IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,

SUPREME COURT COPY

v.

S176983

TERRION MARCUS ENGRAM,
Defendant and Respondent.

Fourth Appellate District, Division Two, No. E047015
Riverside County Superior Court No. RIF125429
The Honorable Helios J. Hernandez, Judge

OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. TERRION MARCUS ENGRAM, Defendant and Respondent.	S176983

ISSUE PRESENTED

Whether, despite the Legislative directive giving precedence to criminal cases over any civil matters or proceedings, a calendar court judge can be allowed to maintain that there are no available courtrooms to handle a criminal trial – resulting in the dismissal of felony criminal charges – when there are, in fact, civil courtrooms and qualified judges available to timely try the case and dispense justice?[1]

PROCEDURAL HISTORY

On March 1, 2006, following a jury trial in Riverside County Superior Court, respondent was found guilty of residential burglary and acquitted of attempted murder.[2] (E040549 CT 160-162.) As a result, on

[1] Concurrently with this brief, appellant has filed a Request for Judicial Notice asking this Court to take judicial notice of its records in files in the *Wagner* appellate matter (case no. S175794), and the *Gurdian*, *Cole*, and *Flores* discretionary review matters (case nos. S172559, S166777 & S159289).

[2] In an order filed February 9, 2009, the Court of Appeal granted appellant's request to take judicial notice of the record in case number E040549. That record includes one volume of clerk's transcript and two volumes of reporter's transcripts. Appellant will cite to those transcripts by including the case number within the citation.

May 5, 2006, respondent was sentenced to state prison for four years. (E040549 CT 178.) Following an appeal to Division Two of the Fourth District Court of Appeal, the judgment was reversed and the matter was returned to the trial court for a retrial. (See *People v. Engram* (July 23, 2007, E040549) (nonpub. opn.).)

On May 27, 2008, following a retrial on the burglary charge, the trial court granted a mistrial due to the jury's inability to reach a unanimous verdict. Respondent remained free from custody on his own recognizance. (CT 29.) Following various continuances, the last statutory day for timely retrial under Penal Code section 1382 became September 29, 2008. (CT 53.) On that date, the calendar judge stated there were no available courtrooms to handle this last-day trial. (CT 54.) On September 30, 2008, the calendar judge granted respondent's motion, and dismissed the case pursuant to Penal Code section 1382. (CT 55.)

Appellant appealed the dismissal to Division Two of the Fourth District Court of Appeal in case number E047015, under the authority of Penal Code section 1238, subdivision (a)(8). (CT 56.) On August 31, 2009, the Court of Appeal filed an unpublished opinion affirming the judgment of dismissal. (See Appendix to Petition for Review.) In an order filed December 2, 2009, this Court granted review.

STATEMENT OF FACTS

Because this case was dismissed before trial, a full statement of facts is respectfully omitted. Based on the Court of Appeal's unpublished opinion in case number E040549, in August of 2005, in Riverside County, respondent got into an altercation with a former girlfriend, and after she retreated injured into her home, he attempted to enter her home by pulling off a window screen and attempting to unlock a window. (See Opinion filed July 23, 2007, in case number E040549; *People v. Engram*, 2007 WL 2084173.)

ARGUMENT

THE AFFIRMANCE OF THE SUPERIOR COURT DISMISSAL MUST BE REVERSED BECAUSE THE SUPERIOR COURT COMMITTED LEGAL ERROR AND EGREGIOUSLY ABUSED ITS DISCRETION WHEN IT FAILED TO PROPERLY CONSIDER THE AVAILABILITY OF CIVIL JUDGES AND COURTROOMS TO HANDLE THIS LAST-DAY CRIMINAL TRIAL

Penal Code section 1050, subdivision (a), provides that "all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time." The section further states: "*In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.*" (Pen. Code, § 1050, subd. (a), italics added.) Under a plain reading of the statute, "civil matters or proceedings" necessarily include matters pending in specially-designated "civil" departments such as probate or family law, as well as non-designated "civil" departments in any Superior Court courtroom.[3] (See *People v. Flores* (2009) 173 Cal.App.4th Supp. 9, 20 [assumes "civil matters and proceedings" means "any civil action or special proceeding of a civil nature which is not clearly a criminal action"] ("*Flores*").)[4]

Despite this clear statement of the law, the calendar judge who was tasked with assigning criminal matters to trial courts refused to determine

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[3] Where a statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist. (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.) If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861.)

