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4 COURT NAME

6 PEOPLE OF THE STATE OF CALIFORNIA,

7 Plaintiff,

8 vs.

9 DEFENDANT'S NAME,

10 Defendant

Case No.:

MOTION TO COMPEL DISCOVERY

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

13 This motion will be made on the ground that the District Attorney has in his or her  
14 actual or constructive possession certain items of evidence which defense counsel is  
15 legally entitled to inspect and copy.

16 **INFORMAL REQUEST FOR DISCOVERY COMPLIANCE**

17 An informal discovery request was served on the District Attorney on [REDACTED] as set  
18 forth in the Affidavit of Counsel, attached. More than 15 days has elapsed since the  
19 service of such informal request and the District Attorney has failed to provide the  
20 defendant's counsel the following items requested in the informal request for discovery:

21 **I**  
**STATUTORY AUTHORITY**

22 Statutory Disclosures Pursuant to 1054.1:

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

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1 6. Relevant written or recorded statements of witnesses or reports of the  
2 statements of witnesses whom the Prosecutor intends to call at the trial,  
3 including any reports or statements of experts made in conjunction with the  
4 case, including the results of physical or mental examinations, scientific  
5 tests, experiments, or comparisons which the Prosecutor intends to offer in  
6 evidence at the trial.

7 **II**  
8 **STATUTES AND DECISIONAL LAW SPECIFIC TO ITEMS REQUESTED**

9 **Penal Code § 1054.1 Items 1 through 6:**

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

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

19 **WITNESSES/VICTIMS NAMES AND ADDRESS (Redacted Police Reports)**

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

24 **Exculpatory Material under Penal Code 1054.1(d) :**

25 Exculpatory evidence under Penal Code section 1054.1(e) includes lineup reports of  
26 other witnesses whom the prosecutor does not intend to call and are thus discoverable  
27 under Brady v. Maryland (1963) 373 US 83, 10 L.Ed.2d 215, 83 S Ct 1194. In Norton v.  
28 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,

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1 the prosecution has a duty to disclose such evidence (Brady v. Maryland (1963) 373 US  
2 83, 10 L.Ed.2d 215, 83 S Ct 1194.)

3 Penal Code Section 1054.1(b) provides that the prosecution has a statutory duty to  
4 disclose all statements made by a defendant. In People v. Angeles (1985, 2nd Dist)  
5 172 Cal.App.3d 1203, 11211, 218 Cal.Rptr. 756, the Court of Appeal stated:

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

10 Percipient witnesses may undermine the testimony of other witnesses whom the  
11 prosecution intends to call at trial. Accordingly, the prosecution must disclose  
12 their identities. (United States v. Strifler (1988, 9th Cir.) 851 F.2d 1197.) In  
13 Norton v. Superior Court of San Diego County (1959, 4th Dist) 173 Cal.App.2d 133, 136,  
14 343 P2d 139, the Court of Appeal ruled as follows:

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

17 Statements of non-testifying witnesses may undermine the testimony of witnesses whom  
18 the prosecution intends to call and are thus exculpatory in nature. Accordingly, the  
19 prosecution must disclose their statements. (United States v. Strifler (1988,  
20 9thCir.) 851 F2d 1197.) In Vetter v. Superior Court of Sacramento County (1961, 3rd  
21 Dist) 189 Cal.App.2d 132, 137, 10 Cal.Rptr. 890, the Court of Appeal stated as  
22 follows:

23 The District Attorney, referring to certain eyewitnesses, stated in his affidavit  
24 "that at this time it is not the intention to call any of them as witnesses at the  
25 trial. But this is no reason for denying the inspection of said statements to  
26 petitioner. In order to properly evaluate the statements made to him by these six  
27 prisoners, counsel for petitioner was entitled to an inspection of the previous  
28 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.

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1  
2 The identities and statements of witnesses whom the prosecution intends to call in  
3 rebuttal of the defense are discoverable. (Izazaga v. Superior Court (1991) 54 Cal.3d  
4 356, 375, 285 Cal.Rptr. 231, 815 P.2d 304., People v. Hammond (1991, 5th Dist.) 22  
5 Cal.App.4th 1611, 1621, 28 Cal.Rptr.2d 180, 186.

