

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
IN AND FOR THE THIRD DISTRICT

ROBERT ALAN GIBBS,	)	
	)	
Petitioner,	)	Shasta County
	)	no. 15F5736
v.	)	
	)	STAY REQUESTED OF
SUPERIOR COURT,	)	HEARING SET TO
SHASTA COUNTY,	)	OCCUR JULY 13, 2018
	)	AT 8:15 A.M. IN
Respondent.	)	DEPARTMENT TWO OF
	)	THE SHASTA COUNTY
	)	SUPERIOR COURT
PEOPLE OF THE STATE OF	)	BEFORE THE HON.
CALIFORNIA,	)	CARA L. BEATTY
	)	(530) 225-5891
Real Party in Interest.	)	
	)	

PETITION FOR ALTERNATIVE WRIT OF PROHIBITION OR  
MANDATE

After Denial of Motion pursuant to Pen. Code § 995,  
By the Honorable Cara L. Beatty,  
Judge of the Superior Court,  
County of Shasta

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- HH. Felony Docket, 15F5736, June 11, 2018.
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JJ. Felony Docket, 15F5736, June 18, 2018.

KK. Reporter's Transcript of Proceedings Held  
June 18, 2018.

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Real Party in Interest.	)	
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ALTERNATIVE PETITION FOR WRIT OF PROHIBITION OR  
MANDATE

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE  
ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE  
OF CALIFORNIA, THE THIRD APPELLATE DISTRICT:

INTRODUCTION

Petitioner, Mr. Robert Alan Gibbs, is currently being detained in Shasta County Jail, pending charges in five criminal cases in Shasta County Superior Court ("Superior Court"). Petitioner seeks extraordinary relief by

way of this petition in one of his cases, Superior Court no. 15F5736, following the denial of his motion to dismiss Counts One, Two, and Three of the Information pursuant to Pen. Code § 995, by the Honorable Judge Cara L. Beatty, on June 11, 2018<sup>1</sup>.

The Information in case 15F5763 charges five felony violations of Pen. Code § 422, with an incident date of September 11, 2015, with each count reflecting a complainant who is a member of a local law enforcement agency. The charges are based upon statements made by Petitioner in a phone conversation on September 11, 2015 with Mr. John Feser, in his capacity as a Deputy Attorney General. At the time, Mr. Feser was representing two Fish and Wildlife Officers that were defendants in a civil suit filed by Petitioner. Mr. Feser began to record the phone call when, according to Mr. Feser, Petitioner threatened to kill his two clients.

The evidence at the preliminary examination in 15F5763 included the testimony of a deputy from the Shasta County Sheriff's Office, who recounted statements by the complainants, as well as Mr. Feser. The audio of the partial recording by Mr. Feser of his phone call with Mr. Gibbs was also received into evidence, and a transcription of the phone call became Court's Exhibit 1A.

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<sup>1</sup> Counsel made an oral motion to reopen the hearing of the motion on June 18, 2018, and Judge Beatty denied that request, as described in further detail below.

Despite that the witness at the preliminary examination did not testify that Mr. Feser had said that Petitioner threatened to kill or cause great bodily injury to the complainants listed in Counts One, Two, and Three, nor did the audio excerpt of the phone between Petitioner and Mr. Feser disclose as much, the magistrate held Petitioner to answer as charged to those charges, and the reviewing court hearing Petitioner's motion to dismiss those charges pursuant to Pen. Code § 995 denied the motion.

In the instant circumstances, Petitioner must establish an exception to the rule of Pen. Code § 1510 that an extraordinary writ challenging the denial of a motion pursuant to Pen. Code § 995 must be made within 60 days of the filing of the Information in a felony case. Petitioner asserts that he was unaware of the meritorious grounds for the instant Pen. Code § 995 motion, and furthermore, that he had no opportunity to raise the motion because of the failures of his various counsel. Petitioner provides an overview of his grounds in this Introduction, with additional facts and argument detailed in the Petition, below, as well as the undersigned's Declaration.

The undersigned (hereinafter "Counsel") was appointed on December 15, 2017, and is now the sixth appointed attorney after the Public Defender Office to represent Petitioner in his pending matters. Counsel received Petitioner's voluminous files in a pronounced state of disarray. Except for one attorney, Mr. Adam Ryan, the balance of Petitioner's previous attorneys

generated a paucity of work product with respect to Petitioner's felony matters.

The work product of Mr. Shon Northam – attorney of record at Petitioner's preliminary examination in 15F5736, and overall for roughly thirteen months – includes only two work-product memos from his investigator regarding Petitioner's requests for discovery and services, as well as case notes from three appearances in court.

