Chapter 9

Pretrial Discovery

Part A. Introduction

§ 9.01 THE NATURE OF DISCOVERY IN DELINQUENCY CASES; SCOPE AND ORGANIZATION OF THE CHAPTER

The jurisdictions differ significantly with respect to the nature of the discovery procedures employed in juvenile court and the specificity with which those procedures are spelled out in the applicable juvenile court statute, court rules, and caselaw. Several jurisdictions conduct discovery in delinquency cases in accordance with adult criminal court procedures for discovery. This result is accomplished in some jurisdictions by juvenile court statutes or court rules mirroring the adult standards (*see, e.g.,* D.C. SUPER. CT. JUV. RULE 16 (2022) (based on D.C. SUPER. CT. CRIM. RULE 16); FLA. RULE JUV. PROC. 8.060 (2022) (based on FLA. R. CRIM. PROC. 3.220); N.Y. FAM. CT. ACT §§ 330.1, 331.1-331.7 (2022) (derived from CRIM. PROC. LAW § 200.9 and article 240)), in other jurisdictions, by juvenile statutes or court rules declaring that the adult discovery rules shall be applicable to delinquency proceedings (*see, e.g.,* IND. CODE ANN. § 31-32-10-1 (2022); WASH. REV. CODE ANN. § 13.40.140(7) (2022)), and in still other jurisdictions, by caselaw holding that in the absence of a statute or court rule, discovery procedures in delinquency cases should approximate those followed in adult criminal cases, *see, e.g., Joe Z. v. Superior Court,* 3 Cal. 3d 797, 801, 478 P.2d 26, 28, 91 Cal. Rptr. 594, 596 (1970). Some jurisdictions have reacted to the civil nature of delinquency proceedings by providing for discovery that is more liberal than criminal discovery (*see, e.g., People ex rel Hanrahan v. Felt,* 48 Ill. 2d 171, 175, 269 N.E.2d 1, 4 (1971) (notwithstanding a state statute that applies criminal discovery rules to delinquency proceedings, court holds that juvenile court has discretion to "allow a broader discovery than is allowed in criminal cases")) or that is virtually equivalent to the liberal discovery rules employed in civil proceedings (*see T.P.S. v. State,* 590 S.W.2d 946, 954 (Tex. Civ. App. 1979) (acknowledging that Texas Family Code calls for application of civil discovery rules to delinquency proceedings, but construing the statute in a restrictive manner and holding that discovery in delinquency cases can be more limited than in other civil cases)). Finally, in some jurisdictions the statutes and court rules are silent about the procedures for, and scope of, discovery in delinquency cases, and the courts have not yet addressed these issues.

Since most jurisdictions that have addressed the issue treat delinquency proceedings as subject to criminal discovery procedures, this chapter will focus on the devices available for criminal discovery and the arguments that can be made for broadening its scope in delinquency cases. Attorneys who practice in those few jurisdictions that authorize civil discovery in delinquency cases should consult local statutes and caselaw, as well as the numerous treatises available on the subject of civil discovery.

As a matter of practice, criminal discovery involves two processes or phases: informal

and formal discovery. Most prosecutors are willing to hand over to the defense upon request certain categories of materials which it is clear that a court would order the prosecutor to divulge if the defense made a motion to discover them. Informal discovery devices (such as the discovery letter, see § 9.05 *infra,* and the discovery conference, see § 9.06 *infra*) provide a quick route to obtaining this material. When the informal devices fail because the prosecutor refuses voluntarily to divulge information requested by the defense, counsel must turn to formal discovery devices, such as motions to compel the prosecutor to disclose the information.

Part B of this chapter examines the informal methods for obtaining discovery. Part C canvasses the formal discovery procedures, describing the devices that can be employed and exploring constitutional doctrines that can be invoked in support of motions for court-ordered discovery going beyond that provided by statutes and local common law. Finally, Part D discusses the prosecutor's right to discovery from the defense.

While employing informal and formal discovery devices, defense counsel should not lose sight of opportunities to use other pretrial proceedings to acquire information about the prosecution's case. The recognized mechanisms for overt discovery in criminal cases – both informal and formal – remain far more limited than those in civil practice and are usually inadequate to advise the defense of everything it needs to know to prepare fully for trial. In this current state of the practice, defense counsel's ingenuity in devising self-help techniques is distinctly at a premium.

Several motions that counsel can file will lead to the prosecutor's disclosing facts not previously known to the defense. See Chapter 7. Evidentiary hearings, such as the probable-cause hearing (see §§ 4.28-4.37 *supra*) and suppression hearings (see Chapter 22), present invaluable opportunities to uncover additional information. Police and court records and transcripts of prior judicial proceedings are also important sources to delve into. See §§ 8.16, 8.19 *supra.* In particular cases there may be other adventitious opportunities for discovery, such as the coroner's inquest in homicide cases or a prior trial resulting in a mistrial. And counsel's pretrial discovery strategy must, of course, be coordinated with a complementary strategy of defense investigation. See Chapter 8.

Counsel should be aware that there are additional discovery processes that are activated at trial. Section 27.12 *infra* describes those processes and suggests techniques for invoking their benefits at a sidebar conference immediately prior to the commencement of the trial.

§ 9.02 THE GENERAL POSITION OF THE DEFENSE ON DISCOVERY

As explained in § 9.01 *supra,* in those jurisdictions that have addressed the scope of discovery in delinquency proceedings, the statutes or court decisions usually regulate such discovery in accordance with the discovery procedures employed in adult criminal cases rather than the more liberal discovery procedures employed in civil cases.

When practicing in a jurisdiction that has not as yet resolved the scope of discovery in delinquency proceedings, counsel should argue that the civil nature of delinquency cases calls for application of civil discovery rules, or at least for discovery that is more liberal than ordinary criminal discovery. *See, e.g., People ex rel. Hanrahan v. Felt,* 48 Ill. 2d 171, 269 N.E.2d 1 (1971).

Even when practicing in jurisdictions that have authoritatively resolved to use criminal discovery rules in delinquency proceedings, counsel can make certain policy arguments in support of the expansion of those rules to permit broader discovery to the defense. Counsel can point out that the quest for truth at trial is better served, under an adversary system of litigation, if the evidence of one party does not come as a surprise to the other but, being known at a time in advance when there is opportunity to check it out through adequate investigation, appears in court subject to meaningful cross-examination and rebuttal.

One of the rationales commonly relied upon to deny liberal discovery in adult criminal cases is the notion that criminal defendants, more than civil litigants, once forewarned are likely to flee the jurisdiction, bribe or intimidate witnesses, or engage in other misbehavior. Even if this spectre were real in the adult criminal context – and there has never yet been any adequate showing made to support the proposition that the dangers *are* greater in criminal cases generically than in civil cases (*compare NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 239-41 (1978), finding a special danger of witness intimidation in NLRB proceedings because of the "peculiar character of labor litigation," *id.* at 240) – these fears are usually inappropriate in the juvenile context. Juveniles, heavily dependent upon their parents for basic necessities, are unlikely to flee the jurisdiction even if forewarned. And, even if risk of flight or of witness intimidation were a significant danger in an individual case, the greater availability of pretrial detention in juvenile cases (see § 4.15 *supra*) would make it possible to eliminate the danger by detaining the child pending trial. Counsel can, therefore, urge that an attitude of openness akin to that which animates modern civil discovery practice should prevail in juvenile cases unless the prosecutor can make some particularized showing that in *this* case and with respect to *this* discovery request, the speculative dangers that so largely shape adult criminal discovery practice have some factual substance to them.

The other principal argument advanced against liberal discovery in adult criminal cases is the supposed inefficiency or unfairness of giving the defendant discovery against the prosecutor when such discovery must inevitably remain a "one-way street" because the privilege against self-incrimination precludes prosecutive discovery against the defendant. However, the evolving caselaw suggests that the Fifth Amendment is *not* an absolute bar to criminal discovery in favor of the prosecution but would permit the prosecutor to obtain disclosure of the products of defense investigation in an appropriate case. See §§ 9.11-9.13 *infra*; *cf. Kansas v. Cheever*, 571 U.S. 87 (2014). Moreover, even if it were an absolute bar – or to the extent that it is a bar – the "one-way street" argument is nonetheless basically unsound. That is so because the Fifth Amendment itself is a one-way street and was designed to be. No one would suppose that because it protects an adult defendant or juvenile respondent against compulsory self-incrimination, the prosecution

should be permitted to incriminate the accused with perjurious or unreliable evidence. See § 9.09(b)(5) *infra.* The efficiency and fairness of prescreening the prosecution's evidence for veracity and reliability is not diminished simply because the overriding policy of the Fifth Amendment makes impossible what would be equally, but independently, desirable – the prescreening of defense evidence as well. Aversion to one-way streets, in this dimension, is nothing more or less than a rejection of basic Fifth Amendment values. *See State v. Whitaker,* 202 Conn. 259, 267, 520 A.2d 1018, 1023 (1987) ("[U]nderlying the imbalance between prosecutorial and defense discovery are constitutional and general societal concerns. In *Middleton v. United States*, . . . [401 A.2d 109,] 116 n. 11 [(D.C. App. 1979)], the court explained that criminal discovery is strongly influenced by concerns that 'the accused be secure from condemnations resting upon his coerced testimony or the improper annexation of his counsel's labors, and that the safety of the community not be jeopardized by unrestrained access to its prosecutor's files. These concerns, as well as proper deference to the constitutional principles which burden the state alone with proof of criminal charges, and considerations of fairness in light of the normal superiority of the government's investigatory resources, necessarily will frustrate the evolution of a parity of access similar to that embodied in the rules applicable to civil proceedings.'"). Such a rejection is particularly indefensible because the best founded attacks on the policy of the Privilege have always rested upon its tendency to protect the guilty, whereas it is the innocent who are worst hurt by denial of discovery on one-way street logic. Finally, the realities of criminal investigation are a one-way street the other way. Police and prosecutors have resources to gather and preserve evidence incomparably greater than those of the accused. *See Wardius v. Oregon,* 412 U.S. 470, 475-76 n.9 (1973). If equal advantage were the measure of fairness in criminal procedure – which the Fifth Amendment fundamentally denies – discovery in favor of the defense would nevertheless be required in virtually all situations.

§ 9.03 THE ADVISABILITY OF PURSUING INFORMAL DISCOVERY METHODS BEFORE RESORTING TO FORMAL DISCOVERY DEVICES

As a general rule, counsel should always pursue informal discovery options, asking the prosecutor for whatever is wanted, before counsel embarks upon discovery motions and other formal discovery devices. Judges understandably dislike being asked for coercive orders when it is not clear that coercion is necessary, and they are likely to tell counsel to pursue informal remedies first. (Indeed, in some jurisdictions, the discovery rules require that defense attorneys employ informal discovery procedures before resorting to discovery motions.) Also, when defense counsel has sought and been denied informal discovery, the balance of goodwill tips in the defense's favor, with the judge blaming the prosecution for the expenditure of court time on a discovery matter.

Part B. Informal Discovery

§ 9.04 DESIGNING A STRATEGY FOR INFORMAL DISCOVERY

Prior to engaging in informal discovery, counsel will need to thoroughly familiarize himself or herself with local discovery rules and the constitutional doctrines (described in § 9.09 *infra*) that can be invoked in support of defense discovery. Even though counsel will usually not explicitly cite these rules and doctrines, a knowledge of the scope of the respondent's formal discovery rights is important in deciding what information to request and the degree to which counsel can insist that s/he is entitled to the information. And occasionally it may be possible to break through an impasse in informal negotiations by demonstrating to the prosecutor that a particular doctrine or citation supports counsel's discovery request.

Counsel should not restrict informal discovery requests to the information to which the defense is entitled as a matter of law; instead counsel should seek everything that a liberal and enlightened criminal procedure would allow to the defense. Later in the process, when counsel is seeking judicial relief because of the prosecutor's refusal to disclose information, counsel will need to calculate whether to be venturesome or to limit discovery motions to materials that are plainly discoverable under the recognized statutes, rules, and constitutional doctrines. At that stage, there are considerations to be weighed against over-ambition. See § 9.08 *infra.* But, given the basic notion of informal discovery – that defense counsel is merely asking for whatever information the prosecutor is willing to disclose voluntarily – counsel need not, and should not, feel restricted to the categories of information that the prosecutor can be compelled to disclose through formal discovery.

§ 9.05 THE DISCOVERY LETTER

Ordinarily, it is preferable to make discovery requests in written form. Discovery letters permit the type of careful phrasing that is difficult to achieve in oral requests. Moreover, if the prosecutor denies the request and counsel moves the court for a discovery order, it will be important to show precisely what counsel requested; a letter serves as the best record that any particular request was made and obviates arguments about how the request was framed. Finally, the written format permits an extended series of requests that would tax a prosecutor's time and patience if made orally in a discovery conference or a phone conversation.

To the extent possible, counsel should make the requests in the discovery letter highly specific. The more precisely a request identifies the item or information sought, the more unreasonable – and potentially unconstitutional – the prosecutor's refusal to produce it will appear. *Cf. United States v. Agurs,* 427 U.S. 97, 106-07 (1976). On the other hand, a discovery request limited to materials that defense counsel has sufficient information to identify with particularity may fail to cover some items that are crucial to the defense. One device for dealing with this problem is to frame discovery requests in the form of a series of concentric circles of increasing breadth and generality. Thus, for example, in an armed robbery prosecution, counsel might request:

(I) The following real or physical objects or substances:

(A) The "thing of value" that it is alleged in Count One of the Petition the respondent took from the complainant, John Smith, on or about May 1, 2019;

(B) Any other thing that it is claimed was taken from John Smith during the course of the robbery alleged in Count One;

(C) The "pistol" described by Detective James Hall at page 6, line 4 of the transcript of the probable-cause hearing in this case;

(D) Any other weapon that it is claimed was used by the respondent during the course of the robbery alleged in Count One of the Petition;

(E) Any other thing that it is claimed was used by the respondent as an instrumentality or means of committing the robbery alleged in Count One;

(F) Any real or physical object or substance that:

(1) the prosecution intends to offer into evidence at any trial or hearing in this case;

(2) the prosecution is retaining in its custody or control for potential use as evidence at any trial or hearing in this case;

(3) is being retained for potential use as evidence at any trial or hearing in this case by, or within the custody or control of:

(a) any personnel of the Oak City Police Department;

(b) any personnel of the State Bureau of Investigation;

(c) any personnel of the Oakland County Criminalistics Laboratory;

(d) [The following paragraphs would designate other relevant agencies];

(4) has been submitted to any professional personnel [as defined in a "Definitions" paragraph of the discovery request, encompassing all forensic science experts and investigators] for examination, testing, or analysis in connection with this case by:

(a) the Office of the Corporation Counsel [or whatever agency

prosecutes juvenile delinquency cases];

(b) the District Attorney's office;

(c) any person previously described by paragraph (I)(F)(3)(a), (b), (c) or (d);

(5) has been gathered or received in connection with the investigation of this case by:

(a) the Office of the Corporation Counsel [or whatever agency prosecutes juvenile delinquency cases];

(b) the District Attorney's office;

(c) any personnel previously described by paragraph (I)(F)(3)(a), (b), (c), or (d);

(6) is relevant to:

(a) the robbery alleged in Count One of the Petition;

(b) the identity of the perpetrator of that robbery;

(c) the investigation of that robbery;

(d) the physical or mental state, condition, or disposition of the respondent at the time of:

(i) that robbery;

(ii) the confession allegedly made by the respondent, described by Detective James Hall at page 10, lines 12-23 of the transcript of the probable-cause hearing in this case;

(iii) any other confession, admission, or incriminating statement allegedly made by the respondent;

(iv) the present stage of the proceedings or any previous or subsequent stages of the proceedings;

(G) Every real or physical object or substance within the categories previously

described by paragraphs (I)(A) through (I)(F), which hereafter comes into the possession, custody, or control of, or is, or hereafter becomes, known to:

(1) the Office of the Corporation Counsel [or whatever agency prosecutes juvenile delinquency cases];

(2) the District Attorney's office;

(3) any person previously described by paragraph (I)(F)(3)(a), (b), (c), or (d).

(II) [The following paragraphs would describe other categories of materials – respondent's statements, witnesses' statements, police and investigative reports and records, lab test results, exculpatory materials, and so forth – in a similar manner.]

Discovery requests in this form have the virtue of covering everything that might be discoverable, whether known or unknown to defense counsel, while insulating counsel's requests for narrower or more specific categories from denial on the ground that the broader or more general categories are impermissible "fishing expeditions" or include undiscoverable material.

Counsel should always include in every discovery letter a paragraph stating that each request for discovery should be construed as seeking not only information presently in the possession of the prosecution or its agents, but also "all like matter that hereafter comes into the possession of, or becomes known to, an attorney for the prosecution, the police, any other law enforcement or investigative agency, or any other agent of the prosecution."

§ 9.06 THE DISCOVERY CONFERENCE

As a general rule, counsel should attempt to meet with the prosecutor for a discovery conference in addition to sending the type of discovery letter described in § 9.05 *supra.* The conference often will yield information not produced in the prosecutor's written response to the discovery letter.

The key to conducting a discovery conference effectively is to set an informal, conversational tone from the beginning. If counsel treats the conference as governed by strict rules, s/he will soon find the prosecutor denying every request on the theory that discovery in criminal and delinquency cases is very limited. If, on the other hand, counsel suggests that the two attorneys simply "talk over the case," the give-and-take of ordinary conversation usually will result in the prosecutor's disclosing information to which the defense is not technically entitled. Of course, "give-and-take" means precisely that: prosecutors usually will not give information that they are not required to give unless they feel that they are getting information in exchange.

Accordingly, counsel should decide in advance what bits of information can be disclosed to the prosecutor as barter without in any way damaging the defense case or giving away too much of the defense strategy.

In addition to seeking information about the case, counsel should use the discovery conference as a vehicle for learning the prosecutor's attitude toward the seriousness of the offense and for discussing the possibility of dismissal of the Petition or diversion of the case. If counsel can convincingly urge the client's innocence or the unfounded nature of a given charge, s/he may attempt to convince the prosecutor at this stage to drop charges or to present lesser ones. Counsel should remember that the prosecutor's personal view of guilt or innocence is important and that it is based on information – both favorable and unfavorable to the respondent – that may not be admissible as evidence in court. A complainant's shabby character or prior unfounded complaints may do counsel no good when the case goes to trial; it is with the prosecutor that they can be put to good effect. If counsel has arranged for the client to take a polygraph test and if the results are favorable, it is often effective to show those results to the prosecutor in support of a bid for dismissal. It will often also prove productive to mention any favorable background information about the respondent, such as lack of a prior record, good school attendance and performance, and participation in school sports or after-school or community activities. See § 19.03(b) *infra*.

It may also be useful to let the prosecutor know that counsel intends to work hard at the case (either explicitly, by saying so and explaining counsel's concern for the client, or implicitly, by describing the motions that counsel intends to file or other work counsel intends to do on the case). The value of this is two-fold. First, if the prosecutor thinks that defense counsel is going all out, the prosecutor's estimate of the time and trouble involved in trying the case will increase and so may the prosecutor's willingness to offer concessions in order to settle the case before trial. Second, counsel's visible dedication to a client often tends to make the prosecutor's own attitude toward the client more sympathetic, because the prosecutor figures that the client probably must have something on the ball to inspire all that zeal. Both of these impressions can, of course, backfire in some cases, causing the prosecutor to prepare more thoroughly or to develop a more competitive turn of mind. Counsel should seek to learn as much as possible about this particular prosecutor's practices and psychology by asking other informed defense practitioners. Particularly when a prosecutor is carrying a heavy caseload, counsel may be wise to keep contact with him or her to a minimum, in order to decrease the visibility of the case or to avoid arousing the prosecutor's combativeness.

Finally, if the respondent is interested in cutting a deal with the state – furnishing testimony against a co-respondent or adult defendant who is charged with the same or connected crimes in criminal court, or furnishing testimony against other persons, or supplying criminal-intelligence wanted by law enforcement, in exchange for dismissal of the Petition or reduction of the charges or acceptance of a plea to a lesser charge (see §§ 5.10, 8.14 *supra;* §§ 14.15, 14.18 *infra*) – counsel might begin discussing this possibility with the prosecutor at the discovery conference.

Part C. Formal Discovery: Mechanisms and Legal Bases

§ 9.07 TYPES OF FORMAL DISCOVERY PROCEDURES

Local practice varies widely with regard to whether and which discovery procedures are available. Statutes and court rules in an increasing number of jurisdictions require that the prosecution produce specified categories of information to the defense upon request and, in some cases, without a request. *See, e.g.*, *Watkins v. State*, 619 S.W.3d 265 (Tex. Crim. App. 2021); VERNON'S ANN. TEX. CODE CRIM. PRO. art. 39.14 (amendment effective September 1, 2017, requiring that the prosecution routinely disclose detailed information about the record and performance of custodial snitches whom it intends to call as witnesses; this automatic disclosure supplements an extensive list of other prosecutorial material discoverable upon defense request); MINN. STAT. ANN. § 634.045, summarized in § 31.10 *infra*; VA. SUPREME COURT RULE 3A:11 (amended effective July 1, 2019). Also, unwritten customs in some localities may offer discovery procedures that are more liberal than those authorized by statutes and formal rules. Counsel who is not thoroughly familiar with local practice will therefore want not only to consult the State's statutes, court rules, and caselaw, but also to confer with experienced defense attorneys practicing in the jurisdiction, to ascertain what types of discovery devices are conventional, as well as what sanctions for discovery violations the local judges commonly employ. *See*, *e.g.*, *City of Seattle v. Lange*, 18 Wash. App. 2d 139, 491 P.3d 156 (2021) (approving the trial court's suppression of blood test results as a sanction for the prosecution's failure to disclose a corrective action report showing that the crime lab forensic expert who conducted the test had made a mistake resulting in a false positive in another DWI case; the Court of Appeals holds that although the report was in the possession of the lab and was unknown to the prosecution, Washington's discovery rules "'impose[ ] a continuing obligation on the prosecutor to seek the disclosure of [defense-requested] discoverable information not in his or her control'" (*id*. at 152, 491 P.3d at 164); that those rules "do not require proof of materiality before mandating disclosure, and . . . that the absence of constitutional materiality 'does not relieve prosecutors of the obligation to disclose impeachment evidence'" (*id*. at 149, 491 P.3d at 162); and that the rules give a trial judge discretion to suppress prosecution evidence as a sanction for discovery violations without making the finding of prejudice which would be required to establish a constitutional *Brady* violation (see § 9.09(a) *infra*): "Nothing in the language of the [applicable] rule requires a finding of prejudice before remedying a discovery violation with something less than dismissal." *Id*. at 155, 491 P.3d at 165.)

