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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiffs and Respondents, v. Adam S. Rodriguez Defendant and Appellant.	Court of Appeal No. H038588 (Santa Clara Super. Ct. No. C111340)

PETITION FOR REVIEW

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA HONORABLE VINCENT J. CHIARELLO PRESIDING

Victoria Hobel Schultz
Bar # 71231
P.O. Box 1145
Mountain View, CA 94042
650 704-4177
vhobelschultz@gmail.com

Attorney for Adam S. Rodriguez

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TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

ISSUE PRESENTED FOR REVIEW

Is a judge who is assigned to another courtroom unavailable to hear a renewed motion to suppress evidence within the meaning of Penal Code section 1538.5, subdivision (p)?

REASONS FOR GRANTING REVIEW

This case raises significant issues as to what a court must do to comply with the mandatory requirement described in Penal Code section 1538.5, subdivision (p). The code section applies when a district attorney refiles the same criminal charges against a defendant after the first case was dismissed following the granting of a motion to suppress. (Pen. Code §1538.5, subd. (j) and (p).) Penal Code section 1538.5, subdivision (p) states that if the district attorney refiles the same charges and the defendant brings a renewed motion to suppress, the renewed motion to suppress in the refiled case shall be heard by the judge who granted the motion to suppress in the first case if that judge is available. (Pen. Code §1538.5, subd. (p).) In pertinent part, Penal Code section 1538.5, subdivision (p) states as follows: "Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available." (Pen. Code §1538.5, subd. (p).)

In the underlying case, Judge Nadler, a presiding judge in San Jose, California, refused to assign the case to Judge Chiarello, the judge who

granted the motion in the first case. (Opinion, p. 4-5.) The issue is whether his failure to do so was an abuse of discretion.

On September 29, 2011, appellant filed a request for calendar setting, and on October 7, 2011 appellant appeared before presiding Judge Nadler to request that Judge Chiarello who granted the motion to suppress in the first case be assigned to the renewed motion to suppress in the refiled case. (Opinion, p. 4; 2CT 184, 473-477.) Judge Nadler denied the motion stating that (a) he did not believe that by law it had to go back to the judge who had previously granted the motion, and (b) that Judge Chiarello was not available to him because the judge was transferred to another division in Palo Alto. (Opinion, p. 4, ftn 4 on p. 11; 2CT 184, 473-477.) Judge Nadler explained that his was a "limited jurisdiction" court, and departments volunteer and make themselves available with the exception of one judge who was assigned full time to him. Judge Nadler stated that everyone else volunteers for assignments on an available basis; it would just have to go out to whatever judge is available on that date. (Opinion, p. 4, ftn 4 on p. 11; 2CT 184, 473-477.) At that time, the matter was scheduled for October 27, 2011. (Opinion p. 4, ftn 4 on p. 11; 2CT 473-477.)

Approximately one month later, on December 8, 2011 when the matter was not assigned to Judge Chiarello, appellant complained to the judge it was assigned to and returned to the presiding judge who repeated what he had said on October 7, 2011. (Opinion, p.5; 2CT 4-16.) Judge Nadler said that he did not believe that the matter must be returned to the judge who originally granted the motion to suppress and that Judge Chiarello had a sentencing calendar in Palo Alto that day so he was not available. (2CT 479-486.)

The Court of Appeal affirmed Judge Nadler's orders and found that there was no abuse of discretion because the presiding judge has inherent discretion to administer the courts. (Opinion, p. 14-16.)

The question presented is whether Judge Nadler abused his discretion by not assigning the case to Judge Chiarello based on the latter's assignment to a courtroom in Palo Alto, about a 25 minute drive from San Jose. The Santa Clara County Superior Court rules specifically state that a criminal case can be assigned to any courthouse at any time. (Opinion, p. 12, ftn 4 on p.12.) A few months after Judge Nadler ruled that he would not assign the case to Judge Chiarello, appellant's case was sent to trial. At that time, a presiding judge in San Jose assigned the case to Judge Chiarello, and it was heard in Judge Chiarello's courtroom in Palo Alto. (Opinion, p. 6; 2CT 740-741; RT 5/11/2012 Vol 2, p. 48-51.) Thus, the Santa Clara County rules were followed by other presiding judges in the county. In addition, it is well established in the context of Penal Code section 1382 that distance and ordinary travel time between courts are not extraordinary, unanticipated, nonrecurring events, and that failure to provide a courtroom is attributable to the state. (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1200-1204; Opinion, p. 15 ftn 7.) Additionally, a judge cannot deprive a defendant of a statutory or constitutional right for the purpose of administrative efficiencies. (*Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 375; Opinion p. 14.)

In *People v. Superior Court* (*Jimenez*) (2002) 28 Cal.4th 798, 801, this court approved two appellate court cases, *Barnes v. Superior Court* (2002) 96 Cal.App.4th 631, 636 and *Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 878-879 that describe the Legislature's intent in promulgating Penal Code section 1538.5, subdivision (p). (*People v.*

Superior Court (*Jimenez*) (2002) 28 Cal.4th 798, 801-808; Opinion, p. 7-10.) The *Jimenez* Court noted that the original purpose for Penal Code section 1538.5, subdivision (p) was to give overworked prosecutors an opportunity to refile and to relitigate motions to suppress before the same judge. This makes it possible for the prosecutor to improve upon his case by new evidence or new witnesses. (*People v. Superior Court* (*Jimenez*), *supra*, 28 Cal.4th 798, 801-808.) Forum shopping for a new judge was characterized as an "evil." If a prosecutor were to challenge the judge who previously granted the motion, it would "eviscerate" Penal Code section 1538.5 (p) and (j). (*Ibid.*)

In this case, the first deputy district attorney assigned to appellant's case attempted to steer the case away from Judge Chiarello by erroneously arguing at the hearings that the first case was dismissed by a section 995 motion so 1538.5, subdivision (p) did not apply and that Judge Chiarello should not hear the renewed motion to suppress because he was not the judge who granted the first motion to suppress. (Opinion, p. 8, ftn. 3.) The deputy district attorney also argued that Judge Northway should hear the motion because she heard the first motion and denied it. (Opinion, p. 5.) When a new deputy district attorney was assigned to the case, he filed papers conceding that it was error not to assign the case to Judge Chiarello and that Judge Chiarello should have been the judge assigned to rule on the renewed and relitigated motion to suppress in the refiled case. (Opinion, p. 6.)

The Opinion states that Judge Nadler's "only reason for finding Judge Chiarello unavailable was his assignment to a courthouse in Palo Alto." (Opinion, p. 11.) This is error because the first reason Judge Nadler stated for not assigning the case to Judge Chiarello was that he disagreed

with appellant's attorney about the law. (Opinion, p. 8, ftn 3; 2CT 473-477; 479-486.)

This is a significant case because it is important for this court to determine what is meant by the term "available." It is appellant's position that for purposes of Penal Code section 1538.5, subdivision (p), Judge Chiarello was available because (a) the defendant followed court procedures and gave sufficient notice of his renewed motion to suppress in the refiled action and his request for assignment to Judge Chiarello; and, (b) Judge Chiarello who previously granted the suppression motion in the first case was still working in the criminal division of the same superior court. There was no showing of any circumstances that would have kept Judge Chiarello from hearing the motion to suppress some time after the October 7, 2011 calendar conference when the assignment was formally requested.

This court should grant review to determine whether the assignment of a judge to a different courtroom renders him unavailable within the meaning of Penal Code section 1538.5, subdivision (p). Finding Judge Chiarello unavailable in these circumstances eviscerated the intent of Penal Code section 1538.5, subdivision (p), denied appellant a substantial and statutory right, and was an abuse of discretion. This case has especially significant ramifications in large jurisdictions.

STATEMENT OF THE CASE

The First Case, Previous Case No. C1070138

On February 24, 2010, a complaint was filed in Santa Clara County charging appellant with violation of Penal Code section 311.11, subdivision (a), and one count of violating Health and Safety Code section 11357,

subdivision (c). (1ACT 159-161; references to 1CT, 1ACT, 1RT and 1ART are to the record in the first case, case no. C1070138.)

On September 23 and 24, 2010, preliminary hearing was held, and appellant's motion to suppress pursuant to Penal Code section 1538.5, subdivision (f), was denied. (1ACT 1-158, 169-181.) Appellant was held to answer on both charges. (1ACT 155.)

