IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

-vs-

DESIREE CHRISTINE FOSTER,
ROBERT NORRIS KAHN &
BECKY ANN JOHNSON,
Defendant(s).

BOB LEE, THE DISTRICT ATTORNEY OF
SANTA CRUZ COUNTY,
Objector & Appellant,

NO. H039380

APPELLANT'S OPENING BRIEF

Santa Cruz County Superior Court Nos. F22191, F22194 and F22196
The Honorable Paul P. Burdick, Judge

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INTRODUCTION

In the underlying criminal matters, the magistrate made an invalid pre-preliminary hearing discovery order which was neither authorized by statute (see Penal Code section 1054 *et seq.*) nor mandated by the federal Constitution. After the prosecution was unable to comply with that improper order as quickly as the magistrate had directed and the preliminary hearing was continued for this and many other reasons, and long after the discovery in question had been provided and the preliminary hearing held, the magistrate nevertheless imposed monetary sanctions on the District Attorney's Office for the delay. Since the magistrate's discovery order was unlawful under Proposition 115, the magistrate's subsequent $500.00 monetary sanction order was likewise unlawful. The sanction order was also an abuse of discretion because it was neither consistent with the applicable legal standards nor supported by the facts. Therefore, the sanction order must be reversed.

STATEMENT OF APPEALABILITY

This appeal is taken pursuant to Code of Civil Procedure section 904.1, subdivision (b), following the final judgments of dismissal entered in the underlying criminal matters in cases F22191, F22194 and F22196. Subdivision (b) provides that sanction orders of $5,000 or less against a party or an attorney for a party "may be reviewed on an appeal by that party after entry of final judgment in the main action . . ." Hence, courts have found that an order for monetary sanctions pursuant to Code of Civil Procedure section 177.5 made in a criminal action is an appealable order once an underlying criminal action has reached final judgment. (People v. Muhammad (2003) 108 Cal.App. 4th 313, 318-319; People v. Tabb (1991) 228 Cal.App.3d 1300, 1304-1305, fn. 4; see also, People v. Ward (2009) 173 Cal.App.4th 1518; cf. Seykora v. Superior Court (1991) 232 Cal.App. 3d 1075, 1080, where the sanction order was not attached to any particular underlying criminal action.)

Here, the District Attorney properly appeals from the magistrate's order imposing monetary sanctions of $500.00 under section 177.5 following the entry of final judgments of dismissal in three of the underlying criminal actions.

STATEMENT OF THE CASE

This case is a patchwork of defendants, whose cases were at times joined with those of various other defendants, and who were all charged in connection with the occupation of the bank at 75 River Street. Its history is further complicated by changes of counsel and changes of judges before the preliminary hearing was held.

Defendants Desiree Foster, Becky Johnson, and Robert Norris Kahn were charged by complaints filed on February 7, 2012 with felony conspiracy (Pen. Code, § 182(a)(1)), felony vandalism (Pen. Code, § 594(b)(1)), and two counts of misdemeanor trespass (Pen. Code, § 602, subd. (m) and (o)). (CT 1-15) At arraignment, Shaneen Porter was appointed to represent defendant Foster. (CT 19) After several court appearances, Daniel Clymo was appointed to represent defendant Johnson. Johnson then disqualified Judge Symons and her case was reassigned to Judge Burdick. (CT 23-24) Johnson and Norris Kahn, who was then represented by Nicole Lambros, were jointly set for a preliminary hearing on April 16, 2012 with a confirmation date of April 13, 2012. (CT 24-25) In contrast, defendant Foster's preliminary hearing was originally set for April 23, 2012. (CT 19)

On the April 13th confirmation date, defendant Norris Kahn substituted in David Beauvais as his new counsel. Beauvais orally requested a continuance of the preliminary hearing because he was new to the case and because he did not have all the discovery he wished to have. (1 RT 4-6; CT 51) Norris Kahn's counsel apparently filed and served a discovery motion, together with an unsigned order shortening time and an undated proof of

service, in court that day. In his motion defendant Norris Kahn argued that the requested discovery was mandated by Penal Code section 1054.1 and was needed for effective cross-examination at the preliminary hearing. (CT 27-49; 1 RT 6-7) The written motion asked for seven categories of items, including all video recordings and photographs taken at or near the bank beginning November 30, 2011; fingerprint reports and results; any recordings from the bank security cameras; all dispatch logs and recordings of "involved officers" between November 30th and December 8, 2011(sic); all recordings of phone calls to the Police Department regarding activity at 75 River Street; all police reports pertaining to the occupation at 75 River Street, including reports about Katherine Beiers' and Martin Bernal's viewing of the property; and a copy of the lease for the 75 River Street property effective on November 30, 2011. (CT 30) Johnson's counsel also stated orally that he was not prepared to go forward and did not yet have all of the discovery. (1 RT 3) The prosecutor responded that some of the items sought were not discoverable and some were not in the People's possession, but that she had brought raw video with her to court to provide to both attorneys. (1 RT 6)

The prosecutor and Johnson's counsel, Mr. Clymo, agreed that Johnson and Norris Kahn's preliminary hearings should be heard together. (1 RT 3-4) Mr. Clymo, however, expected to start a trial on April 23rd that might last 3-4 weeks. and the judge was also going to be unavailable from May 23 through June 8, 2012. The magistrate then set the discovery motion for May 18 but set the two defendants' joint preliminary hearing for May 29, 2012 in front of a visiting judge, despite the unresolved discovery issues and Mr. Clymo's anticipated scheduling conflict. (1 RT 6, 9; CT 50-51) Contrary to the magistrate's later written sanction order (see CT 238, 240), it does not appear from the oral record of April 13 that the magistrate made any discovery orders that day or that Johnson's attorney said he needed time to review recently-

received discovery. (1 RT 3-10)

Defendant Foster's attorney subsequently filed a motion to continue her preliminary hearing set for the morning of April 23, 2012 at 9 a.m. because of a scheduling conflict and asked instead to have her case heard on May 29 along with defendants Johnson and Norris Kahn. (CT 52-55) Defendant RipleyPhipps, along with six codefendants, appeared in court on April 20, 2012 for confirmation of preliminary hearing. Without filing a motion pursuant to Penal Code section 1050, counsel for defendant RipleyPhipps orally made a motion to continue RipleyPhipps' preliminary hearing to be heard along with defendants Johnson and Norris Kahn who were set later due to obtaining counsel later. RipleyPhipps' counsel argued that he had not received the needed discovery of up to 50 hours of video until that day, could not work that weekend, and that a weekend family wedding in Texas meant he would not be back in time for Monday morning. (2 RT 254-255, 258-259) The magistrate tentatively indicated an intention to deny the continuance and to hear the matters the following week when the magistrate had time available, stating he was principally concerned with the court's convenience. (2 RT 257-258) He further indicated that all discovery of the videos and such was being provided. (2 RT 263) However, counsel ultimately convinced the magistrate to hear codefendant Laurendeau's, Alcantara's, Wilson's and Rector's matters on Monday, April 23, and to continue the preliminary hearings for Adams, RipleyPhipps, and Foster to May 29. (2 RT 258-262)

Therefore, defendants Cameron Laurendeau, Franklin Alcantara, and the other two codefendants, Edward Rector and Grant Wilson, had a separate preliminary hearing on April 23, 2012 before Judge Burdick. Officer Winston and Detective Gunter of the Santa Cruz Police Department testified. Detective Gunter testified that he had seen defendant Laurendeau in person inside the bank on December 2. (3 RT 572-573) His counsel objected that she did not

have the video taken that day which was needed in order to meaningfully cross-examine Gunter. (3 RT 572)[1] However, no recordings were introduced as evidence at the April 2012 hearing; only some photographs and a diagram prepared by Officer Winston at defense request were introduced. (3 RT 513, 540, 545, 558) Judge Burdick did not hold the four defendants to answer. (4 RT 761) Laurendeau's counsel asked for a dismissal with prejudice due to an allegedly contaminated identification, but the magistrate denied that request. (4 RT 762) Charges were thereafter refiled against defendants Laurendeau and Alcantara on May 4, 2012. (CT 58-65)

On May 18, 2012, defendants Norris Kahn and Johnson appeared for discovery review and motion. Norris Kahn's counsel sought further discovery of video footage he asserted had not yet been downloaded and of police reports regarding people who were not charged in connection with this occupation. The prosecutor stated that although she initially opposed release of the latter reports, she was providing them to the defense that day. She did note that she too had experienced technical difficulty opening the video files, and both the prosecutor and magistrate suggested that counsel could view a lot of the video footage via a link to YouTube located on the District Attorney's website. (5 RT 1003-1004, 1006) Counsel for defendant RipleyPhipps, who was not on calendar, interjected and attempted to join in Norris Kahn's discovery motion. He stated that he had received nine disks but was missing some video that Detective Williams took. (5 RT 1005)

