In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

CODY WADE HENSON,

Defendant and Respondent.

Case No. S252702

Fifth Appellate District, Case No. F075101
Fresno County Superior Court, Case No. CF16903119
The Honorable W. Kent Hamlin, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

INTRODUCTION & SUMMARY

Respondent (hereinafter "Henson") sought review by this Court of the split Opinion issued on October 19, 2018, by the Fifth District Court of Appeal ("Court of Appeal") in *People v. Henson* (2018) 28 Cal.App.5th 490 ("*Henson*"). On January 30, 2019, this Court granted review.

In this appeal, Appellant (hereinafter, "the People") maintain that sections 949, 954, and 739 of the Penal Code[1] authorize the People to join charges against a defendant who was properly held to answer in the magisterial court, by filing a unified or unitary information to commence proceedings in the superior court.

The 5DCA majority Opinion summarized the question presented by this appeal as follows: "When a defendant is held to answer on charges brought in separate cases following separate preliminary hearings, do the People need the court's permission to file a unitary information, covering the charges in both those cases, as their first pleading?" (*Henson, supra,* 28 Cal.App.5th 490, 495.) To this question, reading sections 954 and 949 together, the majority concluded that, "where the charges meet the requirements set out in section 954, the answer is no. In that situation, whether to file a unitary information covering all charges, or a separate information for each case, is a matter of prosecutorial discretion. If the defendant believes the inclusion of all charges in a unitary information prejudices him or her, he or she may move for severance of counts." (*Id.*) Although questions of statutory interpretation are reviewed *de novo,* the People urge this Court to adopt the Court of Appeal's statutory interpretation.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

The People further contend that the instant matter is a result of the trial court's usurpation of legislative and executive powers that occurred for the purpose of belatedly accommodating administrative issues concerning pleadings that have arisen, all be it infrequently, ever since court unification was implemented.[2]

In issuing its ruling, the trial court found a prohibition against joinder in section 954, expressing that "[t]his is a question about proper procedure, and the Judiciary's control over the case once it's been filed."[3] (*Henson, supra,* 28 Cal.App.5th 490, 501.) In the interest of judicial control, however, the motions court disregarded 1) the legislature's authorization of joinder in section 954, 2) the fact that section 954's requirements for leave of court to consolidate had prerequisites that made that specific provision inapplicable, 3) the meaning of section 954's authorization of a motion to sever, 4) the policy favoring joinder and unitary proceedings enshrined in

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[2] The practice of filing a single, unitary or unified, Information at the inception of proceedings in the superior court after separate holding orders have been issued in the magisterial court following distinct preliminary hearings, pre-dates court consolidation and has been the practice of the Fresno County District Attorney, although infrequently, for as long as institutional memory can determine. That practice has never been challenged until now. This does not make the statutory interpretation of the People right or wrong, but merely underscores that the practice of filing a unitary Information at the inception of proceedings in the superior court is neither "new" nor novel. (*Henson, supra,* 28 Cal.App.5th 490, 521 [the dissent claiming the majority "announces a new rule"].) In fact, the motions court acknowledged this as an ongoing practice in its ruling. (See, RT:115.)

[3] The pleadings "filed" to which both the motions court and Henson were referring were the "filed" separate complaints in the magisterial court. The People had not filed a pleading in the superior court within the meaning of section 949 until the unitary Information was filed. With the filing of a single pleading, the People maintain that there was nothing (certainly no "two or more accusatory pleadings" "in the same court") (§ 954) for the motions court to order consolidated or for the People to seek to consolidate.

the State Constitution (Cal. Const. Art. I, §30), and 5) the independent exercise of prosecutorial discretion to join charges concerning "two or more different offenses of the same class of crimes or offenses" authorized by section 954. (§ 954.)

The Court of Appeal properly based its ruling on a historical, contextual, and textual interpretation of section 954. This Court should follow suit, considering that the statute's current meaning was created at a time when the municipal and superior court were administratively and jurisdictionally separate. In addition, section 954 and statutes in that Chapter have remained unchanged since their amendment in 1951. There is no reason to believe that the legislature had in mind a different or changed meaning for section 954 after administrative court consolidation in 1998 than existed prior to the adoption of Proposition 220's authorization of court consolidation.

The Court of Appeal was also correct in holding that "section 995 is not the proper means by which to seek redress for asserted improper joinder." (*Henson, supra,* 28 Cal.App.5th 490, 503.) While the Court of Appeal noted that a section 995 motion is a proper "means of asserting the information improperly contains charges not set out in the order of commitment, where those offenses were not shown by the evidence at the preliminary hearing or did not arise out of the transaction upon which the commitment was based" (*Id*), it also found that the present case was "maneuvered into that posture ... by the motions judge choosing to ignore essentially half of the record before him.[4] His doing so constituted an abuse

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[4] The identical Information was filed and received in each court file, case 119 and case 499. In order for the motions court to reach its determination to dismiss the charges in case 499, it not only had to ignore the half of the allegations set forth in the information received as to case 119 but also ignored altogether the court's own file as well as the identical (continued...)

of discretion, particularly in the absence of any authority therefor."[5] (*Henson, supra,* 28 Cal.App.5th 490, 504.) Instead, a demurrer pursuant to sections 1002 and 1004 is the appropriate procedure for challenging an alleged improper joinder. This is particularly so when a defendant is specifically made aware of the option to demurrer, and failure to follow that procedure forfeits objection thereto. (§ 1012.)

The election of the motions judge to punish the People for a procedure that only that court had determined was unauthorized, while the actions of the People were within the known practice concerning joinder and without contrary authority suggesting otherwise, was a departure from the norms of the court. To dismiss multiple counts was, therefore, an extreme and unwarranted remedy, constituting an abuse of discretion.

For these reasons, the decision of the Court of Appeal should be affirmed and the matter remanded to the trial court to reinstate the dismissed charges.

(...continued)
information received in case 499. Each file contained a transcript of the respective preliminary examination and each was available to the court. The court, however, elected to call only the case designated as the "lead case" (case 119), the case arising from events that occurred later in time, including an enhancement connected to the custodial status of Respondent in case 499, but ignoring the court's file concerning 499.

[5] At footnote 7 the Court of Appeal explained, "[d]iscretion is abused when 'the ruling in question falls outside the bounds of reason *under the applicable law* and the relevant facts.'" (*Henson, supra,* 28 Cal.App.5th 490, 504, FN7, quoting *People v. Williams* (1998) 17 Cal.4th 148, 162, italics in the original.) Here the applicable law involved, among other statutes, sections 954, 739, and 949.

STATEMENT OF THE CASE

Henson was charged in a Complaint in Fresno County Superior Court case number F16901499 (hereinafter, "499") on March 7, 2016.[6] The Complaint alleged four counts (two felonies and two misdemeanors) stemming from events on March 4, including Count 1, Unlawful Driving or Taking Of A Vehicle pursuant to section 10851 subdivision (a) of the Vehicle Code; Count two, Receiving Stolen Property, Motor Vehicle, pursuant to section 496d subdivision (a); Count 3, Resist, Obstruct, Delay Of Peace Officer Or EMT pursuant to section 148 subdivision (a)(1); and, Count 4, Possession Of Burglary Tools pursuant to section 466. The charges were enhanced by allegations arising from three prior felony convictions; sections 666.5 (for prior 10851 and 10851 subdivision (e) of the Vehicle Code), and section 667.5 subdivision (b) (for prison priors). (CT:6-8.)

At the arraignment on March 8, Henson's motion for "OR or PT release" was denied and the matter was set for hearing on March 15, with a tentative Preliminary Hearing (hereinafter, "PH") date of March 18. (CT:9-10.) Henson was subsequently released on Surety Bond. (See custody status, CT:11-12.) The case was continued repeatedly and then confirmed for PH on May 10, to be heard on May 24. (CT:15-16.)

On May 19, a second Complaint was filed in Fresno County Superior Court, case number F16903119 (hereinafter, "119"). That Complaint alleged five criminal counts, four felonies and one misdemeanor, stemming from events on March 17, including Count 1, Unlawful Driving or Taking Of A Vehicle pursuant to section 10851 subdivision (a) of the Vehicle Code (victim Veronica Bautista); Count two, Receiving Stolen Property, Motor Vehicle, pursuant to section 496d subdivision (a) (victim Veronica

[6] All events are from 2016 unless otherwise stated.

Bautista); Count 3, Unlawful Driving or Taking Of A Vehicle pursuant to section 10851 subdivision (a) of the Vehicle Code (victim Rogelio Jesus Leija); Count 4, Receiving Stolen Property, Motor Vehicle, pursuant to section 496d subdivision (a) (victim Rogelio Jesus Leija); Count 5, Resist, Obstruct, Delay Of Peace Officer Or EMT pursuant to section 148 subdivision (a)(1). Like case 499, the charges in case 119 were enhanced based on the allegation of three prior felony convictions; pursuant to sections 666.5 (for prior 10851 and 10851 subdivision (e) of the Vehicle Code) and section 667.5(b) (for prison priors). In addition, the four felony offenses were enhanced by an allegation that the defendant was "released from custody on bail or Own Recognizance" in case 499 at the time of the commission of the offenses alleged in case 119 pursuant to section 12022.1. (CT:21-23.)

On May 20, Henson was calendared for arraignment in case number 119. That arraignment was continued to May 24 to allow case 119 to be "heard with other cases," with Henson remaining in custody and bail remaining set at $220,000. (CT:24-25.) On May 24, each case was called: Case 499 was arraigned and continued on Henson's Motion to May 31, with a tentative PH date of June 7. In case 119, the public defender declared a conflict and conflict counsel was appointed. (CT:26.) Henson was arraigned, with the case calendared for identical dates within the statutory time, May 31, for settlement conference, and a tentative PH calendared for June 7.

Between May 31, and the date of each respective PH (November 16 for case 119 and November 22 for case 499), the cases were repeatedly continued at the request of Henson up to October 20. (CT:34-72.) On October 20, Henson withdrew a *Marsden* motion made in case 499 and withdrew the general time waiver previously entered, with the case calendared for PH on November 10. (CT:70-71.) In case 119, the *Marsden*

motion was heard and denied, the general time waiver was withdrawn, and the case was likewise set for PH on November 10. (CT:68-69.)

On November 10, the prosecution requested to trail the PH in both cases to November 16, within Henson's time waiver. The motion was granted without opposition. (CT:70-73.) On November 16, the PH was heard in case 119 and the magistrate issued a holding order pursuant to section 872 subdivision (a). (CT:76-79.) Henson was ordered to be present at the Held to Answer Arraignment calendared for December 1. (CT:78.)

On November 16, based on the unavailability of a prosecution witness, the prosecution requested that case 499 continue for PH until November 22, within the previous time waiver executed by Henson. Over Henson's objection, the motion was granted and the PH was calendared for November 22. (CT:74-75.) On November 22, the PH was heard before a magistrate and a holding order was issued pursuant to section 872 subdivision (a). (CT:80-83.) Henson was ordered to be present at the Held to Answer Arraignment, also calendared for December 1. (CT:82.)

On November 29, 2016 the People 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 together the allegations held to answer in case 119 and 499, designating case 119 as the "Lead" case. (CT:123-128.) This filing, however, was rejected by the Superior Court clerk, as demonstrated by the file stamp of "2016 Nov 29" having an "X" through it. (CT:123.) However, according to the court record dated November 29, in each case, 119 and 499, the Information was "Received and Forwarded" to the arraignment court to be heard on December 1. The entry reads,

"Information not entered sent to Dept for future hearing of 12/01/16 to be addressed in Court-Consolidation[.]"[7]

On December 1, the same pleading, although already in the file of each case, was again 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 and to ensure notice to opposing counsel. (The Reporter's Transcript On Appeal, Volume I (addressing December 15) and Volume II (Addressing January 13 and 18), consecutively paginated and collectively referred to hereinafter, "RT":128, 133.)

The Minute Orders of December 1, show the arraignment continued to December 8. The Office of Ciummo and Associates, appeared on behalf of Henson with reference to case 119, requesting that continuance, with

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[7] "Case Information" entries in cases 119 and 499, respectively, show the court clerk docket record. These dockets are the subject of the People's request for judicial notice accompanying this pleading. The entries are discussed in both the Court of Appeal and dissenting Opinions. Although their relevance on the substantive issue of authority to file a unitary Information or whether there is a requirement to seek court approval for consolidation is questionable, the entries do demonstrate that the Information submitted by the People was "Received and Forwarded" in each case on November 29. (*Henson, supra,* 28 Cal.App.5th 490, 497, fn.3 and 515, fn.1.) The Court of Appeal explained that it is not the responsibility of the court clerk "to determine whether a unitary information, covering charges in two cases, is proper. 'The presentation of an information by the district attorney for filing, and the reception of this information and the placing of its file-mark thereon by the clerk of the court, are all purely ministerial acts.'" (*Henson, supra,*28 Cal.App.5th 490, 504, fn.7, quoting *People v. Helm* (1907) 152 Cal. 532, 548, disapproved on other grounds in *People v. Edwards,* (1912) 163 Cal. 752, 756.)

Henson waiving time. (CT:121-122.) The Public Defender appeared in reference to case 499, requested to continue the arraignment to run a conflict check,[8] with Henson waiving time for his arraignment. (CT:129-130.)

On December 8, the case was continued on behalf of Henson by both the Public Defender and Ciummo and Associates to December 15, for the purpose of arguing against the propriety of joining the cases by filing a unitary Information; "to argue filing of consolidated information," Henson waived statutory time. (CT:131-132, 133-134.)

On December 15, the matters were called in Department 34 of the Superior Court. The Reporter's Transcript demonstrates that an attorney from Ciummo & Associates was present in reference to case ending 119 and an accompanying misdemeanor. (RT:4.) Initially, a Deputy Public Defender was present in reference to the case ending 499 and an accompanying misdemeanor. (RT:4.)

Counsel in case 119 requested that the court "tell the DA that [the court is] not accepting this information." (RT:7.) The basis of the request was defense counsel's assertion that the Information acted to consolidate cases 119 and 499 without permission of the court. (RT:4-7.) For this proposition counsel cited Rule 3.350 subdivision (a)(1)(c) of the California Rules of Court, and mentioned section 1009.[9] (RT:4.)

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[8] At the arraignment on the criminal Complaint in case 119 on May 20, the Public Defender was appointed. (CT:24.) As stated, on May 24, the Office of the Public Defender declared a conflict and was relieved, and the Office of Ciummo and Associates was appointed on case 119. (CT:26.)

[9] Rule 3.350 of the California Rules of Court addresses the "Requirements of motion" while section 1009 addresses the amendment of an accusatory pleading. The People maintain that both statutes are inapplicable to the filing of an Information defined as the "first pleading on the part of the people in the superior court in a felony case." (§§ 949, 954.)

