

Innocence Legal Team
1600 S. Main Street, Suite 195
Walnut Creek, CA 94596
Tel: 925 948-9000

Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

THE PEOPLE OF THE STATE OF)	Case No.
CALIFORNIA,)	DA No.
)	
Plaintiff,)	MOTION FOR DISCOVERY; REQUEST
)	FOR SANCTIONS; AFFIDAVIT OF
)	COUNSEL
)	
vs.)	Penal Code sec. 1054.1 et. seq.
)	
,)	Date:
)	Time:
Defendant.)	Dept.:
_____)	

TO: DISTRICT ATTORNEY, COUNTY OF *, AND TO ***, DEPUTY DISTRICT ATTORNEY**

PLEASE TAKE NOTICE that on the above date and time or as soon thereafter as the matter may be heard in the above court, the defendant by counsel will move the court for an order granting pretrial discovery.

This motion will be made on the ground that the District Attorney has in his or her actual or constructive possession certain items of evidence which defense counsel is legally entitled to inspect and copy. An informal discovery request was served on the District Attorney on _____ as set forth in the Affidavit of Counsel, attached. More than 15 days has elapsed since the service of such

informal request and the District Attorney has failed to provide the defendant's counsel the following items requested in the informal request for discovery:

Statutory Disclosures Pursuant to 1054.1:

1. The names and addresses of persons the prosecutor intends to call as witnesses at trial.
2. Statements of all defendants.
3. All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
4. The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
5. Any exculpatory evidence.
6. 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 conjunction with 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.

Evidence Code section 1108 Evidence and Priors:

Copies of all witness statements, police reports,

medical reports, court records, court transcripts, physical evidence, witness transcripts, and all video and audio tapes of witnesses concerning evidence that the prosecution has which would/might qualify as Evidence Code § 1108 evidence. Copies of all prior convictions and the documentary evidence that the prosecution intends to introduce which would/might qualify as Evidence Code § 1108 evidence.

Experts (Prosecution):

Identity of any mental health expert which the prosecution intends to call or has consulted on the subject of _____ or any other subject connected with this case, whether or not said expert will be called by the prosecution. Provide the reports if any by the above listed experts and his/her curriculum vitae.

Identity of any medical expert which the prosecution intends to call or has consulted on the subject of _____ or any other subject connected with this case, whether or not said expert will be call by the prosecution. Provide the reports if any by the above listed experts and his/her curriculum vitae.

Identity of all experts who have given an opinion to the prosecution concerning: _____. Provide the reports if any by the above listed experts and his/her curriculum vitae.

Experts (Defense):

Copies of all transcripts that the prosecution may intend to use for cross examination of the defendant's experts based on testimony of such experts in prior trials, or any other material that may be on tape, video, or set forth in notes, summaries, etc. which the prosecution will use during cross-examination of any defense experts.

Grand Jury Proceedings:

(1) names of all witnesses who appeared before the grand jury concerning the defendant whether their testimony lead to an indictment or not; (2) transcripts of the testimony of all witnesses who testified before the grand jury regarding the defendant; (3) transcripts of the charge and instruction by the court to the grand jury at the time of indictment; (4) transcripts of any advice given or instruction in law given by the court or the district attorney; (5) a transcript of district attorney's opening and closing remarks and argument; (6) a record of all questions by jurors to the district attorney; and (7) a record of all questions to the court by the jurors and the answers given by the court.

Laboratory Testing

Reports, supporting documentation, and notes of laboratory personnel of any laboratory tests run on physical evidence seized by the prosecution in particular _____.

Reports, supporting documentation, and notes of computer experts of their

analysis of the content of all hard drives, diskettes or other storage media of computers seized by or in the possession of the prosecution concerning this case.

Medical Evidence

Medical examination reports on the alleged victim without redactions of names and addresses.

Name, address and telephone number of medical all medical staff present at the medical examination of the alleged victim.

Colposcopic photographs of the examination of the alleged victim.

Other photographs of the alleged victim taken as part of a medical examination or for purposes of documenting injuries of the alleged victim.

Offers of Leniency

Any offers of leniency for any pending or possible charges given to any witness in exchange for testimony.

Physical Evidence/Computers

A clone of all computer hard drives, CD-ROMs, RW-CD's, Zip or Jazz disks, diskettes, tapes, or other storage media (excluding program diskettes) seized by police agency or in the possession of police agencies concerning this case. (Defense will provide blank hard drives, diskettes, or other storage media for this purpose or agrees to pay the cost for those storage devices provided by the prosecution. Prosecution

must provide defense the type and number of storage media needed, if the prosecution is not going to provide the storage media.) (Defense stipulates to the destruction of the copies upon the case being final (completed) or disposal pursuant to Penal Code Section 1417.8 (a)(2).) (Because there are tens of thousands of files on each of the computer(s) which would take weeks to examine individual files and because the defense intends to use its own computer programs to examine the storage devices, it is not feasible to examine the computer storage devices at the police station; for that reason, the defense requires its own copy.

Copies of all photographic and documentary evidence seized by police agencies or in the possession of police agencies concerning this case.

