IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Case No. S252702

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

Appeal from the Superior Court of Fresno County

Honorable Judge W. Kent Hamlin

DEFENDANT AND RESPONDENT'S REPLY BRIEF ON THE MERITS

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

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

ISSUE PRESENTED FOR REVIEW

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

ARGUMENT

I.

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

A. Introduction and overview.

The arguments of the plaintiff and appellant (hereafter "appellant") on review are not presented in the order of arguments presented in Opening Brief on the Merits[1] filed by the defendant and respondent (hereafter "petitioner"). That tends to obscure what is missing in terms of rejoinder to petitioner's arguments. The petitioner's arguments have evolved greatly over time, in ways which appellant does not address at all, especially the "no courts" argument. (DRBOM 49-56.) Therefore an overview of the issue as it stands at this juncture is in order.

The crux of the majority opinion below and appellant's briefing is that Penal Code section 954 simply does not apply to the District Attorney's's invention, the "unitary information," because Penal Code section 954 requires consolidation motions for

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[1]In this brief, the Defendant and Respondent's Opening Brief on the Merits will be referenced as the "DRBOM." The Appellant's Answer Brief on the Merits will be referenced as the "AB."

different pleadings in the same court. Their reasoning is that after the municipal and superior courts were consolidated, and because Penal Code section 739 indicates the first pleading in the superior court is an indictment or information, two complaints can be joined without a court order because the "unitary information" is not filed in the same court as the complaints which are bound over by functionally distinct magistrate courts. (*People v. Henson* (2018) 28 Cal.App.5th 490, 494-495, 504; AB 48-62.)

Also, both the majority and appellant posit something they deem "joinder," which is the District Attorney combining offenses of the same class, at the District Attorney's discretion. (*Henson, supra,* 28 Cal.App.5th 490, 504, 514; AB 66-76.) What the majority opinion did not consider, and what the appellant does not address in its argument, is that a magistrate is not sitting in a court at all. (Argument IE, DRBOM 49-55.) This is so because after the municipal and superior courts were consolidated, thereby eliminating municipal courts, there is literally only one superior court. Superior court judges sometimes exercise functions sitting as a magistrate, but where that occurs, the judges are not sitting in any court at all. (*People v. Scofield* (1967) 249 Cal.App.2d 727, 735; *People v. Superior Court* (1986) 187 Cal.App.3d. 648, 654) The prosecutor does not cite either case or address this point in his briefing. (AB 4-10.)

To reiterate, all courts are now unified, and the municipal courts have been eliminated. Insofar as some functions of a magistrate remain distinct from functions of judges in the superior court, the magistrates are in no court at all. One way or the other,

conjoined complaints (whatever they are called) require judicial permission.

Appellant's arguments, as the dissenting justice below found, ignore the plain meaning of Penal Code section 954, and ignore that Penal Code section 739 defines informations as charges from one bindover. Penal Code sections 739, 749, and 954 were all enacted in Senate Bill 543, with the explicit intent to have all criminal procedures applied to all courts including municipal courts. As petitioner stated in previous briefing not considered by appellant, Penal Code section 954 was last amended in 1951, via Senate Bill 543 (Stats. 1951, ch. 1674.) This was a comprehensive overhaul of the procedural provisions of the Penal Code, in part to clarify terminology for municipal and superior courts, so that the provisions applied clearly to all "courts," with "courts" used in the ordinary sense. The Legislative Analysis stated that:

> The declared purpose of this bill [was] to make all the procedural provisions of the Penal Code applicable to all proceedings in all courts, so far as it is possible and practicable.

(Report of Senate Interim Judiciary Committee, p. 25, transmitted June 19, 1951; Legis. Counsel, Rep. on Sen. Bill No. 543 (1951 Reg. Sess); DRBOM 32-33.)