In response, the arraignment court pointed out the pleas available to counsel at an Information arraignment, and specifically discussed with counsel the availability of a demurrer under section 1002 or a plea. (RT:5-6.) The court noted that it was not "unsympathetic to the merits" of defense counsel's argument but noted section 1004, addressing grounds for a demurrer, excludes as a basis for demurrer joinder authorized by section 954. (RT:5-6.)

Restating that the court was not "unsympathetic with the merits of the situation," the court described two procedures by which counsel might get the matter heard by the court: "by entering either a plea and filing a motion to sever or by demurring and arguing that there's an improper joinder under 954 which in effect is the same thing as a severance motion." (RT:6.) Moreover, the court pointed out that the statutory provisions, to the extent that they might conflict with Rules of Court, would prevail. (RT:7.) The court then denied the "motion to refuse to accept the filing of the information." (RT:7.)

The court then asked counsel how they would like to proceed. In relevant part, the Public Defender declared a conflict and Ciummo and Associates was appointed to represent Henson on the charges stated in the unitary Information relating to case 499. Conflict counsel already represented Henson in case 119. (RT:7.)

Counsel then arraigned Henson, stating, "We'll acknowledge receipt of the information with the objections noted for the record. Waive reading of the statutory and constitutional rights and enter a plea of not guilty." (RT:8.) The court stated, "[o]n case ending 119 and 499 that are filed together in one information, the jury trial date is set for January 23rd" with a settlement conference set for January 12, 2017. (RT:8-9;CT:137-138, emphasis added.) The unrelated misdemeanor cases were calendared for trial.

On December 21, Henson filed a Notice of Motion and Motion to Dismiss pursuant to section 995, and served the People. (CT:139-148.) The Motion alleged insufficiency in Count 7 of the Information as to the charge of Receiving Stolen Property based on a lack of dominion and control over the property and a lack of corpus, in reference to Henson's confession.[10] (CT:143-146.)

In more relevant part, the Motion argued that the Information filed by the People "improperly consolidated" cases 119 and 499 after separate preliminary hearings "without moving the court to do so." (CT:146.) The cited authority for this proposition was Rule 3.350 of the California Rules of Court, and section 1009, addressing the amendment of an indictment, accusation, or information. (§ 1009; CT:146.)

The Motion argued that, "despite the fact that two seperate appointed attorneys were handling the respective cases[,] Defense counsel was not noticed, nor given an opportunity to object at a consolidation hearing." (CT:146-147.) The Motion further argued that there is no new case number on the new Information," (CT:147) "rather, the People are using *both* former case numbers on the new Information. Further, there was no evidence shown to support Counts 1-4 in the preliminary hearing in F-119. Alternatively, there was no evidence shown to support Counts 5-7 in the preliminary hearing in F-499." (CT:147.)

Henson claimed that the two separate case numbers had corresponding transcripts of the respective preliminary hearings. Therefore, one case did not reflect the facts supporting the allegations of the other case held to answer by a magistrate pursuant to section 872 subdivision (a). The

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[10] The court denied the substantive section 995 motion as to Count 7 based on a review of the facts presented at the preliminary hearing. (RT:123-124.)

Motion, however, made no claim of any factual deficiency in the evidence presented at the preliminary hearings as to the allegations held to answer (other than the assertion denied by the court as to Count 7). Rather, based on an assertion of a lack of probable cause under section 995, Henson argued that the Information improperly joined the two "formerly separate" cases, F16903119 and F16901499, without an order of consolidation or leave of court.[11] (CT:142.)

To this unitary Information no demurrer or motion to sever was filed by Henson. The Motion pursuant to section 995 acknowledged that Henson was "arraigned on the Information." (CT:141, 123-128.)

On January 13, 2017, at the hearing on the section 995 Motion, the motions judge thoughtfully created a record. (RT:108.) Although the discussion is lengthy and occurs on both January 13 and January 18, 2017, the court ultimately granted the section 995 Motion as to counts that had their basis in the PH in case 499.

The judge explained that the Information was filed designating case 119 as the "Lead" case. The judge concluded, therefore, that the court could look at the hearing transcript from case 119, but could not look at the PH

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[11] Although Henson's Motion referred to "consolidation" of the two cases, The People joined the two cases after a holding order issued by a magistrate judge pursuant to section 872 subdivision (a), with a unitary and first pleading in the superior court, an Information, under the authority of sections 949 and 954 (in addition to the timing and content requirements authorized by section 739). The People understand the first part of section 954, permitting the charging 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 or offenses, under separate counts," to broadly address and authorize joinder, in contrast to the second part of section 954 addressing consolidation; "if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated." (§ 954.)

transcript from case 499, even though that case number also appeared on the Information and the Information was filed in each court file.

The court used the terms joinder and consolidation interchangeably and explained that the filing of a unitary information, joining two cases held to answer in separate proceedings before a magistrate, is "not a prosecutorial charging decision." (RT:114.) Repeatedly the court explained that the code requires "leave of court to consolidate." (RT:114.) In relevant part, on January 18, 2017, the court concluded that "only Counts 5, 6, and 7 are supported by evidence in the preliminary hearing transcript." (RT:131.) The remaining counts were ordered dismissed because they arose from the transcript in case 499, and the court reasoned, "Counts 1 through 4 have no factual support in that transcript, and therefore they are dismissed per 995."[12] (RT:131-132, (emphasis added for clarity).)

In detail, the court explained its rationale for dismissing Counts 1 through 4 and sustaining Counts 5 through 7, as follows:

> "In F16901499, a preliminary hearing was held, and evidence was presented to the Court of four criminal counts that were before it. In F16903119 a preliminary hearing was held and evidence was presented as to the charges alleged in that case involving taking of vehicles on May 17th of 2016 and other related crimes. What I now have before me is a 995 motion, and it challenges the information filed in what has been called by the D.A., based on their choice, without Court -- without the

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[12] The motion's judge explained that it could have addressed and sustained Counts 1 through 4 by addressing the record in case 499, but it chose to treat case 119, designated as the "Lead" case in the Information, as the record before the court based on that designation. As to case 499, "while [the court acknowledged] there's an information sitting in the other case," and acknowledged that it had case 499 at bench, it did not consider the transcript from case 499 available because the cases were not, in the court's view, "properly consolidated." (RT:133.)

permission of the Court, the D.A.'s now decided to charge all those cases in F16903119. But in the preliminary hearing in F16903119, there was no evidence presented of the crimes that are now charged that were brought over from this other case. I can tell you with some confidence there's probably plenty of evidence in that preliminary hearing transcript to support those charges, but that's a different case. The case that this information was filed in is F16903119, and in that case the preliminary hearing was held and there was no evidence of those crimes in Counts 1 through 5 presented to that magistrate. So the People had evidence of crimes in one case and another case. The People could have filed an information in each case, asked leave of the Court to consolidate, filed a motion on notice, as it's required by the code, as it's specified in the code. Defense could have opposed it. We have two different lawyers, later that wasn't the case, but they could have come up with whatever argument they could make. They're not properly joined. Well, sure they are. They are all the same kinds of charges. So they would have whatever argument they'd had, and you would have routinely gotten granted a consolidation order, and the two actions would have been consolidated. Then I could look in both preliminary hearing transcripts to find the evidence of all seven counts. But because you didn't do that, and instead took it upon yourself to file in F16903119, seven charges, only two of which are supported by the evidence in that case, you now are facing a 995 that challenges the sufficiency of the evidence in those five counts, and there isn't any [be]cause you didn't put them in the prelim, and you didn't get the actions properly consolidated. It's not a prosecutorial charging decision, it just isn't. The D.A.'s Office may think it is, and you may have done this before and may think you can do it again, and maybe you can, and maybe some other Court's gonna tell me I'm crazy. But I can tell you this, it's not a prosecutorial charging decision to take two separate criminal actions and join them into one. It just doesn't work that way. This is a question about proper procedure, and the Judiciary's control over the case once it's been filed." (RT:113-115.)

In opposing the Motion, the prosecutor repeatedly explained, "[w]e did not seek to consolidate two separate offenses, we simply filed, at the first available instance, a charging document that charged two separate offenses as section 954 of the Penal Code permits the People to do so. Defense had the opportunity to challenge that filing, and they have forgone that opportunity, and they cannot raise that issue at a 995 motion." (RT:107, 110.)

The motions judge explained that it had "read a lot of cases with great care," and in the course of the proceedings cited the California Constitution, Article 1, Section 14, *People v. Tenorio* (1970) 3 Cal.3d 89, *People v. Thomas* (2005) 35 Cal.4th 635, *People v. Silva* (1965) 236 Cal.App.2d 453, *People v. Marlow* (2004) 34 Cal.4th 131, and *People v. Merriman* (2014) 60 Cal.4th 1, explaining that these authorities supported the court's conclusions that, 1) by filing two separate criminal complaints initiating "two proceedings resulting in a holding order," this "then gives the People the ability to file an information in each [respective] proceeding [as opposed to joining the counts in a unitary information pursuant to sections 949 and 954]" (RT:110); and, 2) in filing an information based on two separate holding orders from two separate preliminary hearings, joinder of the charges pursuant to section 954 is "not simply a prosecutorial charging decision to join two separate court cases" (RT:115) and joinder at that stage requires "motions to consolidate" and "permission of the Court." (RT:115.)

The prosecutor explained that the People were acting within the scope of section 954 to join two offenses of the same class: "I don't believe 954 stands for the proposition of how actions can be consolidated. 954 is a section we typically use in consolidation motions, but that is not what it says. It says separate offenses can be filed in a single charging document."

(RT:116.) The People were referring to the broad authorization of joinder in section 954.

The court rejected this position, arguing that by filing separate criminal complaints, the People had "two or more accusatory pleadings" in that "you have a complaint, it charges crimes. You have a complaint, it charges crimes. You have a complaint that charges crimes; two separate proceedings that have charged criminal [offenses]. To make them one you need consent of the Court." (RT:116-117.)

The court's inclination to dismiss those counts related to case 499, however, was delayed because the court's interpretation of section 954 was not "the focus of your briefing, it hasn't been the focus of either of your analysis of the case," at the request of the prosecution, the matter was continued to January 18, 2017 for additional research and briefing to be completed. (RT:121.)

The court made clear, in addressing the events and record of the December 15, 2016 hearing before Judge Penner, that even if there was an order of consolidation on December 15, that there was no support for those charges he intended to dismiss because the preliminary hearing had taken place in another case:

> "The Court's position is the D.A. used its charging discretion in filing two actions, and the D.A. can't then suddenly say, We meant to make them one action. And the D.A. doesn't have the power to consolidate cases, the Court does. And this isn't a matter of me reversing some other judge's order, even if one accepts that this minute order is accurate, which I find no support for in the oral proceedings of the Court, quite the contrary. But even if you accepted the proposition that Judge Penner ordered consolidation when he accepted that complaint or information, I'm not overruling his order. I'm just saying in that case there was no evidence of those crimes." (RT:118.)

The prosecutor explained his understanding of Judge Penner's December 15, ruling, the judge treated the motion "as a severance motion on the part of the defense," which meant that there had to be joinder for the court to be addressing severance. (RT:118.) The prosecutor believed this clarified the arraignment court's view that the Information effectively joined the charges. (RT:118.) But the court responded as follows:

> "Again, that's chasing the dog's tail. This is after the D.A. made the Court's decision to consolidate. It's a judicial question whether those matters should be consolidated, it is not purely a charging decision. And that's my position." (RT:118-119.)

The court explained that this issue has come up often over the years but that the court believes that "the D.A. made the Court's decision to consolidate. [But] [i]t's a judicial question whether those matters should be consolidated, it is not purely a charging decision." (RT:119.) The court went on to invite review of his decision:

> "You've got a pretty clear, abundant record, and I would welcome you to take it over to the Fifth and get us a published case on this because this has been a problem off and on throughout the ages, that the D.A.'s Office just thinks, gee, these crimes ought to be joined, so we're just gonna do it, and nobody can say anything about it. Well, they can. What they can say is -- they could perhaps demurrer. I'm not sure a demurrer would be effective because the charges are clear, they identify what they are. It's not a matter of some vagueness in the charging allegations. Both parties were there, they know what the crimes relate to, so I'm not even sure a demurrer lies, but the point is it's not on them to sever a case that's been improperly joined in one case or consolidated into one case. It's your job to consolidate the cases, and you do that by a motion, not by your own decision and just running rough shot over the Court's procedures." (RT:119.)

The prosecutor argued that section 995 (as contrasted with a demurer or a motion to sever) was not the proper tool to challenge joinder. (RT:126-

129.) The prosecution also argued that even if the prosecution's understanding of sections 954 and 995 was in error, the court's remedy -- given that the actual record of facts underlying the charges in case 119 and 499 was present at bench, that an Information was in fact filed in each case, and that the error, if any, was procedural-- should be severance of the charges rather than dismissal of all of the charges related to case 499. (RT:128-129.) To facilitate this alternative remedy, the prosecutor offered the court "two sets of informations," one with the charges relating to the holding order from case 499 and one with the charges relating to the holding order in 119, to avoid dismissal. (RT:129.) The court rejected this offer.

On January 18, 2017, the court ruled that joining otherwise eligible offenses under section 954 in a unitary Information after a proper holding order by a magistrate pursuant to 872 subdivision (a), "bypassing the judicial decision" of permitting consolidation, "and forcing defense to move to sever" is an improper procedure. (RT:130.)

"There is one procedural mechanism to join the cases, and that is a motion to consolidate." (RT:131.) "So while the law favors joinder of counts, while this case logically would have been consolidated upon a motion, ... although the Court is authorized to consolidate two or more accusatory pleadings for trial in an appropriate case,[13] ... only Counts 5, 6,and 7 are supported by the evidence in the preliminary hearing transcript. Counts 1 through 4 have no factual support in that transcript, therefore are dismissed per 995." (RT:131-132, (emphasis added for clarity).)

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[13] The court observed that while authorized to consolidate, the motions court was "not required to do so." (RT:131, citing *People v. Marlow, supra,* 34 Cal.4th 131, 143 and *People v. Merriman, supra,* 60 Cal.4th 1, 37.)

Based on the dismissal of those counts, the People filed a timely notice of appeal to the Court of Appeal. In a split decision, the Court of Appeal analyzed sections 954, 949, and 739 in answering the following question: "When a defendant is held to answer on charges brought in separate cases following separate preliminary hearings, do the People need the court's permission to file a unitary information, covering the charges in both those cases, as their first pleading?" (*People v. Henson, supra,* 28 Cal.App.5th 490, 495.) The Court of Appeal reached the conclusion that, "where the charges meet the requirements set out in section 954, the answer is no." (*Id.*) This conclusion was based on the historic separation of the municipal and superior court and, what the People and the majority conclude is, a latent ambiguity in the phrase in section 954, "in the same court." (*Id.*)

The dissenting Justice concluded that section 739 "requires the People to file a separate information in each case in which a preliminary hearing has occurred and a commitment order issued." (*Henson, supra,* 28 Cal.App.5th 490, 526.) This conclusion regarding section 739, requiring a linear approach to filing a charging document in the superior court, lead the dissent to the further rationale that section 954 "makes perfectly clear that consolidation is the province of the court and further, that consolidation is permitted only when two or more accusatory pleadings are pending in 'the same court.'" (*Id.* at 528, emphasis added.)

