IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Case No. S252702

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Appellant,	)	No. F075101
	)	
v.	)	Sup. Ct. Complaint Nos.
	)	F16903119 and
CODY WADE HENSON,	)	F16901499
	)	
Petitioner, Defendant and Respondent	)	
	)	

Appeal from the Superior Court of Fresno County

Honorable Judge W. Kent Hamlin

DEFENDANT AND RESPONDENT'S OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Case No. S252702

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Appellant,	No. F075101
v.	Sup. Ct. Complaint Nos. F16903119 and F16901499
CODY WADE HENSON,	
Petitioner, Defendant and Respondent	

To the Honorable Tani Cantil-Sakauye, Chief Justice, and to the Honorable Associate Justices of the Supreme Court for the State of California:

Cody Wade Henson, defendant and respondent, and petitioner in this matter, respectfully submits his Opening Brief on the Merits for this Court's consideration.

ISSUE PRESENTED FOR REVIEW

When a defendant is held to answer following separate preliminary hearings on charges brought in separate complaints, can the prosecutor file a "unitary information" covering the charges in both of those cases or must they obtain the trial court's permission to consolidate the pleadings? (See Pen. Code, §§ 949, 954.)

STATEMENT OF CASE AND FACTS

On March 7, 2016, Cody Wade Henson was charged by criminal complaint number F1690499 [hereinafter, "499"], with four offenses committed on March 4, 2016: The unlawful driving or taking of a vehicle (count one; Veh.Code, § 10851, subd. (a)); receiving a stolen vehicle (count two; Pen.Code, § 496d, subd. (a)); misdemeanor resisting arrest (count three; Pen. Code, §148, subd. (a)(1)); and misdemeanor possession of burglary tools (count four; Pen. Code, § 466). It was alleged that prior vehicle theft convictions rendered counts one and two felonies. (Pen. Code, § 666.5.) Mr. Henson was also alleged to have two prison priors. (Pen. Code, § 667.5, subd. (b); 1CT 6-8.)

On March 8, 2016, Mr. Henson was arraigned on case 499, and released on bond pending the preliminary examination hearing. (1CT 9-12.)

On May 19, 2016, a second complaint was filed, Superior Court case number F16903119 [hereinafter, "119"], alleging offenses committed by Mr. Henson on May 17, 2016. These were unlawful driving or taking of a vehicle (counts one and three; Veh. Code, § 10851, subd. (a)); receiving a stolen vehicle (counts two and four; Pen. Code, § 496d, subd. (a)); and misdemeanor resisting arrest (count five; Pen. Code, §148, subd. (a)(1)). The same prison priors and theft priors were alleged. (1CT 21-23.) It was also alleged that Mr. Henson was on bail in case number 499 when he committed the offenses in case number 119. (Pen. Code, § 12022.1; 1CT 23.)

On November 16, 2016, a preliminary examination hearing for the 119 case was

conducted by Judge Denise Whitehead in Department 74. Mr. Henson was bound over, with arraignment set for December 1, 2016. (1CT 76-112.) Although complaints are sometimes deemed to be informations at the close of the preliminary hearing, that did not occur here. (1CT 111-112.)

On November 22, 2016, a preliminary hearing for the 499 case was conducted by Judge Don Penner, in Department 34. He bound Mr. Henson over on the charges, with an arraignment set for the same date, December 1, 2016. (1CT 149-186.) The 499 complaint was also not deemed by the magistrate to constitute an information. (1CT 185-186.)

On November 29, 2016, the prosecutor attempted to file an information combining the charges from the separate complaints in case numbers 419 and 199 into one accusatory pleading. That date stamp was crossed out and there was a subsequent filing stamp on the pleading, dated December 1, 2016. (1CT 123-128.) No information number was generated for either case. The caption said "CASE NUMBERS," followed by the 119 and 499 complaint numbers. The word "Lead" appeared in parentheses after the 119 case number, apparently to designate it as the "lead" case. Underneath that line, the document indicated the arraignment date, and the two District Attorney file numbers for the two complaints. The final line of the caption was the title of the document, which was a single word, "INFORMATION." (1CT 123 [emphasis in original].)

In his appellant's opening brief on the prosecution appeal of the dismissal of some

of the counts, the prosecutor explained:

> On November 29, 2016 Appellant attempted to file its "first pleading on the part of the people in the superior court," as defined in section 949. The six page Information joined the allegations held to answer in case 119 and 499, designating case 119 as the "Lead" case. (CT:123-128.) This filing was rejected by the Superior Court clerk, as demonstrated by the file stamp of "2016 Nov 29" having an "X" through it. (CT:123.)
>
> On December 1, 2016 the same "first" pleading was presented to the court's Judicial Assistant in Department 34 of the Superior Court. The Judicial Assistant accepted and filed the Information, writing in the word "CONSOLIDATED" above the word "INFORMATION," and file stamped the pleading December 1, 2016. (CT:123.) The same Information was filed in each case file to accommodate the court's two case files from the probable cause phase. (RT:128, 133.)

(AOB 10.)

The two complaint files remained physically separate throughout these proceedings. (2RT 104.)[1] Chaos ensued. Mr. Henson had separate counsel on each case: Ciummo and Associates on case number 119, and the Public Defender on case number 499. Both appeared in Department 34 before Judge Penner on December 1, 2016, asking to continue the arraignment on the "Information." The Public Defender had not received the new charging document (1Aug.RT 4) and thought combining the cases could create a conflict. The hearing transcript indicates the Ciummo and Associates attorney was also unfamiliar with the new charging document for the two cases. (1CT 121-122; 1Aug.RT

[1] Clerk's minutes throughout the case state: "Charging Document: Formal Complaint," with separate entries for each of the two cases, under each of the two complaint numbers. (1CT 121-122, 129-133, 135-136, 235.)

1-6.) The District Attorney asked to dismiss the count three resisting arrest charge in the 119 case, but Judge Penner said he couldn't, as the information had not been filed. (1Aug.RT 5-6.)

On December 8, 2016, both counsel appeared again before Judge Penner in Department 34. Four cases were called, the 119 case, the 499 case, a case ending in 032, and a misdemeanor case ending in 703. Ms. Pauline Seiler of Ciummo and Associates appeared on cases 119 and 032. The Public Defender appeared on cases 499 and 703. (1Aug. RT 7.) Ms. Seiler objected that she knew nothing of the 499 case, and objected to combining that case with hers. (1Aug.RT 8.) Attorney David Mugridge also appeared, saying he was negotiating with the family to be retained on the case ending 032, and perhaps more cases if there was a consolidation order. (1Aug.RT 13-15.) The Public Defender said that if the omnibus information was filed, effectively consolidating the charges, then her office would represent Mr. Henson on count one, while Ms. Seiler would then represent Mr. Henson on counts two, three, four, and five. (1Aug.RT 9-10.)[2] Judge Penner asked for clarification of how a conflict would arise if the cases were to be consolidated. The Public Defender said she had represented a victim on the other case, and both counsel took issue with consolidation of the cases absent a motion to consolidate. (1Aug.RT 10-11.) The matter was continued again for arraignment and for

[2]That was not correct. Counts 1, 2, 3, and 4 were March 4, 2016 offenses charged in the 499 complaint. (1CT 6-8.) Counts 5, 6, and 7 were May 17, 2016 offenses, charged in the 119 complaint. (1CT 21-23.)

counsel to prepare a written opposition to filing the information combining the charges from the two complaints. (1Aug.RT 14.)

The matters came on again for hearing on December 15, 2016, in Department 34, before Judge Penner. Appointed counsel for case number 119 and case number 499 both appeared, along with counsel Mugridge, who stated he was bowing out entirely from all four cases. (1RT 4.) The Public Defender formally declared the above-mentioned conflict, and was relieved. Ciummo and Associates accepted appointment on case number 499. (1RT 7.) Mr. Henson's Ciummo and Associates's counsel, Ms. Seiler, asked Judge Penner not to file or accept the combined pleading, because the prosecution had not filed a motion to consolidate. (1RT 4-5.) Judge Penner sympathized with defense counsel's position, but said consolidation issues were separate from the issue of whether he should file the pleading; he knew of no legal mechanism stating he should refuse to file or accept the pleading in question. (1RT 5-6.) Judge Penner specified he was arraigning the defendant "on case ending 119 and 499 that are filed together in one information." (1RT 8.)

The clerk issued separate minutes for each case, regarding the December 15, 2016 hearing before Judge Penner in Department 34. The minutes for the 499 case state: "Court orders case consolidated .. All proceedings will be recorded in: F16903199 [sic]." (1CT 136.) Minutes for the 119 case similarly state: "Court orders. This case as lead case with case F16901499 consolidated into this case." (1CT 138.) However, the reporter's

transcript for that date indicates that Judge Penner did not order consolidation or designate a "lead" case. (1RT 1-11.)

Counsel now appointed on cases 119 and 499 filed a Penal Code section 995 motion for dismissal. She argued insufficiency of evidence in general, but only requested the dismissal of count seven (from the 499 case), for particular insufficiency of evidence issues. She urged the court to find insufficiency of evidence and/or to dismiss all of the counts in case number 499, due to lack of any motion to consolidate, citing California Rules of Court, rule 3.550. (1CT 139-147.)

