IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

Gregory Pellerin, Petitioner

vs.

Superior Court for Nevada County, Respondent,

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

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

PETITION FOR WRIT OF MANDAMUS AND/OR OTHER APPROPRIATE RELIEF;

STAY OF THE PROCEEDINGS REQUESTED [NEXT PROCEEDING IS A PRELIMINARY HEARING SET FOR JANUARY 25, 2011];

MEMORANDUM OF POINTS AND AUTHORITIES;

SUPPORTING EXHIBITS.

Patrick H. Dwyer, SBN 137743
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January 3, 2011

Certificate of Interested Parties

There are no other interested entities or persons to list in this certificate. Cal. Rules of Court, Rule 8.208(e)(3).

Dated: January 3, 2011

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Patrick H. Dwyer, counsel
For Petitioner

Table of Contents

I. Table of Authorities

Statutes

II. Introduction

A. Issues Raised In This Petition

There are two separate matters brought to the Court of Appeals under this petition.

The first matter involves evidence tampering and a violation of the defendant's constitutional rights under Brady v. Maryland (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. Specifically, defendant has uncovered substantial evidence of evidence tampering and the Nevada County Superior Court has denied Defendant's motion for an evidentiary hearing where the Sheriffs Department officers who seized and handled the evidence can be examined under oath about their actions.

The second matter involves the refusal of the Superior Court to order sanctions under California Penal Code ("CPC") §1054.5(b) against the Nevada County District Attorney after a prolonged and unjustified failure to comply with discovery rules CPC §1054.1 and CPC §1054.3, which failure cost the Defendant an extraordinary amount of time, burden, and expense without cause.

The Defendant is bringing this petition for a writ of mandamus because the correction of these errors at this time is needed to preserve his constitutional due process rights and to prevent the further unnecessary and inappropriate expenditure of substantial resources by all of the parties. The availability of appeal after trial in this case will fall far short of providing the Defendant with adequate protection or remedy. Indeed, based upon the facts and procedural status of this case as discussed below, an order staying the proceedings until these matters can be resolved is the only way to prevent further unnecessary and harmful burden, expense and delay to the Defendant.

B. **Factual Summary of Case**

1. **Background Facts**

In September, 2008, a civil action was brought in Nevada County Superior Court by a Mr. John Schema against the Defendant and his wife Susan Pellerin. This action arose out of a series of disputes involving a house with lease option to purchase between the Pellerins (lessees) and a Mr. John Schema (lessor). Initially, there was an action by Mr. Schema for termination of the tenancy (Case no. CO9-148), which the Pellerins won and obtained a judgement against Mr. Schema. The Pellerins then sued Mr. Schema for breach of the lease-purchase agreement and Mr. Schema then countersued. This action (Case No. 75429) is still pending.

In the Spring of 2009, Mr. Schema began to harass the Pellerins by coming onto the leasehold under the pretext of having to serve papers in the litigation. By June, the unannounced trespasses by Mr. Schema and his threatening actions while at the Pellerins home, caused the Pellerins on June 19, 2009, to obtain a court order preventing Mr. Schema from coming to their residence and from delivering further documents in the litigation except through a professional third party (e.g., a lawyer or licensed process server). (Exhibit A, pg. 1) However, over the next ten months Mr. Schema continued to violate the court order by coming to the Pellerin's home and either personally entering the premises or driving someone to the premises to deliver documents in the litigation. Despite two additional appearances before the Superior Court at which Mr. Schema was warned not to go to the Pellerins and just to serve papers by mail, Mr. Schema continued to come to the Pellerins on at least eleven occasions: 7/31/09, 8/1/09, 8/14/09,

8/19/09, 11/30/09, 1/15/10, 2/1/10, 2/26/10, 3/15/10, 4/18/10, and 4/20/10.[1]

On the morning of April 20, 2010, the Defendant was at his home. He heard a knock at the door and heard someone throw some papers at the door. The Defendant opened his door, did not recognize the person, and asked who he was. The person refused to identify himself. Defendant was obviously suspicious that Mr. Schema was the person responsible for bringing this person to his home to serve papers in the litigation. Defendant told his wife to call the Nevada County Sheriffs Office and then left his house and started walking briskly towards the entrance to his residence where he knew from the previous experiences that Mr. Schema would be hiding in his parked vehicle, just out of view. Mrs. Susan Pellerin went and called the police and then began filming the entire incident with a "Flip" video camera from just after the Defendant started walking towards where Mr. Schema was located until after the Nevada County Sheriffs Department arrived at the incident scene.[2]

As Defendant walked towards where Mr. Schema was, the purported "victim" in the present criminal case (a Mr. Thomas Benzing), assaulted and battered Defendant, almost knocking him over. Defendant told Mr. Benzine that he was placing him under citizen's arrest for assault, battery, trespass and violation of a court order to stay away. Defendant did not physically respond at this time, but continued on his way to where Mr. Schema was. Ignoring

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[1] The Pellerins filed a contempt action against Mr. Schema in Nevada County Superior Court on June 23, 2010, Civil Case No. 75120. Mr. Schema was found guilty of contempt on August 16, 2010. A copy of the original Court Order and a transcript of Court's ruling and finding Mr. Schema guilty of contempt are contained in Exhibit A, pg. 2-6.

