S166402

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JEROME SUTTON et al.,

Defendant and Appellant.

S_____

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

PETITION FOR REVIEW 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

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES, OF
THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant Michael Jerome Sutton ("appellant") respectfully petitions this Honorable Court for review in the above matter after decision by the Court of Appeal of the State of California, Second Appellate District, Division Three, on July 30, 2008, in case No. B195337, affirming in part and reversing and remanding in part the judgment in an opinion, certified for partial publication, a copy of which is attached hereto as an appendix.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. When does a trial court err in denying a criminal defendant's motion to dismiss the action on the ground of violation of the defendant's statutory right to a speedy trial, to the defendant's prejudice, and when does defense counsel render ineffective assistance of counsel in connection with this issue?

2. When does a trial court's refusal to allow defense counsel to question an officer on cross-examination about a certain matter deprive the defendant of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution to confront and cross-examine his accuser, to a fair trial, to due process, and to present a defense?

3. When does an upper-term sentence violate a defendant's Sixth and Fourteenth Amendment rights to a jury trial and due process under *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham v. California* (2007) 549 U.S. __, 127 S.CT. 856?

STATEMENT OF THE PROCEEDINGS

A jury convicted appellant of sale of a controlled substance, cocaine base, in violation of Health and Safety Code section 11352, subdivision (a), as charged in count 1, and possession for sale of a controlled substance, cocaine base, in violation of Health and Safety Code section 11351.5, as charged in count 2. (1CT 171-172, 175-176) Appellant waived his right to jury trial on the prior conviction allegations and, according to the minute order, admitted those allegations. (1CT 175, 184) The trial court ordered probation denied and sentenced appellant to state prison for nine years. (1CT 189-191)

Appellant appealed from the judgment. (1CT 194-196) Appellant's opening brief of appellant's codefendant and coappellant, Willie J. Jackson ("Jackson"), was filed July 12, 2007. Appellant's opening brief of appellant ("AOB"), raising four issues and joining in the arguments in Jackson's appellant's opening brief that may be applicable and beneficial to appellant, was filed July 20, 2007, as was appellant's motion to take judicial notice. That motion was granted August 16, 2007. Respondent's brief was filed September 19, 2007. Jackson's appellant's reply brief was filed September 28, 2007. Appellant's reply brief of appellant ("ARB"), including a joinder similar to that in AOB, was filed October 30, 2007. Oral argument was presented December 14, 2007.

On March 26, 2008, the Court of Appeal filed an opinion, certified for partial publication, in which, among other things, the Court of Appeal reversed the judgment as to appellant. On April 1, 2008, the Court of Appeal, on its own motion, granted rehearing and ordered the parties to submit supplemental

briefing addressing Penal Code section 1050.1.[1] On April 16, 2008, application to file brief as amicus curiae of Los Angeles County Public Defender ("LACPD") was granted and LACPD's brief of amicus curiae in support of appellant and Jackson was filed. On April 21, 2008, Jackson's supplemental brief was filed. On April 22, 2008, respondent's supplemental brief, appellant's supplemental brief on behalf of appellant ("ASB") (including a joinder similar to that in AOB as to Jackson's supplemental brief and the above brief of amicus curiae), and motion to take judicial notice on behalf of appellant were filed.

On July 30, 2008, the Court of Appeal filed an opinion ("Opn." or the "Opinion"), certified for partial publication, granting appellant's motion to take judicial notice and, as to appellant, reversing and remanding the judgment as to the sentence enhancements imposed, and as to both appellant and Jackson, otherwise affirming the judgment. On August 14, 2008, Jackson's petition for rehearing and LACPD's brief of amicus curiae in support of "appellants' petition for rehearing" were filed. On August 15, 2008, petition for rehearing on behalf of appellant ("PFR") (including a joinder similar to that in AOB as to Jackson's petition for rehearing and any supportive petition for rehearing of amicus curiae) was filed. On August 25, 2008, Jackson's petition for rehearing was denied. On August 28, 2008, appellant's errata and joinder relating to PFR and appellant's errata relating to PFR ("errata") were filed (with permission) and PFR was denied.

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

STATEMENT OF FACTS

Because of length constraints, appellant adopts the Court of Appeal's statement of facts under the heading "Factual background" (Opn., at p. 3), except:

In the second line of the third paragraph on page 3 of the Opinion, appellant changes "rock cocaine" to "that of cocaine". (1RT 144; PFR 2.) In the same paragraph, after "grams" in the seventh line and also after "grams" in the eighth line, appellant inserts "of a substance containing an undetermined amount of cocaine in the form". (1RT 199-200, 203; PFR 2.)

Following the third paragraph on page 3 of the Opinion, appellant inserts: "Sutton and defendant Jackson testified on their own behalf. Sutton denied involvement in the incident and denied that a bindle of crack cocaine was found on him, that a bottle was found on him, and that a 20-dollar bill was found on him. Defendant Jackson also denied involvement in the incident." (1RT 216-233, 235-250; PFR 3; AOB 22-28.)

ARGUMENT

I.

THIS COURT SHOULD GRANT REVIEW TO SETTLE THE IMPORTANT QUESTIONS OF LAW WHEN DOES A TRIAL COURT ERR IN DENYING A CRIMINAL DEFENDANT'S MOTION TO DISMISS THE ACTION ON THE GROUND OF VIOLATION OF THE DEFENDANT'S STATUTORY RIGHT TO A SPEEDY TRIAL, TO THE DEFENDANT'S PREJUDICE, AND WHEN DOES DEFENSE COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN CONNECTION WITH THIS ISSUE

In part I of the argument in AOB, appellant argued that the trial court erred in denying appellant's motion to dismiss this action on the ground of violation of appellant's right to a speedy trial, and appellant was prejudiced thereby, and defense counsel rendered ineffective assistance of counsel in connection with this issue. (AOB 29-45)

Appellant set forth the background at length with citations to the record (AOB 29-35), including (in part and in effect) that this case was filed under another number (BA303639) and dismissed and refiled; that appellant, who was at all times in custody, did not waive time; that the trial in this case was trailed beyond the 60th day after appellant's arraignment because the trial court found good cause in that Jackson's trial counsel was engaged in trial in another matter; that trial in this case did not begin until the sixth day after the 60th day; and that defense counsel then made a motion for a dismissal because of violation of appellant's right to a speedy trial, which was denied (citing, in part, motion to take judicial notice filed July 20, 2007, Exhibits A, B, C; 1CT 1-A, 4, 30-32, 37-38, 69-70, 72, 75, 102, 104, 106, 108, 110, 112, 114, 122, 124; 1st Augmented RT A-1-A-18; 2d Augmented RT 6-22, 26, 28-29; 1RT

7-8). Because of length constraints, see, for additional facts, part IA of the Discussion on pages 4 through 7 of the Opinion.

Appellant contended in part:

"What constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court." (Citing *People v. Johnson* (1980) 26 Cal.3d 557 ("*Johnson*"), 570.) The determination of the trial court will not be disturbed on appeal, absent a showing of an abuse of that discretion (citing *Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884 ("*Sanchez*"), 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 (citing *People v. Wilson* (1963) 60 Cal.2d 139 ("*Wilson*"), 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 (citing *Johnson* at p. 574.) (AOB 36-37)

In *Johnson*, the defendant was represented by the public defender, at whose request the case was repeated[ly] 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 (citing *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."

(Citing *Johnson* at p. 562.) This Court stated in part that a defendant who is incarcerated pending trial "suffers particular harm when he is denied his right to trial within the statutory period. [Footnote.]" (Citing *Johnson* at p. 569.)

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 . . ." (Citing *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."

(Citing *Johnson* at p. 580.) (AOB 37-38)

In *Sanchez*, the reviewing court stated in part:

> "The rule stated in *Johnson* is equally applicable to the present underlying prosecution where delay beyond the statutory period is caused by the unavailability of appointed counsel for a codefendant rather than petitioner's own appointed counsel. 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. 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."

(Citing *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 (citing *Sanchez* at p. 887). (AOB 38-39)

The reviewing 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. This result is compelled upon two grounds. First, under the rationale stated by the Supreme Court 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.' (*People v. Johnson*, *supra*, 26 Cal.3d at p. 580 . . . .) To allow the state to avoid this clear pronouncement by claiming a conflicting, nonabsolute right to a joint trial, in what appears to be a standard burglary prosecution, would render defendant's right meaningless. Second, while the preference for joint trial stated in section 1098 of the Penal Code serves judicial economy and the convenience of the court and counsel, such a consideration cannot subordinate the defendant's state constitutional right to a speedy trial without a showing of exceptional circumstances. As in *Ferenz v. Superior Court*, *supra*, 53 Cal.App.2d 639, the 60-day period specified in section 1382, subdivision 2 of the Penal Code has been described by the California Supreme Court as '"supplementary to and a construction of" the [state] Constitution.' (*People v. Wilson*, *supra*, 60 Cal.2d at p. 145 . . . .)"

