

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Appellant,

v.

KEVIN PICH KLAUT,

Defendant and Respondent.

A126658

(Sonoma County  
Super. Ct. No. SCR-565911)

**ORDER MODIFYING OPINION AND  
DENYING REHEARING  
[NO CHANGE IN JUDGMENT]**

**THE COURT:**

It is ordered that the opinion filed herein on January 31, 2011, be modified as follows:

At the end of the first paragraph on page 10, immediately before section 3 of the discussion, add as footnote 8 the following new footnote:

<sup>8</sup> In a rehearing petition, Klaut claims that a rehearing must be ordered because this court rendered a decision “based upon an issue which was not proposed or briefed by any party.” (Gov. Code, § 68081; see *People v. Alice* (2007) 41 Cal.4th 668, 679-680.) Klaut contends he had no reason to anticipate the issue of whether a waiver of time under section 859b is irrevocable. We do not agree that rehearing is merited.

The issue before the court is whether the magistrate had statutory authority under Penal Code sections 859b or 1050 to dismiss the complaint. Plainly, this court’s conclusion that the time limits of section 859b were inapplicable is “fairly included” within the issue of whether the magistrate was authorized under that statute to dismiss the complaint for failure to comply with the statutory time limits. (See *People v. Alice*, *supra*, 41 Cal.4th at p. 677; see also *Plumas County Dept. of*

*Child Support Services v. Rodriguez* (2008) 161 Cal.App.4th 1021, 1029, fn. 1.) Moreover, Government Code section 68081 does not afford parties a right to rehearing “each time an appellate court relies upon authority or employs a mode of analysis that was not briefed by the parties.” (*People v. Alice, supra*, at p. 679.) We need only add that there may be many different modes of analysis to address an appellate issue.

In any event, our decision does not turn on whether Klaut’s time waiver under Penal Code section 859b was irrevocable. To be clear, we conclude the magistrate would have lacked statutory authority to dismiss the complaint even if Klaut were allowed to withdraw his time waiver. As set forth above, the magistrate had no authority to dismiss the complaint for failure to set the preliminary hearing within the 10-court-day period when any delay beyond that period was solely attributable to the magistrate’s policy of conducting preliminary hearings only one day of each week. Allowing the parties to brief whether Klaut’s time waiver was irrevocable—an issue squarely addressed by *People v. Love* (2005) 132 Cal.App.4th 276—would simply consume additional resources on a matter that, regardless of its resolution, would have no effect on the outcome of the case.

Apart from the fact that the subject of the rehearing petition has no effect on the outcome of the case, Klaut should bear in mind that the district attorney could have chosen simply to refile the complaint against him in lieu of seeking to reinstate the original complaint. Indeed, we are aware of no impediment to refiling the complaint even if this court were to affirm the dismissal of the original complaint. (Cf. Penal Code § 1387 [*two* dismissals under section 859b bars further prosecution of felony].) Suffice it to say we are not persuaded that further briefing is warranted.

Footnotes 8 and 9 on page 11 are renumbered as footnotes 9 and 10, respectively.

There is no change in the judgment.

The petition for rehearing is denied.

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

\_\_\_\_\_  
McGuiness, P.J.