IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ADAM SERGIO RODRIGUEZ, Defendant and Appellant.	No. S223129 Court of Appeal No. H038588 (Santa Clara County Superior Court No. C111340)

After a Decision by the California Court of Appeal,
Sixth Appellate District, Case No. H038588

Santa Clara County Superior Court No. C111340
The Honorable Jerome Nadler, Judge
The Honorable Vincent Chiarello, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

When the prosecution re-files charges after a defendant's motion to suppress evidence has been granted and the case has been dismissed, does the trial court err by refusing to assign a subsequent suppression motion to "the same judge who granted the [prior] motion" in accordance with Penal Code[1] section 1538.5, subdivision (p), on the ground the prior judge is not "available" to hear the motion because he is sitting in a different courthouse of the same court?

INTRODUCTION

Appellant's first suppression motion was denied at his preliminary hearing. He then filed a renewed suppression motion to be heard at a special hearing in felony court. That motion was granted, whereupon the prosecution dismissed and re-filed the case.

[1] All undesignated statutory references herein are to the Penal Code.

Over the course of the next eleven months, appellant made repeated attempts to have a new suppression motion heard by the judge who had granted the motion in the first case, pursuant to the requirement set forth in section 1538.5, subdivision (p) (hereafter "§ 1538.5(p)") that after the dismissal and re-filing of a case, "Relitigation of the [suppression] motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available." Appellant was stymied in these attempts by the holding of the presiding judge of the Santa Clara County Superior Court that the judge who had granted the suppression motion was "unavailable" because he had been assigned to a different courthouse. However, that "unavailable" judge presided over appellant's court trial and subsequent sentencing.

In a published opinion, the Sixth District Court of Appeal held that the question of whether or not a judge is "available," as contemplated by § 1538.5(p), falls within the discretion of the trial court. (*People v. Rodriguez* (2014) 231 Cal.App.4th 288, 295.) The Court of Appeal held that "unavailable," in this context, means that a judge in question is, "as a matter of practical convenience, unavailable to take on the matter." (*Id.* at p. 296.) The court based this holding on the rationale that "the presiding judge has discretion to manage the court calendar and assign matters to various divisions and judges across the courts of the county." (*Id.* at p. 301.)

On March 25, 2015, this Court issued an order limiting the issues to be briefed herein as follows:

> (1) Does Penal Code section 1538.5, subdivision (p) vest the trial court with discretion to determine whether the judge who heard a defendant's original motion to suppress is "available" to hear a subsequent motion, and if so, what considerations should guide the trial court in exercising that discretion?
>
> (2) Did the trial court err in concluding that the original judge was "unavailable" to hear a renewed motion to suppress within the meaning of Penal Code section 1538.5, subdivision (p)?

For the reasons explained in detail below, the answer to the first question is yes, but with the overriding proviso that the court must exercise its discretion in a manner which acknowledges the crucial role that § 1538.5(p)'s "same-judge" rule plays in preventing the re-litigation provisions of section 1538.5 from being a windfall for the prosecution. The answer to the second question is yes, without qualification.

Accordingly, the judgment of the Court of Appeal should be reversed, and this Court should instruct California's criminal trial courts that they may not end-run around an important statutory requirement by arbitrarily deciding that judges are unavailable.

STATEMENT OF THE CASE

First case, number C1070138

A complaint filed on February 24, 2010 charged appellant with one count of possession of child pornography (§ 311.11, subd. (a)) and one count of misdemeanor marijuana possession (Health & Saf. Code, § 11357, subd. (c).) (1ACT[2] 159-161.) Appellant filed a suppression motion pursuant to section 1538.5 on September 1, 2010, seeking suppression of all of the evidence seized during a police search of appellant's computer, on the grounds that the evidence was seized after San José Police Department Detectives Nunes and Chubon entered appellant's house without a warrant on the basis of purported "consent" obtained by coercion. (1ACT 168-180.) The prosecution filed opposition on September 17, 2010. (1ACT 182-188.) A preliminary hearing was held on September 23 and 24, 2010 before Hon. Diane Northway, who denied the suppression motion and held appellant to answer on both charges. (1ACT 190-191.)

On January 3, 2011, appellant filed a renewed suppression motion, to be heard at a special hearing pursuant to section 1538.5, subdivision (i). (2ACT 202-214.) The prosecution filed opposition on January 14, 2011. (2ACT 217-227.) However, the court struck the

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[2] "1ACT" and "2ACT" designate the two volumes entitled "Augmentation Clerk's Transcript" filed in the Court of Appeal on November 19, 2012.

opposition brief on the grounds that it was filed late[3] and because it failed to address one of the issues raised in the motion. (2ACT 269-270.) An amended opposition was filed on January 26, 2011. (2ACT 272.) Appellant filed a reply to the opposition on February 1, 2011. (2ACT 309-316.)

A hearing on the suppression motion took place on February 4, 2011 before Hon. Vincent Chiarello. (2ACT 318; 1ART[4] 3-4.) At that hearing, the court determined that an audio CD which had been submitted into evidence at the preliminary hearing contained a second audio track which Judge Northway had apparently not considered, despite the fact that the entire CD was in evidence. (1ART 8.) The additional track was a recording of the initial interaction between the detectives and appellant's mother, Susan Rodriguez, prior to the detectives' entry into the Rodriguez home. (1ART 7; see 2ACT 322-325 [transcript].) The court continued the hearing in order to allow the parties to file written briefing addressing the contents of the additional track. (1ART 9-10.) Appellant filed supplemental briefing on March 2, 2011, and the prosecution filed opposition on March 18, 2011. (2ACT 320-325, 327-334.)

The continued hearing on the motion and supplements thereto was held on April 21, 2011, again before Judge Chiarello.

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[3] The prosecution apparently failed to take into account that Monday, January 17, 2011 was Martin Luther King, Jr. Day, a court holiday.

[4] "1ART" through "3ART" designate the three volumes entitled "Augmentation" filed in the Court of Appeal on November 19, 2012.

(2RT 8-28.) The court heard arguments and took the motion under submission, and continued the matter to May 2, 2011. (2RT 26-27.) On that date, the court granted the suppression motion and dismissed the case. (2ACT 342; 2ART 14-33.)

Second case, number C1110340

On July 11, 2011, the prosecution filed a new complaint, alleging the same offenses alleged in the complaint in the previous case. (1CT 169-171.)

On September 29, 2011, appellant filed a new suppression motion. (1CT 191-207.) The motion argued, inter alia, that the "Proper Venue for This Motion" was before Judge Chiarello, pursuant to section 1538.5, subdivisions (j) and (p). (1CT 193-194.) The prosecution filed opposition on October 25, 2011. (2CT 209-419.) On the same date, appellant also filed a Request For Calendar Setting specifying that he was requesting that the case be assigned to Judge Chiarello. (1CT 184.)

