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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOISES GALINDO, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, CITY OF LOS ANGELES POLICE DEPARTMENT et al., Real Parties in Interest.	S - 170550 2nd Dist. No. B208923) (Trial Ct. No. BA337159)

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PETITIONER'S REPLY 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, Suite 590
Los Angeles, California 90012
Telephone No.: (213) 974-3066
Fax No.: (213) 626-3519
Email: Mharvis@pubdef.lacounty.gov

Attorneys for Petitioner

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PETITIONER'S REPLY BRIEF ON THE MERITS

In 1990 California's voters were told by the proponents of Proposition 115 that the criminal justice system was out of balance and favored criminals over law-abiding citizens. More than 57 percent of voters approved Proposition 115 which stated in Section 1 that: "The goals of the people in enacting this measure are to restore balance to our criminal justice system . . ."

Proposition 115 reined in preliminary hearings, reducing them from wide-ranging mini-trials to examinations where police officers may testify to hearsay and the limited purpose is to establish whether there is probable cause to believe that the defendant committed a felony. After Proposition 115 "the

examination shall not be used for purposes of discovery." (Pen. Code § 866, subd. (b).)

The voters did not, however, eliminate preliminary hearings as a "critical stage of the proceeding." Defendants retained almost all of the rights they previously were entitled to, such as the right to make a motion to suppress evidence, the statutory right to confront and cross examine witnesses (limited by a newly-enacted hearsay exception), and the statutory right to call witnesses subject to newly enacted limitations. (Pen. Code §§ 865, 866, 1538.5; see also Petitioner's Opening Brief on the Merits (hereafter OBM), pp. 25-27, for a list of 23 rights guaranteed to defendants at preliminary hearing.) Just as with the preliminary hearings described in *Coleman v. Alabama* (1970) 399 U.S. 1, California's defendants are entitled to the effective assistance of counsel.

Now, 19 years after Proposition 115 was approved by the voters, the Los Angeles County District Attorney (supported to a certain extent by the Los Angeles Police Department) has taken the position that the voters completely eliminated pre-preliminary hearing discovery. Although they say they are generously continuing to provide police reports prior to preliminary hearing, they insist that they are not required to provide *any* discovery at that point. This turns defendants into beggars, dependent entirely upon the largesse of prosecutorial alms-giving. Simply put, such a scheme cannot be constitutional.

Counsel cannot provide constitutionally effective assistance without the necessary tools and there is nothing more essential than the same arrest reports that the prosecutor utilized to file the charges pending against the defendant.

This Court has to determine and give effect to the voter's intent. Whether by review of the plain language of the initiative or the Legislative Analyst's analysis, it is not possible to conclude that the voters intended to completely eliminate pre-preliminary hearing discovery and thereby eliminate preliminary hearings as a critical stage of the proceedings. The voters retained virtually all of the critical rights granted to defendants charged by felony complaint. To paraphrase the Court of Appeal in *People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 428: "It defies common sense to think that the [voters] intended to provide rights under these statutes but at the same time denied the . . . defendant any means to enforce those rights."

The Constitutionally guaranteed right to effective assistance of counsel cannot possibly be satisfied by the presence of an attorney who has no police reports, no witness statements, no knowledge of the physical evidence, no laboratory reports, no statements of the defendant, indeed no idea of the prosecution's case other than a complaint listing the charges. The right to effective assistance of counsel would be a sham. Counsel would be nothing

more than a potted plant, as Colonel Oliver North's attorney Brendan Sullivan famously objected before the Congressional Iran-Contra committee.

The preamble to Proposition 115 establishes that the voters intended to restore balance to the criminal justice system. Plainly, they could not have intended to create an imbalanced criminal justice system - which is what the District Attorney's argument advocates. Preliminary hearings without any discovery are unfair and unbalanced.

I

THE ARGUMENT THAT *PITCHESS* DISCOVERY IS NOT PERMITTED UNLESS IT WILL CHANGE THE OUTCOME OF THE PRELIMINARY HEARING IS CONTRARY TO THIS COURT'S PRECEDENT

One of the grounds the Court of Appeal gave when it held that *Pitchess* discovery is not permitted for preliminary hearing was that the discovery was unlikely to rebut probable cause and therefore unlikely to lead to a different outcome. (Slip Opn., p. 9.) As such, according to the Court of Appeal, *Pitchess* discovery is not material.

To support its conclusions the Court of Appeal minimized the purpose of *Pitchess* discovery as a tool to help the magistrate determine officer credibility by writing that "[a] witness might be untruthful in one setting and truthful in another." (Slip Opn., p. 9.) While this might be true, it is irrelevant and begs the question of how the trier of fact determines credibility. Notably,

the Court of Appeal cited nothing for this proposition and its conclusion that evidence of prior misconduct would not assist the magistrate. The Court of Appeal's argument is contrary to law, common sense, and how witnesses are impeached in the real world. Testimony from a credible defense witness that impeaches a police officer's credibility or establishes a habit, character, and custom *is* relevant and material and *could* make a difference.

> "As Wigmore astutely observed, the time of character evidence '. . . as a question of Relevancy, is simple enough . . . . Character at an earlier or later *time* than that of the deed in question is relevant only on the assumption that it was substantially unchanged in the meantime, *i.e.* the offer is really of character at one period to prove character at another, and the real question is of relevancy of this evidence to prove character, not of the character to prove the act.' (1 Wigmore, Evidence (3d ed. 1940) § 60, p. 463; italics in original.) He then concluded that '. . . there is no difficulty from the point of view of the relevancy of character; a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because character is a more or less permanent quality and we may make inferences from it either forward or backward.' (5 Wigmore, Evidence (Chadbourn rev. ed. 1974) § 1618, p. 595.) We find Wigmore's views compelling." (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448.)

The Los Angeles Police Department tries to reinforce the Court of Appeal by arguing that *Pitchess* discovery "does not have the ability to make a difference" in the outcome of the preliminary hearing and therefore is not material. (LAPD Answer, pp. 10-11.) "Peace officer records only become

subject to disclosure when they can make a difference. . . ." (LAPD Answer, p. 12.)

