A COMPREHENSIVE REVIEW OF CALIFORNIA CRIMINAL DISCOVERY LAW (JANUARY 2014)

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I. INTRODUCTION

California state criminal courts have operated under the reciprocal discovery rules of Penal Code sections 1054-1054.7 since the passage of Proposition 115 in June of 1990. (Pen. Code, § 1054.8 was added in 1998, § 1054.9 in 2002, and § 1054.10 in 2003.)

This summary provides an overview of discovery law as it applies in criminal cases in California state courts.

To understand the general principles of California's reciprocal discovery rules it helps to examine the different roles the justice system demands of defense lawyers on one side, and prosecutors on the other. Constitutional rights such as the right to counsel, privilege against self-incrimination and due process are best guaranteed when lawyers know their role, and understand and respect opposing counsel's role.

How the roles of the prosecutor and defense counsel differ

The role of the prosecutor differs significantly from that of the defense lawyer. **"[T]he prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' (*Berger* v. *United States* (1935) 295 U.S. 78, 88.)"** (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

"Prosecutors have a special obligation to promote justice and the ascertainment of truth.... 'The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present ... the evidence....'" (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378.)

A defense attorney's role is more focused. **"[D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be … interested in preventing the conviction of the innocent, but … we also insist that he defend his client whether he is innocent or guilty. The state has an obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth."** (*United States v. Wade* (1967) 388 U.S. 218, 256-258 (conc. & dis. opn. of White, J.), fns. omitted.)

The law imposes both statutory and constitutional discovery obligations on prosecutors that oblige the prosecutor to disclose different types of evidence. If uncertain whether an item must be disclosed, prosecutors are encouraged to disclose out of an abundance of caution. (*Kyles v. Whitley*

(1995) 514 U.S. 419, 439-440.)

Defense lawyers have no such luxury. As to defense material, either it is discoverable under the statutes, or it must be protected *from* discovery because of the duty of loyalty counsel owes the client, which is at the core of the Sixth Amendment right to counsel. (Bus. and Prof. Code, § 6068, subd. (e); *People v. Doolin* (2009) 45 Cal.4th 390; *People v. Perry* (2006) 38 Cal.4th 302, 315; *People v. Alvarez* (1996) 14 Cal.4th 155, 239-240.) Defense counsel has a duty to represent the client without improperly assisting the prosecutor in obtaining a conviction, as we see from the language of *United States v. Wade,* quoted above. Discovery law is at best ambiguous in several areas. Nevertheless, if defense counsel is unclear about his or her disclosure obligations, material *cannot* simply be provided out of an abundance of caution. The client's interests cannot be compromised by the chance that counsel is giving up material not legally discoverable by the prosecutor. Defense counsel violates his or her ethical obligations by giving up material not legally discoverable, unless it is done to further a legitimate interest of the client. One approach to the dilemma is to **"let the court decide…."** (*People v. Lawson* (2005) 131 Cal.App.4th 1242, 1244, fn. 1.) Because any such hearing would necessarily involve the work-product privilege, it would have to be held in camera. (See generally, *Teal v. Superior Court* (2004) 117 Cal.App.4th 488, 491-492.)

Judges who fully appreciate the decidedly different roles of defense counsel and prosecutor are less likely to misconstrue proper defense *nondisclosure* as a violation of discovery law, and more able to understand why defense counsel must ethically resolve "gray area" issues in favor of client loyalty.

A significant distinction between the roles of prosecutor and defense counsel involves the burden of proof. The state has the burden to prove guilt, so prosecutors must know how the case will be presented and which witnesses will be called before trial. Criminal defense is far more reactive. Until the prosecution rests, counsel may hope the case will be dismissed. (Pen. Code §§ 1118 and 1118.1.) If dismissal is unlikely, the defense role may remain essentially reactive. (See *Brooks v. Tennessee* (1972) 406 U.S. 605, discussed below.) Counsel may plan to defend by attacking the state's evidence by effective cross-examination and argue reasonable doubt. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 941.) When the state rests, however, that evaluation may change. At *this* point counsel may decide *for the first time* to offer an affirmative defense rather than rely solely upon reasonable doubt. At this time defense counsel may *for the first time* intend to call certain witnesses. *Brooks v. Tennessee* tells us intent to call a witness may be formed even later, *during* the presentation of defense evidence. (See *People v. Wiege* (2005) 133 Cal.App.4th 1342.) Even if an affirmative defense strategy is chosen before trial, counsel may form the intent to call different witnesses at different times. Disclosure is not required as to any witness until counsel forms the *intent* to call that particular witness.

Brooks v. Tennessee held that a statute requiring the defendant to testify first in the defense case violates the privilege against self-incrimination and due process of law by forcing the defense to make an uninformed choice. Although a direct confrontation with *Brooks* was avoided by Penal Code section 1054.3, excluding the defendant from the witnesses who must be disclosed (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 367, fn. 5), there is still no reason to make an *uninformed* choice whether to use any potential defense witness at trial and the law does not require that choice to be made at any time earlier than would *normally* occur in preparing and presenting the case.

Brooks v. Tennessee, supra, 406 U.S. 605, 612-613 recognizes realities defense lawyers

face. **"Whether the defendant is to testify is an important tactical decision.... By requiring the [defense] to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense – particularly counsel – in the planning of its case. … the penalty for not testifying first is to keep the defendant off the stand ... [and] The accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense ... the accused and his counsel may not be restricted in deciding whether, and when in ... presenting his defense, [he] should take the stand."**

The defendant is entitled to the benefit of "the guiding hand of counsel," whether it involves the defendant's testimony, or the testimony of any other possible witness. **"[A] defendant *may not know at the close of the state's case* whether his own testimony will be necessary *or even helpful* to his cause."** (*Brooks v. Tennessee*, *supra*, 406 U.S. 605, 610; italics added.) Similarly, counsel may not know if the testimony of *any* potential defense witness will be "even helpful" at the close of the state's case, and is less likely to know thirty days before trial.

Prosecutorial discovery rights are limited, and Penal Code 1054.3 does not require the defense to name defense witnesses 30 days before trial if the intent to call those potential witnesses has not formed by that time in the *normal course* of preparing the case.

On the other hand, intent to call an obvious witness (e.g., solid alibi witness) would normally arise earlier than the intent to call a potential witness whose contribution to the defense is less certain.

Discovery statutes do not require counsel to choose a particular defense strategy at any particular time. Counsel can wait to gauge the strength of the state's case before deciding which witnesses to call, if any, as long as counsel's purpose for waiting is not that of delaying disclosure to opposing counsel.

If the lawyers and judge are familiar with *Brooks v. Tennessee* there should be less misunderstanding when defense disclosure takes place during or near trial rather than thirty days before trial. (See *Woods v. Superior Court* (1994) 25 Cal.App.4th 178, 186-187.) *Brooks* should illustrate to a skeptical judge *how* and *why* defense counsel, in good faith, can wait before deciding to call a witness. *Brooks* reflects *Supreme Court* recognition that counsel sometimes decides to call a witness at the last moment. It shows that counsel may evaluate reasons for and against offering testimony from a witness well after the trial has started, not to avoid discovery obligations but to decide only after careful thought and knowledge of the state of the case. *Brooks* tells us good competent lawyers often provide clients with the "guiding hand of counsel" in this manner. If the timing of counsel's decision to call a witness is arrived at in *good faith,* and disclosure then promptly made (assuming no other bar to disclosure exists), counsel is within the law, and properly balancing the client's interests and the statutory disclosure obligations.

Since the burden of proof rests with the prosecution, he or she will have a witness list and plan for presenting the case, but the same would not always be true for the defense.

The disclosure obligation arises with the decision to call a witness, made within the statutory definition of "intends to call." (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 376, fn. 11 [**"'all witnesses it reasonably anticipates it is likely to call'"**].) "Intends to call" means *actual* intent, otherwise it does little more than accelerate disclosure that will occur anyway, and risks violating constitutional rights and privileges. (*People v. Wash* (1993) 6 Cal.4th 215, 251-252.)

II. DEFENSE DISCOVERY

In the words of the California Supreme Court: **"A ... defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.'"** (*Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84; see also *Magellan v. Superior Court* (2011) 192 Cal.App.4th 1444, 1459; but see *People v. Prince* (2007) 40 Cal.4th 1179, 1234, fn. 10 [discovery claims based on the confrontation right and compulsory process clause of the Sixth Amendment are **"on a weak footing"]**.)

"Absent some governmental requirement that information be kept confidential … the state has no interest in denying the accused access to *all evidence* that can throw light on issues in the case…." (*People v. Riser* (1956) 47 Cal.2d 566, 586, original italics; 5 Witkin and Epstein, California Criminal Law, (3d ed. 2000) § 27, pp. 73-74.)

"We are unaware of any requirement that that a party must cite a specific statute in order to receive discovery to which it is entitled. … Not providing discovery the defense specifically requests merely because defense counsel did not cite the right statute would be inconsistent with the high court's holding [in *Wardius v. Oregon* …412 U.S. at p. 479.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 958.)

Comprehensive discovery from the prosecution is important in any case and critical in more serious cases. Full knowledge of the People's case is essential to prepare and present the defense, and to an effective penalty phase in a capital trial.

Looked at another way, securing pretrial discovery is critical in light of the legal definition of "newly discovered evidence" of actual innocence for purposes of habeas corpus relief post-conviction. (See Pen. Code, § 1473.6, subd. (b); *In re Hardy* (2007) 41 Cal.4th 977, 1016.)

In *People v. Seaton* (2001) 26 Cal.4th 598 the appellant complained about lack of notice of the prosecution theory of felony murder. Despite finding the issue was not preserved due to the lack of an objection, the court restated basic principles of due process also relevant to discovery: **"[T]he Sixth Amendment … and the due process guarantees … require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them. …'Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense *and not be taken by surprise by evidence offered at his trial.*'"** (*Id.* at pp. 640-641; citations omitted, italics added; but see *Coleman v. Calderon* (9th Cir. 1998) 150 F.3d 1105, 1112.)

It is not necessary to prove an item exists for disclosure to be required. (*People v. Hill* (1974) 10 Cal.3d 812, 817.)

Counsel may be *incompetent* if discovery is not sought pretrial. (*Kimmelman v. Morrison* (1986) 477 U.S. 365; *People v. Gayton* (2006) 137 Cal.App.4th 96 [defense counsel incompetent for failing to discover probation department file for probation revocation hearing].) Unless discovery is requested, the defendant may have no remedy if surprised by prosecution evidence. (*People v. Valdez* (2012) 55 Cal.4th 82, 110-111; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1209-1210; *People v. Jackson* (1980) 28 Cal.3d 264, 308; *People v. Moore* (1987) 189 Cal.App.3d 1537, 1540-1541.)

1. General principles of defense discovery

Defense discovery begins with Penal Code section 1054.1: **"The prosecuting**

attorney shall disclose to the [defense] all of the following materials and information, if it is in the possession of the prosecuting attorney or if [he] knows it to be in the possession of the investigating agencies: (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. (b) Statements of all defendants. (c) All relevant real evidence seized or obtained as part of the investigation of the offenses charged. (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. (e) Any exculpatory evidence. (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in ... the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

The defense is also entitled to all discovery provided by **"other express statutory provisions[.]"** (Pen. Code, § 1054, subd. (e); e.g. Evid. Code, § 1042; Evid. Code, § 1043; Pen. Code, § 1127a, subd. (c); Pen. Code, § 1326.)

The statutory phrase "intends to call" is defined as **"including 'all witnesses it reasonably anticipates it is likely to call....'"** (*Izazaga v. Superior Court, supra,* 54 Cal.3d 356, 376, fn.11.)

Izazaga reaffirmed defense access to a broad range of discovery not specifically spelled out in the statutes and reiterated that constitutionally compelled discovery must be provided whether specified by statute or not. **"In order that a defendant may secure a fair trial as required by the due process clause, 'the prosecution has a duty to disclose all substantial material evidence favorable to the accused.... That duty exists regardless of whether there has been a request for such evidence ...' ... The ... duties of disclosure under the due process clause are *wholly independent* of any statutory scheme of reciprocal discovery. The due process requirements are self-executing and need no statutory support to be effective."** (*Izazaga v. Superior Court, supra,* 54 Cal.3d 356, 378; original italics; *People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244-1246.) **"The savings provision of P.C. 1054(e) ... recognizes the right to discovery compelled under federal due process and other federal constitutional principles… regardless of whether it is recognized by California statute."** (5 Witkin and Epstein, California Criminal Law, (3d ed. 2000), § 32(4), p. 78.)

All statements of the defendant must be disclosed, not just relevant statements. (Pen. Code, § 1054.1, subd. (b); *People v. Jackson* (2005) 129 Cal.App.4th 129, 168-169.) This includes oral statements. (*People v. Campbell* (1972) 27 Cal.App.3d 849, 857-858.) If the statements were derived from the use of electronic surveillance (i.e. wire taps), the broad disclosure required by Penal Code section 1054.1, subdivision. (b), is not superseded by the narrower language of Penal Code section 629.70, subdivision. (b). (*Jackson, supra,* 129 Cal.App.4th 129, 170-172.)

The prosecutor must also disclose relevant oral statements of prosecution witnesses. (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154.) **"Interpreting section 1054.3, *and concomitantly section 1054.1,* to include witnesses' oral statements … will help ensure that *both parties* receive the maximum possible amount of information with which to prepare their cases, which in turn facilitates the ascertainment of the truth at trial. … the defense must disclose the anticipated testimony to the prosecutor prior to trial, *just as the prosecutor must disclose to the defense any reports of relevant statements made by the People's witnesses*."** (*Id.* at p. 165, italics added, fn.

omitted.) Oral statements by prosecution witnesses must be disclosed pretrial whether made directly to the prosecutor or to his agent. (*Ibid.*) Oral reports of *defense* experts must be disclosed under Penal Code section 1054.3 (*People v. Lamb* (2006) 136 Cal.App.4th 575, 580), so for discovery to be "reciprocal" the prosecutor must be held to the same standard under section 1054.1.

If witnesses are interviewed by the internal affairs division of a law enforcement agency in response to a complaint made by the defendant pursuant to Penal Code section 832.5, and the interviews are placed in the officer's personnel file, the defendant is entitled to those interviews upon the filing of a *Pitchess* motion pursuant to Evidence Code section 1043. (*Rezek v. Superior Court* (2012) 206 Cal.Ap..4th 633, 642.)

The prosecution **"'has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense.' [Citation.]"** (*People v. Panah* (2005) 35 Cal.4th 395, 460.) Nevertheless, **"…the prosecution … does have the duty, when presented with an informal request from the defense, to satisfy the specific discovery provisions of section 1054 et seq."** (*People v. Little* (1997) 59 Cal.App.4th 426, 432, orig. italics, citation omitted; see Pen. Code, § 1054.1, subd. (d).) A new trial motion was properly granted for failure to disclose a prior felony conviction of a critical witness. (*Id.* at p. 435; but see *People v. Sanchez* (1998) 62 Cal.App.4th 460, 471-474.)

An affirmative duty arises, however, when the police (or prosecutor) have reason to believe exculpatory evidence exists. **"[A] bad faith failure to collect potentially exculpatory evidence would violate the due process clause [in] cases in which the police ... by their conduct indicate ... the evidence could form the basis for exonerating the defendant."** (*Miller v. Vasquez* (9th Cir. 1989) 868 F.2d 1116, 1120-1121; see also *People v. Velasco* (2011) 194 Cal.App.4th 1258, 1264-1265.) **"Law enforcement agencies have a duty, under the due process clause … to preserve evidence 'that might be expected to play a significant role in the … defense.'"** (*California v. Trombetta* (1984) 467 U.S. 479, 488; see also *Arizona v. Youngblood* (1988) 488 U.S. 51, 58.) The duty only applies however when the exculpatory nature of the evidence was apparent before it was lost and it must be otherwise unavailable to the defense. (*People v. Carter* (2005) 36 Cal.4th 1215, 1246; *People v. Cook* (2007) 40 Cal.4th 1334, 1349.) *Youngblood v. West Virginia* (2006) 547 U.S. 867, is such a case. There, the defendant was convicted of sexual assaults and related offenses. After sentencing it was learned that a note written by two of the alleged victims which supported the defendant's consent defense **"was said to have been shown to a state trooper investigating the [case, and] the trooper allegedly read the note but declined to take possession of it, and told the person who produced it to destroy it."** (*Id.* at p. 870.) The court vacated the ruling of the state's high court that had denied relief to the defendant, and remanded for further proceedings.

There is no due process violation if the lost evidence only *might* have exonerated the defendant if tested, in the absence of bad faith. (*Youngblood v. West Virginia, supra,* 547 U.S. 867, 870.) Failure to adequately store evidence for future testing also does not violate due process absent bad faith, particularly where it is only potentially exculpatory. (*People v. Schmeck* (2005) 37 Cal.4th 240, 282-284; *People v. DePriest* (2007) 42 Cal.4th 1, 40-42.)

However, even when the exculpatory nature of the evidence is not apparent, if a court has ordered evidence preserved and the government nevertheless destroys it, the defense may be entitled to a remedial jury instruction. (*United States v. Sivilla* (9th Cir. 2013) 714 F.3d 1168, 1174.)

The defense is entitled to disclosure at least thirty days before trial (Pen. Code, § 1054.7), or as soon as the witness becomes known if less than thirty days before trial. (*People v. Hammond* (1994) 22 Cal.App.4th 1611, 1622; but see *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 48, fn. 10 [police failure to make timely *Brady* disclosure attributed to the unknowing prosecutor].)

The discovery statutes apply to *misdemeanors*, even though the time limits of Penal Code section 1054.7 are inconsistent with the statutory time limits for misdemeanor trials. (*Hobbs v. Municipal Court* (1991) 233 Cal.App.3d 670, 695-697; Pen. Code, § 1382, subd. (a)(3).)

In re Robert S. (1992) 9 Cal.App.4th 1417, 1422, applies reciprocal discovery to *juvenile delinquency* cases through the "discretionary authority" of the court. But at least as to defense disclosure, Penal Code section 1054.3 does *not* apply in juvenile cases absent a court order. (*In re Thomas F.* (2003) 113 Cal.App.4th 1249.) If circumstances support it, disclosure of **"the items listed in Penal Code sections 1054.1 and 1054.3[,]"** may be ordered for a fitness hearing under Welfare and Institutions Code section 707. (*Clinton K. v. Superior Court* (1995) 37 Cal.App.4th 1244, 1250 [a pre-Proposition 21 case].)

In a probation violation hearing, the state must **"disclose evidence material to the issue of … guilt or innocence…."** (*People v. Moore* (1983) 34 Cal.3d 215, 219.) Review of non-confidential parts of the probation file is permitted, (Pen. Code, § 1203.10; *County of Placer v. Superior Court (Stoner)* (2005) 130 Cal.App.4th 807, 812; *McGuire v. Superior Court* (1993) 12 Cal.App.4th 1685, 1687-1688) and counsel may be incompetent for failure to do so. (*People v. Gayton, supra,* 137 Cal.App.4th 96.)

Westerfield v. Superior Court (2002) 99 Cal.App.4th 994, rejected the prosecutor's attempt to hide behind Penal Code section 311.1 in his efforts to deny the defense copies of photographs allegedly depicting child pornography, which were relevant to that capital case. **"The People's interpretation of the statute – that the [DA] would violate the law if he copied the images for the defense … defeats the purpose of the law and exalts absurdity over common sense…."** (*Id.* at p. 998.) Penal Code section 1054.10 limits dissemination of "child pornography evidence" to defense attorneys and their employees, except upon a showing of good cause.

Names addresses and statements of prosecution *rebuttal* witnesses must also be disclosed. (*Izazaga v. Superior Court, supra,* 54 Cal.3d at 375; *People v. Gonzalez, supra,* 38 Cal.4th 932, 956; see also Ogle, *Securing Our Entitlement to Discovery of Prosecution Rebuttal Evidence* (2007 Summer ed.) California Defender, p. 32.) The "intent" to call rebuttal witnesses normally arises only after the defense has disclosed its witnesses. (*People v. Hammond, supra,* 22 Cal.App.4th 1611.) The separate due process concept of "reciprocity" requires the prosecutor to disclose rebuttal witnesses. (*Izazaga, supra,* at p. 377; see *Wardius v. Oregon* (1973) 412 U.S. 470; 5 Witkin and Epstein, California Criminal Law, (3d ed. 2000), § 33(d), p. 79.)

The prosecutor need *not* disclose material gathered for use in *cross-examining* a defense witness (*People v. Tillis* (1998) 18 Cal.4th 284), just as the defense cannot be compelled to disclose what it gathers for cross-examining prosecution witnesses.

Despite the limiting statutory language, *Izazaga* and other cases reaffirm defense discovery rights that existed before Proposition 115. For example, Penal Code section 1054.1, subdivision (d) notwithstanding, the defense is entitled to

information about *all* felony convictions, and misdemeanor conduct involving "moral turpitude" as to *every* prosecution witness. (*People v. Santos* (1994) 30 Cal.App.4th 169, 178-179; *People v. Wheeler* (1992) 4 Cal.4th 284; 5 Witkin and Epstein, California Criminal Law, (3d ed. 2000), § 41(2), p. 89; see also Munkelt, *The Right to Rap Sheet Discovery* (2007 Summer ed.) California Defender, p. 42.)

Penal Code Section 1054.1 reads in part: **"The prosecution shall disclose ... materials and information, *if it is in the possession of the prosecuting attorney* or if the prosecuting attorney *knows* it to be in the possession of the investigating agencies."** (Italics added.) But *In re Littlefield* (1993) 5 Cal.4th 122, restates the prosecutor's greater burden: **"California courts long have interpreted the prosecutorial obligation to disclose relevant materials in the possession of the prosecution to include information 'within the possession or control' of the prosecution. [citation] In *Pitchess* ... we construed the scope of possession and control as encompassing information 'reasonably accessible' to the prosecution. In *Engstrom* ... the court held that materials discoverable ... include information in the possession of *all agencies* (to which the prosecution has access) that are part of the criminal justice system, and not solely information 'in the hands of the prosecutor.' In *People* v. *Coyer* ... the court described information subject to disclosure ... as that 'readily available' to the prosecution and not accessible to the defense.**

***We find no basis* for [assuming] that, by designating discoverable information under ... 1054.1 as that 'in the possession' of the prosecution or its ... agencies, Proposition 115 was intended to abrogate this prior rule precluding the prosecution from withholding information that is 'reasonably accessible' to it."** (*In re Littlefield, supra*, 5 Cal.4th 122, 135, italics added; see also *People v. Filson* (1994) 22 Cal.App.4th 1841.)

A broader duty also arises from the United States Constitution. **"Although the prosecutor testified ... that at the time of trial he was *personally* unaware of the promises ... made to [informant] ... the prosecutor's lack of personal knowledge is not controlling. The Supreme Court has held ... the state's duty to correct false or misleading testimony … applies to testimony which the prosecution knows, or should know, is false or misleading...."** (*In re Jackson* (1992) 3 Cal.4th 578, 595; orig. italics)

The Supreme Court agrees. **"[T]he … prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."** (*Kyles v. Whitley, supra*, 514 U.S. 419, 437; see also *Strickler v. Greene* (1999) 527 U.S. 263.)

Availability is key: **"[T]he party seeking relief from the disclosure requirements has the burden of demonstrating that the information ... is unavailable."** (*In re Littlefield, supra,* 5 Cal.4th 122, 136.)

Any defense discovery necessary to a fair trial - anything *material* to the case, not just exculpatory evidence - is constitutionally discoverable.

It is arguable, for example, that to ensure a fair trial the court may order discovery of the prosecutor's "jury book" detailing prosecution investigation of prospective jurors. Refusal to do so would leave the playing field tilted toward the state, the only party who can easily gather such information. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 765-767; see also *People v. Morris* (1991) 53 Cal.3d 152, 179-180 [a pre-Proposition 115 capital trial].)

A defense request for discovery from the

U.S. Postal Service for a suppression motion was granted in *People v. Brophy* (1992) 5 Cal.App.4th 932, but the Postal Service declined to *deliver*, claiming privilege. (*Id.* at pp. 935-936.) A dismissal motion was denied and the suppression motion went forward. On review, the Court of Appeal said: **"Because defendant's discovery was neither enforced nor complied with he was unable to meet his … burden of showing … an unlawful search. At the time the postal service claimed privilege the trial court should have either enforced its discovery order (if possible) or shifted the burden to the prosecution to show a lawful search had occurred."** (*Id.* at p. 938.) Discovery can be secured from federal agencies (e.g.. FBI, ATF, ICE, DEA). (See also *People v. Prince, supra,* 40 Cal.4th 1179, 1230-1231.) **"*In re Recalcitrant Witness Boeh v. Gates*, 25 F.3d 761 (9th Cir. 1994) … stated … the appropriate means for challenging a federal agency's refusal to produce testimony or documents is either an action under the Administrative Procedure Act or a mandamus action, both of which [were] brought before this court. *See also Swett v. Schenk,* 792 F.2d 1447 (9th Cir. 1986); *Elko Grand Jury v. Siminoe,* 109 F.3d 554 (9th Cir. 1997)…."** (*Johnson v. Reno* (N.D. Cal. 2000) 92 F.Supp.2d 993, 994.)

In *People v. Garcia* (2000) 84 Cal.App.4th 316, a Pelican Bay prison guard convicted of crimes committed in the course of his employment challenged the destruction of notes taken by **"an investigator working for the Director of Corrections who took over an investigation of defendant which had begun with the internal affairs unit...."** (*Id*. at p. 331.) The Court of Appeal ruled that any obligation to preserve notes **"as evidence that would be expected to play a significant role in defendant's defense, the test is whether defendant would be able to obtain comparable evidence by other reasonably available means."** (*Ibid*.) Based on the testimony of *the person who destroyed the notes,* the court found no error. **"[H]is ... notes were either incorporated into his reports or consisted of photocopies of documents generated by [the prison]."** (*Ibid*.) The notes may have been destroyed before charges were filed. (See *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480.)

People v. Coles (2005) 134 Cal.App.4th 1049, holds that there is no discovery violation when police officer notes are destroyed under certain circumstances. These include destroying them pursuant to a "standard procedure," where they were fully incorporated into the written report, were destroyed in good faith, while no charges were yet pending, and no exculpatory value was apparent before the destruction. (*Id.* at p. 1055; *People v. Angeles* (1985) 172 Cal.App.3d 1203; *Killian v. United States* (1961) 368 U.S. 231.) This creates a potential due process reciprocity issue under *Wardius v. Oregon, supra,* 412 U.S. 470 if *Thompson v. Superior Court, supra,* 53 Cal.App.4th 480, is read to prohibit the defense from having a similar "standing procedure" at least prior to the existence of a discovery *order*.

The defense and prosecution still have the right to a conditional examination of witnesses. (Pen. Code, §§ 1335 et seq; Pen. Code, §§ 1349 et seq; Pen. Code, § 1054, subd. (e).)

In habeas corpus proceedings, discovery is available once the order to show cause has issued. (*In re Scott* (2003) 29 Cal.4th 783, 814; *In re Avena* (1996) 12 Cal.4th 694, 730; [cases under Pen. Code, § 1054.9, discussed below, have broader discovery available.].)

Although a defense request for a lineup may not literally be discovery, the showing necessary to secure one is similar to the plausible justification necessary to sustain a discovery request. Lineups can be important to the defense, and should be requested if appropriate in the case. (See *Evans v. Superior Court* (1974) 11 Cal.3d 617; *Garcia v. Superior Court* (1991) 1 Cal.App.4th 979

[voice-only lineup].) But **"[u]nder *Evans*, the … right to compel a lineup is not absolute. It arises 'only when eyewitness identification is shown to be a material issue and there [is] a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.'"** (*Garcia*, *supra*, at p. 988.)

Penal Code section 1054.8, enacted in 1998, imposes specific duties on both the prosecution and the defense in conducting interviews of witnesses *disclosed by the other party*: **"No prosecuting attorney, attorney for the defendant, or investigator for either [party] shall interview, question, or speak to a victim or witness whose name has been disclosed by the opposing party pursuant to Section 1054.1 or 1054.3 without first clearly identifying himself or herself, identifying the full name of the agency by whom he or she is employed, and identifying whether he or she represents, or has been retained by, the prosecution or the defendant. If the interview takes place in person, the party shall also show the victim or witness a business card ... badge or other form of official identification before commencing the interview or questioning."** (Pen. Code, § 1054.8, subd. (a).) Pen. Code section 1054.8, subdivision (b) says that upon a showing of failure to comply, **"a court may issue any order authorized by Section 1054.5."**

Defense investigators routinely identify themselves when contacting a victim or witness, but to avoid the unpleasant issue of sanctions care should be taken to *ensure* compliance with the statute. For in-person contacts presenting identification is required in addition to any verbal notice given. One way to ensure compliance is for the defense investigator to provide a business card to the witness that has thereon his or her name, the "full name of the agency," and the phrase "investigator for the defense."

Mental retardation is a constitutional bar to imposition of the death penalty. (*Atkins v. Virginia* (2002) 536 U.S. 304, 319-321.) Penal Code section 1376 codifies the ban on executing mentally retarded persons. The statute allows the court to make orders **"reasonably necessary to ensure the production of evidence sufficient to determine whether … the defendant is mentally retarded…."** (Pen. Code, § 1376, subd. (b)(2).) **"By its terms, section 1376 applies only to preconviction proceedings."** (*In re Hawthorne* (2005) 35 Cal.4th 40, 44; see generally *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999.) But post-conviction claims are dealt with in a similar manner. (*Hawthorne, supra,* at p. 44.)

2. Exculpatory evidence

Penal Code section 1054.1, subdivision (e), compels the prosecution to disclose **"*[a]ny* exculpatory evidence."** (Italics added.) This statutory requirement is both different and broader than what is required under the United States Constitution to comport with due process under *Brady v. Maryland* (1963) 737 U.S. 83, discussed below. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901 [statute requires disclosure of any exculpatory evidence, not just material exculpatory evidence].)

Brady v. Maryland, *supra*, 373 U.S. 83, is the leading case on exculpatory evidence and how nondisclosure can violate Due Process of Law. **"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either … exculpatory, or … impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."** (*Strickler v. Greene, supra,* 527 U.S. 263, 281-282; *Banks v. Dretke* (2004) 540 U.S. 668, 691; *People v. Johnson* (2006) 142 Cal.App.4th 776, 782-786.)

"We recognize the … cases [*Brady*; *In re Ferguson* (1971) 5 Cal.3d 525; *Giglio* v.

***United States* (1972) 405 U.S. 150; *Napue* v. *Illinois* (1959) 360 U.S. 264] as establishing a duty on the part of the prosecution, even in the absence of a request therefore, to disclose all substantial material evidence *favorable to an accused*, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or ... credibility of material witnesses."** (*People v. Ruthford* (1975) 14 Cal.3d 399, 405-406, orig. italics.)

However, *People v. Salazar* (2005) 35 Cal.4th 1031, states: **"[E]vidence is not [deemed] suppressed unless the defendant was actually unaware of it and could not have discovered it by the exercise of reasonable diligence."** (*Id.* at p. 1049, citations and internal quotations omitted; see also *People v. Zambrano* (2007) 41 Cal.4th 1082, 1134.) Also, material found to be "ancillary" to the issue of guilt or any significant issue in dispute is not subject to disclosure. (*People v. Ayala* (2000) 23 Cal.4th 225, 277-280.)

Favorable language in *People v. Morris* (1988) 46 Cal.3d 1, 30, fn. 14, gave way to the narrow interpretation in *In re Sassounian* (1995) 9 Cal.4th 535. **"California decisions [that] construe the prosecution's duty to disclose evidence under the … due process clause more broadly (see, e.g. *People* v. *Morris* (1988) 46 Cal.3d 1, 30, fn. 14 ...) are erroneous and are hereby disapproved. ...the federal constitutional provision 'requires disclosure ... *only* of evidence that is both favorable to the accused and "material either to guilt or to punishment."'"** (*In re Sassounian*, *supra*, 9 Cal.4th 535, 543-544, fn. 5, original italics; see *People v. Earp* (1999) 20 Cal.4th 826, 865-870 [photographs and tape recording withheld, but not "material"].)

"Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result ... would have been different.' The requisite 'reasonable probability' is a probability sufficient to 'undermine[] confidence in the outcome' on the part of the reviewing court." (*In re Sassounian, supra*, 9 Cal.4th 535, 544; citations omitted.) **"It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract."** (*People v. Dickey* (2005) 35 Cal.4th 884, 907-908, citing *Sassounian, supra.*)

Although in general the defense is entitled to discovery of relevant information and need not show admissibility (*Pierre C. v. Superior Court* (1984) 159 Cal.App.3d 1120, 1122-1123), the narrower question of whether inadmissible evidence can be "material" under *Brady* is unresolved. (*People v. Hoyos* (2007) 41 Cal.4th 872, 918-919; *In re Miranda* (2008) 43 Cal.4th 541, 576-577.) In *Wood v. Bartholomew* (1995) 516 U.S. 1, the court ruled that polygraph evidence was inadmissible, and thus not subject to *Brady*. (*Id.* at p. 5.) But according to the California Supreme Court, **"*Wood* was not based on a per se rejection of inadmissible evidence as a basis for a *Brady* claim[,]"** and **"*Wood* did not establish that inadmissible evidence can never be material for purpose of a *Brady* claim…."** (*In re Miranda, supra,* at p. 576.)

The "governing legal principles" of materiality were discussed in *In re Brown* (1998) 17 Cal.4th 873, **"[I]n *Kyles* ... the court reemphasized four aspects ... critical to proper analysis of *Brady* error. First. '... materiality does not require demonstration by a preponderance that disclosure ... would have resulted ultimately in the defendant's acquittal ... [the] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. ... Second, 'it is not a sufficiency of evidence test. ... The possibility of an**

acquittal ... does not imply an insufficient evidentiary basis to convict. ... Third, 'once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. (*Kyles, supra,* 514 U.S. at p. 435.) The one subsumes the other. (*Id.* at pp. 435-436.) Fourth, while ... undisclosed evidence is evaluated item by item, its cumulative effect ... must be considered collectively. (*Id.* at pp. 436-437 & fn. 10...)" (*Id.* at pp. 886-887; see also *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1227-1228; *United States v. Jernigan* (9th Cir. 2007) 451 F.3d 1149.)

Although *Brady* material must be disclosed whether or not the defense made a request, **"the presence or absence of a specific request at trial is relevant to whether evidence is material…."** (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1472.) The link is explained in *In re Brown, supra.* Non-disclosed *Brady* material **"'not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence *does not exist.* In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies...' [Thus] 'the reviewing court may consider directly any adverse effect ... on the preparation or presentation of the ... case[,] ... in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled....'"** (*In re Brown supra*, 17 Cal.4th 873, 887; italics added, citations omitted.)

"[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles v. Whitley, supra*, 514 U.S. 419, 437; *In re Brown, supra,* 17 Cal.4th 873; *People v. Robinson* (1995) 31 Cal.App.4th 494, 499; but see *People v. Sanchez, supra,* 62 Cal.App.4th 460, 471-474.)

Kyles, a 5-4 reversal of a Louisiana capital conviction, rejects the argument for limiting the prosecutor's burden. **"The State ... suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor. ... 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.' [Citation.] Since ... [he] has the means to discharge the government's *Brady* responsibilities if he will, any argument for excusing the prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."** (*Kyles v. Whitley, supra*, 514 U.S. 419, 438; fn. omitted.)

"[T]he state's obligation under *Brady* ... turns on the cumulative effect of all such evidence suppressed by the government, and … the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. Because the net effect of the evidence withheld by the state in this case raises a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial." (*Kyles v. Whitley, supra*, 514 U.S. 419, 421-422; see also *People v. Pinholster* (1992) 1 Cal.4th 865, 939-940.)

As in *Kyles*, the death sentence in *In re Miranda, supra,* 43 Cal.4th 541 was overturned for *Brady* error. The special circumstance was multiple murder, and the prosecution presented testimony from a co-defendant turned witness, Joe Saucedo, that the petitioner had killed the victim in the first murder. (*Id.* at p. 544.) Saucedo had his

murder charges (same murder) dismissed when, in exchange for his testimony, he pled guilty to assault with a deadly weapon, and was granted probation. (*Ibid.*) Low and behold, while this was happening the prosecutor had in his possession a letter from another inmate, Larry Montez, indicating that Saucedo had confessed to Montez that he (Saucedo) had personally killed the victim – not the petitioner. (*Id.* at p. 545.) The defense never saw the letter. (*Id.* at p. 547.)

The prosecutor is obliged to do *more* than the mere exercise of "due diligence" to learn of exculpatory materials in the hands of law enforcement. (*United States v. Blanco* (9th Cir. 2004) 392 F.3d 382, 393-394; see also *Youngblood v. West Virginia, supra,* 547 U.S. 867.)

University of Florida Law Professor George Dekle, a former United States Attorney, had this to say about exculpatory evidence: **[T]he circumspect prosecutor will work diligently to uncover all evidence in the possession of all law enforcement agencies, not just the evidence the agencies decide to share. This means leaving the office, going to the agency, and inspecting the agency's file; leaving the office, going to the evidence vault, and inspective the evidence on file; carefully inquiring of all involved officers whether that have knowledge of any additional information; and otherwise doing whatever it takes to uncover all available evidence. Sometimes [prosecutors] have difficulty assessing the information which has come to light. Is it really exculpatory? Should you disclose it, or can it be withheld? If you have to ask, you should disclose it."** (Dekle, Prosecution Principles: A Clinical Handbook, (2007), Discovery, p. 145.)

Although the prosecutor has a duty to search for and disclose exculpatory evidence possessed by a person or agency assisting or acting on the government's behalf (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315), information possessed by an agency with *no connection* to the investigation or prosecution is not possessed by the prosecution team, and there is no duty to search for or disclose such material. (*Ibid.*) *People v. Zambrano, supra,* 41 Cal.4th 1082, 1133, says when the sheriff **"was only defendant's jailer, and was not involved in the investigation or prosecution"** the prosecutor's duty to seek *Brady* material does not apply to that agency. Defense counsel should seek information from the prosecutor *and* directly from the Sheriff in these situations. (See also *Barnett v. Superior Court*, *supra*, 50 Cal.4th 890, 906 [defendant not entitled to discovery in the sole possession of out-of-state law enforcement agencies who were not involved in the investigation or prosecution of the case under Penal Code section 1054.9].)

On the other hand, *People v. Uribe, supra,* 162 Cal.App.4th 1457, rejected prosecution arguments in ruling that a video tape of a medical exam by the Sexual Assault Response Team (SART) of an alleged victim that remained in the possession of the hospital *was* subject to *Brady* disclosure. (*Id.* at pp. 1475-1477.) The medical exam **"was initiated through a referral by the police in their investigation of a report of criminal conduct."** (*Id.* at p. 1480.) This is in contrast to *People v. Webb* (1993) 6 Cal.4th 494, where the victim voluntarily sought treatment, and thus her medical and psychiatric records were not in the government's possession, and the prosecution had no greater access to them than did the defendant. (*Id.* at pp. 517-518.)

There is no *Brady* (or *Pitchess*) obligation to seek out testimony from *defendants* in unrelated cases that claim misconduct by the same officers as in the current case. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 362.)

"[T]he … assumption that evidence has to be directly demonstrative of … innocence in order to be subject to disclosure … was legally erroneous …

[I]mpeachment evidence of a key witness is equally subject to the disclosure requirements of *Brady*." (*Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 855; see *People v. Salazar, supra,* 35 Cal.4th 1031, 1048.)

Many cases are resolved with negotiated dispositions and no trial. In *United States v. Ruiz* (2002) 536 U.S. 622, the prosecutor offered a plea bargain, but demanded "terms" that while acknowledging a continuing duty to disclose known information relevant to *factual* innocence, *waived* the right to secure information that could impeach an informant or state witness. (*Id.* at p. 625.) The court ruled that one *can* enter into a valid waiver while ignorant of the existence of such impeaching material, and the prosecutor has no duty to disclose *unless* there is to be a trial. (*Id.* at p. 629.) In *In re Miranda, supra,* 43 Cal.4th 541, the California Supreme Court said they need not **"decide the broad question whether or to what extent the prosecution has a duty to disclose evidence favorable to a criminal defendant before the defendant pleads guilty."** (*Id.* at p. 582, fn. omitted.) That said, *Ruiz* is inconsistent with California Penal Code section 1054.7, which requires disclosure "at least 30-days prior to trial." Also, Penal Code section 1054.1, subdivision (e) has no explicit exception for the situation contemplated in *Ruiz*.

People v. Ramirez (2006) 141 Cal.App.4th 1501, is a plea bargain case involving a *Brady* issue, although ultimately decided on statutory grounds. (*Id.* at p. 1503, fn.1.) After a "no contest" plea but before sentencing, a supplemental police report surfaced that **"significantly weakened the evidence supporting the carjacking charges"** (*Id.* at p. 1506) and **"supported other possible defenses…."** (*Id.* at p. 1507.) A Penal Code section 1018 motion to withdraw the plea was denied, but the Court of Appeal reversed. Withholding this evidence rendered the waiver of rights involuntary and denying the subsequent motion was found to be an abuse of discretion. (*Id.* at pp.1507-1508.) **"The fact that the new information did not uncontrovertibly exonerate appellant is beside the point. [It] identified new defense witnesses, potentially reduces appellant's custody exposure, and provided possible defenses to several charges."** (*Id.* at p. 1508; see also *In re Miranda, supra,* 43 Cal.4th 541, 582.)

Counsel should be wary when the prosecutor invites him or her to review their "open file." (See *People v. Zambrano, supra,* 41 Cal.4th 1082, 1134.) Failure to discover *Brady* material that may be in the file is laid at the doorstep of defense counsel. (*Ibid.*)

Most *Brady* issues come to light post-conviction. But occasionally counsel learns before trial that exculpatory evidence was withheld, perhaps from a grand jury or before a preliminary examination or hearing on a pretrial motion. In either situation (pretrial or post-conviction) **"the test is always the same,"** whether nondisclosure denies the accused a fair trial. (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 53; *In re Sodersten, supra,* 146 Cal.App.4th 1163.) Of course before trial one cannot say whether disclosure would make it "reasonably probable" the defendant would achieve a more favorable *trial* result, so before trial he should receive *any* material that could assist the defense or possibly lead to material that would assist. The Supreme Court says prosecutors should exercise discretion liberally by disclosing, even if in doubt. (*Kyles v. Whitley, supra*, 514 U.S. 419, 439-440.)

To prevail on appeal, **"the prisoner must show both the favorableness and the materiality of any evidence not disclosed by the prosecution...."** (*In re Sassounian, supra*, 9 Cal.4th 535, 545.) This replaces the *Chapman* standard of **"harmless beyond a reasonable doubt."** (*Id.* at p. 545, fn.6.)

"[O]n appeal … favorable evidence is … material only if it is reasonably probable that disclosure would have affected the result." (*People v. Coddington* (2000) 23 Cal.4th 529, 589-590; citations omitted.) *Barker v. Fleming* (9th Cir. 2005) 423 F.3d 1085, 1099-1101, held there was no due process violation when the witness was not central to the case, and was thoroughly discredited in cross-examination, as it was unlikely there would have been a more favorable result.

In *Smith v. Cain* (2012) __U.S.__ [132 S.Ct. 627; 181 L.Ed.2d 571], the United States Supreme Court reversed the conviction in a capital case based on *Brady* error. The defendant was convicted of murder based on the testimony of a single eyewitness who linked him to the crime. However, the prosecutor failed to turn over pre-trial statements of the witness which materially contradicted his trial testimony. Importantly, the Supreme Court rejected the State's argument that the error did not reasonably affect the outcome because a jury could have rejected the contradictory pre-trial statements as speculation. **"The State also contends that [the eyewitness's] statements made five days after the crime can be explained by fear of retaliation. Smith responds that the record contains no evidence of any such fear. Again, the State's argument offers a reason the jury *could* have disbelieved [the eyewitness's undisclosed statements, but gives us no confidence that it *would* have done so."** (*Smith v. Cain*, *supra*, 132 S.Ct. 627, 630, original italics.)

The standard of review for habeas corpus is addressed in *In re Pratt* (1999) 69 Cal.App.4th 1294, 1314-1315. Footnote 16 (*id.* at 1314), explains how the standard depends on the context in which the case comes up for review. Mr. Pratt prevailed by meeting all three prongs of a *Brady* violation, it was upheld on appeal, and the opinion has a detailed analysis of what must be established to obtain post-conviction relief under *Brady* or Penal Code section 1473, subdivision (b)(1). (*Id.* at pp. 1315-1322.)

After a reversal, a retrial is barred by double jeopardy only when the prosecutor *provoked* a mistrial or committed misconduct to avoid a likely acquittal. (*People v. Batts* (2003) 30 Cal.4th 660, 695-696; *Sons v. Superior Court* (2004) 125 Cal.App.4th 110; see *Oregon v. Kennedy* (1982) 456 U.S. 667.)

The kind of material that can be exculpatory is nearly limitless. (See, e.g., *Gantt v. Roe* (9th Cir. 2004) 389 F.3d 908.) It can be evidence of sloppy police investigation or misconduct (*Kyles v. Whitley, supra,* 514 U.S. 419), impeachment evidence (*United States* v. *Bagley* (1985) 473 U.S. 667, 676; *In re Ferguson* (1971) 5 Cal.3d 525), recantation by a prosecution witness (*People v. Boyd* (1990) 222 Cal.App.3d 541, 568-569), criminal charges pending anywhere against a prosecution witness (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842; *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1079-1080), any felony or misdemeanor charges pending against an alleged victim (*Currie v. Superior Court* (1991) 230 Cal.App.3d 83, 96-98), anything the might show a prosecution witness has a "morally lax character," from which a "readiness to lie" could be inferred (*People v. Mickle* (1991) 54 Cal.3d 140, 168), evidence that a prosecution witness has *in fact* lied (*Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1210), prior false accusations by an alleged victim (*People v. Adams* (1988) 198 Cal.App.3d 10, 18-19; see *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 597-600), and evidence of an "'**alleged victim's criminal convictions, pending charges, status of being on probation, *any acts of victim's dishonesty* and, any prior false reports of sex offenses by the victim.'"** (*People v. Hayes, supra,* 3 Cal.App.4th 1238, 1243; italics added.)

It can include names, addresses and statements of percipient witnesses the

prosecution does *not* intend to call at trial (*United States v. Cadet* (9th Cir. 1984) 727 F.2d 1453, 1468-1469), evidence that a third party may have committed the crime (*City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118; see *People v. Hall* (1986) 41 Cal.3d 826), anything relevant to imperfect self-defense, or a finding of guilt on a lesser offense (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 809), evidence shedding doubt on time-of-death in a homicide case (*Paradis v. Arave* (9th Cir. 2001) 240 F.3d 1169), and material in a probation file if it, **"bears on the credibility of a significant witness in the case."** (*United States v. Strifler* (9th Cir. 1988) 851 F.2d 1197, 1201.) The criminal record of each prosecution witness beyond the disclosures required by Penal Code section 1054.1, subdivision (d) should be sought and provided. (5 Witkin and Epstein, California Criminal Law, (3d ed. 2000), § 41(2), p. 89.) **"Evidence of prior misdemeanor misconduct is ... admissible because of its potential impact on credibility. ... While the actual record of the misdemeanor convictions involving moral turpitude is inadmissible hearsay, *disclosure of the existence of such convictions* will certainly assist the defendant in obtaining direct evidence of the misdemeanor conduct itself."** (*People v. Santos, supra,* 30 Cal.App.4th 169, 178-179; italics added; see generally *People v. Wheeler, supra*, 4 Cal.4th 284.)

Leaving aside the effect of expu ngement of a witness's prior convictions, **"the prosecution still [has] the burden of investigating and divulging the existence of such convictions."** (*People v. Martinez, supra,* 103 Cal.App.4th 1071, 1079.) When evidence of moral turpitude is in police personnel records, however, it is only discoverable through the two step process of Evidence Code sections 1043 and 1045. (*California Highway Patrol v. Superior Court (Luna)* (2000) 84 Cal.App.4th 1010.) A prosecutor would have to provide any such materials they possess, however, under traditional *Brady* requirements. (See *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, discussed below on p. 18.)

Exculpatory evidence known to the district attorney or in the possession of the prosecution team at the time of the preliminary examination must be provided for that hearing. (*Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074; *People v. Gutierrez* (2013) 214 Cal.App.4th 343; *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, 1589; *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265; *People v. Mackey* (1985) 176 Cal.App.3d 177.)

Exculpatory information must be offered to the grand jury when seeking an indictment. (*Johnson v. Superior Court* (1975) 15 Cal.3d 248, 255.) **"If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence."** (Pen. Code, § 939.71, subd. (a).) The individual prosecutor conducting the grand jury proceedings need not be actually aware of the evidence for the duty to arise. (*People v. Breceda* (2013) 215 Cal.App.4th 934, 955.) This is because **"[i]t is the duty of the office of the district attorney to gather all the information made available throughout the office and present that information to the grand jury."** (*Ibid.*) Once the prosecutor has informed the grand jury of exculpatory information, the prosecutor must advise grand jurors of their duties under Section 939.7, which allows for grand juries to demand the actual production of evidence and attendance of witnesses. (Pen. Code, § 939.71, subd. (a); see *Berardi v. Superior Court* (2007) 149 Cal.App.4th 476, 490-491.)

Brady itself dealt with favorable material on sentencing. The *ultimate* sentencing issue arises in a capital case. **"In a capital case, evidence favorable to the defendant bearing on punishment is of two kinds. First is evidence that mitigates the impact of the prosecution's evidence … evidence**

that either reduces the defendant's culpability for the charged crimes or other crimes the prosecution proves at the penalty phase or weakens the strength of other aggravating evidence … [and] second … *anything* regarding the defendant personally that he or she offers as mitigating." (*In re Steele* (2004) 32 Cal.4th 682, 698, original italics.) The duty to provide the second category arises only at the request of the defense. (*Id.* at p. 699-700.)

Exculpatory material discovered while the case is on appeal must be disclosed. (*Imbler v. Pachtman* (1976) 424 U.S. 409; *In re Lawley* (2008) 42 Cal.4th 1231, 1246.) This includes evidence that casts doubt on the credibility of a prosecution trial expert. (*People v. Garcia* (1993) 17 Cal.App.4th 1169.) *Garcia* reflects the failure of prosecutorial self-policing because there was culpability by both the local district attorney, *and* the Attorney General's Office. (See also *Banks v. Dretke, supra,* 540 U.S. 668; *Strickler v. Greene, supra,* 527 U.S. 263.) It was learned that a state expert was no longer being used because inaccurate accident reconstruction calculations were given in other cases. (*Garcia, supra,* at pp. 1174-1175.) The conviction was reversed once the facts were known. (*Id.* at p. 1186.)

However, since the focus of *Brady* evidence is guaranteeing a defendant due process at trial and sentencing, the conduct of a trial witness occurring after the trial at issue does not fall within the scope of *Brady*. (*Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1068.)

Brady violations are common when informants are used. (See Pen. Code § 1127a, subd. (b).)

"The use of informants to investigate and prosecute … is fraught with peril. ... criminal informants are … untrustworthy … must be managed and carefully watched by the government and courts to prevent … falsely accusing the innocent … manufacturing evidence … and … lying ... A prosecutor who does not appreciate the perils … risks compromising the truth-seeking mission of our … justice system." (*United States v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 333; see also Pen. Code § 1127a, subds. (c) and (d) [duty to disclose "any and consideration promised to or received by, the in-custody informant[,]" and consideration defined].)

In *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, habeas relief was granted because an array of exculpatory material on an informant was withheld, including misconduct by the informant *while* acting as an informant (*id.* at 1054), benefits he obtained, and false allegations made to police *about the petitioner himself*. (*Id.* at 1056-1057.)

Any inducement given to a government witness for testimony (e.g. leniency), should be disclosed and there is a duty to correct false or misleading testimony and provide accurate information to the defense and jury. (*Giglio v. United States* (1972) 405 U.S. 150, 153-154; *People v. Phillips* (1985) 41 Cal.3d 29, 46.)

In *Hayes v. Brown* (9th Cir 2005) 399 F.3d 972, the prosecutor lied to the judge and allowed false testimony to go to the jury about a deal he had with counsel for a prosecution witness who had felony charges pending – a deal allegedly kept from the witness. (*Id.* at pp. 980-981.) **"[T]hat a witness was tricked into lying on the witness stand by the State does not … insulate the State from conforming its conduct to the requirements of due process. … That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so."** (*Id.* at p. 981, fn. omitted.)

In *People v. Kasim, supra,* 56 Cal.App.4th 1360, a new trial was granted

when the Court of Appeal found that the prosecutor failed to turn over **"significant exculpatory evidence bearing on the credibility of the key prosecution witness – for example, evidence that [the witnesses] had received reduced sentences or escaped prosecution in their own criminal cases and had previously acted directly or indirectly as informants…."** (*Id.* at pp. 1381-1382; see also *Singh v. Prunty* (9th Cir. 1998) 142 F.3d 1157 [due process violation for failure to reveal agreement to provide benefits to witness in exchange for testimony]; *In re Pratt, supra,* 69 Cal.App.4th 1294, 1315-1322.)

On the issue of false or perjured testimony, mere disclosure may not be enough. In *Commonwealth v. Bowie* (9th Cir. 2001) 243 F.3d 1109, the prosecutor was shown a letter suggesting a plan to lie and shift blame to the defendant, apparently written by an accomplice who became a prosecution witness. Although provided to the defense and used at trial, the appellate court still found a denial of due process because the prosecutor failed to use tools available *to him* to expose a plot to offer false testimony. **"[T]he prosecutor's … duty under our Constitution was to do exactly the opposite of what he did. The law ... left no room for doubt that [his] constitutional obligation… to collect potentially exculpatory evidence to prevent a fraud upon the court, and to elicit the truth was promptly to investigate the letter and interrogate their witnesses about it."** (*Id.* at p. 1117; see also *Killian v. Poole, supra,* 282 F.3d 1204, 1210; but see *People v. Morrison* (2004) 34 Cal.4th 698, 715.) And in light of *United States v. Ruiz, supra,* 536 U.S. 622 (discussed above), prosecutors are less likely to disclose pretrial.

"The availability of particular statements through the defendant himself does not negate the government's duty to disclose." (*United States v. Howell* (9th Cir. 2000) 231 F.3d 615, 625 [prosecution knew two police reports were inaccurate in stating money was found on a person other than the accused, when in fact police claimed the money *was* recovered from him].) **"[T]he fact that not one, but two separate police reports contained an identical error as to a critical piece of evidence certainly raises the opportunity to attack the thoroughness and even good faith, of the investigation."** (*Ibid.*, see *Kyles v. Whitley, supra,* 514 U.S. 419.) The prosecutor was criticized for the trial degenerating into a "sporting contest" and a "game of cat and mouse" contrary to Rule 16 of the Federal Rules of Criminal Procedure. (*United States v. Howell*, *supra*, 231 F.3d 615, 625-626; but see *Coleman v. Calderon, supra*, 150 F.3d 1105, 1112.)

The burden of showing post-conviction that testimony was false is daunting. (See *In re Roberts* (2003) 29 Cal.4th 726, 740-741.) **"'[T]he offer of a witness, after trial, to retract his sworn testimony is to be viewed with suspicion.' [Citations.]"** (*Id.* at p. 742; see also *People v. Valdez* (2004) 32 Cal.4th 73, 125-126 [court rejects AG quasi-concession that testimony was false].) Even when false testimony *is* shown, the appellant or petitioner will get no relief unless it is "reasonably probable" a more favorable result would have been realized had that evidence not been presented. (*In re Cox* (2003) 30 Cal.4th 974, 1008-1011, citing *In re Sassounian, supra,* 9 Cal.4th 535, and Penal Code section 1473, subd. (b)(1).)

When material evidence relevant to a defense *motion to suppress evidence* is withheld, due process is violated if it is reasonably probable that, if disclosed, a more favorable outcome would have resulted. (*United States v. Gamez-Orduno* (9th Cir. 2000) 235 F.3d 453, 461.)

Pitchess discovery may be exculpatory and thus fall under *Brady.* *People v. Gutierrez, supra,* 112 Cal.App.4th 1463, says *Brady* and the *Pitchess* statutes "operate in tandem" and **"*Pitchess* procedures implement *Brady* rather than undercut it."**

(*Id.* at pp. 1473-1474; see also *Eulloqui v. Superior Court*, *supra*, 181 Cal.App.4th 1055, 1064-1065.) When there is a conflict between the general duty prosecutors have to conduct a review for exculpatory evidence and restrictions on prosecutor access to *Pitchess* materials (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046), *Gutierrez* notes that the *Brady* duty only applies to materials the prosecutor possesses or has the *right* to possess, so absent a proper statutory motion the prosecutor has no right to possess the material. (*Gutierrez, supra*, at p. 1475.) This shifts *de facto* the function of seeking exculpatory *Pitchess* material to the defense. *Gutierrez* makes the dubious claim that in reaching the result in *Alford* the court **"implicitly suggests [the] good cause requirement is constitutional."** (*Ibid.*)

Nevertheless, in *Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998, the Ninth Circuit reversed in a death penalty case when if found that the prosecution failed to disclose impeachment material contained in an officer's personnel file. The court explained the **"government has a *Brady* obligation to produce any favorable evidence in the personnel records of an officer"** and that **"the government has a duty to examine personnel files upon a defendant's request for their production."** (*Id.* at p. 1016.) Moreover, the court held, **"The state is charged with the knowledge that there was impeachment material in [the officer's] personnel file."** *Milke*, however, was an Arizona case and it is unclear whether the court would reach the same conclusion in a California case in light of Evidence Code section 1043, the *Pitchess* procedures and the ruling in *People v. Gutierrez, supra,* 112 Cal.App.4th 1463.

Although it would seem the five-year limit on discovery of citizen complaints (Evid. Code, § 1045, subd. (b)(1)) would violate due process by arbitrarily denying access to *Brady* material, the court said otherwise in *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10-17. The *Pitchess* process coexists with *Brady* in that discoverable material remains discoverable even if it is more than five-years old, the statute notwithstanding. (*Id.* at p. 14.) **"In holding that *routine* record destruction after five years does not deny … due process, we do not suggest that a prosecutor who discovers facts underlying an old complaint of officer misconduct, records of which have been destroyed, has no *Brady* disclosure obligation. … the Attorney General … as amicus … agreed that, regardless of whether records have been destroyed, the prosecutor still has a duty to seek and assess such information and disclose it if it is constitutionally material."** (*Id.* at p. 12, original italics, fn. omitted; see also *Eulloqui v. Superior Court*, *supra*, 181 Cal.App.4th 1055, 1064-1065 [five-year limitation does not apply to *Brady* evidence].) However, there is no *Brady* (or *Pitchess*) obligation to disclose *defendants'* testimony in unrelated cases claiming misconduct by the same officers. (*People v. Jordan, supra,* 108 Cal.App.4th 349, 362.)

The right to secure exculpatory materials does not extend to such materials in the possession of a codefendant. **"[N]owhere in the discovery statutes or in the cases construing them is the requirement that one defendant be obligated to provide 'materially exculpatory' evidence to a codefendant...."** (*Nielsen v. Superior Court* (1997) 55 Cal.App.4th 1150, 1156; *People v. Ervin* (2000) 22 Cal.4th 48, 101.)

"[D]efendant's right to due process … does not entitle him to invade the attorney-client privilege of another." (*People v. Gurule* (2002) 28 Cal.4th 557, 594; but see *Vela v. Superior Court* (1989) 208 Cal.App.3d 141.) "The attorney-client privilege is "absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1446, 1557;

Costco v. Superior Court (2009) 47 Cal.4th 725, 732.)

3. Discovery to traverse a search warrant

Just before Proposition 115 was enacted, *People v. Luttenberger* (1990) 50 Cal.3d 1 spelled out the criteria for securing discovery aimed at traversing a search warrant. (Pen. Code, § 1538.5, subd. (a)(2).) This discovery is **"based on the fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. Permitting … limited but reasonable access to information relevant to evaluating the validity of a search warrant [is] consistent with this basic principle."** (*Luttenberger supra,* at p. 17, internal citations and quotation marks omitted.) Penal Code section 1054, subdivision (e) requires disclosure when needed to ensure a fair trial.

"As with a request for a *Franks* hearing (*supra*, 438 U.S. 154), the motion for *Rivas*-style discovery should include affidavits supporting ... assertions of misstatements or omissions in the ... affidavit [and] if possible, specify the information he seeks, the basis for his belief the information exists, and the purpose for which he seeks it. ... a 'conclusionary' statement that he needs the information will not suffice…." (*People v. Luttenberger, supra*, 50 Cal.3d 1, 22.)

The question of protected information is more complex. (See Evid. Code §§ 1041-1042.) When dealing with the *identity* of a confidential informant (but not a sealed affidavit), the court said: **"To obtain discovery of protected material such as police files, a ... defendant must make some preliminary showing 'other than a mere desire for all information in the possession of the prosecution.' [citation] '[the] motion ... must ... describe the ... information with at least some degree of specificity and must be sustained by plausible justification.'"** (*Luttenberger, supra*, 50 Cal.3d 1 20.) **"[D]efendant is not entitled to [have] the … court ... examine the documents ... absent some showing that the presumptively valid warrant affidavit is questionable in some way."** (*Id.* at p. 21.) He must **"offer evidence casting some reasonable doubt on the veracity of material statements made by the affiant."** (*Ibid*.)

The defense burden to compel a court to "examine documents" is lower than what is required for a full-blown "*Frank*s hearing." In *People v. Estrada* (2003) 105 Cal.App.4th 783, the defense sought the identity of the confidential informant, supported by the defendant's declaration denying he sold cocaine as claimed in the affidavit. (*Id.* at pp. 788-789.) The court erred in refusing to do that review. **"[T]he standard for compelling pre-*Franks* hearing discovery is lower than whether to allow the hearing on the merits of the suppression … motion…. [¶] … the *Franks* 'substantial preliminary showing' standard [does] not apply to pre-section 1538.5 hearing discovery issues."** (*Id.* at p. 791.) The defendant need only present evidence that casts **"some reasonable doubt on the veracity of material statements made by the affiant."** (*Ibid.,* citation omitted.) Bad faith need not be shown but the defense does have to **"raise a substantial possibility that the alleged untrue statements were material to … probable cause…."** (*Id.* at p. 792, quoting *Luttenberger.*) Several cases say denial of facts stated in the affidavit, without more, is insufficient to compel a *Franks*-hearing. But it is enough for a pre-*Franks* review, at least where the denial, if accurate, vitiates the *entire* justification for the search warrant. (*Id.* at pp. 793-794.) **"We do not address other scenarios where only part of the probable cause factual scenario has been brought into question by the defense declarations."** (*Id.* at p. 794.)

Use of a defendant's declaration means he

can be cross-examined, but it **"should be limited to those matters discussed in the declarant's declaration [and the] testimony may not be used in the prosecution's case-in-chief [but] only for impeachment…."** (*People v. Estrada, supra,* 105 Cal.App.4th 783, 795.) If the defendant refuses to testify the declaration can be stricken. (*Ibid.*)

The law as to a sealed *affidavit* is different (an issue not addressed in *Luttenberger*). In discussing privileges (Evid. Code, §§ 1041-1042), *People v. Hobbs* (1994) 7 Cal.4th 948, states: **"These codified privileges and decisional rules together comprise an exception to the statutory requirement that the contents of a search warrant, including any supporting affidavits setting forth … probable cause … become public record once the warrant is executed. (Pen. Code 1534, subd. (a)…)"** (*Id.* at p. 962; also citing *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1291.) As a result the defense may get nothing, or a redacted or edited affidavit, or written summary of oral or taped statements. (*Hobbs*, *supra*, at pp. 962-963.) Privileged portions of the search warrant affidavit may be sealed at the time the warrant is signed, and then made available for in camera review by a trial judge if the legality of the search is challenged. (*Id.* at p. 963; see Evid. Code, § 915.)

"In contrast to the situation in which the informant's privilege is asserted merely to avoid disclosure of the … *name*, where … *all or a major portion of the search warrant affidavit* has been sealed … a defendant cannot reasonably be expected to make even the 'preliminary showing' required for an in camera hearing under *Luttenberger*. [W]here the defendant has made a motion to traverse the warrant under such circumstances, the court should treat the matter as if the defendant had made the requisite preliminary showing required … in *Luttenberger*." (*People v. Hobbs, supra,* 7 Cal.4th 948, 972, fn. 6; orig. italics.)

The trial judge lacks the discretion to refuse to do the in camera review required on a motion to discover the sealed material and traverse or quash the search warrant. (*People v. Galland* (2004) 116 Cal.App.4th 489, 495.)

In dealing with a request for disclosure of a sealed affidavit, the judge first determines **"whether sufficient grounds exist for maintaining the confidentiality of the informant's identity."** (*People v. Hobbs, supra,* 7 Cal.4th 948, 972.) If so, the court looks at whether disclosing any of the affidavit reveals the informant's identity. (*Ibid.*) If full disclosure would reveal the identity but *portions* of the sealed affidavit do *not* reveal the identity, those portions are to be disclosed. (*Id.* at p. 972, fn. 7.)

