

**S290443**

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

ARMANDO BENAVIDES,

*Petitioner,*

v.

THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS  
ANGELES,

*Respondent,*

PEOPLE OF THE STATE OF  
CALIFORNIA,

*Real party in interest.*

SC No. \_\_\_\_\_

2nd Dist. No. B343477

(Super. Ct. L.A. County  
No. 24CJCF04284-01)

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**Petition for Review**

After Summary Denial of Petition for Writ of Prohibition

Second Appellate District, Division Five

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TO THE HONORABLE PATRICIA GUERRERO, CHIEF  
JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES  
OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, by his attorney Ricard D. Garcia, Public  
Defender of Los Angeles County, respectfully petitions this Court  
for review of an order of the Court of Appeal of the State of  
California, Second Appellate District, Division Five, which

summarily denied petitioner's Petition for Writ of Prohibition on April 11, 2025. The ORDER is attached as an Appendix.

Petitioner now seeks review of the Court of Appeal's summary denial of the Petition for Writ of Prohibition requesting that the order denying petitioner's request for dismissal of the complaint pursuant to Penal Code section 859b be vacated and new and different order granting petitioner's request be entered.

### **ISSUES PRESENTED FOR REVIEW**

Does a magistrate's order to release a defendant from custody at any point during the tenth court day following arraignment negate Penal Code section 859b's requirement to either show good cause or obtain a personal time waiver before continuing the preliminary hearing beyond the tenth day?

Does an in-custody defendant who is ordered released from custody on the tenth court day after arraignment accrue only "partial custody" for that day under Penal Code section 859b, or does any portion of a court day spent in custody constitute a full day in custody for purposes of the statute?

Does Penal Code section 859b distinguish between a "full day" and a "partial day" in custody when determining whether a defendant has remained in custody for ten or more court days after arraignment on the underlying complaint?

Where a defendant remains physically in custody after the court has issued a release order, does the judicial act of ordering



release—by itself—alter the defendant’s custody status for purposes of Penal Code section 859b?

### **NECESSITY FOR REVIEW**

Review is necessary in this matter to settle an important question relating the statutory time limits prescribed Penal Code section 859b (time for commencement of the preliminary examination) and is necessary to ensure uniform application of that code section.

Section 859b provides that when a defendant is in custody solely on the complaint, as petitioner was in this matter, the magistrate must dismiss the complaint if the preliminary hearing is not held within 10 court days after arraignment, unless the defendant waives time or good cause is shown.

The magistrate in this matter continued petitioner’s preliminary hearing beyond the ten court-day limit without a time waiver and without a finding of good cause, in direct violation of section 859b. Petitioner sought relief through a Petition for Writ of Mandate in respondent court. Respondent court denied relief. Counting the days petitioner had remained in custody for purposes of applying the time limits imposed by Penal Code section 859b, respondent court adopted a theory of “partial custody days,” effectively rewriting section 859b in a manner

which undermines the purpose of that code section.<sup>1</sup> The court ruled that because petitioner was ordered released during the course of his tenth court day in custody, petitioner was not in custody for “10 full court days,” and thus not entitled to dismissal under section 859b.<sup>2</sup> Petitioner’s subsequent petition for writ of prohibition challenging respondent court’s action was summarily denied by the Court of Appeal.

Petitioner’s case is pending in the Clara Shortridge Foltz Criminal Justice Center (CSFCJC). CSFCJC is the largest and busiest criminal courthouse in Los Angeles County. Collectively, hundreds of preliminary hearings are calendared every week in CSFCJC’s courtrooms. The summary denial of petitioner’s

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<sup>1</sup> Respondent court’s denial of the Petition for Writ of Mandate is set forth in Exhibit N, Memorandum of Decision (Mandamus). All references to exhibits herein are to the Exhibits filed with the Petition for Writ of Prohibition in the Court of Appeal.

<sup>2</sup> Respondent court and real party characterize the magistrate’s order releasing petitioner as an order releasing him “on his own recognizance.” This is incorrect. Petitioner was not present in court when the magistrate ordered his release and none of the requirements for release pursuant to Penal Code section 1318 (own recognizance release) were met. (Exhibit F, Transcript of Proceedings July 23, 2024, p. 29.) “However else it might be characterized, a release without bail which does not comply with the specific requirements of section 1318 is not a release ‘under an own recognizance.’” (*People v. Jenkins* (1983) 146 Cal.App.3d 22, 27.) It is therefore unclear under what authority the magistrate ordered petitioner’s release.

petition for writ of prohibition by the Court of Appeal ensures that respondent court's "partial custody day" interpretation of section 859b will have wide ranging impact on the preliminary hearing rights of in-custody defendants whose cases are heard in CSFCJC.

The purpose of section 859b is to prevent prolonged pre-preliminary examination incarceration.<sup>3</sup> This case addresses whether a magistrate's order that a defendant be released from custody at some point during the tenth court day after his arraignment negates Penal Code section 859b's requirement to either show good cause or obtain a personal time waiver before continuing the preliminary hearing beyond the tenth day. The answer to this question affects not only the petitioner in this case, but the integrity and uniformity of preliminary hearing practices across Los Angeles County and, potentially, across the state.

