ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S170550

MOISES GALINDO, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, CITY OF LOS ANGELES POLICE DEPARTMENT et al., Real Parties in Interest.	S-_____ 2nd Dist. No. B208923) (Trial Ct. No. BA337159)

SUPREME COURT
FILED
FEB 13 2009
Frederick K. Ohlrich Clerk
DEPUTY

PETITION FOR REVIEW

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Albert J. Menaster,
Susanne Blossom,
Mark Harvis,
(State Bar No. 110960)
Deputy Public Defenders

Appellate Branch
320 West Temple Street, Suite 590
Los Angeles, California 90012
Telephone No.: (213) 974-3066
FAX No.: (213) 626-3519
Email: Mharvis@pubdef.lacounty.gov

Attorneys for Petitioner

RECEIVED
FEB 13 2009
CLERK SUPREME COURT

S170550

TOPICAL INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

STATE CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOISES GALINDO, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, CITY OF LOS ANGELES POLICE DEPARTMENT et al., Real Parties in Interest.	)	S-_____ 2nd Dist. No. B208923) (Trial Ct. No. BA337159)

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner Moises Galindo respectfully petitions this court for review of the published opinion issued by the Second District Court of Appeal, Division Eight, on January 7, 2009, in the matter of *Moises Galindo v. Superior Court,* B208923. A copy of the published opinion of the Court of Appeal is attached as Appendix A.[1/]

[1/] The Court of Appeal originally summarily denied petitioner's petition for writ of mandate. On September 24, 2008, this court granted petitioner's Petition for Review and transferred the matter back to the Court of Appeal with instructions to issue an order to show cause. (S166508.)

The Court of Appeal issued an opinion that completely prohibits *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) discovery for the purpose of preliminary hearings. The Court of Appeal wrongly creates by judicial fiat an exception to *Pitchess* discovery not contemplated by the Legislature. In addition, the Court of Appeal failed to give appropriate import to the fact that preliminary hearings remain a critical stage of criminal proceedings even after Proposition 115. The Court of Appeal's opinion minimized the value of preliminary hearings (which serve the critical function of weeding out groundless charges) and improperly found that speed is more important than justice.

Review is necessary to settle an important question of law and to security uniformity of decision. (Rules of Court Rule 8.500, (b)(1).) Except for this opinion, there has been no case ever issued which prohibited *Pitchess* discovery for preliminary hearing. Although the Court of Appeal focused narrowly upon *Pitchess* discovery, determination of the propriety of the lower court's action necessarily involves consideration of whether or not preliminary hearings in California remain a "critical stage of the proceeding" and also the extent to which a felony defendant might be denied effective assistance of counsel if he or she is prohibited from obtaining necessary *Pitchess* discovery. These are all critical issues for persons who have been charged by complaint with felonies.

ISSUES ON REVIEW

The Court of Appeal ruled that *Pitchess* discovery is not available in support of a preliminary examination. That ruling presents this issue:

Is *Pitchess* discovery, which is an "other express statutory provision," available for the purpose of the preliminary examination?

Subsumed within this issue is whether or not a preliminary hearing in California is or remains a "critical stage of the proceeding."

An additional issue is whether or not a felony defendant is denied the effective assistance of counsel when he or she is unable to obtain *Pitchess* discovery in a case where that discovery could potentially result in dismissal or reduction at the preliminary examination.

IMPORTANCE OF ISSUE

A preliminary hearing has long been held to be a "critical stage of the proceeding" where an accused is entitled to the assistance of effective, prepared counsel. Although post-Proposition 115 preliminary examinations are not as robust as they once were, they still serve the critical function of weeding out groundless charges. Defendants have the statutory right to confront and cross examine adverse witnesses, may put on an affirmative defense, and call witnesses. Magistrates remain tasked with judging credibility and not only deciding whether the charges have been established but whether the crimes charged should remain as felonies or be reduced to misdemeanors. Defendants have the ability to make a variety of motions at the preliminary

examination, such as a motion for a line-up or a motion seeking to suppress evidence.

In order to render effective assistance of counsel, defense counsel must become prepared for the preliminary examination. In many cases, defense counsel may need to do no more than speak with the defendant and read the police reports. In other situations, such as this case, counsel may have to interview witnesses and seek discovery in order to impeach the credibility of the prosecution's witnesses or to present an affirmative defense.

Because this case involves a charge of forcibly resisting police officers in violation of Penal Code section 69, an element of which is that the officer's were acting lawfully, counsel sought *Pitchess* discovery about the arresting officers. This discovery, which may not only be used to impeach an officer but which may also show that an officer has a habit, character, or custom to use excessive force and lie about it in police reports, is unquestionably material. Testimony of *Pitchess* witnesses could be sufficient to cause the magistrate to doubt police veracity and either dismiss the charges or determine that they should proceed as misdemeanors. The evidence could convince the magistrate that the officers did not act lawfully, therefore negating an element of the Penal Code section 69 charge. In addition, should petitioner make a motion to suppress evidence, *Pitchess* witnesses would assist the magistrate when he or she determines whether or not evidence should be suppressed.

Pitchess discovery *is* material to a preliminary hearing and could prove

to be critical to the determination of whether or not petitioner is held to answer. The Court of Appeal, however, ruled that *Pitchess* discovery is not allowed *at all* for the purpose of preliminary hearing, no matter what showing petitioner might make and no matter how useful it might turn out to be. The Court of Appeal elevated speed over justice and did not give preliminary hearings or the magistrates that hear them their proper import and respect.

Pitchess discovery is independently viable as an "other express statutory provision. . . . " (Pen. Code § 1054, subd. (e), Evid. Code §§ 1043-1047.) The Court of Appeal has created an exception for *Pitchess* discovery (not available for preliminary hearing) that is not found in the statutory scheme. The Court of Appeal's opinion precludes magistrates from hearing relevant evidence about the police officers who arrested and are accusing petitioner of resisting. That evidence could make the difference between a holding order or not and perhaps a misdemeanor disposition.

Preliminary hearings are sometimes utilized to preserve testimony on the chance a witness might become unavailable. As may readily be seen, *Pitchess* discovery would be very useful to the effective cross-examination of police officer witnesses. Eliminating *Pitchess* discovery is undoubtedly the first step toward eliminating preliminary examinations as a method of preserving testimony because the ability to cross-examine is effectively undermined.

These are critical issues and petitioner respectfully requests this court grant review.

STATEMENT OF FACTS AND PROCEDURE

Petitioner is charged with one count of resisting a public officer in violation of Penal Code section 69, and one count of criminal threats in violation of Penal Code section 422. A not guilty plea was entered and the case was set for preliminary hearing.

Prior to preliminary hearing petitioner filed his motion seeking *Pitchess* discovery about Los Angeles Police Officers Flores, Smith, and Vargas. The police report written by Officers Flores and Smith detailed the arrest.

On February 29, 2008, at about 7:40 p.m. uniformed Officers Smith and Flores were walking in the Ramona Gardens housing project when they saw petitioner allegedly walking while drinking a beer. Petitioner looked at the officers and walked away from them, holding his front waistband area consistent with attempting to conceal a firearm. The officers ordered petitioner to stop, however he ran and went into 1332 Crusado Lane, Unit 102. Officers Vasquez and Gomez arrived to assist and Sergeant Vargas was called to the scene.

The officers were approached by Edward, Yolanda, and Gloria Galindo who yelled at the officers, took pictures, and filmed them. They yelled for help and tried to incite a riot. All three were eventually arrested. Elvis Galindo also walked toward the officers and was arrested because he was allegedly in violation of an anti-gang injunction.

An elderly man in the residence gave the officers permission to enter and search. Petitioner was arrested inside without incident. While being walked to the police car petitioner told the officers that they did not know who they were "fucking with" and that he would "have all you pigs killed, I am from Hazard." (LAPD Arrest Report attached as Exhibit D to the Petition for Writ of Mandate, p. 3.)

Petitioner and Elvis Galindo were placed in the back of a police car. Both continued to threaten to kill the officers and petitioner head butted Officer Flores in the head. A struggle ensued and Sgt. Vargas stopped the car. When he opened the door Elvis Galindo violently swayed back and forth and fell out of the police car. He was subdued and both arrestees were taken to the police station.

Petitioner's *Pitchess* motion requested discovery of misconduct related to excessive force, honesty, illegal search and seizure, and fabrication of evidence and charges. Petitioner also requested disclosure of all *Brady* (*Brady v. Maryland* (1963) 373 U.S. 83) material.

Petitioner's counsel filed a declaration which established good cause for discovery. Counsel detailed the allegations contained in the police report and then set forth the defense allegations.

