IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOISES GALINDO, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, CITY OF LOS ANGELES POLICE DEPARTMENT et al., Real Parties in Interest.	S170550 2nd Dist. No. B208923 (Trial Ct. No. BA337159)

ANSWERING BRIEF ON THE MERITS

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ANSWERING BRIEF ON THE MERITS

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

Is *Pitchess*[1] discovery so vitally important as to be necessary for use at a preliminary hearing? Is it a modern day David capable of slaying the figurative Goliath of police officer testimony? Petitioner believes so.

[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Real Party in Interest believes another analogy is more fitting: Fool's Gold. Though *Pitchess* discovery sparkles with the purported patina of constitutional significance in petitioner's opening brief, a discerning eye quickly sees that it holds no promise. The value of *Pitchess* discovery is *de minimis* at a preliminary hearing.

Does it shock the conscience to envision a bright line prohibition of *Pitchess* discovery at the preliminary hearing stage? Not at all. Without intending to sound facetious, such a prohibition would result in a win-win-win situation: it would further the purpose of Proposition 115 by eliminating time consuming discovery proceedings in preliminary hearing courts; it would protect against the unnecessary invasion of an officer's right of privacy; and, though public defenders are not in a position to advocate it, it would free their office from the burden of committing already scarce resources in pursuit of discovery at preliminary hearings that is of marginal utility, even at the trial court level.

Proposition 115 reconfigured the landscape of criminal discovery and streamlined the probable cause hearings afforded to defendants known as preliminary hearings. Any viable argument that *Pitchess* discovery was available at the preliminary hearing was eliminated long ago by these changes. Unfortunately, attorneys representing peace officers on *Pitchess* motions were slow to recognize the significance of Proposition 115 and Penal Code section 866. This resulted in criminal defendants obtaining *Pitchess* discovery when they were not entitled to it. Real Party sees the Court of Appeal decision not as one taking away a right but instead stating clearly what should have been the more informed practice of *Pitchess* discovery after Proposition 115.

With specific reference to petitioner's *Pitchess* motion, the preliminary hearing magistrate made the right call. The defense declaration did not meet the standards of *Warrick* because it failed

to set forth a viable defense for the purposes of a probable cause hearing. Under these circumstances, the balance of interests weighed in favor of the officers and in favor of non-disclosure.

ISSUES ON REVIEW

Petitioner seeks an order directing the Superior Court to grant his pre-preliminary hearing motion for *Pitchess* discovery. Petitioner's prayer for relief frames the issues on review:

1. Has good cause been shown and does the balancing of two competing interests, the police officers' right of privacy and the defendant's interest to all information that may be pertinent to his defense, weigh in favor of disclosure?
2. Do the limits on discovery and preliminary hearings imposed by the passage of Proposition 115 preclude pre-preliminary hearing *Pitchess* motions?

STANDARDS ON REVIEW

The standard of review for the denial of a motion for *Pitchess* discovery is abuse of discretion. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992.) Unless a clear case of abuse is shown and unless there has been a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the lower court of its discretionary power. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

The issue of whether a criminal defendant is entitled to *Pitchess* discovery before preliminary hearing is a question of law and is a matter of first impression scrutinized under the standard of independent review. (*People v. Carter* (2005) 36 Cal. 4th 1114, 1140.)

STATEMENT OF FACTS AND PROCEDURE

Petitioner Moises Galindo was arrested on February 29, 2008 at approximately 7:40 pm. The events leading up to his arrest are set forth in the LAPD arrest report authored by Officer Flores, which is Exhibit D, filed in support of Moises Galindo's Petition for a Writ of Mandate in the Court of Appeal.

Officer Flores and his partner Officer Smith, as well as Officer Vazquez and Officer Gomez, were assigned to LAPD's Hollenbeck Division. Their area of patrol was the Ramona Gardens housing development. Their supervisor, who arrived on scene later, was Sgt. Vargas. All officers were in full uniform that evening.

