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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.	S170550 2nd Dist. No. B208923) (Trial Ct. No. BA337159)

OPENING BRIEF ON THE MERITS

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, Room 590
Los Angeles, CA 90012
Telephone: (213) 974-3066
Fax No. (213) 626-3519

Attorneys for Petitioner

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OPENING BRIEF ON THE MERITS

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

In this post-Proposition 115 age, criminal law practitioners sometimes ask what purpose is served by the preliminary hearing. At times preliminary hearings seem to be just a speed bump on the road to conviction. The prosecution only needs to call a hearsay-qualified police officer to relate the facts, the hearing cannot be used for discovery, and the standard to hold a person to answer is very low. Are preliminary hearings still a critical stage of criminal proceedings?

Fortunately, the answer is yes, preliminary hearings remain a critical stage of the proceedings. Although not as wide-ranging and robust as they once were, preliminary examinations help assure the propriety and fairness of felony charges.

> "[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 [Penal Code] 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.)

Because preliminary examinations are a critical stage of the proceedings, defendants are Constitutionally entitled to the effective assistance of counsel which, of necessity, must mean *prepared* counsel. There can be no dispute that competent counsel prepares for a preliminary hearing by, at the very least, reading the arrest reports. Most assuredly, this is also the starting point for a prosecutor getting ready to put on the preliminary hearing. Those reports, along with consultation with the defendant, inform defense counsel of what must be done to become prepared for preliminary hearing.

Some cases are ready for preliminary hearing without any other research or investigation. Others, like this one that involves (at least from the defense

perspective) concerted police misconduct, require competent counsel to do more, including viewing the videos and still pictures of the arrest (some of which are available on the internet on You Tube), interviewing witnesses and potentially calling them to testify, and investigating the police officers in order to present an affirmative defense that might result either in no holding order or a reduction of the charges to misdemeanors. Because this case involves allegations that the police used excessive force and lied about the circumstances of petitioner's arrest, counsel's preparation logically and reasonably included a *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) motion to discover witnesses who had previously complained about similar officer misconduct.

The preliminary hearing magistrate improperly denied the *Pitchess* motion on its merits. Petitioner filed a Petition for Writ of Mandate in respondent Superior Court challenging that decision. The Superior Court, in a stunning ruling, held that defendants were entitled to absolutely no discovery whatsoever for the purpose of preliminary examinations. The impact of that broad and unfortunate ruling is that preliminary hearings cease to be a critical stage of the proceedings and defense counsel is merely an unprepared presence with no ability to effectively defend the client. Truly, under such a circumstance, preliminary hearings would barely even be a speed bump.

The Court of Appeal, ruling narrowly but incorrectly, issued an opinion that completely prohibits *Pitchess* discovery for the purpose of preliminary

hearings. The Court of Appeal wrongly created by judicial fiat an exception to *Pitchess* discovery not contemplated by the Legislature. The Court of Appeal gave short shrift to the role that magistrates play at the preliminary hearing and failed to give appropriate import to the fact that the 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 failed to recognize that *Pitchess* discovery, in a case such as the one at issue here, is indeed necessary for defense counsel to competently represent her client.

No case has ever prohibited *Pitchess* discovery for preliminary hearing save this one. The Court of Appeal's blanket prohibition fails to consider that *Pitchess* discovery is relevant when the magistrate has to make rulings such as whether or not a purported confession was lawfully obtained, evidence was lawfully seized, or the testifying officers are credible. The presentation of *Pitchess* witnesses at the preliminary hearing in this case could help convince the magistrate that the crimes charged did not occur or should be reduced to misdemeanors.

Pitchess discovery is obviously not necessary for every preliminary examination and petitioner has never made such a claim. The Court of Appeal was plainly wrong when it claimed that *Pitchess* witnesses would be unlikely to result in a result favorable to petitioner - it is specious for the court to make

such a claim without knowing the strength and credibility of witnesses who have not been discovered and who have not testified. *Pitchess* discovery *is* available precisely because the witnesses *can* make a difference and *can* influence the magistrate. To make a blanket claim to the contrary, as the Court of Appeal did, is simply unreasonable.

