ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	) **No. S170550**
	)
Plaintiff and Respondent,	) (LASC No.
	) BA337159)
v.	)
	)
MOISES GALINDO	)
	)
Defendant and Appellant.	)
	)
	)

ANSWER BRIEF ON MERITS

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ISSUE PRESENTED

Can a magistrate compel *Pitchess* discovery before the preliminary hearing after Proposition 115?[1]

1. *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, hereafter *Pitchess.*

INTRODUCTION

Prior to 1991, preliminary hearings were used as a discovery and trial preparation device (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1081, hereafter *Whitman*) and criminal discovery was a judicially created doctrine evolving in the absence of guiding legislation. (*Holman v. Superior* Court (1981) 29 Cal.3d 480, 483, hereafter *Holman*.) *Holman* went on to declare:

> The exercise of a judicial power over criminal discovery which inheres in courts when the Legislature is silent must be tempered and restrained when the Legislature has spoken...[I]t would be inappropriate to exercise our inherent powers in conflict with existing legislation. (*People v. Municipal Court* (*Runyan*) 1978) 20 Cal.3d 523, 528.)

(*Id.* at p. 483.)

On June 5, 1990, the People of the State of California, "spoke," and since that time, with respect to criminal discovery, specifically as it relates to preliminary hearings, everything changed. On that day, Proposition 115 was enacted and changed the scope of criminal discovery in California. By virtue of Proposition 115's passage, Penal Code sections 866, subdivisions (a) and (b) were amended, and of major significance is subdivision (b)'s express requirement that the preliminary hearing examination shall no longer be used as a vehicle for discovery.[2] After Proposition 115, preliminary hearings were limited to establishing probable cause; thus the scope of that proceeding dictates what is relevant, and what is abundantly clear is that mandated discovery is no longer authorized at the preliminary hearing stage. (*People v. Eid* (1994) 31 Cal.App.4th 114, 130, hereafter *Eid.*)

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2. Unless otherwise stated, all further statutory references are to the Penal Code.

The People herein contend that the Court of Appeal correctly determined that Evidence Code sections 1043-1045, and sections 832.7 and 832.8 (all alternatively referred to hereafter as the "*Pitchess* scheme") is not an "other express statutory provision" with respect to the preliminary hearing stage. (Slip Opn., at p. 5.) Section 866 is the more specific and more recent statute that controls the more general and less recent law embodied in the *Pitchess* scheme. (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 115, hereafter *Pacific Legal Foundation*; See also *Fuentes v. Workers' Comp. Appeals Board* (1976) 16 Cal.3d 1, 7-8, hereafter *Fuentes*.) As such, section 866 prohibits the magistrate from ordering *Pitchess* discovery before or at the preliminary hearing.[3] Thus, the Court of Appeal correctly determined that, notwithstanding Evidence Code section 1043 et seq., a defendant may not seek *Pitchess* discovery before a preliminary hearing.

STATEMENT OF THE FACTS AND PROCEEDINGS

According to a report written by Los Angeles Police Department Officer S. Flores, on February 29, 2008, at approximately 7:40 p.m., Officers J. Smith and Flores were conducting a "footbeat" in the Ramona Gardens Housing Development. (Petition for Writ of Mandate filed July 1, 2008, hereafter "PWM," Exhibit D at p. 2 of 5.) The officers were in full uniform. (*Ibid.*) They observed Petitioner walking and holding a 12 ounce can of beer. (*Ibid.*) Petitioner spotted the officers and began to walk away from them, while holding his front waistband area in a manner consistent with concealing a firearm. (PWM Exhibit D at p. 2 of 5.) Petitioner ignored several commands to stop and ran into an apartment unit

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3. Although the magistrate may not compel discovery of police reports, the Los Angeles County District Attorney's Office has and will continue to voluntarily provide police reports at the time the defendant is arraigned on the complaint.

that was later determined to belong to his parents. (PWM, Exhibit D at p. 2 of 5.) The officers contained the apartment and awaited the arrival of a supervisor. (*Ibid.*) Sergeant Vargas, the officers' supervisor, spoke to Petitioner's father who gave consent to enter the unit. Upon entering the unit, the officers arrested Petitioner. (*Ibid.*)

While waiting for Sergeant Vargas to arrive, several individuals came up to the officers and yelled at them stating, "You can't go in there without a warrant, we know our rights, leave them alone...We know who you guys are, C.L.E.A.R., your badges don't mean anything to us."[4] (PWM, Exhibit D at p. 2 of 5.) These individuals refused to leave and continued to yell in an effort to get bystanders to gather and riot; two of them photographed the officers. (*Ibid.*) The officers also observed Petitioner's brother walking toward them. (*Id.* at p. 3 of 5.) Because he was an admitted gang member, did not live at that housing development, and was trespassing in violation of a permanent gang injunction order, Petitioner's brother was arrested. (*Ibid.*)

While escorting Petitioner to the patrol vehicle, where his brother was already seated, Petitioner admitted his membership in the Big Hazard gang, admonished the officers, and told them that he would have them killed. (PWM, Exhibit D at p. 3 of 5.) Upon hearing Petitioner's statements, Petitioner's brother made similar threats. (*Ibid.*) Petitioner, his brother, and Officer Flores were seated in the backseat of Sergeant Vargas' patrol car, with Petitioner seated in the middle. (*Ibid.*) Sergeant Vargas drove the vehicle. (*Ibid.*) The individuals who were attempting to incite a riot, continued to do so and they too were arrested. (PWM, Exhibit D at p. 3 of 5.)

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3. C.L.E.A.R. is an acronym for Community Law Enforcement and Recovery.

On the way to the police station, Petitioner and his brother became belligerent to Officer Flores and continued to threaten to kill him and his family. (PWM, Exhibit D at p. 3 of 5.) Petitioner head butted Officer Flores on the side of his head. His brother, also attempted to strike the officer. (*Ibid.*) Officer Flores pushed them away toward the rear driver's side passenger door. (PWM, Exhibit D at p. 3 of 5.) When the car came to a stop, Sergeant Vargas opened the rear driver's side passenger door and Petitioner's brother, who was swaying violently, fell out of the car. (*Ibid.*) Other officers arrived and Petitioner's brother was taken to another patrol vehicle for transport. (*Ibid.*)

On March 14, 2008, the People filed an amended felony complaint (case number BA337159) against Petitioner and his brother alleging one count of section 69, resisting an executive officer, and one count of section 422, terrorist threats, as felonies; In addition, one count of section 166, subdivision (a)(4), violation of a gang injunction order, a misdemeanor, was alleged against Petitioner's brother. (PWM Exhibit A.) On March 26, 2008 Petitioner pleaded not guilty. (PWM, Exhibit B at p. 3.)

