In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. **MICHAEL JEROME SUTTON and WILLIE JACKSON, JR.,** **Defendants and Appellants.**	Case No. S166402

California Second Appellate District Court Case No. B195337
The Honorable Judith L. Champagne, Judge

ANSWER BRIEF ON THE MERITS

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

INTRODUCTION

In this narcotics case with jointly-charged defendants, counsel for appellant Willie Jackson, Jr. (Jackson), on the last day of the 60-day statutory deadline for commencing trial, moved to continue the trial due to his present engagement in another trial that had run longer than expected. Finding that Jackson and codefendant and appellant Michael Sutton (Sutton) had not waived any personal objections, the trial court nonetheless found good cause to continue the joint trial for six days beyond the statutory limit based on Jackson's counsel's unexpectedly long other trial.

The Court of Appeal upheld the trial court's ruling and affirmed appellants' convictions. The Court of Appeal held that the brief trial delay did not violate Jackson's statutory right to a speedy trial because Jackson's trial counsel's court conflict constituted good cause. The Court of Appeal further held that the proper continuance of Jackson's trial also constituted good cause to continue the joint trial as to Sutton.

STATEMENT OF THE CASE

Following a Los Angeles Police Department undercover narcotics buy operation, Sutton and Jackson were arrested for selling drugs together to an undercover officer in downtown Los Angeles. (1RT 48-64, 107-117, 133-134, 138-148, 158-161.)

On June 2, 2006, the Los Angeles County District Attorney ("the People") filed a felony complaint jointly charging appellants with sale of

cocaine base and charging Sutton with possession for sale of cocaine base.[1] (Appellant Sutton's Motion to Take Judicial Notice ("MJN"), Exh. A.)[2] On June 16, day 10 of the 10-day deadline after arraignment for a preliminary hearing (see Pen. Code, § 859b), appellants were mistakenly taken to the wrong courthouse. (10/16/07 ART 1.)[3] As a result, the trial court dismissed the cases due to "delay – action not brought to court in time." (MJN, Exh. B at pp. 2-3; see also 10/16/07 ART 1.)

On June 19, the People refiled a felony complaint with the same charges. (MJN, Exh. C.) On July 21, the People filed an information, again with these charges. (1CT 37-38; see 1CT 115-118.) Appellants were arraigned on the same day. The pretrial conference was set for August 10, and jury trial was set for September 11, as day 52 of the 60-day speedy trial period prescribed by Penal Code[4] section 1382 ("day 52 of 60"). (1CT 69-70.) On August 10, the pretrial conference was trailed to September 6. (1CT 72.) On September 6, the trial date was advanced to September 12, as day 53 of 60. (1CT 75.) On September 12, the matter was transferred to another department for trial assignment on September 15, as day 56 of 60. (1CT 102.)

On September 15, the matter was called for jury trial. The trial court trailed the matter to September 18, as day 59 of 60, over Sutton's objection,

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[1]All further date references are to the year 2006, unless otherwise noted.

[2]On August 16, 2007, the Court of Appeal granted Sutton's Motion to Take Judicial Notice.

[3]"10/16/07 ART" refers to the Reporter's Augmented Transcript filed in the Court of Appeal on October 16, 2007.

[4]All subsequent statutory references are to the Penal Code, unless otherwise indicated.

finding good cause because codefendant Jackson's counsel was engaged in trial. Jackson stated that he was not waiving time for any trial delay. The court acknowledged that Sutton and Jackson were not waiving time. (1CT 104; ART 4–5.)[5] On September 18, the matter was called for jury trial. Jackson's counsel was still engaged in trial, so the court ordered Sutton to appear the next day, as day 60 of 60. (1CT 106; ART 6-7.)

On September 19, day 60 of 60, the matter was called for jury trial. The court trailed the matter to September 20, over Sutton's objection, finding good cause because codefendant Jackson's counsel was still engaged in trial. The court acknowledged that "there's no time waiver here, you're in the 60-day period," and stated, "Mr. Jackson, Mr. Sutton, you're not waiving time." (1CT 108; ART 11-13.)

On September 20, the court called the matter for jury trial. The court trailed the matter to September 21, over Sutton's objection, finding good cause because codefendant Jackson's counsel was still engaged in trial. Jackson's counsel initially made a "pro forma motion to dismiss" on the ground that the matter was on day 61 of 60. The court found that the motion was not in good faith if counsel was also moving to continue because he was engaged in another trial. (1CT 110; ART 15-17.)

On September 21, the matter was called for jury trial. The court trailed the matter to September 22, over Sutton's objection, finding good cause because codefendant Jackson's counsel was still engaged in trial. In response to Sutton's query, the court stated: "You haven't waived one second. I find good cause because one of the two counsel are engaged in trial, which is good cause to trail the case." (1CT 112; ART 18-22.)

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[5]"ART" refers to Reporter's Augmented Transcript filed in the Court of Appeal on July 5, 2007.

On September 22, the matter was called for jury trial. The court trailed the matter to September 25, day 66 of 60, over Sutton's objection, finding good cause because codefendant Jackson's counsel was still engaged in trial. The court said "there's no time waiver" and stated: "The good cause is that one of the lawyers is engaged and can't try two cases at one time. And if one of the lawyers is engaged on a case with two defendants, it's good cause to put both over." (1CT 114; ART 24-26.)

On September 25, all parties announced "ready," and Sutton moved to dismiss for lack of a speedy trial. The prosecutor objected to the motion to dismiss, stating that the prosecution had been ready throughout the proceedings and was not responsible for any delay. The trial court denied the motion, finding that co-counsel's engagement in another matter constituted good cause to continue the trial. (1CT 122-123; 1RT 7-8.)

Following a jury trial, appellants were found guilty as charged. (1CT 170-176; 2RT 310, 317.) The trial court sentenced Jackson to four years in prison and Sutton to nine years in prison. (1CT 182, 186, 189-192; 2RT 324, 339-340.)

Appellants appealed, contending that the trial court violated their statutory right to a speedy trial. The Court of Appeal issued an opinion on March 26, 2008, in which it affirmed the judgment as to Jackson, but reversed Sutton's conviction holding that his right to a speedy trial under section 1382 was violated. (3/26/08 Opn. at 2, 10-13.)

Six days later, on its own motion, the Court of Appeal granted rehearing and ordered the parties to submit supplemental briefing addressing section 1050.1, which addresses continuances in multiple-defendant cases. In a subsequent opinion filed July 30, 2008, the Court of Appeal held that the trial delay did not violate Jackson's statutory right to a speedy trial because his "trial counsel [wa]s presently engaged in another

matter and the matter before the court trail[ed] for a minimal number of days . . . ." (Opn. at 10.) The Court of Appeal further held that in light of the strong legislative preference for joint trials, there was also good cause to continue Sutton's trial. (Opn. at 13-14.) The court affirmed the judgment as to both appellants, reversing and remanding Sutton's matter only with respect to sentencing on prior prison term enhancements. (Opn. at 2, 24.)

Appellants each filed a petition for review in this Court. On October 28, 2008, this Court granted review.