[4] Under California law, there are two kinds of actions: "civil" and "criminal." (Code Civ. Proc., § 24; *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, 164.)

the availability of, or transfer this felony criminal matter to, an available family law or probate courtroom. (RT 12-17.) Instead, the calendar judge applied what appears to be an inflexible policy to refuse to consider utilizing various non-criminal departments to avoid the dismissal of this and 17 other last day criminal matters. This was legal error – not simply an abuse of discretion – and resulted in an unwarranted and unlawful dismissal of felony criminal charges involving the potential for violence.

A. *Relevant Proceedings In The Superior Court*

On the afternoon of September 29, 2008, the calendar judge called this and seventeen other last-day criminal cases and stated there were no available courtrooms to assign a criminal trial. (RT 1, 11-12.) Respondent objected to any further delay, and moved to dismiss the charges pursuant to Penal Code section 1382. (RT 1.) Relying on the calendar judge's representation that he had done everything legally required of him to find a courtroom for these cases, appellant asked the calendar judge to find good cause for a brief continuance. Appellant then asked the calendar judge to consider assigning a criminal trial to a juvenile, probate, or family law department, or utilize a vertical calendar department. (RT 12.) Although most of the cases subject to dismissal were misdemeanors, appellant asserted its belief that they were "serious" and their dismissal had serious implications for the public; the calendar judge agreed. (RT 13.) The calendar judge cited to the "*Gurdian*" case for the proposition that no good cause existed to continue these matters.[5] (RT 14.)

With respect to utilizing a juvenile courtroom to handle a last-day trial, the calendar judge stated that Penal Code section 1050 "directs this

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[5] Presumably, the calendar judge was referring to *People v. Cole* (2008) 165 Cal.App.4th Supp. 1 ("*Cole*"), because "Gurdian" was the companion defendant/respondent in the consolidated appellate opinion.

Court to weigh out how to allocate [its] business in light of the social values that we must consider in administering a court." Without reference to any specific juvenile case or the caseloads of any juvenile courtroom, the calendar judge discussed the general importance of the work done in juvenile courts and stated: "We will not be closing down juvenile court in order to squeeze out one or two more trials. On a practical note, they don't have jury boxes anyway." (RT 14.) The calendar judge then referred to the general importance of the work done in the probate and family law courts, declined to use any of those courtrooms to prevent the dismissal of a criminal case, and added, "on a practical note, probate is handled by commissioners who would not be able to handle trials anyway" and "[m]any of the family law courts are handled by commissioners. Those courtrooms don't have jury boxes." (RT 14-15.)

With respect to utilizing a vertical calendar department, the calendar judge stated there had already been trial courtrooms created from calendar departments, but that the remaining calendar departments were more valuable settling cases than handling trials. (RT 15-16.) The calendar judge added that it was reasonable to argue that a calendar department could handle a criminal trial, but that the presiding judge "has made his choice, I respect his choice, I think he's probably getting it right quite candidly, just because of the number of settlements." (RT 16.) The calendar judge then rejected increased utilization of commissioners and judge pro tems, and overruled appellant's objection to setting the cases for dismissal motions. (RT 17.) Ultimately, the calendar judge continued the matter to the following day for a dismissal motion, and then granted respondent's motion to dismiss. (RT 17, 32.)

B. *The Opinion Incorrectly Holds That The Determination Of Available Courtrooms Is An Exercise Of Discretion*

A primary issue in this case is whether the calendar judge erred in determining it did not have to consider certain courtrooms – such as family law and probate – in assigning this last-day criminal trial matter to a courtroom under the Legislative directive in Penal Code section 1050. The Court of Appeal, in its opinion, addressed this issue solely in the context of whether the calendar judge's determinations were abuses of discretion, and rejected appellant's argument that such determinations are necessarily questions of law to be evaluated de novo. Indeed, quoting *Flores*, the Court of Appeal expressly concluded that the calendar judge "did not abuse [his] discretion by refusing to use remaining noncriminal resources for [defendant's] trial." (Slip Opn. at p. 12; see also Slip Opn. at p. 14 ["We have already concluded the trial court did not abuse its discretion by not utilizing available noncriminal resources to try defendant's case . . . ."].) This manifest legal error compounded the errors by the calendar judge.