Appellant misinterprets this language as meaning that functions of various judicial officers remain the same, and takes the dissenting Justice's analysis as an endorsement of its view of this issue. (See especially AB 38-39.) But appellant ignores that the legislation spoke of actual courts, not judicial functions of magistrates versus superior

court judges. (*Henson, supra,* 28 Cal.App.5th 490, 525.) In other words, the cited language made it clear that the addition of the "same court" language in Penal Code section 954 was a reference to concrete courts, actual courts in existence when Penal Code section 954 was amended. The legislation had nothing to do with functions of magistrates versus judges in actual courts. Thus, while appellant purports to consider the legislative history of the relevant Penal Code sections, the appellant does not address the actual import of the legislative history of Senate Bill 543, as extensively discussed by Justice Smith's dissent, and referenced by petitioner's briefing. (DRBOM 21, 23, 31-34, 55.)

Furthermore, the appellant's argument and the majority opinion below parse Penal Code section 954 as allowing "joinder" of offenses in the same class, as a matter of prosecutorial discretion, citing, *inter alia, People v. Alvarez* (1996) 14 Cal.4th 155. (*Henson, supra,* 28 Cal.App.5th 490, 504; AB 63-71.) But the decision in *Alvarez* is not about establishing any kind of joinder outside the ambit of Penal Code section 954. Instead, it merely allows a prosecutor to amend accusatory pleadings, subject to the judge's findings of law and fact, with the judge ruling even as to whether offenses are of the same class. (DRBOM 40-41; *People v. Alvarez, supra,* 14 Cal.4th 155.) And, as discussed in Defendant and Respondent's Opening Brief on the Merits, the District Attorney never sought to amend any pleading in petitioner's case. (DRBOM 41.)

No authority cited in the majority opinion or in the appellant's briefing recognizes

"joinder" as a prosecutorial right, independent of consolidation. As Justice Smith stated in his dissent below, "joinder" is a matter of consolidation, and consolidation is governed by Penal Code section 954, read as a whole. (*Henson, supra,* 28 Cal.App.5th 490, 527-528.) Furthermore, that joinder/consolidation is preferred says nothing of whether it may occur outside the provisions set forth in the 1915 legislation, which for the first time allowed prosecutors to seek consolidation of similar offenses, or offenses connected in their commission, subject to reviewable judicial determinations.

It is notable that neither "unitary informations" nor "joinder" of the sort the majority opinion and appellant's argument posit are reviewable at all. That is contrary to the whole point of Penal Code section 954, which was a drastic departure from prior law which did not permit any kind of joinder or consolidation, with or without judicial permission.

Nor does the appellant's argument or the majority opinion below give more than a superficial consideration of the import of allowing a prosecutor to simply call conjoined complaints an information, which is simply not how an information has ever been defined, per Penal Code section 739.

B. Principles of statutory construction.

The Court of Appeal and parties to the appeal do not fundamentally disagree on the basic principles of statutory construction; the disagreement is with respect to the application of those principles to the issue on review. As to that, the majority opinion

below finds a latent ambiguity in the law, as does appellant. But the appellant mostly seems to cite the majority opinion on that aspect of the matter, and neither the majority opinion (*Henson, supra,* 28 Cal.App.5th 490, 506) nor the appellant's argument (AB 29, 38-43, 56) address the severely circumscribed contexts in which a latent ambiguity arises, none of which are present here.

Both the majority opinion and the appellant strain to fit the plainly worded statutes on the Procrustean bed of latent ambiguity. The majority relies upon the fact that "same court" becomes surplusage after court consolidation. But avoidance of surplusage is a secondary consideration, not controlling where as here the statutes could not be plainer. (*People v. Valencia* (2017) 3 Cal.5th 347, 382.) In reality, latent ambiguity is mainly applicable in the very distinguishable context, in which amendment of the same statute gives rise to a latent ambiguity, so that the plain language of the statute gives rise to absurd consequences; and/or when giving effect to the plain English meaning of the statute frustrates the evident purpose of the law. (DRBOM 25-30.) Short of that, there is no justification for resort to legislative history or other extrinsic sources. (*Bonnell v. Medical Board, supra,* at p. 1261; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919.)