SUMMARY OF ARGUMENT

The Court of Appeal correctly found that the trial court did not violate appellants' statutory speedy trial rights. A felony trial may be continued beyond the statutory 60-day limit upon a showing of good cause. The trial court properly found good cause to continue appellant Jackson's trial, because Jackson's counsel was engaged in another trial that unexpectedly ran long. Jackson's counsel was not delaying the instant matter so that he could try other cases ahead of it; rather, counsel was briefly unavailable due to actually being in trial on another matter that began soon before the scheduled start of the instant trial. This short continuance for Jackson's trial was warranted.

The trial court also properly found that the six-day continuance granted to Jackson's counsel constituted good cause to continue the joint trial as to appellant Sutton. Under section 1050.1, the trial court's finding of good cause to continue Jackson's trial meant that there was good cause as to the jointly-charged Sutton. Moreover, under section 1050.1, because Jackson's counsel's other trial had almost completed, and all counsel were otherwise prepared, it was not "impossible" for all defendants to be available and prepared within a reasonable period of time. In any event,

given the strong legislative preference for joinder, it was a proper exercise of discretion to keep this case together rather than dismiss or sever Sutton's case. The six-day trial continuance was relatively brief, and the added burden on the court system in conducting two separate trials would have been significant. Further, a rule by this Court disallowing a continuance under these circumstances would foster unnecessary gamesmanship in that co-counsel could force an unwarranted severance by simply ensuring that one counsel was unavailable for trial on the last day of the trial period.

Respondent also respectfully submits that this Court modify the rule that it set forth in *People v. Johnson* (1980) 26 Cal.3d 557. This case presents a suitable vehicle for this Court to reconsider whether, in light of subsequent developments, the *Johnson* rule is appropriate in California's courts. *Johnson*'s solution to the legitimate problem of delay caused by excessive caseloads of public defenders yields negative unintended consequences. Respondent suggests that this Court adopt the United States Supreme Court rule that delays sought by defense counsel are ordinarily attributable to their clients unless there is a showing that the delay in a particular case is the direct result of an institutional breakdown in the public defender system.

Finally, considering the underlying policies and purposes of section 1382 and 1387, any error in violating the speedy trial statute was harmless. Appellants have failed to demonstrate any actual prejudice from the brief delay in this joint felony trial.

ARGUMENT

I. THE TRIAL COURT DID NOT VIOLATE APPELLANTS' STATUTORY SPEEDY TRIAL RIGHTS BY BRIEFLY CONTINUING THE JOINT TRIAL DUE TO ONE COUNSEL'S UNEXPECTEDLY LONG ENGAGEMENT IN ANOTHER TRIAL

A. The Trial Court Properly Exercised Its Discretion in Finding Good Cause to Continue the Joint Trial Due to Co-Counsel's Representation in an Ongoing Trial

1. A Felony Trial May Be Continued beyond the Statutory 60-Day Limit upon a Showing of Good Cause

The California Constitution guarantees a criminal defendant's right to a "speedy public trial." (Cal. Const., art. I, § 15; see also § 1050.) Section 1382 interprets the state constitutional right to a speedy trial. (*People v. Anderson* (2001) 25 Cal.4th 543, 604-605; *People v. Martinez* (2000) 22 Cal.4th 750, 766; *People v. Johnson*, *supra*, 26 Cal.3d at p. 561.) It provides that, absent a showing of good cause, waiver, or consent, a defendant accused of a felony must be brought to trial within 60 days of arraignment. (§ 1382.) "[O]n appeal from a judgment of conviction, a defendant asserting a statutory speedy trial claim must show that the delay caused prejudice, even though the defendant would not be required to show prejudice on pretrial appellate review." (*People v. Martinez*, *supra*, 22 Cal.4th at p. 769; see also *People v. Johnson*, *supra*, 26 Cal.3d at p. 575.)

The right to a speedy trial is not absolute, however, and a trial court may continue a felony case for trial beyond the statutory 60 days upon a showing of good cause. (See *Arroyo v. Superior Court* (2004) 119 Cal.App.4th 460, 463-464, citing § 1050.1; § 1382.) What constitutes good cause to continue a case depends on the circumstances of each case, and the issue is reviewed on appeal under an abuse of discretion standard.

(*People v. Johnson*, *supra*, 26 Cal.3d at p. 570; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) Under this standard, the trial court's "exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

2. The Trial Court Properly Found Good Cause to Continue Jackson's Trial Despite His Objection

Jackson's counsel moved to continue the trial in this case for six days because of his unexpected need to defend another client in a trial that lasted longer than he expected. Because this delay was brief and unanticipated, the trial court properly exercised its discretion in finding good cause to trail this case for six days after the statutory deadline. The trial court also properly exercised its discretion in not inquiring about an option of substitute appointed counsel because, under these circumstances, Jackson's delay would most likely have been longer had substitute counsel been appointed. This Court's precedent, although not permitting exceeding the deadline for a long period based on an attorney's calendar management, does permit a brief continuance due to unforeseen circumstances, such as, here, an attorney's longer-than-expected trial.

It is well settled that defense counsel generally has authority to waive statutory speedy trial rights of the defendant, even over the defendant's objection:

> Defense counsel, as part of his or her control of the procedural aspects of a trial, ordinarily has authority to waive the statutory speedy trial rights of his or her client, even over the client's objection, as long as counsel is acting competently in the client's best interest. (*People v. Harrison*

(2005) 35 Cal.4th 208, 225, 25 Cal.Rptr.3d 224, 106 P.3d 895; *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 781, 784, 126 Cal.Rptr. 251, 543 P.2d 619 (*Townsend*).) This is because statutory speedy trial rights are not among those rights that are considered so fundamental that they are "beyond counsel's primary control." (*Townsend*, *supra*, 15 Cal.3d at p. 781, 126 Cal.Rptr. 251, 543 P.2d 619; cf. *New York v. Hill* (2000) 528 U.S. 110, 114-115, 120 S.Ct. 659, 145 L.Ed.2d 560 [recognizing the authority of defense counsel to waive specified federal statutory speedy trial rights].)

(*Barsamyan v. Superior Court* (2008) 44 Cal.4th 960, 969.) This Court has recently found that defense counsel's implied consent to a continuance of the defendant's trial after the expiration of the statutory speedy trial period was binding on the defendant. (*Id.* at p. 981.)

Where a defendant personally objects, however, defense counsel cannot delay a trial simply to place the interests of another defendant over those of the continued defendant. (*Barsamyan v. Superior Court, supra,* 44 Cal.4th at p. 981; *People v. Johnson*, *supra*, 26 Cal.3d at pp. 561-562.) Almost 30 years ago, this Court determined that the mere fact of conflicting attorney obligations does not constitute good cause under section 1382 to continue a trial over the defendant's objection for 84 days after the 60-day statutory deadline. In *Johnson*, "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." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 561.) This Court ruled that, when a defendant "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 but to accommodate counsel's other clients." This Court also held that, in the case of an incarcerated defendant, the public defender's inability to try a case "within the statutory period because of conflicting obligations does not constitute good cause to avoid dismissal of the charges." (*Id.* at pp. 561-562.)