ISSUES PRESENTED

The issues presented and their answers are:

1. By failing to demurrer, and by arraigning Henson on the pleading filed by the People (a unitary or unified Information), any objection to joinder of the charges was forfeited by Henson and a section 995 motion was an improper means to challenge joinder, even if improper.

2. Section 954 authorizes joinder, in furtherance of the strong policy in favor of unitary or joined proceedings, at the discretion of the prosecution and without an order of the court, of two or more different offenses of the same class of crimes, under circumstances where there are not two or more accusatory pleadings filed in the same court.

3. The motions court's legal fiction of looking only at the transcript from Fresno County Superior Court case number 119 while disregarding the transcript from Fresno County Superior Court case number 499 was error and an abuse of discretion.

ARGUMENT

I

BY FAILING TO DEMURRER AND BY ARRAIGNING HENSON ON THE UNIFIED INFORMATION, ANY ISSUE OF JOINDER OF THE CHARGES WAS FORFEITED, AND A DEFENDANT MAY NOT CHALLENGE JOINDER THROUGH A SECTION 995 MOTION.

The People are mindful that this appeal was addressed by the 5DCA as a question predominantly concerning statutory interpretation of sections 954, 949, and 739, and a determination of whether the prosecution is authorized to join charges properly held to answer in separate preliminary hearings in the magisterial court by filing a unified or unitary information to commence proceedings in the superior court.

While the People welcome that clarification and will certainly address those questions below, the issue of whether Henson's failure to file a demurrer to challenge what Henson argued before the 5DCA, and now maintains was a plain violation of section 954's provisions,[14] is addressed first in this briefing because the issue should be dispositive of the appeal. That is, the People maintain that if there was an apparent violation of section 954, the remedy was to raise that issue by demurrer. A failure to demurrer waives any objection to the joinder, even if improper, of different counts in one information. (§ 1012; *People v. Pearson* (1940) 41 Cal.App.2d 614, 619, cert. denied, (1941) 313 U.S. 587, overruled on other grounds *In re Wright* (1967) 65 Cal.2d 650, 654-55 (addressing §654 sentencing error).)

The issue is also addressed first in this brief because it illuminates the broader statutory scheme in which the sections addressing demurrer play a part. In reviewing the conclusions stated by the dissenting justice in *Henson*, the interplay of sections 954, 949, 739, 1009, 1002, 1004, 1012, and others, and the place that authorization for a demurrer fits into that scheme, reveals the authorization for joinder and consolidation, their distinction, and the rationale as to when each is permitted.

It also clearly demonstrates that section 739 was not intended as a prohibition to joinder that would otherwise comport with the requirements of section 954. Rather, the statutes present a working interaction broadly favoring joinder in which section 739 has a place. The statutes, when

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[14] Although in the motions court Henson's primary argument against the People's unitary Information was that "California Rules of Court, rule 3.350(a)(1)(c) ... [required] a notice of motion to consolidate ... ," (*Henson, supra,* at 498) and Henson referred to section 1009 (*Id.* at FN 5), at no time did Henson discuss or cite section 739 in the motions court or in briefing before the 5DCA.

viewed as a harmonized tapestry, reveal a process in which joinder is greatly favored; some limitations on joinder are imposed as matters reach the trial court; discretionary limitations and judicial oversight of consolidation is introduced in a post arraignment context; and all joinder and consolidation is ultimately subject to trial court discretionary severance in the event of good cause. (§ 954)

As a practical matter, subdivision 3 of Section 1004 provides that a "defendant may demur to the accusatory pleading at any time prior to the entry of a plea" when it appears that more than one offense is charged, except as provided in Section 954. (§ 1004; *People v. Brooks* (1985) 166 Cal.App.3d 24, 29-30.) Section 1012 provides that the means of bringing those objections found in section 1004, when the basis for those objections appear on the face of the accusatory pleading, is only by demurrer "and failure so to take it shall be deemed a waiver thereof." (*People v. Brooks, supra,* 166 Cal.App.3d 24, 29-30.)

Section 1012 reads in full as follows:

> "When any of the objections mentioned in Section 1004 appears on the face of the accusatory pleading, it can be taken only by demurrer, and failure so to take it shall be deemed a waiver thereof, except that the objection to the jurisdiction of the court and the objection that the facts stated do not constitute a public offense may be taken by motion in arrest of judgment."

(§ 1012.)

Brooks goes on to explain that "[u]nder this section it is well settled that in the absence of demurrer or proper objection, the defendant must be deemed to have waived the point as the section expressly provides." (*People v. Brooks, supra,* 166 Cal.App.3d 24, 29-30, citing *People* v. *Stone* (1926) 199 Cal. 610, 624; and, *People* v. *Rankin* (1959) 169 Cal.App.2d 150, 158.) *Brooks* also explains that "[t]his is so even where there is a clear misjoinder." (*People v. Brooks, supra,* 166 Cal.App.3d 24, 29-30, quoting

People v. *Cummings* (1959) 173 Cal.App.2d 721, 730, disapproved in part by *People v. Whitmer* (2014) 59 Cal.4th 733, 740, and *People* v. *Kemp* (1961) 55 Cal.2d 458, 474.)

Specifically, subdivision 3 of section 1004 authorizes a defendant to "demur to the accusatory pleading ... when it appears upon the face thereof ..." "[t]hat more than one offense is charged, except as provided in Section 954." (§ 1004, subd. 3.) As a consequence, if charges are properly joined or consolidated in accordance with section 954, a demurrer may not be brought as a means to challenge that joinder or consolidation. If, however, as Henson alleges, the joinder or consolidation fails to comply with section 954 and is apparent on the face of the pleading, then demurrer is the proper procedure by which to challenge the pleading; right or wrong.

Henson argued from the start that the People had failed to notice a motion to consolidate when the unitary Information was filed, arguing a failure to comply with rule 3.350 of the California Rules of Court and amendment of the pleadings outside of the requirements of section 1009. (RT:4; *Henson, supra,* 28 Cal.App.5th 490, 498.) Although Henson did not address section 954 below, and did not even brief section 739 in the Court of Appeal, the issue argued by Henson has been, from the start, that joinder or consolidation effected by the People through the filing of a unitary pleading was unauthorized and appeared on the face of the People's pleading.

While the People address below why the interpretation of sections 954 and 739 should not be read as prohibiting the procedure followed by the People, even if one reads into section 739 an implicit prohibition against the joinder accomplished by the People's filing of a unitary information, Henson's remedy was to file a demurrer. Having failed to do so, challenge to the joinder was forfeited and could not properly be brought collaterally under section 995. (§ 1012.)

In fact, if there was an implicit prohibition against joinder in section 739, then the attempted joinder by the People could not be authorized by section 954. That is, as the dissent stated, it makes no sense that section 739 prohibits independently that which section 954 would simultaneously authorize. But this is largely the point of the People; because section 954 does plainly authorize joinder, and defines specifically when consolidation of accusatory pleadings requires leave of court, where joinder is authorized and the conditions requiring leave of court are not present, it would seem an absurd reading of section 739 to conclude that the Legislature intended to simultaneously prohibit that authorized joinder in section 954.

This becomes more apparent with a close look at the statutes and what they address. Section 739 addresses "Time for filing information based on order of commitment or preliminary examination." (§ 739.) It does not address joinder or consolidation. In contrast, section 954 permits joinder of charges in a single accusatory pleading, in that "[a]n 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." (§ 954.) In contrast, consolidation of pleadings, separately requires leave of court "if two or more accusatory pleadings are filed in such cases in the same court." (§ 954.)

An accusatory pleading is defined in subdivision (c) of section 691 to include "an indictment, an information, an accusation, and a complaint." (§691, subd. (c).) Holding orders pursuant to subdivision (a) of section 872 are not within the definition of accusatory pleadings. Therefore, court authorized consolidation, as defined in section 954, does not apply to other than accusatory pleadings and would not statutorily apply to holding orders.

In fact, section 954 addresses "filed" pleadings when referring to consolidation. This is so in its present form, and the section has addressed

"filed" pleadings since joinder was first authorized in 1915. (Stats. 1915, ch. 452, p. 744 ["if two or more indictments or informations **are filed** in such cases the court may order them to be consolidated."], emphasis added.)

Instead, if one reads section 739 as imposing a prohibition, then one is granting section 739 preeminence over section 954, rather than harmonizing the statutory scheme. It was this state of preeminence of section 739 that the Court of Appeal rejected, and the People argued was inconsistent with the statutory fabric, the specific language of section 954, and the favored status of joinder. (*Henson, supra, 28* Cal.App.5th 490, 511, fn. 13.)

Although the People maintain otherwise, even if one attempts to read section 739 as strictly requiring a single accusatory pleading be filed for each holding order, thus prohibiting the type of joinder of charges that occurred here,[15] it would seem that whatever was intended to be prohibited by section 739, if anything, would also have been intended to be prohibited or unauthorized by section 954.

It is not reasonable to believe that the Legislature would prohibit joinder in section 739 while simultaneously authorizing that joinder in section 954. So, one may look to the statute concerning demurrer to see if the provisions of section 954 are subject to demurrer. That is, if sections 1002 and 1004 authorize a demurrer to challenge pleadings that fail to comport with section 954, and demurrer is authorized as an appropriate

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[15] Because consolidation is a type of joinder, the People have referred to the first portion of section 954 as broadly authorizing 'joinder' while the second provision addressing consolidation of accusatory pleadings, as 'consolidation.' The People view that form of consolidation designated by section 954 to require court approval, to constitute a term of art as compared with other forms of joinder or consolidation that do not require court approval by statutory provision.

filing in response to an information, then section 739 is subject to the provisions of section 954. And, if joinder is authorized by section 954, it is not prohibited by section 739.

That said, the circumstances presented in this case would fall squarely within the provisions of subdivision 3 of section 1004, assuming a prohibition in sections 739 and 954, but certainly would require any objection to be raised by demurrer rather than a section 995 challenge.

To this end, in *Cummings* there was no question that counts had been improperly joined, in that there were counts that addressed one defendant alone as compared with the counts alleging crimes by multiple defendants. (*People* v. *Cummings, supra,* 173 Cal.App.2d 721, 730.) The court observed that "misjoinder is not one of the grounds upon which the information may be attacked under section 995 of the Penal Code. That objection to the information may be only raised by demurrer. (Pen. Code, § 1004, subd. 3.) By failing to demur, appellant waived the misjoinder (Pen. Code, § 1012)." (*Id.*)

Having failed to demurrer and forfeited his objection to the joinder accomplished through the People's unitary Information, Henson elected to improperly pursue a section 995 challenge. The motions judge focused on consolidation, ignoring or misapprehending the meaning of sections 954 and 1004, and proceeded to improperly address the issue of joinder by a section 995 motion. The court further erred by dismissing joined counts as to which no proper objection was made.

While the People maintain that the joinder was proper by the express terms of section 954, even if improperly joined, the section 995 challenge was itself improper. A defendant's objection to joinder is forfeited by failure to pursue a demurrer.

Henson contends that, if a demurrer is the proper mechanism for challenging joinder, his counsel was ineffective for failing to demurrer.

(ROB:61-62.) As explained *post* even if there was a failure to demurrer, the cases were properly joined. Accordingly, Henson can not satisfy the prejudice prong of *Strickland v. Washington* (1984) 466 U.S. 668, 693-695.)

II

SECTION 954 AUTHORIZES JOINDER OF TWO OR MORE DIFFERENT OFFENSES OF THE SAME CLASS OF CRIMES AT THE DISCRETION OF THE PROSECUTION. SECTIONS 954 AND 739 DO NOT PRECLUDE JOINDER OR REQUIRE A COURT ORDER WHERE THERE ARE NOT TWO OR MORE ACCUSATORY PLEADINGS FILED IN THE SAME COURT.

Section 954 reads in full as follows:

> "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. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

(§ 954.)

The People have maintained that section 954's "same court" language has a meaning that dates back to a time when the Municipal Court and Superior Court were separate and distinct courts, both physically and

administratively. For that reason, the meaning of section 954's "same court" language retains that original meaning, referring to the two courts as distinct, as opposed to any altered meaning following the adoption of Proposition 220, and the administrative unification of the two courts into the current superior court following court consolidation.[16]

While Henson still maintains otherwise, both the Court of Appeal and dissenting Justice found agreement in the meaning of the "same court" language in section 954 (although disagreeing over requirements of section 739), in that the "same court" phrase makes reference to the separate courts prior to court consolidation. Both the majority and the dissent found that section 954 retains its same meaning after court consolidation.[17] (*Henson, supra,* 28 Cal.App.5th 490, 506-507, 527-528.)

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[16] The Court of Appeal observed the following: "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." (*Henson, supra,* 28 Cal.App.5th 490, 505.)

[17] The Court of Appeal explained, "[c]ourt unification has given rise to an ambiguity in *section 954*: Does the phrase 'in the same court' mean in the single, unified superior court, or does the phrase retain its original, preunification meaning? If the former, then the People were required to obtain a court order allowing consolidation of cases 119 and 499. If the latter, the unitary information was proper."

"We conclude the phrase retains its preunification meaning. To construe it otherwise would be to render the phrase surplusage, make *section 949* virtually meaningless, and conflict with other statutes related to

(continued...)

Henson and the dissent differ in regard to the meaning they would ascribe to sections 954 and 739. The dissent acknowledged the ambiguity in section 954 with regard to the "same court" language, but concluded that analysis of section 954 was largely irrelevant to the broader question of joinder or consolidation. In the dissent's view, section 739 "does not authorize the People to unilaterally combine charges arising from separate complaints into a single information at any point in time." (*Henson, supra,* 28 Cal.App.5th 490, 524.), Rather, the dissent concluded, section 739 "requires the district attorney to file a separate information in each individual case in which commitment has occurred."[18] (*Id.* at 525.)

The dissent reached this conclusion even though it acknowledged that joinder and consolidation were broadly authorized by section 954 for the first time in California in 1915, and that the "declared purpose" of Senate Bill 543 "was to 'make all the procedural provisions of the Penal Code applicable to all proceedings in all courts.'" (*Henson, supra,* 28 Cal.App.5th 490, 520, citing Legis. Counsel. Rep. on Sen. Bill No. 543 (1951 Reg. Sess.) p.12.) In spite of this uniform application of procedural provisions, the dissent explained, "[i]n my view, the People do not have the same discretion to add charges in an information that they possessed at

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(...continued)
pleadings and pretrial proceedings." (*Henson, supra,* 28 Cal.App.5th 490, 506-507.)

