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| Benjamin I. Salorio (SBN 221692)Imperial County Public DefenderWayland Chang (SBN 284140)Deputy Public Defender895 BroadwayEl Centro, CA 92243(442) 265-1705(442) 265-1706 faxwaylandchang@co.imperial.ca.usAttorney for DefendantDEFFIRSTNAME DEFLASTNAME |  |
| Superior Court of CaliforniaCounty of IMPERIAL |
| The People of the State of California,Plaintiff;                       v.DEFFIRSTNAME DEFLASTNAME,Defendant.  | Case no.: CASENUMBERFELONY**Opposition to Consolidation and Notice of Motion and Motion to Dismiss Case**Date: DATETime: TIMEDept: DEPT |

TO: The Honorable Judge, and the Imperial County District Attorney:

Please take notice that on the above date, time, and location, defendant DEFFIRSTNAME DEFLASTNAME, intends to oppose joinder of cases CASENUMBERMISD and CASENUMBERFELONY. DEFFIRSTNAME DEFLASTNAME will also move for dismissal of CASENUMBERFELONY for vindictive prosecution for exercising fundamental rights under *Twiggs v. Superior Court* (1983) 34 Cal.3d 360.

This motion will be made on the following grounds:

Joinder is improper because CASENUMBERMISD and CASENUMBERFELONY state the same offense. It would be improper for a single complaint to have both counts. One or the other must be dismissed.

Dismissal of CASENUMBERFELONY is proper because Mr. DefLastName has asserted his right to a speedy trial and to discovery in CASENUMBERMISD, and filing CASENUMBERFELONY is a deliberate attempt to circumvent those rights and punish him for asserting those rights.

This motion will be based on this notice, the attached memorandum of points and authorities, and on such oral and documentary evidence that may be presented at the hearing of this motion.

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| Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Respectfully Submitted, Benjamin Salorio  Imperial County Public DefenderBy: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Wayland Chang Deputy Public Defender  Attorneys for Defendant DEFFIRSTNAME DEFLASTNAME |

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| Superior Court of CaliforniaCounty of IMPERIAL |
| The People of the State of California,Plaintiff;                       v.DEFFIRSTNAME DEFLASTNAME,Defendant.  | Case no.: CASENUMBERFELONYD.A. no.: DANUMBER**Memorandum of Points and Authorities in Support of Motion** |

CASENUMBERMISD is a misdemeanor domestic violence case. On the day of trial, instead of proceeding, the prosecution filed CASENUMBERFELONY, claiming they had not done their due diligence in investigating the case, and that further investigation warranted a felony also being charged. However, CASENUMBERFELONY is not based on additional facts directly relating to the charged offense. They did not dismiss CASENUMBERMISD and now seek joinder of the two cases. Allowing prosecution of CASENUMBERFELONY would jeopardize the rights the defendant has asserted in CASENUMBERMISD.

# STATEMENT OF THE CASE AND FACTS

DefFirstName DefLastName is accused of causing corporal injury on DATE, in violation of Penal Code section 273.5, subdivision (a). A misdemeanor complaint charging him in case number CASENUMBERMISD with violation of that section was filed on DATE. On DATE, he was arraigned and he pleaded not guilty. He requested dates within the statutory period. Readiness conference was set for DATE, and jury trial set was set for DATE. On DATE, the prosecution announced they were not ready and asked to continue until DATE.

On DATE, the prosecution filed a felony complaint in CASENUMBERFELONY, accusing DefFirstName DefLastName of causing corporal injury on DATE, in violation of Penal Code section 273.5, subdivision (a), the identical offense as in CASENUMBERMISD. Under protest, defense counsel arraigned DATE and entered a plea of not guilty. Mr. DefLastName is currently scheduled for pretrial on August 30th, and preliminary examination on September 5th.

The prosecution did not dismiss CASENUMBERMISD before filing CASENUMBERFELONY. DefFirstName DefLastName currently faces charges for the same offense in CASENUMBERMISD and CASENUMBERFELONY.

# POINTS AND AUTHORITIES

## Joinder is not proper in this case

The prosecution have given notice that they seek joinder of cases CASENUMBERMISD and CASENUMBERFELONY. On the face of the accusatory document, grounds for joinder must be present. (*People v. Degnen* (1925) 70 Cal.App.3d 567, 572.) Penal Code section 954 explains the only situations in which joinder is proper:

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.