Even if certain devices are not recognized by applicable local legislation, rules, or practice, counsel can argue that they should be made available in the case at bar in the exercise of the trial court's inherent discretionary power to regulate the proceedings before it. *See*, *e.g.*, *State ex rel. Keller v. Criminal Court of Marion County, Division IV*, 262 Ind. 420, 423, 317 N.E.2d 433, 435 (1974) ("A trial court may, sua sponte, affirmatively order discovery. We have specifically so held: 'Discovery may be provided for by statute, court rule or granted by the inherent power of the trial court.' . . . The object of a trial is the discovery of the truth. A trial judge has the responsibility to direct the trial in a manner which facilitates the ascertainment of

that truth. The power to order discovery is 'grounded in the inherent power of the trial court to guide and control the proceedings.'"); *State v. Richardson*, 452 N.J. Super. 124, 132, 171 A.3d 1270, 1274 (2017) ("Notably, our courts' power to order discovery is not limited to the express terms of the automatic discovery provisions of . . . [the State's criminal procedure rules]. The courts have 'the inherent power to order discovery when justice so requires.'"); *State v. Laux*, 167 N.H. 698, 704 117 A.3d 725, 730 (2015) ("we hold that the circuit court has the inherent authority, within its sound discretion, to order discovery prior to the preliminary hearing when the accused has made a particularized showing that the discovery is needed to show a lack of probable cause and the court concludes that the interests of justice require disclosure"); *United States v. Villa*, 2014 WL 280400 (D. Conn. 2014), quoted in § 9.09(a) *infra*.

Authorities and arguments supporting the recognition of various devices are found in the following literature, most of which is outspoken in favor of broadened criminal discovery: AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, DISCOVERY (4th ed. 2020) [Chapter 11 of the 2017 Standards, updated]; William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1963 WASH. U. L.Q. 279; Richard M. Calkins, *Criminal Justice for the Indigent,* 42 U. DET. L.J. 305, 334-35, 337-39 (1965); Richard M. Calkins, *Grand Jury Secrecy,* 63 MICH. L. REV. 455 (1965); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review,* 53 FORDHAM L. REV. 391 (1984); Ronald L. Carlson, *False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?,* 1969 DUKE L.J. 1171; Robert L. Fletcher, *Pre-Trial Discovery in State Criminal Cases,* 12 STAN. L. REV. 293 (1960); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149, 1172-98 (1960); Sheldon Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice,* 42 NEB. L. REV. 127 (1962); David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567 (1986); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008); Barry Nakell, *Criminal Discovery for the Defense and the Prosecution – The Developing Constitutional Considerations,* 50 N.C. L. REV. 437 (1972); Barry Nakell, *The Effect of Due Process on Criminal Defense Discovery,* 62 KY. L.J. 58 (1973-74); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541; Daniel A. Rezneck, *The New Federal Rules of Criminal Procedure,* 54 GEO. L.J. 1276 (1966); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097 (2004); Hon. H. Lee Sarokin & William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie this Presumption*, 43 RUTGERS L. REV. 1089 (1991); Roger J. Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U. L. REV. 228, 749 (1964); Peter Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 121-31 (1974); Bureau Draft, *A State Statute to Liberalize Criminal Discovery,* 4 HARV. J. LEGISLATION 105 (1966); Edward M. Glickman, Note, *Disclosure of Grand Jury Minutes to Challenge Indictments and Impeach Witnesses in Federal Criminal Cases,* 111 U. PA. L. REV. 1154 (1963); Katherine L.

Hensley, Note, *Discovery Depositions: A Proposed Right for the Criminal Defendant,* 51 S. CAL. L. REV. 467 (1978). A general approach to defense counsel's argument for broadened discovery rights is contained in § 9.02 *supra,* and constitutional considerations that may be advanced to support those rights are enumerated in § 9.09 *infra.*

The most commonly recognized formal discovery devices are discussed in §§ 9.07(a)-9.07(d) *infra.*

§ 9.07(a) Motion for a Bill of Particulars

Upon the filing of a charging paper that is insufficiently detailed to inform the respondent of the vital statistics of the offense charged, s/he may move for a bill of particulars, setting out in the motion the additional information that s/he seeks. S/he is ordinarily entitled to:

(1) The specific date and time of the offense;
(2) Its street location;
(3) The name of the complainant or victim; and
(4) The means by which it is asserted that the respondent committed the offense.

See, *e.g.*, *State v. Huerta-Castro*, 2017-NMCA-026, 390 P.3d 185 (N.M. App. 2016) (the indictment contained six identical counts charging that the defendant "did cause [Child 1] to engage in sexual intercourse and/or caused the insertion of any object into the intimate part of [Child 1]" (*id*. at 190) and six identical counts containing the same allegations regarding Child 2; defense counsel moved for a bill of particulars; he "detailed the vagueness and the effect on his inability to formulate a defense. Specifically, Defendant could not ascertain from the charging document around what time of day things might have happened, or relating whether Defendant was at work, what day or week it was, or where he was during these times." (*id*. at 192); the trial court denied the motion; the Court of Appeals holds that "the district court's failure to order the State to produce a bill of particulars to address the insufficiency of the indictment to charge specific and distinct offenses violated Defendant's rights to due process and requires reversal of five of Defendant's convictions" (*id*. at 194). "'The object of a bill of particulars in criminal cases is to enable the defendant to properly prepare his defense, and, to achieve that fundamental purpose, it must state as much as may be necessary to give the defendant and the court reasonable information as to the nature and character of the crime charged[.]' . . . In cases involving child victims, allegations of criminal behavior often lack specificity as to the date, location, or details of a particular incident within the period of time for which a defendant is charged. . . . We recognize that because the State has a compelling interest in protecting child victims, our courts can be 'less vigorous in requiring specificity as to time and place when young children are involved than would usually be the case where an adult is involved.' . . . This flexibility does not, however, permit the State to proceed based on a lack of adequate notice of the conduct upon which an indictment is based." *Id*. at 191-92); *Dzikowski v. State*, 436 Md. 430, 449-50, 82 A.3d 851, 862 (Md. App. 2011) ("The State violated . . . [the applicable statute] when it filed a bill of particulars in which, rather than inform the petitioner of the conduct that was the basis for the

reckless endangerment count, it instead simply directed the petitioner to discovery. In so doing, the State switched the burden to the petitioner to identify the facts underlying the indictment. Because a charging document must inform the defendant 'of the specific conduct with which he is charged,' . . . , logically, and . . . [under the applicable rule of criminal procedure], a bill of particulars, in supplementation of a short form indictment that fails to so inform, must specify the alleged conduct to which the subject charge relates. Discovery, even open-file discovery, that includes police reports and witness statements, is not the same and cannot substitute for a legally sufficient bill of particulars. While such discovery may contain the full facts of the case, when a defendant is charged using a short form indictment, it is not, and cannot be, a substitute, or satisfy a demand, for a bill of particulars. Discovery does not particularize or relate, from the perspective of the State, the factual information contained therein to the offense charged. It is this perspective and relation of factual information to the offense charged that satisfies the form and substance of a bill of particulars."); *State v. Larson*, 941 S.W.2d 847, 850-53 (Mo. App. 1997) ("Dr. Larson was charged by information with fifty counts of Class A misdemeanor animal abuse . . .¶ Dr. Larson filed a motion for bill of particulars claiming that the information was deficient. Specifically, he asserted that each charge identified neither the acts of abuse nor the specific animal. As a result, Dr. Larson claimed prejudice in the preparation of his defense and the inability to prevent multiple prosecution for the charged offenses. The trial court denied Dr. Larson's motion. ¶ . . . Where an information alleges all essential facts constituting the offense, but fails to assert facts necessary for an accused's defense, the information is subject to a challenge by a bill of particulars. . . . A bill of particulars clarifies the charging document. It prevents surprise and restricts the state to what is set forth in the bill. ¶ The information in Counts 1 through 50 did not sufficiently apprise Dr. Larson of which hog – male, female, dead, alive, white, black, red, Hampshire, Yorkshire or Duroc – he was charged with having abused. Without providing some reasonable description identifying each hog allegedly abused, Dr. Larson would be subject to multiple prosecutions with no way to disprove that the State of Missouri had already litigated criminal charges against him for abusing a particular hog. ¶ . . . The trial court, therefore, abused its discretion in not granting Dr. Larson's motion for a bill of particulars."); *State v. Robinson*, 2020-01389 (La. 3/9/21), 312 So.3d 255 (Mem) (La. 2021) ("La. Const. Art. I, § 13 requires the State to inform the accused in a criminal prosecution of the nature and cause of the accusation against him. The State may provide that information in the indictment alone, or in its responses to a defense request for a bill of particulars. . . . The purpose of the bill of particulars is to inform the accused more fully of the nature and scope of the charge against him so that he will be able to defend himself properly and to avoid any possibility of ever being charged again with the same criminal conduct." *Id*. at 256. "[H]ere, the case is complex, and defendant is accused of a broad conspiracy to obstruct justice in two separate murder investigations. In addition, the State has alleged numerous means in the statute by which defendant may have committed the crimes. . . . [I]t is clear that the State has yet to provide defendant with enough information about the nature and cause of the accusations against him to comply with La. Const. Art. I, § 13, and to sufficiently inform him of the nature and scope of the charges so that he will be able to defendant himself properly. ¶ Accordingly, we grant defendant's application in part to remand to the district court, which is ordered to afford the State one final opportunity to expeditiously provide sufficient particulars." *Id*. at 257.); *Masingill v.*

State, 7 Ark. App. 90, 92, 644 S.W.2d 614, 615 (1983), *petition for review dismissed without expressing a view on the merits,* 278 Ark. 641, 648 S.W.2d 62 (Mem) (1983) ("[T]he State's charges against appellant never revealed that any other person was involved in the alleged crime. In a criminal case, the Bill of Particulars must state the act relied upon by the State with sufficient certainty to apprise the defendant of the specific crime and to enable him to prepare his defense. . . . Here, the State withheld details of the crime to which appellant was entitled and in doing so clearly served to frustrate his defense preparation."). *Cf. Hunter v. State*, 829 P.2d 64, 65 (Okla. Crim App. 1992) ("Initially, we are very disturbed by the fact that the prosecution in the present case did not file the Bill of Particulars seeking the death penalty until seven days prior to trial. At present, there is no set time prior to trial within which the State must file a Bill of Particulars. . . . However, both parties agree that the notice need only be given within a reasonable time prior to trial. We find that giving notice that the State intends to seek the death penalty seven days prior to trial is clearly unreasonable. By comparison, the State is required to give ten days notice of its intention to use evidence of other crimes. . . . It is our opinion the State knows or should know no later than the preliminary hearing whether or not they intend to seek the death penalty in a particular case. We find the notice in the present case simply inadequate. The defendant has the right to a fair trial; how can one properly prepare for a death case trial in one week. This Court adopts the standard that the State must file the Bill of Particulars prior to or at the arraignment of the defendant. The trial court may for good cause shown, extend this time but should use its sound discretion in so doing.").

Allowance of a bill of particulars is generally said to rest in the discretion of the court, and the standard jargon is that the bill does not lie to discover prosecution "evidence" (that is, means of proving facts, as distinguished from the operative facts of the offense themselves). But counsel should note the more liberal practice recognized in *Will v. United States*, 389 U.S. 90, 99 (1967); *State v. Meadows*, 172 W. Va. 247, 254, 304 S.E.2d 831, 838 (1983) ("[w]e have recognized a bill of particulars as a discovery device."). In most jurisdictions the respondent may not demur to the facts stated in the bill or move to dismiss it on the ground of failure to state an offense (see § 17.03 *infra*); and in the event that the prosecution's proof at trial varies from the particulars contained in the bill, the respondent is usually given nothing more in the way of relief than a continuance (or mistrial and continuance if continuance without a mistrial is not feasible (*cf. People v. Petersen*, 190 A.D.3d 769, 770, 140 N.Y.S.3d 234, 236 (N.Y. App. Div., 2d Dep't 2021) (reversing a burglary conviction because "the People limited their theory of burglary in their bill of particulars, which incorporated the allegations of the criminal complaint, to the intent to commit property damage and/or theft," but the trial court "permitt[ed] the prosecutor to argue, during summation, and . . . permitt[ed] the jury to consider, the uncharged theory that the defendant intended to assault the complainant"))); only very rarely will a court dismiss a prosecution for variance of the proof from a bill of particulars. The bill is therefore a device of limited utility. *But see People v. Bradley*, 154 A.D.3d 1279, 1279-81, 63 N.Y.S.3d 159, 160-61 (N.Y. App. Div., 4th Dep't 2017) (reversing the defendant's convictions of criminally negligent homicide and reckless assault while operating a motor vehicle because the prosecution had responded to the defense's pretrial demands for a bill of particulars with respect to the element of recklessness by specifying that the "'[t]he ingestion of marihuana and a failure to take medication

were both factors that contributed to the defendant's recklessness,'" but the prosecution's "evidence presented at trial varied from the limited theories alleged in the indictment, as amplified by the bill of particulars," in that the prosecution "presented evidence that defendant was reckless based upon not only marihuana use and failure to take medication, but also based upon, inter alia, his lack of sleep, failure to inform his doctors of his syncope events, and failure to control his alcohol consumption"; "Inasmuch as there was a variance between the People's trial evidence and the indictment as amplified by the bill of particulars, and that evidence was insufficient to support the theories of defendant's recklessness set forth in the bill of particulars, defendant was essentially tried and convicted on charges for which he had not been indicted . . . ."); *cf. People v. Faison*, 198 A.D.3d 1263, 1264, 154 N.Y.S.3d 180, 182 (N.Y. App. Div., 4th Dep't 2021) ("[W]e must reverse the murder conviction [and grant the defendant a new trial] because County Court's instructions created the possibility that the jury convicted him based on a theory different from that set forth in the indictment, as limited by the bill of particulars. . . . the People's theory of depraved indifference, as outlined in the bill of particulars, was limited to defendant's assaultive conduct, i.e., his infliction of head injuries by shaking or hitting the child, . . . [but] the court's instruction allowed the jury to consider, in addition to the specifically delineated assaultive conduct, defendant's 'inaction' after the assault ended.").

§ 9.07(b) Motion for a List of Prosecution Witnesses

In many jurisdictions the statutes, court rules, or caselaw confer upon the defense a right to the names of all witnesses whom the prosecution plans to use at trial. Usually this is limited to witnesses in the prosecution's case-in-chief and does not extend to potential rebuttal witnesses.

The right to a witness list is given by statutes or rules of two sorts: those that require the names of witnesses to be endorsed on the charging paper and those that authorize the defense to demand the names from the prosecutor. Even under statutes of the former sort, it is often common for prosecutors to withhold a witness list unless defense counsel ask them for it. If local rules require the inclusion of witnesses' names in the Petition, counsel can move to dismiss the Petition for failure to state the names. If the local rules do not establish such a requirement, counsel should either demand the list from the prosecutor directly or move the court for an order requiring the prosecutor to produce a list, as occasion warrants. *See*, *e.g.*, *United States v. W.R. Grace*, 526 F.3d 499, 509-10, 516 (9th Cir. 2008) (en banc) (upholding trial court orders that required the prosecution to produce a final witness list (including all expert witnesses and excluding only potential rebuttal witnesses) before trial and that enforced this disclosure requirement by limiting the government's presentation of witnesses at trial to those disclosed as of the enforcement order's date and limiting the reports the government experts could rely upon to those ordered disclosed: "Other circuits that have addressed a district court's authority to require the government to disclose its witness list in advance of trial have agreed that the court may do so. See United States v. Cannone, 528 F.2d 296, 299 (2d Cir. 1975) ('The general discretion of district courts to compel the government to identify its witnesses is acknowledged widely . . . .'). Some have invoked the court's 'inherent power, exercisable under appropriate circumstances, to assure the proper and orderly administration of criminal justice.' . . . Others

have not explained the source of authority, but simply have stated that it is within a district court's discretion to order the government to produce a witness list under appropriate circumstances. . . . ¶ . . . [W]e . . . hold that the district court had authority to order and enforce the pretrial disclosures of government witnesses and evidentiary documents and that the district court did not abuse its discretion in doing so here.").

If the prosecutor responds to a motion or order for production of a witness list by serving up an obviously inflated list calculated to hamper defense preparation, counsel can seek the court's intervention to extract a more realistic list. *Cf. Chafin v. State*, 246 Ga. 709, 713-14, 273 S.E.2d 147, 152-53 (1980). If counsel's independent investigation suggests, conversely, that the prosecutor is probably withholding the names of some potential prosecution witnesses, counsel can bring the matter to the court's attention by a motion to compel full disclosure; or alternatively counsel can (1) move at a pretrial conference or other pretrial, post-discovery proceeding to preclude the testimony of an unlisted witness (*see*, *e.g.*, *State v. Martinez*, 1998-NMCA-022, 124 N.M. 721, 954 P.2d 1198 (N.M. App. 1998)), or (2) await trial and, when the prosecutor calls an unlisted witness, object to his or her testifying (*see, e.g.*, *Rouse v. State*, 243 So.2d 225 (Fla. App. 1971); *People v. White*, 123 Ill. App. 2d 102, 259 N.E.2d 357 (1970)). At trial the judge will have discretion to (a) exclude the testimony of the witness, or (b) allow the witness to testify and allow the defense a continuance to prepare for cross-examining the witness and to gather defense witnesses responsive to the unannounced witness's testimony. *State v. Prieto*, 2016 WI App 15, 366 Wis. 2d 794, 876 N.W.2d 154 (Wis. App. 2015). *See*, *e.g.*, *Rogers v. State*, 261 Ga. 649, 649-50, 409 S.E.2d 655, 656-57 (1991) ("[I]f a defendant makes a timely written demand for a list of witnesses, a witness whose name does not appear on the list may not testify without defendant's consent. The prosecution's failure to list a witness can be cured in many situations, however, if defendant is granted a continuance or allowed to interview the witness before the testimony is given. ¶ In this case, Rogers made a timely written demand for a list of witnesses . . . . We conclude that the testimony of the witness should not have been allowed without giving Rogers some remedy for the prosecution's noncompliance with the statute. The record is clear that Rogers insisted on his right to a witness list and on his right to a remedy for the failure of the witness to appear on the list."); *People v. Kysar*, 158 A.3d 544, 544, 69 N.Y.S.3d 649, 650 (N.Y. App. Div., 1st Dep't 2018) (reversing a conviction because the trial court failed to grant appropriate relief when the prosecution violated the witness-list rule by presenting the testimony of the complainant, who had been omitted from the witness list because the prosecution was "unable to locate him in the two years between the incident and the trial" and who was located "after the jury was selected, and just before opening arguments"; "[d]efense counsel clearly 'relied to her detriment [in *voir dire*] on her expectation that the People would not call this witness,'" and therefore the trial court, "having denied defense counsel's request to preclude the complainant's testimony, should have granted counsel's alternative request, made prior to opening arguments, to select a new jury").

In a few jurisdictions, the respondent's right to a witness list is not limited to potential prosecution witnesses but extends to witnesses whom the prosecutor knows to have exculpatory evidence. *See*, *e.g.*, *Richardson v. State*, 246 So.2d 771 (Fla. 1971). Local rules should be

consulted.

§ 9.07(c) Discovery Motions

In addition to the two specific types of discovery motions that have been described thus far – motions for a bill of particulars and motions for a list of witnesses – most jurisdictions provide for a generalized discovery motion in which the defense can seek production of any other information to which it is entitled by statute, court rule, or caselaw.

Depending upon the facts of the case, the defense may wish to move for production or inspection of:

1. *Physical objects*. Counsel should ask that these be released for testing by defense experts, if advised; or the court can be asked to order that defense experts be allowed to attend testing by prosecution experts.

2. *Police and other investigative reports; records and materials generated by police procedures and activities* (911 telephone calls; recordings from police body and vehicle vidcams; arrest photographs; booking records; eyewitness identification forms; and so forth); *photographs, diagrams, and other items generated by law enforcement and prosecutorial evidence gathering*. See § 8.19 *supra* for a roster of the kinds of documents and materials that are commonly accumulated in the course of police processing and prosecutorial working-up of a case.

3. *Medical and scientific reports* (*see*, *e.g.*, *Patrick v. State*, 329 Md. 246, 17 A.2d 215 (1992); *Wester v. State*, 260 Ga. 228, 391 S.E.2d 765 (1990); *State v. Adams*, 481 A.2d 718 (R.I. 1984); *People v. Davis*, 52 A.D.3d 1205, 859 N.Y.S.2d 804 (N.Y. App. Div., 4th Dep't 2008); *State v. Fair*, 164 N.C. App. 770, 596 S.E.2d 871 (2004)) *and materials relating to the expected testimony of prosecution expert witnesses* (*see*, *e.g.*, *State v. Fair*, *supra*, 164 N.C. App. at 774, 596 S.E.2d at 873; *State v. Pickett*, 466 N.J. Super. 270, 301, 246 A.3d 279, 306-07 (2021) ("We hold that if the State chooses to utilize an expert who relies on novel probabilistic genotyping software to render DNA testimony, then defendant is entitled to access, under an appropriate protective order, to the [proprietary] software's source code and supporting software development and related documentation – including that pertaining to testing, design, bug reporting, change logs, and program requirements – to challenge the reliability of the software and science underlying that expert's testimony at a *Frye* hearing [see § 33.11 *infra*], provided defendant first satisfies the burden of demonstrating a particularized need for such discovery."); *but see People v. Wakefield*, 2022 WL 1217463, at *9 (N.Y. Ct. App. April 26, 2022) (rejecting "defendant's novel argument that the source code [for TrueAllele software] is . . . [a] declarant [so as to give the defendant a Sixth Amendment right to its discovery]. Even if the TrueAllele system is programmed

to have some measure of 'artificial intelligence,' the source code is not an entity that can be cross-examined. '[T]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination'.").

4. *Written and oral statements of the respondent. See, e.g.*, *United States v. Vinas*, 910 F.3d 52, 54, 58, 59 (2d Cir. 2018) (vacating a conviction and ordering a new trial because the government's notice of the defendant's statement violated Fed. Rule Crim. Pro. 16(a)(1)(A) by presenting "a misleading description of the circumstances under which the defendant purportedly made . . . [the statement], and so misinformed defense counsel about the possible grounds for suppression" and misled counsel "into not moving to suppress" the statement).

5. *Written and oral statements of any co-respondents, adult co-perpetrators, or other alleged accomplices*.

6. *Statements of witnesses*.

7. *Official records* (maintained by detention facilities, prisons, jails, hospitals, probation departments, and so forth) relating to the respondent, co-respondents, adult co-perpetrators, and prosecution and defense witnesses, including materials relevant to credibility in the personnel files of police witnesses; investigative reports relating to previous complaints by the present complainant; and records of all police and prosecutorial transactions with any undercover agents or informants involved.

8. *Criminal records* of the respondent, co-respondents, adult co-perpetrators, prosecution and defense witnesses, and informants.