The dissent explained similarly, "[t]urning to the consolidation provision of *section 954*, I agree with the majority that the use of the term 'the same court' in the consolidation provision of *section 954* signifies the two-tiered system of municipal and superior courts that existed in 1951, when the statute was last amended to insert the word 'same' before the word 'court.'" (*Henson, supra,* 28 Cal.App.5th 490, 527-528.)

[18] This represents a reading of section 739 that is case specific rather than oriented to the "offense," rather than case, related findings made by a magistrate under subdivision (a) of section 872.

point of filing an initial complaint."[19] (*Henson, supra,* 28 Cal.App.5th 490, 527.)

In some contrast, Henson maintains that there is no ambiguity in section 954 as to what is meant by "two or more accusatory pleadings ... filed in such cases in the same court."[20] (§ 954.) Henson urges that section 954 required the People to seek permission of the court to consolidate because two criminal complaints had been filed in the post court unification superior court. This position, however, pays no heed to the persisting division between the magisterial court and the felony trial court, and conflates a criminal complaint with an information, distinct accusatory pleadings filed at different stages in separate divisions of the unified court. (See *Lempet v. Superior Court* (2003) 112 Cal.App.4th 1161, 1168-1169.)

Respectfully, both the dissent and Henson fail to address the broader interwoven statutory tapestry adopted by the legislature, favoring joinder and unitary pleading since 1915. Prior to the passage of Proposition 220 in June of 1998, the Municipal Court and the Superior Court were, in fact,

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[19] The People agree with the dissent that the People's discretion is more limited by statute at the time of filing an information than at the time the People exercise discretion to join charges when filing an initial complaint. This is so because, at the stage of filing a complaint, while the People are bound by section 954's provisions concerning joinder, at the time of filing an information the People are bound by the additional timing and content rules of section 739 in addition to pleading requirements. But section 960 makes clear that, "[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." (§ 960.)

[20] Henson requests this Court take Judicial Notice of the statutory history of Senate Bill 543. The People have no objection to that request, and maintain that the history supports the People's position that section 739 is subject to the provisions of joinder and consolidation presented by section 954.

distinct. Independent of Proposition 220 and court unification, however, section 954, addressing joinder and consolidation, had long since been adopted and has not been amended since 1951.

Section 954 was first enacted in 1872, but at that time provided only for the prosecution to charge "but one offense, and in one form only, except when the offense may be committed by use of different means in the alternative." (Enacted Stats. 1872; *Henson, supra,* 28 Cal.App.5th 490, 520.)

A broad shift in policy, favoring joinder and unitary pleading, began in California in 1915. Section 954 was amended in that year to authorize joinder and unitary pleading ("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") as well as consolidation of existing pleadings ("if two or more indictments or informations are filed in such cases the court may order them to be consolidated.") (Stats. 1915, ch. 452, p. 744.) In fact, this first iteration of section 954 authorizing unitary pleading through joinder and consolidation, appears to allow joinder for all new pleadings, while permitting consolidation for existing pleadings already filed.

Discussing the three most recent amendments of section 954, this Court explained the history of section 954 in the context of a discussion of a claim of once in jeopardy:

> "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 . . . .' (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* (1962) 57 Cal.2d 574, 579-581, (italics in the original).)

Prior to court consolidation authorized by Proposition 220, but after amendment of section 954, in the event that two or more complaints were held to answer before one or more magistrate(s) pursuant to section 872 subdivision (a) and certified to the Superior Court, section 954 appears to authorize the joining of these charges at the inception of the felony prosecution through the filing of an information. (See *People v. Tideman, supra,* 57 Cal.2d 574, 580, explaining that the amendments to §954 authorize joinder or consolidation.)

A reading of *Tideman,* sections 954, and 739, makes clear that unitary pleading through joinder or consolidation was the underlying purpose of the amendments of the sections since their inception and on up

to the present. Although *Tideman* addressed issues related to double jeopardy, it acknowledged that joinder and favorable disposition toward unitary pleadings can be seen in the legislative history addressing Senate Bill 543, which amended sections 739, 954, and 949, among other statutes, with the declared purpose of making "all the procedural provisions of the Penal Code applicable to all proceedings in all courts." (Legis. Counsel, Rep. on Sen. Bill No. 543 (1951 Reg. Sess.) p.12.)

Henson now, and at the Court of Appeal, argues that there is no ambiguity concerning the meaning of the "same court" language in section 954. Rather, Henson maintains that the superior court now is one court and any pleadings filed, whether before the magistrate in the magisterial court or in the superior court at the inception of proceedings in the trial court, are in the "same court" within the meaning of section 954.

Henson demonstrates this position, repeatedly conflating a criminal complaint with an information.[21] (ROB: 24-25, 35, 39, 44-45, 46.) Henson does so in spite of the Court of Appeals unanimous agreement that the "same court" language in section 954 does refer to the previously separate municipal and superior court, and the established meaning of section 954's language. (*Henson, supra,* 28 Cal.App.5th 490, 506-507, 527-528.)

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[21] Examples of Henson's conflating the complaint with the information is replete in the use of such phrases as, "The 'unitary information' filed here was a de facto consolidation of two complaints, not any kind of information;" "combining complaints, without a motion to consolidate;" "'unitary information' is a euphemism for two complaints masquerading as one legitimate accusatory pleading;" "The legislative history ... 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;'" "consolidation is a court function, but in this case it was effected by a fiction, a sublimation of two complaints into one information."

Although the People recognize that consolidation of pleadings is a form of joinder, and section 954 does not specifically use the term joinder, in contrast to consolidation, the section clearly identifies broadly what types of accusations concerning offenses can be joined in an accusatory pleading. In this sense of the matters addressed by section 954, joinder, in the first section of 954, can be contrasted with consolidation, in the second section of the statute. Unlike the Legislature's authorization of charging discretion concerning crimes connected in their commission or offenses of the same class of crime set out in section 954, consolidation is authorized after such cases are separately filed; "if two or more accusatory pleadings are filed in such cases in the same court," then "the court may order them to be consolidated." (§ 954.)

In fact, this use of the terms joinder and consolidation appears in *People v. Merriman,* as that opinion describes the two sections of section 954 as allowing joinder and consolidation, respectively:

> Section 954 authorizes the joinder of 'two or more different offenses connected together in their commission ... or two or more different offenses of the same class of crimes or offenses, under separate counts ... .' The statute further provides that 'if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.' (§ *954.*)

(*People v. Merriman, supra,* 60 Cal.4th 1, 36.)

The quoted language from section 954 in *Merriman* demonstrates that the practical difference between joinder, at the outset of a felony prosecution, and consolidation, of filed pleadings in the same court, is primarily one of authorizing what the prosecution may join in its discretion and determining when permission of the court is needed. The question in this appeal is whether the initiation of a felony prosecution in the superior court by filing a "first pleading," (an information) as defined by section 949, supported by offenses held to answer before a magistrate in two

separate proceedings can be joined in a unitary filing without leave of court?

As discussed in the Court of Appeal Opinion, the answer to this question requires analysis of the meaning of a condition set out in section 954; "if two or more accusatory pleadings are filed in such cases in the same court." (§ 954.) The answer also requires analysis of section 949, defining the information as the "first pleading on the part of the people in the superior court." (§ 949.) And, thirdly, the answer requires analysis of section 739, setting forth the time for filing an information following a holding order pursuant to section 872. (§ 739.)

In addition, the People believe that subdivision (a) of section 872 also is informative. This is because the motions court, the dissent, and Henson approach the matter from the perspective of cases filed. In fact, the motions court and dissent are particularly focused on the court's administration. But subdivision (a) of section 872 states the following:

> "(a) If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty, the magistrate shall make or indorse on the complaint an order, signed by him or her, to the following effect: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe that the within named A.B. is guilty, I order that he or she be held to answer to the same."

(§ 872, subd. (a).)

By focusing on the offenses, and whether or not there is probable cause to support those offenses, the section demonstrates that the holding order pertains to offenses, and is not related to a pleading or a case. The complaint lists offenses the People accuse the defendant of, and the magistrate states which, if any, as to which probable cause has been demonstrated. In fact, it is section 739 that authorizes the People to focus

on the probable cause demonstrated rather than the offenses listed in the complaint when filing charges in the information. (§ 739.)

Consolidation, like amendment of pleadings after "the defendant pleads or a demurrer to the original pleading is sustained," requires leave of court. (§§ 954, 1009.) Section 954, however, authorizes joinder through a unitary filing by its authorization of joinder, as contrasted with consolidation. By the language of section 954, joinder can occur when the information is the first pleading to an action. Similarly, in terms of timing and the requirement of court permission, if arraignment has not occurred on some other information including the same or a portion of the charges included in the filing, amendment of the accusatory pleading without leave of court would be permitted.[22] (§ 1009.)

Although the People have found no case specifically addressing the practice of filing a unitary information after a holding order in two or more cases before a magistrate, or a case addressing the distinction between joinder and consolidation other than *Merriman*, the 1951 amendment to section 954 (as the last amendment enacted by the Legislature to section 954 to the present) makes clear when leave of court is required to seek consolidation of "filed" accusatory pleadings and remains consistent in that regard with the 1915 amendment. (Stats. 1915, ch. 452, p. 477, ["if two or more indictments or informations are filed.]")

In contrast, when the section authorizes joinder, and the conditions requiring court permission for consolidation are not present, the section separately authorizes the prosecution to file a unitary information without seeking permission of the court. (§ 954.) Hence, except in the circumstances outlined by section 954 for consolidation, or circumstances

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[22] In the event that arraignment had not taken place, section 1009 makes plain that amendment is authorized without leave of court. (§ 1009.)

under which amendment of an existing information is sought after arraignment under section 1009, an alternative reading of section 954 is untenable. As this Court has explained, section 954 authorizes joinder as well as consolidation. (*People v. Tideman, supra,* 57 Cal.2d 574, 580; *People v. Merriman, supra,* 60 Cal.4th 1, 36.)

Section 949 explains that "[t]he first pleading on the part of the people in the superior court in a felony case is the indictment, information, or the complaint in any case certified to the superior court under Section 859a." (§ 949.) Section 859a addresses only those cases certified to the superior court for sentencing proceedings by way of a plea. (§ 859a.) Hence, any felony prosecution in the superior court after a holding order has been issued pursuant to subdivision (a) of section 872, is initiated by the filing of an information. Those are certainly the circumstances in which the unitary information was filed in the present case.

It should be clear that a criminal complaint filed and heard before a magistrate, has no remaining force or effect after a holding order pursuant to 872 subdivision (a) issues, unless there is a stipulation or understanding of the parties (after court consolidation) to treat the complaint as an information. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1132-1133, (distinguishing an incurable failure to file an information by agreement as in *People v. Smith* (1986) 187 Cal. App. 3d 1222, from an agreement to proceed on a complaint as an information and correction of a clerical error).)

Hence, the criminal complaint is no longer an active filing at the time that the holding order is issued. Rather it becomes only a historical document remaining in the record of proceedings. The complaint has no effect, and the felony case will only proceed if an information is timely filed pursuant to section 739. (§ 739; See *People v. Smith, supra,* 187 Cal.App.3d 1222, 1224-1225.)

So, in asking whether two or more accusatory pleadings are filed in the same court, in the present context, section 954 is focused on whether two or more informations have been filed at the time consolidation or joinder is being sought. It does not address two or more Informations authorized for filing in the future, or pending filing. And it does not address what past complaints were filed. Rather, consolidation refers to actual pleadings filed in the same court.

Making this point clearer, the People were not seeking to consolidate the two criminal complaints from case 119 and 499 into any pleading. Rather, the People sought to file a unitary pleading, including those offenses for which a holding order had issued by a magistrate (§ 872, subd. (a)) in a separate division of the court from that court in which the information is required to be filed, in order to initiate felony proceedings in the superior court (the trial court). (§ 949.)

Because a holding order addresses allegations supported by probable cause, it does not hold a case to answer. Rather it certifies that probable cause was found in relation to an offense or offenses. (§ 872 subd. (a).) Given that section 739 authorizes the District Attorney to file those charges held to answer and any others supported by the record, it is entirely consistent with section 954 and 739, assuming they work together, for the People to unify those charges for which probable cause has been demonstrated, and file them together in a unitary accusatory pleading to begin proceedings in the superior court.

A. Proceedings Before A Magistrate Are Not In The "Same Court" As Those Before A Superior Court Judge.

The offenses for which Henson was charged are required to be prosecuted by an indictment or information. (§ 682.) Prior to court unification, felony proceedings commenced with the filing of a complaint

in the Municipal Court before a magistrate. (§ 806.) The magistrate conducted a preliminary hearing to determine whether there was sufficient cause to hold the charged party to answer on a felony charge. (§ 872.)

As in the present case, if the magistrate concluded that there was sufficient evidence to hold the defendant to answer on a felony charge, the prosecution, should the People wish to proceed to trial, have a duty to file an information in the Superior Court within 15 days, charging the defendant with the felony offense(s) for which there has been a demonstration of probable cause. (§§ 954, 739, 976, 872, 1382, subd. (a)(1); *People v. Crayton* (2002) 28 Cal.4th 346, 360 (*Crayton*).)

After court unification, "the proceedings in the early stages of a felony prosecution that formerly were held in municipal court now are held in superior court, but the basic procedural steps-the filing of a complaint before a magistrate, the holding of a preliminary examination before a magistrate, and the filing of an information and arraignment on that information before a superior court judge-remain the same." (*Crayton, supra,* 28 Cal.4th at pp. 359-360.) Section 806 still requires the filing of a complaint with a magistrate. (§ 806.)

It appears that the motions judge in the present matter recognized that joinder of offenses into a unified information has occurred in the past, and saw this as "a problem off and on through the ages."[23] (RT:119.) However, the court made no distinction between joinder and consolidation, and did not address the pre and post-court consolidation context, other than

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[23] Why the motions court characterized the practice of filing a unitary information as a "problem" rather than a practice or procedure in need of clarification appears to reveal the motions court's predisposition to view the issue as one of court administration, with a focus on whether or not the practice was authorized by statute and whether the remedy selected would be calculated to punish the People.

to apply the same reasoning as did the trial court in *Lempert v. Superior Court.* (*Lempert v. Superior Court* (2003) 112 Cal.App.4th 1161, 1171-1172 (*Lempert*).)

In *Lempert*, the trial court incorrectly concluded that court consolidation did away with distinctions between the magisterial court and the superior court. Based on that erroneous belief, the trial court denied counsel's request to withdraw from representation at the superior court arraignment on the information. (*Lempert, supra,* 112 Cal.App.4th 1161, 1171-1172.)

To this end, in the present case, the motions court assumed, first, that once charges were filed by the District Attorney, issuing two criminal complaints and seeking a holding order, separately in regard to each, that the District Attorney no longer had discretion to file a unitary information joining the charges demonstrated in the two separate proceedings before a magistrate.[24] (RT:108-109, 110, 114-115, and 118.) Second, the motions judge explained repeatedly that "whether those two cases are joined is a question for the Court." (RT:108, See also, 118, 129, and 130.)