> "I am informed and believe the facts listed in the police report are false, and that the police used excessive force against my client, Moises Galindo (Defendant 1 – hereafter 'Moises'). The residence the police saw my client enter is Moises' elderly parent's home. Moises was not carrying a beer as alleged in the police report. Moises did not have any interaction with the

officers whatsoever before entering his parent's home. Moises saw the officers interacting with some other Ramona Gardens residents as he entered his parents' home, but the officers never addressed Moises or ordered him to stop. Moises was dressed in blue jeans, a plaid button up shirt, and white sneakers.

"Mr. Galindo's elderly father and mother were at home at the time the police attempted to gain entry. Moises' elderly father did not give the officers permission to enter his home, as alleged in the police report. The officers entered the home without permission.

"When Moises was brought out of the house, his brother Elvis Galindo [Defendant 2, hereinafter 'Elvis'] has already been arrested and placed in the back of a patrol car. Moises did not make the threats alleged in the police report while being escorted to the car. He made no threats at any point during his encounter with these officers, either during the arrest or during his transport.

"Moises was placed in the back of the same patrol car with Elvis, and Officer Flores sat in the back seat with them. I am informed and believe that Officer Flores rode in the back of the patrol car in order to physically assault Moises and Elvis, which he did. Moises did not attack Officer Flores in the patrol car, or anywhere else. Moreover, I am informed and believe that Officer Flores and Sergeant Vasquez further physically assaulted Moises and Elvis on the sidewalk before transferring them to a different patrol car." (Motion for Pretrial *Pitchess* Discovery attached to Petition for Writ of Mandate as Exhibit C, pp. 8-9.)

The Los Angeles Police Department filed an opposition in which they argued that petitioner's declaration contained only an unsubstantiated denial of guilt. LAPD argued that petitioner failed to explain why the officers acted the way they did and why others acted the way they did. LAPD concluded that petitioner's factual scenario was not plausible and was insufficient.

On May 16, 2008, the *Pitchess* motion was called for hearing in Department 31, the Honorable Hank M. Goldberg, Judge presiding as magistrate. LAPD argued that petitioner had failed to set forth a plausible alternative scenario. They argued that there was no dispute that petitioner was a gang member and that the reason the police decided to stop petitioner was because he was violating a gang injunction. LAPD argued that the only reason there was violence in the police car was because petitioner and his brother had been violent, and that the facts supported the LAPD version.

Petitioner explained that LAPD had misstated the reason petitioner was stopped. Petitioner read from the declaration of counsel and explained how the defense version contradicted the police version. The magistrate commented that petitioner's allegations went to probable cause and counsel responded that it also went to the credibility of the officers. Counsel argued the discovery was material to the preliminary hearing because an element of the offense is that the officers were acting lawfully and the discovery would help show the officers did not act in a lawful manner. The LAPD responded that it believed the disparity between the police version and petitioner's version went to the substance of the case, not to a *Pitchess* motion.

The magistrate denied the motion, stating that "I think when you make a motion, pre-prelim under *Pitchess*, the defense has to logically show they are going to discover something or might discover something that would change the outcome of the preliminary hearing. Not the trial. This is a probable cause

hearing." (Reporter's Transcript of *Pitchess* Motion May 16, 2008, attached to the Petition for Writ of Mandate as Exhibit F, p. 7: 6-12.)

Petitioner explained that his *Pitchess* motion did go to an element of the offense that must be proven at preliminary hearing and also showed that the police officers lied in their report. The magistrate stated that although petitioner had denied some elements of the crime, he had not denied *all* the elements, and had not alleged sufficient, relevant facts. The magistrate also stated that petitioner just entered a blanket denial of the offense which was tantamount to a not guilty plea. The magistrate demanded that petitioner provide more information about what happened. The magistrate also stated that to obtain *Pitchess* discovery at the preliminary hearing a defendant has to show there is a reasonable chance the discovery would change the outcome of the hearing. The motion for *Pitchess* discovery was denied.

On June 17, 2008, petitioner filed a Petition for Writ of Mandate in the Central District Criminal Master Calendar Court of respondent Los Angeles Superior Court. Petitioner argued that the declaration of counsel was sufficient pursuant to *Warrick v. Superior Court* (2005) 35 Cal.4th 1011. Petitioner also argued that *Pitchess* discovery was an independent, statutorily-authorized discovery mechanism not governed or limited by Penal Code section 1054, et seq. Petitioner further argued that *Pitchess* discovery was properly discoverable for the purposes of preliminary hearing and, in any event, was third party discovery not subject to Penal Code section 1054, et seq.

On June 23, 2008, the Los Angeles Superior Court, the Honorable Steven R. Van Sicklen, judge presiding, denied the petition for writ of mandate. The court stated its ruling in its minutes.

> "Petitioner Moises Galindo ('Petitioner') filed a petition for writ of mandate seeking an order directing the magistrate to grant his petition for a *Pitchess* motion.
>
> "[A]ll criminal discovery is now governed exclusively by – and barred except as provided by section 1054 et seq. (*Hines v. Superior Court,* (1993) 20 Cal.App.4th 1818, 1821 citing to *Sandeffer v. Superior Court, supra,* 18 Cal.App.4th at p. 677 citing *In re Littlefield* (1993) 5 Cal.4th 122, 129.) Penal Code section 1054 does not provide for discovery at the preliminary hearing stage. The absence of provisions allowing discovery at the preliminary hearing stage is reinforced by Penal Code section 866 which specifically states 'the purpose of the hearing is to determine probable cause, not to afford the parties an opportunity for further discovery.' Instead, Penal Code section 1054.7 requires disclosures to 'be made at least 30 days prior to the trial.' [Emphasis Added] This time limit is applicable to the defense as well as to the People. (See *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201.) Here, the magistrate denied petitioner's *Pitchess* motion prior to his preliminary examination. Petitioner is not entitled to issuance of a writ in this matter because discovery is governed exclusively by Penal Code section 1054 et seq. and because there is no provision for discovery at or before the preliminary hearing stage under the statute. (Pen. Code §§ 1054, subd. (E), 1054.5, subd. (a). ¶ Petitioner may re-file his *Pitchess* motion before the trial court in the event he is held to answer after his preliminary hearing." (Superior Court's Minute Order for June 23, 2008, attached as Exhibit H to the Petition for Writ of Mandate; some internal quotations omitted for readability.)

On July 1, 2008, petitioner filed a Petition for Writ of Mandate in the Second District Court of Appeal which was assigned to Division 8. On August 7, 2008, the Court of Appeal issued an order staying the preliminary hearing and requested the City of Los Angeles Police Department and the Los Angeles County District Attorney file a brief addressing the question: Does a criminal defendant have a right to obtain *Pitchess* discovery before the preliminary hearing?

The LAPD and the District Attorney filed letter briefs in which they argued that there is no right to any discovery prior to preliminary hearing because of Proposition 115. The District Attorney also argued that *Pitchess* discovery was always intended to be trial-only.

On August 28, 2008, the Court of Appeal denied the petition for writ of mandate and vacated the stay of preliminary hearing. Petitioner filed a Petition for Review with this court. On September 24, 2008, this court granted petitioner's Petition for Review and transferred the matter back to the Court of Appeal with instructions to issue an order to show cause. (S166508.) The matter was briefed and oral argument held. On January 7, 2009, the Court of Appeal issued its opinion denying the petition for writ of mandate. The Court of Appeal held that *Pitchess* discovery is not available in support of preliminary hearings.

ARGUMENT

INTRODUCTION

Pitchess discovery is available for any proceeding as long as it is material "to the subject matter involved in the pending litigation." (Evid. Code § 1043, subd. (b)(3); *People v. Nguyen* (2007) 151 Cal.App.4th 1473, 1475.) The Court of Appeal, however, created its own exception and disallowed *Pitchess* discovery at the preliminary hearing on the ground there is no "express statutory authority entitling a defendant to *Pitchess* discovery for a preliminary examination." (Slip Opn., p. 5.)

The Court of Appeal was wrong. Its analysis is flawed. The Court of Appeal improperly created an exception to *Pitchess* discovery that is not found in the statutory scheme. Its determination that *Pitchess* discovery could never be material to a preliminary hearing gives short shrift to the purpose of preliminary hearings and the duty of the magistrate to determine the facts and judge credibility. *Pitchess* discovery is allowed for the purpose of preliminary hearing.