On October 7, 2011, the parties appeared before Hon. Jerome Nadler, Presiding Judge, for a hearing on the issue of which judge should hear the suppression motion. (2 CT 185; 3ART 38-42.) The court declined to assign the hearing to Judge Chiarello on two grounds: because it did not agree with the defense "interpretation that it needs to go back to Judge Chiarello by law," and because "Judge Chiarello is not available to me any longer [because] he's been transferred to another division, in Palo Alto." (3ART 40-41.)

The preliminary hearing was held on December 8 and 9, 2011 before Hon. Vanessa Zecher. (2CT 421-422.) The court initially heard argument regarding the proper venue for the suppression motion, and the parties briefly appeared before Judge Nadler for determination of that issue. (1CT 16, 479-484.) Judge Nadler reiterated his disagreement "with the interpretation by the Defense with regard to who the 1538.5 judge is," and reassigned the matter to judge Zecher for preliminary hearing. (1CT 485.) The court took the matter under submission. (1CT 139.) On December 13, 2011, the court denied the suppression motion and held appellant to answer on count 1, the child pornography charge. (1CT 162-166.) The prosecution thereupon dismissed count 2, the marijuana possession charge. (1CT 166.) An information charging appellant with a single violation of section 311.11, subdivision (a) was filed the next day. (2CT 424-426.)

On February 8, 2012, appellant filed a renewed suppression motion pursuant to section 1538.5, subdivision (i). (2CT 453-471.) Again, appellant argued that the "Proper Venue for This Motion" was before Judge Chiarello, under the authority of § 1538.5(p). (2CT 456-458.) Appellant also argued that the court should set aside the holding order on the grounds that the judge who issued it, Judge Zecher, was not the proper judge to hear the suppression motion at the preliminary hearing. (2CT 458.) The prosecution filed opposition on February 22, 2012, which exclusively addressed the venue

issue. (2CT 488-490.) The prosecution did not agree that the holding order should therefore be set aside, arguing that "A motion to set aside a holding order is properly brought in a [section] 995 motion[,] not in a renewed suppression motion." (*Ibid.*) The opposition did not address the merits of the suppression motion.

A hearing on the renewed suppression motion took place on February 29, 2012, before Hon. Linda Clark.[5] (4RT 45-58.) At that hearing, the court agreed with the prosecution that a suppression motion is not the proper procedural mechanism for setting aside a holding order. (4RT 53-54.) Accordingly, appellant withdrew his renewed suppression motion. (4RT 57.)

On March 6, 2012, appellant filed a motion to set aside the information on the basis that the holding order was invalid because Judge Zecher lacked jurisdiction over the suppression motion. (3CT 494-501; § 995, subd. (a)(2)(A).) The prosecution filed opposition on March 15, 2012, arguing that irrespective of whether Judge Zecher was authorized to hear appellant's suppression motion, she was authorized to issue a holding order. (3CT 518-521.) Appellant filed a reply to the opposition on March 21. (3CT 523-524.) At a hearing on March 28, 2012, Judge Clark denied the motion. (3RT 52-55.) After doing so, she indicated that appellant "still [had] the option from

[5] The record also refers to Judge Clark as Hon. Linda R. Condron. (See, e.g., 3CT 739.)

this Court's perspective of pursuing your remedy under 1538.5 as to the renewed motion." (3RT 56.)

Appellant re-filed his renewed suppression motion on April 6, 2012. (3CT 528-549.) The prosecution filed opposition on April 18, 2012. (3CT 551-737.) Judge Clark denied the renewed motion on April 25, 2012. (1RT 41-46.)

On May 11, 2012, a court trial was held before Judge Chiarello in his Palo Alto courtroom. (2RT 51-61.) The trial amounted to what is colloquially known as a "slow plea" (see *People v. Watson* (2007) 42 Cal.4th 822, 825, fn. 3): appellant stipulated that the court could consider the police report as evidence, despite the fact that it was hearsay, and further stipulated that the images described in that report constituted child pornography as contemplated by section 311.11, subdivision (a). (2RT 51-52.) The court found appellant guilty of the single charge. (2RT 60.)

On July 19, 2012, the court suspended imposition of sentence, and placed appellant on three years' formal probation, on the condition (inter alia) that he serve six months in county jail. (3CT 788; 3RT 69-71.)

A timely Notice of Appeal was filed the same day. (3CT 790.) The opinion of the Sixth District Court of Appeal was filed on November 6, 2014, and was certified for publication.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF SECTION 1538.5, SUBDIVISION (P), AND THE HOLDING OF THIS COURT IN THE *JIMENEZ* CASE, MAKE IT CLEAR THAT THE "SAME JUDGE" RULE IS INTENDED TO APPLY IN THE VAST MAJORITY OF CASES.

A. Legislative history of section 1538.5, subdivision (p).

As the Court of Appeal recognized, the word "available" in § 1538.5(p) is ambiguous, in that it might mean either that the judge in question is available so long as he or she continues to work for the same court, or that judges are unavailable "if they are, as a matter of practical convenience, unavailable to take on the matter." (*Rodriguez, supra,* 231 Cal.App.4th at p. 296.) When statutory language is susceptible to more than one reasonable interpretation, the legislative history of the statute may provide a basis for determining the legislative intent behind the ambiguous language. (*Ibid.*; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.) A summary of the relevant points of the legislative history of § 1538.5(p) follows.

In 1992, this Court unanimously held that when a defendant had prevailed on a motion to suppress evidence in the superior court, the prosecution could not avoid the consequences of that ruling by dismissing the charges and re-filing them. (*Schlick v. Superior Court* (1992) 4 Cal.4th 310, 315.) The exact question before this Court

was "whether subdivision (d) of section 1538.5[6] was intended to bar the suppressed evidence at a subsequent trial or hearing of identical charges filed following an initial dismissal under section 1385." (*Id.* at p. 313.) This Court answered that question in the affirmative. *Schlick* made it impossible for the prosecution to "simply refile and relitigate the motion to suppress of a case dismissed as a result of an adverse ruling on a motion to suppress in the superior court." (*Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 876.)

Schlick was published on December 17, 1992. Less than two weeks later, a memorandum by the Los Angeles Country District Attorney's Office criticized the opinion for the following reasons:

> The problem with this decision is that we can now suffer the permanent dismissal of a felony case simply because we did a poor job in presenting our evidence at the 1538.5 motion in the superior court. 1538.5, subd. (j) does permit us to seek to renew a 1538.5 motion made first at the special hearing in the superior court and present new evidence if we can show good cause as to why that evidence wasn't presented at the first hearing. But very often the reason we didn't do a good job at the first hearing was simply that due to the press of cases our deputy was not sufficiently prepared, or did not subpoena an essential witness, or an essential witness did not appear. These reasons would not be considered good cause to renew the hearing but do occur with some frequency.

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[6] Section 1538.5, subdivision (d) provides, in pertinent part, that "If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing . . . ."

