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)

SUPREME COURT
FILED

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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 REPLY BRIEF ON THE MERITS

Jonathan E. Berger
Attorney at Law
1415 Fulton Road #205-170
Santa Rosa, California 95403
(707) 206-6649
jonbergerlaw@gmail.com
State Bar Number 203091

Counsel for appellant by appointment of the California Supreme Court

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Appellant Adam Sergio Rodriguez replies herewith to the Respondent's Brief on the Merits (hereafter "RBM") filed on August 6, 2015. This brief addresses the points raised in the RBM to the extent that such discussion is helpful to this Court. Any failure to address a particular point raised in the RB is not intended as, and should not be taken as, a concession of that point.

ARGUMENT

I. THE DISCRETION OF PRESIDING JUDGES TO EFFECT JUDICIAL ASSIGNMENTS MUST YIELD TO THE REQUIREMENTS IMPOSED BY STATEWIDE STATUTES.

A. The discretion of presiding judges is not "plenary."

Respondent cites a number of statutes and rules of court which say that a presiding judge has what respondent characterizes as "plenary authority to make judicial assignments." (RBM 7-8.) "Plenary" means "full; complete; entire; absolute; unqualified."

(Webster's College Dict. (1996) p. 1037, col. 2.) None of the authorities cited by respondent uses the word "plenary," and none of them supports respondent's contention that a presiding judge's authority over judicial assignments rises to that level.

Respondent does not address the section of appellant's Opening Brief on the Merits ("OBM") which discussed the limitations on the authority of presiding judges. (OBM 15-16.) Thus, respondent ignores the point that Government Code section 68070, subdivision (a), the very first subdivision in the section of the Government Code entitled *The Organization and Government of Courts*, requires that the rules adopted by courts be "not inconsistent with law . . . ." (See OBM 15.) Respondent further ignores this Court's holding in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 that "[a] trial court is without authority to adopt local rules or procedures that conflict with statutes . . . ." (*Id.* at p. 1351.) Since these principles are qualifications to the discretion of presiding judges, their discretion is not unqualified, and therefore not plenary. Their discretion must yield to the dictates of "statewide statutes." (*Id.* at p. 1532; see OBM 15.)

Respondent then asserts that "Penal Code section 1538.5, subdivision (p), read in the light of the Legislature's broad grant of authority, plainly allows the presiding judge to decide if the prior judge is available for purposes of assigning a preliminary hearing for possible relitigation of the suppression motion." (RBM 8-9.) In fact, this is far from plain. It would be plain if, in fact, the "Legisla-

ture's broad grant of authority" were truly "plenary," as respondent proposes, but it is not. As this Court has observed, "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.)

Respondent's argument boils down to an assertion that the discretion afforded to presiding judges of trial courts is broad enough to encompass defining the word "available," in the context of Penal Code[1] section 1538.5, subdivision (p) (hereafter "§ 1538.5(p)"), to mean whatever they want it to mean. The authorities cited by respondent do not support that assertion, and in light of the fact that § 1538.5(p) is a "statewide statute[]," the authorities cited above and in the OBM refute it. (*Elkins, supra,* 41 Cal.4th at p. 1352; OBM 15-16.)

Respondent then quotes at length, with approval, from the opinion of the Court of Appeal. (RBM 9-11.) The quoted section again depends on the premise that the presiding judge's determination that the judge required by § 1538.5(p) is unavailable simply trumps any other factor. (RBM 10, quoting Opn. 16 ["this requirement is subject to the presiding judge's discretionary determination that the first judge is available"].) Again, neither respondent nor the Court of Appeal explains why the court's discretion in this regard is

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

not limited by the requirement that it be "not inconsistent with law." (Govt. Code, § 68070, subd. (a); see OBM 15-16.)

The quoted passage ends with the following assertion:

> . . . [Presiding] 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.

(RBM 11, quoting Opn. 16.) This is precisely the point upon which appellant disagrees with respondent, with the Court of Appeal, and with the presiding judge. In fact, the presiding judge's determination *was* arbitrary and capricious, and it *did* deprive appellant of his rights under § 1538.5(p). It deprived him of the only right that subdivision is concerned with: the right to have a relitigated suppression motion heard by the same judge who granted it the first time around, thus preventing the government from using its power to dismiss and refile criminal charges as a means of getting the motion in front of a more prosecution-friendly judge. And, as discussed further below and in detail in the OBM, it was arbitrary and capricious because it was based on a court policy which virtually guarantees that the same judge who heard the original suppression motion will *never* be available to hear the relitigated one. (OBM 41-44.)