In support of this holding, this Court reasoned in *Johnson* that "improper court administration," "excessive public defender caseloads," and "court congestion," do not constitute good cause for delay of trial. (*People v. Johnson, supra,* 26 Cal.3d at pp. 570-571.) By contrast, delay arising from unforeseen circumstances, such as an unexpected illness or *unavailability of counsel* or witnesses, constitutes good cause to continue a trial. (*Id.* at p. 570, emphasis added; see also *Barsamyan v. Superior Court, supra*, 44 Cal.4th at p. 981.) This Court later reaffirmed this exception involving the unexpected unavailability of counsel, noting that "scheduling conflicts arising from 'exceptional circumstances,' i.e., 'unique [and] nonrecurring events,' may sometimes justify particular delays." (*Stroud v. Superior Court* (2000) 23 Cal.4th 952, 969.)

Turning to this case, it appears that Jackson impliedly made a personal objection to the trial court's continuance past the 60-day limit. In this regard, although the record does not reflect that on day 60 of 60, Jackson personally objected to continuing the matter to day 61, the trial court nonetheless stated, "Mr. Jackson, Mr. Sutton, you're not waiving time." (ART 11.) This appears to have been a finding by the trial court that appellants' earlier objections to the earlier continuances were continuing objections. Although a defendant, in order to invoke a speedy trial statute, ordinarily must explicitly object on the day that the matter is set to a date beyond the statutory deadline (*People v. Wilson* (1962) 60

Cal.2d 139, 146), it appears that the trial court's explicit finding of no personal waiver on day 60 of 60 relieved Jackson of that requirement.

However, the delay in this case was based on what this Court referred to in *Johnson* as "unforeseen circumstances," not "excessive public defender caseloads," and thus unlike in *Johnson*, there was good cause to exceed the deadline for a brief time in this case. In *Johnson*, the defendant's counsel initially delayed trial because counsel was engaged in trial on another matter and because he believed that his other cases had precedence over *Johnson*'s. Counsel in *Johnson* specifically stated he had two other cases older than that of the defendant and asked for a continuance or six *weeks*. (*People v. Johnson*, *supra*, 26 Cal.3d at p. 563.) Counsel continued to delay trial based only on conflicting trial schedules of his other clients, thereby engaging in case management to his client's detriment. (*Id.* at pp. 563-565.)

Here, by contrast, the delay was short, unexpected, and bore no indication of systemic overload in the public defender's office. On Friday, September 15, day 56 of 60, Jackson's counsel stated that he would "probably" be done with his other trial on Monday, September 18, day 59 of 60. (ART 2-3.) So, on Jackson's motion, the matter was trailed until Monday. (ART 3-5.) On the morning of Monday, September 18, day 59 of 60, Jackson's counsel stated that he was "still engaged" in trial and stated, "I don't go back today until 1:30." The trial court answered, "So you won't finish." On Jackson's counsel's motion, the matter was trailed until Tuesday, September 19, day 60 of 60. (ART 7-8.)

It was not until that Tuesday, September 19, day 60 of 60, that Jackson's counsel, contrary to his earlier estimate, now predicted that his other trial would be over "probably tomorrow," day 61 of 60. (ART 10.) After Jackson's counsel's subsequent day-to-day motions to continue based

on his other trial, the trial in this case ultimately began six days after the statutory period expired. This brief delay due to Jackson's counsel's trial was certainly unexpected, as Jackson's counsel's comments on day 61 of 60 corroborate. (ART 16 [where Jackson's counsel makes a motion to continue on the basis that "I'm on day eight of a two-day trial"].) Unlike in *Johnson*, Jackson's counsel was not attempting to manage his calendar by prioritizing other cases over Jackson's case. Rather, he only sought to continue Jackson's case when he became engaged in an unexpectedly lengthy trial in another case. Additionally, the trial court delayed trial by a minimal number of days – six – as opposed to the 84-day delay in *Johnson*.

Nevertheless, Jackson argues that the trial court improperly failed to inquire into available means of protecting his right to a speedy trial when it initially continued the case beyond the 60-day period. (JOB 19-23.)[6] This Court indicated in *Johnson* that when trial counsel requests a delay in trial due to caseload management, the trial court should inquire whether another counsel could be appointed to represent and protect the speedy trial rights of the affected defendant. (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 572-573.) If the defendant seeks to dismiss the charges under section 1382, the trial court should then require the prosecution to show good cause to avoid the dismissal. (*Ibid.*) But, as Jackson acknowledges, this Court in *Johnson* found that if an inquiring court determined that it was not feasible to protect the defendant's speedy trial right by substitution of counsel, "the court will have no alternative but to grant a continuance." (*Ibid.*)

Jackson would not have been better served by a substitution of counsel at this late date. On September 15, day 56 of 60, Jackson's counsel

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[6]"JOB" refers to appellant Jackson's opening brief. "SOB" refers to appellant Sutton's opening brief.

told the trial court that he was engaged in another trial but that it "probably" would be finished on September 18, day 59 of 60, so the court continued the case until then. On September 18, the court trailed it day to day on the basis that Jackson's counsel was still engaged. On day 60 of 60, Jackson's trial counsel for the first time stated that the trial probably would not end until the next day. Given these facts, the trial court could reasonably conclude that it was highly unlikely that any newly substituted counsel would have been adequately prepared for trial before Jackson's counsel was ready on day 61 of 60 of the statutory trial period.

With the court then trailing day to day because of a trial that, according to defense counsel, was supposed to end days earlier, there was no indication anywhere along the line that the other trial would last even as long as six days over the period. Yet, even had the trial court known on day 59 or day 60 that Jackson's counsel would not be ready until day 66, there is no reason to believe that newly substituted counsel would be prepared and ready to proceed before then. There being no feasible alternative to Jackson's counsel, the trial court was under no obligation to inquire into such a possibility.

And again, the prosecutor had announced "ready" since the beginning this case (ART 6, 16, 20, 26; 1RT 1, 7) and bore no responsibility for any delay. Consequently, delaying the trial for six days to retain Jackson's prepared counsel inured to Jackson's benefit, and, moreover, was justified by unforeseen circumstances. Accordingly, the trial court acted well within its discretion in finding good cause to continue Jackson's trial.

3. The Trial Court's Continuance Based on Jackson's Counsel's Unexpected Trial Conflict Constituted Good Cause to Continue the Joint Trial as to Sutton

The voters and Legislature have expressed a strong preference for retaining joinder of codefendants' trials. In fact, upon the prosecution's motion, section 1050.1 effects an automatic finding of good cause to continue a defendant's trial upon the finding of good cause for the codefendant. Because there was good cause to continue Jackson's trial, there was good cause to continue Sutton's trial.

In 1990, Proposition 115, the "Crime Victims Justice Reform Act," took effect, addressing many facets of criminal trial conduct. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 299.) As pertains to this case, one provision of Proposition 115 was section 1050.1, which required trial courts to retain joinder under certain circumstances:

> In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance *shall*, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time.

(Italics added.) Thus, 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. (See *Arroyo v. Superior Court*,

supra, 119 Cal.App.4th at p. 464; *In re Samano* (1995) 31 Cal.App.4th 984, 993.)