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

11 **Evidence Code §1108 Evidence and Priors:**

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

18 Additionally, Evidence Code section 1108(c) specifically states that: " This section  
19 shall not be construed to limit the admission or consideration of evidence under any  
20 other section of this code. "

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

25 Rule 413(b) requires that the government disclose to defendant the similar crimes  
26 evidence to be offered no later than fifteen days before trial (unless shortened by  
27 court order). This notice period protects against surprise and allows the defendant  
28 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

1 their statement, and " similar crimes evidence " which may be offered under Evidence  
2 Code section 1108.

3 **Experts ( Prosecution ) :**

4 Penal Code Section 1054.1(f), by implication, provides for defense discovery of the  
5 identify of experts. In People v. Johnson ( 1974, 4th Dist.) 38 Cal.App.2d 228, 235,  
6 113 Cal.Rptr. 303, the Court of Appeal stated:

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

10 **Experts ( Defense ):**

11 The prosecution has a duty to provide the names and statements of rebuttal witnesses  
12 and their statements. (Izazaga v. Superior Court (1991) 54 Cal.3d 356, 375, 285  
13 Cal.Rptr. 231, 815 P.2d 304., People v. Hammond (1991, 5th Dist.) 22 Cal.App.4th 1611,  
14 1621, 28 Cal.Rptr.2d 180, 186. If it is the intention of the prosecution to cross  
15 examine the defendant's expert(s) using the defense experts' own prior statements or  
16 reports, the defendant should be entitled to such prior statements or reports which  
17 the prosecution intends to rely upon. If the prosecution intends to use a prosecution  
18 rebuttal witness to contradict the defense expert, the defendant is entitled to the  
19 statements or reports of the rebuttal witness. Penal Code section 1054.1(f).

20 **Grand Jury Proceedings:**

21 The defendant is entitled to: (1) names of all witnesses who appeared before the grand  
22 jury concerning the defendant whether their testimony lead to an indictment or not;  
23 (2) transcripts of the testimony of all witnesses who testified before the grand jury  
24 regarding the defendant; see Penal Code section 938.1(a) and Greenberg v. Superior  
25 Court (Greenberg (1942) 19 Cal.2d 319, 121 P.2d 713; (3) transcripts of the charge and  
26 instruction by the court to the grand jury at the time of indictment; (4) transcripts  
27 of any advice given or instruction in law given by the court or the district  
28 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**

1  
2 "The results of . . scientific tests, experiments, or comparisons which the prosecutor  
3 intends to offer in evidence at trial " is discoverable pursuant to Penal Code  
4 section 1054(f).

4 **Medical Evidence**

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

8 **Offers of Leniency / Agreements to Testify**

9 The credibility of a witness may be impeached by evidence of expectation of leniency.  
10 (Alford v. United States (1931) 282 U.S. 687, 75 L.Ed 624, 51 S.Ct. 218.) This rule  
11 has been recognized in People v. Allen (1978, 2nd Dist) 77 Cal.App.3d 924, 931, 144  
12 Cal.Rptr. 6, wherein the court, in holding that it was error to preclude cross-  
13 examination concerning a witness' expectation of leniency for pending charges, stated:  
14 "A party can offer evidence, by proffered extrinsic evidence or by cross-examination  
15 of a witness, to attack the credibility of a witness, if such evidence tends  
16 reasonably to establish that the witness has a motive to fabricate, or some other  
17 motive, that tends to cause the giving of untruthful testimony, even though there may  
18 be no reasonable basis for the existence of such a motive."

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

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

24 **Pending Charges**

25 Cross-examination concerning charges pending against a witness is guaranteed by the  
26 due process clause of the Federal Constitution (Delaware v. Van Arsdall (1986) 475 US  
27 673, 89 L.Ed.2d 674, 106 S Ct 1431) and such charges are therefore discoverable. In  
28

1 People v. Coyer (1983, 1st Dist) 142 Cal.App.3d 839, 191 Cal.Rptr. 376, the Court of  
2 Appeal stated:

3 "Defendant is entitled to discovery of criminal charges currently pending against  
4 prosecution witnesses anywhere in the state."