[2] See the Declaration of Susan Pellerin dated July 14, 2010, in support of Defendant's Motion for a Protective Order and Forensic Examination, a true and correct copy of which is attached hereto as Exhibit D, wherein Mrs. Pellerin declared under oath that she filmed continuously from the time she left the house until well after the Sheriffs' deputies arrived.

the citizens arrest, Mr. Benzine again battered Defendant and threatened to harm him. To defend himself, Defendant put Mr. Benzine into an arm lock and sat him on the driveway. Mr. Benzine continued to try and attack Defendant and to flee. Defendant continued to hold Mr. Benzine until Nevada County Sheriffs deputies arrived, at which time he released Mr. Benzine to their custody and asked that Mr. Benzine be placed under arrest. Instead, after about 30 minutes at the incident scene, the Nevada County Sheriffs Department arrested Defendant for felony battery and took him into custody. *At the Incident scene, Nevada County Sheriffs deputies seized the Flip camera used by Mrs. Pellerin to film the entire incident and took it into custody as evidence*.[3]

Defendant was taken to the Nevada County jail, booked, and then released on bail. An Incident report was prepared and sent to the Nevada County District Attorney and a criminal Complaint was filed against Defendant on May 7, 2010, charging him with felony assault with means likely to produce great bodily injury (PC §245(a)(1), felony battery with serious bodily injury (PC §243(d), and misdemeanor false imprisonment by violence (PC §236). (Exhibit B, pg. 7-8)

2. **Facts Pertaining To Defendant's Motion For An Evidentiary Hearing**

On May 24, 2010, counsel for the Defendant made his first written informal

[3] It is the seizure and subsequent handling of the Flip video camera that was the subject of the Defendant's Motion for an Evidentiary Hearing which was denied and which is one of the two matters leading to this Petition for Mandamus. As discussed below, the Defendant has forensic evidence that the Flip camera was mishandled by the Sheriffs Department and that exculpatory video evidence of the incident was either accidentally lost or intentionally deleted and/or not produced to the Defense.

discovery request which specifically included:[4]

> The flip video camera and/or a true and correct copy of the video contained on said camera that contains images of the events that were the cause of the alleged counts against Defendant, said camera referenced in the Nevada County Sheriff's Office Incident Report No. 11001231 ("Incident Report") at pages 11-12, which camera was seized for evidence.

The Nevada County District Attorney failed to respond within the 15 days statutory period. On June 18, 2010, Defense counsel sent a letter to Deputy District Attorney Katherine Francis requesting compliance with the outstanding discovery requests or face a motion to compel. (Exhibit G, pg. 74.) On June 23, 2010, the Nevada County District Attorney turned over a few of the discovery items, including three CDs: one containing some still photos taken by the Sheriffs deputies at the Incident scene, the next containing an audio recording of a statement made by the Defendant at the incident scene, and the third CD (labled E-3) *containing a video clip from the Flip camera only 1 minute, 18 seconds long* [5] showing the Defendant holding Mr. Benzine while waiting for the Sheriff to arrive.

Counsel for the Defendant sent a letter on June 24, 2010, (Exhibit G, pg. 75) acknowledging receipt of the 1:18 minute video clip (made at approximately 6:02 pm on 4/20/2010) and asking for a copy of the entire video of the incident on the Flip camera and for permission to make a joint physical inspection of the camera with the Deputy District Attorney

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[4] The First and Second Informal Requests for Discovery are set forth as Exhibit C and the specific items that were subsequently included in the Defendant's Motion to Compel are set forth in Exhibit G, pg. 70-72.

[5] The Declaration of Susan Pellerin dated July 14, 2010, stated that she had filmed the entire incident, which was at least 10 minutes long and possibly 20 minutes long. This is a part of Exhibit D, pg. 21-22.

at the Sheriffs Department evidence room. Defense counsel did not receive any reply to this letter or to the other outstanding discovery requests. Consequently, a Motion to Compel Discovery was filed by the Defense on June 28, 2010, (Exhibit G, pg. 64-77) and was short set for July 1, 2010. At the hearing on July 1, 2010, Deputy District Attorney Katherine Francis agreed to allow the Defense to inspect the Flip video camera at the Sheriffs evidence room.

