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6 SUPERIOR COURT OF CALIFORNIA, COUNTY OF

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

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

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

20 This motion will be made on the ground that the District
21 Attorney has in his or her actual or constructive possession certain
22 items of evidence which defense counsel is legally entitled to inspect
23 and copy. An informal discovery request was served on the District
24 Attorney on _____ as set forth in the Affidavit of Counsel,
25 attached. More than 15 days has elapsed since the service of such
26 informal request and the District Attorney has failed to provide the
27

1 defendant's counsel the following items requested in the informal
2 request for discovery:

3 **Statutory Disclosures Pursuant to 1054.1:**

4 1. The names and addresses of persons the prosecutor
5 intends to call as witnesses at trial.

6 2. Statements of all defendants.

7 3. All relevant real evidence seized or obtained as a part
8 of the investigation of the offenses charged.

9 4. The existence of a felony conviction of any material
10 witness whose credibility is likely to be critical to the
11 outcome of the trial.

12 5. Any exculpatory evidence.

13 6. Relevant written or recorded statements of witnesses or
14 reports of the statements of witnesses whom the Prosecutor
15 intends to call at the trial, including any reports or
16 statements of experts made in conjunction with the case,
17 including the results of physical or mental examinations,
18 scientific tests, experiments, or comparisons which the
19 Prosecutor intends to offer in evidence at the trial.

20

21 **Evidence Code section 1108 Evidence and Priors:**

22 Copies of all witness statements, police reports,
23 medical reports, court records, court transcripts, physical
24 evidence, witness transcripts, and all video and audio tapes of
25 witnesses concerning evidence that the prosecution has which
26 would/might qualify as Evidence Code § 1108 evidence. Copies of
27 all prior convictions and the documentary evidence that the

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1 prosecution intends to introduce which would/might qualify as
2 Evidence Code § 1108 evidence.

3

4 **Experts (Prosecution) :**

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

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

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

18

19 **Experts (Defense) :**

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

25

26 **Grand Jury Proceedings:**

27 (1) names of all witnesses who appeared before the grand jury

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

11 12 **Laboratory Testing**

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

16 Reports, supporting documentation, and notes of computer
17 experts of their analysis of the content of all hard drives,
18 diskettes or other storage media of computers seized by or in
19 the possession of the prosecution concerning this case.

20 21 **Medical Evidence**

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

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

26 Colposcopic photographs of the examination of the alleged
27 victim.

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

4 **Offers of Leniency**

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

7
8 **Physical Evidence/Computers**

9 A clone of all computer hard drives, CD-ROMs, RW-CD's, Zip
10 or Jazz disks, diskettes, tapes, or other storage media
11 (excluding program diskettes) seized by police agency or in the
12 possession of police agencies concerning this case. (Defense
13 will provide blank hard drives, diskettes, or other storage
14 media for this purpose or agrees to pay the cost for those
15 storage devices provided by the prosecution. Prosecution must
16 provide defense the type and number of storage media needed, if
17 the prosecution is not going to provide the storage
18 media.) (Defense stipulates to the destruction of the copies upon
19 the case being final (completed) or disposal pursuant to Penal
20 Code Section 1417.8 (a) (2).) (Because there are tens of
21 thousands of files on each of the computer(s) which would take
22 weeks to examine individual files and because the defense
23 intends to use its own computer programs to examine the storage
24 devices, it is not feasible to examine the computer storage
25 devices at the police station; for that reason, the defense
26 requires its own copy.

27 Copies of all photographic and documentary evidence seized

1 by police agencies or in the possession of police agencies
2 concerning this case.

3 If the physical evidence includes any photograph or
4 photographs of a minor that is harmful matter as defined in
5 Penal Code section 313, the defendant will stipulate to the
6 court issuing an order indicating that the photograph or
7 photographs shall be copied and available only to the
8 defendant's counsel, investigator(s), and expert(s) to be
9 designated in such court order, pursuant to Penal Code section
10 1417.8(a)(1), and such photograph or photographs shall be
11 returned to the court after the final determination of the
12 action or proceeding.

13 If the matter is in electronic format such as a computer
14 graphic image and released to the defense on a hard drive or
15 other electronic media storage device, the hard drive or media
16 storage device shall be erased or reformatted to the
17 satisfaction of the court so as to completely eliminate and
18 destroy the matter from the media storage device.