On May 16, 2008, the magistrate held a hearing on Petitioner's *Pitchess* motion, which appeared to have been filed the day before. (PWM Exhibit B at pp. 7-8, Exhibit C, and Exhibit F.) Real Party in Interest, City of Los Angeles, was represented by the Los Angeles City Attorney's Office. The magistrate denied the *Pitchess* motion without prejudice because the *Pitchess* motion, as filed, did not indicate the defense would rebut the probable cause standard required for a preliminary hearing. (PWM, Exhibit B at pp. 7-8, Exhibit F at pp. 7-8, 11, 13-14.)

Petitioner's request for *Pitchess* discovery requested all "complaints from any and all sources relating to acts of aggressive behavior, violence, excessive behavior...and any other evidence of misconduct amounting to moral turpitude...as well as discipline imposed

against Officers Flores, Smith, Vasquez, P. Gomez, and Sergeant Vargas." (PWM, Exhibit C at pp. 1-2.) Petitioner's motion stated that the materials he requested were necessary in order to prepare his case for motions and trial; specifically he claimed that the discovery was material because he had witnesses or evidence that refuted virtually all of the allegations made in Officer Flores' police report, in particular that he assaulted Officer Flores; In fact, Petitioner claimed that "Sergeant Vazquez"[5] and Officer Flores physically assaulted him without being provoked; he alleged that he never threatened Officer Flores and never encountered Officer Flores before walking into the residence; he also claimed that the Officers lied about receiving permission to enter Petitioner's parents' residence. (PWM, Exhibit C at pp. 7-9.)

On June 2, 2008, Petitioner filed a Petition for Writ of Mandate in the Central District Criminal Master Calendar Court, Los Angeles Superior Court, Department 100 arguing that the magistrate improperly denied the *Pitchess* motion. (PWM, Exhibit G.)

On June 23, 2008, the superior court denied the petition because criminal discovery is governed exclusively by section 1054 et. seq. and because there is no provision for discovery at or before the preliminary hearing stage under the statute. (PWM, Exhibit H at pp. 1-2.)

Petitioner then filed a Petition For Writ of Mandate in the Court of Appeal. (Slip Opn., at p. 3.) That court stayed the preliminary hearing and directed Real Party in Interest, the County of Los Angeles represented by the District Attorney of the County of Los Angeles (hereafter Real Party (District Attorney)) and Real Party in Interest, City of Los Angeles (hereafter Real Party (City of Los Angeles)), to file letter briefs answering the question, "Does a criminal defendant have a right to

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5. It appears Petitioner's counsel was referring to Sergeant Vargas.

obtain *Pitchess* discovery before the preliminary hearing?" (Slip Opn., at pp. 3-4.) On August 28, 2008, the Court of Appeal summarily denied the petition. (*Id.* at p. 4.)

Petitioner then filed a petition for review in this Court arguing that the *Pitchess* motion should not have been denied and alleged the same arguments made in his previous petition. (Slip Opn., at p. 4.) The Supreme Court granted the petition for review, transferred the case back to the Court of Appeal with the direction to vacate its order denying the petition for writ of mandate, and to order respondent Los Angeles Superior Court to show cause why the superior court should not grant the relief sought by petitioner. The Court of Appeal complied with the order. (Slip Opn., at p. 4.)
Petitioner, and Real Party in Interests, City of Los Angeles and the District Attorney participated in the oral arguments before that court. (*Ibid.*)

On January 7, 2009, after further briefing and arguments, the Court of Appeal issued a published opinion holding that "[i]n 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 [to obtain pre-preliminary hearing discovery] exists. (Slip Opn., at p. 5.)

On February 13, 2008, Petitioner filed a petition for review in this Court, taking issue with the Court of Appeal's holding that *Pitchess* discovery is not available in support of a preliminary examination. (Petition for Review filed February 13, 2009.) On March 25, 2009 this Court granted review in this case.

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ARGUMENT

INTRODUCTION

This Court, as well as the Court of Appeal, has often upheld the constitutionality of Proposition 115 while recognizing the significant impact it has had on criminal procedure in this state. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, hereafter *Izazaga*; *Whitman*, *supra*, 54 Cal.3d 1063.) To put it succinctly:

> The express purpose of Proposition 115 as set forth in subdivision (c) of section 1 is: "[T]o restore balance to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools."
>
> The combined constitutional and statutory provisions of Proposition 115 seek to protect victims and witnesses, streamline criminal procedure, and limit the preliminary hearing to a determination of probable cause. In order to achieve these legitimate purposes, the probable cause determination now may be based on hearsay declarations and a defendant's opportunity to cross-examine the hearsay declarant has been restricted. Section 866, subdivision (a), requires the magistrate, upon request by the prosecutor, to seek from the defense an offer of proof showing the relevance of the anticipated testimony before the defense may call a witness at the preliminary hearing. The section vests in the magistrate discretion to limit the accused's right to call witnesses at the preliminary hearing and, in effect, defines relevant evidence as testimony which "would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness." (§ 866, subd. (a).)

> Given these pronouncements and by reason of the constitutional and statutory changes brought about by Proposition 115, the scope of relevant defense evidence at the preliminary hearing has been substantially narrowed. Evidence that falls outside the statutory parameters of section 866, subdivision (a), is irrelevant.

(*Eid, supra*, 31 Cal.App.4th at pp. 129-130.)

I

DENIAL OF *PITCHESS* DISCOVERY PRE-PRELIMINARY HEARING IS MANDATED BY PROPOSITION 115

In its decision in this case, the Court of Appeal recognized that the *Pitchess* court ruled "that a criminal defendant may discover evidence of citizen complaints alleging misconduct by law enforcement officers if that misconduct assists in the defense." (Slip Opn., at p. 5.) The court also noted that 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]." (Slip Opn., at p. 5.) The Court of Appeal then ruled that:

> 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., at p. 5.)

In light of the passage of Proposition 115, the Court of Appeal's decision is sound. Petitioner argues that the *Pitchess* case was codified in 1978, ergo it is no longer a judicially created doctrine. (Petitioner's Opening Brief On The Merits at p. 16, hereafter "OBM") This position completely overlooks the fact that section 866, amended by Proposition 115, is the later enacted statute that covers the field of preliminary hearing discovery exclusively, and prohibits compelled discovery at the preliminary hearing stage. (*Pacific Legal Foundation*, *supra*, 29 Cal.3d at p. 115 [the specific and more recent section controls the general and less recent]; See also *Fuentes*, *supra*, 16 Cal.3d at pp. 7-8; See discussion *post* at p. 23.) Also, Petitioner argues that because Evidence Code section 1043, subdivision (a), requires a written *Pitchess* motions to be filed 'with the appropriate court or administrative body...,' and that subdivision (b)(1) of the same section requires the movant to identify the proceeding at which discovery or disclosure is sought, the Legislature envisioned that *Pitchess* motions "will be made in a variety of contexts." (OBM at pp. 16-17.) This position also fails to take into account the significant impact Proposition 115 had on pre-preliminary hearing discovery.