(Citing *Sanchez* at p. 893; and see *Arroyo v. Superior Court* (2004) 119 Cal.App.4th 460 ("*Arroyo*"), 465; *People v. Escarcega* (1986) 186 Cal.App.3d 379 ("*Escarcega*"), 386, fn. 4.) (AOB 39-40)

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 was the

defendant's appointed private 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 appointed 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 (citing *Escarcega* at pp. 383-384, 386-387). (AOB 40)

In the case at bar, appellant was arraigned on July 21, 2006 (citing 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, 2007 (citing 1CT 112, 114, 122-124), appellant never waived time (citing [1CT 69-70, 72, 75-76, 102, 104, 106, 108, 110, 112, 114, 122; 1st Augmented RT A-1-A-18; 2d Augmented RT 1-29]), appellant was in custody throughout the above period of July 21 through September 25, 2006 (citing [1CT 70, 72, 75, 102, 104, 106, 108, 110, 112, 114, 122, 124]), and the reason given by the court for the above trailing of the trial was that good cause was found because Jackson's counsel was engaged in trial (citing 1CT 112, 114; 2d Augmented RT 18, 21-23, 25-26). Based on the foregoing authorities, that was not good cause to postpone the commencement of 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 the] trial due to Jackson's counsel being engaged in another matter (citing 1RT 8). (AOB 40-41)

The first sentence of section 1050.1 is inapplicable because 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 or to trail appellant's trial. The fact that appointed counsel of an incarcerated defendant[2] is engaged in another trial is not good cause to continue that same defendant's trial (citing *Johnson* at pp. 562, 569-571; *Escarcega* at pp. 383-384, 386-387; and see *Sanchez* at pp. 890, 893). (ASB 6)

The first sentence of section 1050.1 is inapplicable because the prosecuting attorney never made a motion with respect to the trial in the instant case as required by that sentence, on the record, either orally or in writing (citing in part 1CT Appeal Transcript Chronological Index, 102-114, 119-124, 1-197; 1st Augmented RT 1-18; 2d Augmented RT 1-29). (ASB 7-13) Furthermore, it appears that there is no such motion in writing in the superior court file in the instant case that is not in the record on appeal. (ASB 7, fn. 5)

The second and final sentence of section 1050.1 is inapplicable because appellant did not make a motion to sever (citing 1st Augmented RT 14-18; 2d Augmented RT 1-29; 1RT 1-8). (ASB 13)

Appellant was prejudiced by the erroneous denial of his motion to dismiss, because this case had once before been dismissed, obviously pursuant to section 859b, when the People were unable to proceed and had been refiled, and, therefore, a dismissal under section 1382 would mean that the People could not refile this case again, because of section 1387, in that none of the exceptions under section 1387, subdivision (a), paragraphs (1), (2), and (3) apply – there is no indication that the prosecution discovered any substantial new evidence, and the termination of the action would not have been the result of the direct intimidation of a material witness or the result of the failure to appear of the complaining witness in a prosecution arising under

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[2] Appellant noted that Jackson remained in custody throughout the proceedings in the superior court in this case (citing, in part, 1CT 1-A, 4, 68, 71, 73, 103, 105, 107, 109, 111, 113, 119, 121). (ASB 6, fn. 4.)

section 243, subdivision (e) or section 262, 273.5, or 273.6. (AOB 43)

In *Johnson*, in holding that the defendant failed to prove prejudice arising from the state's delay in bringing him to trial, this Court 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." (Citing *Johnson* at p. 574.) However, as shown above, the instant case *is* such a case, in that a dismissal itself would have barred refiling. (AOB 43-44)

For the foregoing reasons, the judgment must be reversed and this case must be dismissed. (AOB 44)

If it is determined that appellant has failed to show prejudice or that this issue is not preserved for appeal or is meritless for any reason or reasons involving one or more acts and/or omissions of defense counsel, then defense counsel, by such failing, for which there could be no justifiable tactical reason (citing *People v. Pope* (1979) 23 Cal.3d 412, 426), rendered ineffective assistance of counsel, in that defense counsel failed to perform with reasonable competence and there is a reasonable probability that a determination more favorable to appellant would have resulted in the absence of defense counsel's failing ("reasonable probability" being a probability sufficient to undermine confidence in the outcome), and that failing resulted in an unfair and unreliable proceeding, and appellant was thereby deprived of the assistance of counsel in contravention of his rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by article I, section 15 of the California Constitution (citing, in part, *Lockhart v. Fretwell* (1993) 506 U.S. 364, 368-369, 372 [113 S.Ct. 838, 122 L.Ed.2d 180]; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 894 [104 S.Ct. 2052, 89 L.Ed.2d 674]; *People v. Lucas* (1995) 12 Cal.4th 415, 436). Appellant has been prejudiced by defense counsel's above failing because had defense counsel

expressly objected to the postponements on speedy trial grounds and made to the trial court the related contentions set forth above in this part I, it is reasonably probable that the trial court would have granted the motion to dismiss, and there could not have been a second refiling. (AOB 44-45)

Without limiting the generality of the foregoing, if it is determined that prejudice has not been shown, then defense counsel, by not seeking further 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, rendered ineffective assistance of counsel on the basis of the above authorities, because had defense counsel sought that pretrial relief, prejudice would not have had to be shown and this case would have been dismissed (citing *Johnson* at p. 574; *Wilson* at p. 151), and there could not have been a second refiling. (AOB 45)

The Court of Appeal held that there was good cause to continue Jackson's trial and that the joint trial mandate constituted good cause to delay appellant's trial as well. (Opn., at pp. 7-14.)

Appellant contends that the Court of Appeal erred in its above holdings for these reasons:

(a) Appellant repeats his argument and contentions made to the Court of Appeal as set forth above in this part I, including, without limitation, the citations.

(b) Concerning the statement to the effect that the preference for a joint trial of jointly charged defendants in section 1098 can also constitute good cause to delay a trial beyond the statutory deadline (Opn., at p. 8), section 1098 was enacted in 1872, yet it was not mentioned by this Court in the case, and on the page, cited in that paragraph on page 8, *Johnson* at p. 570, as constituting (or setting forth principles that constitute) good cause to delay a trial beyond the statutory deadline. (PFR 3)

(c) Appellant relies not only on *Johnson*, as indicated on page 8 of the Opinion, but also on *Sanchez* at pp. 890, 893 (AOB 38-41), *Arroyo* at p. 465 (AOB 40), and *Escarcega* at pp. 383-384, 386 and fn. 4, 3 87 (AOB 40). (PFR 3)

(d) Concerning "all later trial dates" (Opn., at p. 10), it appears that there was only one later trial date on which trial counsel requested a continuance, May 6, 1977, on which trial counsel sought a continuance apparently because he had been ordered by a court to begin trial in other cases. (*Johnson* at pp. 563-564 and fn. 3.) (PFR 3)

(e) The distinguishing of *Johnson* (Opn., at p. 10) 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.) 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.) It appears that this matter was in effect delayed so Jackson's trial counsel could try another case ahead of it. Thus, *Johnson* is not reasonably distinguishable. (PFR 4; errata.)

(f) Concerning the statement that Johnson's trial counsel in *Johnson* was engaging in case management, to Johnson's detriment (Opn., at p. 10), it appears that in the instant case, Jackson's trial counsel was also engaging in case management, on September 12, 2006 (1st Augmented RT A-14-A-15) and afterward, which eventuated in being to appellant's detriment. (PFR 4-5; errata.)

(g) Concerning the distinguishing of *Sanchez* (Opn. at p. 10, fn. 11), the only distinction in *Sanchez* is apparently that trial counsel, who was engaged in another trial on December 28, 1981, was also assigned to two other trials. It is not indicated whether either of those two other trials was

responsible for any delay beyond that occasioned by the trial in which trial counsel was engaged on December 28, 1981. (*Sanchez* at pp. 887-888.) Thus, *Sanchez* is not reasonably distinguishable. (PFR 5)

(h) The Court of Appeal (Opn., at p. 11, fn. 12) disregarded its own statements in *Escarcega* at p. 386. *Escarcega* is not reasonably distinguishable. In the same footnote, the Court of Appeal omitted the statement in *Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487 ("*Greenberger*") that "good cause is not shown by . . . overburdened appointed counsel." (*Greenberger* at p. 495, citing *Johnson*, *Sanchez*, and *Escarcega*.) Moreover, the statement found overly broad in that footnote was quoted with approval in *Arroyo* at p. 465. (PFR 5-6)

(i) As to dismissing *Arroyo* (Opn., at p. 11), 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. (PFR 6)

(j) *People v. Teale* (1965) 63 Cal.2d 178, 186 (Opn., at p. 12) is distinguishable, because the defendant claimed a denial of her constitutional, as opposed to statutory right, to a speedy trial, she voluntarily waived the 60-day limit, and further postponements were in her interests. (*Ibid.*) Also, the cases relied on on that page 186 are distinguishable, *People v. McFarland* [(1962)] 209 Cal.App.2d 772, and *Ferenz v. Superior Court* [(1942)] 53 Cal.App.2d 639 ("*Ferenz*") (see, e.g., *Greenberger* at p. 495; *Arroyo* at pp. 465-466). (ARB 3-5; PFR 6)

(k) *Greenberger* (Opn. at p. 12) must be seen in its context, which was a defendant who waived time (the 60-day period) (*Greenberger* at p. 492) and whose codefendants moved to continue the trial in order to adequately prepare for trial (*Greenberger* at p. 492), that is, in their clients'

interests. The court was considering how long the delay could be and still be with good cause (*Greenberger* at p. 501). (PFR 6-7)

(l) *Hollis v. Superior Court* (1985) 165 Cal.App.3d 642 ("*Hollis*") (Opn., at p. 12) is distinguishable because codefendant's counsel had not completed investigating the case, there were numerous legal issues to be investigated, and additional witnesses had to be contacted (*Hollis* at pp. 644, 646). (PFR 7)

(m) In *Greenberger* (Opn., at p. 12), the reviewing court referred to good cause as being "codefendant's need to adequately prepare for trial" (*Greenberger* at p. 499) and stated that "good cause is not shown by . . . overburdened appointed counsel." (*Greenberger* at p. 495, citing *Johnson*, *Sanchez*, and *Escarcega*.) (PFR 8)