5 **Physical Evidence/Computers**

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

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

18 For a discussion of how relevant an examination of the hard  
19 drives, Zip drives, and other storage media are to cases involving possession of child  
20 pornography, see United States v. Perrault (9th Cir. 1999) 195 F.3d 1133, and United  
21 States v. Lacy (9th Cir. 1997) 119 F.3d 742.

22 **Police Reports and Communication Tapes**

23 The prosecution's duty to disclose police reports is based both on statute and on due  
24 process concerns. Penal Code Section 1054.1(f) provides for disclosure of reports of  
25 statements of witnesses whom the prosecutor intends to call at trial. Due process  
26 requires disclosure of any other reports containing evidence that undermines the  
27 credibility or probative value of prosecution evidence. (United States v. Strifler  
28 (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...."

1 "The showing made by petitioner is sufficient to entitle him to production of the  
2 documents he wishes to inspect. It is settled that, during trial, an accused can  
3 compel the People to produce written statements of prosecution witnesses relating to  
4 the matters covered in their testimony. [Citation omitted]. As recent decisions of  
5 this court illustrate, there is no sound basis for applying a different rule merely  
6 because production is required prior to, rather than during trial."

7 Tape recordings or records of radio transmissions concerning the facts underlying the  
8 charges against the defendant may be relevant to the credibility of witnesses and are  
9 therefore discoverable. (United States v. Strifler (1988, 9th Cir.) 851 F.2d 1197;  
10 Davis v. Alaska (1974) 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105.) Tape recordings  
11 of radio and telephone calls to the police department and the times of police and  
12 ambulance responses are public records within the meaning of Government Code Section  
13 7200 and may not be destroyed for at least two years (80 Ops Atty Gen 908 (1981)).

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

#### 19 **Rap Sheets**

20 Penal Code Section 1054.1(d) provides for defense discovery of "felony convictions of  
21 material witnesses whose credibility is likely to be critical to the outcome of the  
22 trial." Evidence Code Section 780 and People v. Castro (1985) 38 Cal.3d 301, 211  
23 Cal.Rptr. 719, 696 P.2d 111, allow impeachment of any witness by felony convictions  
24 involving "moral turpitude." Impeachment of any witness by prior conduct not  
25 amounting to a felony and involving "moral turpitude" is also proper. (People v.  
26 Wheeler (1992) 4 Cal.4th 284, 14 Cal.Rptr.2d 418, 841 P.2d 938.) Accordingly, records  
27 of arrests and convictions of witnesses for felonies and misdemeanors are  
28 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.

1 **Search Warrants and Applications for Previous Search Warrants**

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

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

9 **Statements of Defense Witnesses**

10 If the prosecutor or any investigators working for the prosecution have interviewed  
11 any potential defense witnesses, the reports of the investigators which contain the  
12 statements of such witnesses must be disclosed since such statements are material in  
13 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  
14 stated:

15 Favorable evidence in this context is evidence that "either helps the defendant or  
16 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.)

17 The scope of the prosecutorial duty to disclose encompasses not just exculpatory  
18 evidence in the prosecutor's possession but such evidence possessed by investigative  
19 agencies to which the prosecutor has reasonable access. (People v. Robinson (1995) 31  
20 Cal.App.4th 494, 499, 37 Cal.Rptr.2d 183.)