The entire legislative history of Penal Code section 954 depicts a revolution in pleading, for the first time allowing prosecutors the right to seek judicial permission for consolidation. (*People v. Tideman* (1967) 57 Cal.2d 574; DRBOM 31-32, 38, 44, 50.)

No published case has ever suggested courts have had any difficulty applying Penal Code section 954 to require court permission for consolidation, whatever label the prosecutor attaches to conjoined complaints. As discussed in previous briefing, even when considering legislative history (which is not even called for in this context) there is absolutely no indication the Legislature ever intended Penal Code section 954 not to apply to any document labeled an "information." (DRBOM 31-44.) Giving effect to the plain meaning of Penal Code section 954 does not produce absurd results, thus neither the majority opinion below nor the appellant could specify how requiring consolidation to be ordered by a judge produces an absurd result.

As the Court of Appeal and both parties agree, the sole purpose of statutory construction is to determine the Legislature's intent, in order to effectuate the purpose of the law. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) Penal Code section 954 was designed to allow prosecutors the unprecedented discretion to seek judicial permission for consolidation. If there were ambiguity, it could only be interpreted to justify consolidation at the prosecutor's discretion, if it is reasonably certain the Legislature intended something other than which is expressed in the clear terms of a statute. (*Bakersfield etc. Co. v. McAlpine etc. Co.* (1938) 26 Cal.App.2d 444, 448-449.) A court may not speculate that the Legislature meant something different than what they plainly said. (*Bakersfield etc. Co. v. McAlpine etc. Co., supra,* 26 Cal.App.2d at pp. 448-449.) And as Justice Smith emphasizes in his

dissent, the majority opinion relies impermissibly upon a speculative negative implication from the Legislature not amending Penal Code section 954 after courts were consolidated, which the majority sees as implying there was an exception for the "unitary information." (*Henson, supra,* 28 Cal.App.5th 490, 524.)

The appellant's and majority opinion's claim here is most succinctly refuted by Justice Smith's conclusion, "If it ain't broke, don't fix it." (*Henson, supra,* 28 Cal.App.5th 490, 534.) That is to say that when the Legislature amended a plethora of statutes, at a time when no court had ever expressed any problem with application of Penal Code section 954 in any published opinion, the Legislature simply and sensibly declined to close an imaginary loophole, which had never posed any problem for judges applying the law. As Judge Hamlin concluded, the law straightforwardly requires court permission to consolidate separately bound over complaints. If a loophole ever existed, municipal and superior court consolidation closed it long ago.

It is also notable that the ambiguity the majority opinion and the appellant discern in the law after court consolidation was by their lights present all along, in that a "unitary information" never required consolidation. (*Henson, supra,* 28 Cal.App.5th 490, 505.) Both the majority opinion and the appellant's argument claim a right of "joinder" distinct from consolidation. As discussed in petitioners previous briefing, and below, there is no such thing as joinder, even for offenses of the same class. Even that limited aspect of consolidation (or timely amendment) is a question of law for judicial determination, per

the majority opinion's and prosecutor's own authorities, especially *People v. Alvarez*, *supra,* 14 Cal.4th 155.

Courts can avoid a literal construction of a law if it produces absurd consequences (*Bonnell v. Medical Board, supra,* at p. 1263), or if "such a construction would frustrate the manifest purpose of the enactment as a whole." (*Arias v. Superior Court* (2009) 46 Cal,4th 969, 979.) But since complaints are rarely consolidated (see *Henson, supra,* 28 Cal.App.5th 490, at 521), saying "unitary informations" are outside Penal Code section 954 eviscerates the statute and frustrates its most basic application, the consolidation or "joinder" of complaints the prosecutor chose to pursue separately.