Review is necessary in this matter to clarify the requirements set forth in Penal Code section 859b, and to ensure that its protections apply uniformly in the courtrooms across the Los Angeles County and the State of California.

### **STATEMENT OF THE FACTS**

Petitioner is charged in Case No. 24CJCF04284-01 with a

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<sup>3</sup> *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 8.

felony violation of Penal Code section 245, subdivision (a)(4) (assault by means likely to produce great bodily injury), and with an allegation pursuant to Penal Code section 12022.7, subdivision (a) (causing great bodily injury). (Exhibit A, Complaint.)

Petitioner was arraigned on the complaint and entered his plea of not guilty on July 9, 2024. (Exhibit B, Minute Order July 9, 2024; Exhibit C, Reporter's Transcript of Proceedings, July 9 2024.) At all relevant times, petitioner was in continuous custody on this matter and solely on this matter. (Exh. B; Exh. C, Exh. F, pp. 3-4; Exhibit G, Transcript of Proceedings, July 26, 2024, p. 11.) Petitioner did **not** waive his statutory right to have his preliminary hearing set within 10 court days of his arraignment per Penal Code section 859b, paragraphs 2 and 3. (Exh. B; Exh. C.) The court scheduled petitioner's preliminary hearing for July 22, 2024, as "nine of 10" for preliminary hearing. (Exh. C, p. 16.)

On July 22, 2024, petitioner's matter was trailed to July 23, 2024, the statutory last day for commencement of his preliminary

hearing.<sup>4</sup> (Exh. F, p. 28.) On July 23, 2024, petitioner was not transported to court by the sheriff. (Exh. F, p. 29.) Real party asked for the matter to “be placed on the 60-day calendar.” (*Ibid.*) Real party did not provide a reason for their request, nor did the magistrate require one. (*Ibid.*) The magistrate ordered petitioner released from custody.<sup>5</sup> (*Ibid.*) Over the objection of petitioner’s counsel, the magistrate continued the hearing to July 26, 2024. (Exh. F, pp. 38-39; Exhibit E, Minute Order, July 22,

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<sup>4</sup> On July 22, 2024, all 36 courthouses in Los Angeles County were closed pursuant to an Order issued on July 21, 2024, by the Honorable Samantha P. Jessner, Presiding Judge. (Exhibit D, General Order.) The Order provided that: “The period provided in section 859b of the Penal Code to hold a preliminary examination is extended by one day in cases with a July 22, 2024, statutory deadline.” (Exh. D, p. 21.) The order only applied to preliminary hearings with a July 22, 2024, deadline. (*Ibid.*) The statutory deadline for petitioner’s preliminary examination was July 23, 2024, and was thus unaffected by the General Order.

<sup>5</sup> It is unclear under what authority the magistrate ordered petitioner’s release. Petitioner was not present in court when the magistrate ordered his release and none of the requirements for release pursuant to Penal Code section 1318 (own recognizance release) were met. (Exh. F, p. 29.)

2024.)<sup>6</sup> Though the magistrate ordered petitioner's release on July 23, petitioner was not actually released from custody by the sheriff until the morning of July 26, 2024, 14 court days after his arraignment.<sup>7</sup> (Exh. G., p. 53.) On July 26, 2024, petitioner moved to dismiss the matter pursuant to Penal Code section 859b, since his preliminary hearing was continued beyond the 10-

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<sup>6</sup> Exhibit E is a document obtained from the Los Angeles Superior Court Portal (LASCP). The document appears to be a minute order dated July 22, 2024. Counsel believes that Exhibit E is the minute order for July 23, 2024, and is mis-dated. Counsel's belief on this point is based upon the following. First, the document lists appearances by the prosecution and by petitioner's counsel, an impossibility since all courtrooms were closed on July 22, 2024, and no appearances were made on any calendared cases. Second, the LASCP contains no minute order on this case for July 23, 2024. Third, the exhibit describes the proceedings as being continued to July 26, 2024, with petitioner being a "miss-out." This is what occurred on July 23, 2024, not on July 22, 2024. (Exh. F, pp. 29 and 39.)

<sup>7</sup> The judicial act of ordering a defendant released from custody does not result in the defendant's immediate release from custody. A defendant in sheriff's custody who appears in court must be returned to the jail after the court appearance. This is true even of defendants whose release has been ordered. The process of transporting custody defendants from court back to jail typically takes several hours. Once a "released" defendant has been returned to jail from court, he must typically wait several additional hours, at least, for administrative processing before he is actually released from custody. Petitioner remained in custody for three additional days after the magistrate ordered him released.

day time limit without good cause. The magistrate did not explicitly rule on the motion to dismiss but set the matter for September 6, 2024, over petitioner's objection. (Exh. G, pp. 46 and 54; Exhibit H, Minute Order, July 26, 2024.) The magistrate noted that the remedy of dismissal for a violation of section 859b's 10-day rule only applied to defendants who are in custody. The magistrate reasoned that since he had ordered petitioner released, petitioner was no longer "in custody" and therefore was not entitled to dismissal. (Exh. G, p. 49.) The magistrate similarly found that good cause was not required to continue the preliminary hearing beyond the 10-day time limit because petitioner was ordered released from custody. (*Ibid.*)