19

20 **Physical Evidence Testing**

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

23 Fill in evidence requested

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

26 Fill in evidence requested

27

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1 **Police Reports and Communication Tapes**

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

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

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

8 **Fill in dates**

9 A copy of the 911 tapes of:

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

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17 **Rap Sheets**

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

22

23 **Search Warrant and Previous Copies of Applications for Search Warrants**

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

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

27 Copies of Affidavit(s) of Expertise which were part of obtaining

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1 search warrant(s) in the present case.

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

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

6

7 **Statements**

8 All audio taped and/or video taped statements and/or written
9 statement of the alleged victim without redactions of names and
10 addresses.

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

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

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

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

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

26 All photographs, books, papers, dolls, and other items shown to
27 the alleged victim during the taking of the alleged victim's

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1 statement, including any lineup photographs.

2

3 **Statements of Defense Witnesses**

4 All audio taped and/or video taped statements and/or written
5 statement of any defense witnesses presently disclosed or subsequently
6 disclosed without redactions of names and addresses.

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

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

12

13 **Training And Policies on Audio And Video Taping**

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

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

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

23

24 **Training Courses**

25 The curriculum vitae of Detective _____.

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

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1 by Detective _____ as maintained by his agency.

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

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

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

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

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

11 by Detective _____ on the subject of audio taping and/or video taping
12 of interrogations of suspects.

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

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

17

18 **Training Materials or Educational Materials**

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

25 Copies of any and all training manuals, video or audio tapes,
26 books, notes, or other written material received, read, or considered
27 by Detective ___ concerning the audio and/or video taping of

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1 interviews of alleged victims of child sexual molestation. (If the
2 materials are no longer available identify them so that the defense
3 can obtain copies)

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

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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I

3 STATUTES AND DECISIONAL LAW SPECIFIC TO ITEMS REQUESTED

4
5 **Items 1 through 6:**

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

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

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

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

23
24 **Exculpatory Material under Penal Code 1054.1(d):**

25 Exculpatory evidence under Penal Code section 1054.1(e) includes
26 lineup reports of other witnesses whom the prosecutor does not intend
27 to call and are thus discoverable under Brady v. Maryland (1963) 373

1 US 83, 10 L.Ed.2d 215, 83 S Ct 1194. In Norton v. Superior Court of
2 San Diego County (1959, 4th Dist) 173 Cal.App.2d 133, 343 P2d 139, the
3 appellate court stated that a defendant is entitled to discover
4 photographs that were exhibited to witnesses for the purpose of
5 identification, in order to attempt to impeach these witnesses at
6 trial.

7 In People v. Davis (1971, 2nd Dist) 20 Cal.App.3d 890, 98
8 Cal.Rptr. 71, the Court of Appeal stated that communications from the
9 office of the District Attorney to prospective witnesses may
10 constitute an attempt to suppress evidence. Accordingly, the
11 prosecution has a duty to disclose such evidence (Brady v. Maryland
12 (1963) 373 US 83, 10 L.Ed.2d 215, 83 S Ct 1194.)

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

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

22 Percipient witnesses may undermine the testimony of other
23 witnesses whom the prosecution intends to call at trial. Accordingly,
24 the prosecution must disclose their identities. (United States v.
25 Strifler (1988, 9th Cir.) 851 F.2d 1197.) In Norton v. Superior Court
26 of San Diego County (1959, 4th Dist) 173 Cal.App.2d 133, 136, 343 P2d
27 139, the Court of Appeal ruled as follows:

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

1 Statements of non-testifying witnesses may undermine the
2 testimony of witnesses whom the prosecution intends to call and are
3 thus exculpatory in nature. Accordingly, the prosecution must
4 disclose their statements. (United States v. Strifler (1988, 9thCir.)
5 851 F2d 1197.) In Vetter v. Superior Court of Sacramento County
6 (1961, 3rd Dist) 189 Cal.App.2d 132, 137, 10 Cal.Rptr. 890, the Court
7 of Appeal stated as follows:

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

18 Evidence is admissible to establish that someone other than the
19 defendant may have committed the offense charged against the
20 defendant. (People v. Hall (1986) 41 Cal.3d 826, 226 Cal.Rptr. 112,
21 718 P2d 99; People v. Guillebau (1980, 1st Dist) 107 Cal.App.3d 531,
22 549, 166 Cal.Rptr. 45.) Accordingly, a defendant is entitled to
23 discover evidence that shows that another person committed the crime
24 with which the defendant is charged.