Normally, trial court determinations of good cause to continue a trial matter beyond the statutory speedy trial periods are evaluated under an abuse of discretion standard. (See *Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1275.) However, in this case, appellant is not challenging exercises of discretion, but the calendar judge's refusal to give actual consideration to the use of numerous noncriminal courtrooms to prevent the dismissal of this last-day criminal trial matter. The calendar judge had this and 17 other last-day criminal matters pending before it, and took absolutely no action to determine the importance of any pending civil matters or to determine if any of those civil matters would have been actually prejudiced had a criminal matter been assigned to one of those courtrooms for trial. Determining whether courtrooms are available is not an *exercise of discretion*; it is a determination of fact following

interpretation and application of law. (See *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1562 ["factual determination whether residential units are occupied by low or moderate income persons or families is based on fixed mathematical criteria. There is no discretion to be exercised in making this mathematical comparison"].) Accordingly, this is primarily an error of law, which must be reviewed de novo based on the uncontradicted facts presented in the court below. (See e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 730; *People v. Mateljan* (2005) 129 Cal.App.4th 367, 373.)

C. *Assuming A Determination Of Available Courtrooms Is An Exercise Of Discretion, The Opinion Incorrectly Holds That Such Discretion Can Be Exercised Without Regard To The Facts Of Pending Cases*

The calendar judge refused to assign this last-day criminal trial matter to family law, probate or any other specially-designated civil courtroom expressly because of the important work *generally* done in those courtrooms. (RT 14-16.) Despite the calendar judge's agreement that the pending criminal matters were serious and the dismissals would have serious implications for the public (RT 13), the opinion affirmed the actions and dismissal as appropriate exercises of discretion despite the lack of any record demonstrating that discretion by the calendar judge was actually exercised. Additionally, the Court of Appeal concluded that the calendar judge "considered assigning the case not only to any available civil court, but also to any special civil proceeding courtroom, and reasonably concluded that either no courtrooms were available or it was not in the interests of justice to use the special proceedings courtrooms." (Slip Opn. at p. 7.) However, the record demonstrates otherwise.

Ignoring the plain language of the statute, the calendar judge believed the Penal Code "directs" the court "to weigh out how to allocate

its business in light of the social values that we must consider in administering a court." (RT 14.) Yet, without considering any actual facts or values, the calendar judge said he "would not be closing down juvenile court in order to squeeze out one or two more trials." (RT 14.) With respect to utilizing a vertical calendar department, the calendar judge expressly relied on determinations of the presiding judge, without any independent exercise of discretion. (RT 16.) The calendar judge's actions were, in part, also based on the irrelevant consideration that some of the civil courtrooms lacked jury boxes.[6] (RT 14-15.) The Court of Appeal was simply wrong that the calendar judge "provided valid reasons for not assigning defendant's criminal case to a civil or special civil proceeding courtroom." (Slip Opn. at p. 10.)

Ultimately, the opinion affirming the calendar judge's actions improperly approved of the calendar judge being able to rely on the generally-important nature of the matters heard in the civil courts, without any evidence of actual prejudice that would accrue if a criminal trial matter was given precedence. To completely shield from prejudice or dismissal every nonspecific civil matter while permitting the permanent dismissal of dozens of criminal matters, cannot possibly be an appropriate interpretation and application of the preference contained in Penal Code section 1050.

The calendar judge knew this was a felony case, was necessarily in possession of the court file listing the criminal charges, and had already agreed that dismissal of the charges would have serious implications for the public. Despite this uncontradicted information, the calendar judge was determined to give precedence to unspecified civil matters because of

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[6] This consideration could only be relevant if there were no other courtrooms with jury boxes to which the civil judge could be temporarily moved, and if there was no room in the judge's civil courtroom for 12 jurors to be positioned for a trial.

apparent inflexible policies mandating that decision. The additional acknowledgement that available civil courtrooms were handling important matters was irrelevant to the calendar judge's ruling in this case. However, even if that reason was the basis for the calendar judge's action, it was illogical for the Court of Appeal to affirm the calendar judge's "exercise of discretion" based on the generally important work done in the specially-designated civil courtrooms, but not allow the court to rely on the general seriousness of felony criminal charges in comparison.

