SUPREME COURT COPY COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JEROME SUTTON et al., Defendants and Appellants.	S166402 B195337 (Los Angeles County Super. Ct. No. BA304502; Hon. Judith L. Champagne)

APPELLANT JACKSON'S OPENING BRIEF ON THE MERITS

SUPREME COURT
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MICHAEL JEROME SUTTON et al.,	**(Los Angeles County Super. Ct. No. BA304502)**
Defendants and Appellants.	

SPECIFICATION OF ISSUE TO BE BRIEFED

The court's order granting review specified the following issue to be briefed and argued: Were defendants' statutory speedy trial rights violated when defense counsel announced ready but that he might be in another trial, and the court continued trial for six days over defendants' personal objection, and if so, was the error prejudicial?

INTRODUCTION

This court's decision in *People v. Johnson* (1980) 26 Cal.3d 557 (*Johnson* hereafter) provides controlling authority for the circumstances presented by Mr. Jackson's case. *Johnson* prescribed procedures for trial courts to follow when an indigent defendant like Mr. Jackson personally objects to continuing his trial past the 60-day statutory period due to his appointed attorney's engagement in another client's trial. The rules in *Johnson* were adopted to give meaning to an indigent defendant's statutory speedy trial right when his attorney's obligations to another client conflict

with the defendant's rights under Penal Code[1] section 1382. Under *Johnson*, Mr. Jackson's right to trial within 60 days of arraignment was violated when the trial court ignored the procedural requirements of *Johnson* and denied his motion to dismiss under section 1382. The error in denying the motion to dismiss was prejudicial because the charges against Mr. Jackson had been previously dismissed under section 859b.

ARGUMENT

MR. JACKSON'S SPEEDY TRIAL RIGHTS WERE VIOLATED WHEN HE PERSONALLY OBJECTED TO WAIVING TIME TO CONTINUE HIS CASE PAST THE 60-DAY SPEEDY TRIAL PERIOD WHILE HIS APPOINTED ATTORNEY TRIED ANOTHER CLIENT'S CASE, AND THE TRIAL COURT'S ERROR IN DENYING HIS MOTION TO DISMISS WAS PREJUDICIAL BECAUSE THE CASE HAD BEEN PREVIOUSLY DISMISSED

A. The Relevant Procedural History

After a jury trial, appellant Jackson and codefendant Sutton were convicted of selling cocaine base in violation of Health and Safety Code section 11352, subdivision (a). Codefendant Sutton was additionally convicted of possession of cocaine base for sale in violation of Health and Safety Code section 11351.5. (CT[2] 116, 170-172.) Mr. Jackson was sentenced to four years in state prison (and has been paroled after completing that sentence). (CT 182, 186.) Mr. Sutton was sentenced to

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[1] Statutory citations are to the Penal Code unless otherwise stated.

[2] "CT" refers to the one volume of clerk's transcript filed as part of the normal record on appeal.

nine years in state prison. (CT 189, 192.)

For purposes of the issue specified for review, the key proceedings in the case occurred prior to trial when Mr. Jackson personally and expressly objected to the court postponing his trial beyond the 60-day statutory speedy trial period so that his appointed attorney could give preference to the trial of one of his other clients. As the Court of Appeal noted in its opinion, the case against appellants was originally commenced by the filing of a felony complaint on June 2, 2006, but that complaint was dismissed on June 16, 2006 under section 859b when the defendants were sent to the wrong courthouse on the last day of the 10-day period in which a preliminary hearing must be held for in-custody felony defendants. (06/16/06 Aug. RT[3], pp. 1-2.) As the Court of Appeal opinion also noted, the case was refiled against the defendants by a felony complaint filed on June 19, 2006.[4]

After a preliminary hearing on July 7, 2006, the defendants were held to answer. (CT 4, 32.) The information was filed on July 21, 2006, the defendants were arraigned that same day, and the case was initially set for trial on September 11, 2006 as day 52 of the 60-day speedy trial period prescribed by section 1382. The trial date was later reset to September 12, 2006 as day 53 of 60. (CT 37, 67-70, 73-76.)

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[3] "06/16/06 Aug. RT" refers to the two-page reporter's transcript for June 16, 2006 that was added to the appellate record in the Court of Appeal by a motion to augment the record.

[4] The Court of Appeal took judicial notice of the refiled complaint in response to Mr. Sutton's motion for judicial notice that appended a copy of the complaint.