Following arraignment, appellant moved to suppress pursuant to Penal Code section 1538.5, subdivision (i), before the Honorable Vincent A. Chiarello. (1ACT 202-216.) Judge Chiarello granted the motion and the case was dismissed. (1ART 2/4/2011, 1-13; 1RT 4/21/2011, 1-5; 1RT 4/21/2011, 6-30; 1ART 5/2/2011, 14-37; 1ACT 342.)

Case No. C1110340

Appellant noticed a renewed motion to suppress pursuant to Penal Code sections 1538.5, subdivisions (f), (j) and (p), and it was opposed. (2CT 191-208, 209-419.) (2CT 170-172; references to 2CT, 2ACT, 2RT and 2ART are to the record in this second case, case no. C1110340.)

On October 7, 2011, before the Honorable Jerome Nadler, Presiding Judge, appellant moved to have Judge Chiarello hear the renewed motion to suppress on the grounds that Penal Code section 1538.5, subdivision (p), required that the renewed motion to suppress be heard by the judge who dismissed it in the previous case if that judge is available. (2ART 10/7/2011, VOL III, 38-42.) The People opposed the motion, and it was denied. (2ART, 10/7/2011, 38-42; 2CT 185.)

On December 8, 2011, the presiding judge assigned the preliminary hearing and motion to suppress pursuant to Penal Code section 1538.5, subdivisions (f), (j) and (p), to the Honorable Vanessa Zecher. Appellant again objected on the grounds that Penal Code Section 1538.5, subdivision

(p), required Judge Chiarello to hear the renewed motion to suppress. (2CT 1-15, 479-484.) The People opposed this, and the presiding judge again denied the request to assign the matter to Judge Chiarello. (2CT 1-15, 481-485.)

The preliminary examination was held and the renewed motion to suppress was heard and denied on Dec 8 and 9, 2011. (2CT 1-142.) Appellant was held over for arraignment on violation of Penal Code section 311.11, subdivision (a). (2CT 161-168.)

On February 8, 2012, appellant filed a motion to suppress pursuant to Penal Code section 1538.5, subdivision (i), for review of Magistrate Zecher's denial of the Penal Code section 1538.5, subdivision (f), motion to suppress. (2CT 453-487.) In its Opposition, the People admitted that the previous motion should have been heard by Judge Chiarello who was available and not by Magistrate Zecher. (2CT 488-490.)

On February 29, 2012, the motion was withdrawn during the hearing. (2ART 2/29/2012 Vol 4, 57.) Appellant brought a motion to set aside the holding order pursuant to Penal Code section 995, subdivision (a) (2) (A), which was opposed by the People and denied by Judge Condron on March 28, 2012. (2RT 2/28/20 Vol 3, 52-55; 2CT 494-525.)

Appellant's renewed motion to suppress was opposed by the People and denied by Judge Condron on April 25, 2102. (2RT 4/25/2012, 46; 2CT 528-738.)

On May 11, 2012, trial was before Judge Chiarello in Palo Alto. (2RT 5/11/2012, 48-63.) Appellant waived rights to jury trial and stipulated to a redacted police report as evidence before the court. (2RT 5/11/2012, 59-60.) Appellant was found guilty. (2RT 5/11/2012, 60.) On July 19, 2012, Appellant was sentenced and probation conditions imposed. (2RT

7/19/2012, 67-79.) Notice of Appeal was filed July 19, 2012. (2CT 790.) The Opinion of the 6th district Court of Appeal was filed on November 6, 2014 and certified for publication. (Exhibit A.)

STATEMENT OF FACTS

In November 2009, San Jose Police Officer Chubon received a tip that an individual online chat group had reported that a user named Damon Secloro was making comments about whether teens were available for sex. (2CT 20-21.) Through search warrant, Officer Chubon identified the account holder as Mrs. Susanna Rodriguez at appellant's address. (2CT 21.)

On January 28, 2010, San Jose police officers Chubon and Nunes knocked very loudly at the residence, and Mrs. Susanna Rodriguez, appellant's mother ("Mrs. Rodriguez") came to the front door. (2CT 104.) Officer Chubon took an audio recording of the encounter with the Rodriguez family without informing them. (2CT 23.)

Officer Chubon introduced himself, told Mrs. Rodriguez that he wanted to talk to her about her internet use, and asked if he could talk inside. She declined to let him in. (2CT 568.) Officer Chubon explained that an internet user from her internet address had made some comments about attraction to teenage girls. (2CT 568.) Mrs. Rodriguez asked the officers repeatedly if they would leave and come back, until Officer Nunes told Mrs. Rodriguez that if she didn't answer the questions and cooperate, they could come back with a search warrant and kick the door in. (2CT 570.) Officer Nunes emphasized that it was not an idle threat but a "reality." Officer Nunes continued the threat and told Mrs. Rodriguez that if they did not get cooperation, they would do it "the hard way" as Officer Nunes just described. Following this, Mrs. Rodriguez said, "Give me a few minutes,

ok," and after both officers said "ok," Mrs. Rodriguez was able to close the front door. (2CT 570.)

Officer Chuban did not contradict Mrs. Rodriguez's testimony that she could not close the door during the discourse with the officers until she said, "give me a few minutes, ok," indicating she would return. (2CT 570.) Officer Nunes was half inside the home, half outside and wedging the door open with her body. (2CT 106.)

Mrs. Rodriguez went inside and informed Mr. John Rodriguez, her husband and appellant's father (hereinafter "Mr. Rodriguez") and also informed appellant about her encounter with the police. (2CT 103.)

The officers did not leave but remained in the Rodriguez's driveway.(2CT 32.) Thereafter, Officers Nunes and Chubon told appellant and his brother, Kevin Rodriguez, that the officers came to take a look at and search the computers for pornography and illegal content. (2CT 571-574.) Officer Chubon questioned appellant's brother and searched his laptop computer for illegal content. (2CT 574-577.)

With the front door open, Officer Chubon spoke to Mr. and Mrs. Rodriguez who remained in the home. (2CT 577.) Mr. Rodriguez told the officers to stay outside, and he denied them permission to come into the house. (2CT 126.) This is confirmed later by Officer Nunes who told appellant that "your family does not want us in the house" and by Officer Chubon during the preliminary exam. (2CT 68-69, 587.)

Officer Nunes began the encounter with appellant by resuming the previous threat to return with a search warrant and kick the door in. (2CT 581.) Appellant admitted to a chat a year and a half ago because he was bored, denied interest in underage girls, and did not use the screen name anymore. (2CT 581-584.) After they discussed his social life, the officers

asked if they could see his computer. (2CT 581-586.) Appellant did not give them unequivocal permission. (2CT 587.) At that point, Officer Nunes acknowledged that the family did not want the officers to enter the home. (2CT 587.) So she told him that they could take the computer and bring it back. (2CT 587.)

Appellant did not agree to the officers doing it at that time.(2CT 588.) The officer told appellant that they were not going to leave without appellant's computer. (2CT 588.) Appellant acknowledged that the officers were going to take his computer but he asked them to stay outside. (2CT 588.) He did not give them permission to go into the home. (2CT 588.) The officers told appellant that they would not let him back in the home by himself, unaccompanied by them, because they could not let appellant destroy evidence or come out with a gun. (2CT 588-590.) Appellant admitted to marijuana in his room, and the officer told appellant that they did not care about the marijuana. (2CT 590.)

Thereafter, when appellant walked into the house, the officers followed him. Officer Chubon told appellant's father, Mr. Rodriguez, that the computer was going to be taken from appellant's room. (2CT 590.)

Following the officer's comments, appellant told the officers that it was up to his father. (2CT 592; Audio CD 31:05-07.) Appellant's father indicated that he would not give his permission, and he said that he wanted to speak with his son (Audio CD 31:10-15.) In response, Officer Nunes returned to the threat of getting a search warrant. (2CT 593.) Thereafter, Appellant unplugged the computer, and handed it to Officer Chubon. (2CT 97.)

On February 2, 2010, Appellant was arrested pursuant to warrant on the aforementioned charges. (2ACT, Police Report, 14.)

ARGUMENT

A JUDGE WHO IS ASSIGNED TO ANOTHER COURTROOM IN PALO ALTO IS AVAILABLE TO HEAR A RENEWED MOTION TO SUPPRESS EVIDENCE WITHIN THE MEANING OF PENAL CODE SECTION 1538.5, SUBDIVISION (p)

A. Penal Code Section 1538.5, Subdivision (p) Was Intended to Allow Prosecutors Another Opportunity to Have the Case Heard by the Same Judge, Not to Forum Shop.