Both the LAPD and the Court of Appeal have demonstrated a fundamental misunderstanding of *Pitchess* discovery. The fundamental error is that the Court of Appeal and the LAPD wrongly conclude that *Pitchess* discovery has to be sufficiently persuasive that it will affect the outcome of the preliminary hearing or else it is not discoverable. This conclusion is wrong and improperly conflates the preconviction discovery standard with the standard for post-conviction relief. This court has plainly held that the two standards are vastly different.

> "As we have previously explained, however, this weighing process for screening out unwarranted discovery requests is not akin to the inquiry into whether a particular error in denying discovery was prejudicial, an inquiry that involves an assessment or weighing of the persuasive value of the evidence that was presented and that which should have been presented. *(Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1026 . . . . Indeed, a defendant is entitled to discover relevant information under *Pitchess* even in the absence of any judicial determination that the potential defense is credible or persuasive. (*Warrick, supra*, 35 Cal.4th at p. 1026.)" (*People v. Gaines* (2009) 46 Cal.4th 172, 182.)

The Court of Appeal and the LAPD got it exactly backward. Their argument that *Pitchess* discovery is only permitted when it is likely to effect the outcome has been rejected by this court.

> "Accordingly, a trial court's determination that information in the requested records ought to have been disclosed is not equivalent to a finding that such information would have had any effect on the outcome of the underlying court proceeding—or, indeed, even a finding that such information would have been admissible, inasmuch as the trial court's duty to disclose encompasses information that is not itself admissible but which "may lead to admissible evidence." *(Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1048–1049.) To obtain relief, then, a defendant who has established that the trial court erred in denying *Pitchess* discovery must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed. [Citations.]" (*People v. Gaines, supra*, 46 Cal.4th 172,182-183.)

The LAPD argues that *Pitchesss* discovery should not be allowed for preliminary hearing because the balance between a defendant's need for the information and an officer's need for privacy should tilt in favor of the officer. The LAPD bases this argument on the above-mentioned belief that *Pitchess* is not material because it will not affect the outcome of the hearing. (LAPD Answer, pp. 11-13.) Once again, the LAPD is making an argument that is not supported by precedent from any reviewing court. The clear standard has always been materiality - and no court has ever re-balanced interests based upon the type of proceeding at issue.

> ". . . the threshold for discovery embodied in section 1043 has been characterized by our Supreme Court as 'relatively low.' (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83-86, (*Santa Cruz)*). All the law requires to show good cause to permit such discovery is the 'materiality' of the information to the subject matter of the pending litigation and a reasonable belief that the governmental agency has the 'type' of

information requested." (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392; see also OBM, p. 18.)

This court has made it very clear that the *Pitchess* discovery standard proposed by the Court of Appeal and the LAPD is the *post-conviction* standard. Materiality of the discovery to the pending litigation is what is required, not a re-balancing of interests or a requirement that the discovery will change the outcome of the proceeding.

II

LAPD CONFUSES THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHICH APPLIES TO THE PRELIMINARY EXAMINATION, WITH THE SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES, WHICH IS A TRIAL RIGHT

The LAPD correctly points out that petitioner argued he has the right to effective assistance of counsel at the preliminary hearing. (LAPD Answer, p. 13; OBM, pp. 25, 33.) The Court of Appeal agreed that defendants have the constitutional right to the assistance of effective, prepared counsel at preliminary hearing. (Slip Opn., p. 7.)

The LAPD then veers off on an irrelevant tangent. They claim "there are no Sixth Amendment rights that attach to *Pitchess* motions," citing *People v. Gaines* for the proposition that the constitutional right to confront and cross examine witnesses is unhampered by the failure to provide *Pitchess* discovery,

which is "the same issue raised by petitioner." They twice claim this is an argument made by petitioner. (LAPD Answer, pp. 13-14, 16.)

Petitioner has *not* argued that he has a Sixth Amendment right to confront and cross-examine witnesses at the preliminary examination. Where LAPD got the idea that this is "the same issue raised by petitioner" is unknown.

Instead, petitioner argued that he has a Sixth Amendment right to the assistance of effective and prepared counsel. Petitioner has not argued that *Pitchess* discovery is always a precondition for effective assistance of counsel but rather has argued that in cases such as this one where he is charged with felony resisting arrest and where all the witnesses are police officers, then *Pitchess* discovery *is* essential to effective representation. (OBM, pp. 28-29.)

The LAPD's claim that no Sixth Amendment rights attach to *Pitchess* discovery is overly broad. The failure of defense counsel to request *Pitchess* discovery may amount to ineffective assistance of counsel. (See, for example, *People v. Salcido* (2008) 44 Cal.4th 93, 171; *People v. Nguyen* (2007) 151 Cal.App.4th 1473.) Petitioner will argue *post* that the District Attorney's argument that defendants are not entitled to *any* discovery for preliminary hearing will result in the denial of the constitutional right to effective assistance of counsel.

Petitioner has noted that Penal Code section 865 gives him the *statutory* right to confront and cross-examine witnesses. (OBM, p. 27.) These are "substantial rights," the deprivation of which could result in a successful motion to dismiss pursuant to Penal Code section 995 or entitlement to a writ of prohibition. (*Jennings v. Superior Court* (1967) 66 Cal.2d 867.)[1/]

The LAPD continues debunking arguments not made by petitioner (the "straw man" fallacy where an opponent's position is mischaracterized) when they claim that petitioner is going to argue that Penal Code section 866 violates the Sixth Amendment right to confront and cross examine to the extent it precludes *Pitchess* discovery. (LAPD Answer, pp. 16-17.)

Again, this is not an argument that petitioner had made. Rather, petitioner has relied upon Penal Code section 866 to assist his argument that he is able to obtain *Pitchess* discovery for preliminary hearing. (OBM, pp. 21-22, 26, 35.)

LAPD also argues that "limitations placed on preliminary hearings under Penal Code section 866 are incompatible with *Pitchess* discovery." (LAPD Answer, p. 15.) They restate the Court of Appeal's claim that although

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[1/] Petitioner also made this argument in his Opening Brief on the Merits at page 21, however he erroneously cited *Quinones v. Superior Court* (2008) 166 Cal.App.4th 1519. *Quinones* has been depublished. Petitioner regrets the error. Petitioner will rely upon *Jennings v. Superior Court, supra,* 66 Cal.2d 867.