The analysis of the appellant and the majority opinion impermissibly seizes upon a few words (the "same court" language) to infer an ambiguity. That violates the most basic canons of statutory construction, requiring consideration of how a particular phrase features in the statutory scheme as a whole. A court may not seize upon a few words, isolated from the context and purpose of the statute, to defeat the purpose of a statute." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at 1386–1387.) From 1915 onward, Penal Code section 954 was created to afford prosecutors a new but always circumscribed ability to seek consolidation of charges, by asking a judge for permission to combine separate prosecutions. Nothing ever suggested that the legislature contemplated the prosecutor proceeding without judicial permission. If there are two reasonable interpretations of a statute, "the one that leads to the more reasonable result

will be followed." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) After court consolidation, it is by far the most reasonable interpretation of Penal Code section 954 that the legislature saw no reason to amend the same courts language, because the statute worked as intended.

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

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

The appellant and the majority opinion below assert that court consolidation did

not alter the functional distinctions between old municipal courts/magistrate courts and superior court judges, so those survive court consolidation and render "same court" language surplusage. This implies that the legislature effectively meant to amend Penal Code section 954 by negative implication. (*Henson, supra,* 28 Cal.App.5th 490, 505, AB 38, 66.) On that basis, appellant argues that the unitary information combining two complaints was allowed, as the first pleading filed in the superior court. (AB 62-68.)

Appellant argues that SB 543's application "to all courts at all stages of proceeding" supports his view that the functional difference between a magistrate and superior court judge mean that the two separate complaints, followed by one unitary information, were filed in two totally separate courts. (AB 40, fn 20.)

But the only Penal Code section governing consolidation is Penal Code section 954, last amended in 1951, via Senate Bill 543 (Stats. 1951, ch. 1674.)[2] This was a comprehensive overhaul of the procedural provisions of the Penal Code, in part to clarify terminology for municipal and superior courts, so that the provisions applied clearly to courts and to all "courts," with "courts" used in the ordinary sense. The Legislative Analysis stated that:

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

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

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

Neither the majority opinion nor the appellant's argument directly or indirectly consider how this cuts the legs out from under their assumption that the amendment somehow created an ambiguity for courts to interpret. In his dissenting opinion, Justice Smith quoted this language of legislative intent for the amendment (*Henson, supra,* 28 Cal.App.5th 490, 517) and petitioner quoted it, and requested judicial notice of materials from the Governor's Chaptered Bill file. (DRBOM 21, 23, 31-34, 55.) So, after multiple opportunities to address the import of this most telling statement of what the legislature meant in amending Penal Code section 954 (and related statutes including Pen. Code secs. 739 and 949) the majority and District Attorney have demonstrably no answer to the demolition of their premise of latent ambiguity, via continued distinctions of various court functions after court consolidation.

Neither the majority opinion nor the District Attorney consider how the stated purpose of Senate Bill 543 rules out the notion that the legislature impliedly excepted the "unitary information" from the consolidation requirements plainly set forth in Penal Code section 954. Neither considers that the legislature said it was amending to add "same court" language to ensure that procedures such as consolidation by judicial permission applied to municipal courts and to all courts. (DRBOM 31-44.)

The entire premise of the *Henson* holding is negated by the statement of legislative purpose to apply procedures to all existing courts, with courts being explicitly described

as actual courts then in existence. Neither the majority opinion below nor the appellant's argument consider how plain this made it that the consolidation law remained fundamentally un-altered since 1915. In light of the statement of legislative purpose, the 1951 amendment was unambiguous. Moreover, it is clear the legislature did not amend the "same court" language after court unification in 1998, because there was no reason to do so. Thus, the 1951 amendment is not reasonably interpreted to mean they impliedly "amended" Penal Code section 954 to eliminate the need for judicial permission for consolidation.

In terms of the principles of statutory construction set forth in previous briefing (DRBOM 25-30), it is plainly more reasonable to suppose the legislature saw the requirements as so clear as to require no explicit adaptation of the century-old law of consolidation. It is not reasonable or tenable to discern a legislative intent to negatively imply that prosecutors could now willy-nilly squash complaints together, so long as they coined some term, and found ways to persuade reluctant court clerks to pass on the obvious problem of filing an "information" with no information number.