The District Attorney filed an opposition, including an argument that the defense waived the right to challenge the filing of the combined information by not demurring. The District Attorney contended that Penal Code section 995 was not the appropriate vehicle to challenge the combination of two complaints in one information without the court's leave. (1CT 194-208.) He argued that Judge Penner had already ordered the complaints consolidated, and that Judge Penner had treated the defense motion not to file the combined information as a motion to sever, which was denied. (1CT 207-208.)[3]

The Penal Code section 995 motion was decided in hearings conducted on January 13 and January 18, 2017, before Judge W. Kent Hamlin in Department 73. Judge Hamlin, referencing the transcript of the December 15, 2016 hearing, noted the lack of consolidation orders or a severance ruling in any prior hearing. He also expressed

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[3]He continued to argue this in the People's appeal of the superior court's ruling on the Penal Code section 995 motion. (AOB 7, fn.1.)

doubt that a demurrer could lie. He specified that he was not overturning any previous order made by another judge, but simply ruling on the motion to dismiss for lack of a motion to consolidate. (2RT 108-109, 128-129.) He granted the Penal Code section 995 motion to dismiss, finding that the prosecutor could not combine two complaints in one information without the court's leave. He stated it was his duty as a judge to control abuses of the judicial process, and fashioned a Solomonic remedy, dismissing the counts drawn from the complaint in case number 499, which were Counts 1, 2, 3, and 4, of the combined information. (1CT 235; 2RT 131-132.)

On October 19, 2018, the Court of Appeal of the Fifth Appellate District issued a published opinion in *People v. Henson* (2018) 28 Cal.App.5th 490, reversing the Superior Court order dismissing the counts included in the information, from the complaint in case number 499. Justice Smith dissented.

ARGUMENT

I.

THE PLAIN LANGUAGE OF PENAL CODE SECTION 954 RENDERS CONSOLIDATION A JUDICIAL DECISION, NOT A MATTER OF PROSECUTORIAL DISCRETION. THERE IS NO LATENT AMBIGUITY IN THE STATUTE, TO ALLOW A PROSECUTOR TO COMBINE SEPARATELY BOUND-OVER COMPLAINTS, IN A "UNITARY INFORMATION." NOTHING IN PENAL CODE SECTION 949 OR IN COURT UNIFICATION (PROPOSITION 220) MAKES THE "SAME COURT" LANGUAGE OF PENAL CODE SECTION 954 INAPPLICABLE TO "UNITARY INFORMATIONS," WHICH ARE NOT RECOGNIZED OR AUTHORIZED IN THE PENAL CODE.

A. Introduction and overview

This is a People's appeal of an order of the Fresno County Superior Court, dismissing one of two sets of charges contained in what the Fresno County District Attorney called a "unitary information." This pleading was filed by the prosecutor with no notice to Mr. Henson's attorneys, and no Penal Code section 954 motion to consolidate. Judge Hamlin found that this usurped judicial powers, violated the separation of powers (Cal.Const., Art. III, §3), and violated the plain language of Penal Code section 954. As there was no established procedure for curbing what the judge deemed an abuse of power, he fashioned his own remedy, dismissing all but the charges from the case the prosecutor had self-designated the "lead" case. (2RT 118-119, 130-131.)

At one level, the prosecutor violated the explicit terms of Penal Code section 954, requiring judicial permission for consolidation. A prosecutor cannot circumvent the law

by calling two complaints an information, to avoid seeking leave to consolidate. This violates the declared purpose of Penal Code section 954, as amended in 1951, along with other criminal procedure statutes. (Pen. Code, §§ 739 and 949.) All of these statutes were enacted in the current version for the sole purpose of having criminal procedural statutes apply across the board to all courts. Consolidation via court order has been the law for over one hundred years.

At another level, the reasons why prosecutorial self-consolidation is not allowed are overlapping and not readily organized into discrete topics. Therefore this overview of the main points is provided for guidance in following the thread of the argument. Also, the matter turns upon some nuances of canons of statutory construction, which are set forth at some length, in Argument IB, *infra*.

A majority opinion of the Fifth Appellate District found a "unitary information" is allowed, despite Penal Code section 954, because it is not two complaints in the "same court," which the majority conceded would require a motion to consolidate. (Maj., at p. 505.) It is instead described as a "unitary information," a coinage of the Fresno County District Attorney. The term appears nowhere in Penal Code sections 954, 949, or 739. The majority and prosecutor claimed this was not a consolidation at all. The majority stated that it was administratively deemed a consolidation (Maj., at p. 504, fn. 7), yet another procedure never contemplated by the Penal Code.

The many references to the matter having been "consolidated" by the majority

opinion, a court clerk and judicial assistant, and the prosecutor himself (including in the notice of appeal) mean the "unitary information" was not unitary at all: it was two complaints. That single point cuts the Gordian knot of abstruse arguments, because it takes two pleadings for there to be a consolidation.

The prosecutor has contended, with an implied endorsement of the majority opinion, that prosecutors can always unilaterally effect "joinder" of offenses of the same class. Yet all aspects of consolidation of separately instituted prosecutions are reserved for judicial determination. (Argument IF, *infra*.) A judge may even deny consolidation precisely because a trial on combined charges of the same class may prejudice the jury, which by virtue of the consolidation will be made aware that the defendant is accused of violating the same statute more than once. (*Drew v. United States* (D.C. Cir. 1964) 331 F.2d 85, 94.) A court must balance the benefit of joining charges of similar offenses against the potential impairment of fair trial rights. A joint trial may even result in "gross unfairness," and deny a defendant due process of law, despite the correctness of the initial ruling denying severance of consolidated charges. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

No new terminology is required to determine the issue on review. Penal Code section 954 is the only Penal Code provision concerning the consolidation of separately filed criminal charges. Its plain meaning is that no aspect of consolidation is for the prosecutor to adjudicate. (Argument IF, *infra*.) Penal Code section 954 applies

consolidation requirements to multiple accusatory pleadings filed in the "same court." Calling two complaints a "unitary information" is a change in the label of multiple complaints filed together, but does not substantively change the accusatory pleading - two unconsolidated complaints - and does not avoid the potential impairment of due process addressed by the longstanding requirement for judicial review. Therefore the filing of a "unitary information" does not permit ignoring the requirements of Penal Code section 954. It allows the prosecutor to unilaterally affect the fundamental fairness afforded the defendant, without the safeguards provided by the judicial consideration of consolidation mandated by Penal Code section 954. (Argument IF, *infra.*)

The majority opinion holds the prosecutor may file a single document containing multiple complaints in a "unitary information," so long as it is the "first accusatory pleading" (Pen. Code, sec. 949) in the superior court, and that it is filed within 15 days of bind-over, as Penal Code section 739 requires. (Maj., at pp, 504-507.) The majority held there that the "unitary information" was always permissible after the 1951 amendment of Penal Code section 954, inserting "same courts" language into the statute. In other words, since 1951, the prosecutor could avoid the consolidation requirements of Penal Code section 954, by referring to the document as "unitary," even if its contents do not comport with the law.

Presumably, in light of the majority's interpretation that Penal Code section 954 always allowed the stratagem of the "unitary information," the unification of the courts in

1998 makes no difference to the analysis. But it appears the majority finds even more impetus to endorse labeling combined complaints as informations, after court unification in 1998. The majority finds this created a "latent ambiguity" in the 1951 law. The court observed that before and after unification, municipal/magistrate courts and superior courts had distinct functions. (Maj. at pp. 508-509.) Because the Legislature did not "explicitly amend" Penal Code section 954 after court unification, this rendered "same courts" language surplusage. Thus, the majority decided that by negative implication, the filing of "unitary informations," was permitted, especially after 1998. (Maj. at p. 510.)

This ignores the plain language and legislative history of the "same courts" language of Penal Code section 954. This language was added in 1951 for the declared purpose of applying criminal procedures to all existing courts, including municipal courts. There was no esoteric meaning behind the term "courts;" the Legislature simply referred to procedures applying to the various levels of courts then in existence.

Penal Code section 739, 949, and 954 took their current form as part of an omnibus criminal procedure reform bill, Senate Bill 543, enacted in 1951. (See Request for Judicial Notice; Governor's Chaptered Bill file, Stats 1951, Chapter 1674.)[4] The bill was designed to reflect the existing structure of courts, which then included municipal courts. It standardized and clarified terminology, to ensure that procedural statutes

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[4] All citations to SB 543 materials are from the same source, the Governor's Chaptered Bill file, three parts of which petitioner requests judicial notice: The bill itself, the Legislative Analysis, and a letter regarding the bill.

applied clearly to all courts, not just one tier of courts. Therefore consolidation would be required to combine two complaints before bindover, in municipal/magistrate courts, or to combine two informations in the superior court. The language still serves that purpose and conveys that same plain meaning.