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 such as this one where that discovery could potentially result in dismissal or reduction at the preliminary examination.

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.[1/] 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.)

1/ Video of a portion of the incident leading to petitioner's arrest is available on You Tube at http://www.youtube.com/watch?v=CxQs93lkFME

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 that 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 that 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. This court granted review on March 25, 2009.

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 DISALLOW DISCOVERY FOR PRELIMINARY HEARINGS

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 a "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) and child custody proceedings *(Slayton v. Superior Court* (2006) 146 Cal.App.4th 55).

The Court of Appeal improperly held that because the *Pitchess* statutes do not expressly mention preliminary hearings, then "the sounder approach is to find no such right exists." (Slip Opn., p. 5.) No court, except the Court of Appeal in this case, has ever found that the only proceedings in which *Pitchess* discovery is allowed are those which are expressly mentioned in the *Pitchess* statutes. The Court of Appeal is wrong because the statutory scheme makes it clear that *Pitchess* discovery is available for *any* pending litigation in which it is material.

> "A recent decision has construed the phrase, 'pending litigation,' in a similar context. In *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100 (*Hurd*), the defendant filed a posttrial *Pitchess* motion to gather support for a habeas corpus

> petition. (*Hurd*, at p. 1105.) The court held Penal Code section 1054.9, which allows for pre-habeas corpus discovery, authorized the motion. (*Hurd*, at p. 1108.) But it required the defendant to show the requested records were material to his habeas corpus petition, not his defense to the underlying prosecution. (*Id.* at p. 1105.) The court noted a *Pitchess* motion must 'set[] forth the materiality [of the desired personnel records] to the subject matter involved in the pending litigation ... .' (*Hurd*, at p. 1110.)
>
> "The *Hurd* court concluded, 'We deem the litigation to which the discovery must be material within the meaning of [Evidence Code] section 1043 to be the habeas corpus proceeding that has been or will be initiated by petitioner's habeas corpus petition. We deem the scope of the *Pitchess* discovery available under [Penal Code] section 1054.9 to be that justified by such current materiality to claims cognizable on habeas corpus." (*Hurd, supra*, 144 Cal.App.4th at p. 1111.)" (*People v. Nguyen, supra,* 151 Cal.App.4th 1473, 1478, some internal quotations omitted.)

The Court of Appeal's determination that *Pitchess* discovery is not available for preliminary examinations also 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 Cal.2d 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 may 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 of implied repeal. (See also *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 569.)

The Court of Appeal's 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 (*People v. Cudjo* (1993) 6 Cal.4th 585, 615; *Coleman v. Alabama* (1970) 399 U.S. 1, 9-10);

2) the magistrate determines credibility and weighs the evidence (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 251);

3) the magistrate determines whether the defendant should be held to answer (Pen. Code §§ 871, 872);

4) the magistrate can dismiss charges (*In re William* (1985) 164 Cal.App.3d 979);

5) the magistrate can add charges shown by the evidence (Pen. Code § 872; *People v. Storke* (1919) 39 Cal.App. 633);

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 (Pen. Code § 866);

12) defendants have the right to put on an affirmative defense (Pen. Code § 866);

13) defendants have the right to move to suppress evidence (Pen. Code § 1538.5);

14) defendants may move for a pre-preliminary hearing lineup *(People v. Baines* (1981) 30 Cal.3d 143, 148);

15) defendants may seek discovery of an informant (See, generally, *People v. Konow*, *supra*, 32 Cal.4th 995, 1024);

16) defendants may seek disclosure of an observation post *(Hines v. Superior Court* (1988) 203 Cal.App.3d 1231);

17) defendants have the right to subpoena witnesses (Pen. Code § 859b, subd. (a));

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

19) defendants may move to have a confession suppressed *(People v. Smithson* (2000) 79 Cal.App.4th 480, 494);

20) witness testimony may be preserved for future use should a witness become unavailable (See, generally, *People v. Cromer* (2001) 24 Cal.4th 889);

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);

22) a preliminary hearing held while the defendant is incompetent is a denial of due process of law and will result in a new preliminary hearing (*People v. Duncan* (2000) 78 Cal.App 4th 765); and

23) the defendant has the Constitutional right to self-representation at the preliminary hearing (*Moon v. Superior Court* (2005) 134 Cal.App.4th 1521).