On July 6, 2010, Counsel for the Defense, Mrs. Pellerin, and Defendant visited the Sheriffs Department evidence room and inspected the Flip Camera. It was immediately discovered that the interlock "safety" switch on the Flip camera that protects against erasure of video files was not engaged, thereby enabling the Flip camera to have been erased in whole or in part. The Defense placed the safety switch into the "lock" position and put a piece of tape over the switch so that no video could be erased, it could only be played. This was brought to the attention of the Sheriffs' evidence technician.[6] The Defense then played the files on the Flip camera and discovered three separate video files of the Incident. However, these files had abrupt endings and did not connect to one another. In other words, there were unexplained "gaps" in the filming of the incident which were contrary to the Declaration of Susan Pellerin (see fn3, *supra*). The Defense also observed that the video CD (1:18 minutes long) that had been produced by the Nevada County District Attorney was only a short excerpt of one of the three video files on the Flip camera. This meant that someone had to have intentionally made this short "clip" out of the larger file, put it onto a CD, and then copied and sent this "clip" to the Defense in response to the outstanding discovery requests for all of the video on the Flip camera

[6] See the Declaration of Patrick H. Dwyer in Support of Motion For A protective Order and Forensic Examination, paragraph 6. Exhibit D, pg. 23-24.

relating to the Incident. After making these observations, the Defense returned the camera to the evidence clerk.

On July 8, 2010, counsel for Defendant sent a letter to Deputy DA Katherine Francis confirming the substance of their meeting at which the findings of the physical examination of the Flip camera were reviewed and the use of an independent forensic expert to determine what happened to the Flip camera and why only a small clip of one file had been produced was discussed. (Exhibit D, pg. 29-30) Deputy DA Francis agreed to an independent expert examination of the Flip camera. Lastly, Defense counsel requested that the computer(s) used by the Sheriffs Department to make the short CD "clip" also be examined to see how and possibly why the entire file and the other two files relating to the incident were not produced. It was agreed that such a forensic examination could proceed informally absent any objection by the Sheriffs Department. (Exhibit D, pg. 29-30)

Defense counsel then proceeded to locate an expert in computer forensics and make arrangements for an examination. On the morning of July 14, 2010, counsel for Defendant telephone Deputy DA Francis and informed her that an expert had been located and requested that a further forensic examination proceed as discussed. Deputy DA Francis refused to agree to any further forensic examination of the Flip camera or of any Sheriff Department computers. Counsel for Defendant then prepared and filed the same day a Motion for a Protective Order and Forensic Examination. (Exhibit D, pg.14-37)

The hearing on the Defendant's Motion for a Forensic Examination was first heard on July 20, 2010, and then the hearing was continued to July 22, 2010. During the hearing on July 22, 2010, Sheriffs Deputy Jesse King was examined by the court. (See Exhibit M, pg. __,

which is a transcript of the hearing on July 22, 2010.) Deputy King stated that he had only used the utilities in the Windows operating system to prepare the CD and that he had copied the entire file and had not edited or made any copies of a portion of the file. (Exhibit M, pg. __, lines __) He stated that he was not aware of the presence of more than one file on the Flip camera related to the Evidence. (Exhibit M, pg. __, lines __) The hearing was continued to July 22, 2010, and after argument by both sides, the court granted the Defendant's Motion for a Protective Order and Forensic examination. (Exhibit D, pg. 31-37)

Pursuant to the court's order, the Defense arranged for the forensic firm "Califorensics" to visit the Sheriffs Department on July 27, 2010, to make a forensic examination of the computer believed to be used by Deputy King to make the short video clip. After the hard drive was "mirror imaged", the analysis of the activity on the computer was performed by Califorensics. The analysis was completed by September 2010, and based upon the findings in the preliminary report of Califorensics, Defendant filed a Motion for a Further Protective Order and Forensic Examination on September 16, 2010. (Exhibit E, pg. 38-56)

The factual basis for the Defense Motion for a Further Forensic Examination is set out in the accompanying Memorandum of Points and Authorities, Declaration of Susan Pellerin, and the preliminary report of Califorensics. (Exhibit E, pg. 41-56) The factual support included the statement by Mrs. Pellerin that she had filmed the assaults and batteries on her husband with the Flip camera and that this video would be exculpatory to her husband. The findings of Califorensics (Exhibit E, pg. 49-52) were very significant. These findings were:

1. The video file produced by the Nevada County Sheriff's office was only a partial production of one of three files on the Flip Video;

2. It is possible that a file or files were deleted prior to the connection of the

Flip Video camera to the computer used by deputy Jesse King in the Nevada County Sheriffs Office;

3. The Flip Video camera was accessed without following appropriate forensic procedures after it was seized for evidence; and

4. The file produced to the Defense by the People was an edited version of an original file on the Flip Video camera.

These findings clearly contradicted the testimony of Deputy King on July 22, 2010. The Defendant's Motion for a Further Protective Order and Forensic Examination was heard on October 7, 2010. After oral argument, the motion was granted. (Exhibit E, pg. 53-55) The Defense arranged for and conducted a forensic examination of the computers that were contained in each of the three Sheriffs vehicles that had responded to the Incident scene on October 28, 2010. As of this date, the Defense has been verbally informed by Californsics that it appears the Flip camera was not plugged into any of the three computers in the Sheriffs vehicles.