Thus the Legislative Analysis stated that, "The declared purpose of this bill [was] to make all the procedural provisions of the Penal Code applicable to all proceedings in all courts, so far as it is possible and practicable. (Report of Senate Interim Judiciary Committee, p. 25, transmitted June 19, 1951; quoted in Legis. Counsel, Rep. on Sen. Bill No. 543 (1951 Reg. Sess.); see also letter from Alameda County District Attorney to the Governor's legislative secretary indicating "the principal purpose of [the changes made by Senate Bill 543] is to make the procedural provisions of the code applicable to all proceedings in all courts." (J.F. Coakley, District Attorney of Alameda County, letter to Beach Vasey, Legislative Secretary, July 3, 1951.) The bill amended over a hundred other Penal Code sections, and restructured headings of statutes, including Penal Code section 739 and 749. (See Request for Judicial Notice; Governor's Chaptered Bill file, Stats 1951, Chapter 1674, p.3.) Given the declared purpose of the law, neither Penal Code section 739 (regulating the timing of informations) nor Penal Code section 949 (regarding what an accusatory pleading was called in each court) implied any exceptions to the consolidation requirements set forth in Penal Code section 954. Yet such an implication is integral to the majority analysis of the matter.

The majority has not justified going beyond the plain meaning and declared purpose of the "same court" language in Penal Code section 954, much less justified arcane considerations of court functions. The only reason offered to not give Penal Code section 954 its plainly intended effect is that the "same courts" language becomes surplusage after court unification. (Maj. at p. 510.) But one of the majority's own authorities regarding principles of statutory construction (*People v. Valencia* (2017) 3 Cal.5th 347, 381) explicitly declined to find avoidance of surplusage a determining factor in construing certain language of Proposition 47 as being inapplicable to Strikes Law Reform Act sentencing. Also, no ambiguity exists, latent or otherwise, requiring review of legislative history, much less to interpret the law to allow labeling something a "unitary information" in order to place a pleading outside the most basic requirements of Penal Code section 954.

As detailed below, consequences of a given construction of a law are an important consideration in statutory construction. Penal Code section 954 and the case law interpreting its application to questions of consolidation embody the Legislature's determination of how to balance judicial economy via consolidation against potential fair trial violations, which can even arise even in consolidation of cases in the same class of offenses. Consolidation of charges affects basic due process of law, and requires a reviewable judicial ruling. (Argument IF, *infra*.)

The "unitary information" filed here was a de facto consolidation of two

complaints, not any kind of information. The majority opinion concedes that consolidation without judicial approval would violate the plain meaning and unambiguous language of Penal Code section 954. Only by adopting the prosecutor's coinage of the "unitary information," a term not contained in the Penal Code, does the majority approve as a matter of form what it concedes cannot be approved as a matter of substance. The majority's characterization of the People's "unitary information" as having been administratively deemed a consolidation, which again is not provided for by the Penal Code, is unavailing. No matter what the label, it effected a consolidation and was subject to Penal Code section 954 requirements.

B. Principles of statutory construction

Issues of statutory construction are issues of law, reviewed de novo by this Court. (*People v. Perez* (2018) 4 Cal.5th 1022, 1067.)

The sole purpose of statutory construction is to determine the Legislature's intent, in order to effectuate the purpose of the law. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) That is the "touchstone" of any court's interpretation of a statute. (See *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) The words of the statute in question are the most reliable indicator of the legislative intent, and those words must be given their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) The statute's plain meaning must

be given effect, without interpretation, unless its words are ambiguous.(*Green v. State of California* (2007) 42 Cal.4th 254, 260.)

It is presumed the Legislature meant what they said. (*Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1261.) If they said it in plain language, then there is no room for interpretation, and no justification for resort to extrinsic sources to determine the Legislature's intent. (*Bonnell v. Medical Board, supra,* at p. 1261; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919.) Statutes must be given a strict interpretation, and the law must be applied as it is written, and not expanded by judicial interpretation. (*Chapman v. Aggerler* (1941) 47 Cal.App.4th 848, 853.)

Only if a statutory language is susceptible of more than one reasonable construction may court look to the legislative history, or other extrinsic sources, to ascertain an ambiguous legislative intent. (*People v. Robles* (2000) 23 Cal.4th 1106, 1111.) But the court so interpreting a statute must be reasonably certain the Legislature entertained an intent other than which is expressed in the clear terms of a statute. (*Bakersfield etc. Co. v. McAlpine etc. Co.* (1938) 26 Cal.App.2d 444, 448-449.) A court may not speculate that the Legislature meant something different than what they plainly said:

> The courts are not at liberty to refuse to apply unambiguous language in a statute which involves no absurdity nor any necessary inconsistency with its general purpose; nor may they indulge in mere speculation to the effect that the legislature meant something other or less than what it said. They may not depart from the literal construction of the statute unless they can be reasonably assured that the legislature meant to say something different from what it appears to have said.

(*Bakersfield etc. Co. v. McAlpine etc. Co., supra,* 26 Cal.App.2d at pp. 448-449.)

The words of the statute must be construed in context, keeping in mind the nature and purpose of the statute. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 .) " 'It is our task to construe, not to amend, the statute. "In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted' ... ." (*People v. Leal* (2004) 33 Cal.4th 999, 1008.)

Courts can avoid a literal construction of a law if it produces absurd consequences (*Bonnell v. Medical Board, supra,* at p. 1263), or if "such a construction would frustrate the manifest purpose of the enactment as a whole." (*Arias v. Superior Court* (2009) 46 Cal,4th 969, 979.) But the absurdity of the apparent intent of the Legislature must be obvious from the literal language of the statute, and the doctrine is only to be invoked very sparingly, when as a matter of law it appears the Legislature cannot have meant what it said. (*People v. Valencia, supra*, 3 Cal.5th at p. 411.) As this Court emphasized in *Valencia*, quoting *California School Employees Assn. v. Governing Bd. of South Orange County Community College Dist.* (2004) 124 Cal.App.4th 574, 588 "We must exercise caution using the 'absurd result' rule; otherwise, the judiciary risks acting as a '"super-Legislature"' by rewriting statutes to find an unexpressed legislative intent."

Courts should avoid interpretations which render statutory language surplusage. However, that canon of construction does not control in a number of circumstances,

discussed by this Court in *People v. Valencia* (2017) 3 Cal.5th 347:

> But while we do generally strive to construe enactments to avoid rendering any word or provision surplusage (*City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 724 []), we have also made clear that, like all such interpretive canons, the canon against surplusage is a guide to statutory interpretation and is not invariably controlling. (*People v. Cruz* (1996) 13 Cal.4th 764, 782 []; see also *In re J. W.* (2002) 29 Cal.4th 200, 209 []; accord, e.g., *Arlington Central School Dist. Bd. of Ed. v. Murphy* (2006) 548 U.S. 291, 299, fn. 1 [165 L. Ed. 2d 526, 126 S. Ct. 2455] ["While it is generally presumed that statutes do not contain surplusage, *instances of surplusage are not unknown.*"]; *Lamie v. United States Trustee* (2004) 540 U.S. 526, 536 [157 L. Ed. 2d 1024, 124 S. Ct. 1023] ["[O]ur preference for avoiding surplusage constructions is not absolute."].) although that consideration does not control if the surplusage is a drafting error, or the surplus language is redundant.

(*People v. Valencia, supra,* 3 Cal.5th at p. 382 [emphasis added].)[5]

Thus, in *Valencia*, this Court did not treat the surplusage of language in Penal Code section 1170.18 as being dispositive of the question on review. (*People v. Valencia, supra,* 3 Cal.5th at p. 382.) This comports with canons of construction requiring consideration of how a particular phrase features in the statutory scheme as a whole. A court may not seize upon a few words, isolated from the context and purpose of the statute, to defeat the purpose of a statute, because "[T]he meaning of a statute may not be determined from a single word or sentence... ." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at 1386–1387.) If there are two reasonable interpretations of a statute, "the one that leads to the more reasonable result will be followed." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) The consequences of a

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[5]Parallel citations to the California Reporter and the Pacific Reporter are omitted from most indented case quotations in this brief, and are indicated by brackets "[]."

particular interpretation of a statute are a consideration in determining the meaning of given law. (*People v. Valencia, supra*, 3 Cal.5th at p. 358.) An interpretation of a given law is not reasonable if it is "strained." (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113.)

Voter initiatives and legislation are interpreted by application of the same canons of construction, and the enacting body is presumed to be aware of existing law. (*People v. Gonzales* (2018) 6 Cal. 5th 44 at p. 50.) This does not mean that voters or the Legislature are presumed to be literally and subjectively aware of any particular existing law. It is rather a canon of construction designed to guide courts' interpretation of the law away from judicial law-making. (See *People v. Valencia, supra*, 3 Cal. 5th at p 410, [Cuellar, J., Dissenting], citing *People v. Garcia* (1999) 21 Cal.4th 1, 14, fn 8.)

Events after a statute was enacted are of limited utility in determining intent of a previously existing law, and the repeal of a statute by implication is disfavored. (*Juan G. v. Superior Court* (2012) 209 Cal.App.4th 1480, 1494.) The subsequent amendment of a given statute may give rise to a "latent ambiguity" in a previously unambiguous statute. (*People v. Garrett* (2001) 92 Cal.App.4th 1417, 1422.) But even the Legislature's own explicit declaration as to the meaning of a preexisting statute is neither binding nor conclusive in construing the statute's application to past events. (*Western Security Bank v. Superior Court* (1997) 15 Cal. 4th 232, 244.)

