

In the Supreme Court of the State of California

DONALD SMITH,

Petitioner,

v.

**SUPERIOR COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,**

Respondent,

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Real Party in Interest.

COPY

Case No. S188068

**SUPREME COURT
FILED**

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Deputy

First Appellate District, Division Five, Case No. A124763
San Francisco County Superior Court, Case No. 207788
The Honorable Ksenia Tsenin, Judge

**REAL PARTY IN INTEREST'S OPENING
BRIEF ON THE MERITS**

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ISSUE PRESENTED

Penal Code section 1382, subdivisions (a)(2)(B) adds a 10-day “grace period” beyond the date to which trial is continued at the request or with the consent of a criminal defendant. The issue presented is whether the strong interest in joint trial justifies the brief delay of the trial of an objecting defendant, where the 10-day grace period applies to the trial of a jointly charged codefendant.

STATEMENT OF THE CASE

On February 10, 2009, the San Francisco District Attorney charged petitioner Smith and codefendant Sims with first degree residential burglary (Pen. Code, § 459, further citations are to this code). Both were arraigned on February 11, 2009. Smith did not waive his statutory right to trial within 60 days of that date (§ 1382). The court was informed on April 10, 2009, that counsel for Sims was ill and unavailable for trial. The court indicated an intent to sever or dismiss Smith’s case because the last day for trial was the following Monday, April 13; however, the District Attorney argued that good cause existed to continue the trial of both defendants without a severance.

On April 13, Sims’s counsel remained ill and unavailable. Smith objected to any continuance. The court found good cause to continue the trial for both defendants, noting: “*Greenberger [v. Superior Court (1990) 219 Cal.App.3d 487 (Greenberger)]* says essentially this is an issue [of] whether a joinder overrides defendant’s right to a speedy trial. *Greenberger* says if the only reason to continue a case past the last day is to keep the cases joined, that’s not good cause under [section] 1382 But another reason, like, for example, one of the attorneys needs more time to investigate, then—I’m going to interpret that as the situation here—where one attorney is ill and not able to come to court, that does constitute good

cause to continue this past the last day for the codefendant, as well as the defendant, who is represented by the ill attorney.” The court further indicated: “Today is pretty much still the last day. We will trail it day by day. I have to find out what [Sims's counsel's] condition is, when he can be able to come back, and when he will be able to tell me: Yes, I'm ready to go to trial. [¶] So I think the only safe thing to do is trail it day by day and put it over to the 14th.”

On April 14 and April 16, the court found good cause to continue the trial of both defendants, over Smith’s objection, due to the continued illness of Sims’s attorney. On April 17, Sims’s counsel advised the court that he would be ready to try the case in one week. The court found good cause to continue the matter to April 22, over Smith’s objection.

On April 23, Sims’s counsel was still ill, but advised the court that he would be ready for trial on Monday, April 27. The court stated: “For the record, [Sims’s counsel] will be available and ready to try this and fully recovered on Monday, which means the last for trial, according to case law, would be 10 days after Monday, April [27]th. [¶] So by my calculations, May 7th would be the last day.”

On April 27, the court, over Smith’s objection, put the case over one day. On April 28, Smith moved to dismiss the case against him for violation of his statutory speedy trial right by continuing the case beyond April 27 without good cause. The court denied the motion.

Smith then petitioned the Court of Appeal for a writ to dismiss the charges. The Court of Appeal stayed further trial proceedings and issued an order to show cause.

On October 13, 2009, the Court of Appeal held, in a published decision, that the trial court had violated Smith’s state speedy trial by applying the 10-day grace period of section 1382 while Sims’s attorney remained unavailable for trial. The court directed a writ of mandate to

dismiss the information pending against Smith. The Court of Appeal acknowledged that its decision placed the People “in the difficult circumstance of being required to proceed on a date certain when the delay is caused by a jointly charged codefendant, and not by action or inaction attributable to the prosecution.”

