IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JEROME SUTTON et al.,

Defendants and Appellants.

S166402

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

APPELLANT SUTTON'S REPLY BRIEF ON THE MERITS

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Appellant, Michael Jerome Sutton, files the following brief in reply to answer brief on the merits ("AB"):

STATEMENT OF THE CASE

The reversal and remand as to sentencing on enhancements was not, as respondent indicates (AB 5), limited to prior prison term enhancements (Opn., at pp. 21, 24).

ARGUMENT

I.

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

A. The Trial Court Did Not Properly Exercise Its Discretion in Finding Good Cause

1. On Continuing a Felony Trial Beyond the 60-Day Limit

Penal Code section 1382[1] does not actually provide that a defendant must be brought to trial in certain cases, as respondent indicates (AB 7); it provides that the court shall order the action to be dismissed when a defendant is not so brought to trial. (§ 1382, subd. (a)(2).)

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

2. The Trial Court Did Not Properly Find Good Cause to Continue Jackson's Trial Despite His Objection

Appellant argues that good cause was not shown to trail or continue Jackson's trial. (Appellant's opening brief on the merits on behalf of appellant, Michael Jerome Sutton ("Sutton OB") 22) Respondent contends that the trial court properly exercised its discretion in finding good cause when Jackson's counsel moved to continue the trial in this case because of his unanticipated need to defend another client in a trial that lasted longer than he expected, that had the trial court inquired about substituting appointed counsel, the delay would likely have been longer than it was, and that this Court's precedent permits a brief continuance due to an attorney's longer-than-expected trial. (AB 8-13) Respondent's contentions are meritless, as shown in Sutton OB and below.

Respondent's contention that trial counsel for codefendant Willie Jackson ("Jackson") had an unexpected need to defend another client in a trial (AB 8) is incorrect, because on September 12, 2006, day 53 of 60,when this matter was called for trial, as previously scheduled, Jackson's trial counsel ("Jackson's counsel") was not engaged in another trial, and Jackson's counsel was aware of his potential future conflicting commitment. (1CT 75, 102; 1st ART[2] A-14-A-15) Respondent is focusing on the pretrial hearing on day 60 of 60, but this was a continuing situation that had begun earlier.

Respondent cites *People v. Johnson* (1980) 26 Cal.3d 557 ("*Johnson*"), 570 for respondent's contention that unexpected unavailability of counsel constitutes good cause to continue a trial (AB 10), but this Court in *Johnson* cited certain cases in support of its statement about unforeseen

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[2] As used herein (and in Sutton OB), "1st ART" means the augmented reporter's transcript filed in the Court of Appeal on May 2, 2007.

circumstances, which it summarized as involving illness of codefendant, absence of witnesses, illness of witness, and illness of judge. (*Johnson* at p. 570, fn. 15.) No case was cited for unexpected illness or unavailability of counsel. (*Ibid.*) Clearly, *Johnson* did not consider engagement of counsel in trial for another client to constitute unexpected unavailability of counsel. (*Johnson* at pp. 570-572.)

Respondent states that this Court later reaffirmed this exception involving the unexpected unavailability of counsel, citing *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 969. (AB 10) However, *Stroud* involved the question whether section 861 was violated by a one-day postponement when the magistrate interrupted the defendants' preliminary examination to attend a meeting in another city. (*Stroud v. Superior Court*, *supra*, 23 Cal.4th at p. 968.) The court stated that scheduling conflicts arising from exceptional circumstances, i.e., unique and nonrecurring events, may sometimes justify particular delays, citing *Johnson* at p. 571 and *Rhinehart v. Municipal Court* [(1984) 35 Cal.3d. 772,] 782. (*Stroud v. Superior Court*, *supra*, 23 Cal.4th at p. 969.) *Johnson* was quoting an American Bar Association document that referred to a situation "when certain unique, nonrecurring events have produced an inordinate number of cases for court disposition." (*Johnson* at p. 571, internal quotation marks and citation omitted.) *Rhinehart* involved a situation in which the trial court was not prepared to commence trial for at least three or four court days after jury selection, the issue was whether the trial court's congested calendar constituted good cause for avoiding section 1382's time limits, and this Court stated that "[c]ourt congestion will constitute good cause only when the congestion is 'attributable to exceptional circumstances,'" citing see *Johnson* at pp. 571-572. (*Rhinehart v. Municipal Court*, *supra*, 35 Cal.3d at p. 782, fn. omitted.) So *Stroud* was not talking about unexpected unavailability of counsel, nor were either of the cases

Stroud cited as indicated above.

Contrary to respondent's assertion (AB 11), the delay in this case was not based on what this Court referred to in *Johnson* as "unforeseen circumstances." (*Johnson* at p. 570 & fn. 15.) Any trial may run longer than anticipated, for various reasons. All trial counsel and trial judges with any experience must know this; and when it happens, it does not constitute an unexpected unavailability of counsel; it may even be routine.

This Court in *Johnson* did not limit its attention to "excessive public defender caseloads" (*Johnson* at p. 571), as respondent seems to indicate. (AB 11) This Court endorsed the view that the state or its officers includes those whom the judges assign to represent indigent defendants, and this Court stated that a defendant's right to a speedy trial may be denied by failure to provide enough public defenders or appointed counsel. (*Johnson* at p. 571.) Jackson's counsel was appointed. (E.g., 1CT 4, 67.)