A review of the genesis and aftermath of Proposition 115 and *Pitchess*, including a review of the involved statutes and case law, establishes that *Pitchess* discovery was never intended to be a pre-preliminary hearing right.

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A

The Criminal Discovery Statute[6] Ended Mandated Pre-Preliminary Hearing Discovery

It is well settled that:

> In ascertaining the legislature's intent, we turn first to the language of the statute, giving the words their ordinary meaning. [Citations] We must follow the statute's plain meaning, if such appears, unless doing so would lead to absurd results the Legislature could not have intended. [Citations] If our examination of the statutory language leaves doubt about its meaning, we may consult other evidence of the Legislature's intent, such as the history and background of the measure. [Citations].

(*People v. Birkett* (1999) 21 Cal.4th 226, 231-232, citations omitted, hereafter, *Birkett*.)

The same principles that normally govern statutory construction, as mentioned above, are applicable in interpreting statutes added by initiative. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901 and *People v. Briceno* (2004) 34 Cal.4th 451, 459.) Additionally, the statutory language "must also be construed in the context of the statute as a whole and the overall statutory scheme in light of the electorate's intent." (*People v. Briceno, supra,* 34 Cal.4th at 459.) When the language is ambiguous, courts "refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet."(*Ibid.*)

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6. By "Criminal Discovery Statute" we mean to include those constitutional provisions and statutes that were enacted with the passage of Proposition 115, namely sections 1054 et.seq. as described in *In re Littlefield* (1993) 5 Cal.4th 122, 129, *Izazaga*, *supra*, 54 Cal.3d at pp. 364-365 (which this Court also referred to as "the new discovery chapter"), and *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 59.

In section 866, the drafters explicitly addressed preliminary hearing discovery. Its provisions are unambiguous. That statute governs the evidence the defense may produce at a preliminary hearing and came into existence the day Proposition 115 was enacted. Section 866, subdivision (a), allows the defense to present witnesses at the preliminary hearing once the People rest, subject to limitations. It states in pertinent part:

> Upon the request of the prosecuting attorney, the magistrate shall require an offer of proof from the defense as to the testimony expected from the witness. The magistrate shall not permit the testimony of any defense witness unless the offer of proof discloses to the satisfaction of the magistrate, in his or her sound discretion, that the testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness.

(§ 866, subd. (a).)

Section 866, subdivision (b), provides:

> 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.*

(§ 866, subd. (b), emphasis added.)

The plain language of subdivisions (a) and (b) needs no construction. In particular, subdivision (b) explicitly states that the preliminary hearing shall not be used for discovery. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 937 [If the statutory language is clear and unambiguous, construction is unnecessary and courts should not indulge in it].) Section 1054.7's mandate that "[t]he disclosures required under this chapter shall be made at least 30

days prior to the trial...," serves to further emphasize the point that there shall be no right to discovery before the preliminary hearing.

Petitioner claims that section 866, subdivision (b), applies only to the examination itself, not to pre-preliminary hearing discovery. This interpretation would lead to absurd results. (OBM at pp. 24-25.) For example, according to Petitioner's theory, a defendant would be free to obtain *Pitchess* discovery but would not be able to examine *Pitchess* witnesses at the preliminary hearing to flesh out the discovery obtained. Moreover, as the Court of Appeal noted, *Pitchess* discovery, would delay the preliminary hearing solely to discover potential impeachment evidence against the officers; impeachment evidence of doubtful materiality when all that is required of the magistrate is to find some rational ground to believe an offense was committed and Petitioner was guilty of it. (*People v. Slaughter* (1984) 35 Cal.3d 629, 637; See also *People v. Orin* (1975) 13 Cal.3d 937, 947; See also Slip Opn., at p. 6, and see fns. 2 and 3 on the same page; See also Slip. Opn., at p. 8, fn. 4.)

Thus, to allow discovery to occur before the preliminary hearing, makes a mockery of section 866's prohibition of using the preliminary hearing as a discovery tool. Furthermore, applying the *Pitchess* scheme pre-preliminary hearing tends to bring all of the panoply of rights reserved for trial, down to the preliminary hearing. (*Holman*, supra, 29 Cal.3d at pp. 483, 485; See discussion in section II, *post*.) However, with the enactment of Proposition 115 and section 866, a statute that specifically governs preliminary hearings, such a maneuver is prohibited. (*Pacific Legal Foundation*, *supra*, 29 Cal.3d at p. 115; *Fuentes*, *supra*, 16 Cal.3d at pp. 7-8.)

Assuming, however, that statutory construction is necessary, the clearest evidence that the drafters of the Criminal Discovery Statute intended to end mandatory discovery pre-preliminary hearing is found in

section 859, the statute governing initial appearances before a magistrate. Prior to the enactment of Proposition 115, section 859 imposed the following requirements upon the People:

> The prosecuting attorney shall deliver to, or make accessible for inspection and copying by, the defendant or counsel, copies of the police, arrest, and crime reports, upon the first court appearance of counsel, or upon a determination by a magistrate that the defendant can represent himself or herself. If unavailable to the prosecuting attorney at the time of that appearance or determination, the reports shall be delivered within two calendar days.

(Stats. 1985 c. 877, § 1)

These provisions were repealed by Proposition 115. (Prop. 115, § 15; Section 859; and *Izazaga*, *supra*, 54 Cal.3d 356, 365.) Their removal clearly demonstrates that the electorate intended to eliminate mandatory pre-preliminary hearing discovery. Therefore, an interpretation that mandates *Pitchess* discovery before the preliminary hearing is illogical and absurd in light of the repeal of the requirement to provide a police report, which is unquestionably far more relevant discovery.[7]

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7. In fact, in order to bring a *Pitchess* motion seeking allegations of excessive force by a peace officer, a defendant must as a matter of law attach a copy of the "police report setting forth the circumstances under which the party was stopped or arrested." (Evidence Code § 1046.) Proposition 115 has amended section 859 such that a defendant no longer has a right of access to the police reports prior to the preliminary hearing and therefore as a matter of law would not be able to bring a *Pitchess* motion based on allegations of excessive force. (See also *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70–71. fn.6.)