If the physical evidence includes any photograph or photographs of a minor that is harmful matter as defined in Penal Code section 313, the defendant will stipulate to the court issuing an order indicating that the photograph or photographs shall be copied and available only to the defendant's counsel, investigator(s), and expert(s) to be designated in such court order, pursuant to Penal Code section 1417.8(a)(1), and such photograph or photographs shall be returned to the court after the final determination of the action or proceeding.

If the matter is in electronic format such as a computer graphic image and released to the defense on a hard drive or other electronic media storage device, the hard drive or media

storage device shall be erased or reformatted to the satisfaction of the court so as to completely eliminate and destroy the matter from the media storage device.

Physical Evidence Testing

An opportunity to examine (and have tested by a defense expert) the following physical evidence:

Fill in evidence requested

All scientific and medical reports in your possession or which you have had an opportunity to examine concerning:

Fill in evidence requested

Police Reports and Communication Tapes

An un-redacted copy of all police reports and all supplemental police reports.

An un-redacted copy of the case log or file log (the chronological listing of police contacts regarding the case).

A copy of police communication tapes and CAPS logs for the following dates:

Fill in dates

A copy of the 911 tapes of:

Fill in dates, times, location, caller, etc.

Rap Sheets

The arrest record of the defendant, the alleged victim, all witnesses the prosecution intends to call as witnesses, and all witnesses disclosed by the defense as defense witnesses for crimes of moral turpitude whether felony or misdemeanor.

Search Warrant and Previous Copies of Applications for Search Warrants

Copies of Search Warrant(s) in the present case.

Copies of Affidavit(s) in Support of Search Warrant(s) in the present case.

Copies of Affidavit(s) of Expertise which were part of obtaining search warrant(s) in the present case.

Copies of Returns on Search Warrant(s) in the present case.

Copies of any previous applications for Search Warrants and Affidavits in support thereof involving the defendant which were refused by a Magistrate for lack of probable cause.

Statements

All audio taped and/or video taped statements and/or written

statement of the alleged victim without redactions of names and addresses.

Any transcripts prepared of the above requested statements of the
the
alleged victim without redactions or names and addresses.

All Police Officer and District Attorney Investigator notes concerning the above requested statements of the alleged victim without redactions of names and addresses.

All audio taped and/or video taped statements and/or written statement of the defendant(s) without redactions of names and addresses.

All transcripts prepared of the above requested statements of the
the
defendant without redactions of names and addresses.

All audio taped and/or video taped statements and/or written statements of any witness (whether the prosecution intends to call the witness at trial or not) without redactions of names and addresses.

All photographs, books, papers, dolls, and other items shown to the alleged victim during the taking of the alleged victim's statement, including any lineup photographs.

Statements of Defense Witnesses

All audio taped and/or video taped statements and/or written statement of any defense witnesses presently disclosed or subsequently

disclosed without redactions of names and addresses.

Any transcripts prepared of the above requested statements of the
the
defense witnesses without redactions or names and addresses.

All Police Officer and District Attorney Investigator notes concerning the above requested statements of the defense witnesses.

Training And Policies on Audio And Video Taping

Copies of any policy statement in effect during _____ of the _____ Police Department on the audio or video tape recording of the statement's of suspects.

Copies of any policy statement in effect during _____ of the _____ Police Department on the audio or video tape recording of the statements of suspects of child sexual molestation.

Copies of any policy statement in effect during _____ of the _____ Police Department on the audio or video tape recording of alleged victims of child sexual molestation.

Training Courses

The curriculum vitae of Detective _____.

List of all POST and Non-Post Training Courses attended or taught

by Detective _____ as maintained by his agency.

List of all POST and Non-Post Training Courses attended or

taught

by Detective ___ on the subject of the interrogation of a suspect.

List of all POST and Non-Post Training Courses attended or
taught

by Detective ___ on the subject of the questioning/interviewing of
alleged victims of child molestation.

List of all POST and Non-Post Training Courses attended or
taught

by Detective ___ on the subject of audio taping and/or video taping
of interrogations of suspects.

List of all POST and Non-Post Training Courses attended or
taught

by Detective ___ on the subject of audio taping and/or video taping of
the interview of alleged victims of child sexual molestation.

Training Materials or Educational Materials

Copies of any and all training manuals, video or audio tapes,
books, notes, or other written material received, read, or considered
by Detective ___ concerning the audio and/or video taping of
interrogation of suspects in child sexual molestation cases. (If the
materials are no longer available identify them so that the defense
can obtain copies)

Copies of any and all training manuals, video or audio tapes,
books, notes, or other written material received, read, or considered

by Detective ___ concerning the audio and/or video taping of interviews of alleged victims of child sexual molestation. (If the materials are no longer available identify them so that the defense can obtain copies)

Copies of any and all training manuals, video or audio tapes, books, notes, or other written material received, read, or considered by Detective ___ concerning interrogation of suspects. (If the materials are no longer available identify them so that the defense can obtain copies)

Copies of any and all training manuals, video or audio tapes, books, notes, or other written material received, read, or considered by Detective ___ concerning questioning of alleged victims of child molestation. (If the materials are no longer available identify them so that the defense can obtain copies)

MEMORANDUM OF POINTS AND AUTHORITIES

I

STATUTES AND DECISIONAL LAW SPECIFIC TO ITEMS REQUESTED

Items 1 through 6:

Items 1 through 6 are intended to implement the Legislature's clear intent to promote the ascertainment of truth in trials and to save court time. Each of the items requested is identified in Penal Code § 1054.1 (a) through (f).