To complete the forensic examination process and to answer the many remaining questions concerning the Flip camera, the Defense filed a Motion For An Evidentiary Hearing In Support of Forensic Examination on December 8, 2010. (Exhibit F, pg. 57-63) The Motion was heard on December 21, 2010. After oral argument, the Court ruled from the bench and denied the Defendant's motion. (Exhibit L, pg. 149, lines 8-19.)

3. **Facts Pertaining To Defendant's Motion For Sanctions**

There were numerous items other than the video from the Flip camera that the Nevada County District Attorney did not produce in response to Defendant's informal discovery requests. Defense counsel sent a letter dated June 18, 2010, requesting the production of the requested items in time for the next felony status conference so that a date for a preliminary hearing could be set. (Exhibit G, pg. 74)

On June 24, 2010, the Defense acknowledged that it had received three CDs (as discussed above), but none of the other requested items. No response was made by the Nevada County District Attorney, so the Defense filed a Motion to Compel Discovery on June 28, 2010. (Exhibit G, pg. 64–77) This motion was heard on July 20, 2010. At the hearing, the entire list of items requested by the Defense was read by the Superior Court item by item, allowing the Nevada County District Attorney to object or otherwise state why such item could/should not be produced. The Superior Court, finding no reasons for the failure to produce, ordered the Nevada County District Attorney to produce the requested items by August 19, 2010, a week before the next felony status conference. (Exhibit H, pg. 93, lines 7-22.)

The Nevada County District Attorney failed to produce anything on August 19, 2010. The Defense raised this failure at the next felony status conference on August 26, 2010. The Superior Court asked the Deputy District Attorney why there had been no production as ordered and the Deputy District Attorney responded that he had no good reason. (Exhibit H, pg. 100, lines 1-16) Counsel for the Defense and the Deputy District Attorney left the hearing room to discuss the discovery issues privately. The Deputy District Attorney assured Defense counsel that he would that day send out the emails and other communications necessary to get the requested items produced immediately. See the Declaration of Patrick Dwyer dated September 14, 2010 (Exhibit H, pg. 83-105)

On August 31, 2010, Defense Counsel sent a reminder letter to the Nevada County District Attorney that nothing had yet been produced. (Exhibit H, pg. 103) Another reminder was sent by letter on September 7, 2010, and then another by email on September 9, 2010. (Exhibit H, pg. 104-105) Having no response, the Defense filed a Motion for Sanctions

on September 14, 2010. (Exhibit H, pg. 78–106) The Motion was first set for hearing on September 23, 2010, but was continued to October 7, 2010. Nothing was produced by the People by the hearing date and the matter was continued for a further hearing on October 26, 2010. The People filed an Opposition to the Defendant's Motion for Sanctions, but it failed to contain any substantive grounds for why the requests for discovery could not be produced by the District Attorney. (Exhibit I, pg. 107–112) The Defendant filed a reply to the Opposition, along with additional factual and substantive material in support of the Motion on October 25, 2010. (Exhibit J, pg. 113-129) On the morning of the 26th, before the hearing on Sanctions, the Nevada County District Attorney finally produced items responsive to the Defendant's requests made four months earlier in May and early June, 2010. The Superior Court took the Motion for Sanctions under submission and issued a written ruling on November 4, 2010, denying the Defendant's Motion for Sanctions. (Exhibit K, pg. 130-132)

The Superior Court's Ruling contained a single paragraph which found that the Nevada County District Attorney had made "good faith efforts" to provide the requested discovery", and on that basis, found that the Nevada County District Attorney did not amount to a willful violation of PC §1054. (Exhibit K, pg. 131, lines 6-13) As discussed below, it was an abuse of discretion for the Superior Court to find that there had been a "good faith" effort to comply with the discovery rules under PC §1054 under the clear and egregious facts.

III. Petition for Writ of Mandamus And/Or Other Appropriate Relief; Stay of Proceedings Requested

1. Authenticity of Exhibits

All Exhibits accompanying this Petition are true and correct copies of original documents on file with the Respondent Nevada County Superior Court, except for Exhibits L and M, which are true and correct copies of the reporter's transcripts of the hearings of December 21, 2010, and July 22, 2010, respectively, and for Exhibit A, pg. 1, which is a true and correct copy of the Nevada County Superior Court Order prohibiting Mr. Schema from going to the Defendant's premises. The exhibits are incorporated herein by reference as though fully set forth in this Petition.