B

The Use Of The Word "Trial" In The Criminal Discovery Statute Meant That Its Provisions Were To Apply *Post* Preliminary Hearing

The repeated use of the word "trial," with respect to discovery, and the lack of any reference to preliminary hearings further evidence the intent that the Criminal Discovery Statute is inapplicable to preliminary hearings. (See section 1054.7 discussed *ante* and *post* in fn. 10, as well as *Jones v. Superior Court*, *supra*, 115 Cal.App.4th 48, 59, hereafter *Jones* [finding statute inapplicable to Probation Violation Hearings, "the explicit use of the term 'trial' in the Criminal Discovery Statute is evidence that the statute is limited to a proceeding in which a trier of fact returns a verdict on the charges"], quoting Pipes & Gagen, California Criminal Discovery (3d ed. 2003) 2.18, p. 202.) In *Jones*, *supra*, 115 Cal.App.4th 48, the court noted that, unlike trials, "the fundamental role and responsibility of the hearing judge in a revocation proceeding is not to determine whether the probationer is guilty or innocent of a crime, but whether a violation of the terms of probation has occurred and, if so, whether it would be appropriate to allow the probationer to continue to retain his conditional liberty." (*Id.* at p. 60, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 347.) In concluding that the Criminal Discovery Statute is inapplicable to probation violation hearings, that court also noted other differences between trials and probation violation hearings, including the right to a jury, standards of proof, and the admission of hearsay evidence. (*Ibid.*)

Many of the factors cited in *Jones* also differentiate trials from preliminary hearings. Unlike a trial, a magistrate at a preliminary hearing determines only whether there is probable cause to believe that the defendant committed the charged offense and "lacks authority to determine

the guilt or innocence of the defendant" (*People v. Wallace* (2004) 33 Cal.4th 738, 749.); hearsay evidence may be allowed through the testimony of qualified peace officers (*People v. Miranda* (2000) 23 Cal.4th 340, 347.); there is no right to a jury, and the prosecution's burden is to show sufficient probable cause to hold the defendant to answer, (*Dudley v. Superior Ct* (1974) 36 Cal. App.3d 977), as opposed to proof beyond a reasonable doubt as is required for a trial. (*In re Winship* (1970) 397 U.S. 358 [25 L.Ed.2d 368, 378, 90 S.Ct. 1068].)

C

The Terms "Courts" and "Magistrates" Are Not Synonymous

Case law has long differentiated courts from magistrates. A court is endowed with inherent powers that are "wide" and "derived from the Constitution and are not confined by or dependent on statute." (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1247-48.) By contrast, a magistrate's authority is purely statutory. (*People v. Superior Court (Feinstein)* (1994) 29 Cal.App.4th 323, 328; *People v. Mimms* (1988) 204 Cal.App.3d 471, 480 ["the position of magistrate is an office separate and apart from the court and the authority of a magistrate is likewise provided by statute"].) The legal authority of a magistrate is "extremely narrow." (*Anderson v. Justice Court* (1979) 99 Cal.App.3d 398, 402.)

As a result of these differences, courts have often refused to interpret statutes containing the word "court" as encompassing matters occurring before a magistrate. One example includes section 1466, which authorizes appeals of orders from an "inferior court" to a superior court's appellate division. Reviewing courts have held that because magistrates are not "courts," orders issued by them are not appealable under section 1466. (See, *e.g.*, *People v. Mimms* (1988) 204 Cal.App.3d 471, 480 ["court" and "magistrate" are not synonymous terms].)

The Criminal Discovery Statute permits "courts," not "magistrates," to issue discovery orders. (§ 1054.5) This omission is telling. Moreover, when the drafters of Proposition 115 intended a provision of the initiative to apply to magistrates as well as to trial courts, they expressly used the term "court and magistrate." In section 1050.1, upon a showing of good cause by a prosecutor, the "court or magistrate" has authority to grant a continuance. (§ 1050.1.) The same statute also restricts severance of multiple-defendant cases by "the court or magistrate." (*Ibid.*) Thus, the authors of Proposition 115, and the Criminal Discovery Statute demonstrated that when they intended a statute to apply to a magistrate, they expressly used that term. (*California Teacher's Assn. v. Governing Bd. of Rialto Unified School District* (1997) 14 Cal.4th 627, 633 ["[the legislature] could easily have written the statute to state..."] and see fn. 3 at p. 635.)

The plain language and the intent behind the Criminal Discovery Statute enacted in 1990 does not authorize compelled pre-preliminary hearing discovery; it limits its application to trials. If however, as Petitioner argues, the *Pitchess* scheme was ever intended to apply to the preliminary hearing stage, Proposition 115, as the later enacted statute, ended that.

D

The Court Of Appeal And The Magistrate Below Correctly Characterized The *Pitchess* Request As Beyond The Scope Of Section 866

At the hearing on the *Pitchess* motion, several exchanges between the magistrate and Petitioner's counsel serve to highlight the issues presented in this petition:

> The Magistrate: Seems to me, everything you are alleging that is false would go to the issue of probable cause. Whether- -whether there was probable cause, whether the police lawfully went to the house.

Ms. Blossom:[8] The issue is, do they or do they not lie.

The Magistrate: It has to be something that's material to the preliminary hearing.

Ms. Blossom: It is material to the preliminary hearing, because probable cause is an element of the offense. They are charged with PC 69, resisting executive officer. They have to make a lawful arrest. The People have to prove lawful arrest to prove their case. That's an element of the offense.

The Magistrate: All right.

* * *

[Response from Los Angeles Deputy City Attorney, Stephen Cohen.]

* * *

The Magistrate: Well, the court is going to deny the motion without prejudice. I just don't see 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.

Ms. Blossom: But if there is no lawful arrest, that is an element. That's not a 1538.5 issue. Even if it was, it would still be proper. It's an element of the offense. If I had a *Pitchess* motion saying they are lying about whether my client had a gun, that would effect the outcome of the prelim.

The Magistrate: They never said he did have a gun.

Ms. Blossom: Correct. I am giving you a hypothetical example. The court is saying- -as I understand it [sic], you can't get *Pitchess* discovery pre-prelim unless it goes to an element of the offense. I am saying the element of the offense- -I didn't get to the other offense in my recitation of the declaration. I wasn't sure if the court had an opportunity to read it.

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8. Susanne Blossom is a Los Angeles County Deputy Public Defender who represented Petitioner at the time.

The Magistrate: I did.

Ms. Blossom: There are two offenses against my client. PC 69 [sic]. And I would discuss the facts there that are relevant to the element that the prosecutor has to prove in a preliminary hearing, to prevail, which is that there is a lawful arrest taking place. And I have shown how the police officers are lying- -A, it's moral turpitude to lie in a police report.

