§ 1050.1, italics added.)

The trial court in effect found good cause as to Jackson to trail the trial because Jackson's counsel was engaged in another trial (2d ART 1, 4; 1CT 103; 2d ART 6-7; 1CT 105; 2d ART 9, 11-12; 1CT 107; 2d ART 14, 16-17; 1CT 109; 2d ART 18, 21; 1CT 111; 2d ART 23, 25; 1CT 113). However, the fact that appointed trial counsel of an incarcerated defendant is engaged in another trial is not good cause to continue that same defendant's trial. (*Johnson*, at pp. 562, 569-571; *Escarcega*, at pp. 383-384, 386-387; and see *Sanchez*, at pp. 890, 893.) Jackson was at all relevant times in custody in this case. (1CT 4, 68, 71, 73, 75, 103, 105, 107, 109, 111, 113, 119, 121, 126) Also, as shown above, Jackson did not waive time and he was not silent.

Because good cause was not shown to continue Jackson's trial, section 1050.1 did not operate to create good cause to continue appellant's case or to trail appellant's trial.

(d) The First Sentence of Section 1050.1 is Inoperative Also Because the Prosecuting Attorney Never Made a Motion With Respect to the Trial in This Case as Required by That Sentence

As indicated above, the first sentence of section 1050.1 states in part:

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> "In any case in which two or more defendants are jointly charged in the same . . . information, and the court . . . , for good cause shown, continues the . . . 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."

(§ 1050.1, italics added.) Thus, by its own terms, the first sentence of section 1050.1 is operative only if *the prosecutor makes a motion* (in conjunction with the court's continuing the trial of one or more defendants) apparently to find "good cause" pursuant to section 1050.1 "to continue the remaining defendants' cases so as to maintain joinder."

However, no such motion was made by the prosecutor on the record in this case, either orally or in writing[5] (1CT Appeal Transcript Chronological Index, 102-114, 119-124, 1-197; 1st ART 1-18; 2d ART 1-29), and the Court of Appeal found that the prosecutor here did not make a motion under section 1050.1 (Opn., at p. 13). On September 15, 2006, in Department 100, when the engagement of Jackson's counsel in another trial and non-waiver of time were being discussed, the prosecutors (other deputy district attorneys, standing in for the deputy district attorney who represented the People at trial) were silent. (2d ART 1-5; 1RT 1) On September 18, 2006, in Department 100, the prosecutor indicated that the People announced ready (2d ART 6) and

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[5] Furthermore, it appears that there is no such motion in writing in the superior court file in this case that is not in the record on appeal. Appellant is concurrently filing a motion to take judicial notice of the contents of that file, so that this Court can satisfy itself that there is no such written motion in that file. Such a motion was filed and granted in the Court of Appeal in this appeal (see the Statement of the Case, *ante*), and, as stated above, the Court of Appeal, in the Opinion, found that the prosecutor here did not make a motion under section 1050.1 (Opn., at p. 13).

otherwise remained silent. (2d ART 6-8) On September 19, 2006, day 60 of 60, in Department 100, aside from announcing her presence (2d ART 10), the prosecutor was silent. (2d ART 9-13) On September 20, 2006, day 61 of 60, in Department 100, when Jackson's counsel was making a motion to dismiss, the prosecutor (not the deputy district attorney who represented the People at trial) said only, "The People have been ready, Your Honor, every day" and "We're still ready." (2d ART 16; 1RT 1) Otherwise, except for asking for a brief second call at the outset of the proceedings (2d ART 14, 17), the prosecutor was silent. (2d ART 14-17) On September 21, 2006, day 62 of 60, in Department 100, the prosecutor was silent (2d ART 18-22), except for stating, "Just for the record Lindley Heher for the People. The People are ready" and "People are ready." (2d ART 20) On September 22, 2006, day 63 of 60, in Department 100, except for acknowledging that she was representing the People "on this" (2d ART 24), the prosecutor stated only "And, Your Honor, just for the record, the People are ready." (2d ART 26) Otherwise, the prosecutor was silent. (2d ART 23-27) On September 25, 2006, day 66 of 60 and the first day of trial, the prosecutor was silent in Department 100 (2d ART 28-29), and, later that morning, in Department 124, when defense counsel made "a motion for dismissal on lack of a speedy trial" (1RT 7), the prosecutor said only:

