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 REPLY BRIEF ON THE MERITS

CRC 8.25(b)

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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. Introduction

Appellant Jackson's opening brief contends that this court's decision in *People v. Johnson* (1980) 26 Cal.3d 557 (*Johnson* hereafter) controls his case. The rules adopted in *Johnson* give meaning to an indigent defendant's 60-day statutory speedy trial right under Penal Code[1] section 1382 when his attorney's obligations to another client conflict with the

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

defendant's rights. *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 when his appointed attorney has become engaged in another client's trial and the conflict makes him unavailable to protect the defendant's speedy trial rights. Mr. Jackson's right to trial within 60 days of arraignment was violated when the trial court ignored the procedural steps mandated in *Johnson* and denied his motion to dismiss. The error in denying the motion was prejudicial because the charges against Mr. Jackson were previously dismissed under section 859b and dismissal for a second time under section 1382 would bar refiling, a considerably more favorable result than suffering a felony conviction.

B. Under *Johnson*, Trial Counsel's Engagement in Trial Did Not Constitute Good Cause to Continue Mr. Jackson's Trial Past the 60-day Statutory Speedy Trial Period

Respondent's Answer Brief asserts that the trial court properly found good cause to continue appellant Jackson's trial notwithstanding the court's *Johnson* decision because his trial attorney encountered an "unexpected need" to defend another client. The theory of respondent's argument is that this "unexpected need" constituted an unforeseen circumstance or "unique and nonrecurring event" of the kind that may justify dispensing with the inquiries *Johnson* mandated when an indigent defendant's appointed counsel gives precedence to one client's trial at the expense of another client's statutory speedy trial right. (Answer Brief (Ans. Br.), pp. 8-11.)

Since the basic premise of respondent's argument is that trial counsel's need to defend his other client was "unexpected," it is necessary

to revisit portions of the procedural history of the case to examine that premise. After arraignment, the trial for appellants Jackson and Sutton was set for September 11, 2006 as day 52 of the 60-day speedy trial period, then reset to Tuesday, September 12, 2006 as day 53 of 60. (CT[2] 37, 67-70, 73-76.) Appellants appeared that Tuesday with their attorneys in Department 111. The court noted the case was there "as day 53 of 60" and then heard and denied Mr. Jackson's motion to dismiss on grounds his second preliminary hearing was untimely. Mr. Jackson's counsel noted the case had been once dismissed. (09/12/06 Aug. RT[3], pp. A-1 to A-3.)

After finding the preliminary hearing was timely, the court again noted it was day 53 of 60 and asked if the case was going to trial and needed to be transferred to Department 100. Mr. Jackson's attorney said yes. (09/12/06 Aug. RT, p. A-13.) After discussion of what plea offers were made, the court again brought up sending the case to Department 100. (09/12/06 Aug. RT, p. A-14.) Counsel told the court the defendants were in custody and did not wish to waive time, that 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 Thursday for trial assignment on a third case, and that appellants' case was due to go to Department 100 on Friday. When the court suggested setting this case in Department 100 on Thursday as well, Mr. Sutton's counsel asked for

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

[3] "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.

Friday. When the court suggested counsel should move to continue Mr. Jackson's case if he started trial on another case, counsel said 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 suggested 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 ready for trial on Tuesday and Wednesday. (09/12/06 Aug. RT, pp. A-14 to A-16.) The proceedings ended with the case transferred to Department 100 for 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.)

Based just on this part of the record, it is difficult to understand how respondent can claim that the violation of Mr. Jackson's statutory speedy trial rights was due to his trial counsel's "unexpected need to defend another client." (Ans. Br., p. 8.) Counsel clearly expected he would need to defend *three* other clients in the same week that Mr. Jackson's case was approaching day 60 of 60. Counsel said he only expected one of the three cases to settle, so he anticipated putting the trials of two out-of-custody clients ahead of Mr. Jackson's trial. The case of one of the other clients was set in Department 100 for assignment to trial a day ahead of appellants' case. The distinct possibility counsel would be in trial in another case on Friday was openly acknowledged at Tuesday's hearing. Thus, there was nothing unexpected about the impending conflict Mr. Jackson's attorney faced with trials of multiple clients set so close in time to day 60 of 60 in Mr. Jackson's case. It was clear as early as Tuesday, September 12th that

counsel's trial obligations toward several other clients would likely jeopardize appellant Jackson's right to commence his trial by the 60th day, Tuesday, September 19th.

