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Proposition 115 Preliminary Hearings: Sacrificing Reliability on the Altar of Expediency

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Proposition 115 Preliminary Hearings: Sacrificing Reliability on the Altar of Expediency?

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INTRODUCTION

On June 5, 1990, the voters of California passed Proposition 115, the Crime Victims Justice Reform Act.[1] Proposition 115 includes statutory and constitutional provisions that significantly affect preliminary hearings.[2] This Article discusses the impact of these changes on the effectiveness of preliminary hearings as a

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1. Crime Victims Justice Reform Act, Initiative Measure Prop. 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14.1, 24, 29, 30; CAL. CIV. PROC. CODE §§ 223, 223.5 (West Supp. 1992); CAL. EVID. CODE § 1203.1 (West Supp. 1992); CAL. PENAL CODE §§ 189, 190.2, 190.41, 190.5, 206, 206.1, 859, 866, 871.6, 872, 954.1, 987.05, 1049.5, 1050.1, 1054, 1054.1, 1054.2, 1054.3, 1054.4, 1054.5, 1054.6, 1054.7, 1102.5, 1102.7, 1385.1, 1430, 1511 (West Supp. 1992)). Proposition 115 was passed by 57% of the voters of California on June 5, 1990, at a cost of approximately $800,000. L.A. Times, Aug. 2, 1990, at 29, col. 1; Nat'l L.J., June 18, 1990, at 3.

2. *See* CAL. CONST. art. I, § 30(b); CAL. EVID. CODE § 1203.1 (West Supp. 1992); CAL. PENAL CODE §§ 866, 872(b) (West Supp. 1992). In addition to preliminary hearings, Proposition 115 addressed a variety of criminal law and procedure topics, such as jury voir dire, speedy trials, discovery, joinder and severance of cases, first degree and special circumstance murder, increased penalties for murder, the crime of torture, post-indictment preliminary hearings, appointment of counsel, continuances, and a prohibition against interpreting the California Constitution to afford criminal defendants greater constitutional protections than those afforded by the United States Constitution. Crime Victims Justice Reform Act, Initiative Measure Prop. 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14.1, 24, 29, 30; CAL. CIV. PROC. CODE §§ 223, 223.5 (West Supp. 1992); CAL. EVID. CODE § 1203.1 (West Supp. 1992); CAL. PENAL CODE §§ 189, 190.2, 190.41, 190.5, 206, 206.1, 859, 866, 871.6, 872, 954.1, 987.05, 1049.5, 1050.1, 1054, 1054.1, 1054.2, 1054.3, 1054.4, 1054.5, 1054.6, 1054.7, 1102.5, 1102.7, 1385.1, 1430, 1511 (West Supp. 1992)).

screening device to determine whether a felony case should proceed to trial.

Part I describes the history and importance of preliminary hearings as a screening device in California.[3] Part II examines the purposes and content of Proposition 115's modifications to preliminary hearings.[4] Part III identifies issues of interpretation that arise from, but are not resolved by, the language of the initiative.[5] Part III then explores possible resolutions to these issues in light of Proposition 115's goals.[6] This section identifies various alternatives available to magistrates who must implement Proposition 115 and analyzes the implications of these alternatives with reference to the purpose of preliminary hearings.[7] Part IV discusses how Proposition 115 affects the usefulness of preliminary hearings as a screening device.[8] This Article concludes that Proposition 115 sacrifices reliability to convenience and speed.[9]

I. THE NATURE AND IMPORTANCE OF THE SCREENING FUNCTION OF PRELIMINARY HEARINGS BEFORE THE PASSAGE OF PROPOSITION 115

A. The Basic Nature of Preliminary Hearings in California

A preliminary hearing is an adversarial proceeding[10] held before a presiding municipal court magistrate shortly after a defendant has been formally accused of a felony by way of a

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3. *See infra* notes 10-41 and accompanying text.
4. *See infra* notes 42-61 and accompanying text.
5. *See infra* notes 62-179 and accompanying text.
6. *See infra* notes 62-179 and accompanying text.
7. *See infra* notes 62-179 and accompanying text.
8. *See infra* notes 180-189 and accompanying text.
9. *See infra* notes 190-191 and accompanying text.
10. *See* Mills v. Superior Court, 42 Cal. 3d 951, 957, 728 P.2d 211, 214, 232 Cal. Rptr. 141, 144 (1986) (indicating the importance of adversarial proceedings); Hawkins v. Superior Court, 22 Cal. 3d 584, 588-89, 586 P.2d 916, 918-19, 150 Cal. Rptr. 435, 437-38 (1978) (discussing the nature of preliminary hearings); Jones v. Superior Court, 4 Cal. 3d 660, 667, 483 P.2d 1241, 1244, 94 Cal. Rptr. 289, 292 (1971) (discussing the preliminary hearing procedure); Jennings v. Superior Court, 66 Cal. 2d 867, 879, 428 P.2d 304, 312, 59 Cal. Rptr. 440, 448 (1967) (specifying the purpose of preliminary hearings).

criminal complaint.[11] The acknowledged purpose of preliminary hearings, both before and after the adoption of Proposition 115, is to protect a person accused of crime from government excess and unsubstantiated charges.[12] Before the case may be set for trial, a prosecutor must present sufficient evidence to persuade a magistrate that probable cause exists to believe that a felony has

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11. CAL. PENAL CODE § 859 (West Supp. 1992). The hearing is recorded and, if probable cause is established, it is transcribed. *Id.* § 869 (West Supp. 1992). Preliminary hearings have served as a screening device for felony cases in California since the 1880's. *See* Kalloch v. Superior Court, 56 Cal. 229, 241 (1880) (recognizing the preliminary hearing as a legal and constitutional alternative to indictment by grand jury); Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that California's preliminary hearing procedure complies with the Due Process Clause of the fourteenth amendment to the United States Constitution as an alternative to indictment by grand jury). For discussion regarding the origins of preliminary hearings, see *Johnson v. Superior Court*, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975) (Mosk, J., concurring); P. Weinberg & R. Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361 (1969); and 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1364 (Chadburn rev. ed. 1974). Indictment by grand jury developed concurrently with the preliminary hearing as an alternate method for determining whether a criminal case should be pursued. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 8.2 (1985).

12. Jaffe v. Stone, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941). The Supreme Court of California stated in *Jaffe*: "The purpose of the preliminary hearing is to weed out groundless or unsupported charges" and "to relieve the accused of the degradation and the expense of a criminal trial." *Id. See* People v. Superior Court (Mendella), 33 Cal. 3d 754, 759, 661 P.2d 1081, 1083-84, 191 Cal. Rptr. 1, 3-4 (1983) (holding that the sufficiency of sentence enhancement allegations could be challenged by a motion to dismiss pursuant to California Penal Code § 995, and stating that "together the preliminary hearing and the section 995 motion operate as a judicial check on the exercise of prosecutorial discretion"). *See also* Mills v. Superior Court, 42 Cal. 3d 951, 956, 728 P.2d 211, 213, 232 Cal. Rptr. 141, 143 (1986) (addressing the pre-Proposition 115 version of California Penal Code § 872, which allowed the prosecution to offer hearsay evidence in the form of affidavits at preliminary hearings, and held that the defendant could not be required to produce the witnesses against him or forfeit the right to cross-examine them); Jones v. Superior Court, 4 Cal. 3d 660, 668, 483 P.2d 1241, 1245, 94 Cal. Rptr. 289, 293 (1971) (holding that the prosecution could not ignore a magistrate's factual findings in a rape case that the complaining witness had consented to intercourse by refiling the rape charges on an information in superior court); Jennings v. Superior Court, 66 Cal. 2d 867, 879, 428 P.2d 304, 312, 59 Cal. Rptr. 440, 448 (1967) (holding that a defendant has a right to present an affirmative defense at a preliminary hearing); People v. Elliot, 54 Cal. 2d 498, 504, 354 P.2d 225, 229, 6 Cal. Rptr. 753, 757 (1960) (holding that the magistrate denied the defendant a substantial right at the preliminary hearing by permitting an unauthorized person to remain in the courtroom during the preliminary hearing over the defendant's objection); Mitchell v. Superior Court, 50 Cal. 2d 827, 829, 330 P.2d 48, 50 (1958) (holding that the magistrate conducting the preliminary hearing erred in denying the defendants access to the names of two informants); People v. Bucher, 175 Cal. App. 2d 343, 346-47, 346 P.2d 202, 204-05 (1959) (holding that the postponement of a preliminary hearing over the objection of the defendant resulted in an illegal commitment).

been committed and that the defendant is the perpetrator.[13] Defense counsel is permitted to accompany the defendant,[14] cross-examine witnesses,[15] and present evidence.[16] Issues other than probable cause that have an impact on the case are routinely addressed at the preliminary hearing.[17]

In determining whether there is legally sufficient evidence to justify a felony trial, magistrates must "weigh the evidence, resolve

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13. CAL. PENAL CODE § 872 (West Supp. 1992). *See* People v. Uhlemann, 9 Cal. 3d 662, 667, 511 P.2d 609, 613, 108 Cal. Rptr. 657, 661 (1973); Rideout v. Superior Court, 67 Cal. 2d 471, 473, 432 P.2d 197, 199, 62 Cal. Rptr. 581, 583 (1967). For the prosecutor to meet his burden, some evidence of each element of the crime(s) charged must be established. Williams v. Superior Court, 71 Cal. 2d 1144, 1148, 458 P.2d 987, 990, 80 Cal. Rptr. 747, 750 (1969); W. LA FAVE & J. ISRAEL, *supra* note 11, at § 23.3 (1985).

14. *See* CAL. PENAL CODE §§ 859, 860 (West 1985 & Supp. 1992) (permitting a defendant reasonable time to obtain counsel). *See also* CAL. CONST. art. I, §15.

15. *See* CAL. PENAL CODE § 865 (West 1985); Jones v. Superior Court, 4 Cal. 3d 660, 667, 483 P.2d 1241, 1245, 94 Cal. Rptr. 289, 293 (1971); Jennings v. Superior Court, 66 Cal. 2d 867, 875, 428 P.2d 304, 309, 59 Cal. Rptr. 440, 445 (1967). *McDaniel v. Superior Court*, 55 Cal. App. 3d 803, 126 Cal. Rptr. 136 (1976), established the defense's right to cross-examine witnesses even though cross-examination would lead to discovery. *Id.* at 805, 126 Cal. Rptr. at 137. The right to cross-examine at preliminary hearings is the same right ensured at trial. Alford v. Superior Court, 29 Cal. App. 3d 724, 728, 105 Cal. Rptr. 713, 715 (1972).

16. The pre-Proposition 115 Penal Code declared that "[w]hen the examination of witnesses on the part of the people is closed, any witnesses the defendant may produce must be sworn and examined." CAL. PENAL CODE § 866 (West 1985). *See Jennings*, 66 Cal. 2d at 875-76, 428 P.2d at 309-10, 59 Cal. Rptr. at 445-46 (confirming the right of the defense to present an affirmative defense at preliminary hearings). Proposition 115 amended section 866 to limit the presentation of defense evidence. *See* CAL. PENAL CODE § 866 (West Supp. 1992). California historically has afforded many procedural and substantive protections to the defendant at the preliminary hearing. *Jennings*, 66 Cal. 2d at 875-78, 428 P.2d at 309-13, 59 Cal. Rptr. at 445-49; Hawkins v. Superior Court, 22 Cal. 3d 584, 587, 586 P.2d 916, 917, 150 Cal. Rptr. 435, 436 (1978). In contrast, a grand jury hearing, the alternative to a preliminary hearing, is a nonadversarial proceeding wherein evidence is presented by a prosecutor to grand jurors, who need not have any legal training. CAL. PENAL CODE §§ 893, 923, 935 (West 1985). Neither the defendant nor defense counsel are present. *See id.* § 939 (West 1985). Therefore, the defense does not have an opportunity to confront or cross-examine witnesses or present evidence. *Id.* § 939.7 (West 1985). For this reason, the Supreme Court of California held, in 1978, that all defendants indicted by a grand jury were entitled to a post-indictment preliminary hearing. *Hawkins*, 22 Cal. 3d at 593, 586 P.2d at 922, 150 Cal. Rptr. at 441. Proposition 115 eliminated the defense right to a post-indictment preliminary hearing. *See* CAL. CONST. art. I, § 14.1. *See* Bowens v. Superior Court, 1 Cal. 4th 36, 820 P.2d 600, 2 Cal. Rptr. 2d 376 (1991) (upholding Proposition 115's abolition of post-indictment preliminary hearings).

17. Among other matters that may be heard at preliminary hearings are motions to suppress evidence because of an illegal search or an illegally obtained confession, motions to disclose the identity of informants, and motions to reduce bail.

conflicts, and give or withhold credence to particular witnesses.'"[18] Magistrates may exercise their discretion to hold the defendant to answer all charges listed on the complaint, hold the defendant to answer any additional charges supported by the evidence,[19] or dismiss charges unsupported by the evidence.[20] In California, magistrates also have two somewhat unusual powers. A magistrate's factual findings supporting a determination of a lack of probable cause regarding a felony charge prevent the prosecutor from including that charge on an information.[21] In addition, when a defendant is charged with a felony that can also be charged as a misdemeanor, magistrates have the discretion to reduce the felony to a misdemeanor.[22] Unless magistrates find no probable cause to support either a misdemeanor or felony offense, a defendant can remain incarcerated until trial.[23]

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18. Johnson v. Superior Court, 15 Cal. 3d 248, 252, 539 P.2d 792, 794, 124 Cal. Rptr. 32, 34 (1975); Jones v. Superior Court, 4 Cal. 3d 660, 667, 483 P.2d 1241, 1245, 94 Cal. Rptr. 289, 293 (1971); People v. Schuber, 71 Cal. App. 2d 773, 775, 163 P.2d 498, 499 (1945).

19. *See* CAL. PENAL CODE § 872 (West Supp. 1992).

20. *Id.* § 871 (West 1985).

21. *Jones*, 4 Cal. 3d at 666, 483 P.2d at 1244, 94 Cal. Rptr. at 292. An information is a pleading similar to a felony complaint that prosecutors file in superior court following a probable cause determination. CAL. PENAL CODE § 949 (West Supp. 1992). A prosecutor may add charges to the information in addition to those on the original felony complaint. *Id.* § 739 (West 1985). A prosecutor may, under certain circumstances, refile charges dismissed by a magistrate at a preliminary hearing. *Id.* §§ 1387(a)-(b), 1387.1(a) (West Supp. 1992).

22. CAL. PENAL CODE § 17(b)(5) (West Supp. 1992). Section 17(b)(5) provides as follows:

> (b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: . . . (5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

Id. Criteria for such a reduction include the nature of the alleged offense and the background of the defendant. Esteybar v. Municipal Court, 5 Cal. 3d 119, 123 n.2, 485 P.2d 1140, 1142 n.2, 95 Cal. Rptr. 524, 526 n.2 (1971). If a magistrate reduces all of the charges on the complaint to misdemeanors, a trial date on a misdemeanor complaint will be set in municipal court. CAL. PENAL CODE § 1462 (West 1985). If some felony charges remain, both the felonies and misdemeanors will be tried on an information filed in superior court. People v. Clark, 17 Cal. App. 3d 890, 896, 95 Cal. Rptr. 411, 414 (1971).

23. *See* CAL. PENAL CODE §§ 1268-1281a (West 1985 & Supp. 1992). Defendants may be required to post bail or secure a bond to remain out of custody during the pendency of a felony prosecution. *See id.* Defendants who cannot do so and who are not released on their own recognizance must remain in custody.

B. Special Characteristics of Pre-Proposition 115 Preliminary Hearings

Before the passage of Proposition 115, preliminary hearings were governed by the same rules of evidence applicable at trial.[24] Most importantly, hearsay[25] was inadmissible unless an offered hearsay statement[26] met the foundational requirements of a specific exception to the hearsay rule.[27] When an offered statement included several levels of hearsay, each level of hearsay had to meet the requirements of an exception to the hearsay

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24. Mills v. Superior Court, 42 Cal. 3d 951, 960, 728 P.2d 211, 216, 232 Cal. Rptr. 141, 146 (1986); People v. Schuber, 71 Cal. App. 2d 773, 775, 163 P.2d 498, 499 (1945); *In re* Williams, 52 Cal. App. 566, 568, 199 P. 347, 349 (1921). *See* CAL. EVID. CODE § 300 (West 1987) (describing the applicability of the evidence code to all count actions unless otherwise indicated). However, the best evidence rule does not apply to preliminary hearings. CAL. PENAL CODE § 872.5 (West 1985). The foundations for the rules of evidence can be traced back to Aristotle, who proposed the criteria of relevance, materiality, and competence. R. RIEKE & R. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 31 (1990).

25. Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." CAL. EVID. CODE § 1200(a) (West 1987).