2. Beneficial Interest of Petitioners; Capacities of Respondent and Real Parties in Interest

Petitioner Gregory Pellerin is the Defendant in the action now pending in Respondent Nevada County Superior Court entitled The People of the State of California v. Gregory Pellerin, Case No. F10-159. Respondent Nevada County District Attorney represents the People of the State of California as the real party in interest.

3. Chronology of Pertinent Events

Incident at Defendant's Home and Arrest April 20, 2010

Criminal Complaint filed May 7, 2010.

Written Requests for Informal Discovery sent on May 24, 2010 and June 1, 2010.

June 18, 2010 Defense Counsel sends inquires about late discovery production

June 23, 2010 Defense receives CD with 1:18 minute partial video clip

June 24, 2010 Defense letter asking why only a small portion of video produced

June 28, 2010 Defense files Motion to Compel Discovery

July 1, 2010 Hearing on Motion to Compel and Examination of Flip video camera

July 6, 2010 Defense examination of Flip video camera

July 8, 2010 Defense letter to DDA Francis re informal exam of Flip camera

July 14, 2010 Defense files Motion for Protective Order and Forensic Exam

July 20, 2010, Hearing on Motion to Compel and Motion for Forensic exam. Court orders production of items requested by Defense by August 19, 2010; hearing on forensic exam continued to July 22, 1010

July 22, 1010 Continued hearing on Forensic exam. Court orders examination

July 27, 2010 Defense conducts forensic exam

August 19, 2010 Date for production by District Attorney – nothing produced

August 26, 2010 felony status conference, no production by District Attorney; agreement by District Attorney to immediately produce.

August 31, 2010 Defense counsel letter to DDA Weston requesting production

September 7, 2010 Defense counsel email to DDA Weston requesting production

September 9, 2010 Defense counsel email to DDA Weston requesting production

September 14, 2010 Defense files Motion for Sanctions for failure to produce

September 16, 2010 Defense files Motion for a Further Forensic Examination

October 7, 2010 Hearing on Defense Motion for Sanctions, nothing yet produced, hearing continued to October 26, 2010

October 7, 2010 Hearing on Defense Motion for Further Forensic examination. Court grants order.

October 21, 2010 DDA Weston files an Opposition to the Defense Motion for Sanctions

October 25, 2010, Defense files Reply to Opposition to Sanctions.

October 26, 2010 District Attorney makes production just before final hearing on Sanctions

October 28, 2010, Defense conducts forensic examination of Sheriffs vehicle computers

November 4, 2010 Court issues ruling denying sanctions.

December 8, 2010 Defense files Motion For Evidentiary Hearing In Support of Forensic Examinations

December 9, 2010 Felony status conference and case set for Preliminary Hearing on January 25, 2010

December 21, 2010 Hearing on Defense Motion for Evidentiary Hearing. Court Denies motion from ruling at the bench.

4. **Basis For Relief**

The California Court of Appeal has made it very clear that a writ of mandamus is appropriate in a wide variety of pre-trial criminal matters involving interlocatory orders.[7] Perhaps the best case discussing the basis for relief though mandamus is Maine v. Superior Court (1968) 68 Cal. 2d 375, at 377-378, where the California Supreme Court taught that the mandamus:

> "remedy [that] has been adapted to a spectrum of pretrial circumstances and in each instance was found to be consistent with traditional criteria for issuance of the extraordinary writ ... The common thread woven through the foregoing examples of mandamus antedating trial is the responsiveness of appellate tribunals when initiative is required to protect a defendant's fundamental right to a fair trial. Availability of appeal often falls short of sufficient protection, since 'the burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy', citing Brown v. Superior Court (1949) 34 Cal.2d 559, 562.

As demonstrated below, it is clear from the facts of this case and its present procedural posture that Defendant's Petition for relief from the Superior Court's denial of his Motion for an Evidentiary Hearing about the evidence tampering is absolutely necessary to protect his due process rights and to avoid the burden expense and delay resulting from a possible trial and subsequent appeal.