(Leg. Hist.[7] 80.) This memorandum proposed that the language "If the case has been dismissed pursuant to Section 1385 or if the people dismiss the case on their own motion the people may file a new complaint or seek an indictment and the ruling at the special hearing shall not be binding in any subsequent proceeding" be inserted into section 1538.5, subdivision (j). (Leg. Hist. 81.) The memorandum was subsequently incorporated into a legislative proposal, which was submitted to Sen. Quentin Kopp. (Leg. Hist. 78.) On March 4, 1993, Sen. Kopp introduced Senate Bill 933 (hereafter "SB 933"), which amended section 1538.5, subdivision (j) in precisely the manner proposed by the Los Angeles County District Attorney. (Leg. Hist. 3, 6.)

On May 6, the California Attorneys for Criminal Justice (hereafter "CACJ") wrote to Sen. Kopp, objecting to the bill as follows:

> SB 933 proposes that where a court has dismissed a case in the interest of justice, that a prosecutor may refile and "take another shot" with another judge. CACJ thinks that this proposal would encourage forum shopping and delay proceedings without any real benefit, and must therefore oppose passage of the bill.

(Leg. Hist. 76.) Two weeks later, on May 20, Sen. Kopp introduced an amended version of SB 933. The amendment included a state-

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[7] "Leg. Hist." designates the legislative-history documents provided by Legislative Research & Intent LLC which were the subject of the Motion for Judicial Notice filed and served contemporaneously with this brief. The page numbers in citations to these documents refer to the six-digit "Bates stamp" numbers on the lower right corners of the pages.

ment of legislative intent "that this act shall not be construed or used by a party as a means to forum shop." (Leg. Hist. 9.) The amendment also added subdivision (p), which provided that the prosecution could not dismiss and re-file a complaint more than twice for the purpose of re-litigating a suppression motion "unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing." (Leg. Hist. 14-15.) This version of the bill passed the Senate on May 28. (Leg. Hist. 31.)

On August 16, 1993, the bill was further amended in the Assembly. (Leg. Hist. 16-21.) The amendment, in its entirety, consisted of the addition of the sentence "Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available" at the end of subdivision (p). (Leg. Hist. 21.) In that form, the bill passed unanimously in the Assembly. (Leg. Hist. 31.) The Senate concurred in the Assembly amendment and passed the bill on September 1, 1993. (*Ibid.*) Sen. Kopp sent the bill to Gov. Wilson for his signature less than a week later, noting in his cover letter that "SB 933 also prohibits 'forum shopping' by requiring that all search and seizure motions in a case be heard by the same judge, if that judge is available." (Leg. Hist. 58.)

B. This Court's decision in *Jimenez* reflects that a defendant's statutory right to have his suppression motion heard by the same judge who previously granted it trumps other considerations.

In *People v. Superior Court (Jimenez)* (2002) 28 Cal.4th 798, this Court addressed the issue of whether the prosecution may render a judge "unavailable" to re-hear a suppression motion, as contemplated by § 1538.5(p), by disqualifying the judge pursuant to Code of Civil Procedure section 170.6. (*Id.* at p. 801.) In a unanimous opinion, this Court said no, on the basis that such a procedure "would sanction the forum shopping the Legislature prohibited when it enacted Penal Code section 1538.5, subdivision (p)." (*Ibid.*) In particular, an attempt by the prosecution to "direct a case *away* from a particular court . . . can only be described as the very forum shopping the Legislature recognized as a problem and attempted to remedy by inserting a prohibition against the evil within [Penal Code] section 1538.5, subdivision (p)." (*Id.* at p. 808, original emphasis, quoting *Soil, supra,* 55 Cal.App.4th at p. 880; see also *Barnes v. Superior Court* (2002) 96 Cal.App.4th 631, 640.)

Jimenez, Barnes, and *Soil* all stand for the proposition that the final sentence of § 1538.5(p) is important, means what it says, and is not a mere afterthought which may be cast aside when other considerations come into conflict with it. It was adopted by the Legislature to discourage forum shopping because the Legislature considered forum shopping an "evil" which should be prevented. (*Jimenez, su-*

pra, 28 Cal.4th at p. 808; *Soil, supra,* 55 Cal.App.4th at p. 880; *Barnes, supra,* 96 Cal.App.4th at p. 640.)

It is no less evil when it is enabled by a court's policy. The question presented here is the closely related one of whether a court may adopt a policy regarding judicial assignments which renders the judge who originally granted a suppression motion unavailable to hear the renewed motion after the case has been dismissed and re-filed. Such a policy would have the exact same effect as the disqualification motions disapproved by *Jimenez*: both would permit the prosecution to litigate the suppression motion before a judge who has not already granted the very same motion, and who is therefore substantially more likely to deny it. Accordingly, the answer to the question presented here should be the same as the answer in *Jimenez.* A court has no more right than a prosecutor does to circumvent the intent of § 1538.5(p).

C. A court must exercise its discretion regarding judicial assignments in a manner that is consistent with the statutory scheme.

Trial courts and their presiding judges have the authority to set their own rules and policies, so long as they are "not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." (Govt. Code, § 68070, subd. (a); *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351-1352; Cal. Rules of Court, rule 10.603.) However, "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to

the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.) "[J]udicial discretion must be measured against the general rules of law and, in the case of a statutory grant of discretion, against the specific law that grants the discretion." (*Horsford v. Board of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 393-394.) In particular, "local courts may not create their own rules of evidence and procedure in conflict with statewide statutes." (*Elkins, supra,* 41 Cal.4th at p. 1352.)

As applied here, these principles mean that while courts have broad discretion to adopt policies regarding judicial assignments, that discretion does not extend to policies which conflict with the statutory scheme established by section 1538.5, subdivisions (j) and (p). The statutory scheme implemented by SB 933 was a compromise between two competing interests: on the one hand, the government's interest in avoiding "the permanent dismissal of a felony case simply because we did a poor job in presenting our evidence at the 1538.5 motion in the superior court," and on the other, the defense community's interest in preventing "forum shopping," in the sense of repeatedly presenting the same argument to different judges in hopes of finding one who will agree with it. (Leg. Hist. 76, 80.) At a high level, the idea is that the government gets a second chance at surviving a suppression motion, but it needs to

bring something new to the table the second time: new evidence, new witnesses, a new legal theory, or in general something which would justify denial of the motion and which, due to the "press of cases" or to insufficient preparation by a busy deputy district attorney, it did not have the opportunity to present the first time around. (Leg. Hist. 80.) The mechanism for enforcing that requirement is the "same judge" rule of § 1538.5(p): the new suppression motion must be heard by the judge who granted it the first time, and who is therefore very likely to grant it again if the government does not come up with some compelling reason not to. The purpose of the statutory scheme is emphatically not to afford the prosecution an opportunity to try out its arguments on a different judge.