The trailing on September 15, 2006 was not on "Jackson's motion" (AB 11), it was on Jackson's counsel's motion (2d ART 3-5).[3]

Respondent contends that the delay in the completion of Jackson's counsel's other trial was "unexpected" (AB 11-12), that that trial was "unexpectedly lengthy" (AB 12), and that there were "unforeseen circumstances" (AB 13), but statements made in court in this case create doubt as to how unexpected and unforeseen the delays and the length were. As respondent notes (AB 11), Jackson's counsel stated on Monday, September 18, 2006, day 59 of 60, "I don't go back today until 1:30." (2d ART 7) That was something that Jackson's counsel must have known at least the previous Friday. And on Tuesday, September 19, 2006, day 60 of 60, Jackson's counsel

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[3] As used herein (and in Sutton OB), "2d ART" means the augmented reporter's transcript filed in the Court of Appeal on July 5, 2007.

stated that "my trial is dark today" (2d ART 11), which he must have known at some point earlier would happen. He also stated at that point that there was no possibility that he would be done the following morning, and that they were due back the following day at 1:45. (2d ART 11)

That Jackson's counsel apparently originally anticipated that the other trial would last only two days (2d ART 16; see AB 12) does not bring the fact that that trial lasted well beyond two days into the realm of an unforeseen circumstance of the sort *Johnson* referred to (*Johnson* at p. 570 & fn. 15). Jackson's counsel and the trial court must have known that once the other trial began, any number of common contingencies could come up that would cause that other trial to drag on, such as unanticipated testimony that might require rebuttal witnesses, or the jury's having difficulty reaching a unanimous verdict.

Respondent contends that Jackson's counsel was not attempting to manage his calendar by prioritizing other cases over Jackson's case. (AB 12) However, on September 12, 2006, when this case was called for trial, trial in the other case had not begun. (1st ART A-15; 1CT 102) Jackson's counsel at that time had three other trials "coming before this one." (1st ART A-15)

The granting of a continuance referred to in *Johnson* if it is not feasible to protect the defendant's speedy trial right by substitution of counsel (AB 12) does not necessarily end the matter; as this Court pointed out, a subsequent motion to dismiss may result in a dismissal. (*Johnson* at pp. 572-573.)

Respondent contends that there was no feasible alternative to Jackson's counsel. (AB 13) However, the trial court could have, and should have, investigated the matter and appointed other counsel for Jackson on September 18, 2009, or earlier, especially given that this case had been previously dismissed. (See *Johnson* at pp. 572-573.) Substitute appointed counsel could have been ready quickly, because this was a simple case, involving an undercover police narcotics buy of a third of a gram of substance and the

finding of less than a gram of additional substance in the consequent search of appellant, in an incident that took only a few minutes, where there were no prosecution witnesses unconnected with the police department or the sheriff's department and there were no witnesses for the defense except Jackson and appellant. (See, e.g., Sutton OB 4-6 and citations to the record therein; see also, e.g., 1RT master index, 65, 67-69, 154-155, 201; and see *Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, 982.) Thus, Jackson's defense consisted primarily of cross-examination, which could have been done on the basis of the police report, the preliminary hearing examination, any investigator's reports, any notes or other writings by Jackson's counsel, and a discussion with Jackson's counsel. Jackson testified against Jackson's counsel's advice (1RT 209-210), so presumably not much preparation by counsel would be required for that.

Therefore, there was not good cause to continue Jackson's trial.

3. Jackson's Counsel's Trial Conflict Did Not Constitute Good Cause to Continue the Trial as to Appellant

Appellant argues that there was not good cause as to appellant for the delay, on the basis of four cases, *Johnson*, *Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884, *People v. Escarcega* (1986) 186 Cal.App.3d 379, and *Arroyo v. Superior Court* (2004) 119 Cal.App.4th 460 (Sutton OB 9-18), and that section 1050.1 is inoperative and inapplicable (Sutton OB 19-29). Respondent contends that because there was good cause to continue Jackson's trial (which appellant disputes—see, e.g., part IA2 of this argument, *ante*), there was good cause to continue appellant's trial, relying on section 1050.1 and what respondent argues is the strong legislative preference for joinder. (AB 14-21) Those contentions of respondent's, as well, are meritless, for the reasons set forth in Sutton OB and below.

Respondent contends that under section 1050.1, a continuance granted for good cause to a defendant in a multiple defendant case constitutes good cause to continue the trial for the codefendants (AB 14), but respondent omits the requirement of a motion of the prosecuting attorney. (§ 1050.1.)

Respondent contends that *In re Samano* (1995) 31 Cal.App.4th 984, illustrates how good cause for one codefendant is good cause for another codefendant. (AB 15) However, in that case, as respondent points out, the prosecutor moved, pursuant to section 1050.1, for a continuance of the preliminary hearing as to all 33 defendants. (*In re Samano*, *supra*, 31 Cal.App.4th at p. 988.) Furthermore, the continuance the two attorneys sought was for the benefit of their clients in that case, in that the discovery provided by the prosecutor (16,000 pages of documents and 100 audiotapes) was too voluminous for the attorneys to adequately prepare for the preliminary hearing in the time allotted. (*Ibid.*) The problem was a situation peculiar to preliminary hearings, in that section 859b allowed the continuation of the preliminary hearing beyond the 10-day limit for good cause but required that the defendant in that event be released on his own recognizance; and in that case, the two defendants who sought such release presented a significant flight risk and had bail of $300,000 and $250,000. (*Id.* at pp. 990, 992.) The reviewing court found that joinder at a preliminary hearing should be controlled by the following reasoning:

> "'[I]f 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 [in custody] defendant.'"

(*Id.* at page 992, quoting *Greenberger v. Superior Court* [(1990)] 219 Cal.App.3d [487,] 501, fn. omitted.) So *In re Samano*, unlike this case, involved a prosecutorial motion pursuant to section 1050.1, good cause (the

need to adequately prepare for the preliminary hearing), and no engagement in trial for another client.