The prosecutor did not oppose Norris Kahn's discovery motion and agreed to ask the police to download it all again. She also said she would check on Officer Winston's dash camera video and on the video of the posting

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1 However, when the video was later shown at the January 2013 preliminary hearing, it confirmed that Laurendeau was seen inside the bank that day. (12 RT 2777)

of the trespass notices. (5 RT 1005, 1007) Norris Kahn's counsel then added that he had not received dispatch printouts or the police department First Amendment and control policies he had informally requested. The prosecutor said she would provide dispatch (CAD) logs but that she had only agreed to check whether the requested policies existed. Norris Kahn's attorney asked to vacate the preliminary hearing date so he would have more time to review the videos. (5 RT 1008) The magistrate granted Norris Kahn's discovery motion and directed the prosecutor to provide everything "that we've discussed" by the end of Monday, May 21st. However, the magistrate did not vacate the hearing date and told Norris Kahn's counsel to file a 1050 motion if necessary. (5 RT 1009-1010) While granting the discovery motion, the magistrate made the telling comment that "we've been able to hear all of the other preliminary hearings without this material." (5 RT 1009)

Not surprisingly, on May 25, 2012 before visiting Judge Sillman, defendant Norris Kahn's counsel filed a motion to continue his May 29 preliminary hearing in open court and asked to set a new discovery compliance date. He alleged that the prosecution had failed to fully comply with the discovery order by providing only the November 30th CADs and failing to provide CADs for December 1-3 and records of phone calls to the police department. (6 RT 1260-1261) Although the visiting magistrate considered argument on the discovery issues to be premature, the prosecutor responded that CAD logs were not generated for days other than November 30th, the only day that multiple officers were dispatched. (6 RT 1263) Aside from alleging that the dispatch records would provide a time line of events and speculating that the phone recordings might lead to the discovery of independent witnesses, defendant Norris Kahn did not show how this evidence would be relevant or material to the preliminary hearing. (CT 85-87, 90)

On May 25, 2012, Judge Sillman also arraigned codefendant Alcantara

on the new complaint and reappointed counsel. Alcantara's case was set for a preliminary hearing on July 2 with a confirmation date of June 29. (6 RT 1254-1257) Ryan Murphy, counsel for defendant Adams, asked to withdraw due to a conflict. The magistrate granted that request and appointed J.J. Hamlyn as Adams' new counsel and scheduled counsel's first appearance for June 1. (6 RT 1258-1260, 1262) The magistrate then asked counsel for defendants Foster, Norris Kahn, Johnson and RipleyPhipps how they wished to proceed on the preliminary hearing in light of the new appointment of counsel for Adams. (6 RT 1260) The magistrate further inquired whether any of the other defendants would object to continuing their matters if Norris Kahn's continuance were granted. He suggested a resetting and discovery review date of June 1. (6 RT 1261) Since no one objected, the magistrate continued the matter to June 1 for setting of the preliminary hearing and further discovery review. (6 RT 1261-1262, 1266; CT 88-90) Contrary to the magistrate's later written sanction order (CT 240), it does not appear that any discovery order was made on this date. (6 RT 1254-1267)

These five matters were continued and eventually set for preliminary hearing on August 20 with a confirmation on August 17. (CT 91-94, 96, 101) In the meantime, Judge Burdick denied the People's 170.6 challenge as untimely. (CT 97-102; 7 RT 1504; 8 RT 1755)

Later, codefendants Laurendeau and Alcantara appeared on July 20, 2012 in front of Judge Salazar. Alcantara had disqualified Judge Symons who was scheduled to hear their preliminary hearings on July 23. Laurendeau filed a motion to continue his preliminary hearing set for July 23 due to attorney Briggs' engagement in a federal trial. Counsel further stated that the prosecutor had been on furlough June 11-22 and that unspecified further discovery would be forthcoming. Laurendeau asked to be joined with the other defendants for a preliminary hearing in Judge Burdick's court on August

20 and thus both he and Alcantara were then set for an August 20 hearing with an August 17 confirmation. (7 RT1504-1507; CT 111-119) No discussion of discovery occurred on this date. (7 RT 1504-1507)

On July 9, defendant Johnson's counsel filed her own discovery motion to be heard on August 17, 2012. It sought information related to the work done at 75 River Street as a result of the vandalism. (CT 103-110)

On August 6, 2012, codefendant Laurendeau filed a motion to dismiss (Pen. Code, § 1385 and Due Process) based primarily on an asserted lack of additional evidence to support refiling the charges and on other conduct related to the refiling. (CT 121-129) On August 8, defendant Adams filed a motion to continue the preliminary hearing due to a lack of discovery to be heard on August 10. Counsel's declaration indicated that the prosecutor had been in trial and that defense counsel was going to be out of town from August 10-17, and attached an informal request for 20 categories of discovery. On August 10, the prosecutor provided some discovery and the motion was withdrawn. (CT 130-141)[2]

On August 17, 2012, the magistrate heard Laurendeau's counsel's oral arguments on her motion to dismiss -- a litany of complaints to which she now added a lack of discovery -- and other defense counsel joined in the motion. (8 RT 1753-1756; 1761-1765) The prosecutor disagreed with counsel's factual assertion that the officer had identified the defendant from a video and stated that the defendants were identified through face-to-face contact with the police. (8 RT 1757-1761) She stated that she had provided the defense with everything in her possession. (8 RT 1759) The magistrate ordered the prosecutor to show cause on August 20 why all seven cases should not be

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Appellant moved to augment the record on appeal with the reporter's transcript of the proceedings held on August 10, 2012 and that motion was granted.

dismissed for the People's failure to provide necessary discovery. (8 RT 1764) The magistrate also ordered the prosecutor to provide an inventory of the discovery provided to counsel, when it was provided, and the method by which any videos were provided. (8 RT 1767) Contrary to the magistrate's later written sanction order (CT 241), on August 17 no order appears to have been made to deliver all the videos by 4 p.m. (8 RT 1753-1768) Although the magistrate did not vacate the preliminary hearing date and told counsel to be prepared to proceed, the magistrate also admitted that he was doubtful that it would proceed. (8 RT 1768)

On August 20, 2012, the prosecutor filed a memorandum of Point and Authorities Regarding Pre-Prelim Discovery Obligations, together with a discovery inventory in compliance with the magistrate's order. The prosecutor argued that the function of a preliminary hearing is not to conduct discovery and that a dismissal would be wholly inappropriate. She pointed out that technical difficulties had prevented the People from being able to copy certain DVDs, as other attorneys were aware, so the People had posted videos and photos on YouTube. She further stated that defense counsel never asked to view the DVDs at the District Attorney's Office. On August 20, she said she went so far as to provide each defense attorney with their own external hard drive containing all that the Police Department computer system contained. (CT 145-150)

On the 20th the prosecutor again orally explained to the magistrate that police officers who had yet to testify had identified the defendants from face-to-face contacts and that Detective Gunter had only reviewed the videos in preparation for the hearsay preliminary hearing in which he had testified. (9 RT 2005-2007) She further explained that she had received thirteen DVDs from the Police Department and that she was initially unable to duplicate five of them despite attempts by several people. She said that other counsel was

well aware of the technical difficulties and that they could have viewed the District Attorney's DVDs at any time. Subsequently, she had the videos posted on YouTube, but that apparently was not satisfactory either. She eventually succeeded in copying one of the five DVDs, thus leaving four at issue. Finally, she had copied everything onto seven external hard drives she purchased for the seven defense counsel. (9 RT 2007-2008)

Another supervising attorney in the District Attorney's Office argued that making the DVDs available for viewing was legally sufficient and that the prosecution had gone above and beyond what was legally required before preliminary hearing. (9 RT 2008-2010, 2030) The magistrate responded that the case had been set for confirmation of preliminary hearing two or three times and the defense requested the videos each time. The magistrate expressed concern that the lengthy videos would require time to watch in order for counsel to be prepared to deal with the officers' testimony. Therefore, the magistrate was "reasonably confident" that he had ordered the videos to be produced on each occasion so that everyone would have everything they needed to conduct the preliminary hearing in this high profile case. (9 RT 2010-2011) Some of the defense attorneys denied knowing about the YouTube videos and the technical difficulties. One argued that the law provides for pre-preliminary hearing discovery. Another argued that the issue was not whether there was compliance with the discovery statutes, but whether there was compliance with the magistrate's order. One went so far as to suggest that the entire prosecution was a "charade" and should be dismissed with prejudice. (9 RT 2011-2028)