9. *Grand jury transcripts*, if grand jury proceedings were held in connection with any purported co-perpetrators charged as adults. A special shibboleth of secrecy has traditionally surrounded grand jury proceedings and made courts reluctant to disclose grand jury records. There has, however, been some erosion of this protectionistic attitude, "consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis v. United States*, 384 U.S. 855, 870 (1966). See also § 27.12(a)(1) *infra* (explaining that in a number of jurisdictions, a statute or rule requires that the prosecutor turn over, *at trial*, any prior statements of prosecution witnesses, for purposes of impeachment).

10. *Photographs and other visual aids* shown to witnesses by investigating officers for purposes of identification. *See Simmons v. United States,* 390 U.S. 377, 388 (1968) (dictum).

11. *Other documents or data* that are "within the government's possession, custody, or control and . . . [that are] material to preparing the defense" (FED. RULE CRIM. PRO. 16(a)(1)(E)). *See, e.g.*, *United States v. Soto-Zuniga*, 837 F.3d 992 (9th Cir. 2016) (the district court in a drug possession case abused its discretion by denying the defense motion for discovery of "checkpoint search and arrest statistics" (*id*. at 998); Federal Rule 16(a)(1)(E)'s requirement of production of items "'material to preparing the defense'" includes "discovery related to the constitutionality of a search or seizure" (*id*. at 1000)); *State v. Reed-Hansen*, 2019 ME 58, 207 A.3d 191, 192-96 (Me. 2019) (affirming the trial court's order "imposing a significant discovery sanction [of suppressing "'all evidence obtained as a result of the [traffic] stop'"] following the state's failure to provide to the defendant a dash-cam video of the defendant ostensibly committing the [charged] crime" of driving with an expired inspection sticker: although the state asserted that the video was not subject to discovery requirements "because Reed-Hansen's inspection sticker could not be seen on the video," the court concludes that "there can be no question that the video was 'material and relevant to the preparation of the defense'" given that the "video . . . indisputably records . . . Reed-Hansen's operation of the vehicle, an element of the very crime at issue").

12. Other materials that are obtainable by law enforcement through special accommodations not available to defense counsel. *See*, *e.g.*, *Black v. State*, 2017 Wyo. 135, 405 P.3d 1045, 1051 (2017) (conviction reversed, in part because of the prosecution's failure to comply with a discovery order that it obtain and produce to the defense a six-month batch of Verizon cell phone and Facebook records: "One of the exhibits in support of the motion for sanctions was an email from the prosecutor to defense counsel. The email contained a Facebook policy for addressing record requests from law enforcement. According to the policy, law enforcement 'may expeditiously submit formal preservation requests through the Law Enforcement Online Request System at facebook.com/records, or by email . . . .' Once the request is received, according to the policy, Facebook 'will search for and disclose data that is specified with particularity in an appropriate form of legal process and which we are reasonably able to locate and retrieve.'" 405 P.3d at 1051. Defense counsel's motion for production had alleged that "'[i]t is believed that it is much easier and more convenient for the State to obtain these requested records than the Defendant. It is known, in fact, that such a request for Facebook to provide records is made frequently by law enforcement in Teton County, Wyoming. *See* Records Request at www.facebook.com/records/login (stating that "If you are a law enforcement agent who is authorized to gather evidence in connection with an official investigation, you may request records from Facebook through this system."). Whereas, it is unduly cumbersome and costly, both in time and resources for the Office of the State Public Defender to obtain these records via court subpoena, or subpoena duces tecum, and the required modes of providing notice and service.'" 405 P.3d at 1049.). *Wardius v.*

Oregon, 412 U.S. 470 (1973), discussed in § 9.09(b)(7).

13. Materials relating to any proposed prosecution testimony by snitches (see § 31.10 *infra*) or turncoat accomplices (see §§ 10.12, 31.03 *infra*).

§ 9.07(d) Other Discovery-Related Motions

In addition to the foregoing motions, local practice may recognize (or counsel may be able to persuade the judge to recognize) one or more of the following types of motions, which involve the court's ordering the prosecution or prosecution witnesses to participate in certain discovery-related procedures:

1. Motions for medical or psychiatric examination of the complainant or other prosecution witnesses.

2. Motions for an order requiring the complainant and other prosecution witnesses to speak with the defense because of prosecutorial or police interference with the defense right to investigate. See § 8.13 *supra.*

3. Motions for an order requiring police witnesses to speak with the defense. See § 8.14 *supra.*

In addition, counsel can, in certain circumstances, move for the detention of persons as material witnesses (see §§ 9.10(a), 10.02 *infra*).

§ 9.07(e) Depositions

Although depositions are a key feature of discovery in civil cases, most jurisdictions do not authorize depositions in criminal and juvenile delinquency cases, except when it is necessary to preserve the testimony of a witness for trial (*see, e.g.*, FED. RULE CRIM. PRO. 15(a)) or in other exceptional circumstances (see, *e.g.*, § 8.13 *supra*, discussing deposition as a possible remedy for the prosecutor's impermissibly advising a witness to decline to talk with defense counsel or a defense investigator).

In a small number of jurisdictions, depositions are available in criminal and juvenile delinquency cases for their customary function of discovery. *See, e.g.*, FLA. RULE JUV. PROC. 8.060(d) (2022) (establishing a procedure for depositions in delinquency cases, patterned after the deposition procedure employed in adult criminal cases); VT. RULE FAM. PROC. 1(d)(4) (2022) (expressly incorporating the adult criminal procedure rules for depositions). In these jurisdictions, depositions may be broadly available or limited to specific categories of cases (*e.g.*, exclusively felonies) and/or conditioned upon a showing of need.

In jurisdictions that permit depositions by the prosecution as well as the defense, the

applicable rule commonly recognizes that the accused may not be deposed by the prosecution. Even if such a limitation were not set by the relevant statute or rule, the Fifth Amendment's privilege against self-incrimination would preclude the prosecution from deposing the respondent. *See* § 9.12 *infra*.

Where depositions are available to defense counsel, they will ordinarily be an invaluable tool for discovery of the prosecution's case and for locking prosecution witnesses into statements that can be used to impeach the witness at trial if s/he changes his or her account. In these respects, depositions offer the kinds of tactical benefits discussed in other chapters with regard to preliminary hearings (see § 4.32 *supra*) and suppression hearings (see §§ 22.02, 24.04 *infra*). But depositions can be even more effective for these purposes because they usually cover a wider range of subjects and because their use as a discovery tool is not merely tolerated but specifically intended.

An issue that may arise at trial in a jurisdiction that affords depositions in criminal and juvenile delinquency cases is whether, in the event that a prosecution witness who was deposed is unavailable at trial, the prosecution can introduce the witness's deposition into evidence. The rule of *Crawford v. Washington*, 541 U.S. 36 (2004), discussed in § 30.04 *infra*, should bar such a practice. *See, e.g.*, *Corona v. State*, 64 So.3d 1232, 1241 (Fla. 2011) (discovery depositions, available to the defense in criminal cases under state rules, "do not meet *Crawford*'s cross-examination requirement" of "afford[ing] [the accused] an adequate opportunity to cross-examine the . . . declarant" because, *inter alia*, such depositions are "'not designed as an opportunity to engage in adversarial testing of the evidence against the defendant,'" and they are admissible at trial solely "'for purposes of impeachment'" and not as "'substantive evidence'"). *But see Thomas v. State*, 966 N.E.2d 1267, 1272 (Ind. App. 2012) (concluding that the prosecution's introduction of a deposition of an unavailable witness at trial did not violate *Crawford* because defense counsel had an adequate prior opportunity to cross-examine that witness at the deposition, but ultimately holding that "even assuming that *Crawford*'s requirements were not met, any error in admitting the deposition was harmless"). To make discovery or witness-preservation depositions admissible at trial under *Crawford*, the prosecution must show not only adequate opportunity for cross-examination at the deposition but unavailability of the witness at the time of trial. *State v. Tribble*, 193 Vt. 194, 67 A.3d 210 (2012), summarized in § 2.03 *supra* and § 30.04(c) *infra*. And failure to conduct the deposition in accordance with applicable statutes or court rules may make it inadmissible. *See Avsenew v. State*, 334 So.3d 590 (Fla. 2022) (reversing a conviction because of error in the admission of a preservation deposition conducted remotely using a setup in which the witness could not see the defendant; the applicable Florida rule provides that the defendant is to be kept "in the presence of the witness during the examination" (*id*. at 594)).

§ 9.07(f) Freedom of Information Laws (FOILs)

A number of jurisdictions have enacted freedom of information laws (commonly called FOILs), some of them patterned on the federal Freedom of Information Act, 5 U.S.C. § 552

(2022). Although the Supreme Court has said of the federal Act that it "was not intended to supplement or displace rules of discovery" (*John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989)), and lower courts have said the same of their state FOILs, these laws may be written sufficiently broadly to reach certain government records that defense counsel would like to examine. *See, e.g.*, *United States Department of Justice v. Julian*, 486 U.S. 1 (1988); *Bartko v. United States Department of Justice*, 898 F.3d 51 (D.C. Cir. 2018); *Evans v. Federal Bureau of Prisons*, 951 F.3d 578 (D.C. Cir. 2020); *Fields v. State*, 432 Md. 650, 69 A.3d 1104 (2013); *Jones v. Medlin*, 302 Ga. 555, 807 S.E.2d 849 (2017); *and see Jimerson v. Payne*, 957 F.3d 916, 922 (8th Cir. 2020); *Phillips v. Valentine*, 826 Fed. Appx. 447, 454 (6th Cir. 2020).

Unless the jurisdiction's statute or other controlling authority explicitly forbids its use by parties to litigation against the government or exempts the types of records counsel is seeking (*compare Arkansas State Police v. Wren*, 2016 Ark. 188, 491 S.W.3d 124 (2016), *with Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990)), counsel may find it profitable to follow the statutory procedures for requesting access to records that arguably fall within its compass. *See, e.g.*, *In the Matter of Gould v. New York City Police Department*, 89 N.Y.2d 267, 274-75, 675 N.E.2d 808, 811-12, 653 N.Y.S.2d 54, 57-58 (1996) (even though "petitioners seek [to use FOIL] to obtain documents relating to their own criminal proceedings, and . . . disclosure of such documents is governed generally by CPL [Criminal Procedure Law] article 240 [on discovery in criminal cases,] . . . the Criminal Procedure Law does not specifically prelude defendants from seeking these documents under FOIL, [and therefore] we cannot read such a categorical limitation into the statute"; "the Police Department's argument and the dissent's concern that the requests serve not the underlying purposes of FOIL, but the quite different private interests of petitioners in obtaining documents bearing on their [criminal] cases and will produce an enormous administrative burden" are "unavailing as the statutory language imposes a broad duty to make certain records publicly available irrespective of the private interests and the attendant burdens involved"; the rulings below "establishing a blanket exemption from FOIL disclosure for [police] complaint follow-up reports and police activity logs" are reversed and the cases are remitted to the trial courts "to determine, upon an in camera inspection if necessary, whether the Police Department can make a particularized showing that any claimed exemption applies").

FOIL requests are ordinarily submitted in writing directly to the governmental agency whose records are sought. If the agency does not produce them, a civil action is brought against the agency to compel production. The FOIL specifies the court or courts in which the civil action may be brought and the procedure for bringing it. The National Freedom of Information Coalition tracks open records laws in every jurisdiction and provides detailed information about procedures (including sample request letters) and appeals. It is accessible at https://www.nfoic.org/foi-center/.

§ 9.08 GENERAL STRATEGY WHEN EMPLOYING FORMAL DISCOVERY PROCEDURES

Section 9.04 *supra* advised that counsel seek as much information as possible through

informal discovery procedures. A different tack may be advisable in making formal discovery motions. By limiting these motions to what counsel is likely to get as a matter of settled law and local custom, counsel can display an attitude of undemanding reasonableness that may persuade the court to exercise its discretion in favor of discovery in areas where the prevailing practice allows discovery but does not require it. Since discovery law in most jurisdictions confers broad discretionary power on the trial judge, it often makes sense to get or keep on the judge's good side by requesting nothing that s/he could regard as exorbitant. In deciding whether to employ this strategy, or whether to go for broke and ask for everything that an enlightened criminal procedure would give the defense, or whether to take some intermediate position between these two extremes, counsel will need to assess the temperament of his or her individual judge. When counsel's theory of the case makes one or a few particular items crucial subjects for discovery (see § 6.02(d) *supra*), s/he may do best by focusing on those items in his or her requests for court-ordered discovery, and forgoing other items – or at least forgoing any other items which are not routine, unremarkable staples of local discovery practice.

In any event counsel should make discovery requests as specific as possible, identifying the material that is wanted (*cf. United States v. Agurs,* 427 U.S. 97, 106-07 (1976)) and describing its relevance and importance for the preparation of the defense unless self-evident *(cf. United States v. Valenzuela-Bernal,* 458 U.S. 858, 871-74 (1982)). If counsel is unable to identify with specificity some of the information that s/he wants, counsel should use the concentric circles approach described in § 9.05 *supra* to guard against the risk that the judge will deny the entire discovery motion as a "fishing expedition."

When requesting a discovery order, counsel should recount his or her attempts to obtain the information through informal discovery, and the prosecutor's refusal to disclose it. See § 9.03 *supra.* If counsel sent a discovery letter to the prosecutor (see § 9.05 *supra*), a copy of the letter as well as any prosecutorial responses should be attached as an appendix to the discovery motion. When seeking materials or information to which the defense is not plainly entitled as a matter of routine under established precedent, counsel should take pains to demonstrate his or her efforts and inability to obtain the information independently: for example, counsel should recite his or her attempts to interview the prosecution witness(es) who know the information and the fact that the witness(es) refused to speak with counsel or the defense investigator. By documenting his or her assiduity, counsel demonstrates that s/he genuinely needs the judge's intervention and is not just being lazy. The absence of any alternative to judicial process as a means for obtaining vital information strengthens counsel's entitlement to the court's assistance. *Compare California v. Trombetta,* 467 U.S. 479, 488-90 (1984).

§ 9.09 CONSTITUTIONAL DOCTRINES THAT CAN BE INVOKED IN SUPPORT OF DEFENSE DISCOVERY

The *Brady* rule described in § 9.09(a) *infra,* gives the defense a federal constitutional right to discovery of exculpatory information and information that impeaches prosecution evidence. This is a firmly established doctrine, recognized in all jurisdictions. The other doctrines

described in this section, which provide constitutional rationales for broader defense discovery rights, have not as yet been authoritatively recognized. Accordingly, when relying on the latter doctrines, counsel will need to fully brief their legal basis and should also present a compelling factual showing of need.

§ 9.09(a) The *Brady* Doctrine: The Right to Prosecutorial Disclosure of Evidence Helpful to the Defense

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny require that the prosecution disclose, upon defense request, evidence in the prosecutor's possession that is material and potentially helpful to the defense. The Court ruled in *Brady* that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. *Accord*, *Turner v. United States*, 137 S. Ct. 1885 (2017) (dictum); *Wearry v. Cain*, 577 U.S. 385 (2016) (per curiam); *Smith v. Cain*, 565 U.S. 73 (2012); *Cone v. Bell*, 556 U.S. 449, 451, 469-70 (2009); *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999); *Kyles v. Whitley*, 514 U.S. 419, 432-38 (1995); *Fontenot v. Crow*, 4 F.4th 982 (10th Cir. 2021); *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3d Cir. 2016) (en banc); *Gumm v. Mitchell*, 775 F.3d 345, 363-74 (6th Cir. 2014); *United States v. Tavera*, 719 F.3d 705, 711-12 (6th Cir. 2013); *and see Floyd v. Vannoy*, 894 F.3d 143, 162-63 (5th Cir. 2018) (per curiam) (the prosecution's failure to disclose lab reports indicating that fingerprints lifted at the crime scene did not match the defendant's violated *Brady*: "The State's assertion the fingerprint-comparison results were effectively disclosed through the crime-scene report and list of evidence distorts *Brady*'s requiring prosecutors to offer exculpatory evidence absent a specific request by the defense. . . . Floyd's *Brady* claim does not stem from the fingerprints themselves, but from the results of the State's fingerprint-comparison test. ¶ The State does not demonstrate compliance with *Brady*'s disclosure requirement by asserting a possibility Floyd could deduce that, based on the general evidence provided to him, additional evidence likely existed. . . . Further, the State's assertions the evidence was not withheld because Floyd could have conducted his own analysis are in direct contrast to clearly-established *Brady* law rejecting the defense's ability to conduct their own analysis as justification for prosecutorial non-disclosure."); *United States v. Paulus*, 952 F.3d 717, 725 (6th Cir. 2020) ("The prosecution is not obligated under *Brady* to disclose information to the defense that the defense already 'knew or should have known.' The government argues that Paulus knew the essential facts described in the . . . [undisclosed document] and that he could have gathered the missing [factual] detail with 'minimal investigation.' . . . ¶ . . . But . . . *Brady* 'does not [allow] the State simply to turn over some evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs.' . . . [Here] Paulus would have had to follow a long trail of crumbs to get the missing details"; therefore, the prosecution's nondisclosure violated *Brady*.); *People v. Bueno*, 2018 Colo. 4, 409 P.3d 320, 328 (Colo. 2018) (alternative ground) ("The People urge us to follow several federal circuit decisions holding that where evidence is otherwise available through reasonable diligence by the defendant, that evidence is not suppressed under *Brady*. . . . The Supreme Court has at least twice rejected arguments similar to the People's assertion that the

defense must make reasonable efforts to locate *Brady* materials."); *Bracey v. Superintendent, Rockview SCI*, 986 F.3d 274, 289 (3d Cir. 2021) (recognizing that *Dennis v. Secretary, Pennsylvania Department of Corrections*, *supra,* held that "[t]here is no 'affirmative due diligence duty of defense counsel as part of *Brady*' and 'no support [for] the notion that defendants must scavenge for hints of undisclosed *Brady* material.' . . . Rather, 'the duty to disclose under *Brady* is absolute – it does not depend on defense counsel's actions.' . . . Consequently, the defense 'is entitled to presume that prosecutors have "discharged their official duties"' by sharing all material exculpatory information in their possession, . . . and the defense's diligence in seeking out exculpatory material on its own 'plays no role in the *Brady* analysis,' . . . ."; the *Bracey* court also collects the decisions of other federal circuits that accord with *Dennis*). "When there are multiple *Brady* claims, the Supreme Court instructs that we consider materiality 'collectively.' . . . We must imagine that every piece of suppressed evidence had been disclosed, and then ask whether, assuming those disclosures, there is a reasonable probability that the jury would have reached a different result." *Browning v. Baker*, 875 F.3d 444, 464 (9th Cir. 2017).

"'Information that is favorable to the accused may consist of evidence that "could exonerate the accused, corroborate[ ] the accused's position in asserting his innocence, or possess[ ] favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim."'" . . . Additionally, favorable evidence includes evidence that '"challenges the credibility of a key prosecution witness."' . . . [E]vidence is favorable under *Brady* if 'it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks.'" *Jordan v. State*, 343 S.W.3d 84, 96 (Tenn. App. 2011). *See Commonwealth v. Caldwell*, 487 Mass. 370, 167 N.E.3d 852 (2021) ("'Evidence is exculpatory if it "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness."'" *Id*. at 375, 167 N.E.3d 858. . . . ¶ Here, the prosecutor's note indicated that the witness had testified about a jailhouse confession extracted from a then-fellow inmate in a previous case. Further investigation of the case referenced in the note likely would have led defense counsel to discover the witness's significant role in the prosecution of Rancourt. . . . The judge who heard Rancourt's motion to suppress found that the witness had hoped to gain favorable treatment in exchange for the information that he had provided to the trooper. . . . After providing the information, the witness's sentence was revised and he was released two and one-half months before his previously scheduled release date as a protective measure, although there was no evidence that law enforcement officers made any promises to the witness. . . . ¶ If the defendant's trial counsel had known about the witness's previous involvement in the *Rancourt* case, he could have used it to challenge the witness's claim that he had broken the jailhouse 'code of silence' to testify against the defendant with no expectation of any benefit for himself. Defense counsel could have argued that the witness once again was motivated by a desire to secure favorable treatment in his pending cases." *Id*. at 375-76, 167 N.E.3d 858. "[W]e reject the

Commonwealth's contention that the information revealed by the prosecutor's note is merely cumulative because the Commonwealth had turned over the police report that noted the witness's previous cooperation with law enforcement, about which defense counsel did not question the witness at trial. The specific facts relating to the witness's cooperation in *Rancourt*, including his hope for favorable treatment and the reduction of his sentence, would have made that evidence far more compelling for a jury than the generic reference to the witness's prior police cooperation contained in the police report." *Id*. at 378, 167 N.E.3d 859-60.")."There are good reasons to think that the threshold for the favorability inquiry should be fairly low." *Phillips v. Valentine*, 826 Fed. Appx. 447, 460 (6th Cir. 2020). *See Long v. Hooks*, 972 F.3d 442, 461 (4th Cir. 2020) (en banc) (finding that a state postconviction court "had an improper view of favorable evidence, conflating favorable evidence with exculpatory evidence": "*Kyles* expressly rejects the notion that evidence must be 'impeachment [ ]or exculpatory evidence' in order to be 'favorable.' 514 U.S. at 450-51. Rather, evidence is favorable under *Brady* if it would have 'some weight' and a 'tendency [to be] favorable' to Petitioner. *Id*. at 451."); *see also, e.g.*, *People v. Ulett*, 33 N.Y.3d 512, 520-21, 129 N.E.3d 909, 914-15, 105 N.Y.S.3d 371, 376-77 (2019) (the prosecution violated *Brady* by "withh[o]ld[ing] a video of the crime scene that captured events surrounding the murder, including the body of the victim as he fell to the ground": "This video evidence could have been used to impeach the eyewitnesses. . . . We reject the People's argument that the impeachment value of the video is cumulative to what was already available to defense counsel. Impeachment with contradictory testimony of other witnesses is hardly the same as being confronted with a videotape of the scene. ¶ The video would also have provided leads for additional admissible evidence . . . and avenues for alternative theories for the defense. The video shows people entering and exiting the building, including other potential eyewitnesses. At a minimum, the presence of unidentified witnesses, at least one of whom was only a few feet away when the shots were fired, could have been used by the defense to argue that the police failed to conduct a thorough investigation (*see Kyles*, 514 U.S. at 446–447 [finding that undisclosed *Brady* material could have been used to attack 'the thoroughness and even the good faith of the investigation']). And the video captures something none of the eyewitnesses reported: an additional person at the scene interacting with the victim as he lay on the ground, which defense counsel could have used at trial in combination with the medical examiner's report to argue that another shooter was potentially responsible for the victim's death after he fell to the ground."); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) ("The withheld evidence also raises serious questions about the manner, quality, and thoroughness of the investigation that led to Bowen's arrest and trial. A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation."); *People v. Rong He*, 34 N.Y.3d 956, 135 N.E.3d 1081, 112 N.Y.S.3d 1 (2019) (*Brady* requires the prosecution to produce contact information for individuals who told investigating officers that they had witnessed the criminal episode or events immediately after it); *People v. Ramunni*, 203 A.D.3d 1076, 1078, 166 N.Y.S.3d 27, 30 (N.Y. App. Div., 2d Dept. 2022) (the prosecution violated *Brady* by disclosing only the content of a 911 call – which contained a description of the perpetrator that "did not match the defendant" – while "fail[ing] to provide the defendant with meaningful access to the caller by redacting the caller's identity and contact information and thereafter denying the defendant's request for this

caller's identity"; "While the contents of the 911 call may have provided some clues as to the identity of the caller, the defendant should not be forced to guess as to the identity of this caller.").