26. A "statement" is an "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." *Id.* § 225 (West 1987).

27. *Id.* § 1200(b) (West 1987). California recognizes many specific exceptions to the hearsay rule. *See id.* §§ 1220-1350 (West 1987 & Supp. 1992). California has no equivalent to Federal Rule of Evidence 803(24), a statutory residual hearsay exception authorizing the admission of hearsay statements not covered by a specific exception. FED. R. EVID. 803(24). There is some authority for the proposition that a judge has the discretion to admit hearsay not qualifying under a specific exception if the statement is trustworthy and there is a need to resort to the statement. *See* E. IMWINKELRIED, R. WYDICK & J. HOGAN, CALIFORNIA EVIDENTIARY FOUNDATIONS 238 (1988). The hearsay rule prevents witnesses from testifying to statements they made out of court but is not applicable to out-of-court statements not offered for the truth of their contents. CAL. EVID. CODE § 1200 (West 1987). The rule against hearsay can be traced back to the seventeenth century. *See* J. WIGMORE, *supra* note 11, at § 1364. Proposition 115 provides for the admissibility of hearsay at preliminary hearings. CAL. CONST. art. I, § 30(b); CAL. PENAL CODE § 872(b) (West Supp. 1992). Proposition 115 did not affect the hearsay rule governing evidence presented to the grand jury; hearsay remains inadmissible. CAL. PENAL CODE § 939.6 (West 1985). In contrast, hearsay is admissible in federal courts at preliminary hearings and before the grand jury. FED. R. CRIM. P. 5.1; FED. R. EVID. 1101(d)(2),(3).

rule.[28] Most hearsay exceptions required some showing of reliability, and some required a showing of necessity.[29]

Pre-Proposition 115 preliminary hearings served important purposes in addition to determining whether the evidence justified a felony trial. First, preliminary hearings provided a method for the defense to obtain discovery.[30] By cross-examining witnesses and presenting evidence, the defense typically was able to obtain otherwise undiscoverable information about the prosecution's case.[31] Second, preliminary hearings provided an opportunity for prosecutors to evaluate the reliability and credibility of prosecution witnesses during their testimony under trial-like conditions. Third, preliminary hearings helped preserve the testimony of witnesses who later became unavailable at trial.[32] Finally, preliminary hearings facilitated the impeachment of witnesses at trial who testified inconsistently with their preliminary hearing testimony.[33] As a result, pre-Proposition 115 preliminary hearings facilitated the

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28. CAL. EVID. CODE § 1201 (West Supp. 1992). This is referred to as "multiple hearsay." *Id.*

29. Idaho v. Wright, 110 S. Ct. 3139, 3152 (1990); Ohio v. Roberts, 449 U.S. 56, 65-66 (1980); E. IMWINKELRIED, R. WYDICK & J. HOGAN, *supra* note 27, at 238. *But see* White v. Illinois, 112 S. Ct. 736, 743 (1992) (holding that when a hearsay statement falls within a firmly rooted exception to the hearsay rule, the declarant need not be unavailable).

30. Hawkins v. Superior Court, 22 Cal. 3d 584, 588, 586 P.2d 916, 919, 150 Cal. Rptr. 435, 438 (1978) (discussing *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970), which held that a preliminary hearing is a "critical stage" in the criminal process); Mitchell v. Superior Court, 50 Cal. 2d 827, 830, 330 P. 2d 48, 50 (1958); Priestly v. Superior Court, 50 Cal. 2d 812, 819, 330 P.2d 39, 43 (1958); McDaniel v. Superior Court, 55 Cal. App. 3d 803, 805, 126 Cal. Rptr. 136, 137 (1976). Magistrates had the power to order the prosecution to provide discovery to the defense even before preliminary hearings to facilitate the determination of probable cause. Holman v. Superior Court, 29 Cal. 3d 480, 485-86, 629 P.2d 14, 17, 174 Cal. Rptr. 506, 509 (1981). Proposition 115 explicitly prohibits using the preliminary hearing as a discovery device. CAL. PENAL CODE § 866(b) (West Supp. 1992).

31. *See McDaniel*, 55 Cal. App. 3d at 805, 126 Cal. Rptr. at 137 (holding that the preliminary hearing magistrate erred in restricting defense examination of witnesses); *Mitchell*, 50 Cal. 2d at 829, 330 P.2d at 50 (holding that the defense was entitled at the preliminary hearing to obtain the names of informants who were material witnesses).

32. *See* CAL. EVID. CODE § 1291(a) (West 1987). *See also* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (finding assistance of counsel is necessary at preliminary hearings to cross-examine witnesses and preserve testimony for use at trial).

33. CAL. EVID. CODE § 1235 (West 1987). *See Coleman*, 399 U.S. at 9 (finding assistance of counsel is necessary at preliminary hearings to discover impeachment evidence for use at trial); *Junior High Teacher Acquitted of Charge He Raped Woman, 21*, San Diego Union, July 9, 1991, § B, at 3 (reporting that, according to defense counsel, the jury acquitted the defendant because a witness' testimony at trial was inconsistent with her testimony at the preliminary hearing).

prosecutor's rejection of cases or charges not meriting a felony trial,[34] the defense's identification of appropriate pretrial motions,[35] and the ability of both prosecutors and defense counsel to evaluate the evidence for purposes of plea negotiations and trial preparation.[36]

The variety of purposes served by pre-Proposition 115 preliminary hearings enabled proponents of the pre-Proposition 115 procedures to support the hearings on both fairness and efficiency grounds. The hearings typically required little judicial time compared to the resources required to conduct felony jury trials.[37] The rules of evidence assured the same degree of reliability in the evidence offered at a preliminary hearing as the evidence offered at trial. Screening out appropriate cases early saved the taxpayers the expense of financing prosecution, court-appointed defense counsel, and court resources for unnecessary investigation, pretrial

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34. Prosecutors assess the testimony and other evidence to determine what charges to list on the information filed in superior court. Prosecutors may list charges on the information that are supported by the evidence introduced at a preliminary hearing, whether or not those charges were originally listed on the complaint filed in municipal court. CAL. PENAL CODE § 739 (West 1985).

35. Among other pretrial motions, the defense can challenge a magistrate's probable cause determination by pretrial motion in superior court. CAL. PENAL CODE § 995(a)(2)(B) (West 1985). The superior court is limited, however, to determining whether a probable cause finding was based on legally competent evidence. A judge may not reevaluate the facts or redetermine the credibility of witnesses presented to a magistrate. Jones v. Superior Court, 4 Cal. 3d 660, 667, 483 P.2d 1241, 1245, 94 Cal. Rptr. 289, 293 (1971); Rideout v. Superior Court, 67 Cal. 2d 471, 474, 432 P.2d 197, 199, 62 Cal. Rptr. 581, 583 (1967). Prosecutors can also challenge the magistrate's findings. CAL. PENAL CODE § 871.5 (West 1985). Prosecutors examine preliminary hearing transcripts to determine what position to take in responding to defense motions.

36. Jennings v. Superior Court, 66 Cal. 2d 867, 875, 428 P.2d 304, 309-10, 59 Cal. Rptr. 440, 445-46 (1967); Mitchell v. Superior Court, 50 Cal. 2d 827, 830, 330 P.2d 48, 50 (1958); Coleman v. Alabama, 399 U.S. 1, 9 (1970).

37. Preliminary hearings involve examining witnesses and presenting arguments from counsel. Typical preliminary hearings consume an hour or two of court time, as opposed to days or weeks for jury trials. In practice, "[t]he testimony heard at the preliminary hearing is often that of the prosecution only. The defense may remain silent if it appears that reasonable or probable cause to commit has been established." People v. Elliot, 54 Cal. 2d 498, 504, 354 P.2d 225, 229, 6 Cal. Rptr. 753, 758 (1960). Most preliminary hearings are heard within days or weeks of the alleged offense. A trial could occur months or years after the alleged offense. At trial, the prosecution has the burden of establishing guilt beyond a reasonable doubt, as opposed to establishing probable cause at a preliminary hearing. People v. Uhlemann, 9 Cal. 3d 662, 667, 511 P.2d 609, 612, 108 Cal. Rptr. 657, 660 (1973). Because of this heavier burden, prosecutors present all available persuasive evidence to a jury or trial judge. The defense often presents defense witnesses and evidence. A felony jury trial also involves jury selection, opening statements, closing arguments, jury instructions, and jury deliberations.

motions, trial preparation, and trial.[38] Early screening also saved witnesses the inconvenience and uncertainty of waiting to testify at trial and relieved defendants of months or years of humiliation, financial expense, and pretrial incarceration.[39] Despite mistakes and some egregious cases that may be aberrations,[40] preliminary hearings were designed as an effective screening mechanism that

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38. "In California, the average cost per case-related minute (judge plus indirect court costs) is $7.52, or $2,588.00 per case related day." JUDICIAL COUNCIL OF CALIFORNIA, 1989 ANNUAL REPORT 73 (cited in *Crime Victims Justice Reform Act: Joint Hearing on Proposition 115 Before Senate Committee on Judiciary and Assembly Committee on Public Safety*, Calif. Legislature, pt. 4, at 6 (1989) (statement of economist C. Daniel Vencill, Ph.D.) [hereinafter *Joint Hearing on Proposition 115*]). A typical felony trial, lasting five days, consumes approximately $12,940.00 in court costs. This figure does not include the pretrial and trial costs for prosecutors, public defenders, staff, investigation, and indirect costs. In contrast, an average two-hour preliminary hearing costs less than $1,000. Before Proposition 115 only a small percentage of felony cases proceeded to trial. For the 1989-1990 fiscal year, approximately 94.88% of felony cases in California's superior courts were settled before trial. JUDICIAL COUNCIL OF CALIFORNIA, 1991 ANNUAL REPORT 55. Ninety-three and three-tenths percent of the settled cases resulted in guilty pleas to felonies, 1.7% resulted in guilty pleas to misdemeanors, and 5.4% of the cases were dismissed or transferred. *Id.* Of the 5.12% of cases that proceeded to trial, 77.3% resulted in felony convictions, 5.4% in misdemeanor convictions, and 17.3% in acquittals, dismissals or other dispositions. *Id. See Joint Hearing on Proposition 115, supra*, pt. 4, at 5 (statement of economist C. Daniel Vencill, Ph.D., referring to felony cases); *id.* pt. 1, at 67 (statement of Gary Yancey, District Attorney of Contra Costa). *See also* W. LAFAVE & J. ISRAEL, *supra*, note 11, at § 23.3. Despite the low percentage of trials, from 1986 through 1990 there was an average backlog of 14 criminal cases awaiting trial per authorized superior court judge. JUDICIAL COUNCIL OF CALIFORNIA, 1991 ANNUAL REPORT 70. A full utilization of Proposition 115 could result in an increase in jury trials with a corresponding increase in cost.

39. Pre-Proposition 115 preliminary hearings could screen out weak or insufficient cases. Strong cases were more likely to end in an early guilty plea since defendants were able to listen to witnesses testify against them at preliminary hearings.

40. *See* Graham & Letwin, *The Preliminary Hearings in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A. L. REV. 635 (1971). Proponents of Proposition 115 refer to the McMartin child abuse case in Los Angeles as a reason why the criminal justice system required reform. The McMartin case involved a 20-month preliminary hearing on a felony complaint listing 208 charges involving 41 children against seven defendants. L.A. Times, Jan. 13, 1990, at 1. The magistrate held all defendants to answer on 135 charges. *Id.* However, the prosecutor listed only 100 charges on the information filed in superior court, of which 65, involving two of the original seven defendants, were ultimately tried before a jury. *Id.* After two trials and an expenditure of over $15 million in public funds, no convictions were obtained. *Id.* One of the defendants remained in custody for five years, unable to post bail. *Id. See also* J. Wechter, *California's De Facto Criminal Court*, 6 CALIF. LAW. No. 4, at 40 (1986) (discussing the McMartin case and pre-Proposition 115 attempts to modify the preliminary hearings). McMartin was the longest trial in United States history. L.A. Daily J., Aug. 14, 1991, at 2. However, the screening benefits of the preliminary hearing may have reduced the total trial time. Rather than a trial of 65 counts against two defendants, the trial judge might have had to preside over the original 208 counts against seven defendants. In addition, all seven original defendants might have remained in pretrial detention throughout several years of proceedings.

prosecutors preferred long before the Supreme Court of California no longer gave them a choice.[41]

II. PROPOSITION 115'S CHANGES

Proposition 115 does not change the preliminary hearing's primary purpose of protecting defendants from excessive and unsubstantiated charges. However, Proposition 115 creates new objectives that are inconsistent with some of the subsidiary goals of pre-Proposition 115 preliminary hearings.[42] Accordingly, Proposition 115 expressly prohibits the use of preliminary hearings for discovery, allows the use of hearsay, and limits the introduction of defense testimony.[43] This section describes these changes.

A. The Purpose of Preliminary Hearings After Proposition 115

Under Proposition 115, the magistrate's primary function is still to determine whether probable cause exists to believe a felony has been committed and whether the charged defendant is the perpetrator.[44] Probable cause must still be established by "such a state of facts as would lead a man of ordinary caution and prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused."[45] Magistrates must evaluate

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41. The Supreme Court of California gave felony defendants the right to demand a post-indictment preliminary hearing. Hawkins v. Superior Court, 22 Cal. 3d 584, 592-93, 586 P.2d 916, 921, 150 Cal. Rptr. 435, 440 (1978). Even before 1978, when prosecutors could choose to proceed by grand jury indictment or by preliminary hearing, the vast majority of felony cases were prosecuted by preliminary hearing. Only three and nine-tenths percent of felony prosecutions from 1968 through 1971 were initiated by indictment. *Id.* at 605-06, 586 P.2d at 930, 150 Cal. Rptr. at 449 (Mosk, J., concurring). *See Joint Hearing on Proposition 115, supra* note 38, pt. 1, at 57 (testimony of Arthur Danner, District Attorney of Santa Cruz County).

42. *Text of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET 33 (June 5, 1990). These changes may undermine the preliminary hearing's main function as well.

43. CAL CONST. art. I, § 30(b); CAL EVID. CODE § 1203.1 (West Supp. 1992); CAL. PENAL CODE §§ 866, 872(b) (West Supp. 1992).

44. CAL. PENAL CODE § 866(b) (West Supp. 1992).

45. People v. Uhlemann, 9 Cal. 3d 662, 667, 511 P.2d 609, 612, 108 Cal. Rptr. 657, 660 (1973) (quoting Taylor v. Superior Court, 3 Cal. 3d 578, 582, 477 P.2d 131, 133, 91 Cal. Rptr. 275, 277 (1970)); Rideout v. Superior Court, 67 Cal. 2d 471, 474, 432 P.2d 197, 199, 62 Cal. Rptr. 581, 583 (1967).

credibility and resolve conflicts,[46] and they retain discretion to make factual findings and to reduce eligible felonies to misdemeanors.[47]

Proposition 115 preserves the adversarial structure of preliminary hearings. The prosecution, defense counsel, and the defendant are present.[48] Both parties can call and examine witnesses, and cross-examine witnesses called by their opponents.[49] Proposition 115 continues to envision preliminary hearings as a screening device to determine whether a felony trial is justified. Nevertheless, Proposition 115, in an attempt to redress a perceived failure to recognize "the rights of crime victims" and a perceived imbalance and unfairness in "our criminal justice system," is a dramatic change in California criminal procedure.[50] Proponents of Proposition 115 viewed preliminary hearings as "unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for the truth."[51] Proposition 115's changes, including its changes to preliminary hearings, were presented to the voters as a mechanism to speed justice, remedy witness inconvenience, eliminate trial delays and excessive costs, and effectively combat violent crime by bringing more criminals to justice.[52] Accordingly, Proposition 115 adopts evidentiary and procedural changes that in effect eliminate the subsidiary, defendant-protective purposes of preliminary hearings, as discussed in the next section.

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46. *See* Whitman v. Superior Court, 54 Cal. 3d 1063, 1083, 820 P.2d 262, 274, 2 Cal. Rptr. 2d 160, 172 (1991) (providing that the magistrate has discretion and authority to determine whether the evidence establishes probable cause to require the defendant to answer for the charged offenses).

47. Proposition 115 explicitly recognizes the magistrate's discretion to reduce a felony to a misdemeanor. "It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a *felony*." CAL. PENAL CODE § 866(b) (West Supp. 1992) (emphasis added). Proposition 115 did not change CAL. PENAL CODE § 17(b)(5) (West Supp. 1992), which provides magistrates with discretion to reduce some felonies to misdemeanors. *See supra* note 22 (discussing section 17(b)(5)).

48. CAL. PENAL CODE §§ 859 (West Supp. 1992), 860, 865 (West 1985). *See id.* § 868 (West Supp. 1992) (the magistrate may exclude the public upon motion of the defense).

49. *Id.* §§ 865-66 (West 1985 & Supp 1992).

50. *Text of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET, *supra* note 42, at 33.

51. *Id.*

52. *Id.* at 33-34.

B. Proposition 115's Changes

Proposition 115 adopts three changes that have particular impact upon the preliminary hearing's traditional screening function. First, Proposition 115 narrows the scope of preliminary hearings: By forbidding their use for discovery.[53] In its place, Proposition 115 creates a separate statutory scheme regulating discovery for both prosecution and defense.[54]

Second, Proposition 115 declares hearsay admissible, ostensibly "to protect victims and witnesses in criminal cases."[55] The probable cause finding made by the magistrate at the conclusion of a post-Proposition 115 hearing may now be based entirely on hearsay evidence.[56] Proposition 115 specifically authorizes the introduction of hearsay through a law enforcement officer "qualified" by either five years of experience or completion of a class certified by the Commission on Peace Officer Standards and Training (P.O.S.T.).[57] If the declarant's hearsay statement is

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53. CAL. PENAL CODE § 866(b) (West Supp. 1992). Section 866(b) states: "The examination shall not be used for purposes of discovery." *Id.*

54. *Id.* §§ 1054-1054.7 (West Supp. 1992). Several new statutes exclusively regulate discovery in criminal cases. *See id.* §§ 1054.3, 1054.5(a) (West Supp. 1992). The prosecution now has a right to discovery from the defense. *Id.* §§ 1054.3 (West Supp. 1992). Proposition 115 repealed a portion of an existing statute requiring the prosecution to provide the defense with specified information before a preliminary hearing. *Compare* 1985 Cal. Stat. ch. 877, sec. 1, at 2820-21 (amending CAL. PENAL CODE § 859) *with* CAL. PENAL CODE § 859 (West Supp. 1992) (amended by Proposition 115). *See* Izazaga v. Superior Court, 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991), *review denied*, 54 Cal. 3d 611A (1991) (holding that Proposition 115's new reciprocal discovery procedures in criminal cases, if properly applied, do not violate the state or federal constitutions).