The magistrate expressed concern about the prospect of continuing another preliminary hearing because "a relatively easy order to comply with was not complied with." (9 RT 2029) The prosecutor responded that she had always attempted to comply with the magistrate's orders and to make each

attorney happy, despite the changes of counsel. Finally, she had spent a great deal of her own money and time to download the videos onto hard drives -- a measure her superior said had never been taken before in the lengthy time he had been in the office. (9 RT 2029-2034) Her superiors argued that the defense would never be satisfied with the discovery, but that the prosecution should not have to do more than the law requires. (9 RT 2034-2036) One of them argued that the extreme sanction of dismissal would deprive the public of their right to have a fair trial on these crimes against private property and suggested that if the magistrate nevertheless intended to impose a sanction, it should only sanction the office and not dismiss the case. (9 RT 2035-2037) Contrary to the magistrate's later written sanction order (CT 241), however, District Attorney Lee did not personally appear in court that day or join in this suggestion. (CT 151-156; 9 RT 2035-2037)

The magistrate found that the prosecutor had only been negligent, that there was no bad faith, and stated that dismissal was not an appropriate sanction. (9 RT 2037, 2040, 2042-2044) Given the magistrate's and defense counsel's other commitments, the magistrate then grudgingly continued the preliminary hearing until January 7, 2013 with a confirmation on January 4, 2013 at which time the issue of other sanctions would be heard. Discovery review as well as defendant Alcantara's motion to dismiss based on a claim that the magistrate's factual findings barred refiling were then purportedly set for October 9, 2012. However, apparently only Alcantara's and Laurendeau's matters were actually calendared for that date. (9 RT 2045-2047, 2051; 10 RT 2254; CT 151-156)

On October 9, 2012, the magistrate denied Alcantara's and Laurendeau's additional motion to dismiss (10 RT 2257) and listened to counsel's remaining complaints about the format of one video they had received and about one empty video file copied just the way it appears in the police department's

computer. (10 RT 2258- 2261) If any police reports had not been turned over, the magistrate directed "the district attorney's office to provide all reports concerning the November 28th through December 4 current (sic), any reports generated after those dates that relate to this occurrence." (10 RT 2261) Defendant Norris Kahn continued to request copies of various police department policies and procedures, some of which did not appear to exist, but he apparently made no formal discovery motion for these items. The magistrate expressed doubt that this needed to be litigated prior to preliminary hearing. (10 RT 2259, 2262-2263) For purposes of determining monetary sanctions, the magistrate then directed out-of-county private counsel to submit declarations of the attorney fees their clients incurred for travel to court to litigate discovery issues. (10 RT 2264)

On January 4, 2013, the preliminary hearing date of January 7 was confirmed. As of the 4th, no defense counsel had filed any briefs or declarations in support of sanctions. (11 RT 2504-2506) On January 7, 2013 counsel for defendant Laurendeau filed a motion for sanctions (CT 160-185) and attached declaration of counsel. The prosecution filed an opposing brief regarding sanctions and the prosecution's conscientious efforts to provide discovery despite the technical problems that had to be overcome. The prosecution argued that prior to preliminary hearing the defendants were not entitled to all of the discovery that they would be entitled to prior to trial and that the proposed sanction for delayed discovery at this early stage of the proceedings was unprecedented. (CT 186-189)

Meanwhile, the preliminary hearing proceeded on January 7-8, 2013. With the exception of a few video clips and photographs introduced by the prosecution, most of the items the magistrate had ordered the prosecution to provide in discovery were not used as evidence at the preliminary hearing. (See Statement of Facts, *infra*) Codefendants RipleyPhipps, Alcantara,

Laurendeau, and Adams were held to answer for Counts 2 and 4, felony vandalism and trespass, whereas defendants Foster, Johnson and Norris Kahn were discharged on all counts and their cases dismissed. (13 RT 3140-3149; CT 214-230)

On January 8, the magistrate then addressed the issue of sanctions. The magistrate stated that the prosecution had not addressed the fact that the magistrate had issued a discovery order and the order was not complied with. (13 RT 3152) The magistrate stated that although he did not believe he had authority to impose sanctions pursuant to Penal Code section 1054.5, based on all the circumstances before and after the discovery order was issued it was his intention to order the District Attorney's Office to pay $500 under Code of Civil Procedure section 177.5. (13 RT 3152-3153) Thus, the magistrate issued an order for the District Attorney's Office to pay $500 in monetary sanctions under section 177.5 by February 8. (13 RT 3155)

The magistrate filed a written order imposing sanctions on January 18, 2013. (CT 234-245) The magistrate's written order pointed out that the prosecution had twice filed briefs arguing as a matter of law that the prosecution was not obligated to provide pre-preliminary hearing discovery -- an argument the magistrate apparently found inapposite because the magistrate had already ordered the prosecution to provide discovery. (See CT 241, 243)

The prosecution thereafter sought clarification of the written order since it did not conform to the magistrate's oral order and the magistrate struck the language making the assistant district attorney jointly liable for the monetary sanction. (CT 246-251) The prosecution next sought a stay of the order imposing sanctions pending appeal. Although the record could be clearer, the judge's last order signed and dated February 28, 2013 granted the District Attorney a stay pending appeal. (CT 259; cf. CT 268)

On March 6, 2013, the District Attorney filed a timely notice of appeal

pursuant to Code of Civil Procedure section 904.1(b) from the final judgments of dismissal in the three above-entitled matters. (CT 271-272)

STATEMENT OF FACTS

The facts of the offenses charged in the underlying criminal matters are pertinent to this appeal only to the extent that they are relevant to the propriety of the discovery and sanction orders the magistrate made in these cases. The following facts are taken from the reporter's transcripts of the preliminary hearing held on January 7, 2013 (12 RT) and January 8, 2013 (13 RT).

On November 30, 2011, Officers Winston and Forbus of the Santa Cruz Police Department drove to the courthouse to observe a planned Occupy Santa Cruz march. (13 RT 3061-3062) Officer Winston was shown a flyer that said a group planned to march to picket corporate banks around downtown Santa Cruz and then to march to a foreclosed property. (13 RT 3088) The officers first followed the march to Ocean and Water Streets and next followed it to the bank building at 75 River Street, arriving shortly after 3:00 p.m. As the officers arrived at the bank on River Street, a group of the marchers was already entering the bank through its double doors. Several marchers stood arm-in-arm in front of the entrance to the bank. The officers then left their car and stood at the corner of the bank building close to its double doors. An occupy everything banner was hung from the roof across the top of the bank. While stationed at the bank, Officer Winston took some photographs but did not take any video. (13 RT 3062-3065, 3077-3079)

On November 30, Officer Winston saw codefendant Franklin Alcantara on the courthouse steps, during the march, and then several more times at 75 River Street. Winston saw Alcantara make an announcement to the group of 100 or so marchers at Chase Bank at Ocean and Water Street and later saw him address the group gathered outside 75 River Street. Winston also saw Alcantara enter the bank building several times. (13 RT 3069-3071, 3082-

3083)

Officer Winston also saw defendant Robert Norris (charged as Robert Norris Kahn) at the courthouse steps, involved in the march, and in and out of the bank building. (13 RT 3066, 3071) Norris Kahn was walking around outside the bank with his tape recorder and he went into and came out of the bank several times. (13 RT 3072) Norris Kahn's first entry into the bank occurred within minutes after Winston's arrival at the bank. (13 RT 3091)

Officer Winston saw defendant Becky Johnson outside the bank at 75 River Street; she was holding a sign that said "Seize the banks." (13 RT 3067, 3072-3074) He saw Johnson go into the bank between 3 and 5 p.m. (13 RT 3101-3102, 3105) A video which was apparently consistent with his memory of Johnson's role was played in court. (13 RT 3072-3074)

Officer Winston saw codefendant Brent Adams marching toward 75 River Street at about 2:45 p.m. and then saw Adams go in and out of the bank building shortly after 3:00 p.m. and throughout the day. Adams spent most of his time inside the building. (13 RT 3067, 3080-3082, 3121) Officer Winston spoke with Adams outside the building about the occupy banner. Adams admitted that he had made the banner and had misspelled the word "occupy." (13 RT 3081)

Just before 4:00 p.m. on November 30, 2011, Detectives Hedley and Williams of the Santa Cruz Police Department parked their vehicle on the river levee across the street from the Wells Fargo Bank building at 75 River Street. (12 RT 2904-2905) Close to the same time that these officers arrived, a group of protestors arrived and started surrounding the bank. Detective Williams videorecorded the protestors' activity from the rear seat of the vehicle. The front door to the bank apparently had been unlocked prior to the group's arrival. Detective Hedley saw protestors going into and coming out of the bank, some of them bringing wood pallets and furniture into the bank. Soon

after the protestors made entry, Detective Hedley could also see people on the roof of the bank, some of them appearing to be lookouts and some hanging an occupy sign. (12 RT 2905-2907, 2943) He estimated that the group outside the bank consisted of between 50 and 100 people at different times. (13 RT 3020)

One of the people Detective Hedley saw going in and out of the bank was defendant Robert Norris Kahn whom he recognized from seventeen years of prior contact. During the first 30 minutes or so of Detective Williams' filming, Norris Kahn crossed the street to talk with the detectives. Detective Williams warned Norris Kahn he might be arrested if he went back into the bank. However, Norris Kahn nevertheless went back into the bank and Detective Hedley saw him do this more than once. (12 RT 2907-2909, 2948; 13 RT 3013) The prosecutor played a clip from the video Williams had shot which contained their observations of Norris Kahn. (12 RT 2909-2911)