B. The "same judge" provision is a rule; the "if available" provision is an exception to the rule.

Respondent then makes the following assertions:

> Consistent with the discretion provided by the statute, the presiding judge's assignment of the case to the

> original judge if "available," or an alternative neutral judge, necessarily satisfies the statutory rights of the defendant. Moreover, a presiding judge's case assignments do not promote forum shopping when made by the presiding judge, irrespective of the wishes of either party.

(RBM 11.) Appellant strongly disagrees with both sentences in that passage.

In the first sentence, respondent apparently proposes that the "statutory right" conferred on a defendant by § 1538.5(p) is to have one of two things happen: either to have his relitigated suppression motion assigned to the judge who heard the original motion, or to have the court make a finding that that judge is unavailable and assign it to a different judge. Both alternatives stand on an equal footing, in respondent's view; either will satisfy the statutory right as well as the other. Appellant disagrees. In the OBM, appellant argued that this Court's decision in *People v. Superior Court (Jimenez)* (2002) 28 Cal.4th 798, and the legislative history of § 1538.5(p), compel the conclusion 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." (OBM 18-19.) Respondent does not explain why this is not a valid reading of the law. Indeed, respondent does not even *say* that this is not a valid reading of the law, but that is the clear implication

of respondent's claim that a defendant's "statutory right" under § 1538.5(p) is satisfied equally well by assignment of his suppression motion to the same judge who granted it the first time or by assigning it to an "alternative neutral judge." For the reasons set forth in the OBM, that is not the law.

C. Respondent misconstrues the term "forum shopping."

In the second sentence quoted above, respondent uses a different definition of the phrase "forum shopping" than the one used in the legislative history of the modifications to Penal Code section 1538.5. In respondent's view, "forum shopping" occurs when, and only when, a party expresses an explicit desire for a particular forum. (RBM 11.) Since neither party did that here, respondent reasons, no forum shopping was encouraged by the court's finding that Judge Chiarello was unavailable. (*Ibid.*)

But that is not what "forum shopping" means, in this context. The term first entered the legislative history by way of a letter from the California Attorneys for Criminal Justice ("CACJ") to Sen. Kopp, the proponent of SB 933, expressing their concern about the original version of the bill in the following terms:

> 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.

(OBM 12, quoting Leg. Hist. 76, emphasis supplied.) That was the passage which inspired Sen. Kopp to add the statement of legislative intent "that this act shall not be construed or used by a party as a means to forum shop." (OBM 12-13, quoting Leg. Hist. 9.) That was the type of forum shopping that the Assembly intended to discourage by adopting the current final sentence of § 1538.5(p). And nothing in that passage suggests that what CACJ was concerned about was the prospect of the prosecution selecting a specific judge to hear the renewed suppression motion. Indeed, nothing in the procedures set forth in any version of Penal Code section 1538.5, either before the 1993 amendments or now or any time in between, gave the prosecution the ability to do that, so it would have made no sense for CADC to be concerned about it.

Rather, CACJ was using "forum shopping" as a synonym for "'tak[ing] another shot' with another judge." That is, CACJ was concerned about SB 933 creating a system where prosecutors would lose a suppression motion, and then dismiss and re-file the charges in hopes of having better luck with the motion in front of some other judge. In that sense of "forum shopping" – that is, in the only sense of that term that is relevant to any discussion of § 1538.5(p) – forum shopping is precisely what the prosecution was doing here. Respondent correctly points out that they were not "shopping" for a specific judge who they believed would deny the suppression motion; but what they *were* doing was "shopping" for any judge but

Judge Chiarello, who they had every reason to suppose would grant it. This point is discussed in detail in the OBM. (OBM 26-30.)

D. Compliance with § 1538.5(p) has no effect on court efficiency.

Respondent closes this argument section by suggesting that having relitigated suppression motions consistently heard by the same judge who heard them originally "is baseless, potentially costly, and threatens court efficiency." (RBM 12.) Respondent holds up the suppression motion in the instant case as an example of why that is so: because the preliminary hearing in the re-filed case, which was heard by Magistrate Zecher rather than Judge Chiarello, took two days, "consisted of testimony from four witnesses and the arguments of the parties," and "demanded a substantial time commitment by the magistrate." (RBM 12.)