55. CAL. CONST. art. I, § 30(b); CAL. PENAL CODE § 872(b) (West Supp. 1992).

56. CAL. PENAL CODE § 872(b) (West Supp. 1992). Section 872(b) states: "Notwithstanding Section 1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted." *Id.* Section 1200(b) states that "[e]xcept as provided by law, hearsay evidence is inadmissible." CAL. EVID. CODE § 1200(b) (West 1987).

57. CAL. PENAL CODE § 872(b) (West Supp. 1992). Section 872(b) provides: "Any law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and testifying at preliminary hearings." *Id.* The "115-qualified" officer is authorized to testify to "statements of declarants made out of court offered for the truth of the matter asserted." *Id.* The training course, prepared in December, 1990, six months after Proposition 115 was passed by the voters, consists of a videotape, approximately 40 minutes in length, produced by the San Diego Police Department and authored and certified by P.O.S.T., which includes a question and answer

presented by such a "115-qualified" law enforcement officer, Proposition 115 attempts to protect the hearsay declarant against examination as an adverse witness by the defense.[58]

Third, Proposition 115 restricts the presentation of defense testimony. The initiative requires magistrates, upon the request of the prosecutor, to demand an offer of proof from the defense regarding the testimony expected from a potential witness.[59] Magistrates have discretion to determine whether an offer of proof indicates "that the testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness."[60] Magistrates must prohibit proposed defense testimony failing to satisfy the offer of proof requirements.[61]

III. ISSUES AND IMPLICATIONS FOR MAGISTRATES

While Proposition 115 clearly limits the scope of preliminary hearings, relaxes the rules of evidence, limits defense testimony, and changes the underlying policies, it leaves unanswered questions regarding the interpretation of many of its provisions and raises additional questions regarding its impact on the effectiveness of

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period and a quiz. According to a representative of the San Diego Police Department, the videotape has been shown since January, 1991, by all 39 law enforcement agencies in the state for the purpose of qualifying their officers with less than five years experience to testify to hearsay at preliminary hearings. The videotape focuses on investigation, report-writing, and testifying in court. The videotape refers to law enforcement officers who testify to hearsay in court as "evidence readers."

58. CAL. EVID. CODE § 1203.1 (West Supp. 1992). Section 1203.1 states that "[s]ection 1203 is not applicable if the hearsay statement is offered at a preliminary hearing, as provided in Section 872 of the Penal Code." *Id.* Section 1203 states, in part: "(a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement." *Id.* § 1203 (West 1987). Additionally, Proposition 115 may prevent the defense from calling the hearsay declarant as a witness. *See infra* notes 171-178 and accompanying text (discussing Proposition 115's limitations on defense testimony, codified at CAL. PENAL CODE § 866(a) (West Supp. 1992)).

59. CAL. PENAL CODE § 866(a) (West Supp. 1992).

60. *Id.*

61. *Id.*

preliminary hearings as a screening device for felony cases.[62] This section analyzes the language of the relevant statutory and constitutional changes and the purposes of the initiative. It then discusses alternatives available to magistrates, who must interpret and implement Proposition 115's provisions.

A. Discovery

Although Proposition 115's prohibition against using preliminary hearings for discovery requires magistrates to exercise their discretion, it offers them no guidance.[63] The prohibitory language[64] of this statute appears to apply to both prosecution and defense.[65] As a practical matter, however, magistrates will most often be required to decide whether the defense is attempting to

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62. Proposition 115 addresses so many disparate areas of the criminal justice system that it is difficult to ascertain the meaning of its language from the objectives set forth in the preamble. The definitional problem illustrates interpretation issues that are not likely to be detected by a lay electorate, which raises the issue of whether complex legal processes should be the subject of initiatives. The reader is referred to the epilogue regarding the initiative process written by Professor Miguel Méndez following an article in this symposium written by Professors Imwinkelried and Méndez. *See*, E. Imwinkelried and M. Méndez, *Resurrecting California's Old Law on Character Evidence* 23 PAC. L.J. 1005, 1046-49 (1992).

63. CAL. PENAL CODE § 866(b) (West Supp. 1992). While Proposition 115's statute prohibits discovery at preliminary hearings, it does not define "discovery." *Id.* Proposition 115's new statutory procedures regulating discovery in criminal cases characterize the following as discovery: [T]he names and addresses of trial witnesses, defendant statements, real evidence related to the charges, felony convictions suffered by material witnesses, exculpatory evidence, statements or reports of trial witnesses. *Id.* §§ 1054.1, 1054.3 (West Supp. 1992). *See generally* Izazaga v. Superior Court, 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991), *review denied*, 54 Cal. 3d 611A (1991) (discussing Proposition 115's discovery provisions).

64. Proposition 115 does not prevent the prosecution from voluntarily providing discovery to the defense before or after a preliminary hearing. In practice, many prosecutors continue to do so. Although the defense rarely provides discovery to the prosecution either before or during a preliminary hearing, this does occur under some circumstances. *See* People v. Delon, San Diego Super. Ct., CRN 21465 (preliminary hearing Nov. 25, 1991) (involving a woman charged with murder in the death of her husband). In *Delon*, defense counsel permitted the prosecutor to interview the defendant before a criminal complaint was issued in an unsuccessful attempt to avoid a criminal prosecution. *Id.* The magistrate in *Delon* reduced the murder charge to manslaughter at the preliminary hearing; the prosection refiled the murder charges in superior court. L.A. Times, Dec. 11, 1991, § B, at 2.

65. CAL. PENAL CODE § 866(b) (West Supp. 1992).

obtain discovery.[66] Magistrates will be called upon to invoke the prohibition in ruling on a prosecutor's discovery objection to defense cross-examination of a prosecution witness.[67]

How magistrates interpret this prohibition will determine its significance. As a first alternative, magistrates could sustain a discovery objection to cross-examination if the question seeks any information not presented on direct examination, regardless of relevance. While such a narrow interpretation would shorten preliminary hearings, it would impair a magistrate's independent evaluation of the evidence by reducing the basis for a probable cause determination to unchallenged evidence the prosecution chooses to present and any defense testimony satisfying the new offer of proof criteria. Moreover, a restrictive interpretation of the discovery prohibition would be inconsistent with both Proposition 115's limitations on the presentation of defense testimony[68] and the new discovery provisions.[69] Only by hearing the circumstances

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66. It is highly unlikely that the defense would object to the admission of prosecution evidence, particularly in light of Proposition 115's new, more restrictive, discovery procedures. CAL. PENAL CODE §§ 1054-1054.7 (West Supp. 1992). Both before and after Proposition 115, the preliminary hearing has afforded the defense an opportunity to obtain otherwise unavailable information about the case against the defendant.

67. It is possible that prosecutors might object to defense testimony on discovery grounds. However, a prosecutor's request that magistrates demand an offer of proof from the defense is a more effective bar to defense evidence sought for discovery purposes. CAL. PENAL CODE § 866(a) (West Supp. 1992). It would be difficult for the defense to satisfy the offer of proof criteria with evidence offered for discovery purposes that does not also relate to a determination of probable cause. Many prosecutors do not object to defense testimony since it gives them an opportunity to discover part of the defense case.

68. CAL. PENAL CODE § 866(a) (West Supp. 1992). Section 866(a) explicitly authorizes testimony "reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness." *Id.* Defense testimony regarding entrapment, self-defense, a lack of premeditation, or a lack of specific intent should satisfy the new offer of proof requirements. *See infra* notes 171-178 and accompanying text (discussing Proposition 115's limitations on defense testimony).

69. Motions to suppress evidence or statements are typical evidentiary motions heard at preliminary hearings. Proposition 115 did not explicitly address motions heard at preliminary hearings. However, Proposition 115's discovery provisions *do* recognize alternate discovery procedures authorized by statute or the Constitution of the United States: "[N]o 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." CAL. PENAL CODE § 1054(e) (West 1966). *See* Raven v. Deukmejian, 52 Cal. 3d 336, 355, 801 P.2d 1077, 1089, 276 Cal. Rptr. 326, 338 (1990) (holding that Proposition 115's amendment to article I, section 24 of the California Constitution,

surrounding an observation or identification, supporting a defense of self-defense, or supporting an illegal search, can magistrates evaluate the competency as well as the reliability of the information.[70] Effective cross-examination naturally, and perhaps inevitably, results in discovery, and may expose a lack of probable cause.[71]

Interpreting the prohibition on discovery to excessively circumscribe cross-examination may also impair a magistrate's ability to determine whether the alleged offense should be tried as a felony or misdemeanor. A magistrate examines the circumstances of an alleged offense, the nature of a defendant's alleged involvement, and a defendant's background to determine whether an alleged offense merits a felony or misdemeanor trial.[72] This information is unlikely to be addressed on direct examination, for it is only in the interest of the defense to present evidence justifying a magistrate's reduction of a charge.[73]

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requiring the rights of criminal defendants to be interpreted no more broadly than allowed by the federal constitution, was an invalid revision of the California Constitution).

70. Illegally obtained evidence cannot be considered in determining probable cause. Priestly v. Superior Court, 50 Cal. 2d 812, 815, 330 P.2d 39, 41 (1958); People v. Schuber, 71 Cal. App. 2d 773, 775, 163 P.2d 498, 499 (1945).

71. *See* Alford v. Superior Court, 29 Cal. App. 3d 724, 728, 105 Cal. Rptr. 713, 715 (1972) (holding that a magistrate cannot prevent the defense from examining an informant regarding his name or address). A narrow interpretation of the discovery prohibition provision would render *McDaniel v. Superior Court*, 55 Cal. App. 3d 803, 126 Cal. Rptr. 136 (1976), ineffective. "It is not a valid objection that examination of a witness may lead to the discovery of what the facts were. That is the very purpose of cross-examination." *McDaniel*, 55 Cal. App. 2d at 805, 126 Cal. Rptr. at 137. The officer who witnessed the alleged incident was not called as a witness by the prosecutor. *Id.* The defense attempted to examine him about what the officer had "seen, done, and heard." *Id.* The *McDaniel* court was particularly concerned because the information was not otherwise easily obtainable by the defense prior to trial. *Id. See* Jennings v. Superior Court, 66 Cal. 2d 867, 876, 428 P.2d 304, 310, 59 Cal. Rptr. 440, 446 (1967) (approving wide latitude in the scope of cross-examination).

72. Esteybar v. Municipal Court, 5 Cal. 3d 119, 123, 485 P.2d 1140, 1142, 95 Cal. Rptr. 524, 526 (1971). *See* CAL. PENAL CODE § 17(b)(5) (West Supp. 1992) (authorizing a magistrate's reduction of certain felonies to misdemeanors). Proposition 115 explicitly declared the purpose of preliminary hearings to be to determine whether probable cause exists to believe the defendant committed a *felony*. *Id.* § 866(b) (West Supp. 1992) (emphasis added).

73. A prosecutor presenting a case issued as a felony by his or her office at a preliminary hearing ordinarily has little incentive to present evidence supporting reduction to a misdemeanor. For example, in support of a charge of felony car theft, a prosecutor generally only presents evidence that the car did not belong to the defendant, the owner of the car did not give the defendant permission to take the car, and the defendant had possession of the car. *See* CAL. VEH. CODE § 10851 (West

As an alternative to prohibiting cross-examination whenever discovery may result, magistrates could choose overrule discovery objections when the examination seeks "relevant" evidence.[74] Given the narrowed purpose of preliminary hearings after Proposition 115, magistrates would, under this approach, need to distinguish between evidence relevant for purposes of a probable cause determination and evidence relevant only for future proceedings, such as pretrial motions and trial.[75] This distinction may not be simple. For example, cross-examination within the scope of direct examination[76] should remain relevant to preliminary hearings. A witness's testimony concerning the circumstances of an observation of an event or an identification of a person tests the reliability of that observation or identification. On the other hand, questions regarding potential trial witnesses or questions addressing the subject of pretrial motions may appear to constitute "discovery." However, even these questions could expose unreliable observations or identifications or legally incompetent evidence.

Proposition 115's limits on defense testimony and restrictions on discovery support magistrates interpreting Proposition 115's discovery prohibition to allow admission of this evidence so long

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Supp. 1992) (defining felony joyriding, typically referred to as car theft). In support of a reduction of the charge to a misdemeanor, the defense can present evidence that the owner had left the keys in the car, had given the defendant permission to take the car on other occasions, that the defendant has no prior criminal history, and that the car was returned undamaged. *See, e.g.*, Mills v. Superior Court, 42 Cal. 3d 951, 960, 728 P.2d 211, 216, 232 Cal. Rptr. 141, 146 (1986) (stating that the difference between felony or misdemeanor illegal entry of a vehicle charges may turn on whether the owner of the car secured the doors and windows of the car).

74. " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." CAL. EVID. CODE § 210 (West 1987). "Except as otherwise provided by statute, all relevant evidence is admissible." *Id.* § 351 (West 1987). The first decision of the Supreme Court of California discussing Proposition 115 preliminary hearings confirmed the magistrate's discretion "to allow the admission of relevant defense evidence." Whitman v. Superior Court, 54 Cal. 3d 1063, 1083, 820 P.2d 262, 274, 2 Cal. Rptr. 2d 160, 172 (1991).

75. By bringing various motions at the preliminary hearing, the defense may be able to expand the definition of relevance. *See supra* note 69 (discussing evidentiary motions made at the preliminary hearing).

76. *See* CAL. EVID. CODE § 773 (West 1987) (setting forth the scope and mode of cross-examination).

as it is also relevant to determining the reliability of the evidence or to the determination of whether a misdemeanor or felony trial is justified.[77] For preliminary hearings to continue to serve as an effective screening device, magistrates must interpret Proposition 115's prohibition against discovery broadly enough to identify and hear all legally competent evidence useful in making a reliable probable cause determination. By giving the defense the benefit of the doubt in admitting requested evidence that may be secondarily relevant to pretrial motions or trial, magistrates would be complying with Proposition 115's intent to eliminate significant areas of inquiry while not reducing preliminary hearings to a nullity.[78]

B. Hearsay

Proposition 115's constitutional and statutory provisions declaring hearsay admissible leave magistrates no discretion to prohibit the introduction of hearsay.[79] Proposition 115, in essence, offers California prosecutors blanket authorization to introduce hearsay in every preliminary hearing for any reason.[80] However,

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77. Discovery promotes "the orderly ascertainment of the truth." Holman v. Superior Court, 29 Cal. 3d 480, 486, 629 P.2d 14, 18, 174 Cal. Rptr. 506, 510 (1981) (Bird, C.J., concurring) (quoting Jones v. Superior Court, 58 Cal. 2d 56, 60, 372 P.2d 919, 921, 22 Cal. Rptr. 879, 881 (1962)).

78. *See Text of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET, *supra* note 42, at 33. "[W]here the subject of cross-examination concerns the matter at issue there can be no doubt that the refusal to permit such question results in a denial of a fair hearing." Priestly v. Superior Court, 50 Cal. 2d 812, 822-23, 330 P.2d 39, 45 (1958) (Carter, J., concurring), *quoted with approval in* Jennings v. Superior Court, 66 Cal. 2d 867, 879, 428 P.2d 304, 312, 59 Cal. Rptr. 440, 448 (1967).

79. CAL. CONST. art. I, § 30(b); CAL. PENAL CODE § 872(b) (West Supp. 1992). The language of these constitutional and statutory changes do not provide for either the exercise of discretion or an exception "in the interest of justice." *Id.* In contrast, Proposition 115's provisions prohibiting discovery and limiting the presentation of defense testimony allow magistrates to exercise discretion in implementing these sections. CAL. PENAL CODE § 866(a)-(b) (West Supp. 1992).

80. Proposition 115's statutory language does not specify that hearsay must be offered by the prosecution. The language of the constitutional amendment clearly indicates the rationale for the admissibility of hearsay is "the protection and convenience of witnesses." CAL. CONST. art. I, § 30(b). Assuming the law enforcement foundation is met, the defense is not explicitly precluded from offering hearsay evidence. If a "115-qualified" officer is already present as a prosecution witness, magistrates may be receptive to defense hearsay through cross-examination of that officer to streamline the process. Although the defense in *Whitman v. Superior Court*, 54 Cal. 3d 1063, 1082, 820 P.2d 262, 273, 2 Cal. Rptr. 2d 160, 171 (1991), did not offer hearsay evidence, the court

Proposition 115 leaves unanswered important interpretive questions regarding the foundation for the new hearsay exception, the source of hearsay statements, and the scope of admissible hearsay. Whether or when hearsay statements are sufficiently reliable as a basis for a probable cause determination depends on how magistrates and appellate courts resolve these issues. The significance of the consequences of the suspension of the traditional hearsay rule at preliminary hearings can be explored by examining how magistrates might interpret and apply hearsay evidence during typical preliminary hearings. In each instance, magistrates must first determine whether an officer testifying to hearsay is "115-qualified." Magistrates must then decide whether they can adequately evaluate the reliability of the hearsay evidence. Finally, magistrates must decide whether the hearsay evidence is sufficiently reliable to support a finding of probable cause.