The Legislature is presumed able to specify exceptions to the application of a

given law, and asking for an exception which contravenes the purpose and plain meaning of the statute is "asking [the court] to engage in the most extreme form of judicial rewriting of the statutes." (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902.) When creating exceptions to a statute would have been simple, and the Legislature refrained from specifying exceptions, there is not even any reason to consider the legislative history of the statutes. The clear statement of a blanket rule with no exceptions requires that courts simply apply the law as written:

> It is one of the best-established and most sensible rules of the law that courts should not imaginatively construe--or meddlesomely fiddle with--statutes which are clearly written. If "language is . . . clear and unambiguous, there is no need for construction." (*In re Lance W.* (1985) 37 Cal.3d 873, 886 [].) Still more recently the Supreme Court has warned that "[i]n construing the terms of a statute we resort to the legislative history of the measure only if its terms are ambiguous." (*Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 96 [].)

(*City of Ontario v. Superior Court, supra,* 12 Cal.App.4th at p. 901.)

Below petitioner sets forth the legislative history of Penal Code sections 954, 949, and 739, and considers other methods of construing an ambiguous law. This is not a concession that resort to the legislative history is necessary; the statute unequivocally requires judicial consideration and approval to consolidate accusatory pleadings. As discussed in Argument ID, *infra*, the inclusion of multiple complaints in one document was unavoidably a consolidation, whatever the label on the pleading document.

C. The legislative history and plain meaning of Penal Code sections 954, 949, and 739 precludes parsing the "same court" language of Penal Code section 954, in terms of abstract functions of courts at different stages of proceeding. Senate Bill 543 amended all those statutes to clarify that criminal court processes applied to all levels of actual courts existing at that time. Those laws had no hidden meaning, and did not imply exceptions to consolidation requirements.

The only Penal Code section governing consolidation is Penal Code section 954, which states in pertinent part that:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.

This statute represented a dramatic departure from previous rules governing accusatory pleadings in criminal cases, which previously prohibited the prosecutor from combining different offenses in one accusatory pleading. (*People v. Tideman* (1967) 57 Cal.2d 574, 578-581.) As explained in *Tideman*, "The statutory rules of pleading and procedure in criminal actions today are not only different from, but in certain aspects are contraversions of, those which existed under the Practice Act of 1851 and even under the Penal Code prior to the amendments of 1915 and 1927." (*Id.*, at p. 578.) This had implications for double jeopardy issues decided in *Tideman*, because unlike in some much older authorities, the "modern" version of Penal Code section 954 could mean a defendant was placed only once in jeopardy, for different offenses which were consolidated under the "new" law. (*Ibid.*)

Tideman went on to explain that some older double jeopardy law applied in defendant's favor, only because it was decided when the law was that the prosecutor had to try one offense at a time. This had obvious negative implications for claims of double jeopardy, after 1915. Thus the *Tideman* court explained:

> Originally in California both under the Practice Act and the Penal Code the accusatory pleading could charge but one offense, and that limitation (insofar as it precludes the obtaining of either separately or alternatively punishable convictions for different crimes charged in one indictment) was maintained until 1915. That rule, of course, was important as to the attachment of jeopardy in decisions of the pre-1915 era, and unfortunately, has sometimes had confusing effect in later cases.
>
> In 1915, however, section 954 was amended to, for the first time in this state, not only authorize the charging in one indictment or information of "two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes . . . under separate counts" but also the consolidation for trial of two or more accusatory pleadings separately charging such offenses. The 1915 (and current in this respect) statute furthermore declares that "The prosecution is not required to elect between the different offenses or counts . . . [and] the defendant may be convicted of [n.b.: this does not say punished for] any number of the offenses charged . . . ." (Italics added.) (Stats. 1915, p. 744.) In 1927 the Legislature augmented this renaissance of pleading and procedure in criminal actions by adding the following sentence to section 954: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." (Stats. 1927, p. 1042.) Finally, in 1951, the words "accusatory pleading" were substituted as more briefly inclusive of the words "indictment," "information," and "complaint" and, apparently to preclude any uncertainty as to legislative intent, the last sentence was amended to read "An acquittal of one or more counts shall not be deemed an acquittal of any other count." (Stats. 1951, pp. 3836-3837.)

(*People v. Tideman, supra*, 57 Cal.2d at pp. 577-580.)

Penal Code section 954 was last amended in 1951, via Senate Bill 543 (Stats.

1951, ch. 1674.)[6] This was a comprehensive overhaul of the procedural provisions of the Penal Code, in part to clarify terminology for municipal and superior courts, so that the provisions applied clearly to courts and to all "courts," with "courts" used in the ordinary sense. The Legislative Analysis stated that:

> The declared purpose of this bill [was] to make all the procedural provisions of the Penal Code applicable to all proceedings in all courts, so far as it is possible and practicable. (Report of Senate Interim Judiciary Committee, p. 25, transmitted June 19, 1951)

(Legis. Counsel, Rep. on Sen. Bill No. 543 (1951 Reg. Sess).)

The bill amended over a hundred other Penal Code sections, and restructured headings of statutes. (See Request for Judicial Notice; Governor's Chaptered Bill file, Stats 1951, Chapter 1674, p.3.)

Among the sections replaced or amended were Penal Code sections 739 and 949. Senate Bill 543 amended section 949 to distinguish accusatory pleadings in the superior and municipal courts:

> The first pleading on the part of the people in the superior court is the indictment, information, accusation or complaint in any case certified to the superior court under the provisions of Section 859a or the complaint filed in accordance with the provisions of Section 707 of the Welfare and Institutions Code. The first pleading on the part of the people in all inferior courts is the complaints except as otherwise provided by law.

(Stats. 1951, ch. 1674, § 42, p. 3836.)

Senate Bill 543 also added Penal Code section 739, addressing informations. It

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[6] See Request for Judicial Notice, filed herewith. All citations to SB 543 are from the Governor's Chaptered Bill file of which respondent requests judicial notice.

was moved into the new title 2 from title 3 of part 2, where it was former section 809, which was repealed by Sen. Bill 543 (Stats. 1951, ch. 1674, §§ 5, 6, 26), and replaced with language stating in pertinent part that:

> "When a defendant has been examined and committed ... it shall be the duty of the district attorney ... to file in the superior court ... within 15 days after the commitment, an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed."

(Stats. 1951, ch. 1674, § 6.)

The Court of Appeal's majority opinion tacitly acknowledges that the language of Penal Code section 954 is unambiguous, and agrees that its plain and ordinary meaning is that complaints cannot be consolidated with other separately filed complaints; and separate informations cannot be combined with other separately filed informations, without a judicial order of consolidation. However, the majority discerns a "latent ambiguity" in Penal Code section 954, following the unification of the courts in 1998, which rendered the "same court language" surplusage. The latent ambiguity was then seized upon by the majority to permit interpretation of the otherwise plain language of Penal Code section 954 to permit the filing of a "unitary information" consolidating the charges in separately filed complaints on which the defendant has been separately held to answer without prior judicial review and approval. That in turn suggested to the majority that the Legislature meant (by negative implication, since they did not amend Penal Code section 954 after 1998) to say that a prosecutor could file a "unitary information"

combining complaints, without a motion to consolidate. The only provisos were that it be the "first accusatory pleading" in the superior court (based on Pen. Code sec. 949), and that the orders holding the defendant to answer on the various complaints were made within 15 days of one another, in accordance with Penal Code section 739. (Maj., at p. 511.)

But it is important not to blend discussions of interpretation of unambiguous statutes with discussions of how extrinsic events might affect their construction. It cannot be overemphasized that the majority opinion begins with a brief acknowledgment of basic principles of statutory construction, then segues into an exception for "latent ambiguity." For that, the majority cites the *Garrett* case, in which the amendment of the statute being interpreted creates a "latent ambiguity." (Maj at p. 506, citing to *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1422.)

It is a strained interpretation of California pleading law, and a tortured application of principles of statutory interpretation, to impute to the Legislature an intent not voiced in over 68 years (since SB 543), to except "unitary informations" from the ambit of Penal Code section 954. The inference is particularly attenuated given the passage of decades in which the hypothesized latent ambiguity lay dormant. Since 1998, the Legislature had decades to recognize an amendment was necessary to give meaning to "same courts." A more reasonable interpretation is that the Legislature felt the existing language clearly required prosecutors to seek consolidation of complaints, or of informations. (See *Youth*

Addiction, Inc. V. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 563.)

A latent ambiguity arises from an extrinsic event, such as the amendment of a statute as discussed in *People v. Garrett, supra,* 92 Cal.App.4th at p. 1422. But arguably the only extrinsic event here was the prosecutor's nonstandard pleading being challenged in the trial court, because both the majority opinion and the District Attorney say that, at least since 1951, prosecutors could self-consolidate, simply by designating multiple complaints as an "information." The majority states:

> Prior to 1998, the judicial power of California was vested in the Supreme Court, Courts of Appeal, superior courts, and municipal courts. (Cal. Const., art. VI, former § 1; see § 691, former subd. (a) [defining "'inferior courts'" as including municipal courts and justices' courts].) It is logical to conclude that, at such time, the separation of courts was such that section 954 meant judicial permission was required to consolidate two or more accusatory pleadings filed in municipal court, or two or more accusatory pleadings filed in superior court. *Permission would not have been required to do what the People did in the present case*: file a single information as their first pleading in superior court (§ 949), covering charges as to which separate complaints were filed, and the defendant was separately held to answer, in municipal court. This is so because superior court and municipal court were not the same court.