The Magistrate: The other problem is the preliminary hearing is set for June 2nd- -excuse me- -it's set- -yeah. June 2nd as 0 of 10. Even if the court orders the disclosures, you wouldn't have to [sic] time to look into it for preliminary hearing.

Ms. Blossom: I don't think that's a basis for denying the motion. If these officers are clean, then we don't have an issue with timing. I don't think that's a basis to deny the motion. If there is in fact discovery, then we would file a 1050.

The Magistrate: That's why I said it's without prejudice. Because the court does not see anything here that's being alleged that appears would reasonably change the outcome of the preliminary hearing. Maybe trial, but not a preliminary hearing.

Ms. Blossom: Unless the outcome is a foregone conclusion, which I hope it's not.

The Magistrate: Of course it's not. But I am saying you are going to have to allege a set of facts where I can say if that were true- -that would certainly change the outcome. You haven't even denied all the necessary elements of the offense.

Ms. Blossom: Yes, I did. I am not sure if the court read the declaration. I denied lawful arrest. If there is no lawful arrest, they cannot prevail on PC 69. I also denied directly any criminal threat. If there is no criminal threat, there is no 422.

The Magistrate: But you have done it in conclusory terms. It doesn't tell me what did happen. That's the problem.

(PWM Exhibit F at pp. 6-9.)

Petitioner's counsel continued to argue that her *Pitchess* motion did not contain conclusory denials, but the magistrate went on to deny the motion without prejudice. Ms. Blossom then requested the magistrate to address a separate issue, but then returned to the *Pitchess* issue by asking the magistrate to clarify its ruling. He explained that in order for a *Pitchess* motion to be successful pre-preliminary hearing, Petitioner must demonstrate that he has a reasonable chance to discover something that would change the outcome of the hearing ("... dispute something that is a necessary element of the People's case that has to be proven at preliminary hearing...there was [not] a specific factual foundation as to what exactly did happen at the time that [Petitioner] was arrested.") (PWM Exhibit F at pp. 13-14.)

The above exchanges between the magistrate and Petitioner's counsel demonstrate that the court attempted to remain faithful to the clear dictates and spirit of Proposition 115 as succinctly expressed in *Eid*, *supra*, 31 Cal.App.4th 129-130, discussed *ante*.

Although the magistrate's comments seemed to indicate that had Petitioner made a better showing, he might entertain a *Pitchess* motion brought pre-preliminary hearing, his ultimate act in denying the motion was quite correct. (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [A ruling or decision that is correct in law will not be disturbed on appeal if it was made for the wrong reasons and regardless of the considerations that may have moved the court to its conclusions.].) *Eid* made it very clear that after Proposition 115, discovery is no longer mandatory and cannot be compelled at preliminary hearings. (*Eid*, *supra*, 31 Cal.App.4th at p. 130.) Even though the magistrate apparently held a contrary view regarding pre-preliminary hearing discovery, still his query whether the items requested in the *Pitchess* motion would change the outcome of the

preliminary hearing, was clearly an attempt to determine if Petitioner was making an offer of proof pursuant to section 866, subdivision (a).

To that end, it is worth noting that in *Eid* the court affirmed the magistrate's conclusion that the defendant's counsel's conditional statements regarding what a witness was going to say, if allowed to testify at the preliminary hearing, was an inadequate offer of proof. (*Eid*, *supra*, 31 Cal.App.4th at pp. 126-127 ["...the offer of proof was based on nothing more than optimistic expectation..."].) This seems to be what the magistrate below was telling Petitioner. If Petitioner was not making an offer of proof, or unable to make one pursuant to section 866, subdivision (a), then his pre-preliminary hearing *Pitchess* request was irrelevant.

Thus, Petitioner's *Pitchess* request was grounded in a "hope springs eternal" mentality because it rested on the hope of finding witnesses that would impeach Officers Flores, Smith, Vasquez, Gomez and Sergeant Vargas; not that these impeachment witnesses were available presently. Hence, his request may very well suffice at pretrial, but it fails to satisfy section 866, subdivision (a)'s offer of proof requirement because the *Pitchess* request, more specifically his declaration made "on information and belief," represented an optimistic expectation that he would locate and acquire prospective witnesses for the preliminary hearing. In fact, it is completely understandable that Petitioner was unable to state for certain that he would call these impeachment *Pitchess* witnesses at the preliminary hearing, because he was not certain they existed. The provisions in section 866 prohibit using the preliminary hearing in this manner. Given the fact that the nature and purpose of a preliminary hearing has been substantially altered post Proposition 115, the magistrate was required to deny Petitioner's motion.

As the Court of Appeal below correctly pointed out that while Evidence Code section 1043 limits *Pitchess* discovery to evidence that is material "to the subject matter involved in the pending litigation," Petitioner's *Pitchess* request sought evidence "hoping to show" the aforementioned officers engaged in past misconduct. (Slip Opn., at p. 9; Evidence Code section 1043, subdivision (b)(3).)

E

Prohibiting Mandated *Pitchess* Discovery Before The Preliminary Hearing Gives Effect to Section 866

For the aforementioned reasons, Petitioner's argument that he is entitled to pre-preliminary hearing *Pitchess* discovery because the *Pitchess* scheme is independently statutorily authorized and considered third party discovery is without merit. *Pitchess* discovery is independently authorized (*Albritton v. Superior Court* (1990) 225 Cal.App.3d 961, hereafter *Albritton*) and considered third party discovery (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045, hereafter *Alford*), but it is still discovery, and therefore subject to the limitations of section 866.

Another cardinal rule of statutory construction states that "every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Select Base Materials, Inc. v. Bd. of Equalization* (1959) 51 Cal.2d 640, 675-676.) Thus, interpreting the *Pitchess* scheme to include preliminary hearings would no doubt conflict with the provisions set out in section 866, subdivisions (a) and (b). This Court said in *Correa v. Superior Court* (2002) 27 Cal.4th 444, after Proposition 115, the new limited form of preliminary hearings in this state 'resembles the Fourth Amendment probable cause hearing examined in *Gerstein* [*v. Pugh* (1975) 420 U.S. 103]...'(*Id.* at p. 465 citing *People v. Miranda* (2000) 23 Cal.4th 340, 349.)

The high court in *Gerstein v. Pugh* made it clear that the Fourth Amendment probable cause determination is addressed only to pretrial custody. (*Gerstein v. Pugh*, *supra*, 420 U.S. at p. 123.). Likewise, the preliminary hearing establishes no more than a reasonable suspicion that a crime has been committed in order to hold a defendant to answer while an information is prepared.