In its published opinion, the Court of Appeal held that presiding judges may simply decide, for whatever reasons seem good to them, "that a judge is unavailable to hear a relitigated motion to suppress due to administrative reasons." (*Rodriguez, supra,* 231 Cal.App.4th at p. 300.) The opinion makes no attempt to place any boundaries or restrictions on this power; it simply holds that "a presiding judge who determines the first judge is not available and assigns the relitigated motion to suppress to another judge does not, in doing so, deprive a defendant of his statutory rights," irrespective of the presiding judge's reasons for doing so. (*Rodriguez, supra,* 231 Cal.App.4th at p. 300.) Since the opinion places no limits on the court's discretion to decide what makes a judge "unavailable," the

unavoidable implication of the Court of Appeal's opinion is that *any* administrative concern that falls short of "arbitrary and capricious" (*Rodriguez, supra,* 231 Cal.App.4th at p. 301), no matter how trivial and no matter how easily addressed in a manner consistent with the dictates of § 1538.5(p), trumps the rights of defendants to benefit from the Legislature's carefully thought-out compromise described above.

If that is the law, then the language of § 1538.5(p) which implements that compromise is effectively a nullity, at least in large court systems like Santa Clara County's. If courts are allowed to place their own administrative convenience above the Legislature's determination that prosecutors are likely to forum shop if steps are not taken to prevent them from doing so, innumerable defendants, like appellant, are going to be convicted after a judge has duly determined, based on all relevant considerations, that the government acquired its evidence in a manner that violated the defendant's Fourth Amendment rights, because a different judge will subsequently decide on the basis of precisely the same considerations that the government did not do so. That is precisely the "evil" the Legislature was attempting to prevent by adopting § 1538.5(p) in its current form. (*Jimenez, supra,* 28 Cal.4th at p. 808.)

The legislative history described above and this Court's decision in *Jimenez* make it clear that the general rule is that suppression motions filed after a previous motion has been granted and the case has been dismissed and re-filed must be heard by the

judge who granted the motion the first time around, and that the proviso "if the judge is available" at the end of § 1538.5(p) is intended to be a narrow exception. A trial court's discretion to adopt policies regarding judicial assignments does not extend to modifying that general rule. This Court should rule, consistently with its decision in *Jimenez*, that prosecutors should not get an opportunity to try out their opposition to a suppression motion on a new judge merely because assigning the motion to the judge statutorily mandated to hear it would require the court to alter its policies regarding the assignment of judges. Instead, trial courts must adopt policies which assure that judges who grant suppression motions are available to hear renewed suppression motions - and, if necessary, the preliminary examinations associated with such renewed suppression motions - after cases are dismissed and re-filed pursuant to section 1538.5, subdivision (j). Such a requirement takes precedence over the courts' discretion because it is necessary in order to carry out the Legislature's explicitly stated intent that prosecutors not use their "one 'free' dismissal before the statutory bar to prosecution takes effect" as a means of getting a successful suppression motion re-litigated in front of a more prosecution-friendly judge. (*Schlick, supra,* 4 Cal.4th at p. 313; *Jimenez, supra,* 28 Cal.4th at p. 807.)

D. Cases which address judicial unavailability in other contexts do not control here.

1. *People v. Arbuckle* and its progeny

In *People v. Arbuckle* (1978) 22 Cal.3d 749, this Court announced the now-familiar principle that a defendant who pleads guilty or no contest is entitled to be sentenced by the same judge who accepted the plea bargain. *Arbuckle* holds that "whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge." (*Id.* at pp. 756-757.) "[I]f internal court administrative practices render that impossible, then in the alternative [the] defendant should be permitted to withdraw his plea." (*Id.* at p. 757.) In a footnote, this Court added:

> We recognize that in multi-judge courts, a judge hearing criminal cases one month may be assigned to other departments in subsequent months. However a defendant's reasonable expectation of having his sentence imposed, pursuant to bargain and guilty plea, by the judge who took his plea and ordered sentence reports should not be thwarted for mere administrative convenience. If the original judge is not available for sentencing purposes after a plea bargain, the defendant must be given the option of proceeding before the different judge available or of withdrawing his plea.

(*Ibid.*, fn. 5.) Footnote 5 suggests that, for *Arbuckle* purposes, a judge who has been "assigned to other departments" is "not available for sentencing purposes." (See also *People v. Pedregon* (1981) 115

Cal.App.3d 723, 726.) However, that definition of "unavailable" does not control here, for several reasons.

First, "[t]he *Arbuckle* right . . . is neither constitutional nor statutory, but 'a hybrid, judicially promulgated contractual right.'" (*In re James H.* (1985) 165 Cal.App.3d 911, 921.) In contrast, the right at issue here is statutory. The plain language of the statute that created it, and the legislative history of that statute described above, demonstrate the Legislature's belief that defendants would ordinarily be able to have their re-filed suppression motions heard by the same judge who granted their first motion, and that the unavailability of that judge would be a rare exception. Therefore, the definition of "available" in this context must necessarily be broad enough to effectuate the Legislature's intent, a consideration that does not exist in the *Arbuckle* context.

In this regard, it is notable that the definition of "unavailable" in the *Arbuckle* context excludes judges who are *too* unavailable. The "*Arbuckle* right" referred to by *James H., supra,* is the right of defendants to withdraw their plea if the same judge who accepted the plea agreement is not available to impose sentence. (See, e.g., *People v. DeJesus* (1980) Cal.App.3d 413, 421.) But a defendant does not have that right if the judge's unavailability is due to retirement, death, or disability. *People v. Dunn* (1986) 176 Cal.App.3d 572 addresses the question of whether a defendant could withdraw his plea when the judge who had taken it had retired before sentencing.

(*Id.* at p. 574.) The reviewing court noted that "*Arbuckle* specifically dealt with the situation when 'internal court administrative practices' render it impossible or impracticable for the judge who accepts a defendant's plea to impose the sentence," and held that *Arbuckle* does not apply to situations where the judge who accepted the plea no longer "actively exercises judicial power" at the time of sentencing. (*Id.* at p. 575; see also *People v. Jackson* (1987) 193 Cal.App.3d 393, 396.) That is, a defendant has the "*Arbuckle* right" *only* when the sentencing judge is unavailable due to "internal court administrative practices," and not when the judge is unavailable for other reasons such as retirement or death. While this point does not answer the question of whether a judge can be "unavailable," in the § 1538.5(p) context, due to such internal administrative practices, it certainly demonstrates that "unavailable" has a very different meaning in that context than in the *Arbuckle* context. There can be no question that a judge who has retired or died after a defendant's first suppression motion is "not available" to hear the second one.

Moreover, the difference between the *Arbuckle* context and the § 1538.5(p) context is that in the case of *Arbuckle*, if the judge who must preside over a proceeding is unavailable to do so, there is an available remedy which leaves the defendant in a tenable position: he can choose to withdraw his plea. No comparable remedy exists in the case of re-filed suppression motions. When a defendant files a renewed suppression motion after the charges against him have

been dismissed and re-filed, and the judge who granted the original suppression motion is unavailable to hear the new one, the defendant's only option is to take his chances in front of a different judge. In order for the *Arbuckle* rule to be analogous, it would have to be "the defendant must be sentenced by the same judge who took his plea, but if that judge is unavailable, then the defendant may be sentenced by any judge." In light of the vast difference between the effects of judicial unavailability on defendants, it is unreasonable to suppose that "available" means the same thing in both contexts.