For these two propositions the trial court cited the California Constitution, Article 1, Section 14, *People v. Tenorio, supra,* 3 Cal.3d 89, *People v. Thomas, supra,* 35 Cal.4th 635, *People v. Silva, supra,* 236

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[24] In the present case, the People could not join the crimes alleged in case 119 with those in case 499 at the initial filing of a complaint in the magisterial court because the crimes in case 119 had not been committed and did not exist at the time. While the People could have sought consolidation in the magisterial court by motion, as explained in oral argument at the Court of Appeal, the People had witness concerns and did not wish to delay one set of charges based on witness unavailability in another. Instead, the People determined to proceed by a unitary information in the event that the cases could be held to answer within the 15-day time frame necessary to file them together. (§ 739.) In fact, a delay did occur due to witness availability in case 499. (CT:74-75.)

Cal.App.2d 453, *People v. Marlow, supra,* 34 Cal.4th 131, and *People v. Merriman, supra,* 60 Cal.4th 1. But, not one of these authorities supports the court's position.

Tenorio and *Thomas* address the court's independence and freedom from a prosecutorial veto. *Silva* addresses the power of the court to sever charges where the prosecution, on the eve of trial, sought a consolidation of two separate informations set for trial. When the trial court denied the motion, the prosecution dismissed and refiled in a unitary complaint, attempting to nullify or circumvent the previous order of the court on consolidation. The subsequent denial of a motion to sever was addressed on appeal by the Second Appellate District, which found the denial of the motion for severance to be error. (*People v. Silva, supra,* 236 Cal.App.2d 453, 457.) Although the court found error in the failure to sever based on a *prima facie* showing of an abuse of process, the error was harmless and the conviction was sustained. (*Id.* at 457-458.)

People v. Marlow addresses a death penalty verdict where Marlow contended that the failure to consolidate separate charges brought in San Bernardino County and Orange County violated section 954 and other laws. (*People v. Marlow, supra,* 34 Cal.4th 131, 143.) This Court found that section 954 "permits but does not require joinder under some circumstances." (*Id.*) This Court also found no error in the trial court's denial of a request to sever sexual assault charges and charges connected in their commission from the murder charges. (*People v. Merriman, supra,* 60 Cal.4th 1, 35-37.) This Court concluded that the joinder in filing was proper and the trial court's discretion was properly exercised in refusing to sever counts. (*Id.*)

Finally, Article I, Section 14 of the California Constitution provides in relevant part, the following:

> Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information.

(Cal. Const., Art. I, § 14.)

The balance of Article I, Section 14, has no reference to joinder or consolidation or any remote relevance to those concepts.

In the present case, the trial court did not address *People v. Richardson* (2007) 156 Cal.App.4th 574 or *Lempert*. While *Richardson* addressed the appeal of a denial of a motion to suppress, it also reviewed the impact of court consolidation on the distinct roles and jurisdiction of a magistrate versus a superior court judge, even if the role of magistrate is served by a superior court judge. (*People v. Richardon, supra,* 156 Cal.App.4th 574, 581-584.)

Noting the distinction between the role of the magistrate and the magistrate's limited jurisdiction, *Richardson* explained, "[i]t has long been understood that 'magistrates presiding at preliminary hearings do not sit as judges of courts, and exercise none of the powers of judges in court proceedings.'" (*People v. Richardson, supra,* 156 Cal.App.4th 574, 584 (*Richardson*), citing *People v. Newton* (1963) 222 Cal. App.2d 187, 189.) The opinion went on to explain that, "[i]f a judge of a superior court, or a justice of this [Appellate] court, sees fit to assume the duties of a committing magistrate—duties which are usually performed by others—he has no greater authority as such magistrate than that possessed by any justice of the peace or police judge." (*Richardson, supra,* 156 Cal.App.4th 574, 584, citing *People v. Cohen* (1897) 118 Cal. 74, 78.)

The upshot of the *Richardson* opinion is that the Court of Appeal could not reach the denial of a suppression motion by a magistrate, even in a unified court, because the defendant had failed to raise "the search and seizure issue in the superior court. (*Richardson, supra,* 156 Cal.App.4th

574, 591.) This was true even though the magistrate was a sitting superior court judge, and had, "with the explicit or tacit consent of the parties," assumed the role of a superior court judge for sentencing, without the "idle act" of certifying the proceedings he had just presided over as a magistrate. (*Id.*) "[A]s soon as the parties agreed to proceed immediately with the pronouncement of judgement," there were no "magic words" necessary to allow a superior court judge sitting as a magistrate to undertake the powers as a superior court judge." (*Id.*)

Richardson makes clear that there is a distinct functional difference between the court presided over by a magistrate and the superior court in which an information is filed. Actions taken in the former court are not in any way deemed to be taken in the other court. By extension, what *Richardson* demonstrates is that section 954 does not treat the filing and proceedings before a magistrate (such as the filing of a complaint) as occurring in "the same court" as those filings and proceedings in the superior court (felony trial court).

Similarly, as pointed out by the Appellate Court in *Henson,* in *Lempert* the Sixth District explained that "[t]he voluntary unification of the municipal and superior courts was not intended to fundamentally alter preexisting criminal procedure." (*Lempert, supra,* 112 Cal.App.4th 1161, 1169.) As mentioned above, in *Lempert,* counsel was retained through the preliminary hearing in a felony matter brought in the consolidated court. The defendant was held to answer.

At the superior court arraignment on the Information, counsel advised the court that the matter should be referred to the public defender. The court refused to allow the attorney to withdraw, explaining that the attorney had made a "general appearance" in the case. The court stated as a basis of the denial the unification of the municipal and superior court, and required counsel to bring a formal motion to withdraw. Counsel brought the

motion, but it was denied by the court. (*Lempert, supra,* 112 Cal.App.4th 1161, 1165-1168.)

Counsel brought a writ in the Sixth District Court of Appeal, which court issued a preemptory writ, concluding the superior court erred by requiring a formal motion to withdraw at the particular stage of the proceedings, and that the trial court had abused its discretion by denying the motion to withdraw. (*Lempert, supra,* 112 Cal.App.4th 1161, 1165.) The court explained that court unification, while creating a single court administratively, "that single court has two divisions corresponding to the former municipal and superior courts. The voluntary unification of the municipal and superior courts was not intended to fundamentally alter preexisting criminal procedure." (*Id.* at 1169.)

The court explained that procedure as follows:

> "A felony prosecution that is commenced by the filing of a complaint has two distinct pretrial phases. (1) In the first phase, formerly conducted in the municipal court, the prosecution commences with the filing of the felony complaint. (*§ 806.*) The defendant is brought before a magistrate and is informed of the right to counsel. (*§ 859.*) If the defendant desires counsel and is unable to employ counsel, counsel is appointed. (*Ibid.*) The defendant then appears before the magistrate for arraignment, and, if the defendant pleads not guilty, the magistrate sets the case for a preliminary examination. (*§ 859b.*) If the magistrate finds sufficient cause to believe the defendant is guilty, then the defendant is held to answer, and the district attorney files an information in the superior court. (*§§ 872, 739.*)"
>
> "(2) The second pretrial phase begins with the filing of the information in the superior court. The information is considered the first pleading filed by the People in a felony case in the superior court. (*§ 949.*) After the filing of the information, the defendant is arraigned on the information before a superior court judge. (*§ 976.*) In the interim, counsel who represented the defendant at the preliminary examination continues to represent the defendant "until the date set for arraignment on the information unless relieved by the court

> upon the substitution of other counsel or for cause." (*§ 987.1*) If the defendant appears for arraignment on the information without counsel, the defendant is informed of the right to counsel. (*§ 987.*) If the defendant desires counsel and is unable to employ counsel, the court must appoint counsel to represent the defendant. (*Ibid.*)"

(*Lempert, supra,* 112 Cal.App.4th 1161, 1168-1169.)

The court concluded, "[t]here is no indication that the voluntary unification of the municipal and superior courts was intended to alter basic pretrial felony proceedings, or specifically, the status of counsel who represents the defendant at the preliminary examination. (*Lempert, supra,* 112 Cal.App.4th 1161, 1171-1172, citing for indirect support *People v. Crayton* (2002) 28 Cal.4th 346, 350, fn.1, 359–360 [despite unification of municipal and superior courts, relevant procedural steps in felony proceedings remain the same]; and, *People v. Superior Court (Jimenez)* (2002) 28 Cal.4th 798, 804 [superior court remains appropriate court to review magistrate's actions even after unification].)[25]

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[25] Regarding appointed counsel, *Lempert* concluded, that representation, subject to reappointment in the superior court after the holding order and at the superior court arraignment, statutorily lasts "until the date set for arraignment on the information." (*Lempert, supra,* 112 Cal.App.4th 1161, 1171-1172§ 987.1.) This is set out in section 987.1 and is consistent with *Alexander v. Superior Court* (1994) 22 Cal.App.4th 901, 914. In fact, this conclusion would underscore that Henson's appointed attorney, on case 119 and 499, was subject to appointment or re-appointment at the superior court arraignment. To the extent that appointed counsel conflicted out of representation of Henson, this was not due to any scheme by the People and did not represent any form of prejudice to Henson. He is entitled to retain counsel of his choosing. But, in so far as appointed counsel is concerned, Henson was entitled to appointment of counsel, not necessarily counsel that represented him in the magisterial court, and not necessarily counsel of his choosing. *Harris v. Superior Court of Alameda County* (1977) 19 Cal.3d 786, 795-796.)

This is entirely consistent with section 949's definition of the first pleading by the People in a felony case in the superior court. But it shows, in particular, that there was nothing in the present case to order consolidated in the superior court at the time the trial court concluded that a court order was needed to consolidate the actions held to answer by a magistrate. Rather, section 954's authorization of joinder applied instead of the consolidation provision, simply because the prerequisites for consolidation, as defined by section 954, and requiring court permission, were not present. (See § 954.)

Hence, the People's conclusion that section 954 authorizes joinder and the conclusion by the majority to the same end, based on the latent ambiguity in section 954, should be sustained by this Court.

B. There Were Not Two Or More Accusatory Pleadings In The Superior Court To Order Consolidated, And Section 739 Does Not Prohibit Or Limit Joinder Based On Section 954.

The trial court did not mention or address section 739 in making its ruling. Moreover, Henson did not cite section 739 at the motions court or in briefing to the Court of Appeal. Nevertheless, section 739 addresses the timing requirements for filing of an information following the examination before a magistrate and the minimum content requirements, as follows:

> When a defendant has been examined and committed, as provided in Section 872, it shall be the duty of the district attorney of the county in which the offense is triable to file in the superior court of that county 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. The information shall be in the name of the people of the State of California and subscribed by the district attorney.

(Cal. Pen. Code § 739.)

Section 739 is addressed by many cases. But, generally speaking, each case addresses a central question; whether the record before the magistrate supports the charges filed in the information, regardless of whether those charges were included or not in the section 872 holding order. (*See, e.g., People v. Slaughter* (1984) 35 Cal.3d 629; *People v. Pimental* (1970) 6 Cal.App.3d 729; *People v. Brice* (1982) 130 Cal.App.3d 201; *People v. Santos* (1990) 222 Cal.App.3d 723; *People v. Horton* (1961) 191 Cal.App.2d 592; *People v. Clark* (1973) 30 Cal.App.3d 549.)

While these cases explain the scope and limits as to what record before a magistrate will support charges filed in an information, they in no way address the joinder of charges in an information, where, like the instant case, some of those charges were certified to the superior court in one preliminary hearing, and the balance of those charges included in that same unitary information were certified by the holding order in another preliminary hearing.

It is the People's contention that section 739 does not, and was not intended to, address joinder or consolidation. Section 739 sets out requirements for the minimal content of an information relative to the holding order concerning offenses for which probable cause has been found and the time requirement for filing. Hence, while the filing of an information is authorized by section 739, and that section makes clear that the resulting information must be supported by the findings of a magistrate, joinder is separately authorized by section 954. And, nothing in the history of sections 739 or 954 state, or even suggest, that section 739 stands above or is not subject to provisions of section 954.

In fact, the language of section 739 has some unique qualities. Among these is the statute's description of the role of the District Attorney, to file an information within 15 days, as a "duty." However, because the

People are not obligated to file an information unless, in the People's discretion, the People determine to continue the criminal prosecution, it is apparent the District Attorney retains the discretion not to proceed, simply by forgoing the timely filing of an information. (§ 1382, subd. (a)(1).) Hence, the duty referred to is not an obligation or command to file an information. Rather, it is a duty to file an information in a timely manner or suffer forfeiture of the ability to proceed. (*Id.*) This procedure protects a criminal defendant from uncertainty regarding the status of the prosecution. And, it comports with the purpose behind speedy trial rights.

However, the language of section 739 and its purpose does nothing to reference, address, or limit section 954 joinder of offenses charged. This is no accident. The People contend that the absence of such a reference makes plain that section 739 is subject to 954's provisions concerning joinder and consolidation. Section 954 acts as an overlay, allowing efficient pleading and the unitary pleading first authorized in 1915. This conclusion is supported by the provisions for grounds for demurrer in section 1004.

Subparagraph (3) of section 1004 provides for one of the grounds to demurrer as follows:

> "(3) That more than one offense is charged, except as provided in Section 954."

(§ 1004, subd. (3).)

If it were the case, as insisted by the dissent, that section 739 "requires the People to file a separate information in each case in which a preliminary hearing has occurred and a commitment order issued" (*Henson, supra,* 28 Cal.App.5th 490, 526), then one can not help but wonder what is the purpose of paragraph (3) of section 1004? That is, the dissent reasons that the People are prohibited by section 739 from filing anything in an information other than that which is addressed in the holding order and preliminary hearing. Yet, section 1004 clearly contemplates that a section

739 related information, to the extent that it charges more than one offense, is subject to demurrer, "except as provided in Section 954." (§ 1004, subd. (3).)

It seems obvious that section 739 is subject to section 954. In fact, the 1951 amendment of section 954 enacted by the passage of Senate Bill 543 was intended "to make the procedural provisions of the code applicable to all proceedings in all courts." (*Henson, supra,* 28 Cal.App.5th 490, 529.) Consequently, section 739 and the filing of an information is intended to be subject to the additional provisions of joinder set out in section 954. The filing of an information according to sections 1004 and 739 is subject to demurrer. And the information, while subject to the requirements of section 739, is expressly subject to the provisions of joinder set out in section 954.

What other meaning could the legislature have had by subjecting an information to demurrer, unless to make any additional charges that do not comport with section 954 subject to demurrer? Section 739 is not independent of the provisions of joinder and consolidation set out in section 954. Rather, the dissent's position is inconsistent with statutory provisions and the broader statutory fabric. The statutes and specifically section 1004, expressly subject the filing of an information to the content and timing requirements of section 739, as well as the provisions of section 954.