Respondent cites *Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 733-734, in connection with section 1382. (AB 15) The pages so cited do not refer to section 1382, but in those pages the reviewing court, inter alia, questioned the result reached by the *Samano* majority and stated:

> "While we are mindful of the benefits a single trial of properly joined defendants can produce, those benefits should not trump a defendant's speedy trial rights, guaranteed by the California Constitution and effectuated by the absolute language of section 859b."

(*Ramos v. Superior Court*, *supra*, 146 Cal.App.4th at pp. 733-734.)

Respondent contends that because the 60-day rule of section 1382 contains a good-cause exception, the trial court may continue a trial for both defendants beyond the 60 days, under section 1050.1 (AB 15), but respondent has there omitted the requirement in section 1050.1 that the prosecutor make a motion. (§ 1050.1)

Respondent asks this Court in effect to find that there was an implied motion or to excuse the lack of an explicit motion under section 1050.1. (AB 15) Appellant opposes any such act, for the reasons set forth at Sutton OB 26 (and footnote 8), 27, and 28, and because the Court of Appeal found that the prosecutor did not make a motion under section 1050.1 (Opn., at p. 13).

Respondent contends that to require that the prosecutor make a motion under section 1050.1 would be to require a "useless act," citing *Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 656. (AB 15-16) But in *Youngblood* it was the enactment of a certain statute that this Court stated would be rendered "a futile and useless act" insofar as it purported to bear upon a certain power of a certain governing body, under the plaintiffs' narrow

construction of the statute. (*Id.* at pp. 655-656.) So, on the basis of *Youngblood*, it is the adoption of section 1050.1 that would be a rendered a futile and useless act insofar as it requires a prosecutorial motion, if this Court were to dispense with the need for a such a motion under that section.

Respondent refers to a legislative intent that good cause be automatic in this situation. (AB 16) However, under the express language of section 1050.1, it is only when the prosecuting attorney makes a motion that there is good cause to continue the remaining defendants' cases (§ 1050.1), and there does not appear to be any indication of any legislative intent to the contrary. (See *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227 [the statutory language "generally is the most reliable indicator of legislative intent"].)

Respondent cites the above *Allen* case (AB 16) for the proposition that any interpretation that would lead to absurd consequences is to be avoided. (*Allen v. Sully-Miller Contracting Co.*, *supra*, 28 Cal.4th at p. 227.) However, a bit earlier in the same paragraph in that case, this Court stated:

> "We give the language its usual and ordinary meaning, and '[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the statute governs.' [Citation.]"

(*Ibid.*) There is no ambiguity in the language in section 1050.1 requiring a motion by the prosecuting attorney. Thus, it must be presumed that the legislative intent was that a motion by the prosecuting attorney must be made for there to be good cause to continue the remaining defendants' cases.

Respondent states that when appellant made his motion for dismissal, the prosecutor noted that the People had previously announced ready, and respondent argues that the prosecutor's opposition to appellant's dismissal motion after the 60-day period had passed was a "further" confirmation of the

prosecutor's intent to maintain the joint trial. (AB 16) However, neither announcing ready when the matter was trailed nor opposing appellant's dismissal motion after the 60-day period had passed is confirmation of an intent prior to the expiration of the 60-day period to maintain a joint trial. The prosecutor's announcing ready means at most that the People are ready to proceed to trial. (See *People v. Allan* (1996) 49 Cal.App.4th 1507, 1518.)

Respondent contends that because there was good cause to continue as to Jackson, there was necessarily good cause as to appellant under the first sentence of section 1050.1. (AB 16) However, there was not good cause to continue as to Jackson (see, e.g., part IA2 of this argument, *ante*), and even if there were, that would not constitute good cause as to appellant in the absence of a motion by the prosecuting attorney (§ 1050.1).

Respondent's reliance on the second sentence of section 1050.1, relating to severance (AB 16), is misplaced, because appellant did not move to have his case severed from Jackson's case. (1st ART A-1-A-18; 2d ART 1-29; 1RT 1-7)

Respondent's assertion that the Court of Appeal found that the prosecutor made no "explicit" motion under section 1050.1 (AB 16) is incorrect; the Court of Appeal found that the prosecutor "did not make a motion" under section 1050.1. (Opn., at p. 13.)

Respondent refers to "a constitutional mandate for joint trials" (AB 17), but there is no such mandate. Article I, section 30, subdivision (a) of the California Constitution provides that that constitution shall not be construed by the courts "to prohibit" certain joinder.

Respondent cites *Greenberger v. Superior Court*, *supra*, 219 Cal.App.3d at p. 501, in support of respondent's contention that the joint trial preference can also constitute good cause to delay a trial beyond the statutory deadline. (AB 18) But in *Greenberger*, the reviewing court stated:

> "[I]f 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."

(*Ibid.*, fn. omitted.) In the instant case, the precipitating cause for the trial delay was not justifiable; it was Jackson's counsel's conflicting obligations to another client; and thus section 1098 did not provide good cause to delay appellant's trial.

Respondent cites *People v. Teale* (1965) 63 Cal.2d 178, 186, reversed on other grounds in *Chapman v. California* (1967) 386 U.S. 18, [26], [87 S.Ct. 824, 17 L.Ed.2d 705], and *Hollis v. Superior Court* (1985) 165 Cal.App.3d 642, 646, in support of the proposition that where a continuance is granted to a codefendant upon a finding of good cause, the rights of the other jointly charged defendants are generally deemed not to have been prejudiced. (AB 18) However, those cases are distinguishable. *Teale* and *Hollis* are distinguished at Sutton OB 34 and 35, respectively. Also, *Teale* cited for that proposition *People v. McFarland* [(1962)] 209 Cal.App.2d 772 and *Ferenz v. Superior Court* [(1942)] 53 Cal.App.2d 639. *Ferenz* is distinguished at Sutton OB 34. In *McFarland*, the defendant twice waived the 60-day limitation (*People v. McFarland, supra*, 209 Cal.App.2d at p. 775), he was in prison on an unrelated matter (*ibid.*), there is no indication that his codefendant's counsel was appointed (*id.* at pp. 775-778), and during the 10-day period after the expiration of the last continuance the defendant consented to, a further continuance was granted at the request of the district attorney (*id.* at p. 775). *McFarland* was distinguished in *Sanchez v. Superior Court*, *supra*, 131 Cal.App.3d at pp. 892-893.