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

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[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.

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 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.

The Court of Appeal's conclusion that a defendant may not obtain *Pitchess* discovery at all for a preliminary examination because that discovery is unlikely to lead to a different outcome leads to absurd results. Although a defendant is not required to establish as a precondition for discovery that the disclosed information will lead to a different outcome, the Court of Appeal would deny *Pitchess* discovery even if a defendant did make such a showing. This highlights the fact that the Court of Appeal's ultimate conclusion that

Pitchess discovery is not available for preliminary examinations is a result of flawed reasoning.

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 *Holman v. Superior Court* (1981) 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*, *supra*, 148 Cal.App.4th 825, 835, internal quotations omitted.)

III

PETITIONER'S ALLEGATIONS OF POLICE MISCONDUCT WERE MUCH MORE THAN A MERE DENIAL OF THE TRUTH OF THE POLICE ALLEGATIONS AND THE MAGISTRATE ERRED WHEN HE DENIED THE *PITCHESS* MOTION

The magistrate purported to deny petitioner's *Pitchess* motion on the ground that the showing was insufficient and the evidence not relevant to preliminary hearing. Neither the Superior Court nor the Court of Appeal addressed the sufficiency of the *Pitchess* motion. Rather, the Superior Court decided that pre-preliminary discovery was not authorized at all and the Court of Appeal ruled more narrowly that pre-preliminary *Pitchess* discovery was not available. The magistrate's denial of the *Pitchess* motion on its merits was error.

In 1989, this Court made it clear that the threshold showing to obtain *Pitchess* discovery was "relatively low." *(City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83.) In *Warrick v. Superior Court, supra,* 35 Cal.4th 1011, this Court reiterated the low threshold showing and explained that "to obtain in-chambers review a defendant need only demonstrate that the scenario of alleged officer misconduct *could or might* have occurred." (*Warrick* at p. 1016, emphasis added.) This Court *rejected* the LAPD's arguments that the defense had to establish "objective reasonableness" or that there was a "reasonable probability" the defense version of events occurred. (*Warrick* at pp. 1025-1026.)

This Court further explained that in order to establish a plausible factual foundation for a claim of officer misconduct, a criminal defendant does *not* have to establish that the allegation is reasonably probable or apparently credible. A court hearing a *Pitchess* motion is *not* tasked with determining whether or not a defendant's allegations are credible or believable. A court does *not* weigh or assess the allegations contained in a *Pitchess* motion and does *not* determine whether or not they are persuasive. (*Warrick* at pp. 1025-1026.) This Court held that "a plausible scenario of officer misconduct is one that might or could have occurred." (*Warrick* at p. 1026.) In *Garcia v. Superior Court* (2007) 42 Cal.4th 63, this Court held that a denial may be sufficient.

In this case, petitioner did much more than simply deny his guilt. He directly challenged the veracity of the police officers, from their claim they had reasonable suspicion to detain him through their claim that he threatened, resisted, and assaulted the officers.

Petitioner's detailed allegations more than satisfied the low threshold showing mandated by this Court in *Warrick.*

> "What standard must a moving party meet to show a 'plausible' factual foundation for the *Pitchess* discovery requested? We conclude that a plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges. A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial. Such a showing 'put[s] the court on notice' that the specified officer misconduct 'will likely be an issue at trial.' (*Santa Cruz, supra*, 49 Cal.3d at p. 86.) Once that

burden is met, the defendant has shown materiality under section 1043." (*Warrick* at p. 1026.)