Initial Police Contact with Moises Galindo

Moises Galindo was observed by Officers Flores and Smith drinking from a beer can in violation of a local ordinance prohibiting drinking alcohol in public. When Galindo saw the officers, he walked away while holding his waistband in a manner consistent with attempting to conceal a firearm. Officers ordered Galindo to stop at which time Galindo ran and went into a nearby apartment. Officers Vazquez and Gomez contacted Officers Flores and Smith and the four officers, thereafter, "contained" the residence Galindo had entered. Sgt. Vargas was then contacted by the officers who requested that he respond to the location.

Edward, Yolanda and Gloria Galindo Become Involved

Prior to the arrival of Sgt. Vasquez, Edward Galindo, Yolanda Galindo and Gloria Galindo confronted the four officers outside the apartment. They yelled at the officers: "You can't go in there without a warrant, we know our rights, leave them alone." These three individuals were ordered to leave

the area at which time they replied: "We know who you guys are . . . . your badges don't mean anything to us." Yolanda and Gloria Galindo continuously approached the officers using flash photography and filming in the officers faces. They were warned they were interfering with the officers' investigation and would be arrested if they did not disperse. The situation escalated when Edward, Yolanda and Gloria Galindo yelled for assistance and attempted to have bystanders gather and riot.

Elvis Galindo Arrives and is Arrested

Thereafter, Sgt. Vargas arrived on scene and the officers recognized "Big Hazard" gang member, Elvis Galindo, walking towards them. The officers were aware Elvis Galindo did not live in the Ramona Gardens housing development and had been served with a copy of the "Big Hazard" gang injunction. The officers determined Elvis Galindo was trespassing in violation of the gang injunction and took him into custody under Penal Code section 166(4) for violation of a court order.

Moises Galindo is Arrested

Thereafter, Sgt. Vargas advised an elderly man that an individual had run into the man's apartment. The man gave permission for officers to enter and search. Moises Galindo was found in the apartment and taken into custody. As the officers walked him back to their patrol vehicle, Moises Galindo threatened the officers by stating: "Don't ever talk to me like that, you don't know who you are fucking with. I am going to have all you pigs killed, I am from Hazard." Nearby, Elvis Galindo added: "That's right fuck all you cops I am going to have all you guys taken out, you will see, this is hazard." Both Moises and Elvis Galindo were placed in the back seat of Sgt. Vargas' patrol vehicle for transport to Hollenbeck Station for booking.

Arrest of Edward, Yolanda and Gloria Galindo

Edward, Yolanda and Gloria Galindo remained on scene and continued to attempt to incite a riot against the officers. Consequently, they were taken into custody for interfering with the officers in violation of Penal Code section 148(A)(1).

Use of Force

During transport, Sgt. Vargas was driving and Officer Flores was seated in the rear with Moises and Elvis Galindo. Moises and Elvis Galindo became belligerent and continued their threats; Officer Flores was told: "You don't have any idea who you fucked with. I am going to remember your face, I am going to kill you and your family." Moises Galindo then leaned over began to use his head to strike the head of Officer Flores, who pushed him away. Moises Galindo continued and tried to head-strike Officer Flores again.

Elvis Galindo then threatened Officer Flores by stating: "Don't fuck with my brother, I am going to fucking kill you." Elvis Galindo tried to climb over Moises Galindo and attempted to head-strike Officer Flores. Officer Flores continued pushing both Moises and Elvis Galindo away from him.

Sgt. Vargas stopped the car, got out and opened one of the rear doors. As he opened the door, Elvis Galindo violently swayed back and forth. This caused Elvis Galindo to fall out of the car and onto the ground. Officer Flores got out of the car and assisted Sgt. Flores in restraining Elvis Galindo until he could be transferred to the vehicle of Officers Vasquez and Gomez for transport to LAPD's Hollenbeck station.

Court Proceedings

The People filed a felony complaint against petitioner alleging petitioner had, by means of threat or violence, resisted Officer Flores in the performance of his duties thereby violating Penal Code section

69. It is also alleged that petitioner made criminal threats against Officer Flores in violation of Penal Code section 422. Petitioner entered a not guilty plea and his matter was set for preliminary hearing.

