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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF [COUNTY]

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. [DEFENDANT'S NAME] Defendant	**CASE NO. [CASE NUMBER]** **POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL THE RELEASE OF MEDICAL RECORDS; DECLARATION OF** [Attorney Name] **Date:** **Time:** **Dept:** **Current Trial Date:** **Case Filed:**

POINTS AND AUTHORITIES

FACTS

The complaining witness has made claims of substantial sexual abuse from the age of four years old until the age of eight years old. The allegations include nightly anal penetration resulting in anal bleeding between ten to twenty times. Despite these serious allegations of medical injuries, there is absolutely no corroboration. The defense seeks Jelani's medical records to corroborate or dispel these allegations by determining whether the medical records reflect such injuries. The request is narrowly tailored and limited to only such time as relevant to the instant offense.

I.
DEFENDANT IS ENTITLED TO DISCOVERY OF INFORMATION IN THE POSSESSION OF THIRD PARTIES

Motions for discovery by a criminal defendant are made to the sound discretion of the trial court, "which has the inherent power to order discovery in the interests of justice." (*Hill v. Superior* Court (*Los Angeles*) (1974) 10 Cal.3d 812, 816.) The basic principles underlying criminal pretrial discovery is that an accused is entitled to a fair trial. (*Id.*) "[T]he state has no interest in denying the accused access to all evidence that can throw light on the issues in the case, and in particular, it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits." (*Id.*) (Emphasis in original, citing *People v. Riser* (1952) 47 Cal.2d 566, 586.)

Pitchess v. Superior Court (1974) 11 Cal.3d 531, is direct authority for issuance of a subpoenas duces tecum requiring production of information, or "discovery", in the possession of a non-party, as recognized by the courts in *Pacific Lighting Leasing Company v. Superior Court* (*Los Angeles*) (1976) 60 Cal.App.3d 552, 560, and *Millaud v. Superior Court* (San Diego) (1986) 182 Cal.App.3d 471, 475-476. (See also, *People v. Broderick* (1991) 231 Cal.App.3d 584, [subpoena duces tecum is appropriate discovery tool directed to third parties despite Proposition 115].) Central to the decisions in *Pacific Lighting* and *Millaud* is the realization that information critical to a criminal defendant is not always within the possession or control of the prosecution or its various agents.

For example, in *Millaud*, an Alpha Beta supermarket hired a private investigating service to investigate a killing which occurred on its premises. Alpha Beta provided one report to both prosecution and defense counsel for their use in the ensuing murder case, but refused to provide remaining material which included notes and tape recordings of witness interviews, photographs, and videotapes of the crime scene. Alpha Beta claimed that much of the material was "work product or subject to the attorney-client privilege" and did not want its defense of any

civil action compromised. (*Milllaud, supra,* at p. 474.) Upon review on a writ of mandate, the appellate court found that Alpha Beta's investigation material was "clearly relevant and useful" to the defendant's preparation for trial. (*Millaud, supra,* at p. 476.) The court held that any interest of Alpha Beta could be protected by an order "limiting the use of the material to criminal prosecution", but its interests could not prevail over a criminal defendant's right to a fair trial. (*Id.*)

Thus, upon sufficient showing of good cause, a defendant is entitled to inspect material, whether in the possession of a prosecutor or a third party. (*Pacific Lighting, supra,* at p. 565.) The defendant must make only a "plausible showing" that the requested information "might lead to discovery of evidence". (*Hill v. Superior Court, supra,* at p. 817; citing Traynor, *Ground Lost and Found in Criminal Discovery* (1964) N.Y.U.L. Rev. 228, 244.)

In *Hill,* the defendant requested the felony conviction record ("rap sheet") of a prosecution witness. While the court acknowledged that the rap sheet alone was not a "record of judgement", sufficient for California Evidence Code section 788 purposes, provision of the rap sheet "could provide information that might lead to discovery of that record". (*Hill, supra,* at p. 817.) (See also, *People v. Memro* (1985) 38 Cal.3d 658.) The *Hill* court explored the argument that a defendant should also show that he cannot "readily obtain the information through his own efforts." (*Id.*) In *Hill,* there was no claim that the defendant could have obtained the rap sheet on his own. However, the prosecution claimed the efforts could have been directed to the witness himself to discern his prior record. The court found that the defense need not explain why it did not request the information directly from the witness because: (1) The information would not likely be accurate or complete; and (2) Any attempt to obtain this information could harm the defense, antagonizing the witness. (*Hill supra,* at p. 819.)