In spite of the forgoing, the dissent would place section 739 in a position independent from section 954, and would read section 739 as placing a "limitation on the scope of an information." (*Henson, supra,* 28 Cal.App.5th 490, 526.) But the very fact that sections 954 and 739 were amended in the same Senate Bill in 1951, and all with the stated purpose to "make all the procedural provisions of the Penal Code applicable to all proceedings in all courts" (Legis. Counsel, Rep. on Sen. Bill No. 543 (1951 Reg. Sess.) p.12), strongly suggests otherwise. The express provisions of section 1004 serve as a case in point. The statutes are intended as a tapestry,

a harmonized system, rather than setting section 739 off as a single statute independent of all of the others.

Consequently, because the information is the "first pleading ... in the superior court in a felony case," (§ 949), the conditions precedent for consolidation ("if two or more accusatory pleadings are filed in such cases in the same court") were not present. (§ 954.) It is specifically filed informations (or in proceedings before a magistrate, filed complaints) to which section 954 contemplates the consolidation provision to apply.

The section states that the trial court may order "them" to be consolidated, referring to the "two or more accusatory pleadings ... filed in such cases in the same court." (§ 954.) Moreover, as discussed above, section 954 was not written to consider proceedings before a magistrate and those in the superior court to be occurring in the same court. Although, the language of section 954, requiring the accusatory pleadings to be filed in the "same court" would prohibit consolidation between courts.[26]

Section 954 was last amended when the superior and municipal courts were distinct courts by title, with separate administrations. Although Proposition 220 authorized administrative court consolidation, it is still the case that the holding order made by the magistrate pursuant to section 872, replaces the criminal complaint and acts as the certification that goes to the superior court, authorizing an information to be filed at the discretion of the prosecution. Without an information filed by the prosecution pursuant to section 739, no felony criminal action is initiated in the superior court,

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[26] It is conceivable that one party or another would find it convenient, or even advantageous, to seek to consolidate matters, whether misdemeanor or felony, in the magisterial court with a matter in the superior court. The People's reading of the "same court" language in section 954 would prohibit any such cross-court practice.

unless the parties stipulate to treat the criminal complaint as an information. (*See, People v. Cartwright, supra,* 39 Cal.App.4th 1123, 1132-1133.)

Furthermore, the language in section 954 concerning consolidation, even if applicable, explains that "the court may order [two or more accusatory pleadings] [filed in such cases] [in the same court] to be consolidated." (§ 954.) While it has been demonstrated that proceedings before a magistrate and those in the superior court are not "in the same court," in the sense that they occur in a separate division of the court (*Lempert, supra,* 112 Cal.App.4th 1161, 1168-1169), it is also true that in the present case there were no accusatory pleadings filed in the superior court until the People filed a unitary Information.

As a single filing, there were not two or more accusatory pleadings in the superior court to be ordered consolidated; there was only a single pleading, and that pleading complied with section 954's requirements for joinder. It complied with section 739's time and content requirements. As observed, that unitary pleading was the "first pleading on the part of the people in the superior court." (§ 949.)

Although the dissent asserted that, "[i]n my view, the People do not have the same discretion to add charges in an information that they possessed at point of filing an initial complaint" (*Henson, supra,* 28 Cal.App.5th 490, 527), the People maintain that the Legislature has authorized joinder, subject to the limitations set out in section 954 and the overall statutory scheme, requiring a magisterial probable cause determination concerning offenses prior to filing an information in the superior court.

Although the dissent did not offer support for its conclusion, that the People do not have the same discretion at the stage of filing an information as they have at the stage of filing a criminal complaint, this conclusion also did not take into account that the "declared purpose" of Senate Bill 543

"was to 'make all the procedural provisions of the Penal Code applicable to all proceedings in all courts.'" (*Henson, supra,* 28 Cal.App.5th 490, 520.)

Like the analysis of section 1004, demonstrating an intended interaction between sections 739 and 954, an analogy can be drawn between the intention behind section 1009 and the purpose of section 739. That is, section 1009 authorizes amendment of accusatory pleadings by the People without leave of court if the amendment occurs prior to arraignment (entry of a plea or a demurrer is sustained). (§ 1009.) The People argue that section 954 in combination with sections 739 and 949 allow the People to file a unitary Information as their first pleading in the superior court after holding orders have been issued in the magisterial court. And this would be consistent with the People's broad discretion to amend or join at a stage prior to arraignment.

One of the arguments against such authorization is the sense that the court has an interest in supervising cases once they are filed. (See, *People v. Birks* (1998) 19 Cal.4th 108, 135.) But like section 1009, that would not diminish the People's discretion to amend pleadings, not only after they were filed but until a plea was entered. Sections 739 and 954 authorize the People's broad discretion to unify pleadings at least up to the point that the pleading is filed to initiate proceedings, and likely (in light of the authority to amend in section 1009), until a plea is entered or a demurrer sustained.

C. Statutory Construction And Analysis Supports The Practice Of Joining Charges Previously Held To Answer By Means Of A Unitary Information.

The People also maintain that the latent ambiguity in section 954 concerning the meaning of "same court," led to the statutory analysis set out by the majority, including statutory history, that concluded that section 954 was intended in part to authorize the action taken by the People in

filing a unitary information at the outset of felony proceedings in the superior court (trial court). (*Henson, supra,* 28 Cal.App.5th 490, 506-507.)

However, because issues of statutory interpretation will be considered by this Court *de novo,* and the reasoning of the motions court reviewed independently, the People will set forth the statutory analysis upon which they rely. (*Henson, supra,* 28 Cal.App.5th 490, 504, citing *People v. Prunty* (2015) 62 Cal.4th 59, 71; *People v. Cunningham* (2001) 25 Cal.4th 926, 984; *People v. Alvarez* (1996) 14 Cal.4th 155, 188.)

As discussed, the People maintain that section 954 has two parts specifically relevant to this discussion. The first section has been described by the People as the section authorizing joinder, generally:

> "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 ... ."

(*Henson, supra,* 28 Cal.App.5th 490, 504, quoting § 954.)

The second section provides authority for consolidation of those pleadings that may charge offenses as described in the first section:

> "and if two or more accusatory pleadings are filed in such cases *in the same court*, the court may order them to be consolidated."

(*Henson, supra,* 28 Cal.App.5th 490, 505, quoting § 954 and adding emphasis to the "same court" language.)

Just as the People argued, the Court of Appeal explained that "[p]rior to 1998 [and the implementation of court consolidation], 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].)" (*Henson, supra,* 28 Cal.App.5th 490, 505.) While the Court of Appeal noted that justice courts were

eliminated by initiative measure in 1995, the Opinion went on to explain that, because section 954 was in its current form prior to 1998, the "separation of the 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." (*Id.,* emphasis in the original.)

Again, based on the language of section 954, "[p]ermission 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." (*Id.,* emphasis added.)

The People maintain that the joinder accomplished in the present case through the filing of a unitary pleading to initiate proceedings in the superior court after separate holding orders were issued in the magisterial court, is a practice that has been employed by the People for as far back in time as institutional memory permits recollection. It is not a common practice because it is not a common circumstance. Nevertheless, after court consolidation "was approved on June 2, 1998, and went into effect the next day" (*Henson, supra,* 28 Cal.App.5th 490, 505, citing Cal. Const., art. II, §10, subd. (a)), "Proposition 220 'had the effect of empowering each county to abolish the municipal court in that county by merging its judges and resources into the superior court.'" (*Id.*, quoting *Richardson, supra,* 156 Cal.App.4th 574.) The constitution was amended to vest the State's judicial power in the Supreme Court, Courts of Appeal, and Superior Courts. (Cal. Const., art. VI, §1.) And, the "same court" ambiguity came into being.

After the passage of Proposition 220 the Legislature enacted many statutory changes to facilitate court unification. However, section 954 was

left unchanged, and has remained in its present form since 1951. (*Henson, supra,* 28 Cal.App.5th 490, 505, citing, Stats. 1998, ch. 931, p. 6390.) Having explained the meaning of section 954 prior to court unification, the Court of Appeal sought to determine "whether court unification resulted in a change in meaning as to section 954, despite the absence of an explicit amendment." (*Henson, supra,* 28 Cal.App.5th 490, 505.)

The majority began with the plain language of the section (*Henson, supra,* 28 Cal.App.5th 490, 506, citing *People v. Cornett* (2012) 53 Cal.4th 1261, 1265) but found that they could not give "every word, phrase and sentence" meaning because of the "latent ambiguity" concerning the meaning of the "same court" language in section 954 that arose after court consolidation. (*Id.,* citing *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1422 ["Language that appears unambigious on its face may, however, contain a latent ambiguity]; *People v. Valencia* (2017) 3 Cal.5th 347, 357-358 ["the words of the statute must be construed in context, keeping in mind the statutory purpose, the statute or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible"].)

As discussed above, the court addressed the question, "[d]oes the phrase "in the same court" mean in the single, unified superior court, or does the phrase retain its original, preunification meaning? If the former, then the People were required to obtain a court order allowing consolidation of cases 119 and 499. If the latter, the unitary information was proper." (*Henson, supra,* 28 Cal.App.5th 490, 506.)

This reasoning was based in part on *Lempert.* As discussed, *Lempert* holds that in the post-court unification context, [a]lthough the statutory references have changed, the historical division within the trial court remains." (*Henson, supra,* 28 Cal.App.5th 490, 506, quoting *Lempert,*

supra, 112 Cal.App.4th 1161, 1168-1169.) Hence the majority reasoned as follows:

> "Because the historical division of municipal and superior courts remains the same postunification as it was preunification (at least insofar as criminal procedure is concerned), it stands to reason that when section 954 refers to two or more accusatory pleadings being filed 'in the same court,' it is referring to two or more such pleadings being filed at the stage of proceedings historically conducted in municipal court or at the stage historically conducted in superior court. Thus, while court permission is required to consolidate two complaints or two informations, it is not required to incorporate two complaints into a single information where that information is the People's first pleading at the superior court stage of proceedings. Any other interpretation, based on the existence of a single court following unification, would read "in the same court" out of the statute as being mere surplusage and unnecessary. Additionally, such a literal reading of section 954 would afford judges the discretion to consolidate charges in a complaint with charges in an information, since both documents would be accusatory pleadings filed in the same court. Such a procedure would directly conflict with statutes such as section 995 (requiring the defendant to be legally committed by a magistrate with reasonable or probable cause) and section 1009 (requiring the charged offense to be shown by evidence taken at a preliminary examination)."

(*Henson, supra,* 28 Cal.App.5th 490, 510.)

The dissent's view, and to some extent the view advocated by Henson, is that section 739 dictates which charges the People may include in an information. (*Henson, supra,* 28 Cal.App.5th 490, 527.) But, in reaching this conclusion, neither the dissent nor Henson provide any authority for the proposition that section 954 should be disregarded or subordinated to a rigid reading of section 739, for which they advocate. Moreover, they fail to consider that holding orders address offenses rather than pleadings. (§ 872, subd. (a).)

Instead of disregarding the provisions of section 954, the People and the Court of Appeal seek to view section 954 in context: in the context of the 1915 authorization for joinder of allegations and separate authorization of consolidation of filed pleadings; the continued distinction between joinder and consolidation to the present in section 954; the context of authorization for amendment of pleadings without leave of court until a criminal defendant has been arraigned on that pleading (§ 1009); inclusion in the grounds for demurrer, joinder that does not comport with section 954 and the exclusion of joinder as a basis for demurrer that does comport with section 954; the purpose and plain language of both sections 739 and 954; and the distinction between a motion to consolidate and a motion to sever, discussed below.

Rather, the People and the Court of Appeal Opinion seek to "harmonize" section 954 with section 739, along with the related statutes and policy, in order to give meaning to the legislative purpose.[27] (*Henson,*

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[27] At footnote 13, the Court of Appeal concluded that "sections 739 and 954 can reasonably be harmonized." The majority went on to explain the following:

> "*Section 739* reads: '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... .' (Italics added.) With respect to the Legislature's grammatical choices, '[u]se of the indefinite article[] ... 'an' signals a general reference, while use of the definite article 'the' ... refers to a specific ... thing. [Citation.]' (*Pineda v. Bank of America, N.A. (2010) 50 Cal.4th 1389, 1396–1397 [117 Cal. Rptr. 3d 377, 241 P.3d 870].*) We view the italicized portion of *section 739* as supporting the inference the Legislature was referring to informations in a broad sense

(continued...)

supra, 28 Cal.App.5th 490, 506, citing *People v. Valencia, supra,* 3 Cal.5th 347, 357-358.)

The People conclude, as did the Court of Appeal, that section 739 addresses time and minimal content requirements for an information. The section does not prohibit joinder otherwise authorized by section 954, provided that the charges that would be joined, also comply with the time and content requirements of section 739. This reading is also consistent with subdivision (a) of section 872.

In the present case, the People were able to hold the two cases to answer within sufficient time to permit joinder of the charges from each of the two holding orders to be timely filed in a unitary accusatory pleading in the superior court. (§ 949.) The offenses held to answer were of the same class of crime in compliance with section 954. The charges were all held to answer in the magisterial court pursuant to section 739. The time requirement of filing within 15 days set forth in section 739 was met as to all of the offenses charged. And all the charges remain subject to a motion

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(...continued)

> (assuming valid holding orders). The phrase 'an information' contains no inference the Legislature was referring to a specific single information limited to a specific preliminary hearing and holding order—that is, was requiring a one-to-one correlation between the information and a particular preliminary hearing and related holding order—and *section 739* contains no words of exclusivity."
>
> "The dissent points to *section 739*'s use of the word 'the' to qualify 'commitment,' 'order of commitment,' and 'magistrate.' (Dis. opn., *post*, at p. 525.) While 'the' is a specific rather than a general reference, this does not change our conclusion, since, when words are used in the Penal Code, 'the singular number includes the plural, and the plural the singular ... .' (*§ 7.*)"

(*Henson, supra,* 28 Cal.App.5th 490, 511-512, fn. 13.)

to sever in the event that good cause is asserted and found by the trial court. (§ 954.)

To this end, the statutory tapestry, including sections 739 and 954, indicate a broad authorization for joinder and joint trial. This policy "ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials." (*Henson, supra,* 28 Cal.App.5th 490, 513, quoting *People v. Soper* (2009) 45 Cal.4th 759, 771–772.) And this policy is underscored by the California Constitution's provision in Article I, "the California Constitution 'shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature or by the people through the initiative process.'" (*Henson, supra,* 28 Cal.App.5th 490, 513, quoting Cal. Const., art. I, § 30, subd. (a).)

D. The Distinction Between A Motion To Sever And A Motion To Consolidate Provides Further Evidence That Unitary Pleading Was Authorized By The Legislature And The Motion's Court's Order Usurped The People's Statutorily Authorized.