This is true enough, but respondent offers no reason to suppose that the hearing would have taken any more time, or any less, or had an effect on court efficiency that differed in any way, if it had been before Judge Chiarello. In terms of the overall allocation of the trial court's resources, the judicial time that was going to be devoted to the preliminary examination and the renewed suppression motion in appellant's case was what economists call a "sunk cost."[2] As soon as the prosecution re-filed the charges against appellant, it was

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[2] "A cost that has already been incurred and thus cannot be recovered." <http://www.investopedia.com/terms/s/sunkcost.asp>

inevitable that *some* judge was going to have to perform this task; the only question was which one. Respondent's point is apparently that since Magistrate Zecher did it, Judge Chiarello had time to do something else, but by the same token, if Judge Chiarello had done it, Magistrate Zecher would have had time to do something else, so the overall efficiency of the court was the same either way. Therefore, contrary to respondent's contention, compliance with the requirements of § 1538.5(p) does not make extra work for trial courts.

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

With minimal citation to the record, respondent asserts that the record fails to support appellant's argument regarding the trial court's error. (RBM 12-14.) The single record citation in this argument section is to the page from the transcript of the proceedings on December 8, 2011 where Judge Nadler denied the defense request to assign the preliminary examination to Judge Chiarello. (RBM 13, citing 3 CT 515.) This passage is cited as authority for the proposition that "Appellant does not show that the presiding judge was biased, or that the presiding judge made an arbitrary or capricious assignment decision." (RBM 13.) Respondent does not explain why the non-controversial facts that the court was "not in agreement with the interpretation by the Defense with regard to who the 1538.5 judge is" and that "Judge Chiarello has a sentencing

calendar today in Palo Alto" support the contention that the court's ruling was not arbitrary or capricious. A court's ruling can be arbitrary and capricious even if the court expresses a reason for the ruling, if the reason is a bad one.

In fact, as discussed in detail below, the record supports all of the contentions appellant made in the OBM.

A. The prosecution was forum shopping.

Respondent argues that "Judge Nadler's implicit factual finding that the prosecutor did not engage in forum shopping is supported by the record." (RBM 13.) Respondent gives two reasons for this: first, that "The record does not reflect that Judge Chiarello was ever assigned to preside over preliminary hearings, at any relevant time period," and second, that "there is no evidence that the prosecutor ever challenged . . . Judge Chiarello" pursuant to Code of Civil Procedure section 170.6. (RBM 12-13.) Neither of those points contradicts appellant's contention that the prosecution was engaging in forum shopping.

As to the first point, it is true that the record does not explicitly demonstrate that Judge Chiarello ever presided over a preliminary examination at any relevant time. However, it strongly suggests that he, like all the other judges in Judge Nadler's division, did so at least occasionally. At the proceedings on October 7, 2011, Judge Nadler stated that "everyone else," meaning all the judges in his division other than Judge Del Pozzo, "volunteers for [preliminary examina-

tions] on an availability basis." (3ART 41.) There is no reason to suppose that "everyone else" does not include Judge Chiarello.

However, nothing in the record suggests that Judge Chiarello was incapable of presiding over a preliminary examination or unqualified to do so, and it is absurd to suppose that a superior court judge who is demonstrably capable of hearing a suppression motion (2ACT 318, 342) and presiding over a court trial (2 RT 61) could not equally well preside over a preliminary examination. Therefore, even assuming arguendo that respondent is correct, and Judge Chiarello never actually *did* preside over preliminary examinations, the only possible reason for that would be that the presiding judge never assigned him to do so. Once again, that is a choice that the presiding judge would lack the discretion to make if it conflicted with the "statewide statute[]" requiring renewed suppression motions to be heard by the same judge who granted the original motion. (*Elkins, supra,* 41 Cal.4th at p. 1352.)