The case of *In re Samano, supra*, 31 Cal.App.4th 984, illustrates how good cause for one codefendant is good cause for another codefendant. In the *Samano* trial, a criminal prosecution involving 33 defendants, two defendants requested a continuance of the preliminary hearing beyond the 10-court-day period mandated by section 859b. The trial court then granted the People's section 1050.1 motion for a continuance of the hearing as to all defendants, but denied the motion of two other defendants to be released on their own recognizance because the preliminary examination went beyond the 10-court-day statutory limit in section 859b. (*In re Samano, supra,* 31 Cal.App.4th at p. 989.) Holding that section 859b must be "harmonized" with section 1050.1, the Court of Appeal upheld the trial court's decision, concluding, "The request of one properly joined defendant for a continuance of the preliminary examination with good cause shall be deemed a request of all jointly charged defendants." (*Id.* at p. 993.)

Like the 10-court-day statutory limit of section 859b, the 60-day rule of section 1382 contains a good-cause exception. (See *Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 733-734.) Thus, under section 1050.1, where there are circumstances constituting good cause for one defendant, a trial court may continue a trial for both defendants beyond the end of the 60 days contemplated by section 1382.

The prosecutor in this case does not appear to have made a formal "motion" as to Sutton under section 1050.1. But the trial court stated that granting Jackson's continuance constituted good cause for delaying the joint trial as to Sutton. (ART 12, 17, 21, 25.) Thus, the trial court granted the same relief that the prosecutor would have sought in an express motion. Consequently, this Court should find either that there was an implied motion or else should excuse the lack of an explicit motion. To require that

a prosecutor explicitly make a motion to find good cause under section 1050.1, even after a trial court finds good cause consistent with the dictates of 1050.1, would be to require a "useless act" (*Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 656), contrary to the legislative intent that good cause be automatic in this situation. (See *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227 ["Any interpretation [of a statute] that would lead to absurd consequences is to be avoided"].)

Further, when Sutton made a "motion for dismissal on lack of a speedy trial," the prosecutor noted that the People had answered "ready" since the case was transferred for trial, and opposed the motion. (1RT 7; see ART 6, 16, 20, 26; 1RT 1.) The prosecutor's opposition to Sutton's dismissal motion, after the 60-day period had passed, was a further confirmation of his intent to maintain the joint trial. Because there was good cause to continue as to Jackson, there was necessarily good cause as to Sutton under the first sentence of section 1050.1.

In any event, the second sentence of section 1050.1 provides that a trial court "shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court . . . that it will be impossible for all defendants to be available and prepared within a reasonable period of time." Here, it was not impossible for counsel for both Sutton and Jackson to be available within a reasonable period. Sutton's counsel was available throughout the six-day trial delay, and Jackson's counsel was available six days after the end of the statutory period. Under the circumstances, six days plainly constituted a "reasonable period of time."

The Court of Appeal, however, found that because the prosecutor made no explicit motion under section 1050.1, the statute did not directly support the trial court's ruling. Still, the Court of Appeal recognized that the considerations underlying section 1050.1, and reflected in case

authority, demonstrated a strong preference for joint trials. In light of this law, the Court of Appeal reasoned, "Those policy and pragmatic considerations here include the relative brevity of the delay (six days), and the not insignificant burden on the court system in conducting two trials." As a result, the Court of Appeal found good cause to continue the trial as to Jackson's codefendant Sutton. (Opn. at 11-14.) If this Court agrees with the Court of Appeal that section 1050.1 does not directly apply, it should nonetheless also agree with the Court of Appeal that given the strong legislative preference and constitutional mandate for joint trials, the trial court properly exercised its discretion in this case in finding that the continuance granted to Jackson constituted good cause for delaying the joint trial.

Joinder applies to defendants charged with 'common crimes involving common events and victims.'" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296, citing *People v. Tafoya* (2007) 42 Cal.4th 147, 162, internal quotation marks omitted.) This Court recently summarized the basis for the traditional preference for joinder:

> [J]oint trial ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials. . . . A unitary trial requires a single courtroom, judge, and court attach[és]. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process.

(*People v. Soper* (2009) 45 Cal.4th 759, 772, internal quotation marks and citations omitted.)

This preference for joint trials is embodied in our Constitution as well. Since the voters enacted Proposition 115 in 1990, article I, section 30, subdivision (a) of the California Constitution provides: "This Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature or by the People through the initiative process." In addition, section 1098 provides: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they *must* be tried jointly, unless the court orders separate trials." (Italics added.) This joint trial preference can also constitute good cause to delay a trial beyond the statutory deadline. (See *Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 501.)

Historically, neither a defendant's statutory right to trial within the 60-day period nor the mandate for joint trial have been absolute, but instead have been "subject to the discretion of the trial court in evaluation of conflicting policy and pragmatic considerations." (*Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884, 891.) "A ruling [denying severance] that was correct when made will stand unless joinder causes such 'gross unfairness' as to violate defendant's due process rights." (*People v. Carasi, supra*, 44 Cal.4th at p. 1296, citing *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 998, internal quotation marks omitted; see also *People v. Lewis* (2008) 43 Cal.4th 415, 452.) 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. (*People v. Teale* (1965) 63 Cal.2d 178, 186, reversed on other grounds by *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]; see also *Hollis v. Superior Court* (1985) 165 Cal.App.3d 642, 646 [the defendant's speedy trial right was not violated by a continuance of 100 days past the statutory time based on the codefendant's assertion he needed more time to prepare for trial].)

As the Court of Appeal found, here, the trial delay – six days – was relatively brief, and the burden on appellants was minimal. On the other hand, the added burden on the court system in conducting two separate trials would have been significant. (See *People v. Lawrence* (Apr. 30, 2009, S160736) ___ Cal.4th ___ [2009 WL 1151762] [severing a multi-defendant case in order to grant one defendant's self-representation motion would have caused "the wasteful duplication of holding two trials involving many of the same events and witnesses," resulting in "significant disruption or untoward delay"].) Accordingly, the facts in this case do not present any basis for departing from the strong preference for joint trials, and amply support the trial court's exercise of discretion in continuing Sutton's trial in light of the need to continue Jackson's trial.

This Court's decision in *Johnson* does not impact the propriety of the trial court's decision to continue Sutton's trial. In *Johnson*, this Court protected defendants from situations in which their own attorney might put the interests of another client above their own in order to manage calendar conflicts arising from overburdened appointed counsel. (*People v. Johnson, supra*, 26 Cal.3d at pp. 561-562.) It did not address issues arising from a co-counsel's unexpected engagement in another matter. The solution in *Johnson* of appointing new counsel for Sutton would have been ineffective because Sutton's counsel was in fact ready. Thus, *Johnson* is inapplicable.

Sutton heavily relies upon the Court of Appeal's decision in *Arroyo v. Superior Court, supra*, 119 Cal.App.4th 460, which itself relies upon the appellate decisions in *Sanchez v. Superior Court, supra*, 131 Cal.App.3d 884, and *People v. Escarega* (1986) 186 Cal.App.3d 379. (SOB 7, 9, 15-16, 20-21, 27, 33-36.) *Arroyo* is inapposite because in that case, there was no reason to continue either defendant's trial other than to retain joinder; thus, the Court of Appeal held there was no good cause to set the trial after

the statutory deadline for one of the codefendants. (*Arroyo v. Superior Court, supra*, 119 Cal.App.4th at pp. 464-465.) In contrast, there was good cause in this case to continue one of the codefendant's trials (Jackson's) for a brief period, namely, an unexpected trial conflict.