Respondent asserts that the added burden on the court system in conducting two separate trials would have been significant (AB 19), but the

Court of Appeal did not appear to think so in its original, superseded opinion in this matter filed March 26, 2008. (See superseded opn., at p. 11.) The case respondent cites in support of that proposition (AB 19), *People v. Lawrence* (Apr. 30, 2009, S160736) ___ Cal.4th ___, 92 Cal.Rptr.3d 613, involved a consideration of the totality of the circumstances surrounding the defendant's midtrial request to revoke his in propria persona status and the balancing of certain factors, none of which, of course, included a speedy trial right. (*Id.* 92 Cal.Rptr.3d at pp. 616, 618-621.)

Johnson is not inapplicable, as respondent contends (AB 19), because *Johnson* set forth general principles that were held in *Sanchez v. Superior Court*, *supra*, 131 Cal.App.3d at p. 890, to apply where the delay beyond the statutory period is caused by the unavailability of appointed counsel for a codefendant rather than the defendant's own counsel.

Respondent attempts to distinguish *Arroyo v. Superior Court*, *supra*, 119 Cal.App.4th 460, on the basis that the sole reason for the continuance in *Arroyo* was to maintain joinder (AB 19), but, notwithstanding that in *Arroyo* the codefendant's counsel was not engaged in another trial, *Arroyo* was considering the issue whether the statutory preference for joint trials trumps a defendant's statutory right to a speedy trial (*id.* at pp. 465-466), and thus *Arroyo* is pertinent.

Respondent also asks this Court to disapprove *Arroyo* to the extent that it relied on the "extraordinary circumstances" standard in *Sanchez* and *Escarcega*, on the ground that that standard runs afoul of article I, section 30, subdivision (a) of the California Constitution, added by Proposition 115 in 1990. (AB 20) Respondent relies on *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 12[85] (AB 20), in which the petitioner challenged the granting of the People's motion to consolidate two murder cases for trial on the ground that joinder would result in substantial prejudice to him. (*Id.* at p.

1281.) The court in *Belton* held in part that the voters, through the above constitutional provision and section 954.1, also added by Proposition 115, did not abrogate existing California case law limiting joinder. (*Id.* at pp. 1284-1285.) Joinder was not in issue in *Escarcega* (*People v. Escarcega, supra*, 186 Cal.App.3d at pp. 385-388). Although *Sanchez* did involve the question of the conflict between the statutory speedy trial right and the statutory preference for joinder (*Sanchez v. Superior Court, supra*, 131 Cal.App.3d at pp. 886-887), and the reviewing court did refer to the defendant's state constitutional right to a speedy trial in connection with requiring a showing of exceptional circumstances (*id.* at p. 893), this was done in the context of a statute, section 1382 (e.g., *id.* at p. 889), and the absence of "exceptional circumstances" was only the second ground on which the court in *Sanchez* rested its holding, the other being its reliance on *Johnson* (*Sanchez v. Superior Court, supra*, 131 Cal.App.3d at pp. 893). Respondent is not arguing that section 1382 is unconstitutional, and respondent acknowledges that the mandate for joint trial has not been absolute (AB 18). The above constitutional provision relates to the *prohibition* (that is, the forbidding or prevention) of "the joining of criminal cases as prescribed by the Legislature or by the people through the initiative process" (Cal. Const., art I, § 30, subd. (a)), not to the subordination of joinder to a defendant's statutory speedy trial right. In this case, appellant did not make a motion to sever. (1st ART 14-18; 2d ART 1-29; 1RT 1-8.)

Respondent contends that holding there was no good cause for the non-moving defendant would create inappropriate incentives in a joint trial for defense counsel, who potentially could force an unwarranted severance by agreeing the defendants insist on being tried within 60 days and one counsel ensuring he is engaged in another matter on day 60, and, if the case were dismissed and refiled, engaging in the same conduct on a later occasion. (AB 20-21) But attorneys are officers of the court (*Holloway v. Arkansas* (1978)

435 U.S. 475, 486 [98 S.Ct. 1173, 55 L.Ed.2d 426]; *People v. Mattson* (1959) 51 Cal.2d 777, 793), and "the court should start with the presumption that, unless proven otherwise, lawyers will behave in an ethical manner" (*DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 834). Also, any such deliberate conduct presumably would be grounds for denial of the motion to sever. (See *Johnson* at p. 573, fn. 17.)

Thus, Jackson's counsel's trial conflict did not constitute good cause to continue the trial as to appellant.

4. This Court Should Not Reexamine *Johnson*

Respondent contends that this Court should replace *Johnson*'s dismissal solution with a rule that balances and protects all parties' interests, in part because *Johnson* has proven to be a difficult standard for trial courts to apply, one that encourages defense counsel to play the "speedy trial game" of making themselves unavailable in order to produce a dismissal. (AB 21) Appellant contends that the potential problems with *Johnson* that respondent discusses have not come to pass and thus there is no need to reexamine *Johnson*.