The prosecutor is present for the in camera review, while the defense normally is not, but the defense **"should be afforded the opportunity to submit written questions, reasonable in length, which shall be asked by the trial judge of any witness called to testify at the proceeding."** (*People v. Hobbs, supra,* 7 Cal.4th 948, 973.) The judge's role in the in camera process is more than passive review of what the prosecutor or police provide. **"[T]he defendant may be completely ignorant of all critical portions of the affidavit [and] be unable to specify what materials the court should review…. The court, therefore, must take it upon itself both to examine the affidavit for possible inconsistencies or insufficiencies regarding the showing of probable cause, and inform the prosecution of the materials or witnesses it requires."** (*Ibid.*) This additional material **"will invariably include such items as relevant police reports and other information regarding the informant and [his] reliability."** (*Ibid.*) The court also has the discretion to call as witnesses **"the affiant, the informant, or any other witness whose testimony it deems necessary to rule upon the issues."** (*Ibid.* citations omitted.) Defense counsel should be

able to suggest possible helpful witnesses if he or she can.

If in camera review does not support the claim of material misrepresentation, the defense is so informed. (*People v. Hobbs, supra,* 7 Cal.4th 948, 974.) But if the review shows a "reasonable probability" that a motion to traverse would prevail, **"the district attorney must be afforded the option of consenting to disclosure of the sealed materials … or, alternatively, suffer … an adverse order on a motion to traverse."** (*Id.* at pp. 974-975, citing Evid. Code, § 1042, subd. (d).) A motion to quash a search warrant is similarly addressed. (*Id.* at p. 975.)

No matter what the outcome **"a sealed transcript of the in camera proceedings, and any other sealed or excised materials, should be retained in the record … for possible appellate review."** (*People v. Hobbs, supra,* 7 Cal.4th 948, 975.)

To preserve any claims that the *Hobbs* procedure is constitutionally infirm, a defendant should object that the in camera review violates a defendant's constitutional right to effective counsel, due process of law, and a public trial. (See *Moeller v. Lockyer* (E.D. Cal. Feb. 20, 2009, Civ. No. S-O1-2351) 2009 U.S. Dist. LEXIS 95309.)

The practice of returning a sealed search warrant affidavit to the police department after the in camera review was severely restricted in *People v. Galland* (2008) 45 Cal.4th 354. **"[A] sealed search warrant affidavit, like search warrant affidavits generally, should ordinarily be part of the court record that is maintained at the court. Such a rule minimizes the potential for tampering with the record and eliminates the need for time-consuming and cumbersome record-authentication procedures. [citation]."** (*Id.* at p. 368.) The sealed search warrant affidavit may only be retained by the police **"upon a showing (1) that disclosure of the information would impair further investigation of criminal conduct or endanger the safety of the confidential informant; (2) that security procedures at the court clerk's office … are inadequate to protect the affidavit against disclosure to unauthorized persons; (3) that security procedures in the law enforcement agency or other entity are sufficient to protect the affidavit against disclosure to unauthorized persons; (4) that the law enforcement agency or other entity has procedures to ensure that the affidavit is retained for 10 years after final disposition of the noncapital case, permanently in a capital case, or until further order of the court (see Gov. Code, § 68152, subd. (j)(18)), so as to protect the defendant's right to meaningful judicial review; and (5) that the magistrate has made a sufficient record of the documents that were reviewed, including the sealed materials, so as to permit identification of the original sealed affidavit in future proceedings or to permit reconstruction of the affidavit, if necessary."** (*Ibid.*)

4. Discovery related to Grand Jury

A defendant is entitled to a transcript of the grand jury proceedings. (Pen. Code, § 938.1.) In addition, Penal Code section 924.2, which deals with secrecy of grand jury testimony, also states in part: **"Any court may require a grand juror to disclose the testimony of a witness examined before the grand jury, *for the purpose of ascertaining whether it is consistent with that given by the witness before the court*, or to disclose the testimony given before the grand jury by any person, upon a charge against such person for perjury in giving his testimony or upon trial thereof."** (Italics added.)

In *People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, the court addressed **"to what extent may an indicted defendant obtain discovery of nontestimonial grand jury proceedings for**

… preparing a Penal Code section 995 motion to dismiss ... [for] lack of probable cause." (*Id*. at p. 407.) The court affirmed an order for production of materials bearing on probable cause, including **"transcripts of all communications between the prosecutor and grand jury, [his] opening and closing remarks and argument, and all responses to requests by the grand jury for readbacks of witness testimony [and] the superior court's answers to grand jury questions."** (*Id*. at pp. 407-408.) The order was overturned, however, to the extent that it compelled disclosure of materials deemed irrelevant to the dismissal motion, which included: **"records of all persons present ... roll calls of the grand jurors, and lengths of grand jury deliberations sessions."** (*Id*. at p. 408, [presumably discoverable if sought for a "relevant" purpose].) Voluntarily provided, so not ordered (but presumably discoverable if not provided), were **"transcripts of the witness testimony, the … presentation of exculpatory evidence … admonishments regarding evidence admitted for limited purpose, and the superior court's charge to the grand jury."** (*Ibid*.) These items fall within the statutory scheme. Although not mandated by the federal constitution, they come under **"other express statutory provisions."** (*Id*. at pp. 426-429; Pen. Code, § 1054, subd. (e).) The combination of Penal Code sections 938, 938.1, 939.6, 939.7 and 995 require providing the discovery despite the fact that it is not specifically enumerated in the statutes. Also noted was that although the discovery is not constitutionally mandated (*id*. at p. 427), due process rights arise from grand jury proceedings, and discovery can be ordered, **"to the extent necessary for an indicted defendant to assert a due process right not to be indicted [without] probable cause."** (*Id*. at pp. 436-437.)

5. Defense discovery before preliminary examination

Amendments to Penal Code section 859 notwithstanding, one should seek discovery *before* the preliminary examination. (*Holman v. Superior Court* (1981) 29 Cal.3d 480.) The defendant has the right to counsel and is entitled to *competent* representation at the preliminary examination. **"[T]he right to effective assistance of counsel, as guaranteed by the Sixth Amendment to the federal Constitution, applies not only to trial but also to the preliminary examination…."** (*Galindo v. Superior Court* (2010) 50 Cal.4th 1, 9.) Counsel can be competent only with full access to police reports and other material necessary to *prepare* for the hearing. The preliminary hearing is *more* than a mere probable cause determination, even after Proposition 115. (Pen. Code, §§ 858 et seq; Pen. Code, § 866 [qualified *right* to present evidence].) "Preliminary hearings … serve to protect both the liberty interest of the accused and the judicial system's and society's interest in fairness and the expeditious dismissal of groundless or unsupported charges, thereby avoiding a waste of scarce public resources." (*Bridgeforth v. Superior Court, supra,* 214 Cal.App.4th 1074, 1087.)

The prosecutor's *Brady* obligations also apply to the preliminary examination. (*Bridgeforth v. Superior Court*, *supra*, 214 Cal.App.4th 1074, 1087; *People v. Gutierrez*, *supra*, 214 Cal.App.4th 343; *Merrill v. Superior Court, supra*, 27 Cal.App.4th 1586; *Stanton v. Superior Court, supra*, 193 Cal.App.3d 265.) **"Requiring prosecutorial disclosure of information that is both favorable to the defense and material to the magistrate's determination of [probable cause] provides a valuable … safeguard…."** (*Bridgeforth v. Superior Court*, *supra*, 214 Cal.App.4th 1074, 1087.)

Some of the reasons given in *People v. Superior Court (Mouchaourab), supra,* 78 Cal.App.4th 403, discussed above, for discovery of grand jury materials would apply to discovery before a preliminary examination. For example, Penal Code section 995 is a listed statutory provision

within the **"other express statutory provisions"** of Penal Code section 1054, subdivision (e). (*Id.* at pp. 426-429.) Just as a defendant has a due process right not to be indicted without probable cause (*id*. at pp. 436-437), he also has a due process right not to be held to answer without probable cause, and each gives rise to discovery rights.

This reasoning was found persuasive in *Magallan v. Superior Court*, *supra*, 192 Cal.App.4th 1444. In *Magallen*, the defendant sought discovery relevant to a suppression motion to be made at the preliminary hearing. The attorney general put forth a number of reasons why a defendant is not entitled to discovery at the preliminary hearing stage, all of which were rejected by the Court of Appeal. Frist, the attorney general argued that because Penal Code section 1054, subdivision (e) provides that "no discovery shall occur in criminal cases except as provided by this chapter, or other express statutory provisions, or as mandated by the Constitution of the United States," the magistrate had no authority to order discovery, except that authorized by the statutory scheme, which in turn, only authorizes discovery 30 days prior to trial. The Court of Appeal rejected this argument, explained that the 30 day rule was the outer limit of the prosecutor's discovery obligation and that Penal Code section 1054.5 does not preclude the granting of a motion to compel discovery more than 30 days in advance of trial. (*Id.* at p. 1460.) **"If … the prosecutor's discovery obligations would suddenly take effect 30 days before trial … the defense would be deprived of the opportunity to prepare for trial before that time. Such an interpretation would be completely at odds with the express statutory purposes … to 'promote timely discovery,' avoid the necessity for postponements and avoid 'undue delay of the proceedings.'"** (*Ibid.*)

The *Magallen* court also rejected the prosecution's argument that defense discovery under Penal Code section 1054.1 was limited to the "trial setting" which did not include the preliminary hearing. (*Magallan v. Superior Court*, *supra*, 192 Cal.App.4th 1444, 1458.) The court explained that the statutory scheme "**was not intended to distinguish between the pre-conviction phases of a criminal proceeding…."** (*Ibid.*)

Even though some of the items sought by the defense in *Magallen* we relevant only to the suppression motion and were not included in Penal Code section 1054.1 as part of the prosecutor's statutory discovery obligation, the court, citing *Mouchaourab*, *supra*, held that discovery was nevertheless mandated under the discovery scheme because Penal Code section 1054, requires discovery under **"other express statutory provisions,"** which included Penal Code Penal Code section 1538.5, subdivision (f). (*Magallan v. Superior Court*, *supra*, 192 Cal.App.4th 1444, 1461-1462.)

Again citing *Mouchauorab*, the *Magallen* court explained that because **"the defendant's procedural due process right under the California Constitution entitles him to a full and fair opportunity to [raise a Fourth Amendment claim] at the suppression hearing"** the state constitution **"entitles the defense to the discovery necessary to support a Penal Code section 1538.5, subdivision (f) motion."** (*Magallan v. Superior Court*, *supra*, 192 Cal.App.4th 1444, 1463-1463.)

Perhaps most importantly, the *Magallen* court reaffirmed the continuing viability of *Holman v. Superior Court, supra,* 29 Cal.3d 480, which was decided prior to enactment of the statutory scheme and held that a defendant is entitled to pre-preliminary hearing discovery upon **"a showing that such discovery is reasonably necessary to prepare for the preliminary examination."** (*Holman*, *supra*, at p. 485; *Magallan v. Superior Court*, *supra*, 192 Cal.App.4th 1444, 1459.) In *Magallen*, the defendant satisfied

this showing by demonstrating that the discovery was necessary to his suppression motion. (*Magallan*, *supra*, at p. 1459.)

On the other hand, failure to seek discovery before preliminary examination can leave the accused without a remedy when non-*Brady* material is withheld by the prosecution. (*People v. Webber* (1991) 228 Cal.App.3d 1146, 1165-1168.) *People v. Jenkins* (2000) 22 Cal.4th 900, 950-952, simply restates the holding in *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529, that absent a showing of prejudice, there is no relief for delayed discovery before the preliminary examination when the issue is raised on appeal. (*Jenkins* involved a pre-Proposition 115 preliminary examination.)

6. Pitchess discovery

Evidence of police misconduct contained in an officer's personnel file is generally discoverable by meeting the requirements of Evidence Code section 1043 et seq, arising from the seminal case *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. (See Pen. Code, §§ 832.7 and 832.8.) **"*Pitchess* … and its statutory progeny are based on the premise that evidence contained in [an] officer's personnel file may be relevant to [the] defense and that to withhold [it] would violate the accused's due process right to a fair trial."** (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227.) This is balanced against the officer's **"strong privacy interest…."** (*Ibid.*)

The defendant must first show "good cause." (Evid. Code, § 1043, subd. (b)(3); *City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d 74, 84-86.) "Good cause" requires a specific factual scenario establishing a "plausible factual foundation" for alleged misconduct connected to the defendant. (*City of Santa Cruz, supra,* at pp. 85-86.) The supporting affidavit may include factual allegations based on "information and belief." (*Id.* at p. 86.) Once shown, there is an in camera review by the judge. (*Id.* at p. 84, Evid. Code, § 1045, subd. (b).)

"[T]he threshold for discovery [under] section 1043 has been characterized by our Supreme Court as 'relatively low.' [Citation.] All the law requires to show good cause … is the 'materiality' of the information to the subject matter of the litigation and a reasonable belief that the governmental agency has the 'type' of information requested." (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392.)

A mere desire for information by the defense is insufficient. (*San Francisco v. Superior Court (Phillips)* (1993) 21 Cal.App.4th 1031, 1035.) Similarly, "merely denying the elements of the charge[s]" does not establish a plausible factual foundation for police misconduct. (*People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1342.)

The factual scenario **"may consist of a denial of facts asserted in the police report."** (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024-1025.) **"[A] plausible scenario of officer misconduct is one that might or could have occurred."** (*Id.* at p. 1026; see also *Uybungco v. Superior Court* (2008) 163 Cal.App.4th 1043.) *Pitchess* discovery cannot be denied simply because the judge views the officer's version of events as more believable than a contrary assertion by the defendant. (*Warrick, supra,* at pp. 1024-1025; *People v. Johnson* (2004) 118 Cal.App.4th 292, 304.) However, **"[m]aterials from an officer's personnel file reflecting dishonesty or nonfelony acts of moral turpitude do not become discoverable simply because a defendant argues that the officer will testify falsely."** (*Eulloqui v. Superior Court*, *supra*, 181 Cal.App.4th 1055, 1064.)

People v. Thompson (2006) 141 Cal.App.4th 1312, sidesteps *Warrick* in affirming the denial of a *Pitchess* motion

brought on the theory that police made up evidence to justify the arrest. The defense declaration denied much of what the police report alleged, yet the court treated the police report as factual. The court characterized the defendant's assertions as follows: **"In essence, his declaration claims … the entire incident was fabricated and, by inference … the police officers conspired to do so in advance."** (*Id.* at p. 1318.) The inference is puzzling in that the defendant's allegation, at least in part, was that he **"'was stopped by police and once they realized he had a prior criminal history they fabricated the alleged events and used narcotics already in their possession and attributed these drugs to [him].'"** (*Id.* at p. 1317; see also (*People v. Sanderson, supra*, 181 Cal.App.4th 1334, 1340-1341 [defendant's denial of making statements attributed to him by police, without more, failed to establish a plausible factual scenario].)

Similarly in *People v. Galan* (2009) 178 Cal.App.4th 6, 13, the court held that when a defendant confesses to a crime and does not specifically dispute the veracity of the officer's recitation of the confession, even if he provides an alternative fact pattern, his motion will necessarily present a implausible and internally inconsistent scenario, resulting in an insufficient factual showing.

Denial of the defendant's pro per *Pitchess* motion was upheld in *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, in which he **"alleged one or more grandiose conspiracies [by police] to frame and murder him."** (*Id.* at p. 992.)

To protect privileged information the defense may file a sealed declaration in support of the *Pitchess* motion. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71-73.) *Garcia* disapproves *City of Los Angeles v. Superior Court (Davenport)* (2002) 96 Cal.App.4th 255 **"to the extent it holds that a supporting *Pitchess* affidavit filed under seal may be released to the city attorney under a protective order."** (*Garcia, supra,* at p. 77.)

In response to a *Pitchess* discovery request the custodian of records is **"required to submit for review only those documents that were potentially responsive to the discovery request, [and] our Supreme Court has directed that '[t]he custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion."** (*People v. Guevara* (2007) 148 Cal.App.4th 62, 68; citing *People v. Mooc, supra,* 26 Cal.4th 1216, 1229; see also *People v. Wycoff* (2008) 164 Cal.App.4th 410, 415.) The trial court should make the decision as to what is discoverable *and* make a reviewable record. (*Guevara, supra,* at p. 69.) Specifically, **"the trial court must make a record of what documents it examined to permit future appellate review. To make the record, the trial court may photocopy the records the custodian produced and place or them in a confidential file. Alternatively, the trial court can make a list of or state for the record the documents it examined."** (*Sisson v. Superior Court* (2013) 216 Cal.App.4th 24, 38.)

The trial court may not abdicate its duty to review the documents to the custodian of records. In *Sisson v. Superior Court*, *supra*, 216 Cal.App.4th 24, the Court of Appeal found that the trial court erred when it **"only examined a document if a custodian affirmatively indicated the document contained discoverable information."** (*Id.* at p. 38.)

Pitchess discovery is available on issues relevant to a motion to suppress evidence (*Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 108-109) or whenever it is **"material to the subject matter involved in**

the pending litigation" (*Eulloqui v. Superior Court*, *supra*, 181 Cal.App.4th 1055, 1064).

Pitchess material may be obtained post-conviction under Penal Code section 1054.9, but within the parameters of relevant Evidence Code sections. (*Hurd* v. *Superior Court* (2006) 144 Cal.App.4th 1100, 1110-1111.) When no *Pitchess* motion was made at trial, the petitioner **"must show that the records are material to the claims he or she proposes to raise, and that those claims are cognizable on habeas corpus."** (*Id.* at p. 1111.) The same is true of general post-conviction *Pitchess* discovery. It can only be obtained when the discovery is material to the subject matter of the pending litigation. (*People v. Nguyen* (2007) 151 Cal.App.4th 1473, 1475.)

When relevant, the defense should ask for material related to officer *credibility*, in addition to evidence of prior complaints of excessive force or other relevant character traits of the officer(s) at issue. (See *People v. Daniels* (1991) 52 Cal.3d 815, 854-855; *People v. Hustead* (1999) 74 Cal.App.4th 410.)

If the defense claims the officer planted evidence on the accused to cover up the use of excessive force, discovery of similar complaints would be warranted to lead to evidence of a "habit or custom" consistent with that defense. (*People v. Gill* (1997) 60 Cal.App.4th 743, 750.)

In *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, the court clarified what is and is not discoverable concerning *departmental investigations* of citizen complaints. (The court also held that *Pitchess* discovery is available in juvenile court proceedings.) Once materiality is shown, the defense is entitled to disclosure of the "discipline imposed" upon the officer, but not the "conclusions" of persons investigating a complaint. (*City of San Jose, supra*, at pp. 54-57; Evid. Code, § 1045; *Haggarty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1088.) Still non-discoverable are, "**'conclusions of any officer,' ... the thought processes of, and factual inferences and deductions drawn by an officer investigating a complaint, concerning such matters as the credibility of witnesses or the significance, strength, or lack of evidence."** (*Id.* at p. 55.)

Penal Code section 832.5 requires law enforcement agencies to investigate complaints against their personnel. When a law enforcement agency conducts an internal affairs investigation based on a complaint made by a defendant, any interviews conducted by the internal affairs division of the agency are discoverable by the defendant through a *Pitchess* motion if those documents are contained in the officer's personnel file. (*Rezek v. Superior Court*, *supra*, 206 Cal.App.4th 633, 642.) This is because **"[w]ere it not for the fact the witnesses' statements are located in personal files of police officers, there would be no question that defendant is entitled to such statements"** under Penal Code section 1054.1. (*Id.* at pp. 643-644.) Since **"the Evidence Code discovery procedure works in tandem with the prosecution's duty to disclose relevant statements of witnesses under subdivision (f) of Penal Code section 1054.1"** witness statements may not be shielded from being discovered by being placed in the peace officer's personnel file. (*Id.* at pp. 642-643; see also *Ibarra v. Superior* Court (2013) 217 Cal.App.4th 695, 701-702 [documents not defined as personnel records by Pen. Code § 832.8 may not be shielded from discovery by being placed in a personnel file].)

Non-public records of the Commission on Judicial Performance are not *generally* discoverable, under *Pitchess* or otherwise. (Evid. Code, § 1040; *Commission on Judicial Performance v. Superior Court (Davidson)* (2007) 156 Cal.App.4th 617.)

Nevertheless, when seeking discovery of police misconduct, counsel can still rely on the expansive view of the scope of *Pitchess* discovery discussed in *People v. Memro* (1985) 38 Cal.3d 658, 679-680: **"It is significant that these statutes [Evid. Code] do not limit discovery ... to cases involving altercations between police officers and arrestees, the context in which *Pitchess* arose. It is also noteworthy that the legislature saw fit to ensure that '[n]othing in this article [Evid. Code, § 1040 et seq] shall be construed to affect the right of access to records of complaints, or discipline imposed ... provided that such information is relevant to the subject matter involved in ... litigation.' (Evid. Code, § 1045, subd. (a).) If anything ... the principles of *Pitchess* were not only reaffirmed but expanded by the 1978 legislation."**

With respect to the scope of *Pitchess* discovery, the Supreme Court has noted that "**California's *Pitchess* discovery scheme entitles a defendant to information that will facilitate the ascertainment of the facts at trial, that is, all information pertinent to the defense.**" (*People v. Gaines* (2009) 46 Cal.4th 172, 183, internal citations and quotation marks omitted.)

The five-year limit on discovery of citizen complaints (Evid. Code, § 1045, subd. (b)(1)) does not violate due process. (*City of Los Angeles v. Superior Court, supra,* 29 Cal.4th 1, 10-17.) **"In holding that *routine* record destruction after five years does not deny … due process, we do not suggest that a prosecutor who discovers facts underlying an old complaint of officer misconduct, records of which have been destroyed, has no *Brady* disclosure obligation. … the Attorney General … as amicus … agreed that, regardless of whether records have been destroyed, the prosecutor still has a duty to seek and assess such information and disclose it if it is constitutionally material."** (*Id.* at p. 12, original. italics, fn. omitted.)

When justified, employment records within the five-year time period must be provided from *any* police agency which employed the officer during that time period, not just from the current employer. (*Fletcher v. Superior Court, supra,* 100 Cal.App.4th 386.) The five-year limitation is not absolute. **"[I]t has been held that records outside the five-year limit can be disclosed: [t]he five-year restriction in section 1045 … applies only to records of complaints, or investigation[s] … or discipline imposed… Other personnel records … are not so restricted and may be obtained upon proper compliance with … 1043, [when relevant]…."** (*Id.* at pp. 399-400, original italics, internal quotation marks and citation omitted.)

In *People v. Breaux* (1991) 1 Cal.4th 281, a capital defendant sought *Pitchess* discovery upon learning the prosecutor planned to offer evidence of his prior felony conviction for battery on a peace officer as evidence in aggravation. (*Id.* at p. 310.) The Supreme Court upheld the limiting of discovery to the five-year period leading up to the 1975 battery conviction but excluding the later period prior to the 1984 murder charge. (*Id.* at pp. 311-312.) Notwithstanding the decision in *Breaux*, a defendant would still be entitled to any relevant *Brady* discovery regardless of the time period. (*City of Los Angeles v. Superior Court*, *supra*, 29 Cal.4th 1, 10; see also *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39.) This is because the materiality threshold for obtaining *Pitchess* evidence is **"both broader and lower"** than that for the disclosure of *Brady* Evidence. (*Eulloqui v. Superior Court*, *supra*, 181 Cal.App.4th 1055, 1064.) A defendant is entitled to *Brady* evidence when it affects the fairness of his trial whereas to obtain *Pitchess* evidence, a defendant need only demonstrate that the evidence is relevant to any aspect of the defense of the case. (*Id.* at pp. 1064-1065.) Thus, if evidence is

relevant under *Brady*, it will always be relevant under *Pitchess*, although the opposite it not always true. (*Ibid.*)

Additionally, *Breaux* was distinguished in *People v. Blumberg* (2011) 197 Cal.App.4th 1245, 1249, which held that when a case is reversed on review and remanded for a new trial, the five-year limitation applies only to the five-year period **"prior to the event that is the subject of the criminal litigation."** Because the defendant in *Blumberg* had been granted a new trial by way of habeas corpus relief, and thus was returned to pre-trial status, **"the trial court had discretion to order discovery of complaints that occurred after the date of the initial, subsequently invalidated, conviction."** (*Ibid.*) Stated another way, the limitation articulate in *Breaux* only applies when a defendant seeks *Pitchess* discovery with respect to a crime for which he has already been convicted. (*Ibid.*) When a defendant is pending trial for the crime which forms the basis of the *Pitchess* motion, a defendant is entitled to complaints which occurred after the incident with which he is charged. (*Ibid.*)

In *California Highway Patrol v. Superior Court (Luna), supra*, 84 Cal.App.4th 1010, disclosure was ordered of **"the investigative report pertaining to the problem police report ... and ... the investigative report pertaining to [a] time card documentation issue."** (*Id.* at p. 1018.) The ruling was based upon a defense argument that the material showed conduct involving moral turpitude, admissible to impeach under *People v. Wheeler, supra*, 4 Cal.4th 284. The Court of Appeal reversed, holding that disclosure of police personnel records even under a *Wheeler* rationale is improper when the moving party doesn't meet the two step test of Evidence Code sections 1043 and 1045. (*California Highway Patrol v. Superior Court (Luna), supra*, 84 Cal.App.4th 1010, 1022-1025.)

In *People v. Hill* (2005) 131 Cal.App.4th 1089, the court ruled *Pitchess* discovery was properly denied because the defense failed to show a plausible specific factual scenario since two civilian witnesses identified the defendant as the shooter – not the officers whose credibility was being challenged. (*Id.* at p. 1099.)

Evidence Code section 1045, subdivision (e), restricts use of disclosed material in that it **"may not be used for any purpose other than a court proceeding pursuant to applicable law."** *Alford v. Superior Court* (2003) 29 Cal.4th 1033 holds that this statute restricts use of disclosed records to the specific case in which disclosure was ordered, but did not deal with information developed as a result of obtaining *Pitchess* disclosure. (*Id.* at p. 1037, fn. 2.)

Chambers v. Superior Court (2007) 42 Cal.4th 673, does address the "derivative information" issue, allowing only very limited use of information developed from *Pitchess* discovery – when the *same* lawyer secures the *same* complainant information by way of a new *Pitchess* motion in a subsequent case. (*Id.* at p. 681.) The new *Pitchess* motion must be brought and granted. In representing Defendant B **"counsel cannot simply use the derivative information developed in Defendant A's case. Doing so would reveal complainant information from the officer's record that is subject to the section 1045(e) protective order under which the disclosure was made in Defendant A's case."** (*Ibid.*)

In bringing the subsequent *Pitchess* motion on behalf of Chambers the attorney **"asked the court to release the name of one of the complainant's that had been disclosed to Washington [Defendant A]. She also asked permission to use, on behalf of Chambers, the derivative information independently developed [in Defendant A's case]. In a sealed declaration [counsel]**

described that derivative information, but did not refer to the complainant by name." (*Chambers v. Superior Court, supra,* 42 Cal.4th 673, 678.) Justice Baxter's concurring opinion states: **"I do not interpret the majority's opinion, or its judgment, to imply that counsel may employ information learned as a direct result of the first *Pitchess* disclosure *to support a later request* for *Pitchess* disclosure in a different case."** (*Chambers v. Superior Court, supra,* at p. 683 (conc. opn. of Baxter, J.), orig. italics.) Justice Baxter's interpretation is not mirrored in the majority opinion, and defense counsel *did* "describe" the derivative information from the first case in the pleadings in the second case. Although the majority does not address the issue, Justice Baxter's interpretation is not binding.

Chambers also does not address what one is allowed to do with information revealed in *testimony* in Defendant A's trial, which is presumably part of a public record and thus available to *anyone* who reviews it.

Alford v. Superior Court also holds that although the prosecutor is entitled to *notice* of the *Pitchess* motion, **"[w]e are not suggesting that such notice include the affidavits and/or any other information in support of the *Pitchess* motion."** (*Alford, supra,* 29 Cal.4th 1033, 1045, fn. 5, citation omitted.) At the hearing, the district attorney has no standing to oppose the request (as he represents neither the officer nor the custodian of records), and he is *not* entitled to copies of the material the defense obtains. (*Id.* at pp. 1043-1046.) To get these records he must meet the same Evidence Code standards. (*Id.* at p. 1046; see also *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 610.) If it leads to *Brady* material **"the prosecutor's obligations, as in any case, are governed by constitutional requirements in the first instance."** (*Alford, supra*. at p. 1046, fn. 6, citation omitted; see *United States v. Henthorn* (9th Cir. 1991) 931 F.2d 29; *United States v. Cadet, supra,* 727 F.2d 1453, 1467.)

Coronado Police Officers Association v. Carroll (2003) 106 Cal.App.4th 1001, involved a Public Defender data base that contains information on law enforcement personnel. Law enforcement sought access to that data base under the California Public Records Act (CPRA) (Gov. Code §§ 6250 et seq). The Court rejected their position, noting that the database **"represents a logical application of the traditional functions of defense counsel…."** (*Id.* at p. 1008.) However, the restrictions of Evidence Code section 1045 and *Alford* apply in making database information available. (*Id.* at pp. 1011-1012.)

The prosecution may get the information through the "back door" in that the officer in question has the right upon a showing of good cause, to be present at the in camera review and to know what is disclosed. He or she can then share it with the district attorney. (*Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409.) But an officer sharing the information in that manner *might* be waiving his privacy rights. (*Id.* at p. 415, fn.4.)

Garden Grove v. Superior Court (2001) 89 Cal.App.4th 430, overturned a trial court order requiring disclosure of police officers' birth dates sought to permit the *prosecutor* (at the request of the defense) to run criminal record checks on them. The court ruled that to be valid such an order must be made in accordance with Evidence Code sections 1043 and 1045, rather than by use of Penal Code section 1054.1. (*Id.* at pp. 433-434.)

In general the CPRA is not an alternative means to secure *Pitchess* materials. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272.) See *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278 for a lengthy discussion of what peace officer information is and is not available under the CPRA.

Although having a police officer's home

address would allow one to explore his or her reputation in his community, normally peace officer home addresses are not discoverable. (*People v. Lewis* (1982) 133 Cal.App.3d 317, 321-322; Pen. Code, § 1328.5.)

Law enforcement is not a "party" in a *Pitchess* hearing and cannot file a peremptory challenge. (*Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270; Code Civ. Proc., § 170.6.)

The defense is entitled to discovery if the records are *material*, but need not show they are admissible. (*Pierre C. v. Superior Court, supra,* 159 Cal.App.3d 1120, 1122-1123.)

Evidence Code section 1047 bars disclosure of records of officers, **"who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of the booking...."** This section, however, does not prevent *all* disclosure that might appear to come within the literal language of the statute. (*Alt v. Superior Court* (1999) 74 Cal.App.4th 950; *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393.)

A defendant in a felony case is not barred from bringing a *Pitchess* motion prior to the preliminary hearing. **"As there is no legislative prohibition against the filing of a *Pitchess* discovery motion before a preliminary hearing is held … such a filing is permissible."** (*Galindo v. Superior Court*, *supra*, 50 Cal.4th 1, 11.) However, because the evidentiary outcome of a *Pitchess* motion is uncertain, a defendant has neither a statutory nor a constitutional right to a continuance to litigate a *Pitchess* motion and obtain discovery pursuant to the motion prior to the preliminary hearing. (*Id.* at pp. 10-13.) The California Supreme Court came to this conclusion based, in part, on the dubious conclusion that at a preliminary hearing the "magistrate could … refuse to admit the testimony of [*Ptichess*] witnesses if strong and credible evidence of defendant's guilt exists apart from the testimony provided by the arresting officers." (*Id.* at p. 9; contra, *Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 90-91.) Presumably then, a defendant may have a right to continue the case to litigate a *Pitchess* motion for use at the preliminary hearing if the prosecution was relying solely on the hearsay testimony of non-eyewitness officers, pursuant to Penal Code section 872, subdivision (b).

Care must be taken to provide a good record for appeal. (*People v. Mooc, supra,* 26 Cal.4th 1216, 1242; 5 Witkin and Epstein, California Criminal Law, (3d ed., 2006 Supp.), § 58A, pp. 34-36.) Documents the trial judge reviewed should be included in the court record for appellate court review or the judge should create an oral record of what documents were examined. (See *People v. Samuels* (2005) 36 Cal.4th 96, 110; *Sisson v. Superior Court, supra,* 216 Cal.App.4th 24, 38.)

