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 (2016) (based on D.C. SUPER. CT. CRIM. RULE 16); FLA. RULE JUV. PROC. 8.060 (2016) (based on FLA. R. CRIM. PROC. 3.220); N.Y. FAM. CT. ACT §§ 330.1, 331.1-331.7 (2016) (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 (2016); WASH. REV. CODE ANN. § 13.40.140(7) (2016)), 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*, 134 S. Ct. 596 (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 repudiation of the constitutional Privilege. Such a repudiation 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 defensive 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, 2016;

(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. Counsel will need to consult local statutes, court rules, and caselaw, and counsel should confer with other defense attorneys practicing in the jurisdiction, to ascertain what types of discovery devices are customary. Even if certain devices are not recognized by the local courts, counsel can argue that they should be. 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, Chapter 11 ("Discovery Standards") (4th ed. 2015); 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.*, *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."). *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). 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); 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.

§ 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.

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*, 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*, 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.").

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; 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.*

4. *Written and oral statements of the respondent.*

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).

§ 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) (2016) (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) (2016) (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").

§ 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 (2016). 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).

Unless the jurisdiction's statute explicitly forbids its use by parties to litigation against the government or exempts the types of records counsel is seeking (*see, e.g.*, *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.

§ 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*, *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (per curiam); *Smith v. Cain*, 132 S. Ct. 627 (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); *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).

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*, 136 S. Ct. at 1006-07 ("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. *See also Smith v. Cain*, 132 S. Ct. at 630-31; *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); *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. *See also, e.g.*, *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").

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). *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). "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." *Id.* at 85-86.

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.*, *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"). *See also, e.g.*, AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 11-2.1(a) (3d ed. 1996) ("Prosecutorial Disclosure") (disclosure "within a specified and reasonable time prior to trial"). *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."); *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").

§ 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), 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), 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.*, *Routhier v. Sheriff, Clark County*, 93 Nev. 149, 151-52, 560 P.2d 1371, 1372 (1977); *Catalan v. Cockrell*, 315 F.3d 491, 492-93 (5th Cir. 2002). 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).

"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.*, *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).

§ 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. 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).

§ 9.09(b)(5) The Right Against 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 perjured testimony. *See generally Strickler v. Greene*, 527 U.S. 263, 281 & n.19 (1999) (dictum); *United States v. Agurs,* 427 U.S. 97, 103-04 (1976) (dictum). Specifically, the 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.*, *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). *Cf. Coggins v. Buonora*, 776 F.3d 108 (2d Cir. 2015); *Moore v. Illinois,* 408 U.S. 786, 797-98 (1972) (dictum). *And see Phillips v. Ornosky*, 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*."). 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).

§ 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).

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). State constitutional due process protections may be broader in this regard: As Justice Stevens' concurring opinion in *Fisher* notes (*id*. 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*, 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

The decision in *Wardius v. Oregon,* 412 U.S. 470 (1973), appears to be seminal inasmuch as it recognizes that the Due Process Clause "does speak to the balance of forces between the accused and his accuser." *Id.* at 474. *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 decisions 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.

Although this notion is still embryonic, two obvious implications of *Wardius* deserve note. First of all, 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 v. Oregon*, 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. *Cf. People ex rel. Gallagher v. District Court,* 656 P.2d 1287 (Colo. 1983) (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). *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 Haw. 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,* 467 U.S. 479 (1984) (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"). 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. at 488. *See Evans v. Superior Court,* 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974); *cf. United States v. Ash,* 461 F.2d 92, 104 (D.C. Cir. 1972) (en banc) (dictum), *rev'd on other grounds,* 413 U.S. 300 (1973).

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. 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.

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). 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), appears to apply 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. But local law cannot extend "work product" protection to any materials that are constitutionally required to be disclosed to the defense. *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, *see, e.g., 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. 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*, 134 S. Ct. 596, 600-02 (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*, 134 S. Ct. at 600-02, 603.

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). The latter cases severely limit but do 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. 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*, 134 S. Ct. 2473, 2491 (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."). 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.