Penal Code section 866 does not address discovery for preliminary hearing, allowing such discovery tends to work at cross purposes with the limited nature of preliminary hearings. (LAPD Answer, p. 16.) Other than misstating petitioner's position on the applicability of the constitutional right to confront and cross examine witnesses, this section of LAPD's Answer contains no argument and offers no insight but simply quotes and paraphrases the Court of Appeal's opinion.

LAPD's arguments in sum are either legally incorrect or are based upon a mischaracterization of the arguments made by petitioner. They add nothing to the debate and are not well taken.

III

THE VOTERS DID NOT INTEND TO ELIMINATE PRELIMINARY HEARINGS AS A CRITICAL STAGE OF THE PROCEEDING AND DID NOT INTEND TO ELIMINATE PRE-PRELIMINARY HEARING DISCOVERY

The Los Angeles County District Attorney argues that *Pitchess* discovery is unavailable for preliminary hearing. Unlike LAPD, however, the District Attorney argues that the reason *Pitchess* discovery is disallowed is because after Proposition 115 the defense is not entitled to *any discovery at all* for preliminary hearing. The impact of this argument is that when the voters enacted Proposition 115 with the stated purpose of restoring balance to the criminal justice system, they were actually destroying preliminary hearings as

a critical stage and introducing imbalance. Additionally, the District Attorney's argument means that even though the voters allowed criminal defendants to retain virtually all preliminary hearing "rights" they had prior to Proposition 115, the electorate actually intended to take away the means of effectuating and enforcing those rights. And the voters did all this without being informed that elimination of preliminary hearings as a critical stage was one of their goals.

Petitioner has already explained that prior to Proposition 115 defendants had at least 23 "rights" granted to them at preliminary hearing, ranging from the right to effective assistance of counsel; the ability of the magistrate to add, dismiss, or reduce charges; to the right to call witnesses and put on an affirmative defense. (OBM, pp. 25-27.) The sole preliminary hearing "right" that was explicitly eliminated was the right to use the preliminary hearing *itself* for the purposes of discovery. (Pen. Code § 866, subd. (b).) Although some other statutory rights were limited (such as the ability of the defendant to call witnesses) virtually every other "right" that existed prior to Proposition 115 still exists to this day.

> "In interpreting a voter initiative ... we apply the same principles that govern statutory construction. [Citation.] Thus, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] 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].

> [Citation.] When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" [Citation.] In other words, 'our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.' [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.)

Although it is true that the voters were told that the initiative "[r]epeals the requirement that a copy of the arrest report be delivered to the defendant at the initial court appearance, or within two days of the appearance," that statement appears in the ballot pamphlet under the topic "Disclosure of Information" and not under the separate topic "Preliminary Hearings." (Proposition 115 Analysis by the Legislative Analyst, p. 33, 1990 Ballot Pamphlet.) Under the topic "Preliminary Hearings" the voters were only told that "[t]his measure prohibits a preliminary hearing when a felony is prosecuted by grand jury indictment." (*Id.* at p. 32.)[2]/ Under the topic "Hearsay Evidence," the voters were told "[t]his measure allows the use of hearsay evidence at preliminary hearings if these out–of-court statements are introduced through the testimony of certain trained and experienced law enforcement officers." (*Id.* at p. 33.)

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[2]/ Petitioner notes that the Argument Against Proposition 115 claims that District Attorneys will eliminate preliminary hearings. (1990 Ballot Pamphlet, p. 35.) In context this can only be a reference to the elimination of post-indictment preliminary hearings because, as is obvious, preliminary hearings were otherwise not eliminated.

It is clear that the authors of the initiative knew how to eliminate certain rights related to preliminary hearings. For example, they plainly eliminated post-indictment preliminary hearings, They also plainly eliminated the use of the preliminary hearing itself as a discovery tool. Because the right to some pre-preliminary hearing discovery existed at the time Proposition 115 was enacted (*Holman v. Superior Court* (1981) 29 Cal.3d 480), it is very telling that there is nothing in the text of the initiative, the Legislative Analyst's analysis, or the ballot arguments that purport to divest the preliminary hearing magistrate of the inherent power to order discovery. If it was truly the intent of the authors and the voters to completely eliminate pre-preliminary hearing discovery and to end the hearing's function as a "critical stage of the proceeding" they would have said so. They did not.

Thus, although Proposition 115 was written to specifically bar using the preliminary examination as a discovery tool, it was not written to bar discovery *for* the hearing. The analysis conducted by the District Attorney is one of implied repeal - and implied repeal is disfavored. An express ban on pre-preliminary hearing discovery 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

proposing implied repeal. (See also *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 569.)

Just as the District Attorney argues that Proposition 115 took away the magistrate's inherent power to grant some pre-preliminary hearing discovery, prosecutors argued that the Three Strikes law took away trial court's power under Penal Code section 1385 to dismiss "strike" priors. This court rejected that argument and held in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 at p. 518 that absent a "clear legislative direction to the contrary," the Three Strikes law did not remove a trial court's inherent power to dismiss strike priors. The same analysis should apply here: absent a clearly displayed intent by the voters, Proposition 115 cannot be interpreted as divesting a preliminary hearing magistrate of the power to order pre-preliminary hearing discovery.

Petitioner does not believe that it was the voter's intent to retain preliminary hearings as a critical stage and to retain virtually all of the "rights" applicable to preliminary hearings yet deny defendants the very discovery the prosecution used in the first place to file felony charges. As one Court of Appeal said when it held that both the prosecution and defense can introduce Proposition 115 hearsay evidence at preliminary hearings, "Any other conclusion would work an unfairness and a lack of balance in the criminal

process, which we will not attribute to the voters." (*Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 92.)

IV

PENAL CODE SECTION 866 DID NOT ELIMINATE DISCOVERY FOR THE PURPOSE OF THE PRELIMINARY HEARING

The overarching theme of the District Attorney's answer is their claim that the amendment of Penal Code section 866 by Proposition 115 not only eliminated pre-preliminary hearing *Pitchess* discovery but also eliminated the ability of defendants to get *any discovery at all* for preliminary hearing. The District Attorney claims that *People v. Eid* (1994) 31 Cal.App.4th 114 stands for the proposition that "after Proposition 115, discovery is no longer mandatory and cannot be compelled at preliminary hearings." (District Attorney Answer, p. 20.) The District Attorney is wrong - neither Penal Code section 866 nor *Eid* stand for that proposition. *Eid* is not even a discovery case.