(Maj., at p. 505 [emphasis added].)

The obvious purpose of Penal Code section 954 is to regulate consolidation of accusatory pleadings. That purpose is frustrated by the majority's interpretation of the law as essentially nullified by calling a charging document consolidating separate complaints a 'unitary information." That shows the unlikeliness of the "unitary information" having been a wholly unacknowledged loophole in Penal Code section 954 since 1951. The Legislature is presumed to be able to say what it means, and to mean

what it says, yet there exists no hint in the legislative history of Penal Code section 954 that the Legislature intended to exempt anything the prosecutor labeled as a "unitary information" from consolidation requirements. It is unreasonable to conclude the Legislature gave prosecutors the previously unprecedented power to combine separate prosecutions, subject to judicial regulation, then defeated that very purpose by allowing circumnavigation of such regulation by stapling together separate complaints on which the defendant has been separately held to answer and labeling the resulting document a "unitary information."

A particularly troubling aspect of the majority's analysis is that the "same courts" language from 1951 is theorized to have always allowed unitary informations (Maj., at p. 505), but then lay dormant, finally developing into a "latent ambiguity" when courts were unified in 1998. The court based this on arcane distinctions between functions of various courts, both before and after unification of courts. That makes unification something of a red herring. Nothing suggests "courts" was used in Penal Code section 954 in any abstract sense, if only because when a judge sits as a magistrate, he is in no particular court. (*People v. Superior Court* (1986) 187 Cal.App.3d 648, 654; *People v. Scofield* (1967) 249 Cal.App.2d 727, 735.)

The majority's interpretation of the law defeats its purpose. If it does not eviscerate the law, it certainly creates a large category of exceptions. Respondent has discovered but one Cal.App.Supp. case applying Penal Code section 954 to municipal

court proceedings. (*People v. Simmons* (1978) 82 Cal.App.3d Supp. 1, 3-4.) Thus the "unitary information" is an exception that all but swallows the rule, because the most frequent application of the section is to require judicial permission for the consolidation of informations.

The statute as written in 1951 had the declared purpose of clarifying that procedural statutes applied to all the courts. The plain meaning of Penal Code section 954 was, as the majority recognized, to require court permission to combine two complaints or two informations in the same court. (Maj. at p. 505.) The modern law adopted by the 1915 amendment of Penal Code section 954 represented the first time the prosecutor had ever been allowed to plead multiple cases in one accusatory pleading. Subsequent amendments to Penal Code section 954 have only been to clarify terminology, and especially to show that Penal Code section 954 encompasses all accusatory pleadings across various levels of courts. (*People v. Tideman, supra,* 57 Cal.2d at pp. 577-570.)

Nothing in the legislative history suggests the Legislature intended for prosecutors to circumvent the requirement for judicial approval of consolidation, by merging separately filed and bound over complaints stemming from entirely separate proceedings. Notably, the majority and the prosecutor must resort to coining a term "unitary information," never appearing in the Penal Code, to support this interpret the law. That of itself militates against any such exception to Penal Code section 954 requirements.

Advertising executives persuade consumers to buy something by creating catchy labels, like "Instant Breakfast." "Unitary information" is catchy, but the prosecutor cannot create new criminal procedures with no origin in the Penal Code. Statutory construction begins and ends with the plainly expressed language of the law. The term "unitary information" is a euphemism for two complaints masquerading as one legitimate accusatory pleading. Interestingly, the words "unitary information" are never contained in any document the prosecutor filed in this case. The prosecutor called it simply "INFORMATION"[7] and he did not cavil when the judicial assistant wrote "CONSOLIDATED" above that word. (1CT 123.) Even the notice of appeal was captioned "CONSOLIDATED COURT NO. F16903119, F16901499". (1CT 251.)

Another semantic device employed to support the prosecutor's contravention of Penal Code section 954 is "joinder." Both the majority and prosecutor state that the prosecutor always has the ability to effect "joinder," by filing an accusatory pleading of offenses of the same class. (Maj., at p. 505.) But that is at least a misnomer. Courts are not to prohibit joinder (Cal. Const,. Article I, § 30), and joinder is favored, but is never automatic. The defense must still be afforded the due process inherent in a judicial determination of whether separate proceedings may be combined. Judicial economy never trumps federal constitutional due process requirements. (*Williams v. Superior Court*

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[7] The underlining acted to avoid the court clerk mistaking it for two complaints, although that is apparently how all court clerks and judicial assistants viewed it; as two separate but consolidated complaints.

(1984) 33 Cal.3d 441, 451-452.) There is no "joinder" procedural statute, nor any law indicating separately instituted prosecutions may be joined without judicial permission, via "unitary information."

Penal Code section 954 represents the balance the Legislature struck a century ago between judicial economy and due process. It requires judicial oversight of the consolidation of separate charges from separately filed complaints. In his briefing, the prosecutor cited *People v. Merriman* (2014) 60 Cal.4th 1, as authority for his ability to unilaterally effect "joinder" of similar charges. (AOB 16-17.) But in *Merriman* the prosecutor had obtained court permission to consolidate indictments, and the issue on review was denial of severance. In *Merriman*, this Court never said separate prosecutions are either joined together, or that charges a court has consolidated are severed, except by judicial orders. (*People v. Merriman, supra,* 60 Cal.4th at pp. 36-37.)

In appellate briefing, the prosecutor also cited *People v. Alvarez* (1996) 14 Cal.4th 155, 188, to say that whether offenses are of the same class is a question of law for the prosecutor to decide. Thus he claims the prosecutor can always unilaterally effect "joinder" of offenses of the same class. (AOB 31-32.) The majority opinion similarly states that "joinder"here was proper because the counts were all of the same class, noting "Defendant does not appear to dispute this." (Maj. at p. 504.)

Neither the majority's nor the prosecutor's authorities create any kind of automatic "joinder" without court permission, for distinct accusatory pleadings. In *Alvarez*, the

prosecutor had previously obtained court permission to join separate charges, apparently by an amended information. (*People v. Alvarez, supra,* 14 Cal.4th at pp. 174-175.) In Henson's case, the prosecutor made no motion to amend, and could not amend to charge something not shown by a preliminary examination hearing in the same case. (Pen. Code § 1009; *People v. Casillas* (2001) 92 Cal. App.4th 171, 179). Therefore, in several significant respects, *Alvarez* is distinguishable, and it does not permit prosecutorial self-consolidation.

More importantly, *Alvarez* does not say that the prosecutor may decide whether offenses are of the same class, for separately filed prosecutions. Rather, the case distinguishes issues of law upon which the trial court judge rules - as to whether offenses are of the same class - from issues of mixed fact and law for the trial judge to decide, in determining whether charges are connected in their commission. (*Id.*, at pp. 187-188.) Then appellate review is de novo on the rulings of law, while it is deferential on the findings of fact. (*Ibid.*) Nothing in *Alvarez* indicates the prosecutor may combine separate cases without obtaining court permission to do so.

Respondent did not dispute the offenses being of the same class because the prosecutor here never argued consolidation on the merits. Whether the trial court would have concluded the offenses were of the same class and that consolidation was otherwise appropriate is a matter of speculation. This prosecutor disavowed any intent to seek judicial approval of consolidation, and aside from saying offenses were of the same class,

did not address the relevant desiderata for a judicial ruling on consolidation. This equally distinguishes the instant case from *People v. Landry* (2016) 2 Cal.5th 52, 76, the majority's authority for "joinder." It involved offenses in prison of the same class and connected in their commission, and while the issue was denial of severance, there is no indication the prosecutor had ever filed separate complaints, then filed a "unitary information" without leave of court. Thus, the majority opinion and the prosecutor resort to semantic stratagems to interpret a simply worded statute. It was only ever amended so its provisions more explicitly covered all accusatory pleadings, and all "courts," with the word "court" used in its ordinary sense. Thus, the law regarding construction of ambiguous statutes has no application in this context in the first place.

The majority relies solely on an inapposite citation of the law applicable, where the statute in question is rendered ambiguous by a subsequent amendment of the same statute. (Maj at p. 506, citing to *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1422.) The majority does not indicate the Legislature meant to say complaints or informations could be consolidated without court permission. The majority concedes that is not the law. (Maj., at p. 506.) No case on consolidation endorses the circumvention of the law by combining two separately filed complaints into a so-called "unitary information." Indeed, the absurdity is to suppose that since 1951 the Legislature intended Penal Code section be read to permit aggregation of charges included in separately filed complaints regardless of their character, so long as a single document includes the counts from

various separately bound over complaints. But that is what the majority says. (Maj, at p. 505.)