(n) Concerning "present" engagement in trial on another matter (Opn., at p. 12), on September 12, 2006, when this matter was called for jury trial (1CT 102), Jackson's trial counsel was not engaged in another trial. (1st Augmented RT A-14.) He was presently engaged on September 19, 2006, the 60th day. (2d Augmented RT 10) (PFR 8)

(o) In *Arroyo*, the reviewing court distinguished the cases cited on page 12 of the Opinion with approval, *Greenberger* and *Hollis* (*Arroyo* at p. 465) (PFR 8)

(p) Since *Johnson*, *Sanchez*, *Escarcega*, and *Arroyo* support appellant's position, the Court of Appeal has apparently relied to a great extent on section 1050.1, even though the Court of Appeal found that the prosecutor did not make a motion under section 1050.1 (Opn., at p. 13). 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, 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). (PFR 8-9)

(q) Concerning the burden on the court system in conducting two trials (Opn., at p. 14), 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 speedy trial right would never prevail. Also, in this case, the only witnesses for the prosecution were police officers, a sheriff's department property custodian, and a criminalist and the only witnesses for the defense were appellant and Jackson. (See, e.g., 1RT 32, 105, 128, 135, 156, 169-170, 187-188, 190-191, 215, 234.) This is very unlike, for example, the situation in *Ferenz*, where the trial was to require the presence of some 50 witnesses, including several who resided in Washington, D.C. (*Ferenz* at p. 641.) (PFR 9-10)

(r) Concerning Justice Richardson's statement in *Johnson* (Opn., at p. 14), aside from its being in a dissenting opinion in which only two of the seven justices joined (*Johnson* at pp. 580, 586; see *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383), Justice Richardson appeared to limit his statement to situations in which there is an absence of prejudice to a defendant (*Johnson* at p. 586), and the lead opinion stated that "the present case shows no prejudice arising to the defendant from the delay. This is not a case . . . in which a dismissal would itself have barred refiling." (*Johnson* at p. 574.)

That is not true of the case at bar; here, there was prejudice to appellant, in that a dismissal would have barred refiling, because this case had already been dismissed once, and none of the exceptions applied. (See pp. 6, 11-12, *ante*; and see motion to take judicial notice filed July 20, 2007, Exhibits A, pp. 1-2, B, pp. 1-3, C, pp. 1-3; §§ 859b,1382, subd. (a)(2), 1387, subd. (a)(1), (2), (3).) (PFR 10)

Thus, a grant of review is necessary.

II.

THIS COURT SHOULD GRANT REVIEW TO SETTLE THE IMPORTANT QUESTION OF LAW WHEN DOES A TRIAL COURT'S REFUSAL TO ALLOW DEFENSE COUNSEL TO QUESTION AN OFFICER ON CROSS-EXAMINATION ABOUT A CERTAIN MATTER DEPRIVE THE DEFENDANT OF HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER, TO A FAIR TRIAL, TO DUE PROCESS, AND TO PRESENT A DEFENSE

In part II of the argument in AOB, appellant argued that the trial court's refusal to allow defense counsel to question Officer Diaz on cross-examination about a certain matter deprived appellant of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution to confront and cross-examine his accuser, to a fair trial, to due process, and to present a defense. (AOB 46-53)

Appellant pointed out in part:

Defense counsel asked Diaz on cross-examination if on December 15th, 2005, about 10:30 at night at 7th and Main, he was involved in the arrest of Davon Spencer (citing 1RT 72, 124). The prosecutor objected

on the ground of relevance (citing 1RT 124-125). (AOB 46)

At a colloquy outside the jury's presence, defense counsel indicated in part that he was using it for impeachment purposes; that there was another case with a similar situation where Diaz was a point officer and was at the southeast corner of 7th and Main, where he observed the transaction, and in the report he said he saw something, but defense counsel had a DVD that showed that if you were standing on either corner, you could not see the transaction, because there was a bus in the way and therefore Diaz could not have seen what he said in that report that he did see; that the DVD had a better vantage point than the witness, because "you" (the camera that took the pictures that were transferred to the DVD, apparently) were up higher, on a telephone pole; and that under due process and the federal Constitution, appellant should be able to use it (citing 1RT 125-127). (AOB 46-48)

The trial court refused to allow that line of inquiry, under Evidence Code section 352 ("352"), on the grounds that it would consume a lot of time and it did not know that it was at all probative (citing 1RT 126-127). (AOB 47)

The following day, the trial court revisited the matter and stated that it did not find Diaz to be a primary witness, "rather he testified briefly in corroboration regarding Officer Jackson's testimony"; and that it felt that its tentative ruling under 352 was correct, not to confuse or take unnecessary time for a collateral matter (citing 1RT 187, 213). (AOB 48)

Appellant contended in part:

The right to confront and cross-examine witnesses is essential to due process and is among the minimum essentials of a fair trial (citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [93 S.Ct. 1038, 35 L.Ed.2d 297]; *Davis v. Alaska* (1974) 415 U.S. 308, 315 [94 S.Ct. 1105, 39 L.Ed.2d 3437]). The federal Constitution guarantees criminal defendants a meaningful

opportunity to present a complete defense (citing *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636]). (AOB 48-49)

Although the trial court is vested with discretion in rejecting evidence pursuant to 352 (citing *People v. Wein* (1977) 69 Cal.App.3d 79, 90), 352 must bow to a defendant's due process right to a fair trial and to his right to present all relevant evidence of significant probative value to his defense (citing *People v. Reeder* (1978) 82 Cal.App.3d 543, 553). (AOB 49)

The proffered impeachment evidence was admissible to show moral turpitude (citing Cal. Const., art. I, § 28, subd. (d); *People v. Mayfield* (1997) 14 Cal.4th 668, 748; *People v. Wheeler* (1992) 4 Cal.4th 284, 295, superseded on another point by statute as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459-1460; *People v. Lang* (1989) 49 Cal.3d 991, 1017; *In re Lance D.* (1985) 37 Cal.3d 873, 879, 889). That evidence would have shown, according to defense counsel, that Diaz, in a case involving a recent, similar incident in the same general locality, operating in the same capacity as point man, had testified falsely about being able to see the defendant doing an alleged transaction. (1RT 125-126) This would have a strong bearing on Diaz's credibility in the case at bar and was thus certainly highly relevant. The evidence would have a tendency to show moral turpitude, that Diaz was willing to lie to obtain a conviction in narcotics sale case in the downtown Los Angeles area, and the evidence would have a tendency to contradict Diaz's testimony that he could see the transaction in the instant case. (AOB 49-50)

The trial court abused its discretion in excluding the impeachment evidence under 352. (AOB 50)

352 provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial

danger of undue prejudice, of confusing the issues, or of misl eading the jury." (AOB 50)

A trial court's exercise of discretion under 352 will not be reversed on appeal absent a clear showing of abuse (citing *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599.) A defendant's right to present his defense theory is a fundamental right, and all of his pertinent evidence should be considered by the trier of fact (citing *ibid.*). In cases of doubt, the trial court's discretion should favor the defendant (citing *id.* at p. 600; see also *People v. Wright* (1985) 39 Cal.3d 576, 584-585). (AOB 50-5 1)

Taking the trial court's considerations in turn:

The evidence need not have been time-consuming. Although the length of the DVD was not indicated, the incident in this case took only five minutes (citing 1RT 65), and there is no reason to assume that the incident in the other case would have taken much longer. Furthermore, notwithstanding the trial court's statement that it would have to allow defense counsel to play the DVD, it is not clear that playing the DVD would have ben necessary; Diaz might have admitted he lied about what he could see in the other incident in order to avoid drawing the matter out. "[T]he right of a defendant to present evidence in his defense is so fundamental that consumption of time is irrelevant where the evidence is not cumulative." (Citing *People v. Taylor* (1980) 112 Cal.App.3d 348, 365.) (AOB 51)

The evidence would appear to have been highly probative, because of the apparent similarity between the two incidents. Therefore, if defense counsel could establish that Diaz lied about what he could see in a case relating to a fairly recent similar incident, it would tend to undercut Diaz's credibility in the instant case. Thus, its potential probative value was high (citing see *People v. Mayfield*, *supra*, 14 Cal.4th at pp. 745, 748 [a videotape on a collateral matter intended to demonstrate the falsity of some of

the defendant's testimony could have assisted the jurors in evaluating the defendant's testimony]). (AOB 51-52)

The trial court was wrong to minimize the importance of Diaz's testimony, which corroborated practically every aspect of Officer Jackson's testimony, which, obviously, the prosecutor considered it necessary to do. Diaz's testimony on direct examination occupies 14 pages of reporter's transcript (citing 1RT 105-118) and his testimony in full occupies 31 pages of reporter's transcript (citing 1RT 105-135). That is not testifying "briefly" as the trial court stated (citing 1RT 213). (AOB 52)

The matter in question would not necessarily have created any confusion. The trial court would presumably have exercised control (citing see § 1044; *People v. Taylor*, *supra*, 112 Cal.App.3d at p. 365) to keep the impeachment evidence from going far afield, and the matter involved was fairly simple: could Diaz have seen in the other incident what he purported to see. "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it." (Citing *People v. McDonald* (1984) 37 Cal.3d 351, 372, overruled on another point in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Moreover, the trial court could have given proper admonition and instructions to the jury (citing see *People v. Mayfield* (1972) 23 Cal.App.3d 236, 243, disapproved on another point in *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052, fn. 3). (AOB 52-53)

Thus, reversal is required. (AOB 53)

Appellant was prejudiced by the trial court's above erroneous action, which denied him the right to present a full defense, wrongly prevented a dilution of the prosecution case, and deprived appellant of his above federal constitutional rights (citing see *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]). (AOB 53)

The Court of Appeal held that the trial court did not abuse its discretion by excluding the evidence. (Opn., at pp. 16-18.)