Before the preliminary hearing, petitioner filed a *Pitchess* motion seeking discovery of the personnel files of LAPD Officers Flores, Smith, Vasquez, Gomez and Sgt. Vargas. Petitioner asked for disclosure of any complaints alleging the named officers engaged in aggressive behavior, violence, excessive force, fabrication of charges, illegal search and seizure, false arrest, perjury and false police reports. Petitioner argued discovery of such complaints would assist defense counsel in the cross-examination and impeachment of the officers at the preliminary hearing.

The declaration filed in support of petitioner's *Pitchess* motion alleged the following, upon information and belief. Petitioner Moises Galindo was not carrying a beer as alleged in the police report. Petitioner saw the officers interacting with some other Ramona Gardens residents as he entered his parents' home, but the officers never addressed petitioner nor did they order him to stop. Petitioner's elderly father did not give the officers consent to enter his home and the officers entered the home without permission. Petitioner did not make the threats alleged in the police report while being escorted to the car nor did he make threats at any point during his encounter with these officers, either during the arrest or during his transport. The police used excessive force against petitioner. Specifically, Officer Flores physically assaulted petitioner and Elvis Galindo as they rode in the back of the patrol car. Petitioner did not attack Officer Flores in the patrol car, or anywhere else. Officer Flores and Sergeant Vasquez further physically assaulted Moises and Elvis Galindo on the sidewalk before transferring them to a different patrol car.

Judge Goldberg, the magistrate presiding over the preliminary hearing, denied the *Pitchess* motion without prejudice. Petitioner filed a Petition for Writ of Mandate in the Superior Court seeking

an order directing the magistrate to grant petitioner's *Pitchess* motion. The Superior Court denied the Petition by way of a written minute order. The Superior Court noted: "Penal Code section 1054 does not provide for discovery at the preliminary hearing stage. The absence of provisions allowing discovery at the preliminary stage is reinforced by Penal Code section 866 which specifically states: 'The purpose of the hearing is to determine probable cause, not afford the parties an opportunity for further discovery.'" (Superior Court's Minute Order for June 23, 2008, attached as Exhibit H to the Petition for Writ of Mandate.)

Petitioner again filed a Petition for Writ of Mandate, this time in the Court of Appeal, and the Court granted a stay of the preliminary hearing pending decision by the Court. After briefing, the Petition was summarily denied. A Petition to the Supreme Court followed, which was granted transferring the matter back to the Court of Appeal. Respondent, Los Angeles Superior Court was ordered to show cause why it should not grant petitioner's motion for *Pitchess* discovery. Before oral argument, Real Party in Interest filed a Return to the Petition and petitioner filed a Reply. On January 7, 2009, the Court of Appeal issued its written opinion denying the Petition for Writ of Mandate. The Court of Appeal concluded that a defendant may not seek *Pitchess* discovery for use in a preliminary hearing. This Court granted review on March 25, 2009.

ARGUMENT

INTRODUCTION

Petitioner seeks pre-preliminary hearing discovery of the personnel records of LAPD Officers Flores, Smith, Vasquez, Gomez and Sgt. Vargas. Good cause has not been shown to justify an in camera review of these officers' records. Further, the record on appeal is completely devoid of any indication the officers will testify at the preliminary hearing. Consequently, petitioner has failed to

establish the most basic of foundations: that *Pitchess* discovery, even if available, would be used at the preliminary hearing to impeach these officers. Given these facts, review and disclosure of the officers' personnel records would be a pointless and unjustified invasion of their right of privacy.

In addition, the Sixth Amendment to the Constitution does not require that *Pitchess* discovery be available for use at a preliminary hearing nor is there a statutory basis for pre-preliminary hearing *Pitchess* discovery after the passage of Proposition 115. Finally, any right to *Pitchess* discovery has been preserved by the preliminary hearing magistrate's denial of petitioner's motion *without prejudice* and by petitioner's ability to re-file his motion in the trial court.

I.

PITCHESS DISCOVERY WILL NOT CHANGE THE OUTCOME OF PETITIONER'S PRELIMINARY HEARING

During oral argument on the *Pitchess* motion, defense counsel stated:

> "I'm not sure if the Court read the declaration. I denied lawful arrest. If there is no lawful arrest, they cannot prevail on PC 69. I also denied directly any criminal threat. If there is no criminal threat, there is no 422." (Reporter's Transcript of *Pitchess* motion May 16, 2008, attached to the Petition for Writ of Mandate as Exhibit F, p.9:1-5.)