I

PITCHESS DISCOVERY IS AN "OTHER EXPRESS STATUTORY PROVISION" AND THE LEGISLATURE DID NOT CREATE AN EXCEPTION DISALLOWING DISCOVERY FOR PRELIMINARY EXAMINATION

Penal Code section 1054, subdivision (e), provides, "no discovery shall occur in criminal cases except as provided by this chapter, *other express*

statutory provisions, or as mandated by the Constitution of the United States." (Emphasis added.) *Pitchess* discovery, which is codified in Evidence Code sections 1043 - 1047, is plainly independently statutorily authorized. In *Albritton v Superior Court* (1990) 225 Cal.App.3d 961 the Court of Appeal held:

> "Evidence Code section 1043 is an 'other express statutory provision,' . . . . By its express terms, Proposition 115 does not abrogate or repeal the express statutory discovery authorized by Evidence Code sections 1043-1045. The trial court's ruling to the contrary is in error. Petitioner is entitled to have his *Pitchess* discovery motion heard on the merits." (*Albritton* at p. 962.)

In addition, *Pitchess* is third party discovery, which is another exception to Proposition 115's discovery limitations.

> "[Penal Code section]1054 et seq. applies to disclosure of materials only between the prosecutor and the defendant and/or his or her counsel. These provisions do not regulate discovery from third parties. (*People v. Superior Court (Broderick)* [1991] 231 Cal.App.3d [584] at p. 594.)" (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315.)

> "The *Pitchess* procedure is, as noted, in essence a special instance of third party discovery." *(Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045; see also *Garcia v. Superior Court* (2007) 42 Cal.4th 63; *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737.)

The procedural limitations found in Penal Code section 1054 discovery do not apply to third party discovery or to other statutory discovery procedures such as *Pitchess*.

> "Thus, a defendant maintains his or her right to discovery of material exculpatory evidence under the due process clause . . .and continues to have the right to use statutory discovery procedures not expressly repealed by Proposition 115 . . . . When a discovery request asks for disclosure of materials specifically covered by other statutes, the procedural mechanisms provided in the other statutes prevail. (*Albritton v. Superior Court* (1990) 225 Cal. App. 3d 961.)" (*People v. Superior Court (Barrett), supra,* 80 Cal.App.4th 1305, 1312-1313; see also *People v. Jackson* (2005)129 Cal.App.4th 129, 172.)

Pitchess discovery is thus exclusively governed by Evidence Code section 1043 et seq. The only timing provisions relevant to *Pitchess* discovery are found in Code of Civil Procedure section 1005 and they deal only with *when* the motion must be filed in order to be considered timely. Evidence Code section 1043 et seq. does not preclude discovery of police personnel records pre-preliminary hearing.

The Court of Appeal, despite recognizing that *Pitchess* discovery is statutory, created an exception for preliminary hearings which was *not* created by the Legislature, is not contained in the Legislative history, and is contrary to recognized principles of statutory construction.

The Court of Appeal wrote:

> "Evidence Code section 1043 et seq. does not expressly state whether *Pitchess* discovery may take place for a preliminary hearing. The statute does not mention preliminary hearings, nor does it identify particular courts or types of proceedings to which the right to *Pitchess* discovery is limited. Instead, the statute directs that a defendant's written motion must identify 'the proceeding in which discovery or disclosure is sought' (Evid. Code, § 1043, subd. (B)(1)) and the defendant

> must file the motion with 'the appropriate court or administrative body' (Evid. Code, § 1043, subd. (A)). In the absence of any express statutory authority entitling a defendant to *Pitchess* discovery for a preliminary hearing, we conclude the sounder approach is to find no such right exists." (Slip Opn., p. 5.)

The Court of Appeal supported this conclusion by citing *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, at p. 536, for the proposition that "the right of an accused to seek discovery in the course of preparing his defense to a criminal prosecution is a judicially created doctrine evolving in the absence of guiding legislation."

The obvious problem with this citation to the *Pitchess* case is that *Pitchess* discovery has long been codified. *Pitchess* discovery, of course, was originally created by this court in the *Pitchess* case – when there was no guiding legislation.

It is clear that when *Pitchess* discovery was codified the Legislature created an entitlement to discovery of police personnel information as long as the moving party is able to show that the discovery being sought is material to the pending litigation. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018–1019.) The Legislature *did not* limit *Pitchess* discovery to specific types of cases or proceedings and this is clearly shown by the statutory language.

Evidence Code section 1043, subdivision (a) requires a written *Pitchess* motion to be filed "with the appropriate court or administrative body. . . . " The statute clearly envisions that *Pitchess* motions will be made in a variety of contexts when subdivision (b)(1) requires that the motion include

"Identification of the proceeding in which discovery or disclosure is sought. . . ." The statute does not limit itself to any particular type of case or controversy but instead subdivision (b)(3) requires the moving party to set forth materiality to the "pending litigation. . . ."

Evidence Code section 1045, subdivision (a), similarly requires that the *Pitchess* material be "relevant to the subject matter involved in the pending litigation." In subdivision (b)(3), the Legislature did not limit discovery to trials but instead required the withholding of the conclusions of the investigating officer "in any criminal proceeding. . . ." In subdivision (c), the Legislature again did not refer to trials, but referred to "the issue in litigation. . . ." Importantly, the Legislature did *not* limit disclosure to trials only. Rather, in subdivision (e) the Legislature limited the use of *Pitchess* discovery to "court proceeding pursuant to applicable law."

Penal Code section 832.7 similarly does not contain any reference to "trials." Rather, subdivision (a) of that statute provides that peace officer personnel records are confidential and "shall not be disclosed in any criminal or civil proceeding" except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

The Court of Appeal took judicial notice of the legislative history, which was submitted by both petitioner and the LAPD. A reading of the documents comprising the available legislative history establishes that the Legislature never considered limiting *Pitchess* discovery to trials at all. The

legislative history repeatedly refers to discovery in "civil or criminal proceedings" without reference to "trials." There is no discussion whatsoever suggesting *Pitchess* discovery should be limited to any particular hearing or motion or trial.

Various courts, including this Court, have concluded that *Pitchess* discovery is available for a wide variety of purposes besides trial including: a motion to suppress evidence (*People v. Brant* (2003) 108 Cal.App.4th 100), motions challenging a confession (*People v. Memro* (1985) 38 Cal.3d 658), post-conviction habeas corpus proceedings (*Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100), post-conviction new trial motions *(People v. Nguyen, supra,* 151 Cal.App.4th 1473), child custody proceedings *(Slayton v. Superior Court* (2006) 146 Cal.App.4th 55), and marital support actions (*City of Los Angeles v. Superior Court (Williamson)* (2003) 111Cal.App.4th 883).

No court, except the Court of Appeal in this case, has ever concluded that the only *Pitchess* discovery which is allowed is that which is expressly authorized by the *Pitchess* statutes. This determination violates fundamental principles of statutory construction which establish that when the Legislature did not include exceptions, courts are prohibited from creating such exceptions.

> "However, if a statute announces a general rule and makes no exception thereto, the court can make none. The court may not insert into a statute qualifying provisions not intended by the legislature. Except as it may be necessary to avoid absurd results, the court is not authorized in the construction of a statute to create exceptions not specifically created by the legislature."

(58 Cal.Jur. 3d, Statutes, § 131, pp. 552-553; *Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal2d 469, 476; *An Independent Home Support Service, Inc. v. Superior Court* (2006) 145 Cal.App.4th 1418, 1436.)

The Court of Appeal created an exception for *Pitchess* discovery where none exists and none is permitted. The Court of Appeal's analysis and conclusions are contrary to the Legislative history and contrary to accepted principles of statutory construction. There is nothing in the statutory scheme which precludes *Pitchess* discovery for a preliminary hearing.

II

A DEFENDANT IS ENTITLED TO *PITCHESS* DISCOVERY FOR A PRELIMINARY HEARING BECAUSE THE EXAMINATION IS A CRITICAL STAGE OF THE PROCEEDINGS

The Court of Appeal set forth a number of reasons why *Pitchess* discovery should not be available for preliminary hearings. The Court of Appeal, however, did not give preliminary hearings the importance they merit. Nor did the Court of Appeal ascribe sufficient importance to the role played by the magistrate, who must determine credibility and decide if a holding order should issue. The Court of Appeal even elevated speed over justice. In all respects, the Court of Appeal erred.

Although it is plain that a post-Proposition 115 preliminary hearing is not what it used to be (see *Whitman v. Superior Court* (1991) 54 Cal.3d 1063), it nonetheless remains a critical stage of criminal proceedings that still serves critically important purposes.