Denial of a *Pitchess* motion can be challenged pretrial (*People v. Hill, supra,* 10 Cal.3d 812), and appealed. (*People v. Memro, supra,* 38 Cal.3d 658.) The standard on appeal from denial of a *Pitchess* motion is "abuse of discretion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 824-827; *People v. Gill, supra*, 60 Cal.App.4th 743, 749.) It is the same when the court reviewed records but ordered no disclosure. (*People v. Hughes* (2002) 27 Cal.4th 287, 329-330.) To prevail the defense must also show prejudice. (*People v. Memro, supra*, 38 Cal.3d 658, 684.) Although generally not appealable after a guilty plea, denied *Pitchess* discovery *can* be appealed if related to denial of a suppression motion. (Pen. Code § 1538.5; *People v. Collins* (2004) 115 Cal.App.4th 137, 148-149.)

The sealed transcript of a *Pitchess* hearing and any personnel documents the trial court may have reviewed in camera pursuant to *Pitchess* motion are not part of the normal record on appeal. (Cal. Rules of Court, rule 8.320.) When an appellate claim is premised

on review of the *Pitchess* transcript or the personnel documents before the trial court, **"appellate counsel is required to apply to the superior court for an order that the record include such materials, pursuant to California Rules of Court, rule 8.328(c)."** (*People v. Rodriguez* (2011) 193 Cal.App.4th 360, 366.) However, the appellate court may, in its discretion, augment the record on its own motion to address the issue. (*Ibid.*)

When, on appeal, an appellate court finds that a *Pitchess* motion was erroneously denied, the case should be remanded back to the trial court with directions to grant the motion and conduct the in camera hearing. (*People v. Gaines*, *supra*, 46 Cal.4th 172, 180-181.) If the trial court determines the personnel file contains no relevant information, the judgment should be reinstated. (*Id.* at p. 181.) However, if relevant information is discovered and turned over to the defense, a defendant must be allowed an opportunity to demonstrate that he was prejudiced by the not presenting the evidence at trial. (*Ibid.*) A defendant will only prevail if he can show that there is a reasonable probability would have been different had the information been disclosed. (*Id.* at pp. 182-183.)

7. Discovery relevant to third party suspects

Evidence of third party culpability is *admissible* if **"capable of raising a reasonable doubt of defendant's guilt."** (*People v. Hall, supra*, 41 Cal.3d 826, 833.) It must consist of more than **"mere motive or opportunity"** in that **"there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime."** (*Ibid.*; see also *People v. Valdez, supra,* 32 Cal.4th 73, 106-110.)

"The lowered evidentiary threshold set forth in *Hall* has an obvious impact on the ... discovery available to the ... defendant." (*City of Alhambra v. Superior Court, supra*, 205 Cal.App.3d 1118, 1134.) **"[A] sufficient showing of plausible justification must still contain *facts* demonstrating that there is a reasonable likelihood that the material... is, or might lead to, direct or circumstantial evidence which *links* a third person to the actual crime."** (*Ibid.*, original italics.)

Still, **"admissibility [of evidence] is *not* a prerequisite to discovery."** (*Davies v. Superior Court* (1984) 36 Cal.3d 291, 301, italics added, fn. omitted.)

When drafting a discovery request aimed at third party culpability, counsel should be specific and focus as much as possible on the particular material sought and why it is important to the defense of the case. The request can be made in camera if privileged. In *People v. Kaurish* (1990) 52 Cal.3d 648, the court found no error in a trial court ruling that quashed a subpoena duces tecum for police reports aimed at possible third party culpability, because the request was **"broad and somewhat burdensome [and] made no specific allegations that similar [crimes] had occurred in Hollywood during the same period…."** (*Id.* at p. 687; *People v. Littleton* (1992) 7 Cal.App.4th 906.)

In *City of Alhambra v. Superior Court, supra*, 205 Cal.App.3d 1118, the Court of Appeal found defendant had plausible justification for discovery of twelve homicide reports relevant to possible third party culpability. This case provides a *checklist of factors* the trial court should balance in ruling on a request. **"[T]he court should review (1) whether the material ... is adequately described, (2) whether the ... material is reasonably available to the governmental entity from which it is sought (and not readily available to the defendant from other sources), (3) whether production of the records containing the requested information would violate (i) third party confidentiality or privacy rights or (ii) any protected governmental interest, (4) whether the defendant has acted in a timely manner, (5) whether the time**

required to produce the requested information will necessitate an unreasonable delay in defendant's trial, (6) whether the production of the records containing the requested information would place an unreasonable burden on the governmental entity involved and (7) whether the defendant has ... sufficient plausible justification for the information sought." (*Id.* at p. 1134, fns. omitted.)

To secure a blood sample from a third party suspect one must show probable cause within the meaning of Fourth Amendment search and seizure law. (*People v. Earp, supra,* 20 Cal.4th 826, 882-883.) But if there is an *existing* blood sample of the third party suspect, it should be possible to secure a portion of it for testing without having to show probable cause, since no new bodily intrusion would be necessary.

8. Discovery relevant to police practice of ignoring suspects' Miranda invocations

People v. Peevy (1998) 17 Cal.4th 1184, dealt with issues related to continuing to question a suspect after an invocation of the right to counsel. (See generally, *Miranda v. Arizona* (1966) 384 U.S. 436; *Edwards v. Arizona* (1981) 451 U.S. 477.) In 1988, the Supreme Court abandoned precedent to permit use of these subsequent statements for impeachment. (*Oregon v. Hass* (1975) 420 U.S. 714; *People v. May* (1988) 44 Cal.3d 309) In *May*, Justice Mosk warned that such a rule **"practically invites unlawful conduct."** (*May, supra,* 44 Cal.3d 309, 333-334 (dis. opn. of Mosk, J.).) Although *Peevy* says intentional *Miranda* violations do not bar use of the statements for impeachment, the opinion acknowledges such conduct is *still* illegal. *Peevy* left critical issues undecided. **"We need not determine whether widespread, systematic police misconduct was contemplated by the *Harris* [v. *New York* 401 U.S. 222] decision and whether [such] statements ... would be admissible for purposes of impeachment. Nor ... need we decide whether this court has authority to declare an exception to the *Harris* rule in cases of widespread police abuse ... [because] the argument has not been preserved for appeal."** (*Peevy, supra*, 17 Cal.4th 1184, 1205, citations omitted.)

In *People v. Neal* (2003) 31 Cal.4th 63, the court revisited the issue. **"[I]n light of all surrounding circumstances – including the officer's deliberate violation of *Miranda* … [defendant's] youth, inexperience, minimal education … low intelligence … deprivation and isolation … promise and a threat … defendant's initiation of further contact with the officer was involuntary, and his two subsequent confessions were involuntary as well."** (*Id.* at p. 68.) Thus the statements were inadmissible for any purpose.

The tactic addressed in *Missouri v. Seibert* (2004) 542 U.S 600, was for police to question a suspect without advisement, secure a confession, *then* give a *Miranda* advisement and secure a post-advisement admission. The plurality opinion held the second confession inadmissible. (*Id.* at pp. 614-617.) Although Justice Kennedy did not join the plurality opinion, his separate concurring opinion (*id.* at p. 618), condemned *deliberate* two-step interrogation strategies, making the position the majority holding. **"Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of circumstances.' [citations omitted]"** (*People v. Neal, supra,* 31 Cal.4th 63, 79.) But since intentional violation of *Miranda* is one factor, the defense has the right to discover relevant information about that practice.

Peevy left open the issue of widespread, systematic misconduct and *Neal* says it is a factor to be considered on the issue of voluntariness. Accordingly, defendants can present *evidence* on the issue and therefore obtain discovery to pursue the issue (policies on interrogation, training, etc.). Some attempts may be governed by statutes dealing

with *Pitchess* discovery but with plausible justification, such discovery should be provided.

As *Neal* reaffirmed, involuntary statements are inadmissible for any purpose. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) **"Bluntly put, there is no such thing as an impeachment exception for compelled, coerced, or involuntary statements."** (*Cooper v. Dupnik* (9th Cir. 1992) 963 F.2d 1220, 1250; see also *People v. Montano* (1991) 226 Cal.App.3d 914, 921-929; but see *People v. Baker* (1990) 200 Cal.App.3d 574, cited with approval in *People v. Peevy, supra*, 17 Cal.4th 1184, 1201.) *Cooper* also holds that egregious conduct such as the deliberate, planned and repeated ignoring of a suspect's invocation, "shocks the conscience," and thereby denies substantive due process. (*Cooper*, *supra*, at pp. 1248-1250; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1042; *People v. Branscombe* (1998) 62 Cal.4th 444; *In re Gilbert E.* (1995) 32 Cal.App.4th 1598; *People v. Bey* (1993) 21 Cal.App.4th 1623.)

9. Discovery relevant to the quality of the police investigation

Evidence of sloppy or incomplete police work or police misconduct is usually relevant, helpful and therefore discoverable. In *Kyles v. Whitley, supra*, 514 U.S. 419, a capital case was reversed, in part because the defense was not provided with discovery of evidence of sloppy police investigation and possible misconduct. **"When ... the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it."** (*Id.* at p. 446, fn. 15; *United States v. Howell, supra,* 231 F.3d 615, 625; *United States v. Hanna* (9th Cir. 1995) 55 F.3d 1456, 1459-1461.) Failure to explore informant culpability was a basis for reversal in *Kyles*. (*Kyles, supra,* at pp. 445-451; see *Commonwealth v. Bowie, supra*, 243 F.3d 1109.)

10. Defense testing of physical evidence; right to counsel

In *Prince v. Superior Court* (1992) 8 Cal.App.4th 1176 the judge authorized the release of *a portion* of a vaginal swab to the defense, and a portion to the district attorney, for DNA testing, but further ordered, **"[e]ach party may observe both tests and will be provided with a report on both."** (*Id.* at p. 1179.) The Court of Appeal ruled this order unconstitutional in that it deprived the accused of effective assistance of counsel. **"Effective assistance of counsel includes effective assistance during preparation of a case for trial ... and requires counsel to have his or her client's blood tested where it may exonerate the client. [Citation.] Effective assistance of counsel includes the assistance of experts in preparing a defense [citation] and communication with them in confidence. [¶] … [¶] … allowing … an independent test of the DNA will not unfairly prejudice the People or result in injustice. If the test matches Prince with the crime, defense counsel will not call the expert and the case will proceed on evidence already possessed by the People as if the defense test had not been made. The People will have, at least, four semen test samples. If the defense test excludes Prince, the tester will surely testify and the defense will have to disclose his or her identity and provide any report to the prosecution."** (*Id.* at p. 1180.)

Critical to the holding is that there was *additional* material for the prosecution to test. This distinguishes *Prince* from *People v. Cooper* (1991) 53 Cal.3d 771, where the court held the defense could be denied the opportunity to *confidentially* test blood samples that would be *entirely consumed* in the testing process. (*Id.* at pp. 814-816; see also *People v. Bolden* (2002) 29 Cal.4th 515, 552.)

Prince represents one end of the spectrum, *Cooper* the other, and in between is *People v. Varghese* (2008) 162 Cal.App.4th 1084. In *Varghese* the prosecution had tested a blood sample and the defense wanted to confidentially test the remainder of the sample, conceding **"his testing might consume what remained of [the sample]"** (*Id.* at p. 1090), but later claimed it was unclear whether it would be fully consumed. (*Id.* at p. 1091.) Relying on *Cooper*, the appellate court affirmed the trial court ruling which gave the defense the option of having a neutral expert test the sample, with both parties sharing in the results, or have the defense expert test it but also reveal the **"bottom line result of the test, that is, whether the testing identified the defendant or not."** (*Id.* at p. 1095.) The court found the factual closer to *Cooper* than *Prince* because the prosecutor would be left with no way to corroborate their initial test if the defense challenged those results. (*Ibid.*)

The right to confidentially test physical evidence does not include the right to *secure* at least certain kinds of evidence, such as a firearm, from the police for testing without notice to the prosecutor. (*Walters v. Superior Court (Ubina)* (2000) 80 Cal.App.4th 1074.)

Again, to get a blood sample from a third party the defense must show "probable cause" within the Fourth Amendment law of search and seizure. (*People v. Earp, supra,* 20 Cal.4th 826, 882-883.) If a sample *exists,* securing a portion for testing may be possible without having to show probable cause.

11. Right to confidential request for discovery

In *City of Alhambra v. Superior Court, supra*, 205 Cal.App.3d 1118, the court recognized that when privileged information is offered to show plausible justification, an in camera showing is permitted. **"Will disclosure to the prosecutor 'conceivably' lighten the People's burden or will it serve as a 'link in a chain of evidence tending to establish guilt'? Is the information ... subject to some constitutional or statutory privilege or immunity? If the answer to either question is yes then disclosure should not be made."** (*Id.* at p. 1131; *Garcia v. Superior Court, supra,* 42 Cal.4th 63, 75-76 [reciprocal discovery modifies analysis of the constitutional issue].) The California Supreme Court in *Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 382-383, noted that in camera procedures are within the *discretion* of the trial court.

In *People v. Superior Court (Barrett), supra,* 80 Cal.App.4th 1305 the court ruled that a defendant utilizing a subpoena duces tecum "**should be permitted to present his relevancy theories at an in camera hearing [as] necessary to protect [his] Fifth Amendment right against self incrimination and Sixth Amendment right to counsel."** (*Id.* at p. 1320-1321, citations omitted.) The court said: **"[I]t would be inappropriate to give Barrett the Hobson's choice of going forth with his discovery efforts and revealing possible defense strategies and work product to the prosecution, or refraining from pursuing these discovery materials to protect his constitutional rights and prevent undesirable disclosures to his adversary."** (*Id.* at p. 1321, citations omitted; *Teal v. Superior Court* (2004) 117 Cal.App.4th 488.)

However, when a prosecutor claims privilege he is not *automatically* entitled to an in camera hearing. (*Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 870; see also Evid. Code, § 915, subd. (b).) The same likely applies to defense counsel as well.

The defense must *request* an in camera hearing if he or she wishes to protect work product or other privileges. (*People v. Cook* (2006) 39 Cal.4th 566, 583-584.)

In camera procedures can be risky.

Counsel's view of privilege may differ from the judge's. **"[I]f the claim of confidentiality cannot be sustained as to some or all of the material ... then such material should be made available to the prosecutor (and, where appropriate, interested third parties) so that all parties will have the fullest opportunity possible to participate in those proceedings which will determine what, if any, discovery should be ordered."** (*City of Alhambra, supra*, 205 Cal.App.3d 1118, 1131; *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1079-1080 [court may unseal portions of an in camera hearing which do not involve privileged communications].) If the court is inclined to grant opposing counsel access to the in camera proceedings or the materials at issue in the proceedings, counsel can withdraw the request, or seek writ relief.

Ex parte proceedings are the *exception*, and cases reveal a reluctance to utilize in camera procedures, as well as resistance to broad protective orders. (*Department of Corrections v. Superior Court (Ayala)* (1988) 199 Cal.App.3d 1087; *Walters v. Superior Court (Ubina), supra*, 80 Cal.App.4th 1074.)

In capital cases, Penal Code section 987.9 is highly protective of defense confidentiality.

12. Discovery of privileged or confidential material; and Penal Code section 1054.7

Both prosecutors and defense lawyers have their work product protected from disclosure. (Pen. Code, § 1054.6; *People v. Coddington, supra*, 23 Cal.4th 529, *People ex rel. Lockyer v. Superior Court* (2000) 83 Cal.App.4th 387, 398; but see *People v. Zamudio* (2008) 43 Cal.4th 327, 354-356 [work product more narrow for cases arising after June 1990, Prop. 115].) The privilege can be waived by disclosure to a third party.

A prosecutor or third party may object to defense discovery or subpoena duces tecum by claiming privilege. (*People v. Jackson, supra,* 129 Cal.App.4th 129, 169, fn. 126; *Kling v. Superior Court*, *supra*, 50 Cal.4th 1068, 1079-1080.) A prosecutor may also assert a privilege *on behalf* of a third party by filing a motion to quash a subpoena duces tecum. (*Kling*, *supra*, at pp. 1079-1080.)

It is not uncommon for prosecutors to black out certain witness information before providing the redacted police report, without a "good cause" showing (see Pen. Code § 1054.7) particularly in cases with "gang issues." This practice should be challenged, particularly given the protections in place under Penal Code section 1054.2 which prohibits counsel from revealing **"the address or telephone number of a victim or witness … disclosed … pursuant to … Section 1054.1"** to the accused, his family **"or anyone else,"** unless authorized by the court for **"good cause."** Counsel is permitted to disclose the information **"to persons employed by the attorney or appointed by the court to assist in the preparation of the defendant's case, if … required for that preparation."** (5 Witkin and Epstein, California Criminal Law, (3d ed. 2000), § 36(2), p. 84.) These people must be informed that further dissemination is prohibited except as permitted under the statute. (*Ibid.*)

When a defendant represents himself (*Farretta v. California* (1975) 422 U.S. 806), Penal Code section 1054.2, subdivision (b), allows the information to go to the defendant's court-appointed licensed investigator **"or by imposing other reasonable restrictions...."** (See also *People v. Carson* (2005) 35 Cal.4th 1, 12-13.)

When a prosecutor claims privilege the first question is whether there is a valid claim of privilege. If not, the general law of discovery applies. A prosecutor claiming privilege is not automatically entitled to an in camera hearing. **"[A]n in camera hearing is not proper on a claim of official privilege unless the party claiming the privilege explains in open court why the official**

privilege applies or declares that it cannot do so without betraying the privilege." (*Torres v. Superior Court, supra*, 80 Cal.App.4th 867, 870; see also Evid. Code, § 915, subd. (b).) There is no authority requiring the hearing to be before a judge other than the one to whom is it currently assigned. (*Torres*, *supra*, at p. 870.)

If a privilege does apply, the right to a fair trial (due process of law) and right to confrontation should be asserted on behalf of the defendant to compel disclosure, the privilege notwithstanding. The usual procedure is for the trial judge to review the material in camera and order relevant material disclosed. In *Delaney v. Superior Court, supra*, 50 Cal.3d 785, 807-816, the court discussed how the trial court should balance relevant factors for and against disclosure, and the burden on the moving party. (See also *People v. Marshall* (1996) 13 Cal.4th 799.)

Under Penal Code section 1054.7 disclosure may be **"denied, restricted, or deferred"** but only if good cause is shown. **"'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement."** (*Ibid.*)

This issue arose in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, a capital case in which two inmates were charged with killing a fellow inmate in the L.A. County jail. The trial court granted the district attorney's request to *permanently* conceal the identity of crucial prosecution witnesses from the defense, **"on the ground that disclosure ... [would be] likely to pose a significant danger to their safety."** (*Id.* at p. 1125.) The California Supreme Court affirmed the portion of the order that permitted concealing witness identities before trial, but struck down the portion of the order that extended to the trial itself and beyond. (*Id.* at pp. 1134-1149.) In doing so, the court recognized that the right to confrontation under the Sixth Amendment to the United States Constitution includes more than being permitted to confront the witness in person in court, and more than mere cross-examination. (*Id.* at p. 1137.) It includes the right to know who the witness is and where he lives so that **"testimony may be sought and offered of his reputation for veracity in his own neighborhood."** (*Id.* at pp. 1137-1140.)

Witness vulnerability is greater for inmates than for others, which may help limit *Alvarado* to its facts. In any event, *Alvarado* must be read carefully when the district attorney invokes Penal Code section 1054.7 to hide information, and those efforts should be strenuously opposed. The protections of Penal Code section 1054.2 make additional secrecy unnecessary in most cases.

Alvarado is troubling in that it continues to follow a line of cases that ignore the very real defense need for *pretrial* disclosure in order to investigate issues relevant to the veracity of the prosecution witnesses. The only "remedy" seems to be securing a continuance to conduct that investigation, but most courts are reluctant to grant continuances to the defense on the eve of trial or mid-trial. (See generally *People v. Yeoman* (2003) 31 Cal.4th 93, 134-136.)

The California Supreme Court revisited the issue in *People v. Valdez*, *supra*, 55 Cal.4th 82. The defendant in *Valdez* was alleged to have killed five people in gang-related homicides. The People obtained a number of orders under Penal Code section 1054.7 which allowed the prosecutor to withhold the identities of the witnesses from the defense. However, the trial court also ordered the prosecution to make the witnesses available to the defense prior to trial and to provide the defense with a list of prior convictions for each witness. The defense was able to interview **"the vast majority of witnesses"** prior to trial, but their names were not disclosed. (*Id.* at p. 110.) The trial court

also **"invited defendant's counsel to seek amendment of the order should he determine that further disclosure was necessary**" and indicated that **"it would grant defense counsel continuances during trial upon a showing that he delayed disclosure of the witnesses' identities had hampered counsel's ability to prepare for cross-examination."** (*Id.* at pp. 110-111.) The prosecution ultimately disclosed the names of the witnesses during opening statement and prior to the introduction of evidence. On appeal, defendant claimed that the delayed disclosure prevented the defense from conducting investigation critical to the defense of the case. The Supreme Court rejected this argument, holding that if the defendant's ability to investigate was impaired by the non-disclosure, he should have sought modification of the order in the trial court and, if necessary, have asked for a continuance during trial to investigate. (*Ibid.*)

The lesson of *Valdez* is to treat an order issued under Penal Code section 1054.7 as a fluid order subject to modification as facts change. If the prosecutor is successful in obtaining such an order, defense counsel should seek modification of the order if the order in any way impairs counsel's ability to investigate the case.

While Penal Code section 1054.7 may under certain circumstances justify *non-disclosure*, trial courts may not use the statute to deny defendant's *access* to witnesses without a showing that such accesses would be harassing or accompanied by threats or harm. In *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, the prosecutor tried to restrict defense access to alleged rape victims, providing the trial court with declarations from 13 of the 15 victims in support of his formal request. (*Id.* at p. 1330.) The district attorney offered the defense telephone access to these persons, or access in the district attorney's office, or access in defense counsel's office but with the witnesses accompanied by a district attorney investigator, although the meetings could be "alone" with the witnesses, but the defense rejected these alternatives. (*Id.* at pp. 1330-1331.) The trial court ordered disclosure of the names and addresses, but restricted the defense to communication only in writing. (*Id.* at p. 1331.) The court acknowledged (and the parties agreed) that, **"the due process clause of the state and federal constitutions and our state criminal discovery statutes ... govern access to prospective witnesses and any exception to such access."** (*Id.* at p. 1333.) The court held that although relevant factors could **"conceivably"** support a valid order restricting defense access to witnesses, restrictions cannot be imposed, **"unless there has been a showing of sufficient danger of harassment, threats or harm to the victims to justify a prohibition against the defense directly contacting [them]."** (*Id.* at p. 1335.) Absent that showing prohibiting direct contact is not justified. (*Ibid.*)

In *People v. Hernandez* (2012) 53 Cal.4th 1095, two co-defendants executed declarations about the incident as part of their plea agreements. The court released the declarations to defense counsel but prohibited counsel from sharing the declarations with their clients. The Court of Appeal reversed and found that the order **"violated [defendant's] right to counsel under the Sixth Amendment to the United States Constitution, requiring automatic reversal without a showing of prejudice."** (*Id.* at p. 1102.) The California Supreme Court **"accept[ed]"** the appellate court's conclusion on the deprivation of the right to counsel but disagreed on the issue of prejudice holding that **"a violation of the Sixth Amendment right to effective representation is not complete until the defendant is prejudiced."** (*Id.* at p. 1105, internal quotation, italics and citation omitted.)

A victim's fear, absent *evidence* of threats or danger, harassment or gang affiliation, is

insufficient to justify restricted access. (*Reid v. Superior Court*, *supra*, 55 Cal.App.4th 1326, 1336; see also *Montez v. Superior Court* (1992) 5 Cal.App.4th 763; *Miller v. Superior Court* (1979) 99 Cal.App.3d 381.)

People v. Hammon (1997) 15 Cal.4th 1117 severely restricts pretrial access to material covered by the *psychotherapist-patient* privilege. *Hammon* held, under the facts presented in that case, that a trial court's balancing of a defendant's due process rights and a third party's privacy rights with respect to records sent to the court under a subpoena duces tecum and covered by the psychotherapist-patient privilege, should be delayed until trial. A broad reading of the holding would limit defense access to subpoenaed mental health records to trial, eliminating the right to pretrial discovery of the records. However, it is critical to remember the *limited* nature of what the court addressed. **"[I]n asking whether the trial court has a duty to review confidential or privileged records in camera, we are concerned *exclusively* with the records requested *from the psychologists.*"** (*Id.* at p. 1122, italics added; Evid. Code, § 1014.) Also, the *facts* of the case made the argument for pretrial disclosure less compelling. **"[D]efendant at trial admitted engaging in sexual conduct with [victim], thus largely invalidating the theory on which he attempted to justify pretrial disclosure of privileged information. Pretrial disclosure *under these circumstances*, therefore, would have represented not only a serious, but an *unnecessary*, invasion of the patient's statutory privilege ... and constitutional right of privacy. (Cal. Const., art. I, § 1; see *People* v. *Stritzinger* (1983) 34 Cal.3d 505, 511-512... [recognizing the psychotherapist-patient privilege as an aspect of the privacy right])."** (*Id.* at p. 1127, "unnecessary" italics original; other italics added.) *Hammon* certainly would not apply to records outside the psychotherapist-patient privilege and arguably would not apply to situations where a defendant's proffer is detailed and specific and where the defense theory is clear.

Although the *Hammon* court refused to acknowledge a right to *pretrial* in camera review of the psychologist records based on a Sixth Amendment right to confrontation argument, it did so only because the United States Supreme Court has left that constitutional question unresolved. (*People v. Hammon*, *supra*, 15 Cal.4th 1117, 1125-1127.) **"When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon ... to balance the ... need for cross-examination and the state policies the privilege is intended to serve. [Citation.] Before trial, the court typically will not have sufficient information [for] this inquiry [risking unnecessary disclosure]."** (*Id.* at p. 1127.)

Counsel can continue to request pretrial disclosure of psychologist records particularly if more compelling *facts* support it. As *Hammon* concedes, no U.S. Supreme Court case has precluded pretrial review or disclosure of such records across the board. The obvious lesson of *Hammon* is that, assuming pretrial disclosure or review is denied, counsel must be alert to demand the records (or at least in camera review) *during* trial. Repeated requests can and should be made as trial developments make disclosure more compelling. (See *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 60.) Even if there has been in camera review, and whether or not some material has been provided, disclosure or additional disclosure may be appropriate as trial dynamics change. (*Ibid.*)

Equally important is that *Hammon* deals *exclusively* with the *psychotherapist-patient* privilege and does not bar *pretrial* discovery (or in camera review), of otherwise privileged material. **"'The psychotherapist-client privilege is broader than other privileges. Unlike the physician-patient privilege, for**

example, the psychotherapist-client privilege can be invoked in a criminal proceeding. [Citations.]' (*People* v. *John B.* (1987) 192 Cal.App.3d 1073, 1076-1077....)" (*Nielsen v. Superior Court, supra*, 55 Cal.App.4th 1150, 1154.)

"Communications potentially can be privileged under both the psychotherapist-patient privilege and the attorney-client privilege, and even if the former privilege is waived or otherwise inoperative, the latter privilege will still operate to render the communication confidential and privileged." (*People v. Gurule, supra,* 28 Cal.4th 557, 594.) **"[A] criminal defendant's right to due process of law does not entitle him to invade the attorney-client privilege of another. [Citation.]"** (*Ibid.*, but see *Vela v. Superior Court* (1989) 208 Cal.App.3d 141.)

Privacy protections and a policy encouraging witnesses to come forward make it difficult to get a court-ordered psychiatric examination of a witness even when it appears justified. (*People v. Anderson* (2001) 25 Cal.4th 543, 575-578.)

Doe 2 v. Superior Court (2005) 132 Cal.App.4th 1504, a civil case, sheds light on the clergy-penitent privilege (Evid. Code, §§ 1030-1034), that could also be raised to resist defense discovery. For the privilege to apply the communication must be made in confidence, with no third person present as far as the "penitent" knows, to a cleric authorized or accustomed to hear such communications, and who under the tenants of the faith has a duty to keep the communication secret. (Evid. Code § 1032.) The person need not be a member of the religious group and the communication need not be for the purpose of confession (*Doe 2, supra,* at p. 1517), *unless* the church authorizes its clergy to only hear penitent communications from church members. (*Id.* at p. 1517, fn. 13.) The privilege also does not apply if the person making the statement does not intend the communication to be kept confidential. (*Id.* at p. 1518.)

Arguably a client's right to due process could prevail over the privilege of a third party and the court could be asked to weigh the competing interests. But the third party would have the right to notice and to be heard. (*Doe 2 v. Superior Court, supra,* 132 Cal.App.4th 1504, 1520.)

Another privilege that can stand in the way of defense discovery involves the media shield law. (Cal. Const., art. I, § 2; Evid. Code, § 1070; see *People v. Ramos* (2004) 34 Cal.4th 494, 523-528.) These laws protect news sources and unpublished information from forced disclosure, and apply to both the defense and prosecution.

In *Miller v. Superior Court* (1999) 21 Cal.4th 883, the prosecutor sought the entire tape of an interview with the defendant in a homicide case, including both broadcast footage and the outtakes. The television station provided the portion that had been broadcast, but sought to quash the subpoena for the outtakes. (*Id.* at p. 888.) The court held that a prosecutor's right to due process of law under the state constitution does not prevail over the media shield privilege. But a defendant has greater rights. **"[T]he protection of the shield law must give way to a conflicting federal constitutional right of a criminal defendant. As we stated in *Delaney* [*v. Superior Court* (1990) 50 Cal.3d 785]: '[T]he shield law's protection is overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial.' ... The incorporation of the shield law into the California constitution cannot restrict a criminal defendant's *federal* constitutional right to a fair trial."** (*Id* at p. 891, original italics.) Again drawing upon *Delaney,* the court restated the "two-stage inquiry" necessary to determine whether the contempt power of the court could be utilized to compel disclosure.

"At the threshold, the defendant must show 'a reasonable possibility [that] the information will materially *assist his defense*' [if shown] the court [will] balance the criminal defendant's and newspaper's rights, considering whether the unpublished information ... is confidential or sensitive, the degree to which the information is important to the criminal defendant, whether there is an alternative source of unpublished information, and whether there are other circumstances which may render moot the need to avoid disclosure." (*Miller v. Superior Court, supra,* 21 Cal.4th 883, 891-892, citations omitted.)

Although it would seem the media shield law, based primarily on protecting news sources from disclosure, would yield when *the defendant* is both the source and the party seeking disclosure, that issue has not been resolved. (*People v. Vasco* (2005) 131 Cal.App.4th 137, 152, fn.3.)

The media shield law arose in another context in *Fost v. Superior Court* (2000) 80 Cal.App.4th 724. The defense subpoenaed a newspaper reporter to testify about *published* information useful in impeaching a key prosecution witness. The defense agreed not to seek anything concerning unpublished information. The district attorney sought to quash the defense subpoena, claiming the agreement with the defense would deprive the People of their right to cross-examination. (*Id.* at pp. 728-729.) The Court of Appeal, citing *Miller,* said the People's constitutional right to due process of law does not include the right to compel press disclosure of unpublished material. (*Fost, supra,* at pp. 730-731.) Here, however, the prosecution claim is based on the right to cross-examination, pitting the defendant's right to a fair trial against the district attorney's right to cross examine. The court said, **"[W]hile the 'virtually absolute protection' provided under the shield law need never yield to any superior constitutional right of the People, 'the protection of the shield law must give way to a conflicting federal constitutional right *of a criminal defendant.'"*** (*Id.* at p. 731, original italics, citation omitted.) But to protect a defendant's right to a fair trial may mean permitting the district attorney to breach the media shield. **"We hold that where … a defense witness protected under the shield law resists proper cross-examination on the ground of that law, the testimony of the witness on direct examination, though it did not consist of 'unpublished information' protected by the shield law, may on an appropriate motion by the People be barred or stricken *unless the defendant can show that the refusal of the court to receive such evidence would deprive him of a federal constitutional right to a fair trial, and that, in the circumstances, his right transcends that of the witness under the shield law.*"** (*Id.* at pp. 732-733; italics added.) The net effect here is the defense must meet a constitutional burden despite the fact that no privileged information is being offered on direct examination. Admissibility of the defense testimony ultimately depends upon whether the witness will submit to cross-examination on unpublished material, or suffer the consequences of a contempt citation.

"A criminal defendant's federal constitutional right to a fair trial, and specifically the Sixth Amendment right 'to have compulsory process for obtaining witnesses in his favor,' cannot be deemed to include the right to call a witness who cannot be subjected to proper cross-examination, either because of protections the witness enjoys under the shield law or for any other reason." (*Fost v. Superior Court*, *supra*, 80 Cal.App.4th 724, 736; see also *People v. Gurule, supra,* 28 Cal.4th 557, 605.)

"Where a defense witness protected by the shield law refuses to disclose 'unpublished information' sought by the People on proper cross-examination, the

remedy is for the People to move to exclude or strike related testimony ... on direct examination. The motion should be granted unless the defendant can show that excluding ... such evidence would deprive him of his federal constitutional right to a fair trial and, if he makes this threshold showing, that his right transcends the conflicting right protected by the shield law." (*Fost v. Superior Court, supra,* 80 Cal.App.4th 724, 737-738.)