Judge Goldberg, acting as a preliminary hearing magistrate, replied:

> "But you have done it in conclusory terms. It doesn't tell me what did happen. That's the problem." (*Id*, lines 6-7.)

Real Party agrees with Judge Goldberg's analysis that the defense declaration is insufficient – it is a "problem." The declaration merely sets forth a series of denials that do not establish good cause for discovery under *Warrick*. In other words, telling the court what didn't happen is not the same as stating what did occur. However, the more salient comments from Judge Goldberg, and the ones that distinguish this motion from others filed in a trial court, are as follows:

> "I think when you make a motion, pre-prelim under *Pitchess*, the defense has to logically show they are going to discover something or might discover something that would change the outcome of the preliminary hearing. Not the trial. This is a probable cause hearing." (*Id*, p.7: 7-12.)

Though Judge Goldberg doesn't cite *Warrick,* his assessment fits within the *Warrick* analysis of good cause:

> "To show good cause as required by section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024.)

At the preliminary hearing stage, the People's burden is very, very low. *Pitchess* discovery does not have the ability to make a difference in the context of this low evidentiary threshold. An information will not be set aside or a prosecution thereupon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. (*People v. Slaughter* (1984) 35 Cal.3d 629, 638.)

At the beginning of this brief, *Pitchess* discovery was described as Fool's Gold, a rather harsh description for discovery that has no value. But the assessment is sound. Judge Goldberg gave the same assessment, set forth above, in the hurried confines of a Los Angeles preliminary hearing court. This theme was picked up and put to more refined music in the Court of Appeal opinion where the Court states the following:

> "Evidence Code section 1043 limits *Pitchess* discovery to evidence that is material 'to the subject matter involved in the pending litigation.' (Evid. Code, § 1043, subd. (b)(3).) Here, petitioner seeks evidence from the personnel files of the officers who arrested him hoping to show they had engaged in misconduct involving other members of the public. But such evidence is unlikely to rebut probable cause, which is a preliminary hearing's touchstone, because past misconduct might suggest a reason to doubt an officer's truthfulness, but is not, strictly speaking, exculpatory by tending to show the defendant's actual innocence. A witness might be untruthful in one setting and truthful in another. *Pitchess* material petitioner seeks is unlikely to justify a magistrate's dismissal of a charge for lack of probable cause." (Slip Opn., p. 9.)

If the discovery sought will not make a difference in the outcome of the preliminary hearing, it is not, by definition, material. If it is not material, there should be no disclosure under *Pitchess*. (*Warrick v. Superior Court, supra*, 35 Cal.4th 1021.) Judge Goldberg did not abuse his discretion when he denied petitioner's *Pitchess* motion brought before the preliminary hearing.

II.

THE BALANCE OF INTERESTS SHOULD WEIGH IN FAVOR OF THE OFFICERS AND NON-DISCLOSURE AT A PRELIMINARY HEARING

The last sentence of the quote reproduced above, "*Pitchess* material petitioner seeks is unlikely to justify a magistrate's dismissal of a charge for lack of probable cause," ties in to the topic of this section: the balancing of competing interests. Taking a step back, what is at stake in a *Pitchess* motion? This Court summarized the stakes in *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3rd 74, 81:

> "The statutory scheme [evidence code section 1043, et seq.] . . . carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense."

Granted, the Court in *Santa Cruz* states an officer's privacy rights are safeguarded by an *in camera* review, the five year relevancy limit on disclosure as well as protective orders. *See*, Evidence Code section 1045. However, these protections are in the context of a *Pitchess* motion brought in a trial court where materiality has been demonstrated. Preliminary hearings are a horse of a different color. They are probable cause hearings with a much lower burden of proof. Consequently, the balancing set forth in *Santa Cruz* needs to be re-examined in this context.

As stated, *Santa Cruz* contemplates the restrictions set forth in Evidence Code section1045 as necessary to protect peace officer personnel records deemed by the court to be material to the defense at trial. However, will section 1045 protect an officer's privacy rights where the discovery sought is not

material at a preliminary hearing? If the "*Pitchess* material petitioner seeks is unlikely to justify a magistrate's dismissal of a charge for lack of probable cause," shouldn't the balance between the officers' privacy rights and the defendant's purported interests weigh in favor of the officer and non-disclosure? The only viable answer to this last question is yes.