> "The purpose of the preliminary hearing is to determine whether there is probable cause to believe the defendant has committed a felony. (§ 866, subd. (b); *People v. Brice* (1982) 130 CalApp3d 201, 209.) The hearing operates as a judicial check on prosecutorial discretion and is designed to relieve the defendant of the humiliation and expense of a criminal trial on groundless or excessive charges. (*People v. Superior Court (Mendella)* (1983) 33 Cal.3d 754, 759; *People v. Herrera* (2006) 136 Cal.App.4th 1191, 1202.)
>
> "A defendant has several substantial rights at the preliminary hearing. These rights include the right to confront prosecution witnesses and the right to present evidence at the hearing to negate an element of an offense, to impeach prosecution evidence, or to establish an affirmative defense. (§§ 865, 866, subd. (a); *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 875, 880; *Mitchell v. Superior Court* (1958) 50 Cal.2d 827, 829.) If a defendant is deprived of substantial preliminary hearing rights and is not successful in remedying the deprivation by a timely motion to dismiss, the defendant is entitled to a writ of prohibition upon proper request. (*Jennings v. Superior Court, supra*, 66 Cal.2d at pp. 870–871, 880–881.)" (*Quinones v. Superior Court* (2008) 166 Cal.App.4th 1519, 1525.)

Pitchess discovery provides the names and addresses of potential witnesses. A defendant may call witnesses at the preliminary examination to help the magistrate determine whether there exists probable cause to believe the defendant has committed a felony. (Pen. Code § 866.) A *Pitchess* witness will offer testimony that will impeach a testifying police officer, challenge credibility, and establish that the officer has a habit, character, and custom to commit misconduct. (See, for example, *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, *People v. Hustead* (1999) 74 Cal.App.4th 410, 417, *Pitchess v. Superior Court, supra*, 11 Cal.3d 531, 537.) This testimony would

be relevant and admissible at preliminary hearing to undermine the probable cause asserted by the prosecution, to impeach the prosecution's witnesses, and to negate an element of a charged offense. (See, generally, *People v. Eid* (1994) 31 Cal.App.4th 114; Pen. Code § 866, subd. (a).)

The Court of Appeal, rather than focusing upon the critical nature of preliminary hearings, first focused upon the fact the hearing is supposed to be relatively quick. (Slip Opn., p. 6.) The Court of Appeal was referring to the time limits found in Penal Code section 859b rather than the length of time a particular preliminary examination might take. The court's complaint was that *Pitchess* motions take too long given the "severe time constraints" applicable to preliminary examinations. (Slip Opn., p. 6, fn. 1.)

A defendant has a statutory right to a preliminary hearing within 10 *court* days "unless both waive that right or good cause for a continuance is found. . . ." A defendant may personally waive his or her right to preliminary examination within the 10 court days. A complaint must be dismissed if the matter is not heard within 60 days unless the defendant personally waives that time period. (Pen. Code § 859b.) Although there are indeed time limits for preliminary hearings, the statutory scheme envisions that the times may be waived for good cause. They are not inflexible.

The Court of Appeal is correct that a *Pitchess* motion can be somewhat time consuming, with at least 16 court days notice. (Civ. Proc. § 1005.) However, just as the times for preliminary hearing are not immutable, neither are the notice provisions for *Pitchess* motions. Code of Civil Procedure

section 1005 expressly allows for orders shortening time. In addition, if there are items to be produced the magistrate may require the police department to act expeditiously and the defendant to investigate quickly.

Although the Court of Appeal claims that the interplay between the *Pitchess* statutes and notice provisions of Code of Civil Procedure section 1005 suggests that the legislature did not intend to allow *Pitchess* at preliminary examination, this analysis is incorrect. (Slip Opn., p. 6, fn. 2.) Prior to 1989, *Pitchess* motions were not included in Code of Civil Procedure section 1005 and Evidence Code section 1043 required 10 calendar days notice. *Pitchess* was added to Code of Civil Procedure section 1005 in 1989 by Senate Bill 859 which required 15 calendar days notice. It was not until 1999 that Assembly Bill 1132 increased the time frame to 21 calendar days and then to 16 court days in 2004 by Assembly Bill 3078. The legislative history is very clear that at no time did the Legislature ever consider the impact these changes would have on preliminary hearings or even on misdemeanors, for that matter. The Court of Appeal is just wrong when they wrote that the notice provisions somehow show a legislative intent to disallow *Pitchess* discovery for preliminary hearings.

If the Court of Appeal's logic is to be followed, then *Pitchess* discovery also cannot be available in aid of misdemeanor prosecutions, which have short 30 or 45-day time limits. Nor, for that matter, could Proposition 115's discovery provisions apply to misdemeanors because of the short time frames.

The reality, however, is that both *Pitchess* and Proposition 115 discovery are utilized in misdemeanors even with the shortened time frame. As the Court of Appeal wrote in the context of Proposition 115 discovery for misdemeanors:

> "Certainly, the court would have authority . . . to issue an order to shorten time or an ex parte order to deal with any time problems posed by the local court rule. To suggest we must render a statute enacted by the People inapplicable to misdemeanors on the basis of a court rule would force us to establish a new hierarchy of laws, which is something we cannot do." (*Hobbs v. Mun. Court* (1991) 233 Cal.App.3d 670, 696–97, disapproved on other grounds in *People v. Tillis* (1998) 18 Cal.4th 284, 295.)

The Court of Appeal incorrectly put speed over fairness and also over due process – the right of a criminal defendant to have effective, prepared counsel.

> "A myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. [Citation.] There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. [Citations.] (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589 – 590.)

The Court of Appeal properly noted that Penal Code section 866, subdivision (b), prohibits using the preliminary examination for purposes of discovery. But then the court erred when it concluded that discovery "tends to work at cross-purposes with the limited nature of preliminary hearings." (Slip Opn., pp. 6-7.)

Although Proposition 115 was written to specifically bar using the preliminary examination as a discovery tool, it was not written to bar *Pitchess* discovery prior to the preliminary hearing. The analysis conducted by the Court of Appeal appears to be implied repeal – and implied repeal is disfavored. An express ban on pre-preliminary hearing *Pitchess* discovery, if that was what was intended, would have been easy to accomplish. The failure to do so is strong evidence that this was not intended. "[T]he law shuns repeals by implication" (*People v. Hazelton* (1996) 14 Cal.4th 101, 122; additional citations omitted), and courts consistently reject arguments in favor. (See also *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 569.)

The Court of Appeals' statement that discovery is at cross-purposes with the limited purpose of preliminary hearings improperly minimizes what can occur at a preliminary hearing and how these hearings remain a critical stage of the proceedings. At a preliminary hearing:

1) defendants are entitled to the assistance of effective, prepared counsel;

2) the magistrate determines credibility and weighs the evidence;

3) the magistrate determines whether the defendant should be held to answer;

4) the magistrate can dismiss charges;

5) the magistrate can add charges shown by the evidence;

6) the magistrate may dismiss a complaint pursuant to Penal Code section 1385 (*People v. Konow* (2004) 32 Cal.4th 995, 1022.);

7) the magistrate may reduce a "wobbler" to a misdemeanor (Pen. Code § 17, subd. (b)(5); *People v. Konow, supra*, 32 Cal.4th 995, 1022.);

8) the magistrate may strike "strikes;" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508; Pen. Code § 1385, subd. (a).)

9) the magistrate must rule on sentencing enhancements (*Salazar v. Superior Court* (2000) 83 Cal.App.4th 840);

10) the magistrate may strike special circumstances (*Ramos v. Superior Court* (1982) 32 Cal.3d 26.);

11) defendants have a statutory right to call witnesses subject to specified limitations;

12) defendants have the right to put on an affirmative defense;

13) defendants have the right to move to suppress evidence pursuant to Penal Code section 1538.5;

14) defendants may move for a pre-preliminary hearing lineup;

15) defendants may seek discovery of an informant;

16) defendants may seek disclosure of an observation post;

17) defendants have the right to subpoena witnesses;

18) defendants have the statutory right to confront and cross examine witnesses (Pen. Code § 865);

19) defendants may move to have a confession suppressed;

20) witness testimony may be preserved for future use should a witness become unavailable; and

21) a dismissal counts for purposes of the two-dismissal rule. (Pen. Code § 1387, subd. (a); *Lee v. Superior Court* (1983) 142 Cal.App.3d 637.)

The Court of Appeal simply went too far when it minimized preliminary hearings and how very important discovery is to ensure a defendant's right to the assistance of effective, prepared counsel.

> "A criminal defendant has a constitutional right to the assistance of counsel (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15). This right to counsel extends to every critical stage of the proceeding, including the preliminary hearing. (*Coleman v. Alabama* (1970) 399 U.S. 1, 9-10 (lead opn. of Brennan, J.); *id.* at p. 11 (conc. opn. of Black, J.).) The right comprehends more than just the formality of representation by a lawyer; it entitles the defendant to competent and effective legal assistance. *(United States v. Cronic* (1984) 466 U.S. 648, 654-655; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)" (*People v. Cudjo* (1993) 6 Cal.4th 585, 615.)