The right to privacy (Cal. Const. art. I, § 1) can restrict discovery, subject to in camera review and disclosure if the defendant's due process rights compel it. (*Rubio v. Superior Court* (1988) 202 Cal.App.3d 1343, 1350.)

The privilege against self-incrimination may be invoked by a witness even though he or she denies culpability, and is *not* formally charged with a crime. (*Ohio v. Reiner* (2001) 532 U.S. 17.) The privilege presumably could be invoked in response to a defense subpoena duces tecum or request for information. (See *United States v. Hubbell* (2000) 530 U.S. 27, 36-37.)

The "official information privilege" of Evidence Code section 1040, subdivision (b)(2), is difficult to overcome, at least in a civil case. (*County of Orange v. Superior Court (Wu)* (2000) 79 Cal.App.4th 759.) Suspects in a homicide investigation sought Sheriff's records in a civil suit against the Sheriff. In overturning the order granting the discovery the Court of Appeal referred to the **"broadly recognized confidentiality of investigative files…."** (*Id.* at p. 765; see also *People v. Jenkins, supra*, 22 Cal.4th 900, 956-957.) The records were not discoverable under the California Public Records Act or any other theory posed by the plaintiffs. (See also *Copley Press, Inc. v. Superior Court, supra,* 39 Cal.4th 1272.) Even so, the material is unavailable only for **"some reasonable period … but not forever. ... [a] court may find the trail has grown cold and there is no reasonable probability the case will be solved."** (*County of Orange v. Superior Court (Wu), supra*, 79 Cal.App.4th 759, 768, fn. omitted.) The "official information privilege" should not apply to the defendant's own case, but could as to an investigation involving a third party suspect. (*People v. Jackson* (2003) 110 Cal.App.4th 280.)

Other privileges may have to be overcome in seeking discovery. *Pitchess* discovery is discussed above. Discovery of the identity of a confidential informant is discussed below. Other cases dealing with discovery of privileged material include: *Pennsylvania v. Ritchie, supra*, 480 U.S. 39 [juvenile records; due process of law]; *Davis v. Alaska* (1974) 415 U.S. 308 [right to confrontation]; *People v. Luttenberger, supra*, 50 Cal.3d 1; *In re Keisha T.* (1995) 38 Cal.App.4th 220, 235; *People v. Von Villas* (1992) 10 Cal.App.4th 201; but see: *People v. Webb, supra,* 6 Cal.4th 494, 517-518 [in dicta, no due process right to a *private* person's privileged material not in the hands of a state agency, even if "material"].

Some material in the hands of law enforcement is subject to disclosure under the California Public Records Act (CPRA) (Gov. Code, § 6250 et. seq.), and some are exempt. Among records exempt from disclosure are **"records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the … Attorney General and … Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes…."** (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1068; Gov. Code § 6254(f).) *Haynie* involves the record of an investigative stop that was *not* followed by an arrest. In ruling the report was exempt from disclosure the California Supreme Court contrasted and reconciled the case with *Uribe v. Howie* (1971) 19 Cal.App.3d 194 and *Williams v. Superior*

Court (1993) 5 Cal.4th 337, among others. (*Haynie, supra*, at pp. 1068-1071.) The "investigatory" exemption generally applies "'**only when the prospect of enforcement proceedings [become] concrete and definite.'"** (*Id.* at p. 1069.) However, **"'[i]nformation independently exempt, such as "intelligence information" … is not subject to the requirement that it relate to a concrete and definite prospect of enforcement proceedings.'"** (*Ibid.*, citation omitted.) The same is true of **"records of investigations"** which are **"exempt on their face.…"** (*Ibid.*) The court also rejected the alternative argument that the records should be disclosed under Government Code section 6254, subdivision (f)(2). (*Id.* at pp. 1071-1072.)

Coroner and autopsy reports are exempt from disclosure under the CPRA (Gov. Code, § 6254, subd. (f)), at least when the reports **"constitute an investigation of a death that was a suspected homicide in which the prospect of criminal law enforcement proceedings was concrete and definite."** (*Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1279.)

The CPRA does not permit sidestepping the restrictive statutory hurdles that apply to *Pitchess* discovery. (*Copley Press, Inc. v. Superior Court, supra,* 39 Cal.4th 1272; see Evid. Code, §§ 1043 et. seq., Pen. Code, §§ 832.7 and 832.8.) When documents are sought under the CPRA any claim that the documents are protected from disclosure under the pending litigation exemption is invalid except as to documents **"specifically prepared for use in litigation."** (*County of Los Angeles v. Superior Court (Axelrad)* (2000) 82 Cal.App.4th 819, 830.) **"[A] government agency 'cannot take records which were not exempted in their genesis and transform them into exempt "litigation" documents simply because they *later* become relevant to a lawsuit.' (*City of Hemet, supra* 37 Cal.App.4th at p. 1418, original italics) ... a document is protected from disclosure only if it was specifically prepared for use in litigation. (*City of Hemet, supra* ... at p. 1420.)"** (*Id* at p. 831.) The claim of work-product privilege could be resolved by examining the documents in camera. (*Id.* at p. 833.)

Information may be obtained through the federal Freedom of Information Act. (5 U.S.C., § 552.) In *Lissner v. U.S. Customs Service* (9th Cir. 2001) 241 F.3d 1220, a resident of Hermosa Beach used the act for information about an incident where two local police officers were arrested for smuggling steroids into the country. After the Customs Service denied his request the resident went to the District Court and Ninth Circuit and ultimately prevailed in his quest.

When discovery is denied as privileged, the issue may resurface on appeal. **"Parties who challenge on appeal trial court orders withholding information as privileged or otherwise nondiscoverable 'must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record.' [Citation.]"** (*People v. Price* (1991) 1 Cal.4th 324, 493; see also *People v. Avila* (2006) 38 Cal.4th 491, 607.)

Susan S. v. Israels (1997) 55 Cal.App.4th 1290 upheld tort liability against a defense lawyer for *unauthorized reading* of the crime victim's confidential mental health records, sent to counsel in error in response to a subpoena duces tecum. The records were protected under the constitutional right to privacy and should have been reviewed by the judge prior to being released to counsel. (*Id.* at pp. 1294-1296.)

Dismissal of a similar suit was upheld in *Mansell v. Otto* (2003) 108 Cal.App.4th 265 because counsel used proper channels to secure the medical records. (*Id.* at pp. 276-279.)

13. Confidential Informants

Evidence Code section 1041 creates a *limited* right to keep the identity of a police informant confidential. However, the identity of a percipient witness is not protected from disclosure by this statute. (*Torres v. Superior Court, supra,* 80 Cal.App.4th 867, 872.)

Upon proper showing the prosecutor may demonstrate privilege in an in camera hearing in which a record should be made. (Evid. Code, § 1042, subd. (d); see *Torres v. Superior Court, supra,* 80 Cal.App.4th 867, 874.) The defense should be able to propose questions to be asked and the ultimate issue of disclosure should be addressed later in an adversarial hearing where the defense can fully enunciate the need for disclosure, and testimony heard if needed. (*Ibid.*)

Disclosure must be made when the defense shows the informant is a material witness who might help exonerate the accused. **"The defendant bears the burden of adducing some evidence on this score."** (*People v. Lawley* (2002) 27 Cal.4th 102, 159, citations and internal quotations omitted.) Failure to disclose a material witness requires dismissal. (*Ibid.*; see *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851.)

The prosecutor must disclose any inducement or consideration given to an informant. (*Giglio v. United States, supra,* 405 U.S. 150, 153; see also Pen. Code, § 1127a, suds. (c) and (d).)

14. Discovery of Jury Lists and Venire

The defendant in *People v. Jackson* (1996) 13 Cal.4th 1164, sought materials to challenge the jury selection process, requesting: **"the present master list for the jury pool and for the continued administration of a detailed jury survey similar to one [in a related case]."** (*Id.* at p. 1193.) Although it was not error to deny the request, the court said: **"A defendant … is obviously not required to justify that request by making a prima facie case of underrepresentation. Rather, upon a particularized showing supporting a reasonable belief that under-representation … exists as a result of … systematic exclusion, the court must make a reasonable effort to accommodate … relevant requests for information designed to verify the existence of such underrepresentation and document its nature and extent. (Cf. *City of Santa Cruz* v. *Municipal Court* (1989) 49 Cal.3d 74, 93... [complaints of excessive force by arresting police officers discoverable by the defendant upon 'reasonable belief.'].)"** (*Id.* at p. 1194.)

15. Discovery of the district attorney's charging policies and practices

Prosecutors have wide latitude in filing decisions (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838-839), as long as the charges are supported by probable cause. (Rules Prof. Conduct, rule 5-110.)

But wide latitude does not mean carte blanche. In *United States v. Armstrong* (1996) 517 U.S. 456, the defense claimed there was evidence of abuse of prosecutorial charging discretion in enforcement of statutes that punish crack cocaine sales, in that African-American men appear to be targeted disproportionally when compared to the general population. Writing for the majority, Chief Justice Rehnquist said: **"[A] prosecutor's discretion is 'subject to constitutional constraints.' ... One ... imposed by the equal protection component of the Due Process Clause ... is that the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'"** (*Id.* at p. 464, citations omitted.) As to discovery aimed at showing abuse of charging discretion, however, the court was not generous. Although the defense showed all 24 cases brought under specific

federal drug statutes charged black people, the showing was ruled inadequate because, **"[t]he study failed to identify individuals who were not black [who] could have been prosecuted for the [same] offenses ..., but were not so prosecuted."** (*Id.* at p. 470.) This is a nearly impossible burden. How does one gather information about who could have been prosecuted *but was not*? Police agencies are not likely to provide information about arrests that were *not* prosecuted and courts could quash a subpoena duces tecum for such materials.

Armstrong is consistent with other cases, state and federal, that make discovery of this nature difficult to obtain. Innovative investigation, however, may yield material unavailable through discovery or reveal information to bolster a discovery request.

Such discovery *can* be secured where the defense is able to meet that difficult burden. In *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, the defendant was successful in securing an order for discovery **"in support of his contention that the district attorney's pursuit of the grand theft count was an unconstitutionally discriminatory prosecution."** (*Id*. at p. 1179.)

The standard of review is abuse of discretion. (*People v. Superior Court (Baez)*, *supra*, 79 Cal.App.4th 1177, 1185.) The burden to secure the discovery is that **"the defendant must produce 'some evidence' of discriminatory effect and discriminatory intent"** as stated in *Armstrong, supra*, rather than the lighter "plausible justification" burden of *Murgia v. Municipal Court* (1975) 15 Cal.3d 286. (*People v. Superior Court (Baez), supra*, 79 Cal.App.4th 1177, 1187-1188.) To meet the *Armstrong* burden a defendant must show (among other things) that similarly situated persons were not prosecuted. (*Id*. at p. 1189-1190.) The court ruled 2-1 that the defense met the burden. Evidence supporting the order consisted of non-hearsay parts of declarations from two lawyers who represented clients who had similarly misrepresented their income in relation to their housing assistance benefits, but who were not prosecuted in criminal courts. (*Id*. at pp. 1191-1194.)

At times, suspicion arises that the decision to seek death was reached for an improper reason, racial or otherwise. These concerns should be fully investigated, but discovery of capital charging policies and practices is limited. Disclosure won't be ordered unless one can **"show by direct or circumstantial evidence that … discretion was exercised with *intentional and invidious discrimination in his case*. [Citations.] In theory [defendant] may also show a 'constitutionally unacceptable' risk that an irrelevant and invidious consideration is systematically affecting the application of a facially valid capital sentencing scheme. [Citation.] In light of the substantial discretion properly allowed … in the capital sentencing process ... any statistical or comparative evidence ... must demonstrate a 'significant,' 'stark,' and 'exceptionally clear' pattern of invidious discrimination. [Citation.]"** (*People v. Keenan* (1988) 46 Cal.3d 478, 506, original italics, fns. omitted; *People v. Ashmus* (1991) 54 Cal.3d 932, 979-980.)

The Supreme Court held nationwide statistics showing black people charged with "death eligible offenses" more than twice as often as whites fail to meet the *Armstrong* test for discovery, as they do not show how *similarly situated* persons are prosecuted. (*United States v. Bass* (2002) 536 U.S. 862.)

In *People v. McPeters* (1992) 2 Cal.4th 1148, the defense sought **"a vast amount of statistical data on cases filed and charging decisions made by the district attorney over a seven year period…."** It was sought to show that charging decisions were based on race. (*Id.* at p. 1170.) A public defender study showed that while only one-third of

willful homicide victims were white, *all* death and LWOP sentences occurred in cases where the victim was white. Nevertheless, the court denied the request citing the **"absence of any factual comparison among the homicide cases presented ... despite the availability of information in the public record that could have been used in making such a comparison."** (*Ibid.*) The court upheld the ruling, citing *McCleskey v. Kemp* (1987) 481 U.S. 279: **"Defendant showed no more than the barest of 'apparent disparity[]' [and] ignored readily available, case-specific data that could, if favorable, have supplied the plausible justification for further inquiry."** (*People v. McPeters, supra*, 2 Cal.4th 1148, 1170-1171; see also *People v. Williams* (1996) 46 Cal.App.4th 1767, 1774-1776.) The lesson of *McPeters* is to provide "factual comparisons" to support this kind of discovery request. (*People v. Lucas* (1995) 12 Cal.4th 415, 476-478.)

Prosecutors need not have guidelines to seek death and basing the decision on inaccurate information does not invalidate the decision, absent bad faith. (*In re Seaton* (2004) 34 Cal.4th 193, 203-204.)

If death is improperly sought due to **"the district attorney's personal and emotional involvement in the case"** (*People v. Maury* (2003) 30 Cal.4th 342, 438), the remedy is recusal under Penal Code section 1424. (*Ibid.*) Failure to raise the issue in the trial court waives it on appeal. (*Id.* at p. 439.)

16. Discovery of the prosecution penalty phase evidence in aggravation

The defense is entitled to disclosure of the prosecutor's penalty phase material under various legal provisions. In a capital case, "evidence ... in aggravation" must be provided under Penal Code section 190.3. (*People v. Jennings* (1988) 46 Cal.3d 963; *People v. Matthews* (1989) 209 Cal.App.3d 155.) The statute's duties are self-executing and the prosecutor is obligated to provide notice of the *actual evidence* he or she intends to offer in aggravation, whether requested or not. (*Jennings*, *supra*, at pp. 986-987; *Matthews*, *supra*, at 158, 161; but see *People v. Salcido* (2008) 44 Cal.4th 93, 156-158.)

"The fourth paragraph of section 190.3 provides the applicable rule … 'Except for evidence in proof of the offense or special circumstances which subject the defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice was given to the defendant within a reasonable period of time as determined by the court, prior to trial.' Defendant was thus entitled to notice of the prosecution's intended aggravating evidence before the cause was called for trial or as soon thereafter as the prosecutor learned of the existence of the evidence." (*People v. Roldan* (2005) 35 Cal.4th 646, 733; citation omitted.) The nonspecific notice encompassed by **"the circumstances of the offense"** does not give adequate notice of an intent to present **"victim impact evidence from surviving family members."** (*Ibid.*)

However, a plea of guilty eliminating the guilt phase, limited to an admission to felony murder but not premeditated murder, does not require the prosecutor to give separate notice of intent to offer evidence of premeditation and deliberation in the penalty phase. (*People v. Williams* (2006) 40 Cal.4th 287, 304-305.)

The 190.3 notice need not be in writing nor delivered in any formal manner. *People v. Wilson* (2005) 36 Cal.4th 309, held that by naming of a person as a "possible witness" during voir dire, and by later saying that he anticipated calling that witness the prosecutor gave sufficient 190.3 notice. (*Id.* at pp. 348-349.)

If the prosecutor offers penalty phase evidence beyond that which was noticed to the defense, the defense must object or the issue is waived on appeal. (*People v.*

Garceau (1993) 6 Cal.4th 140, 206; *People v. Farnam* (2002) 28 Cal.4th 107, 175; *People v. Wilson, supra,* 36 Cal.4th 309, 357.)

Although the statute requires *pretrial* notice, when newly discovered evidence arises the defendant is only entitled to **"'prompt notice … and, if necessary … a reasonable continuance … to prepare to meet that evidence.'"** (*People v. Blair* (2005) 36 Cal.4th 686, 751-752, citation omitted.) Evidence is excluded only if notice was unreasonable or unexcused, or delay would prejudice the defendant. (*Id.* at p. 752; see also *People v. Chatman* (2006) 38 Cal.4th 344, 396.)

Penalty phase discovery is also available under Penal Code section 1054.1. (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229.) **"[W]e conclude that reciprocal discovery [Pen. Code § 1054, et seq] is available with respect to penalty phase evidence, and that such discovery should ordinarily be made at least 30 days prior to the commencement of the guilt phase of the trial...."** (*Id.* at p. 1231.)

Penal Code section 1054.1 does not replace section 190.3. Also covered under Penal Code section 1054, subdivision (e), is material discoverable under **"other express statutory provisions...."** Penalty phase disclosure is also constitutionally required.

Penal Code sections 190.3 and 1054.1 do not precisely overlap. In some ways the language of section 190.3 seems more comprehensive, while on the other hand, section 1054.1 clearly includes the district attorney's *rebuttal* evidence, (*People v. Izazaga, supra*, 54 Cal.3d 356, 375; *People v. Gonzalez*, *supra*, 38 Cal.4th 932, 957), while section 190.3, by its terms, excludes rebuttal evidence from that which must be disclosed. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1070-1071; see *People v. Gonzalez, supra,* 38 Cal.4th 932, 956-957.) Also, the timing of disclosure is different in the statutes. Defense counsel should utilize *both* statutes to secure penalty phase material.

Disclosure cannot be delayed until after the guilt phase. (*People v. Superior Court (Mitchell), supra*, 5 Cal.4th 1229.) Penal Code section 190.3 disclosure must also be made before the guilt phase. (*People v. Miranda* (1987) 44 Cal.3d 57, 96-97; *Keenan v. Superior Court* (1981) 126 Cal.App.3d 576, 587.) However, the district attorney is not required to give *separate* notice of evidence that will already have been presented in the guilt phase. (*People v. Champion* (1995) 9 Cal.4th 879, 942.)

In discussing **"applicability of general principles of discovery regarding 'other crimes' evidence…."** the state's high court said, **"we see no reason to dispute their applicability to the penalty phase of a capital case so long as the relitigation of the 'other crime' ... is circumscribed by the bounds of relevance and admissibility of evidence that prevails in the original prosecution."** (*People v. Breaux, supra*, 1 Cal.4th 281, 311, fn. 10 [*Breaux* was tried before Proposition 115]; see also *People v. Grant* (1988) 45 Cal.3d 829, 852-854.)

For a comprehensive review of penalty phase discovery, see Ogle & Phillips, *Penalty Phase Discovery: By Us and Against Us*, (Third Quarter 2000) California Defender, Vol. 9, No. 3, p. 57.)

17. Subpoena duces tecum

The defense has the right to secure material from certain parties by use of a subpoena duces tecum. (Pen. Code, §§ 1326, et seq.) **"That the defense may issue subpoenas duces tecum to private persons is implicit in statutory law (Pen. Code §§ 1326, 1327) and has been ... recognized by courts for at least two decades. (*Millaud* v. *Superior Court* (1986) 182 Cal.App.3d 471, 475-476 ... *Pacific Lighting Leasing Co.* v. *Superior Court* (1976) 60 Cal.App.3d 552,**

559-566…." (*People v. Hammon, supra*, 15 Cal.4th 1117, 1128; but see *Susan S. v. Israels, supra*, 55 Cal.App.4th 1290 [tort liability for unauthorized reading of victim's mental health records].)

In 2004, the Legislature amended Penal Code section 1326 eliminating the option of making the records available to counsel for "inspection and copying." (Evid. Code, § 1560, subd. (e).) Now, the subpoenaed materials *must* to be brought before the judge to determine what, if anything, gets turned over – and the court may review the materials in camera. The statute also now protects defense work product. **"The court may not order the documents disclosed to the prosecution except as required by Section 1054.3."** (Pen. Code, § 1326, subd. (c); *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 748-749 [DA may participate in the hearing at the court's invitation].)

It violates the Fifth and Sixth Amendments to order material provided to the defense to *also* be given to the prosecutor. (*Teal v. Superior Court, supra,* 117 Cal.App.4th 488; see also Pen. Code, § 1326, subd (c) [statute also bars judicial disclosure to the prosecutor].) Disclosure arises only under Penal Code section 1054.3, and then only if the material is offered at trial. (*Teal, supra,* at p. 492.)

The degree to which the prosecutor can participate in a hearing a hearing under Penal Code section 1326, subdivision (c), is not fully resolved. Two decades ago in *Bullen v. Superior Court* (1988) 204 Cal.App.3d 22, the court said, **"[T]he district attorney cite[s] no statute, and we are aware of none, authorizing the district attorney to represent a third party in discovery proceedings in a criminal action."** (*Id.* at p. 25.) But *Bullen* only stands for the proposition that the district attorney cannot *represent* a third party in the absence of statutory authority to do so. (*People v. Superior Court (Humberto S.), supra,* 43 Cal.4th 737, 753-754.) Participation to a lesser degree is not prohibited.

In *Humberto S.*, the court held the prosecution is entitled to notice of a defense request to the court for a hearing under Penal Code section 1326, subdivision (c), that the prosecution has the right to be present and that prosecutorial participation at the hearing is not prohibited, to the extent that the prosecution may be granted permission by the trial court to argue against disclosure. (*People v. Superior Court (Humberto S.), supra,* 43 Cal.4th 737, 749-750.) The court expressly left the nature and scope of permissible by the prosecution unresolved: **"[W]e need not decide here whether prosecutorial participation in third party subpoena hearings is permitted or protected; suffice it to say, as with *Pitchess* hearings, it is not prohibited. … Penal Code section 1326, which governs … third party subpoenas, does not speak to the role (if any) of opposing parties."** (*Id.* at p. 749.)

Who must provide the prosecution with notice of a Penal Code section 1326, subdivision (c) hearing, is not exactly clear. In *Humberto S.*, the court implied that the defense bears the burden of providing notice by analogizing SDT proceedings to the *Pitchess* discovery scheme. (*People v. Superior Court (Humberto S.), supra,* 43 Cal.4th 737, 749.) However, in *Kling v. Superior Court*, *supra*, 50 Cal.4th 1068, 1079, the court held that the trial court erred by failing to give the prosecution notice of the hearing.

Kling v. Superior Court, *supra*, 50 Cal.4th 1068, also revisited the issue of the scope of the People's role at a hearing to release subpoenaed documents under Penal Code section 1326, subdivision (c). As in *Humberto S.*, the court did **"not decide whether a trial court is *required* to allow argument form the People concerning third party discovery issues."** (*Id.* at p.

1078, fn. 2, orig. italics.) However, the court did hold that since a trial court is permitted to allow the prosecution to present argument, and since the prosecution has a due process interest in the way in which the discovery proceedings affect the case, the prosecution may be entitled to **"the identity of the subpoenaed party and the nature of the records sought … in many circumstances…."** (*Id.* at pp. 1078-1079.) The court did not address under what circumstances the prosecution would not be allowed access to this information. The court based its holding on three factors: (1) the prosecution's right to file a motion to quash on behalf of a third party whose "evidentiary privileges" are at stake; (2) the potential impact SDT proceedings might have on the People's due process rights and speedy trial rights; and (3) assuming the court permits the People to argue, the opportunity would not be meaningful if the prosecution were unaware of the identity of the subpoenaed party or the nature of the documents. (*Ibid.*) Presumably if those factors are not present, most commonly when the documents subpoenaed do not contain privileged information or when the defendant is the holder of the privilege, the prosecution would not be entitled to learn the identity of the subpoenaed party or the nature of the documents.

Although *Kling* reaffirmed the defendant's right to an ex parte in camera hearing to review the records produced in accordance with subpoena for the purpose of safeguarding privileged information and attorney work product, the court suggested, without holding, that it might be proper for a trial court to unseal portions of transcript of the in camera hearing which do not contain privileged information or work product. (*Kling v. Superior Court*, *supra*, 50 Cal.4th 1068, 1079-1080.)

Some prosecutors and some in law enforcement claim subpoena duces tecum is not available as to agencies investigating the alleged crime, such as the police department or the coroner, based on Penal Code section 1054.5, subdivision (a) and *People v. Superior Court (Barrett), supra,* 80 Cal.App.4th 1305. Attempts to restrict defense use of the subpoena duces tecum should be resisted. The U.S. Supreme Court held, **"compulsory process [of the courts] is available for the production of evidence needed either by the prosecution or by the defense."** (*United States v. Nobles* (1975) 422 U.S. 225, 231, citing *United States v. Nixon* (1974) 418 U.S. 683, 709.)

People v. Superior Court (Barrett), supra, 80 Cal.App.4th 1305, holds that, under Penal Code sections 1054 et seq, a defendant can compel disclose from the prosecutor of materials in the possession of the district attorney or of investigative agencies that work on the case. **"[I]nvestigative agencies that work on the case are considered part of the prosecution team and a defendant must use the discovery procedures set forth in chapter 10 to obtain discovery from these agencies. (§ 1054.5, subd.(a).)"** (*Id.* at p. 1313.) Some prosecutors argue this limits the defense to Penal Code section 1054.1 as the sole means to acquire discovery in the hands of the "prosecution team." Certainly discovery sought under that section is included, but arguably subpoena duces tecum *also* falls within Chapter 10, under Penal Code section 1054, subdivision (e), as authorized under **"other express statutory provisions...."** (Pen. Code, §§ 686, par. 3, 1326-1328, 1330; Evid. Code, §§ 1560-1566; see also *Albritton v. Superior Court* (1990) 225 Cal.App.3d 961.)

Barrett dealt with a defense request for Department of Corrections records relevant to a prosecution for a homicide committed in a state prison. The court ruled that material gathered by the CDC while investigating the homicide was discoverable under Penal Code section 1054.1, while the more general material being sought was discoverable, if at all, through subpoena duces tecum. (*People v. Superior Court (Barrett), supra,* 80

Cal.App.4th 1305, 1317-1319.) About that process, the court stated: **"Third party records are required to be produced to the court rather than the attorney for the subpoenaing party because: 'The issuance of a subpoena duces tecum ... is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described therein until a judicial determination has been made that the person is legally entitled to receive them.' (*People v. Blair* (1979) 25 Cal.3d 640, 651….) A criminal defendant has a right to discovery by subpoena duces tecum of third party records by showing 'the requested information will facilitate the ascertainment of the facts and a fair trial.' (*Pitchess v. Superior Court, supra,* 11 Cal.3d 531 at p. 536.)"** (*Id.* at p. 1316.) That "showing" can be made in camera to protect confidentiality rights and privileges. A defendant **"should be permitted to present his relevancy theories at an in camera hearing [as] necessary to protect [his] Fifth Amendment right against self incrimination and Sixth Amendment right to counsel."** (*Id*. at pp. 1320-1321, citations omitted.) The court said: **"[I]t would be inappropriate to give Barrett the Hobson's choice of going forth with his discovery efforts and revealing possible defense strategies and work product to the prosecution, or refraining from pursuing these discovery materials to protect his constitutional rights and prevent undesirable disclosures to his adversary."** (*Id*. at p. 1321, citations omitted.)

People v. Sanchez (1994) 24 Cal.App.4th 1012 is not a subpoena duces tecum case, but may be helpful in resisting the argument that Proposition 115 limits the use of a subpoena duces tecum. In *Sanchez* incriminating writings created by the defendant before killing his girlfriend were given to defense counsel, who gave them in a sealed envelope to the trial judge, and upon request the judge gave them to the prosecutor. What may be helpful is the reasoning of the Court of Appeal as to *why* the prosecutor's request was *not* a "discovery" motion, and by logical extension, why a subpoena duces tecum is similarly *not* a discovery motion. The court said the appellant's argument against disclosure, **"is erroneously based upon the notion that the prosecutor's motion was a 'discovery' motion to which the reciprocal discovery statutes applied. It was not. To return to the linchpin language of *Littlefield*: 'In criminal proceedings, under the *reciprocal* discovery provisions ... all court ordered *discovery* is governed exclusively by – and barred except as provided by – the discovery chapter. ...' [] The statute makes clear the meaning of 'discovery' in its statement of purposes: 'To save court time by requiring that discovery be conducted informally *between and among parties* before judicial enforcement is requested.' (§ 1054, subd.(b).) In making its motion, the prosecutor sought no evidence from appellant ... [it] was possessed by the trial court (*not* a 'party') and it was from the trial court the prosecutor sought and obtained it."** (*Id.* at pp. 1026-1027; fn. omitted, orig. italics)

In using a subpoena duces tecum, defense counsel is also not asking for anything possessed by the prosecutor, a "party," *Barrett* notwithstanding. Thus, the defendant should not be barred by the statute from using a subpoena duces tecum to secure material from police agencies, the coroner, or any other entity that possesses something relevant to the case. The defense should have the *option* of seeking the materials by subpoena duces tecum *or* from the prosecutor under Penal Code section 1054.1.

Sanchez quotes from *People v. Superior Court (Broderick)* (1991) 231 Cal.App.3d 584, 594: **"'Proposition 115 discovery procedures apply only to discovery between the People and the defendant.**

They are simply inapplicable to discovery from third parties.'" (*People v. Sanchez*, *supra*, 24 Cal.App.4th 1012, 1027, citation omitted.) *Broderick* upheld a prosecution subpoena duces tecum, and the rationale should apply as well to the defense.

The subpoena duces tecum was based upon federal constitutional rights to confrontation (*Davis v. Alaska, supra*, 415 U.S. 308) and on due process of law. (*Pennsylvania v. Ritchie, supra*, 480 U.S. 39). Penal Code section 1054, subdivision (e), preserves defense discovery "mandated by the Constitution of the United States." In discussing the discovery statutes and *Brady* obligations in *Izazaga* Chief Justice Lucas wrote: **"[D]ue process rights are self-executing and need no statutory support to be effective [and] if a statutory scheme exists, these due process requirements operate outside such a scheme. ... No statute can limit the foregoing due process rights of criminal defendants."** (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 378.) Law and logic suggest the same must be said of the broader constitutional underpinnings of the defendant's *right* to utilize a subpoena duces tecum.

Attempts to restrict defense access to relevant material should be challenged. The U.S. Supreme Court questioned the integrity of prosecutors who try to prevent the defense from obtaining relevant information. In a subpoena duces tecum case, *Gordon v. United States* (1953) 344 U.S. 414, the court noted: **"[A]n accused is entitled to production of [relevant] documents. ...' the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.'"** (*Id.* at p. 419, fns. omitted.)

If the police or other agency refuses to accept or honor a subpoena duces tecum, counsel may seek and the trial court should issue an *Order to Show Cause Re: Contempt*. Any objection to a subpoena duces tecum is properly raised in a motion to quash – not by police refusal to accept the subpoena.

The "consumer notice" requirement of Code of Civil Procedure section 1985.3 does not apply to criminal cases. That statute defines the subpoenaing party as **"the person … causing a subpoena duces tecum to be issued or served in connection with *any civil action* or proceeding pursuant to this code.…"** (Code of Civ. Proc., § 1985.3, par. (3), italics added.) In *Pitchess v. Superior Court, supra,* 11 Cal.3d 531, the city attorney objected that the supporting affidavit did not establish "good cause" as required by Code of Civil Procedure section 1985. (*Id.* at p. 535.) That argument was **"premised on the erroneous assumption that the statutory provisions governing discovery in civil actions apply to criminal proceedings."** Accordingly, **"it has long been held that civil discovery procedure has no relevance in criminal prosecutions."** (*Id.* at p. 536.) The defense has no consumer notice obligation, and need only **"establish some cause for discovery other than 'a mere desire for the benefit of all information which has been obtained by the People in their investigation….' [citation]"** (*Id.* at p. 537; see also *M.B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 1393-1394.) *People v. Clinesmith* (1959) 175 Cal.App.2d Supp. 911 was in effect overruled.

A subpoena duces tecum may be used to obtain documents from Victim Compensation and Government Claims Board where that agency has provided assistance to the victim or the victim's family in a case. However, when the records are sought in connection with a restitution hearing, a defendant is not entitled to the release of the documents until he or she has rebutted the presumption contained in Penal Code section 1204, subdivision (f)(4)(A) and the trial court

determines, in camera, that the documents are relevant. (*People v. Lockwood* (2013) 214 Cal.App.4th 91, 100.)