In this respect, the *Engram* opinion ignored the actual facts and information already available to the calendar judge, and set up a double standard permitting the court to consider the nature of civil cases in general while ignoring the nature of pending criminal matters. This holding is inappropriate, and sets up impossible burdens for the People where felony charges involving a potential for violence can be found to be less important than any miscellaneous nonspecific pending civil matters. No judge has an inherent right to try any particular case, nor to refuse to transfer cases out of his department. (See *People v. Echols* (1954) 125 Cal.App.2d 810, 817.) In reality, there was no actual discretion exercised in granting priority to the nonspecific civil matters, and the People's rights were significantly violated as a result. (See, e.g., *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 [if a trial court's decision is influenced by an erroneous understanding of applicable law or reflects that the court is unaware of the full scope of its discretion, it cannot be said the court has properly exercised its discretion under the law].)

D. *Given The Legislative Directive Providing Precedence To Criminal Matters Over All Other Civil Matters Or Proceedings, Discretion Cannot Be Exercised In Such A Way To Compel The Dismissal Of A Last-Day Criminal Trial Matter Without Evidence Of Actual Prejudice To A Pending Civil Matter*

Appellant has never sought to "shut-down" the family law or probate departments, or any other non-criminal departments handling traditional civil trials. Under Penal Code section 1050, subdivision (a), appellant's request to use one of those departments to prevent the dismissal of felony criminal charges was eminently reasonable and consistent with the plain language of the statute. Moreover, Rules of Court, rule 4.115, regarding criminal master calendar assignments requires the master calendar judge to "assign to a trial department any case requiring a trial or dispositional hearing." (See also Cal. Rules of Court, rule 10.951 ["supervising judge of the criminal division must assign criminal matters requiring . . . trial to a trial department"].) Rule 4.115 also requires the court to "implement calendar management procedures, in accordance with local conditions and needs, to ensure that criminal cases are assigned to trial departments before the last day permitted for trial under section 1382." (Cal. Rules of Court, rule 4.115(b).)

In addition, in *Perez v. Superior Court* (1980) 111 Cal.App.3d 994, the reviewing court held that the superior court could "not adhere to an inflexible policy mandating that on a given day of the week short civil cases take priority over criminal cases which are required pursuant to section 1382 to come to trial on that date." (*Id.* at p. 1000.) In *Perez*, the superior court had congested calendars and a policy of utilizing its courtrooms on Monday only for short civil matters. As a result, a criminal matter that reached its last statutory day on a Monday was not sent out to trial despite the ready availability of courtrooms to handle the case. (*Id.* at p. 997.) On those facts, the reviewing court found it error by the trial court

not to bring the defendant to trial before the expiration of the statutory period. (*Id.* at p. 999.) Indeed, the court expressly observed that the superior court's "somewhat inflexible policy requiring that short civil cases be heard on the first working day of each week made no provision for a criminal matter which under section 1382 was required to come to trial on that date." (*Id.* at p. 1000.)

By inflexibly refusing to utilize any number of civil judges to hear this felony trial, the calendar judge violated the principles of *Perez,* the Rules of Court, and Penal Code section 1050. (See *Tudman v. Superior Court* (1972) 29 Cal.App.3d 129, 132 ["the fact that civil cases were sent out for trial . . . eliminates any legal ground for refusing to send out defendant's case for trial in one of the departments in the civil pool"]; see also *Herrick v. Municipal Court* (1957) 151 Cal.App.2d 804, 810 [reviewing court specifically noted that to avoid dismissing a criminal matter, the civil calendar "could have been set aside for one day so a criminal matter could be heard"].)

As set forth above, appellant has never asserted or argued that criminal matters should take precedence over *all* civil matters or proceedings. Indeed, this Court long ago acknowledged that the statutory preference for criminal cases over civil cases is not an absolute requirement.[7] (See *People v. Osslo* (1958) 50 Cal.2d 75, 106.) However,

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[7] Although the statutory preference for criminal cases is directory, the Court of Appeal is continuing to perpetuate the error from the earlier *Flores* decision in relying on Penal Code section 1050, subdivision (l), in support of this incontrovertible principle. (Slip Opn. at pp. 6, 10, citing *People v. Flores*, *supra*, 173 Cal.App.4th Supp. at p. 20.) However, subdivision (l) was added to the statute in 2003 to prevent trial courts from dismissing criminal matters due to a prosecutor's failure to timely file a motion for continuance. (Assem. Bill 1273 (2003-2004 Reg. Sess.) ch. 133.) Subdivision (l) has nothing to do with the preference for criminal cases.