It must be self-evident that the right to competent and effective legal assistance means the right to *prepared* counsel. Discovery is a means by which counsel investigates and becomes prepared. (*People v. Lyon* (1996) 49 Cal.App.4th 1521, 1526.) The rule is not, and Constitutionally cannot be, that although a criminal defendant has the right to counsel at preliminary hearing, he has no right to *prepared and effective* counsel.

Although the Court of Appeal accused petitioner of arguing that *Pitchess* discovery is a precondition for effective assistance of counsel, that is not the argument petitioner made. (Slip Opn., p. 7.) Petitioner's argument to

the Court of Appeal was in response to the Superior Court's order denying his writ petition wherein the court stated that defense discovery was not allowed *at all* for preliminary hearings. Petitioner was arguing that discovery is essential else the right to effective assistance of counsel becomes meaningless.

In the narrower confine of *Pitchess* discovery at a preliminary hearing, petitioner does not believe that *Pitchess* discovery is *always* a precondition for effective assistance of counsel. In a case such as this one, however, where petitioner is charged with felony resisting arrest and where all the witnesses are police officers, *Pitchess* discovery *is* essential to proper and effective representation.

When the magistrate determines probable cause at the preliminary hearing *in this case*, he or she must determine the credibility of the prosecution's police witnesses.

> "As we have previously noted in describing the burden of proof required at a probable cause hearing, 'the [superior court] may weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses.' ([*People v.*] *Slaughter* [1984] 35 Cal.3d [629] at p. 637.) In performing its role at the probable cause hearing, therefore, the superior court may evaluate the validity of any evidence presented by an expert, as well as judge the credibility of any expert witness who testifies at the hearing. Any credibility determination to be made at the probable cause stage, however, whether in a civil or criminal proceeding, is a

gross and unrefined one." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 257-258.)[2/]

The Court of Appeal wrote that *Pitchess* discovery was "unlikely to rebut probable cause," "unlikely to justify a magistrate's dismissal of a charge for lack of probable cause," and was "unlikely to lead to a different outcome for the preliminary hearing." (Slip Opn., p. 9.) Although the Court of Appeal says this is so, it is not. The Court of Appeal has created a brand new standard for *Pitchess* discovery that is not found in any *Pitchess* case – the moving party must show it is *likely* that the discovery will affect the outcome otherwise discovery is not available. This new standard is not only unsupported by case law, it is directly contrary to the standard for *Pitchess* discovery that has been codified in the statutory language and explained in every *Pitchess* case issued by this and every other court.

Depending upon the circumstances, a *Pitchess* witness may make a powerful and compelling witness. The Court of Appeal minimizes just how important a *Pitchess* witnesses' testimony may be.

In *People v. Hustead, supra,* 74 Cal.App.4th 410, at page 418, the Court of Appeal explained that *Pitchess* discovery may be used to impeach, to cross-examine an adverse witness, to show an officer's motive to lie, to show bias

---

[2/] In *Cooley*, this Court held that the standard of review for a probable cause determination in a Sexual Violent Predator case was the same standard as utilized in preliminary hearings. This Court's explanation of the standard of review was identical to the standard for preliminary hearings as evidenced by citation to *People v. Slaughter, supra,* 35 Cal.3d 629, a case dealing with preliminary hearings.

which would affect an officer's credibility, and to show that an officer has a habit, character, and/or custom to engage in misconduct. In addition, *Pitchess* evidence might show motive, intent, or plan. (*People v. Memro* (1985) 38 Cal.3d 658, 681.)

Petitioner, through *Pitchess* discovery, could present witnesses who might cause the magistrate to disbelieve the testimony of the arresting police officers. The testimony may cause the magistrate to determine that the charges should be dismissed or reduced to misdemeanors. The magistrate may determine that the only charge properly shown by the evidence is the lesser violation of Penal Code section 148.

The Court of Appeal's argument that *Pitchess* witnesses are unlikely to impact the outcome of the hearing would render all defense character witnesses irrelevant. For example, in a rape case the defense may seek to call a witness who would testify that the victim had falsely accused him of rape on a prior occasion. This testimony is relevant and admissible pursuant to Evidence Code section 1103. (*People v. Adams* (1988) 198 Cal.App.3d 10; *People v. Tidwell* (2008) 163 Cal.App.4th 1447.) It is the same type of testimony that would come from a *Pitchess* witness – that on another occasion the police officers falsely accused a defendant of resisting arrest and uttering threats. The Court of Appeal was simply wrong when it ruled that this type of testimony is unlikely to matter at a preliminary hearing. Not only might it matter, it might be critically important.

It may also be that petitioner might seek to challenge the lawfulness of the officer's actions by making a motion to suppress evidence pursuant to Penal Code section 1538.5. *Pitchess* discovery is, of course, proper in aid of a motion to suppress which statutorily may be made at the preliminary hearing. (*People v. Brant* (2003) 108 Cal.App.4th 100.)

The Court of Appeal tried to distinguish *Brant* by arguing that *Brant* did not discuss when the motion was made. (Slip Opn., p. 10.) That, however, was not the point of *Brant* and the Court of Appeal's analysis leads to the absurd consequence that defendants who make a motion to suppress before trial *can* utilize *Pitchess* witnesses but defendants who make the motion at preliminary examination *cannot*. The Court of Appeal is actually suggesting that it is permissible to deprive the magistrate hearing a suppression motion of relevant evidence and testimony which would be admissible if the motion were run pretrial. That result is unreasonable.

It should be obvious that the denial of *Pitchess* discovery for use at a preliminary hearing involving charges of resisting arrest and testimony solely by police officers denies defendants the tools counsel needs to be effective. Without *Pitchess* discovery not only will counsel not be able to properly and effectively cross-examine witnesses, the magistrate will also be denied knowledge critical to the determination of the holding order.

> "In spite of a discovery order which required them to disclose statements of all witnesses, the People failed, prior to defendant's first preliminary examination, to provide defendant with a statement taken from the principal witness against him.

> They also failed to disclose that the witness had been hypnotized. Consequently, defendant was unable to effectively cross-examine the witness during the preliminary examination, or present evidence of the hypnosis to the magistrate. (See, e.g., *Priestley v. Superior Court* [1958] 50 Cal.2d 812 [failure to disclose identity of informant which prevented effective cross-examination required dismissal under section 995]; *Alford v. Superior Court* [1972] 29 Cal.App.3d 724 [denial of cross-examination for purposes of impeachment constitutes denial of substantial right]; see also *Davis v. Alaska* (1974) 415 U.S.[denial of cross-examination about witness' juvenile record, for purposes of impeachment, held to violate Sixth Amendment right of confrontation].) (*People v. Mackey* (1985) 176 Cal.App.3d 177, 185-186.)

Because effective assistance of counsel is a Constitutional mandate, and because the preliminary hearing remains a critical stage of the proceedings, it would be unconstitutional to deny counsel discovery sufficient to allow him or her to effectively challenge the evidence of probable cause presented by the prosecution. *People v. Erwin* (1993) 20 Cal.App.4th 1542 provides an example of how prepared counsel can cross-examine witnesses or present witnesses in order to show the magistrate why the defendant should not be held to answer.

> "Respondent has made no showing why his confrontation rights are not adequately protected by the right to cross-examine Detective Looney, the right to call and examine any hearsay declarants, including Jessica and her mother, for whom he can make a qualifying offer of proof under Penal Code section 866, and the right to argue to the magistrate that Detective Looney's policy of not using available recording devices militates against finding reasonable cause to hold him to answer." (*Id.* at pp. 1552-1553.)

It should be clear that the failure to provide *Pitchess* discovery severely handicaps defense counsel who is unable to properly examine the police witnesses, which in turn deprives the magistrate of information which might result in no holding order or some other favorable disposition.

> "Nondisclosure of evidence impeaching eyewitnesses on material issues is the deprivation of a substantial right under *Jennings*. (*People v. Mackey* [1985] 176 Cal.App.3d [177] at p. 185.) The defense was unquestionably handicapped by the prosecutorial error. The magistrate, having heard the impeachment of the three key witnesses, might well have stricken the gross negligence allegation or granted the defense section 17, subdivision (b)(5) motion." (*Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 273.)

Prior to Proposition 115's adoption, discovery for preliminary hearing was routine and had been since at least 1981 when *Holman v. Superior Court*, 29 Cal.3d 480, was decided. In *Holman*, this Court specifically held that pre-preliminary hearing discovery orders were within the discretion of the court and that a magistrate does not lack jurisdiction to issue discovery orders. Importantly, the reasons this Court allowed pre-preliminary discovery are as important and viable now as they were in 1981.