On Tuesday, September 12th, the defendants appeared with their attorneys in Department 111, and the court noted the case was there "as day 53 of 60." (09/12/06 Aug. RT[5], pp. A-1 to A-2.) The court then took up Mr. Jackson's motion to dismiss on grounds the preliminary hearing was, for a second time, not timely held. In arguing the motion, counsel for Mr. Jackson noted that the case had been previously dismissed. (09/12/06 Aug. RT, p. A-3.) After the court ruled that the preliminary hearing was timely, it noted again that the case was on day 53 of 60 and asked if it was going to trial and needed to be transferred to Department 100. Mr. Jackson's attorney responded yes. (09/12/06 Aug. RT, p. A-13.) Department 100 is the criminal master calendar court of the Los Angeles County Superior Court from which cases are assigned "for trial to any court throughout the county." (Superior Court of California, County of Los Angeles, Court Rules, Chap. Six, Criminal Div. Procedures, rule 6.0, subd. (a).)[6]

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[5] "09/12/06 Aug. RT" refers to the supplemental reporter's transcript for September 12, 2006 that was also added to the appellate record in the Court of Appeal by a motion to augment the record.

[6] Rule 6.0, subdivision (a) provides:

> 6.0 DUTIES OF SUPERVISING JUDGE OF THE CRIMINAL DIVISION
>
> (a) Responsibility of Department 100. The Supervising Judge or such judge designated by the Supervising Judge shall preside in Department 100 and shall assign cases for trial to any court throughout the county, hear Grand Jury matters, resolve issues relating to pending death penalty cases and assist other courts in coordination of criminal calendars. The Supervising Judge may designate any other Superior Court judge to assist in these duties.

After a brief discussion of what plea offers had been made, the court again brought up sending the case to Department 100. (09/12/06 Aug. RT, p. A-14.) At this point, counsel for Mr. Jackson told the court the defendants were in custody and did not wish to waive time. He said he was due to start a trial that day in a case he thought would settle, was due to start another trial the next day, Wednesday, was already in Department 100 on a third case on Thursday, and appellants' case was due to go to Department 100 on Friday. When the court suggested setting appellants' case in Department 100 on Thursday, counsel for Mr. Sutton said Friday was better for him. The court then suggested that counsel for Mr. Jackson file a motion to continue Mr. Jackson's case if he started trial on one of the other cases. Counsel responded that the problem with that idea was that his clients in his other three trial matters were out of custody and he preferred to give priority to in-custody clients like Mr. Jackson. The court then suggested that counsel could file a motion to continue in the other case, and counsel said he would do that in the Thursday case but offered no solution for his two other cases that were ready to start trial that day and the next day. (09/12/06 Aug. RT, pp. A-14 to A-16.) The proceedings ended with the court transferring appellants' case to Department 100 for assignment for trial on Friday, September 15, 2006 as day 56 of 60 with all parties announcing ready subject to the possibility counsel for Mr. Jackson might be engaged in trial in another case. (09/12/06 Aug. RT, pp. A-16 to A-18.)

In Department 100 on Friday, September 15th, counsel for Mr. Jackson informed the court he was engaged in trial, said he was probably going to be done on Monday, September 18th, and noted that Tuesday was the last day, i.e. day 60 of 60. The court stated it was going to try to get a

time waiver from the defendants because the case was "not going to go to the last day." (Aug. RT[7], pp. 1-2.) A little later, counsel for Mr. Jackson reiterated that he was in trial and thought the trial would finish on Monday. The court spoke to Mr. Jackson directly, informing him that his attorney was engaged in trial and would be available to try his case on Tuesday, the 19th of September, and asked him if he was agreeable to coming back on that date and having his trial within two days of then. (Aug. RT, pp. 2-4.) Mr. Jackson responded, "As long as no time is being waived." (Aug. RT, p. 4.) The court sought clarification that he would not waive time, and Mr. Jackson stated again, "No time. I don't want to waive time." (Aug. RT, p. 4.)[8] The court then told the defendants it would bring them back on Monday even though they were coming for nothing since counsel was engaged in another trial. It put the case over to Monday, September 18th as day 59 of 60. (Aug. RT, pp. 4-5.)

On September 18th, day 59 of 60, counsel for Mr. Jackson informed the court he was still engaged in trial, and the court trailed the matter to

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[7] "Aug. RT" refers to the supplemental reporter's transcript that includes the proceedings of September 15, 2006, as well as September 18, 19, 20, 21, 22 and 25, 2006.

[8] Under this court's recent decision in *Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, if appellant Jackson had agreed to waive time and continue his trial to Tuesday, September 19th, he actually would have been consenting to go to trial on that date or within 10 days thereafter because *Barsamyan* holds that the continuance would have triggered a renewed 10-day grace period under section 1382. Mr. Jackson's personal objection to giving up his speedy trial right is what distinguishes his case from *Barsamyan* where the defendant did not personally object. (*Id.*, at p. 982.)