Detective Hedley identified codefendant Brent Adams on Williams' November 30th video as a person who was going in and out of the bank and carrying trash cans that appeared to have come from the bank. (12 RT 2914, 2916-2918) Hedley testified that he had seen codefendant Gabriella RipleyPhipps going in and out of the bank on that video. However, in a clip played on cross-examination, RipleyPhipps was only walking outside the bank. (13 RT 3048) On the video Hedley had also seen defendant Desiree Foster standing near the bank doorway and waving people in, as well as going in and out of the bank herself. (12 RT 2915; 13 RT 3041) In a photograph in the Indymedia or the Sentinel, he had seen codefendant Cameron Laurendeau on the roof of the building. (13 RT 3057-3058)

On November 30, 2011, Sergeant Harms of the Santa Cruz Police Department was assigned to take a group of about twenty officers over to the Wells Fargo Bank building at 75 River Street in order to make sure that the

open double doors to the building remained open. (12 RT 2822-2824, 2832) At 5:45-6:00 p.m., Sgt. Harms heard a representative of Wells Fargo Bank informing police that the people in the bank were trespassing and asking the police to have them leave. (12 RT 2824-2825, 2842-2843, 2853-2854) When Sgt. Harms arrived at the bank a little before 6:30 p.m., he saw a large group of approximately 150 people gathered outside the building, a couple of people going in and out of it, and about 20-25 people inside the bank (12 RT 2823, 2852, 2855) Through the two open doors, he could see that the other doors had been barricaded with furniture and other items. (12 RT 2823-2824) Sgt. Harms secured the doors in an open position and then informed the people inside that they had broken into the bank and the owner wanted them to leave. (12 RT 2825, 2838, 2844)

As he told the group inside to leave, Sgt. Harms observed a person he recognized as codefendant Brent Adams within earshot about five feet inside the doors. He saw Adams push a large piece of furniture in front of the two open doors, blocking access to the entrance. (12 RT 2825-2826, 2838-2839) Adams told the officer to speak with "Gabby" so the officer asked Adams to call her. Instead, Adams and others inside the bank continued to stack furniture in front of the doors. When Sgt. Harms and four other officers tried to remove the barricade of furniture, they met with resistance from persons inside the bank. (12 RT 2827-2828) The sergeant reiterated that the people inside needed to leave, but Adams responded that he had no intention of leaving. (12 RT 2828-2829)

Meanwhile, Sgt. Harms also recognized another person inside the building, codefendant Alcantara. He saw Alcantara jump on top of the furniture blocking the doors and twist the video camera mounted above the door as if to break it off the wall. (12 RT 2829-2830) When Sgt. Harms asked Alcantara whether he was going to leave willingly, Alcantara looked at the

officer and shook his head no in response. (12 RT 2830, 2895)

Codefendant Adams shouted to the crowd on the sidewalk and asked them to advance on the officers so that those inside the bank could secure the doors. (12 RT 2830-2831) The large and emotionally-charged group outside then began to inch toward the officers, chanting "baby steps forward." (12 RT 2831-2833) Therefore, the out-numbered officers withdrew to avoid a confrontation. (12 RT 2833-2834) As Sgt. Harms was leaving, he encountered codefendant "Gabby" (Gabriella) RipleyPhipps, the voice for the group. When he told her that the officers could not leave peacefully if the crowd continued to advance on them, she conveyed the message to the crowd to stop and the crowd complied. (12 RT 2834-2835, 2850-2851) When these officers had safely retreated, Detectives Williams and Hedley stopped filming. (12 RT 2944)

On December 1, 2011, Lt. Richard undertook the task of posting trespass flyers he had created. (12 RT 2759) His flyers had a City of Santa Cruz logo and stated, "Anyone on this property is trespassing in violation of section 602 subsection o of the Penal Code." The flyer further stated, "Santa Cruz Police Department has been authorized by the property owner to take enforcement action for this violation. Violators need to leave this property immediately. Anyone remaining on this property is subject to enforcement action." (12 RT 2759-2762) At about 3:06 p.m., Lt. Richard posted this flyer on each of the bank's exterior doors. His actions that day were videorecorded. (12 RT 2763)

That day Lt. Richard also had the task of trying to negotiate a peaceful conclusion to the occupation with the group inside the bank building. (12 RT 2759, 2763, 2796) In an effort to make contact, he first spoke with codefendant Adams when he came out of the bank building at 75 River Street. (12 RT 2763-2764, 2767) He gave Adams a cell phone that would receive

incoming calls and asked Adams to deliver it to the group in the bank in hopes of starting a negotiation. He told Adams that he would call the phone in about an hour. (12 RT 2767, 2819) Adams said that he was not the person in charge, could not promise anything, and the group would have to decide what to do with the phone. (12 RT 2818; 13 RT 3032) Lt. Richard told Adams that he was violating the law and the owners had asked that they leave. (12 RT 2817-2818)

At about 8:36 p.m. that evening, Lt. Richard met with "Wild Cat" (Gabriella RipleyPhipps) who had shown up at the Police Department on her own initiative. (12 RT 2769, 2797) Lt. Richard told her that the occupiers were trespassing and needed to leave the building immediately. He said the flyer he posted was their warning. He then asked her what their exit strategy was so that it could be accomplished safely. Codefendant RipleyPhipps acknowledged that she was the spokesperson for the group but said that she would need to go back to the group and discuss the matter. (12 RT 2770)

Later that evening Lt. Richard tried calling the cell phone he had given codefendant Adams, but no one answered. Instead, Lt. Richard was able to reach RipleyPhipps on her personal phone at about 10:11 p.m. She told Richard that the group came to a consensus that they were not leaving at that time and wanted further negotiations. Richard told her again that they were trespassing and needed to leave or the police would have to take enforcement action. (12 RT 2771-2772)

On December 2, 2011, Detective Hedley returned to the bank with Lt. Richard to videorecord and photograph Lt. Richard's second posting of no trespassing signs there. (12 RT 2919-2920, 2774; 13 RT 3014) Only portions of the prior day's flyers were still posted. (12 RT 2809-2810) At about 3:36 p.m., Lt. Richard again posted flyers on the exterior doors of the bank building at 75 River Street. (12 RT 2772-2774) This time the flyers said, "Anyone on

this property is trespassing in violation in [sic] Section 602 of the Penal Code which may include any of its subsections." (12 RT 2773) That day Detective Hedley saw codefendant Cameron Laurendeau standing inside the bank staring back at the officers, watching what they were doing. (12 RT 2920, 2810, 2914) Lt. Richard testified that he then spoke with Laurendeau after Laurendeau had come out the building. Lt. Richard told Laurendeau that the group was trespassing and needed to leave immediately. (12 RT 2774-2775, 2778-2779) The prosecutor also played a video clip of that interaction outside the bank; another clip showed Laurendeau inside the building at another point. (12 RT 2776-2779, 2914)

At about 4:11 p.m. that day, Lt. Richard again contacted codefendant RipleyPhipps on her cell phone to tell her the trespassers needed to leave immediately. (12 RT 2779) Between that call and his later call to RipleyPhipps at around 6:32 p.m., the power to 75 River Street was turned off. When he called her at 6:32, she said the group was still meeting to discuss their plans. (12 RT 2780) He then called her again at around 8:17 p.m. and she told him they would meet again the next morning. He again reminded her that they were illegally trespassing and needed to leave immediately. (12 RT 2780-2781) On both days Richard saw about 10 or 20 people inside the bank. He also saw about that many people coming and going on December 1. (12 RT 2806-2807)

On December 3, 2011, Lt. Richard again tried to call codefendant RipleyPhipps but did not speak with her on the phone. (12 RT 2782-2783) He then went to 75 River Street at about 11:50 a.m. to post more flyers. He also verbally informed people he saw that they needed to leave. (12 RT 2788, 2795) Outside the bank, codefendant RipleyPhipps contacted Lt. Richard in person and he reminded her that the trespassers needed to leave immediately. He said the police did not want to see anyone get hurt. (12 RT 2783-2784,

2801) Her companion Daniel Walters, who identified himself as "Kelly," told Richard there was damage inside the bank and said the group should leave. (12 RT 2783-2785) At 2:27 p.m. Lt. Richard spoke with codefendant RipleyPhipps again. She told him the group needed 24 hours to clean up and leave the bank. Lt. Richard again told her they needed to leave immediately. (12 RT 2786) They once again spoke at 4:27 p.m. and she said the group was continuing to clean up. Richard reiterated that they needed to leave immediately. When Lt. Richard returned to the bank at about 10:13 p.m. that day, the building was finally vacant. (12 RT 2787)