This likelihood was confirmed at the next court appearance in Department 100 on Friday, September 15th. Counsel for Mr. Jackson informed the court he was engaged in trial and said he would be done "probably Monday," noting that the last day for Mr. Jackson's trial was Tuesday. 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[4], pp. 1-2.) This reaction from the court signaled its recognition that counsel's "probably" was too indefinite to rely upon and that a time waiver was imperative to prevent the 60 days from running. The court, in other words, correctly anticipated that counsel might not be done with his other client's trial in time to commence appellant's trial before the speedy trial period expired on Tuesday. By no later than Friday, then, counsel's conflict between representing another client and protecting Mr. Jackson's speedy trial right was not at all unexpected; the conflict was so abundantly apparent to the court that it decided to try to get appellants to waive time.

After appellants were present, the court confirmed that Mr. Jackson's attorney was engaged in trial and asked when the trial would be done. Counsel said he "would anticipate" that it was "more than likely" that testimony would be done that day, Friday. The court observed that even if

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[4] "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.

testimony was done they would still need to do jury instructions and argument and queried whether this meant counsel would not be finished until Monday or Tuesday. Counsel said, "Monday probably." (Aug. RT, p. 3.) Speaking directly to Mr. Jackson, the court informed him his attorney was engaged in trial and would be available to try his case on Tuesday, September 19th, and asked 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.) When the court sought clarification, Mr. Jackson stated again, "No time. I don't want to waive time." (Aug. RT, p. 4.) The court then told appellants it would bring them back on Monday "for nothing" since counsel was engaged. The court put the case over to Monday, September 18th as day 59 of 60. (Aug. RT, pp. 4-5.)

On Monday, counsel for Mr. Jackson informed the court he was still in trial, and the court trailed the case to Tuesday, September 19th, saying it would trail day-to-day with "no time waiver from the defendants" and ordering that they be kept there all day and brought back in the morning. When the court told counsel to notify it if he finished his trial, counsel said he was not due back in court until 1:30 p.m. The court responded, "So you won't finish," and asked what court the trial was in. (Aug. RT, pp. 6-7.) At this point, the court knew absolutely that counsel would still be in trial in another client's case on day 60 of 60 of Mr. Jackson's speedy trial period.

On day 60 of 60, Tuesday, September 19th, counsel for Mr. Jackson told the court outside the presence of the defendants that his trial was not over. Asked when it was supposed to be over, counsel said "probably

tomorrow" because they were dark that day. (Aug. RT 10.) When the defendants were brought in, counsel confirmed he was still engaged in trial and asked to trail appellant's case until his trial was done. The court said no time waiver was necessary, told the defendants directly they were not waiving time, and ordered them back the next morning. During these brief proceedings, counsel stated again that his trial was dark that day and there was no possibility he would be done the next morning, then said they were not even due back to court until 1:45 p.m. (Aug. RT, pp. 10-11.) In response to Mr. Sutton's query as to when the 60-day speedy trial period began, the court said it started the day of arraignment and this was the 60th day but there was good cause to put the trial over for both defendants because Mr. Jackson's counsel was in trial. (Aug. RT, pp. 11-12.) When Mr. Sutton said they never waived time, the court responded, "there's no time waiver here, you're in the 60-day period," and explained they were "just going day to day until the lawyers are available." (Aug. RT 13.)

The next morning, Wednesday, September 20th, the 61st day after arraignment, counsel for Mr. Jackson informed the court he was still in trial. When told to bring Mr. Jackson out, the bailiff said he was a "miss-out." The court directed the bailiff to let it know when Mr. Jackson arrived and told counsel to go to his trial. (Aug. RT, pp. 14-15.) At this point, counsel for Mr. Jackson said 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 responded, "so what," and declared that the motion to dismiss was not a

"good faith" motion because counsel was asking to continue the case and could not make both motions. (Aug. RT, p. 16.) Later, when the bailiff brought appellants out, the court told them 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 for good cause because Mr. Jackson's counsel was engaged in another trial. (Aug. RT, pp. 16-17.) The court said nothing to suggest any finding that counsel's unavailability was unexpected. Any such finding would have been baseless because the likelihood of counsel's unavailability had been obvious since the previous Friday when the court saw the looming speedy trial problem and unsuccessfully tried to obtain time waivers to head it off.