A. Penal Code Section 866 Does Not Prohibit Discovery For Preliminary Hearing

One theory the District Attorney advances is that Penal Code section 866, as amended by Proposition 115, controls over the *Pitchess* discovery statutes because it is a later-enacted statute that covers the field of preliminary hearing discovery exclusively and prohibits compelled discovery for

preliminary hearing. (District Attorney Answer, p. 10.) Actually, Penal Code section 866 does not control pre-preliminary hearing discovery and does not prohibit pre-preliminary hearing discovery.

Penal Code section 866, in pertinent part as amended by Proposition 115, reads:

> "(a) When the examination of witnesses on the part of the people is closed, any witness the defendant may produce shall be sworn and examined.
>
> "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.
>
> "(b) 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."

By its terms, Section 866 does *not* prohibit discovery for the purpose of preliminary hearing. Rather, it prohibits using the preliminary hearing *itself* for discovery, which previously was permitted. "Although the preliminary hearing previously had been recognized as an opportunity for discovery and trial preparation [Citations], after Proposition 115 'the purpose of a

preliminary examination [is] 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).)" (*People v. Eid, supra,* 31 Cal.App.4th 114, 129, emphasis added.)

Subdivision (b) of Penal Code section 866 by its own terms does not prohibit discovery in general and does not prohibit *Pitchess* discovery. The actual prohibition had one purpose: to eliminate the preliminary hearing itself as a discovery tool.

B. *Pitchess* Discovery Is Independently Viable As An "Other Express Statutory Provision" And Is Third-Party Discovery

Although the District Attorney claims that Penal Code section 866 controls all discovery for preliminary hearing, they fail to discuss Penal Code section 1054, subdivision (e) which provides that "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.) Plainly, *Pitchess* discovery is an "other express statutory provision" authorized by Evidence Code sections 1043-1045 and 1047. (*Albritton v. Superior Court* (1990) 225 Cal.App.3d 961, 962.)

In addition, the District Attorney fails to explain that *Pitchess* discovery is *not* discovery from the prosecution but rather is discovery from a *third party*. Proposition 115's discovery provisions are limited to the parties in a criminal

proceeding and do not pertain to materials held by a third party. *(People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315.) Petitioner has fully briefed these issues in his opening brief on the merits at pages 13-15 and will not repeat those arguments here.

If the District Attorney is correct, then the defense will no longer be able to utilize subpoenas duces tecum for preliminary hearing even though Penal Code section 1326 plainly states that they may be issued by courts *and* magistrates. Yet, according to the District Attorney, Penal Code section 866 has eliminated the power of magistrates to issue subpoenas duces tecum because there is no discovery for preliminary hearing. This is just one more example of how the District Attorney has tortured Penal Code section 866 and read it in a manner not intended by the authors or the voters.

C. *Eid* Is Not A Discovery Case And Did Not Hold That Pre-Preliminary Hearing Discovery Is Unavailable

The District Attorney mischaracterizes the holding of *Eid*, which it claims "made it very clear that after Proposition 115, discovery is no longer mandatory and cannot be compelled at preliminary hearings." (District Attorney Answer, p. 20.)

Eid is not a discovery case. The issue in *Eid* was whether the magistrate properly refused to allow the defense to call the victim, Heidi, as a witness. The Court of Appeal found that the defense offer of proof was

insufficient and the magistrate did not error. The *Eid* court summarized the impact of Proposition 115 upon preliminary hearings and, in so doing, discussed that the examination itself could no longer be used for the purpose of discovery. In the concluding paragraph the *Eid* court wrote:

> "As modified by Proposition 115, preliminary hearings are now limited to establishing probable cause only; therefore, the scope of that proceeding dictates what is relevant. Discovery is no longer permissible. Section 866, subdivision (a), allows for a broad introduction of evidence, both by the prosecution and the defense. However, the defendants failed to make an offer of proof sufficient to warrant allowing them to cross-examine the victim at the preliminary hearing pursuant to section 866, subdivision (a). Because the accuseds were not illegally committed, the order of dismissal must be set aside." *(People v. Eid, supra,* 31 Cal.App.4th 114, 130.)

When this paragraph is considered in context, it is clear that the only possible meaning is that the preliminary hearing itself may not be used for the purposes of discovery, which is what the court said earlier in its opinion. *Eid* had nothing to do with preliminary hearing discovery and cannot be interpreted as the District Attorney has done.

The District Attorney also cites *Eid* to support its very odd argument that conflates the showing necessary to obtain *Pitchess* discovery with the "offer of proof" which must be made upon objection to admit the testimony of a defense witness. (Pen. Code § 866.) The District Attorney argues that a defendant's showing of good cause for *Pitchess* discovery, which is made

upon information and belief, can never be a valid offer of proof to admit the testimony of *Pitchess* witnesses. (District Attorney Answer, p. 21.) This argument is nonsensical. The low standard for *Pitchess* discovery is not the same as the Penal Code section 866 showing. Indeed, as this court has stated, the determination that the requested records ought to have been disclosed is not the same as a finding the evidence might be admissible. (*People v. Gaines, supra,* 46 Cal.4th 172, 182-183.)

D. The Testimony of *Pitchess* Witnesses Is Admissible At Preliminary Hearing Pursuant To Penal Code Section 866

The District Attorney seems to be arguing that *Pitchess* discovery is not available because the testimony of *Pitchess* witnesses would not be admissible at preliminary hearing. (District Attorney Answer, pp. 20-21.) Their argument is wrong.

Penal Code section 866 limits defense witness testimony to that which is likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness. This court has plainly said that *Pitchess* encompasses impeachment evidence. "Moreover, the *Brady* duty of disclosure, like the duty announced in *Pitchess*, extends to impeachment evidence [citation] including impeachment of peace officers." (*People v. Gaines, supra,* 46 Cal.4th 172.)

