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Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115

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Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115

Keywords

Criminal Justice System, Discovery, Arraignment, Preliminary Hearing

LESS RELIABLE PRELIMINARY HEARINGS AND PLEA BARGAINS IN CRIMINAL CASES IN CALIFORNIA: DISCOVERY BEFORE AND AFTER PROPOSITION 115

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INTRODUCTION

On June 5, 1990, the voters of California passed Proposition 115, the Crime Victims Justice Reform Act.¹ The initiative implemented a broad range of statutory and constitutional changes relating to California's criminal justice system.² For the most part, these changes

1. State of California, Crime Victims Justice Reform Act, Initiative Measure Prop. 115 (approved June 5, 1990) (codified at CAL. CONST. art. I, §§ 14.1, 24, 29, 30; CAL. CIV. PROC. CODE §§ 223, 223.5 (West Supp. 1998); CAL. EVID. CODE § 1203.1 (West 1995); CAL. PENAL CODE §§ 189, 190.2, 190.41, 190.5, 206, 206.1, 859, 866, 871.6, 872, 954.1, 987.05, 1049.5, 1050.1, 1054, 1054.1, 1054.2, 1054.3, 1054.4, 1054.5, 1054.6, 1054.7, 1102.5, 1102.7, 1385.1, 1430, 1511 (West Supp. 1998)) [hereinafter PROPOSITION 115]. Proposition 115 was passed by nearly 57% of the voters of California. See Eric Bailey, *State Propositions: The Effects in Orange County*, L.A. TIMES, June 7, 1990, at A-29.

2. Among other things, Proposition 115 added discovery provisions to the California Penal Code and to the California Constitution. See CAL. PENAL CODE §§ 1054-1054.7 (West Supp. 1998); see also CAL. CONST. art. I, § 30(c) (recognizing that discovery in criminal cases must be reciprocal in nature). In addition to discovery, Proposition 115 addressed a variety of substantive and procedural topics in criminal law, such as jury voir dire, speedy trials, hearsay preliminary hearings, post-indictment preliminary hearings, joinder and severance of cases, first degree and special circumstance murder, increased penalties for murder, the crime of torture, appointment of counsel, continuances, and a prohibition against interpreting the California Constitution to afford criminal defendants greater constitutional protections than those

limit the procedural rights of the accused and increase the rights and discretion of the prosecution in an effort to harmonize the system with federal law.³

By creating a statutory and reciprocal discovery scheme in anticipation of trial, Proposition 115 dramatically alters the discovery process in criminal cases⁴ and may well have set a trend that other states will follow.⁵ In particular, its changes to court-ordered defense discovery undermine the reliability of preliminary hearings and plea bargaining.⁶ A meaningful analysis of the effect of these discovery

afforded by the U.S. Constitution. *See id.* § 29 (providing the right to a speedy trial, due process of law, and to a public trial); *id.* § 30(b) (allowing hearsay evidence to be admitted at preliminary hearings); *id.* § 30(c) (mandating reciprocal discovery in criminal cases to provide for fair and speedy trials); CAL. CIV. PROC. CODE § 223 (West Supp. 1998) (establishing requirements and guidelines for examination of prospective jurors by the court and by counsel); CAL. EVID. CODE § 1203.1 (West 1995 & Supp. 1998) (disallowing the cross-examination of the declarant of hearsay evidence if the hearsay statement is offered at a preliminary examination); *see also* CAL. CONST. art. 1, § 14.1 (indicating that no post-indictment preliminary hearing will take place if an indictment is returned on a felony case); *id.* (indicating that the courts may not interpret the California Constitution to prohibit the joining of criminal cases); *id.* § 24 (limiting the interpretation of a defendant's constitutional rights to those provided by the U.S. Constitution); CAL. PENAL CODE § 189 (West Supp. 1998) (setting forth the types of first degree murder and qualifying all other murders as second degree); *id.* § 190.2 (describing the penalty for first degree murder with special circumstances as death or life in prison without the possibility of parole); *id.* § 190.5(b) (providing penalties for defendants who are convicted of first degree murder and who are between the ages of sixteen and eighteen at the time of the murder); *id.* §§ 206, 206.1 (setting forth the elements for the crime of torture and indicating that torture is punishable by a life term in state prison); *id.* § 859 (repealing language requiring a prosecutor to provide copies of police arrest, and crime reports to the defense within two calendar days of arraignment); *id.* § 987.05 (describing requirements and procedures relating to defense counsel assigned in felony cases); *id.* § 1050.1 (allowing for continuances in cases where two or more defendants are charged jointly in the same complaint, indictment, or information); *id.* § 1511 (providing for a remedy for setting trial dates beyond the statutory time limits in felony cases).