In the current case, as in *Hill* and *Millaud,* third parties possess information which is critical to Defendant's defense. It would be impossible for Defendant to obtain the information

by other means Defendant is entitled to a fair trial and an intelligent defense, in light of all relevant and reasonably accessible information. (*Hill v. Superior Court*, *supra*, 10 Cal.3d at p. 816.) He is entitled to the subpoenaed information.

II.
DEFENDANT'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OUTWEIGH ANY PRIVACY RIGHTS; FULL DISCLOSURE OF THE INFORMATION REQUESTED IS WARRANTED

The complaining witness has made claims of substantial sexual abuse from the age of four years old until the age of eight years old. The allegations include nightly anal penetration resulting in anal bleeding between ten to twenty times. Despite these serious allegations of medical injuries, there is absolutely no corroboration. The defense seeks Jelani's medical records to corroborate or dispel these allegations by determining whether the medical records reflect such injuries. The request is narrowly tailored and limited to only such time as relevant to the instant offense.

III.

IN CAMERA REVIEW OF THE REQUESTED INFORMATION IS MANDATED BY FEDERAL AND STATE LAW

Pennsylvania v. Ritchie (1987) 480 US 39, [94 L Ed 2d 40, 107 S Ct 989], and its California progeny clearly mandate that, at minimum, the trial court conduct an in- camera inspection of the records and information requested. In *Ritchie* a father, charged with various sexual offenses against his minor daughter, subpoenaed a state child welfare agency's records which pertained to the daughter. There he hoped to find a medical report, names of witnesses, and other exculpatory evidence. The agency refused to comply with the subpoena, invoking a state law which protected the confidentiality of its records and allowed access only to certain specified persons and agencies, including courts of competent jurisdiction. After examining the records in chambers and finding no medical report, the Court of Common Pleas of Allegheny

County, Pennsylvania, refused to order the disclosure of the records. The father was subsequently convicted before the Court of Common Pleas.

In reversing and remanding for further proceedings in the trial court, the United States Supreme Court directed the Pennsylvania trial court to conduct a full examination of the requested records, basing its decision on the Due Process Clause of the Constitution. The relevant portion of the *Ritchie* opinion states as follows;

> . . . the Court traditionally has evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the Fourteenth Amendment. (See *United States v Bagley*, 473 US 667, [87 L Ed 2d 481, 105 S Ct 3375] (1985); Brady v Maryland, 373 US 83, [10 L Ed 2d 215, 83 S Ct 1194] (1963).) (See also *Wardius v Oregon*, 412 US 470, [37 L Ed 2d 82, 93 S Ct 2208] (1973).) Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case. Although we conclude that compulsory process provides no greater protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. It is enough to conclude that on these facts, Ritchie's claims more properly are considered by reference to due process.
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> It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. (*United States v Agurs*, 427 US 97, [49 L Ed 2d 342, 96 S Ct 2392] (1976); *Brady v Maryland*, *supra*, at p. 87, [10 L Ed 2d 215, 83 S Ct 1194].) Although courts have used different terminologies to define "materiality," a majority of this Court has agreed, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v Bagley*, 473 US, at 682, [87 L Ed 2d 481, 105 S Ct 3375] (opinion of Blackmun, J.); see *id.*, at p. 685, [87 L Ed 2d 481, 105 S Ct 3375] (opinion of White, J.)
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> . . . Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances . . . .
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> . . . In the absence of any apparent state policy to the contrary, we therefore have no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determines that the information is "material" to the

defense of the accused. (*Pennsylvania v. Ritchie* (1987) 480 US 39, [94 L Ed 2d 40, 107 S Ct 989].)

The reasoning in *Ritchie* followed the California cases addressing the in-camera review of confidential records. In *People v. Reber* (1986) 177 Cal.App.3d 523, the trial court denied a requested in-camera review of the victims' confidential psychiatric records. The appellate court found the trial court in error, holding that "adherence to a statutory privilege of confidentiality must give way to pretrial access when denial would deprive a defendant of the constitutional right of confrontation and cross-examination." (*Id.* at p. 531; See also *United States v. Lindstrom* (11th Cir. 1983) 698 F.2d 1154 and *United States v. Partin* (5th Cir. 1974) 493 F.2d 750 (improper to withhold records where evidence the person was suffering from serious mental illness shortly before or during the period in which the events to which she testified occurred).)