Furthermore, *Sanchez* and *Escarega*, the latter which propounded a rule that "extraordinary circumstances" were necessary to continue a jointly charged defendant's trial past the statutory deadline upon the continuation of a codefendant's trial, were decided before Proposition 115 added article I, section 30, subdivision (a) to the California Constitution in 1990. As noted above, article I, section 30, subdivision (a) "precludes the courts from applying the California Constitution as an independent basis for the prohibition of joinder." (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1298.) Thus, "where an evaluation of joinder is based on the California Constitution," because of section 1382, for example, which interprets the state constitutional right to jury trial, "it would be abrogated by Proposition 115." (*Ibid.*) As a result, this Court should disapprove *Arroyo* to the extent that the Court of Appeal relied on this earlier "extraordinary circumstances" standard that runs afoul of the subsequent constitutional change.

In addition, holding that there was no good cause for the non-moving codefendant would create inappropriate incentives for defense counsel in a joint trial. Codefendants' counsel potentially could force an unwarranted severance by agreeing that the defendants insist on being tried within 60 days, and that one counsel ensure that he is engaged in another matter on day 60. In such a scenario, the only options, even if the prosecutor has been ready throughout, would be to sever the cases and require the prosecution of separate trials, or to dismiss and refile. But, if the latter choice was made, the same scenario could occur again at a later date, forcing a severance such that the prosecutor must proceed immediately

against one defendant when a prosecution against two or several defendants had been planned.

Or, as in the instant case, if the matter had been previously dismissed, section 1387 would bar a refiling of the charges, so that an otherwise unwarranted severance would be the only option. Such a result would not have been consistent with the Legislature's or the voters' strong preference for joint trials. Thus, the trial court properly found that Jackson's counsel's unexpected court conflict constituted good cause to continue Sutton's trial for a short period so as to maintain joinder in this two-defendant case.

4. This Court Should Replace *Johnson*'s Dismissal Solution with a Rule That Balances and Protects the Interests of All Parties, Including the Courts, the People, and the Defendants

As stated previously, *Johnson* is distinguishable from Jackson's situation, and it is plainly inapplicable to Sutton's. Nevertheless, respondent respectfully submits that *Johnson* has proven to be a difficult standard for trial courts to apply, a standard that encourages defense counsel to play the "speedy trial game"[7] of making themselves unavailable in order to produce a dismissal, a standard that unfairly shifts the burden of defense counsel's case conflicts from their clients to the public and California's trial judges. Respondent respectfully submits that the high court's constitutional rule for federal speedy trial rights, attributing defense counsel's delay to the defendant rather than to the state, absent a showing of institutional breakdown in the public defender system, is a

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[7] *Cf. People v. Marshall* (1997) 15 Cal.4th 1, where this Court expresses its "concern that some assertions of the right to self-representation may be a vehicle for manipulation and abuse," and acknowledges that "[m]any courts" have noted that "clever defendants" will play "the '*Faretta* game,'" trying to create reversible error by making equivocal self-representation requests. (*Id.* at p. 22, quoting *People v. Williams* (1990) 220 Cal.App.3d 1165, 1170.)

more suitable solution in the statutory speedy trial context as well. This solution minimizes the gamesmanship and uncertainty that have resulted from the *Johnson* rule,[8] while still protecting poorer defendants from the potentiality that systemic public defender overload makes it impossible for them to receive a speedy trial.[9]

This Court recently declined an invitation to reconsider *Johnson*. In *Barsamyan v. Superior Court*, this Court found that defense counsel's implied consent to continuance of the defendant's trial after the expiration of the statutory speedy trial period was binding on the defendant. (*Barsamyan v. Superior Court, supra*, 44 Cal.4th at p. 981.) Because the defendant in *Barsamyan* did not personally object, there was no cause to apply the *Johnson* rule at all, and so this Court, understandably, chose not to revisit *Johnson*. (*Id.* at p. 982.) In order to resolve *Jackson*'s case, however, this Court has to actually apply *Johnson*'s rules regarding attorney conflict and unforeseen circumstances. Therefore, this seems a suitable case to reexamine and refine *Johnson*'s solution for addressing "court congestion or excessive public defender caseloads." (*People v. Johnson, supra*, 26 Cal.3d at p. 571.)

Twenty-nine years ago, the *Johnson* court was presented with the legitimate problem of repeated delays by deputy public defenders that had chronically congested calendars due to excessive caseloads. (*People v. Johnson, supra*, 26 Cal.3d at pp. 569-575.) To solve the conflict of interest that was resulting from excessive caseloads, *Johnson* turned to the speedy

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[8] For example, in this case, Jackson's counsel requested continuances past the statutory limit because of his own unexpected court conflict while simultaneously moving to dismiss the case on speedy trial grounds.

[9] This argument is substantially derived from a portion of the Los Angeles City Attorney's brief in *Barsamyan v. Superior Court, supra*, 44 Cal.4th 960. (See 2007 WL 2485601, *29-37 [answer brief on the merits].)

trial statute and framed the issue as whether appointed counsel had the "power to consent" to delay under the statute. *Johnson* placed sole control over delay in the hands of the defendant, deciding that appointed counsel could not consent to delay over a defendant's express objection to resolve any calendar conflict. To do so, *Johnson* had to make an exception to the general authority of counsel to consent to statutory delay, which this Court had previously settled in *Townsend v. Superior Court* (1975) 15 Cal.3d 774. Because *Johnson* chose to treat the problem as a statutory speedy trial issue, it determined that the failure of appointed counsel to get the defendant to trial within the statutory period due to a calendar conflict would mandate a dismissal — even if the People were fully ready for trial.

Johnson's solution has been counterproductive, as recognized by other state courts. Despite the goal of having cases go to trial without delay, public defenders instead can use *Johnson* to justify keeping the statutory period running. Then, potentially, they can advise the court of their conflict and the defendant's need for new counsel at the 11th hour. This simply turns *Johnson* into a vehicle for dismissals when the court is given inadequate time to marshal its resources to appoint new counsel who can be ready by the last day and secure courtrooms and jurors at the last moment.