On September 24, 2024, petitioner filed a Petition for Writ of Mandate in the respondent court seeking a writ directing the magistrate to dismiss the complaint pursuant to Penal Code section 859b. (Exhibit I, Petition for Writ of Mandate.) Petitioner pointed out that having been arraigned in custody on July 9, 2024, the last day for his preliminary to commence was July 23, 2024. (*Id.* at p. 6.) Petitioner asserted that the plain language of section 859b required dismissal in this matter because petitioner's preliminary hearing was continued without good cause and without petitioner's consent beyond section 859b's 10-day time limit. (Exh. I.)

On October 7, 2024, respondent court issued an Alternative

Writ of Mandate (Exhibit J, Alternative Writ of Mandate.) In its October 7 order, respondent court found that “because Defendant was in custody for 10 days solely on the complaint, the plain language of the third paragraph of section 859b required dismissal of the complaint ... unless Defendant personally waived time or the People established good cause.” (Exh. J, p. 153.) Respondent court further recited “Defendant did not waive time, and the magistrate did not find good cause. Thus, Defendant was entitled to dismissal of the complaint on July 23, 2024, absent a finding of good cause.” (*Ibid.*) Respondent court ordered the magistrate to vacate the July 23, 2024, order denying petitioner’s motion to dismiss and to enter a new order granting the motion. (*Ibid.*) Alternatively, respondent court ordered real party to show cause why the peremptory writ of mandate should not issue. (*Ibid.*)

On October 10, 2024, the magistrate did not vacate the July 23, 2024, order. Instead, the magistrate directed real party to show cause, if any, why the peremptory writ of mandate should not issue. (Exhibit K, Minute Order October 10, 2024.)

On October 22, 2024, real party filed their Return to Order to Show Cause (Exhibit L, Return.) Real party admitted that the “plain language” of section 859b mandates dismissal when “(1) a defendant’s preliminary hearing is set or continued beyond 10 court days from the date of the arraignment; and (2) [the



defendant] remained in custody for ‘10 or more court days.’” (Exh. L, p. 165.) Real party contended that, “Clearly, the Legislature intended this section to mean that a defendant must remain in custody for a minimum of 10 *full* court days on the complaint for the section [referring to the dismissal requirement of section 859b] to be triggered at all.” (*Ibid.*, emphasis in the original.) Real party argued that since petitioner was ordered released on the tenth day following his arraignment, he was not in custody for ten *full* days and therefore dismissal was not required when the matter was continued beyond the tenth day without good cause over petitioner’s objection.<sup>8</sup> (*Id.* at pp. 7-8.) Real party offered no authority suggesting that trial courts should treat a *partial* day spent incarcerated as a legal nullity under section 859b.

Petitioner filed his Reply to Return to Order to Show Cause on November 4, 2024. (Exh. M.) The Reply disputed real party’s contention that petitioner was not entitled to a dismissal under section 859b. Petitioner first explained that generally when a statute speaks in terms of days, it is presumed that the Legislature intended a partial day to be counted as a full day.

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<sup>8</sup> Real party made additional contentions, rejected by respondent court, about why the peremptory writ should not issue. Petitioner answered all of real party’s contentions in his Reply to Return to Order to Show Cause, filed on November 4, 2024. (Exhibit M, Reply.)

(*People v. Smith* (1989) 211 Cal.App.3d. 523.) Second, petitioner highlighted a fundamental flaw in real party's accounting of custody days. Throughout the Return, real party treated the tenth court day after arraignment (the last day for the preliminary hearing to commence) as identical with tenth court day of continuous custody. They are not identical. The statutory last day for the preliminary hearing to commence is ten court days *after* the arraignment. (Pen. Code sec. 859b) For a defendant who is in custody at his arraignment, the tenth day *after* arraignment will be the *eleventh* day in custody.<sup>9</sup> (Exh. M, pp. 196-197.)

On November 20, 2024, respondent court issued its Memorandum of Decision denying petitioner's Petition for Writ of Mandate. (Exh. N, Memorandum of Decision (Mandamus).) Adopting real party's method of counting custody days, respondent court found that because petitioner was ordered released from custody on July 23, he was not in custody for 10 full court days. (Exh. N, p. 209.)

On January 21, 2025, petitioner filed a Petition for Writ of Prohibition in the Court of Appeal. On April 11, 2025, the

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<sup>9</sup> In this case, petitioner was in custody on July 9, 2024, when he was arraigned on the complaint. (Exh. B; Exh. C.) July 23, 2024, marked the eleventh court day petitioner was in custody on the complaint – July 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, and 23.