3. *See infra* notes 104-11 and accompanying text (discussing how the purpose of Proposition 115 was not to protect the accused but to make changes regarding trial procedure and discovery in favor of the prosecution similar to those in the federal system).

4. *See infra* notes 117-38 and accompanying text (describing Proposition 115's single statutory scheme and how it changes the timing and substance of the discovery process).

5. California has initiated numerous nationwide political-legal trends through its use of ballot initiatives, and Proposition 115 may follow suit. *See, e.g.,* Eleanor Swift, *Does It Matter Who is in Charge of Evidence Law?*, 25 LOY. L.A. L. REV. 649, 660-61 (1992) (contending the initiative process is inappropriate for Proposition 115); Eric Shine & Ronald Grover, *What's Next for Business? Check out the California Ballot, That state's myriad initiatives often become national trends*, BUS. WK., Nov. 4, 1996, at 39 (discussing Proposition 13 in 1978, Proposition 187 in 1994, and Proposition 209 in 1996, all of which triggered national trends). Now that California has retreated from broad defense discovery and no prosecution discovery to align its discovery procedures in criminal cases with those of the federal government, it would not be surprising if other states followed suit. *See, e.g.,* Mark A. Esqueda, Note, U. DET. MERCY L. REV. 317, 349-50 (1997) (stating that Proposition 115 is a lodestar for Michigan courts to follow in interpreting similar state provisions); Therese M. Myers, Note, *Reciprocal Discovery Violations: Visiting the Sins of the Defense Lawyer on the Innocent Client*, 33 AM. CRIM. L. REV. 1277, 1282 & n.32 (stating that Georgia and Michigan have followed California in reciprocal criminal discovery expansion).

6. *See* discussion *infra* Part IV (examining how Proposition 115's changes to discovery in California criminal proceedings have impaired the reliability of preliminary hearings in screening cases before trial and have detracted from the possibility of achieving reliable results

changes on preliminary hearings and plea bargaining requires an examination of the purpose of the criminal justice system and the function and history of the discovery process.⁷ This Article discusses how Proposition 115's changes to the discovery process influence these functions in this historical and philosophical context.

Part I briefly describes the purpose of the criminal justice system, and the role of discovery in facilitating that purpose. Part II examines the historical development of the timing and substance of discovery in California before Proposition 115 was passed, while Part III identifies the purpose and nature of Proposition 115's changes to that process. Part IV discusses the unfortunate impact of these changes on the effectiveness of preliminary hearings to screen reliable criminal cases prior to trial, and on the likelihood of achieving a reliable result in the event of a trial or plea bargain. Part IV then examines the inadequacy of other pretrial sources of information as substitutes for discovery, and concludes that Proposition 115's discovery changes undermine the reliability of judgments in the criminal trial courts. Finally, Part V proposes reforms.

I. THE PURPOSE OF THE CRIMINAL JUSTICE SYSTEM AND THE FUNCTION OF DISCOVERY

A. *The Purpose of the Criminal Justice System*

The purpose of the criminal justice system is often described as a "search for the truth"⁸ in order to convict the guilty and free the innocent.⁹ This process is a synthesis of a variety of elements,

from plea bargains).

7. See discussion *infra* Parts I, II (offering a brief description of the criminal justice system's purpose and the function of discovery within the criminal justice system, followed by a history of discovery in California prior to Proposition 115).

8. See generally Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (exploring how and why the justice system should be directed towards reaching the truth). The search for truth is a widely held objective of the criminal justice system. See, e.g., *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring) ("The State's obligation is not to convict, but to see that, so far as possible, truth emerges."). See generally *Izazaga v. Superior Court*, 54 Cal. 3d 356, 370, 815 P.2d 304, 313 (1991) (recognizing the viewpoint that discovery, in serving to promote "the orderly ascertainment of the truth," should not be a one-way street" (quoting *Jones v. Superior Court*, 58 Cal. 2d 56, 60, 372 P.2d 919, 921 (1962)); Barry Nakell, *Criminal Discovery for the Defense and the Prosecution—the Developing Constitutional Considerations*, 50 N.C. L. REV. 437, 437 (1972) (indicating that the basic aims of discovery in criminal cases include enabling parties to obtain information on disputed issues, protecting against surprises at trial, delineating issues clearly and narrowly, helping to ascertain the truth, detecting perjury, encouraging settlements, and assuring that probative evidence is available to the party whom it benefits).