Appellant contends that the Court of Appeal erred in its above holdings, for these reasons: Appellant repeats his argument and contentions made to the Court of Appeal as set forth above in this part II, including, without limitation, the citations.

Thus, a grant of review is necessary.

III.

THIS COURT SHOULD GRANT REVIEW TO SETTLE THE IMPORTANT QUESTION OF LAW WHEN DOES AN UPPER-TERM SENTENCE VIOLATE A DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY TRIAL AND DUE PROCESS UNDER *BLAKELY V. WASHINGTON* (2004) 542 U.S. 296 AND *CUNNINGHAM V. CALIFORNIA* (2007) 549 U.S. _, 127 S.CT. 856

In part IV of the argument in AOB, appellant argued that the imposition of an upper-term sentence on count 1 violated appellant's Sixth and Fourteenth Amendment rights to a jury trial and due process under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] ("*Blakely*") and *Cunningham v. California* (2007) 549 U.S. _, 127 S.Ct. 856 ("*Cunningham*"). (AOB 60-70)

Appellant pointed out in part:

At the probation and sentencing hearing, on November 21, 2006 (citing 2RT 329), the trial court, in sentencing appellant, stated in part:

"In reviewing the evidence in this case, the Court found that the defendant, with six or more prior felonies being on both probation and parole at the time of the instant offense, is an unsuitable candidate for

probation. As to both counts probation is denied.

"With regard to count 1, it is the judgment and sentence of the Court that Mr. Sutton be sentenced to the state prison for the upper term of five years for the violation of 11352.A [sic] of the Health and Safety Code section. The selection of the upper term is based on a number of factors, specifically the prior criminal history, the priors that included the parole status and probation status at the time of the instant offense; the fact that there is a second count for which he could be separately sentenced in a consecutive fashion, but which the Court deems will be sentenced in a concurrent fashion."

(Citing 2RT 339.) Thereafter, defense counsel did not object to the imposition of the upper term or contest any of the trial court's above findings (citing 2RT 339-342). (AOB 60-61)

Appellant contended in part:

The upper-term sentence imposed violates the United States Constitution because the trial court relied on factors not found true beyond a reasonable doubt by a jury. (AOB 61)

As the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] ("*Apprendi*"), "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely* at pp. 301-305, that court held that the trial court's use of an aggravating factor not found to be true by the jury to increase the defendant's sentence beyond the statutory maximum, other than the fact of a prior conviction, violated the rule explained in *Apprendi*. (AOB 62)

In 2007, in *Cunningham*, the United States Supreme Court held that the middle term prescribed in California's statutes, not the upper term, is

the relevant statutory maximum, and California's determinate sentencing law violates a defendant's federal constitutional right to a jury trial and proof beyond a reasonable doubt by allowing the jury to impose an aggravated sentence on facts found by the judge by a preponderance of the evidence (citing *Cunningham*, 127 S.Ct. at pp. 860, 868, 870-871). (AOB 62)

In the instant case, the factors used by the trial court do not pass muster under *Cunningham*. Although the aggravating factors the trial court found here were related to recidivism, the exception to the right to jury trial set forth in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350] ("*Almendarez-Torres*") does not apply, because that exception applies only to the mere *fact* of a prior conviction (citing *Shepard v. United States* (2005) 544 U.S. 13 ("*Shepard*"), 25 [125 S.Ct. 1254, 161 L.Ed.2d 205] (plurality opn.)). (AOB 62-63)

The factors referred to by the trial court in the case at bar will be examined in turn. (AOB 63)

First, the trial court referred to appellant's "prior criminal history" (citing 2RT 339), but it did not identify any particular existing convictions. If it meant the three cases Nos. BA180496, BA018332, and BA230050 it had referred to earlier (citing see 2RT 337), two of those were used in imposing enhancements and the enhancement relating to the third was stricken because of the remoteness in time of that conviction (citing 2RT 340), so those should not count (citing see, e.g., Cal. Rules of Court, rule 4.420(c)). If it meant that appellant's convictions as an adult were numerous, that is not a valid factor under the *Almendarez-Torres* exception. (AOB 63)

Second, the trial court referred to "the priors that included the parole status and probation status at the time of the instant offense." (Citing 2RT 339.) That also is not a valid factor under the *Almendarez-Torres* exception. (AOB 63)

Third, the trial court referred to "the fact that there is a second count for which he could be separately sentenced in a consecutive fashion, but which the Court deems will be sentenced in a concurrent fashion." (Citing 2RT 33.) However, that factor (citing Cal. Rules of Court, rule 4.421(a)(7)) does not apply, because section 654, subdivision (a) would have operated to preclude a consecutive sentence on count 2, because obviously both offenses were incidental to one objective, appellant harbored only a single intent, and appellant could be punished only once (citing *People v. Coleman* (1989) 48 Cal.3d 112, 162; see Cal. Rules of Court, rule 4.424); and, as a separate consideration, it would have been an abuse of discretion to impose a consecutive sentence on count 2, because the crimes and objectives were intertwined, no acts or threats of violence were involved, and the crimes were committed at the same time and place (citing § 669; *People v. Bradford* (1976) 17 Cal.3d 8, 20; Cal. Rules of Court, rule 4.425, subd. (a)(1), (2), (3)). (AOB 64-65)

Although the trial court did refer to appellant's "criminal history," it also specified other factors. Therefore, even if it is determined that "criminal history" is a valid factor (and appellant contends to the contrary, as argued above), it is uncertain whether the trial court would have imposed the upper term based solely on that factor, so this matter must be remanded to enable the trial court to make that determination. (AOB 66)

Furthermore, it appears that the majority on the United States Supreme Court is no longer firmly behind *Almendarez-Torres* (citing *Shepard* at p. 27 (conc. opn. of Thomas, J)). (AOB 66)

None of the aggravating factors used by the trial court here were submitted to a jury, or found true by a jury beyond a reasonable doubt. Appellant's upper-term sentence therefore violates the Sixth and Fourteenth Amendment principles of *Apprendi* and *Blakely*, as set forth in *Cunningham*,

and cannot stand. (AOB 66)

Although the above rule is not violated where the defendant admits the fact or facts on which a sentence above the statutory maximum is based (citing *Cunningham*, 127 S.Ct. at p. 860), there was no such admission by appellant in the case at bar. (AOB 66-67)

Because the error involves the fundamental right to a jury trial, as well as the application of the appropriate burden of proof as to the factual determination, the error is structural and requires reversal per se (citing *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302]). (AOB 67)

Washington v. Recuenco (2006) 548 U.S. _ [126 S.Ct. 2546, 165 L.Ed.2d 466] did not necessarily resolve whether determination of aggravating factors under a preponderance of the evidence standard rather than a reasonable doubt standard could be deemed a structural defect. (AOB 68)

Also, this matter must be remanded because, the middle term being the statutory maximum under *Cunningham*, there is a separation of powers problem under *People v. Wright* (1980) 30 Cal.3d 705, 709-713, and a complete legislative enactment is required. Although the Legislature amended section 1170, subdivision (b) effective March 30, 2007 to remove the statutory presumption to the middle term (Stats. 2007, ch. 3, § 2), that amendment should apply forward only. Retroactive application would present an ex post facto problem. Thus, even if appellant is a recidivist, the matter must be relitigated in the trial court. (AOB 68)

Defense counsel's lack of objection does not constitute a waiver o[r] forfeiture, because an objection would have been futile and therefore the issue is preserved (citing *People v. Esquibel* (2006) 143 Cal.App.4th 645, 660), in that at the time of appellant's sentencing, on November 21, 2006

(citing 1CT 209; 3RT 437, 449), *People v. Black* (2005) 35 Cal.4th 1238 (later abrogated by *Cunningham*),which upheld California's determinate sentencing law against a *Blakely* challenge, was controlling authority and all lower California courts were bound by its holding (citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) (and an objection would not have achieved the purpose of prompt detection and correction of error in the trial court (citing *People v. Scott* (1994) 9 Cal.4th 331, 351)); but if it is determined otherwise, then defense counsel rendered ineffective assistance of counsel, for the same reasons and on the basis of the same authorities as are set forth [in the discussion of ineffective assistance of counsel on pages 12 and 13, *ante*, which reasons and the citation to which authorities are] by this reference incorporated in this part III as if set forth in full at this point. (AOB 68-70)

The Court of Appeal held, on the basis of *People v. Black* (2007) 41 Cal.4th 799 ("*Black II*"), 819-820, *People v. Sandoval* (2007) 41 Cal.4th 825 ("*Sandoval*"), 839, and *People v. Towne* (2008) 44 Cal.4th 63 ("*Towne*"), [79], that appellant's upper term sentence on count 1 was proper because appellant suffered prior convictions. (Opn., at pp. 22-23.)

Appellant contends that the Court of Appeal erred in its above holding, for the following reasons:

(a) Appellant repeats his argument and contentions made to the Court of Appeal as set forth above in this part III, including, without limitation, the citations.

(b) To the extent that *Black II* and *Sandoval* (both of which were decided on the date AOB was signed and served) and *Towne* compel a decision contrary to appellant's position, argument, and contentions above in this part III, appellant respectfully contends that those cases were wrongly decided and in violation of the above United States Supreme Court cases and should not be followed.

Thus, a grant of review is necessary.

IV.

JOINDER

To the extent permitted, under California Rules of Court, rule 8.504(e)(3) or any other rule or otherwise, appellant joins in the arguments in Jackson's petition for review in this appeal that may be applicable and beneficial to appellant and appellant joins in the arguments in any amicus curiae letter and attachment or other document filed by LACPD in support of appellant and Jackson that may be applicable and beneficial to appellant.

CONCLUSION

For the reasons set forth above, appellant respectfully urges this Honorable Court to grant review in this matter.