Petition for Writ of Prohibition was summarily denied by Division Five of the Second District Court of Appeal.<sup>10</sup>

## **ARGUMENT**

### **I. If An In-Custody Defendant's Preliminary Examination Is Delayed For More Than 10 Court Days Without A Waiver Or Good Cause, The Complaint Must Be Dismissed**

A preliminary hearing must be held within 10 court days of the arraignment unless both the defendant and the prosecution waive their respective rights to a preliminary hearing at the earliest possible time or the court finds good cause to continue the hearing beyond the tenth court day following the arraignment. (Pen. Code sec. 859b, 2d par; *Irving v. Superior* (1979) 93 Cal.App.3d 596; *People v. Figueroa* (2017) 11 Cal.App.5th 665, 674.) When a defendant is in custody and the preliminary hearing is set or continued beyond 10 court days after the arraignment, the magistrate shall dismiss the complaint unless the defendant personally waives the 10–court–day requirement, or the People show good cause for a continuance beyond that period. (Pen. Code sec. 859b, 3d par.; *Landrum v. Superior Court, supra*, 30 Cal.3d 1, 8; *People v. Figueroa, supra*, 11 Cal.App.5th 665, 674.)

### **II. In This Matter, The Magistrate Continued**

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<sup>10</sup> Justice Baker suggested that an alternative writ should issue.

**Petitioner's Preliminary Hearing Beyond 10  
Court Days Without A Time Waiver Or A  
Showing Of Good Cause**

On July 9, 2024, petitioner was arraigned in custody on this matter, making on July 23, 2024, the statutory deadline for petitioner's preliminary examination to commence. (Pen. Code sec. 859b, 3d par.; Exh. B; Exh. C: Exh. F, pp. 28-29; Exh. G, p. 53.)

On July 9, real party asked the court to continue the preliminary hearing by placing the matter "on the 60-day calendar." (Exh. F, pp. 28-29.) Real party did not provide a reason for their request nor did the magistrate require one. (*Ibid.*) Petitioner objected to the countinuanace, pointing out that real party had not established good cause. (*Ibid.*) The magistrate continued the preliminary hearing over petitioner's objection and invited petitioner's counsel to "take a writ if you can." (Exh. F, pp. 37-38.)

**III. Contrary To The Assertions Of Respondent  
Court And Real Party, Petitioner Was In  
Custody For More Than 10 Court Days When  
His Preliminary Hearing Was Continued  
Without A Waiver Or A Finding Of Good  
Cause**

A continuance of the preliminary hearing beyond the tenth court day after the arraignment without a waiver or showing of good cause violates the 10-day rule. (Pen. Code sec. 859b, par. 2.)

A violation of the 10-day requires dismissal only if the defendant has been in custody solely on the underlying complaint and has been in custody for 10 or more court days. (Pen. Code sec. 859b, par. 3; *People v. Standish* (2006) 38 Cal.4th 858, 865; *People v. Luu* (1989) 290 Cal.App.3d 1399, 1407.)

Both respondent court and real party argue that petitioner was not in custody for 10 full court days, since he was ordered released on his own recognizance during the course of his 10th court day in custody. (Exh. N, p. 209; Exh. L, p. 166.) Therefore, they assert that petitioner is not entitled to a dismissal. (*Ibid.*)

The claim that petitioner was not in custody in this matter for 10 full court days is false. Petitioner was arraigned in custody on July 9, 2024, and was not released until the morning of July 26, 2024, at 9:41 a.m. (Exh. B; Exh. C; Exh. F, pp. 28-29; Exh. G, p. 53.) Petitioner was, therefore, in custody for the following court days solely on the underlying complaint: July 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, and 26. (Exh. B; Exh. C; Exh. F, pp. 28-29; Exh. G, p. 53.) Petitioner was in custody in this matter for 14 court days (counting July 26) without having his preliminary hearing.

**IV. Contrary To Claims By Respondent Court  
And Real Party, The Magistrate's Order  
Releasing Petitioner From Custody On July  
23 Did Not Render That Day A Partial  
Custody Day**

Respondent court and real party claim that because petitioner was ordered released on July 23, 2024, that day did not count as a “full day” spent in custody under the 10-day rule of section 859b. (Exh. N, p. 209; Exh. L, p. 165.) They argue that because petitioner was ordered released on his own recognizance 10th court day after arraignment, petitioner was not in custody for “10 full court days,” and therefore petitioner is not entitled to dismissal. (*Ibid.*) This claim is profoundly flawed.

First, as discussed above, petitioner was in custody for 14 court days (counting July 26) solely on the underlying complaint without having his preliminary hearing.<sup>11</sup> (Exh. B; Exh. C; Exh. F, pp. 28-29; Exh. G, p. 53.)

Additionally, defendants are given credit for a full day regardless of the actual portion of the 24-hour cycle they are held in detention. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 921.) When a statute speaks in terms of days, it is presumed that the Legislature intended a partial day to be counted as a full day. (*People v. Smith, supra*, 211 Cal.App.3d 523, 526.) Days in custody are *always* counted in whole numbers. (*In re Jackson* (1986) 182 Cal. App.3d 439 (any part of a day is a day for credits at sentencing.)

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<sup>11</sup> July 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, and 26.

Neither respondent court nor real party cite any authority that supports the concept of a “partial day” in custody.