The Legislature has provided that when a motion to suppress in a felony case is granted and the case dismissed, the prosecution may refile the case. When the case is refiled, the suppression motion can be renewed and relitigated subject to Penal Code section 1538.5, subdivision (j). (Pen. Code, § 1538.5, subd. (j).) The Legislature has also provided that relitigated suppression motions "shall be heard by the same judge who granted the motion at the first hearing if the judge is available." (Pen. Code, §1538.5, subd. (p); *People v. Superior Court* (*Jimenez*), *supra,* 28 Cal.4th 798, 801 (*Jimenez*); *Barnes v. Superior Court, supra*, 96 Cal.App.4th 631, 636 (*Barnes*); *Soil v. Superior Court, supra*, 55 Cal.App.4th 872, 878-879 (*Soil*).) In *Jimenez, Barnes* and *Soil*, the district attorney attempted to use Code of Civil Procedure section 170.6 to disqualify the judge who granted the motion in the first case so the same judge would not hear the renewed motion to suppress in the refiled case. (*Ibid.*) The courts acknowledged this type of forum shopping as an "evil" that Penal code section 1538.5, subdivision (p) attempted to wipe out:

> This 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)." (Citation.)

(*Jimenez, supra,* 28 Cal.4th at p. 808.)

The legislative history reveals that the focus was to give an overworked deputy who missed evidence or witnesses a chance to improve the presentation of evidence before the same judge. (*People v. Superior Court (Jimenez), supra,* 28 Cal.4th 798, 806-809.) The intent of including Penal Code section 1538.5, subdivision (p) in the legislative scheme was to prevent the district attorney from gaining a second chance with a new judge. (*Ibid.*) When the bill was sponsored in the Legislature it did not initially have language requiring the same judge to hear the renewed motion to suppress. (*Ibid.*) But defense attorneys objected to giving the prosecutor a second chance with a new judge so the language was added to specifically require that the same judge hear the renewed motion to suppress in the refiled case. (*Ibid.*) The purpose of passing the legislation was to prevent a new judge from hearing the renewed motion. (*Ibid.*) The legislative intent behind Penal Code section 1538.5, subdivision (p) is stated succinctly in the aforementioned cases, and the legislative intent is discussed in the Opinion, pp. 7-10.

For example, in *Jimenez*, when the prosecution tried to get around the language of Penal Code section 1538.5, subdivision (p) by trying to disqualify the judge so the judge would not be "available," the court stated that to allow a 170.6 challenge would "eviscerate" the provisions of the statute:

> This legislative history "makes it clear the Legislature intended these amendments to prohibit prosecutors from forum shopping." (*Barnes, supra,* 96 Cal. App. 4th at p. 638.) To allow the prosecutor to make a judge unavailable to rehear

> the suppression motion simply by filing a peremptory challenge under Code of Civil Procedure section 170.6 would permit this prohibited forum shopping and "essentially eviscerate the provisions of subdivision (p)" of Penal Code section 1538.5. (*Barnes, supra*, at p. 641.)

(*Jimenez, supra*, 28 Cal.4th at 807.)

Similarly, if a presiding judge could deny a defendant the right to have the judge who granted his motion to suppress in the first case from hearing the motion in the second case because of court efficiencies, the presiding judge would be "eviscerating" the provisions of subdivision (p).

The purpose of the legislation was to give overworked deputies the opportunity to present a better case to the same judge; it was not to give deputies a completely new opportunity before a judge who might be more sympathetic to them:

> The district attorney told the Legislature the reason the amendment was needed was because trial deputies were overworked and might lose the first suppression motion simply because they did a poor job of presenting the evidence. Given this statement of need, it makes sense that the same judge who heard the first motion, and granted it, should hear the second motion. When the same judge hears the evidence [that] was previously omitted, or the argument that the previously unprepared prosecutor forgot to make, then the judge will once again make the correct ruling, which this time will be to deny the suppression motion.' *(Soil v. Superior Court, supra, 55 Cal.App.4th at pp. 879-880, [64 Cal.Rptr.2d 319],* fn. omitted.)

(*Jimenez, supra*, 28 Cal.4th at 808.)

Thus, Penal Code section 1538.5, subdivision (p) was promulgated to give the prosecutor the opportunity to go before the same judge and to forbid forum shopping by any means. Efforts needed to be made to assign

the case to Judge Chiarello to comply with Penal Code section 1538.5, subdivision (p).

B. Appellant Followed Court Rules and Gave Sufficient, Timely Notice So That Judge Chiarello Could Be Made Available to Hear the Renewed Motion to Suppress.

The Opinion noted that appellant moved to have the suppression motion heard before Judge Chiarello, but this was opposed by the prosecution. (Opinion, p. 4.) On September 29, 2011, appellant completed the form called "Request for Calendar Setting." (2CT 184.) The form provides space to describe the reason for the request. Defendant typed his reason for a specific request as follows: " 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.' [Cal. Pen. Code section 1538.5(p); People v. Jimenez (2002) 28 Cal.4th 798, 805] Judge Chiarello heard the previous motion." (2CT 184.)

Appellant appeared before Judge Nadler on October 7, 2011 well before the date of the preliminary hearing on December 8, 2011 and with enough time for Judge Nadler to make efforts to assign Judge Chiarello for the renewed motion to suppress. (Opinion, p. 4; 2CT 184, 473-477.)

C. The Record Indicates That Judge Nadler Refused to Assign the Case to Judge Chiarello Both Because He Did Not Believe the Law Required it and Because He Considered Judge Chiarello to Be Unavailable.

After noting that Judge Chiarello was a judge in Santa Clara County, the Opinion states that "[a]dditionally, Judge Nadler's only reason for finding Judge Chiarello unavailable was his assignment to a courthouse in Palo Alto," and the "issue is whether this reasoning was an abuse of

discretion." (Opinion, p. 11.) Judge Nadler's comments on the record indicate that the first reason expressed by Judge Nadler was that he believed that he was not required to assign the renewed motion to suppress in the refiled case to Judge Chiarello, not that Judge Chiarello was in Palo Alto. (Opinion, p. 4; 2CT 184, 473-477.)

At two court appearances, both on October 7, 2011, at the calendar setting conference, and on December 8, 2011, Judge Nadler very explicitly stated that his first reason for not assigning Judge Chiarello to the renewed motion to suppress in the refiled case was that the law did not require him to. (Opinion, p. 4; 2CT 184, 473-477.)

Judge Nadler did not express that he made any attempts or would make any attempts to try to get Judge Chiarello assigned to the renewed motion to suppress. (Opinion, ftn 4 on p. 11; 2CT 473-477, 479-486.)

At the calendar setting conference on October 7, 2011, appellant's counsel re-stated what was in the calendar conference setting form: Judge Chiarello heard the motion to suppress in the first filed case; Judge Chiarello granted the motion to suppress in the first filed case; the district attorney refiled the same charges; and pursuant to 1538.5, subdivision (p), Judge Chiarello must hear the renewed motion to suppress in the refiled case if he is available. (CT 474.)

When appellant's attorney finished speaking and the deputy district attorney began to argue, Judge Nadler interrupted and expressed that he didn't agree with the appellant's interpretation of the law and that the motion to suppress did not have to go to Judge Chiarello. Judge Nadler gave this as his first reason for denying sending the motion to suppress to Judge Chiarello. He gave as his second reason that Judge Chiarello was in Palo Alto and not directly under his supervision.

[appellant's attorney finishes his comments that 1538.5, subdivision (p) applies and Judge Chiarello granted the motion in the previous case so Judge Chiarello should hear the renewed motion in the refiled case.]

Mr. NGO [deputy district attorney]: Thanh Ngo for the People. As to the statute –

THE COURT: You don't have to argue it.
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 to me any longer; he's been transferred to another division in Palo Alto.

(Opinion p.8, ftn 3; CT 475.)

'Then, on December 8, 2011, Judge Nadler's comments are similar:

THE COURT: Let's return to the prelim matter the Rodriguez matter.
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, not available for this prelim.
The matter is reassigned to Judge Zecher for prelim right now.

(Opinion p.8, ftn 3; CT 485.)