1. Identifying a "115-Qualified" Law Enforcement Officer

Determining who qualifies as a "115-qualified" law enforcement officer may not always be simple.[81] Proposition 115 fails to define "law enforcement officer,"[82] or state whether an

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recognized and did not resolve this issue. *Id.* As a practical matter, the defense is unlikely to offer hearsay evidence.

81. *See Whitman*, 54 Cal. 3d at 1084, 820 P.2d at 274, 2 Cal. Rptr. 2d at 172 (Mosk, J., concurring) (stating: "Plainly, section 872(b) creates a new exception to the hearsay rule. What is not plain, however, is its meaning.").

82. Proposition 115, in amending section 190.2 of the Penal Code, left unchanged the term "peace officer" in that section. CAL. PENAL CODE § 190.2(a)(7) (West Supp. 1992). This statute specifically refers the reader to sections of the Penal Code defining the term "peace officer" for purposes of that section (three of which were repealed in 1980 and another of which was replaced by another statute in 1980). *Id.* One alternative available to magistrates is to assume that "law enforcement officer" and "peace officer" are interchangeable and to examine closely the statutory definitions of the latter to provide guidance in defining the former. If the terms "peace officer" and "law enforcement officer" are interchangeable, a prosecutor may be allowed to qualify any peace officer described by Penal Code section 830.1, *et seq.*, including horse racing investigators, park rangers, state lottery officers, reserve officers, or litter control specialists, to relay a hearsay declarant's statement to the court during a preliminary hearing. *Id.* §§ 830.1-830.12 (West Supp. 1992). Certain occupations are statutorily designated within the "peace officer" category only so long as the person so employed in that category is performing specific enforcement services. *Id.* It is unclear whether Proposition 115 allows only the percentage of that time that has been devoted to what is traditionally viewed as "law enforcement" to be credited toward "law enforcement"

officer must be currently employed in that capacity.[83] As a result,

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experience. Another alternative is to assume that "law enforcement officer" and "peace officer" are defined differently, since both terms appear in Proposition 115. If the terms "law enforcement officer" and "peace officer" are *not* interchangeable, there is little guidance providing a definition for "law enforcement officer." A statute on training in handling domestic violence cases defines "law enforcement officer" as an officer or employee of a local police department or sheriff's office, or any peace officer with the Department of Parks and Recreation. *Id.* § 13519(a) (West Supp. 1992). A statute on a missing person training course defines "law enforcement officer" as officers or employees of a local police or sheriff's office or the California Highway Patrol. *Id.* § 13519.1(a) (West Supp. 1992). Proposition 115 regards the new police officer who has just completed the P.O.S.T. class as the functional equivalent of an officer with five years experience for the purpose of narrating hearsay at preliminary hearings. It is unclear whether completion of the P.O.S.T. class is sufficient to qualify someone in a nontraditional law enforcement occupation. A literal reading of the statute suggests that the P.O.S.T. class provides the equivalent of five years experience to someone in the appropriate category of occupation; it does not qualify a person employed in a noncovered occupation. Because the nature of that law enforcement experience is undefined by Proposition 115, it is unclear whether any law enforcement experience is sufficient so long as the five-year requirement is met, or whether a certain quality of experience is required. Is five years guarding prisoners sufficient? Is five years in administration, public relations, or community liaison work or less than five years of patrol experience combined with some other experience sufficient? Can a reserve officer who has devoted ten hours per week for five years qualify to relate hearsay? One appellate court has already determined that an arson investigator is a "law enforcement officer" within the meaning of Proposition 115. Martin v. Superior Court, 230 Cal. App. 3d 1192, 1195, 281 Cal. Rptr. 682, 684 (1991). *See* People v. Baker, San Diego Super. Ct., CRN 20481 (preliminary hearing June 19, 1991). The Proposition 115 foundation supplied by the testifying officer, who had been with the federal government as a "sworn peace officer" for seven years, was four years as a federal boarding officer and U.S. Customs officer, and almost three years as a border patrol officer. *Id.* In these two positions, he enforced federal laws and regulations on the high seas and United States waters, and the immigration and naturalization laws. *Id.* The magistrate was satisfied with this foundation, but referred to California Penal Code section 830.8, indicating that federal criminal investigators are not California peace officers but may exercise the powers of arrest under certain circumstances. *Id.* (citing CAL. PENAL CODE § 830.8 (West 1985)). If the defense may offer hearsay, it is unclear whether a licensed private investigator qualifies to testify to hearsay on the grounds that "law enforcement experience" encompasses the crime detection, investigation, and prevention activities engaged in by private investigators. Like sworn police officers, private investigators interview witnesses, advise suspects of a need for counsel or their *Miranda* rights, preserve evidence, reconstruct crime scenes, evaluate the sufficiency of a criminal charge, and, on occasion, provide information to law enforcement or the prosecution sufficient for an arrest of an uncharged person or the exoneration of a person already accused of a crime. The prosecution in *People v. Gandara*, 233 Cal. App. 3d 1163, 284 Cal. Rptr. 906 (1991), *review granted*, 819 P.2d 1, 1 Cal. Rptr. 543 (1991), offered 115 hearsay through an investigator employed by the district attorney's office. *Id.*

83. "[A]ny law enforcement officer" with the requisite experience may testify to hearsay. CAL. PENAL CODE § 872(b) (West Supp. 1992). Interpretation problems arise because the statute does not indicate whether this hearsay witness must be currently employed as a law enforcement officer, or whether a law enforcement background is sufficient. In contrast, California Penal Code section 190.2, part of Proposition 115, explicitly refers to peace officer and *former* peace officer. *See id.* § 190.2 (a)(7) (West Supp. 1992). The ruling of the Supreme Court of California requiring the testifying officer to have some knowledge of the statement or the case, addressed *infra* note 89 and accompanying text, may still allow a former law enforcement officer to qualify. *Whitman*, 54 Cal.

prosecutors could attempt to offer hearsay testimony through law enforcement employees ranging from traditional police officers to litter control personnel. A broad interpretation of the meaning of the term "115-qualified" would be inconsistent with any presumed contribution to the reliability of the information, the trustworthiness of the hearsay declarant, or the accuracy of the narration to the court provided by the experience or training of a testifying officer.[84] Because the qualifications of a "115-qualified" officer may be the only assurance that hearsay is reliable,[85] it is particularly important for magistrates to require a "115-qualified" law enforcement officer to have recent experience or training in criminal investigations, including training in interviewing witnesses, recognizing and preserving evidence, a working familiarity with the elements of crimes, important court decisions and statutes relating to police procedure, and report preparation. A "115-qualified" officer with this background is more likely to be able to "meaningfully assist"[86] magistrates in determining the reliability of hearsay evidence by, at a minimum, accurately recording and relating information pertinent to the case.

The Supreme Court of California, in its first decision addressing the new hearsay exception, *Whitman v. Superior Court*,[87] required magistrates to look beyond an officer's training or experience to

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3d at 1072, 820 P.2d at 266-67, 2 Cal. Rptr. 2d at 164-65. Because it is unclear whether the law enforcement experience necessary to qualify the witness to testify to hearsay must be recent or may have occurred in the past, Proposition 115 may not preclude the defense from calling a former law enforcement officer whose background meets Proposition 115's criteria, but who is currently employed by the defense as a defense investigator. Assuming the drafters intended that the person who relays hearsay be a "currently employed" law enforcement officer, it is unclear whether that experience must be complete as of the time the witnesses were interviewed or at the time of the preliminary hearing.

84. *Whitman*, 54 Cal. 3d at 1073-74, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165.

85. *See id.* at 1085, 820 P.2d at 275, 2 Cal. Rptr. 2d at 173 (Mosk, J., concurring) (noting that an officer with the requisite training and experience who has also *actually investigated* the case may provide some indicia of reliability for hearsay statements that do not otherwise possess adequate indicia of trustworthiness); *infra* notes 99-162 and accompanying text (discussing a magistrate's determination of the reliability of the hearsay evidence).

86. *See id.* at 1072-73, 820 P.2d at 266-67, 2 Cal. Rptr. 2d at 164-65 (holding that "[t]he testifying officer must not be a mere reader, but must have sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement").

87. 54 Cal. 3d 1063, 820 P.2d 262, 2 Cal. Rptr. 2d 160 (1991).

determine whether that officer is "115-qualified" to narrate hearsay in a particular case.[88] The court held that the "115-qualified" law enforcement officer must have "sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the [hearsay] statement."[89] While it is clear that a testifying officer whose knowledge of the case is limited to reports prepared by others is not "115-qualified," and that personal contact with the declarant or the case is not required, it is unclear what does constitute "sufficient knowledge."[90] Therefore, magistrates must determine minimum qualifications for testifying officers on a case-by-case

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88. *Id.* at 1073, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165.

89. *Id.* at 1072, 820 P.2d at 267, 2 Cal. Rptr. 2d at 164-65. The *Whitman* court held that permitting hearsay evidence from an "evidence reader" whose knowledge is limited to the four corners of the documents from which he or she testifies renders nugatory any contribution an officer's training or experience offers to the reliability of the evidence. *Id.* at 1073, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165. Because the officer in *Whitman* was an "evidence reader," with no independent knowledge of the case, the *Whitman* court ordered the superior court to grant the defendant's motion to set aside the information pursuant to section 995 of the California Penal Code. *Id.* at 1083, 820 P.2d at 274, 2 Cal. Rptr. 2d at 172. *See* CAL. PENAL CODE § 995 (West Supp. 1992). *See also* People v. Gandara, 233 Cal. App. 3d 1163, 284 Cal. Rptr. 906 (1991), *review granted*, 819 P.2d 1, 1 Cal. Rptr. 543 (1991). *Gandara* involved a "115-qualified" officer testifying to the qualifications of and report prepared by a criminalist that were relayed to him by another criminalist. *Id.* at 1163, 284 Cal. Rptr. at 908. The court noted that the function of "evidence reader" can be performed as easily by anyone with average reading and speaking ability; in fact, the declarant's hearsay statements could be more quickly and efficiently supplied to the magistrate by providing him or her with copies of the reports. *Id.* at 1173, 284 Cal. Rptr. at 912. "Literally any person who could walk and read could perform the function that [the '115-qualified' officer] performed at the preliminary examination. Certainly a receptionist at the laboratory, a delivery person, or the court clerk could have given the same testimony that [the officer] did. Such a result appears to be beyond the intention of Proposition 115." *Id.*

90. *Whitman*, 54 Cal. 3d at 1072, 820 P.2d at 267, 2 Cal Rptr. 2d at 164-65. Section 872(b) of the Penal Code allows the testifying officer to relate "the statements of declarants made out of court offered for the truth of the matter asserted" and does not require these statements to be made directly to the testifying law enforcement officer. CAL. PENAL CODE § 872(b) (West Supp. 1992). The Supreme Court of California permits " 'reader' testimony if the testifying officer has 'sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement.' " *Whitman*, 54 Cal. 3d at 1088, 820 P.2d at 277, 2 Cal. Rptr. 2d at 175 (Kennard, J., concurring and dissenting) (quoting *Whitman*, 54 Cal. 3d at 1072, 820 P.2d at 267, 2 Cal. Rptr. 2d at 175). "This vague test contains no guidance whatsoever for magistrates and litigators, leaving them adrift on the flood of litigation likely to ensue from efforts to grasp the meaning of the majority's ill defined terminology. . ." *Id.* at 1089, 820 P.2d at 278, 2 Cal. Rptr. 2d at 176 (Kennard, J., concurring and dissenting).

basis. Some magistrates may require the testifying officer to have investigative familiarity with the case, personal knowledge of how the hearsay statement was made, or direct personal contact with the hearsay declarant.[91] Others could simply require the testifying officer to be verbally briefed on the case by another officer[92] or to have had some contact with the declarant.[93]

Magistrates who require the "115-qualified" officer to have direct contact with the circumstances under which the hearsay statement were made effectuate the purpose of requiring the "115-qualified" officer to have either five years experience or to have

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91. Before and after Proposition 115, prosecutors are entitled to designate an investigating officer at a preliminary hearing to assist them. CAL. PENAL CODE §§ 867, 868 (West 1985). While Proposition 115's statutory language does not explicitly require an investigating officer to be used to narrate hearsay, one of the justices in *Whitman* suggested the adoption of this interpretation. *Whitman*, 54 Cal. 3d at 1086, 820 P.2d at 275, 2 Cal. Rptr. 2d at 173 (Mosk, J., concurring). The majority did not do so. The majority referred to an officer with the requisite training or experience who had some knowledge of the case or the statement as the "investigating officer," but did not require the officer to have actually investigated the case in order to be "115-qualified." *Id.* at 1073-74, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165-66.

92. It is likely that the officer in *Whitman* could have become "115-qualified" with a telephone briefing from the declarant officer. *See Whitman*, 54 Cal. 3d at 1090, 820 P.2d at 278, 2 Cal. Rptr. 2d at 176 (Kennard, J., concurring and dissenting).

93. This contact could be in person, over the telephone, or by mail. The P.O.S.T. videotape recommends that the testifying officer make an effort to verify the identity of a hearsay declarant on the telephone. *See* Montez v. Superior Court, 233 Cal. App. 3d 917, 285 Cal. Rptr. 279 (1991), *vacated by*, ___ Cal. 4th ___, 823 P.2d 620, 4 Cal. Rptr. 2d 454 (1992). In *Montez*, the "115-qualified" officer testified from police reports prepared by another officer regarding an interview by that officer with the victim and a witness to an alleged residential burglary. *Id.* at 921, 285 Cal. Rptr. at 282. The testifying officer had had no contact with either the victim or witness, but had interviewed the defendant and codefendant. *Id.* at 922, 285 Cal. Rptr. at 282. The testifying officer was unable to describe the circumstances under which the witness had made an identification of the defendant. *Id.* at 923, 285 Cal. Rptr. at 283. A "115-qualified" law enforcement officer with minimal knowledge of the case assigned to preliminary hearing duty as a "testifying officer," may defeat the spirit of *Whitman*. *See also Whitman*, 54 Cal. 3d at 1073, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165 (holding that "[t]he testifying officer must not be a mere reader, but must have sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement."). It is unclear whether a law enforcement officer who spends the majority of his time testifying at preliminary hearings to hearsay statements retains his law enforcement status, particularly if Proposition 115 is interpreted to require five years *current* law enforcement experience. If an officer assigned to testify at preliminary hearings is held to comply with *Whitman*, a bailiff providing courtroom security at a preliminary hearing, who usually has no independent knowledge of the case, could testify to hearsay by reading from reports after a briefing from their authors. *See Whitman*, 54 Cal. 3d at 1089, 820 P.2d at 278, 2 Cal. Rptr. 2d at 176 (Kennard, J., concurring and dissenting) (criticizing the majority holding which permits an officer to testify based on another officer's report).

completed a course in "investigating and reporting of cases and testifying in preliminary hearings."[94] The training or experience requirements presume the exercise of judgment by a testifying officer, rather than only the accurate narration, or "parroting," of information contained in a report.[95] Training or experience in the investigation and reporting of cases is of value only at the time the information is obtained, not at the time the information is narrated in court.[96]

Magistrates have three choices in deciding whether a law enforcement officer with the requisite training or experience is "115-qualified" in a particular case. First, they can require the prosecutor to establish the officer's knowledge of the statement or the case as part of the foundation for the new hearsay exception.[97] Alternatively, magistrates can allow the defense to question an officer on voir dire before direct examination to challenge the sufficiency of his knowledge of the statement or the case.[98] Third, magistrates could allow an officer to testify to hearsay simply by establishing his training or experience, but permit the defense to challenge the sufficiency of an officer's knowledge on cross-examination.

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94. CAL. PENAL CODE § 872(b) (West Supp. 1992).

95. *See Whitman*, 54 Cal. 3d at 1073-74, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165.

96. In *Whitman*, the defendant was charged with driving under the influence of alcohol as a felony. *Id.* 54 Cal. 3d at 1068, 820 P.2d at 264, 2 Cal. Rptr. 2d at 162. The testifying officer testified from a report prepared by a fellow officer who was the hearsay declarant. *Id.* Because the testifying officer had no contact with either the case or the hearsay statement, he was unable to provide important information concerning "the time or circumstances of the preparation of [the declarant-officer's] report, or the various tests conducted to determine [the defendant's] sobriety." *Id.* In addition, the testifying officer "was unable to explain certain discrepancies and omissions in the report." *Id.* The testifying officer's testimony at the preliminary hearing indicates his experience with the procedures followed in investigating and reporting driving under the influence cases. *See* People v. Whitman, No. C-9091321 (Santa Clara Super. Ct.) (preliminary hearing, Sept. 19, 1990). Even if the testifying officer's experience included some participation in the investigation of this particular case, it is unlikely that he would have been any more able to provide the missing information without personal knowledge of the circumstances surrounding the making of the hearsay statement.

97. The court in *Hollowell v. Superior Court*, ___ Cal. App. 4th ___, 4 Cal. Rptr. 2d 321 (1992), held that the prosecution must establish an officer's completion of a P.O.S.T. course as a foundational requirement for the admission of hearsay testimony.