Harmonizing the *Pitchess* scheme and the express provisions found in Section 866 into a rule that provides for mandated *Pitchess* discovery post preliminary hearing, renders the two schemes complimentary, serving the twin goals of respecting a streamlined probable cause hearing and Petitioner's pretrial right to discovery. (*Fuentes*, *supra*, 16 Cal.3d at p. 7; *Alford*, *supra*, 29 Cal.4th at p. 1040 [statutory language is not considered in isolation, the entire substance of the statute is examined "in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts--citing to *People v. Acosta* (2002) 29 Cal. 4th 105, 112].) Again, this conclusion is buttressed by the fact that *Albritton* and *Alford*, as well as *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, which Petitioner also cites in support of his claim that *Pitchess* discovery is a right that should be afforded him pre-preliminary hearing, all arose in the context of a trial (OBM at p. 17), not a preliminary hearing.

Similarly, Petitioner's reliance on *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100 (hereafter *Hurd*) is misplaced. As Petitioner notes, *Hurd* dealt with post-conviction habeas corpus proceedings and section 1054.9 which provides for the same, but it did not deal with section 866. Furthermore, section 1054.9, subdivision (b) defines discovery materials as material in the possession of the prosecution and law enforcement authorities that the same defendant would have been entitled to at the time of trial. Thus, *Hurd* was not concerned with materials the

prosecution and law enforcement had at the time of a probable cause hearing.

Petitioner's reliance on cases such as *Brant v. Superior Court* (2003) 108 Cal.App.4th 100 (hereafter *Brant*) (*Pitchess* motion in aid of a suppression motion brought pretrial), *People v. Memro* (1985) 38 Cal.3d 658 (a motion to challenge confessions brought pretrial [disapproved on other grounds in *People v. Gains* (2009) _Cal.4th_, 92 Cal.Rptr.3d 627, 205 P. 3d 1074 fn.2], *People v. Nguyen* (2007) 151 Cal.App.4th 1473 (a post-conviction *Pitchess* motion) and *Slayton v. Superior Court* (2006) 146 Cal.App.4th 55 (hereafter *Slayton*) (a *Pitchess* motion brought in a child custody proceeding) is similarly misplaced because none of the cases arises in a preliminary hearing context. The aforementioned distinctions were not lost on the Court of Appeal below. The same division of the Court of Appeal decided the instant case and *Brant*, *supra*. In distinguishing *Brant*, the court below pointed out that the *Pitchess* issue there arose in the context of a pretrial motion and their opinion never discussed the issue in the context of a preliminary hearing. Therefore, they noted that a case is not authority for a proposition not addressed, citing *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], and *Ginns v. Savage* (1964) 61 Cal.2d 520, 524 fn. 2. (Slip Opn., at p. 10.)

It should also be noted that, although the court in *Slayton* found that the *Pitchess* procedure applied in a child custody case, it quoted favorably from *City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883, hereafter *City of Los Angeles* (disapproved on other grounds by *International Federation of Professional and Technical Engineers v. Superior Court of Alameda County* (2000) 42 Cal.4th 319, 345) and its treatment of the *Pitchess* scheme. In *City of Los Angeles*, the

court held that utilizing the *Pitchess* procedure is unnecessary and a waste of time when a spouse is trying to obtain certain financial records in a marital dissolution case because the spouse is entitled to it by law. (*City of Los Angeles*, *supra*, 111 Cal.App.4th at pp. 893-897.) The court viewed the *Pitchess* scheme as "generally applicable statutes requiring *all* persons seeking peace officer personnel records to comply with the described procedure;" the Family Code, however, expressed the legislative intent that *the spouse* has a fiduciary duty to provide full financial disclosure at dissolution of a marriage. (*Id.* at pp. 893-894, emphasis added.) The court stated that it was necessary to harmonize the relevant *Pitchess* statutes with those of the Family Code where the legislative intent conflicted with that in the *Pitchess* scheme. (*Ibid.*) The *City of Los Angeles* court held, after harmonizing the involved statutes, that the *Pitchess* procedure must yield to the Family Code in the interest of full disclosure of financial information which is essential to an equitable division of assets, as well as calculating spousal and child support. (*Id.* at pp. 893-895.)

II

PITCHESS DISCOVERY WOULD UNNECESSARILY DELAY THE PRELIMINARY HEARING

The magistrate's comments regarding the fact that even if he ordered the *Pitchess* disclosures Petitioner would not have them in time for the June 2nd preliminary hearing, was not only undisputed, it was a significant observation. Among the goals of Proposition 115 is to secure swift and fair justice and to streamline criminal procedure. (*Eid*, *supra*, 31 Cal.App.4th at pp. 129-130.) As the Court of Appeal below noted, "A *Pitchess* motion, which unfolds in several steps, including a hearing on the motion, review of the officer's personnel file by the law enforcement agency's custodian of records, and an in camera inspection by the court,

potentially interrupts a preliminary hearing's streamlined proceedings." (Slip Opn., at p. 6.) Thus, if Petitioner was allowed the *Pitchess* discovery he requested, it would necessitate a continuance of the preliminary hearing and thereby frustrate the goals of Proposition 115; indeed, Petitioner's counsel admitted that a continuance was a distinct possibility. (PWM Exhibit F at p. 8.) This "possibility" is exactly what *Holman*, a pre-Proposition 115 and a post *Pitchess* case, admonished magistrates to avoid. (*Holman*, *supra*, 29 Cal.3d at p. 485.)

In his brief, Petitioner erroneously relies on *Holman*. In *Holman*, the defendants requested that the prosecutor provide the names and addresses of all witnesses, experts, technicians, as well as any statements made by the defendants and witnesses; they also requested police and expert reports, physical evidence, and various materials or information in the People's, or its agents, possession. (*Holman*, *supra*, 29 Cal.3d at p 482.) The holding in *Holman* that magistrate have, ancillary to their statutory powers, authority to order discovery was premised on the fact that, at the time, no legislation dealt with the kind of criminal discovery requested by the defense in that case. (*Id.* at pp. 483, 485.)

> 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. [Citations.]

(Holman, *supra*, 29 Cal.3d at p. 483, citing *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536.)

Nearly nine years later to the day, Proposition 115 provided that "guiding legislation." It should also not go unnoticed that *Holman* was decided at a time when preliminary hearings were used for trial preparation and discovery (*Whitman*, *supra*, 54 Cal.3d at p. 1081.) Hence, *Holman's* continuing validity on the issue of whether a magistrate retains ancillary

powers to order pre-preliminary hearing discovery is questionable, if not superseded altogether. Moreover, even *Holman* decried protracted discovery procedures employed at the preliminary hearing stage:

> ... [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 fully agree with the foregoing observation. 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. Pretrial discovery is aimed at facilitating the swift administration of justice, not thwarting it.