Interpreting Penal Code section 954 as merely a labeling requirement gives little effect to the law. It also has the absurd effect of judicial oversight turning on and off as time goes on, an especially unlikely implication of the law, based on its plain terms and legislative history. Penal Code section 954would turn on after the filing of separate complaints, but before the defendant is held to answer. Then the requirement for court approval turns off, as charges are compiled for presentation in an information, but only for a 15-day window. (Maj., at p. 511.) Then the law would turn back on with respect to subsequently filed informations in the trial court.

As the dissent notes, it is unclear how the 15-day window provided by Penal Code section 739 would be implemented "on the ground."

> ...interpreting section 739 as permitting the combining of charges from multiple commitment orders and/or preliminary hearing transcripts in one information does not make sense as, under such a scenario, the timeliness of the information could not be evaluated with respect to a specific 15-day window, as clearly contemplated by the statute. Section 739 does not suggest that the timeliness of a particular information may be measured with respect to multiple commitments in multiple cases.

(Diss., at pp. 525-526.)

Here the dissent adds that Penal Code section 739 specifies that an information must be filed "within 15 days after *the* commitment." (Diss., at p. 526 [adding emphasis].) The definite article underscores that the preliminary hearing transcript is the "touchstone" of

the information, which must reflect charges which were the basis of "the" commitment order, issued at that hearing. (Diss., at p. 26, citing *People v. Kellin* (1962) 209 Cal.App.2d 574, 575-576; *People v. Burnett* (1999) 71 Cal. App.4th 151, 165; *People v. Terry* (2005) 127 Cal.App.4th 750, 765-766.) The majority's interpretation of the law here violates Penal Code section 739, which contemplates one information for each preliminary examination hearing, to be filed within 15 days of a particular commitment order.

The majority does not address the evident intent of the Legislature, over 100 years ago, in allowing prosecutors for the first time to obtain court permission for consolidation. The purpose of the Legislature as discussed in *Tideman* has never altered, nor is there any hint in Penal Code section 954, discussed in *Tideman*, to except "unitary informations" from the ambit of the law.

The majority opinion's interpretation of an ambiguity from court unification is ill considered. The Legislature knows how to create an exception to a statute if it wishes to do so. (*Cal.Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349; *City of Ontario v. Superior Court, supra*, 12 Cal.App.4th at p. 902.) The Legislature has not amended Penal Code section 954 to permit the prosecutor to engage in extrajudicial consolidation of charges included in separately prosecuted complaints

The plain meaning of Penal Code section 954 is clear, and there is no occasion to construe it at all, even to the extent of considering its legislative history. Nevertheless, the

legislative history and declared purpose of all the statutes discussed in this case - Penal Code sections 954, 949, and 739 - rules out allowing a prosecutor to dodge the law by calling combined complaints a "unitary information."

Penal Code sections 954, 739, and 949 were enacted in their present form to apply procedures to all courts. The Legislature has never contemplated consolidation except as a matter for judicial determination, and there is no call for interpreting Penal Code section 954. Its explicit and unambiguous terms require judicial approval for consolidation of all types of accusatory pleadings. Furthermore, it frustrates the declared purpose of the law - to apply procedures including motions to consolidate to all accusatory pleadings in all courts - to exempt filings at arguably the most significant stage of the pleadings, when the information paves the way for trial and conviction.

D. The "unitary information" is a fiction. There were two complaints which the majority, the prosecutor, and court clerks all conceded at many points were "consolidated." The majority said it was administratively deemed a consolidation, while the prosecutor and clerk said Judge Penner ordered two complaints to be consolidated on December 15, 2016. If there was consolidation, *a fortiori* there were two complaints, not any kind of information.

The majority opinion held that the prosecutor may combine two complaints in a "unitary information," and that this is not "consolidation." Therefore, while the emphasis of the majority and the prosecutor was on whether there were two accusatory pleadings in the "same courts," this misdirects attention away from a more fundamental problem with excepting the "unitary information" from the ambit of Penal Code section 954: That the

"unitary information" is a fiction. It serves a rhetorical but not a substantive purpose. The pleading here was actually two complaints, not any kind of information. The "unitary information" fiction is belied by any number of references to the complaints as having been "consolidated," after the fact, by the majority opinion, the prosecutor, and a judge's judicial assistant.

Consolidation is by longstanding definition, a court order to combine proceedings. (Black's Law Dict. (4th ed. 1951) p. 382, vol. 1.) Consolidation is a court function, but in this case it was effected by a fiction, a sublimation of two distinct complaints into one information. This purportedly meant there was no "consolidation," governed by Penal Code section 954. But, after the fact, various parties to this case have been forced to characterize the complaints as having been "consolidated." Some parties even affirmatively allege that there were two complaints, and that Judge Penner explicitly ordered them to be consolidated.

In the briefing on appeal, the prosecutor explained that his pleading was rejected for filing in the main clerk's office, so he took it to a judicial assistant, who wrote "CONSOLIDATED" on the complaints he had aggregated and labeled an "INFORMATION." (1CT 128; AOB 10.) The majority dismisses this as established fact, complaining that it would require judicial notice, which at this juncture would prejudice the opposing party for lack of notice of a proposal to take judicial notice of the prosecutor's representations. (Maj., at 497, fn 3.) But the opposing party *is* the District

Attorney making the representation, so there is no issue of notice.

That aside, the prosecutor said he was not seeking consolidation (2RT 107; AOB 24, 33), but did not object when the judicial assistant labeled the pleading "CONSOLIDATED." Also, the prosecutor incorrectly claimed that Judge Hamlin approved the practice of foregoing a motion to consolidate. In fact Judge Hamlin stated he disapproved of this practice. (2RT 133-134.) Also, the pleading was not labeled a "unitary information" as the prosecutor indicated would comport with Penal Code section 954. (1CT 123.) The "lack of notice" boot is on the other foot.

Judger Penner's judicial assistant claimed that Judge Penner literally ordered the cases consolidated and referenced case 119 as the lead case. But the reporter's transcript for that date indicates Judge Penner did not order consolidation or designate a "lead" case. (1RT 1-11.) Judge Penner specified he was arraigning the defendant "on *case* ending 119 and 499 that *are* filed together in one information." (1RT 8 [emphasis added].)

If "unitary informations" are allowed, the pleading should have been captioned as such, but it was not. The majority opinion says the clerk had the duty to make the case filing work by whatever means necessary; therefore the two complaints were not consolidated, yet were processed as consolidated, "by necessity. (Maj. at p. 504, fn 7.) The prosecutor erroneously claimed at various points that Judge Penner had explicitly ordered consolidation and denied severance, citing what is now 1RT 1-11 (AOB 12, 37.)

Although court clerks are administrators, they lack authority to alter the character of an accusatory pleading, and cannot prepare minutes of orders not made by the judge in the oral proceedings. A judge's oral pronouncements always controls over any conflicting clerk's entries, because what the judge orders is by definition the "judgment," not what a clerk says. (*People v Mitchell* (2001) 26 Cal.4th 181, 185.) Judge Penner said nothing about consolidating the complaints, denying severance, or designating one of the cases as the "lead case." (1RT 1-11.)

Not the least of the negative consequences of this extrajudicial consolidation was all the unnecessary litigation in this case. The 'unitary information" did not serve judicial economy here. Normal consolidation procedures, including a court ruling, are integral to administrative processing of combined prosecutions. The consolidation without a court ruling made the processes of the court in this case irregular at many levels, down to dockets reflecting nonexistent consolidation orders. The characterization of the complaints as having been "consolidated" is a tacit recognition that the aggregation of the counts charged in the separate complaints was a consolidation effected without court permission. Not having a proper court-ordered consolidation means the cases remain in two separate files, with two separate case numbers listed in the online docket of the Court of Appeal and of this Court. (See http://appellatecases.courtinfo.ca.gov.)

On the notice of appeal, the prosecutor captioned this "CONSOLIDATED COURT NO. F16903119, F16901499". (1CT 251.) So the case still has no "unitary"

information number. This is not a problem when judges consolidate cases, because the judge may designate one information number as the "lead" case and order that the lead case number be used as the case proceeds toward trial. But here the prosecutor complained about Judge Hamlin's use of his lead case designation, to decide which case to dismiss. (2RT 125.) Judge Penner carefully noted he was only arraigning the defendant "on case ending 119 and 499 that are filed together in one information." (1RT 8.) So he had not designated a "lead" case, either.

The prosecutor's unitary information was (and still is) two complaints consolidated without court permission, in violation of the plain language of Penal Code section 954.

E. A judge sitting as a magistrate is in no particular court, and Penal Code section 954 added "same courts" language to refer to actual levels of courts in existence at the time the law was amended. Cases distinguishing functions of courts before and after court unification are inapposite, and the majority's claim that court unification implicitly amended Penal Code section 954 is contradicted by their claim a "unitary information" was allowed after 1951, 27 years before court unification.

The limits of a magistrate's function were outlined in an 1897 California Supreme Court case that still is good law:

> A superior judge, when sitting as a magistrate, possesses no other or greater powers than are possessed by any other officer exercising the functions of a magistrate ... The office is purely a statutory one, and the powers and duties of the functionary are solely those given by the statute; and those powers are precisely the same, whether exercised by virtue of one office, or that of another ... As such magistrate, he is purely a creature of the statute.