September 19th on counsel's request. The court stated the case would trail day to day with "no time waiver from the defendants" and ordered the defendants returned to court the next morning. (Aug. RT, pp. 6-7.)

On Tuesday, September 19th, day 60 of 60, counsel for Mr. Jackson said he was still engaged in trial – although not in session that day – and projected that the trial would probably end the next afternoon. The court stated that no time waiver was necessary, told the defendants directly they were not waiving time, and ordered them back the next morning. (Aug. RT, pp. 10-11.) When Mr. Sutton asked the court when the 60-day speedy trial time period began, the court told him it started on the day of arraignment and that this was the 60th day, but that there was good cause to put the matter over for both defendants when one lawyer was engaged in trial as was counsel for Mr. Jackson. (Aug. RT, pp. 11-12.) When Mr. Sutton said there was a discrepancy about them waiving time and they had never done so, the court stated "there's no time waiver here, you're in the 60-day period," and then explained that they were "just going day to day until the lawyers are available." (Aug. RT 13.)

The next day, Wednesday, September 20th, the 61st day after arraignment, counsel for Mr. Jackson informed the court he was still in trial. The court then told the bailiff to bring Mr. Jackson out, but the bailiff responded that Mr. Jackson was not present, that he was a "miss-out." The court directed the bailiff to let it know when Mr. Jackson arrived, and told his attorney to go to his trial. (Aug. RT, pp. 14-15.) At this point counsel for Mr. Jackson stated he was "told I should make at least a pro forma motion to dismiss" because this was "day 61 of 60." (Aug RT, p. 15.) The

court asked counsel how he could make a motion to dismiss when he was engaged in trial and had asked for a continuance. Counsel responded that he was "on day eight of a two-day trial." (Aug. RT, p. 16.) The court rejoined with "so what," and declared that the motion to dismiss was not a "good faith" motion because counsel was also making a motion to continue and could not make both motions. (Aug. RT, p. 16.) Later, the court asked the bailiff to bring both defendants out. When they were present – Mr. Sutton with counsel but Mr. Jackson on his own because his attorney had left to attend his other client's trial – the court said Mr. Jackson's counsel had been present earlier and was still engaged in trial, that the case was "60 of 60 [sic], and the matter is last day today," that it would "remain last day," and ordered it to trail to September 21st finding good cause in that Mr. Jackson's counsel was engaged in another trial. (Aug. RT, pp. 16-17.)

On Thursday, September 21st, the court stated that neither defendant was present, then determined from counsel for Mr. Jackson that he was still in trial. The court let both attorneys leave after saying it would bring the defendants out once they arrived to let them know it was trailing their case. (Aug. RT, pp. 18-20.) Once the defendants were present, without counsel, the court told them Mr. Jackson's attorney was still engaged in trial and that he and Mr. Sutton's attorney were present earlier and excused. The court said it anticipated the case would go to trial the next day, then found good cause to trail the case to September 22nd based on counsel being engaged in another trial. When Mr. Sutton sought assurances that this did not mean they were waiving time, the court stated, "You haven't waived one second." (Aug. RT, pp. 21-22.)

On Friday, September 22nd, counsel for Mr. Jackson stated yet again that he remained engaged in trial, said he would "hopefully" be available for trial on Monday, September 25th and requested that the court trail the defendants' case until then. The court found good cause for trailing the case due to counsel's other trial, said "there's no time waiver," and ordered everyone back on Monday. (Aug. RT, pp. 24-25.) Mr. Sutton expressed confusion over the meaning of their speedy trial rights, stating that he was told they had 60 days to start trial, that the 60 days was up the day before (the 61st day had actually come two days before, on Wednesday), and they had not waived time. The court answered that it had found good cause to put their case over in that one of the lawyers was engaged in trial and could not try two cases at once. Mr. Sutton said again that he was confused because they never waived time. The court countered that Mr. Sutton was not confused, that he just did not like it, and when Mr. Sutton responded, "that's a fact," the court said its answer to him was, "too bad." (Aug. RT, pp. 25-26.) On Monday, September 25, 2006, counsel for Mr. Jackson announced he was done with his other client's trial and, in Mr. Jackson's absence because he was again a "miss-out," the case was transferred to the department in which jury selection commenced later that day. (Aug. RT, pp. 28-29; CT 120-121, 123-124.)