Peace officers records only become subject to disclosure when they can make a difference, when they are material to the defense of the charges facing the defendant. (*Warrick v. Superior Court, supra*, 35 Cal.4th 1021.) If they are not material, as in a preliminary hearing, they should not be turned over. Even accepting that a judge and court reporter will keep the *in camera* proceedings confidential, and even accepting that defense counsel will abide by the terms of a protective order, an officer should not have even these individuals privy to information from his or her confidential personnel files unless it is absolutely necessary and good cause has been demonstrated.

If there is a flaw in the Court of Appeal opinion, it is that the Court does not acknowledge or discuss the officers' claim to confidentiality based upon their privacy rights. The Court's oversight is unfortunate because the officers' rights aren't merely important. They are an essential consideration in any *Pitchess* motion. By using the words "equally compelling" in the *Santa Cruz* decision, this Court has placed consideration of the officers' rights on equal footing with the defendant's rights. And inherent in a procedure that undertakes a balancing of interests is the possibility that the balancing will go in the other direction: in favor of maintaining officers' privacy rights.[2] As the utility of *Pitchess* discovery diminishes for the defense, the more the balance weighs in favor of the officer and against disclosure. Such is the case with *Pitchess* motions filed before the preliminary hearing.

[2] In *Thompson v. Superior Court* (2006) 141 Cal.App. 4th 1312, the Court of Appeal's decision weighed in favor of 11 officer's privacy rights and upheld the trial court's denial of defendant's *Pitchess* motion.

Judge Goldberg hedged his bets during the hearing he held on petitioner's *Pitchess* motion. He denied the *Pitchess* motion on the merits and stated as well that *Pitchess* motions couldn't be brought in preliminary hearing courts[3]:

> "Ms. Blossum [defense counsel]: [I]f the Court could clarify . . . for me . . . was your ruling that [a Pitchess motion is] going to be improper as a matter of course pre-prelim? Or that my declaration was insufficient to justify discovery?"
>
> "Court: Combination of both." (Reporter's Transcript of *Pitchess* motion May 16, 2008, attached to the Petition for Writ of Mandate as Exhibit F, p.13: 26-28; p. 14: 1-4.)

The following sections review the reasons why, "as a mater of course," defendants may not seek *Pitchess* discovery for use in at a preliminary hearing.

III.

THIS COURT HAS HELD THERE ARE NO SIXTH AMENDMENT RIGHTS THAT ATTACH TO *PITCHESS* MOTIONS

Petitioner argues that denial of a *Pitchess* motion that seeks discovery for use in a preliminary hearing is unconstitutional:

> "Because effective assistance of counsel is a Constitutional mandate, and because the preliminary hearing remains a critical stage of the proceedings, it would be unconstitutional to deny counsel discovery sufficient to allow him or her to effectively challenge the evidence of probable cause presented by the prosecution." (Opening Brief on the Merits, p. 33.)

Last month this Court issued a written opinion in *People v. Gaines* (2009) Cal.4th LEXIS 4289 where the defendant sought a ruling that an erroneous denial of a *Pitchess* motion prior to trial should be deemed reversible per se on appeal after conviction. During the course of the opinion, this Court

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[3] Judge Goldberg also noted that the time required for the preliminary hearing to be completed would not permit adequate time for the defense to look into any *Pitchess* discovery that may have been disclosed.

addressed a number of issues including whether a failure to disclose evidence helpful to the defense, i.e. *Pitchess* impeachment evidence, would impinge upon the federal constitutional right to confrontation under the Sixth Amendment, the same issue raised by petitioner.