As further demonstrated below, it is also very clear from the uncontested facts of the prosecution of this case that the Defendant has been subjected to blatant, unwarranted, and intentional refusal of the Nevada County District Attorney to follow the informal discovery rules under PC §1054.1 and PC §1054.3. The refusal of the Superior Court to grant sanctions against

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[7] Rulings on the admissibility of evidence are not subject to petitions for a writ of mandamus.

the Nevada County District Attorney for these violations was a clear abuse of discretion that: (a) thrust upon the Defendant an extraordinary expense and burden to obtain discovery; and (b) signaled the Nevada County District Attorney that it has a "green light" to engage in open disobedience of the statutory scheme for informal discovery under PC §1054, thereby emasculating the rights of defendants and permitting a district attorney to use such tactics against a defendant who lacking the resources or ability, to obtain guilty pleas and plea bargains that would otherwise not be obtained. Innocent citizens without substantial wherewithal will be forced to plead guilty and accept punishment simply because a district attorney faces no consequences for ignoring the statutes of this state.

5. **Absence of Other Remedies**

The only other remedy available to the Defendant is to go through the rest of the legal proceedings (preliminary hearing, trial, etc.) and then file an appeal. As discussed above in Main v. Superior Court, *supra*, appeal often falls short of sufficient protection, since "the burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy". This is exactly the type of case that the California Supreme Court had in mind when it made this statement.

IV. **Prayer**

Petitioner Gregory Pellerin prays that this court:

1. Issue an alternative writ directing Respondent Superior Court to grant Defendant's Motion for An Evidentiary Hearing or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ of mandamus and/or such other extraordinary relief as is warranted, directing

the Respondent Superior Court to set aside and vacate its order of December 21, 2010, denying Defendant's Motion;

2. Issue an alternative writ directing Respondent Superior Court to grant Defendant's Motion for Sanctions or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ of mandamus and/or such other extraordinary relief as is warranted, directing the Respondent Superior Court to impose sanctions as requested by the Defendant;

3. Award Petitioner his costs pursuant to California Rule of Court 8.278; and

4. Grant such other relief as may be just and proper.

Respectfully Submitted,

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Patrick H. Dwyer,
Counsel for Petitioner
Gregory Pellerin

January 3, 2011

V. **Verification**

I, Patrick H. Dwyer, declare as follows:

I am counsel for the Petitioner. I have read the foregoing Petition for Writ of Mandamus And/Or Other Extraordinary Relief and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than the Petitioner, have verified this Petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on January 3, 2011, at Penn Valley, California.

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Patrick H. Dwyer

VI. Memorandum of Points and Authorities in Support of Petition

A. The Denial Of Defendant's Motion For An Evidentiary Hearing Regarding Evidence Tampering

There are three very important questions for the Court to answer in deciding whether the Superior Court's denial of an evidentiary hearing was an error. These are:

(a) whether a defendant's right to due process is violated when a defense motion for an evidentiary hearing concerning possible tampering of exculpatory evidence is denied prior to a preliminary hearing;

(b) whether a defendant's right to discovery of evidence under PC §1054 et seq. is abrogated when a defense motion for an evidentiary hearing concerning possible tampering of allegedly exculpatory evidence is denied prior to a preliminary hearing; and

(c) if there is substantial evidence of evidence tampering prior to a preliminary hearing, may the defense make a motion under 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, prior to the preliminary hearing, or must it wait until the case is assigned for trial?

The analysis should begin with the principles set down in Brady v. Maryland. The paramount rule established under the US Constitution is that:

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady at 87.

The decision in California v. Trombetta made the rule of Brady v. Maryland applicable to all California criminal prosecutions. There the court held that:

> The most rudimentary of the access-to-evidence cases impose

> upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. Napue v. Illinois, 360 U.S. 264, 269-272, 79 S.Ct. 1173, 1177-1179, 3 L.Ed.2d 1217 (1959); see also Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). But criminal defendants are entitled to much more than protection against perjury. A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1196. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. United States v. Agurs, 427 U.S., at 112, 96 S.Ct., at 2401. The prosecution must also reveal the contents of plea agreements with key government witnesses, see Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and under some circumstances may be required to disclose the identity of undercover informants who possess evidence critical to the defense, Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). California v. Trombetta at 485.

The facts presented by this case make a clear showing that there has been some form of tampering and possible loss of exculpatory evidence favorable to the Defendant and that not all of the exculpatory evidence was (or still has been) turned over to the Defense. Thus, there is no question that there already has been a due process violation of the Defendant's rights under applicable law.

However, in the cases that have gone to the appellate courts to date, see e.g., In re Brown (1998) 17 Cal. 4th 873, 879; Kyles v. Whitley (1995) 514 US 419; People v. Little (1997) 59 Cal. App. 4th 426, there has not been a single case that Defendant can find that deals directly with an evidence tampering situation at this early in a criminal proceeding, ***and in particular, with the question of what is the correct procedural process that the Superior Court must follow under such circumstances***.

