

**IN THE COURT OF APPEAL OF CALIFORNIA  
THIRD APPELLATE DISTRICT**

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**Gregory Pellerin, Petitioner**

**vs.**

**Superior Court for Nevada County, Respondent,**

**The People of the State of California, Real Party in Interest.**

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**From the Superior Court for Nevada County,  
The Honorable Candace S. Heidelberger**

**REPLY  
TO THE OPPOSITION TO PETITION FOR WRIT OF MANDAMUS  
AND/OR OTHER APPROPRIATE RELIEF**

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## II. Argument

### A. Youngblood-Trombetta Motions Prior To A Preliminary Hearing

#### 1. The People of the State of California Have Conceded That No Authority Exists Precluding A Defendant From Asserting A Youngblood-Trombetta Motion Prior To A Preliminary Hearing

From the memorandums submitted by both Petitioner and by the People of the State of California, it appears that the issues presented by the petition for a writ of mandate regarding the timing of a Youngblood-Trombetta motion are a matters of first impression. Accordingly, this Court of Appeal must base its decision upon sound reasoning of the consequences to a defendant's due process rights under the United States and California Constitutions.

#### 2. There Are Crucial Due Process Rights Of The Defendant That Can Only Be Protected By Resolution Of The Evidence Tampering Issue Under Brady v. Maryland Prior To The Preliminary Hearing

The importance of a preliminary hearing cannot be overstated. In most felony cases it is the sole proceeding in a case at which evidence is taken. See San Jose Mercury News v. Municipal Court (1982) 30 Cal. 3d 498, 511. Thus, the preliminary hearing is a critical opportunity for the defense to demonstrate to the prosecution why charges should be dropped or reduced and it is the only chance that a defendant has for a court to rule that the case should be discharged or that the charges should be lowered. For example, the preliminary hearing is the pivotal moment for most defendants to have a "wobbler" reduced to a lesser charged offense. Moreover, the transcript of the preliminary hearing may be used to impeach a witness at trial if the witness testifies inconsistently. Evidence Code §1235; California v. Green (1970) 399 US 149, 26 L Ed. 2d 489, 90 S Ct. 1930. In addition, at the preliminary hearing the defense may

cross-examine witnesses for the purpose of raising an affirmative defense, Jennings v. Superior Court (1967) 66 Cal. 2d 867, negating an element of the offense, Jennings, supra, or impeach a witness, Alford v. Superior Court (1972) 29 Cal. App. 3d 724, 728. In order to preserve these rights of the defendant, it is imperative that all factual investigation has been completed and all exculpatory evidence be located and produced so that all of the evidence favorable to the defendant may be presented to the prosecution and the court.

Accordingly, any state action that would prevent a defendant from being able to present any and all possible *exculpatory evidence* at the preliminary hearing must be viewed with the utmost scrutiny and with the presumption that such state action violates the defendant's due process rights. For example, to allow the prosecution to "drag its feet" and delay the production of exculpatory evidence under the informal discovery rules of PC §1054 et seq. until after a preliminary hearing would clearly be a violation of a defendant's due process rights.<sup>1</sup>

In this case, the defense has found and presented substantial evidence that there may have been tampering with exculpatory evidence in the form of the video of the incident taken by the defendant's wife. See Defendant's Petition for Mandate, pgs. 8-9, and Exhibit E thereto, pg. 49-52. Consequently, the defense clearly has a due process right under Brady v. Maryland (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194; Arizona v. Youngblood (1988) 488 US 51, 58, 102 L Ed 2d 281, 109 S Ct 333; and California v. Trombetta (1984) 467 US 479, 488, 81 L Ed 2d 413, 104 S Ct 2528, to have an evidentiary hearing so that the defense can discover

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<sup>1</sup> PC §866(b) prohibits either side from using the preliminary hearing to obtain discovery. This prohibition on discovery at a preliminary hearing makes it even more imperative that all evidence, especially exculpatory evidence, be disclosed prior thereto. Stanton v. Superior Court (1987) 193 Cal. App. 3d 265, 269-271.

all of the facts pertaining to the handling and production of the Flip video evidence by the prosecution.

The only question for this court is *when* does the defendant get his due process rights under the law: *before or after a preliminary hearing at which time he may bound over for trial?* The People of the State of California have not presented a single reason why the defendant should have his constitutional rights delayed until after the preliminary hearing. The People of the State of California callously and completely ignore the fact that a fellow citizen, presumed innocent under the law until proven guilty by a proper trial, may be unjustly bound over for trial at the preliminary hearing because that citizen was prevented from discovering what happened to exculpatory evidence prior to his preliminary hearing.