Mr. Ryan was appointed after Petitioner's seventh *Marsden*<sup>2</sup> motion to relieve Mr. Northam was finally granted. Mr. Ryan's work-product reflects court appearances, correspondence with Petitioner, and requests for expert services. There is no evidence, however, of a specific request by Petitioner for a motion to dismiss counts in the Information in 15F5736 pursuant to § 995, nor an analysis of the merits of such a motion by Attorney Ryan.

When Mr. Ryan was appointed to the Shasta County Superior Court bench, Mr. John Carelli was appointed to represent Petitioner. Rather amazing – and certainly also appalling – is that when Counsel received Petitioner's files from Mr. Carelli, Counsel found not one shred of work product that Counsel can attribute to Mr. Carelli's "efforts" on Petitioner's cases.

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<sup>2</sup> See *People v. Marsden* (1970) 2 Cal.3d 118

Critically with respect to this Petition, when Counsel received Petitioner's files in late December 2017, a transcription of the excerpt of the phone call between Petitioner and Mr. Feser on September 11, 2015 was nowhere in the file. Moreover, as Petitioner declares, he never received a copy of the transcription of the excerpt of his call with Mr. Feser until it was provided to him by Counsel in mid-March of 2018.

Counsel has worked diligently to review Petitioner's files, communicate with Petitioner, conduct investigation, and prioritize motion work in preparation of Petitioner's matters for trial. Notes from a jail visit with Petitioner on January 12, 2018 reflect in non-specific terms the need to explore the filing of Pen. Code § 995 motions in Petitioner's cases. Counsel finally requested the transcription of the excerpt of the phone call between Petitioner and Mr. Feser on or about March 1, 2018, and delivered it to Petitioner on March 19, 2018.

On March 12, 2018, Counsel filed a bail motion on Petitioner's behalf, and concurrently with the filing of the bail motion, filed a written challenge of Judge Flynn, pursuant to Code of Civil Procedure § 170.6. Following Judge Flynn's denial of the challenge, Counsel submitted a petition for a writ of mandate to this Court, and an alternative writ of mandate did issue;

Petitioner's proceedings in Superior Court were stayed until order of this Court on May 18, 2018<sup>3</sup>.

Petitioner's cases were restored to the Superior Court calendar on May 22, 2018, and Petitioner's motion pursuant to Pen. Code § 995 was filed on May 25, 2018. In Petitioner's § 995 motion, it should be noted that Counsel did not attach a transcription of the excerpt of the phone call between Petitioner and Mr. Feser, based on the assumption that the court would locate that transcript within the court's file<sup>4</sup>. The prosecution filed an opposition to Petitioner's § 995 on June 4, 2018, that does include the transcription of the phone call, which is the same transcript submitted at the preliminary examination.

When the § 995 motion was heard and denied on June 11, 2018, Counsel submitted on the transcription of the phone call provided by the prosecution; Counsel was thereafter alerted by Petitioner that the prosecution's transcription differed from the defense's in one particularly meaningful instance, and two other less critical instances. The critical contention is as follows: according to page 6 of the People's transcription, at

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<sup>3</sup> See this Court's record in C086752.

<sup>4</sup> In fact, the docket from September 1, 2016 – Exhibit D to this Petition – reflects that Exhibit 1A from the preliminary examination, the transcript, was in fact retained by the Court, despite Judge Beatty's comments at the hearing of the motion on June 11, 2018.

line 1, Petitioner says "I'm going to fucking kill you." (See Exhibit GG, People's Opposition to Defendant's 995, Exhibit A, therein.) Per Petitioner's transcription, the same audio is in fact transcribed: "I'm not fucking kidding you."<sup>5</sup> (See Exhibit EE, page 9, line 36.)

In proceedings in Petitioner's matters heard on June 18, 2018, Counsel made an oral request of Judge Beatty to re-open and reconsider the court's ruling on the § 995 motion, asking that the court review the audio of the excerpt of the phone call to make a finding on the lines in the prosecution's transcription that Petitioner was now disputing. Judge Beatty refused Counsel's request, stating that even if she clarified the transcription in the manner Counsel advanced, it would not change her view of the sufficiency of the evidence at Petitioner's preliminary examination.

#### GROUND'S FOR ISSUANCE OF THE WRIT

Petitioner seeks this Court's Order prohibiting further proceedings in all of Petitioner's cases, and directing Judge Beatty to vacate the order denying Petitioner's motion pursuant to Pen. Code § 995, subd.(a)(2)(B), and in its place, enter an order dismissing Counts One, Two and Three of the Information in 15F5736, or to take other appropriate action. Petitioner

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<sup>5</sup> From a contextual and common sense standpoint, the transcription provided by Petitioner makes much more sense, given that Mr. Feser never said that he was personally threatened by Petitioner, and certainly if he had, it would be surprising if he too was not an alleged victim in the case.

asserts that Judge Beatty erred in finding that the record of the preliminary examination provided sufficient evidence to hold Petitioner to answer to those charges.