98. Magistrates would most likely exercise this option upon a defense objection on foundation grounds.

The first or second alternative would permit magistrates to exclude proposed hearsay evidence from an unqualified officer. These two alternatives would further Proposition 115's goals and be consistent with the view of the Supreme Court of California that some contact with the statement or case is necessary.[99] The third alternative would postpone testing an officer's qualifications until after an officer has narrated hearsay in a particular case. Disqualifying an officer and excluding hearsay after it has already been presented may be consistent with the court's decision, but arguably defeats Proposition 115's objective of streamlining preliminary hearings and eliminating discovery-type cross-examination. However, the third choice remains an alternative, particularly in situations involving an officer who is ultimately shown to be unqualified. Even magistrates who initially decide an officer is "115-qualified" may discover during the testimony of that officer that in fact the officer does not possess sufficient knowledge of the case or statement. As a result of Proposition 115's authorization of the indiscriminate use of hearsay, magistrates utilizing the first or second alternative in the interests of efficiency may have to resort to the third to exclude 115-hearsay from an unqualified officer.

2. *Evaluating Reliability*

Once an officer is "115-qualified," magistrates must evaluate the reliability of the hearsay evidence itself.[100] The hearsay rule[101] excludes statements made out of court that are offered for their truth because they are unreliable.[102] Hearsay statements admitted as an exception to this rule have traditionally been required to fulfill foundational requirements designed to ensure that

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99. *Whitman*, 54 Cal. 3d at 1073-74, 820 P.2d at 266-67, 2 Cal. Rptr. 2d at 164-65.

100. *See* Johnson v. Superior Court, 15 Cal. 3d 248, 252, 539 P.2d 792, 794, 124 Cal. Rptr. 32, 34 (1975); Jones v. Superior Court, 4 Cal. 3d 660, 667, 483 P.2d 1241, 1245, 94 Cal. Rptr. 289, 293 (1971); People v. Schuber, 71 Cal. App. 2d 773, 775, 163 P.2d 498, 499 (1945).

101. CAL. EVID. CODE § 1200 (West 1987).

102. *Whitman*, 54 Cal. 3d at 1084, 820 P.2d at 275, 2 Cal. Rptr. 2d at 173 (Mosk, J., concurring); E. IMWINKELRIED, R. WYDICK & J. HOGAN, *supra* note 27, at 237; J. WIGMORE, *supra* note 11, at § 1362.

proposed hearsay testimony exhibits some indicia of trustworthiness.[103] Some hearsay exceptions require a showing of necessity in addition to trustworthiness.[104]

Proposition 115 does not change these foundational requirements. The initiative replaces them, in the preliminary

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103. Ohio v. Roberts, 448 U.S. 56, 66 (1980). "Reliability can be inferred without more, in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id. See* Idaho v. Wright, 110 S. Ct. 3139, 3152 (1990) (holding that the admission of a child's hearsay statements violated the Confrontation Clause). The trial judge in *Wright* found a three-year-old child incompetent to be a witness, and the United States Supreme Court, relying on its analysis in *Ohio v. Roberts*, held that her earlier statements made to a pediatrician, admitted under a residual hearsay exception, were not trustworthy. *Id.* at 3152-53. *See also* United States v. Inadi, 475 U.S. 387, 394-400 (1986) (holding that the hearsay statements satisfying a co-conspirator exception to the hearsay rule were admissible without a finding that the declarant was unavailable to testify). Although California does not have a residual hearsay exception, "[i]f the evidence does not fall within" a recognized hearsay exception, "it may still be admitted if it carries 'particularized guarantees of trustworthiness.' " E. IMWINKELRIED, R. WYDICK & J. HOGAN, *supra* note 27, at 238.

104. CAL. EVID. CODE § 240 (West 1987). "Necessity" usually means that the declarant is legally unavailable. California's relevant statute states:

> (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:
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> (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
>
> (2) Disqualified from testifying to the matter.
>
> (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.
>
> (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
>
> (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.
>
> (b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.
>
> (c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.
>
> The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

Id. But see White v. Illinois, 112 S. Ct. 736, 743 (1992) (holding that when a hearsay statement falls within a firmly rooted exception to the hearsay rule, the declarant need not be unavailable).

hearing context, with the single requirement of a "115-qualified" law enforcement officer.[105] Like traditional hearsay exceptions, this limited threshold foundation for hearsay does away with three protections implicit in the traditional rule against hearsay as follows: that witnesses testify *in person, under oath,* and *subject to cross-examination.*[106] Under Proposition 115, the "115-qualified" law enforcement officer is present in court as a substitute for the hearsay declarant.[107] The officer narrating hearsay testifies under oath[108] and is subject to cross-examination in place of the absent hearsay declarant. However, unlike traditional hearsay exceptions, Proposition 115 does *not* require that the hearsay statement manifest any indicia of reliability at the time it is made.[109] The foundation for the new exception addresses *only* the qualifications of the narrator at the time the hearsay evidence is offered to magistrates.[110] Proposition 115's language requires neither an examination of "the totality of circumstances that surround the making of the statement [nor those] that render the declarant particularly worthy of belief."[111] Additionally, Proposition 115

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105. CAL. PENAL CODE § 872(b) (West Supp. 1992).

106. *Id.* The hearsay rule assumes that evidence will be more trustworthy if the opponent may cross-examine the declarant to expose misperception, faulty narration, inaccurate memory, and insincerity. E. IMWINKELRIED, R. WYDICK & J. HOGAN, *supra* note 27, at 237. *See* FED. R. EVID. 801 advisory committee's note.

107. CAL. PENAL CODE § 872(b) (West Supp. 1992). "A 'declarant' is a person who makes a statement." CAL. EVID. CODE § 135 (West 1987).

108. CAL. EVID. CODE § 710 (West 1987). The effect of the oath in encouraging a person about to testify in a formal court proceeding to tell the truth has traditionally been regarded as critical to that person's motivation to be truthful. An out-of-court declarant who does not testify under oath in person may not appreciate the significance of his statement in the context of a felony prosecution. MCCORMICK, MCCORMICK ON EVIDENCE § 245 (3d ed. 1984). *See* People v. Goyochea, San Diego Super. Ct., CRN 116823 (preliminary hearing Oct. 2, 1990). In *Goyochea*, the prosecutor, who had presented the prosecution's case through hearsay over a defense objection, recognized the value of the oath by vigorously cross-examining a witness called by the defense about his having taken an oath to tell the truth and about the penalties for perjury. *Id.*

109. *See* Whitman v. Superior Court, 54 Cal. 3d 1063, 1085, 820 P.2d 262, 275, 2 Cal. Rptr. 2d 160, 173 (1991) (Mosk, J., concurring) (noting that an officer with the requisite training and experience who has also *actually investigated* the case may provide some indicia of reliability for hearsay statements that do not otherwise possess adequate indicia of trustworthiness).

110. CAL. PENAL CODE § 872(b) (West Supp. 1992).

111. *See* Idaho v. Wright, 110 S. Ct. 3139 (1990) (discussing the confrontation clause requirements for hearsay not falling within a firmly rooted hearsay exception). The Supreme Court of California has held that Proposition 115's admission of hearsay evidence does not violate federal

does not require a showing that the proposed hearsay testimony is necessary because the declarant is unavailable.[112] The declarant need not be exempted from testifying on privilege grounds, disqualified as a witness, dead, or beyond the reach of the court's process.[113] So long as hearsay evidence is offered by a "115-qualified" officer, prosecutors need not demonstrate either reliability or necessity as a prerequisite to the use of hearsay evidence.

By mandating hearsay through the testimony of a "115-qualified" law enforcement officer, Proposition 115 seems to presuppose that, by virtue of experience or training, that officer can assess the reliability of the hearsay declarant and can relate the statement accurately.[114] The Supreme Court of California has adopted this view.[115] If that presumption is correct, admitting the declarant's statement through a substitute may avoid inconveniencing victims and witnesses of crime without sacrificing the reliability of the evidence. Preliminary hearings may also become shorter and less expensive in the absence of the hearsay declarant.[116] If that presumption is incorrect, however, magistrates may have more difficulty recognizing and rejecting untrustworthy evidence, resulting in increased trial court congestion and an adverse impact on the protections preliminary hearings traditionally

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confrontation clause standards. *Whitman*, 54 Cal. 3d at 1079-82, 820 P.2d at 267-73, 2 Cal. Rptr. 2d at 167-71.

112. CAL. CONST. art I, § 30(b); CAL. PENAL CODE § 872(b) (West Supp. 1992).

113. *Id.* Proposition 115 does not require a case-by-case demonstration of a need for protection. *Id.* Proposition 115 replaces the traditional and specific "need" for the admission of certain types of hearsay with generally applicable convenience and protection. CAL. CONST. art. I, § 30(b). In effect, Proposition 115 allows the prosecution's decision to offer hearsay to render the declarant unavailable, although the defense may be able to call the hearsay declarant as a witness.

114. Proposition 115 does not explicitly identify the purpose for substituting a "115-qualified" law enforcement officer for a hearsay declarant. The preamble and the requirements of training or experience suggest the inferences offered. *See* CAL. PENAL CODE §872(b) (West Supp. 1992); *Text of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET, *supra* note 42, at 33.

115. Whitman v. Superior Court, 54 Cal. 3d 1063, 1073-74, 820 P.2d 262, 267, 2 Cal. Rptr. 2d 160, 165 (1991).

116. Preliminary hearings will be shorter, but less reliable, if a testifying officer has limited knowledge of the case, declarant, or hearsay statement, the defense cannot call the hearsay declarant at a preliminary hearing, or if a magistrate narrowly interprets the prohibition against discovery and offer of proof criteria to bar all but the most compelling defense testimony. *See infra* notes 172-179 and accompanying text (discussing Proposition 115's limitations on defense testimony).

provide defendants. A "115-qualified" officer's training and experience may facilitate only an accurate narration of unreliable hearsay.[117]

In some instances, magistrates may be able to resolve the reliability of hearsay evidence on a categorical basis. For example, it would be reasonable for a magistrate to conclude that even a "115-qualified" officer with some knowledge of the case or the hearsay statement cannot offer "meaningful assistance" in determining the reliability of hearsay regarding conclusions of experts.[118] Although the Supreme Court of California stated that Proposition 115's probable intent was to allow the use of hearsay statements from any person, that decision does not preclude magistrates from reevaluating the statutorily presumed capability of a "115-qualified" law enforcement officer to provide assistance.[119] Experts, by definition, provide specialized and technical information to the court.[120] A "115-qualified" officer is unlikely to possess the training, experience, or familiarity with a particular field necessary to help magistrates assess the nature or sufficiency of an expert's qualifications, the reliability of an expert's conclusions and how they fit within the views of the relevant scientific community,[121] or the methodology the expert

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117. The Supreme Court of California conceded that the reliability of a hearsay statement may remain untested until trial. *Whitman*, 54 Cal. 3d at 1078, 820 P.2d at 270, 2 Cal. Rptr. 2d at 168.

118. *Id.* at 1072, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165.

119. *Id.* at 1074, 820 P.2d at 267, 2 Cal. Rptr. at 164-65. The court relied on California Evidence Code section 135. *Id. See* CAL. EVID. CODE § 135 (West 1987).

120. *See* CAL. EVID. CODE § 720 (West 1987). Section 720 of the Evidence Code provides:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
>
> (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

Id. Experts are used extensively in the most serious felony cases, such as murder, child abuse, and rape. When expert testimony constitutes the backbone of a criminal case, the reliability of the expert conclusions become critical.

121. *See* People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

has used.[122] "Proposition 115-qualified" officers with five years experience or exposure to the P.O.S.T. videotape are not likely to be more able than any other lay witness to assess preliminarily the reliability of cause of death conclusions, drug and alcohol analyses, ballistics results, fingerprint comparisons, or DNA results, or to explain the significance, relative strength, or alternate interpretations of expert conclusions.[123] Nor is the typical "115-qualified" officer likely to be able to "meaningfully assist" magistrates in evaluating the reliability of hearsay from some specialized law enforcement officers who qualify as experts.[124] Although prohibiting the use of hearsay evidence from experts may allow the defense to obtain discovery, expert testimony often offers technical information consistent with self-defense, a lack of premeditation, consent, or accident that significantly impacts a probable cause determination.[125]

In addition, magistrates could reasonably adopt Proposition 115's specific justification for the use of hearsay "[in order] to protect victims and witnesses,"[126] to exclude experts, and perhaps law enforcement officers with specialized expertise, as hearsay declarants.[127] Experts do not "witness" an alleged crime; rather,

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122. The Supreme Court of California did not address the issue of whether Proposition 115 allows a "115-qualified" officer to narrate out-of-court statements from experts. *See Whitman*, 54 Cal. 3d 1063, 820 P.2d 262, 2 Cal. Rptr. 2d 160. Neither did the P.O.S.T. videotape. *See* People v. Mao, San Diego Super. Ct., CR 120971 (preliminary hearing Mar. 19, 1991). In *Mao*, the magistrate sustained a defense objection on foundation grounds to the police officer's attempt to testify to a doctor's conclusions regarding the nature of injuries suffered by the alleged victim without establishing the doctor's medical qualifications and the diagnostic techniques used. *Id.*

123. A "115-qualified" officer is likely to be no more than an "evidence reader" whenever used to introduce hearsay from an expert. The Supreme Court of California and the P.O.S.T. videotape use "reader" and "evidence reader" to refer to an officer testifying to hearsay statements who has no knowledge beyond the reports from which he or she testifies. *Whitman*, 54 Cal. 3d at 1072-73, 820 P.2d at 266-67, 2 Cal. Rptr. 2d at 164-65.

124. *Id.* at 1072-73, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165. Some law enforcement officers have specialized training in areas such as homicide, narcotics, gangs, and vice.

125. Expert conclusions may support a reduction of a charge or negate probable cause. This information is likely to be exposed only during cross-examination of the expert by the defense.

126. CAL. CONST. art. I, § 30(b).

127. The Supreme Court of California relied on Proposition 115's general objectives of increasing efficiency and expediting proceedings, rather than its specific objective authorizing the use of hearsay, in approving the substitution of a "115-qualified" law enforcement officer for another officer. *Whitman*, 54 Cal. 3d at 1075, 820 P.2d at 268, 2 Cal. Rptr. 2d at 166; *id.* at 1085-86, 820 P.2d at 278, 2 Cal. Rptr. 2d at 176 (Kennard, J., concurring and dissenting). *See Text of Proposed*

they utilize their expertise to analyze and interpret evidence or behavior requiring their expertise. Some experts testify in criminal cases as part of their duties; others are paid to offer their expertise in particular cases.[128] These "witnesses" are not generally in need of "protection,"[129] nor are they likely to be ably represented by a lay substitute. Because of the specific justification for the use of hearsay, the limitations of a "115-qualified" officer, and the purpose of the "115-qualified" law enforcement foundation, Proposition 115's category of hearsay declarants logically excludes experts. In appropriate cases, to assure some indicia of reliability, magistrates could consider receiving expert hearsay from a "115-qualified" officer with additional specialized knowledge.[130]

Another important type of hearsay magistrates might consider excluding as a category is multiple hearsay.[131] Proposition 115 does not define the scope of admissible hearsay. Its statutory language seems to allow a testifying officer to narrate a hearsay

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Law, in CALIFORNIA BALLOT PAMPHLET, *supra* note 42, at 33. The P.O.S.T. videotape asserts that officers can testify to each other's reports to accommodate vacation schedules.

128. Indeed, privately employed experts regularly advertise their qualifications, and enhance their credibility by testifying as expert witnesses.

129. *See* CAL. CONST. art I, § 30(b). For an illustration of this proposition, see People v. Gandara, 233 Cal. App. 3d 1163, 284 Cal. Rptr. 906 (1991), *review granted*, 819 P.2d 1, 1 Cal. Rptr. 2d 543 (1991). The "115-qualified" law enforcement officer (who was an investigator with the Kern County District Attorney's Office) testified to the qualifications and report of a criminalist that he had obtained from another criminalist. *Gandara*, 233 Cal. App. 3d at 1166, 284 Cal. Rptr. at 908. The court stated that "a criminalist is not in the class of people who might need protection." *Id.* at 1173, 284 Cal. Rptr. at 912.

130. An alternative to requiring experts to attend the preliminary hearing is a stipulation between counsel that the subject of the stipulation will not be in issue for some period of time or some types of proceedings. E. IMWINKELRIED, R. WYDICK & J. HOGAN, *supra* note 27, at 461-63. Magistrates have the discretion to accept or reject the stipulation. *Id.* If a magistrate accepts a stipulation, the subject of the stipulation is no longer in issue for the time period covered by the stipulation (typically a preliminary hearing, and perhaps pretrial motions). It remains common practice at preliminary hearings for prosecutors and defense counsel to agree to stipulate to expert evidence, such as fingerprints, chemical analysis of controlled substances, bodily fluids, or ballistics results. Preliminary hearing stipulations usually do not extend to trial.

131. Under certain circumstances, "multiple hearsay" is admissible in California. *See* CAL. EVID. CODE § 1201 (West 1987). "Multiple hearsay" is defined as a statement made out of court being offered for the truth of the matter which is made to someone other than the hearsay reporter who is in court.

statement made to someone other than himself.[132] Proposition 115 arguably even allows magistrates to hear multiple hearsay learned by the declarant. In its recent decision, the Supreme Court of California, in dicta, expressed doubt that the use of multiple hearsay was envisioned by the drafters of Proposition 115.[133] The court did not, address, bar the use of multiple hearsay so long as the testifying officer was not just an "evidence reader."[134] The court did not decide whether magistrates should presume multiple hearsay to be unreliable, or, if magistrates hear such evidence, whether they should require prosecutors to establish either the foundational requirements of a specific hearsay exception,[135] "particularized guarantees of trustworthiness,"[136] or the court-expanded "115-qualified" law enforcement officer foundation for each level of hearsay.[137] Magistrates who interpret Proposition

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132. CAL. PENAL CODE § 872(b) (West Supp. 1992). This assumes the officer is not present when the statement is made. On the other hand, section 872(b) of the Penal Code does not declare "all" hearsay admissible. *Id.*

133. Whitman v. Superior Court, 54 Cal. 3d 1063, 1072-75, 820 P.2d 262, 267-68, 2 Cal. Rptr. 2d 160, 165-66 (1991) (the facts presented in *Whitman* did not involve multiple hearsay).