Penal Code section 866 does not define "affirmative defense." Section 32.12 at page 970 of California Criminal Law Procedure and Practice (CEB, 2008 Ed.) defines the term:

> "As a rule, a defense either (1) disputes the sufficiency of the evidence to establish one or more elements of the offense or (2) affirmatively asserts a state of facts that, if true, defeats the prosecution's allegations. Defenses that fall into the second category are often referred to as affirmative defenses, because they ordinarily require the defendant to produce some evidence of the facts that support their assertion."

Depending upon the charges in a case, the testimony of a *Pitchess* witness could be admitted to establish affirmative defenses including duress, defense of another, self defense, entrapment, and mistake of fact. (See *People v. Frazier* (2005) 128 Cal.App.4th 807, 817; CalCrim 3470.) A *Pitchess* witness may offer testimony that will impeach a police officer, challenge his or her credibility, and/or establish that the officer has a habit, character, and custom to commit misconduct. In this case, *Pitchess* witnesses could testify that the arresting officers used excessive force in their cases and then lied about it, which would be admissible as character evidence and could establish the affirmative defense of self-defense or defense of others. (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, Evid. Code § 1103.)

Testimony from *Pitchess* witnesses could also negate an element of the offense. In this case *Pitchess* testimony could assist the magistrate in determining whether the officers acted lawfully. The magistrate could use the testimony to determine whether petitioner is guilty of a felony violation of Penal Code section 69 or the lesser-included misdemeanor offense of Penal Code section 148. (*People v. Lacefield* (2007) 157 Cal.App.4th 249.)

Pitchess discovery is 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; Pen. Code § 1538.5, subd. (f)(2).) Petitioner's allegations in his *Pitchess* motion challenge the reasonable suspicion to detain claimed by the officers and he could, therefore, use *Pitchess* discovery to aid a motion to suppress evidence should he choose to make one at the preliminary hearing.

Penal Code section 866 *allows* the testimony of *Pitchess* witnesses in an appropriate case. It does not preclude discovery. The District Attorney's arguments to the contrary are not correct.

V

HOLMAN V. SUPERIOR COURT REMAINS VALID LAW AND PERMITS DISCOVERY FOR THE PRELIMINARY HEARING

The District Attorney offers a variety of reasons why, in addition to their reading of Penal Code section 866, defendants are not entitled to

discovery for preliminary hearing and particularly not *Pitchess* discovery. They variously argue that the repeal of the requirement to deliver police reports to the defendant within two calendar days eliminated all pre-preliminary hearing discovery; the discovery statutes by their terms only apply to trial; magistrates do not have the power to order discovery; *Pitchess* unnecessarily delays the hearing[3]/; and *Pitchess* is not a preliminary hearing right. (District Attorney's Answer, pp. 14-34.)

A. Proposition 115's Discovery Provisions Do Not Apply To Preliminary Hearings

The District Attorney argues that the repeated use of the word "trial" in the Proposition 115 discovery provisions is evidence that discovery is not permitted for preliminary hearing, citing *Jones v. Superior Court* (2004) 115 Cal.App.4th 48. (District Attorney Answer, pp. 15-16.) *Jones,* however, actually undercuts their argument.

The question in *Jones* was whether reciprocal discovery applied to probation violations. The Court of Appeal examined Proposition 115's criminal discovery scheme and held that it only applied to trials and that

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[3]/ Petitioner has addressed the issue of the quick nature of preliminary hearings and *Pitchess* discovery in his opening brief at pp. 22-24 and will not repeat that argument.

probation violation hearings were not trials. Therefore, reciprocal discovery was not permitted even though the probationer *was* entitled to discovery.

Although the District Attorney claims *Jones* supports its arguments, in fact it does not. The District Attorney is arguing that as a result of the criminal discovery statutes, there is *no* discovery except for trials. Because preliminary hearing is not a trial, there is absolutely *no* discovery and no *Pitchess* discovery even though it is separately statutorily authorized.

Jones, however, does not so hold. In fact, *Jones* recognizes that there *is* discovery – to the defendant because discovery of the evidence against the probationer is compelled by the Due Process Clause of the United States Constitution. Discovery that is constitutionally compelled, of course, cannot be restricted by a state statute, but, in any event, constitutionally-compelled discovery is permitted by Penal Code section 1054, subdivision (e). Thus, *Jones* stands for the proposition that even if the criminal discovery statutes apply only to trials, discovery is still allowed at other criminal proceedings – such as probation violation hearings.

The District Attorney fails to mention *People v. Superior Court (Mouchaourab)*, *supra,* 78 Cal.App.4th 403, which also undercuts their arguments. In *Mouchaourab* the issue was whether a defendant could discover non-testimonial grand jury proceedings in order to make a pretrial motion to

dismiss the indictment pursuant to Penal Code section 995. The prosecution argued that discovery was strictly limited by the criminal discovery statutes and that there was no provision which allowed discovery of non-testimonial grand jury proceedings to make a pretrial 995 motion - these items were neither constitutionally compelled nor subject to an express statutory provision. The Court of Appeal agreed that pretrial discovery of grand jury transcripts was not constitutionally compelled and noted that there was no specific statutory provision giving indicted defendants pretrial access to transcripts and non-testimonial communications.

Nonetheless, the Court of Appeal rejected the prosecution's argument that the statutory scheme must be strictly construed in a manner which would limit a court's authority to order disclosure of the record of grand jury proceedings to witness testimony alone. Instead, the court examined the entire statutory scheme, including a defendant's right to bring a Penal Code 995 motion, and concluded that discovery was necessary and allowed in order to effectuate a defendant's rights. "It defies common sense to think that the Legislature intended to provide rights under these statutes but at the same time denied the indicted defendant any means to enforce those rights." (*People v. Superior Court (Mouchaourab)*, *supra*, 78 Cal.App.4th 403, 428.)

B. Magistrates Have The Power And Duty To Provide Appropriately Limited Discovery For Preliminary Hearing

The District Attorney argues that magistrates do not have the power to issue discovery orders. (District Attorney Answer, pp. 16-17.) Their attempts to limit and distinguish *Holman v. Superior Court*, *supra,* 29 Cal.3d 480, 482, where this court held that "within the discretion of the magistrate, a reasonable, limited discovery is permissible," must fail. (District Attorney Answer, pp. 26-28.)