Respondent cites *People v. Marshall* (1997) 15 Cal.4th 1, 22, in connection with respondent's above "speedy trial game" contention. (AB 21 & fn. 7.) However, as respondent indicates (AB 21, fn. 7), this Court in *Marshall* was discussing what it noted has been called the "*Faretta* game" (*People v. Marshall*, *supra*, 15 Cal.4th at p. 22), played by "clever defendants." Those defendants are criminals or people accused of crime. In contrast, the issue in the instant case relates to appointed counsel, officers of the court (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 486; *People v. Mattson*, *supra*, 51 Cal.2d at p. 793), and it should be initially presumed that, unless proven otherwise, they will behave ethically (*DCH Health Services Corp. v. Waite*, *supra*, 95 Cal.App.4th at p. 834). Furthermore, section 1050,

subdivision (a) imposes a duty on all counsel, both the prosecution and the defense, to expedite proceedings in criminal cases to the greatest degree that is consistent with the ends of justice. (§ 1050, subd. (a); *Johnson* at p. 573, fn. 17.)

> "It would therefore be improper for appointed counsel deliberately to overbook his calendar or otherwise conduct himself so as to delay trial and thereby secure a dismissal of the charges against his client; such deliberate delay, because undertaken for the benefit of the defendant, would constitute good cause to deny a motion to dismiss."

(*Johnson* at p. 573, fn. 17.)

Respondent refers to the problem presented to this Court in *Johnson* as relating to deputy public defenders. (AB 22) While *Johnson* did involve a defendant who was represented by the public defender (*Johnson* at p. 563), this Court in *Johnson* referred to "appointed counsel" (e.g., *Johnson* at p. 569 ["the congested calendar of appointed counsel"] and p. 571 ["[t]he right [to a speedy trial] may also be denied by failure to provide enough public defenders or appointed counsel"]), and thus it is clear that this Court in *Johnson* was not limiting its concern to congestion in the public defender's office.

Respondent contends that this Court in *Johnson*, to solve the conflict of interest that was resulting from excessive caseloads, "turned to the speedy trial statute" (AB 22-23), as though that were a solution initiated by this Court. However, of course, it was the defendant in *Johnson* who raised a statutory speedy trial claim in the trial court and claimed on appeal that he was denied his statutory right to a speedy trial. (*Johnson* at pp. 564-565.)

Respondent asserts that no state court outside of California has followed *Johnson*'s solution, but respondent cites no authority for that assertion. (AB 23) Likewise, respondent contends that *Johnson*'s solution

stands alone (AB 24), citing in support of that contention only a 1982 Colorado case and a 1985 Massachusetts case (both discussed below) (AB 24, fn. 11).

Respondent cites seven cases in support of respondent's contention that several states have held that counsel can delay statutory speedy trial rights in order to resolve a calendar conflict. (AB 23-24 & fn. 10) However, those cases are not so clear cut, as will be shown.

In *People v. Eddington* (1978) 64 Ill.App.3d 650 [381 N.E.2d 835], notwithstanding the court's statement quoted by respondent (AB 24, fn. 10), it appears that the defendant did not object to the continuance; he presented evidence that he was not present and did not join in the motion. (*Eddington, supra*, 381 N.E.2d at p. 837.) Under Illinois decisional law, the defendant was bound by his counsel's consent and agreement to the continuance of his case, even though this request was made in the defendant's absence. (*Ibid.*)

Omitted from respondent's summary (AB 24, fn. 10) of *State v. Sims* (2006) 272 Neb. 811, 814-815 [75 N.W.2d 175], is that the continuance was requested by counsel on the basis that he would need more time to prepare to cross-examine the codefendant upon learning that the codefendant (who, on the day before the date scheduled for trial, entered into a plea agreement) was going to testify against the defendant. (*Id.* 75 N.W.2d at p. 180.) The applicable statute provided that a period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel was excluded from the speedy trial calculation. (*Id.* 75 N.W.2d at p. 184.) The date on which trial commenced was the earliest practicable date given counsel's and the judge's schedules that had been established well before the unexpected motion to continue. (*Id.* 75 N.W.2d at pp. 184-185.)

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The opinion in *State v. Eager* (Ohio Ct. App., Feb. 19, 1998, No. 07 APA 08-1007) 1998 WL 67015, *3, does not appear to contain the quotation set forth for it (AB 24, fn.10); that opinion related to whether the trial court erred when it denied the defendant's petition for post-conviction relief (apparently concerning an allegation that a tape had been tampered with) without conducting an evidentiary hearing. (*Eager*, *supra*, 1998 WL 67015 at *1, *2.)

In *State v. Karlen* (1999 SD 12) 589 N.W.2d 584 (AB 24, fn. 10), there was no indication that counsel was appointed or that the defendant objected to the continuance. (*Karlen*, *supra*, 589 N.W.2d at pp. 596-599.)

In *State v. George* (1984) 39 Wash.App. 135 [692 P.2d 219] (AB 24, fn. 10), counsel waived the speedy trial rule for a specified number of days, by filling in blanks in a certain order, which the juvenile signed earlier without completing the blanks; the reviewing court found that the juvenile implicitly authorized his attorney to take whatever action he deemed appropriate on the juvenile's behalf in the final execution of that order. (*George*, *supra*, 692 P.2d at pp. 220, 225.) Also, there is no indication that the juvenile's counsel was appointed (*id.*, *passim*), and the juvenile was not in custody (*id.* at p. 220).

In *Farinholt v. State* (1984) 299 Md. 32, 39-40 [472 A.2d 452] (AB 24, fn. 10), the defendant personally consented to the critical postponement, which was for his own benefit (the defendant's attorney wished to call as a witness the codefendant, who had been granted a separate trial and would not testify until he had been sentenced) (*Farinholt*, *supra*, 472 A.2d at pp. 453-454), and there is no indication that the defendant's trial counsel was appointed (*id.*, *passim*).