Penal Code Section 1054.1(a) provides that the prosecution must disclose the names and addresses of persons intended to be called as witnesses. No legitimate reason exists to withhold discovery of their telephone numbers and inconvenience to the witnesses will result from unannounced contacts by a defense investigator. Additionally, Penal Code sections 841.5(b) and (c) explicitly recognize the right of defense counsel to obtain the telephone numbers of victims and witnesses.

WITNESSES/VICTIMS NAMES AND ADDRESS (Redacted Police Reports)

In the case of Reid v. Sup. Ct (1997) 55 CA 4th 1326, 1328 the court of appeals vacated a Superior Court order denying names and address of victim/witnesses to the defense and an order that defense investigators were not allowed to contact the witnesses.

Exculpatory Material under Penal Code 1054.1(d):

Exculpatory evidence under Penal Code section 1054.1(e) includes lineup reports of other witnesses whom the prosecutor does not intend to call and are thus discoverable under Brady v. Maryland (1963) 373 US 83, 10 L.Ed.2d 215, 83 S Ct 1194. In Norton v. Superior Court of San Diego County (1959, 4th Dist) 173 Cal.App.2d 133, 343 P2d 139, the appellate court stated that a defendant is entitled to discover photographs that were exhibited to witnesses for the purpose of identification, in order to attempt to impeach these witnesses at trial.

In People v. Davis (1971, 2nd Dist) 20 Cal.App.3d 890, 98 Cal.Rptr. 71, the Court of Appeal stated that communications from the office of the District Attorney to prospective witnesses may constitute an attempt to suppress evidence. Accordingly, the prosecution has a duty to disclose such evidence (Brady v. Maryland (1963) 373 US 83, 10 L.Ed.2d 215, 83 S Ct 1194.)

Penal Code Section 1054.1(b) provides that the prosecution has a statutory duty to disclose all statements made by a defendant. In People v. Angeles (1985, 2nd Dist) 172 Cal.App.3d 1203, 11211, 218 Cal.Rptr. 756, the Court of Appeal stated:

" \...[Law enforcement officers] must take reasonable precautions to preserve for trial [their] original handwritten notes made in the course of interrogating a criminal defendant unless the interrogation is tape recorded and the tape is preserved."

Percipient witnesses may undermine the testimony of other witnesses whom the prosecution intends to call at trial. Accordingly,

the prosecution must disclose their identities. (United States v. Strifler (1988, 9th Cir.) 851 F.2d 1197.) In Norton v. Superior Court of San Diego County (1959, 4th Dist) 173 Cal.App.2d 133, 136, 343 P2d 139, the Court of Appeal ruled as follows:

"The defendant is entitled to discover the identity of eyewitnesses, regardless of whether the prosecution intends to call them to testify."

Statements of non-testifying witnesses may undermine the testimony of witnesses whom the prosecution intends to call and are thus exculpatory in nature. Accordingly, the prosecution must disclose their statements. (United States v. Strifler (1988, 9th Cir.) 851 F2d 1197.) In Vetter v. Superior Court of Sacramento County (1961, 3rd Dist) 189 Cal.App.2d 132, 137, 10 Cal.Rptr. 890, the Court of Appeal stated as follows:

The District Attorney, referring to certain eyewitnesses, stated in his affidavit "that at this time it is not the intention to call any of them as witnesses at the trial. But this is no reason for denying the inspection of said statements to petitioner. In order to properly evaluate the statements made to him by these six prisoners, counsel for petitioner was entitled to an inspection of the previous statements made so many days before, when, undoubtedly, the facts and circumstances were fresher in their minds."

Evidence is admissible to establish that someone other than the defendant may have committed the offense charged against the defendant. (People v. Hall (1986) 41 Cal.3d 826, 226 Cal.Rptr. 112, 718 P2d 99; People v. Guillebau (1980, 1st Dist) 107 Cal.App.3d 531, 549, 166 Cal.Rptr. 45.) Accordingly, a defendant is entitled to discover evidence that shows that another person committed the crime

with which the defendant is charged.

The identities and statements of witnesses whom the prosecution intends to call in rebuttal of the defense are discoverable. (Izazaga v. Superior Court (1991) 54 Cal.3d 356, 375, 285 Cal.Rptr. 231, 815 P.2d 304., People v. Hammond (1991, 5th Dist.) 22 Cal.App.4th 1611, 1621, 28 Cal.Rptr.2d 180, 186.

Evidence Code Section 1035.4 provides that a court may compel disclosure of information received by a sexual assault counselor which is relevant to charges of sexual assault or child abuse if the court determines that the probative value outweighs the effect of compelled disclosure on the victim, the treatment relationship, and the treatment services.

Evidence Code § 1108 Evidence and Priors:

If the prosecution intends to offer evidence of the defendant's commission of another sexual offense or offenses, the defendant is entitled to statements of the witnesses or a summary of the substance of any testimony that is expected to be offered by the prosecution, at least 30 days before the scheduled date of trial or at such later time as the court may allow for good cause. Evidence Code section 1108(b). See People v. Soto (1998 5th Dist.) 64 Cal.App.4th 966, 979-980, 75 Cal.Rptr.2d 605, 613-614.