> "The People have answered ready since the first day this case was in Department 100. It is my recollection on each and every occasion when defense counsel for Mr. Sutton was asked if he wanted to waive time for the convenience or because his co-counsel was in fact in trial he did. In light of that fact and in light of the fact the People have been ready each and everyday,

the People would oppose the motion." (1RT 7)[6]

Thus, the prosecutor never invoked section 1050.1 in connection with trailing or continuing appellant's case or trial because of Jackson's counsel's unavailability due to his engagement in another trial, nor did the prosecutor ever make a motion in that regard as required by section 1050.1 or make any statement that could conceivably be construed as such a motion, nor did the prosecutor ever make any reference to such a motion.

The document entitled "Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss Pursuant to Penal Code Section 995; Motion Shortening Time in Which to File It's [sic] Opposition" that was filed on September 11, 2006 (1CT 77-81) could not reasonably be construed as such a motion, because that memorandum related solely to Jackson's "Motion to Dismiss Information of Defendant Willie Jackson, Jr." (1CT 82) relating to Jackson's contention that the preliminary hearing was held too late (see 1CT 79), and although that memorandum referred to good cause (1CT 80), it did so solely in connection with continuing the preliminary hearing (1CT 80), and although it quoted part of the text of section 1050.1 (1CT 80), it misidentified the statute as "Penal Code section 1054.1" (1CT 80) and it omitted from the quotation the part of the first sentence of section 1050.1 that pertains to continuing the trial (1CT 81) – it quoted in relevant part as follows: "continues the . . . preliminary hearing, . . . of one or more defendants' cases [sic]" (1CT 81, ellipsis points in original).[7]

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[6] Defense counsel responded, denying that he or appellant waived time. (1RT 7-8)

[7] The deputy district attorney who prepared the above memorandum (1CT 77, 81) did not appear at any of the proceedings in this case on September 12, 15, 18, 19, 20, 21, 22, or 25, 2006. (1st ART A-1; 2d ART 1-3, 6, 9-10, 14, 18, 20, 22, 24, 28; 1RT 1)

The requirement that the prosecuting attorney make a motion is an integral part of the first sentence of section 1050.1. It cannot be read out of that statute as surplusage, because "significance should be given to every word of a statute, if possible, and an interpretation which renders part of the statute surplusage or nugatory should be avoided." (*People v. Hinks* (1997) 58 Cal.App.4th 1157, 1164.)

Furthermore, an important reason for requiring such a motion is that it puts the defendants on notice that the prosecution is relying on section 1050.1, which allows the defendants to respond to that motion, such as by arguing that there was no good cause for continuing the trial of one of the defendants.

Nor is there any basis for holding that the prosecutor in the instant case made implicitly a motion of the kind required by section 1050.1.[8] No statement whatsoever was made by the prosecutor at any of the relevant proceedings about good cause or continuing appellant's case or joinder. (See the above discussion about the prosecutor's not making a motion and what the prosecutor stated at the various proceedings and related citations to the record.)

"It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute. [Citation.]" (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631, superseded by statute on another ground as stated in *Wilson v. Kaiser Foundation Hospitals* (1983) 141 Cal.App.3d 891, 897, fn. 6.)

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[8] There is apparently no reference in any published case in the Cal. and Cal.App. 2d, 3d, and 4th series to a prosecutor's (or the prosecution's or the People's) making an implicit or implied motion.

Courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698; *People v. Fenton* (1993) 20 Cal.App.4th 965, 969.) Where the language of a statute is clear, its plain meaning should be followed. (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 38.) Although there is an exception to that principle in the situation in which to follow a statute's plain or literal meaning would result in absurd consequences which the Legislature did not intend (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 113; *People v. Fenton*, *supra*, 20 Cal.App.4th at p. 969), no absurd consequence would flow from requiring an actual motion by the prosecutor under section 1050.1, in accordance with its provisions, in order to take advantage of the benefits to the prosecution flowing from section 1050.1. The general principles of law relating to speedy trial rights would apply. And the statutory preference for joint trials embodied in section 1098 does not trump a defendant's statutory right to a speedy trial. (*Arroyo*, at p. 465.) Application of the plain meaning of section 1050.1 does not lead to an absurd result.

As for legislative intent, or, where Proposition 115 is concerned, the electorate's intent (see *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1175), the goals of Proposition 115 were, according to its preamble:

> "to restore balance to our criminal law system, to create a system in which justice is swift and fair, ... in which *violent* criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools."

(*Raven v. Deukmejian*, *supra*, 52 Cal.3d at p. 342, italics added.) However, "Proposition 115's general anticrime, provictim purpose has not been

considered a blanket ban on any process or procedure favorable to the defendant." (*Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 92.)

The ballot arguments in favor of Proposition 115, which may be considered (*Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at p. 1175):

> "include statements such as 'Proposition 115 simply remedies gross inequities and will bring more violent criminals to justice.' [Citation.] Many of the arguments, both pro and con, are devoted to Proposition 115's impact upon Californians' right to privacy. The proposed changes in criminal law and procedure are not addressed in detail."

(*Id.* at p. 1176.)

Appellant is not a violent criminal. His prior convictions, as listed in the probation officer's report, were mostly narcotics-related (1CT 58-59), and his current offenses were narcotics-related (1CT 171-172).

There does not appear to be anything in the electorate's intent, to the extent indicated above, that would allow this Court reasonably to find that no motion by the prosecutor is required under section 1050.1 or that such a motion, under the circumstances of this case, was made implicitly or impliedly.

To find an implicit motion or implied motion by the prosecutor in satisfaction of section 1050.1, under the circumstances of this case, would be to dispense altogether with the need for a motion by the prosecutor and would result in the denial to appellant of due process under the Fourteenth Amendment to the United States Constitution.

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(e) The Second and Final Sentence of Section 1050.1 Is Inapplicable Because Appellant Did Not Make a Motion to Sever

The second sentence of section 1050.1 (quoted above) in effect prohibits the court from causing jointly charged cases to be severed under certain circumstances. That obviously is inapplicable, because defense counsel never moved to sever appellant's trial from Jackson's trial. (1st ART 14-18; 2d ART 1-29; 1RT 1-8.)

(f) Conclusion

As shown above, the conditions for section 1050.1's furnishing good cause for continuing appellant's trial were not established, for two reasons: first, because good cause was not shown to continue Jackson's trial; and second, as an independent reason, because the prosecutor never made a motion as required by the first sentence of that section. Therefore, section 1050.1 cannot be used as a basis for denying appellant relief. If anything, section 1050.1 should in this case favor appellant's position. This will be treated further in the discussion below of the Court of Appeal's partial or indirect reliance on section 1050.1.

4. Appellant Was Prejudiced

Appellant was prejudiced by the erroneous denial of his motion to dismiss, because this case had once before been dismissed, pursuant to section 859b,[9] when the People were unable to proceed (1st MJN, Exhibit B, pp. 2-3;

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[9] Section 859b provided in 2006, and continues to provide, in relevant part: "Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the

3d ART 1-2). Therefore, a dismissal under section 1382 would mean that the People could not refile this case again, because under section 1387,[10] two previous dismissals of charges for the same offenses will bar a new felony charge (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1019), and none of the exceptions under section 1387, subdivision (a), paragraphs (1), (2), and (3) apply.[11]

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preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later . . . . [¶] Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment, plea, . . . and the defendant has remained in custody for 10 or more court days, solely on that complaint, unless either of the following occur: [¶] (a) The defendant personally waives his or her right to a preliminary examination. [¶] (b) The prosecution establishes good cause for a continuance beyond the 10-day court period."