The thrust of Petitioner's argument is simple: the record at the preliminary examination fails to show that Petitioner made a threat to kill or cause great bodily injury to the complainants in Counts One, Two and Three, as is required by Pen. Code § 422. While according to Mr. Feser, in an unrecorded portion of his phone call with Petitioner, Petitioner did threaten to kill the Fish and Wildlife Officers listed as victims in Counts Four and Five, Mr. Feser never told the officer testifying at the preliminary examination that Petitioner had specifically threatened the complainants in Counts One, Two, and Three. Moreover, in the recorded excerpt of the phone call that was admitted into the record at the hearing, Petitioner made generalized and sensational threats against police and civilians, but he never specifically threatened the complainants in Counts One, Two, and Three. A violation of Pen. Code § 422 is victim specific per the statute itself, and that requirement was ignored by both the magistrate at the preliminary examination, as well as Judge Beatty in hearing Petitioner's motion to dismiss pursuant to Pen. Code § 995.

In compliance with Pen. Code § 999a, this Petition has been served and filed within the fifteen calendar days of Judge Beatty's denial of Petitioner's § 995 motion on June 11, 2018.

Moreover, Petitioner respectfully requests that this Court find that this petition is not barred by Pen. Code § 1510 which provides, in pertinent part:

The denial of a motion made pursuant to Section 995 [ . . . ] may be reviewed prior to trial only if the motion was made by the defendant in the trial court not later than [ . . . ] 60 days following defendant's arraignment on the information [ . . . ] unless within these time limits the defendant was unaware of the issue or had no opportunity to raise the issue.

Petitioner submits that he was unaware of the issue, and furthermore, that he had no opportunity to raise the issue, given that the efforts of his various counsel have been ineffective in their collective failure to review the record at the preliminary examination and consider what is an incredibly straightforward attack on the holding order on Counts One, Two, and Three in the instant case. (See *Fleming v. Superior Court* (2010) 191 Cal.App.4th 73, 103-104 ["if there is ineffective assistance in not timely bringing a meritorious section 995 motion, then the section 995 motion may be reviewed on the merits."]).

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## PETITION

Petitioner, Mr. Robert Alan Gibbs, respectfully petitions this Court for a Writ of Prohibition directed to Respondent Court, and by this verified petition alleges that:

### I

Petitioner is the defendant in the above-entitled action now pending in Respondent Court. The plaintiff in the above-entitled action is named in this Petition as the real party in interest.

### II

A Complaint was filed on September 16, 2015, numbered B, and an Amended Complaint was filed on September 17, 2015, numbered 15-05736 ("15F5736"), correcting typographical errors in the original pleading; Petitioner was arraigned in custody on September 16, 2015, in Department One. The case finally proceeded to preliminary examination on September 1, 2016, and following a holding order, the Amended Complaint was deemed the Information by stipulation of the parties. The matter remains pending. A certified copy of the of the Amended Complaint, now Information, is lodged with this Court, made part of this Petition, and labeled Exhibit A. The certified docket reflecting Petitioner's arraignment is lodged with this Court,

made part of this Petition, and labeled Exhibit B<sup>6</sup>. The certified docket reflecting proceedings on September 1, 2016, is labeled Exhibit C. The certified Reporter's Transcript of Proceedings on September 1, 2016, is lodged with this Court, made part of this Petition, and labeled Exhibit D.

### III

Over the life of case 15F5736, both prior to, as well as following the preliminary examination, appointed counsel for Petitioner has changed for various reasons. The Public Defender Office declared a conflict in Mr. Gibbs' matters on September 21, 2015, and Attorney Robert Hammonds was appointed – a docket for that date is labeled Exhibit E. On September 29, 2015, Mr. Hammonds declared a conflict, and Attorney Joseph Ahart was appointed – a docket for that date is labeled Exhibit F. On November 13, 2015, Petitioner's *Marsden* motion was granted, relieving Attorney Ahart, and Attorney Shon Northam was appointed – a docket for that date is labeled Exhibit G.