Additionally, Evidence Code section 1108(c) specifically states that: " This section shall not be construed to limit the admission or

consideration of evidence under any other section of this code. "

Evidence Code section 1108 is modeled after Federal Rules of Evidence, Rule 413(b). It has been held that the government is required to disclose " similar crimes evidence. " In the case of US v. Enjaly (10th Cir. 1998) 134 F.3d 1427 at pg. 1433 the court stated:

Rule 413(b) requires that the government disclose to defendant the similar crimes evidence to be offered no later than fifteen days before trial (unless shortened by court order). This notice period protects against surprise and allows the defendant to investigate and prepare cross- examination. It permits the defendant to counter uncharged crimes evidence with rebuttal evidence and full assistance of counsel.

Thus, the defendant is entitled to all of the material in the possession of the prosecution involving statements of the witnesses or a summary of the substance of their statement, and " similar crimes evidence " which may be offered under Evidence Code section 1108.

Experts (Prosecution) :

Penal Code Section 1054.1(f), by implication, provides for defense discovery of the identify of experts. In People v. Johnson (1974, 4th Dist.) 38 Cal.App.2d 228, 235, 113 Cal.Rptr. 303, the Court of Appeal stated:

Where it is appropriate, the defendant may discover the reports of the state's experts concerning their examination of real evidence [citation omitted]; discovery of the identity of state experts is analogous.

Experts (Defense):

The prosecution has a duty to provide the names and statements of rebuttal witnesses and their statements. (Izazaga v. Superior Court (1991) 54 Cal.3d 356, 375, 285 Cal.Rptr. 231, 815 P.2d 304., People v. Hammond (1991, 5th Dist.) 22 Cal.App.4th 1611, 1621, 28 Cal.Rptr.2d 180, 186. If it is the intention of the prosecution to cross examine the defendant's expert(s) using the defense experts' own prior statements or reports, the defendant should be entitled to such prior statements or reports which the prosecution intends to rely upon. If the prosecution intends to use a prosecution rebuttal witness to contradict the defense expert, the defendant is entitled to the statements or reports of the rebuttal witness. Penal Code section 1054.1(f).

Grand Jury Proceedings:

The defendant is entitled to: (1) names of all witnesses who appeared before the grand jury concerning the defendant whether their testimony lead to an indictment or not; (2) transcripts of the testimony of all witnesses who testified before the grand jury regarding the defendant; see Penal Code section 938.1(a) and Greenberg v. Superior Court (Greenberg (1942) 19 Cal.2d 319, 121 P.2d 713; (3) transcripts of the charge and instruction by the court to the grand jury at the time of indictment; (4) transcripts of any advice

given or instruction in law given by the court or the district attorney;(5) a transcript of district attorney's opening and closing remarks and argument; (6) a record of all questions by jurors to the district attorney; and (7) a record of all questions to the court by the jurors and the answers given by the court. See People v. Superior Court of Santa Clara County (Mouchaourab) (2000, 6th Dist.) 78 Cal.App.4th 403, 437-440, 92 Cal.Rptr.2d 829, 857-860.

Laboratory Testing

"The results of . . . scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at trial " is discoverable pursuant to Penal Code section 1054(f).

Medical Evidence

"The results of . . . scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at trial " is discoverable pursuant to Penal Code section 1054(f).

Offers of Leniency / Agreements to Testify

The credibility of a witness may be impeached by evidence of expectation of leniency. (Alford v. United States (1931) 282 U.S. 687, 75 L.Ed 624, 51 S.Ct. 218.) This rule has been recognized in People v. Allen (1978, 2nd Dist) 77 Cal.App.3d 924, 931, 144 Cal.Rptr. 6, wherein the court, in holding that it was error to preclude cross-

examination concerning a witness' expectation of leniency for pending charges, stated: "A party can offer evidence, by proffered extrinsic evidence or by cross-examination of a witness, to attack the credibility of a witness, if such evidence tends reasonably to establish that the witness has a motive to fabricate, or some other motive, that tends to cause the giving of untruthful testimony, even though there may be no reasonable basis for the existence of such a motive."

In order to effectively cross-examine witnesses who testify pursuant to an agreement with the prosecution, the prosecution must disclose the terms of any agreement relating to leniency or other consideration given in exchange for the testimony of the witness. This right to discovery was recognized by the Supreme Court in People v. Phillips (1985) 41 Cal.App.3d 29, 45-48, 222 Cal.Rptr. 127, 711 P.2d 423, and People v. Morris (1988) 46 Cal.3d 1, 29-34, 249 Cal.Rptr. 119, 745 P.2d 843:

"The prosecution must disclose any agreement between it and counsel for an accomplice who testifies as a witness even though counsel does not communicate the agreement to the witness. The jury is entitled to have 'a complete picture of the factors affecting the witness' credibility.'"