In the 29 years after *Johnson* was decided, no state court outside of California has followed *Johnson*'s solution that the public defender's resource problem should be solved by permitting dismissal of cases on statutory speedy trial grounds because of a defense calendar conflict. Drawing no distinction between the authority of appointed and retained counsel, several states have, like *Townsend*, held that because a defendant's statutory speedy trial rights are within counsel's control, counsel can delay

those rights in order to resolve a calendar conflict.[10] Some state courts have explicitly cited *Johnson* and refused to follow its reasoning that counsel can never consent to delay to due to a calendar conflict. *Johnson*'s solution, then, stands alone.[11]

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[10] See *People v. Eddington* (1978) 64 Ill.App.3d 650, 653 [381 N.E.2d 835] [concerning appointed counsel, the court held, "Where a continuance or delay in trial is occasioned because defense counsel is engaged elsewhere, the delay is properly charged to the defendant"]; *State v. Sims* (2006) 272 Neb. 811, 814-815 [725 N.W.2d 175] [concerning retained counsel, the court held that the defendant was bound by the delay requested by counsel that included counsel's and the court's upcoming vacations]; *State v. Eager* (Ohio Ct. App., Feb. 19, 1998, No. 07 APA 08-1007) 1998 WL 67015, *3 [concerning appointed counsel, the court held, "A defendant's right to be brought to trial within the (statutory speedy trial statute) may be postponed by defense counsel for extensions to prepare for trial as well as for conflicts in defense counsel's schedule"]; *State v. Karlen*, 1999 SD 12, ¶¶ 7-14 [589 N.W.2d 594] [the court held that defense counsel's agreement to a continuance because he had a conflicting trial was a continuance attributable to the defendant]; *State v. George* (1984) 39 Wash.App. 145, 149-156 [692 P.2d 219] [concerning retained counsel, citing *Townsend* with approval, the court held that counsel can postpone defendant's statutory speedy trial right because his trial calendar was already full]; *Farinholt v. State* (1984) 299 Md. 32, 39-40 [472 A.2d 452] [a defendant's counsel may consent to a trial date in violation of the state statutory speedy trial right]; *State v. Zuck* (1982) 134 Ariz. 509, 515 [658 P.2d 162] [delays sought by a defendant's counsel are binding on the defendant and waive the defendant's speedy trial right even when done without the defendant's consent]; *State v. LeFlore* (Iowa 1981) 308 N.W.2d 39, 41 [defense counsel may waive the defendant's statutory speedy trial right without the defendant's express consent].

[11] See *People v. Chavez* (Colo.Ct.App. 1982) 650 P.2d 1310, 1311 [the public defender requested a continuance beyond the statutory speedy trial deadline because he "had other matters scheduled"; the court found dismissal was not required, noting that *Johnson* held to the contrary but "declin(ing) to follow it"]; *Commonwealth v. McCants* (1985) 20 Mass.App.Ct. 294, 298-300 [480 N.E.2d 25] [citing *Johnson* as being in contrast to that court's position that counsel does not need the defendant's consent before agreeing to scheduling arrangements, noting that "counsel have conflicting engagements"].

Even in California, appellate courts have expressed frustration and dissatisfaction with *Johnson*'s solution. Justice Richardson predicted that the rule in *Johnson* would discourage plea bargains and encourage more delay and congestion of the court system in hopes of forcing a dismissal on the last day. (*People v. Johnson, supra*, 26 Cal.3d at p. 584 (dis. opn. of Richardson, J.).) Fifteen years after *Johnson*, Justice Vogel in *People v. Superior Court* (*Alexander*) (1995) 31 Cal.App.4th 1119, 1129, stated that *Johnson* had made effective court calendar management even more difficult. Justice Vogel urged this Court to "reconsider" *Johnson*'s solution that appointed counsel can never consent to delay over a client's objection in order to go to trial on another defendant's case. Noting that "the practical reality is that defense counsel cannot do two things at once," Justice Vogel advocated that trial courts should generally be able "to defer to trial counsel's decisions regarding caseload management when the only right implicated was the statutory right to a speedy trial." Agreeing with Justice Richardson's dissent in *Johnson*, Justice Vogel suggested the problem of appointed counsel causing inordinate delays due to an excessive caseload "would best be handled on a case-by-case basis." (*Id.* at p. 1129, fn. 8; see also *Gomez v. Municipal Court* (1985) 169 Cal.App.3d 425, 439-441 (dis. opn. of Lillie, J.) [the public defender's misuse of *Johnson* to force a dismissal by deliberately waiting until the last day to advise court he was unavailable and that the client refused to waive time "makes a mockery of our system of justice"].)

Respondent acknowledges that like the resource problems in prosecutorial agencies and the court system, the public defender's resource problem is important. It has ramifications not only on counsel's ability to effectively represent his or her clients, but also on the efficient operation of the court, the burden on jurors, the People's right to a speedy trial, and the public's safety and welfare from the release of criminals through

dismissals. In his dissent, Justice Richardson voiced his concern that *Johnson*'s solution would jeopardize these considerations, noting that the courts and the public "may become victims of a judicial interpretation of such unnecessary rigidity." (*People v. Johnson, supra*, 26 Cal.3d at pp. 584-586 (dis. opn. of Richardson, J.).) Respondent asks this Court to refine *Johnson* and adopt a solution that protects the interests of all those involved.

In practice, *Johnson*'s solution does not resolve the conflict; it merely encourages delay by offering defendants the possibility of a dismissal as the sanction for continuances caused by appointed counsel's calendar conflicts. Rather than promoting dismissals, there are better ways to resolve appointed counsel's calendar conflicts, through solutions that consider not only the defendant's objection to excessive delay, but also the right of the prosecution to a speedy trial, the right of appointed counsel to control their calendars, the obligation of appointed counsel to resolve conflicts and effectively represent their clients, and the authority of the trial court to monitor and resolve conflicts caused by excessive public defender caseloads.

Rather than completely stripping defense counsel of the authority to consent to an ordinary and reasonable delay caused by a calendar conflict, the general rule should apply that the statutory right set forth in section 1382 is among the procedural rights that counsel controls and can postpone, even over a defendant's objection. (*Townsend v. Superior Court, supra*, 15 Cal.3d at pp. 781-782 ["the statutory right to be tried within 60 days (§ 1382, subd. 2) cannot properly be termed 'fundamental' in the foregoing sense and therefore beyond counsel's primary control"]; see also *New York v. Hill* (2000) 528 U.S. 110, 115 [120 S.Ct. 659, 145 L.Ed.2d 560] [counsel had the authority to agree to a trial date outside the statutory time period required under the Detainer Act because "[s]cheduling matters are plainly

among those for which agreement by counsel generally controls"].) As Justice Vogel observed, ordinary scheduling conflicts will naturally arise in any attorney's caseload if the attorney represents more than one client at a time. Such ordinary scheduling conflicts, that are not the result of excessive caseloads, should fall within the general rule.[12]

When appointed counsel seeks to delay a case because of a calendar conflict over the defendant's personal objection, the trial court in making its good cause determination can monitor whether the delay is the result of an excessive public defender caseload. If it is, then, as the *Johnson* court held, the trial court should deny the continuance because it is not based on good cause. (*People v. Johnson, supra*, 26 Cal.3d at pp. 569-574.) Under this

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[12] This Court has noted that unreasonable systemic delay can never constitute good cause to delay trial over a defendant's objection:

> [I]t is well settled that postponements or interruptions arising from the laziness or indifference of either counsel, or from chronic or routine court congestion caused by improper court administration or by the state's failure to provide the judges and facilities necessary to meet the foreseeable caseload, is no excuse for infringing an individual defendant's rights to expeditious treatment. (E.g., *Johnson, supra*, 26 Cal.3d 557, 570-571 & fn. 13 [statutory right to speedy trial]; *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 781-782 [200 Cal.Rptr. 916, 677 P.2d 1206] (*Rhinehart*) [same].) "'[U]nreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn.'" (*Johnson, supra*, at p. 571, quoting *Barker v. Wingo* (1972) 407 U.S. 514, 538 [92 S.Ct. 2182, 2196, 33 L.Ed.2d 101] (conc. opn. of White, J.).) On the other hand, scheduling conflicts arising from "'exceptional circumstances,'" i.e., "'unique [and] nonrecurring events,'" may sometimes justify particular delays. (*Johnson, supra*, at p. 571; *Rhinehart, supra*, at p. 782.)