B. **The Decision in *Johnson* and its Application to Appellant Jackson's Circumstances**

Almost 29 years ago, this court addressed appellant Jackson's situation in *Johnson*. The defendant in *Johnson* was not brought to trial within the 60-day period prescribed in section 1382, a period that at that time started to run on the day the information was filed but now commences

on the day the defendant is arraigned on the indictment or information. The court stated in *Johnson*, and has reiterated in similar terms, that section 1382 "interprets the state constitutional right to a speedy trial" set forth in article I, section 15 of the California Constitution. (*Johnson, supra,* 26 Cal.3d at p. 561; *People v. Harrison* (2005) 35 Cal.4th 208, 225; *People v. Martinez* (2000) 22 Cal.4th 750, 766.) Like appellants, the defendant in *Johnson* "raised his speedy trial claim in the trial court, but did not seek pretrial appellate intervention." (*Johnson, supra,* 26 Cal.3d at p. 561.)

In *Johnson*, instead of bringing the defendant to trial within 60 days, "the trial court, at the request of the public defender, and over defendant's express objection, repeatedly continued the case, with the result that trial commenced 144 days after the filing of charges." (*Johnson, supra,* 26 Cal.3d at p. 561.) The court summarized its conclusions regarding the defendant's speedy trial rights under these circumstances as follows:

> We conclude, first, that when a client expressly objects to waiver of his right to a speedy trial under section 1382, counsel may not waive that 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. Secondly, we conclude that, at least 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. Finally, we reaffirm the holding of *People v. Wilson* (1963) 60 Cal.2d 139, 32 Cal.Rptr. 44, 383 P.2d 452, that a defendant seeking post-conviction review of denial of a speedy trial must prove prejudice flowing from the delay of trial; we affirm here

because defendant proved no prejudice.

(*Johnson, supra,* 26 Cal.3d at pp. 561-562; see also *Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, 980-982.)

1. Appointed Counsel Could Not Waive Mr. Jackson's Invocation of His Speedy Trial Right to Resolve Calendar Conflicts in Another Client's Case

In *Johnson*, the postponement of the trial that put the trial date beyond the 60-day period, as well as two subsequent postponements, were granted at the express or implied request of the defendant's appointed counsel, but over the express objection of the defendant himself. "The postponements were not sought nor granted to serve the best interests of the defendant; they stem from calendar conflicts of the public defender, and the decision of the public defender and the court to resolve these conflicts by trying other cases in advance of that of defendant." (*Johnson, supra,* 26 Cal.3d at p. 566.) When trial courts and appointed defense attorneys face these circumstances, this court concluded that appointed counsel may not waive a client's right to a speedy trial within the 60-day statutory period over his client's personal objection.

The court explained this conclusion as flowing from appointed counsel's obligation to devote himself solely to a client's individual interest undiminished by conflicting considerations of the interests of other clients he concurrently represents. The court applied this ethical principle to hold that an appointed attorney may not elect to abandon an objecting client's speedy trial rights in favor of taking another client's case to trial. It reasoned as follows:

> Thus when the public defender, burdened by the conflicting rights of clients entitled to a speedy trial, seeks to waive one client's right, that conduct cannot be justified on the basis of counsel's right to control judicial proceedings. The public defender's decision under these circumstances is not a matter of defense strategy at all; it is an attempt to resolve a conflict of interest by preferring one client over another. As a matter of principle, such a decision requires the approval of the disfavored client. (Cf. ABA Code of Prof. Responsibility, E.C. 5-16.) We conclude that the 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.

(*Johnson, supra,* 26 Cal.3d at pp. 566-567.) In further support of this conclusion, the court observed that this rule is "essential to fulfill the objectives of section 1382" because the speedy trial right it confers on criminal defendants "becomes meaningless if counsel can disregard defendant's views and interests and waive the right" and because it would "defeat the public interest in speedy criminal trials" to permit appointed attorneys to routinely waive their clients' speedy trial rights to accommodate crowded calendars. (*Id.,* at p. 567.)

In *Johnson*, the public defender had appeared with his client on the date set for trial, March 23rd, and told the court he was presently engaged in the trial of another case, said he had two other cases older than his client's case, and asked for a continuance to May 6th. The court asked the defendant if he waived his right to trial within the statutory 60-day period and consented to the continuance, and the defendant replied, "No." Despite this express objection from the defendant, the court found "good cause" for the continuance and postponed the trial until May 6th. (*Id.,* at p. 563, and

fn. 2.) This postponement to May 6th "put the trial date beyond the 60-day period." (*Id.,* at p. 565.)

Mr. Jackson's circumstances are indistinguishable from the circumstances of the indigent defendant in *Johnson.* When Mr. Jackson appeared in Department 111 on Tuesday, September 12th, his attorney informed the court that the case was ready to go to trial and needed to be transferred to Department 100, but that he was due to start trial in another case that same day, was due to start trial in a second case the next day, Wednesday, and had a third case set in Department 100 the following day, Thursday. Counsel informed the court that his other clients were out of custody and he preferred to give priority to in-custody clients like Mr. Jackson. The court sent the case to Department 100 for assignment for trial on Friday, September 15th as day 56 of 60 with all parties announcing ready subject to the possibility that counsel for Mr. Jackson might be in trial. (09/12/06 Aug. RT, pp. A-13 to A-18.)