### IV

It was Attorney Northam that represented Petitioner when 15F5736 finally went to preliminary hearing. Petitioner's first *Marsden* motion to relieve Attorney Northam was heard on December 28, 2015, and it was

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<sup>6</sup> All dockets identified as Exhibits herein are certified by the Shasta County Superior Court, and lodged with this Court and made part of this Petition.

denied by the Honorable Judge Daniel E. Flynn – a docket for that date is labeled Exhibit H. Petitioner's second *Marsden* motion to relieve Attorney Northam was heard on February 4, 2016, and it was denied by Judge Flynn – a docket for that date is labeled Exhibit I. On February 11, 2016, Attorney Northam declared a doubt as to Petitioner's competency pursuant to Pen. Code § 1368 – a docket for that date is labeled Exhibit J. On May 13, 2016, after the review of three doctors, the parties submitted on the reports, Petitioner was found competent, and criminal proceedings were reinstated – a docket for that date is labeled Exhibit K. On June 16, 2016, a *Marsden* hearing to relieve Attorney Northam was set, but dropped from calendar – a docket for that date is labeled Exhibit L. On July 8, 2016, Petitioner's third *Marsden* motion to relieve Attorney Northam was heard and denied by Judge Flynn – a docket for that date is labeled Exhibit M. On July 12, 2016, Petitioner's fourth *Marsden* motion to relieve Attorney Northam was heard and denied by Judge Flynn; on the same date, Petitioner requested a *Faretta*<sup>7</sup> hearing in order that he might represent himself, and an alienist was appointed to evaluate whether Petitioner was able to do so – a docket for that date is labeled Exhibit N. A closed hearing was held on August 10, 2016 before Judge Flynn, and Attorney Northam continued as Petitioner's counsel – a docket for that date is labeled Exhibit O.

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<sup>7</sup> See *Faretta v. California* (1975) 422 U.S. 806

After the preliminary examination, the next hearing in Petitioner's matters was September 15, 2016, a date set for Petitioner's arraignment on the Information in 15F5736 and setting of trial; at that time, Petitioner requested yet another *Marsden* motion – a docket for that date is labeled Exhibit P. On September 16, 2016, Petitioner's fifth *Marsden* motion to relieve Attorney Northam was heard and denied by Judge Flynn – a docket for that date is labeled Exhibit Q. On October 24, 2016, Petitioner's sixth *Marsden* motion to relieve Attorney Northam was heard and denied by Judge Flynn; on the same date, Petitioner renewed his *Faretta* motion to represent himself, and that motion was denied as well – a docket for that date is labeled Exhibit R.

On January 6, 2017, Petitioner came before the Honorable Judge Wilson Curle for a trial readiness conference, and Petitioner made his seventh *Marsden* motion to relieve Attorney Northam; this time, in Judge Flynn's absence, the motion was granted, Attorney Northam was relieved, and Petitioner's matters were continued for the appointment of a new attorney – a docket for that date is labeled Exhibit S.

## V

Attorney Adam Ryan was appointed to represent Petitioner on January 10, 2017 – a docket for that date is labeled Exhibit T. A trial setting was continued following an in camera hearing on Attorney Ryan's motion to continue on March 17, 2017; also on that date, Petitioner again stated his

desire to represent himself, and a hearing was set for March 21, 2017 – a docket for that date is labeled Exhibit U. On March 21, 2017, Petitioner withdrew his request for a *Faretta* waiver, and the case was continued for setting on May 22, 2017 – a docket for that date is labeled Exhibit V. On April 27, 2017, a *Marsden* hearing was placed on calendar, but was dropped from calendar when Petitioner was brought to court – a docket for that date is labeled Exhibit W. On May 22, 2017, a *Marsden* hearing was again calendared for the next day – a docket for that date is labeled Exhibit X. On May 23, 2017, however, the case was continued for the appointment of new counsel, as Attorney Ryan had been appointed to the Superior Court bench – a docket for that date is labeled Exhibit Y.

## VI

Attorney John Carelli was appointed on May 26, 2017 – a docket for that date is labeled Exhibit Z. On September 7, 2017, Attorney Carelli made a motion to be withdrawn, which was denied by Judge Flynn – a docket for that date is labeled Exhibit AA. On October 2, 2017, Petitioner's *Marsden* motion to relieve Attorney Carelli was denied by Judge Flynn – a docket for that date is labeled Exhibit BB. Petitioner's matters were sent out to a trial court before the Honorable Judge Bradley L. Boeckman on December 12, 2017, and Petitioner made another *Marsden* motion to relieve Attorney Carelli; as had been the case with Attorney Northam, before a judge other

than Judge Flynn, Petitioner's motion was granted and Attorney Carelli was relieved – a docket for that date is labeled Exhibit CC.

## VII

Present Counsel for Petitioner, the undersigned, was appointed on December 15, 2017 – a docket for that date is labeled Exhibit DD. Counsel has submitted a Declaration averring that the collective failure of Petitioner's various representatives to provide Petitioner with a transcription of the excerpt of the September 11, 2015 phone call between Petitioner and Mr. Feser until mid-March of 2018, after which Petitioner immediately demanded that Counsel file a meritorious Pen. Code § 995 motion to dismiss Counts One, Two and Three of the Information in 15F5736, would amount to ineffective assistance of counsel under *Strickland v. Washington* (1984) 466 U.S. 668, if this Court bars this Petition for extraordinary relief pursuant to Pen. Code § 1510.