134. *Id.*

135. Although the Evidence Code provides for the admission of multiple hearsay, each hearsay level constituting the multiple hearsay statement is required to meet an exception to the hearsay rule. CAL. EVID. CODE § 1201 (West 1987). As noted by the Supreme Court of California, this section was not modified by Proposition 115, nor did Proposition 115 exempt the new hearsay exception from this requirement. *Whitman*, 54 Cal. 3d at 1074, 820 P.2d at 267-68, 2 Cal. Rptr. 2d at 165-66. *But see id.* at 1089, 820 P.2d at 278, 2 Cal. Rptr. 2d at 176 (Kennard, J., concurring and dissenting) (offering hypothetical situation illustrating the difficulties with the standard set forth by the majority).

136. Idaho v. Wright, 110 S. Ct. 3139, 3152 (1990).

137. *Whitman*, 54 Cal. 3d at 1072-74, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165. The P.O.S.T. videotape indicates judges differ on this issue, and this observation is borne out in practice. The hearsay declarant in *Whitman* appeared to be a "115-qualified" officer based on the testifying officer's opinion of the age of the declarant's badge number. *Id.* at 1069, 820 P.2d at 264, 2 Cal. Rptr. 2d at 162. Some magistrates have admitted multiple hearsay so long as the officer on the witness stand is "115-qualified." *See, e.g.*, Montez v. Superior Court, 233 Cal. App. 3d 917, 921, 285 Cal. Rptr. 279, 282 (1991), *vacated by*, ___ Cal. 4th ___, 823 P.2d 620, 4 Cal. Rptr. 2d 454 (1992). There was no indication in *Montez* that the officer who prepared the report containing statements from others from which the "115-qualified" officer testified was also "115-qualified." *Id.* A disconcerting example of the admission of multiple hearsay is presented in *People v. Edwards* (San Diego Super. Ct.) CR 122093 (preliminary hearing May 1, 1991). Over defense objection, a detective, a 12-year police veteran, testified to statements made by a three-year-old child to his uncle, that were relayed to his mother, who told another police officer, who relayed this information to the detective. *Id.* Defense counsel's objections on hearsay and witness competency grounds were overruled. *Id.* No foundation was established for each level of hearsay. *Id.* Defense counsel's motion to dismiss pursuant to Penal Code section 995 was granted on the grounds that the hearsay evidence

115's new exception, at a minimum, to exclude multiple hearsay unless each level independently qualifies as an exception give effect to both the specific justification for the use of hearsay and the purpose served by a testifying officer's training or experience.[138]

Once magistrates permit a "115-qualified" officer to narrate hearsay evidence in a particular case, they still must evaluate the reliability of the evidence in order to make a probable cause determination.[139] They may have to conduct this evaluation not only without an adequate replacement for the preliminary assistance of traditional hearsay exceptions, but without the assistance of an effective adversarial challenge.[140] If magistrates do not overemphasize Proposition 115's prohibition against using preliminary hearings for discovery, Proposition 115 leaves intact the defense's right to cross-examine witnesses.[141] However, the right to cross-examine presupposes a witness with sufficient knowledge to permit effectively "challenging the witness's

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was not reliable. *Id.* According to defense counsel, a new complaint was filed by the District Attorney's Office the day the motion to dismiss was granted and a new preliminary hearing was conducted. The defendant remained in custody throughout both proceedings. The testifying officer in the original case met the standards outlined by *Whitman*, 54 Cal. 3d at 1072-74, 820 P.2d at 267, 2 Cal. Rptr. 2d at 165.

138. This determination is difficult if the narrators between the declarant and the testifying officer have no training or experience in relaying facts accurately, or if someone in the chain of information cannot be identified at all. By accepting layers of intermediaries between the testifying officer and the hearsay declarant, magistrates are not likely to further Proposition 115's objectives of offering victims and witnesses protection and avoiding inconvenience through the use of hearsay. Magistrates permitting a single "115-qualified" officer to consolidate the hearsay information from several officers may increase the difficulty of determining the source of the hearsay evidence in order to evaluate its accuracy. *See Whitman*, 54 Cal. 3d at 1089, 820 P.2d at 278, 2 Cal. Rptr. 2d at 176 (Kennard, J., concurring and dissenting).

139. *Id.* at 1083, 820 P.2d at 274, 2 Cal. Rptr. 2d at 172.

140. Instead, magistrates must decide whether the training or experience of a "115-qualified" officer with case-specific knowledge offers some indicia of the reliability of the evidence in a particular case. As a practical matter, Proposition 115 requires magistrates to assess the narrator in order to evaluate both the message and the messenger.

141. Cross-examination not only scrutinizes what the witness knows, but how the witness knows it and whether the witness is truthful. The right to cross-examine witnesses still applies to a preliminary hearing as well as to a trial. CAL. PENAL CODE § 865 (West 1985). The spirit of Proposition 115, as interpreted by the Supreme Court of California, in requiring the testifying officer to possess sufficient background and knowledge to assist magistrates, was to assure that an officer's hearsay information could be meaningfully explored. *Whitman*, 54 Cal. 3d at 1072, 820 P.2d at 266-67, 2 Cal. Rptr. 2d at 164-65.

perceptions, ability to recall and articulate recollections, veracity and character."[142] Carried to its logical conclusion, Proposition 115's authorization for the use of hearsay would limit exploration of the reliability of hearsay evidence to the knowledge of a "115-qualified" officer.[143] Because of Proposition 115's authorization for the use of nonselective hearsay evidence, its reliability cannot be assumed.[144]

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142. Davis v. Alaska, 415 U.S. 308, 316 (1974). No less an authority than Wigmore describes cross-examination as "the greatest legal engine ever invented for the discovery of the truth." J. WIGMORE, *supra* note 11, at § 1367. *See* Ohio v. Roberts, 448 U.S. 56, 71 (1980); Priestly v. Superior Court, 50 Cal. 2d 812, 821-23, 330 P.2d 39, 44-46 (1971) (Carter, J., concurring); Jennings v. Superior Court, 66 Cal. 2d 867, 876-78, 428 P.2d 304, 310-11, 59 Cal. Rptr. 440, 446-47 (1967). Section 780 of the Evidence Code lists factors to be considered in determining the credibility of a witness, including the following:

(a) His demeanor while testifying and the manner in which he testifies.
(b) The character of his testimony.
(c) The extent of his opportunity to perceive, to recollect, or to communicate any matter about which he testifies.
(d) The extent of his opportunity to perceive any matter about which he testifies.
(e) His character for honesty or veracity or their opposites.
(f) The existence or nonexistence of a bias, interest, or other motive.
(g) A statement previously made by him that is consistent with his testimony at the hearing.
(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
(i) The existence or nonexistence of any fact testified to by him.
(j) His attitude toward the action in which he testifies or toward the giving of testimony.
(k) His admission of untruthfulness.

CAL. EVID. CODE § 780 (West 1987).

143. The hearsay statements are "subject to a kind of indirect cross-examination." *Whitman*, 54 Cal. 3d at 1085, 820 P.2d at 275, 2 Cal. Rptr. 2d at 173 (Mosk, J., concurring). If the defense is prohibited from calling the hearsay declarant as a witness, this limitation is particularly significant. A testifying officer possessing superficial information regarding the alleged offense significantly reduces the information available to evaluate the reliability of the evidence. Obviously, examining a witness who personally observed an incident or made an identification permits a more extensive inquiry into the underlying reliability of the information than questioning a witness who is narrating only what he or she was told or has read.

144. The declarant could be an elderly victim of rape, a paid informant in a drug case, or a car theft victim intent on insurance fraud by fabricating a theft. Hearsay statements do not need to be corroborated, given under particular circumstances, to particular people, under oath, or at any particular time in relation to the time of the alleged offense. CAL. CONST. art. I, § 30(b); CAL. PENAL CODE § 872(b) (West Supp. 1992). They do not have to be necessary as the only method available to present information from an unavailable declarant. *Id.* The declarant could be in the courtroom audience during the preliminary hearing. The statements do not have to be preserved in any way. *Id.* The admissibility of Proposition 115 hearsay statements is not affected by the circumstances under which the statement is made or by their subject matter. *Id.* Hearsay evidence may relate, for example, to the time the sun set on a certain day, or to a complicated gang shooting. Hearsay is not restricted

Regardless of the "115-qualified" officer's knowledge, the use of hearsay eliminates the opportunity for magistrates to observe a declarant's demeanor, for magistrates cannot observe absent declarants.[145] A "115-qualified" officer's training or experience may assist him or her in accurately describing the out-of-court

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to matters of lesser importance or cases involving less serious felonies. *See* People v. Washington & Anderson (San Diego Super. Ct.) CR 12186 (preliminary hearing Apr. 22, 1991). The prosecutor in *Washington and Anderson* introduced testimony from an earlier trial as hearsay through a "115-qualified" officer. *Id.* The officer's recollection and summary was obviously less reliable than a transcript of the earlier proceedings. The magistrate could have taken judicial notice of a transcript. CAL. EVID. CODE § 452 (West 1985). *See* People v. Olvera, San Diego Super. Ct., CR 117770 (preliminary hearing Nov. 13, 1990). The declarant in *Olvera*, whose statement was narrated by a "115-qualified" officer, was a paid informant, a narcotics addict, and a convicted felon who had lied to a superior court jury and the San Diego Police Department. *Id. Mills v. Superior Court*, 42 Cal. 3d 951, 728 P.2d 211, 232 Cal. Rptr. 141 (1986), spoke disapprovingly of the similar general admissibility of hearsay in declaring section 872 of the Penal Code unconstitutional. *Id.* at 960, 728 P.2d at 216, 232 Cal. Rptr. at 146; CAL. PENAL CODE § 872 (West 1985). Former section 872 allowed hearsay evidence from declarants who were neither eyewitnesses nor victims to be admitted at a preliminary hearing. 1981 Cal. Stat. ch. 1026, sec. 1, at 3941 (amending CAL. PENAL CODE § 872) (amended by Proposition 115). Ten days notice to the defense was required. *Id.* The statute specifically allowed the defense to call the declarant as a witness at a preliminary hearing for the purpose of cross-examination. *Id.* If reasonable defense efforts to secure the presence of hearsay declarants were unsuccessful, the court was required to grant a short continuance of a preliminary hearing and was required to order the prosecution to present these declarants for cross-examination. *Id.* The consequence for the prosecution's failure to present these declarants for cross-examination was the elimination of their hearsay statements from consideration for purposes of a preliminary hearing. *Id.* The court declared the statute unconstitutional on due process grounds as a violation of article I, section 15 of the California Constitution, and discussed with disapproval the general admissibility of hearsay and the assertion that the admissibility of hearsay promoted the convenience of witnesses. *Mills*, 42 Cal. 3d at 960, 728 P.2d at 216, 232 Cal. Rptr. at 146. The *Whitman* court held that *Mills* is no longer controlling authority because Proposition 115's new constitutional amendment represents a specific exception to the confrontation right contained in article I, section 15 of the California Constitution. Whitman v. Superior Court, 54 Cal. 3d 1063, 1076-77, 820 P.2d 262, 269, 2 Cal. Rptr. 2d 160, 167 (1991). *See* CAL. CONST. art. I, § 30(b).

145. *See* J. WIGMORE, *supra* note 11, at § 1395. The demeanor of a witness who is present in court assists magistrates in evaluating that person's ability to perceive, remember, and relate an event. A witness' attitude toward the proceedings, verbal abilities, and expression of emotions assist in evaluating that witness' credibility. A witness may appear to be sincere, confused, accurate, fearful, respectful, or resentful. Whether a witness is hostile, easily angered in court, timid, inarticulate, or forthright may determine not only whether probable cause exists, but, if so, whether an offense is properly charged as a felony or misdemeanor. Also, magistrates cannot observe the demeanor of a declarant during hostile questioning. Because Proposition 115 does not require a prosecutor to justify offering hearsay evidence, a magistrate cannot determine whether a declarant is willing to testify, or is unwilling to face a defendant or a magistrate for a variety of reasons. CAL. CONST. art. I, § 30(b); CAL. PENAL CODE § 872(b) (West Supp. 1992). An absent declarant's behavior while in a defendant's presence cannot be observed. "A witness's reluctance to face the accused may be the product of fabrication rather than fear or embarrassment." Herbert v. Superior Court, 117 Cal. App. 3d 661, 671, 172 Cal. Rptr. 850, 855 (1981).

demeanor of a hearsay declarant to the magistrate, but that demeanor will have been observed under less formal circumstances than a courtroom. The accuracy of the testifying officer's description will also be influenced by the quality of that officer's contact with a declarant. An officer who has observed a declarant can offer magistrates more probative information than an officer who speaks to a declarant by telephone or one who has some knowledge of the case but has had no personal contact with the declarant.[146]

Even a "115-qualified" officer with knowledge of the case and direct contact with the declarant may impede an evaluation of the reliability of the hearsay statement. A testifying officer's knowledge depends on how much information that officer obtained from the hearsay declarant and what information that officer considered important enough to be remembered or recorded.[147] Almost by definition, an officer testifying to hearsay possesses less information than the hearsay declarant. A testifying officer's response, "I don't know," to questions about the reliability of the declarant or the declarant's statement renders further inquiry by the defense or magistrate useless.[148] The admission of hearsay does

146. A magistrate's reliance on a "115-qualified" officer for a description or analysis of a hearsay declarant's demeanor underscores the importance of requiring that officer to have training and experience in obtaining, preserving, and relating information obtained from interviews with people as well as the perusal of documents, in addition to personal contact with the declarant.

147. Even an officer's personal contact with a declarant is usually limited to that necessary to obtain information supporting a criminal prosecution rather than to obtain an extensive history from the declarant. Declarants are rarely interviewed at length by the police or prosecution prior to a preliminary hearing. In a typical situation, a declarant will be interviewed only once by a police officer close to the time of the alleged incident. Therefore, even an officer who has had personal contact with the declarant may be unable to provide information to magistrates regarding a declarant's ability to observe, remember, or communicate simply because of the officer's limited time with a declarant and because the officer's primary purpose at the time was to elicit information to facilitate a prosecution. Because charges listed on the complaint are determined by prosecutors after reports have been prepared by the police, an officer may not have obtained information relevant to charges that are the subject of a preliminary hearing.

148. The P.O.S.T. videotape explicitly recognizes that an officer cannot be cross-examined on what he doesn't know. "It has been said that a person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities. He entrenches himself in his simple assertion that he was told so and so, and leaves the burden upon his dead or absent author." San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 317-18, 104 P. 999, 1000 (1909).

not directly affect the evidentiary rules relating to constitutionally mandated prerequisites for the admission of hearsay against the defendant,[149] or the admission of illegally obtained evidence.[150] However, to the extent the "115-qualified" officer is unaware of the circumstances under which an incriminating statement was obtained or the evidence seized, the 115 procedure makes it difficult, if not impossible, to expose incompetent evidence.[151] Magistrates will thus be limited in their ability to determine probable cause accurately to the extent that a testifying officer cannot or will not provide information.[152]

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149. *See* CAL. EVID. CODE § 1204 (West 1987). Section 1204 provides, "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California." *Id.* Although Proposition 115 attempted to eliminate independent state grounds as a source for defendant's rights (California Constitution article I, section 24), *Raven v. Deukmejian*, 52 Cal. 3d 336, 355, 801 P.2d 1077, 1089, 276 Cal. Rptr. 326, 338 (1990), invalidated that particular provision.

150. *See* Priestly v. Superior Court, 50 Cal. 2d 812, 815, 330 P.2d 39, 41 (1958) (holding that evidence seized illegally was not competent evidence supporting a valid probable cause determination); People v. Schuber, 71 Cal. App. 2d 773, 775, 163 P.2d 498, 499 (1945) (holding that extrajudicial uncorroborated admissions by the defendant may not be considered without independent proof of the commission of the crime by defendant); CAL. PENAL CODE § 1538.5 (West Supp. 1992) (providing for defense motion to suppress illegally obtained evidence). Because Proposition 115 did not explicitly address pretrial motions brought at a preliminary hearing, the defense may be able to exclude 115-hearsay testimony relating to the issue raised by a particular motion. *See* CAL. PENAL CODE § 1538.5 (West Supp. 1992).

151. This would be particularly difficult if magistrates narrowly interpreted Proposition 115's prohibition against discovery at preliminary hearings. *See supra* notes 63-78 and accompanying text (discussing Proposition 115's prohibition against using preliminary hearings to obtain discovery). *See also* CAL. EVID. CODE §§ 911-920 (West 1987) (addressing privileges). The admission of hearsay may also affect determining whether a legal privilege exists that would protect the hearsay statement from disclosure.