Pending Charges

Cross-examination concerning charges pending against a witness is guaranteed by the due process clause of the Federal Constitution (Delaware v. Van Arsdall (1986) 475 US 673, 89 L.Ed.2d 674, 106 S Ct

1431) and such charges are therefore discoverable. In People v. Coyer (1983, 1st Dist) 142 Cal.App.3d 839, 191 Cal.Rptr. 376, the Court of Appeal stated:

“Defendant is entitled to discovery of criminal charges currently pending against prosecution witnesses anywhere in the state.”

Physical Evidence/Computers

Penal Code Section 1054.s(c) provides for prosecution disclosure of relevant real evidence obtained as part of the investigation of the offenses charged. Additionally, appellate courts have stated that the defendant is entitled to inspect any physical evidence obtained by the prosecution during the investigation of the case. (People v. Cooper (1960) 53 Cal.2d 755, 770, 3 Cal.Rptr. 148, 349 P.2d 964; Schindler v. Superior Court of Madera County (1958, 3rd Dist) 161 Cal.App.2d 513, 520, 327 P.2d 68.)

In the instant case, it is crucial to the proper defense of the case that the defense be provided exact clone copies of the computer hard drive and all other electronic storage media such as Zip and Jazz drives, CD-ROMS, RW-CDs, diskettes, tapes, etc. as the manner in which any allegedly harmful matter was obtained and stored, or how the matter was deleted from the storage media may provide a defense to possession of such material.

For a discussion of how relevant an examination of the hard

drives, Zip drives, and other storage media are to cases involving possession of child pornography, see United States v. Perrault (9th Cir. 1999) 195 F.3d 1133, and United States v. Lacy (9th Cir. 1997) 119 F.3d 742.

Police Reports and Communication Tapes

The prosecution's duty to disclose police reports is based both on statute and on due process concerns. **Penal Code Section 1054.1(f)** provides for disclosure of reports of statements of witnesses whom the prosecutor intends to call at trial. Due process requires disclosure of any other reports containing evidence that undermines the credibility or probative value of prosecution evidence. (United States v. Strifler (1988, 9th Cir. Ariz) 851 F.2d 1197; Davis v. Alaska (1974) 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105.) Original notes of police officers are reports and contain statements whose disclosure is required by Penal Code Section 1054.1(f). In Funk v. Superior Court of Los Angeles County (1959) 52 Cal.2d 423, 424, 340 P.2d 593, the court noted that the defendant "moved for an order directing that he be allowed to examine the original notes made by the officers and to inspect and copy written statements prepared from the notes....

"The showing made by petitioner is sufficient to entitle him to production of the documents he wishes to inspect. It is settled that, during trial, an accused can compel the People to produce written statements of prosecution witnesses relating to the matters covered in their testimony. [Citation omitted]. As recent decisions of this

court illustrate, there is no sound basis for applying a different rule merely because production is required prior to, rather than during trial."

Tape recordings or records of radio transmissions concerning the facts underlying the charges against the defendant may be relevant to the credibility of witnesses and are therefore discoverable. (United States v. Strifler (1988, 9th Cir.) 851 F.2d 1197; Davis v. Alaska (1974) 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105.) Tape recordings of radio and telephone calls to the police department and the times of police and ambulance responses are public records within the meaning of Government Code Section 7200 and may not be destroyed for at least two years (80 Ops Atty Gen 908 (1981)).

Penal Code Section 629.20 entitles a defendant to receive at least 10 days before trial a transcript of the contents of intercepted wire communications and a copy of the court order and accompanying application under which the interceptions was authorized. Failure to comply with discovery precludes admission of evidence of the interception.

Rap Sheets

Penal Code Section 1054.1(d) provides for defense discovery of "felony convictions of material witnesses whose credibility is likely to be critical to the outcome of the trial." Evidence Code Section 780 and People v. Castro (1985) 38 Cal.3d 301, 211 Cal.Rptr. 719, 696 P.2d 111, allow impeachment of any witness by felony convictions involving

"moral turpitude." Impeachment of any witness by prior conduct not amounting to a felony and involving "moral turpitude" is also proper. (People v. Wheeler (1992) 4 Cal.4th 284, 14 Cal.Rptr.2d 418, 841 P.2d 938.) Accordingly, records of arrests and convictions of witnesses for felonies and misdemeanors are discoverable, at least if the conduct involves "moral turpitude."

In Hill vs. Superior Court of Los Angeles County (1974) 10 Cal.3d 812, 817, 112 Cal.Rptr. 257, 518 P.2d 1253, the California Supreme Court held that the felony conviction records and the records of arrests and detentions of prospective witnesses are discoverable by the defendant, upon a showing of good cause, for the purposes of impeachment. The Court of Appeal in Re B. (1978, 5th Dist) 82 Cal.App.3d 106, 114, 146 Cal.Rptr. 828, in discussing the defendant's right of discovery, stated "This right has been held to compass rap sheets.

Search Warrants and Applications for Previous Search Warrants

The defendant should be entitled to review the search warrant endorsed by the reviewing magistrate, as well as the affidavits in support of the warrant to determine if the warrant was based on competent evidence. If the affidavits are sealed, the defendant must follow the procedure outlined in People v. Hobbs (1994) 7 Cal.4th 948, 30 Cal.Rptr.2d 651.

Penal Code Section 1539(c) provides that a defendant is entitled to discover any previous application for a search warrant in the case that was refused by a magistrate for lack of probable cause.