Given the appellant's misinterpreting the legislature's declared statement of purpose - to apply procedures to all courts - and its failure to address the "no court" problem, there is no utility to repeating discussions of cases addressing functional distinctions between magistrate courts and superior courts, such as *Lempert v. Superior Court* (2003) 112 Cal.App.4th 1161. (DRBOM 49-56.)

Appellant has also not countered petitioner's response to the appellant's and the majority opinion's claim that there is something called "joinder," that gives the prosecutor discretion to "join" charges of the same class, purportedly derived from the first phrase of Penal Code section 954. Appellant somehow sees this as the evident purpose of the original enactment of Penal Code section 954, discussed in the *Tideman case*. (*People v. Tideman* (1967) 57 Cal.2d 574.) (AB 42.)

Appellant attempts to salvage the reliance on the *Alvarez* case, which involved an amendment of pleadings obtained by the prosecutor, and was then reviewed as judicial findings of law (i.e., whether offenses were of the same class), and findings of fact (i.e, were the offense connected in their commission (DRBOM 40-41) by inserting a discussion of the prosecutor's right to seek amendment of an accusatory pleading. (AB 63, 71.) However, that does not save *Alvarez* as authority for prosecutorial discretion for "joinder" without a consolidation motion in compliance with Penal Code section 954.

First, this prosecutor never obtained an amendment of either of the complaints; he word-processed them together and called it an information. Second, *Alvarez* does not address the issue of whether a prosecutor may join separately filed complaints without judicial permission and review. It is patently obvious that the *Alvarez* case was literally a judicial review of judicial decisions on whether the offenses were of the same class (reviewed by this Court de novo), and whether the offenses were connected in their commission (to be reviewed deferentially).

In petitioner's's case, there was no amendment, and no judicial determination of either the issues of fact or law. All aspects of Penal Code section 954 consolidation rulings are explicitly matters for judicial determination. The Penal Code does not contain the term "unitary information," nor does it use the word "joinder" as something the prosecution can effect on its own initiative. The fact that courts may not prohibit joinder (Cal. Const,. Article I, § 30), and that joinder is favored, does not make consolidation a matter of unilateral prosecutorial choice. The defense must still be afforded the due process inherent in a judicial determination of whether separate proceedings may be combined. Judicial economy never trumps federal constitutional due process requirements. (*Williams v. Superior Court* (1984) 33 Cal.3d 441, 451-452.) There is no "joinder" procedural statute, nor any law indicating separately instituted prosecutions may be joined without judicial permission, via a "unitary information."

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

As discussed above, appellant circumnavigates this argument by arguing that there was no consolidation. Appellant instead repeatedly characterizes the filing of a so-called "unitary information", after having filed separate complaints initially, as a "joinder," something distinct from consolidation. He argues that petitioner has "conflated joinder

and consolidation" (AB 74) and insists that the statutory framework established by Penal Code sections 949, 954, and 739 authorizes "joinder." (AB 56-68.)

This disregards a large amount of petitioner's arguments. As discussed above (Argument IC, *ante*), petitioner does not conflate joiner and consolidation. Rather, petitioner argues that the appellant uses the term "joinder," which Penal Code section 954 does not recognize, in order to avoid calling the complaints "consolidated" which is, by longstanding definition, a court order to combine proceedings. (Black's Law Dict. (4th ed.1951) p. 382, vol. 1; DRBOM 45-49.)

Despite the pains appellant takes to distinguish "joinder" from "consolidation," various parties to this case, including the prosecutor, have characterized the complaints as "consolidated" at times. For instance, after the pleading was initially rejected for filing, the judicial assistant who filed the pleading wrote "CONSOLIDATED" on the complaints he had aggregated and labeled an "INFORMATION." (1CT 128.) The prosecutor said he was not seeking consolidation (2RT 107), but did not object to the judicial assistant labeling the pleading as such.