25 The identities and statements of witnesses whom the prosecution
26 intends to call in rebuttal of the defense are discoverable. (Izazaga
27 v. Superior Court (1991) 54 Cal.3d 356, 375, 285 Cal.Rptr. 231, 815
28 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

1 is relevant to charges of sexual assault or child abuse if the court
2 determines that the probative value outweighs the effect of compelled
3 disclosure on the victim, the treatment relationship, and the
4 treatment services.

5
6 **Evidence Code § 1108 Evidence and Priors:**

7
8 If the prosecution intends to offer evidence of the defendant's
9 commission of another sexual offense or offenses, the defendant is
10 entitled to statements of the witnesses or a summary of the substance
11 of any testimony that is expected to be offered by the prosecution, at
12 least 30 days before the scheduled date of trial or at such later time
13 as the court may allow for good cause. Evidence Code section 1108(b).
14 See People v. Soto (1998 5th Dist.) 64 Cal.App.4th 966, 979-980, 75
15 Cal.Rptr.2d 605, 613-614.

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

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

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

1 possession of the prosecution involving statements of the witnesses or
2 a summary of the substance of their statement, and " similar crimes
3 evidence " which may be offered under Evidence Code section 1108.

4
5 **Experts (Prosecution) :**

6 Penal Code Section 1054.1(f), by implication, provides for
7 defense discovery of the identify of experts. In People v. Johnson
8 (1974, 4th Dist.) 38 Cal.App.2d 228, 235, 113 Cal.Rptr. 303, the Court
9 of Appeal stated:

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

13 **Experts (Defense) :**

14 The prosecution has a duty to provide the names and statements
15 of rebuttal witnesses and their statements. (Izazaga v. Superior Court
16 (1991) 54 Cal.3d 356, 375, 285 Cal.Rptr. 231, 815 P.2d 304., People v.
17 Hammond (1991, 5th Dist.) 22 Cal.App.4th 1611, 1621, 28 Cal.Rptr.2d
18 180, 186. If it is the intention of the prosecution to cross examine
19 the defendant's expert(s) using the defense experts' own prior
20 statements or reports, the defendant should be entitled to such prior
21 statements or reports which the prosecution intends to rely upon. If
22 the prosecution intends to use a prosecution rebuttal witness to
23 contradict the defense expert, the defendant is entitled to the
24 statements or reports of the rebuttal witness. Penal Code section
25 1054.1(f).

26
27 **Grand Jury Proceedings:**

1 The defendant is entitled to: (1) names of all witnesses who
2 appeared before the grand jury concerning the defendant whether their
3 testimony lead to an indictment or not; (2) transcripts of the
4 testimony of all witnesses who testified before the grand jury
5 regarding the defendant; see Penal Code section 938.1(a) and
6 Greenberg v. Superior Court (Greenberg (1942) 19 Cal.2d 319, 121 P.2d
7 713; (3) transcripts of the charge and instruction by the court to the
8 grand jury at the time of indictment; (4) transcripts of any advice
9 given or instruction in law given by the court or the district
10 attorney; (5) a transcript of district attorney's opening and closing
11 remarks and argument; (6) a record of all questions by jurors to the
12 district attorney; and (7) a record of all questions to the court by
13 the jurors and the answers given by the court. See People v. Superior
14 Court of Santa Clara County (Mouchaourab) (2000, 6th Dist.) 78
15 Cal.App.4th 403, 437-440, 92 Cal.Rptr.2d 829, 857-860.

16

17 **Laboratory Testing**

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

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22 **Medical Evidence**

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

26

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

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1 Cross-examination concerning charges pending against a witness
2 is guaranteed by the due process clause of the Federal Constitution
3 (Delaware v. Van Arsdall (1986) 475 US 673, 89 L.Ed.2d 674, 106 S Ct
4 1431) and such charges are therefore discoverable. In People v. Cover
5 (1983, 1st Dist) 142 Cal.App.3d 839, 191 Cal.Rptr. 376, the Court of
6 Appeal stated:

7 "Defendant is entitled to discovery of criminal charges
8 currently pending against prosecution witnesses anywhere in
9 the state."