Finally, as a practical matter, the judicial act of ordering a defendant released from custody does not result in the defendant’s immediate release from custody. An in-custody defendant who has been ordered released must be transported back to jail for administrative processing before their actual release. This process typically takes at least several hours. It is not unusual for a defendant whose release is ordered in the morning to wait until the early hours of the following day before being released from custody. The present case illustrates the point. Petitioner was not released until three days after the magistrate’s release order. (Exh. G, p. 53.) Thus, even assuming, *arguendo*, section 859b made a distinction between a “partial day” and a “full day” spent in custody, the key factor should be whether the defendant was actually released from custody, rather than whether he was merely ordered to be released.

**V. Respondent Court’s Claim That A Showing of Good Cause Or A Time Waiver Is Unnecessary To Continue A Preliminary Hearing So Long As The Defendant Is Ordered Released From Custody At Any Point During The Course Of The Tenth Court Day Is Without Merit**

Respondent court and real party propose that if a defendant is ordered released from custody at any point during the course of

the tenth court day, there is no requirement to show good cause or a time waiver to move the case to the 60-day calendar.<sup>12</sup> (Exh. N, p. 209; Exh. L, p. 165.) This proposal conflicts with settled case law. All cases set for preliminary hearing require either a time waiver or good cause in order to be continued beyond the tenth court day. (Pen. Code sec. 859b, 2d par.; *Irving v. Superior Court*, *supra*, 93 Cal.App.3d 596; *People v. Luu*, *supra*, 290 Cal.App.3d 1399, 1405; *People v. Figueroa*, *supra*, 11 Cal.App.5th 665, 674.) This rule applies whether or not the defendant is in custody. (*People v. Alvarez* (1989) 208 Cal.App.3d 567, 575.) Neither respondent court nor real party cite any authority for their eccentric interpretation of section 859b.<sup>13</sup>

Implicit in the arguments of both real party and respondent

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<sup>12</sup> In this context, “move the case to the 60-day calendar” presumably means “to continue the case beyond the tenth court day to a date within 60 days of the arraignment.”

<sup>13</sup> Respondent court suggests that there is a “school of thought” that holds “if the defendant is released on the 10th court day [dismissal is not required for violation of the 10-day rule] because the defendant would no longer be in custody.” (Exh. N, p. 207.) Respondent court cites Benzinger, Criminal Practice Series: Preliminary Hearing Handbook (The Rutter Group 2024), sec. 1:35, p. 40, for the source of the purported “school of thought.” (*Ibid.*) However, respondent court offers no caselaw supporting this purported school of thought. Moreover, in this matter petitioner was not released on the 10th court day. Thus, the unsubstantiated school of thought has no bearing in this matter.



court is the notion that a magistrate's order releasing a defendant from custody results in the defendant's immediate release. (Exh. L, pp. 177-180; Exh. N, p. 209.) This does not correspond with the facts, as described above in section IV.

Real party claims that any other interpretation of section 859b would "lead to an absurd result – specifically, an in-custody defendant would be entitled to dismissal of their case the moment the clock strikes 8:30 a.m. at the beginning of the tenth court day." (Exh. L, pp. 165-166.) Real party is wrong on several points. First, real party's understanding of the 10-day rule is flawed. For an in-custody defendant, section 859b requires dismissal only "if the preliminary examination is set or continued *beyond* 10 court days from the time of the arraignment" without a time waiver or finding of good cause. (Pen. Code sec. 859b, 3d par., emphasis added.) Thus, under no circumstances would an in-custody defendant be entitled to dismissal "the moment the clock strikes 8:30 a.m. at the beginning of the tenth court day." The remedy of dismissal is available only if the preliminary does not commence at some point before the close of business on the 10th court day.

Moreover, it is far from clear how to apply the interpretation of section 859b offered by respondent court and real party. Suppose that at 4:29 p.m. on the 10th court day after arraignment the prosecution requests that an in-custody defendant be ordered released and the preliminary hearing

continued until the 60th day. Under the interpretation of section 859b offered by respondent court and real party, the magistrate should comply with the prosecution's demand "to move the case to the 60 day calendar" without requiring either a time waiver or a showing of good cause. The purpose of section 859b is to prevent prolonged pre-preliminary examination incarceration. (*Landrum v. Superior Court, supra*, 30 Cal.3d 1, 8.) It is difficult to see how the interpretation of section 859b offered by respondent court and real party comports with the purpose of the statute.

The interpretation of Penal Code section 859b by respondent court and real party are contrary to the plain language of statute, contrary to settled case law, and contrary to the facts.

**VI. The Magistrate In This Matter Lacked  
Authority To Order Petitioner's Release  
From Custody On July 23, 2024**

It is worth pausing here to recall the procedural history in this matter since this will aid in evaluating the issues discussed here and elsewhere in this petition. On July 23 (the last day for petitioner's preliminary hearing to commence under section 859b's 10-day rule), real party asked for the matter to "be placed on the 60-day calendar." (Exh. F, p. 29.) Real party did not provide a reason for their request, nor did the magistrate require one. (*Ibid.*) Real party's use of the imprecise courtroom colloquialism "place on the 60-day calendar" is unfortunate. It is

not immediately clear what was meant by real party's request. All felony cases initiated by the filing of a complaint are, by operation of law, governed by section 859b's 60-day rule. (Pen. Code sec. 859b, 6th par.) So, on July 23, petitioner's case was already "on the 60-day calendar." Judging by the magistrate's actions in response to real party's request, "place on the 60-day calendar" was a twofold request – to continue the hearing beyond the tenth court day *and* to release the petitioner from custody. (Exh. F, pp. 38-39; Exh. E.)