(*People v. Cohen* (1897) 118 Cal. 74, 78.)

In 1986, the Third District Court of Appeal noted that when a judge acts as a magistrate, he does not do so as a judge of a particular court but rather as one who derives his powers from the provisions of Penal Code sections 807 and 808. (See *People v. Superior Court* (1986) 187 Cal.App.3d. 648, 654.) The court noted that the appellate jurisdiction of the superior court over inferior courts does not include the orders of a magistrate, which cannot be appealed because the term "inferior court" does not encompass a municipal or justice court judge sitting as a magistrate. (*Id.* at p. 654.) "This is a limitation arising out of the nature of the office of magistrate." (*Id.* at p. 654.) The Second District Court of Appeal in 1967 noted, "By initiating proceedings before magistrates, no trial jurisdiction of any court is invoked." (*People v. Scofield* (1967) 249 Cal.App.2d 727, 735.)

This is important, as the majority opinion rests upon the differences in functions of courts sitting as trial court judges, versus sitting as magistrates. This the majority finds removes the "unitary information" from the ambit of Penal Code section 954, because the unitary information is not in the "same court," functionally speaking. (Maj., at p. 510.) This is an improper construction of the law, controverting its plain meaning and legislative history. The "same courts" language was added with the declared purpose of encompassing events taking place in what was then municipal courts, such as the filing of complaints. Thus the language would mean two complaints could not be consolidated, or two informations consolidated, without leave of court. That meaning applies equally well

before or after unification, because there are still complaints and informations, referenced by "accusatory pleadings" in Penal Code section 954. (*People v. Tideman, supra,* 57 Cal.2d at pp. 577-570.)

But just as importantly, the judge sitting as a magistrate is in "no court," which even more strongly indicates the Legislature was using "same courts" in its ordinary meaning, whereby two complaints or two informations required judicial consolidation. The majority decision says "same courts" must refer to stages of proceedings, and complaints and informations are at different "stages," subject to different rules, so the "first accusatory pleading" in the stage formerly designated as taking place in the superior court, can be two complaints presented in one pleading. (Maj., at p. 490.)

Nothing in the unambiguous language of Penal Code section 954 suggests there was any concern with "stages" of pleadings; the most direct interpretation of "same courts" is to complaints, or informations, which existed before and after court unification. If there was ever room for interpreting language inserted to reference accusatory pleadings of all kinds, it would not lead to the majority court's negative implication of loopholes in the law allowing consolidation of separate complaints without judicial review and approval, which the law was explicitly intended to avoid.

That aside, the unification of courts required no analysis of court functions or stages of proceedings. The superior court is now one court, and as discussed above (Argument IC, *ante*), the most straightforward interpretation of "same courts" language -

which works even after unification of courts - is that Penal Code section 954 prohibits consolidation of any separate accusatory pleadings, whether it be complaints or informations, in whatever court those are filed. As Justice Smith said in his dissent here, "If it ain't broke, don't fix it." (Diss., at p. 534.) If court unification has an effect, it would militate in favor of requiring judicial consolidation for all sorts of accusatory pleadings, as they are all now in the "same court." If a loophole in Penal Code section 954 ever existed, it was closed in 1998 with court unification, after which all pleadings are "in the same court."

The majority speculates that if court unification means all pleadings are in the same court, courts could consolidate complaints with informations. (Maj. at p. 510). But that is contrary to the whole structure of the Penal Code provisions in question. It is an imaginary problem, and if it ever arose, it could be addressed at that time. The most parsimonious interpretation of legislative intent is that the Legislature saw no necessity to parse abstract court functions or stages of proceedings when courts were unified, because one still could not combine two complaints or two informations, no matter how one viewed judges' functions in various spheres. The only necessity for such theoretical speculation is the Fresno prosecutor taking exception to the enforcement of the plain language of the law, which, as Judge Hamlin pointed out, was a problem the prosecutor created by their practice of skipping motions to consolidate. (2RT 125.)

None of the prosecutor's or majority opinion's authorities for such parsing were

decided for the purpose of interpreting Penal Code section 954. Court unification did raise questions as to post-unification procedures, all of which were resolved by consideration of the purpose of unification, and the purpose of statutes amended to clarify the law. The cases observe (as does the majority opinion) that court unification was not meant to change the fundamental processes from what had been done in municipal courts and superior courts. Thus, in *People v. Richardson* (2007) 156 Cal.App.4th 574, a defendant made a motion to suppress evidence, pursuant to Penal Code section 1538.5, at his preliminary examination hearing. When the magistrate denied the motion, he then pled guilty. The appellate court held that he could not appeal the denial of the suppression motion, because unification law specifically provided for superior court review of preliminary examination hearing suppression motions. The pre-unification rule of *People v. Lilienthal* (1978) 22 Cal.3d 891, 896 still applied, because there were still two levels of proceedings, reflecting the division of functions of the courts before and after unification.

The majority finds *People v. Richardson, supra,* 156 Cal.App.4th at p. 574 of little use for the purpose of determining the "same courts" issue presented in this case, noting that it rested upon the difference between municipal courts and superior courts, instead of the different functions of magistrates and judges. (Maj., at pp. 489-490.) The *Richardson* case if anything militates in favor of Mr. Henson's's position that the two complaints were in the "same court." Specifically, the *Richardson* court observed that

unification rendered all courts the same court, and held that unification changes nothing about substantive court processes. (*Id.*, at p. 587.) The *Richardson* court also sensibly applied the *Lilienthal* rule, despite changes in how nomenclature applied in the wake of reunification. That brings the question back to what was the status quo before court unification, where again the majority offers the novel notion that combining two complaints has always been permitted since Penal Code section 954 contained "same courts" language, because a "unitary information" is just one accusatory pleading in the post-bindover court. (Maj., at p. 505.)

An authority not considered by the majority is *People v. Nickerson* (2005) 128 Cal. App.4th 33, 36-39. It illustrates Mr. Henson's point that where unification required amendment of statutes to resolve discrepancies, new statutes were written or old statutes amended to remedy them. But no problems were apparently discerned in the application of the straightforward language of Penal Code section 954, as no amendments were made to the statute in the aftermath of the unification of the courts. Thus in *People v. Nickerson, supra,* 128 Cal. App.4th at pp. 36-39, the court observed that Penal Code section 691was drafted to define felony and misdemeanor cases, and to preserve the pre-existing distinctions between these cases. No similar clarification was necessary with respect to Penal Code section 954, which already distinguished complaints (in what was formerly the municipal court) and informations (in what was formerly the superior courts), and the same courts language added to the section in 1951 already required court

permission for consolidation of complaints or informations. The purpose of requiring consolidation has remained the same before and after "same courts" language was inserted into the law.

The majority found support for its conclusion that the aggregation of charges on which a defendant is separately held to answer in a single accusatory pleading and the filing of the same is not a consolidation of accusatory pleadings filed in the "same court," in *Lempert v. Superior Court* (2003) 112 Cal.App. 4th 1161, 1164-1165. (Maj., at pp. 508-509.) After lengthy quotations of *Lempert*, the majority circles back to its assertion that the "first accusatory pleading" in the superior court can combine two complaints. Yet as discussed above, Penal Code section 949 was designed to distinguish nomenclature of accusatory pleadings in various then-existing tiers of the court, and was not intended to change anything. The majority's incorrect assumption is that the status quo before and after unification was allowance of the "unitary information." The majority opinion and prosecutor posit, without supporting authority, that it was always allowed after the "same courts" language was added to Penal Code section 954 in 1951. But nothing in court unification or Senate Bill 543 indicates the "same courts" language referenced abstract functional distinctions between various stages of court proceedings.

Furthermore, the policy behind a retained attorney's right to withdraw from representation has no application to the policy behind court unification. Court unification was only to increase efficiency. (Diss. at p.521.) Allowing prosecutors the ability to seek

consolidation was designed to increase efficiency, but was always subject to judicial review. The majority opinion never explains how unitary informations could be permissible before court unification, but also constitute a latent ambiguity that arose from court unification, purportedly rendering "same courts" surplusage. If a unitary information was always allowed, since 1951, then court unification could not make it more so. And the "same courts" language is not surplusage if it always referred to the fact that two complaints or two informations cannot be consolidated without leave of court. In any case, avoidance of surplusage is a secondary consideration in statutory construction, and cannot serve to obfuscate the plain meaning of Penal Code section 949. (*People v. Valencia, supra,* 3 Cal.5th at p. 382.)

The majority interpretation of Penal Code section 954 is contrary to all primary and secondary canons of statutory construction, creating the absurd result that prosecutors can avoid seeking consolidation by saying they are not doing so, but then, after the fact, saying cases were consolidated. Penal Code section 954 unambiguously requires an order by a judicial officer permitting consolidation.

F. Interpreting Penal Code section 954 to allow a prosecutor to consolidate complaints without court permission violates Mr. Hensons' rights to due process of law.