18. Discovery post-judgment

For habeas corpus **"discovery is available once we have issued an order to show cause.…"** (*In re Scott, supra,* 29 Cal.4th 783, 814; *In re Avena* (1996) 12 Cal.4th 694, 730.) The court may, under Penal Code section 1484, order discovery if **"the superior court believes that discovery is necessary to ensure a full and fair hearing…."** (*Board of Prison Terms v. Superior Court (Ngo)* (2005) 130 Cal.App.4th 1212, 1242.)

Although *Scott* is limited to cases where the OSC has issued, it addresses issues from *People v. Gonzalez* (1991) 51 Cal.3d 1179, which dealt with discovery sought to prepare a habeas corpus petition. The court said **"the trial court lacked jurisdiction to order 'free floating' postjudgment discovery when no criminal proceeding was then pending before it."** (*Id.* at p. 1256.) Citing *People v. Ainsworth* (1990) 217 Cal.App.3d 247, *Gonzalez* says discovery is ancillary to a pending action and with nothing pending no motion lies. *Ainsworth* discovery was sought *after* an appeal, but *Gonzalez* restricted it *while* the appeal was still pending.

When the state appeals the grant of a new trial the case *is* still pending and the trial court can grant discovery motions. (*Wisely v. Superior Court* (1985) 175 Cal.App.3d 267.)

Exculpatory material must be disclosed even after conviction or appeal. (*Imbler v. Pachtman, supra*, 424 U.S. 409, 427, fn. 25; *People v. Kasim, supra*, 56 Cal.App.4th 1360, 1377; *People v. Garcia, supra*, 17 Cal.App.4th 1169; Rules Prof. Conduct, rule 5-220.)

Penal Code section 1054.9 deals with discovery for post-conviction habeas corpus proceedings or a motion to vacate judgment, but only applies to cases **"in which a sentence of death or of life in prison without the benefit of parole has been imposed…."** (Pen. Code, § 1054.9, subd. (a).) Because the statute provides exclusively for post conviction discovery in a select group of cases, it operates apart from those parts of Penal Code section 1054 which were codified by Prop. 115 and deal exclusively with trial. (*People v. Pearson* (2010) 48 Cal.4th 564, 569-572.)

To obtain discovery under the statute, the defense must show that **"good faith efforts to obtain discovery material from trial counsel were made and were unsuccessful…."** (Pen. Code, § 1054.9, subd. (a).) This section makes discoverable **"materials in the possession of the prosecution and law enforcement … to which the … defendant would have been entitled at the time of trial."** (Pen. Code, § 1054.9, subd. (b).) Physical evidence may be ordered upon a proper showing. (Pen. Code, § 1054.9, subd. (c).) The motion is brought in the trial court unless execution is "imminent," in which case the appellate court could entertain the request. (*In re Steele, supra,* 32 Cal.4th 682, 692.) The motion can be made before the habeas petition is filed. **"[W]e believe the Legislature [intended] to include cases where the movant is *preparing* the petition as well as cases in which the movant has already filed it."** (*Id.* at p. 691, original italics.) To secure 1054.9 discovery the defendant must show: (1) the discovery was provided at trial but has since been lost; (2) the defendant should have had it at trial under a discovery order under the constitution or by statute; (3) it should have been provided at trial and was requested by the defense; or (4) the defense at trial failed to request an item the prosecution would have been obligated to provide if it *had* been requested. (*Id.* at p. 697.)

A defendant need not identify specific documents or show that the documents

themselves are still in the People's possession. (*Barnett v. Superior Court*, *supra*, 50 Cal.4th 890, 898.)

However, when a defendant seeks discovery that was not initially provided to trial counsel, defendant bears the burden of demonstrating **"a reasonable basis to basis to believe that the other specific materials actually exist."** (*Barnett v. Superior Court, supra,* 50 Cal.4th 890, 899.) A defendant need not show that the prosecution *still* possesses the requested materials. **"[A] reasonable basis to believe that the prosecution had possessed the materials in the past would also provide a reasonable basis to believe the prosecution still possesses the materials."** (*Id.* at p. 901.)

If the requested evidence is exculpatory a defendant must specify how the evidence is relevant to the case or risk the request being denied as overbroad. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 372.) But a defendant does not also have to show that it is material in the sense the outcome may have been different if provided at trial. (*Barnett v. Superior Court, supra,* 50 Cal.4th 890.)

Penal Code section 1054.9 may not be used as a vehicle to obtain discovery in the sole possession of out-of-state law enforcement agencies who were not involved in the investigation or prosecution of the case. (*Barnett v. Superior Court, supra,* 50 Cal.4th 890, 906.)

The defense may not obtain discovery under the statute if it is not sought within a reasonable period of time. (*Catlin v. Superior Court* (2008) 166 Cal.App.4th 133, 138-143, quoting from and relying upon *Steele, supra,* 32 Cal. 4th 682, 692-693, fn. 2.)

As stated above, in appropriate cases *Pitchess* discovery may be obtained under Penal Code section 1054.9, within the parameters of the Evidence Code. (*Hurd* v. *Superior Court, supra,* 144 Cal.App.4th 1100, 1110-1111.) When the motion was not made at trial the prisoner **"must show that the records are material to the claims he or she proposes to raise, and that those claims are cognizable on habeas corpus."** (*Id.* at p. 1111.)

Penal Code section 1376 bans executing mentally retarded persons. Although the terms of the statute only apply before trial, **"postconviction claims … should be adjudicated in substantial conformance with the statutory model."** (*In re Hawthorne, supra,* 35 Cal.4th 40, 44.) The statute permits orders **"reasonably necessary to ensure the production of evidence sufficient to determine whether … the defendant is mentally retarded…."** (Pen. Code, § 1376, subd. (b)(2).)

19. Remedies and alternatives when discovery is denied

When a discovery request is denied counsel can make a supplemental request with more supporting information. (*Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107, 1111.) Even with nothing new, **"information … deemed immaterial upon original examination may become important as proceedings progress, and the court would be obliged to release [it as] material to the fairness of the trial."** (*Pennsylvania v. Ritchie, supra*, 480 U.S. 39, 60.) Discovery may be sought *any time* the supporting grounds arise, before or *during* trial, even if a prior request for the material has been denied.

Petitioning for a writ of mandate is another option available when the trial court refuses the request or quashes a subpoena duces tecum. (*Rubio v. Superior Court, supra*, 202 Cal.App.3d 1343; *Matthews v. Superior Court, supra*, 209 Cal.App.3d 155; 1 Appeals and Writs in Criminal Cases (Cont. Ed. Bar 2002) [the prosecutor may also challenge an order *granting* discovery to the defense. (Pen. Code, § 1512, subd. (a)].) Extraordinary writ relief is discretionary and

may be summarily denied. If the Court of Appeal denies the writ petition counsel can petition for review in the California Supreme Court, but must be aware of the short time available – ten days to file after the date a summary denial is *filed* in the Court of Appeal. (Cal. Rules of Court, rule 8.500(e)(1).)

Denial of discovery can be reviewed on appeal after a guilty verdict. **"A ruling on a motion to compel discovery ... is subject to review for abuse of discretion."** (*People v. Ashmus, supra*, 54 Cal.3d 932, 979.) An appellate court may remand the case to the trial court with instructions to gauge the affect of having been improperly denied discovery, and to grant a new trial if a fair trial was denied. (See *Pennsylvania v. Ritchie, supra*, 480 U.S. 39; *United States v. Alvarez* (9th Cir 2004) 358 F.3d 1194, 1209; *People v. Hustead, supra*, 74 Cal.App.4th 410, 418-419; *People v. Johnson, supra*, 118 Cal.App.4th 292, 304-305; see also *Horton v. Mayle* (9th Cir. 2005) 408 F.3d 570, 578, fn. 3.)

If the defendant *pleads* guilty, however, the plea eliminates any appellate rights as to discovery relevant to guilt or innocence. (*People v. Hunter* (2002) 100 Cal.App.4th 37.) Thus, denial of a motion to discover the identity of an informant will not be reviewed on appeal after a guilty plea or no contest plea (*People v. Hobbs, supra,* 7 Cal.4th 948, 955-956), but denying a request to unseal a search warrant affidavit done in conjunction with a motion to quash a search warrant is appealable. (*Id.* at pp. 956-957.) Denial of *Pitchess* discovery is not appealable after a guilty or nolo plea, unless it is relevant to an appeal from the denial of a motion to suppress evidence. (*People v. Collins, supra,* 115 Cal.App.4th 137, 148-149.) Another exception to the "no appeal after plea" rule involves discovery aimed at discriminatory prosecution (equal protection), denial of which affects the legality of the proceedings. (*People v. Moore* (2003) 105 Cal.App.4th 94, 100-101; Pen. Code § 1237.5.)

Creative use of habeas corpus may also be an option, before trial or after conviction. (*In re Baert* (1988) 205 Cal.App.3d 514; see also Pen. Code, § 1054.9, discussed above.)

The California Public Records Act (CPRA) may be used for some records. (Gov. Code, §§ 6250 et. seq; California Criminal Law (Cont. Ed. Bar 2012), §§ 12.1-12.15, pp. 277-390.)

The right to secure records is not diminished by a prior denial of discovery of the same material. Although *County of Los Angeles v. Superior Court (Axelrad), supra,* 82 Cal.App.4th 819, involves civil litigants (former jail inmates claiming prolonged incarceration), the rulings should apply in criminal cases. **"[A] plaintiff who has filed suit against a public agency may … directly or indirectly through a representative, file a CPRA request [to] obtain[] documents for use in the plaintiff's civil action, and that the documents must be produced unless one or more of the statutory exemptions set forth in the CPRA apply."** (*Id.* at p. 826.) The court said that although prior adverse rulings on the discovery request should be made known to the court hearing the CPRA request, in ruling the court is **"not bound by the [prior] rulings unless all … elements of the collateral estoppel doctrine are present."** (*Id.* at p. 829-830.) It is unlikely all elements would be present. Furthermore, just as one seeking documents under the CPRA is not bound by the relevancy requirements of civil discovery (*id.* at p. 829, fn 9), a defendant in a criminal case using the CPRA should not be required to show plausible justification for obtaining the documents.

Public agencies often oppose disclosure of material sought pursuant to the CPRA. **"Government Code sections 6258 and 6259 [are] the exclusive procedure for litigating the issue of a public agency's obligation to**

disclose records to a member of the public [and] these provisions do not authorize a public agency in possession of the records to seek a judicial determination regarding its duty of disclosure." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 423.) These statutes cannot be circumvented by securing declaratory relief from the courts. (*Ibid.*)

If a CPRA request is denied counsel may seek review by petition for extraordinary writ. (Gov. Code, § 6259, subd. (c).)

Whenever discovery is denied, it may be possible to gather the material or information by other means, like additional investigation. (*People v. Kasim, supra*, 56 Cal.App.4th 1360.) Although *Pullin v. Superior Court* (2000) 81 Cal.App.4th 1161, deals with civil discovery the holding should apply if a similar issue arose in a criminal case – lawful investigation can be effective along with or as an alternative to traditional discovery.

20. Remedies for a prosecutor's violation of discovery law

"[A] trial court may, in the exercise of its discretion, consider a wide range of sanctions in response to the prosecution's violation of a discovery order." (*People v. Ayala, supra,* 23 Cal.4th 225, 299, internal quotations omitted.)

"A trial court may enforce … discovery … by ordering immediate disclosure, contempt proceedings, continuance of the matter, and delaying or prohibiting a witness's testimony or the presentation of real evidence. … However, the exclusion of testimony is not … appropriate … absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial." (*People v. Jordan, supra,* 108 Cal.App.4th 349, 358; citations omitted.)

Statutory options are open-ended: **"any order necessary to enforce the provisions of this chapter, including *but not limited to*, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony ... continuance of the matter, or *any other lawful order.* Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."** (Pen. Code, § 1054.5, italics added; see CALCRIM 306; but see *People v. Bell* (2004) 118 Cal.App.4th 249 and related cases discussed below.) The statute provides the sole basis for issuing orders for discovery in criminal cases. (*People v. Mitchell* (2010) 184 Cal.App.4th 451, 458.) Securing a mid-trial continuance may be difficult, and appellate relief for a denial is rare. (*People v. Wilson, supra,* 36 Cal.4th 309, but see *People v. Mitchell*, *supra*, 184 Cal.App.4th 451 [trial court acts in excess of its jurisdiction when it excludes evidence without first considering lesser sanctions].)

Penal Code section 1054.5, subdivision (c), permits exclusion of testimony **"only if all other sanctions have been exhausted."** (See generally, *People v. Mitchell*, *supra*, 184 Cal.App.4th 451, 459.) Dismissal is allowed only when required under the federal constitution. (*Ibid.*; *People v. Brophy, supra*, 5 Cal.App.4th 932, 937; *People v. Ashraf* (2007) 151 Cal.App.4th 1205; Pen. Code § 1054.8(b).) A *partial* dismissal is also only permitted as a sanction when required under the U.S. Constitution. (*People v. Superior Court (Meraz), supra,* 163 Cal.App.4th 28 [special circumstance allegation improperly dismissed].)

In *Izazaga v. Superior Court, supra,* then Chief Justice Lucas wrote: **"...the provisions relating to timing of disclosure *and the mechanics of enforcement* apply evenhandedly to both the prosecution and defense."** (54 Cal.3d 356, 374, italics added.)

When exculpatory evidence is not disclosed by the prosecutor prior to the preliminary hearing, a defendant may bring a non-statutory motion to dismiss the

information. (*People v. Gutierrez*, *supra*, 214 Cal.App.4th 343, 348-349 [**"breach of the prosecutor's *Brady* obligation in connection with a preliminary can be raised by a defendant in a nonstatutory motion to dismiss"**]; see also *Stanton v. Superior Court, supra*, 193 Cal.App.3d 265.) Also, the prosecutor's failure to turn over *Brady* information prior to the preliminary hearing violates a substantial right (*Gutierrez*, *supra*, at p. 356) which may be enforced by a motion to dismiss under Penal Code section 995, even if discovered *during* or after trial. (*People v. Mackey, supra*, 176 Cal.App.3d 177, 185-186.)

To prevail on a non-statutory motion to dismiss based on undisclosed exculpatory evidence the defense must show that the information was material to the determination of probable cause. **"[T]he standard of materiality is whether there is a reasonable probability that disclosure of the exculpatory or impeaching evidence would have altered the magistrate's probable cause determination with respect to any charge or allegation."** (*Bridgeforth v. Superior Court*, *supra*, 214 Cal.App.4th 1074, 1087; *Merrill v. Superior Court, supra*, 27 Cal.App.4th 1586, 1596-1597.)

People v. Jackson (1993) 15 Cal.App.4th 1197, affirmed exclusion of *defense* evidence for failure to provide prompt discovery. The opinion's argument on why a lesser sanction, such as a continuance, was not required is not persuasive. A continuance would have provided the district attorney with a **"meaningful opportunity to rebut or impeach"** but the court dismissed it by baldly asserting a continuance would *not* remedy the issue. (*Id.* at p. 1203.) The exclusion sanction should apply to the prosecutor as well under Chief Justice Lucas' admonition in *Izazaga*, quoted above. One can demand exclusion of *prosecution* evidence when discovery is untimely, citing *Jackson.* Otherwise the "mechanics of enforcement" are *not* evenhanded. Of course, in *Jackson* the prosecutor provided *late* discovery and *no* sanction was imposed for the **"minor infraction."** (*Id.* at p. 1202; *People v. Panah*, *supra,* 35 Cal.4th 395, 459-460 [coroner's report disclosed Monday morning of testimony, timely even though it was prepared the previous Friday]; *People v. Rutter* (2006) 143 Cal.App.4th 1349, 1352-1354; but see *People v. Mitchell*, *supra*, 184 Cal.App.4th 932.)

"Although a discovery sanction may include an element of punishment, the record must support a finding of significant prejudice or willful conduct." (*People v. Bowles* (2011) 198 Cal.App.4th 318, 327.) **"[T]here is a distinction between having evidence and refusing to disclose, and discovering evidence and disclosing it at a time when it places the others side at a disadvantage."** (*People v. Gonzalez* (1994) 22 Cal.App.4th 1744, 1759.)

Sanctions in general are discussed in *Mendibles v. Superior Court* (1984) 162 Cal.App.3d 1191, 1198. It and cases cited therein, may help when asking for sanctions. (See *People v. Zamora* (1980) 28 Cal.3d 88; *People v. Mitchell*, *supra*, 184 Cal.App.4th 932.)

Monetary sanctions under Code of Civil Procedure section 177.5 are limited to situations where a lawful court order is violated, and thus available only for violation of a discovery *order*. (*People v. Muhammad* (2003) 108 Cal.App.4th 313; see also *People v. Hundal* (2008) 168 Cal.App.4th 965.) Even if the conduct violates a court order the prosecutor would be entitled to **"*notice and an opportunity to be heard.* (§ 177.5, 2d par., italics added.)"** (*Id.* at p. 970.)

A prosecutor's discovery law violation is sanctionable **"only prior to the close of testimony and for so long as the trial court has jurisdiction of a criminal case."** (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 805.) If the discovery violation is not

raised until later, the defendant will not prevail unless he can **"establish that the information not disclosed was exculpatory and that 'there is a reasonable probability that, had the evidence been disclosed ... the result ... would have been different.'"** (*Ibid*.)

If a prosecutor's statutory discovery violation comes to light after a guilty verdict but while the trial court still retains jurisdiction, the trial court may not dismiss the case or order any other statutory sanction. (*People v. Bowles* (2011) 198 Cal.App.4th 318, 327.) **"Once the trier of fact has rendered a verdict it is no longer possible to remedy a discovery violation by the sanctions outlined in section 1054.5."** (*Ibid*.) Once the defendant has been found guilty and the truth of any prior convictions has been decided, **"any violation of a defendant's pretrial right to discovery is appropriately addressed by available post trial remedies such as an appeal from judgment [citation], a motion for new trial [citations], or a petition for writ of habeas corpus [citation]."** Although the trial court may not grant a new trial solely on the basis of a statutory discovery violation, the trial court may still grant a new trial if the evidence is "newly discovered" and material to the case, if the failure to obtain it was based on ineffective of counsel, if the failure to disclose it was due to prosecutorial misconduct or if the failure to disclose the evidence constitutes a *Brady* violation. (*Id*. at p. 329.)

Sometimes witnesses refuse defense interviews. Chilling witnesses can violate due process or deny the right to counsel. (See *Reid v. Superior Court, supra*, 55 Cal.App.4th 1326, 1332-1335 [due process denied when judge *restricts* defense access to alleged victims without *evidence* to trigger Penal Code section 1054.7].) The state lacks the power to *legally* block defense access to witnesses outside the judicial process. (*People v. Powell* (1957) 48 Cal.2d 704, 709; *Walker v. Superior Court* (1957) 155 Cal.App.2d 134, 139-140; *Schindler v. Superior Court* (1958) 161 Cal.App.2d 513, 520-521; see Havlena, *When Witnesses Won't Talk to the Defense* (Summer/Fall 2002) California Defender, p. 51.) Refusal to speak with one party is admissible as evidence of bias. (*People v. Hannon* (1977) 19 Cal.3rd 588, 599-602.)

21. Discovery under the Sexually Violent Predators Act (defense and prosecution)

Some clients previously convicted of certain offenses face continued loss of liberty in proceedings under the Sexually Violent Predators Act. (Welf. & Inst. Code §§ 6600 et. seq.) The act only requires that the parties have **"access to all relevant medical and psychological records and reports."** (Welf. & Inst. Code § 6603, subd. (a).)

An SVP case is **"'a special proceeding of a civil nature[.]'"** (*People v. Yartz* (2005) 37 Cal.4th 529, 536.) As civil cases (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1142, 1171-1172), discovery is governed by the Civil Discovery Act of 1986, (Code Civ. Proc. §§ 2016.010 et seq), rather than criminal law discovery. (*People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 988; *People v. Yartz, supra,* 37 Cal.4th 529, 537, fn. 4; see also *Leake v. Superior Court* (2001) 97 Cal.App.4th 675 [disapproved by *Yartz* on other grounds].) Subpoenas duces tecum may be issued under Code of Civil Procedure section 1985. (*Lee v. Superior Court* (2009) 177 Cal.App.4th 1108, 1124.) However, any subpoenas issued under section 1985, must comport with the requirement that the subpoena be accompanied by an affidavit stating good cause. (*Id.* at pp. 1126-1127.) Depositions may be taken from state witnesses and SVP clients.

To obtain discovery the defense must make **"a timely demand … Specifically, defendant should have completed discovery 30 days before the date set for**

trial. (See Code of Civ. Proc., § 2024.020…. [case citation omitted].)" (*People v. Dixon* (2007) 148 Cal.App.4th 414, 444.) And **"disclosure of the names and addresses of potential witnesses is a routine and essential part of pretrial discovery."** (*Id.* at p. 443; citation omitted.) In *Dixon*, the defense sought information needed to contact the victims in the underlying crimes, and the Court of Appeal held the defense is not required to show "good cause" to get those names. (*Id.* at pp. 442-443.) Nor is Penal Code section 293 a bar to disclosure to the public defender. (*Id.* at pp. 443-444.)

"[I]n managing discovery … the … court must keep in mind… the narrow scope of permissible discovery and the need for expeditious adjudication." (*People v. Superior Court (Cheek), supra,* 94 Cal.App.4th 980, 991.) The judge is authorized to **"limit discovery where appropriate."** (*Ibid.,* Code Civ. Proc., § 2019.030.) *Cheek* discusses SVP discovery in detail, including **"pretrial opportunities to call and cross-examine experts and other witnesses…."** (*Cheek, supra,* at p. 994.) Nevertheless, the opinion **"is not meant to be exhaustive [and] must be applied … on a case-by-case basis."** (*Ibid.*)

In *People v. Angulo* (2005) 129 Cal.App.4th 1349, 1363, the court stated: "**To file an SVPA proceeding, the Department had to obtain at least two expert opinions that Angulo was an SVP. The department could consult a total of four experts to obtain the required evaluations. (Welf. & Inst. Code § 6601, subds. (d)-(h).) Nothing in the SVPA permitted the district attorney to keep any of those evaluations confidential. To the contrary, the SVPA provides than an alleged SVP is entitled 'to have access to all relevant medical and psychological records and reports.' (Welf. & Inst. Code § 6603(a)….) Accordingly, the offender has access to any dissenting report when the Department is obliged to consult more than two experts."**

As to *defense* disclosure, privileges that apply in criminal cases may not be as protective in SVP cases. For example, the psychotherapist-patient privilege (Evid. Code, § 1014) is waived when the expert is appointed by court order except when requested by the defense in a criminal case. (Evid. Code, § 1017, subd. (a).) Although SVP cases **"have many of the trappings of a criminal proceeding[,]"** (*People v. Hurtado* (2002) 28 Cal.4th1179, 1192), the waiver exception for criminal cases does not apply to SVP cases. (*People v. Angulo, supra,* 129 Cal.App.4th 1349, 1363-1367.) Still, **"[u]nder the Civil Discovery Act … opinions of nontestifying experts are not discoverable unless the opposing party shows that fairness requires disclosure."** (*Id.* at p. 1358; citations omitted.) However, confidential expert assistance is not constitutionally compelled in an SVP case. (*Id.* at pp. 1359-1363.)

The prosecutor cannot use the "request for admissions" procedures of the Code of Civil Procedure (Code Civ. Proc., § 2019.010, subd. (e)), to force admissions from an SVP client. (*Murrillo v. Superior Court* (2006) 143 Cal.App.4th 730.) It would violate the due process rights of the client. (*Id.* at p. 740.)

Under Welfare and Institutions Code section 6603, the prosecutor may obtain otherwise confidential information about the person subject to an SVP petitioner without a subpoena duces tecum to the extent such information is contained in a mental health evaluation. (*Albertson v. Superior Court* (2001) 25 Cal.4th 795, 805; *Lee v. Superior Court*, *supra*, 177 Cal.App.4th 1108, 1125.)

III. PROSECUTORIAL DISCOVERY

1. Prosecutorial discovery in general

Penal Code Section 1054.3 requires defense disclosure of: **"(a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, [and] any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments or comparisons which the defendant intends to offer in evidence at trial. (b) Any real evidence which the defendant intends to offer in evidence at the trial."** Other statutes and published cases further define defense discovery obligations.

"Unless section 1054.3 applies, there is no statutory or constitutional duty on the part of the defendant to disclose anything to the prosecution." (*Andrade v. Superior Court* (1996) 46 Cal.App.4th 1609, 1613; *United States v. Wade, supra,* 388 U.S. 218, 256-258 (conc. & dis. opn. of White J.) quoted in the Introduction; but see *In re Scott, supra,* 29 Cal.4th 783, 812-814 [allowing discovery in habeas corpus proceedings once OSC issues, *including* discovery to the prosecution; see also Pen. Code, § 1054.9].)

As discussed below, additional disclosure obligations can arise when the defense takes *possession* of certain kinds of physical evidence. (*People v. Meredith* (1981) 29 Cal.3d 682; *People v. Superior Court (Fairbank)* (1987) 192 Cal.App.3d 32; *People v. Sanchez, supra*, 24 Cal.App.4th 1012; see also Pen. Code, §§ 296, 296.1, 296.2, and *People v. Walker* (2000) 85 Cal.App.4th 969.)

Discovery statutes apply to *misdemeanors* (*Hobbs v. Municipal Court, supra*, 233 Cal.App.3d 670, 695-697) and reciprocal discovery principles apply in *juvenile delinquency* cases through the "discretionary authority" of the court. (*In re Robert S., supra*, 9 Cal.App.4th 1417, 1422.) However, **"[i]n the absence of an express order for reciprocal discovery by the juvenile court, the provisions of Penal Code section 1054 do not automatically apply to a delinquency proceeding."** (*In re Thomas F., supra,* 113 Cal.App.4th 1249, 1254.) Without an order sanctions cannot be imposed. (*Id.* at pp. 1254-1255.) Prosecutorial discovery can be ordered for a fitness hearing. (*Clinton K. v. Superior Court, supra,* 37 Cal.App.4th 1244, 1250; Welf. & Inst. Code § 707.)

Relevant *oral* statements of a trial witness must be revealed. (*Roland v. Superior Court, supra,* 124 Cal.App.4th 154, 160.) The statutory language includes oral reports and both the defense and prosecutor must disclose relevant oral statements, whether made directly to counsel or to a third party such as an investigator. (*Id.* at pp. 164-165.) Oral reports from experts must also be disclosed, (*People v. Lamb, supra,* 136 Cal.App.4th 575, 580.)

Nevertheless, material gathered as to defense witnesses may be protected from disclosure for a variety of reasons. For example, Penal Code section 1054.3 limits disclosure to any witness counsel **"intends to call ... at trial...."** In *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, the court ruled that a probation revocation hearing is not a "trial" and the defense has no disclosure obligations under Penal Code section 1054.3 or any other provision of law. (*Id.* at p. 59.)

Defense disclosure is not required for a preliminary hearing, (Pen. Code § 866), Penal Code section 1538.5 motion, or any proceeding that is not a "trial." (But see *In re Scott, supra,* 29 Cal.4th at 812-814; and *Smith v. Superior Court* (2007) 152 Cal.App.4th 205, 217 [in dicta, the prosecutor would

"presumably…be entitled to discovery of the information [defendant] intends to introduce at the [jury challenge] hearing"].)

A public defender data base containing information on police cannot be obtained under the California Public Records Act. (*Coronado Police Officers Assn. v. Carroll, supra,* 106 Cal.App.4th 1001.)

2. Taking possession of physical evidence

Before June of 1990, the law only required defense disclosure if the defense took possession of certain kinds of physical evidence. In *People v. Meredith, supra,* 29 Cal.3d 682, a defense investigator took possession of the victim's partially burned wallet from a location known from statements of the defendant to his lawyer. (*Id.* at p. 686.) The wallet and location where it was found were admitted into evidence. **"[A]n observation by defense counsel or his investigator, which is the product of a privileged communication, may not be admitted unless the defense *by altering or removing physical evidence* has precluded the prosecution from making the same observation. …the defense investigator, by removing the wallet, frustrated any possibility that the police might later discover it in the trash can."** (*Id.* at p. 686-687, italics added; see *People v. Lee* (1970) 3 Cal.App.3d 514.) **"[T]he defense decision to remove evidence [is] a tactical choice."** (*Meredith, supra,* at p. 695.) Investigators should not take possession of evidence without the lawyer's authorization. **"If counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation."** (*Ibid*.)

Once the defense takes possession of physical evidence subject to *Meredith* disclosure counsel has a **"self executing"** obligation to **"immediately inform the court.…"** (*People v. Superior Court (Fairbank), supra,* 192 Cal.App.3d 32, 39-40.) **"The court, exercising care to shield privileged communications and defense strategies from prosecution view, must then … ensure that the prosecution has timely access to physical evidence … and timely information about alteration of any evidence."** (*Id.* at p. 40; see *People v. Sanchez, supra*, 24 Cal.App.4th 1012, 1018-1020.)

If the defense claims the circumstances surrounding the seizure of the evidence are privileged, it has the burden to prove the existence of facts giving rise to the privilege. (*Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389, 403.) The bare assertion that an agent of the defense delivered the evidence is insufficient. (*Ibid*.)

The *Meredith* duty differs from what is required by Penal Code section 1054.3, subdivision (b), which applies only to **"real evidence … the defendant intends to offer … at trial**." The *Meredith* duty does not apply unless the item is evidence of the crime – evidence the prosecutor could use to prove the case. Physical evidence to be offered by the defense at trial is subject to Penal Code section 1054.3, subdivision (b), but evidence that must be provided under *Meredith* might *not* be offered by the defense at trial. In that situation, Penal Code section 1054.3 would not apply.

3. Statements from prosecution witnesses for cross-examination are not discoverable

Defense investigation often focuses on prosecution witnesses, typically interviews of persons named in police reports or appearing on the prosecutor's witness list. Useful information is then used in cross-examining those witnesses. *None* of this material is discoverable by the prosecution. In writing for the majority in *Izazaga*, former Chief Justice Lucas said: **"[T]he defense is not required to disclose any statements it obtains from prosecution witnesses it may use to refute the prosecution's case during**

cross-examination. Were this otherwise, we would be presented with a significant issue of reciprocity." (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 377, fn. 14; see also *Coronado Police Officers Association v. Carroll, supra,* 106 Cal.App.4th 1001, 1015.) There is no reason to disclose *anything* about this aspect of the defense investigation, unless disclosure advances some specific interest of the *client*. (See also *People v. Tillis, supra,* 18 Cal.4th 284 [D.A. need not disclose material obtained for cross-examination of defense witnesses].)

Unfortunately some lawyers are unaware of this significant protection, and through inadvertence gratuitously assist prosecutors by providing this material. Some prosecutors demand it ignorant of the law or hoping defense counsel does not know that material *for cross-examination* is not discoverable.

In 1998, the California Supreme Court dismissed its grant of review and ordered publication of *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163. *Hubbard* reaffirmed the protection against these disclosures. The trial court ordered disclosure of reports of defense interviews of *prosecution* witnesses. The appellate court held that the order was contrary to the Supreme Court's admonition in *Izazaga* quoted above. (*Hubbard, supra*, at pp. 1167-1169.) The prosecutor argued: **"[O]nce its witness denies having made the statement to the defense investigator ... the defense will call its investigator to impeach the prosecution witness."** (*Id.* at p. 1170.) The Court of Appeal rejected this assumption. **"[N]o rule of law … require[s] the defense to disclose evidence gathered by an investigator who may tentatively be called ... for impeachment purposes. [This] case is illustrative. ... counsel did not call the investigator to whom [the witness] made pretrial statements."** (*Ibid.*)

If defense counsel *does* decide to call the investigator as a trial witness, that decision triggers the disclosure obligation, but not before that decision is made. *When* the intent is formed to call the investigator as a trial witness that investigator's name, office address, and "relevant" statements (those "related to" testimony counsel intends to elicit) would be made. *Relevant portions* of the investigator's report of the interview of the witness would be discoverable.

Some prosecutors demand a copy of the defense investigator's report when, *in cross-examination,* the defense lawyer asks "*did you tell my investigator....?"* They have no right to that material, counsel has a duty to maintain the confidentiality of that material, and it is misconduct for the prosecutor to suggest in front of the jury that material was wrongfully withheld. Relevant statements become discoverable *only* if and when defense counsel actually "intends" to call the defense investigator as a trial witness. (*Hubbard v. Superior Court, supra*, 66 Cal.App.4th 1163.)