Judge Penner's judicial assistant incorrectly claimed that Judge Penner ordered the cases consolidated. The prosecutor likewise claimed at various points that Judge Penner had explicitly ordered consolidation and denied severance, citing what is now 1RT 1-11. But now, since the majority and dissenting opinions below agree the record shows no such order (nor does the transcript of that proceeding), appellant seems to have forsaken

the claim that the case was ordered consolidated, while still at times claiming Judge Penner designated a "lead case." (AB 14, 81.) That did not occur either. Judge Penner specified he was arraigning the defendant "on *case* ending 119 and 499 that *are* filed together in one information." (1RT 8 [emphasis added].) And still, on the notice of appeal, the prosecutor captioned this "CONSOLIDATED COURT NO. F16903119, F16901499". (1CT 251.)

The labeling of the complaints as "consolidated" is a tacit recognition that the aggregation of the counts charged in the separate complaints was a consolidation effected without prior court permission. Not having a proper court-ordered consolidation means the cases remain in two separate files, with separate case numbers listed in the online docket of this court and the Court of Appeal. (See http://appellatecases.courtinfo.ca.gov.)

The majority opinion below held that the prosecutor may combine two complaints in a "unitary information," which is not "consolidation." Therefore, the focus of the majority opinion and the appellant's argument on whether there were two accusatory pleadings in the "same court" misdirects attention away from a more fundamental problem with excepting the "unitary information" from the ambit of Penal Code section 954 - i.e., that the "unitary information" is a fiction and the prosecution's pleading was actually two complaints, not an information. The "unitary information" fiction is belied by the various references listed above, to the complaints as having been "consolidated."

Consolidation is a court function, but here it was effected by a fiction, a

sublimation of two distinct complaints into one information. This purportedly meant there was no "consolidation," governed by Penal Code section 954. The prosecutor's "unitary information" was (and still is) two complaints consolidated without court permission, in violation of the plain language of Penal Code section 954.

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

Appellant's answer brief discusses at length appellant's reasoning behind its argument that a magistrate and superior court judge are not operating in the "same court," functionally speaking. However, appellant's argument overlooks the fact that a magistrate is sitting in no particular court. (DRBOM 49-56.)

The limits of a magistrate's function were outlined in an 1897 decision of this Court:

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

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

In 1986, the Third District Court of Appeal noted that when a judge acts as a

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

This is important, as the majority opinion below and the argument of the appellant rests upon the differences in functions of courts sitting as trial court judges, versus sitting as magistrates. This, the majority opinion finds and the appellant argues, removes the "unitary information" from the ambit of Penal Code section 954, because the unitary information is not in the "same court," functionally speaking. (*Henson, supra,* 28 Cal.App.5th 490, 510.) But aside from ignoring the legislature's statement of intent in Senate Bill 543, the judge sitting as a magistrate is in "no court," which even more strongly indicates the Legislature was using "same courts" in its ordinary meaning, whereby two complaints or two informations required judicial consolidation. The majority decision below says "same courts" must refer to stages of proceedings, and

complaints and informations are at different "stages," subject to different rules, so the "first accusatory pleading" in the stage formerly designated as taking place in the superior court, can be two complaints presented in one pleading. (*Henson, supra,* 28 Cal.App.5th 490.)

But the unification of courts required no analysis of court functions or stages of proceedings, and the superior court is now one court. The "same court" language simply means that two informations or two complaints cannot be consolidated without judicial permission. If court unification has an effect, it would militate in favor of requiring judicial consolidation for all sorts of accusatory pleadings, as they are all now in the "same court." If a loophole in Penal Code section 954 ever existed, it was closed in 1998 with court unification, after which all pleadings are "in the same court."

The majority interpretation of Penal Code section 954 is contrary to all primary and secondary canons of statutory construction, creating the absurd result that prosecutors can avoid seeking consolidation by saying they are not doing so, on the specious grounds that courts and magistrates have different functions. Magistrates are in "no court," and appellant offers no basis to conclude otherwise.