9. See, e.g., *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is better

including evidentiary and procedural rules, litigant concerns, social values, political interests, institutional considerations, and systemic capacity. As the justice system evolves, these elements are accorded different weights in relation to each other¹⁰ and their fusion achieves a “legal”¹¹ truth that ultimately meets our current social expectations of “fundamental fairness”¹² or “justice.”¹³ Together, these social,

that five guilty men should be acquitted before one innocent man is convicted.”); *see also, e.g.*, *United States v. Cronin*, 466 U.S. 648, 655 (1984) (maintaining that the Sixth Amendment right to counsel is based in part on the primary objective of criminal justice, which is to convict the guilty and set free the innocent); Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the Search for the Truth in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1271 (1996) (stating further that the main purpose of criminal trials is a search for truth, and that the public is interested in convicting the guilty and acquitting the innocent).

10. *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L. Q. 279, 279 (stating that “the single constant for our profession is the need for continuous examination and reexamination of our premises as to what law should do to achieve better justice”). Justice Brennan argues for, among other things, expanded discovery for the defense in order to dispel the notion that a criminal trial is a game. *See id.* at 282 (stating that all accused should have the right of discovery on equal terms, or that no one should have that right).

11. *See, e.g.*, Hon. Simon H. Rifkind, *The Lawyer’s Role and Responsibility in Modern Society*, in 30 REC. ASS’N OF THE BAR OF THE CITY OF N.Y. 534, 535-36 (1975) (stating that the adversarial process is a type of organized and institutionalized confrontation which strives to achieve a thorough search for and assessment of both facts and law); *see also, e.g., id.* at 543 (concluding that a trial’s purpose is not to ascertain truth, but to resolve controversies by applying rules to achieve a “courtroom truth”).

12. *See* Eric D. Blumenson, *Constitutional Limitations on Prosecutorial Discovery*, 18 HARV. C.R.-C.L. L. REV. 123, 126, 170 (1983) (arguing that enforcing discovery rules which exclude undisclosed evidence may harm the accuracy and fairness of a trial, and noting alternatives that could better enhance the search for truth).

In short, the accused is afforded maximum protection even at the expense of a factually reliable result. This illustrates that the principal objective of an accusational system is not necessarily to seek the truth, but to ensure that the accused has been treated fairly, and that, correspondingly, the system has produced a fair and just result. Raneta Lawson Mack, *It’s Broke So Let’s Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT’L & COMP. L. REV. 63, 69-70 (1996). *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE: HORNBOOK SERIES* § 2.4, at 52-55 (2d ed. 1992) (discussing the relationship between fundamental fairness, the due process clause, and the Bill of Rights).

13. *See* Bradley & Hoffmann, *supra* note 9, at 1271 (recognizing that in addition to searching for truth, criminal trials also serve the important purpose of “expressing society’s deepest shared notions of institutional justice and fair play”); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 12 (1951) (“Justice is something larger and more intimate than truth. Truth is only one of the ingredients of justice. Its whole is the satisfaction of those concerned.”); Abraham S. Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1149 (1960) (maintaining that the principal objective of criminal procedure is to ensure that the disposition of a case before the court is just, and that justice at times requires serving the larger public interest); *see also* Blumenson, *supra* note 12, at 133-36 (explaining that the search for justice relies upon the Bill of Rights, which was designed to counterbalance the extremely disadvantageous position of an accused, and adding that truth and justice are not synonymous). *But see* ALAN M. DERSHOWITZ, *REASONABLE DOUBTS* 34-48, 166-67 (1996) (discussing how the criminal justice system is not a search for “pure” truth, and that the legal system mandates that certain truths be suppressed by both legal and ethical methods). In *Reasonable Doubts*, Professor Dershowitz describes the differing layers of “truth” in criminal justice, *see id.* at 143, and asserts that defense attorneys are often obligated to prevent specific truths from surfacing:

political, and institutional elements produce a community,¹⁴ rather than an individual,¹⁵ body of law.¹⁶ To provide a context for the development of discovery, it is worthwhile to examine briefly how these elements impede, modify, or advance the search for “legal truth,” fairness and reliability.