The prosecutor's misguided demand for disclosure may arise from misunderstanding Evidence Code sections 768, 770 and 771. When the defense "confronts" the witness with the prior statement (Evid. Code, § 770, subd. (a)), counsel may do it from memory or read from an investigation report. Reading from a report, however, does *not* invoke Evidence Code section 771 because *the witness* is not using the report to refresh his recollection. Unless it is a statement prepared by *that witness* (like a police report), it should not be offered to the witness to refresh recollection. Counsel is not examining a witness "concerning a writing" (Evid. Code, § 768), any more than written notes of questions to ask involve a "writing" within the meaning of the statute. As long as counsel is not *showing* the report to the witness (Evid. Code, § 768, subd. (b)), opposing counsel has no right to inspect it. Thus, the inquiry, "*did you tell my investigator...*?" triggers *no* disclosure obligation. Only if the *witness* used it to

refresh recollection, would opposing counsel be entitled to examine it. That is rare in defense cross-examination of prosecution witnesses, except perhaps for police reports that presumably came *from* the prosecutor. But when disclosure is erroneously ordered the relief will not be forthcoming when evidence of guilt is overwhelming. (*People v. Samuels, supra,* 36 Cal.4th 96, 115.)

Unless disclosure of material gathered for cross-examination advances a specific interest of the *client,* defense lawyers are ethically obligated *not* to disclose it. (Bus. & Prof. Code, § 6068, subd. (e); *United States v. Wade, supra,* 388 U.S. 218, 256-258 (conc. & dis. opn. of White, J.); *People v. Alvarez, supra,* 14 Cal.4th 155, 239-240.)

4. Intent to call the witness triggers the duty to disclose

Counsel's state of mind may be that he or she *might* call a particular witness at trial, but in good faith not yet "intend" to. Until that intent is formed, disclosure is not required.

The statutory phrase "intends to call" is defined as **"including 'all witnesses it reasonably anticipates it is likely to call....'"** (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 376, fn. 11.) The "intent" trigger is open to interpretation and for various reasons counsel may not know which witnesses he or she intends to call thirty days, or *one* day before trial. (See *Brooks v. Tennessee, supra,* 406 U.S. 605.)

As discussed above, *Hubbard v. Superior Court, supra,* 66 Cal.App.4th 1163, sheds light on the "intent to call" issue. The prosecutor argued for immediate disclosure once his witness denied making the statement to the defense investigator (*id*. at p. 1170), but the court rejected the argument: **"[N]o rule of law … require[s] the defense to disclose evidence gathered by an investigator who may *tentatively* be called by the defense for impeachment purposes. [In t]he instant case ... counsel did not call the investigator to whom [the witness] made pretrial statements."** (*Ibid.*, italics added.) The defense is not required to disclose *any* witness who may only tentatively be called, until that intent becomes firm. **"Defense … need present nothing…. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution[.]"** (*United States v. Wade, supra,* 388 U.S. 218, 257-258 (conc. & dis. opn. of White, J.).)

Izazaga and federal cases hold the self-incrimination privilege is not violated by defense disclosure because prosecutorial discovery merely "accelerates" the timing of disclosure that *will* eventually occur at trial. (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 365-369.) This rationale fails, however, if "reasonably likely" means disclosure is required when there is something less than firm intent to call the witness. (*e.g. People v. Wash, supra,* 6 Cal.4th 215, 250-252; **"the prosecution received an unwarranted windfall[,]"** but no prejudice.)

In *Sandeffer v. Superior Court* (1993) 18 Cal.App.4th 672 the court acknowledged: **"[T]he determination whether to call a witness is peculiarly within the discretion of counsel. Even when counsel appears to the court to be unreasonably delaying the publication of his decision to call a witness, it cannot be within the province of the trial judge to step into his shoes. ... [T]he court ... is limited to the remedies provided in the act for such stonewalling."** (*Id.* at p. 678.) The trial judge exceeded his authority in ordering discovery as to a defense witness counsel said he did not yet intend to call. Of course, the court also warned that counsel risks sanctions if the trial judge perceives a violation, but how that is determined is not explained.

The sanction threat in *Sandeffer* was the reality in *People v. Jackson, supra*, 15

Cal.App.4th 1197, where the defense did not provide discovery until the evidence was offered, with the claim that "intent" to offer the evidence arose after the prosecution rested. That explanation was rejected by the court and all but ignored by the Court of Appeal. They said simply, **"the ... judge refused to believe defense counsel did not seriously consider calling the witness until moments before he did."** (*Id.* at p. 1203.) But to "seriously consider" calling a witness is *not* the standard in *Izazaga* for triggering disclosure. One would *expect* lawyers to "seriously consider" calling *potential* witnesses, but ultimately none, only some, or perhaps all might actually testify. The process of seriously considering which witnesses to call may or may not lead to an "intent" to call. Serious consideration may occur long before firm intent is formed.

The act of subpoenaing a *potential* defense witness doesn't necessarily signify the intent to call that witness. Competent defense lawyers will subpoena witnesses they intend to call, and *potential* witnesses whom they *may* want to call. (See *Brooks v. Tennessee, supra,* 406 U.S. 605, discussed below.)

In *People v. Hammond, supra*, 22 Cal.App.4th 1611, in the context of mid-trial disclosure of a prosecution rebuttal witness, the court said it **"would be an ill-advised precedent for either the defense or the prosecution [to assume] that no previously unknown witness will suddenly become known during trial."** (*Id.* at p. 1622.)

5. Brooks v. Tennessee

As discussed in the Introduction, *Brooks v. Tennessee, supra,* 406 U.S. 605, recognizes realities a defense lawyer faces: **"Whether the defendant is to testify is an important tactical decision.... By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense – particularly counsel – in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand… The accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense. ... the accused and his counsel may not be restricted in deciding whether, and when in ... presenting his defense, the accused should take the stand."** (*Id.* at pp. 612-613.)

The defendant is entitled to the benefit of "the guiding hand of counsel," whether the decision involves the defendant's testimony, or that of any *possible* defense witness. **"[A] defendant *may not know at the close of the state's case* whether his own testimony will be necessary *or even helpful* to his cause."** (*Id.* at p. 610; italics added.) Similarly, counsel may not know if the testimony of *any* potential defense witness will be "even helpful" at the close of the state's case, and less likely to know thirty days before trial.

Brooks struck down a statute requiring the defendant to testify first in the defense case, or forego the right to testify, as a violation of the privilege against self-incrimination and due process of law. The statute forced the defense to make an uninformed tactical decision. Although Penal Code section 1054.3 excludes the defendant from the witnesses who must be disclosed, there is no reason to make an *uninformed* choice whether to call any potential witness, and discovery law does not require that decision any earlier than would *normally* occur in preparing and presenting the case.

Penal Code 1054.3 does not require the defense to name defense witnesses thirty days before trial, if the intent to call those witnesses has not formed by then in the *normal course* of preparing the case. (For a discussion of why defense counsel cannot be forced to make an *uninformed* choice in the context of being improperly denied access to rebuttal discovery see *People v. Gonzalez,*

supra, 38 Cal.4th 932, 959-960.)

Of course intent to call an obvious defense witness (*i.e.* solid alibi witness) arises earlier than one whose usefulness is less certain.

Discovery statutes do not require counsel to choose a defense strategy at any particular time. Counsel can wait to gauge the strength of the state's case before deciding which witnesses to call, if any, as long as the motive for waiting is not that of delaying disclosure.

If the lawyers and judges are familiar with *Brooks v. Tennessee* there should be less misunderstanding when defense disclosure takes place during or near trial rather than thirty days before trial. (See *Woods v. Superior Court, supra,* 25 Cal.App.4th 178, 186-187; *People v. Jackson, supra*, 15 Cal.App.4th 1197, 1203.) *Brooks* illustrates *how* and *why* defense counsel, in good faith, can wait to decide to call a particular witness, and reflects the Supreme Court recognition that counsel *legitimately* makes decisions to call certain witnesses at the last moment in some cases. *Brooks* tells us good competent lawyers sometimes provide clients with the "guiding hand of counsel" in just this way.

If counsel does not allow the disclosure duties to accelerate or delay forming the intent to call a witness, the decision can be defended on firm legal and ethical grounds.

The tactical decision regarding whether a defendant should testify was also addressed in *People v. Cuccia* (2002) 97 Cal.App.4th 785. Although involving **"circumstances … not analogous to those in *Brooks v. Tennessee*"** (*id.* at p. 791), the judge erred in giving the defense an ultimatum, when a scheduled defense witness could not be located, that either the defendant testify or the case be deemed closed. (See also *People v. Lawson, supra,* 131 Cal.App.4th 1242, 1246.) The record did not show lack of diligence in securing attendance of the missing witness, and the court noted, **"a brief continuance would have allowed defendant to present his witness before deciding if he wanted to testify."** (*Cuccia, supra,* at p. 792.)

The trial court still retains discretion **"to regulate the order of proof."** (Evid. Code § 320; see *People v. Lancaster* (2007) 41 Cal.4th 50, 103.)

When information will not be disclosed 30 days before trial, one way to protect against exclusion of evidence or other unwarranted sanctions is to ask for an in camera hearing early to explain counsel's position. (Pen. Code, § 1054.7; *People v. Lawson, supra,* 131 Cal.App.4th 1242, 1244, fn. 1; *People v. Loker* (2008) 44 Cal.4th 691, 733.) It helps, of course, to have a competent and receptive trial judge who has the discretion whether to permit in camera proceedings (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 383, fn. 21), and could deny the request. Even if denied, however, by having made the request counsel can better defend his or her actions in the timing of disclosure by reminding the judge of the earlier attempt to keep the judge informed.

In camera proceedings can be risky. The judge may not agree with the reasons for delay and could order immediate disclosure. Writ relief can be sought (*Andrade v. Superior Court, supra*, 46 Cal.App.4th 1609, *Prince v. Superior Court, supra*, 8 Cal.App.4th 1176, *Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260; *People v. Mitchell*, *supra*, 184 Cal.App.4th 451, 456-458), but the appellate court could also rule against the defense (*Woods v. Superior Court*, *supra*, 25 Cal.App.4th 178), or simply deny the petition. Counsel can reconsider the decision to call a witness if faced with an adverse ruling.

6. Confidentiality when defense experts test physical evidence; right to counsel

As mentioned above, in *Prince v.*

Superior Court, supra, 8 Cal.App.4th 1176, 1180, the court said: **"Effective assistance of counsel ... requires counsel to have [the] blood tested where it may exonerate the client. [Citation.] Effective assistance of counsel includes the assistance of experts in preparing a defense [citation] and communication with them in confidence. [¶] … [¶] … If the test matches [defendant] with the crime, defense counsel will not call the expert and the case will proceed on evidence already possessed by the People as if the defense test had not been made. ... If the defense test excludes [defendant], the tester will surely testify and the defense will have to disclose his or her identity and provide any report to the prosecution."** There was *additional* material for the prosecutor to test, a fact distinguishing *Prince* from *People v. Cooper, supra*, 53 Cal.3d 771, 814-816, where the defense was denied the opportunity to confidentially test samples that would be *entirely consumed* in the process. (See *People v. Bolden, supra,* 29 Cal.4th 515, 548-553.)

The right to a confidential test of physical evidence does not include the right to *secure* certain evidence, such as a firearm, from the police for testing without notice to the prosecutor. (*Walters v. Superior Court (Ubina), supra*, 80 Cal.App.4th 1074

7. Only "relevant" statements are discoverable by the prosecution

Where disclosure will be made of a defense trial witness, counsel is not required to deliver *all* statements, but only **"*relevant* written or recorded statements ... or reports of the statements...."** (Pen. Code § 1054.3, subd. (a); italics added.) In. discussing what is relevant, the state's high court relied on *United States v. Nobles, supra*, 422 U.S. 225: **"[U]nder the new discovery chapter … defendant need disclose only the witnesses (and their statements) the defendant intends to call at trial. It is logical to assume that only those witnesses defense counsel *deems helpful to the defense* will appear on the defendant's witness list. The identity of damaging witnesses that the defense does not intend to call at trial need *not* be disclosed. ... discovery is *limited* to relevant statements and reports of statements of defense witnesses."** (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 379-380, original italics.)

Izazaga endorsed the remedy in *Nobles* of redacting, or editing the material, to limit disclosure to that which is relevant. **"[The] dissent ... attempts to distinguish *Nobles* by pointing out that there the trial court's discovery order was 'limited' in that it only reached '*the relevant portion* of the investigator's report. ...' The distinction fails; section 1054.3 *similarly limits* discovery to only the '*relevant* written or recorded statements' of witnesses."** (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 380, fn. 17, italics added to "similarly limits"; see also: *Andrade v. Superior Court, supra*, 46 Cal.App.4th 1609.)

Nobles upheld a discovery order that **"was quite limited in scope, opening to prosecution scrutiny *only that portion* of the report that *related to* the testimony the [defense] investigator would offer to discredit the witnesses' identification testimony."** (*United States v. Nobles, supra*, 422 U.S. 225, 240; italics added.) Material not helpful to the defendant even from a witness with helpful information, would usually not be offered by the defense. What is "relevant" for discovery purposes is that which is *related to* testimony the defense *will* offer at trial. (A thorough knowledge of *Nobles* and its limiting language is essential to ensure only "relevant" portions of defense witness statements are disclosed.) An example of "redacting" (on grounds other than relevancy), is found in *Rodriguez v. Superior Court, supra*, 14 Cal.App.4th 1260, discussed below.

In *People v. Gurule, supra,* 28 Cal.4th

557, 605-606, the *prosecutor* presented a redacted tape recording of a police interview of the defendant – redacted to leave out the part favorable to the accused. (*Ibid.*) The court found no error, noting that allowing the entire unedited recording would have permitted the defendant to present favorable evidence without cross-examination. (*Id.* at p. 605.) Just as redacting is proper to protect the prosecutor's right to cross-examination, redacting for discovery is proper under *Nobles* and *Izazaga* to protect work product, or ensure due process of law, right to counsel, the privilege against self-incrimination, or a combination thereof.

Cross-examining a defense investigator about redacting irrelevant material to suggest to the jury that defense evidence is suspect, incomplete, and not to be trusted, violates the work product privilege. It is improper to use the fact that information was not provided through discovery to suggest impropriety when the prosecutor has no right to the material withheld. If material is improperly withheld the court has the power to sanction the defense, but the prosecutor should not be permitted to impugn the integrity of the defense without seeking that remedy outside the presence of the jury. (See *People v. Seaton* (2001) 26 Cal.4th 598, 681.)

Although *Thompson v. Superior Court, supra,* 53 Cal.App.4th 480, holds that notes of an interview are discoverable as "written or recorded statements" (Pen. Code, §§ 1054.1 and 1054.3), *Thompson* does not address the issue of "relevancy" or redacting. *Thompson*, a Court of Appeal opinion, cannot require disclosure of unedited notes to reveal material protected by *Nobles* and *Izazaga*.

8. Attorney-client, work product, and other privileges

Disclosure is not required if the material is **"privileged pursuant to an express statutory provision, or ... as provided by the Constitution of the United States."** (Pen. Code, § 1054.6; see Evid. Code, §§ 900-1070; Pen. Code, § 952; Pen. Code, § 987.9; see also: *Hobbs v. Municipal Court, supra*, 233 Cal.App.3d 670, 690-695.) **"[Pen. Code §] 1054.6 modifies the blanket disclosure provisions of … 1054.3. Thus … 1054.3 requires disclosure when the witness is designated *only* when that information is not privileged as work product or by statute or the federal Constitution"** (5 Witkin and Epstein, California Criminal Law, (3d ed. 2000), § 36(1), p. 83, original italics, citations omitted.)

Work product is protected from discovery. **"It is the policy of the state to do both of the following: (a) Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases. (b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts."** (Code of Civ. Proc., § 2018.020; see *People ex rel. Lockyer v. Superior Court, supra,* 83 Cal.App.4th 387, 398.)

There are two kinds of work product—core work product and qualified work product. Core work product is protected under subdivision (a) of Code of Civil Procedure section 2018.030 and provides, **"A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances."** Qualified work product is protected under subdivision (b) of the same statute which provides, **"The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice."**

Penal Code section 1054.6 limits work product in criminal cases to core work product as defined by subdivision (a) of Code of Civil Procedure section 2018.030. (*People v. Zamudio, supra,* 43 Cal.4th 327, 354-356; *Izazaga v. Superior Court, supra,* 54 Cal.3d 356, 382, fn. 19.)

Core work product is found **"not only when a witness's statements are 'inextricably intertwined with explicit comments or notes by an attorney stating his or her impressions of the witness, the witness's statements, or other issues in the case. [Citation.] It also may occur when the questions that the attorney has chosen to ask (or not ask) provide a window into the attorney's theory of the case or the attorney's evaluation of what issues are most important. Lines of inquiry that an attorney chooses to pursue through followup questions may be especially revealing. … Moreover, in some cases, the very fact that the attorney has chosen to interview a particular witness may disclose important tactical or evaluative information, perhaps especially so in cases involving a multitude of witnesses."** (*People v. Coito* (2012) 54 Cal.4th 480, 496.) Although *Coito* is a civil case and stated that the court was **"address[ing] the work product privilege in the civil context only"** (*Id.* at p. 488.) because Penal Code 1054.6 expressly incorporates Code of Civil Procedure section 2018.030, subdivision (a), *Coito's* interpretation of core work product should apply equally in criminal cases.

For the same reason, the expansive interpretation of core work product found in *Rico v. Mitsubishi Motors Corporation* (2007) 42 Cal.4th 807, should apply with equal force in criminal cases. **"Plaintiffs urge that the document is not work product because it reflects the statements of declared experts. They are incorrect. The document is not a transcript of the … strategy session, nor is it a verbatim record of the experts own statements. It contains [the paralegal's] summary of points from the strategy session, made at [counsel's] direction. [Counsel] also edited the document … to add his own thoughts and comments, further inextricably intertwining his personal impressions with the summary."** (*Id.* at p. 815, citation omitted.) The court endorsed the trial judge's holding. **"'[A]lthough [the document] doesn't contain overt statements setting forth the lawyer's conclusions, *its very existence is owed to the lawyer's thought processes.* The document reflects not only the strategy, but also the attorney's opinion as to the important issues in the case.'"** (*Ibid.*)

An argument can be made that a defendant in a criminal case should have equal or greater work product protection than a civil litigant, in part because it is essential to secure the full benefits of the constitutional right to counsel. But in the absence of such a ruling we are left with the meager protections of Penal Code section 1054.6. (*People v. Zamudio, supra,* 43 Cal.4th 327, 354-356.)

Teal v. Superior Court, supra, 117 Cal.App.4th 488, 492, holds that it violates the Fifth and Sixth Amendment rights of the defendant to order material provided to the defense by way of a subpoena duces tecum to *also* be provided to the prosecutor. Disclosure obligations may arise but *only* if the material is to be offered at trial. (*Ibid.*)

In 2004 the Legislature amended Penal Code section 1326 to address the issue of protecting defense work product in the context of a receiving documents from the court by way of a subpoena duces tecum: **"The court may not order the documents disclosed to the prosecution except as required by Section 1054.3."** (Pen. Code § 1326, subd. (c).)

Teal v. Superior Court, supra, 117 Cal.App.4th 488, also reinforces the defense

right to make an in camera showing to support securing materials produced by subpoena duces tecum to protect the constitutional rights and prevent revealing work product. (*Id.* at p. 491-492; see Pen. Code, § 1326, subd. (c).)

In *Rodriguez v. Superior Court, supra*, 14 Cal.App.4th 1260, the defense disclosed a defense psychologist's report, but had redacted the portion of the report in which the defendant made statements regarding the offense. The prosecutor sought the entire report, the defense objected citing a variety of privileges, but the trial court ordered the disclosure *and* ruled the prosecution could call the doctor as their witness in the case-in-chief. (*Id.* at pp. 1263-1264.) The appellate court issued a writ of mandate reversing the order. (*Id.* at p. 1271.) The defense secured the report confidentially under Evidence Code section 952, and the appellate court held the attorney-client privilege was not waived by naming the witness, and that protections of Penal Code section 1054.6 applied to the redacted material. (*Id.* at pp. 1267-1269.) The attorney-client privilege also covers **"confidential communications between a client *and experts retained by the defense."*** (*People v. Roldan, supra,* 35 Cal.4th 646, 724, citation and internal quotations omitted, original italics; *Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 153; but see Evid. Code, § 956.5.)

A court cannot compel the disclosure of privileged information in order to rule on a claim of privilege. (Evid. Code, § 915, subd. (a).) However, "**Evidence Code section 915, while prohibiting examination of assertedly privileged information, does not prohibit disclosure or examination of other information to permit the court to evaluate the basis for the claim, such as whether the privilege is held by the party asserting it … whether the attorney-client relationship existed at the time the communication was made … whether the client intended the communication to be confidential, or whether the communication emanated from the client.** (*Costco v. Superior Court* (2009) 47 Cal.4th 725, 737.)

In *Zimmerman v. Superior Court*, *supra*, 220 Cal.App.4th 389, the former attorney for a criminal defendant was held in contempt for failing to disclose how she came into possession of evidence relevant to the prosecution's case. The lawyer claimed the information was protected by the attorney-client privilege because she received the evidence through an agent of the defense and then provided it to the court as required by *People v. Meredith*, *supra*, 29 Cal.3d 682. They attorney refused to provide any other information regarding the identity of the agent or the how the agent came to possess the evidence. The Court of Appeal, affirming the finding of contempt, found that the mere assertion that the evidence was found by an agent was insufficient to prove the preliminary fact that the privilege existed. (*Id.* at pp. 401-402.) The court explained, **"[W]e cannot extend the attorney-client privilege so far that it alleviates the burden of proving the existence of privilege to such a degree that the party invoking privilege merely has to represent an agent was involved in the delivery of the evidence without having to prove the existence of agency. …[T]he attorney-client privilege can protect the information coming to an attorney from the client's agent as long as the agent is acting within the scope and authority of his agency. In such a situation, we further conclude the attorney's observations could be privileged if they were made as a direct consequence of a protected communication. [Citation.] However, the party claiming the existence of agency has the burden to prove the existence and scope of the agency with actual facts."** (*Id.* at p. 403.)

Waiver of the attorney-client privilege is more restricted than waiver of the psychotherapist-patient privilege. Although there is a limited exception to the attorney-

client privilege in habeas corpus proceedings alleging ineffective assistance of counsel (Evid. Code, § 958), the privilege remains in effect in subsequent proceedings, including a retrial. (*People v. Ledesma* (2006) 39 Cal.4th 641, 690-694.) **"[I]n filing his … habeas corpus petition alleging ineffective assistance of counsel, petitioner did not *waive* the [attorney-client] privilege, he merely triggered an *exception* to it that is not applicable in future proceedings. (See *People v. Ledesma.…*)"** (*In re Miranda, supra,* 43 Cal.4th 541, 555, original italics.)

In *Ledesma*, however, the privilege *was* waived by defense testimony from an expert who reviewed and considered the privileged information. (*People v. Ledesma, supra,* 39 Cal.4th 641, 695.)

In habeas corpus proceedings the prosecutor may use a subpoena duces tecum to obtain from the defense file **"only the items potentially relevant to the question presented by our reference order."** (*In re Miranda, supra,* 43 Cal.4th at 555.)

Andrade v. Superior Court, supra, 46 Cal.App.4th 1609, reached a similar result although the report ordered under Evidence Code section 730 was not also protected by Evidence Code section 952. (But see *Woods v. Superior Court, supra*, 25 Cal.App.4th 178.) The *Andrade* statements were protected by attorney-client privilege, psychotherapist-patient privilege and privilege against self-incrimination. None were waived by calling the expert as a witness, even though parts of his report were being disclosed. However, **"[a]n attorney's impression of his client's mental state is not protected by the attorney-client privilege."** (*People v. Perry, supra,* 38 Cal.4th 302, 316; citations omitted.)

Andrade and *Rodriguez* deal with *pretrial* disclosure. *People v. Jones* (2003) 29 Cal.4th 1229, deals with disclosure *during* trial. The appellant claimed revealing redacted information violated the privilege against self-incrimination, right to counsel, work-product doctrine and attorney-client privilege. (*Id.* at p. 1263.) The court disagreed. **"By injecting his mental state as an issue in the case, and calling [the expert witness] to testify, defendant waived any challenge to the contents of the interviews on which Dr. Thomas relied."** (*Id.* at p. 1264, citation and fn. omitted.)

The law used to be that when the defense put the defendant's mental condition in issue at trial, the prosecutor could have the defendant examined by a prosecution expert. (*People v. McPeters, supra,* 2 Cal.4th 1148, *People v. Carpenter* (1997) 15 Cal.4th 312, 412.) Not under the statutes enacted by Proposition 115, however. (Pen. Code, §§ 1054 et seq.) In *Verdin v. Superior Court* (2008) 43 Cal.4th 1096 the court said: **"[A]ny rule that existed before 1990 suggesting or holding a criminal defendant who places his mental state in issue may thereby be required to grant the prosecution access for purposes of a mental examination by a prosecution expert was superseded by the enactment of the criminal discovery statutes in 1990, and … nothing in the criminal discovery statutes … authorizes a trial court to … order … such access."** (*Id.* at p. 1109; see also *People v. Wallace* (2008) 44 Cal.4th 1032, 1087 [also no authority for mid-trial DA expert exam].)

Effective January 1, 2010, Penal Code section 1054.3, subdivision (b), was amended to permit the prosecution to petition the court for an order to conduct a mental health examination of the defendant whenever the defendant's mental health is at issue in any criminal or juvenile wardship proceeding, effectively superseding the holding of *Verdin.*

Competence to stand trial is not an issue of guilt or innocence. (Pen. Code, § 1367 et seq.) Penal Code section 1054, subdivision (e), permits discovery authorized by "other express statutory provisions," and Penal Code section 1369 calls for appointing **"two**

psychiatrists, licensed psychologists, or a combination thereof. One … may be named by the defense and one may be named by the prosecution."

Baqleh v. Superior Court (2002) 100 Cal.App.4th 478 held the defendant may have to submit to an exam by a prosecution expert, not under Penal Code section 1054.3 but as a **"special proceeding of a civil nature"** under the Civil Discovery Act of 1986. But statements obtained by the expert cannot be used in the criminal trial because of the **"judicially declared rule of immunity."** (*Id.* at pp. 502-503; reaffirmed in *People v. Pokovich* (2006) 39 Cal.4th 1240, 1253 [statements made during a *court ordered* competency exam cannot be used even for impeachment].)

If otherwise privileged information is relied upon by a defense expert who testifies to his opinion, the prosecutor may be entitled to that material, including reports of experts not testifying. (*People v. Combs* (2004) 34 Cal.4th 821, 862.) This could turn a defense expert into a prosecution witness. (*Id.* at pp. 863-864.)

As discussed above, in 1997 the California Supreme Court ruled that when defense counsel seeks material covered by Evidence Code section 1014 (*psychotherapist-patient* privilege), not only is pretrial disclosure not permitted, pretrial in camera review is likely to be improper. Thus disclosure, if any, will normally only be forthcoming *during* trial. (*People v. Hammon, supra*, 15 Cal.4th 1117.) For discovery to be "reciprocal," the defense must have similar protections for material covered by the *psychotherapist-patient* privilege, whether records of a witness or the accused. **"Pretrial disclosure ... would ... represent[] not only a serious, but an *unnecessary*, invasion of the patient's statutory privilege ... and constitutional right of privacy. (Cal. Const., art. I, § 1; see *People* v. *Stritzinger* (1983) 34 Cal.3d 505, 511-512 ... [recognizing the psychotherapist-patient privilege as a privacy right])."** (*Id.* at p. 1127, original italics.)

In SVP cases however, the right to a confidential examination is conditional, due to the unique nature of the proceedings. (*People v. Angulo, supra,* 129 Cal.App.4th 1349.)

"Communications potentially can be privileged under both the psychotherapist-patient privilege and the attorney-client privilege, and even if the former privilege is waived or otherwise inoperative, the latter privilege will still operate to render the communication confidential and privileged." (*People v. Gurule, supra,* 28 Cal.4th 557, 594.) Thus, for example, when a psychotherapist is appointed to assist defense counsel pursuant to Evidence Code section 730, the psychotherapist "is obligated to maintain the confidentiality of the client's communications not only by the psychotherapist-patient privilege but also by the lawyer-client privilege." (*Elijah W. v. Superior Court*, *supra*, 216 Cal.App.4th 140, 153 [holding the defense is entitled to the assistance of an expert who respects the attorney-client privilege and who would not report abuse, neglect or threats to authorities].)

For the same reason, when a witness's psychiatric records are also covered by the attorney-client privilege, they are not discoverable. (*People v. Gurule, supra,* 28 Cal.4th 557, 594.) **"[A] criminal defendant's right to due process of law does not entitle him to invade the attorney-client privilege of another. [Citation.]"** (*Ibid.*)

"'The psychotherapist-client privilege is broader than other privileges. Unlike the physician-patient privilege, for example, the psychotherapist-client privilege can be invoked in a criminal proceeding. [Citations.]' (*People* v. *John B.* (1987) 192 Cal.App.3d 1073, 1076-1077....)"

(*Nielsen v. Superior Court, supra*, 55 Cal.App.4th 1150, 1154.) Although *Nielsen* protects a defendant from having to reveal his mental health records to a *codefendant* (sought by subpoena duces tecum), it seems psychotherapist records should be at least as protected under *Hammon* from pretrial disclosure as are those of an alleged victim (disclosure *during* trial, if at all).

In *Story v. Superior Court* (2003) 109 Cal.App.4th 1007 the prosecutor sought the defendant's psychotherapy records claiming they were not privileged because the purpose for seeing the therapist **"was to obtain probation, not treatment of a mental condition."** (*Id.* at p. 1013.) The court upheld the privilege and denied access to the district attorney. (*Id.* at p. 1019.)

As discussed above, Penal Code section 1376 codifies the ban on executing mentally retarded persons. The statute allows the court to make orders **"reasonably necessary to ensure the production of evidence sufficient to determine whether … the defendant is mentally retarded, including … examination … by, qualified experts. No statement made by the defendant during an examination ordered by the court shall be admissible in the trial on the defendant's guilt."** (Pen. Code, § 1376, subd. (b)(2).) *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30 affirms the right of the prosecution to test a retardation claim by an examination by their expert. (*Id.* at p. 40.) This exam **"is not logically encompassed by the criminal discovery statutes."** (*Id.* at p. 41.) The court also limited immunity with respect to statements made to the prosecution expert to the statutory language quoted above, rejecting the defense argument for unqualified judicial immunity. (*Id.* at pp. 41-44.) **"The mental retardation examination must be limited in its scope to the question of mental retardation. … The trial court must prohibit any [prosecution] tests … not reasonably related to determining … retardation."** (*Id.* at p. 45.)

In *Scripps Memorial Hospital v. Superior Court* (1995) 37 Cal.App.4th 1720, the court ruled Evidence Code section 1157, subdivision (a), shields a defense *psychiatrist's* medical staff records from prosecutorial discovery, Evidence Code section 1157, subdivision (e), notwithstanding. The prosecutor sought the records hoping to impeach the defense psychiatrist, but the Court of Appeal ruled that subdivision (e) *unambiguously limits* discovery to **"the records of health providers added to the statute in 1983, 1985 or 1990 [dietitians, podiatrists, psychologists, and peer review bodies as defined in Bus. & Prof. Code § 805]."** (*Id.* at pp. 1725-1726.) *Scripps* is contrary to *People v. Superior Court (Memorial Medical Center)* (1991) 234 Cal.App.3d 381, which ruled the statute was "ambiguous" and permitted the discovery.

In most instances the *identity* of the client is not privileged, but there are exceptions. Where revealing the client's name **"might serve to make the client subject to official investigation or to expose him to criminal or civil liability"** his identity may be protected by the attorney-client privilege. (*Hays v. Wood* (1979) 25 Cal.3d 772, 785; see also *Brunner v. Superior Court* (1959) 51 Cal.2d 616, 618; and *People v. Sullivan* (1969) 271 Cal.App.3d 531, 543.)

Another privilege that can stand in the way of discovery for the defense and prosecution involves the media shield law that protects news sources and unpublished information. (Cal. Const., art. I, § 2; Evid. Code, § 1070; Pen. Code, § 1524, subd. (g).) Two cases, *Miller v. Superior Court, supra*, 21 Cal.4th 883 and *Fost v. Superior Court, supra*, 80 Cal.App.4th 724, dealing with the media shield law are discussed above in the section on Defense Discovery, subsection 12.

On a related "privilege" issue, the Penal Code says grand jury transcripts are made

public ten days after the defendant has received a copy. (Pen. Code § 938.1, subd. (b).) All or part of the transcript can be sealed, however, until after the trial, if **"there is a reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair and impartial trial.…"** (*Ibid.*) And, **"[t]he 'reasonable likelihood' standard … places a lesser burden on a defendant seeking to prevent dissemination of grand jury transcripts than would the 'substantial probability' standard that applies to public access cases under the First Amendment."** (*Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 645, citation omitted.)