(*Holman, supra*, 29 Cal.3d at p. 485.)

Therefore, Petitioner's reliance on *Holman* is misplaced, because the *Holman* decision provides no support for the granting of a *Pitchess* motion pre-preliminary hearing, not only because it would unduly delay the proceeding, but also because it would drag "all the discovery procedures from the trial court down into the preliminary hearing stage." (*Holman, supra*, 29 Cal.3d at pp. 483, 485.) Such a move would restore the preliminary hearing to a mini trial, a result that Proposition 115 expressly sought to reform.

To be sure, the discovery request in *Holman* for the names and addresses of witnesses, is essentially a garden variety request. This information is usually found in police reports that the defense bar receives when their client is arraigned on the complaint, and it adequately informs them of the testimony they will encounter at the preliminary hearing. Providing police reports to defense counsel remains the practice in Los Angeles County even after the enactment of Proposition 115 (see discussion of section 859 *ante*). However, for the purposes of a preliminary hearing, the discovery requested in Petitioner's *Pitchess* motion is anything but

garden variety. It would involve several protracted hearings and additional investigation time once discovery is turned over thereby delaying the preliminary hearing; so much for "facilitating the swift administration of justice." (*Holman, supra,* 29 Cal.3d at p. 485.)

It should also be noted that Petitioner explained to the magistrate below that his *Pitchess* request related to his preparation for the preliminary hearing. However, his declaration contained in his *Pitchess* motion sought the requested discovery in order to prepare for "motions and trial," and that any materials he received as a result of a successful *Pitchess* motion would be used to "locate witnesses" that would testify to the Officers' bad character and specific instances of misconduct "of the type alleged in this case." (PWM, Exhibit C at p. 7 lns. 9-11, and p. 9 lns. 16-18.) The motion was bereft of any request to prepare for the preliminary hearing. Hence, in addition to finding that the *Pitchess* request sought evidence that was immaterial to the preliminary hearing and its limited purpose, the magistrate below correctly denied the motion because it would needlessly delay the June 2nd preliminary hearing date.

III

PITCHESS DISCOVERY WAS NEVER INTENDED TO BE A PRE-PRELIMINARY HEARING RIGHT

In *Pitchess v. Superior Court*, this court granted a limited right to discover peace officer personnel records in order to ensure "*a fair trial* and an intelligent defense in light of all relevant and reasonably accessible information." (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 535, emphasis added.) The *Pitchess* request there was brought by the defense before a trial court. In 1978 the Legislature codified the discovery procedure set out in the *Pitchess* case in Evidence Code sections 1043 through 1045 and sections 832.7 and 832.8. (*Alford, supra,* (2003) 29

Cal.4th at p. 1037.) As the Court of Appeal below concluded, the *Pitchess* scheme does not expressly provide for pre-preliminary hearing discovery of police officer personnel records. Likewise, no case law dictates that *Pitchess* discovery is to be conducted prior to or at the preliminary hearing. Indeed, the vast majority of cases coming after the *Pitchess* case and its codification, including many cases cited by Petitioner, dealt with the discovery procedure in either a felony or misdemeanor trial posture. (See *Albritton, supra,* 225 Cal.App.3d 961; *Alford*, *supra*, 29 Cal.4th 1033; *Warrick v. Superior Court* (2005), 35 Cal.4th 1011; *Garcia v. Superior Court* (2007) 42 Cal.4th 63; *People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305; *City of Santa Cruz v. Municipal Court*, (1989) 49 Cal.3d 74, 80 fn.2, *People v. Mooc* (2001) 26 Cal.4th 1216; *Chambers v. Superior Court* (2007), 42 Cal.4th 673 *People v. Salcido* (2008) 44 Cal.4th 93; *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409; *Brant, supra,* 108 Cal.App.4th 100; *People v. Hustead* (1999) 74 Cal.App.4th 410.)[9]

Thus, case law recognizes that *Pitchess* discovery, a mechanism to obtain impeachment evidence, is subject to the discretion of the trial court; and, at least after the enactment of Proposition 115, the ancillary powers of the magistrate do not include requiring mandatory discovery. (See discussion *ante* of *Holman*, *supra*, 29 Cal.3d at p. 485 and why it is now superseded because of the enactment of Proposition 115 and section 866.) This is so, because discovery rights do not ripen until the

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9. In *People v. Samayoa* (1997) 15 Cal.4th 795, 827, a *Pitchess* motion was submitted to a preliminary hearing magistrate (who permitted disclosure of some information), and then, subsequently to the trial court in an effort to obtain more information. However, it does not appear that any party objected to that practice, and, as the Court of Appeal below concluded, this Court did not address the efficacy of that procedure. (Slip Opn., at p. 11.)

defendant has been arraigned on an information and until 30 days before trial. (Section 1054.7; See also *Whitman*, *supra*, 54 Cal.3d at pp. 1078-1082 for an analogous discussion of when a defendant's confrontation rights mature.)[10]

The aforementioned court decisions coming after *Pitchess* conform to the legislative intent embodied in the *Pitchess* scheme, namely, that *Pitchess* motions shall be submitted to a *trial court* or at least submitted post preliminary hearing.[11] Again, the principles of statutory construction dictate that:

> In ascertaining the legislature's intent, we turn first to the language of the statute, giving the words their ordinary meaning. [Citations] We must follow the statute's plain meaning, if such appears, unless doing so would lead to absurd results the Legislature could not have intended. [Citations] If our examination of the statutory language leaves doubt about its meaning, we may consult other evidence of the Legislature's intent, such as the history and background of the measure. [Citations].

(*Birkett*, *supra*, 21 Cal.4th at pp. 231-232, citations omitted.)

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10. Section 1054.7 requires discovery to be made at least 30 days before trial "unless good cause is shown why a disclosure should be denied, restricted, or deferred;" See also section 859 discussed *ante* [prosecutor is no longer required to provide police reports before the preliminary hearing.]. In a similar vein, the United States Supreme Court stated in *United States v. Ruiz* (2002) 536 US 622, 629, [153 L Ed 2d 586, 122 S Ct 2450], the Constitution's due process requirement does not require disclosure of material, exculpatory impeachment evidence before a plea of guilty because "impeachment information is special in relation to the fairness of a trial…"

11. As Petitioner indicated, the Court of Appeal below took judicial notice of the legislative history of Evidence Code section 1043-1045 that was submitted by Real Party (District Attorney) and Petitioner. (OBM at p. 17.)

An examination of the Legislative history of the *Pitchess* scheme indicates that *Pitchess* motions are, at the very least not to be submitted to a magistrate.