On Friday, when appellants' case was called in Department 100 for trial assignment, counsel for Mr. Jackson announced he was engaged in trial, that he would "probably" be done on Monday, September 18th, and advised the court that Tuesday the 19th was the last day of the speedy trial period for appellants' case. The court told counsel it would try to get a time waiver from the defendants (who, it appears, were not yet in the courtroom) because the case was "not going to go to the last day." (Aug. RT 1.) When defendants were present, the court informed Mr. Jackson that his attorney was in trial in another case and asked if he was agreeable to coming back on Tuesday, September 19th and having his trial within two days of that date.

Mr. Jackson said he was agreeable as long as time was not being waived, that he did not want to waive time. (Aug. RT 4.) By making it clear he did not waive his right to a trial within the 60-day speedy trial period, Mr. Jackson voiced his personal objection to continuing the case in exactly the same manner the defendant in *Johnson* objected.

When the case was called in Department 100 on Monday, September 18th, day 59 of 60, the court continued the trial to the next day and said the case would trail day to day with "no time waiver from the defendants," signaling its recognition that the continuance was without Mr. Jackson's or Mr. Sutton's consent. (Aug. RT 6-7.) On Tuesday, the last day of the 60-day period, the court made it clear that it fully understood the defendants were not waiving time but took the position that no time waiver was needed because Mr. Jackson's attorney was engaged in trial and that meant there was good cause to continue the trial for both defendants. (Aug. RT 11-12.) At that point in the case, appellants' speedy trial posture became identical to the posture of the defendant in *Johnson* at the procedural point on March 23rd when his attorney said he was engaged in trial and asked for a continuance to a date outside the speedy trial period. This led the trial court in *Johnson* to err by finding that counsel's request established good cause to continue the case even though the defendant himself registered his objection to the continuance by refusing to waive time. The trial court in Mr. Jackson's case made the same erroneous finding of good cause.

In distinguishing the court's earlier decision in *Townsend v. Superior Court* (1975) 15 Cal.3d 774, *Johnson* noted that appointed defense counsel did not seek a continuance past the speedy trial period in order to have more

time to prepare Mr. Johnson's defense or to secure the attendance of witnesses, but did it because he was representing another client in trial and that client's interests conflicted with starting Mr. Johnson's trial within the speedy trial period. (*Johnson, supra,* 26 Cal.3d at p. 568.) The court continued:

> On the record before us, defense counsel entertained no reason to believe delay would benefit defendant; since counsel knew that defendant was incarcerated pending trial, he knew that delay was probably contrary to the best interests of his client. Thus in seeking delay counsel was not "pursuing his client's best interest in a competent manner" (*Townsend v. Superior Court, supra,* 15 Cal.3d 774, 784, 126 Cal.Rptr. 251, 258, 543 P.2d 619, 626). Instead, he was deliberately subordinating the statutory right of defendant Johnson to a speedy trial to the rights of other clients. Given his caseload and the conflicting demands upon his time, counsel may have reasonably arranged and ordered the interests of his clients. An attorney, however, owes undivided loyalty to each client (see ABA Code of Prof. Responsibility, E.C. 5-1); he does not enjoy the prerogative of weighing the rights of one client against those of another.

(*Johnson, supra,* 26 Cal.3d at p. 568.) This quote provides an exact description of appellant Jackson's circumstances; the only change that needs to be made in the wording for it to fit Mr. Jackson is to substitute "defendant Jackson" for "defendant Johnson" in the third sentence.

The court also stated in *Johnson* that it did not doubt that defendant Johnson's attorney exerted his best efforts to accommodate the needs and rights of his multiple clients, but the court's point was that "defense counsel should not be placed in a situation in which he must subordinate the right of one client to a speedy trial to the rights of another client; once counsel must

confront that dilemma, his best efforts may be insufficient to protect the individual rights of each of his clients." (*Id.*, at p. 568, fn. 10.) The court then held that, under the circumstances in *Johnson*, appointed counsel may not waive the defendant's right to a speedy trial under section 1382 over his client's express objection. This meant the continuances past the 60-day speedy trial period granted by the trial court at the request of defendant Johnson's appointed counsel were not granted "at the request of the defendant or with his consent" as that language is used in section 1382. (*Id.*, at pp. 568-569.) It follows that the continuance of Mr. Jackson's trial from September 19th to September 20th, which took it beyond the 60-day speedy trial period, as well as the subsequent day-to-day continuances, were not granted at Mr. Jackson's request or with his consent.

