CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

March 22, 2019

Please respond to:
JOHN T. PHILIPSBORN
Law Offices of J.T. Philipsborn
507 Polk Street, #350
San Francisco, CA 94102

The Honorable Jorge E. Navarrete
Clerk, California Supreme Court
Supreme Court of California
455 Golden Gate Ave., Ground Floor
San Francisco, CA 94102

Re: *People v. Eliseo Barajas*, Supreme Court No. S254238 (Court of Appeal Case No. B295310, Second Appellate District, Division 1; Los Angeles Superior Court Appellate Division No. BR053547; Los Angeles Superior Court No. 7DN07158)

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY ELISEO BARAJAS, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

Dear Mr. Navarrete:

This letter, permitted by the California Rules of Court, Rule 8.500(g), is submitted by California Attorneys for Criminal Justice (hereafter 'CACJ') in support of the Petition for Review filed by Eliseo Barajas (hereafter referred to as 'Petitioner').

Identification of *Amicus Curiae*

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including "to defend the rights of persons as guaranteed by the United States Constitution, the

Constitution of the State of California, and other applicable law," and the improvement of "the quality of the administration of criminal law." (Article IV, CACJ By Laws). CACJ's membership consists of approximately 1700 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 45 years, CACJ has appeared before this Court as an *amicus curiae* on matters of importance to the administration of justice, and to its membership.[1]

Interest of CACJ in this matter

CACJ respectfully submits that it has an interest in the issues presented in this matter, and a sound basis on which to urge this Court to grant review. CACJ's members include not only lawyers working in various Public Defender offices throughout California, but also a number of lawyers in private practice who often appear in California courts on behalf of an individual charged with a misdemeanor. Indeed, the majority of individuals who appear in California in criminal courts are reesponding to a misdemeanor level offense.

ARGUMENT AND AUTHORITIES

As previously pointed out in briefing lodged in this litigation by the San Francisco Public Defender's Office (under Case No. S253470), the interpretation, application, and breadth of Penal Code § 991 are all at issue here. As pointed out by the Court of Appeal for the Second Appellate District in *People v. McGowan* (2015) 242 Cal.App.4th 377, the legislative history of Penal Code § 991 demonstrates the intent of the Legislature in enacting the statute. *Id.*, at 386-87. As the *McCowan* court put it, the purpose of section 991 is to permit the 'weeding

[1] The undersigned Chair and Vice Chair of the CACJ *Amicus Curiae* Committee certify by the signature below and as an officer of this Court that no compensation has been paid by any of the parties to this litigation, or by any interested party, other than by CACJ and/or by the undersigned, for any time spent in the research or production of this brief, or for any costs associated with it.

out' of misdemeanor charges faced by accuseds who are in custody for which the probable cause cannot be suitably established. *Ibid.*

The issues presented to this Court are compelling in that it is apparent that the Appellate Division of the Los Angeles Superior Court has interpreted the statute at issue differently than it had a number of years earlier, contending that this case presents an appropriate opportunity to overrule *People v. Ward* (1986) 188 Cal.App.3d Supp.11. . The Court of Appeal, to which the case was transferred under this Court's January, 2019 ruling in S 253470, declined to do so. CACJ now urges this Court to grant review to ensure that a matter of statewide importance is not essentially determined by the Appellate Division of one particular Superior Court, especially given existing precedent that tends to undermine the reasoning offered by that Appellate Division for the ruling rendered in this case.

Given the lack of action by the Court of Appeal after the first attempt by Petitioner to obtain review of this case, the question that remains to be determined is whether the Appellate Division of the Los Angeles County Superior Court offered a sufficiently compelling analysis in its decision in *People v. Barajas* (2018) 30 Cal.App.5th Supp.1[2] to overrule its decision in *People v. Ward* (1986) 188 Cal. App. 3d Supp 11, thus providing a correct statement of "[l]imitations applicable to probable cause hearings...." *Barajas*, at pp.11-12.

CACJ agrees with Petitioner that there are compelling arguments that should move this Court to grant review. As was pointed out by *Amicus Curiae* San Francisco Public Defender in the first attempt to gain review of this case (under Case No. S253470) Penal Code §991 has been applied by trial courts in misdemeanor cases to allow dismissal of cases at the arraignment based on the representation, and/or agreement, that there was likely a problematic search associated with the case. (January 14, 2018 letter from Deputy San Francisco Public Defender Christopher Gauger on behalf of the San Francisco Public

[2] Cited for the purposes of the convenience of the Court and parties.

Defender). The San Francisco Public Defender noted what was essentially the beneficial and prophylactic function of the pre-*Barajas* interpretation and application of §991.

The *Barajas* Appellate Division tethers much of its analysis to the United States Supreme Court decision in *Gerstein v. Pugh* (1975) 420 U.S. 103. See *Barajas, supra*, 30 Cal.App.5th Supp., at 7-8. Starting with the observation that *Gerstein* required California to provide a procedure for the judicial review of the pretrial detention of a charged misdemeanor, the *Barajas* court explains that Penal Code § 991 was enacted essentially to codify this Court's decision in *In re Walters* (1975) 15 Cal.3d 738, 747, and to eliminate 'groundless complaints'–relying for the first point on this Court's ruling in *In re Walters* (1975) 15 Cal.3d 738, 747, and on *People v. McGowan* (2015) 242 Cal.App.4th 377, 383-84, for the second.