These quotes indicate that the Opinion is in error and that Judge Nadler abused his discretion because he misunderstood the law. There are no statements on the record that memorialize any attempt to assign Judge Chiarello to the renewed motion to suppress.

D. Judge Nadler Had a Responsibility to Insure That a Defendant's Rights Were Not Compromised in Favor of Court Room Efficiency or Convenience.

The Opinion does not give examples or set parameters for what

administrative reasons might be sufficient to deprive a defendant of his rights under 1538.5, subdivision (p).

> However, we disagree with defendant that a presiding judge's determination that a judge is unavailable to hear a relitigated motion to suppress due to administrative reasons somehow deprives a defendant of a fundamental or statutory right. As previously discussed, it is clear from the language of section 1538.5, subdivision (p), that while the provision is mandatory, its application is subject to the first judge's availability. Therefore, a presiding judge who determines that 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.

(Opinion, p. 14-15.)

The implication is that any administrative reason, no matter how trivial, is enough to deprive a defendant of the right to have the judge who granted the motion rehear it. In fact, the Opinion concludes by stating that "the judge's inherent discretion to assign matters" is sufficient to deprive a defendant of his rights under Penal Code section 538.5, subdivision (p):

> In coming to this conclusion, we reiterate the presiding judge has discretion to manage the court calendar and assign matters to various divisions and judges across the courts of the county. Therefore, while the language of section 1538.5, subdivision (p) requires a relitigated motion to suppress to be heard by the judge who granted the motion in the first case, this requirement is subject to the presiding judge's discretionary determination that the first judge is available. Given our interpretation of the legislative intent behind section 1538.5, subdivision (p), coupled with the presiding judge's inherent discretion to assign matters, Judge Nadler's determination of Judge Chiarello's availability was not an abuse of discretion. It was not arbitrary or capricious, and it did not deprive defendant of his rights under the statute.

(Opinion, p. 16.)

The Opinion concludes that the presiding judge must make a "discretionary determination" as to whether the first judge is available. The Opinion states that "this requirement is subject to the presiding judge's discretionary determination that the first judge is available." (Opinion, p. 16.) When appellant followed court procedure, filed his request for a calendar hearing, went before Judge Nadler on October 7, 2011, well before the date of the preliminary hearing and motion to suppress to ask for Judge Chiarello, Judge Nadler said that Judge Chiarello was not available "to me." (Opinion, ftn 4 on p. 11.) Thus, the question becomes what responsibility does a judge have to insure that a defendant's rights are not trampled upon by the administrative workings or efficiencies of the criminal and civil courts. Appellant contends that a judge who denies that the law requires him to assign the case to Judge Chiarello and takes no action to secure the assignment to Judge Chiarello through court processes, abused his discretion.

Moreover, a local court cannot act in the interest of judicial economy and efficiency if it is at the expense of a litigant and deprives the litigant of rights under the law. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351-1352; *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1319.) In fact, the Opinion cites *Gonzalez v. Commission on Judicial Performance, supra,* 33 Cal.3d 359, 375, and states that "[w]e agree with the sentiments set forth in *Gonzalez* and with defendant's assertion that a judge cannot sacrifice a defendant's statutory rights in the interests of efficiency." (Opinion, p. 14.)

E. Judge Chiarello Was Available According to Local Santa Clara Superior Court Rules, Case Law and Actual Practice.

The question of when a judge or courtroom is available has arisen in other contexts that are instructive here.

The issue of when a judge is "unavailable" when the judge is in another courtroom or division in superior court was decided by the California Supreme Court in *People v. Arbuckle* (1978) 22 Cal.3d 749 and its progeny. (*People v. Arbuckle* (1978) 22 Cal.3d 749.) The issue arose in the context of sentencing after a plea bargain because a defendant is entitled to have the judge who accepted his plea agreement later rule on his sentence. In *Arbuckle*, the court held that a judge remains "available" even if the judge is assigned to a different court or department; a judge is **not** unavailable just because he was assigned to another courthouse. (*Id.* at 756-757.)

In *Arbuckle*, Judge Roberts refused to transfer the case to Judge London for sentencing after Judge London accepted the plea agreement. The sentence imposed by Judge Roberts was not allowed to stand because Judge Roberts refused to transfer the case. The California Supreme Court ruled that "internal court administrative practices" could not deprive the defendant of his rights. (*People v. Arbuckle*, *supra*, 22 Cal.3d 749, 757.) The court was explicit when it stated that the defendant's rights "should not be thwarted for mere administrative convenience." (*Id.* at 759.)

Cases following *Arbuckle* have articulated that judges are unavailable when they are no longer in the judiciary, disabled, retired, sick or deceased. (See *People v. Watson* (1982) 129 Cal.App.3d 5, 7; *People v. Jackson* (1987)193 Cal.App.3d 393, 396; *People v. Dunn* (1986) 176 Cal.App.3d 572, 575; *People v. Pedregon* (1981) 115 Cal.App.3d 723, 726.)

The Opinion states that *Arbuckle* is not informative because "there

are times when a court's internal administrative practices may render it impossible or impractical for the judge who accepted a defendant's plea to impose the sentence" and the plea may be withdrawn. (Opinion, p. 13-14.) While this is true with respect to plea agreements, in the Penal Code section 1538.5, subdivision (p) situation, if a judge is not available another judge can hear the case, but unavailability, according to *Arbuckle*, does not occur when a judge is in a different division of the superior court. (*People v. Arbuckle*, *supra*, 22 Cal.3d 749, 757-759.)

After the motion to suppress was heard and denied by Magistrate Zecher, a new deputy district attorney was assigned to appellant's case. At that time, the prosecution admitted that Judge Chiarello had been available and should have heard the motion to suppress instead of Magistrate Zecher when it served and filed papers stating that "[t]he People agree that the motion should have been heard by Judge Chiarello." (Opinion, p. 6; 2CT 489.) The prosecution cited *People v. Arbuckle* (1978) 22 Cal.3d 749 and argued that "[a]pplying that reasoning to this case, Judge Chiarello was available, because like Judge London, he had been transferred to another department of the Superior Court." (2 CT 489.)

Santa Clara County local rules permit a presiding judge to assign a case to different courthouses. (Opinion, p. 12.) The rule states "any case may be assigned to another courthouse for discussion, hearing and/or trial at the discretion of the Supervising–Criminal and/or Presiding Judge." (Opinion, p. 12.) The Opinion does not address this except to state that the People counter it by citing *People v Roberts* (2010) 184 Cal.App.4th 1149. But in its Opinion, this Court of Appeal rejected the reasoning in *Roberts* and stated that *Roberts* did not apply in the instant situation. (Opinion, p. 13.) Appellant's trial was assigned by a presiding judge in San Jose to

Jose to Judge Chiarello in Palo Alto, and the Opinion acknowledges this. (Opinion, p. 6.) Thus, the Superior Court rule was indeed followed, and hearings and other matters were assigned from San Jose to Palo Alto. (Opinion, p. 6; 2CT 740-741; RT 5/11/2012 Vol 2, p. 48-51.)

In a footnote, the Opinion acknowledges appellant's argument that the California Supreme Court determined that "distance and extraordinary travel time between two courts in which a defendant is required to appear does not constitute exceptional circumstances establishing good cause warranting delay in a defendant's criminal trial. (Opinion, ftn 7 on p. 15; *People v. Hajjaj, supra,* 50 Cal.4th 1184, 1200-1204. (*Hajjaj*).) *Hajjaj* states that "distance and travel time between calendar courts and trial courts are routine matters that must be taken into account by the state in fulfilling its duties. (*People v. Hajjaj, supra,* 50 Cal.4th 1184, 1203.) The *Hajjaj* Court went on to say that "Distance and ordinary travel time are quite distinct from the kind of extraordinary, unanticipated, nonrecurring events, discussed in *Johnson, supra,* 26 Cal.3d 557, that may constitute "exceptional circumstances" excusing delay caused by court congestion." (*Id.* at 1204.) The court gave examples of "unique non-recurring events" such as a large scale riot or other mass public disorder" that might result in an inordinate number of cases but did not include travel time or distance to a superior court in the county as an exceptional circumstance. (*Ibid.*) The court was very clear that "[a]lthough other unanticipated but less calamitous circumstance may be designated as 'exceptional' under the circumstances of a particular case, a constant feature---such as distance and ordinary travel time between two courthouses in which the defendant is required to appear---cannot qualify". (*Ibid.*)