In *Brady,* the evidence improperly suppressed by the prosecution was a co-defendant's confession that identified the co-defendant as the lone triggerman in a robbery-murder. In *United States v. Bagley,* 473 U.S. 667 (1985), the Court made clear that "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule," and thus the *Brady* doctrine extends to "evidence that the defense might . . . use[ ] to impeach the Government's witnesses by showing bias or interest." *Id.* at 676. *Accord*, *Wearry v. Cain*, 577 U.S. at 392 ("the rule stated in *Brady* applies to evidence undermining witness credibility"); *Strickler v. Greene*, 527 U.S. at 280; *Kyles v. Whitley*, 514 U.S. at 433; *United States v. Flores-Rivera*, 787 F.3d 1, 18 (1st Cir. 2015) (finding a *Brady* violation where potential impeachment evidence went undisclosed: "[T]he testimony of the three cooperating [*i.e.*, turncoat] witnesses – especially Delgado – was both essential to the convictions and uncorroborated by any significant independent evidence. Indeed, the absence of such evidence is so marked and surprising in view of the resources devoted to the investigation and the availability of three turned conspirators that it could reasonably cause the factfinder to be dubious about the witnesses' claims. This is therefore a case in which the *Brady* material that was not produced need not be 'highly impeaching' in order to require that the verdict be reversed. . . . ¶ Delgado was the star witness. . . . On cross, . . . Delgado parried any suggestions that his testimony was orchestrated with that of the other witnesses. In fact, he denied even talking about the case with them, telling the jury that to do so was against the rules. So, too, did those other two cooperating witnesses firmly deny a basic premise of the defense: that they coordinated their testimony. ¶ Had defense counsel possessed Delgado's notes, counsel could have either shown Delgado and the others to have perjured themselves, and/or forced them to admit that they had at the very least compared prospective testimony with one another. . . . It was not just the defense who believed the potential for the cooperators to talk about the case in prison jeopardized the government's chances of a conviction. The prosecutor elicited testimony from . . . [another of the three turncoat witnesses] . . . on redirect that suggested male and female prisoners could not talk to each other at the prison."); *Mellen v. Winn*, 900 F.3d 1085 (9th Cir. 2018). *See also Smith v. Cain*, 565 U.S. at 75-76; *United States v. Walter*, 870 F.3d 622, 629-31 (7th Cir. 2017); *Barton v. Warden,* 786 F.3d 450, 465-70 (6th Cir. 2015) (*per curiam*); *Lewis v. Connecticut Comm'r of Correction*, 790 F.3d 109, 113, 123-24 (2d Cir. 2015); *Amado v. Gonzalez*, 758 F.3d 1119, 1133-34, 1138-39 (9th Cir. 2014); *Johnson v. Folino*, 705 F.3d 117, 129-30 (3d Cir. 2013)*; United States v. Mahaffy*, 693 F.3d 113, 130-33 (2d Cir. 2012); *State v. Best*, 376 N.C. 340, 852 S.E.2d 191 (2020); *In re Stenson*, 174 Wash. 2d 474, 488-89, 276 P.3d 286, 293-94 (2012). For example, "*Brady* requires prosecutors to disclose any benefits that are given to a government informant, including any lenient treatment for pending cases." *Maxwell v. Roe*, 628 F.3d 486, 510 (9th Cir. 2010), and cases cited. *Accord*, *Carter v. State*, 2019 UT 12, 439 P.3d 616, 631 (Utah 2019) ("We agree with the district court that the Tovars' declarations do not allege the prosecutor asked them to alter their testimony in any substantive way. Standing alone, this claim is likely insufficient to create a material dispute of fact regarding materiality. But we do not view this claim in isolation, we view it along with Carter's other claims of

misconduct and evidence suppression. *See Kyles*, 514 U.S. at 436 . . . ('The . . . final aspect of . . . materiality to be stressed here is its definition in terms of suppressed evidence considered collectively. . . .'). . . . [T]he Tovars' testimony is inconsistent in meaningful ways. In the same way that it is reasonable to infer that the Tovars' testimony changed over time in response to financial benefits received, it is likewise reasonable to infer that the Tovars' testimony changed over time, at least in part, in response to testimony coaching by the prosecutor. When considered alongside the financial benefits and the threats of deportation and separation, the inferences drawn in favor of Carter from the accusations of testimony coaching become more than mere speculation."); *Simpson v. State*, 2022 WL 120867, at *8 (Fla. January 13, 2022) (a witness's credibility may be attacked by showing bias, including the possible bias arising from the witness's relationship to a party; here "because Little Archie had been an informant in another case, he had a 'relationship to a party' that was a potential source of bias requiring disclosure. And disclosure of a witness' informant status is required even where there is no evidence that the witness was given favorable treatment in exchange for the information."). *See also Fuentes v. Griffin*, 829 F.3d 233, 247 (2d Cir. 2016) ("if the prosecution has a witness's psychiatric records that are favorable to the accused because they provide material for impeachment, those records fall within *Brady* principles"); *In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 152 N.E.3d 65 (2020), quoted in the sixth paragraph of this section.

To satisfy the "materiality" standard of *Brady* and its progeny, the defendant must show that "'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." *Strickler v. Greene*, 527 U.S. at 289. *See*, *e.g.*, *Long v. Hooks*, 972 F.3d at 458 (finding that a state postconviction court "unreasonably applied Supreme Court law in imposing an erroneously high burden . . . [when it] required Petitioner to demonstrate the withheld evidence would have changed the result at trial 'by a preponderance of the evidence,' rather than asking him to demonstrate a 'reasonable probability of a different result.'").."In determining whether "'there is a reasonable probability" that the result of the trial would have been different[,]' . . . a court must consider 'the aggregate effect that the withheld evidence would have had if it had been disclosed['] . . . . In order to determine 'the aggregate effect' of the withheld evidence, the court must *both* 'add[ ] to the weight of the evidence on the defense side . . . all of the undisclosed exculpatory evidence' *and* 'subtract[ ] from the weight of the evidence on the prosecution's side . . . the force and effect of all the undisclosed impeachment evidence.'" *Juniper v. Zook,* 876 F.3d 551, 568 (4th Cir. 2017). *Cf. Tempest v. State*, 141 A.3d 677, 683 (R.I. 2016) ("With respect to . . . [*Brady* violations], our jurisprudence 'provides even greater protection to criminal defendants than the one articulated [by the United States Supreme Court].' . . . 'When the failure to disclose is deliberate, this [C]ourt will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; we shall simply grant the defendant a new trial.'"). Materiality judgments made at the pretrial stage are necessarily predictive and therefore dangerously speculative. For an analysis of this problem and a possible solution, *see* Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277 (2020). Counsel seeking *Brady* disclosure before trial should insist that the applicable standard is *potential* materiality, and that this is a broader measure than the ordinary post-trial "retrospective test, evaluating the

strength of the evidence after trial" (*United States v. Olsen*, 704 F.3d 1172, 1183 (9th Cir. 2013)). "[S]ome trial courts . . . have concluded that the retrospective definition of materiality is appropriate only in the context of appellate review, and that trial prosecutors must disclose favorable information without attempting to predict whether its disclosure might affect the outcome of the trial." *Id.* at 1183 n.3; *see United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999) ("Numerous cases define the *Brady* obligation in the context of appellate review considering the ramifications of a prosecutor's failure to disclose evidence. Using this post-trial perspective, *Brady* held that it would be a due process violation only if the suppressed evidence was 'material.' Courts have concluded that '[e]vidence is considered 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."' . . . ¶ This standard is only appropriate, and thus applicable, in the context of appellate review. Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighed against the presumed effect of the undisclosed *Brady* material. . . . ¶ Additionally, the post-trial review determines only whether the improper suppression of evidence violated the defendant's due process rights. However, that the suppression may not have been sufficient to violate due process does not mean that it was proper. . . . ¶ Because the definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context, the Court relies on the plain meaning of 'evidence favorable to an accused' as discussed in *Brady*. ¶ The meaning of 'favorable' is not difficult to determine. In the *Brady* context, 'favorable' evidence is that which relates to guilt or punishment . . . , and which tends to help the defense by either bolstering the defense's case or impeaching prosecution witnesses . . . . The Court notes again that in the pretrial context it would be inappropriate to suppress evidence because it seems insufficient to alter a jury's verdict. Further, '[t]he government, where doubt exists as to the usefulness of evidence, should resolve such doubts in favor of full disclosure . . . .' Thus, the government is obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case."); *United States v. Wells*, 2013 WL 4851009, at *3 (D. Alaska 2013) ("[i]n the pretrial context the government should review 'materiality' of exculpatory information as evidence that may be 'favorable to the accused' which, if so, should be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial"); *United States v. Lampkin*, 2016 WL 11680667, at *2 (D. Alaska 2016) ("Compliance with *Brady* in a pretrial context requires a more expansive application of what constitutes evidence favorable to the accused. Evidence that is favorable to the accused should be disclosed and, 'where doubt exists as to the usefulness of evidence, [the government] should resolve such doubts in favor of full disclosure.'"); *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) ("The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed – with the benefit of hindsight – as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. Because the definition of 'materiality'

discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial."); *and see United States v. Villa*, 2014 WL 280400, at *2 (D. Conn. 2014) ("Some courts have noted that . . . [the] retrospective definition of *Brady* material 'is only appropriate . . . in the context of appellate review.' *United States v. Sudikoff*. . . ; *see also* Ellen Yaroshefsky, Prosecutorial Disclosure Obligations, 62 HASTINGS L.J. 1321, 1335 n.70 (2011) (collecting cases). Aside from the inherent difficulty of measuring materiality to a trial that has not yet occurred, the analysis post-trial focuses on a different question – 'whether the improper suppression of evidence violated the defendant's due process rights' rather than whether the material ought to have been disclosed in the first place. . . . While it is not clear if this theory has been accepted in this Circuit, . . . the Second Circuit noted that that it had 'no occasion to consider the scope of a trial judge's discretion to order pretrial disclosures as a matter of sound case management . . . .'"). *Cf.* Riley E. Clafton, *Note, A Material Change to Brady: Rethinking Brady v. Maryland, Materiality, and Criminal Discovery*, 110 J. CRIM. L. & CRIMINOLOGY 307 (2020). And when drafting discovery-request memoranda that cite appellate decisions spelling out *Brady* doctrine, counsel should be sure to quote verbatim the language of *Kyles*, *Cone*, and *Agurs* emphasizing that doubtful questions of materiality should be resolved in favor of disclosure.

Brady has also been held to apply to prosecutors' failures to disclose factual information which would support a procedural contention (such as the contention that prosecution evidence was unconstitutionally obtained and therefore required to be suppressed), even though the information does not go to the issue of guilt-or-innocence in the strictest sense. *People v. Geaslen*, 54 N.Y.2d 510, 516, 430 N.E.2d 1280, 1282, 446 N.Y.S.2d 227, 229 (1981) ("[W]here, as here, there is in the possession of the prosecution evidence of a material nature which if disclosed could affect the ultimate decision on a suppression motion, and that evidence is not disclosed, such nondisclosure denies the defendant due process of law. The failure of the District Attorney in this instance to disclose to the suppression court the Grand Jury testimony of Officer Wheeler (which on its face can only be classified as 'favorable' to defendant) to allow the suppression court to make an *in camera* inspection to determine whether the testimony should be made available to defendant prior to or at the suppression hearing, constitutes a denial of the due process required by the Federal Constitution under the principles of *Brady v. Maryland* . . . and its progeny."); *Biles v. United States*, 101 A.3d 1012, 1020 (D.C. 2014) ("[T]he suppression of material information can violate due process under *Brady* if it affects the success of a defendant's pretrial suppression motion. We have described as 'eminently sensible' a broad formulation of the government's *Brady* obligation that would reach the kind of evidence 'that would suggest to any prosecutor that the defense would want to know about it,' . . . and a rule prohibiting the government from suppressing favorable information material to a Fourth Amendment suppression hearing would impose little if any additional burden on prosecutors and police beyond the obligations that court rules and professional standards already impose."); *Milke v. Ryan*, 711 F.3d 998, 1019 (9th Cir. 2013) ("Also at issue was . . . [a police detective's] claim –

again, unsupported by evidence – that Milke waived her *Miranda* rights and didn't ask for a lawyer. Beyond its effect on . . . [the detective's] credibility, evidence of . . . [his] falsifications and his disregard of *Miranda*, would have been highly relevant to the determination of whether Milke's alleged confession had been lawfully obtained. The suppression of evidence of . . . [the detective's] lies and misconduct thus qualifies as prejudicial for purposes of *Brady* and *Giglio*."); *Jackson v. City of Cleveland*, 925 F.3d 793 (6th Cir. 2019) (a cognizable *Brady* claim was presented by allegations that police officers neglected to inform the prosecuting attorneys that a juvenile who, under the police theory of the case, was an eyewitness and had identified the defendants as the perpetrators of a murder, had in fact not been present at the murder scene and was coerced by the officers into signing a statement falsely asserting that his reason for failing to identify the defendants in a lineup was that he was afraid of them: "The prosecutor did not speak to . . . [the juvenile] prior to bringing charges, and so the false statement constituted the entire basis for his [the prosecutor's] understanding of . . . [the juvenile's] involvement. If . . . [the police officers had not fabricated . . . [the juvenile's] statement, therefore, charges would not have been brought" (*id.*at 816), and the juvenile would not have been called to testify before the grand jury and at trial.); *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (dictum) ("The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different"); *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990), *ruling on another issue vacated*, 503 U.S. 930 (1992); *cf. United States v. McElroy*, 697 F.2d 459, 464 (2d Cir. 1982) (Federal Criminal Rule "16(a)(1)(A) requires the government to disclose the substance not only of the incriminating post-arrest oral statements which it intends to use at trial, but also the substance of the defendant's responses to any *Miranda* warnings which preceded the statements. Disclosure, to be meaningful, must be made of the defendant's responses both to the warnings which immediately preceded his admissions and to any other set(s) of warnings given the defendant from arrest onwards. Requiring the government to make such disclosure will bring to light *Miranda* violations that might otherwise remain hidden because the defendant misunderstands his rights, fails fully to inform defense counsel, or is unable to remember. Disclosure is clearly consistent with the view that pretrial discovery is an important avenue to the protection of defendants' rights. As prudence and long practice require law enforcement officers to record a defendant's responses to the *Miranda* warnings, disclosure imposes no significant additional burden on law enforcement agencies. We believe that our interpretation of Rule 16 will, at little cost to effective law enforcement, help to make meaningful in practice the important rights which motivated the *Miranda* decision.").

The *Brady* "rule encompasses evidence 'known only to police investigators and not to the prosecutor' . . . [and] therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" *Strickler v. Greene*, 527 U.S. at 280-81 (quoting *Kyles v. Whitley,* 514 U.S. at 437-38). *See Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam); *Barton v. Warden*, 786 F.3d at 465; *Aguilar v. Woodford*, 725 F.3d 970, 982-83 (9th Cir. 2013); *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 78 (Mo. 2011) ("Even if the prosecutor was subjectively unaware that a

weapon was confiscated from . . . [a suspect other than the defendant], the State is nonetheless under a duty to disclose the evidence. . . . In this case, the murder occurred in prison, and the prison guards were acting on the government's behalf. Therefore, the State had a duty to discover and disclose any material evidence known to the prison guards."); *McCormick v. Parker*, 821 F.3d 1240 (10th Cir. 2016) (the prosecutor violated *Brady* by failing to disclose to the defense that the alleged Sexual Assault Nurse Examiner (SANE) who testified for the state at trial "wasn't certified as a SANE nurse in Texas when she testified" and that she had "misrepresented herself as a certified SANE nurse 'to patients, court officials and the public'" (*id*. at 1244); there was no indication that "the prosecutor actually knew about [witness] Ridling's lapsed credentials" (*id*. at 1246) but "Ridling was part of the prosecution team for *Brady* purposes . . . [and] [a]ccordingly, we must impute her knowledge of her own lack of certification to the prosecutor" (*id*. at 1247)); *and see Carillo v. County of Los Angeles*, 798 F.3d 1210 (9th Cir. 2015); *Jackson v. City of Cleveland*, *supra*; *In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 642, 658, 152 N.E.3d 65, 70, 82 (2020) (rejecting the objections of two police officers to the prosecution's disclosure to defense counsel, in "criminal cases where the petitioners might be witnesses," that the officers "knowingly made false statements in their police reports that concealed the unlawful use of force by a fellow officer against an arrestee and supported a bogus criminal charge of resisting arrest against the arrestee": the court "conclude[s], as did the district attorney, that the prosecutors here have a *Brady* obligation to disclose the exculpatory information at issue to unrelated criminal defendants in cases where a petitioner [police officer] is a potential witness or prepared a report in the criminal investigation. That obligation remains even though that information was obtained in grand jury testimony compelled by an immunity order. And the district attorney may fulfill that obligation without prior judicial approval; a judge's order is needed only for issuance of a protective order limiting the dissemination of grand jury information. ¶ More broadly, we conclude that where a prosecutor determines from information in his or her possession that a police officer lied to conceal the unlawful use of excessive force, whether by him- or herself or another officer, or lied about a defendant's conduct and thereby allowed a false or inflated criminal charge to be prosecuted, the prosecutor's obligation to disclose exculpatory information requires that the information be disclosed to defense counsel in any criminal case where the officer is a potential witness or prepared a report in the criminal investigation."). *A fortiori*, a prosecutor's duty to learn about exculpatory and impeaching evidence "includes evidence held by other prosecutors;" "knowledge of that evidence is imputed to . . . [the trial prosecutor] under *Brady*." *Aguilar v. Woodford*, 725 F.3d at 982.

"It is well established that the state violates a defendant's right to due process under *Brady* when it withholds evidence that is 'favorable to the defense' (and material to the defendant's guilt or punishment). . . . In describing evidence that falls within the *Brady* rule, the Supreme Court has made clear that impeachment evidence is 'favorable to the defense' even if the jury might not afford it significant weight." *Lambert v. Beard*, 537 Fed. Appx. 78, 86 (3d Cir. 2013). *See also id*. at 85-86 ("We further hold that, to the extent the state court determined that the Police Activity Sheet was not exculpatory or impeaching under *Brady* because it was ambiguous, such determination was an unreasonable application of clearly established Supreme

Court precedent."); *Jones v. Medlin*, 302 Ga. 555, 807 S.E.2d 849, 854 (2017) ("The admissibility of the undisclosed material itself is not a prerequisite to finding a Brady violation; the question is whether, had the material 'been disclosed to the defense, the result of the proceeding would have been different,' in reasonable probability. . . . Thus, 'inadmissible evidence may be material [under *Brady*] if it could have led to the discovery of [material] admissible evidence. . . .'"); *Commonwealth v. Johnson,* 644 Pa. 150, 174 A.3d 1050 (2017) (The prosecution's failure to disclose five police reports relating to criminal investigations of a key prosecution witness (Robles) violated *Brady:* "The reports are textbook impeachment evidence. They suggest that Robles sought to curry favor with the police in the face of ongoing criminal investigations and mounting evidence of his own criminal conduct. And they would have guided defense counsel's efforts to expose to the jury the 'subtle factors' of self-interest upon which Johnson's life or liberty may have depended." *Id.* at 1056-1057. "The withheld evidence also revealed instances where Robles had lied or deceived the police when it was in his interest to do so . . . . In addition, the withheld evidence revealed that Robles had a motive to eliminate rival drug dealers such as Johnson's affiliates." *Id.* at 1057. "The substantive admissibility of impeachment evidence, vel non, is not dispositive of a Brady claim. . . . Documents like the police reports at issue here – which would not have been admissible as substantive evidence at Johnson's trial – may nevertheless contain information that can be used to impeach a witness." *Id.* at 1056.). *Compare Turner v. United States*, 137 S. Ct. at 1892-95 (finding that undisclosed evidence, which the Government conceded to have been "'favorable to the accused,'" was not "material" for *Brady* purposes and therefore did not require the reversal of the defendants' convictions, because there was no "'reasonable probability that, had the evidence been disclosed,'" the outcome of the trial "'would have been different'"; prosecution witness Carrie Eleby's undisclosed statement to a prosecutor that "she had been high on PCP during a . . . meeting with investigators" essentially duplicated evidence that "the jury heard multiple times about Eleby's frequent PCP use, including Eleby's own testimony that she and [prosecution witness Linda] Jacobs had smoked PCP shortly before they witnessed Fuller's attack," and "it would not have surprised the jury to learn that Eleby used PCP on yet another occasion"; an undisclosed prosecutorial note reporting that Kaye Porter, "a minor [prosecution] witness," had "changed her mind about having agreed with Eleby's claims," would have added "little . . . [of] significance," given that Porter was "impeached at trial with evidence about changes in her testimony over time"; although the prosecution failed to disclose a detective's note that Linda Jacobs "'vacillated' [during an interview] about what she saw," the "jury was . . . well aware of Jacobs' vacillation, as she was impeached on the stand with her shifting stories about what she witnessed"; the Court explicitly describes its non-materiality holding as "fact-intensive" and as dictated by "the context of this trial, with respect to these witnesses"; and it says that "We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence," citing *Wearry v. Cain*, *supra*.). "The dispositive question . . . is whether the guilty verdict . . . is worthy of confidence in the absence of the suppressed evidence." *Thomas v. Westbrooks*, 849 F.3d 659, 663 (6th Cir. 2017) (in a state-court prosecution, "the State violated . . . [the defendant's] due process rights as articulated in *Brady v. Maryland* when the prosecution failed to inform him that . . . [the key prosecution witness] had received $750 from the FBI prior to trial" under the auspices of "the Safe Streets Task Force – a

joint federal-state working group charged with investigating and prosecuting gang-related crime" (*id*. at 661-63)).

The *Brady* obligation trumps any state-law privilege of non-disclosure that the prosecution may assert. *Fontenot v. Crow*, *supra*, 4 F.4th at 1063 (although "[a]t the time of Mr. Fontenot's trials, Oklahoma law viewed unsworn statements of prosecution witnesses and police investigative reports to fall within the work-product privilege, making them non-discoverable," the Tenth Circuit holds that the prosecutor's failure to turn such materials over to the defense violated *Brady*).