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

Appellant's Answer Brief is largely silent on the due process issues presented in

the Defendant and Respondent's Brief on the Merits. Appellant remarks in passing that their chosen statutory interpretation preserves due process but otherwise makes no response to the arguments set forth in the DRBOM. (AB 69, 72.) The process of combining complaints into one information without the court's leave deprives defendants of due process of law. As petitioner stated in previous briefing, Penal Code section 954 provides each defendant with the benefit of judicial oversight, balancing fairness and due process against judicial economy. While joinder is preferred, to save the state money, "[J]oinder laws must never be used to deny a criminal defendant's fundamental right to due process and a fair trial." (*Williams v. Superior Court, supra,* 33 Cal.3d at pp. 451-452 [superseded by statute on another point of cross-admissibility].) That balancing underlies the crux of decisions on consolidation or severance (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938), and California Constitution, art. I, sec. 30 does not abrogate the principles set forth in *Williams*. (*Ibid.*)

Due process is violated by allowing prosecutors to omit notice by filing a document which the prosecutor and the majority opinion say a court clerk has no authority not to accept. The information in this case did not include a proof of service, and the fact that the document may have been placed in the files for each of the separate complaints was patently unavailing, in terms of bringing various defense counsel up to speed before appearances on the information. Only one of petitioner's attorneys on one of the cases appeared initially and it took weeks for all counsel to be rounded up and

brought to court to address the non-standard pleading. (DRBOM 13-15.) Attorneys do not customarily peruse the court file before a routine appearance, and counsel on the 499 case said, unsurprisingly, that she was ambushed by learning of charges imported from another separate proceeding with entirely separate counsel. The conjoining of the separate cases confused matters, and forced other counsel to declare a conflict. (DRBOM 15, citing 1RT 4-7.)

Appellant has no answer to the obvious problem that a prosecutor seeking consolidation is in an unequal position with a defendant challenging denial of a motion to sever. (*Calderon v. Superior Court, supra,* 87 Cal.App.4th, at p. 938.) And a motion to consolidate generates a reviewable order on the direct appeal of a judgment, whereas the filing of a "unitary information" generates no order at all.

An improper joinder of counts can violate the constitutional right to a fair trial. (*United States v. Lane* (1986) 474 U.S. 438, 446.) Consolidation is only appropriate if it serves the "interests of justice" and is ordered "for good cause shown." (Pen. Code, § 954; *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 135; *People v. Marquez* (1992) 1 Cal.4th 553, 572.) The prosecutor in petitioner's case did not provide a good cause showing for combining the complaints, nor did prosecutor address any of the applicable considerations for consolidation to any judicial officer, when as noted above, even if offenses are of the same class, consolidation is a matter for judicial determination. (*People v. Alvarez, supra,* 14 Cal.4th 155.)

That is not to mention that the prosecutor does not address previous briefing on why consolidation is for judicial determination, given all the potential adverse effects on due process. (DRBOM 56-61.) These include whether the prosecution was piling on too many overly similar charges, the problem of giving rise to inconsistent defenses, forcing one attorney on one case to declare a conflict; or bolstering a weak case with a strong case. Yet those are all fundamental considerations integral to due process when a judge is deciding whether to allow consolidation of complaints the prosecutor chose to file separately and which have bound over in separate proceedings. (*Drew v. United States* (D.C. Cir. 1964) 331 F.2d 85, 94; *People v. Davis* (1995) 10 Cal.4th 463, 508; *People v. Smallwood* (1986) 42 Cal.3d 415, 432; *Cross v. United States* (1964) 335 F.2d 987, 989; *People v. Torres* (1964) 61 Cal.2d 264, 266.)

Consolidation decisions must consider the particularized facts and circumstances of each individual case. (*People v. Gomez* (1994) 24 Cal.App.4th 22, 27; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.) There is not the slightest indication the prosecutor did this here. In terms of due process, there is a night-and-day difference between the prosecutor's fait accompli of conjoined complaints, versus a reasoned and impartial judicial determination of the myriad considerations inherent in a consolidation decision. Nothing suggests that here the prosecutor had good cause to consolidate on his own initiative. It saved minutes word-processing the complaints into an information, but was a monkey-wrench thrown into the works of the court docketing and case management

systems, which have established procedures for joining cases, including physically merging the case files, as the dissenting justice below observed. (*Henson, supra,* 28 Cal.App.5th 490, 532-533.)