Statements of Defense Witnesses

If the prosecutor or any investigators working for the prosecution have interviewed any potential defense witnesses, the reports of the investigators which contain the statements of such witnesses must be disclosed since such statements are material in that they " either help the defendant or hurt the prosecution. " In People v. Kasin, (1997, 4th Dist.) 56 Cal.App.4th 1360, 1379, 66 Cal.Rptr.2d 454, 506 the court stated:

Favorable evidence in this context is evidence that "either helps the defendant or hurts the prosecution, as by impeaching one of its *1380 witnesses." (In re Sassounian (1995) 9 Cal.4th 535, 544, 37 Cal.Rptr.2d 446, 887 P.2d 527.) The scope of the prosecutorial duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession but such evidence possessed by investigative agencies to which the prosecutor has reasonable access. (People v. Robinson (1995) 31 Cal.App.4th 494, 499, 37 Cal.Rptr.2d 183.) "As the California Supreme Court recently noted: '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 v. Superior Court, [(1974)] 11 Cal.3d 531, 535, 113 Cal.Rptr. 897, 522 P.2d 305, we construed the scope of possession and control as encompassing information "reasonably accessible" to the prosecution. In Engstrom v. Superior Court (1971) 20 Cal.App.3d 240, 243, 97 Cal.Rptr. 484 (disapproved on other grounds in Hill v. Superior Court, [(1974)] 10 Cal.3d [812] at p. 820, 112 Cal.Rptr. 257, 518 P.2d 1353,) the court held that materials discoverable by the defense 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." (20 Cal.App.3d at p. 244, 97 Cal.Rptr. 484.) In *People v. Coyer* (1983) 142 Cal.App.3d 839, 843, 191 Cal.Rptr. 376, the court described information subject to disclosure by the prosecution as that "readily available" to the prosecution and not accessible to the defense.' (In re *Littlefield* (1993) 5 Cal.4th 122, 135, 19 Cal.Rptr.2d 248, 851 P.2d 42.)" (Ibid.; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 437, [115 S.Ct. 1555, 1567, 131 L.Ed.2d 490] ["[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."].)

Training And Policies on Audio And Video Taping, Training Courses, and Training Materials or Educational Materials

Officer training is discoverable. Defendant does not seek evidence of a disciplinary nature against the officers for purpose of a civil suit, but only evidence which is relevant to the issue of the competency of the evidence obtained by the police who conducted the investigation in this case. (For a general discussion of discovery of police training records, see *Soto v. City of Concord* (1995 N.D. Cal.) 162 F.R.D. 603, 614) Such training material may be considered exculpatory in nature in the event the police investigation fell below certain training standards.

The District Attorney has an affirmative duty to determine if the training materials being sought are in the possession of the officers or their agencies involved in this case, and must provide the same to the defense. As set forth in the Calif. Supreme Court decision *In re Brown* (1998) 17 Cal.4th 873, 879, 73 Cal.Rptr.2d 698, 701:

Pursuant to Brady, supra, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request (id. at p. 87, 83 S.Ct. at pp. 1196-1197), a general request, or none at all (United States v. Agurs (1976) 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (Agurs)). The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf...." (Kyles, supra, 514 U.S. at p. 437, 115 S.Ct. at p. 1567.) Courts have thus consistently "decline[d] 'to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel.' " (United States v. Auten (5th Cir.1980) 632 F.2d 478, 481.) "A contrary holding would enable the prosecutor 'to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial,' [citation]." (Martinez v. Wainwright, supra, 621 F.2d at p. 188; > United States ex rel. Smith v. Fairman (7th Cir.1985) 769 F.2d 386, 391-392.) Thus, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." (Giglio v. [952 P.2d 719] United States (1972) 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104; Kyles, supra, 514 U.S. at p. 439, 115 S.Ct. at p. 1568.)

As a concomitant of this duty, any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. "The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation." (U.S. v. Payne (2d Cir.1995) 63 F.3d 1200, 1208 (Payne); see Smith v. Secretary Dept. of Corrections, supra, 50 F.3d at pp. 824-825, and cases cited therein.) The Supreme Court recently reiterated this principle: "whether the prosecutor succeeds or fails in meeting this obligation [to learn of favorable evidence] [17 Cal.4th 880] whether, that is, a failure to disclose is in good faith or bad faith, [citation]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." (Kyles, supra, 514 U.S. at pp. 437-438, 115 S.Ct. at pp. 1567-1568; see also Giglio v. United States, supra, 405 U.S. at p. 154, 92 S.Ct. at p. 766.)

Training records do not fall within the police records protected from disclosure as set forth in Penal Code section 832.8, requiring a Pitchess Motion. That section states that:

As used in Section 832.7, "personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

- (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.
- (b) Medical history.
- (c) Election of employee benefits.
- (d) Employee advancement, appraisal, or discipline.
- (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.
- (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

In this situation, unlike cases in which records of complaints against the officer are sought, there is nothing of a significantly private nature being requested. Defense is not seeking complaints against any officer by this motion, only records of training and experience which bear upon the issues of competency. However, once the court has determined that the records sought are material, the court still has the opportunity to review the officer's file *in camera* if it so chooses, in order to determine whether there is anything specific which rises to such a level of privacy as to warrant non-disclosure.