(*Stroud v. Superior Court, supra*, 23 Cal.4th at p. 969.)

rule, appointed counsel has two options, either take the defendant to trial or withdraw because of the conflict and take steps to see that new counsel is appointed.

It is just such a solution to the problem that Justice Richardson was advocating in *Townsend* and in his dissent in *Johnson*. He recognized that the caseloads of the public defender would requiring some "trailing practice," but stated, "We do not suggest that counsel possesses carte blanche under any conditions to postpone his client's trial indefinitely." (*Townsend v. Superior Court, supra*, 15 Cal.3d at pp. 783-784.) He urged that "trial courts can be trusted to monitor the cases carefully, constantly sensitive and alert to any instances of abuse or overreaching." (*People v. Johnson, supra*, 26 Cal.3d at pp. 585-586 (dis. opn. of Richardson, J.).)

Appointed counsel's responsibility to control her client's statutory speedy trial right should be brought back into line with all the other procedural rights under counsel's control. Operating under such rules, public defenders, like all other attorneys, will be obligated to make reasoned and professional decisions on how to manage and prioritize their clients and their caseloads so that their clients' rights are not disadvantaged. When a public defender's caseload becomes overwhelming, the concern addressed in *Johnson* should be remedied by early court oversight and intervention and the appointment of new counsel.[13] *Johnson* should not be used merely as a vehicle to obtain a dismissal, an indefensible result that

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[13] Defense counsel ordinarily should know about any systemic problem regarding public defender caseload when initially appointed. As a result, defense counsel should immediately bring it to the attention of the trial court, giving the trial court time to appoint counsel outside the public defender's office. Conversely, if defense counsel suddenly raises such an issue for the first time soon before the expiration of the statutory period, the trial court should be less receptive toward a claim of systemic overload.

harms those who are not responsible for the delay — the prosecution, the public, and the courts.

This formulation is consistent with the United States Supreme Court's treatment of attorney conflicts in adjudging cases involving the federal constitutional right to speedy trial. In *Vermont v. Brillon* (2009) 129 S.Ct. 1283, 1290-1291, the Court reiterated that delays sought by defense counsel are ordinarily attributable to the defendants they represent, rather than the State. The same principle applies whether counsel is privately retained or publicly assigned, for the duties and obligations are the same for each. (*Id.* at p. 1291.) Assigned counsel are not state actors for purposes of a speedy-trial claim. (*Id.* at pp. 1291-1292.) The Court observed:

> A contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal of the indictment on speedy-trial grounds. Trial courts might well respond by viewing continuance requests made by appointed counsel with skepticism, concerned that even an apparently genuine need for more time is in reality a delay tactic.

(*Id.* at p. 1292.) The Court noted that this rule is not absolute; delay resulting from a systemic institutional breakdown in the public defender system could be charged to the State. (*Id.* at pp. 1292-1293.)[14] As stated previously, these concerns are also applicable to claims involving statutory state speedy trial rights. Respondent thus suggests that this Court should adopt the federal standard for assessing good cause from defense continuances, allowing defense counsel to seek reasonable delays, even

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[14] Appellants could not have shown any such systemic breakdown in the instant case. Sutton's counsel was ready to proceed, and *Jackson*'s counsel was delayed only by his engagement in an unexpectedly long trial. There was no institutional impediment to appellants' speedy trial rights.

without the defendants' consent, while giving trial courts the power to control their courtrooms and the responsibility to be vigilant against any prejudice to defendants from institutional breakdown.

B. Appellants Have Failed to Show Any Prejudice

Assuming for argument that the trial court violated appellants' statutory speedy trial rights, neither appellant has shown actual prejudice. Prior to trial, an incarcerated defendant may prevail on a motion to dismiss by showing a violation of the state speedy trial statute, without showing any prejudice. (*People v. Standish* (2006) 38 Cal.4th 858, 885-886; *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 89.) But when a defendant alleges a violation of a statutory speedy trial right on post-conviction appeal, he must show that the delay caused prejudice. (*People v. Martinez, supra*, 22 Cal.4th at p. 769; *People v. Johnson, supra*, 26 Cal.3d at p. 575.) Since appellants raise their speedy trial claims on direct appellate review, they must show prejudice.

Appellants contend that they each suffered prejudice because the prior dismissal of the charges under section 859b meant that the grant of a second dismissal under section 1382 would have barred any further prosecution.[15] (JOB 23-24; SOB 29-31.) This Court has stated that a failure to comply with section 1382 would not be reversible "'except in a

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[15] Under section 859b, a trial court must dismiss a complaint if, when a defendant is in custody, the preliminary examination is set or continued more than 10 days after the arraignment. Because the trial court found that it was day 10 of 10 and that appellants had been sent to another courthouse, it dismissed the complaint due to delay. (MJN, Exh. B at pp. 2-3; see also 10/16/07 ART 1.) It appears that there is no exception in section 1387 permitting a third felony filing in this case. (See § 1387, subd. (c)(1) [permitting a third refiling for good cause when the previous termination was for exceeding the 60-day limit for noncustodial defendants under section 859b, but not specifying this exception for exceeding the 10-day limit for custodial defendants under section 859b].)

case where, if the motion had been granted, the statute of limitations would have been a bar to a new information or indictment for the same offense.'" (*People v. Wilson* (1963) 60 Cal.2d 139, 152, quoting *People v. Douglas* (1893) 100 Cal. 1, 6; *People v. Johnson, supra*, 26 Cal.3d at p. 574.) Referring to the prejudice on appeal in misdemeanor cases, this Court in *People v. Wilson* indicated that "the erroneous denial of such a motion to dismiss would be rendered prejudicial by Penal Code, section 1387, which provides in pertinent part that on order of dismissal (under section 1382) 'is a bar to any other prosecution for the same offense if it is a misdemeanor . . . .'" (*People v. Wilson, supra*, 60 Cal.2d at p. 153, fn. 5, citing *People v. Molinari* (1937) 23 Cal.App.2d Supp. 761, 767.)

Later, in *Johnson*, a felony case, this Court, citing *Wilson*, implied that prejudice could exist in "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." (*People v. Johnson, supra*, 26 Cal.3d at p. 574, emphasis added.) In part because dismissal did not bar refiling in *Johnson*, this Court found there was no prejudice. (*Ibid.*)

It appears, then, that this Court has never directly confronted a situation where, as here, a felony would be reversed based solely on the finding that the prosecution could not refile. Even assuming that automatic prejudice for inability to refile should apply to misdemeanors, it should not apply to felonies, due to the legislative judgment that felonies should be treated differently than misdemeanors in a speedy trial context because of the significantly greater harm that felonies cause. Instead, for a defendant raising a violation of his statutory right to a speedy trial to prevail in a felony post-conviction appeal, he or she should have to affirmatively demonstrate some form of individual prejudice, as is required in showing a violation of the constitutional rights to speedy trial.