The magistrate erred when he concluded petitioner's declaration of counsel was insufficiently detailed. In addition, the magistrate did not think *Pitchess* discovery was relevant to a preliminary hearing. Although the critical nature of discovery for preliminary hearings has already been discussed, the specifics of this case further establish why discovery, specifically *Pitchess* discovery, is necessary at preliminary hearing.

The magistrate stated that the defense allegations were not relevant to any element of the crimes charge and went only to probable cause. Of course, even if petitioner's allegations went only to probable cause or reasonable suspicion, *Pitchess* discovery *is* proper to support a motion to suppress evidence which may be made at the preliminary examination. (*People v. Brant, supra,* 108 Cal.App.4th 100; Pen. Code § 1538.5, subd. (f)(2).)

The magistrate was also legally wrong when he claimed that the defense allegations were not relevant to the elements of the charged crimes. Petitioner is charged with violating Penal Code section 69, resisting an executive officer. Cal Crim 2652 specifies that two of the elements of this offense are that "The defendant [unlawfully] used force [or violence] to resist an executive officer" and "When the defendant acted, the officer was performing (his/her) lawful duty."

In addition, Cal Crim 2652 states that "A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties)."

Petitioner's allegations directly contradict and controvert these elements and therefore the magistrate was wrong as a matter of law when he claimed the allegations did not.

The magistrate also claimed that in order to obtain *Pitchess* discovery prior to preliminary hearing, the defense must show that they are going to discover something or might discover something that would change the outcome of the preliminary hearing. If the magistrate was saying that the *Pitchess* threshold showing is somehow different for preliminary hearings, then the magistrate erred. There is absolutely no authority for the magistrate's conclusion and it defies 30-plus years of *Pitchess* precedent which has *never* set forth that preliminary hearings are somehow different.

On the other hand, the magistrate sounds like he is actually referring to the standard governing *Brady* discovery. (*Brady v. Maryland* (1963) 373 U.S. 83.) "Evidence is material under the *Brady* standard if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7-8.) *Brady* and *Pitchess* discovery although related are different and have different threshold showings. "Although *Brady* and *Pitchess* both require disclosure of material evidence, they employ different standards of materiality." (*Id.* at p. 7.)

Petitioner's allegations were more than sufficient and established that *Pitchess* discovery was material to the defense of the preliminary hearings. The magistrate's conclusion to the contrary was error and an abuse of discretion.

CONCLUSION

Just as *Pitchess* discovery is not material to every trial, it is not material to every preliminary hearing. This case, however, is a "classic" *Pitchess* situation where the police have been accused of using excessive force and then lying about their actions - from the reasonable suspicion to detain to their use of force and their claims that petitioner threatened them. Preliminary hearings remain a critical stage of criminal proceedings and cases involving the allegations of police misconduct present here demand that competent and prepared counsel make a *Pitchess* discovery motion. The Court of Appeal erred when it held that *Pitchess* discovery was not available to allow defense counsel to become prepared. *Pitchess* discovery *is* available for preliminary hearing in an appropriate case and *this* is an appropriate case.

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

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to the California Rules of Court, the OPENING BRIEF ON THE MERITS in this action contains 10,026 words. Counsel relies on the word count of the WordPerfect 12 program used to prepare this brief.

MARK HARVIS

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 April 23, 2009, I served the within OPENING BRIEF ON THE MERITS, 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
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

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

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

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

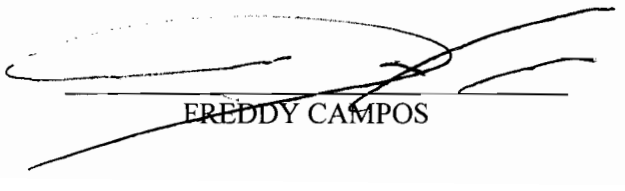
CLERK, DIVISION EIGHT
CALIFORNIA COURT OF APPEAL
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

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

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

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

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 23, 2009, at Los Angeles, California.



FREDDY CAMPOS