> "[I]t is the general rule that in the absence of contrary legislation courts have the inherent power to order appropriate pretrial discovery. We believe a similar inherent power exists, and may be exercised, by magistrates ancillary to their statutory power to determine whether there is probable cause to hold the defendant to answer (Pen. Code, §§ 871, 872). The magistrate's statutory role is directed toward making a preliminary assessment of the truth or falsity of the charges filed against the defendant; pretrial discovery may well assist in such a

> determination. (*Holman v. Superior Court*, *supra,* 29 Cal.3d 480, 485.)

Holman also held that a defendant has a "right to present an affirmative defense at a preliminary hearing ... [and that] in order for that right to be meaningful, it must include the opportunity to obtain discovery *prior to the hearing*." (*Holman v. Superior Court*, *supra,* 29 Cal.3d 480, 484; quoting *People v. Hertz* (1980) 103 Cal.App.3d 770, 776, emphasis added in *Holman*.) Defendants retain the right to present an affirmative defense (Pen. Code § 866, subd. (a)) and the need for discovery to do so is just as obvious now as it was then.

> "[T]he purpose of a preliminary hearing is, in part, to assure that a person is not detained for a crime that was never committed . . . . *(Rayyis v. Superior Court* (2005) 133 Cal.App.4th 138, 149.) Preliminary hearings are designed to weed out groundless or unsupported charges of grave offenses and to relieve the accused of the degradation and expense of a criminal trial. (*People v. Superior Court* (*Mendella*) (1983) 33 Cal.3d 754, 759.) Preliminary hearings and section 995 motions operate as a judicial check on the exercise of prosecutorial discretion and help ensure that the defendant [is] not ... charged excessively. (*People v. Superior Court* (*Mendella*), *supra*, at p. 759; accord, *People v. Herrera* (2006) 136 Cal.App.4th 1191, 1202.)" (*People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 835, internal quotations omitted.)

//

//

//

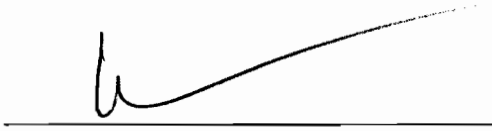
CONCLUSION

For these reasons it is respectfully requested this court grant the Petition for Review.

Respectfully submitted,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Albert J. Menaster,
Susanne Blossom,
Mark Harvis,
Deputy Public Defenders

By 

MARK HARVIS
Deputy Public Defender
(State Bar No. 110960)

Attorneys for Petitioner

APPENDIX "A"

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MOISES GALINDO, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CITY OF LOS ANGELES POLICE DEPARTMENT et al., Real Parties in Interest.	B208923 (Los Angeles County Super. Ct. No. BA337159)

ORIGINAL PROCEEDINGS; petition for writ of mandate. Superior Court of Los Angeles County. Steven R. Van Sicklen, Judge. Writ denied.

Office of the Public Defender, Michael P. Judge, Albert J. Menaster, Susanne Blossom and Mark Harvis, Deputy Public Defenders, for Petitioner.

Office of the District Attorney, Steve Cooley, District Attorney, John K. Spillane, Chief Deputy District Attorney, Sharon J. Matsumoto and Gilbert Wright, Deputy District Attorneys, for Respondent.

Rockard Delgadillo, City Attorney, Carlos De La Guerra, Managing Assistant City Attorney, Kjehl T. Johansen and Jess J. Gonzalez, Deputy City Attorneys, for Real Parties in Interest, City of Los Angeles.

Petitioner Moises Galindo seeks a writ of mandate compelling respondent Los Angeles Superior Court to order *Pitchess* discovery from real parties in interest, the City of Los Angeles and the Los Angeles Police Department. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evid. Code, § 1043 et seq.) Petitioner intends to use the discovery during his preliminary hearing on a charge of resisting an executive officer and making criminal threats. (Pen. Code, §§ 69, 422.) Because we conclude a defendant may not seek *Pitchess* discovery for use in a preliminary hearing, we deny the writ.

FACTS AND PROCEEDINGS

According to an arrest report filed by Los Angeles police officers S. Flores and J. Smith, the officers were on foot patrol in the early evening of February 29, 2008, when they saw petitioner Moises Galindo drinking from a can of beer while in public. When petitioner noticed the officers, he walked away from them, holding his front waistband as if he were trying to conceal a handgun. The officers ordered him to stop, but he fled into a nearby apartment. The officers surrounded the apartment and requested that their supervising sergeant come to the scene. As the officers waited for their sergeant, residents of nearby apartments began yelling at the officers while filming them and taking their pictures with flash photography. When the residents refused to disperse, the officers arrested several of them, including petitioner's brother. In the meantime according to the arrest report, Sergeant Vargas received permission from the resident of the apartment into which appellant had fled for officers to enter the apartment. Shortly thereafter, the officers arrested petitioner without further resistance. While police escorted petitioner to their patrol car, he told them he was "from Hazard" and would have them killed.

The People filed an amended felony complaint against petitioner. It alleged petitioner had by means of threat or violence resisted Executive Officer Flores in the performance of his duties. (Pen. Code, § 69.) It also alleged he had made criminal threats against him. (Pen. Code, § 422.) Petitioner pleaded not guilty.

Before the preliminary hearing, petitioner filed a *Pitchess* motion under Evidence Code section 1043 *et. seq.* seeking discovery of the personnel files of Sergeant Vargas and officers Smith and Flores. (See *Pitchess v. Superior Court, supra,* 11 Cal.3d 531.) In support of the motion, petitioner denied having a can of beer when the officers saw him. He claimed no interaction occurred between him and the officers, who were engaged with neighborhood residents when he entered his parents' apartment. The officers did not order him to stop, and they did not ask for permission to enter his parents' apartment to arrest him. He further claimed that his brother, who was one of the bystanders the police arrested, was in the back seat of the patrol car when officers placed petitioner there. During the drive to the police station for booking, Officer Flores sat in the back seat with petitioner and his brother and, petitioner alleged, physically assaulted them while en route.

Through his *Pitchess* motion, petitioner sought evidence of misconduct from the personnel files of the officers who arrested him. The motion requested discovery of evidence, if any, of accusations against the officers alleging aggressive behavior, violence, excessive force, fabrication of charges, illegal search and seizure, false arrest, perjury, and false police reports. Petitioner reasoned such discovery might help his defense counsel cross-examine and impeach the testimony of the officers in the then-upcoming preliminary hearing. The magistrate presiding over the preliminary hearing denied the motion without prejudice.

Petitioner filed a petition for writ of mandate in the superior court directing the magistrate to grant petitioner's *Pitchess* motion. The superior court denied the petition. It reasoned that the Criminal Discovery Act (Pen. Code, § 1054), which governs criminal discovery, did not permit discovery at a preliminary hearing. Petitioner then filed a petition before this court for a writ of mandate. Arguing that the preliminary hearing was a critical stage in the proceedings against him, he asserted his right to effective assistance of counsel rested on counsel's adequate investigation and preparation, which entitled him to *Pitchess* discovery. We stayed the preliminary hearing. In addition, we directed the

district attorney and the real party in interest, City of Los Angeles, to file letter briefs answering the question "Does a criminal defendant have a right to obtain *Pitchess* discovery before the preliminary hearing?" After reviewing the petition and the district attorney's and city's responses, we summarily denied the petition.

Petitioner filed a petition for review in the California Supreme Court. He argued his right to effective assistance of counsel rested on counsel's adequate preparation, entitling him to *Pitchess* discovery. He further argued the superior court erred in relying on Penal Code section 1054 to deny his *Pitchess* motion. That statute exclusively governs discovery between the parties, which are the defendant and the prosecutor representing the People of California. (Pen. Code, § 1054, subd. (e).) Penal Code section 1054 expressly states, however, that it applies to criminal discovery only in the absence of "other express statutory provisions." (*Ibid.*; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315.) Evidence Code section 1043, which governs third-party *Pitchess* discovery from law enforcement agencies not parties to the criminal prosecution, is one such provision. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045-1046; *Albritton v. Superior Court* (1990) 225 Cal.App.3d 961, 963; 5 Witkin & Epstein, Cal. Criminal Law (3d 2000) Trial, § 32, p. 77.)

The Supreme Court granted his petition for review. Transferring the case back to us, the Supreme Court directed us to vacate our order denying petitioner's petition for writ of mandate, and told us to order respondent Los Angeles Superior Court to show cause why the superior court should not grant petitioner the relief he sought. We complied with the Supreme Court's directions and ordered the superior court to show cause why it should not grant petitioner's motion for *Pitchess* discovery. Before oral argument on the order to show cause, real party in interest City of Los Angeles filed a return to the petition, and petitioner filed a reply. The parties then appeared before us for oral argument.