It should be noted that the U.S. Supreme Court's Brady standards for releasing exculpatory evidence do not require that the defendant show that possession of this evidence would result in an acquittal. The defendant need only show that the favorable evidence could put the whole case in a sufficiently different light so as to undermine confidence in the prosecution's case. Nor is admissibility the issue; the court need only consider whether the evidence is material. See again, Kyles v. Whitley, supra. See also, Pierre C. v. Superior Court (1984) 159 Cal.App.3d 1120, 1122-23. Evidence is discoverable if it may lead to relevant evidence, even if it does not turn out to be admissible at trial. Kelvin L. v. Superior Court (1976) 62 Cal.App.3d 823, 828.

In the present case, it is alleged in the attached affidavit of counsel, that the defendant invoked his right to counsel, but the police continued to interrogate the defendant. Evidence of systematic, pervasive, and intentional police conduct with the intent to circumvent Miranda v. Arizona (1966) 384 U.S. 436, 474, 86 S.Ct 1602, 1627, 16 L.Ed.2d 694 and Edwards v. Arizona (1981) 451 U.S. 477, 482 484-485, 101 S.Ct. 1880, 1883, 1884-1885, 68 L.Ed.2d 378 has a direct bearing on the admissibility of the defendant's post arrest statement. A statement that was given involuntarily due to coercion, or was given after the defendant invoked his right to counsel may be deemed inadmissible. See People v. Peevy (1998) 17 Cal.4th 1184 (rhg.den. June 24, 1998), 73 Cal.Rptr.2d 865.

It is police misconduct to interrogate a suspect in custody who has invoked the right to counsel. People v. Peevy (1998) 17 Cal.4th 1184 at pg. 1205. Such conduct is unethical. People v. Bradford (14 Cal.4th 1005, 1042, 60 Cal.Rptr.2d 255. However, the practice of continuing custodial interrogations after suspect requests counsel has been recognized as a serious problem by the California Supreme Court in Peevy, supra at pg. 1205-1207.

Statements given by a defendant based on a misrepresentation to the accused that his statement will not be used against him in conjunction with an Edwards violation renders the statement involuntary and inadmissible for all purposes. People v. Peevy, supra, 17 Cal.4th 1184, 1201, People v. Bey (1993) 21 Cal.App.4th 1623, 1627, 27 Cal.Rptr.2d 28.

Evidence of contravention of Miranda and Edwards is material as to the officer's credibility. Such evidence is exculpatory in nature and must be disclosed to the defense. Brady v. Maryland (1983) 373 U.S. 83, Giglio v. United States (1972) 405 U.S. 150.

II

CONSTITUTIONAL STANDARD FOR DISCLOSURE OF INFORMATION

FAVORABLE TO DEFENDANT

The due process clause of the United States Constitution imposes a duty on the prosecution to disclose to the defense upon request any

information favorable to the accused that is within the prosecutor's possession and is material to the defendant's guilt or to sentencing. (Brady v. Maryland (1963) 373 US 83, 10 L.Ed.2d 215, 83 S Ct 1194.)

The test for materiality is whether the requested evidence might affect the outcome of the trial. (United States v. Agurs (1976) 427 US 97, 49 L.Ed.2d 342, 96 S Ct 2392.)

This constitutional duty is wholly independent of any statutory scheme of reciprocal discovery. (People v. Hayes (1992, 1st Dist) 3 Cal.App.4th 1238, 1244, 5 Cal.Rptr.2d 105; Penal Code Section 1054(e).)

The prosecution's due process obligation to provide discovery includes such matters as the prior record of a witness (United States v. Strifler (1988, CA9 Ariz) 851 F.2d 1197); witness statements favorable to the defendant (United States ex rel. Meers v. Wilkins (1964), CA2 NY) 326 F.2d 135); evidence that undermines the credibility or probative value of prosecution evidence (United States v. Strifler (1988, CA9 Ariz) 851 F.2d 1197; Davis v. Alaska (1974) 415 US 308, 39 L.Ed.2d 347, 94 S Ct 1105; promises of immunity to prosecution witnesses (Giglio v. United States (1972) 405 US 150, 31 L.Ed.2d 104, 92 S Ct 763); prior inconsistent statements of prosecution witnesses (Giles v. Maryland (1967) 386 US 66, 17 L.Ed.2d 737, 87 S Ct 783); prior false charges by a complaining witness (People v. Adams (1988, 1st Dist) 198 Cal.App.3d 10, 342 Cal.Rptr. 580); and the identity and statements of prosecution rebuttal

witnesses (Izazaga v. Superior Court (1991) 54 Cal.3d 356, 377, 285 Cal.Rptr. 231, 815 P.2d 304).

As the Supreme Court stated in Pitchess v. Superior Court of Los Angeles County (1974) 11 Cal.3d 531, 535, 113 Cal.Rptr. 897, 522 P.2d 305:

"Allowing the accused the right to discover is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information."

This discovery obligation has been enunciated also by the United States Supreme Court in Giles v. Maryland (1967) 386 US 66, 98, 17 L.Ed.2d 737, 87 S Ct 783:

"The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."