DATED: September 5, 2008 Respectfully submitted,

William L. Heyman

WILLIAM L. HEYMAN
Attorney at Law

CERTIFICATE OF NUMBER OF WORDS

Pursuant to California Rules of Court, rule 8.504(d)(1) and (3), I hereby certify, in reliance on the word count of the computer program used to prepare this petition for review, that the number of words in this petition for review (including the footnotes, but excluding the tables, the Court of Appeal opinion, and this certificate) is 8,399.

DATED: September 5, 2008 Respectfully submitted,

William L. Heyman

WILLIAM L. HEYMAN
Attorney for Appellant
Michael Jerome Sutton

APPENDIX

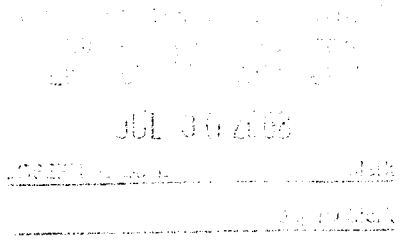
CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JEROME SUTTON et al., Defendant and Appellant.	B195337 (Los Angeles County Super. Ct. No. BA304502)



APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Affirmed in part; reversed and remanded in part.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant Michael Jerome Sutton.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Willie J. Jackson.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II, III and IV of the Discussion.

Michael P. Judge, Public Defender, and John Hamilton Scott, Deputy Public Defender, for Public Defender of Los Angeles County, California, as Amicus Curiae on behalf of Defendants and Appellants.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The joint trial of defendants and appellants Michael Jerome Sutton and Willie J. Jackson began six days after the 60-day statutory deadline in Penal Code section 1382.[1] The trial court continued the trial as to both defendants because Jackson's counsel was engaged in trial on another matter. On appeal, defendants contend that good cause did not exist to continue the trial beyond the statutory deadline. In the published portion of this opinion, we hold that an appointed counsel's present engagement in another matter is good cause to continue the joint trial of jointly charged defendants. In the nonpublished portion of this opinion, we reject defendants' contention that the trial court erred in excluding evidence, although we agree with Sutton's other contention that there are errors in his sentence. We therefore reverse and remand this matter as to Sutton with respect to the sentencing errors only. We otherwise affirm the judgment as to both defendants.

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1 All further undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

On May 31, 2006, Officer Anthony Jackson, a member of the Narcotics Division Buy Team, was working undercover at 7th and Ceres in Los Angeles. Defendant Jackson was counting money on Ceres. The officer looked at defendant Jackson, who approached the officer and asked what he wanted. The officer said he wanted "a 20," meaning $20 worth of narcotics. Defendant Jackson said he had to get it; he crossed the street to a waist-high camping tent, where Sutton was waiting.

Sutton and defendant Jackson talked, although the officer could not overhear their conversation. Sutton opened a white bottle out of which he poured an off-white solid substance into his hand and gave it to defendant Jackson. Defendant Jackson walked back to the officer and asked him for the money. The officer gave defendant Jackson a prerecorded $20 bill, and defendant Jackson gave the officer an off-white solid resembling rock cocaine. As the officer walked away, he signaled to his partners that the buy was complete.

Jackson was arrested. Officers recovered $14 from his pants pockets. Sutton was arrested. Officers recovered an off-white substance resembling rock cocaine, a white canister also containing an off-white substance resembling cocaine, and $44 from him. Detective Vip Kanchanamongkol, who was in charge of the operation, compared a $20 bill recovered from Sutton to the prerecorded bill Officer Jackson used to buy the drugs from defendant Jackson. The bills matched. Testing confirmed that the substance Officer Jackson bought was 0.33 grams of cocaine base and that the substance recovered from Sutton was 0.99 grams of cocaine base.

II. Procedural background.

Trial was by jury. On October 5, 2006, the jury found Sutton and Jackson guilty of count 1, sale of a controlled substance, cocaine base (Health & Saf. Code, § 11352, subd. (a)). The jury also found Sutton guilty of count 2, possession for sale of a controlled substance, cocaine base (Health & Saf. Code, § 11351.5).

On October 24, 2006, the trial court sentenced Jackson to the midterm of four years on count 1.

On November 21, 2006, the trial court sentenced Sutton to the upper term of five years on count 1. The court imposed an additional three years under Health and Safety Code section 11370, subdivision (a), based on a prior felony conviction for violating Health and Safety Code section 11351.5 and an additional year under section 667.5, subdivision (b). The court sentenced him to a concurrent four-year term on count 2. The court dismissed one prior conviction from 1990.

This appeal followed.[2]

DISCUSSION

I. The six-day delay did not violate defendants' statutory right to a speedy trial.[3]

Because their trial was delayed beyond the statutory deadline in section 1382, Sutton and Jackson contend that their right to a speedy trial was violated.[4] We disagree.

A. *Additional facts.*

The People filed a felony complaint on June 2, 2006, charging Jackson and Sutton with sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and charging Sutton with sale of cocaine base (Health & Saf. Code, § 11351.5). On June 16, noting that it was "10 of 10" and that the defendants had been inadvertently sent to the wrong

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2 We filed an opinion in this case on March 26, 2008, but, on our own motion, we granted rehearing and ordered the parties to file supplemental briefs addressing section 1050.1.

3 In Jackson's opening brief he joined any contention Sutton raised that may be "applicable and beneficial" to him. He did not separately brief the speedy trial issue. Jackson's appellate counsel, in response to our rehearing order, thereafter submitted a supplemental brief in which she argued that the speedy trial issue was indeed applicable to her client. We therefore will consider the issue as to Jackson.

4 The argument is based solely on section 1382. Sutton does alternatively contend that his trial counsel rendered ineffective assistance of counsel by, among other things, failing to object to continuing trial.

courthouse, the trial court dismissed the matter. Sutton was released from custody, but was placed in custody again three days later.

By a felony complaint, the People refiled the matter on June 19, 2006. An information was filed on July 21, 2006, charging Sutton and Jackson again with violating Health and Safety Code section 11352, subdivision (a), and Sutton with violating Health and Safety Code section 11351.5. Sutton and Jackson were arraigned that same day, July 21, and trial was scheduled for September 11, 2006, as day 52 of 60. The trial date, however, was vacated and set for September 12, as day 53 of 60. On September 12, all parties announced ready for trial, although Jackson's appointed counsel said he might be engaged in trial on another case.[5] The case was transferred to Department 100 for trial assignment on September 15, as day 56 of 60.

On September 15, 2006, Jackson's counsel said he was engaged in trial, but he would be available on the 19th. The trial court asked Jackson if it was "agreeable with you that you come back here on September 19th and have your trial within two days of that date?" Jackson said, "As long as no time is being waived," and "I don't want to waive time," to which the court replied, "That's fine." The court trailed the matter to September 18, as day 59 of 60.

On September 18, 2006, all parties announced ready, except for Jackson's counsel, who was still engaged in trial. On Jackson's continuing motion to trail, the court trailed the trial to September 19. The court noted that there was no time waiver from either defendant.

On September 19, 2006, day 60 of 60, Jackson's counsel said he was still engaged in trial. The court again noted that the defendants were not waiving time, and Sutton expressly asked when the 60 days started to run. Noting that Jackson's counsel was still engaged in trial on another matter, the court found good cause to continue the matter as to both defendants.

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[5] Sutton also had appointed counsel. The parties do not dispute that Sutton and Jackson remained incarcerated during these proceedings.

The next day, September 20, 2006, day 61 of 60, Jackson's counsel was still in trial but he nevertheless made "a pro forma" motion to dismiss. The court said it was not a good faith motion to dismiss because he was also making a motion to continue.[6] The court again found good cause to continue the matter based on Jackson's counsel being in trial.

The following day, September 21, 2006, Jackson's counsel was still engaged in trial. The trial court again found good cause to trail the case until September 22. Sutton asked if this meant he waived time. The court said, "You haven't waived one second. I find good cause because one of the two counsel are engaged in trial, which is good cause to trail the case."

On September 22, 2006, Jackson's counsel asked to trail the matter to the 25th, because he was still engaged in trial. The trial court granted the motion, and it found that there was no time waiver. Sutton personally addressed the court:

"Defendant Sutton: I'm confused.

"The court. What are you confused about, Mr. Sutton?

"Defendant Sutton: 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.

"Defendant Sutton: What's the good cause? What's the good cause?

"The court: The good cause is that one of the lawyers is engaged and can't try two cases at one time. And if one of the lawyers is engaged on a case with two defendants, it's good cause to put both over. [¶] Now, do you want a further explanation than that?

"Defendant Sutton: 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.

"Defendant Sutton: Well, that's a fact.

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6 Sutton's counsel was not present for this portion of the proceedings. He had called and said he would be late.

"The court: That's a fact. [¶] And you know what my answer to you is? Too bad. See you on Monday."

On September 25, 2006, all parties announced ready for trial, and the case was transferred to Department 124 for trial. Noting that it was day 66 of 60 and that his client never waived time, Sutton's counsel cited, among others, *People v. Escarcega* (1986) 186 Cal.App.3d 379 (*Escarcega*), and moved for dismissal based on the lack of a speedy trial. The People responded, "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."

Sutton's counsel corrected the district attorney: "I never waived time. I emphasized on the record that Mr. Sutton did not want to waive time. The court was aware of that. That is why they brought Mr. Sutton everyday from a week ago, over a week ago, on a daily basis in case a trial court opened up. It was over our decision not to waive time. We did not waive time." The court said good cause to trail the case had been found because co-counsel was engaged in another matter, and it therefore denied the motion.[7]

B. *There was good cause to continue defendants' trial.*

The California Constitution guarantees a criminal defendant's right to a "speedy public trial." (Cal. Const., art. 1, § 15; see also § 1050.)[8] Section 1382 interprets the

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[7] Although the prosecutor said that Sutton had waived time and various minute orders state he waived time, the record is clear he did not. Therefore, Sutton does not have a claim of ineffective assistance of counsel based on his trial counsel's failure to object to the delay of trial. The People also do not argue on appeal that there was such a waiver.