[10] Section 1387 provided in 2006, and continues to provide, in relevant part as follows: "(a) An order terminating an action pursuant to this chapter . . . is a bar to any other prosecution for the same offense if it is a felony . . . and the action has been previously terminated pursuant to . . . Section 859b, . . . except in those felony cases . . . where subsequent to the dismissal of the felony the judge or magistrate finds any of the following: [¶] (1) That substantial new evidence has been discovered by the prosecution that which would not have been known through the exercise of due diligence at, or prior to, the time of termination of the action. [¶] (2) That the termination of the action was the result of the direct intimidation of a material witness, as shown by a preponderance of the evidence. [¶] (3) That the termination of the action was the result of the failure to appear by the complaining witness, who had been personally subpoenaed in a prosecution arising under subdivision (e) of Section 243 or Section 262, 273.5, or 273.6."

[11] There is an exception under section 1387.1, which allows a third filing where the offense is a violent felony under section 667.5, but neither of the offenses with which appellant was charged in this case was a violent felony (Health & Saf. Code, §§ 11351.5, 11352, subd. (a); § 667.5, subd. (c)), so that exception does not apply.

This result is compelled by *Johnson*, in which this Court, in holding that the defendant failed to prove prejudice arising from the state's delay in bringing him to trial, stated: "This is not a case in which the statute of limitations would have been a bar to new charges, or *one in which a dismissal itself would have barred refiling.*" (*Johnson* at p. 574, italics added.) However, as shown above, the instant case *is* such a case, in that a second dismissal would have barred refiling.

Therefore, prejudice has been established, and the judgment must be reversed as to appellant.[12]

5. Ineffective Assistant of Counsel

If it is determined that appellant has failed to show prejudice, then defense counsel, by failing to seek pretrial relief, by way of a petition for writ of mandate in the Court of Appeal and, if that were denied, a petition for review in this Court, for which failure there could be no justifiable tactical reason (*People v. Pope* (1979) 23 Cal.3d 412, 426), rendered ineffective assistance of counsel (see, e.g. *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Lucas* (1995) 12 Cal.4th 415, 436), because had defense counsel sought that pretrial relief, prejudice would not have had to be shown and this case would have been dismissed (*Johnson*, at p. 574; *People v. Wilson*, *supra*, 60 Cal.2d at p. 151), and there could not have been a second refiling, for the reasons set forth above, and appellant was therefore prejudiced. This Court stated in *Johnson* that the decision in *Wilson* "represents a policy judgment that defendants

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[12] The Court of Appeal found, in the Superseded Opinion, on the basis of *Johnson*, that appellant had established that he had been prejudiced by the violation of his right to a speedy trial. (Superseded Opn., at pp. 11-12.)

should seek review of speedy trial claims before trial." (*Johnson*, at pp. 574-575.)

6. The Opinion; Why the Court of Appeal Went Astray

(a) On the Statutory Preference for Joint Trials

The Court of Appeal based its decision in this matter on what it termed "the clear statutory preference for joint trials" (Opn., at p. 8), based on section 1098, and also citing in support article I, section 30, subdivision (a) of the California Constitution and section 1050.1. However, the above constitutional provision only concerns the avoidance of *prohibition* of joinder (Cal. Const., art. I, § 30, subd. (a) ["This Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature or by the people through the initiative process"].) As for section 1050.1, as shown above, section 1050.1 does not operate under the circumstances in this case to establish good cause for the continuing or trailing of Jackson's trial or appellant's trial. (Section 1050.1 will be discussed further, below.)