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

On Friday, September 22nd, counsel for Mr. Jackson stated again that he remained 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 to trail based on counsel's other trial, said there was 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, said he was told they had 60 days to start trial, that the 60-day period was up the day before (it was actually up 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 because one of the lawyers was in trial and could not try two cases at once. Once again, the court made no comments suggesting that its good cause finding was based on counsel being in trial *unexpectedly*. When Mr. Sutton again expressed confusion because they never waived time, the court countered that he was not confused, that he just did not like it, and when Mr. Sutton said, "that's a fact," the court said, "too bad." (Aug. RT, pp. 25-26.) On Monday, September 25th, Mr. Jackson's attorney said his other trial was over, and the case was transferred to the court where jury selection began later that day. (Aug. RT, pp. 28-29; CT 120-121, 123-124.)

This record rebuts respondent's basic premise that Mr. Jackson's circumstances are distinguishable from those of the defendant in *Johnson* because his attorney encountered an "unexpected need" to defend another client. There was no unexpected need. Everyone in the trial court on Tuesday, September 12th, knew counsel had multiple clients to defend because he clearly announced he had three other cases set for trial. When he came to court on Friday, September 15th and announced he was in trial on one of those other cases, the trial court did not express shock or amazement. It asked counsel when he would be done, and when counsel said "probably Monday," the court immediately saw the speedy trial

implication of this indefinite projection and said it was going to try to get a time waiver to keep the case from going to the last day. The court did attempt to get a time waiver, and by taking that action demonstrated it fully expected counsel's trial would extend to and beyond the last day of appellants' speedy trial period, Tuesday, September 19th.

Respondent strives to interpret counsel's tentative Friday projection that his conflicting trial would end "probably Monday" as constituting an ironclad guarantee that counsel had no expectation the trial would extend past Monday. (Ans. Br., p. 11.) But this interpretation is countered by the trial court's expectation that the trial *would* go past Monday so that a time waiver was necessary to avoid last day problems. Respondent, moreover, acknowledges that when counsel told the court on Monday that he was still in trial but was not due back in court until 1:30 p.m., the court fully understood that this meant the trial would not finish that day and would carry over to Tuesday, day 60 of 60 in Mr. Jackson's case. In other words, the court knew the case would go to the last day and also knew that counsel made no claim it would conclude on that day in time to commence Mr. Jackson's trial. So the court's sense on Friday that a time waiver was needed to avoid violating section 1382, which evidenced its expectation that counsel's current trial would run past the 60th day for appellants' trial, was fully realized on Monday.

By that point, however, in direct contravention of this court's decision in *Johnson*, the trial court had settled on its position that counsel's engagement in trial on another client's case automatically constituted good cause to continue Mr. Jackson's trial past the 60-day statutory speedy trial

period. Indeed, when Mr. Jackson's attorney told the court on Tuesday that his trial was not in session that day and that it would be over "probably tomorrow," the court made no comment of any sort that this was an unexpected development that established good cause for continuing appellants' trial past the 60th day. (Aug. RT, pp. 9-11.) What the court said was that the engagement of Mr. Jackson's lawyer in another client's trial constituted "good cause to put the matter over for both defendants" past the 60th day. (Aug. RT, p. 12.)

Respondent also cites a statement by Mr. Jackson's counsel on the day *after* time ran out under section 1382 as evidence that the continuance of appellant's trial was due to the unexpected length of his other client's conflicting trial. (Ans. Br., p. 12.) On Wednesday, when the court challenged counsel's motion to dismiss the charges against Mr. Jackson as not a good faith motion because he was still in trial on the other case, counsel said he was still in trial because he was "on day eight of a two-day trial." (Aug. RT, p. 16.) The relevant point that this comment made was that Mr. Jackson's attorney had not been playing games to try to set up a dismissal under section 1382 and therefore his motion to dismiss was made in good faith. (See *Johnson, supra,* 26 Cal.3d at p. 573, fn. 17.)

While the comment may also have suggested that *counsel* thought his other client's trial would be shorter, it came after appellants had already been denied their statutory speedy trial right and could not retroactively serve to justify the *court's* decision the day before to continue the case because counsel's engagement in another client's trial automatically constituted good cause. The court, in fact, placed no significance on the

comment; it met it by rejoining, "Well, so what?" (Aug. RT, p. 16.)