F. Judge Nadler Abused His Discretion.

For the reasons described herein, Judge Nadler abused his discretion when he denied the request pursuant to Penal Code section 1538.5, subdivision (p) to assign the renewed motion to suppress in the refiled case to Judge Chiarello who granted the motion to suppress in the first case. Judge Chiarello misunderstood the scope of his discretion. (*People v. Lara* (2001) 86 Cal.App.4th 139, 165-166; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297- 1298; *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 862.) The fact that Judge Chiarello was in a courtroom in Palo Alto when local rules state that any judge can hear any matter and that appellant's trial was assigned from San Jose to Judge Chiarello in Palo Alto is further indication of Judge Nadler's failure to follow the proper procedure for exercising his discretion. " '[W]hen a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction. . . . ' [Citations.]" (*Rodman v. Superior Court* (1939) 13 Cal.2d 262, 269; *Los Angeles County Dept. of Children and Family Servs. v. Superior Court* (2005) 126 Cal.App.4th 144, 152.) Furthermore, court discretion is grounded in the policy and purpose of the statutes or laws being applied."[T]rial court discretion is not unlimited. '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. [Citation.]' (6 Witkin (2d ed. 1971) Appeal, § 244, p. 4235 . . .)" (*Westside Community for Independent Living 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. [Citations.]" (*Horsford v. Board of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 393-394.)

For the reasons set forth herein, denying appellant's calendar request and failing to make attempts to facilitate Judge Chiarello to hear the renewed and relitigated motion to suppress in the refiled case was an abuse of discretion.

Dated: Dec 15 2014

Respectfully submitted,

Victoria Hobel Schultz

Victoria Hobel Schultz
Attorney for Adam S. Rodriguez

WORD COUNT

I, Victoria Hobel Schultz, hereby certify that there are 6378 words in this Petition for Review according to the wordprocessing program.

Dated: Dec 15 2014

Victoria Hobel Schultz

Victoria Hobel Schultz

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is P.O Box 1145, Mountain View, CA 94042. On the date shown below, I served the within PETITION FOR REVIEW to the following parties hereinafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

Attorney General's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA
94102-7004

Court Clerk's Office
Appeals Division
191 N. First Street
San Jose, CA 95113

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

Office of the Clerk
California Court of Appeal
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

HAND DELIVERED TO: Clerk's Office
California Supreme Court
350 McAllister Street
S.F., CA 94102

I declare under penalty of perjury the foregoing is true and correct.
Executed this 15th day of December 2014, at Santa Clara, California.

Victoria Hobel Schultz

Victoria Hobel Schultz

Filed 11/6/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ADAM SERGIO RODRIGUEZ, Defendant and Appellant.	H038588 (Santa Clara County Super. Ct. No. C1110340)

Defendant Adam Sergio Rodriguez was convicted after a court trial of possession of child pornography (Pen. Code, § 311.11, subd. (a)).[1] The trial court suspended imposition of sentence and placed him on three years felony probation. On appeal, he argues that he was prejudiced because his relitigated motion to suppress was not heard by the judge who granted his earlier motion to suppress in violation of section 1538.5, subdivision (p). In the alternative, he contends his motion to suppress was erroneously denied and two of his probation conditions are unconstitutionally vague.

We conclude the trial court did not abuse its discretion when it declined to assign the motion to suppress to the judge who granted defendant's motion to suppress in the first case. Additionally, we determine the motion to suppress was properly denied. However, we agree with defendant that two of his probation conditions require modification. We modify the probation conditions and affirm the judgment.

[1] Further unspecified statutory references are to the Penal Code.

Ex A

FACTUAL AND PROCEDURAL BACKGROUND

The Crime

In November 2009, San Jose Police Officer Russell Chubon began investigating a tip that an individual with the username "Damon Secloro" was making comments in an America Online chat group about having sex with teenage girls. Chubon served a search warrant on America Online to identify the user's internet protocol (IP) address, and the account holder was identified as Susanna Rodriguez (defendant's mother) with an address in San Jose.

The January 28, 2010 Investigation and Search

On January 28, 2010, Chubon and his partner, Kendra Nunes, went to the residence associated with the IP address. Chubon wore a concealed digital recorder and taped the visit. After conversing with the officers, defendant eventually surrendered his computer. The officers scanned the computer and found images of underage children in sexually explicit poses. On February 2, 2010, Chubon returned to the home with a search warrant. Defendant waived his rights and acknowledged he had child pornography on his computer, including approximately "a dozen photos and a dozen videos." Defendant denied trading images with other individuals and said he had obtained the material through Web sites.

The First Case

On February 24, 2010, the district attorney filed a felony complaint charging defendant with possession of child pornography in violation of section 311.11, subdivision (a) and a count of possession of marijuana in violation of Health and Safety Code section 11357, subdivision (c). Judge Diane Northway conducted a preliminary hearing on the matter on September 23 and 24, 2010. Judge Northway also heard and denied defendant's motion to suppress. Defendant was held to answer on both charges.

The Renewed Motion to Suppress and Judge Chiarello's Decision

On January 3, 2011, defendant filed a renewed motion to suppress under section 1538.5, subdivision (i). Defendant argued the search and seizure of his computer was invalid because the officers entered his home without a search warrant, his consent to the officers to take his computer was the direct result of the unlawful entry, and his consent was involuntary.

The motion was assigned to Judge Vincent Chiarello, who reviewed the transcript of the preliminary hearing and the taped encounter between the officers and Susanna Rodriguez, John Rodriguez (defendant's father), and defendant.[2] Judge Chiarello summarized the pertinent facts as follows:

Susanna was the first to come to the door and speak with the detectives when they arrived at the house. She told the detectives several times during their conversation she wished to talk with her husband, John. At some point, Detective Nunes said to Susanna: "Here is the reality. We could go get a search warrant and come, you know, kick the door in and do it that way." Susanna told the officers to give her a few moments, and she retreated back into the house after closing the door. Several minutes later, defendant came to the door and began speaking with the detectives. Nunes told defendant that "if we're reaching a dead-end at this point, and then we have to start considering things like a search warrant and all that, which I think is unnecessary based on all we know."

Chubon asked if he and Nunes could go inside the house. John expressly told the officers to stay outside. The officers continued to talk to John, Susanna, defendant, and defendant's brother. Defendant told the detectives to remain outside, and Chubon asserted he was concerned defendant could return with a gun. At some point, Chubon followed defendant into the house. Nunes followed Chubon inside. John and the officers

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[2] Since several of the individuals involved in this case share the same surname, we will refer to them by their first name for clarity. No disrespect is intended.

had a conversation about their presence in the home. Nunes then asked Chubon if she should call "Steve Fein and see if we have enough for a search warrant." Chubon told Nunes to go ahead with the call, but John interjected and said it was not necessary. Later, defendant unplugged his computer and gave it to the detectives.

Based on this evidence, Judge Chiarello concluded the interaction between the officers and the family had been "tainted at the outset by the statement that the officers could go get a search warrant and come kick the door in and do it that way." Judge Chiarello asserted the People had failed to prove that defendant's consent to the search was free and voluntary, because his consent was the result of coercion or duress. Judge Chiarello distinguished the case from *People v. McClure* (1974) 39 Cal.App.3d 64. In *McClure*, the court concluded a statement that officers could pursue a search warrant "did not serve to vitiate appellant's consent to search, since this statement threatened nothing more than what the officers had a legal right to do." (*Id.* at p. 69.) Judge Chiarello remarked that unlike the *McClure* case, here "the officers at the outset explicitly threatened to come back and kick the door in, which they most certainly did not have the right to do with a search warrant, unless, as [the district attorney] pointed out, there were certain circumstances later on that justified that."

Judge Chiarello granted the motion to suppress on May 2, 2011, and the case against defendant was dismissed.

The Second Case

The district attorney refiled a complaint against defendant on July 1, 2011, alleging the same counts as in the first case. Defendant filed a notice he was renewing his motion to suppress under section 1538.5, subdivisions (f), (j), and (p). Defendant also moved to have the suppression motion heard by Judge Chiarello (§ 1538.5, subd. (p)), which the People opposed. Presiding Judge Jerome Nadler denied defendant's motion to have the suppression hearing before Judge Chiarello, asserting that "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 [p]reliminary [e]xamination matters. Everyone else volunteers for that assignment on an availability basis. [¶] So I'm not sure who's going to be available on October 27 at 8:32 when this matter is set for [p]reliminary examination and now [section] 1538.5. [¶] It will just have to go out to whatever Judge is available on that date."