On December 4, 2011, Detective Hedley went back to the bank to document the damage through video and photographs. (12 RT 2920) There was still furniture blocking the River Street doors and plywood, clothing and backpacks were located out in front of the bank. The sign that the building was for rent had been "graffitied" over. (12 RT 2921) Windows were covered with protest signs. (12 RT 2922) Inside the bank, graffiti was found on the elevator doors, on other doors, and on walls and tables. The wall of the elevator had graffiti that read, "On 11-30 we willfully occupied." Some of the graffiti in the bank had been painted over with paint that did not match the wall color. There was also graffiti that looked like someone tried to scrub it off. Hedley photographed a key box on a wall that was open and empty. (13 RT 3044) All of the security cameras had either been removed or their wires had been disconnected. Some cabinets were broken and the ladder to the roof was broken away from the wall. There were protest signs hung all over, chains had been placed on the River Street doors, and lots of garbage was left behind. (12 RT 2923, 2927-2928, 2930; 13 RT 3037-3038) Among the signs in the building was one that said no vandalism and another that said to pick up after yourself. (12 RT 2942)

Detective Hedley went back the next day to take additional photographs

of furniture left in the bank that did not belong to the property owner. (12 RT 2926, 2929)

Detective Gunter testified that Laicia Bucher, the regional property manager for Wells Fargo, provided him with a final estimate of $23,000.00 for the damage done at 75 River Street during its occupation from November 30-December 3, 2011. This total included estimates from six companies for the hauling of damaged furniture, biohazard and other cleanup services, replacement of thermostats, and changing of the locks. (13 RT 3006-3008)

ARGUMENT

I. MONETARY SANCTIONS MAY NOT BE IMPOSED FOR FAILURE TO TIMELY COMPLY WITH THE MAGISTRATE'S UNLAWFUL DISCOVERY ORDER.

A monetary sanction can only be imposed against an attorney when authorized by statute. (People v. Muhammad, supra, 108 Cal.App.4th at p. 323.) Code of Civil Procedure section 177.5, the section upon which the magistrate relied in imposing the monetary sanction herein, states in pertinent part:

> A judicial officer shall have the power to impose reasonable monetary sanctions, not to exceed fifteen hundred dollars ($1,500) . . . payable to the court, **for any violation of a lawful court order** by a person, done **without good cause or substantial justification**. . . .
>
> Sanctions pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or on the court's own motion, after notice and opportunity to be heard. An order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order. (Emphasis added.)

Obviously, one of the express prerequisites for a lawful sanction order under section 177.5 is the existence of a prior "lawful court order" that was violated. (People v. Hundal (2008) 168 Cal.App.4th 965, 970; see also, People v. Muhammad, supra, 108 Cal.App.4th at p. 325.)

The only prior order which could be the basis for the later monetary

sanction (see CT 243) appears to be the magistrate's grant of defendant Norris Kahn's discovery motion on May 18, 2012. Contrary to the magistrate's recollection and his written sanction order, no other orders appear to have been made by Judge Burdick on April 13, 2012 or by Judge Sillman on May 25, 2012. As discussed below, the May 18th discovery order, which was neither authorized by an express statutory provision nor mandated by the federal Constitution, was an unlawful order and therefore may not support an order for monetary sanctions under section 177.5.

A. THE MAGISTRATE'S ORDER WAS NOT AUTHORIZED BY PENAL CODE SECTION 1054 *ET SEQ.*

The magistrate's pre-preliminary hearing discovery order was unlawful. The voters, in adopting Proposition 115 in 1990, expressly declared that their purposes were to reduce the unnecessary "costs of criminal cases" and to "create a system in which justice is swift and fair . . ." (Prop. 115, § 1, subds. (b), (c); see also Tapia v. Superior Court (1991) 53 Cal.3d 282, 293.) Penal Code section 1054 further enumerated the purposes of the discovery chapter enacted by this initiative measure and stated that it should be interpreted to save court time and to protect victims and witnesses from undue delay in the proceedings. (Pen. Code, § 1054, subds. (b)-(d); see also People v. Superior Court (Mouchaourab) (2000) 78 Cal.App.4th 403, 425.) To carry out these goals, the voters changed both the nature of preliminary examinations and the discovery rights of defendants attendant to preliminary examinations. Proposition 115 amended Penal Code section 866 which now provides in subsection (b):

> It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. **The examination shall not be used for purposes of discovery**. (Emphasis added.)

By Proposition 115, the purpose of preliminary examinations has been

considerably narrowed to encompass only probable cause determinations. (Whitman v. Superior Court (1991) 54 Cal.3d 1063, 1080-1082.) In Correa v. Superior Court (2002) 27 Cal.4th 444, 452, the Supreme Court recognized the limited nature of the preliminary examination subsequent to the passage of Proposition 115:

> We have emphasized that after the passage of Proposition 115, the preliminary hearing now serves a limited function. No longer to be used by defendants for discovery purposes and trial preparation, it serves merely to determine whether probable cause exists to believe that the defendant has committed a felony and should be held for trial. [Citation].

By their very nature, probable cause determinations do not involve the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. (Whitman v. Superior Court, supra, 54 Cal.3d at p. 1080, citing Gerstein v. Pugh (1975) 420 U.S. 103, 121-122.) Thus, although some adversary procedures are customarily employed, the full panoply of procedural rights available at trial are not constitutionally mandated at a preliminary examination. (Whitman v. Superior Court, supra at pp. 1080-1081.)

Proposition 115 also changed the law regarding a defendant's discovery rights in conjunction with the preliminary examination. Earlier cases had reflected the now-obsolete view that the preliminary hearing was a vehicle for defense discovery. (See Holman v. Superior Court (1981) 29 Cal.3d 480, 483-485 [finding that criminal discovery was a judicially-created doctrine and that a magistrate had inherent power to order discovery in the "absence of contrary legislation."].) However, Proposition 115 not only amended section 866 to provide that preliminary hearings "shall not be used for purposes of discovery," but it instituted various procedural limitations to prevent defendants from using preliminary hearings as discovery vehicles. (People v.

Superior Court (Barrett) (2000) 80 Cal.App.4th 1305, 1320.)

For example, Proposition 115 eliminated from Penal Code section 859 the long-standing statutory requirement that the prosecution provide discovery of crime reports to the defense at arraignment or within two calendar days thereof. (See Historical and Statutory Notes, 50 West's Ann. Pen. Code (2008 ed.) foll. § 859, p.383.) Furthermore, other related discovery provisions in former Penal Code sections 1102.5, 1102.7 and 1430 were repealed. (Prop. 115, §§ 24, 25 and 27.)

More importantly, in their place Penal Code sections 1054-1054.7 were enacted. Section 1054(e) provides that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (Similarly see, Pen. Code, §1054.5(a); Cal. Const., art I, § 30, subd. (c) [criminal discovery shall be prescribed by legislation or by voter initiative].) Section 1054, subdivision (e), precludes the courts from broadening the scope of discovery beyond that provided in the chapter or other express statutory provisions, or as mandated by the federal Constitution. (People v. Superior Court (Mouchaourab), supra, 78 Cal.App.4th at p. 426, citing People v. Tillis (1998) 18 Cal.4th 284, 294.) "In criminal proceedings . . . all court-ordered discovery is governed exclusively by -- and is barred except as provided by -- the discovery chapter newly enacted by Proposition 115." (In re Littlefield (1993) 5 Cal.4th 122, 129; accord, Verdin v. Superior Court (2008) 43 Cal.4th 1096, 1106 [holding superseded by statute]; Roland v. Superior Court (2004) 124 Cal.App.4th 154, 161; Jones v. Superior Court (2004) 115 Cal.App.4th 48, 56.) Thus, a criminal defendant is entitled to pre-preliminary hearing discovery only if the federal Constitution, the chapter containing Penal Code section 1054, or another express statutory provision mandates it.

Many of the criminal discovery provisions set forth in section 1054 *et*

seq. are expressly made applicable in a trial setting. Virtually every discoverable item under these statutes is trial-related. (Jones v. Superior Court, supra, 115 Cal.App.4th at p. 57, citing Pipes & Gagen, California Criminal Discovery (3d ed. 2003) § 2:16, p. 201.) For instance, the statutes provide that names, addresses, written or recorded statements, and felony convictions of trial witnesses must be disclosed. (Pen. Code, §§ 1054.1, 1054.3.) In addition, under section 1054.7 disclosures must be made at least 30 days before trial, or "immediately" if the information becomes known within 30 days of trial. Moreover, the Supreme Court has repeatedly used the term "trial court" in discussing the power of the court to enforce discovery. (See, e.g., Izazaga v. Superior Court (1991) 54 Cal.3d 356, 383 ["section 1054.5(b) empowers the trial court to 'make any order necessary to enforce the provisions of this chapter' "]; similarly see, In re Littlefield, supra, 5 Cal.4th at p. 130; see also, People v. Superior Court (Mitchell) (1993) 5 Cal.4th 1229, 1231, 1235-1236, 1239.) Therefore, there appears to be no statutory requirement under this chapter that discovery be provided prior to preliminary hearing, although the prosecution frequently will voluntarily provide early discovery.