Defense counsel should always make a general *Brady* request in his or her discovery letter to the prosecution (see § 9.05 *supra*) and in discovery motions (see § 9.07(c) *supra*). Such a request might be framed in terms such as the following:

> any and all materials and information within the possession of the prosecution or law enforcement agents which could constitute evidence favorable to the accused, or which could lead to material favorable evidence, including exculpatory or mitigating matters and any matters that could be used to impeach the prosecution's evidence or to undermine the prosecution's case, within the meaning of *Brady v. Maryland,* 373 U.S. 83 (1963).

In addition, counsel should make particularized requests for any specific items or categories of *Brady* information that counsel can identify, on the basis of defense investigation, as likely to be in the hands of prosecuting or law enforcement authorities. While the prosecution does not escape its obligation to turn over *Brady* information when the defense request is "merely a general request" – or even when "there has been no [defense] request at all" – *United States v. Agurs,* 427 U.S. at 106-07; *Strickler v. Greene*, 527 U.S. at 280; *Kyles v. Whitley*, 514 U.S. at 433-34, the chances of reversal of a conviction may be somewhat improved if the prosecution failed to honor a specific *Brady* request. *See United States v. Bagley,* 473 U.S. at 682-83 (opinion of Blackmun, J.); *Pennsylvania v. Ritchie,* 480 U.S. 39, 58 n.15 (1987). *See also*, *e.g.*, *People v. Vilardi*, 76 N.Y.2d 67, 71-78, 555 N.E.2d 915, 916-21, 556 N.Y.S.2d 518, 519-24 (1990) (a specific *Brady* request by defense counsel triggers the enhanced protections afforded by the state constitutional version of the *Brady* doctrine).

Because *Brady* and its progeny involved invalidations of convictions in response to post-trial revelations that the prosecutor had failed to disclose information favorable to the accused at any time prior to the conclusion of a trial, they do not speak directly to the requisite timing of *Brady* disclosures. But their rationale implies that disclosure of *Brady* material "must be made at such time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case." *United States v. Pollack,* 534 F.2d 964, 973 (D.C. Cir. 1976). *See, e.g.*, *United States v. Obagi*, 965 F.3d 993 (9th Cir. 2020) (the prosecution's discovery and disclosure of impeachment material for the first time after the government had delivered its closing argument and between the closing arguments of two joined defendants came too late; failure to

provide earlier disclosure violated *Brady*, and the violation could not be cured by the trial judge's instructions to the jury to disregard the testimony of the potentially impeached witness and any government arguments based on that witness's testimony); *United States v. Bundy*, 968 F.3d 1019, 1031 (9th Cir. 2020) (affirming an order of the district court which had "concluded that dismissal with prejudice was appropriate because the government withheld key evidence favorable to the defense until after trial was underway – in clear violation of its duties under *Brady* – and dismissing without prejudice would allow the government to cure its mistakes, to the detriment of the defendants."); *Fuentes v. Griffin*, 829 F.3d at 249-50 (the prosecution's failure to turn over a psychiatric report about the complainant was prejudicial for a number of reasons including, "importantly, [that] timely disclosure of the [report] . . . would have provided defense counsel with an opportunity to seek an expert opinion with regard to the [report's] . . . indication of other significant symptoms, in order to establish reasonable doubt in the minds of the jurors because of [complainant] G.C.'s predisposition toward emotional instability and retaliation – an opinion he was able to obtain after he eventually learned of the psychiatric record but not in time to present it to the jury"); *Blakeney v. State*, 236 So.3d 11, 24 (Miss. 2017) ("Because the prosecution's late disclosure of previously undisclosed witnesses left the defense without adequate time to prepare, we find that a continuance should have been granted"). *See also, e.g.*, AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, DISCOVERY (4th ed. 2020) [Chapter 11 of the 2017 Standards, updated], Standard 11-2.3(b), *Timing of Discovery* ("in all cases, disclosures should be made in sufficient time for each party to use the disclosed information to adequately prepare for hearings, the entry of a plea, trial, or sentencing"). In federal practice, an amendment of FED RULE CRIM. PRO. 5 effective October 21, 2020, requiring that "[i]n all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law" (Rule 5(F)(i)), carries the strong implication that *Brady* disclosure is required early in the pretrial process. *Compare United States v. Ruiz*, 536 U.S. 622, 625, 631, 633 (2002) (*Brady* doctrine "does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant," given that pre-plea prosecutorial disclosure of "'information establishing the factual innocence of the defendant'" and other constitutional and systemic protections guard against the risk that "innocent individuals, accused of crimes, will plead guilty"), *with State v. Huebler*, 275 P.3d 91, 96-98 (Nev. 2012) ("the considerations that led to the decision in [*United States v.*] *Ruiz* do not lead to the same conclusion when it comes to material exculpatory information": "While the value of impeachment information may depend on innumerable variables that primarily come into play at trial and therefore arguably make it less than critical information in entering a guilty plea, the same cannot be said of exculpatory information, which is special not just in relation to the fairness of a trial but also in relation to whether a guilty plea is valid and accurate."; "We are persuaded by language in *Ruiz* and due-process considerations that a defendant may challenge the validity of a guilty plea based on the prosecution's failure to disclose material exculpatory information before entry of the plea."), *and Bridgeforth v. Superior Court*, 214 Cal. App. 4th 1074, 1077, 1087, 154 Cal. Rptr. 3d 528, 530, 538 (2013) ("applying the traditional three-factor

due process analysis utilized in *Ruiz* . . . [and] the remaining considerations cited in *Ruiz*" to hold that the due process clauses of the federal and state constitutions require "the prosecution to disclose, prior to the preliminary hearing, evidence in its possession that is both favorable to the defense and material to the probable cause determination to be made at the preliminary hearing"). And, in any event, both prosecutors and judges should be sensitive to the argument that timely pretrial discovery is a better way to run a system than disclosure at trial, with a constitutionally compelled mistrial and continuance, or postconviction litigation of questions of nondisclosure. "[T]he aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" *Smith v. Phillips,* 455 U.S. 209, 219 (1982). This is why, as the Supreme Court noted pointedly in *Agurs,* "the prudent prosecutor will resolve doubtful questions in favor of disclosure." 427 U.S. at 108. *See also Cone v. Bell*, 556 U.S. at 470 n.15 ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. . . . As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles v. Whitley*, 514 U.S. at 439-40 ("Unless . . . the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. ¶ This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'. . . And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."); *Strickler v. Greene*, 527 U.S. at 281 (the *Brady* doctrine reflects "the special role played by the American prosecutor in the search for truth in criminal trials" and the prosecutor's interest in ensuring that "'justice shall be done'" (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))); *Banks v. Dretke*, 540 U.S. at 696 ("[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."); *Turner v. United States*, 137 S. Ct. at 1893 ("Consistent with the[ ] principles [that "the *Brady* rule's '"overriding concern [is] with the justice of the finding of guilt"'" and that "the Government's '"interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done,"'"], the Government assured the Court at oral argument that subsequent to petitioners' trial, it has adopted a 'generous policy of discovery' in criminal cases under which it discloses any 'information that a defendant might wish to use.' . . . As we have recognized, and as the Government agrees, . . . '[t]his is as it should be.'"); *Fernandez v. Capra*, 916 F.3d 215, 217, 222-23 (2d Cir. 2019) (dictum) (the prosecution violated the obligation to "promptly disclose" *Brady* evidence by delaying disclosure of the lead investigator's involvement in a drug sale until the prosecutor had "reviewed the audiotapes and concomitantly ordered the arrest" of the investigator; "while [prosecutor] Burmeister may have reasonably sought a high degree of certainty in the credibility of the accusation before ordering the arrest of a NYPD officer, it was not reasonable for Burmeister to delay the disclosure to [defendant]

Fernandez of credible evidence from an undercover officer that Officer Melino had negotiated a sale of cocaine"; "'if there were questions about the reliability of the exculpatory information, it was the prerogative of the defendant and his counsel – and not of the prosecution – to exercise judgment in determining whether the defendant should make use of it'"); *In re Kline*, 113 A.3d 202, 204, 213 (D.C. 2015) (District of Columbia Rule of Professional Conduct 3.8(e), which "prohibits a prosecutor in a criminal case from intentionally failing to disclose to the defense any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused," "requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny").

For an argument that *Brady* doctrine needs an overhaul to take account of evolving prosecutorial technology, *see* Andrew Guthrie Ferguson, *Big Data Prosecution & Brady*, 67 U.C.L.A. L. REV. 180 (2020).

§ 9.09(b) Other Bases for Constitutional Contentions of Rights to Discovery

The following subparagraphs sketch additional constitutional principles that defense counsel can invoke in developing arguments to support discovery requests for particular kinds of materials or information that are not encompassed – or are only dubiously encompassed – by the *Brady* doctrine.

§ 9.09(b)(1) The Sixth Amendment Right to Counsel

The Sixth Amendment right to counsel, incorporated into the Fourteenth Amendment by *Gideon v. Wainwright,* 372 U.S. 335 (1963); *see also, e.g.*, *Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002) – "'a bedrock principle in our justice system'" (*Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017), quoting *Martinez v. Ryan*, 566 U.S. 1, 12 (2012)) – guarantees more than that the respondent must have a lawyer. It assures "effective aid in the preparation and trial of the case," *Powell v. Alabama,* 287 U.S. 45, 71 (1932); *State v. Lindsey*, 271 N.C. App. 118, 132, 843 S.E.2d 322, 332 (2020), and it is violated whenever defense counsel's performance is inadequate to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984); *see id*. at 685-86; *Rompilla v. Beard*, 545 U.S. 374, 387-90 (2005); *Wiggins v. Smith*, 539 U.S. 510, 521-22, 524-28, 533, 534-35 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91, 395-97 (2000). The Amendment is not solely – or even primarily – an admonition to defense attorneys to do the best job they can under the circumstances. More basically, it invalidates any state-created procedure that compels counsel to operate under circumstances which preclude an effective defense effort. *Powell v. Alabama*, 287 U.S. at 71-73; *Holloway v. Arkansas*, 435 U.S. 475, 481-86 (1978); *Holt v. Virginia*, 381 U.S. 131 (1965); *Ferguson v. Georgia,* 365 U.S. 570 (1961); *Brooks v. Tennessee,* 406 U.S. 605 (1972); *Geders v. United States,* 425 U.S. 80 (1976); *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980) (dictum). "[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord

with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring v. New York,* 422 U.S. 853, 857 (1975). For example, the Sixth Amendment has repeatedly been held to condemn eve-of-trial appointments of counsel that leave the lawyer inadequate time to prepare for trial. *E.g., Jones v. Cunningham,* 313 F.2d 347 (4th Cir. 1963); *Martin v. Virginia,* 365 F.2d 549 (4th Cir. 1966); *Roberts v. United States,* 325 F.2d 290 (5th Cir. 1963); *Townsend v. Bomar,* 331 F.2d 19 (6th Cir. 1964); *People v. Stella*, 188 A.D.2d 318, 318-19, 590 N.Y.S.2d 478, 478-79 (N.Y. App. Div., 1st Dep't 1992). *See also*, *e.g.*, *Catalan v. Cockrell*, 315 F.3d 491, 492-93 (5th Cir. 2002); *Routhier v. Sheriff, Clark County*, 93 Nev. 149, 151-52, 560 P.2d 1371, 1372 (1977); *Blakeney v. State*, 236 So.3d 11, 24 (Miss. 2017) ("Because the prosecution's late disclosure of previously undisclosed witnesses left the defense without adequate time to prepare, we find that a continuance should have been granted"). Timely appointment of counsel was required by *Powell v. Alabama,* the fountainhead of all right-to-counsel cases, because during the pretrial period "consultation, thoroughgoing investigation and preparation were vitally important." 287 U.S. at 57. If adequate *time* to prepare is a constitutional mandate, adequate *information* to prepare is arguably no less necessary. For, as the Supreme Court has recognized, the pretrial gathering of this information is a vital part of the effective assistance of counsel that the Constitution commands. *See Coleman v. Alabama,* 399 U.S. 1, 9 (1970); *Adams v. Illinois,* 405 U.S. 278, 281-82 (1972); *see also Rompilla v. Beard*, 545 U.S. at 387 ("The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense."); *Wiggins v. Smith*, 539 U.S. at 522, 524-26, 531-32, 534; *Williams v. Taylor*, 529 U.S. at 396; *Strickland v. Washington,* 466 U.S. at 690-91.

§ 9.09(b)(2) The Right to Fair Notice of Charges

In *Cole v. Arkansas,* 333 U.S. 196, 201 (1948), the Supreme Court recognized the "principle of procedural due process . . . that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." In *In re Gault,* 387 U.S. 1, 33-34 (1967), the Court recognized that a juvenile charged with a delinquency offense has the same right to fair notice of the charges as an adult criminal defendant. "These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Jackson v. Virginia,* 443 U.S. 307, 314 (1979). *See Wright v. Beck*, 981 F.3d 719 (9th Cir. 2020), surveying the Supreme Court's caselaw and holding it violated when the police obtained and executed an *ex parte* order for the destruction of a gun collection seized from an individual who had been arrested for possession of an unregistered assault weapon.

"Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" *In re Gault,* 387 U.S. at 33. This principle may – though it probably needs not – be derived from the express right given an accused by the Sixth Amendment "to be informed of the nature and cause of the accusation." *See*

Faretta v. California, 422 U.S. 806, 818 (1975) (dictum); *Herring v. New York,* 422 U.S. 853, 856-57 (1975). Even in noncriminal matters the Supreme Court has found a due process right to adequate notice of the issues posed for adjudication in a proceeding affecting individual interests. *E.g., Morgan v. United States,* 304 U.S. 1 (1938); *Gonzales v. United States,* 348 U.S. 407 (1955); *Goldberg v. Kelly,* 397 U.S. 254, 267-68 (1970) (dictum); *cf. Wolff v. McDonnell,* 418 U.S. 539, 563-64 (1974); *Goss v. Lopez,* 419 U.S. 565, 578-82 (1975); *Vitek v. Jones,* 445 U.S. 480, 494-96 (1980); *but see Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1, 14 n.6 (1979). A passing *dictum* in *United States v. Agurs,* 427 U.S. 97, 112 n.20 (1976), says that "the notice component of due process refers to the charge rather than the evidentiary support for the charge"; but the line between these two will often be shadowy.

§ 9.09(b)(3) The Sixth Amendment Right to Confrontation

The extent to which the Sixth Amendment right to confrontation governs pretrial discovery is unclear in light of *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). The lead opinion in *Ritchie,* written by Justice Powell, is a majority opinion except on one point: its analysis of the Confrontation Clause. On that point, Justice Powell, with three other Justices concurring, concluded that "the right of confrontation is a *trial* right" and cannot be "transform[ed] . . . into a constitutionally-compelled rule of pretrial discovery." *Id.* at 52. However, three Justices – Justices Brennan and Marshall in dissent, and Justice Blackmun concurring solely in the plurality's result on this point – concluded that the Confrontation Clause does confer upon the defense a constitutional right to discovery of information that would facilitate effective cross-examination. *See id.* at 61-62 (Blackmun, J., concurring) ("In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness"); *id.* at 66 (Brennan, J., dissenting) ("the right of cross-examination . . . may be significantly infringed by . . . the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial"; the trial court's "denying access to the prior statements of the victim . . . deprived Ritchie of material crucial to any effort to impeach the victim at trial . . . [and was] a violation of the Confrontation Clause"). The remaining two Justices, Justices Stevens and Scalia, took no position on the Confrontation Clause issue, concluding that the writ of *certiorari* should have been dismissed because the lower court's judgment was not yet final. *See id.* at 78 (Stevens, J., dissenting).

The elements of a Confrontation Clause argument in support of discovery are set forth in Justice Brennan's dissent in *Ritchie. See* 480 U.S. at 66-72. Since the argument has not been rejected by a majority of the Court – and, indeed, was expressly supported by three members of the Court – counsel can continue to press it as a basis for discovery requests. *See, e.g.*, *United States v. Arias*, 936 F.3d 793 (8th Cir. 2019); *Burns v. State*, 968 A.2d 1012, 1024 (Del. 2009), *subsequent history in* 979 A.2d 1110 (Table), 2009 WL 2490253 (Del. 2009); *State v. Peseti*, 101 Hawai'i 172, 186, 65 P.3d 119, 133 (2003); *Commonwealth v. Barroso*, 122 S.W.3d 554, 559-60, 561 (Ky. 2003); *State v. Spurlock*, 874 S.W.2d 602 (Tenn. Ct. Crim. App. 1993) (reversing a conviction primarily because the prosecution's failure to disclose recordings of interviews of its

key witness by police officers and a prosecutor violated due process; "It is a fundamental principle of law that an accused has the right to cross-examine prosecution witnesses to impeach the credibility or establish the motive or prejudice of the witness. This includes the right to cross-examine a prosecution witness regarding any promises of leniency, promises to help the witness, or any other favorable treatment offered to the witness." *Id*. at 617. "The prosecution knew that [prosecution witness] Apple's testimony was crucial to its case; and, further, the prosecution knew that Apple's prior criminal record, use of illicit narcotics, sparse work record, and other factors made his credibility tenuous at best. It may be reasonably inferred from the evidence and the nature of the . . . recordings that the prosecution made every effort to suppress the recordings. The prosecution knew if the material contained on these tapes was conveyed to defense counsel, an extremely competent, experienced and skilled criminal defense lawyer, Apple's credibility would have been completely destroyed; and the trier of fact would not have believed Apple's testimony." *Id*. at 620.).

§ 9.09(b)(4) The Right To Present Defensive Evidence

The Sixth Amendment guarantees a criminal defendant or juvenile respondent the right "to have compulsory process for obtaining witnesses in his favor." In *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), a majority of the Court recognized that "[o]ur cases establish, at a minimum, that criminal defendants have the right to the Government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Id.* at 56. "[C]onclud[ing] . . . that compulsory process provides no *greater* protections in this area than those afforded by due process," the Court elected to analyze the claim solely as a *Brady* issue, *id.* at 56; see § 9.09(a) *supra,* without "decid[ing] . . . whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment."

Pending the Court's resolution of the parameters of the compulsory process right, counsel can argue that the Compulsory Process Clause of the Sixth Amendment, when coupled with the Due Process Clause, confers a right to present defensive evidence (*Webb v. Texas*, 409 U.S. 95 (1972) ("'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies [quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)]'"); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense [quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)]."'"); *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973); see § 33.04 *infra*, which, in turn, implies a corollary right to pretrial discovery of information in the sole possession of the prosecution that might lead to defensive evidence. *Cf. Melnik v. Dzurenda*, 14 F.4th 981, 985-86 (9th Cir. 2021) (in order to prepare for a disciplinary hearing, a prison inmate requested that officials give him envelopes in which they claimed drugs were being sent to him; they refused; the Ninth Circuit holds that this refusal

violated his right to due process: "The Supreme Court established in *Wolff v. McDonnell* [418 U.S. 539 (1974),] that there are procedural due process rights that a prisoner must be afforded in the context of a prison disciplinary proceeding prior to being deprived of a protected liberty interest. . . . The Court held that one of the constitutional rights afforded a prisoner in a disciplinary hearing is that the 'inmate facing disciplinary proceedings should be allowed to . . . present documentary evidence in his defense when permitting him to do so w[ould] not be unduly hazardous to institutional safety or correctional goals.' . . . ¶ Many courts have held that for the right articulated in *Wolff* to mean anything, a prisoner must also have the right to access evidence that he might use in preparing or presenting his defense."); *Roviaro v. United States,* 353 U.S. 53 (1957); *United States v. Augenblick,* 393 U.S. 348, 356 (1969) (dictum). *See generally* Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845 (1995). The Supreme Court of Hawai'i has drawn the appropriate conclusion: "'[C]entral to the protections of due process is the right to be accorded a meaningful opportunity to present a complete defense.' . . . Under this 'well-established principle,' 'all defendants must be provided with the basic tool[s] of an adequate defense.' . . . One such basic tool is access to known favorable evidence on which a defense may be based. . . . Therefore, the prosecution has a constitutional obligation to disclose evidence that is material to the guilt or punishment of the defendant. ¶ The duty to disclose evidence that is favorable to the accused includes evidence that may be used to impeach the government's witnesses by showing bias, self-interest, or other factors that might undermine the reliability of the witness's testimony." *Birano v. State*, 143 Hawai'i 163, 181-82, 426 P.3d 387, 405-06 (2018).

§ 9.09(b)(5) The Right Against Prosecutorial Fabrication of False Incriminating Evidence or Concealment of Evidence That Impeaches Prosecution Testimony

A line of decisions from *Mooney v. Holohan,* 294 U.S. 103 (1935), to *Miller v. Pate,* 386 U.S. 1 (1967), condemns the prosecution's presentation of "evidence that it knew (or should have known) was false." *See e.g.*, *Pyle v. Kansas*, 317 U.S. 213 (1942); *United States v. Butler*, 955 F.3d 1052, 1064 (D.C. Cir. 2020); *United States v. Ausby*, 916 F.3d 1089, 1092 (D.C. Cir. 2019); *Fogle v. Sokol*, 957 F.3d 148 (3d Cir. 2020); *Burgess v. Goldstein*, 997 F.3d 541, 553 (4th Cir. 2021) ("'We have recognized a due process right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity.'"); *accord*, *Truman v. Orem City*, 1 F.4th 1227 (10th Cir. 2021); *O'Connell v. Tuggle*, 2021 WL 5973048 (10th Cir. December 16, 2021) (applying the principle to sustain a section 1983 claim of clear due process violation in a case in which a social worker, taking notes during a police interview of the mother of a child whose death was suspicious, deliberately recorded falsely that the mother had confessed to abusing the child); *Frost v. New York City Police Department*, 980 F.3d 231, 244 (2d Cir. 2020) ("The Due Process Clause guarantees a criminal defendant's 'right to a fair trial.' . . . This right is violated '[w]hen a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors.'"); *Richards v. County of San Bernardino*, 2022 WL 2284649, at *5 (9th Cir. June 24, 2022) ("'[t]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government'"); *Ricks v. Pauch*, 2021 WL

4775145, at *4 (6th Cir. October 13, 2021) ("[t]he officers do not contest that it was clearly established in 1992 that fabricating evidence to create probable cause to detain a suspect would have violated the suspect's Fourth Amendment right to be free from unreasonable seizures"); *accord*, *Dennis v. City of Philadelphia*, 19 F.4th 279 (3d Cir. 2021); *Patrick v. City of Chicago*, 974 F.3d 824, 834-35 (7th Cir. 2020) ("We have recently clarified the contours of constitutional claims based on allegations of evidence fabrication. A claim for false arrest or pretrial detention based on fabricated evidence sounds in the Fourth Amendment right to be free from seizure without probable cause. . . . If fabricated evidence is later used at trial to obtain a conviction, the accused may have suffered a violation of his due-process right to a fair trial. . . . And 'misconduct of this type that results in a conviction might also violate the accused's right to due process under the rubric of *Brady* . . . and *Kyles* . . . if government officials suppressed evidence of the fabrication.'"); *Stinson v. City of Milwaukee*, 2013 WL 5447916, at *18 (E.D. Wis. 2013), *rulings on other issues aff'd in part and appeal dism'd in part*, 868 F.3d 516 (7th Cir. 2017) (en banc) ("'a police officer who manufactures false evidence against a criminal defendant violates the due process clause if the evidence is later used to deprive the defendant of her liberty in some way'"); *Morse v. Fusto*, 804 F.3d 538, 541, 547-48 (2d Cir. 2015) (upholding section 1983 relief for a defendant who was "deprived . . . of his constitutional right to a fair trial" as a result of a prosecutor's and state investigator's intentional presentation of "false or misleading evidence" to the grand jury in support of an indictment); *Jackson v. City of Cleveland*, summarized in § 18.9.1 *supra*; *and see generally Strickler v. Greene*, 527 U.S. 263, 281 & n.19 (1999) (dictum); *United States v. Agurs,* 427 U.S. 97, 103 (1976) (dictum); *cf. McDonough v. Smith*, 139 S. Ct. 2149, 2155 n.2 (2019); *Coggins v. Buonora*, 776 F.3d 108 (2d Cir. 2015). "'In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. . . .' . . . ¶ When, however, a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant. '[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'. . . This standard. . . applies whether the state solicited the false testimony or allowed it to go uncorrected; . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt." *Adams v. Commissioner of Correction*, 309 Conn. 359, 370-72, 71 A.3d 512, 519-20 (2013); *accord*, *Henning v. Commissioner of Corrections*, 334 Conn. 1, 24-25, 219 A.3d 334, 348-49 (2019).