Count One of CASENUMBERMISD alleges:

On or about the 4th day of June 2017, said defendant(s), DEFFIRSTNAME DEFLASTNAME; did commit a MISDEMEANOR, namely: INJURING A SPOUSE, COHABITANT, FIANCE, BOYFRIEND, GIRLFRIEND OR CHILD’S PARENT a violation of Section 273.5(a) of the Penal Code of the State of California in that said: did willfully and unlawfully inflict corporal injury resulting in a traumatic condition upon CWNAME, who was someone with whom the defendant had a dating relationship.

Count One of CASENUMBERFELONY alleges:

On or about the 4th day of June 2017, said defendant(s), DEFFIRSTNAME DEFLASTNAME; did commit a FELONY, namely: INJURING A SPOUSE, COHABITANT, FIANCE, BOYFRIEND, GIRLFRIEND OR CHILD’S PARENT a violation of Section 273.5(a) of the Penal Code of the State of California in that said: did willfully and unlawfully inflict corporal injury resulting in a traumatic condition upon CWNAME, who was someone with whom the defendant had a dating relationship.

Mr. DefLastName is charged in CASENUMBERMISD and in CASENUMBERFELONY with the same offense. The only difference is the classification as a misdemeanor or as a felony.

CASENUMBERMISD and CASENUMBERFELONY are not two different offenses connected together in their commission. Offenses are connected together in their commission if there a common element of substantial importance. (*People v. Romero and Self* (2015) 62 Cal.4th 1, 29.) CASENUMBERMISD and CASENUMBERFELONY together are charging the same offense. There is not one piece of evidence that would only go towards one case and not towards the other.

CASENUMBERMISD and CASENUMBERFELONY are not two different statements of the same offense. An example of two different statements of the same offense would be attempted murder and the malicious use of explosives. (*People v. Koehn* (1929) 207 Cal. 605, 608.) CASENUMBERMISD and CASENUMBERFELONY both use identical statutes and identical language to describe the same offense. They are not different statements of the same offense.

CASENUMBERMISD and CASENUMBERFELONY are not two different offenses of the same class of crime. Offenses are of the same class if they possess common characteristics or attributes. (*People v. Kemp* (1961) 55 Cal.2d 458, 476.) CASENUMBERMISD and CASENUMBERFELONY together are charging the same offense. Every characteristic is in common, not merely some.

If the prosecution’s argument is to be accepted, then a single felony complaint can charge the same offense as both a felony and a misdemeanor, despite the constitutional guarantee against double jeopardy and Penal Code section 654. A person cannot be convicted of two crimes if one is a necessarily lesser included offense of the other. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) *Ortega* gives an example of an assault and a battery, because “assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim. (*Ibid*.) This rule against multiple convictions is an exception to the general rule of Penal Code 654 where one can be convicted multiple times, but punished only once for a single act. Clearly, a person cannot be convicted twice of only a single offense, the only difference being one is a felony and one is a misdemeanor.

Penal Code section 954 does not distinguish between misdemeanor and felonies for purposes of joinder. (*Aydelott v. Superior Court* (1970) 7 Cal.App.3d 718, 722.)

Charging the identical statute with identical language and identical dates has been criticized as confusing and creating uncertainty. (*People v. Cole* (1952) 113 Cal.App.2d 253, 255.) If the prosecution is indeed contending that CASENUMBERMISD and CASENUMBERFELONY are separate incidents, then the prosecution must make an election as which charge is for which incident. (*People v. Muniz* (1970) 4 Cal.App.3d 562, 568, fn.8; *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 8.)

A felony complaint is substantively and procedurally different from a misdemeanor complaint. “A felony complaint, unlike a misdemeanor complaint, does not confer trial jurisdiction. It invokes only the authority of a magistrate, not that of a trial court. . . . The misdemeanor complaint, by contrast, is not a preliminary accusation. It is a formal charge, an accusatory pleading giving the court jurisdiction to proceed to trial.” (*People v. Martinez* (2000) 22 Cal.4th 750, 763–764.)

Joinder of CASENUMBERMISD and CASENUMBERFELONY simply is not proper. The prosecution’s briefing has already alluded to what would be the proper procedure to charging a felony in referring to *Burris v. Superior Court* (2005) 34 Cal.4th 1012, if the prosecution wishes to prosecute CASENUMBERFELONY—the prosecution must first dismiss CASENUMBERMISD, but at the cost of incurring a dismissal for purposes of Penal Code section 1387.

## Filing CASENUMBERFELONY is vindictive prosecution so it should be dismissed.

Filing CASENUMBERFELONY is vindictive prosecution for Mr. DefLastName asserting his rights to a speedy trial or to discovery in CASENUMBERMISD. Vindictive prosecution is a violation of due process under both the United States Constitution and the California Constitution.