In Galindo v. Superior Court (2010) 50 Cal.4th 1, the Supreme Court found that because Pitchess discovery is authorized by express statutory provisions, Proposition 115 does not preclude a defendant from making such a motion before the preliminary hearing. Nevertheless, the court held that the magistrate was not *required* to grant a Pitchess motion if it would delay the preliminary examination. (Id. at pp. 11-13.) The Sixth Amendment right to effective assistance of counsel is not violated if defense counsel lacks Pitchess discovery for use at the preliminary hearing. (Id. at p. 9-10.) The court stated:

> Before the voters' June 1990 passage of Proposition 115, courts would "routinely" and repeatedly grant continuances to accommodate a criminal defendant's request for "pretrial

> discovery to prepare for a preliminary examination." (Pipes & Gagen, Cal. Criminal Discovery (4th ed. 2007) Preliminary Examinations, § 2:12, pp. 329–330; see, e.g., *Saulter v. Municipal Court* (1977) 75 Cal. App. 3d 231, 247 [142 Cal. Rptr. 266].)
>
> In their ballot argument, the proponents of Proposition 115 stressed their goal of reducing unnecessary delays in criminal proceedings. According to the measure's proponents, criminal "defense lawyers love delays" because it is in their client's interest when "[w]itnesses die or their memories fade," but Proposition 115 would end the "useless delays that frustrate criminal justice in California." (Ballot Pamp., Primary Elec. (June 5, 1990) argument in favor of Prop. 115, p. 34.) The voters' passage of Proposition 115 codified that goal in Penal Code section 1054, which stresses avoidance of "undue delay" in criminal proceedings. (Pen. Code, § 1054, subd. (d).) That goal would be frustrated if we were to uphold the pre-Proposition 115 practice of routinely and repeatedly granting postponements of a preliminary hearing to accommodate a defendant's efforts to obtain *Pitchess* discovery for use at the preliminary hearing. . . .
>
> **After the magistrate concluded** that petitioner's purpose in bringing the *Pitchess* motion was to develop evidence for use at the preliminary hearing, that this objective could be realized only by postponing the preliminary hearing, and that **the possibility of discovering evidence favorable to the defense did not justify delaying the preliminary hearing, the magistrate denied petitioner's *Pitchess* motion. We hold that this ruling was not an abuse of the magistrate's discretion.** The ruling does not preclude petitioner from bringing a renewed *Pitchess* motion, when this matter returns to the magistrate, for the purpose of obtaining evidence for use at trial. (Ibid; emphasis added.)

This result is consistent with the initiative's purpose of avoiding undue delay. Thus, even where another express discovery statute allows a defendant to move for discovery before a preliminary hearing, it does not follow that the preliminary hearing must be delayed for receipt of that discovery, even if it might possibly disclose evidence favorable to the defendant.

In contrast to the absence of any express statutory discovery rights for a defendant facing a preliminary hearing, the Legislature has expressly provided certain statutory rights of discovery to defendants facing a grand jury indictment. Thus, in People v. Superior Court (Mouchaourab), supra, 78 Cal.App.4th 403, this Court found that Penal Code section 939.71, together

with sections 939.6 and 995, provided the requisite "express statutory provisions," within the meaning of section 1054, subdivision (e), to authorize discovery of nontestimonial portions of grand jury proceedings. (Id. at p. 429.) In Magallan v. Superior Court (2011) 192 Cal.App.4th 1444, 1462, this Court likewise held that Penal Code section 1538.5 was the express statutory provision which entitled a defendant to the dispatch records necessary to support the suppression motion. In contrast, the Legislature has not adopted any specific statutory discovery provisions for preliminary hearings. Therefore, the only discovery authorized in preliminary hearing matters is that (1) authorized by Penal Code sections 1054-1054.7 or (2) otherwise required by the United States Constitution.

Here, in contrast to Magallan, the defense sought dispatch records and many other items for purposes unrelated to any motion to suppress evidence under section 1538.5. Neither defendant Norris Kahn's counsel nor the magistrate attempted to justify the discovery order made herein based on any express statutory provision specifically authorizing pre-preliminary hearing discovery of the items sought but relied on the provisions of Penal Code section 1054 *et seq.* (See Norris Kahn's motion, CT 29-49, relying generally on section 1054.1) Without citing any authority, the magistrate simply granted Norris Kahn's motion in its entirety when it was unopposed. Although the magistrate later stated he did not believe he had statutory authority to impose a sanction under Penal Code section 1054.5 (13 RT 3152), in his written order he characterized his discovery orders as orders issued pursuant to Penal Code section 1054. (CT 241). As set forth above, the discovery chapter beginning with section 1054 does not authorize the kind of discovery order made herein prior to preliminary hearing and no other statute appears to authorize it.

Even if this Court rejects the interpretation that the discovery provisions of Proposition 115 are directed at trial and applies section 1054 *et seq.* to

evidence to be presented at a preliminary hearing, the Court should note that the list of items sought by defendant Norris Kahn's discovery motion still went far beyond that necessary for preliminary hearing. For instance, it was not confined to the names, addresses and statements of preliminary hearing witnesses. (Cf. Pen. Code, § 1054.1, subds. (a), (f), which are directed at trial witnesses.) Rather, it sought all police reports, including reports about visits to the scene of the occupation by non-defendant officials like city council member Katherine Beiers. When defense counsel sought to cross-examine Officer Winston at the preliminary hearing about whether Beiers was prosecuted for her visit, the magistrate properly sustained a relevance objection. (13 RT 3094) Norris Kahn's motion also broadly requested all law enforcement dispatch logs and recordings between November 30th and December 8, 2011, all recorded phone calls to the police department about the activity at 75 River Street and the lease for the property, none of which were introduced as evidence at the preliminary hearing. The motion further sought the results of any fingerprint comparisons done -- forensic results that may or may not be completed and available before a preliminary hearing. Even his request for all video footage and photographs went beyond those that were presented, or even relevant to the issues, at the preliminary hearing. His informal requests went even farther. As set forth in the Statement of the Case above, the prosecutor therefore expended a lot of time and effort ascertaining which items existed and then trying to comply with the magistrate's overbroad discovery order. (See 1 RT 6 [videos]; 5 RT 1004 [reports including non-defendants]; 6 RT 1263 [dispatch records]; 8 RT 1759 [everything she possessed]; see also, CT 149-150 [inventory of discovery].) Thus, the magistrate's insistence on compliance with an unlawful discovery order -- an order which extended well beyond the items needed for the preliminary hearing -- improperly delayed the preliminary hearing, contrary to the intent

of Proposition 115.

B. THE FEDERAL CONSTITUTION DOES NOT MANDATE PRE-PRELIMINARY HEARING DISCLOSURE OF THE ITEMS THE MAGISTRATE ORDERED DISCLOSED.

Since no statute authorized the discovery order in question, the magistrate's order was unlawful unless the discovery ordered was constitutionally mandated. However, the federal Constitution does not confer a general right to criminal discovery. (United States v. Ruiz (2002) 536 U.S. 622, 629; People v. Gonzalez (1990) 51 Cal.3d 1179, 1258.) The Constitution does not require the prosecutor to share all useful information with the defendant. (United States v. Ruiz, supra.) In Brady v. Maryland (1963) 373 U.S. 83, 87, the United States Supreme Court held that due process requires a prosecutor to disclose evidence favorable to an accused where the evidence is material either to guilt or to punishment. Later, the Supreme Court observed that this right to receive exculpatory impeachment evidence from prosecutors is "a right that the Constitution provides as part of its basic 'fair trial' guarantee . . ." (United States v. Ruiz, supra at p. 628.) Suppression of evidence amounts to a constitutional violation only if it deprives a defendant of a fair trial. (United States v. Bagley (1985) 473 U.S. 667, 678.) Moreover, the record before the trial court must show a "reasonable probability" of a different result. Speculation does not constitute a probability. (People v. Superior Court (Meraz) (2008) 163 Cal.App.4th 28, 52-53.)

Our own Supreme Court similarly recognizes that Brady governs trials, not preliminary hearings. "Brady materiality is a 'constitutional standard' required to ensure that nondisclosure will not 'result in the denial of defendant's [due process] right to a fair trial.' " (City of Los Angeles v. Superior Court (Brandon) (2002) 29 Cal.4th 1, 8.) ". . . [N]ot every nondisclosure of favorable evidence denies due process. '[S]uch suppression

of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial.'" (In re Brown (1998) 17 Cal.4th 873, 884; see also People v. Mooc (2001) 26 Cal.4th 1216, 1225 [the prosecution has a "constitutional obligation to disclose . . . material exculpatory evidence so as not to infringe the defendant's right to a fair trial [Citations]"].)