Finally, as discussed above, there is a statutory framework that has authorized and broadly favored joinder and joint trial in California since 1915. The dissent and Henson seek to remove section 739 from that framework and read it as a statutory measure meant to restrict and limit joinder, rather than a provision intended to ensure timely filing and due process compliance with the requirement of a probable cause determination, prior to filing an accusatory pleading in the superior court. (See, §§ 739 and 872.)

One of the grounds expressed by the dissent for reaching this restrictive interpretation is based on the Justice's impression of motions to sever, versus motions to consolidate. At footnote 8, the dissent explains that the consolidation provision of section 954 was largely to allow the

magisterial court to consolidate misdemeanor offenses for trial while the superior court would be able to consolidate felony matters for trial. (*Henson, supra,* 28 Cal.App.5th 490, 521, fn. 8.) The dissent explained that, "while the 1951 version of section 954 technically appears to permit consolidation of felony complaints in the municipal (now magistrate) court, in practice this would rarely come up." (*Id.*) The dissent explained, this is so because of ...

> "the inquiry courts undertake in considering the question of consolidation is more appropriately conducted later in the proceedings. In considering the question of consolidation, the court evaluates the cross-admissibility of the relevant offenses and evidence, the relative strength of the cases at issue, and the possibility of prejudice to the defendant. (See *People v. Lucas* (2014) 60 Cal.4th 153, 214 (*Lucas*), disapproved on other grounds in *People v. Romero & Self* (2015) 62 Cal.4th 1.)"

(*Id.*)

But the citation to the *Lucas* decision does not support the conclusion drawn by the dissent. *Lucas* is a case involving multiple murder, attempted murder, and kidnapping charges. The consolidation motion brought by the prosecution in pre-trial proceedings presented an unusual theory of joinder. Although the various counts were of the same class of crimes, joinder was based on a theory that the various crimes were admissible as to each other to prove identity for each of the other killings because they were so unusual and distinctive, and so similar, as to reflect the "signature" of a single perpetrator. The prosecution further argued that in separate trials, each offense would be admissible under subdivision (b) of section 1101 of the Evidence Code. (*Lucas, supra,* 60 Cal.4th 153, 212-214.)

In fact, the trial court did find, and this Court affirmed, that "each incident displayed a pattern so unusual and distinctive as to support an inference that the same person committed all of the killings and that such

evidence, therefore, was relevant on the issue of identity. In separate trials, evidence of the other four incidents would have been admissible in each trial. Any inference of prejudice is dispelled." (*Lucas, supra,* 60 Cal.4th 153, 215, citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1316.)

Unlike the unusual circumstances presented in *Lucas,* a conclusion as to whether two or more offenses are properly joined pursuant to section 954 "is examined independently as the resolution of a pure question of law--whether the offenses are 'different statements of the same offense' or are 'of the same class of . . . offenses.'" (*People v. Alvarez, supra,* 14 Cal.4th 155, 188; § 954.) The same is true of the legal mixed fact-law question of whether the offenses were "connected . . . in their commission." (*Id.*) However, "a determination as to whether separation is required in the interests of justice is assessed for abuse of discretion." (*Id.*, citing *People v. Balderas* (1985) 41 Cal. 3d 144, 170-171.)

The People maintain that, as a matter of law, section 954 authorizes the executive to file an accusatory pleading, defined by subdivision (c) of section 691,[28] to charge in a single information "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." (§ 954.) This practice of joining offenses by filing a unitary pleading at the inception of the felony prosecution in the superior court is favored and is written into the California Constitution. (Cal. Const. Art. I, §30, § 949, § 954 .)

Contrary to the dissent's reasoning, that such consolidation usually occurs in the trial court, felony cases are not infrequently joined (to the extent that consolidation occurs) in the magisterial court as a matter of

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[28] "The words 'accusatory pleading' include an indictment, an information, an accusation, and a complaint." (§691, subd. (c).)

convenience for witnesses and as a means of achieving judicial economy. In fact, other than in cases as complex and having novel theories for joinder as *Lucas,* the usual circumstance in which consolidation is sought occurs in cases much like the present; in which a recidivist offender commits a series of very similar crimes, but the reports were not available for joinder at the time of filing the criminal complaint. In these more common cases, like that of Henson, the People seek joinder or consolidation as early as practicable.

The dissent mistakenly treats *Lucas* as the typical case. It is far from that. A classic case of consolidation is one in which the defendant is charged with common crimes involving common events and victims. (*People v. Turner* (1984) 37 Cal.3d 302, 311, disapproved on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1115.) In any event, in generalizing the *Lucas* consolidation and the test of that joinder on appeal, certainly not the typical question of law, the dissent posits a requirement of extensive evidence before the court in order for the court to evaluate cross-admissibility and relative strength of the cases. But this assumption is not applicable to most cases. Generally, such a factual inquiry is not called for in motions to consolidate, although such matters may be raised by the defendant to oppose. More commonly, however, such issues are very much the case in motions to sever, where good cause must be established. (§ 954.)

This contrast between consolidation and severance raises the point the People seek to underscore. A motion to consolidate can be brought in the magisterial court or superior court, at the moving party's discretion. If granted, while the charges will proceed in a unitary fashion, that ruling remains subject to a motion to sever for good cause in the trial court. (§ 954.) Any ruling to consolidate prior to trial, and even a denial of severance, if brought prior to trial assignment, is merely advisory. The trial court, "in the interest of justice and for good cause shown, may in its

discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (§ 954; See *People v. Merriman, supra,* 60 Cal.4th 1, 37.)

The reason the People emphasize this point is that the policy favoring joinder, begun in 1915, can much more freely permit joinder and consolidation under circumstances where the Legislature authorized the trial court to ensure a fair trial by, for good cause shown, exercising its ability to sever counts in the interest of justice. (§ 954.) And this is so, even where counts would otherwise lawfully qualify for joinder or consolidation. Due process issues arising from various matters that might prejudice a defendant when counts are tried together becomes the focus in a motion to sever as contrasted with compliance with the joinder or consolidation provisions of section 954.

This concept comports with the statutory fabric discussed above. The language of sections 954 and 739 and the matters they address support the People's position. As there were not two accusatory pleadings filed in the superior court, the provision of section 954 addressing consolidation simply did not apply. Concepts of statutory construction also support the People's practice of joinder by filing a unitary Information.

In particular, the statutory history does not suggest in any way that section 739 is independent of, or superior to section 954. Rather, the People's understanding of sections 954 and 739, like that of the Court of Appeal, is based on an effort to harmonize the statutes and give credit to the policy favoring joinder rather than to treat section 739 as having "preeminence" over section 954. (*Henson, supra,* 28 Cal.App.5th 490, 511, fn. 13.)

Similarly, the dissent's assertion that consolidation is the province solely of the court appears inconsistent with the provisions in section 954.

While it may be more convenient, in terms of court administration, to treat all matters of consolidation as under the court's authority, that is not what section 954 states. In fact, such a concept is not found in express or implied language in any statute or historical reference to the statutes. Moreover, this idea of court province was rejected by the Court of Appeal at footnote 12 based on the express language in section 954. (*Henson, supra,* 28 Cal.App.5th 490, 510, fn.12.)

That said, the People do assert that section 954, in combination with section 949, authorizes the unitary Information filed by the People. At the outset of this brief, the People explained that the motion's court expressed a similar view to that of the dissent, that consolidation can only be obtained by leave of court. But this notion was based on a conflating of the terms, joinder and consolidation. This does not appear to be consistent with the statutory authority granted to the People by the Legislature in section 954.

The Court of Appeal, in addressing the trial court's rulings, summarized Article III, section 3 of the California Constitution stating, "[t]he powers of the state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." The majority went on to describe executive functions including the prosecuting authority's sole discretion to determine whom to charge with public offenses and what charges to bring. (*Henson, supra,* 28 Cal.App.5th 490, 512, quoting *People v. Birks, supra,* 19 Cal.4th 108, 134.) The majority went on to explain that, "Judges must be as vigilant to preserve from judicial encroachment those powers constitutionally committed to the executive as they are to preserve their own constitutional powers from infringement by the coordinate branches of government." (*Henson, supra,* 28 Cal.App.5th 490, 512, quoting *People v. Superior Court (Greer)* (1977)

19 Cal.3d 255, 262, superseded by statute on another ground as stated in *People v. Conner* (1983) 34 Cal.3d 141, 147.)

The Court of Appeal continued in writing that, "courts generally may not review, for abuse of prosecutorial discretion, a prosecutor's decision as to the type and number of offenses to charge. (*Henson, supra,* 28 Cal.App.5th 490, 512, citing *People v. Birks, supra,* 19 Cal.4th 108, 134; *People v. Cortes* (1999) 71 Cal.App.4th 62, 79.) However, the Court of Appeal explained that once charges are filed, the disposition of those charges becomes a judicial responsibility. The Court of Appeal recognized that the inherent powers of the courts derive from Article VI, section 1 of the California Constitution. And from these powers the court may "adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council." (*Henson, supra,* 28 Cal.App.5th 490, 513.)

The Court of Appeal seemed to agree that if the motions court was correct as to the People's actions being prohibited, that it had the authority to adopt a new form of procedure where none previously existed and where justice demanded it. (*Henson, supra,* 28 Cal.App.5th 490, 513, citing *Swarthout v. Superior Court* (2012) 208 Cal.App.4th 701, 708-709.) But the Opinion went on to express that, "[a] court is authorized, however, only to act within the bounds of the law. It does not have inherent authority to prohibit what the law permits, based on a misunderstanding of the law or its own view as to what the law should be." (*Id.*)

And that is what the People maintain has occurred here. The motions court genuinely but erroneously concluded that once complaints are filed in the magisterial court, and after court consolidation, the cases initiated by the prosecution will remain separate unless the court orders consolidation pursuant to section 954. Although the motions court was undoubtedly sincere, section 954, particularly when informed by the divisions of the

court that remain following court consolidation discussed in *Lempert*, does not support the motions court's interpretation.

Moreover, although section 739 was brought to the Court of Appeal's attention in briefing and oral argument by the People, the interpretation presented by the dissent fails to address the statutory language of section 954 concerning "filed" pleadings; fails to harmonize the statutes; fails to recognize that in the context of amending pleadings section 1009 recognizes the People's broad right to amend without leave of court prior to arraignment; and fails to recognize the discretion granted to the People to join charges in the interest of efficiency, economy, and justice. The motions court and dissent appear to focus on the administrative function of the court and what will happen to its case files in the event a unitary filing occurs, rather than the magistrate's finding of probable cause as to offenses rather than pleadings or cases. (§ 872, subd. (a).)

Based on the preceding authorities, the People are granted broad discretion to join offenses under section 954. The procedures have been explicitly made applicable to all courts. Based on the timing of the offenses, Henson's crimes were charged in two separate criminal complaints. The offenses in each of those complaints were separately held to answer before a magistrate. (§ 872, subd. (a).) In compliance with section 739, a single, unitary Information charging those offenses was timely filed in the superior court, joining those offenses for which the magistrates had found probable cause. To that Information no demurrer was filed.

The People respectfully submit that a failure to challenge the joinder by a demurrer forfeited objection to the People's joinder of those offenses held to answer, even if that joinder was improper. More, the filing of a unitary Information, joining those offenses held to answer in the magisterial court, to initiate proceedings in the superior court pursuant to section 949,

was authorized by section 954 and entirely consistent with sections 872, 739, and the statutory framework enacted by the Legislature.

The People therefore request that this Court adopt the reasoning and holding of the Court of Appeal.

III

THE MOTIONS COURT ABUSED ITS DISCRETION BY IMPROPERLY DISREGARDING THE TRANSCRIPT FROM CASE 499 AND PERMITTING OBJECTION TO ALLEGATIONS OF JOINDER OF MORE THAN ONE OFFENSE BY MEANS OTHER THAN A DEMURRER, AND SELECTING A REMEDY CALCULATED TO EXCEED THAT AUTHORIZED FOR A DEMURRER.

The motion court's fiction of looking at only the transcript for case 119, while disregarding the transcript from case 499, occurred in the context of, and to facilitate, a section 995 challenge to the sufficiency of the record below. However, *People v. Cummings, People v. Brooks,* and section 1012 make clear that a section 995 motion is not a proper mechanism by which to challenge issues of joinder.

There is no question that Henson's objection was to the joinder of charges held to answer from case 499 with those of case 119. The failure of Henson to file a demurrer pursuant to sections 1002, 1004 and 1012, or even a motion to sever as authorized by section 954, particularly in light of an Information Henson believed on its face improperly joined or improperly consolidating cases 119 and 499, waived that issue and should have precluded the section 995 motion brought before the motions court in this case.

However, as inappropriate as the 995 motion was to attack an alleged issue of improper joinder, so too was the motions court's effort to ignore Henson's statutory obligation under sections 1004 and 1012 to bring

a demurrer in order to contest the People's authority to join charges held to answer in separate hearings through the filing of a unitary Information, and to ignore Henson's waiver of the issue by failure to demurrer.

Instead, the motions court sought to suggest that the People had committed an error of such great significance that the failure of Henson to follow statutory procedures was apparently irrelevant. The motions court described this error by the People as a failure to file a motion to consolidate the cases in the magisterial court or file two Informations, one for case 119 and one for case 499, and then seek consolidation of the pleadings in the superior court.

This amounted to a procedural shift of responsibility from Henson to the People: to demurrer in accordance with statutory requirements, or waive the issue and elect to bring a motion to sever as authorized by section 954 in the alternative; to a claim of the People's responsibility to bring a motion to consolidate. The motions court was declaring and assigning a paramount responsibility for the People to file a motion to consolidate.

The People maintain that this amounted to an error of law, and, to the extent that fashioning a remedy is discretionary, an abuse of discretion predicated on several errors of law. In fact, because the motions court's errors were based on a misunderstanding of the law, those errors were by definition an abuse of discretion. "When a trial court's decision rests on an error of law, that decision is an abuse of discretion." (*People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737, 746, see also, *People v. Eubanks* (1996) 14 Cal.4th 580, 595; *People v. Neely* (1999) 70 Cal.App.4th 767, 775-776; *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016.)

In addition, while the People welcome resolution of issues of statutory interpretation surrounding sections 954 and 739, discussed above, the dismissal of counts 1, 2, 3, and 4 of the Information by the court, based

as it was on a fiction that one of two transcripts of proceedings was unavailable to the court because a unitary Information was filed designating case 119 as the lead case, was particularly troubling. This is so because the People had, in order to provide continuity and notice to the court and Henson, presented an identical unitary Information for each of the court files in case 119 and 499.[29]

As mentioned, section 995 is not a proper means to remedy alleged misjoinder. The section permits the trial court to set aside an information if before the filing of the information a defendant was not legally committed by a magistrate, or if a defendant was committed without reasonable or probable cause. (§ 995, subd. (a)(2); *Henson, supra,* 28 Cal.App.5th 490, 503.) As noted by the Court of Appeal, because an information is generated after the commitment, "the manner in which charges are alleged in an information cannot affect the legality of the commitment by the magistrate." (*Henson, supra,* 28 Cal.App.5th 490, 503.) As a result, Henson's motion alleged that he was committed without reasonable or probable cause.