The preliminary hearing and motion to suppress was assigned to Judge Vanessa Zecher. Defendant opposed the assignment to Judge Zecher, arguing again that Judge Chiarello should hear the renewed motion to suppress under section 1538.5, subdivision (p). Judge Zecher sent the parties back to Judge Nadler. Before Judge Nadler, the district attorney argued that Judge Northway heard the first motion to suppress and denied it and opined if the case were to be reassigned, it should be reassigned to Judge Northway, not Judge Chiarello. After considering the parties' arguments, Judge Nadler asserted that "Judge Chiarello has a sentencing calendar today in Palo Alto and, therefore, [is] not available for this prelim. [¶] This matter is reassigned to Judge Zecher for prelim right now."

The Suppression Hearing Before Judge Zecher

Judge Zecher heard the motion to suppress on December 8, 2011. Detective Chubon, Susanna, John, and defendant testified during the hearing. Defendant again argued his consent had not been voluntary. After considering the testimony and evidence submitted by the parties, Judge Zecher denied the motion to suppress and ordered defendant be held for arraignment.

The Renewed Motion to Suppress

Defendant filed a renewed motion to suppress pursuant to section 1538.5, subdivision (i), on February 8, 2012, seeking review of Judge Zecher's denial of the motion to suppress. Defendant again insisted Judge Chiarello should have heard his

relitigated motion to suppress. The People conceded the motion should have been heard by Judge Chiarello, not Judge Zecher. Defendant withdrew his motion after the trial court concluded a renewed motion to suppress under section 1538.5, subdivision (i) was not a proper vehicle for defendant's argument that Judge Zecher should not have heard the relitigated motion to suppress.

On March 6, 2012, defendant moved to set aside the information (§ 995). During the hearing on his section 995 motion, defendant argued because his motion to suppress was heard by Judge Zecher, not Judge Chiarello, he had been deprived of a substantial right; therefore, the information should be set aside. The People asserted the right to the same judge under section 1538.5, subdivision (p) was a procedural right, not a substantial right. The trial court denied the motion on March 28, 2012. On April 6, 2012, defendant filed a renewed motion to suppress pursuant to section 1538.5, subdivision (i). Judge Linda Condron heard and denied the renewed motion to suppress on April 25, 2012.

The Trial and Judgment

Defendant waived his right to a jury trial on May 7, 2012. After a court trial presided over by Judge Chiarello, defendant was found guilty of violating section 311.11, subdivision (a). The trial court suspended imposition of sentence and placed defendant on three years felony probation, subject to various terms and conditions. Defendant appealed.

DISCUSSION

On appeal, defendant maintains the trial court erred when it declined to assign the motion to suppress to Judge Chiarello. In the alternative, defendant contends his motion to suppress was erroneously denied and two of his probation conditions are unconstitutionally vague.

Right to the Same Judge under Section 1538.5, Subdivision (p)

Section 1538.5 allows a defendant to move to suppress evidence that was obtained as a result of an unreasonable search or seizure. Subdivision (j) of section 1538.5 specifies that "[i]f the case has been dismissed pursuant to Section 1385, either on the court's own motion or the motion of the people after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p)."

Section 1538.5, subdivision (p), provides "[i]f a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing as otherwise provided by subdivision (j), unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing. Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing *if the judge is available.*" (Italics added.)

Therefore, it appears the plain language of section 1538.5, subdivision (p), gives the trial court discretion to determine whether a judge is available to hear a relitigated motion to suppress. "As with all actions by a trial court within the exercise of its discretion, as long as there exists 'a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of the action.' " (*Gonzales v. Nork* (1978) 20 Cal.3d

500, 507.) Accordingly, we review the trial court's conclusion that Judge Chiarello was unavailable to hear the motion to suppress for abuse of discretion.[3]

Fundamentally, our interpretation of section 1538.5, subdivision (p) is rooted with our objective to ascertain and effectuate legislative intent. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) In determining intent we "look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to the achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Id.* at pp. 1007-1008.)

Here the wording of the statute is susceptible to various interpretations. There are no cases clearly establishing what renders a judge available or unavailable to hear a relitigated motion to suppress under section 1538.5, subdivision (p), and the statute itself does not define the term "available." Defendant argues "available" should be construed to mean a judge is available even when he or she is assigned to a different courthouse or division within the county. The People contend a judge is not "available" within the meaning of the statute if they are, as a matter of practical convenience, unavailable to

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[3] During oral argument, defendant reiterated that the district attorney had erroneously argued to Judge Nadler that the previous case had been dismissed pursuant to a section 995 motion so section 1538.5 did not apply, and that Judge Chiarello should not hear the renewed motion because he was not the judge who granted the first motion to suppress. Defendant claims the record indicates Judge Nadler relied on these incorrect statements when making his determination. During the October 2011 hearing, Judge Nadler did state that he did not agree with defendant's "interpretation that it needs to go back to Judge Chiarello by law" and he was "not in agreement with the interpretation by the Defense with who the 1538.5 Judge is." However, whether or not Judge Nadler relied on the district attorney's statements does not change our analysis. During the same hearing, Judge Nadler asserted that Judge Chiarello was not available to him because he had been transferred to another division in Palo Alto.

take on the matter. Because of this ambiguity, we must look to extrinsic sources, including the legislative history of the statute.

Before 1993, prosecutors had a limited ability to relitigate motions to suppress. (*Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 875 (*Soil*).) "If a motion to suppress was made and granted at the preliminary hearing and the case was dismissed by the magistrate or by the prosecution on its own motion, the prosecution was allowed to refile the case and start all over again. The ruling at the first motion to suppress was not binding on the refiled case. If the motion to suppress was granted at the preliminary hearing, but the defendant was nevertheless held to answer for trial, the prosecution was allowed to relitigate the suppression motion de novo at a special hearing in the superior court. Again, the ruling at the first motion to suppress was not binding at the subsequent hearing. If the motion to suppress was not made by the defendant at the preliminary hearing, but was made for the first time in the superior court, and was granted, the remedies available to the prosecution were as follows: (1) if the prosecution had additional evidence not presented at the motion to suppress and could show good cause why such evidence was not presented, the prosecution was allowed to present that evidence and seek to have the prior ruling overturned; and (2) the prosecution could seek appellate review. The prosecution could not, however, 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. (*Schlick v. Superior Court* (1992) 4 Cal.4th 310, 316 (*Schlick*).) The ruling on the motion to suppress in the superior court would be binding on the refiled case. (*Ibid.*)" (*Id.* at p. 876.)

In 1993, the Legislature attempted to rectify the anomaly created by *Schlick* by introducing Senate Bill No. 933 (1993-1994 Reg. Sess.), which would allow the prosecution two chances to show that the challenged search was legal, regardless of whether the motion was brought in superior court or in municipal court. (*Soil, supra*, 55

Cal.App.4th at p. 876.) Senate Bill No. 933 did not originally contain language limiting the ability of a prosecutor to refile a case after the grant of two motions to suppress. (*Id.* at p. 878.) It also did not contain language specifying which judge would hear the second or third suppression motions. (*Ibid.*) Therefore, the bill would have given the People the opportunity to have two de novo hearings in front of two different judges. (*Id.* at p. 879.) The bill analysis prepared by the Senate Committee on the Judiciary concluded that as introduced, Senate Bill No. 933 would allow the People to have at least four suppression hearings. The analysis also noted that the California Attorneys for Criminal Justice opposed the bill because it would encourage forum shopping. (*Id.* at p. 878.)

Accordingly, the bill was amended to specify that it should not be construed as a means to forum shop. (*Soil, supra*, 55 Cal.App.4th at pp. 878-879.) The amended bill included language, now located in subdivision (p) of section 1538.5, mandating " '[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.' " (*Soil, supra*, at p. 879.) The requirement the same judge hear a relitigated motion to suppress applies to all relitigations, not just to suppression motions that have been heard twice. (*Id.* at p. 880.)