The consequences of a particular interpretation of a given law are an important consideration in whether a statute should be construed in certain way. (*People v.*

Valencia, supra, 3 Cal.5th at p. 358.) The majority's endorsement of the exercise of prosecutorial discretion to combine separately filed complaints without leave of court is fundamentally unfair and deprives defendants of due process of law. It may, as it did in this case, interfere with the defendant's representation by counsel. Judicial determinations on consolidation affect the fundamental fairness of criminal proceedings guaranteed to all criminal defendants by the Fourteenth Amendment due process clause. Penal Code section 954 provides each defendant with the benefit of judicial oversight, balancing fairness and due process against judicial economy. While joinder is preferred, to save the state money, "[J]oinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (*Williams v. Superior Court, supra,* 33 Cal.3d at pp. 451-452 [superseded by statute on another point of cross-admissibility].) That balancing underlies the crux of decisions on consolidation or severance (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938), and California Constitution, art. I, sec. 30 does not abrogate the principles set forth in *Williams*. (*Ibid.*)

In its opinion, the majority noted that a defendant can avoid unfairness by seeking severance of improperly consolidated complaints. But that shifts the burden to the defendant, whereas Penal Code section 954 places the relatively slight burden on the prosecutor to seek consolidation, and convince the court that consolidation is appropriate. A prosecutor seeking consolidation is not in an equal position with a defendant challenging denial of a motion to sever. (*Calderon v. Superior Court, supra,* 87

Cal.App.4th, at p. 938.) For one thing, a defendant challenging a denial of severance on appellate review is behind the eightball, because the state has already been put to the expense of a trial. So upending Penal Code section 954 takes a burden from the prosecutor, and shifts it to the defendant, who must then demonstrate that the trial was grossly unfair, a much higher burden. (*Ibid.*; *People v. Mendoza*, *supra*, 24 Cal.4th, at p. 162.) A motion to consolidate is made at the earliest juncture, pretrial, when it can be most economically adjudicated. And a motion to consolidate generates a reviewable order on the direct appeal of a judgment, whereas the filing of a "unitary information" generates no order at all.

The United States Supreme Court recognized that improper joinder of counts can violate the constitutional right to a fair trial. (*United States v. Lane* (1986) 474 U.S. 438, 446.) The decision to order consolidation is made "in the interests of justice and for good cause shown". (Pen. Code, § 954; *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 135; *People v. Marquez* (1992) 1 Cal.4th 553, 572.)

Whether offenses are of the same class is only one consideration. As the court considers the question of prejudice, and the danger that improper joinder will impair substantive rights, it should be remembered that similarity between joined offenses can be a significant factor weighing in favor of finding prejudice. (*Drew v. United States, supra,* 331 F.2d, at p. 94 ["the 'similarity' point cuts the other way... "Every suggestion at the trial that the two crimes were closely parallel increases the likelihood that the jury may

become confused or misuse the evidence."] (*Id.*, at p. 94, fn. 21.)

Consolidation decisions must consider the particularized facts and circumstances of each individual case. (*People v. Gomez* (1994) 24 Cal.App.4th 22, 27; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.)

There are additional considerations for a judge ruling on consolidation, which also require a consideration of the particularized facts of a given case. (*People v. Gomez, supra*, 24 Cal.App,4th, at p.27.) These are whether the consolidation bolsters weak charges with charges where the evidence is stronger, or whether one set of charges is more inflammatory than the other. (*People v. Davis* (1995) 10 Cal.4th 463, 508.) Joint trials may also prejudice a defendant, if his defenses are different, and this makes him look inconsistent or false, or presents him with the dilemma of taking the stand on one case, while not taking it in the other. (*People v. Smallwood* (1986) 42 Cal.3d 415, 432; *Cross v. United States* (1964) 335 F.2d 987, 989.) That could adversely affect the defendant's constitutional right to testify and present a defense and create a conflict with his Fifth Amendment right to remain silent. (*Ibid.*) Presenting an alibi on one case but not the other could create an atmosphere of falsity on one case or the other, which could infect the credibility of the defense as a whole. (*People v. Torres* (1964) 61 Cal.2d 264, 266.)

In Mr.Henson's case, it is not possible to say whether an exercise of the court's discretion to allow consolidation would have been appropriate. By filing a "unitary

information" and evading judicial consideration of consolidation, the factors bearing on the exercise of that discretion were not argued by the parties or submitted for judicial determination. The filing of a "unitary information" without notice to the defense or court authorization was akin to the prosecutor conducting a trial in absentia, while sitting on the bench.

It is not the prosecutor's call whether to combine separately bound over complaints.[8] Due process involves at a minimum, notice, and an opportunity to be heard. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S. Ct. 893.) Mr. Henson received neither. Consolidation was the prosecutor's fait accompli, effected without any effort to persuade a judge that consolidation was appropriate or any opportunity for the defense to show consolidation would prejudice his ability to receive a fair trial . Saving of judicial resources is never of itself a reason to consolidate. (*Williams, supra,* 33 Cal.3d at p. 441.)

The implication of the majority opinion and the prosecutor's arguments on appeal is that since consolidation is so rarely denied, skipping the process of consolidation is not a matter of any moment. But there are many criminal case processes which do not often inure to the benefit of defendants which still cannot be elided. Motions to suppress evidence are rarely granted, but they implicate the Fourth Amendment right to be free from unreasonable searches and seizures. Due process is just as important of a right, and allowing prosecutors a self-help shortcut to consolidation - especially where it was the

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[8] Nor, as noted by Justice Smith in his dissent, does the prosecutor have the exclusive right to seek consolidation. A defendant may also seek consolidation. (Diss., at p. 532.)

prosecutor who chose to pursue separate sets of charges in separate complaints and separate preliminary examination hearings - is an unacceptable consequence of the majority's failure to enforce the plain language of Penal Code section 954 requiring a motion to consolidate, and a review and ruling by a judge.

The majority's interpretation of the statutes in question deprives criminal defendants of due process of law.

G. Remedy, demurrers, and ineffective assistance of counsel

The majority found a "unitary information" was allowed, and that Judge Hamlin erred finding it was not, and in dismissing the counts drawn from the complaint in case number 499. Thus the majority did not reach the issue of the possible ineffective assistance of Mr. Henson's trial counsel in failing to demur. (Maj., at p. 504, fn 8.)

Should this Court decide that the prosecutor's extrajudicial consolidation of the separate complaints was illegal, but that Judge Hamlin could not remedy the error by granting a motion to dismiss under the rubric of Penal Code section 995, Judge Hamlin's ruling should still be upheld as a correct result, even if effected by the wrong avenue. Similarly, if Mr. Henson's counsel sought relief via the Penal Code section 995 motion when, instead, he should have demurred, the Court should find trial counsel provided ineffective assistance of counsel. As respondent stated in previous briefing:

> It is a denial of the Sixth Amendment right to the effective assistance of counsel, to seek a desired result by non-viable means, while at

> the same time, failing to pursue viable avenues toward that same end. (*People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366; *People v. Lopez* (2008) 42 Cal.4th 960, 962; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 - 267.) If counsel forfeited or waived the consolidation issue, by pursuing it as a Penal Code section 995 motion, and not demurring, the issue is cognizable on appeal, as ineffective assistance of counsel.

(RB 57-58.)

Also, a demurrer is a complaint of the facial invalidity of a pleading, covered by Penal Code section 1004. The "unitary information" was not in that sense defective on its face, because it appeared to allege offenses of the same class. Therefore, as Justice Smith explained in his dissenting opinion, the Penal Code section 995 motion was all in all the best avenue for challenging the improperly consolidated pleading. (Diss., at p. 533.)

The majority recognizes that Judge Hamlin had the power to act to curb illegality on the part of the prosecutor, but says there was no illegality. (Maj., at p. 503.) Respondent submits that an "outside the box" violation of Penal Code section 954 would require that the judge fashion his own remedy. The rubric under which he remedied the error should not vitiate the correctness of the result.

CONCLUSION

This case presents a question of whether the trial court's decision to dismiss the extraneous counts included in an unauthorized consolidated information was proper. For the reasons set forth above, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal, and affirm the trial court's ruling.

DATED: August 5, 2019.

Respectfully submitted,

Barbara A. Smith

BARBARA A. SMITH
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520, subdivision (c)(1), I certify that this brief contains less than 14,000 words, and specifically 13,890 words, based on the word-count feature of my word-processing program.

DATED: August 5, 2019

Respectfully submitted,

Barbara A. Smith

BARBARA A. SMITH
Attorney for Respondent

ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE AND SERVICE BY MAIL

I, Barbara A. Smith, certify:

I am an active member of the State Bar of California, not a party to this cause. My electronic service address is smith78223@gmail.com. My business address is 8359 Elk Grove Florin Road., Suite #103-305, Sacramento, CA 98529. On August 5, 2019, I served the persons and/or entities listed below by the method indicated. For those "Served Electronically," I transmitted a PDF version of Defendant and Respondent's Brief on the Merits by e-mail to the e-mail service addresses provided below. For those marked "Served by Mail," I deposited in a post office mail slot regularly maintained by the United States Postal Service at Sacramento, California, a copy of the above document in a sealed envelope, with postage fully prepaid, addressed as provided below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 5, 2019, at Sacramento, California.

Barbara A. Smith

Barbara A. Smith, Declarant