10

11 **Physical Evidence/Computers**

12 Penal Code Section 1054.s(c) provides for prosecution disclosure
13 of relevant real evidence obtained as part of the investigation of the
14 offenses charged. Additionally, appellate courts have stated that the
15 defendant is entitled to inspect any physical evidence obtained by the
16 prosecution during the investigation of the case. (People v. Cooper
17 (1960) 53 Cal.2d 755, 770, 3 Cal.Rptr. 148, 349 P.2d 964; Schindler v.
18 Superior Court of Madera County (1958, 3rd Dist) 161 Cal.App.2d 513,
19 520, 327 P.2d 68.)

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

27 For a discussion of how relevant an examination of the hard

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

5
6 **Police Reports and Communication Tapes**

7 The prosecution's duty to disclose police reports is based both
8 on statute and on due process concerns. **Penal Code Section 1054.1(f)**
9 provides for disclosure of reports of statements of witnesses whom the
10 prosecutor intends to call at trial. Due process requires disclosure
11 of any other reports containing evidence that undermines the
12 credibility or probative value of prosecution evidence. (United
13 States v. Strifler (1988, 9th Cir. Ariz) 851 F.2d 1197; Davis v. Alaska
14 (1974) 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105.) Original notes of
15 police officers are reports and contain statements whose disclosure is
16 required by Penal Code Section 1054.1(f). In Funk v. Superior Court
17 of Los Angeles County (1959) 52 Cal.2d 423, 424, 340 P.2d 593, the
18 court noted that the defendant "moved for an order directing that he
19 be allowed to examine the original notes made by the officers and to
20 inspect and copy written statements prepared from the notes....

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

1 for felonies and misdemeanors are discoverable, at least if the
2 conduct involves "moral turpitude."

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

12
13 **Search Warrants and Applications for Previous Search Warrants**

14 The defendant should be entitled to review the search warrant
15 endorsed by the reviewing magistrate, as well as the affidavits in
16 support of the warrant to determine if the warrant was based on
17 competent evidence. If the affidavits are sealed, the defendant must
18 follow the procedure outlined in People v. Hobbs (1994) 7 Cal.4th 948,
19 30 Cal.Rptr.2d 651.

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

23
24

25 **Statements of Defense Witnesses**

26 If the prosecutor or any investigators working for the
27

1 prosecution have interviewed any potential defense witnesses, the
2 reports of the investigators which contain the statements of such
3 witnesses must be disclosed since such statements are material in that
4 they " either help the defendant or hurt the prosecution. " In People
5 v. Kasin, (1997, 4th Dist.) 56 Cal.App.4th 1360, 1379, 66 Cal.Rptr.2d
6 454, 506 the court stated:

7
8 Favorable evidence in this context is evidence that "either
9 helps the defendant or hurts the prosecution, as by impeaching
10 one of its *1380 witnesses." (In re Sassounian (1995) 9
11 Cal.4th 535, 544, 37 Cal.Rptr.2d 446, 887 P.2d 527.)
12 The scope of the prosecutorial duty to disclose encompasses not
13 just exculpatory evidence in the prosecutor's possession but
14 such evidence possessed by investigative agencies to which the
15 prosecutor has reasonable access. (People v. Robinson (1995) 31
16 Cal.App.4th 494, 499, 37 Cal.Rptr.2d 183.)
17 "As the California Supreme Court recently noted: 'California
18 courts long have interpreted the prosecutorial obligation to
19 disclose relevant materials in the possession of the prosecution
20 to include information "within the possession or control" of the
21 prosecution. [Citation.] In Pitchess v. Superior Court, [
22 (1974)] 11 Cal.3d 531, 535, 113 Cal.Rptr. 897, 522 P.2d 305, we
23 construed the scope of possession and control as encompassing
24 information "reasonably accessible" to the prosecution. In
25 Engstrom v. Superior Court (1971) 20 Cal.App.3d 240, 243, 97
26 Cal.Rptr. 484 (disapproved on other grounds in Hill v. Superior
27 Court, [(1974)] 10 Cal.3d [812] at p. 820, 112 Cal.Rptr. 257,
28 518 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**