Based on a full and fair reading of the trial record, there is no support for respondent's premise that the trial court continued appellants' trial past the 60th day because of the unexpected length of the trial of counsel's other client. The trial court never mentioned this and rested its denial of Mr. Jackson's motion to dismiss on the 61st day solely on the position rejected in *Johnson* that appointed counsel's engagement in a trial for one client automatically constituted good cause to continue another client's trial past the 60-day speedy trial period.

Even if the record were not so clear on this point, respondent's argument would nevertheless fail. The secondary premise of the argument is that the purported unexpected length of the trial of Mr. Jackson's counsel's other client would constitute an "unforeseen circumstance" that would justify the trial court's continuance of appellant's trial past the 60th day. *Johnson* makes it clear it would not. In deciding *Johnson*, this court surveyed principles appellate courts have evolved as to when there is good cause for delaying a criminal trial. It stated:

> The courts agree, for example, that delay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss.[FN 13 omitted.] Delay for defendant's benefit also constitutes good cause.[FN14 omitted.] Finally, delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses constitutes good cause to avoid dismissal.[FN15 omitted.]

(*Johnson, supra,* 26 Cal.3d at p. 570.)

Respondent seizes on the last sentence to argue that the unanticipated length of another client's trial is an "unexpected unavailability of counsel" that constitutes an "unforeseen circumstance." (Ans. Br., pp. 8-10.) But the whole point of *Johnson* was to examine, and to ultimately reject, the presumption that an appointed attorney's congested caseload "necessarily constituted good cause to deny dismissal" under section 1382. (*Johnson, supra,* 26 Cal.3d at p. 571.) *Johnson* concluded that a defendant deserves capable counsel "who, barring exceptional circumstances, can defend him without infringing upon his right to a speedy trial," which means that "the state cannot rely upon the obligations which an appointed counsel owes to other clients to excuse its denial of a speedy trial to the instant defendant." (*Id., supra,* at p. 572.) In other words, obligations an appointed attorney owes to one client do not constitute exceptional or unforeseen circumstances that justify violating another client's statutory speedy trial rights. As this court concluded in *Johnson*, "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." (*Id., supra,* at p. 567.) Unavailability of appointed counsel for *that* reason does *not* constitute good cause on any theory that it amounts to an exceptional or unforeseen circumstance.

Respondent raises another point that fails to provide a meaningful basis for distinguishing *Johnson*. The Answer Brief repeatedly asserts that appellant's statutory speedy trial right was only violated by six days and that *Johnson* permits a continuance past the 60-day limit under section 1382 if it is brief. (Ans. Br., pp. 8, 11-13.) First, *Johnson* says no such thing; its

analysis placed no significance on the length of the delay in the defendant's trial beyond the 60-day statutory period. Second, the Legislature did not draft section 1382 to mandate dismissal of the charges if a defendant is not brought to trial within *about* 60 days, or within 60 days *give or take a week or two.* The Legislature's choice of a precise 60-day time limit cannot be judicially discarded by reading into the statute exceptions to the 60-day limit beyond the good cause exception specifically incorporated into the statutory language.

Appellant Jackson's opening brief points out that after *Johnson* rejected any "facile assumption" 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, the court went on to prescribe the procedure trial courts must follow when confronted with a conflict between an incarcerated defendant's speedy trial right and his appointed attorney's trial obligations to other clients. The court stated:

> 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 concluded that the record of the trial court proceedings on the day 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. 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.)

Appellant Jackson's opening brief contends that the exact same error was committed in his case. Once the case was in Department 100 ready for trial assignment, Mr. Jackson's appointed counsel sought to continue it beyond the 60-day statutory period solely because of his conflicting commitment to try another client's case. At least 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. In fact, the trial court knew the day before, on

Monday, that counsel would still be in trial on day 60 of 60. And if the court had actually sought to comply with *Johnson*, it would have been well-advised to begin the inquiry into ways to safeguard Mr. Jackson's speedy trial right on the preceding Friday, September 15th, when the court sought and failed to obtain time waivers after recognizing the danger the case would go to the last day. The court's failure to conduct any inquiry at any point was error under *Johnson*.

In addition to the error in failing to inquire into ways to protect Mr. Jackson's speedy trial rights, the trial court erred for a second time on 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 not bringing it in good faith notwithstanding counsel's 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.)