application of the Legislative mandate in Penal Code section 1050 in a manner to give preference to nonspecific civil matters -- with no evidence of potential prejudice -- and permit the dismissal of felony criminal charges, can never be an appropriate exercise of discretion under the plain language of the statute, established court rules, and long-standing case authority. (See, e.g., *People v. Russel* (1968) 69 Cal.2d 187, 195 ["all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue"]; *People v. Gaston* (1999) 74 Cal.App.4th 310, 314-315 [discretion of a trial judge is a controlled power, guided by fixed legal principles that are to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice]; see also *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

E. *The Opinion's Conclusion That Non-Specific Civil Matters Can Take Priority Over A Last-Day Criminal Trial Matter Is Not Supported By This Court's Opinion In People v. Osslo*

The *Engram* opinion relied on the *Flores* and *Cole* decisions' reliance on this Court's 1958 decision in *People v. Osslo*, *supra*, 50 Cal.2d 75 ("*Osslo*"), to support the calendar judge's actions in dismissing the felony criminal charges despite the availability of civil judges and courtrooms. (Slip Opn. at p. 10.) However, nothing in *Osslo* dictates that nonspecific civil matters take priority over a last-day criminal trial involving felony charges, resulting in the dismissal of those charges. Moreover, if *Osslo* can be reasonably read to support such a result, the Court should take this opportunity to reconsider *Osslo*.

In *People v. Osslo*, *supra*, the defendant complained on appeal about his criminal case being continued for seven days over his objection despite

criminal matters having statutory precedence in Penal Code section 681a, and the fact that civil trial matters were being regularly assigned to open courtrooms.[8] The matter had been set for trial by stipulation on July 9, 1956, and after daily continuances, was ultimately assigned to a trial courtroom seven days later on July 16, 1956. (*Id.* at p. 104.) Without reference to Penal Code section 1382, or even a suggestion that July 9 was the statutory last day for trial absent good cause, this court upheld the continuances and held:

> It does not appear that the policy of sections 681a and 1050 was disregarded. . . . [I]t appears that the orderly administration of a crowded calendar required the continuances to enable trial of the case in a proper department. The precedence to which criminal cases are entitled is not of such an absolute and overriding character that the system of having separate departments for civil and criminal matters must be abandoned.

(*People v. Osslo*, *supra*, 50 Cal.2d at p. 106.) Significantly, there was no threatened dismissal in *Osslo*, nor apparently any claim of a violation of the defendant's speedy trial rights.

Relying on *Osslo* through its citation to the *Flores* and *Cole* opinions, the *Engram* court held that whether a particular case is given precedence over a civil matter is within the court's discretion, and here,

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[8] At the time of *Osslo*, Penal Code section 681a contained language now found in similar form in Penal Code section 1050: "The welfare of the people of the State of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial [officers] and of all district attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice." (*People v. Osslo*, *supra*, 50 Cal.2d at p. 106.) Penal Code section 1050 at the time of *Osslo* included a similar Legislative mandate still present in that section: "Criminal cases shall be given precedence over all civil matters and proceedings." (*Ibid.*)

"the trial court provided valid reasons for not assigning defendant's criminal case to a civil or special civil proceeding courtroom." (Slip Opn. at p. 10.) However, appellant respectfully submits that the calendar judge's decision was arbitrary, not based on the facts of the pending cases, and was in no way compelled by *Osslo*. With full knowledge this case involved felony charges, and information easily available to him that the charges involved potential violence, the calendar judge chose to take an action inconsistent with statutes, rules, and case law, to permit the dismissal of this criminal case in favor of nonspecific civil matters. The designation of certain courtrooms to handle only civil matters despite the instant case being in immediate need of a courtroom was arbitrary. Approval of this conclusion was in no way compelled by this Court's decision in *Osslo*. (See *People v. Gaston*, *supra*, 74 Cal.App.4th at p. 314-315.)

F. *Good Cause Existed As A Matter Of Law To Continue This Case Beyond September 29, 2008*

Under generally accepted and established case authority, neither the prosecutor's, nor the court's, congested calendars can constitute good cause for continuing a criminal case beyond the statutory speedy trial periods set forth in Penal Code section 1382. (See *Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 495.) What constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court. (See *People v. Johnson* (1980) 26 Cal.3d 557, 570.) Historically, court congestion would only constitute good cause when the congestion is attributable to exceptional circumstances. (*Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 782.) However, since the enactment on January 1, 2008, of California Rules of Court, rule 4.115, court congestion can and has regularly constituted good cause to continue trial matters.