Respondent's second point depends on the unstated assumption that forum shopping necessarily involves a motion to disqualify a judge. As discussed above, that is not what "forum shopping" means in the context of § 1538.5. The term refers to CACJ's concern that the prosecution might dismiss and re-file charges, not because the prosecution "didn't do a good job at the first hearing . . . due to the press of cases, or . . . [because] an essential witness did not appear," but rather for the sole purpose of having the suppression

motion re-heard by a different judge in hopes of getting a better ruling. (Leg. Hist. 80; OBM 11-13.) Nothing in the legislative history of SB 933, the bill that created § 1538.5(p), suggests that the statement of legislative intent "that this act shall not be construed or used by a party as a means to forum shop" had anything to do with challenges to judges under Code of Civil Procedure section 170.6. (Leg. Hist. 9.)

B. Judge Chiarello was available.

Respondent argues that "Appellant's assertion that Judge Chiarello was truly available to hear the preliminary hearing is contradicted by the presiding judge's contrary factual finding." (RBM 13.) Respondent does not identify the "contrary factual finding" referred to, but it is presumably the presiding judge's finding that "Judge Chiarello has a sentencing calendar today in Palo Alto." (3 CT 515.) But that was not the entirety of the court's ruling. What the court said was "Judge Chiarello has a sentencing calendar today in Palo Alto *and, therefore, [is] not available for this prelim.*" (*Ibid.*, emphasis supplied.) That is, the court did more than just make a factual finding; it made a factual finding, "Judge Chiarello has a sentencing calendar in Palo Alto," and then drew a legal conclusion from it, "Judge Chiarello is unavailable."

Again, the primary point of disagreement between appellant and respondent is that for respondent, the factual finding supports the legal conclusion because the conclusion was drawn by a presiding judge, and presiding judges have the discretion to equate "has a

sentencing calendar in Palo Alto" with "unavailable." In other words, respondent is again arguing, in effect, that Judge Chiarello was unavailable because the presiding judge said so. For respondent, the analysis begins and ends with the court's holding.

Appellant disagrees. Because of the importance of the "same judge" rule in the statutory scheme established by the Legislature, the inquiry must go deeper than that. As appellant noted in the OBM, the reason that Judge Chiarello was assigned to a sentencing calendar on December 8, 2011 was that the court had chosen to so assign him, rather than assigning him to appellant's preliminary examination, as appellant had repeatedly requested well in advance of that date. (OBM 34-35; see 1CT 193-194 [defense written argument that "Proper Venue for This Motion" was before Judge Chiarello, filed September 29], 3ART 40 [defense oral argument to that effect on October 7].)

If the court's point was that Judge Chiarello was unavailable because of the remoteness of the Palo Alto courthouse from the central courthouse in San José, it was contradicted by this Court's holding that a defendant's rights are not trumped by the distance and ordinary travel time between two courthouses of the same court. (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1202-1204; see OBM 36.)

C. The court's judicial-assignment policy effectively rendered the entire bench unavailable to hear renewed suppression motions.

Respondent argues that "Appellant's assertion that the judicial assignment policy made *'all* judges *always* unavailable' to hear relitigated suppression motions at the preliminary hearing stage is baseless conjecture." (RBM 14.) In fact, it is not conjecture and it has a basis. As set forth in the OBM, the basis is a statement made by Judge Nadler on the record. (OBM 41.) Judge Nadler said that only one judge in the court, Judge Del Pozzo, was "assigned full time to my division, or to take Preliminary Examination matters." (3ART 41.) Judge Nadler then made the statement that forms the basis of appellant's conclusion: "Everyone else volunteers for that assignment on an availability basis." (*Ibid.*) The phrase "that assignment" unmistakably refers to the phrase at the end of the previous sentence, "Preliminary Examination matters."

As explained in detail in the OBM, what Judge Nadler was clearly saying here was that the court's policy is to assign preliminary examinations to whatever judge happens to express a willingness to take them at any given time. (OBM 41-43.) In Judge Nadler's view, all judges (other than Judge Del Pozzo) who have not volunteered to hear preliminary examinations are "unavailable" to hear them, as contemplated by § 1538.5(p). The effect of that policy is almost inevitably going to be exactly what happened here: charges against a defendant are dismissed and re-filed after he prevails on a

suppression motion, he brings a new suppression motion concurrently with the preliminary examination in the new case, and he finds that the judge who granted the original motion is "unavailable" to hear the preliminary examination because that judge has not volunteered to do so at the relevant time.