## VIII

Petitioner has submitted a Declaration stating that he has repeatedly requested a transcription of the excerpt of the audio of his September 11, 2015 phone call to Mr. Feser to his various attorneys, and that said transcript was not provided to him until the latter part of March 2018, when he received it from current counsel. The transcription of the excerpt of the phone call generated by Counsel is lodged with this Court, made part of this Petition, and labeled Exhibit EE.

IX

Petitioner's motion pursuant to Pen. Code § 995 to dismiss Counts One, Two, and Three of the Information in 15F5736 was filed on May 25, 2018 - is lodged with this Court, made part of this Petition, and labeled Exhibit FF.

X

The People's response to Petitioner's § 995 motion is lodged with this Court, made part of this Petition, and labeled Exhibit GG.

XI

Petitioner's Pen. Code § 995 motion was heard by the Honorable Judge Cara L. Beatty on June 11, 2018 - a docket for that proceeding is labeled Exhibit HH. The certified Reporter's Transcript of Proceedings on June 11, 2018 is lodged with this Court, made part of this Petition, and labeled Exhibit II.

XII

In proceedings on Petitioner's matters on June 18, 2018, Counsel made an oral motion to re-open Petitioner's Pen. Code § 995 motion, which was denied by Judge Beatty - a docket for that proceeding is labeled Exhibit JJ. The certified Reporter's Transcript of Proceedings on June 18, 2018 is lodged with this Court, made part of this Petition, and labeled Exhibit KK.

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### XIII

This Petition seeks this Court's Order prohibiting further proceedings in all of Petitioner's cases, and directing Judge Beatty to vacate the order denying Petitioner's motion pursuant to Pen. Code § 995, subd.(a)(2)(B), and in its place, enter an order dismissing Counts One, Two and Three of the Information in 15F5736, or to take other appropriate action.

### XIV

Petitioner is particularly aggrieved by Respondent Court's actions, which will result in irreparable damage to Petitioner, in that Petitioner will be forced to proceed to a trial setting in case 15F5736 facing unsupported charges that undermine his bargaining position with respect to a global settlement of his pending matters. In terms of the instant case, Petitioner will be forced to defend himself against unsupported charges involving law enforcement victims that may further inflame a jury against Petitioner, and if convicted, subject him to additional exposure in prison, not to mention additional serious felony priors that could be alleged in a future felony case. Finally, the appellate remedy available to Petitioner to challenge the denial of his Pen. Code § 995 motion is inadequate because Petitioner would not be entitled to relief on appeal after judgment without showing prejudice. (*People v. Pompa-Ortiz* (1980) 40 Cal.3d 239, 264.)

As such, Petitioner seeks an order staying further proceedings in the Superior Court until a decision is issued in the instant petition. Petitioner's

matters are calendared for a trial readiness conference on July 13, 2018, at 8:15 a.m., before Judge Beatty, in Department Two of the Shasta County Superior Court (telephone at 530-225-5891), in advance of a jury trial scheduled to commence on July 17, 2018.

XV

The parties directly affected by the instant proceeding now pending in Respondent Court are Petitioner, by and through counsel; Respondent Court; and Real Party in Interest, the People of the State of California. All proceedings about which this petition is concerned have occurred within the territorial jurisdiction of Respondent Court and of this Court.

XVI

No other petition for a writ has been made by, or on behalf of Petitioner, relating to this issue.

XVII

Respondent Court should be ordered to vacate its ruling made on June 11, 2018, denying Petitioner's motion to dismiss Counts One, Two, and Three of the Information in 15F5736 pursuant to Pen. Code § 995, and instead, grant the motion.

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*Prayer for Relief*

WHEREFORE, Petitioner prays that:

1. A Preemptory Writ of Prohibition issue commanding Respondent Court to stay further proceedings in all of Petitioner's cases.
2. An Alternative Writ of Mandate issue directing and requiring Respondent Court to vacate the order denying Petitioner's motion pursuant to Pen. Code § 995, subd.(a)(2)(B), and in its place, enter an order dismissing Counts One, Two and Three of the Information in 15F5736, or in the alternative, to show cause before this Court at a specified time and place why such an order ought not issue; and that,
3. Petitioner be granted such other and further relief as may be appropriate and just.

Dated: June 26, 2018

Respectfully Submitted,



Theodore P. Somers,  
Attorney for Petitioner,  
Mr. Robert A. Gibbs

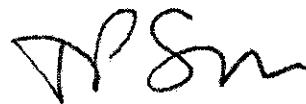
## VERIFICATION

I am an attorney licensed to practice in all court of California.