In *State v Zuck* (1982) 134 Ariz. 509 [658 P.2d 162] (AB 24, fn. 10), there was no mention of the reason or reasons for the continuances. (*Zuck*, *supra*, 658 P.2d at pp. 167-168.) *Zuck* relied on *State v. Kelly* (1979)

123 Ariz. 24 [597 P.2d 177], in which the delay resulted from counsel's moving for a mental examination of the defendant (*id.* 597 P.2d at p. 178). *Kelly* in turn relied on *State v. Adair* (1970) 106 Ariz. 62 [470 P.2d 675], in which the continuance was requested by counsel appointed the day before trial, who sought more time to prepare the defense (*id.* 470 P.2d at pp. 672-673). *Zuck* also relied on *State v. Killian* (1978) 118 Ariz. 408 [577 P.2d 259], in which counsel sought continuances to interview material witnesses he had recently learned of or not been able to interview because of recent incidents of violence where they were incarcerated (*id.* 577 P.2d at pp. 260-261).

In *State v. LeFlore* (Iowa 1981) 308 N.W.2d 39, 41 (AB 24, fn. 10), although the defendant did not expressly consent to waiver of his speedy trial right, there is no indication that he objected to it or that he refused to sign the waiver form counsel presented to him or that he made any statement in connection with not signing the waiver form. (*Id.* at pp. 40-41.) Therefore, it is not clear from *LeFlore* that the law in Iowa is substantially different from that under *Johnson*.

As for the two cases cited in support of respondent's contention that *Johnson* stands alone (AB 24, fn. 11):

Although the reviewing court in *People v. Chavez* (Colo.App.1982) 650 P.2d 1310, in a split decision by a three-judge panel, declined (*id.* at p. 1311) to follow *Johnson*, the facts appear to indicate that the defendant was incarcerated on another matter, because at the critical time, he was confined in the Colorado State Penitentiary (*id.* at p. 1310), which would lessen the basis for the rule in *Johnson*, which expressed concern for the defendant incarcerated in the present matter (see *Johnson* at p. 569 & fn 11). The dissenting judge in *Chavez* viewed the statute and rule as requiring an express waiver or some conduct by the defendant himself that would constitute such a waiver. (*People v. Chavez*, *supra*, 650 P.2d at p. 1312, dis. opn. of

Pierce, J.) The majority in *Chavez* found dispositive (*Chavez* at p. 1311) *People v. Anderson* (Colo.App. 1982) 649 P.2d 720, but in *Anderson* the continuance in question was held to be for good cause, in that counsel's unanticipated military obligations made adequate trial preparation impossible. (*Id.* at pp. 722-724.)

In *Commonwealth v. McCants* (1985) 20 Mass.App. 294 [480 N.E.2d 25], the defendant took the position on appeal that continuances acceded to by counsel are not excludable from the calculation of the 12-month speedy trial period unless the defendant specifically and explicitly consented to the delay or instructed the attorney to obtain it. (*Id.* 480 N.E.2d at pp. 26, 28.) The reviewing court noted that the defendant did not complain that he was "left in the dark" (i..e., apparently, not informed by his counsel about continuances and the reasons for them) and stated in part:

> "[A]n informed defendant cannot expect to accept the lawyer's services, refrain from signaling dissatisfaction, and be able to contend later that he should not be bound by selected representations that the lawyer has made."

(*Id.* 480 N.E.2d at p. 29.) The reviewing court also stated in part that when a defendant has failed to object to delays, he will be held to have acquiesced to them for purposes of the speedy trial rule. (*Id.* 480 N.E.2d at p. 26.) So *McCants* is really not substantially different from *Johnson* (see *Johnson* at pp. 561, 567).

Respondent refers to Justice Richardson's concern in his dissenting opinion in *Johnson* about a possible decline in plea bargains (AB 25), but respondent does not cite any statistics to indicate that such a decline has happened. It appears that the vast majority of felony cases in this state are still resolved by plea bargains. For example:

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> "In fiscal year 2000-2001, of the total number of felony dispositions consisting of felony convictions, less than 5 percent followed a trial by the court or by a jury."

(*In re Chavez* (2003) 30 Cal.4th 643, 654, fn. 5, citing Judicial Council of Cal., Court Statistics Rep., Statewide Caseload Trends, 1991-1992 Through 2000-2001 (2002) pp. 51-53.)

Justice Vogel's invitation, in footnote 8 on page 1128 of *People v. Superior Court (Alexander)* (1995) 31 Cal.App.4th 1119, to this Court to reconsider *Johnson* (AB 25) has not been referred to in any California case in the 14 years since *Alexander* was decided. The presiding justice dissented from the views expressed in that footnote, stating in part: "I cannot endorse relieving court congestion at the expense of defendant's speedy trial rights." (*Alexander* at p. 1136, conc. & dis. opn. of Woods (A.M.), P.J.) Furthermore, defense counsel in that case did not request a continuance, and he announced ready three times during the 60-day statutory period. (*Alexander* at pp. 1123-1126.) The case related to the legality of the court's case management policy which led to the dismissal order. (*Id.* at pp. 1122, 1127.)

Presiding Justice Lillie's dissent in *Gomez v. Municipal Court* (1985) 169 Cal.App.3d 425, 435, 439-441(AB 25) was based on her conclusion that there was no abuse of judicial discretion in the denial of the motion to dismiss, because *Johnson* did not control, in that (in part) it is limited to the in-custody defendant (*Gomez, supra*, 169 Cal.App.3d at pp. 436-437, dis. opn. of Lillie, P.J.). The defendant in *Gomez* was released on his own recognizance on the day he was arraigned. (*Gomez, supra*, at p. 427.) Also, Presiding Justice Lillie did not state that what the public defender did in that case made "a mockery of our system of justice" (AB 25), she stated that the result reached in the majority opinion "opens the way for abuse that makes a mockery of our system of justice." (*Gomez, supra*, at p. 441, dis. opn. of Lillie, P.J.) However, there

is no indication that there has been such abuse.