Therefore, contrary to respondent's assertion, the record *does* "establish that existing assignment policy eviscerates the statutory right as a matter of law." (RBM 14.) The passage in the record that establishes it is Judge Nadler's comment that "Everyone else volunteers for [preliminary examinations] on an availability basis." (3ART 41.) The policy reflected by that comment eviscerates the statutory right by causing the "available" exception to swallow the "same judge" rule: that is, by virtually guaranteeing that the judge required by § 1538.5(p) to hear the renewed suppression motion will be unavailable to hear it.

D. Appellant had every right to bring a suppression motion as part of his preliminary examination.

Respondent notes that "appellant elected to demand a preliminary hearing on the new complaint, and elected to present a concurrent motion to suppress evidence at the time of the preliminary hearing." (RBM 13.) This is true: appellant elected to do both of those things. He was allowed to do so by statute. (§ 1538.5, subd. (f).) Respondent's point in mentioning this, apparently, is that appellant could have avoided the problem he complains of here by not

electing to do those things. Since appellant chose to bring his suppression motion concurrently with the preliminary examination, respondent insinuates, he left himself open to the possibility that the judge who heard the original suppression motion would not be available to hear a preliminary examination.

In the first place, the unstated premise of this argument is that a defendant forfeits the right conferred by § 1538.5(p) by availing himself of the procedure set forth in section 1538.5, subdivision (f) for making a suppression motion at a preliminary hearing. Appellant disputes that point. Section 1538.5(p) says 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"; nothing in that passage, or in its legislative history, suggests that anything is different when "the motion" is heard as part of a preliminary examination pursuant to section 1538.5, subdivision (f). The only rational conclusion from the intersection of subdivisions (p) and (f) of section 1538.5 is that when a defendant has prevailed on a suppression motion, the charges against him are dismissed and re-filed, and he files a new suppression motion concurrently with the preliminary examination pursuant to subdivision (f), that examination must be conducted before the same judge who granted the first suppression motion, if that judge is available, pursuant to subdivision (p).

Moreover, nothing in the record suggests that it would have made any difference if appellant had separated the suppression mo-

tion from the preliminary examination. The presiding judge's primary rationale for refusing to assign the preliminary examination to Judge Chiarello was that he "has a sentencing calendar," and that having a sentencing calendar rendered him unavailable to hear the preliminary examination. (2CT 485.) It seems reasonable to suppose that, in Judge Nadler's view, it would have rendered him equally unavailable to hear a free-standing suppression motion. Judge Nadler's point was that Judge Chiarello was busy doing sentencing and was therefore unavailable to do anything else.

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

With respect to prejudice, respondent notes that "Magistrate Zecher reasonably denied the defense motion to suppress evidence." (RBM 14.) Therefore, respondent reasons, "The record does not demonstrate a reasonable probability of a better result had the presiding judge assigned the preliminary hearing to Judge Chiarello, rather than to Judge Zecher." (*Ibid.*) Respondent apparently assumes that since Magistrate Zecher denied the renewed suppression motion, since her denial of it was "reasonabl[e]," and since Judge Chiarello is also a reasonable judge, he would have denied it too. But this overlooks the crucial fact, central to this proceeding, that Judge Chiarello had already granted it once. (2ART 25; 2ACT 342.)

Prior to granting it, Judge Chiarello made a lengthy and detailed record of his reasons for doing so. (2ART 14-25.) The reasons

were based on, in his words, "a careful examination of all the circumstances surrounding the consent" purportedly given by appellant's family to a search of their house. (2ART 15-16.) Those circumstances primarily consisted of the interactions between the police officers and the family members, notably including Det. Nunes's comment that "We could go get a search warrant and come, you know, kick the door in and do it that way." (2ART 16-23.) These interactions were memorialized on audio recordings of "two separate encounters at the house" between the police and the family. (2ART 14.) And those audio recordings, and the circumstances surrounding the police entry into appellant's home that they established, were no different the second time the motion was heard. The renewed suppression motion included references to the same passages of the same audio recordings, including the "kick the door in" comment. (1CT 195-197.) There is no reason to suppose that Judge Chiarello would have analyzed them any differently the second time he heard the suppression motion than he did the first time.

As noted in the OBM, this Court has held that the *Watson* standard applicable to the prejudice analysis for errors under state law does not require absolute certainty "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; see OBM 44.) All that is required is "a *reasonable chance*, more than an *abstract possibility*," of such an effect. (*People v. Wilkins* (2013) 56 Cal.4th 333, 351,

original emphasis.) There is far more than a reasonable chance or abstract possibility that if Judge Chiarello had heard the renewed motion, and had considered exactly the same facts and circumstances which persuaded him to grant it the first time, he would have granted it the second time for the same reasons. That would unquestionably have been a better outcome for appellant.