2. *People v. Roberts*

Penal Code section 629.60 requires that once a judge has issued an order authorizing a wiretap, periodic reports about the wiretap must be submitted "to the judge who issued the order." (*Id.* at p. 1179.) In *People v. Roberts* (2010) 184 Cal.App.4th 1149, a judge had authorized a wiretap on the defendant's cell phone, but some of the reports required by section 629.60 were reviewed by a different judge. (*Id.* at pp. 1169 [order issued by Judge Deddeh], 1181 [two reports signed by Judge Wellington].) The reviewing court did not consider this to be significant:

> Not every provision of section 629.60 plays a central role in limiting unnecessary interception of wire and oral communications. A central role is one that affects the legality of the authorization or the execution of the wiretaps. [Citation.] [¶] Contrary to defendants' assertions, we do not believe the requirement the report be signed only by the judge that issued the authorization order plays a central role in the statu-

> tory scheme. As a practical matter, a supervising judge may be unavailable. Rather than forgo prompt judicial oversight of the wiretap, a fully informed judge may review the reports.

(*Id.* at p. 1185.)

Here, in contrast, the requirement that a re-filed suppression motion be heard by the same judge who granted the original motion plays a distinctly central role in the statutory scheme which allows the government to dismiss and re-file charges against defendants who have successfully moved to suppress the government's evidence against them. As explained in detail above, the "same judge" requirement of § 1538.5(p) was adopted for the specific purpose of responding to the criminal-defense community's concerns that this scheme would allow prosecutors to forum shop. Therefore, the *Roberts* court's rationale for overlooking the "same judge" provision of section 629.60 does not apply here. (See *Rodriguez, supra,* 231 Cal.App.4th at p. 852 [Court of Appeal agreeing with this point].)

II. THE TRIAL COURT ERRED PREJUDICIALLY BY REFUSING TO ASSIGN THE RENEWED SUPPRESSION MOTION TO THE JUDGE WHO HAD PREVIOUSLY GRANTED THE SAME MOTION.

Under the principles discussed above, the trial court's refusal to assign appellant's renewed suppression motion to Judge Chiarello, the judge who had granted it prior to the dismissal and re-filing of the case, was a prejudicial abuse of discretion for the following reasons:

- The prosecution's extended resistance to litigating the suppression motion before Judge Chiarello demonstrates that it was doing exactly what the anti-forum-shopping provisions of section 1538.5 and this Court's ruling in *Jimenez, supra,* were intended to prevent.

- By any reasonable definition of the word, Judge Chiarello actually *was* available to hear the motion.

- The presiding judge apparently misunderstood the requirements of § 1538.5(p).

- As a practical matter, the court's judicial-assignment policy had the effect of making *all* judges *always* unavailable to hear suppression motions which were brought at preliminary examinations pursuant to section 1538.5, subdivision (f)(1).

Each of these issues is discussed in detail below.

A. The prosecution was forum shopping.

The legislative history discussed in argument section I above "'makes it clear that the Legislature intended these amendments to

prohibit prosecutors from forum shopping.'" (*Jimenez, supra,* 28 Cal.4th at p. 807, quoting *Barnes, supra,* 96 Cal.App.4th at p. 638.) But forum shopping is precisely what the prosecution was doing in the instant case.

1. The prosecution's goal was plainly to litigate the suppression motion before a judge more likely to grant it than Judge Chiarello.

The term "forum shopping" most commonly means "The process by which a plaintiff chooses among two or more courts that have the power - technically, the correct jurisdiction and venue - to consider the plaintiff's case. This decision is based on which court is likely to consider the case most favorably." (Nolo's Plain-English Law Dictionary, <http://www.nolo.com/dictionary/forum-shopping-term.html>.) The classic example involves the choice between federal and state courts. (See, e.g., *Beeman v. Anthem Prescription Mgmt., LLC* (9th Cir. 2012) 689 F.3d 1002, 1007.) However, it is clear that when CACJ expressed concerns about SB 933 "encourag[ing] forum shopping" (Leg. Hist 76), they were using the term in a broader sense. Certainly, nothing about the proposed legislation created an alternative court system in which the government could properly file criminal cases, providing the government with the opportunity to choose the court most likely to deliver a conviction. When CACJ objected to the prospect of "forum shopping" (Leg. Hist. 76), and when the Legislature, two weeks later, responded by adding language to SB 933 explicitly stating its intent that "this act shall not be construed or

used by a party as a means to forum shop" (Leg. Hist. 9), what they were talking about was a more subtle form of forum shopping: the government dismissing and re-filing charges following the suppression of evidence necessary to its case in hopes of getting a new suppression motion heard by a judge who would deny it.

It is clear from the record in the instant case that when the prosecution dismissed and re-filed the charges against appellant, it was forum shopping in precisely the manner CACJ was concerned about, and the Legislature declared to be outside the purpose of the amendments wrought by SB 933. The purpose of providing the government with, in CACJ's words, "another shot" at prosecuting defendants who have prevailed on suppression motions was not to improve the government's conviction rate; it was to permit prosecutors to re-litigate such motions when they "discover in the middle of a hearing that the grounds for the motion were not what the prosecutor anticipated and that a necessary witness is not available," or when they are "'ambushed' by a defense attorney who presents several unanticipated witnesses or an unanticipated legal theory" at the hearing on the first motion. (Leg. Hist. 45, 76.) But nothing like that occurred here.

To begin with, there were no unanticipated legal theories. From the outset, the defense theory for suppression of the evidence seized in appellant's home was that Detectives Nunes and Chubon had entered the Rodriguez home on the basis of purported "con-

sent" which was no consent at all because it was given under duress. The very first point made in the original suppression motion, following a description of the search warrant affidavit, was that "the validity of that warrant rests entirely on the legality of the alleged 'consent' to enter defendant's home and obtain his computer. . . . Defendant denies he gave 'consent,' as that term is used in Fourth Amendment jurisprudence." (1ACT 170.) The argument section of the motion contains two sections, respectively headed "Any 'Consent' From Defendant to Surrender his Computer Was Invalid Because it Was Tainted By the Unlawful Entry Into His Home" and "The Alleged Consent to Surrender His Computer Was Not Voluntarily Given in Any Event." (1ACT 175, 177.) No competent prosecutor could possibly fail to anticipate this legal theory in a case where the police entered a private residence after one the residents had said "can we just call you back so you could come back?" and the police had responded "We could go get a search warrant and come, you know, kick the door in and do it that way." (2CT 228.)

Nor were there either unanticipated grounds or unanticipated or unavailable witnesses. At the first preliminary hearing, the defense called three witnesses: appellant himself, his mother, and his father. (1ACT 3, 99.) Again, no competent prosecutor, no matter how busy, could possibly have failed to anticipate that the witnesses at a suppression hearing involving police entry into a private home would be the residents of that home. The prosecutor called two wit-

nesses: Detectives Nunes and Chubon. (1ACT 2.) At no point in the entire remainder of the litigation of the suppression motions, in both cases, did the prosecution call any other witnesses, so this was not a case of the government discovering "in the middle of a hearing . . . that a necessary witness is not available." (Leg. Hist. 45.)