Specifically, the Supreme Court has held that the Due Process Clause invalidates a state conviction obtained after a trial at which the prosecutor has knowingly elicited false testimony from a witness, even on a matter relating to the witness's credibility rather than directly to the defendant's guilt (*Alcorta v. Texas,* 355 U.S. 28 (1957)), or at which the prosecutor has knowingly permitted the witness to testify falsely on such a matter (*Napue v. Illinois,* 360 U.S. 264 (1959)). Under *Napue,* if the prosecution knows of any evidence inconsistent with the testimony of one of its material witnesses and "relevant to his credibility," the defense and "the

jury [are] . . . entitled to know of it" (*Giglio v. United States,* 405 U.S. 150, 155 (1972)). *See, e.g.*, *Haskell v. Superintendent Greene SCI*, 866 F.3d 139 (3d Cir. 2017); *Dow v. Virga*, 729 F.3d 1041, 1047-51 (9th Cir. 2013); *Guzman v. Secretary*, 663 F.3d 1336 (11th Cir. 2011); *Sivak v. Hardison*, 658 F.3d 898 (9th Cir. 2011); *Moore v. Illinois,* 408 U.S. 786, 797-98 (1972) (dictum). *And see In re Jackson*, 12 F.4th 604, 611 (6th Cir. 2021) (holding that a viable *Napue* claim was pleaded by allegations that law enforcement agents had intimidated a prosecution witness into testifying falsely that the defendant had confessed to several murders, and observing that "*Napue* claims . . . have a prejudice-like prong in that 'a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury.' . . . [and that t]his threshold can be met when the knowingly misleading testimony is offered by a 'key prosecution witness'"); *Phillips v. Ornoski*, 673 F.3d 1168, 1183-85 (9th Cir. 2012) ("*Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc) controls this case. . . . In *Hayes*, as here, the prosecutor had reached a deal with the attorney for a key state witness, James, providing for the dismissal of all felony charges against him . . . if he testified against Hayes at trial. *Id*. at 977. As in this case, the prosecution elicited a promise from James's attorney that James would not be informed of the deal, and at trial James testified that he had received no promise of benefits in exchange for his testimony. *Id*. at 977, 980. As we observed in *Hayes*, and as is equally applicable here, that a witness may have been unaware of the agreement entered into on his behalf may mean that his testimony denying the existence of such an agreement is not knowingly false or perjured, but it does not mean it is not false nevertheless. As we explained in *Hayes*: ¶ '[T]hat the witness was tricked into lying on the witness stand by the State does not, in any fashion, insulate the State from conforming its conduct to the requirements of due process. . . . The fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury. That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so.' ¶ . . . In *Hayes* we made clear in no uncertain terms that the practice of 'insulating' a witness from her own immunity agreement so that she can profess ignorance of the benefits provided in exchange for her testimony is an egregious violation of the prosecution's obligations under *Napue*."); *People v. Smith*, 498 Mich. 466, 870 N.W.2d 299 (2015) ("Four times . . . [prosecution witness] Yancy denied having been paid in connection with the defendant's case – specifically, that he had not been compensated for his testimony at the defendant's trial and also that he had not been otherwise compensated for 'cooperating' 'with regards to this case.' Clearly, the jury could have interpreted this statement to indicate that Yancy had *never* been paid for his involvement with the investigation of the homicide [in issue], not merely that the Genesee County Prosecuting Attorney's office had not compensated him for 'testimony' or cooperation with the defendant's formal prosecution. The latter point might have been true; the former point was plainly misleading and likely untrue, as the prosecutor well knew . . . . This former point, however, was never corrected or clarified at trial, nor was the true nature or extent of Yancy's participation or compensation as an informant put before the jury. Rather, the prosecutor exploited the potential confusion Yancy's testimony created by reminding the jury of Yancy's denials during closing argument, cementing the false notion that Yancy had only been paid for his cooperation in *other cases*, and attempting to advance his credibility as a result of that fact . . . ." *Id*. at 474, 870 N.W.2d at 303. Capitalizing on Yancy's testimony that he had no paid involvement in the defendant's case is inconsistent with a prosecutor's duty to correct false

testimony. Indeed, the prosecutor sought to transform testimony that might have been merely confusing on its own into an outright falsity. Irrespective of the veracity of Yancy's claim that he had not been paid to 'testify,' the prosecutor should not have capitalized on Yancy's testimony after Yancy had confusingly denied being paid for cooperating in 'this case.' . . . Her actions served to underscore the jury's false impression that because Yancy had not been paid to 'testify,' he had no questionable incentive for his participation in this case. Simply put, the prosecutor sought to benefit from the problematic testimony and use it to her advantage. This prosecutorial conduct does not comport with due process." *Id*. at 480-81, 870 N.W.2d at 306-07.). It is but a short step to hold that since the whole of every witness's testimony impliedly asserts its veracity, nondisclosure of any material known to the prosecution that is legally admissible to impeach the witness would also violate due process. *Cf. Giles v. Maryland,* 386 U.S. 66 (1967). The California Supreme Court, for example, has required disclosure of the felony record of a prosecution witness on this theory. *In re Ferguson,* 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971). *See also State v. Ireland*, 11 Or. App. 264, 500 P.2d 1231 (1972).

Some courts hold that a prosecutor who knows a prosecution witness has presented false testimony satisfies *Napue* by informing defense counsel of the perjury. Others hold that the prosecutor has an independent obligation to set the record straight and assure that the jury is made aware of the true facts as the prosecutor knows them. *See Gomez v. Commissioner of Correction*, 336 Conn. 168, 188, 243 A.3d 1163, 1175-76 (2020) (canvassing the federal caselaw on the issue and adopting the latter rule; "[I]t is the prosecutor who is best positioned to repair the damage that is done to 'the efficient and fair administration of justice'. . . ; when a state's witness provides false testimony. In the face of silence – or worse, complicity – on the part of the prosecution and continued dissembling by the state's witness, there is no reason to believe that defense counsel will have any greater success in persuading the jury that the witness has been promised benefits in exchange for his or her testimony than, for instance, that he or she is the true perpetrator. As the United States Court of Appeals for the Ninth Circuit explained in [*United States v.*] *LaPage*, [231 F.3d 488, 492 (9th Cir. 2000)] '[a]ll perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial. The jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism.'").

Perjury by a prosecution witness violates due process even when the prosecutor who examines the witness is unaware of its falsity; "rather, knowledge on the part of any representative or agent of the prosecution is enough" (*People v. Olinger*, 176 Ill. 2d 326, 347, 680 N.E.2d 321, 332, 223 Ill. Dec. 588, 599 (1997)). *See*, *e.g.*, *Giglio v. United States,* 405 U.S. 150, 154 (1972); *Ex parte Castellano*, 863 S.W.2d 476 (Tex. Crim. App. 1993); *People v. Ellis*, 315 Ill. App. 3d 1108, 735 N.E.2d 736, 249 Ill. Dec. 132 (2000); *People v. Kasim*, 56 Cal. App. 4th 1360, 1380, 66 Cal. Rptr. 2d 494, 506 (1997) ("[t]he scope of the prosecutorial duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession but such evidence possessed by investigative agencies to which the prosecutor has reasonable access"). It follows that, if the witness who testifies perjuriously is a police officer or other state agent, due

process is violated whether or not the prosecutor is aware that the testimony is untrue.

Some state court decisions hold that perjurious testimony by any prosecution witness violates due process even when the prosecutor is unaware of its falsity. *E.g*, *In re Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009).

§ 9.09(b)(6) The Right Against Prosecutorial Suppression of Evidence Favorable to the Defense

The *Brady* doctrine described in § 9.09(a) *supra* governs prosecutorial disclosure of evidence favorable to the defense. A closely related, but older and conceptually distinct doctrine prohibits the prosecutor from suppressing such evidence. This right was recognized as an alternative ground of decision in *Pyle v. Kansas,* 317 U.S. 213 (1942), and *Wylde v. Wyoming,* 362 U.S. 607 (1960). It is best expounded in *United States ex rel. Almeida v. Baldi,* 195 F.2d 815 (3d Cir. 1952). *See also Soo Park v. Thompson*, 851 F.3d 910 (9th Cir. 2017) ("'[I]t is well established that "substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process."'" *Id*. at 919. "[W]rongful conduct by prosecutors or law enforcement officers can . . . constitute 'substantial government interference' with a defense witness's choice to testify." *Id*. "Detective Thompson contacted Ayala after Park gave notice to the District Attorney of her intention to use Ayala as a defense witness at her criminal trial. During the course of the phone conversation, Thompson told Ayala that 'John [Gilmore] was really upset about the whole thing because he – he feels like they just made you lose faith in him, I guess.' . . . [I]t is plausible to infer that Thompson intended to intimidate Ayala, a domestic violence victim, by informing her that Gilmore, her abuser, was 'really upset' by her potential testimony." *Id*. at 920. "Moreover, Park contends that Thompson's actual motive in asserting Gilmore's innocence, Park's guilt, and the defense team's dishonesty was to dissuade Ayala from testifying. . . . During the phone call in question, Thompson declared, among other things, that Gilmore was certainly innocent and that Park was in fact the killer: 'And first, what I want to tell you is that John [Gilmore] is not the killer . . . . But the two people who showed up at your house two weeks ago . . . they are private investigators who were hired by the defense team that is representing the killer [Park] [in] this case." *Id*. at 920-21. "Park further alleges that Thompson made false representations of the evidence against Park, incorrectly stating, for example, that Park 'left her blood DNA on the door handle.' Detective Thompson also encouraged Ayala not to 'believe what they're [the defense team] saying,' because they were 'going to tell every lie they can to try and get [Park] off.' Thompson described the defense team as 'private investigators who are hired by [Park's] defense attorneys to try and shoot holes in – in our prosecution of their – of the bad guy' and stated that they 'bent the facts to try to, you know, make you think something else.' Taken together, the allegations regarding Thompson's misrepresentation of the evidence against Park, coupled with her statements about Park's guilt, Gilmore's innocence, and the defense investigators' duplicity (as well as her statement that Gilmore was 'really upset' with Ayala), can reasonably be interpreted as adequately pleading a deliberate intent on the part of Thompson to intimidate and otherwise attempt to persuade Ayala to refuse to testify on behalf of the defense." *Id*. at 921.); *Morse v.*

Fusto, 804 F.3d 538, 541, 543, 547-48 (2d Cir. 2015) (the prosecutor's and state investigator's alteration of documents – which were then presented to a grand jury in support of an indictment – to remove exonerating details supported a grant of section 1983 relief for violation of the "'right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigative capacity'").

This doctrine is at the heart of the caselaw described in § 8.13 *supra,* establishing a right to judicial relief when the prosecution suppresses evidence by instructing witnesses not to speak with defense counsel or a defense investigator. The doctrine would also seem to imply a right of defense access to any exculpatory or favorable materials that are within the exclusive control of the prosecutor, such as impounded physical objects. The Supreme Court has recognized that if a police officer or prosecutor, acting in "bad faith," destroys evidence "potentially useful" to the defense, its destruction violates the accused's due process rights. *See Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) (dictum); *Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004) (per curiam) (dictum). *Accord*, *Jimerson v. Payne*, 957 F.3d 916, 930-31 (8th Cir. 2020) (finding a *Youngblood* violation where a recording of a turncoat accomplice's confession was lost or destroyed before trial: "After law enforcement and the deputy prosecutor discussed the recording, the prosecutor advised that the recording was inadmissible. The testimony from . . . [law enforcement officers] was not that the prosecutor thought the evidence was inculpatory, but that it could not be used or 'wouldn't have evidentiary value.' Although the substance of the recording is not entirely clear, what the recording contained appears to be significant enough that law enforcement and the prosecution worked together to intentionally conceal its existence from the defense. That intent is demonstrated in several ways. One way is the prosecutor's decision to provide, at a minimum, misleading answers to defense counsel's discovery requests, but more accurately classified as untruthful answers. Another way is the prosecutor's decision not to preserve the recording after he found out about it and opined it was inadmissible. In addition, law enforcement assisted the prosecution's efforts to conceal the existence of the recording by putting together a statement for . . . [an informant] to sign that deliberately left out any mention that a recording took place. The existence of the recording was also omitted from the state police report, which failed to identify . . . [the] informant. Taken together, the uncontroverted evidence establishes bad faith."); *Blakeney v. State*, 236 So.3d 11, 27-28 (Miss. 2017) ("Blakeney argues that the ATF reports [regarding electronic evidence obtained from cell phones and discarded by the prosecution] were forensic evidence that did not support the State's theory that Blakeney had murdered V.V. in order to demonstrate that he was worthy of entry into the Aryan Brotherhood. Moreover, Blakeney contends that in a world that is full of digital photography on cell phones with the ability to share with others, the fact that the cell phone and computer records contained nothing incriminating demonstrates evidence in favor of Blakeney. We find that the prosecutor's failure to disclose the contents of the ATF reports was in error and in bad faith. Clearly, information on Blakeney's and Viner's cell phones and computer potentially could be useful. One of the most monumental defenses that Blakeney presented was an attempt to show that he had pursued membership into the Aryan Brotherhood only after he had been in jail for years and only for protection in prison. Thus, a recent picture of Blakeney without swastika tattoos could have emphasized the defense's point that Blakeney had not been involved with the Aryan

Brotherhood before he went to jail. And, as Blakeney argued, the lack of the presence of any incriminatory evidence would be in Blakeney's favor, especially in a case with minimal direct evidence against a capital murder suspect. Surely had any mention of anger or gang initiation been present on the ATF reports, the prosecution would have introduced it into evidence. In addition, the prosecutor's statement that he had engaged in a practice of disposing of exculpatory evidence demonstrates bad faith. Therefore, prosecutorial misconduct also requires reversal in this case."). State constitutional due process protections may be broader in this regard: As Justice Stevens' concurring opinion in *Fisher* notes (540 U.S. at 549 n.*), "[s]ince *Youngblood* was decided, a number of state courts have held as a matter of state constitutional law that the loss or destruction of evidence critical to the defense does violate due process, even in the absence of bad faith." *See State v. Tiedemann*, 2007 UT 49, 162 P.3d 1106, 1115-17 (Utah 2007) (rejecting *Arizona v. Youngblood*'s "bad faith" requirement on state constitutional grounds); *People v. Handy*, 20 N.Y.3d 663, 669, 988 N.E.2d 879, 882, 966 N.Y.S.2d 351, 354 (2013) (declining to reach the question of whether to reject *Youngblood* on state constitutional grounds and instead "resolv[ing] this case, following the approach taken by the Maryland Court of Appeals in *Cost v. State*, 417 Md. 360, 10 A.3d 184 (2010), by holding that, under the New York law of evidence, a permissive adverse-inference instruction should be given when a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and when that evidence has been destroyed by agents of the State"). As long as the evidence has not been destroyed but is still in the state's possession, the language and logic of the Supreme Court's federal Due Process decisions are clear that "the good or bad faith of the prosecution is irrelevant" and that the prosecution "must disclose material exculpatory evidence." *Illinois v. Fisher*, 540 U.S. at 547. *Accord*, *Arizona v. Youngblood*, 488 U.S. at 57.

§ 9.09(b)(7) The Right Against an Unfair Balance of Advantage Favoring the Prosecution

Wardius v. Oregon, 412 U.S. 470, 472 (1973), holds that "the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi[-disclosure] rules unless reciprocal discovery rights are given to criminal defendants." *See*, *e.g.*, *United States v. Bahamonde*, 445 F.3d 1225 (9th Cir. 2006) (A regulation of the Department of Homeland Security required the defendant "to state with specificity the testimony he expected from Agent Rodmel but the government was not required at any time to state what evidence it expected to offer in rebuttal, either from Rodmel or anyone else. Nor was there any other requirement in force to compel the government to reveal that information." *Id.* at 1229. "The regulation, as applied in this case, accordingly falls squarely within the rule of *Wardius*." *Id*. at 1230.); *Mauricio v. Duckworth*, 840 F.2d 454, 457-58 (7th Cir. 1988) (In this habeas proceeding "the district court found . . . that . . . [Indiana's facially constitutional] discovery procedures were not applied evenhandedly in Mauricio's case. Thus, although the relevant Indiana alibi statutes do not explicitly impose upon parties an affirmative obligation to disclose alibi and alibi rebuttal witnesses, the district court found that, in the circumstances presented by this case, the trial court's discovery order requiring the defense to list *all* its witnesses should have triggered a corresponding and reciprocal obligation on the part of the State to list *all* its potential witnesses – including likely rebuttal witnesses. In the opinion of Judge Sharp, the trial court's failure to require the State to divulge

the identical information it required from the defense altered the balance struck by the statutory discovery provisions and created instead the same type of nonreciprocal discovery scheme held unconstitutional by the Supreme Court in *Wardius*." The Seventh Circuit agrees with this analysis, disagrees with District Judge Sharp's finding that the *Wardius* violation was harmless, and orders habeas relief.); *Camp v. Neven*, 606 Fed. Appx. 322, 326 (9th Cir. 2015) ("We conclude that allowing the State to present unnoticed expert rebuttal testimony when Camp was required to disclose his own expert testimony on the same issues was a violation of the Supreme Court's precedent in *Wardius*, and that the state courts were unreasonable in denying Camp relief on this ground."); *State v. Wooten*, 260 So.3d 1060 (Fla. App. 2018) ("Due process . . . requires that discovery 'be a two-way street.' *Wardius* . . . at 475. . . .").

The *Wardius* opinion states more broadly that "the Due Process Clause . . . does speak to the balance of forces between the accused and his accuser" (*id.* at 472). *See also United States v. Ash,* 413 U.S. 300, 309 (1973), noting the Sixth Amendment's concern against "the imbalance in the adversary system that otherwise [that is, without defense counsel] resulted with the creation of a professional prosecuting official." These formulations suggest that Justice Cardozo's famous phrase about keeping "the balance true" (*Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934)) may be more than just a jurisprudential attitude: It may be a constitutionally enforceable right of the defense. Their implication is that if significant procedural tools or benefits are made available to the prosecution by state law or practice, defendants must be given the same or similar tools or benefits. *See State v. Reimonenq*, 2019-0367 (La. 10/22/19), 286 So.3d 412 (La. 2019) (After a trial judge issued a ruling *in limine* excluding the testimony of a proposed prosecution witness, the prosecutor entered a *nol pros* and then reindicted the defendant. The defendant filed a motion to quash, noting that "the state's decision to dismiss and reinstitute criminal charges is a power that defendant does not have. He urged that . . . [the Louisiana Supreme] Court's precedent bars the state from flaunting its power by essentially granting itself a continuance in a way that substantially prejudices defendant's right to a fair trial" (*id.* at 414). The Louisiana Supreme Court holds that the motion to quash must be granted: "Inherent in justice and the concept of fundamental fairness is ensuring a 'balance of forces between the accused and his accuser,' *Wardius v. Oregon*, 412 U.S. 470, 474 . . . . In its brief, the state openly acknowledges it could have sought writs from the appellate court and simply declined to do so. The state also suggests that dismissing and reinstituting these charges was simply 'to put its case together.' We find that in this case, the state's exercise of its statutory right . . . to dismiss and reinstitute charges against defendant upset this 'balance of forces' to such a degree that it violates defendant's right to due process and fundamental fairness." *Id*. at 417.).

Although the balance-of-forces principle is still embryonic, two implications of *Wardius* deserve note.