Since at least 1981 when *Holman* was decided, discovery for preliminary hearing has been and, for the most part, continues to be, routine. 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,* at p. 485.)

Plainly this court may not exercise its inherent powers in conflict with existing legislation. (*Holman*, at p. 483.) As petitioner has argued at length, however, Proposition 115's provisions do not govern a magistrate's

discretionary power to grant discovery when the interest of justice requires. Therefore, there is no conflict.

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.) 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.

When *Holman* was decided this court was well aware of the limited purpose of preliminary hearings. This court did not throw open the door to unlimited discovery that would result in unnecessary delay. Instead, this court's holding was moderate and restrained:

> "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. . . .
>
> "Subject to the foregoing qualifications, however, we conclude that a reasonable, limited discovery directed to the restricted purpose of the preliminary examination should be available, in the discretion of the magistrate, prior to that examination." (*Holman*, at p. 486.)

The essential nature of pre-preliminary hearing discovery is found in *Clinton K. v. Superior Court* (1995) 37 Cal.App.4th 1244, a post-Proposition 115 case, which cites *Holman* for the premise that a trial court has the

discretion to order discovery for preliminary hearing. *Clinton K.* finds that the concept should also apply in juvenile cases, so that when there is a "showing that such discovery is reasonably necessary to prepare for the preliminary examination," the court is authorized to order it prior to that hearing. (*Id.* at p. 1249.)

A magistrate's inherent discretion to order discovery for preliminary hearing is based upon effectuating rights such as the right to put on an affirmative defense and also based upon fundamental fairness. Proposition 115's purpose was to ensure that justice was fair and balanced, not unfair and one-sided.

C. *Pitchess* Discovery Is Available For Any Proceeding To Which It Is Material

The District Attorney argues that *Pitchess* discovery was never intended to be available for the purpose of preliminary hearing or, for that matter, for any purpose other than trial. (District Attorney Answer, pp. 28-32.) The District Attorney is not correct.

To support its argument that the case law establishes that *Pitchess* discovery is only available for trials, the DA string-cites numerous decisions involving *Pitchess* motions made in the trial court. These cases, they conclude, are proof that *Pitchess* discovery is only available for trials. (District Attorney Answer, p. 29.)

The District Attorney does not explain that *none* of the cases they cite had as an issue whether *Pitchess* discovery could be obtained for preliminary hearing. It is plainly the rule that "cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) It is also a fact that at least two published cases involved *Pitchess* motions made in support of preliminary hearings: *People v. Samayoa* (1997) 15 Cal.4th 795 and *Saulter v. Municipal Court* (1977) 75 Cal.App.3d 231. Simply put, the *fact* that a published decision involved a *Pitchess* motion made for trial or for preliminary examination is not authority for any proposition. However, it is also clear that in neither *Samayoa* nor *Saulter* was an objection made that *Pitchess* discovery was unavailable to support a preliminary examination. It simply was not an issue.

The District Attorney's argument is that *Pitchess* discovery is for trial, only. The Court of Appeal concluded that *Pitchess* discovery is unavailable for any proceeding except trial unless it is specifically statutorily authorized. (Slip Opn., p. 5.). If they are correct, then this court and other Courts of Appeal that have allowed *Pitchess* discovery in non-trial contexts must have ruled incorrectly.

In *Brant v. Superior Court, supra,* 108 Cal.App.4th 100, the Court of Appeal held that *Pitchess* discovery could be obtained to support a motion to

suppress evidence pursuant to Penal Code section 1538.5. Penal Code section 1538.5 motions, by statute, are pretrial motions which may be made at preliminary hearing but must be made prior to trial except in exceptional circumstances. (Pen. Code § 1538.5, subds. (f), (g), (h), and (i).) Additionally, in *People v. Memro* (1985) 38 Cal.3d 658 (overruled on other grounds in *People v. Gaines, supra,* 46 Cal.4th 172, 181, fn. 2), this court held that *Pitchess* discovery could be obtained to support a pretrial motion to suppress a confession. And, in *People v. Nguyen, supra,* 151 Cal.App.4th 1473, the Court of Appeal held that *Pitchess* discovery could be obtained to support a post-conviction new trial motion. Similarly, the Court of Appeal in *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100 held that *Pitchess* discovery was available for post-conviction habeas corpus litigation. (See, also, OBM, pp. 18-20.) Case law has consistently held that *Pitchess* discovery is available for all litigation to which it is material.

The District Attorney argues that *Pitchess* discovery was never intended to be a pre-preliminary hearing right based upon their interpretation of the statutory scheme and the legislative history. (District Attorney Answer, pp. 28-32.) Petitioner has already explained that neither the legislative history nor the statutory scheme contains the limitations urged by the District Attorney. (OBM, pp. 16-18.) Rather than repeat those arguments, petitioner will simply

summarize by noting that the legislative history does not contain the limitation to trial and exclusion of preliminary hearing urged by the District Attorney. The Legislature knows how to write statutes containing limitations and they could have easily done so. (See, for example, *Murillo v. Fleetwood Enterprises* (1998) 17 Cal.4th 985, 999; *In re Chantal S.* (1996) 13 Cal.4th 196, pp. 206-207.) Yet, not only did they not discuss this issue, they did not include such language in the statutory scheme. The statutes never mention the word "trial court," do not limit discovery to "trials," and plainly anticipate *Pitchess* motions will be made in a variety of contexts. The District Attorney's arguments to the contrary are unfounded and unreasonable.

VI

THE DENIAL OF ALL DISCOVERY FOR PRELIMINARY HEARING WILL RESULT IN THE COUNSEL BEING INEFFECTIVE

Preliminary hearings are a critical stage of criminal proceedings which serve a valuable purpose.

> "In *People v. Elliot* (1960) *supra*, 54 Cal.2d 498, 504 [Overruled on other grounds in *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 528], we reiterated, The preliminary examination is not merely a pretrial hearing. The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed. [Citations.] To effectuate this constitutional and statutory purpose the defendant must be permitted, if he

> chooses, to elicit testimony or introduce evidence tending to overcome the prosecution's case or establish an affirmative defense." *(Jennings v. Superior Court, supra,* 66 Cal.2d 867, 880, internal quotations omitted.)