At the hearing at which Judge Chiarello granted the suppression motion, there were no witnesses at all. Judge Chiarello's decision to grant the motion was chiefly based on the contents of a second audio track he had discovered on a CD containing the officers' recordings of their interactions with members of appellant's family; specifically, the portion of that audio track in which Det. Nunes told appellant's mother, Susan Rodriguez, that if she did not allow the detectives to enter her home, they "could go get a search warrant. And, come you know, kick the door in and do it that way. . . . We don't want to do it the hard way. We just want to get your cooperation." (2ACT 323-324.) The court found that the entire "encounter between Officers Chubon and Nunes was tainted at the outset" by this statement. (2ART 22.)

If it is true, as the court and the parties apparently agreed, that Judge Northway, the magistrate at the preliminary hearing, had not considered that additional audio track (2RT 9-10, 16), then it would arguably be reasonable to consider Nunes's "kick the door in" comment to be "unanticipated grounds." However, the court, upon discovering the extra audio track, gave the parties ample opportu-

nity to file supplemental briefing regarding its effects, which the parties did. (1ART 9-10; 2ACT 320-325, 327-334.) By the time the substantive argument on the suppression motion took place, the prosecution was not only on notice of the additional track, but had read the defense's briefing on its effects and had filed its own brief in response. All told, the prosecution had over two and a half months, from the initial hearing on February 4 to the continued hearing on April 21, to prepare to argue about the interaction between the officers and Susan Rodriguez recorded on the extra track. (2ACT 318; 2 RT 9.) This was hardly an "ambush." (Leg. Hist. 76.)

In summary, this was not a situation where the prosecution "didn't do a good job at the first hearing [because] due to the press of cases our deputy was not sufficiently prepared, or did not subpoena an essential witness, or an essential witness did not appear." (Leg. Hist. 76.) On the contrary, the record demonstrates that the prosecution's only conceivable purpose in dismissing and re-filing the charges was to get the suppression motion re-litigated before a judge who might reach a different conclusion that the prosecution preferred, and to keep it away from the judge who had already granted it once, and who, given that the prosecution made exactly the same arguments the second time around, was virtually certain to grant it again. The rationale behind the final sentence of § 1538.5(p), as reflected by the legislative history outlined above, was to prevent the government from doing that.

2. The prosecution was doing what this Court's ruling in *Jimenez* was intended to discourage.

The only distinction between the situation addressed in *Jimenez, supra* and the situation here is that in *Jimenez*, the prosecution's attempt to "direct a case away from a particular court" was initiated by the prosecution, by means of a motion to disqualify the judge in that court. (*Jimenez, supra,* 28 Cal.4th at p. 802.) Here, the litigation over which judge should hear the motion was initiated by the defense, in the portion of the first suppression motion in the second case addressing "Proper Venue for This Motion." (1CT 193-194; see also 1CT 184 [calendar request making the same point].) The three-paragraph argument described the holding of *Jimenez, supra,* noted that Judge Chiarello was currently sitting in the Palo Alto courthouse, and pointed out that this was not a problem because, under local rule 1(H) of the Santa Clara County Superior Court, any adult criminal case could be assigned to any judge at any courthouse. (*Ibid.*; SC Cty. Loc. Rule[8] 1(H).)

The prosecution opposed appellant's venue argument in an argument based on *People v. Superior Court (Cooper)* (2003) 114 Cal.App.4th 713, in which the reviewing court declined to extend the reasoning of *Jimenez* to re-litigated suppression motions following the re-filing of a case after an information is set aside pursuant to

[8] "SC Cty. Loc. Rule" designates the local-rules document which was the subject of the Motion for Judicial Notice filed and served contemporaneously with this brief.

section 995. (2CT 214-215; *Cooper, supra,* 114 Cal.App.4th at pp. 716-717.) The prosecution's argument was somewhat unaccountable, since the information in the first case had *not* been set aside pursuant to section 995; rather, the court dismissed the first case after granting appellant's suppression motion, which is precisely the situation addressed by section 1538.5, subdivision (j). (2ACT 342.) Therefore, *Cooper* was inapposite. However, for present purposes, the important point is that the prosecution vigorously opposed what it characterized as "send[ing] the hearing to the second judge who granted the renewed motion, Judge Chiarello." (2CT 215.)

The prosecution's ongoing resistance to allowing Judge Chiarello to hear the suppression motion, beginning with the argument just noted and persisting for the next eleven months, demonstrates that the prosecution was seeking "an opportunity to direct a case *away* from a particular court," in particular Judge Chiarello's court, just as eagerly as the prosecution in *Jimenez.* Because of *Jimenez,* the prosecution could not accomplish that goal by means of a disqualification motion, but it made every effort to accomplish it by whatever means it could. To allow the prosecution to succeed at that attempt would be to "'essentially eviscerate[] the provisions of subdivision (p)' of Penal Code 1538.5." (*Jimenez, supra,* 28 Cal.4th at p. 807, quoting *Barnes, supra,* 96 Cal.App.4th at p. 641.)

B. Judge Chiarello was available, in the ordinary English sense of the word.

The central question raised in this proceeding is what the word "available" in § 1538.5(p) means. Certainly, it does not mean "available for immediate consultation," in the sense that one might telephone a business establishment and ask the person who answers the call "Is the manager available?" Since no judge is ever "available" in that sense, it is beyond reasonable dispute that when the Legislature mandated that "Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available," it did not mean that if that judge is not available immediately with no notice, the motion may be heard by another judge. (§ 1538(p).) The Legislature was surely aware that judges have calendars, and that in order to have a matter heard by a particular judge, one must follow the procedures for getting the matter on that judge's calendar for some future date. Unless "available" is a legal term of art divorced from its ordinary English meaning, along the lines of "malice" and "negligence" – and nothing in the legislative history suggests that is the case – what it must mean, in this context, is "amenable to having the hearing placed on his or her calendar."

In that sense, Judge Chiarello was available to hear both suppression motions in the second case.

1. The court had sufficient notice that it needed to schedule the suppression hearing before Judge Chiarello.

To begin with, the court had adequate lead time to make any necessary arrangements for Judge Chiarello to hear the motions. The very fact that a suppression motion was filed in a case that had previously been dismissed and re-filed following the grant of a suppression motion was sufficient to put the court on notice that the matter needed to be assigned to the judge who had granted the previous motion, since that is the procedure mandated by section 1538.5, subds. (j) and (p). But appellant did not rely on the court drawing that inference. On September 29, 2011, appellant filed two documents which made the point explicitly: a Request for Calendar Setting form which explained that "Under 1538.5(p), 'relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available.' [Citations]," and a written suppression motion containing a section explaining that the "Proper Venue for This Motion" was before Judge Chiarello. (1CT 184, 193-194.) Therefore, the court was on notice as of September 29, 2011 that it needed to place the matter on Judge Chiarello's calendar.