Rule 4.115(b) states in pertinent part: "Any request for a continuance, including a request to trail the trial date, must comply with rule 4.113 and the requirement in section 1050 to show good cause to continue a hearing in a criminal proceeding. . . ." This amendment adopted by the Judicial Council of California requires a good cause showing to trail a criminal matter within the 10-day grace period. (See also Cal. Rules of Court, rule 4.113 [continuance will be denied unless moving party presents affirmative proof in open court that ends of justice require a continuance].)

The instant case, like hundreds of other cases dismissed by Riverside County judges, was dismissed on the last statutory day for trial after it had been trailed to the last statutory day due to court congestion. (CT 53-55.) Had it not been for this asserted "court congestion," the case would have been assigned to a courtroom earlier for trial. Yet, it was that "court congestion" that necessarily constituted the good cause to continue the matter to the last statutory day. Accordingly, with this recent rule amendment requiring identical good cause showings for trailing a trial within the statutory period and for continuing a trial beyond the statutory period, court congestion has, in practice, become good cause to continue a trial matter beyond the normal statutory last day.[9]

Moreover, even if court congestion alone somehow cannot be good cause for a continuance despite this new rule, court congestion combined with the calendar judge exhausting all other required alternatives to dismissal is good cause. In *People v. Yniquez* (1974) 42 Cal.App.3d Supp. 13, the Appellate Department of the Los Angeles County Superior Court held that the presiding judge is *not* required to continually contact the Judicial Council when: 1) court congestion is a continuing problem; 2) the Judicial Council

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[9] Penal Code section 1247k gives properly promulgated court rules the force and effect of California law.

had been notified from time to time; 3) the Judicial Council had provided some assistance; 4) and the Judicial Council was unable to provide other assistance. (*Id.* at p. 20.) On the other hand, in *reversing the dismissal* of 35 misdemeanor cases under section 1382 on the basis of court congestion, the *Yniquez* court held that *court congestion is good cause* for continuing a case beyond the statutory periods in Penal Code section 1382 if the court calendars are in fact congested, that the judges and commissioners had given exclusive attention to criminal matters, and that the Judicial Council had been unable to provide assistance. (*Id.* at p. 19.) The *Yniquez* court further held that the prosecution has the burden to demonstrate the foregoing in opposing motions to dismiss based on Penal Code section 1382. (*Id.* at p. 19-20.)

In this case, appellant sought to identify alternatives to dismissal, and to verify on the record that the calendar judge had considered the mandate set forth in Penal Code section 1050. The calendar judge made it clear that his interpretation of Penal Code section 1050 did not require factual consideration or utilization of numerous civil departments and that all of the superior court's available resources had already been diverted to handling criminal matters. (RT 12-16.) If the calendar judge correctly identified the court's legal responsibilities and fully complied with the legal duty to divert every available "civil" resource to handling criminal trials, then the calendar judge committed additional legal error by failing to find that appellant

established good cause to continue this case beyond the statutory period. (*People v. Yniquez*, *supra*, 42 Cal.App.3d Supp. at p. 19.)[10] That legal error as an exceptional circumstance, combined with the asserted court congestion, necessarily constituted good cause compelling a continuance. (See *Rhinehart v. Municipal Court*, *supra*, 35 Cal.3d at p. 782.)

G. *The Appropriate Remedy Is To Reverse The Dismissal And Order The Reinstatement Of The Serious Felony Charges*

Although statutory speedy trial periods are intended to protect a defendant's constitutional right to a speedy trial, the periods set forth in Penal Code section 1382 are not fundamental, and can be exceeded for various reasons amounting to good cause. (See *Barsamyan v. Appellate Division of Superior Court of Los Angeles County* (2008) 44 Cal.4th 960, 969; *Mendez v. Superior Court* (2008) 162 Cal.App.4th 827, 837.) As the record in this case demonstrates, and in part because respondent had been through trial on these charges on two prior occasions, there is no basis to believe that respondent would be improperly prejudiced or that any evidence would be lost due to an additional delay.

The calendar judge both exceeded his jurisdiction and committed a manifest abuse of discretion by failing to understand and to exercise the full scope of his discretion when dismissing the instant criminal trial matter.