2. **Appointed Counsel's Engagement in Another Client's Trial Did Not Constitute Good Cause for Continuing Appellant Jackson's Trial Beyond the 60-day Statutory Period**

Johnson then proceeded to examine whether the trial court was correct in finding that appointed counsel's engagement in the trial of another client constituted good cause for continuing an incarcerated defendant's trial past the speedy trial period over the defendant's personal objection. As stated in the court's summary of its conclusions, the answer was no, and the same answer applies here.

Johnson determined that this answer flowed from the purpose underlying the California Constitution's protection of the right to a speedy trial as stated in a 1901 decision by the court: "'to protect those accused of crime against possible delay, caused either by willful oppression, or the

neglect of the state or its officers.'" (*Johnson, supra,* 26 Cal.3d at p. 571, quoting *In re Bergerow* (1901) 133 Cal. 349, 355.) *Johnson* observed that, in addition to prosecutors, "the state or its officers" includes judges and the attorneys appointed by judges to represent indigent defendants, and that "'oppression' or 'neglect' may include the failure to provide the facilities and personnel needed to implement the right to speedy trial." (*Johnson, supra,* 26 Cal.3d at p. 571.) From this, the court concluded:

> A defendant's right to a speedy trial may be denied simply by the failure of the state to provide enough courtrooms or judges to enable defendant to come to trial within the statutory period. The right may also be denied by failure to provide enough public defenders or appointed counsel, so that an indigent must choose between the right to a speedy trial and the right to representation by competent counsel.

(*Ibid.*)

Johnson then recognized a distinction between a "chronic" undersupply of appointed counsel and "exceptional circumstances" that cause a transitory undersupply. It said:

> The state cannot reasonably provide against all contingencies which may create a calendar conflict for public defenders and compel postponement of some of their cases. On the other hand, routine assignment of heavy caseloads to understaffed offices, when such practice foreseeably will result in the delay of trials beyond the 60-day period without defendant's consent, can and must be avoided. A defendant deserves not only capable counsel, but counsel who, barring exceptional circumstances, can defend him without infringing upon his right to a speedy trial. Thus the state cannot rely upon the obligations which an appointed counsel owes to other clients

> to excuse its denial of a speedy trial to the instant defendant.

(*Johnson, supra,* 26 Cal.3d at p. 572.)

Having rejected any "facile assumption" that an appointed attorney's calendar conflicts automatically constitute good cause for ignoring an indigent defendant's statutory speedy trial right over the defendant's personal objection, *Johnson* turned to the facts in the case and prescribed the procedure trial courts must follow when confronted with a conflict between an incarcerated defendant's speedy trial right and his appointed attorney's calendar obligations to other clients. The court stated:

> In the present case the record does not indicate any ground for the postponements of March 23 and May 6 which would suggest good cause to deny defendant's motion to dismiss. When the public defender moved for a continuance on March 23, he clearly posited his request not upon a benefit to Johnson but upon commitment to clients other than Johnson. He revealed that his representation of other clients created a conflict which he proposed to resolve to Johnson's detriment.

(*Id.,* at p. 572.) Once again, the application of this reasoning to Mr. Jackson's case requires only a few case-specific word substitutions. Here, "When [appointed counsel] moved for a continuance on [September 19th], he clearly posited his request not upon a benefit to [Jackson] but upon commitment to clients other than [Jackson]."

Johnson then prescribed the procedure courts must utilize when confronted with this scenario:

> Under these circumstances we think the court should inquire

> whether the assigned deputy could be replaced by another deputy or appointed counsel who would be able to bring the case to trial within the statutory period. In some instances, appointment of new counsel will serve to protect defendant's right to a speedy trial. If, on the other hand, the court cannot ascertain a feasible method to protect defendant's right, the court will have no alternative but to grant a continuance; upon a subsequent motion to dismiss, however, the court must inquire into whether the delay is attributable to the fault or neglect of the state; if the court so finds, the court must dismiss.

(*Johnson, supra,* 26 Cal.3d at pp. 572-573.) *Johnson* noted that, in most cases, a dismissal under section 1382 will not result in the defendant escaping trial because section 1387 allows the prosecution to refile felony charges after a section 1382 dismissal unless the charges have previously been dismissed. The court expressed confidence "that in cases in which there has been a prior dismissal, both court and counsel will give special attention to securing a speedy trial, granting the case priority if essential to that purpose." (*Id.*, at p. 573.)