Also, the preference in section 1098 for joint trials is not as "clear" or strong as the Court of Appeal would have it. Section 1098 contemplates that the trial court may order separate trials.[13]

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[13] Section 1098 provided in 2006, and continues to provide: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial."

Beyond this, there is obviously a tension between the above statutory preference for joint trials and the statutory (interpreting the constitutional) right to a speedy trial. (See *Sanchez*, at p. 891.)

The Court of Appeal's approach in the Opinion was to posit that the preference for a joint trial of jointly charged defendants "can also constitute good cause to delay a trial beyond the statutory deadline" and then (as to the delay of Jackson's trial) to endeavor to distinguish, on the facts, the cases that have held to the contrary, including *Johnson*, *Sanchez*, and *Arroyo*, and, in effect, to disavow its own opinion in *Escarcega*. (Opn., at pp. 8-11.) But, as shown above, those cases are not reasonably distinguishable. The Court of Appeal found that the precipitating cause for delaying Jackson's trial, "namely, his counsel's present, and brief, engagement in trial on another matter," was justifiable. (Opn., at p. 12.) However, on September 12, 2006, when this matter was called for jury trial and the parties announced ready, Jackson's counsel was not engaged in another trial. (1st ART A-1, A-14-A-15, A-17.) Also, as shown above, there was not good cause to continue Jackson's trial.

(b) On Authorities and Another Consideration Relied on by the Court of Appeal to Find Good Cause to Delay Appellant's Trial

Having found, on the basis of the above authorities, that there was good cause to continue Jackson's trial (Opn., at p. 11), the Court of Appeal considered whether there was also good cause to continue appellant's trial. In that regard, the Court of Appeal relied principally on four cases, section 1050.1, and the burden on the court system (Opn., at pp. 11-14), which will be discussed or further discussed below.

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(i) The Cases: *Teale, Ferenz, Greenberger, Hollis*

The Court of Appeal quoted *People v. Teale* (1965) 63 Cal.2d 178, 186, revd. on other grounds in *Chapman v. California* (1967) 386 U.S. 18, 26 [87 S.Ct. 824, 17 L.Ed.2d 705], as stating that where "a continuance is granted upon good cause to a codefendant the rights of the other defendants are generally not deemed to have been prejudiced." (Opn., at pp. 11-12) However, *Teale* is clearly distinguishable, because in that case, the claim was denial of the *constitutional* right to a speedy trial, this Court stated that Mrs. Chapman, the defendant who made that claim, voluntarily waived the 60-day limit, a further postponement was presumably in her interest, and a still further postponement was to give new counsel for her codefendant an opportunity to prepare. (*People v. Teale*, *supra*, 63 Cal.2d at p. 186.)

The Court of Appeal also cited *Ferenz v. Superior Court* (1942) 53 Cal.App.2d 639 (Opn., at p. 12)), but that case is distinguishable as well. In *Ferenz*, two of the nine jointly indicted defendants were unavailable for trial because they were in the custody of federal officers and were being tried in a federal district court. (*Ferenz v. Superior Court*, *supra*, 53 Cal.App.2d at pp. 642-643.) Also, *Ferenz* involved 50 witnesses, the attendance of some of whom could not be procured before a certain date, and some of whom resided in Washington, D.C. (*Id.* at pp. 641, 643.) The reviewing court found that the facts showed good cause for the trial of the seven petitioners beyond the 60-day period prescribed by section 1382, on the ground that it would be desirable and in the interests of justice for the nine defendants to be jointly tried because they were all involved in the same violation of the statute intended to prevent subversive conduct tending to overthrow the government of the United States by force and violence and to impede organized efforts of government agencies in conducting World War II, in which the United States was then engaged. (*Id.* at pp. 641-643.) *Ferenz* was distinguished in *Arroyo* (*Arroyo* at pp. 465-466).