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 that still serves the purposes stated by this court in *Jennings*. As petitioner has already stated, defendants are entitled to the assistance of effective, prepared counsel. To state it simply: counsel cannot hope to be prepared and be effective without some discovery, specifically the arrest reports. The District Attorney's argument that discovery is not available for preliminary hearing manifests a seismic change in the way California conducts its felony criminal process – a change that eliminates preliminary hearings as a critical stage of the proceedings and a change the voters did not know or understand would occur.

A. Without Police Reports Counsel Will Be Unable To Effectively Cross-Examine Witnesses

Proposition 115 repealed the portion of Penal Code section 859 that required the prosecutor to deliver arrest reports to the defendant or counsel within two days of the first court appearance. The District Attorney concludes that this repeal "clearly demonstrates that the electorate intended to eliminate

mandatory pre-preliminary hearing discovery." (District Attorney Answer, p. 14.)

This court has, however, distinguished between mandatory and discretionary pre-preliminary hearing discovery. At a time when Penal Code section 859 contained the mandatory production language that has since been eliminated, this court wrote: "This provision, calling for limited mandatory disclosure of specified reports cannot be deemed to express an intent to withhold reasonable discretionary discovery prior to the preliminary hearing, if the interest of justice so requires." (*Holman v. Superior Court, supra,* 29 Cal.3d 480, 483.) Logically, if the existence of a mandatory discovery provision does not preclude discretionary discovery, it does not follow that the elimination of that mandatory provision would also eliminate discretionary discovery.

Petitioner has already explained that nothing in the 1990 Ballot Pamphlet told the voters that by eliminating the above requirement they were actually eliminating pre-preliminary hearing discovery. (See p. 13, above.) It is rather amazing that it has taken 19 years for prosecutors to come to a conclusion that they claim was "clearly demonstrate[d]" by the voters in 1990. In addition, this court believed that defendants would continue to receive police reports.

In *Whitman v. Superior Court, supra,* 54 Cal.3d 1063 this court had to decide whether Proposition 115 would allow "reader" or multiple hearsay testimony which, it was argued, ran afoul of the Federal Constitutional due process requirement of reliability. The decisional linchpin which allowed this court to uphold hearsay preliminary hearings was the ability of the defendant to effectively cross-examine the officers who were presenting the hearsay testimony.

> "But substantial additional objections to the reliability of the evidence might arise if multiple hearsay were involved, and the defendant were also deprived of the opportunity to *meaningfully cross-examine* the testifying officer regarding the circumstances under which the out-of-court statement was made." (*Whitman, supra,*, 54 Cal.3d 1063, 1074, emphasis added.)

> "Additionally, the experience and training requirements of the section [Penal Code § 872, subd. (b)] help assure that the hearsay testimony of the investigating officer will indeed be as reliable as appropriate in light of the limited purpose of the preliminary hearing...(See *Manson v. Brathwaite* (1977) 432 U.S. 98, 115 [reliability of trained, experienced police officers].) Although the underlying reliability of the victim or witness may remain untested until trial, we think the evaluation and cross-examination of the testimony of the qualified investigating officer provides sufficient basis for a pretrial probable cause determination." (*Whitman, supra*, 54 Cal.3d 1063, 1078.)

It is doubtful this court considered that the cross-examination required by *Whitman* would by done by a lawyer who has no discovery and has never seen a single police report memorializing the out-of-court conversations. It should be fairly obvious that a lawyer who does not have those arrest reports

will be unable to "meaningfully cross-examine" the officer. Without discovery not only will counsel not be able to properly and effectively cross-examine witnesses, but 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.)

Simply put, counsel who does not receive discovery is unprepared counsel and cannot adequately, effectively, and constitutionally represent a criminal defendant at preliminary hearing. Petitioner has already explained how lack of discovery renders counsel ineffective in his Opening Brief on the Merits at pp. 32-34.

As explained by the United States Supreme Court: "...[T]he lawyer's skilled examination and cross-examination of witnesses may expose fatal

weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over." (*Coleman v. Alabama, supra,* 399 U.S. 1, 9.) The interpretation of Proposition 115 advanced by the District Attorney would result in Constitutionally ineffective assistance of counsel and may very well render hearsay preliminary hearings unconstitutional. This court should not adopt the District Attorney's arguments but rather should construe Proposition 115 to avoid serious doubts about its constitutionality. (*People v. Superior Court (Romero), supra,* 13 Cal.4th 497, 518.)

B. Without Discovery, The Rights Guaranteed To Defendants Become Meaningless

Petitioner has already established that defendants have been guaranteed 23 "rights" at preliminary hearing. (OBM, pp. 25-27.) Without discovery, many of these rights will continue to exist but will be unenforceable.

Ironically, the lack of discovery will fall hardest on persons who are truly innocent - those who are being prosecuted as a result of faulty eyewitness identification, sloppy police work, incompetent evidence analysis, honest mistake or even frameups by corrupt police or "victims" bent upon revenge. A defendant who may be guilty or who was present at a crime scene might be able to tell his attorney some of what happened, even though he would not know what the police wrote, what the witnesses said, or the evidence gathered against him. An innocent person, on the other hand, would know nothing. An

innocent person cannot assist counsel – he does not know the names of the victims and witnesses, the identities of the involved police officers, why he has been arrested and charged. The District Attorney's claim that discovery has been forever outlawed would put the lie to preliminary hearings - they most certainly would no longer protect those wrongfully charged or overcharged.

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

Defendants have the statutory right to move to suppress evidence or return property. (Pen. Code § 1538.5.) Yet, without police reports identifying the arresting officers and the allegations establishing reasonable suspicion and/or probable cause, counsel cannot begin to file a motion to suppress evidence. Counsel would not even know if the arrest and/or search was done with a warrant, which shifts the burden to the defendant, and in any event would not know the identities of the officers or other witnesses who should be subpoenaed. Counsel could not effectively and properly make the

determination whether or not a suppression motion should be made at preliminary hearing or at a later time, perhaps after defense investigation. Absent discovery, the right to move to suppress evidence at preliminary examination becomes illusory.