In deciding there was no Sixth Amendment violation for failure to grant the *Pitchess* motion, this Court cited a number of considerations. First, the Court held that "[e]ven if relevant evidence that could have been used to impeach the deputies [i.e., *Pitchess* discovery] was wrongfully withheld, defendant suffered no restriction on the scope of their cross-examination and was free to cross-examine these witnesses on any relevant subject." (*Gaines* Slip Opn. 14.) Second, the Court quoted *United States v. Bagley* (9185) 473 U.S. 667, 678: "The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. As discussed above, such suppression of evidence amounts to a constitutional violation *only* if it deprives the defendant of a fair *trial*." (Emphasis added.) Third, the Court quoted *Pennsylvania v. Richie* (1987) 480 U.S. 39, 53 (plur. Opn. of Powell, J): "The ability to question adverse witnesses . . . does not include the power to require pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony."

Real Party believes the analysis in the *Gaines* decision not only establishes a basis for holding there was no abuse of discretion by Judge Goldberg when he denied the *Pitchess* motion on the merits but also dismantles petitioner's argument that the Sixth Amendment requires *Pitchess* motions to be permitted for preliminary hearing.

IV.

THE LIMITATIONS PLACED ON PRELIMINARY HEARINGS UNDER PENAL CODE SECTION 866 ARE INCOMPATIBLE WITH PITCHESS DISCOVERY

There is no general constitutional right to discovery in criminal cases (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559) and except for *Brady v. Maryland*[4] (1963) 373 U.S. 83, "the Due Process clause has little to say regarding the amount of discovery which the parties must be afforded." (*Wardius v. Oregon* (1973) 412 U.S. 470, 474.)

Since the Sixth Amendment is not a basis for pre-preliminary hearing *Pitchess* motions as demonstrated above, and since petitioner is not claiming a *Brady* violation for failure to provide *Pitchess* discovery before the preliminary hearing[5], the only basis left for claiming a right to pre-preliminary hearing *Pitchess* discovery must be based upon statute.

Petitioner argues: "Pitchess discovery is an 'other express statutory provision' and the Legislature did not disallow discovery for preliminary hearings." (Opening Brief, p. 13.) Petitioner goes on to quote *People v. Superior Court (Barrett)*(2000) 80 Cal.App. 4th 1305, 1312-1313 and asserts *Pitchess* discovery is exclusively governed by Evidence Code section 1043 et seq.

While it is true *Pitchess* qualifies as an "other express statutory provision", it does not follow that preliminary hearing *Pitchess* discovery is therefore permitted. The Court of Appeal opinion addressed this issue directly and noted: "preliminary hearings are not designed for pursuing discovery or as forums for discovery motions." (Slip Opn., p. 6.)

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[4] "[S]uppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." (Id. at p. 87.)

[5] In addition to *Pitchess* discovery, petitioner's *Pitchess* motion also requested disclosure of all *Brady* material. However, Petitioner has not pursued this issue on appeal in the Superior Court, in the Court of Appeal or in the Supreme Court.

The Court thereafter quotes Penal Code section 866(b), which states:

> "It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery." (Penal Code section 866(b).)

The Court acknowledges section 866(b) does not address discovery before the preliminary hearing, but finds such an argument unpersuasive: "allowing pre-preliminary hearing discovery tends to work at cross-purposes with the limited nature of preliminary hearings." (Slip Opn., p. 7.)

The Court of Appeal then quotes from a decision by this Court:

> "[T]he preliminary hearing . . . serves a limited function. No longer to be used by defendants for discovery purposes and trial preparation, it serves merely to determine whether probable cause exists to believe that the defendant has committed a felony and should be held for trial." (*Correa v. Superior Court* (2002) 27 Cal.4th 444, 452.)

V.

PRECLUDING PITCHESS MOTIONS AT PRELIMINARY HEARING UNDER PENAL CODE SECTION 866 IS NOT UNCONSTITUTIONAL

As previously stated, petitioner has argued that a denial of a *Pitchess* motion at preliminary hearing is a denial of the Sixth Amendment right to effective cross-examination of the officers who may testify at the preliminary hearing. Real Party anticipates petitioner will raise the same argument as to Penal Code section 866 to the extent this section is used as a basis for precluding *Pitchess* discovery. However, the constitutionality of section 866 was addressed in *People v. Eid* (1994) 31 Cal.App. 4th 114.

On appeal, defendants in *People v. Eid* contended that a magistrate's refusal, under Penal Code section 866(a), to allow the defense to call the victim as a witness at the preliminary hearing was unconstitutional and violated their rights to confront and examine the victim on an element of the offenses charged. The Court of Appeal determined this claim lacked merit.