The Defendant believes that his due process rights requires that, in situations such as presented by this case where there is a problem with evidence handling discovered at the outset of the case, that any factual questions about the evidence processing and/or tampering and/or failure to disclose exculpatory evidence to the Defense ***must be resolved before there are any other major proceedings in the court (other than other discovery matters), especially before a preliminary hearing.*** This is especially true with the application of PC §866(b), which prohibits either side from using the preliminary hearing to obtain discovery. Indeed, it is because of the prohibition on discovery at a preliminary hearing that it may be proper to make a common law motion to dismiss if not all of the evidence that should have been disclosed, was in fact, disclosed. See Stanton v. Superior Court (1987) 193 Cal. App. 3d 265, 269-271.

In this case, the Defense filed a Motion for an Evidentiary Hearing before the matter was set for preliminary hearing. This motion was denied. Consequently, the Defendant has to proceed to a preliminary hearing not being able to obtain answers to many significant questions that bear directly upon the right of the Defendant to cross examine and confront witnesses, including impeachment, the right to present witnesses, the ability to present affirmative defenses, and the right to present other evidence negating the charges against him. This is a clear violation of Defendant's due process rights under Brady v. Maryland, California v. Trombetta and Stanton v. Superior Court.

For example, the Defendant will not be able to have pertinent facts about the handling of the Flip camera that could be used to impeach the arresting officers. The Defendant will not have the facts to know if there has been an intentional wrongdoing against him by the prosecution's production of a 1:18 minute video clip which was only a portion of a much longer

video file and when there where two other video files that were not produced at all, including one video file that shows the purported "victim", Mr. Benzine, clearly battering the Defendant after the Defendant's making a citizen arrest and prior to putting Benzine into a protective arm hold on the ground. Was this just an inadvertent mistake or was it intentional and was the Nevada County District Attorney complicit in this failure to disclose? The Defendant has the right to present an affirmative defense of having acted in self-defense and this has been significantly impaired by the failure to properly handle and disclose the Flip camera video.

An evidentiary hearing as requested by the Defendant is the only way to find out the answers to the foregoing (and many other questions) **under oath** that would enable the Defendant to prepare the best defense possible at his preliminary hearing. Consequently, the denial of the Defendant's Motion for an Evidentiary Hearing was a violation of his most basic due process rights under the United States and California constitutions, as well as a violation of the California statutory scheme for discovery of evidence under PC §1054 et seq. which is intended to promote the ascertainment of truth, save court time, protect victims, prevent delay, and prevent trial by ambush. See In re Littlefield (1993) 5 Cal. 4th 122.

B. **The Denial Of Defendant's Motion For Sanctions**

1. The Denial Was Not Supported By Any Evidence

The denial of the Defendant's Motion for Sanctions was based upon the Superior Court's factual finding that the Nevada County District Attorney had acted in "good faith" in responding to the Defendant's discovery requests. (Exhibit K, pg. 131, lines 6-13) **However, the court failed to cite to *any* evidence of good faith actions on the part of the Nevada County District Attorney whatsoever. Rather, the Superior Court simply ignored the long,**

arduous, and expensive history of the Defendant's efforts to obtain the requested discovery and the knowing and intentional failing of the Nevada County District Attorney to comply, including the following events:

> (a) original written informal requests; (b) the reminder letters sent by Defense counsel; (c) the Defendants's Motion to Compel, which was granted; (d) the failure to produce by the date set by the Court after granting the Motion to Compel (August 19, 2010); (e) the failure to produce by the date of the next felony status conference (August 26, 2010), (f) the failure to produce after letters sent by Defense counsel on August 31, 2010, September 7, 2010, and September 9, 2010, (g) the failure to produce by the date of the first hearing on the Motion for Sanctions on October 7, 2010, and (h) the failure to produce until the morning of the final hearing on the Motion for Sanctions on October 26, 2010.

The record shows that there was no evidence of any kind presented by the Nevada County District Attorney for the failure to comply with the routine discovery requests. Under the **substantial evidence** standard of review,[8] it was impossible for the Superior Court to make a factual finding that the Nevada County District Attorney had acted in "good faith" because there is not a scintilla of evidence in the record to support such a finding. Yes, a Superior Court has the power to make factual determination, and yes, such determinations will ordinarily be upheld on appeal. However, where, as in this case, there are no facts whatsoever recited by the Superior Court supporting its Ruling Denying Motion For Sanctions, it was physically impossible for the court to have reached the factual conclusion that the Nevada County District Attorney acted in "good faith".

The Superior Court was required to find at least some evidence that was of

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[8] See e.g., Winograd v. American Broadcasting Co. (1998) 68 Cal. App. 4th 624, 632; Bowers v. Bernards (1984) 150 Cal. App. 3d 870, 872-873.