152. " 'There's a big difference . . . between a police officer telling you that a witness saw the defendant at the scene, and the witness testifying that he saw the suspect at the scene for one second.' " J. Wechter, *supra* note 40, at 65 (quoting San Francisco Municipal Court Judge Alfred G. Chiantelli in an article discussing a bill introduced in the Legislature that would have allowed hearsay testimony at preliminary hearings). The circumstances of a declarant's opportunity to observe an incident or to identify a person determine the accuracy of that observation. If a declarant is an eyewitness to an alleged crime, his or her ability to perceive, remember, and relate the incident is critical to determine the reliability of his or her statement. "[T]he probative value of an identification depends on the circumstances under which it was made." People v. Gould, 54 Cal. 2d 621, 631, 354 P.2d 865, 870, 7 Cal. Rptr. 273, 278 (1960). The officer may have no knowledge of possible impeachment information, such as the declarant's prior contacts with law enforcement, the nature of any relationship between the declarant and the defendant, whether the declarant has any interest in the outcome of the case, or any complicity by the declarant in the commission of the alleged offense.

Because Proposition 115 substitutes a testifying officer for a hearsay declarant, the testifying officer's own credibility becomes an additional factor that magistrates must evaluate. Traditional law enforcement officers receive training in obtaining, recording, and relaying information to facilitate criminal prosecutions.[153] By exercising judgment in identifying information that may be important to the prosecution of the case, even a "115-qualified"

A bias in the case for or against the defendant may affect a declarant's truthfulness. A custody dispute in a child molest case may bias the information against a defendant who is a party to that dispute. Information from a paid informant implicating the defendant may affect the reliability of that information. Also, the testifying officer may have insufficient information to expose the declarant's incompetence as a witness. Unless otherwise provided, all persons are competent to testify. CAL. EVID. CODE §§ 700-701 (West Supp. 1992). *See* People v. Washington and Anderson, San Diego Super. Ct, CR 12186 (preliminary hearing Apr. 22, 1991). In *Washington and Anderson*, the "115-qualified" officer testified only during cross-examination that a prosecution witness had lied to officers and had testified at an earlier trial inconsistently with other statements. *Id.* The defense was aware of this information because of their participation in the earlier proceedings. *Id. See also* People v. Edwards, San Diego Super. Ct., CR 122093 (preliminary hearing May 1, 1991). The complaining witness was a three-year-old child whose information was relayed by the testifying officer through a series of people, preventing the magistrate from examining the child's ability to provide truthful information. *Id.* This officer, a detective investigating the case, exceeded the qualifications set forth in *Whitman* to testify to hearsay. *Id. See* Whitman v. Superior Court, 54 Cal. 3d 1063, 1072, 820 P.2d 262, 267, 2 Cal. Rptr. 2d 160, 165 (1991).

153. Police officers are active participants in an adversarial criminal justice system. They, unlike journalists, mediators, or other neutral observers, are not trained to present all sides of a dispute. The *San Diego Union* describes the academy training all San Diego Police Department recruits receive. San Diego Union, Aug. 11, 1991, § A, at 1, 6 ("Hanging Tough: One Kid Beats the Odds; A Police Recruit Escapes Whirlpool of Drugs, Violence"). The *Union* reported that a training officer, exhorting recruits to pump their legs higher while running in place, says " 'You can see that dirtbag, . . . [y]ou're gaining on him, he's tired and you're smiling.' " *Id.* § A, at 6. The asphalt used for running was inscribed with "Pig town," "Pigs suck," and "Crips rule," serving as notice that the recruits "were about to plunge into a hostile world." *Id.* The information the officers obtain is forwarded to the prosecuting agency to determine whether it supports the filing of a criminal complaint. *See* CAL. GOV'T CODE § 26501 (West 1988). "An officer's job is not finished when a suspect is arrested; rather, it continues through conviction and punishment. Like prosecutors and judges, officers are an integral part of the criminal justice system." *Whitman*, 54 Cal. 3d at 1088, 820 P.2d at 277, 2 Cal. Rptr. 2d at 175 (Kennard, J., concurring and dissenting). The P.O.S.T. videotape acknowledges this. Any bias or interest on the part of the officer may reflect on the accuracy or completeness of the hearsay statement. *See, e.g., 60 Minutes: Bad Cops* (CBS television broadcast, June 30, 1991) (transcript no. 2342, vol. XXIII, no. 41). *60 Minutes* reported that four Oakland Housing Authority police officers were convicted of civil rights violations. *Id.* The prosecution revealed a pattern of police brutality and preparation of false police reports. *Id.*

officer in direct contact with the declarant influences the information available at the preliminary hearing.[154]

Hearsay evidence that cannot be effectively challenged because of the cumulative effect of an absent declarant, gaps in an officer's knowledge, the relative importance of unavailable information, or questions about an officer's credibility impairs an independent evaluation of the evidence.[155] Missing information may be supplemented if the defense calls a hearsay declarant as a witness.[156] Proposition 115 allows the defense to call a declarant as a witness, but initially protects the declarant from being examined as an adverse witness.[157] The most significant consequence of this rule is that the defense, in examining the hearsay declarant, must proceed by direct examination rather than leading cross-examination questions. Prohibiting cross-examination may further Proposition 115's objective of treating witnesses with

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154. The officer's judgment may be guided by his or her training, experience, or personal integrity; but a judgment, by definition, is a choice. Even a videotape may not offer a complete picture of an event. *See* NEWSWEEK, *Video Vigilantes*, July 22, 1991, at 42. A testifying officer's untruthfulness, evasiveness, or simple carelessness may be impossible to detect in the absence of an examination of the declarant. *See generally* Conley, O'Barr, & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375. An officer concerned with expedience rather than careful attention to detail could inaccurately record or omit important information. Unless recording a statement verbatim, an officer is more likely than a civilian to choose words with a strong legal impact. The line between what the declarant said or intended to say and what the officer believes the declarant said or intended to say is also likely to blur.

155. Eyewitness information is of particular concern. "A judicial officer engaged in a judicial determination of probable cause can hardly rest easy solely with the hearsay account of the policeman of what these eye-witnesses told him if the eyewitnesses can be available, so that he can listen to their versions and observe their demeanor, and provide an opportunity to defense counsel to explore their account on cross-examination." Ross v. Sirica, 380 F.2d 557, 565 (D.C. Cir. 1967). "Eyewitness identification in criminal cases is wrong as many as 4 times in 10." San Diego Union, Oct. 13, 1991, § A, at 7-8.

156. This assumes the defense is able to locate and subpoena the declarant as well as satisfy an offer of proof. *See infra* notes 172-179 and accompanying text (discussing Proposition 115's limitations on defense testimony). It may be more difficult after Proposition 115 to locate and subpoena hearsay declarants. Not only may the defense have no notice that a "115-qualified" officer will substitute for the hearsay declarant, but Proposition 115's elimination of any requirement that the prosecution provide discovery to the defense before a preliminary hearing may mean the defense has no information regarding who or where the declarant is. *See* CAL. PENAL CODE § 859 (West Supp. 1992).

157. CAL. EVID. CODE § 1203.1 (West Supp. 1992). If the prosecutor requests that the magistrate demand an offer of proof, the defense must satisfy those requirements before calling the hearsay declarant as a witness. CAL. PENAL CODE § 866(a) (West Supp. 1992).

care and respect.[158] However, this provision fails to recognize that the hearsay declarant, in reality, is likely to be a hostile witness for the defense. Leading questions may be the most efficient, and perhaps the only, method of obtaining responsive, informative answers.[159] Despite Proposition 115, magistrates retain discretion to control the mode of interrogating witnesses, to designate adverse witnesses, and to permit leading questions "in the interests of justice" in order to supplement a "115-qualified" officer's lack of knowledge.[160]

Suspension of the hearsay rule without a change in the standard for determining probable cause requires magistrates to compensate for a lack of indicia of trustworthiness and impaired cross-examination.[161] To "conscientiously entertain a strong suspicion of guilt" after Proposition 115, magistrates must assure that they have sufficient information to test Proposition 115 hearsay "in some appreciable way."[162] Proposition 115 may require magistrates to admit hearsay evidence, but they need not accept it as reliable.[163]

3. *Deciding Probable Cause*

At the conclusion of preliminary hearings, how magistrates respond to the use of 115-hearsay evidence in deciding probable cause will ultimately determine the significance of the new hearsay

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158. *Text of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET, *supra* note 42, at 33.

159. While nonleading questions allow the witness to develop an answer and leading questions generally require the witness to agree or disagree with a statement, leading questions are generally more efficient in obtaining information from a reluctant witness.

160. Magistrates may retain discretion to permit leading questions. *See* CAL. EVID. CODE §§ 765, 767 (West 1987). Proposition 115 did not affect Evidence Code section 765 which allows the court to control the examination of witnesses, or section 767, which allows a change in the mode of interrogation "in the interests of justice." *Id.*

161. *See* Whitman v. Superior Court, 54 Cal. 3d 1063, 1085, 820 P.2d 262, 275, 2 Cal. Rptr. 2d 160, 173 (1991) (Mosk, J., concurring).

162. *Id.*

163. *See* Williams v. Kidd, 170 Cal. 631, 151 P. 1 (1915). In *Williams*, the court stated: "[A]s the purpose of all rules of evidence is to aid in arriving at the truth, if it shall appear that any rule tends rather to hinder than to facilitate this result, to promote rather than repress fraud, it should be abrogated without hesitation." *Id.* at 649, 151 P. at 8. *Accord* People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).

exception. Once magistrates have received 115-hearsay evidence, they must decide whether it is sufficiently reliable to support a "strong suspicion" to justify holding a defendant to answer for a felony trial.[164] Prosecutors who replace the traditional foundations for hearsay exceptions with a "115-qualified" law enforcement officer run the risk that magistrates will decline to find probable cause because of unreliable evidence. This risk can be evaluated by considering three approaches magistrates can use in reaching a probable cause determination based on 115-hearsay.

One approach would be for magistrates to accept hearsay evidence uncritically and to find probable cause as soon as a prosecutor has introduced sufficient testimony to suggest a defendant has committed a crime, regardless of any contrary evidence. Magistrates could then limit defense cross-examination and the presentation of further (defense) evidence, reasoning that the weight of the evidence is a matter for a jury to decide at trial.[165] In so doing, magistrates would in part abdicate the independent fact-finding function that even Proposition 115 expects them to fulfill; the responsibility for evaluating the evidence and resolving conflicts. In effect, magistrates would be changing the standard for determining probable cause. Preliminary hearings would cease to serve as a check on the prosecutor's discretion.

Moreover, by accepting hearsay evidence uncritically, magistrates would effectively substitute the judgment of the testifying officer for their own.[166] This approach would also delegate to a "115-qualified" officer a magistrate's duty to determine whether an eligible felony should be reduced to a

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164. People v. Uhlemann, 9 Cal. 3d 662, 667, 511 P.2d 609, 612, 108 Cal. Rptr. 657, 660 (1973); Rideout v. Superior Court, 67 Cal. 2d 471, 474, 432 P.2d 197, 199, 62 Cal. Rptr. 581, 583 (1967). This is of particular importance if hearsay is the sole basis for holding a defendant to answer for a felony trial.

165. Magistrates might characterize evidence that goes beyond a minimal probable cause threshold as "discovery."

166. A magistrate is required to do more than this in issuing a search warrant. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Illinois v. Gates, 462 U.S. 231, 239 (1983). *See* People v. Olvera, San Diego Super. Ct., CR 117770 (preliminary hearing Nov. 13, 1990). The conclusion of the preliminary hearing magistrate indicated the evidence was "pretty" thin, but found probable cause because of the "115-qualified" officers "familiarity with the case."

misdemeanor to the "115-qualified" officer. In the past, magistrates have rightly resisted this course in evaluating non-hearsay evidence. One court, for example, responded to a prosecutor's assertion that "[a]s long as the prosecution's evidence showed probable cause to hold petitioner to answer it was irrelevant at that stage whether the man was, in fact, framed" by stating, "[t]o accept these arguments would reduce the preliminary hearing to an ex parte proceeding at which the defendant's presence would be a meaningless gesture."[167]

A second approach would be for magistrates to accept hearsay evidence unless the defense can expose its unreliability. This approach fails to recognize that Proposition 115 creates new obstacles to testing the reliability of hearsay evidence that may render cross-examination futile. More importantly, by accepting hearsay unless challenged, magistrates would convert the traditional burden on the proponent of demonstrating the reliability of hearsay evidence into a burden on the opponent of attempting to expose its unreliability.[168] By accepting hearsay unless that evidence is challenged by the defense, magistrates would be evaluating the reliability of the evidence only if given a reason to do so. The defense would have the burden of providing the impetus for a magistrate to review the sufficiency of the evidence to justify a felony trial, and to decide whether a felony charge should be reduced to a misdemeanor.

The third approach embodies the magistrate's traditional role. Rather than accepting hearsay uncritically or accepting hearsay unless challenged, magistrates would independently evaluate the

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167. Jennings v. Superior Court, 66 Cal. 2d 867, 880, 428 P.2d 304, 312, 59 Cal. Rptr. 440, 448 (1967). *See* Esteybar v. Municipal Court, 5 Cal. 3d 119, 127, 485 P.2d 1140, 1145, 95 Cal. Rptr. 524, 529 (1971) (stating that the magistrate's function at a preliminary hearing is to act as an "independent arbiter of the issues presented by the adversaries").

168. A fundamental principle of the foundations to hearsay exceptions is to demonstrate some indicia of reliability before the testimony is offered. E. IMWINKELRIED, R. WYDICK & J. HOGAN, *supra* note 27, at 238. The proponent of the evidence is far more likely to be familiar with the evidence. The opponent of hearsay evidence is further handicapped in effectively challenging that evidence if the declarant is not present to be cross-examined.

evidence and discharge the defendant if the evidence is unreliable.[169] "The rule which requires less evidence at a preliminary examination, or even slight evidence, merely goes to the quantum, sufficiency or weight of evidence and not to its competency, relevancy or character."[170] In weighing the evidence, evaluating credibility, and resolving conflicts, magistrates effectuate the purpose of both pre- and post-Proposition 115 preliminary hearings and facilitate the adversarial character of preliminary hearings that Proposition 115 continues to presume. "When the decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature."[171] If magistrates are unconvinced of the reliability of hearsay evidence regardless of whether there is a challenge by the defense, defendants should be discharged. If magistrates find hearsay evidence sufficiently reliable to support a "strong suspicion" of guilt, but the circumstances warrant a misdemeanor trial, eligible felonies should be reduced to misdemeanors.

C. Limitation on Defense Testimony

Proposition 115's limitation on defense testimony furthers the goal of expediting preliminary hearings by prohibiting their use for discovery. The offer of proof criteria restrict the purpose of preliminary hearings to a determination of probable cause by prohibiting defense evidence that does not "establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a hearsay declarant testified to by a prosecution witness."[172] Whether this limitation facilitates or impedes a probable cause determination depends on how magistrates interpret the language of this provision

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169. The Supreme Court of California, in rejecting a separation of powers challenge, recognized the independence of magistrates. Whitman v. Superior Court, 54 Cal. 3d 1063, 1083, 820 P.2d 262, 274, 2 Cal. Rptr. 2d 160, 172 (1991).

170. People v. Schuber, 71 Cal. App. 2d 773, 775, 163 P.2d 498, 499 (1945).

171. People v. Tenorio, 3 Cal. 3d 89, 94, 473 P.2d 993, 996, 89 Cal. Rptr. 249, 252 (1970). *Tenorio* involved a dismissal of a prior conviction by a trial judge, but refers to the judicial process as a whole. *Id.*

172. CAL. PENAL CODE § 866(a) (West Supp. 1992).

in light of Proposition 115's goals and the purpose of preliminary hearings, and how they choose to exercise their discretion in implementing this provision. Although magistrates must comply with a prosecution request,[173] magistrates alone have discretion to determine whether the defense offer of proof is satisfactory.[174]

To interpret these requirements, magistrates must decide whether proposed testimony must potentially eliminate an element of a charged crime or need only cast doubt on prosecution testimony. Some magistrates may demand an offer of proof that specifies which of the three criteria proposed testimony will satisfy, which count of a multiple-count complaint proposed testimony will address, or how proposed testimony will impeach a prosecution witness or hearsay declarant.[175] Others may require only a good

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173. Magistrates are required to demand a defense offer of proof only upon the request of a prosecutor; however Proposition 115 does not prohibit magistrates from making that demand on their own motion. CAL. PENAL CODE § 866(a) (West Supp. 1992). Indeed, Proposition 115's prohibition of preliminary hearing discovery seems to authorize implicitly a *sua sponte* demand. As a practical matter, however, the impact of this limitation on preliminary hearings will be determined by how magistrates apply the statute rather than whether magistrates demand an offer of proof on their own motion or in response to the prosecution's request.