As an initial consideration, the Court noted the following:

"In the first instance, other than the probable cause hearing held to justify the continued detention of the accused, '. . . there exists no federal constitutional right to a preliminary hearing to determine whether a case should proceed to trial.' (*Whitman v. Superior Court, supra, 54 Cal. 3d at pp. 1078-1079.*)" (*Id.* at p. 128.)

The Court's analysis continued:

"Additionally, '[t]he right to confrontation is basically a *trial* right.' (*Barber v. Page (1968) 390 U.S. 719, 725, [20 L. Ed. 2d 255, 260, 88 S. Ct. 1318], italics added; Whitman v. Superior Court, supra, 54 Cal. 3d at p. 1079.*) It 'includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.' (*Barber v. Page, supra, 390 U.S. at p. 725 [20 L. Ed. At p. 260; Whitman v. Superior Court, supra, at p. 1079.*)" (*Id.* at p. 128.)

Finally, the Court concluded its discussion on this issue with the following:

"The requirements of the confrontation clause of the Sixth Amendment are satisfied as long as the defendant is 'assured of full and effective cross-examination at the time of trial.' (*California v. Green (1970) 399 U.S. 149, 159 [26 L. Ed. 2d 489, 497, 90 S. Ct. 1930].*)

"We therefore find no violation of the right to confront and and cross-examine in the magistrate's refusal to allow the defendants to call Heidi [the victim] as a witness at the preliminary hearing. (See *Whitman v. Superior Court, supra, 54 Cal. 3d at pp. 1075-1082.*)" (*Id.* at p. 128.)

In the present matter, petitioner's *Pitchess* motion was denied without prejudice in the preliminary hearing court. This ruling preserves petitioner's ability to re-file his *Pitchess* motion in the trial court; preserves petitioner's ability to call witness for trial that might be disclosed as a result of his *Pitchess* motion; and, preserves his ability as well to cross-examine the officers on *Pitchess* materials that may be disclosed. Consequently, petitioner is "assured of full and effective cross-examination at the time of trial."

CONCLUSION

It is an everyday reality in California that most defendants plead guilty even after having their *Pitchess* motions heard. And this weary writer has, on many occasions, been asked to sit and wait in court on the date and time set for hearing on a *Pitchess* motion so the prosecution and defense could work out a plea bargain before the motion was heard. In these circumstances, it is not unusual for the *Pitchess* motion to be taken off calendar as the defendant pleads guilty and stipulates to a factual basis for the plea based upon a police report that moments earlier was alleged to be a total fabrication. Such is the practice in the criminal courts. Despite this rather cynical perspective, Real Party in Interest understands *Pitchess* motions are here to stay and that this Court's decision in *Warrick* is the benchmark for "good cause" in *Pitchess* discovery. That being said, Real Party simply asks this honorable court to put pre-conviction *Pitchess* discovery and the *Warrick* decision back in their proper place: the *trial* court.

Dated: May 26, 2009

Respectfully submitted,

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CUSTODIAN OF RECORDS

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to the California Rules of Court, the enclosed Petition for Writ of Prohibition is produced using 12-point Roman type including footnotes and contains approximately 6,046 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

KJEHL T. JOHANSEN
Supervising Deputy City Attorney

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 201 N. Los Angeles Street, Space 301A, Los Angeles Mall, Los Angeles, CA 90012.

On May 26, 2009, I served the foregoing document described as:

ANSWERING BRIEF ON THE MERITS

on the interested party(ies) in this action by placing the true copy(ies) thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

[ ] **BY MAIL** – I caused each envelope with postage fully prepaid, to be placed in the United States Mail at Los Angeles, California. I thereafter caused such envelope to be deposited in the mail at Los Angles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

[X] **BY LA CITY ATTORNEY'S DOCUMENTS SERVICES** – I caused each envelope to be sent via messenger, 200 North Main St., 8th Floor, City Hall East, Los Angeles, CA 90012.

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

Executed May 26, 2009, at Los Angeles, California.

Lorraine Cervantes

Lorraine Cervantes, Declarant

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