First, any criminal procedures that provide "nonreciprocal benefits to the State" in regard to the investigation, preservation, and presentation of its evidentiary case should be constitutionally assailable "when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" (*Wardius,* 412 U.S. at 474 n.6). For example, if procedures are available by

which the prosecution can detain witnesses or collect and secure other evidence favorable to its case, then either the prosecution should be obliged equally to collect, secure, and make available witnesses and evidence favorable to the defense, or at least the defense should be given equal use of the procedures. If court orders or compulsory process can be issued to assist the prosecution in conducting lineups, fingerprint or handwriting or voice comparisons, or other scientific tests, the results of those investigations must be disclosed to the defense; and judicial process must be made available for the conduct of similar investigations at the instance of the defense, at least to search out "evidence that might be expected to play a significant role in the . . . defense" (*California v. Trombetta,* 467 U.S. 479, 488 (1984)). *See Evans v. Superior Court,* 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974) (giving defendants a state constitutional due process right to a pretrial order requiring the prosecution to conduct a lineup); *People v. Mena,* 54 Cal. 4th 146, 277 P.3d 160, 141 Cal. Rptr. 3d 469 (2012) (adhering to *Evans* despite post-*Evans* legislation that might have been read as limiting defense discovery to statutorily enumerated procedures that do not include lineups); *United States v. Ash,* 461 F.2d 92, 104 (D.C. Cir. 1972) (en banc) (dictum), *rev'd on an unrelated point,* 413 U.S. 300 (1973) ("It was the combined interests of fairness and effective police administration that led this court to approve judicial orders, on application of the prosecutor, that reinforced the long-standing police recognition of the need for corporeal lineups for persons taken into custody on photographic identification, by requiring the attendance at a police-conducted lineup of persons released on recognizance or bail. Orders may likewise be issued at the request of defense counsel, as has been done by various district judges in pretrial procedures."); *cf. People ex rel. Gallagher v. District Court,* 656 P.2d 1287 (Colo. 1983) (the defendant was denied due process when police refused to perform forensic testing requested by defense counsel before testing was rendered impossible by the preparation of the homicide victim's body for burial); *Snyder v. State*, 930 P.2d 1274, 1277 (Alaska 1996) ("the Due Process Clause of the Alaska Constitution entitles a DWI arrestee to an independent chemical test even if that person refuses to take the statutorily prescribed breath test"); *and compare* the cases holding that the unnecessary destruction of material evidence in the course of forensic testing by the prosecution, so as to preclude independent testing by defense experts, constitutes a violation of due process (*State v. Vannoy*, 177 Ariz. 206, 209-12, 866 P.2d 874, 878-80 (Ariz. App. 1993); *People v. Gomez,* 198 Colo. 105, 596 P.2d 1192 (1979); *People v. Garries,* 645 P.2d 1306 (Colo. 1982); *State v. Blackwell*, 245 Ga. App. 135, 137-42, 537 S.E.2d 457, 460-63 (2000); *People v. Taylor*, 54 Ill. App. 3d 454, 369 N.E.2d 573, 12 Ill. Dec. 76 (1977); *People v. Dodsworth,* 60 Ill. App. 3d 207, 376 N.E.2d 449, 17 Ill. Dec. 450 (1978); *State v. Morales*, 232 Conn. 707, 726-27, 657 A.2d 585, 594-95 (1995) ("Like our sister states, we conclude that the good or bad faith of the police in failing to preserve potentially useful evidence cannot be dispositive of whether a criminal defendant has been deprived of due process of law. Accordingly, we, too, reject the litmus test of bad faith on the part of the police, which the United States Supreme Court adopted under the federal constitution in *Youngblood* [*infra*]. Rather, in determining whether a defendant has been afforded due process of law under the state constitution, the trial court must employ the *Asherman* balancing test [referring to *State v. Asherman*, 193 Conn. 695, 724-26, 478 A.2d 227, 245-47 (1984)], weighing the reasons for the unavailability of the evidence against the degree of prejudice to the accused. More specifically, the trial court must balance the totality of the

circumstances surrounding the missing evidence, including the following factors: 'the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence.'"); *State v. Matafeo*, 71 Hawai'i 183, 187, 787 P.2d 671, 673 (1990) (dictum) ("This court has held that '"the duty of disclosure is operative as a duty of preservation," [and] that principle must be applied on a case-by-case basis,' . . . ¶ In certain circumstances, regardless of good or bad faith, the State may lose or destroy material evidence which is 'so critical to the defense as to make a criminal trial fundamentally unfair' without it.")) *with California v. Trombetta*, *supra* (limiting the federal constitutional version of this doctrine to "evidence that both possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means" (*id.* at 489)), *and Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988), limiting the doctrine to destruction in "bad faith"). For a summary of the *Trombetta/Youngblood* rules in more defense-friendly terms, *see United States v. Johnson*, 996 F.3d 200, 206 (4th Cir. 2021) (in a case in which the prosecution failed to disclose that it had possession of potentially exculpatory evidence and then permitted that evidence to be lost, the court of appeals holds that the district court is required to make a more complete evidentiary record before adjudicating the defendants' motion to dismiss the prosecution: "A criminal defendant may prove a due process violation based on the prosecution's failure to preserve evidence if the evidence 'possess[es] an exculpatory value that was apparent before the evidence was destroyed' and if it is 'of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' *See Trombetta* . . . . A showing of bad faith is required, however, when the lost evidence can only be said to be 'potentially useful' to the defendant because the contents of the evidence are unknown. *See Arizona v. Youngblood* . . . . ¶ Even absent a due process violation, a criminal defendant may be entitled to an adverse inference instruction pursuant to the spoliation of evidence rule. Under that evidentiary rule, 'an adverse inference may be drawn against a party who [loses or] destroys relevant evidence.' . . . In order to draw the inference, there must be 'a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.'"). *See also State v. Richardson*, 452 N.J. Super. 124, 138-39, 171 A.3d 1270, 1279 (2017), collecting "persuasive decisions of other jurisdictions . . . . [that] have found an adverse inference charge was warranted by the State's destruction of potentially useful evidence, even where bad faith was not shown").

Second, *Wardius* raises the question to what extent "the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Wardius v. Orgeon*, 412 U.S. at 475 n.9. In a case in which counsel can compile a strong record of his or her unsuccessful attempts to obtain important defensive information from the prosecution and his or her equally unsuccessful efforts to acquire the information through independent sources, it may be possible to persuade a court that the traditional plight of the impecunious respondent – going into trial blind in the face of a well-prepared adversary – itself requires the allowance of corrective discovery measures under *Wardius.*

§ 9.09(b)(8) The Obligation of the Equal Protection Clause That a State Not Permit an Indigent Respondent To Be Deprived of "The Basic Tools of an Adequate Defense" by Reason of Poverty

The equal protection doctrine guaranteeing an indigent respondent "the basic tools of an adequate defense," *Britt v. North Carolina,* 404 U.S. 226, 227 (1971) (dictum), is discussed in § 4.31(d) *supra* and § 11.03(a) *infra.* One method of compensating for the investigative disadvantage suffered by impoverished respondents, compared to respondents who have money, is to give the defense full discovery of the products of the prosecution's investigation.

§ 9.10 RESPONSES TO PROSECUTORIAL ASSERTIONS THAT THE INFORMATION THAT THE DEFENSE IS SEEKING IS PRIVILEGED

§ 9.10(a) The "Informer's Privilege"

The courts have recognized an "informer's privilege" that empowers the prosecution to conceal the name of a confidential source of information, upon a claim of the privilege by the prosecutor and a representation that disclosure would endanger the prosecution's interests.

In *Roviaro v. United States,* 353 U.S. 53 (1957), the Supreme Court discussed the applicability of the privilege to block a criminal defendant's request for the name of an informer who appeared, from the trial testimony, to have been a central figure in the narcotics transactions with which the defendant was charged. The Court there required disclosure of the name, concluding "that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* at 62. *See also United States v. Valenzuela-Bernal,* 458 U.S. 858, 870-71 (1982) (dictum); *State v. Jackson*, 239 Conn. 629, 631-37, 687 A.2d 485, 486-89 (1997); *Commonwealth v. Madigan*, 449 Mass. 702, 705-11, 871 N.E.2d 478, 481-86 (2007); *State v. Florez*, 134 N.J. 570, 578-83, 636 A.2d 1040, 1044-46 (1994).

The Court cut back somewhat on the *Roviaro* doctrine in *McCray v. Illinois,* 386 U.S. 300 (1967), upholding a trial court's refusal to order disclosure of the name of an informer at a hearing on a motion to suppress tangible evidence, even though the informer's information was being relied upon to support a warrantless arrest and incidental seizure. However, the diffuseness of the *McCray* decision makes it difficult to ascertain exactly how much of *Roviaro* it retracts. Certainly, "*McCray* does not establish an absolute rule against disclosure," even at a suppression hearing. *State v. Casal,* 103 Wash. 2d 812, 817, 699 P.2d 1234, 1237 (1985). *"McCray . . .* concluded only that the Due Process Clause of the Fourteenth Amendment did not require the State to expose an informant's identity routinely, upon a defendant's mere demand, when there was ample evidence in the probable-cause hearing to show that the informant was reliable and his

information credible." *Franks v. Delaware,* 438 U.S. 154, 170 (1978). Moreover, *McCray*'s limitations upon *Roviaro* arguably apply only to informers whose information bears exclusively upon a pretrial search-and-seizure issue and do not affect the *Roviaro* rules governing informers who have information pertinent to the central trial issue of guilt or innocence. So, for the present, defense counsel would be warranted in continuing to press for the disclosure of informers' names, both before and at trial, as defensive needs dictate. *See*, *e.g.*, *Sheriff of Washoe County v. Vasile*, 96 Nev. 5, 7-8, 604 P.2d 809, 810-11 (1980) ("During cross examination of Officer Douglas at the preliminary examination, defense counsel asked for the name of the person who introduced Officer Douglas to Vasile and who was seated in the car during the purported marijuana sale. The prosecutor's objection, based on the confidential informant privilege, . . . was sustained. ¶ . . . The informant . . . was apparently the only independent witness who could hear and see the transaction in question. He was a material witness whose identity should have been disclosed. The magistrate's refusal to require disclosure or dismiss the charges was error."); *State v. Walston*, 401 Mont. 15, 469 P.3d 716 (2020) (reversing an order of a trial court that denied the defendant's pretrial motion for disclosure of the identity of a confidential informer who was the key witness to a drug transaction with which the defendant was charged or, in the alternative, for dismissal of the charges against the defendant); *State v. Jones*, 169 N.E.3d 397 (Ind. 2021) (remanding a criminal case on interlocutory appeal to the trial court for a determination whether the defendant is entitled to a court order for a pretrial face-to-face interview with a government informer, the Indiana Supreme Court holds that a defense request for such an order triggers the informer's privilege and requires a *Roviaro*-like case-specific weighing of considerations for and against an exception to the privilege); *Beville v. State*, 71 N.E.3d 13, 17 (Ind. 2017) (the trial court erred in upholding a prosecutor's invocation of the informer's privilege to bar the defendant from joining defense counsel in viewing "a video recording of a controlled drug buy between . . . [the defendant] and a confidential informant"; even if the state had satisfied its threshold burden of "establish[ing] that the informer's privilege applies in the first instance" (which the State failed to do "because it is unclear whether the video would actually reveal the informant's identity"), the state supreme court "find[s] that Beville carried his burden of proving an exception to the privilege because his review of the video was relevant and helpful to his defense"); *State v. Chapman*, 209 Mont. 57, 679 P.2d 1210 (1984). Of course, the attempt should be made to assimilate the case as much to *Roviaro,* and to segregate it as much from *McCray,* as possible. If an informer's identity is needed both to challenge a search and seizure, for example, and to defend on the guilt issue, a pretrial discovery motion should rest on the latter need.

The informer's privilege is a creature of state law, subject to federal constitutional constraint. This means that the States are free to restrict the privilege to a compass narrower than that recognized in federal practice under *Roviaro* (*see*, *e.g.*, *State v. Delaney*, 58 Hawai'i 19, 24, 563 P.2d 990, 993-94 (1977) ("[W]e have followed the U.S. Supreme Court's decision in *McCray* . . . and held that neither the federal nor state constitutions dictate disclosure of an informer's identity where the sole purpose is to challenge the finding of probable cause. . . . [But a] trial court may, in its discretion, require disclosure if it believes that the officer's testimony is inaccurate or untruthful."); *Little v. Commonwealth*, 553 S.W.3d 220, 224-25 (Ky. 2018)

(dictum) (applying a state rule of evidence which exempts from the informer's privilege the names of informers who appear as a prosecution witness at trial, the Kentucky Supreme Court declares it "unacceptable," "unconscionable" and "an abuse of the trial court's discretion" to deal with a defendant's motion for disclosure of such an informer's name 30 days before trial by ordering the disclosure only 48 hours before trial)) although they are not free to expand the privilege so as to shield informers under circumstances which would deny the defendant the fair opportunity to contest the prosecution's case which is a fundamental component of due process (*see*, *e.g.*, *State v. Bullen*, 63 Hawai'i 27, 32, 620 P.2d 728, 731 (1980) (reversing a conviction because the police arranged to have charges against an informer *nol prossed* so that he could leave the State: the Hawai'i Supreme Court finds that, because the informer was an active participant in the drug transaction for which the defendant was charged, the case was one in which "the government's privilege to withhold from disclosure the identity of persons reporting law violations to the police must give way to the due process requirements of a fair trial. . . . ¶ Merely identifying the informer, however, would not suffice. Knowledge of the informant's name would be useless to the defendant unless he was also made aware of the location of the prospective witness. Where the government chooses to employ an informer in its sponsored enterprise, it must be prepared to supply the defendant with information as to his whereabouts. This would require the government, at the very least, to acquire information which might later be useful in locating the informant, while he is still under police discipline and control.")). Legislation, state or federal, may require more liberal disclosure of materials that reveal an informer's identity than *Roviaro* and *McCray* envision. *See*, *e.g., United States v. Perez*, 353 F. Supp. 3d 131 (D. Mass. 2018).

Even when the informer's privilege does bar disclosure of an informant's identity, it does not protect "the contents of a communication [when these] will not tend to reveal the identity of an informer"; nor does it protect the informer at all "once . . . [his or her] identity . . . has been [otherwise] disclosed to those who would have cause to resent the communication." *Roviaro v. United States,* 353 U.S. at 60 (dictum). *See*, *e.g.*, *State v. Dexter*, 941 N.W.2d 388 (Minn. 2020). Its purpose is to prevent the improvident unmasking of government undercover agents. *Cf. Weatherford v. Bursey,* 429 U.S. 545, 557-60 (1977). Nothing in the privilege, therefore, precludes inquiry into such matters as a confidential informant's batting average (see § 23.32(b) *infra*), or the terms of the informant's compensation by the government, or the informant's own guilt of criminal offenses, or the promises of immunity made to the informant to induce him or her to inform. Nor, once an informant is known, does the privilege authorize the prosecution to shield that informant from being interviewed by the defense. When counsel ascertains an informant's identity and finds that the informant is evading attempts to be contacted and interviewed or when it otherwise appears that s/he may vanish before trial, counsel should not hesitate to seek his or her arrest as a material witness. See § 10.02 *infra.* Police spies, "special agents," and undercover informers often are criminals cooperating with the government in return for nonprosecution; they are exceedingly unstable and likely to disappear without a trace; and the prosecution cannot be relied upon to know of their whereabouts. If defense counsel wants to be assured that they will be around at the time of trial, counsel may have no option but to use material-witness procedures to have them jailed. Less aggressive procedures are available (see

§ 10.08(c) *infra*) but are not sure-fire.

§ 9.10(b) Work Product

In federal cases, the "work product" doctrine of *Hickman v. Taylor,* 329 U.S. 495 (1947), and *Upjohn Co. v. United States,* 449 U.S. 383, 397-402 (1981), applies to criminal discovery, *see United States v. Nobles,* 422 U.S. 225, 236 (1975) (dictum), protecting "the mental processes of the attorney," 422 U.S. at 238, whether that attorney be the prosecutor or defense counsel, *see id.* at 238 & n.12; *cf. United States v. Valenzuela-Bernal,* 458 U.S. 858, 862 n.3 (1982). *But see Goldberg v. United States,* 425 U.S. 94, 101-08 (1976) ("work product" protection does not bar production at trial of prior statements of government witnesses that are "otherwise producible under the Jencks Act [see § 27.12(a)(1)]" (*id.* at 108)).

Whether such a limitation of defense discovery is recognized in state criminal cases is, of course, in the first instance a matter of local law. Counsel should consult the relevant state statutes, rules and precedents governing the scope of the privilege (*see*, *e.g.*, *State ex rel. Becker v. Wood*, 611 S.W.3d 510 (Mo. 2020) (en banc)) and its waiver (*see*, *e.g.*, *People v. Superior Court of San Diego County,* 12 Cal. 5th 348, 499 P.3d 999, 287 Cal. Rptr. 3d 312 (2021)). But local law cannot extend "work product" protection to any materials that are constitutionally required to be disclosed to the defense. *Fontenot v. Crow*, 4 F.4th 982 (10th Cir. 2021); *see Davis v. Alaska,* 415 U.S. 308 (1974); *cf. Chambers v Mississippi,* 410 U.S. 284 (1973). Thus, for example, a "work product" privilege could not override the prosecutor's due process obligation to disclose exculpatory materials and such impeaching information as the existence of promises made by the prosecutor to prosecution witnesses. See § 9.09(a) *supra.*

§ 9.10(c) Other Claims of Governmental Privilege

It is not uncommon for prosecutors to stonewall defense discovery requests by broad claims of some unspecified privilege to protect "governmental secrets" or "government operations" or the "confidential relations" of government employees. If any privilege of this sort is recognized beyond the scope of the informer's privilege (§ 9.10(a) *supra*) and the attorney's work product doctrine (§ 9.10(b) *supra*), it is extremely narrow, *compare Federal Bureau of Investigation v. Fazaga*, 142 S. Ct. 1051 (2022), *with United States v. Nixon,* 418 U.S. 683 (1974); *Kerr v. United States District Court,* 426 U.S. 394 (1976); *Schneider v. City of Jackson*, 226 S.W.3d 332, 344 (Tenn. 2007) ("the law enforcement privilege has not previously been adopted as a common law privilege in Tennessee and should not be adopted herein"), and is arguably altogether inapplicable in criminal and delinquency prosecutions because "it is unconscionable to allow [a government] . . . to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *United States v. Reynolds,* 345 U.S. 1, 12 (1953) (dictum). State statutes creating governmental-operations privileges are narrowly construed in order to maintain consistency with the "'fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.'" *City of Santa Cruz v. Municipal*

Court, 49 Cal. 3d 74, 84, 776 P.2d 222, 228, 260 Cal.Rptr. 520, 526 (1989), quoting *Pitchess v. Superior Court*, 11 Cal. 3d 531, 535, 522 P.2d 305, 308, 113 Cal.Rptr. 897, 900 (1974).

Part D. Discovery by the Prosecution Against the Defense

§ 9.11 THE PROSECUTION'S RIGHT TO DISCOVERY

Most States have enacted statutes requiring that respondents who intend to employ a defense of alibi or insanity must file a pretrial notice of their intention and inform the prosecution of certain particulars relating to the proposed defense, including the names of witnesses who will be called to prove it. In addition, in many States, statutes confer upon the prosecution a right to obtain discovery from the defense of certain other categories of information such as the names and sometimes statements of intended defense witnesses, reports of defense experts, and tangible evidence. The latter statutes are generally of one or the other of two types: those that give the prosecution affirmative independent discovery rights; and those that give the prosecution reciprocal discovery rights, allowing the prosecutor to obtain certain types of information from the defense if and after the defense has first sought similar information from the prosecution.

Even when discovery by the prosecutor is legislatively authorized, it is "limited . . . by . . . constitutional privileges." *Standefer v. United States,* 447 U.S. 10, 22 (1980) (dictum). The limitations imposed by the Fifth Amendment privilege against self-incrimination are discussed in § 9.12 *infra,* and those established by the Sixth Amendment right to counsel in § 9.13 *infra.*

If counsel is practicing in a jurisdiction that has no statute authorizing prosecutorial discovery, counsel should oppose all discovery motions by the prosecution on the ground that such a radical change from traditional procedures is a matter for the Legislature and should not be ordered by a court without express legislative authority. It is one thing for the judiciary to institute discovery procedures in favor of the defense, inasmuch as these procedures tend to promote constitutional values that are particularly committed to the care of courts. See § 9.09 *supra; and see Jencks v. United States,* 353 U.S. 657 (1957). It is quite another thing to institute unprecedented procedures in favor of the prosecution – procedures that often raise close constitutional questions and that prosecutors (unlike juvenile respondents) surely have the power to obtain from the Legislature if the Legislature deems those procedures advisable. *Cf. People v. Kilgore*, 2020 CO 6, 455 P.3d 746, 751 (Colo. 2020) ("the [trial] court erred in ordering the parties to exchange exhibits thirty days prior to trial": the "court was devoid of authority to require Kilgore to disclose his exhibits to the prosecution before trial because nothing in [Colo.] Rule [Crim. Pro.] 16(II) [which "requires Kilgore to make certain pretrial disclosures to the prosecution . . . [but] does not mention trial exhibits"] permitted the court to do so. . . . ¶ The disclosure order is concerning for an additional reason – it arguably infringes on Kilgore's constitutional rights. The district court, at a minimum, potentially infringed on Kilgore's right to due process because his compliance with the disclosure order may help the prosecution meet its burden of proof."); *United States v. LaSalle National Bank,* 437 U.S. 298, 312-13 (1978) (dictum).

§ 9.12 FIFTH AMENDMENT LIMITATIONS UPON PROSECUTORIAL DISCOVERY

When the Court in *Williams v. Florida,* 399 U.S. 78 (1970), sustained the constitutionality of an alibi-notice statute, the Court's Fifth Amendment analysis started from the premise that the defendant intended to present the alibi information at trial. There could be no viable claim of compelled self-incrimination, the Court said, because the choice to adduce or withhold this information was left entirely to the defendant; all the statutory requirement of an alibi notice did was to advance the *time* of disclosure of material that the defendant had freely elected to spread upon the record at trial in any event. *Id.* at 83-86. The corollary of this reasoning is that court-ordered disclosure to the prosecution of any potentially incriminating matter that the defense does *not* intend to produce at trial violates the Fifth Amendment. *See Prudhomme v. Superior Court,* 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970). Indeed, the Supreme Court has impliedly so held several times since *Williams. Brooks v. Tennessee,* 406 U.S. 605 (1972); *New Jersey v. Portash,* 440 U.S. 450 (1979); *United States v. Doe,* 465 U.S. 605 (1984); *compare Estelle v. Smith,* 451 U.S. 454 (1981), *with Buchanan v. Kentucky,* 483 U.S. 402, 422-24 (1987), *and Kansas v. Cheever*, 571 U.S. 87, 93-95 (2014).

No pretrial discovery sought by the prosecution may therefore be ordered that would require the respondent, personally or through counsel, to make any oral or written statement whose contents "would furnish a link in the chain of evidence needed to prosecute the [respondent] . . . for a crime," *Hoffman v. United States,* 341 U.S. 479, 486 (1951); *see Blau v. United States,* 340 U.S. 159, 161 (1950); *Maness v. Meyers,* 419 U.S. 449, 461 (1975), or that would provide "'an investigatory lead,' [or produce] . . . evidence . . . by focusing investigation on [the respondent] . . . as a result of his compelled disclosures," *Kastigar v. United States,* 406 U.S. 441, 460 (1972); *see also United States v. Hubbell*, 530 U.S. 27, 40-46 (2000), unless the information which is ordered to be disclosed is either information that the respondent intends to adduce at trial or information that the prosecutor could properly bring out on cross-examination of the respondent in the light of what the respondent does intend to adduce at trial – that is, material "reasonably related to those [subjects that will be] brought out in direct examination" of the respondent, *United States v. Nobles,* 422 U.S. 225, 240 (1975), or material constituting proper rebuttal of other defense evidence, *see Buchanan v. Kentucky,* 483 U.S. at 422-24; *Kansas v. Cheever*, 571 U.S. at 93-95, 97. *See also*, *e.g.*, *United States v. Morton*, 993 F.3d 198, 203 (3d Cir. 2021) ("The Fifth Amendment's protections include more than just 'evidence which may lead to criminal conviction,' extending to 'information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.' . . . As a result, the key inquiry is whether the witness 'reasonably believes' her testimony 'could be used in a criminal prosecution or could lead to other evidence that might be so used.' . . . ¶ Mindful of that focus, where a witness, like Morton here, makes a 'prima facie' invocation of the privilege, . . . it must be '*perfectly clear*, from careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency to incriminate . . .'" or she cannot be compelled to make disclosures (emphasis in original).).