While the People disagree with the rationale, the People certainly understand that the trial court's intent was, because the court held the view

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[29] The People have requested judicial notice of the court's docket information for case 119 and 499. The November 29, 2016 entries for each case are identical and show that the unitary Information submitted by the People for filing was "Received and Forwarded" for hearing on December 1, 2016. Specifically, the entry states, "Information not entered sent to Dept for further hearing of 12/01/16 to be addressed in Court-Consolidation." The docket entries demonstrate that the People had, in fact, attempted to file the identical Information in each case, and in each case the Information was "Received." Although case 119 was identified as the lead case on the face of each copy of the Information, both case numbers appeared on the Information and each case file contained the Information submitted. (RT:133.)

that a consolidation motion was necessary for the People to join the case pleadings in the first instance, that the People's filing of a unitary Information in case 119 could only be supported by the preliminary hearing transcript related to those counts held to answer in case 119 in the magisterial court; counts 5, 6, and 7 of the unitary Information. By the same reasoning, the People's filing of a unitary Information in case 499 could only be supported by the preliminary hearing transcript related to those counts held to answer in case 499 in the magisterial court; counts 1, 2, 3, and 4.

But by this reasoning, it is perplexing how the court determined only to address the Information as it related to case 119 but not address the Information as it related to case 499. In fact, although the court explained that the decision was based on the People's designation of case 119 as the lead case, the decision appears random and arbitrary. That is to say, if the court believed that the People did not have the authority to file a unitary Information in the first instance, and the People did, in fact, submit the identical Information for both court files, and both file numbers appeared on the Information appearing in each case, and the section 995 challenge was noticed as including both case numbers, one would think that the court would be obligated to address each case file separately, ignoring the unauthorized act of the People, rather than arbitrarily choose to ignore the court's own file in case 499.

Instead, the court selectively elected to give credence to a portion of what the People attempted to accomplish while rejecting others: The court recognized the People's election to designate case 119 as the lead case. (RT: 131-132.) The court chose to ignore the fact that Henson had been arraigned on December 15, "[o]n case ending 119 and 499 that are filed together in one information." (RT:8-9;CT:137-138.) The court recognized that there were two court files; that the People had filed an Information in

both (RT:133); and, that the People had joined the charges in a single pleading. But the court pretended to have only case 119 at bench, even though the section 995 motion addressed both case 119 and case 499, their alleged improper consolidation, and the court acknowledged having both files at bench.

In the event that the court had looked at the record in case 499, rather than dismissing counts 1, 2, 3, and 4, the court presumably would have found a basis in the record from that separate transcript. The motions court certainly expressed that this was likely the case. (RT:113.) In light of the court's failure to look at the record, it is reasonable to presume that there was probable cause, in that there was a holding order from the magistrate. Whether there was a lack of evidence in the record was never tested. Rather the motions court elected to ignore the record, the indorsement on the complaint (§ 872, subd. (a)), and pretend that there was no record. This fiction constitutes both an error of law as well as an abuse of discretion.

Assuming, as did the motions court, that section 954 prohibited consolidation by the People without leave of court (or assuming in the alternative that the dissenting Justice's view is correct, that section 739 prohibits the filing of a unitary information), the motions court should have given no credit to the actions by the People it believed prohibited. Reason would dictate that the motions court should have acted on that portion of the Information in each respective case that corresponded to the charges pertaining to the holding order issued. In this manner, the motions court would have effectively severed the charges but would have complied with that portion of the law it concluded had not been violated.

Instead, the motions court acted on the very procedure utilized by the People (joining or consolidating the charges and designating case 119 as the Lead case) that it believed the People were prohibited from doing

without court approval. At the same time, the motions court, although declaring that the People's procedure was prohibited and was improper at its inception, gave recognition to the People's designation of case 119 as the Lead case and pretended that no Information was filed in case 499. Given that the motions court was aware that the court's own file contained an information, the court's pretense that case 499 did not exist, was an abuse of discretion.

To cure the allegedly improper joinder, rather than ignore one of two sets of charges held to answer, both of which had an Information timely filed pursuant to section 739, and both corresponding to court files containing a record supporting the respective charges at bench, it would seem that the motions court should have rejected those actions the court felt were unauthorized rather than ignore that portion of the procedure that was unquestionably proper; the filing of an Information in each case file.[30] (See § 739.) This would appear to be the least arbitrary remedy, unless it was the goal of the motions court to punish the People. Assuming punishment was the purpose of the motions court's unusual election of a remedy, one might reasonably ask oneself what there was to punish? Further, one might question whether any punishment was warranted for following a procedure for which there is no established authority to the contrary.

There is no record to suggest that the People were in any way on notice that the procedure of filing a unitary Information was prohibited.

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[30] Although the People maintain that section 739 does not prohibit joinder and is not restricted to a linear interpretation, requiring the filing of one Information for one holding order, assuming that such a linear interpretation is correct, the remedy would appear to be to follow the authorized procedure rather than adopt a more severe hybrid procedure calculated to punish the People with dismissal. Had Henson filed a demurrer, the remedy under section 1007 would have been leave to amend, not dismissal. (§ 1007.)

Moreover, other than accomplishing that which the law favors (joinder), there was no advantage being taken and no procedure was being circumvented. Specifically, as to allegations that some advantage was being taken by the filing of a unitary pleading, the People absolutely contend otherwise.[31]

More, the Court of Appeal and dissenting Justice treated this appeal as a matter of first impression, with the majority going on to agree with the People's position. This suggests that the People's actions did not warrant any form of punishment. Sanctions are generally available to a court where a party violates an order. They are not generally available or appropriate for advocacy, particularly advocacy where there is no known authority to the contrary.

At the time of filing the unitary Information, there was no published authority that would prohibit the procedure followed by the People. And with all due respect, the statutory authority above certainly provides, at the

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[31] Several assertions have been made by Henson, and to a lesser extent by the dissenting Justice, that the procedure of filing a unitary Information would provide the People with an unfair advantage: Choosing opposing counsel, forum shopping, and depriving counsel of notice for consolidation. (*Henson, supra,* 28 CalApp.5th 490, 533 ["a prosecutor, by simply designating a lead case, will be able to dictate which defense attorney and court department the resulting unified case will be directed to at arraignment."].) The People maintain that these are false issues: Notice is provided, in that the charges were held to answer and an accusatory pleading was filed; Counsel is selected and appointed by the court, conflicts are based on counsel's history and not any action on the part of the People; a defendant has a right to appointed counsel rather than appointed counsel of his choosing (*Harris v. Superior Court of Alameda County, supra,* 19 Cal.3d 786, 795-796.); and, the court in which Henson's case or cases would be filed are determined alphabetically. Whether offenses are joined or filed separately, the case or cases would be filed in the same court based on the defendant's name. The People's filing of a unitary pleading would not result in any form of forum shopping.

very least, a credible basis upon which the People relied in proceeding as they did.

The Court of Appeal recognized the motions court's rationale for addressing the matter under section 995 but went on to explain "[t]his case could only be maneuvered into that posture, however, by the motions judge choosing to ignore essentially half of the record before him. His doing so constituted an abuse of discretion, particularly in the absence of any authority therefor." (*Henson, supra,* 28 Cal.App.5th 490, 503, noting that "[d]iscretion is abused when 'the ruling in question falls outside the bounds of reason under the applicable law and the relevant facts,'" *People v. Williams* (1998) 17 Cal.4th 148, 162.)

In contrast, the dissenting Justice applied a different rationale in concluding that the motions court did not abuse its discretion:

> "the information purported to be based on a consolidated record but the records of the relevant cases were not in fact consolidated. Henson therefore properly opted to bring a section 995 motion, as such a motion requires the court to evaluate the charges included in the information against the underlying record. Specifically, in ruling on a section 995 motion, the court considers whether the charges in an information find support in the commitment order or preliminary hearing transcript in the record."

(*Henson, supra,* 28 Cal.App.5th 490, 533, citing as indirect authority *People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226; *People v. Graff* (2009) 170 Cal.App.4th 345, 360-361.)

The dissent, however, does not fully address the court's failure to consider the record in case 499, either the Information in the case or the transcript. In fact, the dissent explained that "[s]ince the District Attorney failed to follow statutory requirements for filing an information and

thereafter consolidating cases,[32] the purported unified information did not consolidate the relevant cases. The cases and their respective records thus remained separate." (*Henson, supra,* 28 Cal.App.5th 490, 533.) If that is so, how does it justify the dismissal of charges rather than following the law that the motions court claimed was binding on the People?

Ironically, the People never claimed to have consolidated anything. The word, "consolidated," hand written on the unitary Information, was written there by the court's judicial assistant. (*Henson, supra,* 28 Cal.App.5th 490, 497, fn. 3.) The People argued then and contend now that the filing of a joined, unitary Information was the first pleading in the superior court by the People and was authorized by statute. How this authorized joinder is addressed administratively by the court, however, is a separate matter.[33]

While one can appreciate that the dissent concluded that section 739 prohibited the filing of a unitary pleading, but the dissent's reliance on its

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[32] The dissent concluded that section 739 "requires the People to file a separate information in each case in which a preliminary hearing has occurred and a commitment order issued." (*Henson, supra,* 28 Cal.App.5th 490, 526 and 532.)

[33] This issue was touched upon in oral argument at the Court of Appeal. The People's response to a question by the dissenting Justice was considered "nonchalant" in the dissent. But the point the People were attempting to make, perhaps clumsily, is that the procedure the People were following was authorized by the Legislature and statute. As a result, how the court would go about accommodating that which the Legislature authorized was not for the People to say. Moreover, the impression or view of the judicial assistant does not answer the question as to whether the procedure is or was statutorily authorized in the first instance. The judicial assistant's label does not define the procedure. However, as a practical matter, a very simple local rule or rule of court, setting forth the pleading requirements for a unitary Information -- which case to designate as lead, and how the court might merge their files-- would be the usual approach to such issues.

own conclusion drawn from an issue of first impression, creates a tautology upon which the dissent rested its support for the motions court's election of a punitive remedy of dismissing counts. That is, the dissent arrived at the novel conclusion that section 739 (a section Henson never cited in the motions court or in briefing to the Court of Appeal, and a section the motions court did not address) prohibits the filing of a unitary pleading in the superior court regardless of the language of section 954. The dissent then used that conclusion to justify the dismissal of charges that had been held to answer before a magistrate.

The motions court was resolute in its belief that the People were violating procedure. But the record, the position of the People, and later the Court of Appeal Opinion all demonstrate that this was certainly not a settled issue of law or procedure. And this is among the reasons the People argue an abuse of discretion, dismissal of counts for improper joinder where the remedy for demurrer would be leave to amend. If a demurrer had been properly brought and sustained, the People would have been permitted up to ten days in which to amend the information to cure the defect. (§ 1007.) Dismissal of counts constitutes an abuse of discretion particularly by a motions court that first entertains an unauthorized motion to challenge joinder under section 995 (rather than the specifically authorized demurrer under sections 1002 and 1004), and then selects a remedy that prejudices the People with dismissal rather than the statutory remedy that would have been available under the correct procedure, set out in section 1007.

As a result, the dismissal of counts, which punished the victims of crime and the broader community, was an unreasonable and abusive remedy that "falls outside the bounds of reason under the applicable law and the relevant facts." (*Henson, supra,* 28 Cal.App.5th 490, 503, fn.7, quoting *People v. Williams, supra,* 17 Cal.4th 148, 162.) The motions court's determination to dismiss the charges from case 499, rather than

effectively severing the counts from each respective court file seems all together excessive and punitive, even assuming pleading irregularities by the People, in light of section 1007's statutorily authorized leave to amend. This is particularly so given the motions court's disregard of Henson's forfeiture of the issue of joinder by failing to demurrer. (§§ 1004, 1012.) Henson elected not to pursue a demurrer or motion to sever, even though each of these options was suggested by the arraignment court as appropriate.[34]

The motions court both committed errors of law and abused its discretion. As a result, the order of dismissal of counts 1, 2, 3, and 4 should be reversed as determined by the Court of Appeal.

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[34] The arraignment court treated Henson's objection to the People's unified information as a motion "to refuse to accept the filing of the information." That motion was denied. (RT:5-7.) The arraignment court explained the procedural options available to Henson "entering either a plea and filing a motion to sever or demurring and arguing that there is an improper joinder under 954." (RT:6.) No demurrer was filed. Consequently, on December 15, 2016, the arraignment court, having advised Henson of section 1002 and the option to enter a "demurrer or a plea," Henson entered a plea.

CONCLUSION

For the foregoing reasons, the People respectfully request that this Court affirm the Court of Appeal's opinion and remand the matter to the trial court with an order to reinstate the dismissed counts in the information.

Dated: October 3, 2019

Respectfully submitted,

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Fresno County District Attorney

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Attorneys for Plaintiff and Appellant

AABOM Henson.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **Appellant's Answer Brief On The Merits** uses a 13 point Times New Roman font and contains 25,955words.

Dated: October 3, 2019

LISA A. SMITTCAMP
Fresno County District Attorney

DOUGLAS O. TREISMAN
Senior Deputy District Attorney
Attorneys for Plaintiff and Appellant

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Henson**
No.: **S252702/ F075101**

I declare:
I am employed in the Office of the District Attorney, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the District Attorney for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the District Attorney is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On October 3, 2019, I electronically served the attached **APPELLANT'S ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on October 3, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the District Attorney at 3333 East American Avenue, Bldg. 701, Suite F, Fresno, CA 93725, addressed as follows:

Clerk of the Superior Court
Criminal Department, Room 401
1100 Van Ness Avenue
Fresno, CA 93724-0002
(By U.S. Mail)

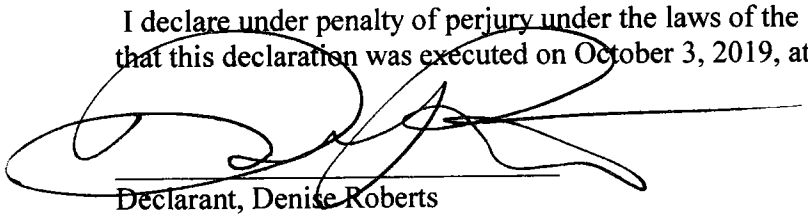
Clerk, Court of Appeal
Fifth Appellate District
(Served by Truefiling)

Office of the Attorney General
(Served by Truefiling)

Barbara A. Smith
Attorney for Defendant and Respondent
(Served by Truefiling)

CCAP
(Served by Truefiling)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 3, 2019, at Fresno, California.



Declarant, Denise Roberts
Paralegal