In that capacity, I was appointed to represent the Petitioner, Mr. Robert A. Gibbs, in the proceedings underlying the foregoing Petition on December 15, 2017, and make this verification on Petitioner's behalf. The facts contained in the foregoing Petition are within my personal knowledge based on my representation of Petitioner, or gleaned from certified court records with respect to those appearances for which I was not personally present. As to statements regarding those proceedings for which I was not personally present, I am informed and believe that they are true based upon my review of certified court records and my familiarity with their production and appearance.

I have read the foregoing Petition, and the exhibits attached thereto and lodged with this Court.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on June 26 2018, in Redding, California.



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Theodore P. Somers,  
Attorney for Petitioner,  
Mr. Robert A. Gibbs

MEMORANDUM IN SUPPORT OF THE WRIT PETITION

I.

PETITIONER'S MOTION TO DISMISS COUNTS ONE, TWO AND THREE OF THE INFORMATION PURSUANT TO PENAL CODE SECTION 995 WAS MERITORIOUS, BECAUSE PENAL CODE SECTION 422 IS A VICTIM SPECIFIC OFFENSE, AND THE RECORD AT PRELIMINARY EXAMINATION DOES NOT SHOW THAT PETITIONER EVER THREATENED DEATH OR GREAT BODILY INJURY TO THE COMPLAINANTS IN THE CHALLENGED COUNTS.

This Court, upon a review of the Reporter's Transcript of the preliminary examination in 15F5736 (Exhibit D), and a review of the transcription of the phone call between Petitioner and Mr. Feser in (Exhibits EE and GG, respectively) should find that nowhere in the evidence before the magistrate is a specific threat made by Petitioner to kill or cause great bodily injury to the listed complainants in Counts One, Two and Three. Consequently, given the plain language of subdivision (a) of Pen. Code § 422, the evidence at the preliminary examination was insufficient to sustain a holding order as to Counts One, Two and Three of the Information, and Petitioner's Pen. Code § 995 motion (Exhibit FF) should have been granted by Judge Beatty<sup>8</sup>.

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<sup>8</sup> Petitioner would urge this Court to evaluate this Petition using Exhibit EE, given Judge Beatty's comments on the record on June 18, 2018. (Exhibit KK, page 20, lines 19-35; and page 21, lines 1-2.

II.

THIS PETITION FOR EXTRAORDINARY RELIEF SHOULD NOT BE BARRED BY PENAL CODE SECTION 1510 BECAUSE PETITIONER WAS UNAWARE OF THE ISSUE.

Pen. Code § 1510 which provides, in pertinent part:

The denial of a motion made pursuant to Section 995 [ . . . ] may be reviewed prior to trial only if the motion was made by the defendant in the trial court not later than [ . . . ] 60 days following defendant's arraignment on the information [ . . . ] unless within these time limits the defendant was unaware of the issue.

*Strickland v. Washington* (1984) 466 U.S. 668, 687 establishes a two-prong test for ineffective assistance of counsel: first, the defendant must show that counsel's performance was deficient, and second, the defendant must show that the deficient performance prejudiced the defendant. In *Fleming v. Superior Court* (2010) 191 Cal.App.4th 73, 104 -105, the Court found that where trial counsel was ineffective in failing to pursue a meritorious motion to dismiss pursuant to Pen. Code § 995 within 60 days of the filing of the Information, then a petition for extraordinary relief should not be barred by Pen. Code § 1510. Assuming, for the sake of its analysis, that this Court finds that Petitioner's motion to dismiss pursuant to Pen Code § 995 should have been granted, then this Court should excuse the fact that the motion was filed well beyond 60 days from the date of Petitioner's

arraignment on the Information, because the performance of Petitioner's counsel here was inarguably deficient.

It goes without saying that a transcription of evidence that is in the form of an audio recording is the easiest way to review and analyze said evidence. When a case moves quickly because of a defendant's assertion of his right to a preliminary examination within the statutory period, however, audio recordings, if even in the possession of defense counsel, are often not transcribed by defense counsel.

But where as here, when Mr. Northam was appointed for some nine months before the preliminary examination, and where the audio evidence is so fundamental to the prosecution's case, the failure to secure a transcription of the audio in order to prepare Petitioner's defense is deficient. And further, given that the transcription of audio was provided to Attorney Northam at the preliminary examination, it is worse that the document was never retained in the file. (See Exhibit D: Reporter's Transcript, page 10, lines 15-17; see Declaration of Counsel.) Even more galling is that Petitioner was not afforded a transcription of the audio, despite his requests of numerous attorneys, until 18 months after the preliminary examination, and when it was finally provided, Petitioner immediately demanded that Counsel file a Pen. Code § 995 motion. (See Declaration of Petitioner, and Declaration of Counsel.)