First, because the search for “legal truth” is intended to culminate in a trial that is designed to recreate an event, it is important to recognize the difficulty of accurately recreating that event. Real evidence, such as weapons, bodily fluids, documents, or other physical objects may be altered or improperly preserved any time between the original event and the trial. Information from percipient fact witnesses is unavoidably influenced by the witnesses’ ability to perceive, remember, and relate accurately. Fact witnesses necessarily provide their individual recollections of events, and a variety of factors may affect the reliability of their memories.¹⁷

[A] criminal trial is anything but a pure search for truth. When defense attorneys represent guilty clients—as most do, most of the time—their responsibility is to try, by all fair and ethical means, to *prevent* the truth about their client’s guilt from emerging. *Id.* at 166 (emphasis in original).

14. See generally Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL’Y 357, 359-72 (1986) (discussing the history of the public prosecution system as a part of community-based law whereby “community kinship” brought about criminal justice).

15. See Goldstein, *supra* note 13, at 1149-50 (arguing that justice requires procedures to level the playing field between the state and the accused).

16. See Bradley & Hoffmann, *supra* note 9, at 1272 (asserting that the trial process brings “community catharsis” and further elaborating that “[t]he criminal trial, as the most vivid and visible intersection of State and individual, simultaneously affirms the needs of both our collective and separate selves” (citing Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1140 (1982))). Professor Peter Arenella has described how criminal procedure serves to legitimize a community’s processes. He stated that “criminal procedure can perform a legitimization function by resolving state-citizen disputes in a manner that commands the community’s respect for the fairness of its processes as well as the reliability of its outcomes.” Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 188 (1983).

Furthermore, criminal procedure fuses the processes of reconstructing facts and evaluating morals:

Since substantive guilt includes both facts and value judgments about the actor’s moral culpability, criminal procedure must provide a procedural mechanism that reliably reconstructs historical facts and morally evaluates their significance. The combination of these two procedural functions—reliable historical fact reconstruction and moral evaluation—cannot be equated with “truth” discovery.

Id. at 198.

17. The accuracy of a perception or recollection of an event may be influenced by a witness’s emotional state at the time of the observation, the quality of the opportunity to observe the event, the reaction of other people to the witness’s recollections, or the witness’s own motives, biases, or other interests in effect either at the time of the observation or at the time the witness is asked to recall the event. See JUDGE JEROME FRANK & BARBARA FRANK, NOT GUILTY 206 (1971).

Facts do not register impartially or identically with all observers. The facts they perceive are not, for them, objective, but are subjective. The outer world and their respective inner worlds combine, intertwine, and in differing ways for each one. Each

Increasingly, studies focus on the use of distorted information from percipient witnesses, particularly regarding the identification of a suspect to support a criminal conviction.¹⁸

Additionally, fact-finders usually must determine that an accused had formed the particular mental state required for the charged offense in order to determine whether she should be held criminally responsible.¹⁹ A state of mind, such as the specific intent to steal, may be established by direct evidence, such as a statement by the accused, or by drawing inferences from facts observed, recalled, and reported by witnesses or by other circumstances. In recognizing the potential risks of establishing specific intent based on circumstantial evidence, courts, such as those in California, provide instructions to be read to juries regarding how they are to proceed with their deliberations.²⁰

Second, the criminal justice system employs the adversarial process as the method for ascertaining “legal truth.” A criminal trial involves two or more opposing litigants who employ procedural and

dwells partly in a world of his own, compounded uniquely of the internal and the external. He observes in terms of his unique needs, personality, temperament, emotions.

Id.