[8] Section 1050, subdivision (a), provides: "The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end, the Legislature finds that the

state constitutional right to a speedy trial. (*People v. Johnson* (1980) 26 Cal.3d 557, 561 (*Johnson*); *People v. Martinez* (2000) 22 Cal.4th 750, 766 [the statutory speedy trial rights are supplementary to and a construction of the state constitutional speedy trial guarantee].) Section 1382 provides that absent a showing of good cause, waiver or consent, a defendant accused of a felony is entitled to a dismissal of charges if the matter is not brought to trial within 60 days of arraignment. (§ 1382; *Johnson,* at p. 563.) What constitutes good cause to continue a case depends on the circumstances of each case, and the issue is reviewed on appeal under an abuse of discretion standard. (*Johnson,* at p. 570; *Hollis v. Superior Court* (1985) 165 Cal.App.3d 642, 645.)

Examples of good cause to delay a trial include an unexpected illness or unavailability of counsel or witnesses, delay caused by a defendant's conduct, and delays for the defendant's benefit. (*Johnson, supra,* 26 Cal.3d at p. 570.) The preference for a joint trial of jointly charged defendants can also constitute good cause to delay a trial beyond the statutory deadline. That preference is in section 1098, which provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." (See also 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"]; § 1050.1 [discussed *post*].)

Notwithstanding the clear statutory preference for joint trials, Sutton and Jackson contend that the preference cannot here trump their statutory speedy trial rights, based on

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criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. Excessive continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses. Continuances also lead to longer periods of presentence confinement for those defendants in custody and the concomitant overcrowding and increased expenses of local jails. It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and judicial officers and of all counsel, both for the prosecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice. . . ."

Johnson, supra, 26 Cal.3d 557. In *Johnson*, defendant's appointed counsel, over his client's objection, asked for a continuance of trial because he was engaged in trial on other matters. He explained that he was presently engaged in another trial and that he had two older cases he felt he should try before defendant Johnson's case. (*Id.* at pp. 563-564 & fn. 2.) The court found good cause to continue the trial. On the continued trial date, defense counsel asked for another continuance, again detailing his schedule in connection with three other cases. (*Id.* at pp. 563-564 & fn. 3.) Over defendant's objection, the court again found good cause to continue the matter. Defendant was finally brought to trial 144 days after the information was filed. (*Id.* at p. 565.)

Johnson made two holdings. First, when a client expressly objects to waiving his or her right to a speedy trial under section 1382, "counsel may not waive [the speedy trial] right to resolve a calendar conflict when counsel acts not for the benefit of the client before the court but to accommodate counsel's other clients." (*Johnson, supra,* 26 Cal.3d at pp. 561-562; see also *id.* at p. 567 ["consent of appointed counsel to a postponement of trial beyond the statutory period, if given solely to resolve a calendar conflict and not to promote the best interests of his client, cannot stand unless supported by the express or implied consent of the client himself"].)[9] Second, in the case of an incarcerated defendant, the public defender's inability to try a case within the statutory time because of conflicting obligations does not constitute good cause to avoid dismissal of the charges. (*Id.* at pp. 561-562.)

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9 In reaching this conclusion, the *Johnson* majority distinguished *Townsend v. Superior Court* (1975) 15 Cal.3d 774. *Townsend* held that a defendant's appointed counsel has the power to control judicial proceedings and to waive nonfundamental rights. Thus, consent of counsel alone, without that of the client, satisfies section 1382; in other words, counsel can waive the client's rights under section 1382. (*Townsend,* at p. 780; *Johnson, supra,* 26 Cal.3d at p. 568.) Although it appears that *Johnson* departs from *Townsend*—indeed the *Johnson* majority strongly criticized *Townsend*—the majority did not expressly overrule it. Justice Richardson, who authored *Townsend,* dissented from the majority's holding with respect to the right to speedy trial issue, and described the majority opinion as a reversal of *Townsend.* (*Johnson,* at pp. 581-582.)

Although *Johnson*'s second holding refers broadly to appointed counsel's "conflicting obligations," the factual scenario on which this holding was based is different than the one before us. In *Johnson*, defendant's trial counsel delayed Johnson's first trial date because counsel was engaged in trial on another matter and because he felt his other cases had precedence over Johnson's. On all later trial dates Johnson's trial counsel based his requests for continuance only on conflicting trial schedules of his other clients. He was thus engaging in case management, to Johnson's detriment. Here, Jackson's trial counsel, before the statutory deadline passed, initially announced ready for trial, although he said he might be engaged in trial on another case. He thereafter became engaged in that other trial. While Jackson's counsel was engaged in the other matter, Sutton and Jackson's trial trailed day to day, until their case was transferred for trial on September 25, six days after the 60-day deadline in section 1382. A situation such as this, in which trial counsel is presently engaged in another matter and the matter before the court trails for a minimal number of days, is thus distinguishable from *Johnson*. Trial counsel here was actually in trial on another matter and was not delaying this matter so that he could try other cases ahead of it.[10]

The facts here are also distinguishable from those in *Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884 (*Sanchez*). The petitioner and two codefendants in *Sanchez* were jointly charged. (*Id.* at p. 887.) Codefendant's counsel told the court he was engaged in another criminal trial and "was assigned to two other 'must-go' criminal trials immediately thereafter." (*Ibid.*) The trial court found good cause to continue petitioner's trial along with his codefendant's trial.[11] Relying on *Johnson, Sanchez* said that "on

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10 Because we conclude that good cause existed to continue Jackson's trial based on his counsel's unavailability, we need not determine whether Jackson waived or expressly or impliedly consented to the continuance under section 1382, subdivision (a)(2)(A) and (B), an issue which is not raised by any party.

11 The record is not clear how far past the statutory deadline trial occurred, but it appears it was somewhere between seven to twenty-one days. (*Sanchez, supra,* 131 Cal.App.3d at p. 888.)

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 [a defendant] to a trial within the 60-day period." (*Sanchez*, at p. 893.)[12] *Sanchez* mirrors more closely the facts in *Johnson* than the ones before us. It involved trial counsel's attempts to manage his caseload to the defendant's detriment.

Arroyo v. Superior Court (2004) 119 Cal.App.4th 460, is also distinguishable. Arroyo and his codefendant were arraigned on different days. Arroyo's trial was set for December 15, 2003, but his codefendant, who had been arraigned on a later date, was not scheduled to be tried until January 26, 2004. The trial court continued Arroyo's trial to January 26 so that he could be jointly tried with his codefendant. The Court of Appeal held that Arroyo's speedy trial rights were violated. The trial court erred in relying on "maintaining joinder alone as the sole reason for continuance, without regard to any competing factors." (*Id.* at p. 467.) *Arroyo*, however, did not involve, as here, the unavailability of codefendant's counsel due to his present engagement in trial on another matter.

Thus, there was good cause to continue the trial of Jackson. The question then becomes whether there was also good cause to continue the trial of the jointly charged defendant, Sutton. *Johnson* does not answer this question directly, because it did not involve jointly charged defendants. But our California Supreme Court has otherwise noted that where "a continuance is granted upon good cause to a codefendant the rights of

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12 We relied on *Sanchez* in *Escarcega, supra,* 186 Cal.App.3d at page 386, footnote 4, to reject the People's contention that their and the codefendants' desire "to avoid needless duplication or to obtain an expeditious disposition are relevant factors in determining whether defendant's right to a speedy trial was violated." We said that the "preference for a joint trial of jointly charged defendants does not constitute good cause to delay one defendant's trial beyond the time period set forth in Penal Code section 1382, subdivision [(a)(2)]." (*Escarcega*, at p. 386, fn. 4.) To the extent *Escarcega* can be interpreted as finding that the preference for a joint trial does not, under any circumstance, constitute good cause to continue a trial past the statutory time, such an interpretation is "overly broad." (*Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 495 (*Greenberger*).)

the other defendants are generally not deemed to have been prejudiced." (*People v. Teale* (1965) 63 Cal.2d 178, 186 [continuance premised on codefendant's counsel's need to prepare for trial], revd. on other grounds by *Chapman v. California* (1967) 386 U.S. 18; see also *Ferenz v. Superior Court* (1942) 53 Cal.App.2d 639 [cited with approval in *Teale* and finding that the unavailability of two defendants was good cause to continue for 22 days the joint trial of nine defendants in a complex trial].)

Greenberger, supra, 219 Cal.App.3d 487, also held that the preference for joint trials can constitute good cause to delay a trial beyond the statutory time. *Greenberger* was a multi-defendant-murder trial in which defendant Greenberger refused to waive time, although her codefendants moved to continue trial based on a need for pretrial investigation. Greenberger was ultimately tried six months beyond the statutory time. The court found that although there are "no magic calipers marking the exact reach of good cause delay," good cause existed based on a consideration of factors including length of delay, seriousness of charges, complexity of the case, prejudice to the defendant, the reason for the delay, witness hardship, and burden on the courts. (*Id.* at pp. 502, 505-506; see also *Hollis v. Superior Court, supra,* 165 Cal.App.3d 642 [defendant's right to a speedy trial was not violated by a continuance of 100 days past the statutory time based on codefendant's assertion he needed more time to prepare for trial].)