The Court of Appeal cited *Greenberger v. Superior Court*, *supra*, 219 Cal.App.3d 487 in support of its conclusion that the preference for joint trials can constitute good cause to delay a trial beyond the statutory time (Opn. at p. 12), but *Greenberger* must be seen in its context, which was a defendant who waived time (the 60-day period) (*Greenberger v. Superior Court*, *supra*, 219 Cal.App.3d at p. 492) and whose codefendants moved to continue the trial in order to adequately prepare for trial (*ibid.*), that is, in their clients' interests. (The preliminary hearing transcript was 4,565 pages long and there were 15,000 pages of discovery. (*Id.* at p. 505.)) In the part of *Greenberger* quoted from and cited by the Court of Appeal (Opn., at p. 12), the reviewing court was considering whether, having found that there was good cause to delay the trial, a delay of six months was still with good cause (*Greenberger v. Superior Court*, *supra*, 219 Cal.App.3d at p. 501), that is, how long could the delay be and still be with good cause. The reviewing court referred to good cause as being "codefendant's need to adequately prepare for trial" (*id.* at p. 499) and stated that "good cause is not shown by . . . overburdened appointed counsel." (*Id.* at p. 495, citing *Johnson*, *Sanchez*, and *Escarcega*.) *Greenberger* is thus distinguishable, and it was distinguished in *Arroyo* (*Arroyo*, at p. 465).

Hollis v. Superior Court (1985) 165 Cal.App.3d 642, cited on page 12 of the Opinion, is also distinguishable, because the reasons for the continuance were that the codefendant's counsel's investigation had not been completed, there were numerous legal issues to be investigated, and additional witnesses had to be contacted, to complete preparations for a murder defense (*id.* at pp. 644, 646). *Hollis* was distinguished in *Arroyo* (*Arroyo*, at p. 465).

(ii) Section 1050.1

Since *Johnson*, *Sanchez*, *Escarcega*, and *Arroyo* support appellant's position, the Court of Appeal apparently relied to a great extent on section

1050.1, even though it found that the prosecutor did not make a motion under section 1050.1 (Opn., at p. 13). However, section 1050.1 provides good cause, by its very terms, only if the prosecutor makes a motion under section 1050.1. If, as here, the prosecutor does not make such a motion, then section 1050.1 should operate in favor of the defendant, not in favor of the prosecution, or at worst (from the defendant's standpoint), section 1050.1 should have no effect. Section 1050.1 obviously gave the prosecution a means to prevail over contrary existing decisional law. If, as here, the prosecution, for whatever reason, does not avail itself of section 1050.1, then existing decisional law, under which the preference for joint trials does not trump the defendant's speedy trial right (except, perhaps, under extraordinary circumstances, absent here), should prevail. In *Arroyo*, after finding that section 1050.1 was erroneously relied on under the circumstances (*Arroyo*, at p. 464), the reviewing court held in favor of the defendant's contention that his speedy trial rights were violated (*Arroyo*, at pp. 463, 467).

(iii) Burden on the Court System

The Court of Appeal expressed concern over the burden on the court system in conducting two trials. (Opn., at p. 14.) But that is an inescapable feature of any instance of upholding a defendant's right to a speedy trial against a statutory preference for joinder. If that burden on the court system were to prevail as a consideration, the defendant's statutory speedy trial right would be a nullity. Also, this case was a relatively straightforward and simple one involving 10 witnesses (1RT Master Index), including only police officers, a sheriff's department property custodian, a criminalist, appellant, and Jackson (see, e.g., 1RT 32, 105, 128, 135, 156, 169-170, 187-188, 190-191, 215, 234), with one counsel estimating three days to try the case (1st ART A-16). This is very unlike, for example, the situation in *Ferenz*, where, as indicated above,

the trial was to require the presence of some 50 witnesses, including several who resided in Washington, D.C. (*Ferenz v. Superior Court*, *supra*, 53 Cal.App.2d at p. 641.)