When Petitioner identified the deficiency in the evidence at the preliminary examination to Counsel, the proceedings in his cases were currently stayed by this Court in C086752. (See Declaration of Counsel.) Counsel filed Petitioner's § 995 motion one week after this Court lifted the stay in his cases. Given that proceedings were stayed, this Court should excuse Counsel's failure to notice the motion as soon as the basis for its filing became known.

It would seem prejudicial enough that Petitioner's various counsel did not argue the deficiency of the evidence at the preliminary examination itself, nor undertake the review of the preliminary examination, spot the issue, and file the motion in a timely manner, but where Petitioner himself was so quick to identify the meritorious issue, there could be no more clear prejudice than to have this Petitioner to go to jury trial on three unsupported serious felony charges under these circumstances.

#### CONCLUSION

Penal Code § 422 is a victim-specific offense, and the evidence at the preliminary examination did not demonstrate that Petitioner made a threat of death or great bodily injury specific to the alleged victims in Counts One, Two, or Three of the Information.

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The delay in filing Petitioner's Pen. Code § 995 can only be attributed to the collective ineffectiveness of his counsel, and therefore, this Court should find that Petitioner was unaware of the issue within the meaning of Pen. Code § 1510, and grant the requested relief.

Dated: \_\_\_\_\_

Respectfully Submitted,

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Theodore P. Somers,  
Attorney for Petitioner,  
Mr. Robert Alan Gibbs

DECLARATION OF PETITIONER, ROBERT ALAN GIBBS

I, Robert A. Gibbs, am over the age of eighteen and competent to testify. If called to testify in this proceeding, I would testify as follows:

1. I am the defendant in Shasta County Superior Court case numbers 15F5736, 15F5464, 14F6355, 14F4854, and 13M4757.
2. I have been housed in Shasta County Jail since my arraignment in 15F5736 and 15F5464 on September 16, 2015.
3. I am currently represented by Attorney Theodore Somers, who is the sixth conflict public defender that I have had since my arraignment in 15F5736.
4. I have found it exceedingly difficult to get my appointed counsel to communicate with me in the preparation of defenses to my cases.
5. Aside from Mr. Robert Hammonds, who himself declared a conflict of interest shortly after his appointment, I have been dissatisfied with my counsel's efforts, and have had to resort to *Marsden* motions in an attempt to effectuate my Sixth Amendment rights.
6. I have found Mr. Somers to be significantly more responsive to my cause, but still I have misgivings about the speed in which he has prepared my cases.
7. For months prior to the preliminary examination in 15F5736, and consistently since, I have asked each of my various counsel on more than one occasion to provide me with a transcription of an audio

recording, the excerpt of my conversation with Deputy Attorney General John Feser on September 11, 2015.

8. None of my various attorneys, or their investigators, have played for me the audio of the excerpt of my conversation with Deputy Attorney General John Feser on September 11, 2015.
9. During the prosecution's presentation of evidence at my preliminary examination on September 1, 2016, I was not in the courtroom – the Reporter's Transcript of those proceedings demonstrates as much. Therefore, I did not hear the audio of the excerpt of my conversation with Mr. Feser at that time.
10. The above transcription of the excerpt of my phone call with Mr. Feser was finally provided to me by Mr. Somers by "jail mail" on or about March 19, 2018.
11. Upon my review of the transcript, I immediately noticed that the transcript does not show that I threatened the deputies listed as the complainants in Counts One, Two and Three with death or great bodily injury. I then cross-referenced the Reporter's Transcript of the Proceedings of the preliminary examination, and found that there was no other evidence of a specific threat to those complainants elicited by the prosecution.

12. At my next jail visit with Mr. Somers, I highlighted this issue and demanded that he file a Pen. Code § 995 motion to dismiss Counts One, Two, and Three of the Information in 15F5736.

13. I pray that this Court undertake a review of the Honorable Judge Beatty's denial of my Pen. Code § 995 motion on the merits, because I was unaware of the grounds for the motion until I received the transcript. Moreover, I do not believe that I can get a fair hearing on this or other issues before the bench officers in Shasta County Superior Court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, except as to those matters stated under information and belief for which I believe to be true, and that this declaration was executed on June 26<sup>th</sup>, 2018, at Redding, California.