The *Reber* Court relied on *Davis v. Alaska* (1974) 415 U.S. 308. In *Davis v. Alaska*, the trial court issued a protective order preventing the defense from questioning the witness about his juvenile probation status. The United States Supreme Court held that the right to confrontation was paramount to the state's policy of protecting anonymity of the juvenile offender and whatever temporary embarrassment might result to the witness and his family by disclosure of his juvenile record was outweighed by the defendant's "right to probe into the influence of possible bias in the testimony of a crucial identification witness." (*Id.* at 319.)

In *Reber*, the Court stated that the "Sixth Amendment guarantee that an accused in a criminal prosecution 'be confronted with the witnesses against him' means more than confronting the witnesses physically." (*Reber, supra,* 177 Cal.App.3d at p. 529; (citation omitted.). "The primary right secured by confrontation is cross-examination" which does not limit the cross-examiner to only "delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." (*Id.* at pp. 529-530.) The Court held that the accused must have access to the information pretrial. (*Id.* at p. 531; (Accord *People v. Hammon* (1997) 15 Cal.4th 1117).) "The exercise of the power of a trial court to provide for discovery in criminal cases is

consistent with the fundamental proposition that [the accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." (*Id.* at p. 531; see also Cal. Const. art. 1, § 28(d) (all relevant information is admissible).) "One of the legitimate goals of discovery is to obtain information for possible use to impeach or cross-examine an adverse witness." (*Id*.)

These principles were reaffirmed by the United States Supreme Court in *Crawford v. Washington,* 541 U.S. 36 (2004), which held "[t]he Sixth Amendment's Confrontation Clause provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him.'" (*Id*. at p. 2951.) This is a "bedrock procedural guarantee" which applies to both federal and state prosecutions. (*Id.*) The Supreme Court, echoing *Reber* and *Davis v. Alaska*, stated that "the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner, by testing in the crucible of cross-examination." (*Id.* at pp. 2954-55.)

Under the procedure set forth in section 1326, when a criminal defendant has subpoenaed confidential records of a nonparty, "the court may order an *in camera* hearing to determine whether or not the defense is entitled to receive the documents." (§1326, subd. (c). At the pretrial stage of the proceedings, the trial court is not required to review or grant discovery of confidential records in a nonparty's possession. *People v. Hammon* (1997) 15 Cal.4th 1117, 1127-1128 [no Sixth Amendment right to pretrial discovery of non-party's confidential records]; At trial, however, the court may review the records and disclose information if necessary, to preserve the defendant's Sixth Amendment rights of confrontation and cross-examination. *People v. Hammon, supra*, at 1127. "When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon … to balance the defendant's need for cross-examination and the stated policies the privilege is intended to serve." *Ibid*

In *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1295-1296, the court reviewed the "procedure to be followed once the defendant shows good cause for discovery of a witness's mental health records. the trial court should (1) obtain the records and review them in camera; (2) weigh the constitutional right of confrontation against the witness's right to privacy; (3) determine which if any records are essential to the defendant's right of confrontation; and (4) create an adequate record for review." … "[T]he good cause requirement embodies a "relatively low threshold" for discovery' [citation] under which a defendant need demonstrate only a logical link between the defense proposed and the pending charge' and describe with some specificity 'how the discovery being sought would support such a defense ….'" *People v. Gaines* (2009) 46 Cal.4thg 172

Here the defense is requesting access to confidential records based on the complaining witness's claims that he suffered extreme injuries during the period requested. The records will assist the triers of fact in determining the truth of those matters asserted. From the discovery already provided, it can reasonably be inferred that those records should contain information relevant to this case. Such an inference could only be rebutted by an in-camera examination.

CONCLUSION

For the above-stated reasons, Defendant respectfully requests that the court conduct an in-camera review of the subpoenaed documents, and that relevant documents be released to the defense to establish there was never any treatment of Jelani for anal bleeding from being sodomized as he claimed. .

Dated:

Respectfully submitted,
[Attorney Name]

by:_____
Attorneys for Defendant