DISCUSSION

In 1974, the California Supreme Court ruled in *Pitchess v. Superior Court, supra,* 11 Cal.3d 531 that a criminal defendant may discover evidence of citizen complaints alleging misconduct by law enforcement officers if that misconduct assists in the defense. In 1978, the California Legislature codified procedures governing *Pitchess* discovery at Evidence Code sections 1043 to 1045. (See also Pen. Code, §§ 832.7, 832.8 [defining officer's personnel records subject to *Pitchess* discovery].) We review denial of a *Pitchess* discovery for abuse of discretion. (*People v. Lewis* (2006) 39 Cal.4th 970, 992; *Pitchess v. Superior Court*, *supra*, at p. 536.) Because we conclude a defendant is not entitled to seek *Pitchess* discovery for use in a preliminary hearing, the preliminary hearing magistrate did not abuse his discretion in denying petitioner's *Pitchess* motion.

Evidence Code section 1043 et seq. does not expressly state whether *Pitchess* discovery may take place for a preliminary hearing. The statute does not mention preliminary hearings, nor does it identify particular courts or types of proceedings to which the right to *Pitchess* discovery is limited. Instead, the statute directs that a defendant's written motion must identify "the proceeding in which discovery or disclosure is sought" (Evid. Code, § 1043, subd. (b)(1)) and the defendant must file the motion with "the appropriate court or administrative body." (Evid. Code, § 1043, subd. (a).) In the absence of any express statutory authority entitling a defendant to *Pitchess* discovery for a preliminary hearing, we conclude the sounder approach is to find no such right exists. (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 536 ["the right of an accused to seek discovery in the course of preparing his defense to a criminal prosecution is a judicially created doctrine evolving in the absence of guiding legislation."].)

First, a preliminary hearing is supposed to be relatively quick.[1] A preliminary hearing does not aspire to match a trial's probing and more stately search for the truth. A *Pitchess* motion, which unfolds in several steps, including a hearing on the motion, review by the law enforcement agency's custodian of records of the officer's personnel file, and an in camera inspection by the court, potentially interrupts a preliminary hearing's streamlined proceedings.[2] Moreover, the extra time spent may be for naught because the officer's personnel file might not hold any information relevant to the accused's defense.[3]

Second, preliminary hearings are not designed for pursuing discovery or as forums for discovery motions. Penal Code section 866 circumscribes a defendant's right to call witnesses during a preliminary hearing. The statute limits the scope of the witness's testimony to helping (1) establish an affirmative defense, (2) negate an element of the charged offense, or (3) impeach a prosecution witness or hearsay declarant. (Pen. Code,

---

1 A preliminary hearing is under severe time constraints inapplicable to trial. (Pen. Code, § 859b [right to hearing within 10 days of arraignment; complaint dismissed if no hearing within 60 days].)

2 *Pitchess* motions are governed by the notice requirements of Code of Civil Procedure section 1005 [21 days notice if served by mail in California]. (See Evid. Code, § 1043, subd. (a).) Although a defendant in a criminal case may waive the statutory 10 day time for preliminary hearing, the interplay among the statutes regulating the calling of witnesses and discovery (Penal Code), *Pitchess* (Evidence Code) and notice (Code of Civil Procedure) suggest the legislature did not intend to create a statutory right to *Pitchess* discovery before the preliminary hearing.

3 Additional time may be required if the *Pitchess* discovery reveals potential witnesses to past claims of misconduct. Those witnesses need to be located and, where available, subpoenaed. (See, e.g. *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 ["Typically, the trial court discloses only the names, addresses, and telephone numbers of individuals who have witnessed, or have previously filed complaints about, similar misconduct by the officer."]; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1285 [citing *Warrick*].)

§ 866, subd. (a).) The defendant may not examine witnesses or use the hearing to conduct discovery. Subdivision (b) expressly states:

> "It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery." (Pen. Code, § 866, subd. (b).)

As petitioner correctly points out, the statutory prohibition of a preliminary hearing as a discovery device does not speak to discovery prior to the actual preliminary hearing. Nevertheless, allowing pre-preliminary hearing discovery tends to work at cross-purposes with the limited nature of preliminary hearings. As the Supreme Court explained:

> "[T]he preliminary hearing . . . serves a limited function. No longer to be used by defendants for discovery purposes and trial preparation, it serves merely to determine whether probable cause exists to believe that the defendant has committed a felony and should be held for trial." (*Correa v. Superior Court* (2002) 27 Cal.4th 444, 452.)

Petitioner notes that a preliminary hearing is a "critical stage" in the criminal proceedings against him at which he has a constitutional right to counsel. (*People v. Cudjo* (1993) 6 Cal.4th 585, 615.) Defense counsel's effectiveness depends, in part, on adequate investigation and preparation, and proper discovery is one part of adequately investigating and preparing a defense. (*People v. Lyon* (1996) 49 Cal.App.4th 1521, 1526.) Thus, petitioner contends, his right to effective assistance of counsel at the preliminary hearing entitled him to *Pitchess* discovery. We agree with a preliminary hearing's importance and a defendant's right to effective counsel at that hearing. (*People v. Superior Court (Mandella)* (1983) 33 Cal.3d 754, 759 [preliminary hearing "operates as a judicial check" safeguarding a defendant's rights].) Nevertheless, we reject petitioner's contention that *Pitchess* discovery is a precondition for effective assistance of counsel at the hearing.

A preliminary hearing is not a trial; it is an abbreviated hearing. (*People v. Slaughter* (1984) 35 Cal.3d 629, 637-638.) A preliminary hearing's purpose is to

determine if probable cause exists to make a defendant stand trial. (*People v. Wallace* (2004) 33 Cal.4th 738, 749; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 251.) Its narrow scope and purpose limit the rights that attach to the defense. For example, despite the defendant's right to confront witnesses against him at trial, the prosecution may rely entirely in a preliminary hearing on the hearsay evidence of certain law enforcement officers, who may recount the out of court statements of victims, suspects, and witnesses. (Pen. Code, § 872, subd. (b).) In addition, despite the right to trial by a jury in the eventual determination of a defendant's actual guilt, the magistrate presiding over the preliminary hearing may weigh the evidence in assessing whether probable cause exists and may do so even though the weighing is "gross and unrefined." (*Cooley v. Superior Court, supra,* at p. 257; *People v. Slaughter, supra,* at pp. 637-638.)[4] Our Supreme Court explained in *Cooley v. Superior Court, supra:*

> "This court has stated in the felony preliminary hearing context that ' " '[p]robable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused.' " [Citations.]' [Citations.] In making the determination of probable cause, the magistrates do not themselves decide whether the defendant is guilty. [Citations.] Rather, they simply decide whether a reasonable person could harbor a strong suspicion of the defendant's guilt. In doing so, they may 'weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses.' [Citations.] But the proceeding is not a trial: if the magistrate forms a personal opinion regarding the defendant's guilt, it is of no legal significance. [Citation.]" (*Cooley,* at pp. 251-252.)

---

4 *People v. Slaughter, supra,* 35 Cal.3d at pages 637-638 ["[T]he burden on the prosecution before the magistrate is quite distinct from that necessary to obtain a conviction before a judge or jury. . . . '[A] magistrate conducting a preliminary examination must be convinced of only such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. [Citations.] In other words, "Evidence that will justify a prosecution need not be sufficient to support a conviction . . . . *An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.* [Citations.]" ' [Citations.]" (Emphasis original.).]

Petitioner argues that *Pitchess* discovery is necessary to ensure effective representation at the preliminary hearing. We agree that the test for ineffective assistance of counsel is the same for a trial or preliminary hearing – whether competent representation would have resulted in a better outcome for the defendant. (See *People v. Cudjo, supra,* 6 Cal.4th at p. 615.) Although the test is the same, it plays out differently because of a preliminary hearing's limited scope. The difference between a favorable and unfavorable outcome at a preliminary hearing depends on whether defense counsel can obtain factual findings precluding the People from pursuing a particular charge. But the tools available to defense counsel for winning a dismissal of some, or all, of the alleged charges are limited. For example, a defendant may call witnesses on his behalf, but the law restricts their testimony to establishing an affirmative defense, negating an element of the offense, or impeaching a prosecution witness or hearsay declarant, but no more. (Pen. Code, § 866, subd. (a).)