Greenberger recognized that the preference for a joint trial "encompasses varied and significant interests. So significant, in fact, that they may serve as counterweights to a defendant's right to confront witnesses [citation], his privilege against self-incrimination [citation]; his right to exclude prejudicial character evidence [citation], and others [citations]." (*Greenberger, supra,* 219 Cal.App.3d at p. 499.) The court then said that "if the precipitating cause for trial delay is justifiable, such as codefendants' need to adequately prepare for trial, then the section 1098 joint trial mandate constitutes good cause to delay the trial of an objecting codefendant." (*Id.* at p. 501, fn. omitted.) As we have explained, the precipitating cause for delaying Jackson's trial here was justifiable, namely, his counsel's present, and brief, engagement in trial on another matter. Under

such a circumstance, the joint trial mandate constituted good cause to delay Sutton's trial as well.

Section 1050.1 underscores the soundness of this conclusion. That section provides: "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."[13] Although we do not directly rely on section 1050.1, because the prosecutor here did not make a motion under it, the statute states a clear preference for joint trials under situations similar to the one before us.[14] Under section 1050.1, if good cause exists to continue the trial of defendant No. 1, then good cause exists to continue the trial of defendant No. 2 to maintain joinder. As we have said, good cause existed to continue Jackson's trial, therefore, had a motion under section 1050.1 been expressly made, good cause would have existed to continue Sutton's trial as well under that statute.

In reaching our conclusion that defendants' speedy trial rights were not violated by the six-day delay, we are mindful that "neither a defendant's constitutional right to trial within the 60-day period nor the mandate for joint trial are absolute, but are subject to the

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13 Proposition 115, adopted by the voters and made effective June 6, 1990, added section 1050.1, among others, to the Penal Code.

14 See generally, *A.A. v. Superior Court* (2003) 115 Cal.App.4th 1, 4, 6 (section 1050.1 is not a " 'joinder' " statute; if anything, it is a " 'continuance' " statute that gives the People good cause to seek a continuance of the entire case when the court grants a continuance to two or more defendants in a jointly charged case); *In re Samano* (1995) 31 Cal.App.4th 984, 995 (dissenting Justice Stone noting that section 1050.1 "gives the prosecution the right to maintain joinder" (dis. opn. of Stone, J.)).

discretion of the trial court in evaluation of conflicting policy and pragmatic considerations." (*Sanchez, supra,* 131 Cal.App.3d at p. 891.) Those policy and pragmatic considerations here include the relative brevity of the delay (six days), and the not insignificant burden on the court system in conducting two trials. We thus take note of Justice Richardson's cautionary statement in his dissenting opinion in *Johnson*: "The problem of overcrowded courtrooms is a major concern to all who are involved in the judicial process. . . . We may, on a case-by-case basis and when appropriate, afford relief by dismissal to those individual defendants who have been denied their right to a speedy trial. We should not, however, by judicial improvisation, and in the absence of prejudice to a defendant, particularly in matters so closely affecting the public safety and welfare, impose our own theories of management on local court systems, thereby reaching arbitrary results which are neither constitutionally compelled nor in the public interest." (*Johnson, supra,* 26 Cal.3d at p. 586 (dis. opn. of Richardson, J.).)

II. Cross-examination of Officer Hector Diaz.

The trial court excluded video evidence defendants proffered to impeach Officer Hector Diaz's testimony that he saw the entire transaction between defendants and Officer Jackson. Both defendants now contend that the evidence was erroneously excluded, and that they were prejudiced by its exclusion. Jackson, whose trial counsel did not join in the objections to the exclusion of the evidence, also argues that his counsel provided ineffective assistance of counsel for failing to do so. We hold that the trial court did not abuse its discretion by excluding the evidence, and therefore, the ineffective assistance of counsel claim must also fail.

A. *Additional facts.*

During the transaction, Officer Hector Diaz was the "point" officer—the officer who keeps his eyes on the undercover officer conducting the buy and who relays information to other officers in the area. He was standing on the south sidewalk of 7th in the middle of Ceres, and he testified he had a direct view of Officer Jackson the entire time Officer Jackson was on Ceres. He saw defendant Jackson approach Officer Jackson and talk to him. Officer Diaz also saw Sutton give something to defendant Jackson, who

then gave it to Officer Jackson. After Officer Jackson walked away, Officer Diaz saw defendant Jackson walk back to Sutton and give him something.

During cross-examination, Sutton's defense counsel asked Officer Diaz if he was involved in Davon Spencer's arrest on December 15, 2005. The prosecutor objected, and, at sidebar, defense counsel explained that he was going into the unrelated incident for impeachment purposes. Officer Diaz filed a report in the Spencer case stating he saw the transaction there, but a DVD showed that "if you are standing on either corner [of 7th and Main], you could not see the transaction because there is a bus in the way." Defense counsel said that the camera was on a telephone pole, which, the trial court noted, gave the camera a different vantage point than any officer on the ground.

"Mr. White: [The bus] pulled up, stopped and either let people off or on. It is a Santa Monica bus. This was the time that Mr. Spencer was alleged to have been doing something, but the bus was in the way. You can see the top of Mr. Spencer's head.

"The court: If I were to allow this, I have to allow you to play the DVD. We are going to get into a case that has no other connection with this case; is that correct?

"Mr.White: That's correct, Your Honor. The only connection is that the officer is in a similar situation where he is testifying. Here he is in a position where he could see. In this report it says that he could see when he couldn't have seen what he saw on another case. I am using it for impeachment only.

"The court: Under [Evidence Code section] 352 I am not going to allow it at this time. If later on it appears that this witness' testimony is pivotal, then I will reconsider your offer to recall him. At this point, I can't see any purpose. I can see a lot of time being consumed. I do not want to conduct a trial within a trial. Obviously, at that point you have to let the people bring in other witnesses who may have seen and can corroborate what the witness said he saw. [¶] I don't know that a DVD from a different vantage point is at all probative. We'd have to get into all of that. No, I am not going to permit it at this time. [¶] He may retake the stand and you may get into a different line of questioning.

"Mr. White: I will, Your Honor. I do want to point out this is important to Mr. Sutton to be able to impeach this officer –

"The court: I understand. That is why I said to you down the road in this trial if this should become a pivotal witness, we will revisit. I can see a lot of time being consumed and I am exercising my discretion under [section] 352 of the Evidence Code.

"Mr. White: Under due process and the federal Constitution, Mr. Sutton should be allowed to use it."

Later, after the People rested, the trial court stood by its tentative ruling and reiterated that Officer Diaz was not a primary witness, rather, he testified briefly to corroborate Officer Jackson's testimony.

B. *The trial court did not abuse its discretion by excluding the evidence.*

Sutton and Jackson contend that the exclusion of the above evidence violated their constitutional rights to a fair trial and to present a defense. (See, e.g., U.S. Const., 5th, 6th & 14th Amends.; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense]; *United States v. Owens* (1988) 484 U.S. 554, 558 [the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose infirmities through cross-examination, thereby calling to the fact finder's attention reasons for giving scant weight to a witness's testimony].) We disagree.

"A defendant has the general right to offer a defense through the testimony of his or her witnesses [citation], but a state court's application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon this right [citations]." (*People v. Cornwell* (2005) 37 Cal.4th 50, 82.) Although the United States Supreme Court, in *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303, "determined that the combination of state rules resulting in the exclusion of crucial defense evidence constituted a denial of due process under the unusual circumstances of the case before it, it did not question 'the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures.' [Citation.]." (*Cornwell,* at p. 82.)

Certainly, evidence of misconduct on the part of a prosecution witness "may suggest a willingness to lie [citations], and this inference is not limited to conduct which resulted in a felony conviction." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.) But the "admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Wheeler*, at p. 296, fn. omitted.)

On appeal, we review the exclusion of evidence under Evidence Code section 352 for abuse of discretion. (*People v. Holloway* (2004) 33 Cal.4th 96, 134.) We will not disturb a trial court's decision to exclude evidence under Evidence Code section 352 absent a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, the trial court precluded cross-examination of Officer Diaz into whether he lied in the Davon Spencer case. The trial court cited undue consumption of time, lack of probative value, and that Officer Diaz was not a "pivotal" witness to justify exclusion of the evidence. Defendants take issue with the cited justifications.

First, they argue that the evidence need not have been time consuming. They argue that playing the DVD would probably not have taken long and that it may even have been unnecessary to play it if Officer Diaz conceded he lied at Davon Spencer's trial. It is certainly possible that Officer Diaz would have made such a concession, even if unlikely. In any event, there is no record of how long it would take to play the DVD. Even if playing the DVD itself would not have taken long, its admission undoubtedly would have required other witnesses from Davon Spencer's trial to be called to corroborate what Officer Diaz said he saw. This would have, as the trial court feared, created a "trial within a trial."

Second, defendants argue that the evidence was highly probative because of the similarity between their case and Davon Spencer's. Thus, if defense counsel could

establish that Officer Diaz lied in Spencer's case, then Diaz's credibility in this case would be undercut. But, as the trial court pointed out, defense counsel represented that the camera filming the Davon Spencer transaction was on a pole; thus, the DVD was filmed from a different vantage point than the one Officer Diaz had on the street. To establish that the camera had a better vantage point than did Officer Diaz and that the officer could not have seen the transaction would have required introduction of other evidence regarding, for example, where the officer was standing, where Davon Spencer was standing, the specific time of the transaction, and the specific time the bus came and went.

Finally, defendants argue that Officer Diaz was a pivotal witness, contrary to the trial court's conclusion that Officer Diaz was not a pivotal witness. They argue that only Officer Diaz's testimony corroborated Officer Jackson's testimony concerning the transaction between him and defendants. That is not accurate. Detective Kanchanamongkol, although he did not witness the transaction, recovered from Jackson after he was arrested, the prerecorded $20 bill. Drugs and a white bottle or container as described by Officer Jackson were recovered from Sutton. This evidence corroborated the incident as related by Officer Jackson, even in the absence of Officer Diaz's testimony.