Justice Richardson's prediction that the majority's holding in *Johnson* would give rise to wholesale dismissal of criminal cases (*Johnson* at pp. 583-585, conc. & dis. opn. of Richardson, J.) (AB 26) has obviously not been borne out; if respondent had statistics showing a sizable number of cases had been dismissed by application of the speedy trial rule, respondent surely would have presented those statistics. In any event, it is presumably likely that most cases that are so dismissed are simply refiled, and that it is only the rare case, like this one, in which a second dismissal is involved. Justice Richardson also stated in part that the majority acknowledged that the Legislature might at any time "revise section 1382 to increase the permissible pretrial time period, and in the wake of the majority opinion, it may well do so." (*Johnson* at pp. 584-585, conc. & dis. opn. of Richardson, J.) Yet in the 29 years since *Johnson*, the Legislature has not done so.

Respondent has conjured up a straw man and, while asking this Court to "refine" *Johnson*, is really asking this Court to jettison *Johnson* and to return to *Townsend v. Superior Court* (1975) 15 Cal.3d 774, which this Court limited in *Johnson* (*Johnson* at pp. 566, 567 & fn. 8, 568, 572-573).

As to *New York v. Hill* (2000) 528 U.S. 110 [120 S.Ct. 659, 145 L.Ed.2d 560] (AB 26), under the statute in question in that case, the Interstate Agreement on Detainers, if the defendant is not brought to trial within the applicable statutory period, the indictment must be dismissed with prejudice (*id.* at p. 112), unlike section 1382, which allows the case to be refiled once in most instances and twice in certain situations. Also, the court concluded that certain language in the Interstate Agreement on Detainers, to the effect that when counsel seeks a continuance the prisoner need not be present, contemplated that scheduling questions may be left to counsel. (*New York v. Hill*, *supra*, 528 U.S. at p. 115.) Section 1382 contains no such language. The

court also pointed that the would-be defendant is already incarcerated in another jurisdiction. (*New York v. Hill*, *supra*, 528 U.S. at p. 117.) That of course in not true in the case at bar. Furthermore, unlike section 1382, the Interstate Agreement on Detainers' time limits do not apply at all, unless the prisoner or the receiving state files a request, which feature (among others), according to the court, made the defendant's analogy to the federal speedy trial act inapt. (*New York v. Hill*, *supra*, 528 U.S. at p. 117 & fn. 2.)

Respondent's contentions concerning public defender caseload (AB 27-28) are inapposite, because the public defender is not involved in this case. Also, respondent ignores that the trial court was aware a week before the statutory deadline that Jackson's counsel had other cases that might interfere with a timely beginning of trial in this case (1st ART A-15).

In *Vermont v. Brillon* (2009) 129 S.Ct. 1283 (AB 29), which involved the federal constitutional right to a speedy trial (*id.* at p. 1289), the defendant had six different appointed attorneys over a period of almost three years between his arrest and trial (*id.* at p. 1287), and he engaged in deliberate efforts to force the withdrawal of two of the attorneys, absent which no speedy-trial issue would have arisen (*id.* at p. 1292). The high court also held that delay caused by assigned counsel's failure to move the case forward was not attributable to the state. (*Id.* at p. 1291.) It mentioned that delay may be a defense tactic that works to the accused's advantage, in that witnesses may become unavailable or their memories may fade over time. (*Id.* at p. 1290.) Those factors are not in issue here. "[O]ur own Legislature has defined certain time periods beyond which the right suffers infringement and has simplified our court's application of the right." (*Johnson* at p. 563.)

Respondent asks this Court to abandon the rule in *Johnson* that is easy to apply and has not resulted in serious problems and to substitute a vague concept of allowing "reasonable delays," which may well result in extensive

litigation. In most cases involving claimed violation of the statutory speedy trial right, the defendant will be unable to show prejudice; it will presumably be the unusual case in which, as in this case, a dismissal will preclude further prosecution. And in such a case, court and counsel can give special attention to securing a speedy trial (see *Johnson* at p. 573). Also, there should not be a problem in serious cases, where continuances are likely to be for further preparation, and thus for good cause, and the defendant is unlikely to object to them (see, e.g., *People v. Wright* (1990) 52 Cal.3d 367, 382, 390). Thus, *Johnson* should not be reexamined.

B. Appellant Has Shown Prejudice

Appellant argues that he has shown prejudice, in that, because this case had been once dismissed, if this case had been dismissed for violation of appellant's statutory speedy trial right, it could not be refiled, because of section 1387 (Sutton OB 29-31). Appellant has referred particularly to the inapplicability of the exceptions in that section's subdivision (a) (Sutton OB 30). Also, as respondent concedes (AB 30, fn. 15), the exception in that section's subdivision (c)(1) does not apply. And none of the other exceptions in that section apply. Nonetheless, respondent contends that appellant has not shown "actual" prejudice and should be required to do so. (AB 30-35) Appellant disagrees.

Respondent contends, apparently (AB 31), that because this Court in *People v. Wilson* (1963) 60 Cal.2d 139, 153, fn. 5 referred only to a misdemeanor prosecution in which the erroneous denial of a motion to dismiss on the ground of violation of a statutory speedy trial right would be rendered prejudicial by section 1387, there should be no such finding of prejudice where a felony prosecution is involved. However, as respondent points out (AB 32), before 1975, felony charges could be refiled ad infinitum. (*Burris v. Superior*

Court (2005) 34 Cal.4th 1012, 1019.) That undoubtedly accounts for the omission from *Wilson* of reference to a felony prosecution that has already been dismissed as also being rendered prejudicial by section 1387. In *Johnson*, which was decided five years after 1975 and which involved a felony prosecution, this Court indicated that prejudice would be shown if the case were one in which a dismissal would itself have barred refiling. (*Johnson* at p. 574.)