Continuing a preliminary hearing beyond the 10th court day requires a time waiver or a showing of good cause. (Pen. Code sec. 859b, 2d par; *Irving v. Superior*, *supra*, 93 Cal.App.3d 596; *People v. Figueroa*, *supra*, 11 Cal.App.5th 665, 674.) Notably, real party made the request to continue the hearing without offering good cause for the request. Respondent court granted the request to continue without requiring real party to show good cause.

Respondent court and real party characterize the magistrate's order releasing petitioner as an order releasing him "on his own recognizance." (Exh. N, Exh. L.) This is incorrect. Petitioner was not present in court when the magistrate ordered his release and none of the requirements for release pursuant to Penal Code section 1318 (own recognizance release) were met. (Exh. F, p. 29.) "However else it might be characterized, a

release without bail which does not comply with the specific requirements of section 1318 is not a release ‘under an own recognizance.’” (*People v. Jenkins, supra*, 146 Cal.App.3d 22, 27.)

Additionally, as a general rule, one judge cannot reconsider and overrule an order of another judge setting a bail amount without a change in circumstance. (*In re Alberto* (2002) 102 Cal.App.4th 421.) At petitioner’s July 9 arraignment, the Honorable Susan J. DeWitt, Judge of the Superior Court, set bail in the amount of \$105,000. (Exh. B.) The bail amount was set at the request of real party. (Exh. C, p. 16.) On July 23, when the magistrate nullified Judge DeWitt’s previous order setting bail, no change of circumstance was cited by real party, nor ostensibly relied on by the magistrate. (Exh. F, p. 29.)

Penal Code section 859b contains a provision for a defendant’s release pursuant to Penal Code section 1318 (the own recognizance release statute). (Pen. Code sec. 859b, 5th par.) However, that provision does not authorize a magistrate unfettered authority to alter an order setting a bail amount made by another judge. If the preliminary hearing is continued beyond the 10th court day over the defendant objection but upon a showing of good cause, then section 859b compels the magistrate to release the defendant pursuant to section 1318. (Pen. Code sec. 859b, 2d, 3d, 4d, and 5th pars.; *People v. Standish, supra*, 38 Cal.4th 858, 866; *People v. Figueroa, supra*, 11 Cal.App.5th 665,

674.)

The authority granted to the magistrate under section 859b to countermand a previous order setting bail is *conditioned upon the finding of good cause* for continuance of the preliminary hearing beyond the tenth court day. In this matter, the magistrate continued the preliminary hearing beyond the tenth court day without a finding of good cause. (Exh. F, pp. 29 and 38-39.) Therefore, any authority to release petitioner from the previous bail order was not conferred by section 859b. It remains unclear under what authority the magistrate ordered petitioner's release.

**VII. Claim By Respondent Court That The Arraignment Day, When Petitioner Was In Custody, Should Not Count When Applying Penal Code Section 859b Is Without Merit**

In its accounting of court days that petitioner spent in custody, respondent court does not count July 9, 2024, the day petitioner was arraigned. (Exh. N, p. 209.) Refusing to count the arraignment day for purposes of section 859b's 10-day rule, respondent court asserted that "In California, the computation of time is governed since 1872 by Code of Civil Procedure section 12." (*Ibid.*) That code section states:

"The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." (Code Civ. Proc., sec. 12.)

Petitioner concedes that in determining when an act is to be done, the computation of days is done as provided by Code of Civil Procedure, section 12. However, no sound principle of law or public policy supports the principle that the number of days a prisoner spends in custody is computed by treating the first day as a nullity. A hypothetical defendant, arrested on January 1, who remains incarcerated until sentenced on January 10, is entitled to credit for 10 days spent in custody. The suggestion that this hypothetical defendant should only be given credit for nine days in custody is dystopian in its absurdity.

The error in reasoning by respondent court stems from its failure to recognize that under section 859b, the last day for commencement of the hearing (under the 10-day rule) is not commensurate with the number of days the defendant has spent in custody. (Pen Code sec. 859b, 3d par.) Assuming there has been no waiver and no finding of good cause for a continuance, the last day for the preliminary hearing to commence is “10 court days *from the time of the arraignment.*” (*Ibid*, emphasis added.) In other words, under section 859b, the last day for the hearing to commence is determined by *excluding* the day of the arraignment, but *including* the tenth day following the arraignment, consistent with Code of Civil Procedure, section 12.

However, if the preliminary hearing is not held on (or prior to) the last day, the matter must be dismissed whenever the

defendant “has remained in custody for 10 or more court days.” (Pen Code sec. 859b, 3d par.) Notably, section 859b does not require that a defendant remain in custody for 10 court days *from the time of the arraignment* before he is entitled to dismissal. To qualify for dismissal, the defendant must only have “remained in custody for 10 or more court days.” (*Ibid.*) Neither Penal Code section 859b, nor Code of Civil Procedure section 12, suggest that court days spent in custody are calculated by any method other than simply counting court days spent in custody.