174. *See* Faubel v. Superior Court, 235 Cal. App. 3d 256, 277, 279 Cal. Rptr. 658, 670 (1991) *review dismissed, cause remanded*, ___ Cal. 4th ___, 823 P.2d 618, 4 Cal. Rptr. 2d 452-53 (1992). The statute purports to limit the exercise of that discretion by requiring the proposed defense testimony to be "reasonably likely" to fulfill the offer of proof requirements. CAL. PENAL CODE § 866(a) (West Supp. 1992). This standard, in contrast to Proposition 115's hearsay provisions, creates a preliminary barrier for proposed defense evidence. *See* CAL. CONST. art. I, § 30(b); CAL. PENAL CODE § 872(b) (West Supp. 1992). Proposition 115 eliminates all threshold barriers to the use of hearsay evidence so long as the appropriate officer testifies. *Id.*

175. *See* People v. Goyochea, San Diego Super. Ct., CR 116823 (preliminary hearing Oct. 2, 1990). In response to a defense request to call a witness, the prosecution in *Goyochea* demanded that the magistrate request an offer of proof. *Id.* At the prosecutor's request, the magistrate required defense counsel to specify which of the three charges on the complaint the witness's testimony would address. *Id.* The magistrate did not require a summary of the proposed witness's testimony including a showing of relevance, as requested by the prosecution, although the defense did ultimately make these representations. *Id.* During the cross-examination of this witness, the prosecutor indicated that he had interviewed this witness that day before the preliminary hearing. *Id.* The prosecutor also had a tape recording of this witness's statement made to a police officer before the preliminary hearing. *Id.* The prosecutor's conduct clearly indicates that the prosecutor was not demanding an offer of proof to inform himself of the substance of the proposed testimony in order to prepare himself for cross-examination. At best, he was attempting to streamline the preliminary hearing; at worst he was attempting to prevent the magistrate from hearing potential defense evidence that could influence the magistrate's probable cause decision. *See* People v. Edwards, San Diego Super. Ct., CR 122093 (preliminary hearing May 1, 1991). Over the prosecution's objection that the proffered testimony did not meet Proposition 115's offer of proof criteria for defense evidence, defense counsel was permitted

faith representation that the proposed testimony is likely to satisfy the offer of proof criteria.

A magistrate's willingness to recognize limits on the defense's ability to provide a detailed offer of proof, either as a general matter or in a particular case, is likely to influence what constitutes a "satisfactory" showing. Even before Proposition 115, the defense was rarely as well-informed about the case as the prosecution and was often unable to obtain information from potential prosecution witnesses before a preliminary hearing. Proposition 115's elimination of mandatory discovery before preliminary hearings is likely to decrease the information available to the defense to the extent that the new offer of proof requirements may be an unsurmountable threshold.[176] Magistrates adopting a narrow interpretation may eliminate testimony that would illustrate the confusing nature of an incident, fundamental weaknesses in the prosecution's case, or alternative explanations for a defendant's conduct. While preliminary hearings may be shorter as a result, magistrates would be prohibiting evidence the prosecution did not wish magistrates to consider in evaluating the evidence simply because it might cast doubt on the prosecution's evidence.

Despite Proposition 115's explicit recognition of the power of magistrates to reduce eligible felonies to misdemeanors,[177] the offer of proof requirements seem to eliminate the ability of the

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to elicit statements made by the defendant to the police officer who was testifying to hearsay for the prosecution. *Id.*

176. Requiring an offer of proof presumes that the defense possesses sufficient information about the case to accurately assess the nature of the proposed evidence. Providing a sufficient offer of proof will be more difficult for the defense if the prosecution utilizes Proposition 115's discovery provisions by no longer providing the defense with police reports and other discovery prior to the preliminary hearing. *See* CAL. PENAL CODE §§ 859, 1054-1054.7 (West Supp. 1992). *See also* Faubel v. Superior Court, 235 Cal. App. 3d 256, 278-79, 279 Cal. Rptr. 658, 671 (1991), *review dismissed, cause remanded*, ___ Cal. 4th ___, 823 P.2d 618, 4 Cal. Rptr. 2d 452-53 (1992). In *Faubel*, defense counsel made an offer of proof in support of calling as a defense witness the complaining witness, whose hearsay statements had been presented by a "115-qualified" law enforcement officer. *Id.* at 279, 279 Cal. Rptr. at 671. Defense counsel stated that he or she was unprepared and unable to offer the court a more specific offer of proof than that he or she believed the complaining witness's testimony could impeach her hearsay statement offered by the "115-qualified" officer. *Id.* The magistrate's refusal to allow defense counsel to call the complaining witness on the grounds that the offer of proof was insufficient was upheld. *Id.*

177. CAL. PENAL CODE § 866(b) (West Supp. 1992).

defense to present testimony facilitating the exercise of this power. In reducing eligible felonies to misdemeanors, magistrates traditionally have considered evidence that neither raises an affirmative defense, negates an element of a charge, nor impeaches a witness.[178] Magistrates can interpret these requirements to compensate for this inadvertent omission to allow testimony supporting a reduction to a misdemeanor without undermining Proposition 115's limitations on discovery and defense testimony.

Traditionally, the defense has seldom offered evidence at preliminary hearings.[179] Therefore, among Proposition 115's changes to preliminary hearings, the limitation on defense testimony will have the least significant overall impact. When the defense wishes to offer testimony the prosecution did not present but attempts to exclude by requesting an offer of proof, magistrates should interpret these restrictions consistently with Proposition 115's limitations on the purpose of preliminary hearings without inhibiting their evaluation of the reliability of the evidence and determination of whether the evidence justifies a felony trial.

IV. PROPOSITION 115'S EFFECT ON PRELIMINARY HEARINGS AS A SCREENING DEVICE

Before Proposition 115, a magistrate's independent evaluation of whether sufficient reliable evidence existed to justify a felony trial protected defendants from unsubstantiated and excessive criminal charges. Magistrates were assisted in their judicial task of weighing the evidence and resolving conflicts by the hearsay rule, and by the ability of the defense to explore the strength of the

178. In support of a reduction of a felony to a misdemeanor, magistrates typically consider the relatively minor nature of the offense, the defendant's lack of criminal history, the defendant's minimal involvement in a multiple-defendant case, or the defendant's youth, abilities, and resources. *See* Esteybar v. Municipal Court, 5 Cal. 3d 119, 123, 485 P.2d 1140, 1142, 95 Cal. Rptr. 524, 526 (1971).

179. *See* People v. Elliot, 54 Cal. 2d 498, 354 P.2d 225, 6 Cal. Rptr. 753 (1960). In *Elliot*, the court stated, "The testimony heard at the preliminary hearing is often that of the prosecution only. The defense may remain silent if it appears that reasonable or probable cause to commit has been established." *Id.* at 504, 354 P.2d at 229, 6 Cal. Rptr. at 757. An affirmative defense or information sufficient to negate a criminal charge may be discovered through effective cross-examination.

prosecution's evidence by cross-examining prosecution witnesses and by presenting evidence. By screening out cases that merited misdemeanor trials or dismissals, magistrates conserved the resources of the criminal justice system. In the course of determining probable cause, pre-Proposition 115 preliminary hearings secondarily facilitated pretrial motion and trial preparation.

Although post-Proposition 115 preliminary hearings are still intended to assure that a magistrate's probable cause determination is supported by a "strong suspicion," Proposition 115's statutory and constitutional changes hinder magistrates in accomplishing this purpose. A prohibition against the use of preliminary hearings for discovery, the authorization for the unrestricted admission of hearsay evidence through a "115-qualified" law enforcement officer, and limitations on defense testimony restrict the depth and breadth of information available to magistrates.[180] As a result, magistrates may find it more difficult to accurately assess the trustworthiness of the evidence. If that is the case, a defendant could be ordered to stand trial on felony charges based on evidence that could have been determined to be unreliable at the time of the preliminary hearing.[181]

Furthermore, Proposition 115 impairs the usefulness of the preliminary hearing for both the prosecution and defense in evaluating the case for settlement and preparing for pretrial motions and trial. The defendant may be less informed of the nature and

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180. CAL. CONST. § 30(b); CAL. EVID. CODE § 1203.1 (West Supp. 1992); CAL. PENAL CODE §§ 866(a)-(b), 872(b) (West Supp. 1992).

181. The possibility that the reliability of hearsay evidence may be postponed until trial is conceded by *Whitman v. Superior Court*, 54 Cal. 3d 1063, 1078, 820 P.2d 262, 270, 2 Cal. Rptr. 2d 160, 168 (1991). A review of the magistrate's decision by a superior court judge is unlikely to conclude that a probable cause finding is based on unreliable evidence. CAL. PENAL CODE § 995 (West 1985). The preliminary hearing transcript cannot be supplemented by additional testimony and the standard for review precludes reversing a magistrate's findings unless there is no rational basis to believe a crime has been committed and the defendant is the perpetrator. Rideout v. Superior Court, 67 Cal. 2d 471, 474, 432 P.2d 197, 199, 62 Cal. Rptr. 581, 583 (1967). Proposition 115 did not affect pretrial motions, some of which allow testimony. The hearsay rule remains applicable and witnesses, including the preliminary hearing hearsay declarant if relevant to the motion, can be called and examined. *See* CAL. EVID. CODE § 1200 (West 1987). The defense thereby may be able to obtain some information about the case against the defendant before trial. However, pretrial motions are limited to specific legal issues, such as the legality of a search or the disclosure of the name of an informant, rather than testing the sufficiency of the evidence to justify a felony trial.

substance of the charges against him before trial. Following a Proposition 115 preliminary hearing, a defendant may plead guilty because of a fear of trial and a lack of information about the strength of the prosecution's case rather than because of actual criminal responsibility.[182] This is particularly troubling if a defendant in custody is offered an attractive plea bargain that substantially reduces the potential sentence if convicted at trial.[183] Counsel may not be able to meaningfully assist the defendant either in evaluating the strength of the charges and possible settlement to determine whether to proceed to trial or during the trial itself.[184] At trial, the use of hearsay evidence at preliminary hearings may preclude the defense from impeaching prosecution witnesses at trial with inconsistent statements or presenting a defense, resulting in an increase in motions for new trials and appeals as information is discovered later than it otherwise would have been before Proposition 115. In addition, Proposition 115 may be a Pyrrhic

182. A defendant could be incarcerated throughout proceedings as a result of an unsubstantiated case. Even a defendant who is not in custody is burdened financially and emotionally by the pendency of a felony prosecution. The costs of retained counsel and the impact on the defendant's employment and reputation can be substantial. Pretrial incarceration increases the pressure to plead guilty.

183. Even before Proposition 115, courts upheld a defendant's acceptance of a favorable plea bargain independent of the defendant's actual guilt. *See* North Carolina v. Alford, 400 U.S. 25 (1970); People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

184. The defense may have no more information about the case at the time of a plea than at the time of the preliminary hearing. Apart from preliminary hearings, the defense has no other opportunity to obtain information from an unwilling witness before trial. Pretrial motion hearings involve narrow legal issues rather than the sufficiency of the case as a whole. Before Proposition 115, the prosecution was required to provide discovery to the defense within 48 hours of arraignment. CAL. PENAL CODE § 859 (West 1985). This discovery typically included police reports of the alleged incident, along with available lab reports, detective's follow-up reports, and other information available to the prosecution early in the case. Since the preliminary hearing occurs within ten court days of arraignment (absent a waiver by the defense), the defense typically had at least eight days after obtaining some information about the case to prepare for the preliminary hearing, which included making decisions about issuing subpoenas for witnesses to appear at the hearing. Proposition 115 repealed that portion of the statute mandating discovery to the defense prior to the preliminary hearing. CAL. PENAL CODE § 859 (West Supp. 1992). Instead, new statutes were enacted to regulate discovery in criminal cases, except for discovery pursuant to other statutes or as mandated by the United States Constitution. *Id.* §§ 1054-1054.7 (West Supp. 1992). Discovery defined by these provisions must be provided, after compliance with the provisions of the statutes, at least 30 days prior to trial. *Id.* In contrast, civil cases, in which a defendant's liberty is *not* at stake, afford both parties the opportunity to obtain discovery throughout the proceedings. *See* CAL. CIV. PROC. CODE §§ 2017, 2025(e) (West 1983).

victory for prosecutors who introduce hearsay evidence at preliminary hearings.[185] If the case proceeds to trial, weak witnesses will not have been tested under cross-examination, and the testimony of witnesses who are unavailable for the trial will not have been preserved under oath.[186] Trial witnesses may not remember the details of an incident that was a fresh memory at the time of the preliminary hearing.[187]

Finally, postponing adequate protection against groundless charges until trial ignores the significant and immediate implications of a felony prosecution. A felony trial represents the culmination of a process designed to determine guilt and potentially exact a severe punishment, and may not occur until years after the preliminary hearing.[188] A felony trial marshals the full resources of the state and the defense, generating the expenditure of money and resources warranted by the significant loss of liberty that a felony conviction permits. If preliminary hearings fulfill their function, these resources are rarely expended for unsubstantiated charges. However, Proposition 115 may further increase the congestion in already crowded superior courts by restricting the information presented to magistrates at preliminary hearings. Proposition 115's objective of streamlining preliminary hearings may ultimately result in felony trials for cases that settlement, dismissal, or reduction to a misdemeanor might otherwise resolve.[189]

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185. Critics of pre-Proposition 115 preliminary hearings have stated: "It's *only* a prelim" in response to concerns expressed about Proposition 115's possible consequences.

186. The P.O.S.T. videotape suggests three situations in which prosecutors might wish to call the percipient witnesses: to preserve testimony, to allow the testimony to be tested by cross-examination, and to call reluctant witnesses who later might change their testimony.

187. Reports made at the time of the alleged incident may jog a faded memory, but are no substitute for fresh recollection.

188. The right to a speedy trial may give way to the necessity of investigation and preparation for serious felony cases. *See* CAL. PENAL CODE § 1382 (West Supp. 1992). A defendant insisting on his or her right to a speedy trial could still be incarcerated 93 days until trial. *Id.* §§ 825, 859b, 1382 (West Supp. 1992). In contrast, a preliminary hearing must be heard within ten court days of a defendant's initial appearance on the felony complaint. *Id.* § 859b (West Supp. 1992).

189. A prosecutor's choice to introduce hearsay pursuant to Proposition 115 in particular cases might result in an intentional or inadvertent misuse of the criminal justice system. Although Proposition 115 intended "justice that is swift and fair," it does not preclude a prosecutor from utilizing its provisions to postpone the resolution of a weak or legally insufficient case that magistrates would have dismissed or reduced at a pre-Proposition 115 preliminary hearing. *Text of*

CONCLUSION

The Crime Victims Justice Reform Act weakens the effectiveness of preliminary hearings as a screening device. Despite its stated objectives, Proposition 115 erodes the fundamental principles of justice relied on by both the Supreme Court of the United States and the Supreme Court of California for over one hundred years to shield persons accused of crime from government excess and unsubstantiated charges.[190] To reach a probable cause

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Proposed Law, in CALIFORNIA BALLOT PAMPHLET, *supra* note 42, at 33. Unlike Scarlett O'Hara, there are legal consequences for prosecutors to consider in deciding to "think about it tomorrow." Prosecutors are ethically bound to serve the ends of justice as well as to prosecute and cannot use available procedures for unnecessary delay. *See* ABA Stds. Rel. to the Admin. of Crim. Justice, 3-1.1, 3-2.9; CALIFORNIA DIST. ATTY'S. ASS'N., *Uniform Crime Charging Standards* (1989). "The procedures prescribed by the Legislature for the conduct of the preliminary examination are designed to protect the rights of the accused and to see to it that no one is detained in custody indefinitely or capriciously in order that a case may be developed in the future, or circumstances arise that will justify a trial. The interests of society do not demand, and the rights of the individual forbid, such invasion of personal liberty." People v. Bucher, 175 Cal. App. 2d 343, 346, 346 P.2d 202, 204 (1959) (involving a one-day continuance of a preliminary hearing). *See, e.g.*, People v. Baker, San Diego Super. Ct., CRN 20481 (preliminary hearing June 17, 1991). In *Baker*, the victim of an alleged kidnapping was not present at the preliminary hearing. *Id.* There was a question whether the victim had been kidnapped or whether she had initially accompanied her ex-boyfriend voluntarily (this defendant was the ex-boyfriend's companion). *Id.* Another question of particular concern was whether she could be located for trial. *Id.* Although she had recently alleged that her ex-boyfriend had abducted her in another county, she had not appeared in court to testify against him. *Id.* The prosecutor ultimately moved to dismiss this case on the day scheduled for the Penal Code section 995 hearing because the victim could not be located. *Id.* The defendant was in custody for 50 days. *Id.* Before Proposition 115, if the alleged victim were unavailable at the time of the preliminary hearing, the defendant would have been released in a maximum of 18 days. CAL. PENAL CODE §§ 825, 859b (West Supp. 1992). That the plea bargain was extended to the defendant prior to the preliminary hearing is notable. According to defense counsel, the prosecution offered to dismiss a kidnapping charge carrying a maximum of eight years in custody and reduce the remaining false imprisonment to a misdemeanor in exchange for a guilty plea to the misdemeanor. The offer also included an agreement for no further time in custody. Given the original charge, this was not only extremely favorable to the defendant, who rejected it in favor of proceeding through the preliminary hearing, but indicates some recognition by the prosecutor of the difficulty in securing the alleged victim's presence at trial. *See also* People v. Thomas, San Diego Super. Ct., CR 120909 (preliminary hearing Mar. 13, 1991). The defendant was accused of burglarizing the home of someone he knew and had visited. *Id.* A fingerprint determined to be the defendant's was found on the outside of a window. *Id.* A "115-qualified" officer testified that the victim, an essential trial witness, had died before the preliminary hearing. The magistrate held the defendant to answer. *Id.* The prosecution moved to dismiss the case at the Penal Code section 995 hearing. *Id.* The defendant was in custody throughout the proceedings.

190. *See* Hurtado v. California, 110 U.S. 516, 538 (1884); Kalloch v. Superior Court, 56 Cal. 229, 232-33 (1880).

determination, in a "critical stage"[191] in criminal proceedings, magistrates now bear an increased burden to assure a fair search for the truth without sacrificing reliability for expediency.

191. Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).