This Court has stated that "[s]ection 1387 reflects a legislative judgment that because of the heightened threat to society posed by serious crimes, more filings should be permitted for serious crimes than for minor ones." (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1019.) Before 1975, in fact, "the interest in prosecuting felonies was considered so much greater that, while a one-dismissal rule applied to misdemeanors, felony charges could be refiled ad infinitum." (*Ibid.*) As this Court

> once colorfully explained, the Legislature's differential treatment of misdemeanor and felonies in section 1387 is justified by the fact that felonies include crimes "so heinous in character that to [their] frequent and unchecked commission might be attributed the origin of a possible statewide disaster, or eventually, the downfall of organized society," while many misdemeanors "may be insignificant as far as [their] effect on the body politic is concerned."

(*Ibid.*, quoting *People v. Dawson* (1930) 210 Cal. 366, 370.)

Given this greater societal interest in allowing the prosecution of felonies, a prejudice inquiry in this context should include the question of whether the core concerns of section 1387 have been undermined by multiple dismissals – whether the prosecutor acted "to harass defendants," "to forum shop," or "for the evasion of speedy trial rights through the repeated dismissal and refiling of the same charges." (*Burris v. Superior Court, supra*, 34 Cal.4th at p. 1018, internal quotation marks omitted.) This would be consistent with the prejudice test for federal and state constitutional speedy trial violations, which already encompasses these factors.

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, specifically identifying three ways of establishing such prejudice:

(1) proof of oppressive pre trial incarceration; (2) proof of anxiety and concern of the accused; and (3) proof of a possibility that the defense was impaired. (See *Barker v. Wingo* (1972) 407 U.S. 514, 532 [92 S.Ct. 2182, 33 L.Ed.2d 101].) Further, this "*Barker*" test notes four factors to be considered in deciding speedy trial violations: (1) the length of the delay; (2) the reason for the delay; (3) the assertion of the right; and (4) the prejudice to the defendant. (*Id.* at pp. 530-533.)

This Court has likewise noted that the same concerns control an analysis of a speedy trial right violation, whether based on the federal or state constitutional right to a speedy trial. (See *People v. Harrison* (2005) 35 Cal.4th 208, 227 [finding no violation of state or federal constitutional right to a speedy trial on delay of over seven months]; *People v. Wilson, supra*, 60 Cal.2d at pp. 153-154 [finding that the defendant had not shown prejudice where the trial was delayed for two months over his objection].) The California Constitution's speedy trial guarantee protects the accused against "prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and . . . it prevents him from being 'exposed to the hazard of a trial, after so great a lapse of time' that 'the means of proving his innocence may not be within his reach' – as, for instance, by the loss of witnesses or the dulling of memory." (*People v. Martinez, supra*, 22 Cal.4th at pp. 767-768, quoting *Barker v. Municipal Court* (1966) 64 Cal.2d 806, 813, internal quotation marks omitted; see also *United States v. Marion* (1971) 404 U.S. 307, 320 [92 S.Ct. 455, 30 L.Ed.2d 468] [identifying the same three purposes for federal speedy trial right].) 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, which affects a defendant's fundamental rights.

The question then would become what, if any, actual prejudice did appellants suffer from having their trial delayed for six days while Jackson's counsel was engaged in another trial. Appellants have not demonstrated that their right to present a defense was in any way impaired. They have not shown that any evidence was lost or any witness was made unavailable by the six-day delay. There has been no showing that the prosecution gained any advantage when this case was continued.

Nor is there any indication that the prosecution sought the two dismissals, either separately or together, in order to harass appellants, to forum shop, or for the evasion of speedy trial rights through the repeated dismissal and refiling of the same charges. Rather, both dismissals were beyond the prosecution's control, the first because appellants mistakenly were taken to the wrong courthouse, and the second because defense counsel was engaged in another trial. Indeed, the People announced ready before the end of the 60-day statutory period and several other times while the case was being continued from day to day. Furthermore, the prosecution waited only three days after the first dismissal to refile, and the matter did not linger, lasting only about three and a half months from the initiation of the first complaint to the beginning of trial.

Additionally, appellants have made no showing that they would have received a more favorable result had Jackson's counsel been substituted for another appointed attorney who would have been ready to proceed within the 60-day statutory period. The only prejudice that appellants can truly claim is the six additional days that they spent in county jail prior to trial. Of course, appellants were given custody credit for this time, so their total time in custody was not affected by the six-day delay.

And importantly, even if Jackson's counsel had been replaced on day 60 of 60, newly-appointed counsel would have required a continuance to become familiar with the case. Since this continuance would have been

for Jackson's benefit, the trial court would have been authorized to continue the case despite Jackson's personal objection. (*People v. Johnson, supra*, 26 Cal.3d at pp. 561-562.) And the proper continuance of Jackson's case would have constituted good cause to continue Sutton's case as well. (*People v. Teale, supra*, 63 Cal.2d at p. 186; § 1050.1.) Therefore, had the trial court dealt with the engagement of Jackson's counsel in another trial by replacing him with another attorney, appellants' trial would have been delayed even further. They cannot now demonstrate actual prejudice from the six-day delay under these circumstances.

CONCLUSION

As the Court of Appeal found, the trial court did not violate appellants' statutory speedy trial rights. The trial court properly exercised its discretion in finding good cause to continue Jackson's trial, which in turn constituted good cause to continue Sutton's trial. Accordingly, respondent respectively asks this Court to affirm the Court of Appeal's decision affirming the judgment as to each appellant.

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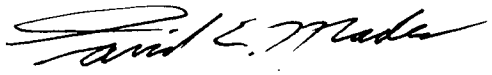

DAVID E. MADEO
Deputy Attorney General
Attorneys for Respondent

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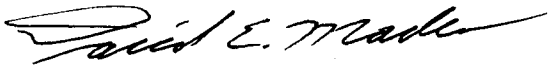
CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 10,771 words.

Dated: May 4, 2009

EDMUND G. BROWN JR.
Attorney General of California



DAVID E. MADEO
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Michael Jerome Sutton and Willie Jackson, Jr.***

Number: **S166402**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 4, 2009, I served the attached

ANSWER BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

William L. Heyman, Attorney at Law
3152 Big Sky Drive
Thousand Oaks, CA 91360
Counsel for Michael Jerome Sutton

The Honorable Judith L. Champagne, Judge
Los Angeles County Superior Court
210 West Temple Street, Department 124
Los Angeles, CA 90012

J. Courtney Shevelson, Attorney at Law
316 Mid Valley Center, PMB 187
Carmel, CA 93923-8516
Counsel for Willie Jackson, Jr.

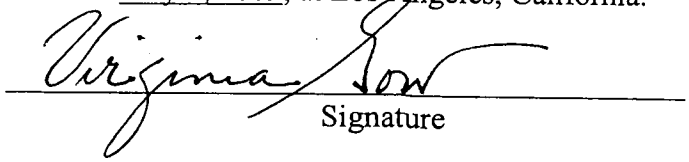
Lindley Heher, Deputy District Attorney
Los Angeles County District Attorney's Office
210 West Temple Street, Suite 18000
Los Angeles, CA 90012

California Appellate Project (LA)
520 South Grand Avenue, 4th Floor
Los Angeles, CA 90071

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 4, 2009, at Los Angeles, California.

Virginia Gow
Declarant


Signature

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