The right to request a lineup pursuant to *Evans v. Superior Court* (1974) 11 Cal.3d 617 will forever be lost. To be useful, a lineup must be held prior to identification in court at preliminary hearing. "The prerequisites for obtaining an *Evans* lineup are (1) a timely request for the lineup, (2) a showing eyewitness identification was a material issue, and (3) a showing a reasonable likelihood of a mistaken identification existed that a lineup would tend to resolve. [Citation.]" (*People v. Mena* (2009) 173 Cal.App.4th 1446, 1451.)

It would be impossible for a defendant to request a lineup without discovery. Without the police reports counsel would not know whether there is a reasonable likelihood of mistaken identification. Counsel cannot intelligently determine whether to ask for a lineup. And, once preliminary hearing has passed, the utility of a lineup is nil and the ability to challenge it upon appeal is forever lost. (*Id.* at pp. 1451-1453.)

In Los Angeles County the District Attorney and the defense participate in a Felony Early Disposition Program known as EDP. EDP was established with the assurance that people accused of felonies would receive full discovery

and disclosure so that cases appropriate for resolution prior to preliminary hearing would be reliably determined and equitable settlements achieved. EDP has been successful in justly settling a huge number of felony cases at an early stage, saving the courts, county agencies, and law enforcement considerable time and money.

EDP will cease to exist without discovery. No competent counsel would plead his or her client without, at the very least, some idea of the evidence arrayed by the prosecution. The police reports provide that information which may be verified with the client and an appropriate disposition reached. The end of EDP will result in higher costs and a giant waste of time for all the parties involved in the criminal justice system and "justice" will be unnecessarily delayed.

The District Attorney states in footnote 3 of their Answer (page 3) that they will continue to provide police reports when defendants are arraigned on the felony complaint even though they insist they are not required to do so. While this is a good and proper practice, it cannot be a constitutional way of doing business. This voluntary system relies solely upon the good will of the elected District Attorney, who can change at any election or who can change his mind at anytime. Defendants in other counties may not be so lucky because their District Attorney might decide to not follow Steve Cooley's lead.

In addition, a District Attorney's promise to provide discovery can never be enforceable should a prosecutor renege on the promise. Rather than being a right necessitated by constitutional considerations of due process and fundamental fairness, discovery becomes an unenforceable gift which may be taken away at any time. Surely discovery which is an unenforceable privilege cannot be constitutional.

The Los Angeles County Public Defender is aware that discovery is not always provided - that some prosecutors insist on withholding discovery. In one court the Public Defender requested sufficient discovery to allow conflict checks, however the District Attorney refused, claiming that providing that information to defense counsel would imperil the witnesses *and* they had no general discovery obligation anyway. Without this discovery defendants may be denied the assistance of conflict-free counsel, which is a constitutionally guaranteed right. (*People v. Doolin* (2009) 45 Cal.4th 390, 458.)

Defendants are entitled to seek disclosure of informants and observation posts. (*People v. Konow* (2004) 32 Cal.4th 995, 1024; *Hines v. Superior Court* (1988) 203 Cal.App.3d 1231.) Neither an observation post nor an informant will be disclosed unless it is material - with an informant that may mean the person is an eyewitness who could provide exculpatory testimony.

As has already been discussed, defendants have the statutory right to subpoena witnesses and put on an affirmative defense. These rights would be empty without discovery. A defendant may move to suppress a confession but without discovery of the reports detailing the circumstances of the statement and/or the audio/videotapes of the confession counsel would be shooting blindly in making such a challenge.

Testimony will no longer be preserved for future use should a witness become unavailable. It simply cannot be said that defense counsel has the ability to effectively confront and cross-examine witnesses without a copy of their statements to the police and the prosecutor. A witness cannot be confronted and impeached by prior inconsistent statements, their criminal record, and conduct involving moral turpitude, nor may credibility be effectively challenged without discovery of statements given to the police or prosecutor. (See Section VI, subdivision (A), above.)

Preliminary hearings have long been a critical stage of criminal proceedings. If discovery is no longer allowed, then that role has been eliminated. It simply cannot be said that the voters intended such a result.

CONCLUSION

The voters intended that balance and fairness be restored to a criminal justice system that favored criminals. They did not intend a one-sided, unfair

system which is what preliminary hearings without discovery would become. Discovery of police reports is needed in every case in order for preliminary hearings to be fair and for counsel to be effective. Discovery of *Pitchess* evidence is necessary in cases such as this one where the allegation is felony resisting arrest and all the witnesses are police officers. This court is respectfully requested to hold that *Pitchess* discovery is available for preliminary hearing in appropriate cases.

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
(State Bar No. 110960)
Deputy Public Defender

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to the California Rules of Court, the enclosed Petitioner's Reply Brief on the Merits is produced using 13-point Roman type including footnotes and contains approximately 9,738 words, instead of the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

MARK HARVIS
Deputy Public Defender

PROOF OF SERVICE

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

That on July 16, 2009, I served the within PETITIONER'S REPLY 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
DEPARTMENT OF JUSTICE
STATE OF CALIFORNIA
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

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

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

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

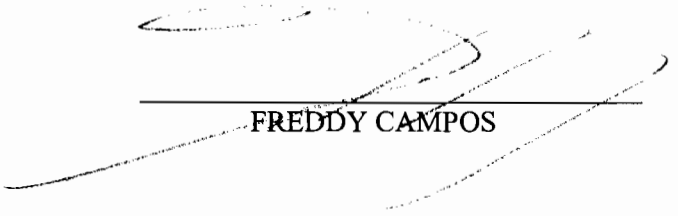
PETER R. NAVARRO, ESQ.
714 W. OLYMPIC BLVD., SUITE 450
LOS ANGELES, CA 90015

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

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

CARMEN TRUTANICH, CITY ATTORNEY
CARLOS DELA GUERRA. ASST. CITY ATTY.
KJEHL T. JOHANSEN, DEPUTY CITY ATTY.
210 NORTH LOS ANGELES STREET
LOS ANGELES MALL, SPACE 301
LOS ANGELES, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 16, 2009, at Los Angeles, California.



FREDDY CAMPOS