Evidence of the vindictive prosecution is the timing of events. Mr. DefLastName had a right to a speedy trial within 45 days of arraignment under Penal Code section 1382, subdivision (a), paragraph (3), which would have occurred on September 5, 2017. CASENUMBERFELONY was filed on the day of trial for CASENUMBERMISD. The evening before trial, the prosecution announced intention to introduce evidence under Evidence Code section 1109, even though that statute requires disclosure to the defense at least 30 days before trial, in accords with Penal Code section 1054.7. Even if the evidence was disclosed that evening, which it was not, 30 days from then would have been September 22, 2017, well, after the 45th day of September 5, 2017.

The doctrine of vindictive prosecution precludes the prosecution from responding to the criminal defendant’s exercise of his rights by intentionally fashioning a charge that more severely punishes the defendant. The United States Supreme Court said:

To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." (Citation.) In a series of cases beginning with *North Carolina v. Pearce* and culminating in *Bordenkircher v. Hayes*, the Court has recognized this basic–and itself uncontroversial–principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.
(*United States v. Goodwin* (1982) 457 U.S. 368, 372.)

*Bordernkircher v. Hayes* (1978) 434 U.S. 357, 363, flatly calls out penalizing a person’s reliance on his legal rights “patently unconstitutional.”

Such conduct is also a violation of the California Constitution’s guarantee of due process. (*In re Bower* (1985) 38 Cal.3d 865, 876.) The California Supreme Court has similarly condemned such prosecutorial misconduct in the landmark case of *Twiggs v. Superior Court* (1983) 34 Cal.3d 360.

The facts of *Twigg* are apropos. The defendant had moved for disclosure of a police informant. The trial court denied the defendant’s motion. A jury trial resulted in a mistrial. The defendant again moved for disclosure of the police informant. Before retrial, the prosecutor added five allegations of prior prison terms. “The record suggests, however, that the prosecutor took no steps to investigate the prior convictions, and that she only discovered that the prior convictions could be charged after a different prosecutor showed her defendant's "prison package" at a joint pretrial conference involving this and another case.” (*Twiggs*, *supra*, 34 Cal.3d at 365.) The Court in *Twiggs* noted “a strong presumption of vindictiveness is warranted by the timing of the amended information. *(Id*. at p. 374.) The prosecution has “a heavy burden of rebutting the presumption with an explanation that adequately eliminates actual vindictiveness.” (*Id*. at p. 375.) “The prosecution should be required to show that facts would legitimately influence the charging process were not available when it exercised its discretion to bring the original charges.” (*Id*. at p. 374.) In Mr. DefLastName’s case, the justification for the felony charge is prior uncharged conduct that occurred in Mexico. Obviously, such conduct could not be the basis of an additional charge in a court in Imperial County in California. Nor is that conduct direct evidence of the instantly charged conduct. Yet on that basis, the prosecution now says that an offense for which there has been no additional police reports or statements is now worthy of a four year exposure instead of 364 days.

# CONCLUSION

Joinder is improper. There cannot be both a misdemeanor count and a felony count alleging the exact same offense. One or the other must be dismissed. Due process requires that the felony case be dismissed.

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| Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Respectfully Submitted, Benjamin Salorio  Imperial County Public DefenderBy: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Wayland Chang Deputy Public Defender Attorneys for Defendant DEFFIRSTNAME DEFLASTNAME |

# PROOF OF SERVICE

**Case name: People v. DEFFIRSTNAME DEFLASTNAME**

**Case number: CASENUMBERFELONY**

I am a citizen of the United States and a resident of the County of San Diego in the State of California. I am over 18 years old and am not a party to this action. My office address is:

Imperial County Public Defender

895 Broadway

El Centro, CA 92243

I served the following documents on Monday, August 28, 2017:

**Opposition to Consolidation and Notice of Motion and Motion to Dismiss Case**

I served the documents on the following people:

Imperial County District Attorney

County Administration Building

940 West Main St, Suite 102

El Centro, CA 92243

The documents were served by the following means:

[   ] by personal service. I personally delivered a true and correct copy to the above address. I left a copy with the receptionist, which was date-stamped. I also received back from the receptionist a date-stamped copy.

[ ✓ ] by personal service of a true and correct copy to an Imperial County Deputy District Attorney, whom I believe is the assigned prosecutor, in the El Centro Courthouse at 939 W. Main St, El Centro, CA 92443.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in El Centro, California on August 28, 2017.

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|  | By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Wayland Chang Attorney for Defendant DEFFIRSTNAME DEFLASTNAME |