3. The Trial Court Erred in Failing to Inquire into Available Means of Protecting Appellant Jackson's Right to a Speedy Trial and in Summarily Denying His Motion to Dismiss for Violating His Speedy Trial Rights under Section 1382

Johnson concluded that the record of the trial court proceedings of March 23rd in which the defendant's case was continued beyond the 60-day period failed to demonstrate good cause to avoid dismissal of the case under section 1382 because the court did not inquire into available means of protecting the defendant's right to a speedy trial. Specifically, the trial court erred by simply accepting appointed counsel's "recital of conflicting obligations without inquiring whether the conflict arose from exceptional

circumstances or resulted from a failure of the state to provide defendant with counsel able to protect his right." (*Johnson, supra,* 26 Cal.3d at p. 573.) The trial court perfected its violation of defendant Johnson's speedy trial right when it summarily denied his motion to dismiss the charges. What the court should have done in response to the motion to dismiss was require the prosecution to show good cause to avoid the dismissal: "Thus, in summarily denying defendant's motion, the court committed error which, on the record, and in the absence of a prosecution showing of good cause, resulted in denying defendant's right to a speedy trial under section 1382." (*Id.*, at p. 574.)

The exact same error was committed in appellant Jackson's case. Once the case was in Department 100 as ready for assignment for trial, Mr. Jackson's appointed counsel sought to continue it beyond the 60-day statutory period solely because of conflicting obligations in another client's case. Counsel's request to continue the case past the 60th day was over Mr. Jackson's objection to any action that waived his speedy trial right. By the point on Tuesday, September 19th, day 60 of 60, that counsel told the trial court he continued to be engaged in his other client's trial and sought to continue Mr. Jackson's trial beyond the 60-day period, the court should have recognized its duty under *Johnson* to inquire into available means of protecting Mr. Jackson's right to a speedy trial, yet the court made no inquiry. In fact, in light of *Johnson*, the trial court would have been well-advised to begin this required inquiry on the preceding Friday, September 15th, when the court itself recognized the danger that the case would go to the last day and sought to elicit a waiver of time but failed because Mr. Jackson insisted on enforcing his right to go a trial within 60 days of his

arraignment in a case that cannot be characterized as complex or difficult.

In addition to the trial court's error in failing to inquire into ways to protect Mr. Jackson's speedy trial rights, the court erred for a second time the next day, Wednesday, September 20th, the 61st day after arraignment, when counsel for Mr. Jackson moved to dismiss the charges under section 1382. At that point, under *Johnson*, the trial court should have required the prosecution to show good cause to avoid the dismissal and should have dismissed if good cause was not established. Instead, the court unjustifiably chastised defense counsel for even bringing the motion, accusing him of bringing it in bad faith notwithstanding that he had an ethical duty to make the motion as promptly as reasonably possible to protect Mr. Jackson's speedy trial interests. (*People v. Wilson* (1963) 60 Cal.2d 139, 145, fn. 3.)

At least by the time that counsel for Mr. Jackson told the court on the 60th day that he was still in trial in another case under circumstances in which Mr. Jackson had already made it expressly clear that he objected to any continuance beyond the speedy trial period, the trial court was obligated under *Johnson* to inquire into whether appointed counsel "could be replaced by another . . . appointed counsel who would be able to bring the case to trial within the statutory period." (*Johnson, supra,* 26 Cal.3d at p. 572.) If the court had made the inquiry and determined it was not feasible to protect Mr. Jackson's speedy trial right at that point by substitution of counsel, *Johnson* recognized that a continuance would be the only alternative. But when counsel for Mr. Jackson subsequently moved to dismiss under section 1382 on the advice of someone who apparently explained to him his ethical duty to protect Mr. Jackson's right to a speedy trial, the court was required

to inquire into whether the delay was attributable to the fault or neglect of the state and to dismiss if it was. (*Id.*, at pp. 572-573.) As in *Johnson*, the trial court's failure to comply with these procedural obligations resulted in the erroneous denial of Mr. Jackson's motion to dismiss and the violation of his right to a speedy trial under section 1382.

Johnson held that the trial court there erred by failing to engage in the inquiries that this court, for the first time, said were required. But in recognition that there was no way for courts to have anticipated the holdings, the court declared that the new speedy trial principles announced in *Johnson* should not be applied to rulings denying motions to dismiss made prior to the finality of the decision. (*Johnson, supra,* 26 Cal.3d at p. 575.) But when appellant's case was in Department 100 in September 2006, *Johnson* had been on the books for over 26 years and was recognized in standard treatises as the controlling case when an in-custody defendant, represented by an appointed attorney engaged in another trial, personally objects to continuing his case past the 60-day speedy trial period prescribed in section 1382. (See California Criminal Law Procedure and Practice (Cal. CEB Annual, 2008), § 19.21, p. 517; and § 19.25, pp. 519-520; 5 Witkin & Epstein, Cal. Criminal Law 3d, Criminal Trial, § 310, pp. 460-461 ["Defense Counsel Unavailable"].) There is no readily apparent excuse for the trial court's failure to adhere to the principles established in *Johnson.*

This is particularly so in light of the prior dismissal of appellants' case under section 859b. That should have raised a bright red flag to the trial court and the prosecution that they had to carefully address Mr. Jackson's assertion of his speedy trial right after he personally and

unequivocally refused to waive time. *Johnson* specifically warns courts and counsel to give special attention to a defendant's assertion of his speedy trial right when there has been a prior dismissal, and to grant the case priority if necessary so as not to abridge that right. (*Johnson, supra,* 26 Cal.3d at p. 573.)