The People of the State of California have failed to present a single reason, based either upon procedure or policy, explaining why the defendant should have his constitutional rights delayed until after his preliminary hearing. The People of the State of California have not enunciated any undue burden whatsoever that would be placed upon them by allowing a defendant to have a full evidentiary hearing regarding possible evidence tampering prior to a preliminary hearing, and if sufficient evidence exists of evidence tampering, then allowing that defendant to make a Youngblood-Trombetta motion prior to the preliminary hearing.

**B. The Denial Of Sanctions For Failure To Comply With The Informal Discovery Rules Was Without Any Factual Basis And Violated The Substantial Evidence Rule And Was An Abuse Of Discretion**

The People's opposition to the petition for mandate concerning the denial of sanctions is quite simply, fraught with misstatement of the record and the facts. Rather than go through these

misstatements in detail,<sup>2</sup> the defendant simply refers the Court to the statement of facts and the record presented in the original petition for mandate which accurately sets forth what really happened. This record shows without question that there was no evidence of any kind that the prosecution acted in “good faith”. Indeed, all of the evidence shows that the prosecution dragged out compliance with very simple and straightforward discovery requests for as long as possible, forcing the defense to use every tool possible to obtain discovery, including a motion to compel and finally a motion for sanctions. The end result was that the defendant incurred legal fees and costs that would never have been incurred had the prosecution simply complied as required by PC §1054 et seq.

The real issue for this Court of Appeal is whether the use of obviously dilatory tactics by the prosecution is permissible under the law. The law is intended to protect both the prosecution and the defense from such outrageous “games”. The reasons are quite simple: neither the State of California, nor more defendants, *can afford the legal and time costs imposed upon the opposing side when dilatory tactics are employed*. That is why the legislature specifically enacted PC §1054.5(b) which allows a court to impose whatever sanctions are reasonably necessary to keep either side from abusing the informal discovery process. These sanctions must include the award of fees and costs necessary to enforce the discovery process by a party that is the object of dilatory tactics. Otherwise, the discovery rules are easily abused by prosecutors, but easily enforced against defendants.

This Court must decide whether there are going to be any “teeth” in PC §1054.5(b) on

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<sup>2</sup> The People set out their argument about the factual record at pgs 18-19 of their Opposition.

the side of defendants. There are a number of cases that impose sanctions against the defense when it has played games, but petitioner is unable to find a single instance of sanctions being imposed upon any prosecutor. Why? Are all prosecutors “saints”? Are the superior courts overly reluctant to impose sanctions on a district attorney that they have to deal with on a day-to-day basis?

The facts presented by the petitioner about the dilatory tactics of the prosecution are not disputed by the People in their Opposition. The People simply argue that it was up to the Court’s discretion to find a lack of good faith. If a court can simply ignore such outrageous and dilatory actions by a prosecutor and cause a defendant extraordinary legal fees and costs to enforce the discovery process, then the scales of justice are artificially swung in favor of the People and only those defendants that have sufficient financial resources will have the ability to obtain discovery as required by law.

This Court must send a clear message: there shall be a level playing field when it comes to the obedience of the discovery rules under PC §1054 et seq. If either the defense or prosecution gets out of line, then the imposition of sanctions should be expected by the offending party in equal measure.

### **III. Conclusion**

Where in the United States or California constitutions does it say that due process in a criminal case does not come into effect until after a preliminary hearing? The People have failed to demonstrate a single reason why an evidentiary hearing into possible evidence tampering or destruction should be delayed until after a preliminary hearing. Absent any reason whatsoever, let alone a compelling reason for the state to deny a defendant his due process rights, the

decision of the trial court below must be overturned and a full evidentiary hearing, and if warranted, a Younblood-Trombetta motion made, argue, and decided, before the preliminary hearing of the defendant.

The imposition of sanctions for the outrageously dilatory tactics of the prosecution in this case is necessary to establish clear judicial guidance for all inferior courts that there must be a level playing field with regard to obedience of the discovery rules. Otherwise, prosecutors will gain a very significant advantage over defendants who do not have the financial resources and sheer will to fight for their due process right to discovery of all of the evidence.

Respectfully Submitted,

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Patrick H. Dwyer,  
Attorney for Petitioner

February 5, 2011