As previously noted, there are no cases specifically defining what makes a judge unavailable to hear a relitigated motion under section 1538.5, subdivision (p). However, courts have concluded that due to the legislative purpose of the statute, the prosecution may not render a judge "unavailable" to hear a renewed motion to suppress by disqualifying him or her under Code of Civil Procedure section 170.6. (*Barnes v. Superior Court* (2002) 96 Cal.App.4th 631, 642; *People v. Superior Court (Jimenez)* (2002) 28 Cal.4th 798, 809.) This exception is necessary to effectuate the legislative intent of section 1538.5, subdivision (p), as otherwise the prosecution could steer a motion to suppress away from a particular judge solely because that judge granted the first motion to suppress.

The parties do not dispute that Judge Chiarello was a judge in Santa Clara County when defendant filed his renewed motion to suppress, a fact that is sufficiently established in the record.[4] Additionally, Judge Nadler's only reason for finding Judge Chiarello unavailable was his assignment to a courthouse in Palo Alto. Therefore, the issue here is whether Judge Nadler's determination that Judge Chiarello was unavailable to hear the motion to suppress was an abuse of his discretion, in violation of section 1538.5, subdivision (p). In addressing this point, we find it is vital to acknowledge the complex nature of scheduling and assignments in a multi-court judicial system. Accordingly, we requested the parties file supplemental letter briefs addressing how a presiding judge's discretion to assign cases and manage court calendars in the interest of judicial economy and efficiency functions with a provision like subdivision (p) of section 1538.5.

Defendant and the People agree that a presiding judge has discretion to "distribute the business of the court among the judges, and prescribe the order of business" for the court. (Gov. Code, § 69508, subd. (a).) The presiding judge's assignment of business to the court and the judges is "wholly discretionary." (*Anderson v. Phillips* (1975) 13 Cal.3d 733, 737.) Additionally, pursuant to California Rules of Court, rule 10.950, courts that have more than three judges may designate criminal and civil divisions. The

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[4] During the hearing before Judge Nadler on October 7, 2011, Judge Nadler stated: "Judge Chiarello is not available to me any longer; he's been transferred to another division, in Palo Alto. [¶] 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 [p]reliminary [e]xamination matters. Everyone else volunteers for that assignment on an availability basis." During the preliminary examination hearing before Judge Zecher, the People stated that Judge Chiarello "sits in Palo Alto," was therefore in a different courthouse, and had a "separate calendar system."

presiding judge retains discretion and authority over civil and criminal case assignments. (Cal. Rules of Court, rule 10.950.)

Defendant argues there is a local superior court rule in Santa Clara County that allows a presiding judge to assign cases to different courthouses.[5] The rule states "[a]ny case may be assigned to another courthouse for discussion, hearing and/or trial at the discretion of the Supervising–Criminal and/or Presiding Judge." (Super. Ct. Santa Clara County, Local Rules Crim. Rule 1.H.) Therefore, defendant insists Judge Chiarello's assignment to a courthouse in Palo Alto did not necessarily render it impossible for Judge Nadler to assign him the motion to suppress. Accordingly, he contends that for the purposes of section 1538.5, subdivision (p), Judge Chiarello was "available" to hear his suppression motion.

The People counter that Judge Nadler correctly concluded that Judge Chiarello was unavailable, arguing *People v. Roberts* (2010) 184 Cal.App.4th 1149 (*Roberts*) demonstrates that a judge's practical unavailability is sufficient. *Roberts* concerned a different statute involving wiretapping orders (§ 629.60), which requires reports be signed by the same judge that issued the authorization. The *Roberts* court concluded the same judge may not always be available and "[r]ather than forgo prompt judicial oversight of the wiretap, a fully informed judge may review the reports." (*Roberts*, *supra*, at p. 1185.) *Roberts* determined that "[c]ontrary 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 statutory scheme." (*Ibid.*)

Rebutting the People's claims on this point, defendant insists a judge's practical unavailability should not render him unavailable for the purposes of hearing a relitigated

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[5] The local rules are not a part of the record on appeal. On our own motion, we take judicial notice of the Superior Court of Santa Clara County, Local Rules Criminal Division. (Evid. Code, §§ 452, 459.)

motion to suppress, and *Roberts* is not instructive because the requirement contemplated in that case was not important to the statutory scheme. We agree that contrary to the requirement found in section 629.60, the requirement in section 1538.5 was expressly added to curb forum shopping and is an important part of the statutory scheme. However, what is unclear is whether subdivision (p) of section 1538.5 should be interpreted to mean a judge is "available" to hear a motion to suppress regardless of any administrative hurdles.

Defendant takes the position that a judge is available to hear a motion to suppress even when internal court practices render the assignment difficult or impractical. He insists that *People v. Arbuckle* (1978) 22 Cal.3d 749, 753 (*Arbuckle*) is informative on the subject of judicial availability. In *Arbuckle*, our Supreme Court concluded that when a judge accepts a plea bargain that involves sentencing discretion, it is an implied term that the sentence will be imposed by that judge. (*Id.* at p. 757.) In reaching this decision, the court acknowledged 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 [a] bargain and [a] guilty plea, by the judge who took his plea and ordered sentence reports should not be thwarted for mere administrative convenience." (*Id.* at p. 757, fn. 5.)

We disagree with defendant's assertion that *Arbuckle* is informative. In fact, *Arbuckle* contemplates there are times when a court's internal administrative practices may render it impossible or impractical for the judge who accepted a defendant's plea to impose the sentence.[6] *Arbuckle* specifically concluded if the judge who accepted the plea

[6] Cases that have followed *Arbuckle* have not determinatively established what accounts to an "impossibility." However, the appellate court in *People v. DeJesus* (1980) 110 Cal.App.3d 413, 419, held that a judge's temporary absence due to a death in the family did not constitute impossibility under *Arbuckle*.

was indisposed due to administrative reasons, the defendant should be given the opportunity to withdraw his plea. (*Arbuckle, supra*, 22 Cal.3d at p. 757.)

Like the *Arbuckle* court, we too are faced with a quandary. There may be times when it would be difficult for the judge who heard and granted the first motion to suppress to hear the relitigated motion to suppress due to the complex administrative processes of the court system. However, defendant argues that the requirement of section 1538.5, subdivision (p) is mandatory and must be followed regardless of any practical difficulties. What defendant fails to acknowledge is that contrary to his assertions, section 1538.5, subdivision (p) is not absolute; it includes a caveat: a renewed motion to suppress shall be heard by the same judge only if that judge is *available.*

Defendant insists a presiding judge cannot find a judge unavailable to hear a relitigated motion to suppress due to administrative reasons, because the presiding judge cannot deprive defendants of fundamental or statutory rights even in the interest of efficiency. He contends our Supreme Court determined in *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 375 that a judge cannot violate a defendant's rights for the purpose of judicial economy, like to improve a congested court calendar. In *Gonzalez*, a judge improperly disregarded procedures by holding a "half-off sentencing 'bargain day' for persons pleading guilty," an "*en masse* plea bargaining technique" that "sought 'a couple of dollars for the county and a conviction for the state.' " (*Ibid.*) The *Gonzalez* court concluded the judge's mass plea bargain offer contravened the principle of individualized sentencing embodied in the Penal Code, thereby constituting willful judicial misconduct. (*Ibid.*) We agree with the sentiments set forth in *Gonzalez* and with defendant's assertion that a judge cannot sacrifice a defendant's statutory rights in the interests of efficiency.

However, we disagree with defendant that a presiding judge's determination that a judge is unavailable to hear a relitigated motion to suppress due to administrative reasons

somehow deprives a defendant of a fundamental or statutory right. As previously discussed, it is clear from the language of section 1538.5, subdivision (p), that while the provision is mandatory, its application is subject to the first judge's availability. Therefore, 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.

Furthermore, a determination that a judge is unavailable in this scenario does not encourage prosecutorial forum shopping. Unlike the situations confronted by the courts in *Jimenez* and *Barnes*, here the prosecution did not take affirmative steps to divert defendant's relitigated motion to suppress away from a particular court. The People may have initially opposed defendant's request to transfer his suppression hearing to Judge Chiarello, but it was the presiding judge who ultimately determined that Judge Chiarello was not available to hear the motion. We are guided in our interpretation of section 1538.5, subdivision (p) by the express intent of the legislature when enacting the provision. Judge Nadler's decision to assign the motion to suppress to Judge Zecher did not promote judge-shopping by the prosecution.[7] It did not, as defendant argues, eviscerate the legislative intent of the statute.