7. Conclusion

For the foregoing reasons, there was not good cause to continue or trail appellant's trial beyond the 60-day statutory limit, the trial court therefore erred in denying appellant's motion for dismissal on lack of a speedy trial, and appellant was prejudiced, and thus the Court of Appeal's decision in the Opinion on the speedy trial issue, and the judgment, must be reversed and this case must be dismissed as to appellant.

II.

JOINDER

To the extent permitted, appellant joins in the arguments in Jackson's appellant's opening brief on the merits in this matter that may be applicable and beneficial to appellant.

CONCLUSION

For the foregoing reasons, the Court of Appeal's decision in the Opinion on the speedy trial issue, and the judgment in this case, should be reversed as to appellant.

DATED: January 20, 2009

Respectfully submitted,

William L. Heyman

WILLIAM L. HEYMAN
Attorney at Law

CERTIFICATE OF NUMBER OF WORDS

Pursuant to California Rules of Court, rule 8.520(c)(1) and (3), I hereby certify, in reliance on the word count of the computer program used to prepare this appellant's opening brief on the merits, that the number of words in this appellant's opening brief on the merits (including the footnotes, but excluding the tables, the quotation of issues, and this certificate) is 11,202.

DATED: January 20, 2009 Respectfully submitted,

William L. Heyman

WILLIAM L. HEYMAN
Attorney for Appellant
Michael Jerome Sutton

PROOF OF SERVICE

Re: *People v. Michael Jerome Sutton et al.* (S166402)

I am over the age of 18, I am an active member of the State Bar of California and am not a party to the within action; my business address is 3152 Big Sky Drive, Thousand Oaks, California 91360.

On January 20, 2009, I served the within APPELLANT'S OPENING BRIEF ON THE MERITS ON BEHALF OF APPELLANT MICHAEL JEROME SUTTON in said action, by placing a true copy thereof in each of 10 envelopes, addressed as follows, and then sealing said envelopes and depositing the same, with the postage thereon fully prepaid, in the United States mail at Thousand Oaks, California:

Clerk, Court of Appeal
Second Appellate District
Division Three
Second Floor, North Tower
300 South Spring Street
Los Angeles, California 90013

Edmund G. Brown Jr., Attorney General
David E. Madeo, Deputy
300 South Spring Street
Los Angeles, California 90013

Steve Cooley, District Attorney
Lindley Heher, Deputy
18-000 Criminal Justice Center
210 West Temple Street
Los Angeles, California 90012

Clerk, Superior Court
Criminal Division, for delivery to
Honorable Judith L. Champagne, Judge
111 North Hill Street, Room 105E
Los Angeles, California 90012

Mr. Michael J. Sutton P-42201 Lassen-B-106 Correctional Training Facility P.O. Box 705 Soledad, California 93960	
Thomas J. White, Sr., Esq. Law Offices of Thomas J. White, Sr. 2275 Cooley Place Pasadena, California 91104	(Trial Counsel for Appellant)
J. Courtney Shevelson Attorney at Law 316 Mid Valley Center, PMB 187 Carmel, California 93923	(Counsel for Coappellant, Willie J. Jackson, on Review)
Jennifer L. Peabody, Esq. Marilee Marshall & Associates, Inc. 523 West Sixth Street, Suite 1109 Los Angeles, California 90014	(Counsel for Coappellant, Willie J. Jackson, in the Court of Appeal)
Michael P. Judge, Public Defender John Hamilton Scott, Deputy Appellate Branch 320 West Temple Street, Room 590 Los Angeles, California 90012	(Amicus Curiae in Support of Appellant and Coappellant in the Court of Appeal)
California Appellate Project 520 S. Grand Avenue, 4th Floor Los Angeles, California 90071	

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

Executed this 20th day of January, 2009, at Thousand Oaks, California.

William L. Heyman

WILLIAM L. HEYMAN
Attorney at Law