The People petitioned for review. This Court granted review and held the case, pending its decision in *People v. Sutton* (2010) 48 Cal.4th 533 (*Sutton*). After *Sutton*, this Court retransferred this case to the Court of Appeal with directions to vacate and reconsider its decision in light of that decision.

On October 28, 2010, the Court of Appeal filed another published opinion directing the dismissal of the information against Smith. The court held that *Sutton* does not alter the analysis or conclusion in its prior decision. This Court granted the People’s petition for review.

SUMMARY OF ARGUMENT

The illness of codefendant Sims’s counsel constituted good cause to continue the trial of both defendants notwithstanding Smith’s objection. It is undisputed that the 10-day grace period in section 1382, subdivision (a)(2)(B) applied to Sims’s case. Because Sims and Smith were joined codefendants, the 10-day grace period necessarily applied also to Smith’s case in light of section 1050.1. The state’s interest in maintaining joinder of defendants constituted good cause for the grace-period delay of Smith’s trial.

The Court of Appeal incorrectly interpreted the statutory good cause requirement for continuances of trial. In cases such as the present one, where multiple defendants are properly joined, the good cause requirement must be applied in light of *People v. Sutton* (2010) 48 Cal.4th 533, as well as Proposition 115’s constitutional prohibition against construing a defendant’s state speedy trial rights in a manner prohibiting joinder as

prescribed by statutes including sections 1382 and 1050.1. (Cal. Const., art. I, § 30, subd. (a).). In light of these considerations, the statutory 10-day grace period is not intended to require the prosecution to proceed on a date certain when delay is caused by a jointly charged codefendant as suggested by the Court of Appeal. Instead, the 10-day grace period eliminates the necessity for severance of jointly charged defendants in cases like this one.

ARGUMENT

Joint trials play a vital role in the criminal justice system. (*Richardon v. Marsh* (1987) 481 U.S. 200, 209; see *People v. Soper* (2009) 45 Cal.4th 759, 772.) The Legislature in section 1098 provides that where two or more defendants are jointly charged, “they must be tried jointly unless the court order separate trials” Section 1098 states a legislative preference for joint trials.

Consistent with these principles, the “good cause” requirement for the continuance of a criminal trial should be construed to allow joinder as prescribed by sections 1382 and 1050.1. (Cal. Const., art. I, § 30, subd. (a).) Accordingly, the public’s strong interest in joint trial in this case justified the brief delay of the trial of defendant Smith because the 10-day grace period applied to the trial of his jointly charged codefendant.

Section 1382 provides that a felony defendant must be tried within 60 days of arraignment. If the defendant requests or consents to a continuance for good cause beyond the 60 days, the statute augments the request by 10 days. (§ 1382, subd. (a)(2)(B).)¹ This 10-day “grace period” was enacted

¹ In pertinent part, section 1382 provides:

“(a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: . . .

(continued...)

in 1959 to prevent a defendant from forcing the trial court and the People to trial on a day of the defendant's choosing, without adequate time to secure a courtroom and the attendance of witnesses. A 10-day period was selected because it is short enough to protect a defendant's state law right to a speedy trial. (See *Barsamyan v. Appellate Division of the Superior Court of Los Angeles County* (2008) 44 Cal.4th 960, 979.)

In 1990, Proposition 115 added article I, section 30, subdivision (a) of the California Constitution. It 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." Proposition 115 also enacted section 1050.1. That statute implements California's strong preference for joint trials of jointly charged defendants. It provides that where trial of one jointly charged defendant is continued for good cause, that continuance is, itself, good cause to continue the trial of all defendants "so as to maintain joinder." (§ 1050.1) Under

(...continued)

In a felony case, when a defendant is not brought to trial within 60 days of the defendant's arraignment on an indictment or information However, an action shall not be dismissed under this paragraph if either of the following circumstances exist:

(A) The defendant enters a general waiver of the 60-day trial requirement.