In place of the inquiries mandated by *Johnson*, respondent asks this court to simply assume there was no feasible way for the trial court to protect Mr. Jackson's speedy trial right. (Ans. Br., pp. 12-13.) But *Johnson* rejected this assumption-based approach because it would render meaningless the speedy trial right the Legislature created in section 1382. (*Johnson, supra,* 26 Cal.3d at p. 567.) Respondent's assertion that there is no reason to believe new counsel could have been prepared to represent Mr.

Jackson within the speedy trial period attempts to reward the trial court for ignoring *Johnson* and failing to conduct the inquiry it mandated, an inquiry designed to determine *without* resort to assumptions whether appointment of new counsel was feasible. Equally important, respondent provides no answer to the trial court's error in failing to conduct the key inquiry mandated by *Johnson* at the point that Mr. Jackson moved to dismiss his case under section 1382, the inquiry "into whether the delay is attributable to the fault or neglect of the state." (*Johnson, supra,* at pp. 572-573.)

Respondent's contentions fail to distinguish Mr. Jackson's circumstances from those of the defendant in *Johnson*. Under *Johnson*, the record does not establish good cause for continuing appellants' trial beyond the 60-day speedy trial period mandated by section 1382.

C. Respondent Fails to Establish Any Need for the Court to Reconsider its Decision in *Johnson*

Respondent "submits that *Johnson* has proven to be a difficult standard for trial courts to apply" because it encourages defense attorneys to play games by "making themselves unavailable in order to produce a dismissal" and "unfairly shifts the burden of defense counsel's case conflicts from their clients to the public and California's trial judges." (Ans. Br., p. 21.) Respondent baldly claims that *Johnson* has resulted in "gamesmanship and uncertainty" without offering anything that actually proves this assertion. (Ans. Br., pp. 22-25.) Having posited problems from *Johnson* that do not exist, respondent goes on to suggest an "alternative" scheme in which trial courts would monitor whether a delay sought by an appointed attorney beyond the statutory speedy trial period "is the result of

an excessive public defendant caseload." (Ans. Br., pp. 27-30.) But this same exact monitoring is precisely what *Johnson* has required trial courts to undertake since 1980.

Respondent's argument that *Johnson* has resulted in gamesmanship by defense attorneys cites nothing that supports the claim and ignores this court's recognition in *Johnson* that the possibility of this kind of abuse has a common-sense remedy:

> Because appointed counsel are furnished by the state, fault or neglect by such counsel may under the reasoning of this opinion result in the dismissal of charges. We observe, however, "that both the people and the defendant have the right to an expeditious disposition, and to that end it (is) the duty of all courts and judicial officers and of all counsel, both the prosecution and the defense, to expedite such proceedings to the greatest degree that is consistent with the ends of justice. . . ." (§ 1050.) 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, supra,* 26 Cal.3d at p. 573, fn. 17.)

If purposeful overbooking and purposeful delay to trigger speedy trial dismissals have occurred in the 29 years since *Johnson* was decided as respondent baldly asserts, there is nothing in California case law to suggest that trial courts have been unable to ferret it out and remedy it by denying motions to dismiss as *Johnson* prescribed. If respondent is trying to suggest

that gamesmanship was what was going on in appellants' case, the record does not support any such assertion. The trial court never articulated the least suspicion that Mr. Jackson's attorney was playing games or dissembling when he erroneously estimated his other client's trial would end before it did. Most significantly, when the trial court denied counsel's motion to dismiss under section 1382, the court did not accuse counsel of playing games by purposely overbooking or stalling completion of his other client's trial to delay Mr. Jackson's case past the 60th day. What the court said was that the motion to dismiss was not a good faith motion because counsel was also saying he was unavailable due to being in trial on another client's case. But *Johnson* held that is exactly the situation that requires a trial court to conduct an inquiry to decide whether the delay was attributable to the fault or neglect of the state. Moreover, when the trial court asked counsel how he could take both the position that he was unavailable to represent Mr. Jackson and the position that Mr. Jackson's case should be dismissed under section 1382, counsel responded he was "on day eight of a two-day trial," thereby indicating Mr. Jackson's case did not go past the 60th day because counsel had connived to make that happen.