In coming to this conclusion, we reiterate the presiding judge has discretion to manage the court calendar and assign matters to various divisions and judges across the courts of the county. Therefore, while the language of section 1538.5, subdivision (p),

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[7] In the context of a defendant's right to a speedy trial, our Supreme Court has determined that "distance and ordinary travel time between two courts in which a defendant is required to appear [does not] constitute 'exceptional circumstances' " establishing good cause warranting delay in a defendant's criminal trial. (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1203.) Defendant argues that this provides an analogy to the situation presented here, but we disagree that a finding of "exception circumstances" to establish good cause warranting delay in a criminal trial is analogous to a finding that a judge is unavailable to hear a relitigated motion to suppress.

requires a relitigated motion to suppress to be heard by the judge who granted the motion in the first case, this requirement is subject to the presiding judge's discretionary determination that the first judge is available. Given our interpretation of the legislative intent behind section 1538.5, subdivision (p), coupled with the presiding judge's inherent discretion to assign matters, Judge Nadler's determination of Judge Chiarello's availability was not an abuse of discretion. It was not arbitrary or capricious, and it did not deprive defendant of his rights under the statute.

Denial of the Motion to Suppress

Alternatively, defendant argues that his motion to suppress was erroneously denied by Judge Zecher, who found the encounter between the detectives, defendant, and defendant's father consensual "both in terms of tone and in terms of content."

"Defendant's challenge to the trial court's ruling denying his motion to suppress presents a mixed question of law and fact that is subject to a two-tier standard of review. 'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.' " (*People v. Sardinas* (2009) 170 Cal.App.4th 488, 493.) "In determining whether substantial evidence supports the trial court's findings, '[i]f there is conflicting testimony, we must accept . . . the version of events most favorable to the People, to the extent the record supports them.' " (*People v. Boulter* (2011) 199 Cal.App.4th 761, 767.)

When denying the motion to suppress, Judge Zecher determined that when Susanna answered the door, she felt comfortable enough to "shut the door and retreat into the house to discuss the matter with her husband or whoever it is that she felt she needed to discuss the matter with." Judge Zecher also noted there was a conflict in the facts as to

what actually happened when Susanna went into the house, but it was clear defendant later came to the front door and there was no indication that he was forced to do so. Judge Zecher further concluded there was no evidence defendant or his brother were coerced into speaking with the detectives. After reviewing the transcript of the encounter, it was apparent to Judge Zecher that defendant and his father made a "noncoerced decision to allow the detective to take [the] computer tower," and that there was nothing in the record that would suggest coercion by the detectives.

Judge Zecher concluded the officers' statements regarding a search warrant were not coercive in nature because they were a "confirmation of legally what the detectives were going to do." Judge Zecher also considered the statement made by Detective Nunes about kicking in the door, and found defendant was aware of that statement but "while [the statement was] not particularly palatable, it is clear in the interaction between the detectives and [defendant] and his family . . . they were not coercive to the extent that [defendant's] Fourth Amendment rights were violated." Defendant argues that contrary to the magistrate's conclusions, defendant and his family did not voluntarily consent to the search of the home, because their consent was obtained due to coercion and duress.

A police officer can enter a residence without a warrant to conduct a search if consent is voluntarily given. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222.) "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." (*Id.* at p. 227.) The prosecution has the burden to establish that consent to search was freely and voluntarily given and not the result of coercion or duress. (*Bumper v. North Carolina* (1968) 391 U.S. 543, 548, 549.)

" ' "An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies

the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review." ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

Defendant argues the officers failed to leave immediately when they initially spoke with Susanna, and Detective Nunes improperly wedged herself into the door frame, preventing Susanna from closing the door. Defendant contends this was a display of force by Nunes that would "frighten and scare the homeowner." However, Chubon testified during the preliminary hearing that he did not remember Nunes wedging herself in the door. The trial court is vested with the power to judge the credibility of witnesses and resolve conflicts in testimony. (*People v. James* (1977) 19 Cal.3d 99, 107.) Therefore, the court was entitled to disbelieve the testimony that Nunes prevented Susanna from closing the door in favor of Chubon's testimony that no such event occurred.

Defendant also asserts that Detective Nunes's threat to obtain a search warrant to "kick the door in" was coercive and illegal. In *People v. Ratliff* (1986) 41 Cal.3d 675 (*Ratliff*), our Supreme Court upheld a finding of consent after officers entered a defendant's home, handcuffed him, and threatened to secure a search warrant and break into the defendant's car trunk if he did not consent. (*Id.* at pp. 685-687.) The defendant also claimed the uniformed police officers had drawn their guns. (*Ibid.*) Our Supreme Court concluded "[t]he trial court was . . . entitled to conclude that even if such a 'threat'

was made, it merely amounted to a declaration of the officers' legal remedies should defendant refuse to cooperate." (*Id.* at p. 687.)

The situation presented here was much less coercive than the situation in *Ratliff.* As Judge Zecher noted, Susanna, after hearing the alleged threat, felt comfortable enough to close the door to speak with her husband. Additionally, none of the individuals at the house were placed in handcuffs, the officers were not in uniform, and the officers testified they did not believe they had visible weapons. Similar to *Ratliff,* one of the officers mentioned obtaining a search warrant to kick the door in. However, the trial court was entitled to find this was only a declaration of the officers' legal remedies should consent be denied. (*Ratliff, supra,* 41 Cal.3d at p. 687.) During the preliminary hearing, defendant himself testified the tone the officers took with him was upbeat.

In sum, substantial evidence supported the trial court's finding of voluntary consent to the search.

Vague Probation Conditions

Lastly, defendant argues two of his probation conditions are unconstitutionally vague because they lack an express knowledge requirement: the condition he "shall not . . . possess any pornographic or sexually explicit material" and the condition he "shall not possess or use any data encryption technique program." We agree that without an express knowledge requirement, defendant could unwittingly violate the condition as there are situations in which he may not know he possesses pornographic or sexually explicit material or a data encryption technique program. Therefore, we modify the probation conditions to add a requirement that defendant must *knowingly* possess pornographic or sexually explicit material and must *knowingly* possess or use any data encryption technique program. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

The People do not object to the modification of these probation conditions but urge us to consider the approach adopted by our colleagues at the Third Appellate District

in *People v. Patel* (2011) 196 Cal.App.4th 956. In *Patel*, the Third Appellate District considered whether a probation condition forbidding defendant from drinking or possessing alcohol or being in a place where alcohol is the chief item of sale was invalid because the condition lacked an express knowledge requirement. (*Id.* at p. 959.) The court expressed its frustration with the "dismaying regularity" to which it must revisit the issue of a lack of an express scienter requirement in orders of probation. (*Id.* at p. 960.) The court noted that since there exists a substantial uncontradicted body of case law that establishes that a "probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter," it would no longer entertain the issue on appeal. (*Ibid.*) The Third Appellate District then stated from that point forward it would construe all probation conditions proscribing restrictions on presence, possession, association, or other actions with the requirement that the action be undertaken knowingly. (*Id.* at p. 961.)

A number of the courts of appeal have declined to follow the rationale of *Patel*, including the Fourth Appellate District in *People v. Moses* (2011) 199 Cal.App.4th 374, 381 and this court in *People v. Pirali* (2013) 217 Cal.App.4th 1341, where we chose to modify probation conditions to include an express knowledge requirement. "Our Supreme Court faced the issue of the lack of a knowledge requirement in a probation condition and concluded that 'modification to impose an explicit knowledge requirement is necessary to render the condition constitutional.' [Citation.] Until our Supreme Court rules differently, we will follow its lead on this point." (*Id.* at p. 1351.)

DISPOSITION

The probation condition prohibiting purchase or possession of pornographic or sexually explicit material is modified to state that defendant "shall not knowingly purchase nor possess any pornographic or sexually explicit material, as defined by his probation officer." The probation condition prohibiting possession or use of data

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

People v. Rodriguez
H038588

Trial Court:	Santa Clara County Superior Court Superior Court No. C1110340
Trial Judge:	Hon. Vincent J. Chiarello
Counsel for Plaintiff/Respondent: The People	Kamala D. Harris Attorney General Dane R. Gillette Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Laurence K. Sullivan Supervising Deputy Attorney General René A. Chacon Supervising Deputy Attorney General
Counsel for Defendant/Appellant: Adam Sergio Rodriguez	Under appointment by the Court of Appeal Victoria H. Schultz