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[10] The Appellate Division in *Cole* seemingly criticized the *Yniquez* opinion as "not binding authority" and for having "been questioned insofar as [it assumes] that court congestion or heavy public defender caseloads constitutes good cause." (165 Cal.App.4th Supp. at p. 17, fn. 13, citing *People v. Johnson*, *supra*, 26 Cal.3d at p. 571.) However, the discussion within *Johnson* about good cause was expressly limited to "the case of an incarcerated defendant." (*Id.* at p. 569.) In any event, the instant case was not dismissed solely due to court congestion, but due to *perceived* court congestion when in fact non-criminal courtrooms were available to handle this last-day criminal trial.

Hence, there is nothing inherently unfair or even marginally unconstitutional in reinstating the charges and setting the case for further proceedings within a reasonable time period. (See *People v. Yniquez*, *supra*, 42 Cal.App.3d Supp. at p. 19 [reversing the dismissal of 35 misdemeanor cases after finding court congestion *combined with other actions* can be good cause to exceed statutory periods].)[11]

Appellant agrees that under established California law, improper court administration is normally not good cause to continue a criminal trial matter beyond the normal statutory periods contained in Penal Code section 1382. (See *People v. Johnson*, *supra*, 26 Cal.3d at p. 571.) However, the facts of the instant case demonstrate the injustice of such an inflexible rule. Appellant had the burden to demonstrate good cause in order to continue this criminal trial matter, and the calendar judge had broad discretion to determine whether good cause existed. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) Yet, despite the availability of courtrooms and judges who could have been utilized to prevent the dismissal of this last-day criminal matter, the calendar judge chose to take action resulting in the dismissal of the charges. (See *Tudman v. Superior Court*, *supra*, 29 Cal.App.3d at p. 132 ["the fact that civil cases were sent out for trial . . . eliminates any legal ground for refusing to send out defendant's case for trial in one of the departments in the civil pool"].) To utilize *Johnson* to insulate from appellate scrutiny the patent legal error in this circumstance,

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[11] The *Yniquez* opinion has never been criticized with respect to the remedy permitted there; the reinstatement of the dismissed cases despite the expiration of the statutory periods. (See *Rhinehart v. Municipal Court, supra,* 35 Cal.3d at p. 782, fn. 16; *People v. Andrade* (1978) 86 Cal.App.3d 963, 976; *Batey v. Superior Court* (1977) 71 Cal.App.3d 952, 957; *People v. Kessel* (1976) 61 Cal.App.3d 322, 326; *People v. Superior Court (Lerma)* (1975) 48 Cal.App.3d 1003, 1007; *People v. Reed* (1982) 133 Cal.App.3d Supp. 7, 10.)

carries the potential to subvert the directives of the Legislature and the will of the People set out in Penal Code section 1050.

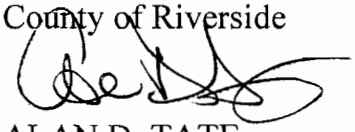
CONCLUSION

Accordingly, for the reasons stated, appellant respectfully requests that the judgment of the Court of Appeal affirming the dismissal by the Superior Court be reversed.

Dated: December 29, 2009

Respectfully submitted,

ROD PACHECO
District Attorney
County of Riverside



ALAN D. TATE
Senior Deputy District Attorney

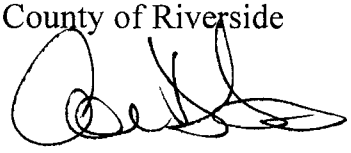
CERTIFICATE OF WORD COUNT
Case Nos. S176983/E047015

The text of the ***OPENING BRIEF ON THE MERITS*** consists of 5,598 words as counted by the Microsoft Word Program used to generate the said ***OPENING BRIEF ON THE MERITS***.

Executed on December 29, 2009.

Respectfully submitted,

ROD PACHECO
District Attorney
County of Riverside



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PROOF OF SERVICE BY MAIL
Case Nos. S176983/E047015

I, the undersigned, say: I am a resident of or employed in the County of Riverside, over the age of 18 years and not a party to the within action or proceeding; that my residence or business address is 3960 Orange Street, Riverside, California.

That on December 29, 2009, I served a copy of the paper to which this proof of service by mail is attached, ***OPENING BRIEF ON THE MERITS***, by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Postal Service mailbox, in the City of Riverside, State of California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on December 29, 2009, at Riverside, California.

Michele M. Setzer
DECLARANT