(B) The defendant requests or consents to the setting of a trial date beyond the 60-day period. Whenever a case is set for trial beyond the 60-day period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or within 10 days thereafter"

The 10-day grace period also implies to misdemeanor trials. (See § 1382, subd. (a)(3)(B).)

that statute, severance of cases due to the unavailability or unpreparedness of one or more defendants is prohibited unless it is “impossible” for all defendants to be available and prepared within a reasonable period of time.² (*Ibid.*)

This Court addressed the interplay of these statutes in *People v. Sutton* (2010) 48 Cal.4th 533 (*Sutton*). In that case, codefendants Jackson and Sutton were jointly charged with sale and possession of cocaine. On the 60th and final day for trial under section 1382, Jackson’s counsel indicated that he was unavailable because he was engaged in another trial. Both defendants’ cases were continued “day to day” for about a week. On appeal, the defendants argued that Jackson’s counsel’s trial in the other matter was not good cause for a continuance. Sutton argued separately that assuming good cause existed to continue trial as to Jackson, the unavailability of codefendant’s counsel was not good cause to continue trial in Sutton’s case. This Court disagreed on both points. As to Sutton’s case, which is the one analogous to petitioner Smith’s case, the Court stated that the state’s interest in a joint trial may itself constitute good cause to continue a codefendant’s case: “[A] trial court properly may find that the significant state interests that are furthered by conducting a single trial of

² Section 1050.1 provides, in pertinent part,

In any case in which two or more defendants are jointly charged, in the same . . . information, and the court . . . for good cause shown, continues the . . . 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 . . . 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.

jointly charged criminal defendants constitute good cause to continue a codefendant's trial beyond the presumptive statutory period designated in section 1382." (*Id.* at p. 559.) In so holding, the Court overruled, among others, *Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884, and *Arroyo v. Superior Court* (2004) 119 Cal.App.4th 460, both cases relied on by the Court of Appeal here. The opinion in *Sutton* observes that "past decisions of this court make it clear that *the substantial state interests served by a joint trial may support a finding of good cause to continue a codefendant's trial beyond the presumptive statutory period set forth in section 1382.*" (48 Cal.4th at pp. 561-562, italics added, citing *People v. Teale* (1965) 63 Cal.2d 178; *People v. Clark* (1965) 62 Cal.2d 870.) This Court stated further that "the provisions of section 1050.1 . . . clearly establish that the state interest in permitting jointly charged defendants to be tried in a single trial generally constitutes good cause to continue a defendant's trial to enable that defendant to be tried with a codefendant whose trial properly has been continued to a date beyond the presumptive statutory deadline." (*Sutton, supra*, 48 Cal.4th at p. 562, fn. omitted.)

Considering this Court found good cause in section 1382 generally satisfied by the state interest in maintaining joint trial of codefendants as authorized by section 1050.1, the Court of Appeal erroneously concluded that "*Sutton* does not alter the statutory analysis on which our prior decision was based." (Slip opn. at p. 1.) It is true that *Sutton* did not directly hold that a continuance of trial requested or consented to by a defendant, together with the 10-day grace period automatically added by statute, is good cause to delay the trial of a codefendant, so as to maintain the joint trial, as required by Penal Code section 1050.1. While *Sutton* did not directly decide the issue in this case of whether the 10-day grace period in section 1382 extends to a jointly charged codefendant, this Court's

language and its construction of the relevant statutes are in severe tension with the conclusion reached by the Court of Appeal in this case.

First, because the interest in maintaining joint trials is itself good cause to continue a codefendant's trial, it does not matter whether the trial of the codefendant who originally sought the continuance properly begins within the 10-day grace period, as opposed to a period when codefendant's counsel is actually unavailable for trial. The grace period, which exists as a matter of legislative policy, does not dissipate the good cause for maintaining joinder.

Second, in *Sutton* itself, this court repeatedly emphasized that the continuance there was not open ended, but lasted only for a few days. So too here, the People did not seek any prolonged extension. Not only has Smith never argued that he was prejudiced by the additional continuance afforded by the grace period, the delay represented by that grace-period is every bit as reasonable as the short delay that occurred in *Sutton*.