1 Officer training is discoverable. Defendant does not seek
2 evidence of a disciplinary nature against the officers for purpose of
3 a civil suit, but only evidence which is relevant to the issue of the
4 competency of the evidence obtained by the police who conducted the
5 investigation in this case. (For a general discussion of discovery of
6 police training records, see Soto v. City of Concord (1995 N.D. Cal.)
7 162 F.R.D. 603, 614) Such training material may be considered
8 exculpatory in nature in the event the police investigation fell below
9 certain training standards.

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

15
16 Pursuant to Brady, supra, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d
17 215, the prosecution must disclose material exculpatory evidence
18 whether the defendant makes a specific request (id. at p. 87,
19 83 S.Ct. at pp. 1196-1197), a general request, or none at all
20 (United States v. Agurs (1976) 427 U.S. 97, 107, 96 S.Ct. 2392,
21 2399, 49 L.Ed.2d 342 (Agurs)). The scope of this disclosure
22 obligation extends beyond the contents of the prosecutor's case
23 file and encompasses the duty to ascertain as well as divulge
24 "any favorable evidence known to the others acting on the
25 government's behalf...." (Kyles, supra, 514 U.S. at p. 437,
26 115 S.Ct. at p. 1567.) Courts have thus consistently
27 "decline[d] 'to draw a distinction between different agencies
28 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

1 responsibility of the prosecutor. The prosecutor's office is an
2 entity and as such it is the spokesman for the Government."
3 (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.)

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

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

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

- 27 (a) Personal data, including marital status, family members,
28 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.

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

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

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

24 In the present case, it is alleged in the attached affidavit of
25 counsel, that the defendant invoked his right to counsel, but the
26 police continued to interrogate the defendant. Evidence of
27 systematic, pervasive, and intentional police conduct with the intent

1 to circumvent Miranda v. Arizona (1966) 384 U.S. 436, 474, 86 S.Ct
2 1602, 1627, 16 L.Ed.2d 694 and Edwards v. Arizona (1981) 451 U.S. 477,
3 482 484-485, 101 S.Ct. 1880, 1883, 1884-1885, 68 L.Ed.2d 378 has a
4 direct bearing on the admissibility of the defendant's post arrest
5 statement. A statement that was given involuntarily due to coercion,
6 or was given after the defendant invoked his right to counsel may be
7 deemed inadmissible. See People v. Peevy (1998) 17 Cal.4th 1184
8 (rhg.den. June 24, 1998), 73 Cal.Rptr.2d 865.

9 It is police misconduct to interrogate a suspect in custody who
10 has invoked the right to counsel. People v. Peevy (1998) 17 Cal.4th
11 1184 at pg. 1205. Such conduct is unethical. People v. Bradford (14
12 Cal.4th 1005, 1042, 60 Cal.Rptr.2d 255. However, the practice of
13 continuing custodial interrogations after suspect requests counsel has
14 been recognized as a serious problem by the California Supreme Court
15 in Peevy, supra at pg. 1205-1207.

16 Statements given by a defendant based on a misrepresentation to
17 the accused that his statement will not be used against him in
18 conjunction with an Edwards violation renders the statement
19 involuntary and inadmissible for all purposes. People v. Peevy, supra,
20 17 Cal.4th 1184, 1201, People v. Bey (1993) 21 Cal.App.4th 1623, 1627,
21 27 Cal.Rptr.2d 28.

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

1 CONSTITUTIONAL STANDARD FOR DISCLOSURE OF INFORMATION

2 FAVORABLE TO DEFENDANT

3
4 The due process clause of the United States Constitution imposes
5 a duty on the prosecution to disclose to the defense upon request any
6 information favorable to the accused that is within the prosecutor's
7 possession and is material to the defendant's guilt or to sentencing.
8 (Brady v. Maryland (1963) 373 US 83, 10 L.Ed.2d 215, 83 S Ct 1194.)

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

12 This constitutional duty is wholly independent of any statutory
13 scheme of reciprocal discovery. (People v. Hayes (1992, 1st Dist) 3
14 Cal.App.4th 1238, 1244, 5 Cal.Rptr.2d 105; Penal Code Section
15 1054(e).)