We therefore conclude that the trial court did not abuse its discretion in excluding the DVD evidence. Because we so conclude, Jackson's claim that his trial counsel was ineffective for failing to join in Sutton's objection to the exclusion of the evidence fails, because Jackson was not prejudiced by any failure on the part of his counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [a defendant claiming ineffective assistance of counsel must also show by a preponderance of evidence "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome"].)

III. Sutton's prior convictions.

An amended information charged Sutton with two prior convictions (case

Nos. BA180496 & BA018332) within the meaning of section 667.5, subdivision (b). The information also alleged that Sutton had been convicted in case No. BA230050 for violating Health and Safety Code section 11351.5, thereby subjecting him to the three-year enhancement in Health and Safety Code section 11370.2, subdivision (a).[15]

On October 5, 2006, after the jury adjourned for deliberations, the trial court asked Sutton if he wanted a jury trial on his priors. The court advised Sutton he would have "all the same rights" as at a jury trial. Sutton waived his right to a jury trial. The prosecutor then advised him as follows: "Michael Sutton, you are entitled to a trial as to whether or not you were previously convicted on April 18th of 1999 of Health and Safety Code section 11350[,] [subdivision (a)] under case number BA180496, in the Superior Court in Los Angeles, and another conviction on July 13th of 1990, for Health and Safety Code section 11350[,] [subdivision (a)], BA018332, in the Superior Court in Los Angeles. [¶] Also a conviction on November 20th of 2002, for Health and Safety Code section 11351.5, under case number BA230050, in the Superior Court of Los Angeles. [¶] You are entitled to a jury trial in that case. At a jury trial you are entitled to call witnesses on your behalf to testify. The People are required to call witnesses into court to testify before you and your counsel. Your counsel would have the opportunity to question or cross-examine those witnesses. [¶] In addition, you have the right to testify on your own behalf and present any defense you have. Any witnesses you wish to subpoena into court, the subpoenas would be issued at no cost to you. [¶] Do you understand your – you also have a right not to testify at all, and that cannot be held

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15 Health and Safety Code section 11370.2, subdivision (a), provides: "Any person convicted of a violation of, or of a conspiracy to violate, Section 11351, 11351.5, or 11352 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment."

against you. In addition, you have the right to remain silent, which remains through the entire trial. [¶] Do you understand the rights that you have in connection with a trial as to the priors that I just outlined?"

Sutton responded that he understood and that he waived the rights. The trial court then found that Sutton "knowingly, understandingly and intelligently waived and [gave] up his right to have the jury determine the validity of the prior. The court finds it to be a voluntary waiver and accepts the waiver."

Later that same day, the jury reached its verdict. The trial court therefore set the matter over to October 24, 2006. On that day, the court asked Sutton how he wanted to handle the "court trial prior." His counsel said Sutton would admit the priors. Sutton then admitted that on April 18, 1999, he was convicted of a violation of Health and Safety Code section 11350, subdivision (a) in case No. BA180496 and that, on July 19, 1990, he was convicted of violating Health and Safety Code section 11350, subdivision (a) in case No. BA18332. He also admitted that he received a state prison sentence in those cases.

Sutton, however, refused to admit that, on November 20, 2002, he was convicted of violating Health and Safety Code section 11351.5 in case No. BA230050. Because the file on that matter was not available, the sentencing hearing was continued to November 21. By that day, the file had been obtained and it apparently showed that Sutton entered a plea of no contest to a violation of Health and Safety Code section 11351.5. The trial court, in proceeding to sentence Sutton, noted that he had previously admitted the two prior convictions in case Nos. BA180496 and BA018332. The court also mistakenly said Sutton had admitted the prior conviction in case No. BA230050.

Based on these events, Sutton now contends, first, that he was not advised of and did not waive his constitutional rights at the court trial;[16] second, he did not admit he

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16 The specific basis of this claim is Sutton was informed of and waived his rights to a jury trial on October 5, 2006. Nineteen days later, on the day of the court trial, Sutton was not again informed of and did not expressly waive any rights before admitting prior convictions.

served a prison sentence; and, third, he did not admit to a conviction in case No. BA230050. Because we agree with the second and third contentions, we need not reach the first.

Specifically, Sutton admitted he was convicted of a violation of Health and Safety Code section 11350, subdivision (a), on April 18, 1999 in case No. BA180496 and of violating that same section on July 19, 1990 in case No. BA018332. He also admitted that he was sentenced to state prison in those matters. Sutton, however, was never asked and never admitted he *served* a prison sentence. Moreover, there was no admission made concerning the five-year washout period. Thus, as the People concede, the one-year sentence under section 667.5, subdivision (b), was improperly imposed. (See generally, *People v. Lopez* (1985) 163 Cal.App.3d 946; *People v. Epperson* (1985) 168 Cal.App.3d 856.)

We also conclude that the three-year enhancement under Health and Safety Code section 11370.2, subdivision (a), was improperly imposed. As set forth above, Sutton never admitted that he had suffered a conviction in case No. BA230050 for a violation of Health and Safety Code section 11351.5. The People point out that at trial Sutton testified, on cross-examination, that on November 20, 2002, he was convicted of possession for sale of cocaine base. That testimony, however, is insufficient to constitute an admission for the purposes of imposing an enhancement under Health and Safety Code section 11370, subdivision (a). Sutton never admitted a case number, and, moreover, he said he went to county jail as a result of that conviction, although he was apparently sentenced to summary probation. Given this confusion, we cannot find that Sutton admitted the prior conviction in case No. BA230050.

We therefore reverse the sentences imposed under section 667.5, subdivision (b), and under Health and Safety Code section 11370.2, subdivision (a).

IV. The upper term sentences imposed on Sutton.

The trial court imposed the upper term of five years for Sutton's violation of Health and Safety Code section 11352, subdivision (a). The court based its selection of the upper term "on a number of factors, specifically the prior criminal history, the priors

that included the parole status and probation status at the time of the instant offense; the fact that there is a second count for which he could be separately sentenced in a consecutive fashion, but which the court deems will be sentenced in a concurrent fashion. [¶] For those reasons the upper term of five years is imposed[.]"

Citing *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856], defendant contends that the imposition of the upper terms violated his federal constitutional right to a jury under the Sixth and Fourteenth Amendments to the United States Constitution.

In *Cunningham*, the United States Supreme Court reaffirmed *Blakely v. Washington, supra,* 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U .S. 466, and overruled *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). *Cunningham* held that California's determinate sentencing law violates a defendant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution to the extent that law authorizes the trial judge to find facts (other than a prior conviction) that expose a defendant to an upper term sentence by a preponderance of the evidence. "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham v. California, supra,* 549 U.S. at p. __ [127 S.Ct. at pp. 863-864].)

After *Cunningham*, our California Supreme Court, in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), reexamined California's determinate sentencing system and held that "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*Id.* at p. 813) "[I]mposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Id.* at p. 816.)

Black II also took a broad view of the scope of the prior conviction exception. The court said, "As we recognized in [*People v.*] *McGee* [(2006) 38 Cal.4th 682],

numerous decisions from other jurisdictions have interpreted the *Almendarez-Torres* [*v. United States* (1998) 523 U.S. 224] exception to include not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions . . . . [¶] The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' [citation], require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.' " (*Black II, supra,* 41 Cal.4th at pp. 819-820.) The court continued to take a broad view the recidivism exception in *People v. Towne* (2008) 44 Cal.4th 63 [2008 D.A.R 9681] in which the court agreed "with the majority of state and federal decisions holding that the federal constitutional right to a jury trial and proof beyond a reasonable doubt on aggravating circumstances does not extend to the circumstance that a defendant was on probation or parole at the time of the offense or has served a prior prison term." (*Towne*, 44 Cal.4th at p. ___ [2008 D.A.R at p. 9685].)

We are bound by *Black II,* by its companion case, *People v. Sandoval* (2007) 41 Cal.4th 825, and by *Towne*.[17] (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, if Sutton suffered prior convictions, then he was eligible for the upper term. A review of his criminal history, as revealed by the probation officer's report, supports the trial court's conclusion that Sutton had at least six prior convictions. The probation report also shows that he was on probation at the time he committed the current offense. His upper term sentence on count 1 was therefore proper.

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[17] *People v. Sandoval* held that any sentencing error is reviewed under the standard in *Chapman v. California, supra,* 386 U.S. 18. The test for harmless error is whether the reviewing court can conclude, "beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury[.]" (*People v. Sandoval, supra,* 41 Cal.4th at p. 839.)

DISPOSITION

Defendant Michael Sutton's motion for judicial notice is granted. As to Michael Sutton, the judgment is reversed and remanded as to the sentence enhancements imposed under Penal Code section 667.5, subdivision (b), and under Health and Safety Code section 11370.2, subdivision (a). The judgment as to both defendants is otherwise affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.

PROOF OF SERVICE

Re: *People v. Michael Jerome Sutton et al.* (2 Crim. B195337)

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 September 5, 2008, I served the within PETITION FOR REVIEW ON BEHALF OF APPELLANT MICHAEL JEROME SUTTON in said action, by placing a true copy thereof in each of nine 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)

Jennifer L. Peabody, Esq.
Marilee Marshall & Associates, Inc.
523 West Sixth Street, Suite 1109
Los Angeles, California 90014

(Counsel for Coappellant, Willie J. Jackson)

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)

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 5th day of September, 2008, at Thousand Oaks, California.

William L. Heyman

WILLIAM L. HEYMAN
Attorney at Law