The only California authority respondent cites in support of the claim that *Johnson* has created problems by allowing defense counsel to play speedy trial games is the dissent by Justice Richardson 29 years ago in *Johnson* itself and a Court of Appeal decision that criticized *Johnson* 14 years ago. (Ans. Br., p. 25.) Justice Richardson's dissent in 1980 was full of dire predictions of undesirable consequences from the majority's decision that never came to pass, such as courts needing to force unprepared attorneys to trial to avoid dismissals under section 1382 and drastic

reductions in plea bargains and concomitant increases in trials and court congestion from defendants holding out hope for outright dismissals. (*Johnson, supra,* 26 Cal.3d at pp. 583-583 (dis. opn. of Richardson, J.).) Justice Richardson also suggested the Legislature would see the need to meet the majority's decision in *Johnson* with an increase in the 60-day period allowed by section 1382, but that never happened either because the decision simply did not cause the problems Justice Richardson imagined.

The Court of Appeal decision respondent cites is *People v. Superior Court (Alexander)* (1995) 31 Cal.App.4th 1119 (*Alexander*, hereafter). *Alexander* criticized *Johnson* in a footnote. (*Id.*, at p. 1129, fn. 8.) The criticism boiled down to a claim that the problem of too few public defenders and too many cases had become so intractable since *Johnson* was decided that the only solution was to forget about trying to give meaning to the statutory right to a speedy trial in section 1382 because it was only a statutory right and not a constitutional right. In essence, *Alexander* suggested this court should just abandon its effort in *Johnson* to prescribe procedures to protect and enforce the statutory speedy trial right by requiring dismissal if appointed counsel's conflicting need to serve another client's interests at the expense of the instant defendant's speedy trial right is attributable to the fault or neglect of the state. Just as the Legislature has rejected for 29 years Justice Richardson's call in *Johnson* to increase the length of the statutory speedy trial period, this court has rejected for 14 years the invitation in *Alexander* to reconsider *Johnson.*

There continues to be no reason for the court to reconsider and overrule *Johnson.* Respondent has not cited anything to show that *Johnson*

has created real problems in the administration of criminal justice in terms of frequent or arbitrary dismissals of criminal cases. The absence of evidence of such problems likely flows from the fact that *Johnson* calls for the remedy of dismissal only in very limited circumstances. First, *Johnson* only applies if appointed counsel is seeking a continuance past the 60-day speedy trial period *solely* to serve another client's interests and not to benefit the instant defendant. Second, *Johnson* only applies if the defendant *personally objects* to counsel's continuance request. Third, the defendant's personal objection does not trigger dismissal; it only triggers a duty on the part of the trial court to inquire into whether it is feasible to appoint substitute counsel who can protect the defendant's statutory speedy trial right. If it is not feasible, then *Johnson* says the court has "no alternative but to grant a continuance." (*Johnson, supra,* 26 Cal.3d at p. 572.) Fourth, nothing more is required of the trial court unless the defendant moves to dismiss the case after the 60th day has passed; if there is no motion, there is no dismissal. Fifth, even if the defendant moves to dismiss, all that motion does is trigger an inquiry "into whether the delay is attributable to the fault or neglect of the state," defined in *Johnson* as the failure of the state to provide enough courtrooms, judges, public defenders or appointed counsel to protect the defendant's speedy trial rights. (*Id.*, at pp. 571, 573.) Sixth, the section 1382 remedy of dismissal is only required based on this inquiry if the court finds that the delay *was* attributable to the fault of the state. If it was not, then *Johnson* does not call for dismissal. Finally, even if a dismissal results from the application of the principles and procedures of *Johnson*, it will rarely follow that the defendant escapes trial on felony charges because dismissal "for lack of a speedy trial is not a bar to further prosecution unless the charge has been previously dismissed on such

grounds." (*Id.*, at p. 573.)

Respondent's reliance on out-of-state cases (Ans. Br., pp. 23-24) fails to provide useful authority to support the claim that the rules and procedures adopted in *Johnson* to give meaning to the statutory speedy trial right have proved unworkable. The cited out-of-state cases do not analyze speedy trial statutes comparable to section 1382 and they do not analyze factual scenarios comparable to the facts in *Johnson* and in appellants' case because, for example, the defendant either did not personally object or expressly consented to the delay, the delay was for the defendant's benefit, or the defendant's attorney was retained rather than appointed. In *Johnson*, this court took reasonable steps to give meaning to California's statutory speedy trial right, and decisions in other states in cases interpreting dissimilar speedy trial statutes and involving dissimilar facts provide no grounds for reconsidering the rules and procedures *Johnson* adopted.