The ABA Code of Professional Responsibility, DR 7-103(B) also recognizes the duty of the prosecution to disclose evidence:

"A public prosecutor or other governmental lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

This responsibility has been echoed in Re Ferguson (1971) 5 Cal.3d 525, 531, 96 Cal.Rptr. 594, 487 P.2d 1234:

"The search for truth is not served but hindered by the concealment of relevant and material evidence. Although

our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal. Implementation of this policy requires recognition of a duty on the part of the prosecution to disclose evidence to the defense in appropriate cases."

The prosecution's obligation to disclose material information to the defense not only attaches at or before the trial of the case, but is also present at or before the preliminary hearing. (Mitchell v. Superior Court of San Francisco (1958) 50 Cal.2d 827, 330 P.2d 48.)

III

SANCTIONS REQUESTED

The defendant requests that the court order the immediate disclosure by the prosecution to the defendant's counsel of the discovery set forth above no later than ____.

Because the prosecution has failed to disclose the items set forth above, the defendant requests a continuance of thirty days to prepare for trial. In the event that the prosecution fails to comply with such an order within the time ordered by this court, then defendant shall be entitled to 30 days to prepare for trial from the date the prosecution does comply.

In addition, the defendant requests that the prosecution be required to pay for any expert witness fees or costs incurred by the defendant as a result of the delay in receiving such discovery. If the prosecution fails to comply with the court's order, defendant reserves the right to seek preclusion of such evidence as a sanction pursuant to Penal Code section 1054.5(c).

As moving party to this motion, the moving party must be in compliance with the informal discovery procedure. Penal Code section 1054.5(b). The defendant has complied with the reciprocal discovery rules as set forth in the Affidavit of Counsel attached hereto.

Penal Code section 1054.5(b) states in pertinent part:

. . Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order...."

As set forth in the Affidavit of counsel, attached, the defendant has complied with the informal reciprocal discovery requirements, by furnishing such discoverable material as the defendant currently has in his possession. Therefore, the defendant as moving party, is entitled to request sanctions for failure by the District Attorney to comply with the requirements of Penal Code section 1054.1.

In People v. Jackson, (1993, 4th Dist.) 15 Cal.App.4th 1197, 1202, 19 Cal.Rptr.2d 80, 82, the court held that it is not necessary for the moving party to file a formal discovery request before sanctions can be imposed. The court held:

If filing a motion to compel were mandatory before sanctions could be imposed, nothing would prevent parties from withholding critical evidence despite being requested through informal procedures to disclose the information. A party would have nothing to lose by concealing a key witness until a formal motion to compel is brought, yet opposing counsel would not know to bring a formal motion because he or she would have no way of knowing the informal request was not complied with. Thus, parties would always have to bring formal requests to compel discovery to prevent surprise testimony at the trial. This would result in the very mischief the statute was designed to prevent. Requiring informal discovery, which is intended to save court time from judicial enforcement (§ 1054, subd. (b)), would have little impact if parties were required to bring a formal motion to compel before every trial.

In People v. Edwards, (1993, 2nd Dist.) 17 Cal.App.4th 1248, 1264, 22 Cal.Rptr.2d 3, 13, the court noted that prior to precluding evidence for failure to comply with discovery rules, the court must look at other less drastic measures. The court stated:

Penal Code section 1054.5, subdivision (b), suggests several discovery sanctions a trial court may impose "including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." The statutory duty to exhaust all other sanctions requires a

trial court to consider these endorsed sanctions before imposing a preclusion sanction.

Thus, the defendant's request for a continuance to permit a reasonable time to review the discovery, and for witness fees is a reasonable and lawful order. If the prosecution fails to comply with this court's order after the hearing on this matter, the defendant will seek an order precluding the prosecution from introducing such evidence at trial pursuant to Penal Code section 1054.5(c) which states in pertinent part: "The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted," or seek other remedies which the court may deem proper.

Dated:

Respectfully submitted,

Attorney for Defendant

AFFIDAVIT OF COUNSEL

PATRICK CLANCY declares:

1. I am an attorney duly licensed to practice law in the State of California. I am a Certified Criminal Law Specialist. I am the attorney for the defendant in this matter. This matter is set for trial on _____.
2. On _____, I caused to be served on the District Attorney, an Informal Discovery request, a true copy of which is attached hereto as EXHIBIT A.
3. If served an additional Informal Discovery Request on _____, a true copy of which is attached hereto as EXHIBIT B.
4. More than 15 days has elapsed since the District Attorney was served with the Informal Discovery Request, and the District Attorney has failed to comply with the Request by failing to provide the following:
5. I provided the District Attorney with the following reciprocal discovery on _____:
6. I am requesting that I have a 35 day continuance to prepare for trial, assuming the District Attorney provides me with

all of the discovery I have requested and that which he is legally required to provide. I have not been provided crucial evidence which must be reviewed and examined by myself and my experts before trial. Upon receipt of the material, I will need at least 30 days to properly prepare a defense in this matter. I have substantial experience in the area of defending allegations of sexual abuse, and based on my experience, 30 days is the minimum amount of time needed to properly prepare for trial.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on _____ at Walnut Creek, California.

PATRICK CLANCY