"ponderable legal significance ... [i]t must be reasonable ..., credible, and of solid value..." that justified the failure of the Nevada County District Attorney to comply with the discovery requests and the motion to compel. Kuhn v. Department of General Services (1994) 22 Cal. App. 4th 1627, 1633. See Roddenberry v. Roddenberry (1996) 44 Cal. App. 4th 634, 651-654. The Superior Court found no evidence of any kind: it just made a summary conclusion that was completely contrary to the facts before it. There is no other conclusion than that the Superior Court's failed to meet the substantial evidence test.

2. **The Denial Was An Abuse Of Discretion**

Normally, an appellate court will not disturb a Superior Court ruling that is a mere exercise of its discretion. There must be a clear showing of an abuse of the court's discretion and a miscarriage of justice. See Blank v. Kirwin (1985) Cal. 3d 311, 331; Denham v. Superior Court (March & Kidder) (1970) 2 Cal. 3d 557, 566.

However, an abuse of discretion will be found when the decision "exceeds the bounds of reason, all the circumstances before it being considered." Denham v. Superior Court. In Horseford v. Board of Trustees of Calif. State Univ. (2005) 132 Cal. App. 4th 359, at 393, the appellate court established that "[a]ction that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion."

The basis for sanctions for violation of the criminal discovery rules is set out in PC §1054.5(b). This statutory rule was designed to allow the court the leeway to make orders as necessary to ensure that the informal discovery rules are obeyed: in this instance, PC §1054.1 and PC §1054.3. If a Defendant is unable to obtain timely and complete discovery of the

evidence from the prosecution, the entire system of criminal justice is in jeopardy. The criminal discovery statutes were expressly enacted by the legislature to eliminate gamesmanship and ambushes at trial. They are intended to give each side equal access to the evidence necessary to determine the guilt or innocence of the accused.

Under the facts of this case, it is unquestionable that the Nevada County District Attorney was knowingly and willfully failing to comply with the discovery rules. The discovery that was turned over finally on October 26, 2010, could and should have been turned over in June, 2010, without any cost to the Defendant other than having his counsel send a written informal discovery request. Instead, the record proves that the Defense was deliberately "stonewalled" by the prosecution for no reason other than to be punitive and burdensome to the Defendant.

As discussed above, the Superior Court did not find a single piece of evidence that provided any rational basis for the delay in producing the discovery. Thus, as set forth in the Horseford v. Board of Trustees of Calif. State Univ. Decision at 393, the failure of the Superior Court to impose sanctions on the district attorney was an "[a]ction that transgresses the confines of the applicable principles of law [and] is ... an 'abuse' of discretion."

It is critical from a policy perspective that the appellate court correct this failure of the Superior Court to not only restore the Defendant to some of his rights as an accused, but to prevent the Nevada County District Attorney from ever again acting with such callous disregard of the law with any defendant. Either the rule of law is upheld, or prosecutorial misconduct will be unrestrained.

Lastly, the Superior Court cited to California Code of Civil Procedure ("CCP")

§128.5 and CCP §177.5 at the appropriate statutory authority to deny an award of attorneys fees to defense counsel. These citations are entirely misplaced. PC §1054.5(b) provides all of the statutory necessary for the Superior Court to make an award of attorneys fees to defense counsel where it finds that a district attorney has knowingly and willfully used dilatory tactics in refusing to abide by the statutory informal discovery rules. Specifically, the statute provides that "*a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to*, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or *any other lawful order*" necessary to enforce the intent of the statutory informal discovery rules PC §1054.1 and PC §1054.3. See People v. Ayala (2000) 23 Cal. 4th 225, 299, where the California Supreme Court cited to the ruling in People v. Wimberly (1992) 5 Cal. App. 4th 773, 792 that "a trial court may, in the exercise of its discretion [under PC 1054.5(b)], consider a wide range of sanctions in response to the prosecution's violation of a discovery order."

In a situation such as this, where the Defendant has incurred significant legal costs pursuing his constitutional and statutory rights to gather evidence in his defense entirely as the result of the obstreperous behavior of the prosecution, it is perfectly reasonable and lawful under PC §1054.5(b) for the Superior Court to issue an order reimbursing the Defendant for his attorney's fees.

VII. **Conclusion**

For the reasons set forth above, Petitioner Gregory Pellerin respectfully requests this Court to grant an immediate stay of the proceedings and then to grant extraordinary writ relief as prayed and issue a decision that the Defendant is entitled to an evidentiary hearing prior to his preliminary hearing.

In addition, based upon the factual showing by the Defendant of the clear abuse of the discovery rules by the Nevada County District Attorney and the failure of the Superior Court to impose sanctions for such misconduct despite all of the evidence supporting the imposition of sanctions, Petitioner Gregory Pellerin respectfully requests this Court to grant extraordinary writ relief as prayed and issue a decision that sanctions for violation of PC §1054 et seq. Be imposed.

Respectfully Submitted,

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Attorney for Petitioner

January 3, 2011