Slightly over a week later, appellant put Presiding Judge Nadler personally on notice of this point. At a hearing before Judge Nadler on October 7, appellant's counsel pointed out the "Proper Venue" portion of the written motion and argued that the motion should be assigned to Judge Chiarello. (3ART 40.) At that time, the

preliminary hearing, at which the suppression motion would be heard, was set for October 27, almost three weeks in the future.[9] (1CT 179-183; 3ART 41.) That was ample lead time for Judge Nadler to find a way to place the hearing on Judge Chiarello's calendar. If it was not, the court could have continued the preliminary hearing on its own motion in order to comply with the statutory mandate. A case must be dismissed if the preliminary hearing is continued more than 60 days after the entry of a plea absent a personal waiver from the defendant, but here, appellant had entered such a waiver along with his plea. (§ 859b; 1CT 187.)

2. A local rule permitted the hearing to be assigned to Judge Chiarello.

The local rules of the Santa Clara County Superior Court provide that any adult criminal case may be assigned by the supervising or presiding judge to any of the county's five courthouses. (SC Cty. Loc. Rule 1(H).) Appellant made this point in his initial suppression motion in the second case (CT 194), and Judge Nadler must have been aware of it in any event, since a presiding judge is presumably aware of the court's rules. Therefore, despite Judge Nadler's comment that "Judge Chiarello is not available to me any longer" (3ART 40-41), no rule prevented the suppression motion

[9] The preliminary hearing was subsequently reset to December 8, 2011, at the request of the defense. (1CT 186-188; 2CT 420.)

from being assigned to him in compliance with the statutory mandate, and Local Rule 1(H) expressly permitted it.

3. Judge Chiarello was not rendered unavailable by the fact that he was sitting in Palo Alto rather than San José.

Judge Nadler explained that Judge Chiarello was "not available to [him] any longer" because Judge Chiarello had "been transferred to another division, in Palo Alto." (3ART 40-41.) To the extent that this determination rested on the geographical distance between Palo Alto and the main Santa Clara County courthouse in San José, it was contrary to established law. Distance and ordinary travel time between two courts in which a defendant is required to appear do not constitute circumstances sufficient to justify the denial of a speedy trial. (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1202-1204.) By analogy, they also do not constitute good cause to justify the denial of a defendant's statutory right to have a re-filed suppression motion heard by the same judge who granted the original motion if that judge is available.

4. The holding that Judge Chiarello was unavailable is called into question by the fact that he was available to preside over appellant's court trial and sentencing.

The most telling indicator of Judge Chiarello's availability to hear appellant's suppression motion was that he was unquestionably available to conduct appellant's court trial, and subsequently to sentence appellant, because he actually did those things. Appel-

lant's renewed suppression motion in the second case was heard by Judge Clark[10] in a San José courtroom on April 25, 2012. (3CT 739.) The minutes for that proceeding indicate that appellant's next court appearance was set for May 7, for "RAS," which presumably stands for "readiness and setting." (*Ibid.*) On May 7, twelve days after the suppression motion was heard by Judge Clark, the matter was assigned to "D85 forthwith" at a proceeding described in the minutes as "MASTER TRIAL CALENDAR." (3CT 740.) Department 85 is Judge Chiarello's courtroom in Palo Alto. (2RT 50-51.) Later on the same day, May 7, appellant and counsel appeared at that courtroom, where, in a discussion in chambers, "both counsel stipulate to crt trial submitted on police rpt." (3CT 741.) All further proceedings in the case were held before Judge Chiarello in Palo Alto. (3CT 742 ["slow plea" court trial], 788 [sentencing].)

In other words, despite the fact that Judge Chiarello was "unavailable" to hear the suppression motion, he was available to take appellant's slow plea twelve days later. All it took to get appellant's case before him was for another judge, in this case Judge Northway, to order the matter transferred forthwith to Department 85. (3CT 740-741.) In light of that, Judge Nadler's insistence that "Judge Chiarello is not available to me any longer" seems to be, at best, an over-simplification. (3ART 40-41.)

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[10] Also known as Judge Condron. See footnote 5 above.

C. The presiding judge abused his discretion.

As noted above, a trial court has the discretion to adopt its own rules and policies, but that discretion does not extend to violating either the law in general or the specific statute that conferred the discretion. (*Horsford, supra,* 132 Cal.App.4th at pp. 393-394; *Elkins, supra,* 41 Cal.4th at p. 1352.) For the reasons described next, the presiding judge's holding that Judge Chiarello was unavailable to hear defendant's renewed suppression motion did not pass muster under that analysis.

1. The court apparently misunderstood the requirements of section 1538.5, subdivision (p).

At the proceeding on October 7, 2011, defense counsel began by briefly summarizing his written argument regarding the necessity of assigning the re-litigated suppression motion to the judge who had granted the motion in the first case, concentrating on the effect of *Jimenez, supra.* (3ART 40, referring to 1CT 193-194.) After counsel concluded his remarks, the prosecutor stated his appearance and began to respond to defense counsel's arguments. The court stopped him, saying "You don't have to argue it," and then said "Well, counsel, I don't agree with your interpretation that it needs to go back to Judge Chiarello by law. *Furthermore,* Judge Chiarello is not available . . . ." (3ART 40, emphasis supplied.) The court then went on to describe its reasons for finding Judge Chiarello unavailable, which are addressed in detail in the next section.

Judge Nadler made the same point three months later on December 8, in substantially the same terms, when Judge Zecher interrupted the preliminary hearing to consult with him regarding the proper venue for the suppression motion. (1CT 16; 479-485.) On that occasion, Judge Nadler said

> I'm not in agreement with the interpretation by the Defense with regard to who the 1538.5 Judge is, so I don't think it goes back to Judge Chiarello. *Furthermore,* Judge Chiarello has a sentencing calendar today in Palo Alto and, therefore, [is] not available for this prelim.

(2CT 485, emphasis supplied.)

The court's use of the word "furthermore" in the above-quoted comments is significant, because it indicates that the court had two independent rationales for its ruling. The court was *not* saying "the suppression motion does not need to go back to Judge Chiarello *because* he is unavailable." That would have been a correct statement of law if Judge Chiarello actually had been unavailable, although, as discussed above, he was not. Rather, the court was saying, in effect, "The law does not require that Judge Chiarello hear the suppression motion; moreover, even if it did, he is not even available to hear it."

The first part of that, the court's disagreement with the proposition that "it needs to go back to Judge Chiarello by law," was incorrect. The case against appellant was re-filed, following a dismissal as the result of a successful motion to suppress, under the authority of the passage of section 1538.5, subdivision (j) beginning

with "If the case has been dismissed pursuant to Section 1385." That passage provides that the result of the defendant's successful suppression motion in the first case "shall not be binding in any subsequent proceeding, except as limited by subdivision (p)." Subdivision (p) provides that "[r]elitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available." The "judge who granted the motion at the first hearing" was Judge Chiarello. (2ART 14.) Therefore, re-litigation of that motion unquestionably "need[ed] to go back to Judge Chiarello by law" if he was available. (3ART 40.)