Robert A. Gibbs

Robert A. Gibbs

5. The review of hundreds of pages of discovery, reports of court-appointed alienists, letters from Petitioner to his various predecessor counsel and others, as well as numerous petitions for writs of habeas corpus challenging conditions of Petitioner's confinement in Shasta County Jail, took many, many more hours of my time.
6. When I received the files, a copy of Exhibit 1A, the transcription of the audio of the excerpt of a phone call between Petitioner and Deputy Attorney General John Feser on September 11, 2015, which was introduced at the preliminary examination, was not located.
7. Other basic evidence and/ or work product that I would have expected to find in Petitioner's files -- pending for years and sent into a trial department on two occasion -- was not present, including (1) a transcription of the recorded interview of Petitioner on September 11, 2015, by investigators with the Shasta County Sheriff's Office, with respect to 15F5736, (2) the photos taken by investigating officers in a domestic violence case, 15F5464, for which Petitioner was arraigned on September 16, 2015, (3) the certified court records of the convictions of the complainant in 15F5464 for two violations of Pen. Code § 288(a), which would be obviously necessary impeachment of that witness at trial, (4) a transcription of a recorded interview on April 3, 2015 of then a witness in a prior pending case, now the complainant in 15F5464, with a deputy district attorney and his investigator.

Moreover, I found not a single witness statement taken by a defense investigator in any of the felony matters.

8. The work product of Mr. Shon Northam – attorney of record at Petitioner's preliminary examination in 15F5736, and overall for roughly thirteen months – includes two work-product memos from his investigator regarding Petitioner's requests for discovery and services, as well as case notes from three appearances in court.
9. Mr. Ryan's work-product is more substantive, and reflects court appearances, correspondence with Petitioner, and requests for expert services, but critical with respect to this motion, there is no evidence of a specific request by Petitioner for a motion to dismiss counts in the Information in 15F5736 pursuant to § 995, nor an analysis of the merits of such a motion by Attorney Ryan. Furthermore, as stated above, there was no transcription of the audio of the excerpt of Petitioner's phone call with Mr. Feser in the file to illuminate the issue finally advanced by Petitioner in his Pen. Code § 995 motion.
10. When Mr. Ryan was appointed to the Shasta County Superior Court bench, Mr. John Carelli was appointed to represent Petitioner. I found no work-product at all generated by Mr. Carelli, the attorney immediately preceding my appointment.
11. When I initially met with Petitioner, I found him to be depressed, exasperated, and full of ideas.

12. Counsel has worked diligently to communicate with Petitioner, conduct investigation, and prioritize motion work in preparation of Petitioner's matters for trial. Notes from a jail visit with Petitioner on January 12, 2018 reflect the request to explore the filing of Pen. Code § 995 motions in Petitioner's cases in a non-specific nature. Counsel finally requested the transcription of the excerpt of the phone call between Petitioner and Mr. Feser on March 1, 2018, and delivered it to Petitioner on or about March 19, 2018.

13. Proceedings were stayed by this Court in C086752 on March 29, 2018, and remained stayed until May 18, 2018.

14. Counsel generated the Pen. Code § 995 motion in 15F5736 after being apprised of the issue in a jail visit with Petitioner, while the proceedings in his cases were stayed.

15. When the § 995 motion was heard and denied on June 11, 2018, Counsel submitted on the transcription of the phone call provided by the prosecution – an error pointed out to Counsel by Petitioner in a jail visit on June 17, 2018. The critical contention, pointed out to Judge Beatty on June 18, 2018, is as follows: according to page 6 of the People's transcription, at line 1, Petitioner says "I'm going to fucking kill you." (See Exhibit GG, People's Opposition to Defendant's 995, Exhibit A, therein.) Per Petitioner's transcription, the same audio is in fact transcribed: "I'm not fucking kidding you."

(See Exhibit EE, page 9, line 36.) Counsel, given familiarity with the cadence and inflection of Petitioner's speech, is very confident of the accuracy of EE, as opposed to the transcript contained in GG, and admitted at the preliminary examination.

16. In preparation for the filing of this Petition, Counsel has confirmed with court staff that the transcript found in Exhibit GG to this Petition is in fact the same transcript housed in the court's file as Exhibit 1A from the preliminary examination on September 1, 2016.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, except as to those matters stated under information and belief for which I believe to be true, and that this declaration was executed on March 20, 2018, at Redding, California.

A handwritten signature in black ink, appearing to read 'TPS', written over a horizontal line.

Theodore P. Somers

CERTIFICATION OF WORD COUNT

RULE 8.204(c)

Theodore P. Somers declares:

I am an attorney licensed to practice law in the State of California, and I have been appointed to represent Mr. Robert Alan Gibbs in the criminal matters underlying this Petition.

I certify that this Petition contains 7,657 based upon the computer program used to create it: Microsoft Word 2016.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 26 2018, at Redding, California.



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Theodore P. Somers,  
Attorney for Petitioner,  
Mr. Robert Alan Gibbs