The Legislative history of the *Pitchess* scheme states that:

> This bill is an attempt to cope with alleged law enforcement reaction (of shredding records to prevent discovery) to the California Supreme Court holding in Pitchess v. Superior Court of Los Angeles County (1974), 11 C 3d 531.

(Senate Committee On Judiciary SB 1436 (D. Carpenter) 1977-78 Regular Session at p. 7.)

(See Real Party in Interest's (District Attorney) letter brief filed August 25, 2008, Exhibit 1 at pp. 7-8.)

Contrary to Petitioner's argument that the *Pitchess* scheme was meant to be applicable to the preliminary hearing stage, the Legislature was obviously aware that the *Pitchess* case involved a request to obtain peace officer personnel records in the context of a trial, and it is doubtful that it ever envisioned the same request be made at or before a preliminary hearing. (*People v. Slaughter*, *supra*, 35 Cal.3d at p. 640 ["It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." [citations].].) Buttressing that view is Evidence Code section 1042, subdivision (c) which indicates when a bench officer may admit evidence elicited from a confidential informant; It states in pertinent part:

> Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or

> identity of the informant be disclosed if the judge or magistrate is satisfied…

(Evidence Code § 1042, subd. (c).)

Evidence Code section 1042, subdivision (c) has not been amended since 1969, and expressly mentioned "preliminary hearing," "magistrate," and "court proceeding." In view of that section's existence in 1978, Petitioner's argument that Evidence Code sections 1043-1046 envisioned its applicability to the preliminary hearing is without merit. (*California Teacher's Assn. v. Governing Bd. of Rialto Unified School District* (1997) 14 Cal.4th 627, 633, hereafter *California Teacher's*.) The fact that the Legislature specifically mentioned magistrate in Evidence Code section 1042, subdivision (c) and specifically did not refer to it in the *Pitchess* scheme demonstrates that they were codifying only the law that was announced in the *Pitchess* case and the facts and circumstances that led to it. (*Fuentes*, *supra*, 16 Cal.3d at p. 7 [Courts must assume that when the Legislature passes a statute it is aware of existing related laws and intends to maintain an existing body of rules (citations)].) More importantly, Evidence Code sections 1042 subdivision (c) and the *Pitchess* scheme evidence the fact that if the Legislature wanted the latter to apply to preliminary hearings it would have expressly said so. (*California Teacher's*, *supra*, 14 Cal.4th 633 ["[the legislature] could easily have written the statute to state…"] and see fn. 3 at p. 635.)

In any event, any doubt that the *Pitchess* scheme does not apply to preliminary hearings after its codification in 1978, has been put to rest by the enactment of Proposition 115.

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IV

AN INABILITY TO OBTAIN *PITCHESS* DISCOVERY PRE-PRELIMINARY HEARING DOES NOT DENY PETITIONER HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

As the Court of Appeal below noted, even after Proposition 115, the preliminary hearing remains a critical stage of the proceedings where a defendant is afforded the right to counsel. (Slip Opn., at p. 7; See also *People v. Cudjo* (1993) 6 Cal.4th 585, 615.) This is so because this state permits prosecutors to call witnesses at the preliminary hearing. (*Whitman*, *supra*, 54 Cal.3d at pp.1080-1082; See also *Gerstein v. Pugh*, *supra*, 420 U.S. at pp. 121-123 and *Coleman v. Alabama* (1970) 399 U.S. 1.) But contrary to Petitioner's claim, he is not denied discovery "sufficient to allow him or her to effectively challenge the evidence of probable cause," and he is not denied his right to effective assistance of counsel because he cannot obtain *Pitchess* discovery pre-preliminary hearing. (OBM at p. 33.) Petitioner is free to call witnesses to challenge the People's evidence as long as he satisfies section 866, subdivision (a)'s requirements. As this Court observed in *People v. Miranda* (2000) 23 Cal.4th 340 (hereafter *Miranda*):

> [Proposition 115] provides the defendant opportunities at the preliminary examination to cross-examine and evaluate the testimony of a qualified law enforcement officer relating single-level hearsay, and to call specified defense witnesses to rebut the prosecution's case. As the Court of Appeal in this case concluded, "These procedures adequately ensure factfinding reliability, and provide the defendant with all the process that is due."

(*Id.* at p. 354.)

Although *Miranda* ruled that, at a preliminary hearing involving a multiple defendant case, it was permissible for the prosecutor to use an officer to testify to statements he obtained from a co-defendant against the other defendant, even though that statement could not be used at trial, its above comments regarding the defendant's opportunities at the preliminary hearing are still applicable here. For as the Court of Appeal in this case astutely observed, the test for ineffective assistance of counsel plays out differently at a preliminary hearing as opposed to a trial because of the preliminary hearing's limited scope. However, pursuant to section 866, subdivision (a), Petitioner still has tools available in which to test the evidence for probable cause. (Slip Opn., at p. 9.)

To that end, in Petitioner's declaration contained in his *Pitchess* motion, he claimed to have access to witnesses that would refute just about every claim Officer Flores' police report made regarding Petitioner's statements and actions, as well as the officers' responses to those actions. If that is the case, he should have no problem satisfying Section 866, subdivision (a)'s offer of proof requirement enabling him to call those witnesses to testify at the preliminary hearing.

CONCLUSION

The Court of Appeal correctly concluded that mandated *Pitchess* discovery is not authorized before the preliminary hearing and Petitioner is not denied effective assistance of counsel because of his inability to obtain it. To rule otherwise, would render the goals espoused by Proposition 115, and specifically section 866, a nullity. A preliminary hearing is not a trial. Its sole purpose is to determine whether or not probable cause exists to believe a crime was committed. Since June 5, 1990, it is intended to be a quick and streamlined procedure. The People recognize that Petitioner retains the right to seek *Pitchess* information post-

preliminary hearing as Evidence Code section 1043-1045 had always envisioned. Therefore, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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By

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204 (c)(1) of the California Rules of Court, enclosed Answer Brief on Merits is produced using 13-point Times New Roman including footnotes and contains approximately 11,103 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this petition.

GILBERT WRIGHT
Deputy District Attorney

DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document, Answer Brief on Merits, by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

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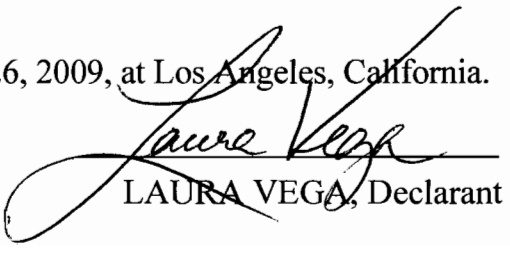

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