CONCLUSION

This Court has asked the parties to brief two issues:

> (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)?

Respondent, in summary, answers the first part of the first question in the affirmative, and the second part with the assertion that the trial court requires no guidance in exercising that discretion because the authority of the presiding judge of a trial court to make judicial assignments is "plenary." Respondent answers the second question in the negative for the same reason: because *no* conclusion by a presiding judge regarding the availability of a judge for any purpose can *ever* be in error, due to that same alleged "plenary au-

thority." For the reasons set forth above and in the OBM, this Court should reject respondent's argument.

Appellant recognizes that there will be times when the judge who has heard a defendant's original suppression motion is truly unavailable to hear a renewed motion. The fundamental point of disagreement between appellant and respondent is over the question of whether that unavailability must have an objective, articulable factual basis, or whether it is sufficient that the judge is defined to be unavailable by the ipse dixit pronouncement of a presiding judge or the operation of a general-purpose court rule. Appellant, obviously, takes the former position. The legislative history of § 1538.5(p) demonstrates that the "same judge" rule is an important enough component of the statutory scheme that it should only be broken in exceptional cases, for reasons substantially more compelling than what amounts to "because I said so."

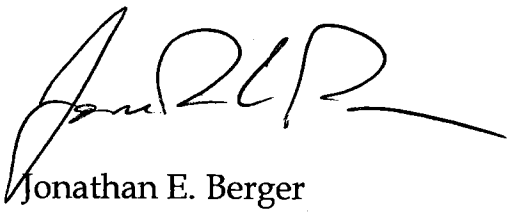
The instant case affords this Court the opportunity to explain to California's trial courts the analysis they must follow in deciding whether the judge who heard the original suppression motion is available to hear the renewed one. This Court should hold that a judge is unavailable, in the sense contemplated by the final clause of § 1538.5(p), if and only if that judge is no longer a judge of the court, due for example to death or retirement, or if the court finds, after active consideration of the circumstances surrounding that judge's calendar, that assigning that judge to hear the motion would occa-

sion an intolerable delay in a jury trial or other time-sensitive proceeding. If none of those conditions can be affirmatively identified, then the court must adjust its rules and procedures regarding judicial assignments to avoid "conflict with [the] statewide statute[]" holding that when the prosecution dismisses and re-files charges against a defendant after the defendant has successfully moved to suppress evidence, the defendant is entitled to have the renewed suppression motion heard by the same judge who granted it the first time. (*Elkins, supra,* 41 Cal.4th at p. 1352; § 1538.5(p).)

Since none of those conditions pertained to the trial court's refusal to assign appellant's renewed suppression motion to Judge Chiarello, the trial court's determination that he was unavailable exceeded its discretion. Therefore, this Court should reverse the judgment of the Court of Appeal.

Dated: Aug. 24, 2015
Sebastopol, CA

Respectfully submitted,



Jonathan E. Berger
Counsel for Appellant

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

I, Jonathan E. Berger, declare:

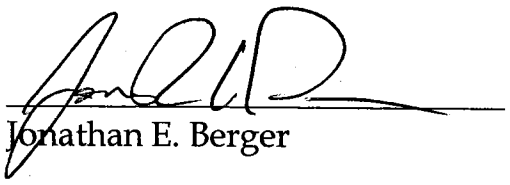
1. I am an attorney duly licensed to practice before the courts of the State of California. I represent the appellant in this appeal.

2. I am the author of the attached Appellant's Reply 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 Reply Brief on the Merits, excluding the cover sheet and tables but including all footnotes, is 4,938 words.

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

Dated: Aug. 24, 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 August 25, 2015, I served the attached:

APPELLANT'S REPLY 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.

Office of the Attorney General
Docketing6DCASFAWT@doj.ca.gov

Nafiz M. Ahmed, Esq.
nafiz@ahmedandsukaram.com

Victoria Hobel Schultz, Esq.
vhobelschultz@gmail.com

Adam S. Rodriguez
[Email address on file]

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: Aug. 24, 2015
Sebastopol, CA

Jonathan E. Berger