Respondent also contends that because felonies cause greater harm than misdemeanors, a defendant raising a statutory speedy-trial-right violation in a felony post-conviction appeal should have to affirmatively demonstrate some form of "individual" prejudice, as is required in showing a violation of the constitutional speedy trial right. (AB 31) But such a requirement would eviscerate the statutory speedy trial right, because hardly any defendant would ever be able to demonstrate prejudice under that standard. Where the delay is only a matter of days, as in this case, it would be a vanishingly rare case in which the defendant could demonstrate that, for example, a crucial defense witness because unavailable or suffered memory decay, or exonerating evidence disappeared. If the delay were sufficiently long that prejudice of that sort could be shown, the defendant would be in the area of a constitutional violation, and so the statutory speedy trial right would be hollow, which the Legislature could not have intended.

Respondent contends that the United States Supreme Court has held that a showing of prejudice is necessary to show a violation of a federal constitutional speedy trial right, which can be done in three ways, and cites in support of that proposition *Barker v. Wingo* (1972) 407 U.S. 514, 530-533 [92 S.Ct. 2182, 33 L.Ed.2d 101]. (AB 32-33) However, "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial."

(*Moore v. Arizona* (1973) 414 U.S. 25, 26 [94 S.Ct. 188, 38 L.Ed.2d 183], quoting and citing *Barker v. Wingo*, *supra*, 407 U.S. at p. 533; see *People v. Martinez* (2000) 22 Cal.4th 750, 765-766.) Under federal constitutional law, uncommonly long delay gives rise to a presumption of prejudice, which intensifies over time. (See *Doggett v. United States* (1992) 505 U.S. 647, 651-652, 654-657 [112 S.Ct. 2686, 120 L.Ed.2d 520]; and see *People v. Martinez*, *supra*, 22 Cal.4th at p. 766.)

Respondent appears to contend that California also requires a showing of specific prejudice to prevail on a constitutional speedy trial claim. (AB 33) But a California constitutional speedy trial claim requires a showing of specific prejudice only if the claimed violation is not also a violation of a statutory speedy trial provision; otherwise, no affirmative showing of prejudice is necessary. (*People v. Martinez*, *supra*, 22 Cal.4th at p. 766; see *People v. Harrison* (2005) 35 Cal.4th 208, 227.) When a speedy trial claim is based on statute, it is only when pretrial appellate relief is not sought that prejudice must be shown. (*People v. Martinez*, *supra*, 22 Cal.4th at p. 769, citing *Johnson* at p. 575.)

Respondent contends that this Court should not "formulate" a more stringent prejudice test in a felony case for a statutory speedy trial violation than for a constitutional speedy trial violation. (AB 33) But no formulation is necessary; this Court acknowledged in effect 29 years ago that prejudice in the context of a statutory speedy trial violation is shown if, following dismissal for such a violation, the case could not be refiled. (*Johnson* at p. 574.) And acknowledgment of this type of prejudice goes back even further, to 1963 in *People v. Wilson*, *supra*, 60 Cal.2d 139, acknowledging that prejudice would be shown where, if the motion to dismiss had been granted, the statute of limitations would have barred a new information of indictment for the same offense (*id.* at pp. 152-153), and where, in a misdemeanor prosecution, such

a motion to dismiss were erroneously denied, because under section 1382, further prosecution for the same offense would be barred (*id.* at p. 153, fn. 5).

Because no prejudice whatsoever need be shown if pretrial appellate relief is sought for a claimed statutory speedy trial violation, this Court should not depart from *Wilson* and *Johnson* and require a showing of specific prejudice, by which is meant, apparently, prejudice arising from the delay itself (see *People v. Harrison*, *supra*, 35 Cal.4th at p. 227), such as loss of a defense witness, as opposed to barred-further-prosecution prejudice, simply because trial counsel, although making a motion to dismiss, does not seek pretrial appellate relief. One type of prejudice should be as good as another in this regard.

Therefore, this Court should adhere to the *Wilson/Johnson* formula of prejudice in this type of case and find that because appellant could not have been further prosecuted if his motion to dismiss for violation of his statutory speedy trial right had been granted, appellant has shown that he was prejudiced by the erroneous denial of that motion.

II.

JOINDER

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

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in appellant's opening brief on the merits on behalf of appellant and Jackson's briefs on the merits (to the extent appellant joins in and is permitted to join in same), the Court of Appeal's decision in the Opinion on the speedy trial issue, and the judgment in this case, should be reversed as to appellant.

DATED: May 26, 2009

Respectfully submitted,

William L. Heyman

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Attorney at Law

CERTIFICATE OF NUMBER OF WORDS

Pursuant to California Rules of Court, rule 8.520(c)(1) and (3), I hereby certify, in reliance on the word count of the computer program used to prepare this reply brief on the merits, that the number of words in this appellant's opening brief on the merits (including the footnotes, but excluding the tables and this certificate) is 8,353.

DATED: May 26, 2009

Respectfully submitted,

William L. Heyman

WILLIAM L. HEYMAN
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Michael Jerome Sutton

PROOF OF SERVICE

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

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

On May 26, 2009, I served the within APPELLANT SUTTON'S REPLY BRIEF ON THE MERITS 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:

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

Executed this 26th day of May, 2009, at Thousand Oaks, California.

William L. Heyman

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