The *Barajas* court concludes–on its way to its eventual ruling–that: "Both *Gerstein* and *Walters* contemplate a procedure largely based on documentary evidence and not conducive to a determination of whether evidence was constitutionally obtained." *Barajas*, 30 Cal.App.5th Supp., at 10-11. But in aiming to support its conclusion that a judicial probable cause determination is necessarily a narrow process confined to what paper may exist at the time of an arraignment, the *Barajas* court ignores what this Court explained in *Walters, supra*, 15 Cal.3d, at 747-48: "*Gerstein* concluded by acknowledging the rights of the state to adopt flexible procedures which could encompass any or all of the safeguards which are not constitutionally compelled and stated, 'whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.'" *Walters*, at 747-48, *relying on Gerstein, supra*, at 124-25.

Clearly, the United States Supreme Court did not require that States cabin a judicial probable cause determination in such a way as to require that the determination, in misdemeanor cases, should be made by a mere examination of reports. This Court has not retreated from the analysis of a probable cause hearing

that it set forth in *Walters*–in which the Court offered a fulsome discussion of the way a probable cause determination is to be made. While the subject of searches leading to arrest was not raised there, the subject of warrants was, and the court's analysis is telling:

> A difficulty is immediately apparent, however, in that after his arrest a defendant is not afforded an opportunity to challenge in the criminal proceedings the propriety of the determination of probable cause for issuance of the warrant. If we do not afford him the opportunity to make that challenge then we would, in actuality, give conclusive effect to the propriety of all arrest warrants merely because the warrant was issued. We elect not to approve a procedure for determining compliance with a constitutional mandate when that procedure is vulnerable to attack on grounds which suggest the possibility of a star-chamber determination, particularly when the alternative poses little additional burden to the administration of justice.

Id., at 749-50. The *Walters* court then concluded its analysis by explaining that: "Since *Gerstein* affords the states wide latitude in implementing its mandate, we choose to apply its probable cause determination to all misdemeanor post-arrest detentions when the defendant is not released prior to arraignment or at the time of arraignment, and does not waive the probable cause determination." *Id.*, at 750-51.

Indeed, neither this Court's analysis in *Walters* nor the Court of Appeal's analysis in *McGowan* support the analysis offered by the Appellate Division in this matter. The *McGowan* court reviewed at some length the legislative history and the legislative committee analyses of the bills that explained the purpose of the enactment of a statute to set forth the purpose of a judicial probable cause determination in a misdemeanor case where continued detention was the critical question. As the *McGowan* court explained: "These legislative analyses evince the Legislature's desire to create a procedural mechanism to 'weed out groundless

misdemeanor complaints prior to trial' and to facilitate the 'expeditious dismissal of unsupported or frivolous charges.'" *Id.*, at 385-86.

The Appellate Division appears to have chosen as the lynchpin for the analysis leading to its conclusion the notion that because Penal Code § 991 is not included "...as one of the few statutes [...] under which a suppression of evidence issue could be litigated," the absence of some cross-reference between § 991 and Penal Code § 1538.5 necessarily means that there is no legally provided space for addressing the basis or circumstances under which a misdemeanant was charged with the pending misdemeanor(s). The current *Barajas* ruling explains the concern that Petitioner seeks a "...probable cause determination hearing outside the boundaries *Gerstein* sets for a prompt and informal hearing." *Barajas*, 30 Cal.App.5th Supp, at 10-11. In arriving at its determination, the *Barajas* court asks whether the accused can raise questions about the constitutionality of his or her detention in a probable cause hearing. *Id.*, at 8-9.

At least for the purposes of addressing whether this issue is worthy of review, this Court's ruling in *In re Walters, supra*, 15 Cal.3d 738, is worthy of mention. In *Walters*, which was decided on the heels of the U.S. Supreme Court's decision in *Gerstein, supra*, this Court acknowledged the latitude that was provided to the states to address a probable cause determination. As this Court noted in *Walters*, and as the Court of Appeal noted at somewhat greater length in *McGowan*, procedures used in misdemeanor level probable cause determinations must meet a given level of reliability and must be sufficient to demonstrate "...the factual basis for the crime charged, including all elements of the offense." *Walters*, at 752-53. Where the material supplied to the arraigning magistrate to establish probable cause and to provide sufficient factual basis for an informed judicial determination demonstrates the existence of barriers to the pursuit of the charges in a misdemeanor case, latitude for a magistrate to dismiss the charges based on evident Fourth Amendment violations should clearly exist. As is pointed out by the Court of Appeal in *McGowan, supra*, there are mechanisms by which the prosecution can seek delay in the probable cause hearing in a misdemeanor case, or in which the prosecution can re-file the case if necessary.

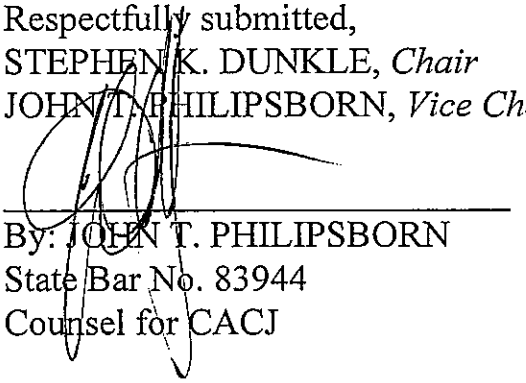
Petitioner raises compelling issues that are discussed in existing case law in ways that the Appellate Division incompletely recognized.

CACJ joins in supporting a grant of review.

CONCLUSION

For all of the reasons stated here, CACJ respectfully urges this Court to find that review should be granted to address the issues framed by Petitioner and framed by CACJ here.

Respectfully submitted,
STEPHEN K. DUNKLE, *Chair*
JOHN T. PHILIPSBORN, *Vice Chair*



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PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102.

On today's date, I served the within documents entitled:

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY ELISEO BARAJAS, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;

( ) By electronically transmitting a true copy thereof;

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Respondent

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

Executed this March 22, 2019, at San Francisco, California.

Signed: _____
Melissa Stern