Ordering the respondent to disclose tangible evidence, on the other hand, would not violate the Fifth Amendment Privilege because, under currently prevailing doctrine, the Privilege forbids only "testimonial self-incrimination" (*Fisher v. United States,* 425 U.S. 391, 399 (1976)) and accordingly does not extend to the production of physical objects. *See Schmerber v. California,* 384 U.S. 757 (1966) (extracting blood from a drunk-driving suspect for chemical analysis does not violate the Fifth Amendment); *United States v. Mara,* 410 U.S. 19 (1973) (requiring a suspect to produce handwriting exemplars does not violate the Fifth Amendment); *United States v. Dionisio,* 410 U.S. 1 (1973) (requiring a suspect to speak for voice identification does not violate the Fifth Amendment). The Supreme Court has also applied this doctrine to permit compelled production of preexisting writings, *Fisher v. United States*, 425 U.S. at 414, including an incriminated person's own business records, *United States v. Doe*, 465 U.S. 605 (1984). *See also State v. Diamond*, 905 N.W.2d 870 (Minn. 2018) (rejecting a Fifth Amendment challenge to a trial court's order requiring a defendant to provide a fingerprint to unlock his cellphone, which had been seized pursuant to a warrant authorizing its seizure and the examination of its contents). The *Mara-Doe* line of cases severely limits but does not completely overrule *Boyd v. United States,* 116 U.S. 616 (1886), insofar as *Boyd* construed the Fourth and Fifth Amendments as forbidding courts to compel the production of a person's papers. *Boyd* is not now good law as to "business records," *United States v. Doe,* 465 U.S. at 606; *see also Fisher v. United States*, 425 U.S. at 414; *Andresen v. Maryland*, 427 U.S. 463 (1976), but it may survive as a protection of nonbusiness papers (*see Fisher v. United States,* 425 U.S. at 414 (distinguishing *Boyd*); *United States v. Miller,* 425 U.S. 435, 440 (1976) (same)), or at least of intimate private papers. In cases like *Diamond*, *supra*, in which clients are ordered to take physical actions that give authorities access to electronically locked cell phones, counsel should document and emphasize that "[c]ell phones . . . place vast quantities of personal information literally in the hands of individuals" (*Riley v. California*, 573 U.S. 373, 396-97 (2014), summarized with additional helpful quotations in § 23.08(b) *infra*) – a point ignored in the Minnesota Supreme Court's mechanistic opinion. *See People v. Spicer*, 2019 IL App. 3d 170814, 125 N.E.3d 1286, 430 Ill. Dec. 268 (2019), summarized in § 23.08(b) *infra*. And there is reason to believe that the *Fisher/Miller/Doe* line of cases may be reconsidered in the near future. *See United States v. Hubbell*, 530 U.S. at 49-56 (Justice Thomas, dissenting, suggesting that the time may be ripe for reinvigoration of *Boyd*); *cf. Riley v. California*, 573 U.S. 373, 386 (2014), discussed in § 23.08(b) *infra* (holding that the Fourth Amendment forbids warrantless searches of cell phones incident to arrest, in large part because "a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form – unless the phone is."); *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (citing *Boyd* for the proposition that the Fourth "Amendment seeks to secure 'the privacies of life' against 'arbitrary power'" (*id*. at 2214); noting that "the Court has drawn a line between what a person keeps to himself and what he shares with others" (*id*. at 2216); explaining that in *United States v. Miller*, "Miller had 'take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government'" (*Carpenter*, 138 S. Ct. at 2216); insisting that "this Court has never held that the Government may subpoena third parties for records in which the suspect has a

reasonable expectation of privacy" (*id*. at 2221); and rejecting the notion that "private letters, digital contents of a cell phone – any personal information reduced to document form, in fact – may be collected by subpoena" unconstrained by the Fourth Amendment's requirement of a search warrant (*id*. at 2222); *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) ("Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. . . . Ever mindful of the Fourth Amendment and its history, the Court has viewed with disfavor practices that permit 'police officers unbridled discretion to rummage at will among a person's private effects.'"). Given the uncertain state of the law, defense counsel is warranted in interposing Fourth and Fifth Amendment objections to any prosecutorial discovery request seeking nonbusiness documents whose contents incriminate a respondent.

The Fifth Amendment unquestionably forbids prosecutorial discovery of any document – business or nonbusiness, and whether written by the respondent or by anyone else – when the *act of producing that document,* as distinguished from the contents of the document, would be incriminating. This is the case whenever (a) the act of production would constitute an admission of the existence or possession of the document, in a context in which such an admission would be probative of the respondent's guilt, *United States v. Hubbell*, 530 U.S. at 36 & n.19; *United States v. Doe*, 465 U.S. at 612-14; *Fisher v. United States*, 425 U.S. at 410-12 (dictum), or (b) the act of production would constitute an implicit authentication of the document, when such an authentication could be used by the prosecution as part of its case against the respondent, *id.* at 412-13 & n.12 (dictum); *Andresen v. Maryland,* 427 U.S. at 473 & n.7 (dictum), or (c) the act of production would open the door to the individual's being "compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena," the "answers [to which] . . . , as well as the act of production itself, may . . . communicate information about the existence, custody, and authenticity of the documents," *United States v. Hubbell*, 530 U.S. at 38-40, 43-45. In these situations, notably, the prosecution cannot avoid the Fifth Amendment objection by foreswearing evidentiary use of the implications arising from the act of production, *see United States v. Doe*, 465 U.S. at 612-14; if the prosecution *could* use those implications in any way to make its case against the respondent, then the respondent cannot constitutionally be required to produce.

Similarly, the pretrial discovery of other tangible objects possessed by the respondent whose existence or possession is incriminating, or of information obtained by defense counsel from third parties whose identities or connections with the case could lead the prosecution to incriminating evidence should be forbidden because, whatever the original source of that information may have been, it is now being sought from the respondent through compulsory process addressed to the respondent (*compare United States v. Miller*, 425 U.S. at 440-45; *Andresen v. Maryland*, 427 U.S. at 473-77; *Couch v. United States*, 409 U.S. 322 (1973)) for possible use by the prosecutor in prosecuting the respondent. *See People v. Havrish*, 8 N.Y.3d 389, 393-97, 866 N.E.2d 1009, 1012-16, 834 N.Y.S.2d 681, 684-88 (2007) (when the defendant in a domestic violence case was ordered by the court to "surrender any and all firearms owned or possessed," the unlicensed handgun which he surrendered to the police should have been suppressed as a compelled communication in violation of the Fifth Amendment privilege against

self-incrimination: "the surrender of evidence can be testimonial if, by doing so, defendant tacitly concedes that the item demanded exists or is in defendant's possession or control when these facts are unknown to the authorities and would not have been discovered through independent means"). Admittedly, *United States v. Nobles,* 422 U.S. 225 (1975), appears to hold that the Fifth Amendment privilege does not cover records of defense interviews with persons other than the accused, at least when those persons are independently available to the prosecution. But *Nobles* was a case involving the prosecution's power to secure discovery of portions of a defense investigator's report after (1) the prosecution had concluded its case-in-chief at trial and (2) the defense had called the investigator to testify concerning interviews with prosecution witnesses. *See Corbitt v. New Jersey,* 439 U.S. 212, 219 n.8 (1978). In this situation the defense has voluntarily presented evidence about a set of facts; its evidence indicates that the underlying facts are not only already known to the prosecution but also have already been the subject of testimony by prosecution witnesses; and its Fifth Amendment claim is therefore necessarily limited to a contention that a particular recorded version of those same facts is privileged merely because it was made by an agent of the defense other than the accused. *Nobles'* rejection of that contention does not imply that a respondent can be compelled by court order to come forward with materials whose existence, possession, or authentication are incriminating *unless and until* s/he has voluntarily elected to adduce those materials at trial. This compulsion would obviously affront the basic policy of the Self-Incrimination Clause that requires the prosecution "'to shoulder the entire load,'" *Miranda v. Arizona,* 384 U.S. 436, 460 (1966); *compare Andresen v. Maryland,* 427 U.S. at 475-76 & n.8.

Counsel should therefore resist, on Fifth Amendment grounds, any and all prosecutorial discovery prior to the time when s/he has had an opportunity to investigate and prepare the defense case; and s/he should insist upon the right to defer decision concerning what s/he will present at trial until s/he has been given ample prior disclosure of the prosecutor's case to enable counsel to make that decision intelligently. If prosecutorial discovery is ever to be ordered, the respondent has a due process right to reciprocal discovery under *Wardius v. Oregon,* 412 U.S. 470 (1973); *see also, e.g.*, *Camp v. Neven*, 606 Fed. Appx. 322 (9th Cir. 2015); see § 9.09(b)(7) *supra;* and the decision in *Brooks v. Tennessee*, 406 U.S. 605 (1972), demonstrates that no disclosure may be required of the defense unless (i) *prior* to the time when the respondent is asked to disclose, (ii) s/he is given a sufficient preview of the prosecutor's case to make an advised and intelligent decision concerning what, if any, defensive evidence s/he will present at trial. *Brooks* invalidated a statute requiring that if a defendant was going to testify, s/he must testify before any other defense evidence was presented. That requirement was held to violate the Fifth Amendment on the ground that the constitutional privilege against self-incrimination forbids forcing the defense to decide whether or not to present the defendant's testimony before "its value can be realistically assessed," *id.* at 610. *See also Portuondo v. Agard*, 529 U.S. 61, 70 (2000) (discussing *Brooks*). But surely, if a criminal defendant or juvenile respondent cannot be compelled to decide whether to testify and to "subject himself to impeachment and cross-examination at a time when the strength of *his* other evidence is not yet clear," *id.* at 612 (emphasis added), a defendant or respondent cannot be compelled to furnish the prosecution with information that may be used in any fashion to incriminate him or her – even merely by

"focusing investigation on [the respondent] . . . as a result of his compelled disclosures," *Kastigar v. United States,* 406 U.S. 441, 460 (1972) – prior to the time when the respondent has been sufficiently informed about the prosecutor's evidence to decide what defensive evidence will be "necessary or even helpful to his case," *Lakeside v. Oregon,* 435 U.S. 333, 339 n.9 (1978) (dictum). Under *Brooks,* such a requirement violates not merely the Fifth Amendment but also the Sixth Amendment right to counsel, "[b]y requiring the accused and his lawyer to make [an important tactical decision regarding the presentation of defensive evidence] . . . without an opportunity to evaluate the actual worth of their evidence." *Brooks v. Tennessee,* 406 U.S. at 612. *See also Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980) (dictum).

It is a difficult question whether the Fifth Amendment forbids conditioning defense discovery upon reciprocal disclosures that, if ordered directly, would violate the privilege. Certainly, when the respondent has a constitutional right to discovery under any of the doctrines identified in § 9.09 *supra,* the respondent's enforcement of that right cannot be conditioned upon the waiver of another constitutional right, and in such instances, the reciprocal disclosure requirement would seem to be invalid. *Cf. Simmons v. United States,* 390 U.S. 377, 389-94 (1968), reaffirmed in *United States v. Salvucci,* 448 U.S. 83, 89-90 (1980); *Lefkowitz v. Cunningham,* 431 U.S. 801, 807-08 (1977); *Brooks v. Tennessee,* 406 U.S. at 607-12. In other cases, however, it is likely that a requirement of reciprocation can be imposed and the defense presented with the choice of both giving and getting or neither.

§ 9.13 "WORK PRODUCT" PROTECTIONS AGAINST PROSECUTORIAL DISCOVERY

When the "work product" doctrine was discussed in § 9.10(b) *supra* in connection with defense discovery of prosecutorial files, it was explained that the prosecution's ability to use the "work product" privilege to insulate its files from defense discovery is initially a matter of state law. However, when the issue is one of whether defense files are "work product," the issue assumes constitutional dimension. The function of the "work product" doctrine is to provide "a privileged area within which [the attorney] . . . can analyze and prepare his client's case," *United States v. Nobles,* 422 U.S. 225, 238 (1975), in order to "assure the thorough preparation and presentation of . . . the case" (*id.*); and the Sixth Amendment countenances "no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process," *Herring v. New York,* 422 U.S. 853, 857 (1975). The Sixth Amendment right to the effective assistance of counsel (described and documented in § 9.09(b)(1) *supra*) therefore arguably requires "work product" protection of defense counsel's trial preparation, in addition to whatever "work product" protection it is given by state law. The *Nobles* case holds nothing to the contrary, although it does permit limited prosecutorial discovery of a defense investigator's report *after* the defense has presented the investigator's testimony at trial and thereby waived both the "work product" and Sixth Amendment protections. *See United States v. Nobles*, 422 U.S. at 240 n.15.

The "work product" doctrine is primarily designed to shield materials that reveal an

attorney's analyses and assessments of the case, including evaluations of potential witnesses. For this reason, it is particularly protective of counsel's own summaries of oral statements of witnesses, as distinguished from written or transcribed statements of witnesses or even defense investigators' reports reflecting the oral statements of witnesses. *See Upjohn Co. v. United States,* 449 U.S. 383, 399-402 (1981). In the case of witnesses whose testimony will be favorable to the defense – as distinguished from potential prosecution witnesses (see §§ 8.11-8.12 *supra*) – counsel may wish to increase the likelihood of avoiding prosecutorial discovery by taking oral statements instead of written statements from witnesses and by including appropriate evaluative matter in his or her writeups of those statements. See § 8.10 *supra*. Counsel can obtain maximum protection by (a) refraining from taking written statements from these witnesses; (b) instructing defense investigators to take only oral statements from witnesses and to report their contents orally to counsel; (c) personally interviewing witnesses whose information promises to be favorable; (d) summarizing counsel's interviews of these witnesses in a way that melds the witnesses' own words with counsel's observations of the credibility and potential uses of the witnesses' statements; (e) coding these summaries as suggested in the concluding paragraph of § 5.05 *supra* so as to enable counsel – but not a judge who may later inspect the summary *in camera* on a prosecution motion for discovery – to distinguish passages that are unmarked direct quotations of the witness from passages that are counsel's commentaries; (f) collecting the summaries of information gotten from two or more witnesses in a single document (or in several documents, each of which contains information from more than a single witness) in which counsel connects the several witnesses' statements and relates them to the defense theory of the case (see § 6.02 *supra*); and (g) captioning the document[s] "strategy memorandum." Anything that discloses counsel's "litigating strategies [is not] . . . the subject of permissible inquiry by his opponent . . ." (*United States v. Valenzuela-Bernal,* 458 U.S. 858, 862 n.3 (1982) (dictum)). Counsel can consult these memoranda while preparing defense witnesses to testify (see § 10.09 *infra*) but should not give them to the witness to read. *See United States v. Alvarez*, 519 F.2d 1036, 1046-47 (3d Cir. 1975), quoted in § 12.15(a) *infra*; *State v. Mingo*, 77 N.J. 576, 581-82, 392 A.2d 590, 592-93 (1978) (dictum) ("The right to counsel afforded criminal defendants by the Sixth Amendment of the United States Constitution and by Art. I, par. 10 of the New Jersey Constitution comprehends the right to the effective assistance of counsel. To safeguard the defense attorney's ability to provide the effective assistance guaranteed by these constitutional provisions, it is essential that he be permitted full investigative latitude in developing a meritorious defense on his client's behalf. This latitude will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial. ¶ The particular application of the foregoing principle involved in the present case is a defense attorney's right to seek out expert evidence in aid of the defense without risking its disclosure to the State if for any reason the expert's opinion turns out to be unfavorable to the defense. . . . ¶ We think it makes no difference whether the principle calling for vindication in such a situation is to be denominated the effective representation by counsel or the attorney-client privilege. We regard them as related, and basically subserving the right of a criminal defendant to be effectively represented by counsel. . . . We believe that right to be clearly subverted if an expert report obtained for defense purposes by defendant's counsel is to be made discoverable to the State and utilizable by it,

directly or indirectly, at trial, unless a defendant signifies his intention to use the expert evidence at trial or in fact does so." *Id.* at 581-82, 392 A.2d at 592-93. ¶ "We accordingly hold that the report and testimony of a defense-retained expert consultant who will not testify as a defense expert witness and whose report will not be utilized as evidence are not available to the State. This rule will safeguard the internal strategic processes of the defense. The protection such a rule affords will enhance the ability of the defense attorney to provide effective representation by affording him the maximum freedom to seek the guidance of expert advice in assessing the soundness and advisability of offering a particular defense without the fear that any unfavorable material so obtained can be used against his client. A defense attorney should be completely free and unfettered in making a decision as fundamental as that concerning the retention of an expert to assist him. Reliance upon the confidentiality of an expert's advice itself is a crucial aspect of a defense attorney's ability to consult with and advise his client. If the confidentiality of that advice cannot be anticipated, the attorney might well forego seeking such assistance, to the consequent detriment of his client's cause. The protection from unwarranted disclosure we today mandate is an indispensable element of a criminal defendant's constitutional right to the effective assistance of counsel." *Id.* at 587, 392 A.2d at 595.).

State law in the form of statutes, rules of court or common-law doctrines provides work-product protection that may be more extensive than the protection which defense counsel can claim as ancillary to the Sixth Amendment or parallel state constitutional right-to-counsel guarantees. For example, "Florida [and a number of other States] recognize[ ] two forms of work product: opinion work product and fact work product. 'Fact work product traditionally protects that information which relates to the case and is gathered in anticipation of litigation.'. . . In comparison, opinion work product 'consists primarily of the attorney's mental impressions, conclusions, opinions, and theories.' . . . ¶ The distinction between the two forms of work product becomes important when disclosure is sought. Fact work product can be discovered upon a determination by an opposing party of need and undue hardship. . . . Conversely, 'opinion work product generally remains protected from disclosure.'" *Kidder v. State,* 117 So.3d 1166, 1171 (Fla. App. 2013). *See Smith v. State,* 873 So.2d 585 (Fla. App. 2004) (in holding that "a 22-page psycho-social report, prepared by defense counsel with the assistance of other members of the defense team, that is in narrative form and is based on medical records, witness interviews, and mental health evaluations" (*id*. at 587) and that was shown to a defense "expert witness who would be testifying at trial" (*id*. at 591) was opinion work product absolutely protected against discovery by the prosecution, the Court of Appeals finds "the conclusion . . . inescapable that . . . [this] report . . . and its addendum . . . constitute classic opinion work product. It is a summary of witness statements, italicizing certain portions, which unavoidably combined a selection process achieved through an interpretative filter that emphasized certain information over other, thus disclosing counsel's opinions and strategy. . . . The act alone of compelling an attorney to disclose a group of documents invariably reveals the counsel's 'assessment of the relative importance of each of those documents, and of their significance as a collection'" (*id*. at 588).); *Thomas v. State*, 191 So.3d 500, 501 (Fla. App. 2016) (applying Florida's work-product rules to reverse a trial court's reciprocal discovery order that allowed the prosecution to interview a fingerprint expert who "was a consultant on the defense team recruited to assist in forming a

strategy to challenge the prosecution's fingerprint expert witness, not a testifying witness"). *And see, e.g.*, *In re 2018 Grand Jury of Dallas County*, 939 N.W.2d 50 (Iowa 2020) (applying Iowa's work-product doctrine to hold that "the State cannot subpoena an expert retained by the defense to testify before the grand jury regarding her opinions on the criminal matter being investigated" (*id*. at 52) and that the prosecution could not establish waiver of the privilege by asserting that defense counsel had disclosed the identity of the expert to the prosecutor during plea negotiations (*id*. at 60)); *Commonwealth v. Kennedy*, 583 Pa. 208, 218, 876 A.2d 939, 945 (2005) (relying on the work product doctrine to require the quashing of a prosecution subpoena directed to "an expert, who was originally hired by a criminal defendant's attorney in order to prepare for the defendant's trial, . . . where the defendant does not plan on calling the expert at trial or using any materials that the expert completed as evidence at trial"); *People v. Spiezer,* 316 Ill. App. 3d 75, 735 N.E.2d 1017, 249 Ill. Dec. 192 (2000) ("we are most persuaded that the work product doctrine protects from disclosure reports and other materials prepared by nontestifying, consulting [defense] experts and also prevents the State from introducing such evidence at trial" (*id*. at 80, 735 N.E.2d at 1020, 249 Ill. Dec. at 195); the court goes on to explain why work product is a more satisfactory basis for this holding than the attorney-client privilege, the constitutional privilege against self-incrimination or the constitutional right to counsel (*id*. at 87-89, 735 N.E.2d at 1025-27, 249 Ill. Dec. at 200-02)); *State v. Pawlyk*, 115 Wash. 2d 457, 479, 800 P.2d 338, 350 (1990) (while upholding a trial court order granting the prosecution discovery of the findings and conclusions of a psychiatrist retained by the defense who examined the defendant but whom defense counsel did not intend to call as a witness in support of a noticed insanity defense, the court observes: "We recognize, nonetheless, that the work product doctrine does apply to some extent in this case. While it does not preclude disclosure of the psychiatrist's factual findings and opinions on the issue of defendant's insanity, it does operate to preclude disclosure of defense counsel's 'opinions, theories or conclusions.' . . . The trial court excluded from disclosure any letters or communications between . . . [the psychiatrist] and defense counsel. It appears that this exclusion was intended to protect this type of information from disclosure, and we agree that this limitation is appropriate. . . . While it seems doubtful that . . . [the psychiatrist's] reports would contain any such information, if defendant believes they do he may request the trial court to examine the materials in camera and to protect any such work product from disclosure."); *Washington v. State*, 856 S.W.2d 184, 188 (Tex. Crim. App. 1993) (en banc) (holding that the trial court erred in overruling the defendant's work-product objection to a mid-trial order granting the prosecutor disclosure of the tape recording of a defense investigator's interview of a prosecution witness who had been cross-examined by defense counsel regarding statements he made in that interview: "[T]he interview at issue here was an attempt both to evaluate the strengths and weaknesses of the State's case and to prepare . . . [the defendant's] case. . . . This Court has held that the work-product privilege applies in similar cases."); *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 193, 777 P.2d 686, 691 (1989) (holding that a soil analysis report commissioned upon advice of defense counsel by a corporation under criminal investigation for hazardous waste management violations and containing in the margin handwritten notes which the analyst made in response to questions by defense counsel was protected from discovery by Arizona's work product rule, which protects "reports to the extent they 'contain the opinions, theories or conclusions . . . of defense counsel or his legal or

investigative staff'" (*id*. at 193, 777 P.2d at 691): "[The corporation] created the protocol for the investigation report. The creation of the protocol – specifying the type of investigation, the type and location of samples, the method of taking the samples, and the method of their analysis – necessarily constitutes scientific or engineering theories and opinions. The interpretation of gas chromatography tests is more than a mere lay observation; it requires scientific training. The ability to make expert scientific observations necessarily requires professional judgment and, therefore, opinion and conclusion. Thus, the determination that certain compounds or chemicals exist in the soil samples is a conclusion. Additionally, the determination that certain material in the soil samples is a hazardous waste can be made only by applying the Code of Federal Regulations. Thus, determining whether the substances in the soil samples were hazardous wastes requires the application of law to fact and is, in the truest sense, a conclusion."); *cf. State v. Martinez*, 461 N.J. Super. 249, 255, 220 A.3d 498, 501-02 (2019).