Arguably, grand jury transcripts should never be made public. Grand jury proceedings are secret by nature and there is no public right of access to any facet of the grand jury's work, except that which is specifically granted by statute. (*Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 654.) The records of grand jury proceedings are not public records (*Id.* at p. 654) and the public has no constitutional right of access to them. Therefore, any right of access has to be expressly granted by the statute and **"the Legislature intended disclosure of grand jury materials to be strictly limited."** (*Daily Journal Corp. v. Superior Court* (1999) 20 Cal.4th 1117, 1124.) Penal Code section 938.1 grants the public a qualified right of access to grand jury transcripts, except when the release of the transcript is reasonably likely to prejudice a defendant's right to a fair and impartial trial. While the statute thereby provides a qualified right of access to the *transcript*, it does not allow any public access to grand jury *exhibits*. Exhibits are not part of the transcript. (*Stern v. Superior Court* (1947) 78 Cal.App.2d 9, 13 [interpreting former section 925 which was replaced by section 938 and 938.1 in 1959].) The transcript is a record of the testimony presented and **"[t]estimony is limited to that sort of evidence which is given by witnesses speaking under oath or affirmation."** (*Ibid.*)

At times, counsel tries to protect privileged material by seeking an in camera hearing. (*City of Alhambra v. Superior Court, supra,* 205 Cal.App.3rd 1118; Pen. Code, § 1054.7.) *Torres v. Superior Court, supra*, 80 Cal.App.4th 867, 870, holds that a *prosecutor* claiming privilege is not automatically entitled to an in camera hearing: **"[A]n in camera hearing is not proper on a claim of official privilege unless the party claiming the privilege explains in open court why the official privilege applies or declares that it cannot do so without betraying the privilege."** (See Evid. Code, § 915, subd. (b).) A similar showing could be required of the defense.

Osband v. Woodford (9th Cir. 2002) 290 F.3d 1036, provides for a protective order when privileged information is disclosed. **"While a petitioner in a habeas corpus action who raises a … claim of ineffective assistance of counsel waives the attorney-client privilege as to the matters challenged … it is within the discretion of the district court to issue an order limiting that waiver to the habeas proceeding in which the [issue] is raised."** (*Id.* at p. 1042, citations omitted.) *Osband* clarifies issues left unresolved in *McDowell v. Calderon* (9th Cir. 1999) 197 F.3d 1253. There, the government challenged the protective order only indirectly by appealing from a motion for review of the already existing order, so the standard for review was "clear error" rather than "error." The court speculated: **"The warden contends that, because raising [IAC] claims ... waives the attorney-client privilege, the district court erred in prohibiting the Attorney General from disclosing the documents discovered from McDowell's trial counsel's file to 'prosecutorial personnel or agencies' for use in ... McDowell's penalty phase retrial.** ***It is debatable whether the district court can so limit the Attorney General's use of the documents....*** **"** (*Id.* at pp. 1255-1256, italics

added, fn. omitted; see *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053.)

Three years later in *Osband* the Ninth Circuit affirmed the power of the district court to do issue protective orders. The Legislature and California Supreme Court have also been specific about the limited waiver when inadequacy of counsel issues are litigated. (See Evid. Code § 958; *People v. Ledesma, supra,* 39 Cal.4th 641, 695; *In re Miranda, supra,* 43 Cal.4th 541, 555 [attorney-client privilege waived *only* for the habeas proceedings, not future proceedings].)

A separate issue arose in a federal habeas corpus proceeding in which ineffective assistance of counsel was alleged, when the Attorney General went to the state court seeking disclosure of confidential Penal Code section 987.9 funding requests. (*People v. Superior Court (Berryman)* (2000) 83 Cal.App.4th 308.) The motion was denied, but the Court of Appeal reversed. **"[F]iling of a petition for writ of habeas corpus alleging … claims of ineffective assistance of counsel due to counsel's failure to investigate and/or prepare a defense, constitutes raising by collateral review an issue or issues related to the ... record created pursuant to Penal Code section 987.9. ... No further 'litigation purpose' beyond the filing of the petition for writ of habeas corpus is required by [Penal Code § 987.9(d)]."** (*Id.* at p. 311.)

Although the attorney-client privilege **"covers all forms of communication, including transmittal of documents [, … it] does not cover every document turned over to an attorney by the client."** (*Green & Shinee v. Superior Court* (2001) 88 Cal.App.4th 532, 537; see Evid. Code, § 954.) For example, the privilege does not protect supplemental police reports about an off-duty altercation which deputies prepared on orders of supervisors, but delivered to their lawyers (*Id.* at pp. 536-537.) The reports were "public records" (*id.* at p. 537), unusual when the district attorney is seeking documents provided to counsel for the "target." Also conversations conducted loud enough to be heard by third parties may not be protected by the attorney-client privilege. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 403.)

In *People v. Bolden, supra,* 29 Cal.4th 515, a police criminalist type-tested a dried stain on a knife seized from the defendant. Only one test was possible, so a defense expert witnessed the testing. (*Id.* at pp. 548-549.) The *defense* expert was called as a witness by the prosecution in the *Kelly-Frye* hearing, over work product and attorney-client privilege objections. (*Id.* at pp. 549.) The court found no error, and **"no evidence that [defense expert's] observations during the testing or his opinions concerning the validity … were the product of a privileged communication …."** (*Id.* at p. 551.)

Clients sometimes reveal information to a member of the clergy. Although *Doe 2 v. Superior Court, supra,* 132 Cal.App.4th 1504 is a civil case, the analysis of the clergy-penitent privilege (Evid. Code, §§ 1030-1034), is pertinent to criminal discovery, and may bar disclosure to the prosecution. (Evid. Code, § 1033.) For the privilege to apply the communication must be made in confidence, with no third person present as far as the "penitent" knows, to a clergyman (or woman) authorized or accustomed to hear such communications, and who under the tenants of the faith has a duty to keep the communication secret. (Evid. Code, § 1032.) The person need not be a member of the religious group and the communication need not be for the purpose of confession (*Doe 2, supra,* at p. 1517), *unless* the church authorizes its clergy to hear penitent communications only from church members. (*Id.* at p. 1517, fn. 13.) There is no privilege unless the person intends his or her communication to be confidential. (*Id.* at p. 1518.)

Although narrowly construed in *Izazaga*,

there may be materials that, if disclosed, *would* **"'reveal, directly or indirectly [defendant's] *knowledge* of facts relating him to the offense or ... [require defendant] to share *his thoughts* and beliefs with the Government.'"** (*Izazaga v. Superior Court, supra,* 54 Cal.3d 356, 369, fn. 8, original italics.) Disclosure that would violate the privilege against self-incrimination is not required. (Pen. Code, § 1054.6.) The privilege against self-incrimination may be invoked by even by a witness who denies culpability and is *not* charged. (*Ohio v. Reiner, supra,* 532 U.S. 17.)

However, in *People v. Boyette* (2002) 29 Cal.4th 381, 413-414, the prosecutor cross-examined the accused on the *content* of statements made to police in a motion to suppress those statements as involuntary. **"[His] statements – even if … admissions of guilt – were admissible in the suppression hearing only, and not to prove his guilt in the People's case-in-chief at trial. [Citation.] This limited immunity protects an accused's rights under the Fifth Amendment…."** (*Id.* at p. 415, fn. omitted.)

Special procedures apply when a law office is to be searched. (Pen. Code, § 1524, subdivisions (c), (d), (e), (f) and (i).) Materials seized are subject to attorney-client privilege and work product claims. Whether charges have been filed or not the court has the authority to make orders to prevent disclosure of materials protected by the attorney-client privilege or work product. (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703; Code Civ. Proc. § 2018.060.)

If the accused is or was a peace officer, the prosecutor can get personnel records only by complying with Evidence Code section 1043, except within the *limited* exemption of Penal Code section 832.7. (*People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397; see also *Alford v. Superior Court, supra,* 29 Cal.4th 1033.)

In *Coronado Police Officers Association v. Carroll, supra,* 106 Cal.App.4th 1001, the court denied police access to the contents of the Public Defender database, rejecting the claim that it is permitted under the California Public Records Act (CPRA). However, in dicta the court said: **"Records … concerning the administrative decision to compile the database, the cost of maintaining [it] or rules applying to its access and use are policy decisions made by the Public Defender in its capacity as administrator of a public office. A court *could* properly conclude that such documents are public records…."** (*Id.* at p. 1009, italics added.)

9. Reports and "notes" of defense experts

In *Rodriguez v. Superior Court, supra*, 14 Cal.App.4th 1260, the court approved deleting portions of a defense expert's written report to protect attorney-client privilege under Penal Code section 1054.6. (*Id.* at pp. 1265-1269.)

Andrade v. Superior Court, supra, 46 Cal.App.4th 1609, approved redacting the defendant's statements from a psychologist's report, even though the expert was to testify, *and* his opinions were based in part on those statements. The privilege against self-incrimination, psychotherapist-patient and attorney-client privileges were not waived simply because the expert was testifying and his report was being disclosed in part. *Andrade* rejected *Woods v. Superior Court, supra*, 25 Cal.App.4th 178, as not controlling. (*Andrade, supra*, at pp. 1613-1614.)

In *Woods* the defense disclosed a psychologist's evaluation of the defendant, and subsequently the court ordered disclosure of the defendant's responses to standardized tests. The Court of Appeal affirmed, rejecting the defense position that it violated self-incrimination protections. (*Woods v. Superior Court, supra*, 25 Cal.App.4th 178, 181-182, 185-186.) Failure to raise the right to counsel, attorney-client privilege, and work-product

privilege in the trial court waived those issues, but the court added (in dicta) that had they been preserved the ruling would not change. (*Id*. at p. 187.)

The court that decided *Woods* had said earlier in *Sandeffer v. Superior Court, supra*, 18 Cal.App.4th 672, that experts' notes are *not* discoverable under the statutes, **"in most circumstances."** (*Id*. at p. 679.) Later, in *Hines v. Superior Court* (1993) 20 Cal.App.4th 1818, that court defined *Sandeffer* "notes" as **"random 'notes' which might be lodged in an experts file"** (*id.* at 1823), but permitted discovery of **"factual determinations of the expert from observations made during an examination."** (*Ibid.*)

Oral reports of defense experts must be disclosed to the same extent as written reports would be subject to disclosure. (*People v. Lamb, supra,* 136 Cal.App.4th 575, 580.)

In 1994, the California Supreme Court ruled that the defense could not normally secure material covered by the *psychotherapist-patient* privilege or be granted in camera review of those records before trial. (*People v. Hammon, supra*, 15 Cal.4th 1117.) That bar would have to apply as well to reports and notes of that material, but to be "reciprocal" the defense should have similar protections. Cases like *Woods* must be read in light of restrictions reflected in *Hammon.*

10. Notes of witness interviews

Thompson v. Superior Court, supra, 53 Cal.App.4th 480, holds that notes of *witness interviews* are **"written or recorded statements"** under Penal Code sections 1054.1 and 1054.3, and subject to disclosure.

In *People v. Lawson, supra,* 131 Cal.App.4th 1242, the court noted that when a written document contains relevant statements of a discoverable witness, that document is discoverable whether it is a report or mere notes. (*Id.* at p. 1244, fn. 1.)

Notes of *prosecution* witnesses were destroyed in *People v. Garcia, supra,* 84 Cal.App.4th 316. The appellant was convicted of crimes committed in the course of employment and the issue was the destruction of notes taken by a CDC investigator, **"who took over an investigation … which had begun with the internal affairs unit…."** (*Id*. at p. 331.) The court ruled that as to an obligation to preserve notes: **"the test is whether defendant would be able to obtain comparable evidence by other reasonably available means."** (*Ibid*.) Based on testimony of *the person who destroyed the notes,* the court found no error. **"[H]is ... notes were either incorporated into his reports or consisted of photocopies of documents generated by [the prison]."** (*Ibid*.)

Although the notes in *Garcia* may have been destroyed before charges were filed, the same test should apply when defense witness notes are unavailable. When comparable evidence can be provided (by the defense or from other sources), no other sanction applies. Notes incorporated into disclosed reports meet the *Garcia* test. Reciprocity (due process) and the admonition in *Izazaga* about sanctions applying evenhandedly compel that conclusion, as police are not required to keep notes in many circumstances. (See *Killian v. United States, supra,* 368 U.S. 231; *People v. Coles, supra,* 134 Cal.App.4th 1049.)

11. The prosecutor must first disclose his witness list

Material potentially discoverable by the prosecutor need not be disclosed if the duty does not yet exist. The duty only arises upon demand from the prosecution, but an informal request is sufficient. (*People v. Jackson, supra*, 15 Cal.App.4th 1197.) *Jackson* did not address how and when a defense *objection* must be raised.

"*Following disclosure of the prosecution's witnesses*, on demand the defense must disclose *only the witnesses* (and their statements) it intends to call in refutation of the prosecution's case, rather than all evidence developed by the defense in refutation." (*Izazaga v. Superior Court, supra*, 54 Cal.3d 376, 377, fn. 14; "only the witnesses" italics original, other italics added.) Thus, the defense can withhold otherwise discoverable material until the prosecutor first provides *his* witness list. "Reciprocal" discovery means the defense *reciprocates,* and absent disclosure by the prosecutor there is nothing upon which to reciprocate.

The prosecutor can name witnesses orally. When this occurs defense counsel should "confirm" the list in open court or in writing to the prosecutor (email or letter), thus creating a record of the names disclosed.

Some prosecutors tell defense counsel the state's witnesses are the persons named in the police reports. This likely meets the requirement of providing a list of witnesses, but only when the prosecutor *specifically* makes that representation. In doing so the prosecutor insulates the defense from any disclosure obligation as to anyone named therein, because until the prosecution rests defense counsel can assume his or her investigation will be used to cross-examine the witness. (Information gathered for cross-examination is not discoverable.) Only if the state rests *without* calling that "named" witness does that person become at least a potential defense witness. If defense counsel then "intends" to call that previously named witness as his or her own witness at trial, then but only then is disclosure required.

If the prosecutor says the police reports list his witnesses the defense should still demand the *statements* (written and oral). If no further disclosure is made the court should be asked to limit testimony to what is reflected in the police reports, as new information would violate discovery rules *and* arguably due process. Enunciating what has been disclosed when announcing "ready" protects the record.

12. Discovery of defense penalty phase material by the prosecution

People v. Superior Court (Mitchell), supra, 5 Cal.4th 1229, ruled Penal Code section 1054.3 discovery obligations apply to penalty phase evidence, and **"such discovery should ordinarily be made at least 30 days prior to the commencement of the guilt phase of the trial, but the courts [have] discretion *in an appropriate case* to defer disclosure of all or part of the defendant's penalty phase evidence until the guilt phase has been completed."** (*Id.* at p. 1231, italics added.) *People v. Superior Court (Sturm)* (1992) 9 Cal.App.4th 172, decided before *Mitchell*, ruled the penalty phase is part of the "trial" for discovery purposes, but did not resolve the timing issues.

Mitchell glosses over an obvious objection to the timing of disclosure. Before an adverse guilt-phase verdict makes a penalty phase a reality, any "intent" to call defense witnesses in a penalty phase is conditional. The intent to call witnesses that triggers disclosure is defined as, **"including 'all witnesses it reasonably anticipates it is likely to call....'"** (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 376, fn. 11.) Logic suggests this can not occur while even one juror could prevent a penalty phase if unwilling to find any special circumstance allegation to be true (even if willing to convict for first degree murder).

Justice Mosk's brief dissent in *People v. Superior Court (Mitchell), supra*, 5 Cal.4th 1229, 1239, highlights a related issue. *Izazaga* says the privilege against self-incrimination does not bar prosecutorial discovery because it merely "accelerates" the timing of disclosure that will eventually

occur. (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 365-367.) This is not true for penalty phase material before verdict. Unless there is a special circumstance guilty verdict there will be *no* penalty phase and earlier disclosure of penalty phase material could be a windfall to the D.A. - one that could be useful in the guilt phase, directly or indirectly. (Cf. *Kastigar v. United States* (1972) 406 U.S. 441.)

The trial court can preclude or delay disclosure of defense penalty phase evidence, but only when found to be premature or constitutionally prohibited. **"Defendant ... argues ... that advance disclosure of his intended penalty phase evidence may jeopardize his guilt phase defense, potentially violating his privilege against self-incrimination and infringing upon his right to a fair trial. We *find merit in defendant's position*, but we note that any such problems could be largely eliminated by deferring prosecution discovery of defense penalty phase evidence *in an appropriate case* pending the guilt and special circumstance determinations."** (*People* v. *Superior Court (Mitchell), supra*, 5 Cal.4th 1229, 1237; italics added; Pen. Code § 1054.7.) Nevertheless, **"[i]f the trial court deems a particular item or items *constitutionally* protected from discovery until the guilt phase has concluded, the court should nonetheless order immediate disclosure of all unprotected items [under] section 1054.3."** (*Id.* at p. 1239, original italics.)

Mitchell lists the factors the trial court should consider when asked to defer disclosure to the prosecution until after the guilt phase verdicts are in. The decision is **"based on such considerations as the probable duration of the guilt phase, the *likelihood* that a guilty verdict, *with special circumstances*, will be returned, and the *potential adverse effect* disclosure *could* have on the guilt phase defense[.]"** (*People v. Superior Court (Mitchell), supra*, 5 Cal.4th 1229, 1239; italics added.) How the judge makes a pretrial determination of likely guilt phase verdicts is not explained. One would expect defense counsel to be permitted an in camera hearing to explain how the defense case makes it less likely, or to explain potential adverse affects of early disclosure.

Much of what is obtained for penalty phase defense is derived from information the defendant himself provides. He reveals significant events and identifies important people in his life, and this can be the basis for most penalty phase investigation. *Izazaga* says the privilege against self-incrimination would protect from disclosure material that would, **"'reveal, directly or indirectly [defendant's] *knowledge* of facts relating him to the offense or ... [require him] to share *his thoughts* and beliefs with the Government.'"** (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 369, fn. 8, original italics.) If counsel can demonstrate that disclosure would have this effect, the judge should excuse or delay such disclosure.

The trial court may reject arguments for delaying defense disclosure. **"[W]e hold that the reciprocal discovery provisions contemplate both guilt and penalty phase disclosure ordinarily would occur at least 30 days prior to commencement of the trial on *guilt* issues."** (*People* v. *Superior Court (Mitchell), supra*, 5 Cal.4th 1229, 1238, original italics.) Although this language says what the *statutory provisions* contemplate, it is *followed* by analysis of why and how disclosure to the prosecutor is deferred in some cases. The court is acknowledging that when in conflict constitutional protections override what is contemplated by *statute*.

Penalty phase material should only be disclosed after careful consideration of all arguments for *not* disclosing or delaying as to *each* item, and making such arguments when appropriate. (Pen. Code, § 1054.6.)

A judge might delay disclosure only until

the state rests in the guilt phase. But this would fail to protect the defense if the jury does not reach a verdict, and the guilt phase is retried. It prevents misuse of the information in the first guilt phase, but to fully protect the accused defense disclosure would be delayed until *after* guilt phase verdicts, subject to further delay unless the verdicts make a penalty trial imminent. (See Ogle & Phillips, *Penalty Phase Discovery: By Us and Against Us*, (Third Quarter 2000) California Defender, Vol. 9, No. 3, p. 57.)

13. The decision whether to disclose defense material

In deciding whether to disclose material, counsel must fully appreciate a complex set of competing duties and obligations. (See, *e.g.* Bus. and Prof. Code, § 6068, subd. (e); Pen. Code, § 1054.3; see also discussion above of *Brooks v. Tennessee, supra*, 406 U.S. 605.)

Whether relying on work product or other privileges, *Brooks v. Tennessee,* or other arguments for nondisclosure, counsel's position must be arrived at in *good faith,* and he or she must be prepared to vigorously argue the justifying facts and legal principles when the prosecutor claims a violation, or the trial judge wants an explanation.

Izazaga v. Superior Court, supra, 54 Cal.3d 356, 382-383, suggests an in camera hearing to claim privileges, presumably made at the time of the prosecutor's discovery request. (See *City of Alhambra, supra,* 205 Cal.App.3d 1118, 1130-1131; *People v. Lawson, supra,* 131 Cal.App.4th 1242, 1244, fn. 1.) However, considering the trial court's broad discretion to deny the request (*City of Alhambra, supra*. at p. 383, fn. 21), and the judge's familiarity with the law and willingness to be persuaded, seeking in camera review entails some risk.

Published cases show more acceptance of defense nondisclosure when raised pretrial (and writ relief sought if necessary), than when counsel withholds and only reveals it at the moment of delayed disclosure.

Legal issues affect, but are separate from the *tactical* decision called for when deciding whether to disclose privileged material in plea bargaining or sentence bargaining. This is a legitimate exercise of discretion as counsel carefully considers a variety of factors – the client's attitude toward a plea bargain, the likelihood of a favorable resolution of the case, what effect this particular material would likely have on resolving the case, the "downside" to revealing the information if the case is not resolved, and other relevant factors.

14. Ramifications of disclosing witnesses

Disclosure of defense witnesses risks harassment or intimidation. The witness may find himself being advised of the law of perjury, for example. It is misconduct to attempt to intimidate a defense witness, and likely to violate constitutional rights of the accused. (*People v. Hill, supra,* 17 Cal.4th 800, 834-836; *People v. Bryant* (1984) 157 Cal.App.3d 582.) When misconduct involving a penalty phase defense witness was raised the Court of Appeal warned, **"Either the district attorney's office will police any abuse or the courts will do so at the prosecutor's considerable inconvenience, we expect. *Nothing could be more outrageous than an attempt to intimidate a witness* for either side in a capital case, and trial judges must swiftly and surely rectify abuses."** (*People v. Superior Court (Sturm), supra*, 9 Cal.App.4th 172, 184, italics added; but see *People v. DePriest, supra,* 42 Cal.4th 1, 53-56.)

A protective order can be sought if there is risk of witness intimidation: **"disclosure shall be made ... unless good cause is shown why a disclosure should be denied, restricted, or deferred. 'Good Cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss**

or destruction of evidence, or possible compromise of other investigations by law enforcement. Upon the request of *any party*, the court may permit a showing of good cause for the denial *or regulation* of disclosures ... to be made in camera." (Pen. Code § 1054.7; italics added.) Although the language is weighted toward law enforcement the remedy is also available to the defense. (*People v. Loker, supra,* 44 Cal.4th 691, 733.) "Good cause" must include *any* restriction or remedy necessary to protect a constitutional right of the accused. (See e.g. *People v. Superior Court (Mitchell), supra*, 5 Cal.4th 1229, 1237.) **"Constitutional rights of criminal defendants are self-executing and need no statutory enforcement mechanism."** (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 382.)

Past abuses, particularly by the same deputy district attorney, investigator, peace officer or police department, provide examples of what might prompt a protective order. (See *Andrus v. Estrada* (1995) 39 Cal.App.4th 1030; [a lawyer's past history of use of dilatory tactics is relevant to sanctions].) The court could order no contact with the defense witness outside the presence of defense counsel or defense investigator. Counsel could offer to make the witness available for a monitored interview, if the trial court would so restrict the contact. Protective orders can be fashioned in various ways but the court will require a good reason before ordering it.

Just as hostile prosecution witnesses may refuse to talk with the defense (often after being advised by the police or prosecutors that they are not required to), defense witnesses are not required to cooperate with law enforcement (unless called before a grand jury). Defense witnesses can be advised that they can decide whether to cooperate. But it is difficult for people to resist the "authority" of police or prosecutors, and refusing an interview can be offered as evidence of bias at trial, as the defense argues when a state witness is uncooperative. (*People v. Hannon, supra,* 19 Cal.3d 588, 599-602.)

Defense experts should be *fully* informed about the *privileged* nature of the information they possess and insist that nothing be provided to the police or prosecution, orally or otherwise, except through defense counsel. It is defense counsel's duty to comply with discovery statutes, not that of a witness. (*Rodriguez v. Superior Court, supra*, 14 Cal.App.4th 1260; *Andrade v. Superior Court, supra*, 46 Cal.App.4th 1609; see also *Woods v. Superior Court, supra*, 25 Cal.App.4th 178.) Experts often have work-product or other privileged information that needs protecting and the judge should (on request) prevent the exploitation of the expert's refusal to be interviewed when done to protect a privilege or privileges.

Counsel must be alert to prosecutor or police misconduct in interaction with defense witnesses. It should be anticipated and exposed to judicial scrutiny when it occurs. Habeas corpus is likely warranted when improprieties are discovered after trial.

15. Remedies for an improper order

An order for defense disclosure may be overbroad, require premature compliance, may apply to material not legally discoverable or otherwise erroneous. (*People v. Lawson, supra,* 131 Cal.App.4th 1242.) Improper orders can be challenged by a petition for writ of prohibition to block enforcement, or writ of mandate to compel a different order. **"Writ review of discovery orders is appropriate where the order may undermine a privilege … [or] to address "questions of first impression … of general importance to the trial courts and … [legal] profession…."** (*Story v. Superior Court*, *supra*, 109 Cal.App.4th 1007, 1013; citations and internal quotations omitted.) *Story* reversed an order permitting prosecutor access to psychotherapy records. (*Id.* at p. 1019.)

Rodriguez v. Superior Court, supra, 14 Cal.App.4th 1260, reversed an order for disclosure of material protected by the attorney-client privilege. *Andrade v. Superior Court, supra*, 46 Cal.App.4th 1609, reached a similar result, based on several privileges.

Prince v. Superior Court, supra, 8 Cal.App.4th 1176, nullified an order that improperly compelled disclosure of a defense expert's report on a DNA test when no decision had been made whether the evidence would be offered at trial. Disclosure would have been premature or entirely gratuitous absent that intent.

Hubbard v. Superior Court, supra, 66 Cal.App.4th 1163, is another example of a favorable ruling when counsel brought a pretrial challenge to a discovery order.

Simply defying the order could lead to contempt which, if *properly* done, could be upheld. (*In re Littlefield, supra*, 5 Cal.4th 122.) If the writ petition is denied in the Court of Appeal, or relief not provided by the ruling, as in *Littlefield*, a Petition for Review could be filed in the California Supreme Court.

16. Sanctions

Penal Code Section 1054.5 provides various methods to enforce discovery rules. In *Izazaga*, Chief Justice Lucas wrote: **"the provisions relating to timing of disclosure and the mechanics of enforcement apply evenhandedly to both the prosecution and defense."** (*Izazaga v. Superior Court, supra*, 54 Cal.3d 356, 374.) The mechanics of enforcement should not be applied more vigorously against the defense. (See *People v. Jackson, supra,* 15 Cal.App.4th 1197.) Defense conduct should be treated with the same deference afforded to the prosecution. (See *People v. Panah, supra,* 35 Cal.4th 395, 460; *People v. Rutter, supra,* 143 Cal.App.4th 1349, 1352-1354.)

Exclusion of defense evidence should be rare. If a good faith claim that disclosure was not required (whether correct or not) is rejected the remedy should not be exclusion of the evidence. Under narrow circumstances it does not violate the constitution to exclude defense evidence, (*Taylor v. Illinois* (1988) 484 U.S. 400), but Penal Code section 1054.5, subdivision (c), *precludes* exclusion of testimony offered by either party unless **"all other sanctions have been exhausted."** (*People v. Mitchell*, *supra*, 184 Cal.App.4th 451, 459.) *People v. Jackson, supra,* 15 Cal.App.4th 1197 notwithstanding, it is nearly impossible to exhaust all other sanctions. **"[A] court may make *any order necessary* to enforce … this chapter, including *but not limited to*, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony ... continuance … or *any other lawful order*. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."** (Pen. Code, § 1054.5, subd. (b), italics added; see also CALCRIM 306.)

People v. Edwards (1993) 17 Cal.App.4th 1248, ruled it was error to exclude defense evidence for failing to provide discovery. *Edwards* analyzes *Taylor v. Illinois, supra,* and *Michigan v. Lucas* (1991) 500 U.S. 145. **"*Taylor* concluded … preclusion … was justified in that case because the accused deliberately had violated the discovery order to gain a tactical advantage and the proffered evidence *likely had been fabricated*. [¶] … [¶] The high court [in *Michigan* v. *Lucas*] also clarified *Taylor* and stated: 'We did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather … alternative sanctions would be "adequate and appropriate in most cases."' [Citation.]"** (*Edwards, supra*, at p. 1262, italics added.)

People v. Gonzales (1994) 22 Cal.App.4th 1744, reversed robbery convictions because

defense testimony was erroneously excluded for untimely disclosure. The court held that neither *Taylor v. Illinois, supra*, 484 U.S. 400 nor Penal Code section 1054.5, subdivision (c), allowed for exclusion of the testimony. (*Id*. at pp. 1756-1759.) The court said, **"if … exclusion was imposed because of prejudice, we find no basis to support [exclusion, and if] the sanction ... was taken as punishment for failure to comply with discovery orders, we find neither a showing of significant prejudice nor a record supportive of a finding of willfulness. We therefore conclude the exclusion of the testimony of appellant's witness was a violation of the compulsory process clause."** (*Id*. at p. 1759.)

Outright exclusion did not occur in *People v. Lamb, supra,* 136 Cal.App.4th 575, although the court denied the opportunity to present surrebuttal evidence as a sanction for failing to disclose oral statements of a defense expert, or in the alternative under Evidence Code section 352. (*Id.* at pp. 581-582.)

Before 1990, when discovery obligations applied only to prosecutors, then Chief Justice Lucas said: **"the usual remedy for noncompliance with a discovery order is not suppression of evidence, but a continuance."** (*People v. Robbins* (1988) 45 Cal.3d 867, 884.) The *usual remedy* should be no different now. (See *People v. Mitchell*, *supra*, 184 Cal.App.4th 451, 459 [exclusion only proper if all other remedies exhausted].)

It was prejudicial to give CALJIC 2.28 (CALCRIM 306) in *People v. Bell, supra,* 118 Cal.App.4th 249. Nothing suggested disclosing alibi witnesses only 10-days before trial adversely affected the prosecutor's case (*id.* at p. 255), and the defendant *himself* had no role in the delay, contrary to the language of 2.28. (*Id.* at pp. 254-255.) CALCRIM 2.28 failed to provide guidance **"on how [the violation] might legitimately affect their deliberations[,]"** (*id.* at p. 255) and the evidence **"was not overwhelming … essentially … two eyewitnesses."** (*Id.* at p. 257) CALJIC 2.28 was also found faulty in *People v. Saucedo* (2004) 121 Cal.App.4th 937 (harmless error), *People v. Cabral* (2004) 121 Cal.App.4th 748 (reversed), and *People v. Lawson, supra,* 131 Cal.App.4th 1242 (reversed). It is unclear whether CALCRIM 306, avoids the flaws in CALJIC 2.28. (*People v. Riggs* (2008) 44 Cal.4th 248, 306-307.)

Failure to comply with Penal Code section 1054.8, subdivision (a), is dealt with through Penal Code section 1054.5. (Pen. Code, § 1054.8, subd. (b).)

A sanction for a violation of a discovery order is remedial in nature and is intended to address the wrongdoing of the party in violation or to cure the prejudice caused by the violation. Therefore, while a **"sanction may include an element of punishment, the record must support a finding of significant prejudice or willful misconduct."** (*People v. Bowles*, *supra*, 198 Cal.App.4th 318, 326.)

Monetary sanctions pursuant to Code of Civil Procedure section 177.5 are limited to violations of a lawful court order, (*People v. Muhammad, supra,* 108 Cal.App.4th 313), thus as to discovery only available for violation of a discovery *order*.

If a witness is not located until just before trial or during trial the intent to call the witness normally would only arise when that occurs. Disclosure at that point would be timely, and sanctions would be inappropriate. (*People v. Walton* (1996) 42 Cal.App.4th 1004, 1016-1017.) A continuance may be appropriate, but not as a sanction.

Without an express court discovery order Penal Code section 1054 does not apply in a juvenile delinquency proceeding, and no sanctions can be imposed for failure to disclosed witnesses. (*In re Thomas F., supra,* 113 Cal.App.4th 1249, 1254-1255.)

17. Retroactivity

The only defense material protected from disclosure by retroactivity is that which was *obtained* prior to the June 1990 effective date of Proposition 115. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300.) A case that went to warrant long ago or is back for *retrial*, might qualify. Even a pre-Proposition 115 homicide case would fall under the discovery statutes except as to defense evidence *obtained* before the effective date. As unlikely as this is, there would still be no prosecutorial discovery in the few isolated cases where material was gathered that long ago.

IV. CONCLUSION

This overview of California law discusses most significant cases. Recent opinions, however, are subject to modification, and Court of Appeal opinions could be nullified entirely by rehearing, depublication, or grant of review by the California Supreme Court.

Also, case law interpretation of discovery law is a constant and evolving process. For these reasons readers are cautioned to follow the "subsequent history" of recent cases and watch for new cases as they arise.

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