Respondent court contends that “[c]ounting the days as Defendant proposes [to include the arraignment] would ... be inconsistent with the text, purpose and operation of section 859b.” (Exh. N, p. 209.) The purpose of section 859b is to prevent prolonged pre-preliminary examination incarceration. (*Landrum v. Superior Court, supra*, 30 Cal.3d 1, 8.) Surely, an accurate accounting of all court days that a defendant spends incarcerated is fundamental to avoiding prolonged incarceration. On the other hand, respondent court’s proposal to ignore court days petitioner spent in custody is antithetical to the purpose of section 859b.

#### **VIII. Contrary To Real Party’s Contention, The September 24, 2024, Petition For Writ Of Mandate Was Not Untimely**

In their Return, real party contends that the September 24, 2024, writ petition was untimely. (Exh. L, p. 163.) Respondent court correctly rejected this contention. (Exh. N, p. 207.) Real

party argues that the contested action occurred on July 23, 2024, and that 60 days following that date was Saturday, September 21, 2024, making Monday, September 23, 2024, the deadline for filing the original petition. First, real party is incorrect that the contested action occurred on July 23, 2024. In the writ filed on September 24, 2024, petitioner challenged the magistrate's refusal to grant petitioner's motion to dismiss made on July 26, 2024. (Exh. I.)

On July 23, 2024, petitioner did not formally make a motion to dismiss. (Exh. F.) On July 23, after real party asked the court to place petitioner's hearing on the 60-day calendar, petitioner's counsel engaged in an extended colloquy with the magistrate about the repercussions of continuing the hearing without a finding of good cause, which would include dismissal. (Exh. I, pp. 63-74.) As real party pointed out in their Return, a preliminary hearing is timely if it commences at any time on the 10th court day. (Exh. L, p. 166.) Thus, petitioner's counsel did not ask for dismissal on July 23, because, until the close of business that day, the court retained the power to reconsider its position and make attempts to commence the hearing within the statutory time frame. Any motion to dismiss pursuant to section 859b would have been untimely until July 23 passed without commencement of the hearing. On the next court date, July 26, 2024, the motion to dismiss was ripe and petitioner's counsel



moved to dismiss. (Exh. G, p. 46.) Sixty days from the contested action (July 26) was September 24, 2024, the day the original petition was filed.

Assuming that the contested action occurred on July 23, 2024, respondent court pointed out that though “generally appeals must be filed within 60 days of the order being appealed, there is no statutory deadline for a petition filed in the superior court.” (Exh. N, p. 207, citing *People v. Superior Court (Clements)* (1988) 200 Cal.App.3d. 491, 495.) With no statutory deadline, the timeliness of a writ petition is measured by laches, which requires both unreasonable delay and a showing of prejudice to the real party. (Exh. N, pp. 4-5, citing *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 163.) No showing of prejudice to real party had been offered in this matter. (Exh. N, p. 208.)

#### **IX. Contrary To Real Party’s Contention, The September 24, 2024 Petition Was Not Moot**

In their Return, real party contends that “[p]etitioner’s action of requesting a continuance [on September 6, 2024] beyond the 60-day date moots this [September 24, 2024] writ petition...”<sup>14</sup> (Exh. L, p. 163.) Real party’s mootness claim is without merit. The issue presented by the petition filed on September 24, 2024, is whether petitioner was entitled to a dismissal of his case when the magistrate continued his

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<sup>14</sup> Exhibit P, Minute Order September 6, 2024.

preliminary hearing on July 23, 2024, without a time waiver or a showing of good cause. (Exh. I.) Whether petitioner subsequently sought a continuance on September 6, 2024, is irrelevant to that issue.

Respondent court rejected the mootness claim on two grounds. First, respondent court suggested that the issue presented by the September 24 petition is whether the prosecution was “required to show good cause for a continuance on July 23, 2024, not whether [Petitioner] would have waived time.” (Exh. N., p. 208.) Second, respondent court found the petition was not moot because “it arises from a situation which is capable of repetition yet evades review.” (Exh. N, p. 208, citing *In re William* (1970) 3 Cal.3d 16, 23, fn 14.)

**X. Contrary To Real Party’s Argument, There Was Not Good Cause To Continue Petitioner’s Preliminary Hearing On July 23, 2024**

Real party asserts that there was good cause to continue petitioner’s preliminary hearing beyond July 23, 2024. (Exh L, p. 10.) The record does not support this contention. In their Return, real party suggests that the only reason petitioner’s preliminary hearing did not commence on July 23, 2024, was the sheriff’s failure to transport petitioner to court. (Exh. L, p. 167.) On July 23, 2024, real party did not offer any reason for their request that petitioner’s hearing “be placed on the 60-day

calendar.” (Exh. F, p. 29.) Specifically, real party did not rely on the sheriff’s failure to transport petitioner as the reason for their request to continue the hearing beyond the statutory last day. Moreover, the sheriff’s failure to transport petitioner is not good cause to continue the hearing. (*Jackson v Superior Court* (1991) 230 Cal.App.3d 1391, 1393.)