Third, contrary to the Court of Appeal's view, *Sutton* does speak to cases like this. A passage unnoted by the Court of Appeal, in *Sutton*, admonishes that

[w]hen the proposed delay to permit a single joint trial is relatively brief, the substantial state interests that are served *in every instance* by proceeding in a single joint trial generally will support a finding of good cause to continue the codefendant's trial under section 1382, even when there is not indication that, were the defendants' trials to be severed, the separate trials would be unusually long or complex. (See, e.g., *People v. McFarland*, *supra*, 209 Cal.App.2d 772, 776-778; see also § 1050.1.)

(48 Cal.4th at p. 560, italics added and fn. omitted.)

In sum, *Sutton* makes clear that sections 1382 and 1050.1 harmonize in a way that serves, rather than frustrates, California's joint trial policy. That policy serves important interests. It helps to minimize the burden on

crime victims, their survivors, and families, and of witnesses occasioned by criminal trial proceedings. It reduces demands on the limited pool of prospective jurors. Additionally, it conserves scarce judicial and prosecutorial resources. (See *People v. Soper*, *supra*, 45 Cal.4th at p. 772.)

The Court of Appeal ignored those several interests and adopted an interpretation of sections 1382 and 1050.1 that requires the trial court to jettison the 10-day grace period imposed by the Legislature in section 1382, subd. (a)(2)(B), unless good cause (other than the interest in maintaining joinder) can be shown to justify even a brief delay of trial. Yet, consistent with *Sutton*, the legislative policy of maintaining joint trial found in section 1050.1 is itself good cause for such a brief delay.

Furthermore, the contrary construction of those statutes resurrects the very evils the 10-day grace period was intended to prevent whenever a jointly charged defendant objects to a continuance beyond 60 days properly obtained by a codefendant. Under accepted rules of statutory construction, “[w]hen two statutes touch upon a common subject, they are to be construed in reference to each other, so as to ‘harmonize the two in such a way that no part of either becomes surplusage.’ [Citations.] Two codes ‘must be read together and so construed as to give effect, when possible, to all the provisions thereof.’ [Citations.]” (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778-779, internal quotations marks omitted.) Our position harmonizes sections 1050.1 and 1382. It also avoids what would otherwise be an apparent facial conflict between section 1382 and article I, section 30, subdivision (a) of the state Constitution if the 10-grace period were construed to prohibit joint trial of otherwise properly joined codefendants.

Under Penal Code section 1050.1, one defendant’s good cause continuance—which by statute includes the 10-day grace period—justifies continuing trial as to all, so as to maintain joint trial. No additional showing of good cause is required under 1050.1. The concept of “good

cause” properly understood in this way supports a harmonious interplay of sections 1382 subdivision (a)(2)(B) and 1050.1. By permitting the People to try the case within 10 days after the date to which the requesting defendant announced ready, the Legislature determined, in effect, that “good cause” exists up to 10 days after the date requested by the codefendant. In other words, the 10-day grace period is automatically part of the period for which “good cause” justifies the continuance of trial in the first place. “No showing of good cause was necessary to support [the People’s] request to bring defendant to trial within ten days after the last date to which he had consented . . . since that statute provides that the action ‘shall not be dismissed’ if this is done.” (*Malengo v. Municipal Court* (1961) 56 Cal.2d 813, 815-816, fn. omitted.)

As recently as 2008, our Supreme Court restated this interpretation of section 1382: “In addition to enabling courts to ensure the availability of judicial resources, the 10-day grace period afforded by section 1382(a)(3)(B) serves the interests of both the prosecution and of defendants because, while maintaining the defendant’s right to speedy trial, it also ‘protects the People by giving them 10 days if necessary.’ [Citations.] Implicitly recognizing the importance to the prosecution of having the *full* 10 days available to it, *various decisions have concluded that a court should not enter a dismissal pursuant to section 1382 for prosecutorial delay within the 10 days even in the absence of a showing of good cause for delay.* [Citations.] [¶] Accordingly, . . . a defense objection concerning a prosecutor’s request to trial within the 10-day period would ‘serve [] no pragmatic function.’ [Citation.] . . . ‘*In effect, the 10-day grace period, by precluding any effective defense objection, effects the consent of the defendant to be brought to trial at any time within the 10-day period.*’ (*Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, 978-979, italics added.)