Respondent's argument that the court should reconsider *Johnson* suggests that the court should adopt an alternative scheme in which trial court's should be trusted to "monitor whether the delay [beyond the speedy trial period] is the result of an excessive public defender caseload." (Ans. Br., pp. 27-28.) But *Johnson* already entrusts trial courts with the determination whether the delay "is attributable to the fault or neglect of the state" (*Johnson, supra,* 26 Cal.3d at p. 573), a determination that includes whether chronically excessive caseloads of appointed counsel have caused speedy trial deprivations. So it is difficult to see how respondent's suggested alternative would provide any kind of meaningful departure from what *Johnson* already provides and has provided for 29 years with minimal

controversy. Respondent has failed to make out a cogent case that there is some pressing need for the court to reconsider *Johnson*. Accordingly, the court should reject the suggestion that it do so.

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

Mr. Jackson's opening brief contends that the violation of his 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 a second dismissal would have barred further prosecution pursuant to subdivision (a) of section 1387. *Johnson* itself provides authority that a violation of a defendant's speedy trial rights from the erroneous denial of a motion to dismiss under section 1382 is prejudicial when the existence of a prior dismissal bars new charges. It held there was no prejudice to the defendant there only 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 dismissal in appellants' case, this *is* a case "in which a dismissal would itself have barred refiling." This court has also held that the erroneous denial of a motion to dismiss under section 1382 in a misdemeanor case is prejudicial because section 1387 bars further prosecution for the same misdemeanor after one dismissal. (*People v. Wilson, supra,* 60 Cal.2d at p. 163, fn. 5; see also *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, 812.)

The court's logic on this prejudice point in *Johnson* and *Wilson* is unassailable since prejudice is typically measured (outside of per se reversal contexts) by whether the result to the defendant in the case would have been more favorable in the absence of the lower court's error. Respondent, in fact, offers no argument to contest the court's logic in *Wilson* as to misdemeanors, but claims that felonies are too serious for the logic to apply. (Ans. Br., p. 31.) But the greater seriousness of felonies is already factored into the requirement in section 1387 that there must be *two* dismissals of a felony charge before further filings are barred. The two-dismissal rule for felonies fully expresses the Legislature's judgment on how to differentiate between misdemeanors and felonies in the context of dismissals for violations of a defendant's statutory speedy trial right.

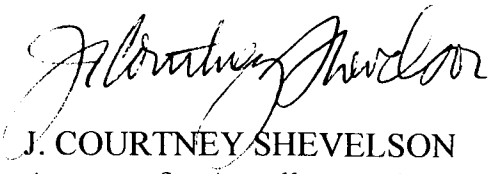
Respondent argues that in the context of appellants' case, the prejudice analysis should look behind the Legislature's judgment that refiling of felony charges must be barred after two dismissals and should consider whether "the core concerns of section 1387 have been undermined by multiple dismissals" by applying prejudice standards for constitutional speedy trial violations. (Ans. Br., pp. 32-33.) But the California Legislature's choice in section 1387 was to deem further prosecution of a felony after two dismissals per se abusive, i.e. prejudicial, and this court is bound to enforce that legislative choice regardless of its own views about the "core concerns" that informed that legislative choice. In the end, respondent's argument asks the court to simply ignore the logic of its position in *Johnson* and *Wilson* that prejudice is demonstrated when a court erroneously denies a motion to dismiss for a speedy trial violation and further prosecution would have been barred under section 1387 in the

absence of the error, and to adopt instead an analysis that would disregard the Legislature's policy choice that two dismissals is enough. The court should decline respondent's invitation to disrespect the two-dismissal rule in section 1387 and should stick with the logic of *Johnson* and *Wilson*. The trial court's error in denying Mr. Jackson's motion to dismiss was prejudicial because the case was previously dismissed and further prosecution would have been barred by a second dismissal, a considerably more favorable result to Mr. Jackson than being convicted of a felony.

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 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,



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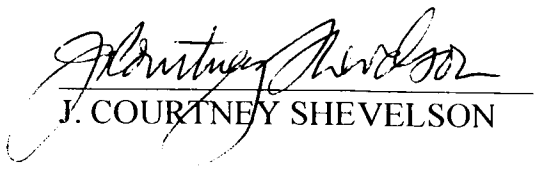
CERTIFICATE OF COMPLIANCE

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 7,267 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 REPLY BRIEF ON THE MERITS

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Each said envelope was then, on May 26, 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 May 26, 2009, at Monterey, California.

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