16 The prosecution's due process obligation to provide discovery
17 includes such matters as the prior record of a witness (United States
18 v. Strifler (1988, CA9 Ariz) 851 F.2d 1197); witness statements
19 favorable to the defendant (United States ex rel. Meers v. Wilkins
20 (1964), CA2 NY) 326 F.2d 135); evidence that undermines the
21 credibility or probative value of prosecution evidence (United States
22 v. Strifler (1988, CA9 Ariz) 851 F.2d 1197; Davis v. Alaska (1974) 415
23 US 308, 39 L.Ed.2d 347, 94 S Ct 1105; promises of immunity to
24 prosecution witnesses (Giglio v. United States (1972) 405 US 150, 31
25 L.Ed.2d 104, 92 S Ct 763); prior inconsistent statements of
26 prosecution witnesses (Giles v. Maryland (1967) 386 US 66, 17 L.Ed.2d
27 737, 87 S Ct 783); prior false charges by a complaining witness

1 (People v. Adams (1988, 1st Dist) 198 Cal.App.3d 10, 342 Cal.Rptr.
2 580); and the identity and statements of prosecution rebuttal
3 witnesses (Izazaga v. Superior Court (1991) 54 Cal.3d 356, 377, 285
4 Cal.Rptr. 231, 815 P.2d 304).

5 As the Supreme Court stated in Pitchess v. Superior Court of Los
6 Angeles County (1974) 11 Cal.3d 531, 535, 113 Cal.Rptr. 897, 522 P.2d
7 305:

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

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

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

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

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

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

34 "The search for truth is not served but hindered by the
35 concealment of relevant and material evidence. Although
36 our system of administering criminal justice is adversary

1 in nature, a trial is not a game. Its ultimate goal is the
2 ascertainment of truth, and where furtherance of the
3 adversary system comes in conflict with the ultimate goal,
4 the adversary system must give way to reasonable restraints
5 designed to further that goal. Implementation of this
6 policy requires recognition of a duty on the part of the
7 prosecution to disclose evidence to the defense in
8 appropriate cases.”

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

13 III

14 SANCTIONS REQUESTED

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

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

24 In addition, the defendant requests that the prosecution be
25 required to pay for any expert witness fees or costs incurred by the
26 defendant as a result of the delay in receiving such discovery. If the
27 prosecution fails to comply with the court's order, defendant reserves

1 the right to seek preclusion of such evidence as a sanction pursuant
2 to Penal Code section 1054.5(c).

3 As moving party to this motion, the moving party must be in
4 compliance with the informal discovery procedure. Penal Code section
5 1054.5(b). The defendant has complied with the reciprocal discovery
6 rules as set forth in the Affidavit of Counsel attached hereto.

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

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

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

20 In People v. Jackson, (1993, 4th Dist.) 15 Cal.App.4th 1197,
21 1202, 19 Cal.Rptr.2d 80, 82, the court held that it is not
22 necessary for the moving party to file a formal discovery
23 request before sanctions can be imposed. The court held:

24 If filing a motion to compel were mandatory before
25 sanctions could be imposed, nothing would prevent parties
26 from withholding critical evidence despite being requested
27 through informal procedures to disclose the information.
28 A party would have nothing to lose by concealing a key
witness until a formal motion to compel is brought, yet

1 opposing counsel would not know to bring a formal motion
2 because he or she would have no way of knowing the informal
3 request was not complied with. Thus, parties would always
4 have to bring formal requests to compel discovery to
5 prevent surprise testimony at the trial. This would
6 result in the very mischief the statute was designed to
7 prevent. Requiring informal discovery, which is intended
8 to save court time from judicial enforcement (§ 1054, subd.
9 (b)), would have little impact if parties were required to
10 bring a formal motion to compel before every trial.

11 In People v. Edwards, (1993, 2nd Dist.) 17 Cal.App.4th 1248,
12 1264, 22 Cal.Rptr.2d 3, 13, the court noted that prior to
13 precluding evidence for failure to comply with discovery rules,
14 the court must look at other less drastic measures. The court
15 stated:

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

27 Thus, the defendant's request for a continuance to permit a
28 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.

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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.

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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