Appellant acknowledges that several courts have recently stated that exculpatory evidence must be disclosed prior to a preliminary hearing. The two recent cases of People v. Gutierrez (2013) 214 Cal.App.4th 343 (rev. den.) and Bridgeforth v. Superior Court (2013) 214 Cal.App.4th 1074 (rev. den.) have recognized that a defendant has a due process right to disclosure of exculpatory evidence prior to a preliminary hearing. However, the statements to this effect in Bridgeforth are *dicta* since no Brady violation was found in that case. There, as here, the video had been turned over to the defense months before the preliminary hearing. The court further held that the delay in providing the photographs was not a breach of the prosecutor's duty of disclosure because they were not favorable to the defense or material to the probable cause determination. (Id. at p.1089.) Thus, it was only the Gutierrez case that recently found a Brady violation had occurred at a preliminary hearing.

However, even if the rule of People v. Gutierrez, supra, 214 Cal.App.4th 343, is accepted, it does not apply here because the videos at issue were not Brady evidence. The defendants never established, and the magistrate never found, that the delayed discovery was material, exculpatory evidence. Nor does the transcript of the lower court's proceedings show that it was. Officers Winston and Hedley testified to their own observations of defendant Norris Kahn, the warning Detective Williams gave him, and the timing of these events. The only thing the video clip appeared to provide was corroboration of what Hedley had observed about Norris Kahn, and there was

no showing that this video clip had not initially been disclosed. (12 RT 2904-2930, 2942-2955; 13 RT 3013-3014, 3063-3072, 3090-3093) Although Norris Kahn was not held to answer, this resulted from the magistrate's finding that the prosecution failed to prove through the testimony of the officers that Norris Kahn was in the bank after the property owner had authorized the police to take action against the trespassers and the police had then warned the trespassers to leave. (13 RT 3127-3131, 3136-3138, 3143) In light of this finding, the magistrate declined to hear evidence of Norris Kahn's affirmative defense. (13 RT 3126, 3129-3130)

For the same reasons, the magistrate did not hold defendants Johnson and Foster to answer, but it was not due to any belatedly disclosed exculpatory video footage. Again, it was the prosecution's inculpatory evidence that was simply found insufficient. (13 RT 3128, 3131, 3134, 3136-3138, 3143)

Although codefendant Laurendeau's counsel cited Brady in her brief in support of sanctions (CT 164), she never specified any exculpatory evidence that was withheld. Moreover, Laurendeau was held to answer based on the officers' testimony to their observations, corroborated by video evidence that did not serve to exculpate him. Defense counsel only presented affirmative evidence of defendant's employment records that she had subpoenaed and photos showing that some of the posted trespass notices had been torn down. (12 RT 2809-2810; 13 RT 3131-3133, 3145-3148)

In the absence of a statute expressly providing for discovery prior to preliminary hearing or a federal Constitutional mandate, the magistrate had no legal authority to enter the wide-ranging, pre-preliminary hearing discovery order made in this case or to delay the hearing until that discovery was complete. Since the discovery order was unlawful, the sanction order pursuant to section 177.5 is likewise unlawful. The magistrate's proper remedy to avoid delay was to deny a continuance and proceed with a timely preliminary hearing

(see Galindo v. Superior Court, supra, 50 Cal 4th at pp. 11-13) -- not to punish the prosecution for delays resulting from the continuances he granted when the prosecution failed to speedily comply with this unlawful and overbroad discovery order. This case is a prime example of exactly what the voters sought to prevent by adopting Proposition 115.

II. THE MAGISTRATE FAILED TO GIVE DUE CONSIDERATION TO THE LAWFULNESS OF HIS ORDER BEFORE IMPOSING A SANCTION.

Once the magistrate had made a discovery order, the magistrate did not want to revisit the lawfulness of that order when the prosecution sought to do so before the magistrate imposed sanctions. Instead, the magistrate expressed the view that the issuance of an order was all that mattered. He indicated that his principal concern was the motion and order compelling disclosure in May. (9 RT 2035) He further stated, "There was a specific discovery order that was issued later. So, again, my concern is why wasn't the May discovery order complied with . . ." (9 RT 2038) The magistrate framed the question as whether a negligent violation of a pre-preliminary examination discovery order warrants dismissal, but declined to impose this "nuclear" sanction. (9 RT 2041-2042) When he later imposed the monetary sanction, he stated to the prosecutor that her papers on the issue of sanctions "did not really address the fact that I issued a discovery order and the order was not complied with." The magistrate then found, based on the circumstances before and after the order had been issued, that there was no substantial justification for the prosecutor's failure to comply with the discovery orders. (13 RT 3152-3153) He further found that the sum of $500.00 was enough "to make sure that orders are complied with . . ." (13 RT 3154) Thus, the magistrate's primary and only concern appeared to be whether his order was complied with -- not whether his order had been lawful *ab initio*.

Similarly, the magistrate's written order imposing sanctions stated, "In

her brief filed with the court on the morning of the order to show cause hearing [August 20, 2012] she cited authority which questioned whether the defendants were entitled to pre preliminary hearing discovery -- ignoring that the discovery orders had already been issued pursuant to the authority of Penal Code § 1054." (CT 241, no. 20) As to the January 7, 2013 hearing, the magistrate wrote that the prosecutor filed a brief "again suggesting that as a matter of law the district attorney had no obligation to provide discovery prior to the preliminary examination. Her position again ignored that the Court had ordered her to provide the discovery." (CT 243, no. 24) Thus, the magistrate repeatedly declined to consider the legality of his earlier order and apparently took the position that sanctions could be imposed simply because an order was made and violated.

Appellant certainly does not contend that court orders may be ignored and the prosecutor here made great efforts to comply with the discovery order the magistrate had made. However, contrary to the magistrate's position, the prosecution was clearly entitled to a hearing on the discovery order's legality -- a prerequisite to a lawful sanction order -- once the magistrate indicated that he might impose sanctions for noncompliance. Courts have held that due process, as well as the statute itself, requires that a person against whom Code of Civil Procedure section 177.5 monetary sanctions may be imposed be given adequate notice that such sanctions are being considered, notice of what act or omission of the individual is the basis for the proposed sanctions, and an objective hearing at which the person is permitted to address the lawfulness of the order, the existence of the violation, and the absence of good cause or substantial justification for the violation. (People v. Hundal, supra, 168 Cal.App.4th at p. 970 (emphasis added); Seykora v. Superior Court, supra, 232 Cal.App.3d at p.1088.) Inherent in review of a lower court's exercise of discretion in imposing monetary sanctions is a consideration of whether the

court's imposition of sanctions was a violation of due process. (Moyal v. Lanphear (1989) 208 Cal.App.3d 491, 501.) Although the magistrate may have allowed the prosecution a hearing prior to imposing sanctions here, he failed to appreciate that the lawfulness of his discovery order was an issue which could and should properly be addressed at that hearing. In this the magistrate erred and failed to afford the District Attorney's Office the objective hearing required by the governing statute and by due process.

Although the prosecutor had not initially opposed Norris Kahn's discovery motion on the ground that a pre-preliminary hearing order would be unlawful or on any other ground, and had simply tried to provide the discovery ordered, this initial failure to oppose the unlawful order made on May 18, 2012 should not operate as a forfeiture of the right to raise the issue on appeal. Generally, the forfeiture doctrine prevents a party from raising an issue on appeal where the party failed to lodge a timely objection in the trial court. (In re S.B. (2004) 32 Cal.4th 1287, 1293 [superseded by statute on another ground.].) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]" (Ibid.) In this case, the purpose of the rule is satisfied because the prosecution brought the issue of the legality of the discovery order to the magistrate's attention in a timely fashion before the magistrate imposed the challenged sanction.

In addition, the doctrine of forfeiture does not apply to the issue of whether the magistrate had authority to make such a discovery order. "Forfeiture of the right to complain of a ruling of the trial court is not found . . . where the court acted 'in "excess of its jurisdiction" ' or beyond its legal authority. [Citations.]" (In re Stier (2007) 152 Cal.App.4th 63, 75; People v. Le (2006) 136 Cal.App.4th 925, 931.) The forfeiture doctrine "does not apply where the trial court exceeds its statutory authority." (People v. Andrade

(2002) 100 Cal.App.4th 351, 354.) Moreover, a reviewing court may consider on appeal "a claim raising a pure question of law on undisputed facts." (People v. Yeoman (2003) 31 Cal.4th 93, 118.) The issue of whether the magistrate's discovery order was beyond the magistrate's legal authority is just such a question of law and is thus properly cognizable on this appeal.