Evidence Code section 1043 limits *Pitchess* discovery to evidence that is material "to the subject matter involved in the pending litigation." (Evid. Code, § 1043, subd. (b)(3).) Here, petitioner seeks evidence from the personnel files of the officers who arrested him hoping to show they had engaged in misconduct involving other members of the public. But such evidence is unlikely to rebut probable cause, which is a preliminary hearing's touchstone, because past misconduct might suggest a reason to doubt an officer's truthfulness, but is not, strictly speaking, exculpatory by tending to show the defendant's actual innocence. A witness might be untruthful in one setting and truthful in another. *Pitchess* material petitioner seeks is unlikely to justify a magistrate's dismissal of a charge for lack of probable cause. And because the *Pitchess* material is unlikely to lead to a different outcome for the preliminary hearing, counsel's not receiving the material does not mean counsel is inadequately prepared for the preliminary hearing. Hence, counsel's assistance is effective (at least in regard to *Pitchess* related matters).

Petitioner contends that denying *Pitchess* discovery before the preliminary hearing frustrates the "primary purpose" of the hearing, which is "to weed out groundless

charges." He asserts that cross-examining the officers who arrested him by impeaching them with past misconduct would have been especially helpful in refuting the charges against him. In support, he cites decisions that rejected limitations on cross-examination in a preliminary hearing. But the decisions he cites involved narrower cross-examination than what he urges here because they involved cross-examination of evidence bearing directly on the criminal charges. For example, in *People v. Erwin* (1993) 20 Cal.App.4th 1542, the People offered a hearsay declarant's evidence through the testimony of an investigating officer. The appellate court held the magistrate had the discretion during the preliminary hearing to permit the defense to call the declarant to the stand to permit the defendant to examine the declarant. Petitioner also cites *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, where the People had relied at the preliminary hearing on narrowly selected portions of eyewitness statements to the police. The appellate court held the trial court erred by denying the defendant access to the complete eyewitness statements to use in cross-examining the witnesses.

This division's decision in *Brant v. Superior Court* (2003) 108 Cal.App.4th 100 does not undercut our decision today that a defendant may not pursue *Pitchess* discovery for a preliminary hearing. In *Brant*, this division permitted *Pitchess* discovery in support of a pretrial motion to suppress evidence. Drawing from *Brant*, petitioner notes a defendant may file a motion to suppress at a preliminary hearing. It follows therefore, petitioner reasons, that *Pitchess* discovery should likewise be allowed for a preliminary hearing, too. We do not, however, read *Brant* that way. *Brant* did not discuss whether the motion to suppress was heard during the preliminary hearing, or followed that hearing. A case is not authority for a proposition it does not address. (*People v. Harris* (1989) 47 Cal.3d 1047, 1071 [disapproved on other grounds by *People v. Wheeler* (1992) 4 Cal.4th 284, 299 fn. 10 and *People v. Hill* (1998) 17 Cal.4th 800, 833; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) For reasons we have discussed involving the unsoundness of allowing *Pitchess* discovery during a preliminary hearing, we decline to rely on *Brant* as standing for any such proposition.

Holman v. Superior Court (1981) 29 Cal.3d 480 is not inconsistent with our rejection of any right to *Pitchess* discovery for a preliminary hearing. *Holman* found preliminary hearing magistrates have the inherent power to permit discovery before a preliminary hearing. (*Holman,* at p. 485) The discovery *Holman* permitted was "limited," however, and "directed to the restricted purpose of the preliminary examination." (*Holman,* at pp. 485-486.) Indeed, *Holman* noted the need to balance a defendant's interest in discovery against a preliminary hearing's stated aspiration of brevity. As *Holman* noted,

> "[T]he preliminary examination is not a trial, and those discovery procedures which are available to prepare for trial may be neither applicable nor appropriate in the present context. . . . We do not intend to suggest that magistrates routinely should grant discovery requests, or authorize time-consuming discovery procedures, in the absence of a showing that such discovery is reasonably necessary to prepare for the preliminary examination, and that discovery will not unduly delay or prolong that proceeding." (*Holman,* at p. 485.)

Our Supreme Court's decision in *People v. Samayoa* (1997) 15 Cal.4th 795, does not compel a different result, again for the reason a decision is not authority for a proposition it does not address. (*People v. Harris, supra*, 47 Cal.3d 1047, *Ginns v. Savage, supra*, 61 Cal.2d 520.) In *Samayoa*, the preliminary hearing magistrate granted a defendant's *Pitchess* motion and conducted an in camera review of a law enforcement officer's personnel file. (*People v. Samoyoa, supra,* at p. 825.) Following the in camera review, the magistrate ordered the release of a redacted copy of a specific misconduct complaint against the officer but denied disclosure of the rest of the file's contents. Before trial, the defendant sought superior court review of the magistrates' ruling, but the superior court upheld the magistrate's order. (*Id.* at p. 826.) On review, the Supreme Court upheld the lower courts' selection of material to release. (*Id.* at p. 827.) In reciting the proceedings in the lower courts, the Supreme Court did not comment on the propriety of *Pitchess* discovery at a preliminary hearing. Not having discussed the legal point, *Samayoa* is not authority that a defendant is entitled to such discovery. (But see *People*

v. Mooc (2001) 26 Cal.4th 1216, 1229-1230 [cites *People v. Samayoa* approvingly with an explanatory parenthetical stating a "magistrate" had ordered *Pitchess* discovery in *Samayoa*].)

Finally, *Saulter v. Municipal Court* (1977) 75 Cal.App.3d 231 (*Saulter*) does not contradict the rule we establish today. *Saulter* was decided in 1977 before the codification of *Pitchess* discovery at Evidence Code 1043 et seq. in 1978. (Stats. 1978, ch. 630, p. 2082, § 1.) In *Saulter*, the preliminary hearing magistrate denied a defendant's motion for discovery of an officer's personnel records involving prior misconduct. (*Saulter,* at p. 234.) The magistrate suggested the defendant ought to seek the records through a subpoena duces tecum. On review, the appellate court held the magistrate erred by imposing on the defendant the burden of subpoenaing the records because the defendant had made a sufficient showing under the *Pitchess* decision for discovery of the records without further ado. (*Saulter,* at pp. 236-237.) *Saulter* is of questionable validity, however, after passage of Proposition 115, which enacted the Criminal Discovery Act at Penal Code section 1054. A more recent decision than *Saulter* explains that "cases such as *Saulter v. Municipal Court* . . . arose at a time when it was an accepted view that the preliminary hearing, in addition to determining whether there was probable cause, was a vehicle for defense discovery. [Citation.] This view is obsolete. Proposition 115 amended section 866 to provide that preliminary hearings 'shall not be used for purposes of discovery' (§ 866, subd. (b)) and to institute procedural limitations to thwart defendants from using preliminary hearings as discovery vehicles." (*People v. Superior Court (Barrett), supra,* 80 Cal.App.4th at p. 1320.) Given the development of statutory and case law since *Saulter*, we consider its current validity questionable.

DISPOSITION

The petition for writ of mandate directing the superior court to grant Petitioner Moises Galindo's motion for *Pitchess* material is denied.

CERTIFIED FOR PUBLICATION

RUBIN, J.

WE CONCUR:

COOPER, P. J.

FLIER, J.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to the California Rules of Court, the enclosed Petition for Review is produced using 13-point Roman type including footnotes and contains approximately 8,365 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

MARK HARVIS
Deputy Public Defender

PROOF OF SERVICE

I, the undersigned, declare I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012;

That on February 13, 2009, I served the within PETITION FOR REVIEW, MOISES GALINDO, on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles, addressed as follows:

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
STATE OF CALIFORNIA
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

HON. STEVEN R. VAN SICKLEN, JUDGE
TORRANCE COURTHOUSE
DEPARTMENT F
825 MAPLE AVENUE
TORRANCE, CA 90503

HON. HANK GOLDBERG, JUDGE
LOS ANGELES SUPERIOR COURT
DEPARTMENT 31
210 WEST TEMPLE STREET
LOS ANGELES, CA 90012

PETER R. NAVARRO, ESQ.
714 W. OLYMPIC BLVD., SUITE 450
LOS ANGELES, CA 90015

CLERK, COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 8
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

I further declare that I served the above referred-to document by hand delivering a copy thereof addressed to:

STEVE COOLEY, DISTRICT ATTORNEY
APPELLATE DIVISION
320 WEST TEMPLE STREET, SUITE 540
LOS ANGELES, CA 90012

ROCKARD DELGADILLO, CITY ATTORNEY
CARLOS DE LA GUERRA, MANAGING ASST. CITY ATTORNEY
KJEHL T. JOHANSEN, SUPERVISING DEPUTY CITY ATTORNEY
201 NORTH LOS ANGELES STREET
LOS ANGELES MALL SPACE 301
LOS ANGELES, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 13, 2009, at Los Angeles, California.

FREDDY CAMPOS