"[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195.) "An order resting upon a demonstrable error of law constitutes an abuse of discretion." (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49, internal quotation marks omitted; see also *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162, 1165-1166.) Thus, to the extent that the court based its refusal to assign the suppression motion to Judge Chiarello on a misunderstanding of the legal principles set forth in section 1538.5, subds. (j) and (p), that refusal was an abuse of the court's discretion.

2. The court abused its discretion by adopting a judicial-assignment policy which effectively rendered the entire bench unavailable to hear renewed suppression motions.

This Court has held that a judge may not deprive a defendant of a fundamental or statutory right in the interests of judicial economy or court management. (*Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 375 [en masse pleading to clear congested calendar].) That is precisely what the court did here.

At the proceeding on October 7, 2011, the court made a highly revealing remark about its reasons for finding Judge Chiarello "unavailable":

> And judges are - mine is a limited jurisdiction Court - I hate to say it - and so departments make themselves available when they're available to me, with the exception of Department 54, who's Judge Del Pozzo, who's assigned full time to my division, *or to take Preliminary Examination matters. Everyone else volunteers for that assignment on an availability basis.*

(3ART 41, emphasis supplied.) The point is unmistakable: the court's administrative policy is to assign preliminary hearings only to those judges who volunteer for them. There is nothing else the court could have meant by "that assignment." What the court was saying here was that every judge in the court, with the possible exception of Judge Del Pozzo, is *always* "unavailable" to be assigned to preside over a preliminary examination three weeks in the future, because assignments of preliminary examinations are not made until a judge "volunteers for that assignment on an availability basis,"

and there is no way of knowing that far in advance whether any particular judge will volunteer.

That policy might be a reasonable one if it made no difference which judge presided over any given preliminary examination, but subdivisions (j) and (p) of section 1538.5 create a situation where it *does* make a difference. Under the scheme set up by those subdivisions, a defendant whose case has been dismissed and re-filed after a suppression motion is granted, and who then moves for suppression at the preliminary hearing in the new case, is entitled to have the motion heard by the same judge who granted the suppression motion in the first case. And that, in turn, compels the conclusion that a defendant may be entitled to have the entire preliminary examination before that judge. If a defendant moves for suppression at a preliminary examination pursuant to section 1538.5, subdivision (f), as appellant did, there is no way for "[r]elitigation of the motion [to] be heard by the same judge who granted the motion at the first hearing if the judge is available" (§ 1538.5(p)) unless that "same judge" presides over the entire preliminary examination. Thus, an administrative policy which assumes that judges are fungible with respect to preliminary examinations, and which renders it impossible for a defendant to have the preliminary hearing in the new case before the same judge who granted the suppression motion in the old case, flies directly in the face of the statutory mandate.

What the Santa Clara County Superior Court has done here, whether by accident or design, is to exempt itself from the statute's reach by taking advantage of a loophole in the statutory language. It has adopted a policy which, in the court's view, renders the "same judge" provision of § 1538.5(p) nugatory, because under that policy *none* of its judges is *ever* "available" to hear preliminary examinations. As demonstrated by the legislative history discussed above, the phrase "if the judge is available" at the end of subdivision (p) was meant to be a narrow exception to a general rule, but the "everyone volunteers for preliminary examinations on an availability basis" policy that Judge Nadler described causes the exception to swallow the rule.

This Court has held that a trial court's discretion is "to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice . . . ." (*Bailey v. Taafe* (1866) 29 Cal. 422, 424.) This principle is no less vital today than it was a century and a half ago. (See, e.g., *People v. Jacobs* (2007) 156 Cal.App.4th 728, 738.) The sort of twisting of statutory language indulged in by the trial court here is inconsistent with the spirit of the law, and was therefore an abuse of the court's discretion. This Court should plug the loophole employed by the trial court, and make California's criminal trial courts understand that they need to adopt policies which enable them to "subserve and

not to impede or defeat" a statutory scheme adopted by the Legislature to ensure "the ends of substantial justice." (*Ibid.*)

D. Appellant was prejudiced by the court's erroneous ruling.

When an error arises under state law, it is prejudicial and requires reversal when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1954) 46 Cal.2d 818, 836.) "Reasonably probable," in this context, means "merely a *reasonable chance*, more than an *abstract possibility*," of such an effect. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351, original emphasis.)

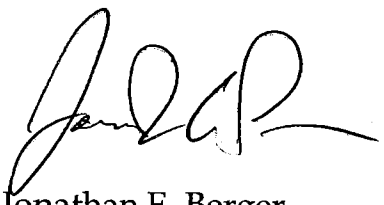
Here, as noted above, it is not only reasonably probable, but virtually certain that if Judge Chiarello had heard appellant's suppression motion in the second case, he would have granted it. In light of the fact that the renewed motion was, for all intents and purposes, the same motion he had already granted once, there is no reason to suppose he would have denied it when he heard it for the second time. If the evidence had been suppressed, the prosecution would of necessity have dismissed the case, since it would have had no evidence to adduce against appellant.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the Court of Appeal.

Dated: June 10, 2015
Sebastopol, CA

Respectfully submitted,



Jonathan E. Berger
Counsel for Appellant

CERTIFICATE OF COMPLIANCE
[CRC 8.520(c)(1)]

I, Jonathan E. Berger, declare:

1. I am an attorney duly licensed to practice before the courts of the State of California. I represent the appellant in this appeal.

2. I am the author of the attached Appellant's Opening Brief on the Merits, which I prepared using Microsoft Word.

3. According to Microsoft Word's word-count tool, the length of the text portion of the attached Appellant's Answer Brief on the Merits, excluding the cover sheet and tables but including all footnotes, is 10,470 words.

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

Dated: June 10, 2015
Sebastopol, CA

Jonathan E. Berger

PROOF OF SERVICE BY U.S. MAIL, ELECTRONIC MAIL, AND ONLINE SUBMISSION

I, Jonathan E. Berger, declare:

I am over 18 years of age and not a party to this action. I am a citizen of the United States and a resident of Sonoma County, California. My business address is 1415 Fulton Road #205-170, Santa Rosa, California.

On June 11, 2015, I served the attached:

APPELLANT'S OPENING BRIEF ON THE MERITS

by placing true and correct copies thereof in sealed envelopes, with first class postage fully prepaid thereon, and placing them in a United States Postal Service mailbox. The envelopes were addressed as follows:

Appeals Clerk, Criminal Division
Santa Clara County Superior Court
191 N. First Street
San José, CA 95113-1090
Attn: Hon. Jerome Nadler

Office of the District Attorney
70 W. Hedding Street
San José, CA 95110

Sixth District Appellate Program
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050

On the same date, I served the same document by transmitting true and correct electronic copies thereof, in PDF format, by electronic mail to the following addresses. The originating email address was jonbergerlaw@gmail.com.

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On the same date, I served the same document to the Court of Appeal, Sixth Appellate District, by transmitting a true and correct electronic copy thereof, in PDF format, by means of that court's online electronic submission facility.

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

Dated: June 10, 2015
Sebastopol, CA

Jonathan E. Berger