C. **The Violation of Mr. Jackson's Speedy Trial Rights Was Prejudicial Because the Prior Dismissal of the Case under Section 859b Barred Refiling the Charge Against Him**

The violation of Mr. Jackson's speedy trial rights by the trial court's erroneous denial of his motion to dismiss under section 1382 was prejudicial because the prior dismissal of the charges under section 859b meant that the grant of a second dismissal would have barred any further prosecution. Subdivision (a) of section 1387 states that the dismissal of a case under that chapter – the chapter that contains section 1382 – "is a bar to any other prosecution for the same offense if it is a felony . . . and the action has been previously terminated pursuant to this chapter, or Section 859b . . ."

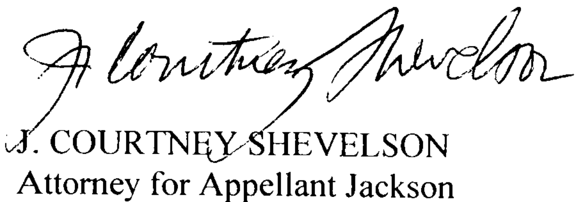
Johnson itself provides authority that a violation of a defendant's speedy trial rights in the denial of a motion to dismiss under section 1382 is prejudicial when the existence of a prior dismissal bars new charges. *Johnson* held that there was no prejudice to the defendant there, but said this was so because it was "not a case in which the statute of limitations would have been a bar to new charges, *or one in which a dismissal would itself have barred refiling.*" (*Johnson, supra,* 26 Cal.3d at p. 574; italics added.) Because of the prior section 859b dismissal in appellants' case, and by operation of subdivision (a) of section 1387, this *is* a case "in which a

dismissal would itself have barred refiling." (See also *People v. Wilson, supra,* 60 Cal.2d at p. 163, fn. 5 [in a misdemeanor case, the erroneous denial of a motion to dismiss under section 1382 is prejudicial because section 1387 bars any other prosecution for the same offense]; *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, 812.)

CONCLUSION

The procedures adopted in *Johnson* in 1980 to cover appellant Jackson's circumstances were crafted to fulfill the Legislature's objectives in establishing the 60-day speedy trial period in section 1382. The court correctly saw that the speedy trial right that section 1382 confers on criminal defendants would become meaningless if an appointed attorney could simply disregard an individual client's views and interests and waive his speedy trial right to give preference to the rights of another client. Under the court's analysis in *Johnson*, the trial court erred in denying Mr. Jackson's motion to dismiss for violation of his statutory speedy trial right, and the error in denying the him the dismissal to which he was entitled under section 1382 was prejudicial because it would have been a second dismissal that would have barred any further prosecution.

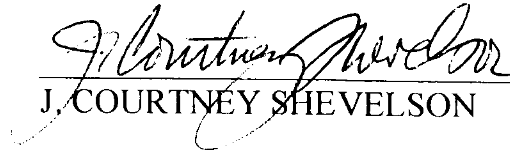
Respectfully submitted,



J. COURTNEY SHEVELSON
Attorney for Appellant Jackson

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies pursuant to rule 8.520(c)(1) of the California Rules of Court that this opening brief on the merits contains approximately 7,018 words based on the word count of the computer program used to prepare it.



J. COURTNEY SHEVELSON

DECLARATION OF SERVICE BY MAIL

I, J. Courtney Shevelson, declare:

I am over eighteen (18) years of age and not a party to the within cause; my business address is PMB 187, 316 Mid Valley Center, Carmel, California 93923; I served a copy of the

APPELLANT JACKSON'S OPENING BRIEF ON THE MERITS

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

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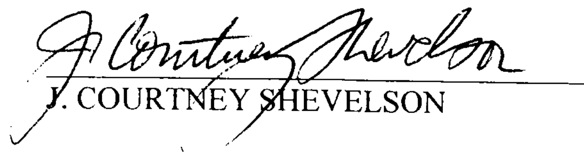
Each said envelope was then, on February 2, 2009, sealed and deposited in the United States mail at Monterey, California, the county in which I am employed, with postage fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed on February 2, 2009, at Monterey, California.



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