21 "As the California Supreme Court recently noted: 'California courts long have  
22 interpreted the prosecutorial obligation to disclose relevant materials in the  
23 possession of the prosecution to include information "within the possession or  
24 control" of the prosecution. [Citation.] In Pitchess v. Superior Court, [ (1974) ]  
25 11 Cal.3d 531, 535, 113 Cal.Rptr. 897, 522 P.2d 305, we construed the scope of  
26 possession and control as encompassing information "reasonably accessible" to the  
27 prosecution. In Engstrom v. Superior Court (1971) 20 Cal.App.3d 240, 243, 97  
28 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

1 system, and not solely information "in the hands of the prosecutor." (20 Cal.App.3d  
2 at p. 244, 97 Cal.Rptr. 484.) In *People v. Coyer* (1983) 142 Cal.App.3d 839, 843, 191  
3 Cal.Rptr. 376, the court described information subject to disclosure by the  
4 prosecution as that "readily available" to the prosecution and not accessible to the  
5 defense.' (In *re Littlefield* (1993) 5 Cal.4th 122, 135, 19 Cal.Rptr.2d 248, 851 P.2d  
6 42.)" (Ibid.; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 437, [115 S.Ct. 1555,  
7 1567, 131 L.Ed.2d 490] ["[T]he individual prosecutor has a duty to learn of any  
8 favorable evidence known to the others acting on the government's behalf in the case,  
9 including the police."].)

10  
11 **Training And Policies on Audio And Video Taping, Training Courses, and Training**  
12 **Materials or Educational Materials**

13 Officer training is discoverable. Defendant does not seek evidence of a disciplinary  
14 nature against the officers for purpose of a civil suit, but only evidence which is  
15 relevant to the issue of the competency of the evidence obtained by the police who  
16 conducted the investigation in this case. ( For a general discussion of discovery of  
17 police training records, see *Soto v. City of Concord* (1995 N.D. Cal.) 162 F.R.D. 603,  
18 614 ) Such training material may be considered exculpatory in nature in the event the  
19 police investigation fell below certain training standards.

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

24 Pursuant to *Brady, supra*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, the prosecution  
25 must disclose material exculpatory evidence whether the defendant makes a specific  
26 request (*id.* at p. 87, 83 S.Ct. at pp. 1196-1197), a general request, or none at all  
27 (*United States v. Agurs* (1976) 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342  
28 (*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;

1 > United States ex rel. Smith v. Fairman (7th Cir.1985) 769 F.2d 386, 391-392.)  
2 Thus, "whether the nondisclosure was a result of negligence or design, it is the  
3 responsibility of the prosecutor. The prosecutor's office is an entity and as such it  
4 is the spokesman for the Government." (Giglio v. [952 P.2d 719] United States (1972)  
5 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104; Kyles, supra, 514 U.S. at p. 439,  
6 115 S.Ct. at p. 1568.)

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

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

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

25 (a) Personal data, including marital status, family members, educational and  
26 employment history, home addresses, or similar information.

27 (b) Medical history.

28 (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.

#### MOTION TO COMPEL DISCOVERY

1  
2 (f) Any other information the disclosure of which would constitute an unwarranted  
3 invasion of personal privacy.

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

12 It should be noted that the U.S. Supreme Court's Brady standards for releasing  
13 exculpatory evidence do not require that the defendant show that possession of this  
14 evidence would result in an acquittal. The defendant need only show that the  
15 favorable evidence could put the whole case in a sufficiently different light so as to  
16 undermine confidence in the prosecution's case. Nor is admissibility the issue; the  
17 court need only consider whether the evidence is material. See again, *Kyles v.*  
18 *Whitley*, supra. See also, *Pierre C. v. Superior Court* (1984) 159 Cal.App.3d 1120,  
19 1122-23. Evidence is discoverable if it may lead to relevant evidence, even if it  
20 does not turn out to be admissible at trial. *Kelvin L. v. Superior Court* (1976) 62  
21 Cal.App.3d 823, 828.

22 In the present case, it is alleged in the attached affidavit of counsel, that the  
23 defendant invoked his right to counsel, but the police continued to interrogate the  
24 defendant. Evidence of systematic, pervasive, and intentional police conduct with  
25 the intent to circumvent *Miranda v. Arizona* (1966) 384 U.S. 436, 474, 86 S.Ct 1602,  
26 1627, 16 L.Ed.2d 694 and *Edwards v. Arizona* (1981) 451 U.S. 477, 482 484-485, 101  
27 S.Ct. 1880, 1883, 1884-1885, 68 L.Ed.2d 378 has a direct bearing on the admissibility  
28 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.