**XI. Because Petitioner’s Preliminary Hearing  
Did Not Occur Within The Required Time  
Limit Described In Penal Code Section 859b,  
The Criminal Action Must Be Dismissed**

On July 23, 2024, the 10th court day after petitioner’s July 9, 2024 arraignment, the magistrate continued the preliminary examination over petitioner’s objection and without good cause. (Exh. F, p. 38.) Petitioner remained in custody for 10 or more court days solely on the underlying complaint. (Exh. B; Exh. C; Exh. F, pp. 38-39; Exh. G, p. 53.) Therefore, this matter must be dismissed. (Pen. Code sec. 859b, 3d par.; *Landrum v. Superior Court, supra*, 30 Cal.3d 1, 8; *People v. Standish, supra*, 38 Cal.4th 858; *People v. Figueroa, supra*, 11 Cal.App.5th 665, 674.)

## **CONCLUSION**

For these reasons and those stated in the Court of Appeal, petitioner respectfully requests that this Court grant review.

Respectfully submitted,

RICARDO GARCIA  
PUBLIC DEFENDER  
OF LOS ANGELES COUNTY,  
CALIFORNIA

By: \_\_\_\_\_

Michael Pentz  
(State Bar No. 175910)  
Deputy Public Defender  
Attorneys for Petitioner

## **CERTIFICATE OF COMPLIANCE**

I certify that pursuant to the California Rules of Court Rules 8.520(c)(1), the attached PETITION FOR REVIEW in this action contains 7643 words according to the word count of the computer program used to prepare the document.

DATED: April 21, 2025

By: /s/\_\_\_\_\_

Michael Pentz

## **Proof of Service**

I declare under penalty of perjury that the following is true and correct:

At the time of service, I was at least 18 years of age and not a party to this legal action. My business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012. I served the foregoing petition for review in Case No. B343477/ LASC No. 24CJCF04284-01 and the attached exhibits as follows:

### ***By Truefiling***

On April 21, 2025, I served copies of the documents identified above on the following recipient via Truefiling:

Los Angeles County District Attorney's Office  
Appellate Division  
320 West Temple Street, Suite 540  
Los Angeles, California 90012  
[TrueFiling@da.lacounty.gov](mailto:TrueFiling@da.lacounty.gov)

Office of the Attorney General  
300 South Spring Street  
Los Angeles, California 90013  
[docketinglaawt@doj.ca.gov](mailto:docketinglaawt@doj.ca.gov)

***By U.S. Mail***

On April 21, 2025, pursuant to the California Rules of Court, rule 8.486, subdivision (e)(1), I placed a true copy of the petition identified above in a sealed envelope for collection and mailing following our ordinary business practices in the County of Los Angeles, California. I am familiar with this agency's practices for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid. The addressee was as follows:

**Honorable Efrain M. Aceves**

Department 34

Clara Shortridge Foltz Criminal Justice Center

210 West Temple Street

Los Angeles, CA 90012

**Honorable William C. Ryan**

Writs Center 1

Clara Shortridge Foltz Criminal Justice Center

210 West Temple Street

Los Angeles, CA 90012

Executed on April 21, 2025, at Los Angeles, California.

/s/

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ANA MORALES

# APPENDIX



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COURT OF APPEAL – SECOND DIST.

FILED

Apr 11, 2025

EVA McCLINTOCK, Clerk

B. Rosales

Deputy Clerk

ARMANDO BENAVIDES,

Petitioner,

v.

THE SUPERIOR COURT OF  
LOS ANGELES COUNTY,

Respondent.

THE PEOPLE,

Real Party in Interest.

B343477


(Super. Ct. No. 24CJCF04284-01)


(Efrain Aceves & William C. Ryan,  
Judges)

**O R D E R**

THE COURT:

The court has read and considered the petition for writ of prohibition filed January 21, 2025. The petition is denied.

  
HOFFSTADT, P.J.

  
KIM (D.), J.

I would issue an alternative writ.



BAKER, J.

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

Case Name: **Armando Benavides**

Case Number: **TEMP-08LZ0J6D**

Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **mpentz@pubdef.lacounty.gov**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI CASE INIT FORM DT	Case Initiation Form
PETITION FOR REVIEW	B343477_PFR_Benevides_24CJCF04284_

Service Recipients:

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Michael Pentz Los Angeles County Public Defender 175910	mpentz@pubdef.lacounty.gov	e-Serve	4/21/2025 2:47:11 PM
Los Angeles County District Attorneys Office Appellate Division	TrueFiling@da.lacounty.gov	e-Serve	4/21/2025 2:47:11 PM
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Ellin Gurvitch, Deputy Public Defender	EGurvitch@pubdef.lacounty.gov	e-Serve	4/21/2025 2:47:11 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

4/21/2025

Date

/s/Ana Morales

Signature

Pentz, Michael (175910)

Last Name, First Name (PNum)

Los Angeles County Public Defender

Law Firm