The majority decision below contravenes due process in ways neither the majority opinion nor the appellant's argument have addressed.

G. Remedy, demurrers, and ineffective assistance of counsel.

Appellant halfheartedly addresses this in section I of their argument, where they recycle their previous argument that petitioner's failure to demurrer under Penal Code section 1004 constitutes a forfeiture of right to challenge joinder pursuant to Penal Code section 1012. (AB: 30-37) They devote a single paragraph at the very end of the argument to the issue raised in the DRBOM regarding the possible ineffective assistance of petitioner's trial counsel for failure to demur. (AB 37.) It is true that if the "unitary information" was proper, then petitioner's trial counsel was not ineffective for failing to seek to remedy an improper consolidation. But it cannot be gainsaid that, if a failure to demur caused valid due process and procedural objections to be forfeited, then counsel erred reversibly in seeking a correct result via the wrong procedural avenue. (DRBOM 61-62.)

This is a unique case and the judge had the power to resolve any problem by fashioning a remedy, as the majority opinion below recognizes. The rubric under which

he did so is irrelevant.

Appellant raises the demurrer issue first in his answer brief and seems to consider it of primary importance, yet also acknowledges that it is largely tangential to the issue on review. (AB 30-31.) If Judge Hamlin's ruling was correct (even if his remedy was not) then the result should be affirmed, and this Court should devise an appropriate remedy. If his ruling was incorrect and the prosecutor's pleading was proper, then whether the defense could or should have demurred is irrelevant. If this Court finds the prosecutor over-stepped his charging discretion, but the Penal Code section 995 dismissal was not the proper remedy, then this Court, in its wisdom, should determine the correct remedy for the error.

H. The trial court's ruling was not an abuse of discretion.

Appellant argues that Judge Hamlin's ruling was an abuse of discretion, because it ignored the charges in case 499, and did not require petitioner to file a demurrer which appellant contends was the proper vehicle with which to challenge their combined pleading. The majority opinion below also concluded Judge Hamlin misapplied Penal Code section 995 and abused his discretion. (AB 77-79.) In actuality, Judge Hamlin was never afforded the opportunity to exercise his discretion, as he himself pointed out.

Judge Hamlin was either correct that the prosecutor could not effect self-help in consolidation, or he was wrong and the prosecutor could do so. The result is a question

of law for this Court's de novo review (*People v. Perez* (2018) 4 Cal.5th 1022, 1067), not a matter for the judge to exercise discretion. Consolidation is discretionary but as Judge Hamlin pointed out to the prosecutor, the judge was never asked to exercise his discretion, or to consider the criteria applicable to an exercise of discretion whether to grant consolidation.

CONCLUSION

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

DATED: November 18, 2019.

Respectfully submitted,

Barbara A. Smith

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Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520, subdivision (c)(1), I certify that this brief contains less than 14,000 words, and specifically 6627 words, based on the word-count feature of my word-processing program.

DATED: November 18, 2019

Respectfully submitted,

Barbara A. Smith

BARBARA A. SMITH
Attorney for Petitioner

ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE AND SERVICE BY MAIL

I, Barbara A. Smith, certify:

I am an active member of the State Bar of California, not a party to this cause. My electronic service address is smith78223@gmail.com. My business address is 8359 Elk Grove Florin Road., Suite #103-305, Sacramento, CA 98529. On November 17, 2019, I served the persons and/or entities listed below by the method indicated. For those "Served Electronically," I transmitted a PDF version of Defendant and Respondent's Reply Brief on the Merits by e-mail to the e-mail service addresses provided below. For those marked "Served by Mail," I deposited in a post office mail slot regularly maintained by the United States Postal Service at Sacramento, California, a copy of the above document in a sealed envelope, with postage fully prepaid, addressed as provided below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 18, 2019, at Sacramento, California.

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Barbara A. Smith, Declarant