MOTION TO COMPEL DISCOVERY

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

7 Evidence of contravention of Miranda and Edwards is material as to the officer's  
8 credibility. Such evidence is exculpatory in nature and must be disclosed to the  
9 defense. *Brady v. Maryland* (1983) 373 U.S. 83, *Giglio v. United States* (1972) 405 U.S.  
10 150.

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**II**  
**CONSTITUTIONAL STANDARD FOR DISCLOSURE OF INFORMATION FAVORABLE TO DEFENDANT**

11 The due process clause of the United States Constitution imposes a duty on the  
12 prosecution to disclose to the defense upon request any information favorable to the  
13 accused that is within the prosecutor's possession and is material to the defendant's  
14 guilt or to sentencing. (*Brady v. Maryland* (1963) 373 US 83, 10 L.Ed.2d 215, 83 S Ct  
1194.)

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

17 This constitutional duty is wholly independent of any statutory scheme of reciprocal  
18 discovery. (*People v. Hayes* (1992, 1st Dist) 3 Cal.App.4th 1238, 1244, 5 Cal.Rptr.2d  
19 105; Penal Code Section 1054(e).)

20 The prosecution's due process obligation to provide discovery includes such matters as  
21 the prior record of a witness (*United States v. Strifler* (1988, CA9 Ariz) 851 F.2d  
22 1197); witness statements favorable to the defendant (*United States ex rel. Meers v.*  
23 *Wilkins* (1964), CA2 NY) 326 F.2d 135); evidence that undermines the credibility or  
24 probative value of prosecution evidence (*United States v. Strifler* (1988, CA9 Ariz)  
25 851 F.2d 1197; *Davis v. Alaska* (1974) 415 US 308, 39 L.Ed.2d 347, 94 S Ct 1105;  
26 promises of immunity to prosecution witnesses (*Giglio v. United States* (1972) 405 US  
27 150, 31 L.Ed.2d 104, 92 S Ct 763); prior inconsistent statements of prosecution  
28 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).

**MOTION TO COMPEL DISCOVERY**

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

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

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

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

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

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

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

23 "The search for truth is not served but hindered by the concealment of relevant and  
24 material evidence. Although our system of administering criminal justice is adversary  
25 in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth,  
26 and where furtherance of the adversary system comes in conflict with the ultimate  
27 goal, the adversary system must give way to reasonable restraints designed to further  
28 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.)

MOTION TO COMPEL DISCOVERY

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2 **III**  
**SANCTIONS REQUESTED**

3 The defendant requests that the court order the immediate disclosure by the  
4 prosecution to the defendant's counsel of the discovery set forth above no later than  
5 [REDACTED].

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

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

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

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

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

28 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:

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

13  
14 In *People v. Edwards*, (1993, 2nd Dist.) 17 Cal.App.4th 1248, 1264, 22 Cal.Rptr.2d 3,  
15 13, the court noted that prior to precluding evidence for failure to comply with  
16 discovery rules, the court must look at other less drastic measures. The court stated:

17  
18 Penal Code section 1054.5, subdivision (b), suggests several discovery sanctions a  
19 trial court may impose "including, but not limited to, immediate disclosure, contempt  
20 proceedings, delaying or prohibiting the testimony of a witness or the presentation of  
21 real evidence, continuance of the matter, or any other lawful order. Further, the  
22 court may advise the jury of any failure or refusal to disclose and of any untimely  
23 disclosure." The statutory duty to exhaust all other sanctions requires a trial  
24 court to consider these endorsed sanctions before imposing a preclusion sanction.

25  
26 Thus, the defendant's request for a continuance to permit a reasonable time to review  
27 the discovery, and for witness fees is a reasonable and lawful order. If the  
28 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,

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Attorney for Defendant

MOTION TO COMPEL DISCOVERY

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MOTION TO COMPEL DISCOVERY

**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 04/12/2019, 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 06/05/2019 at Pleasant Hill, California.

\_\_\_\_\_  
PATRICK CLANCY

Dated this day of Month, year.

\_\_\_\_\_  
Attorney Name

**MOTION TO COMPEL DISCOVERY**