(*People v. Graves* (2010) 189 Cal.App.4th 619, 638, petn. for review filed Dec. 7, 2011 (S188704).)

The Court of Appeal’s decision charts a virtual roadmap for jointly charged defendants to force severance, thus defeating the Legislature’s

strong preference for joint trials of jointly charged defendants. For example, suppose counsel for defendant #1 states that he cannot proceed to trial until the 90th day because he is in a two-month murder trial. Defendant #2 objects, but under section 1050.1 his objection would be overruled. Suppose on the 75th day, counsel for defendant #1 announces that his other trial suddenly concluded and he is now available for trial. Under the Court of Appeal's decision, the People would have the benefit of the 10-day grace period to try defendant #1, but would be forced to try defendant #2 immediately on the 75th day. "Good cause" (as the Court of Appeals defines it) would not exist to continue defendant #2's trial, and therefore section 1050.1 would not apply. The concern is far more than hypothetical in an age of gang trials where defendants are routinely charged jointly for multiple serious crimes. A host of reasons can justify the continuance of joint trials over the objection of one or more defendants, including illness of counsel or a defendant, conflicting trial schedules, or the inability to locate a witness relevant for one defendant but not the others, to name just a few possibilities.³

In such circumstances, the Legislature clearly did not intend the People to proceed to trial on a date certain against one defendant when delay is caused by a jointly charged codefendant, rather than by action or inaction attributable to the prosecution. Likewise, dismissal within the automatic 10-day period would be against legislative policy and not in the

³ The Legislature's enlargement by 10 days of a defendant's request for a continuance for good cause is itself "sufficient reason" to continue trial of joined codefendants under section 1383. It reads:

If the defendant is not charged or tried, as provided in section 1382, and sufficient reason therefore is shown, the court may order the action to be continued from time to time

furtherance of justice. (See *People v. Rubaum* (1980) 110 Cal.App.3d 930, 935.)

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeal should be reversed.

Dated: February 7, 2011

Respectfully submitted,

KAMALA D. HARRIS

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DANE R. GILLETTE

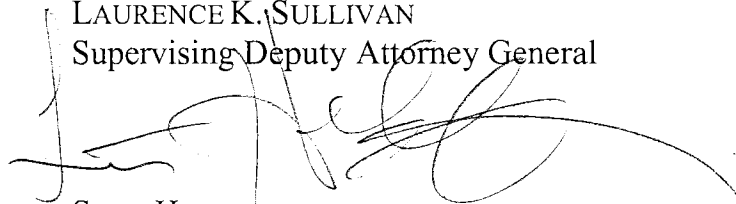
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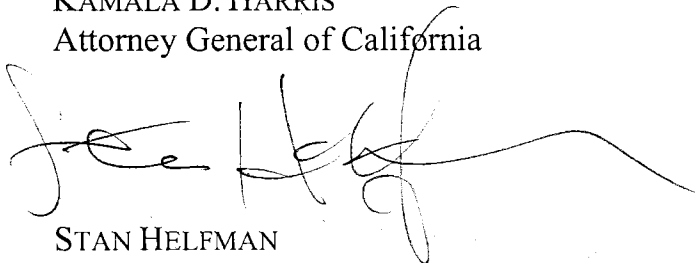
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CERTIFICATE OF COMPLIANCE

I certify that the attached REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,610 words.

Dated: February 7, 2011

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read 'Stan Helfman', written in a cursive style. The signature is positioned above the printed name and title of the signatory.

STAN HELFMAN
Supervising Deputy Attorney General
Attorneys for Real Party in Interest

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Smith v. Superior Court of the City and County of San Francisco;
The People of the State of California, Real Party in Interest**

No.: **S188068**

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 February 10, 2011, I served the attached **REAL PARTY IN INTEREST'S OPENING 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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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 February 10, 2011, at San Francisco, California.

S. Agustin
Declarant

S. Agustin
Signature