III. THE MONETARY SANCTION IMPOSED WAS INCONSISTENT WITH THE LAW AND THE FACTS AND THUS WAS AN ABUSE OF DISCRETION.

A. THE MAGISTRATE'S SANCTION ORDER CONFLICTS WITH THE LEGAL PRINCIPLES AND POLICIES GOVERNING CRIMINAL DISCOVERY.

The imposition of sanctions is within the discretion of the court. On appeal, an order imposing monetary sanctions is reviewed for a prejudicial abuse of discretion. (People v. Tabb, supra, 228 Cal.App.3d at p. 1311; People v. Ward, supra, 173 Cal.App.4th at p. 1527.) However, the court's discretion must be exercised in a reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards as adapted to the current circumstances. (Moyal v. Lanphear, supra, 208 Cal.App.3d at p. 501; Winikow v. Superior Court (2000) 82 Cal.App.4th 719, 726.) All exercises of legal discretion must be guided by legal principles and policies appropriate to the particular matter at issue. In other words, discretion must be exercised according to the rules of law. (People v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, 977.)

As discussed in greater detail in argument I above, the magistrate's enforcement of his unlawful discovery order through the imposition of monetary sanctions runs contrary to the legal principles and policies adopted by the voters when they approved Proposition 115. The electorate sought to avoid undue delay of proceedings when it enacted the statutory scheme for

reciprocal discovery and determined that preliminary hearings shall not be used for purposes of discovery. (Pen. Code, § 1054; Pen. Code § 866, subd. (b).) However, the magistrate accomplished exactly the opposite here by his discovery order, the continuances he then granted, and his sanction order punishing the prosecution for failure to speedily comply with his discovery order. The discovery order made herein was not only contrary to Proposition 115, it was also clearly overbroad, even if the trial-related provisions of Penal Code section 1054 *et seq.* are found applicable to preliminary hearings. This order encouraged Norris Kahn's counsel and other attorneys to make other broad requests for informal discovery and to then complain to the magistrate about lack of compliance in order to gain continuances. This Court should observe that defendants Norris Kahn and Johnson were the only defendants to file formal motions to compel discovery. In other motions filed, the lack of informal discovery was cited as a reason for delay, or even dismissal, of the case. Meanwhile, the prosecutor spent her time trying to satisfy the many requests from the seven defense counsel in between her furlough time and other trials. (See CT 111-119, 130-141, 176-184; 5 RT 1004-1005, 1007-1008; 6 RT 1263) She finally spent her own money and time downloading all of the Police Department computer files on this case onto external hard drives -- an extraordinary measure -- in order to comply with the magistrate's order.

The magistrate abused his discretion by holding the prosecution responsible for delay engendered by his enforcement of a broad discovery order that was neither authorized by statute nor mandated by the Constitution. He then further abused his discretion and denied Appellant due process by declining to revisit the lawfulness of that order before imposing sanctions. It is entirely contrary to the voters' intent in enacting Proposition 115 to sanction the prosecution for delay attributable to this broad and unlawful discovery order.

B. THE MAGISTRATE'S STATED FACTUAL BASIS FOR THE SANCTION ORDER IS INCONSISTENT WITH THE RECORD.

The imposition of sanctions is also an abuse of discretion where the court's basis for imposition of sanctions is not supported by the record. (Winikow v. Superior Court, supra, 82 Cal.App.4th at p. 727.) The magistrate's oral and written orders relied on many assumed facts which are not born out by the record. Given the cacophony of seven defense counsel's repeated complaints (see, e.g., 8 RT1753-1756) and the number of different proceedings held in this matter, it is not surprising that the magistrate would become confused by the roar of the crowd. However, the magistrate's written order repeatedly relied on his mistaken view that he had thrice made discovery orders -- on April 13, May 18 and May 25. (CT 238, no. 11; CT 240, nos. 16 and 18; CT 242, no. 21; CT 243, finding no. 1) In fact, on April 13 Norris Kahn's motion to compel was filed in court and was simply set over for a hearing on May 18. (1 RT 6, 9; 5 RT 1010) The reporter's transcripts show that a court order was only made on May 18 when the motion to compel was granted. (5 RT 1010) On May 25 Judge Burdick did not even hear these matters and the visiting judge made no discovery rulings or orders. (6 RT 1254-1267) The magistrate also stated that he had ordered the videos to be delivered by 4 p.m. on August 17, but the transcript does not support this. (8 RT 1753-1768) He further stated that August 17 was "at least the third time the discovery orders had been violated." (CT 241, no. 19) However, in fact, the prosecution had only failed to comply with the magistrate's one discovery order made on May 18 and that was by failing to meet the May 21 deadline. Thus, one of the main premises on which the magistrate relied in deciding to order monetary sanctions -- that he had made three orders which the prosecution had violated three times -- is not supported by the uncontradicted evidence in the record.

Second, although the magistrate was understandably frustrated that the preliminary hearing did not proceed on the first dates selected that were acceptable to the court and all eight parties to the case, the prosecution was not responsible for all the delays. The magistrate's written order erroneously assumed that defendant Norris Kahn's motion to compel had been granted on April 13 (CT 238, no. 11) instead of on May 18, as the record reflects. (5 RT 1010) Thus, it is only the delays of the hearing occasioned by the prosecution's failure to comply after the first compliance deadline of May 21 -- not any delays in April -- that could possibly be attributed to the prosecution's failure to comply with the magistrate's order.

Moreover, as the record shows, there were many reasons the preliminary hearing got delayed that had nothing to do with the prosecution's failure to comply with the discovery order. It was very difficult to find dates when the court had a block of time available and all eight of the attorneys in the case were also available. For example, Foster's counsel, Shaneen Porter, filed a motion to continue the April 23, 2012 preliminary hearing because it conflicted with another court matter she had scheduled. (CT 52-55) On the preliminary hearing confirmation date of May 25, 2012, when defendant Alcantara was arraigned on the refiled complaint and defendant Adams substituted in new counsel, the court asked other counsel how they wished to proceed in light of the substitution. (6 RT 1254-1257, 1258-1260) With the assent of counsel, the court then put the matter over to June 1 for resetting of the hearing. (6 RT 1261-1262) Codefendants Laurendeau and Alcantara later appeared before Judge Salazar on July 20, 2012 and Laurendeau moved to continue his preliminary hearing due to his attorney's involvement in a federal trial as well as to obtain unspecified further discovery. (7 RT 1504-1507; CT 111-119) On August 20, 2012, after full discovery of the police videos and photos had been provided to each attorney on a hard drive, the preliminary

hearing was nevertheless continued more than four months to January 7, 2013, the date it was actually heard. However, it was the court's scheduled homicide trials and defense counsel's other court commitments that caused the continuance to be lengthy. (9 RT 2045-2047) Thus, many of the delays were a function of the number of counsel involved and everyone's busy schedules. All of this delay should not be attributed to the prosecution.

In addition, the magistrate's order erroneously states that District Attorney Bob Lee himself appeared in court on August 20, 2012 and suggested that monetary sanctions should be imposed instead of a dismissal. (CT 214, no. 20) However, the minutes and reporter's transcript show that District Attorney Bob Lee did not appear in the matter that day and did not join in this suggestion. (CT 151-156; 9 RT 2035-2037) There are other minor factual inaccuracies in the magistrate's written order as well, but those mentioned above should suffice to show that the magistrate's recollection of the history of this litigation was inaccurate in many important respects.

Finally, although the magistrate found that the prosecutor's failure to timely comply with the discovery order was negligent rather than intentional, the magistrate failed to consider the extraordinary lengths to which the prosecutor had gone in order to comply with the broad pre-preliminary hearing discovery order, as shown by the record. The prosecutor repeatedly sought to comply with the magistrate's order, but ran into unforeseen technical difficulties with providing viewable copies of the videos. (CT 188; 9 RT 2007-2008, 2029-2034) She finally took the extraordinary measure of spending a great deal of money and a great deal of her own time to download all the material onto external hard drives for each attorney.

Therefore, the magistrate's findings and sanction order are unsupported by the record. On this record, it was unreasonable to retroactively punish the prosecution for the unusual technical difficulties encountered, especially since

defense counsel had the court-ordered discovery for months prior to the actual preliminary hearing and the magistrate's subsequent monetary sanction order.

In sum, the magistrate's monetary sanction order was neither supported by the facts nor consistent with the laws of criminal discovery adopted by the voters.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully submits that the magistrate's order imposing sanctions pursuant to Code of Civil Procedure section 177.5 must be reversed.

Dated: July 15, 2013.

Respectfully submitted.

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Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S OPENING BRIEF uses a 13 point Times New Roman font and contains 13119 words.

Dated: July 15, 2013

Respectfully submitted,

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(Proof of Service by Mail - 1013a, 2015.5 C.C.P.)
PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA CRUZ)

I am a citizen of the United States and a resident of the County aforesaid. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 701 Ocean Street, Room 200, Santa Cruz County Governmental Center, Santa Cruz, California, 95060. On JULY , 2013, I served a copy of the within

APPELLANT'S OPENING BRIEF

on the interested party(ies) in said action by placing a true copy thereof fully prepaid in the United States mail at Santa Cruz, California and addressed as follows:

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I, ANGIE MADRIGAL, certify under penalty of perjury that the foregoing is true and correct.

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