18. According to Ohio State University Professor Ronald Huff, mistaken eyewitness testimony is the main cause of over 7500 false convictions each year. See Kevin Krajick, *Genetics in the Courtroom: Controversial DNA Testing Can Clear a Suspect*, NEWSWEEK, Jan. 11, 1993, at 64 (remarking that victims of crime, particularly after receiving investigators’ suggestions, can invent false memories); see also David F. Hall et al., *Postevent Information and Changes in Recollection for a Natural Event*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 124-41 (Gary L. Wells & Elizabeth Loftus eds., 1984) (discussing, in criminal cases, the effect of information received subsequent to the initial perception of an event on a witness’ memory); Gary L. Wells & Amy L. Bradford, “Good, You Identified the Suspect”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 360 (1998) (discussing the results of an experiment measuring the effect of feedback on witness’ identification); *Don’t Rely on Witness IDs*, NAT’L L.J., June 15, 1998, at A6 (discussing a study conducted by an Iowa State University psychologist demonstrating that people making identifications from police lineups and photographs are more confident about their identifications if they are given positive feedback than if they receive negative or no reinforcing feedback).

19. Discussing why they reached a seven to five deadlock on an aggravated arson charge after convicting the defendant of six counts of arson, jurors told reporters that during their five days of deliberations most of their time was spent on the question of intent. See J. Harry Jones & Greg Moran, *Arsonist is Spared Life Term*, SAN DIEGO UNION-TRIB., July 24, 1998, at B-1. One juror indicated that “[t]here wasn’t enough direct evidence to show what the defendant thought.” *Id.* at B-8.

20. The California jury instruction regarding the level of circumstantial evidence that is required to prove specific intent or the necessary mental state reads, in relevant part:

The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged . . . unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion.

CALIFORNIA JURY INSTRUCTIONS, CRIMINAL § 2.02, at 39 (6th ed. 1996) [hereinafter CA JURY INSTRUCTIONS]; see also *id.* § 2.01, at 37 (addressing the level of circumstantial evidence generally required for a finding of guilt).

evidentiary tools to gather and use information in order to win,²¹ and is presided over by a magistrate who is usually unfamiliar with the case.

The degree and timing each adversary has to access information about the case, and the quality and admissibility of such information directly influences the achievement of “legal truth.” For example, cross-examination, one of the most effective tools available to test the reliability of information, is effective only to the degree that the cross-examining party has access to relevant information and sufficient time with which to prepare to use it. Additionally, an otherwise relevant piece of information may not be admissible because it is privileged or because of a procedural defect such as inadequate notice.²² Furthermore, the search for “legal truth” is influenced by the relative skill of each adversary, including each adversary’s ability to choose whether and how to present information to the fact-finders. Ultimately, the advocates provide information to a judicial officer or jury who must evaluate the information presented in order to reach a verdict.

Third, prevailing social, political, and institutional values also modify the search for “legal truth.”²³ Constitutional guarantees²⁴ and

21. The adversarial process has been compared to a game in which lawyers compete to win. *See, e.g.*, FRANK & FRANK, *supra* note 17, at 225 (stating that the legal profession’s current idea of a fair trial is one in which lawyers fight according to specific ground rules that judges, like referees, will enforce, while a jury determines the winner); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 16-17 (1990) (arguing, twenty-six years after his first lecture on the subject, that fairness dictates that discovery for the defense should continue to expand to avoid the metaphor of a trial as a game); *see also* ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xv-xvi (1982) (stating that “winning” is the lawyer’s primary goal).

22. The Hon. Ronald Domnitz of the San Diego Municipal Court once told the author that, in his opinion, the goal of the criminal justice process has nothing to do with truth and everything to do with evidence.

23. *See* Arenella, *supra* note 16, at 202 (recognizing that the criminal justice system can be viewed as a conflict resolution mechanism that garners respect from the community for outcomes that are reliable and processes that are fair).

24. *See, e.g.*, U.S. CONST. amend. IV (establishing protection against unreasonable searches and seizures regardless of the value of evidence found); *id.* amends. V, XIV, § 1 (establishing the right of the accused against self-incrimination, regardless of whether the information she possesses would facilitate the search for truth); *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (holding that, to protect a person’s privilege against self-incrimination, a person taken into custody must be informed of her right to remain silent, that anything said may be used against that person in court, that she has a right to an attorney or to have an attorney appointed to her if unable to afford one); *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that under the Fifth Amendment, a defendant has the absolute right to remain silent and that a prosecutor cannot comment that such silence constitutes evidence of guilt); Blumenson, *supra* note 12, at 134 (asserting that assignment of the burden of proof does not comport with searching for truth, and that the Fourth Amendment and *Miranda* recognize that the search for the truth is not a priority of the criminal justice system). The California Supreme Court requires separate trials for co-defendants when one or more co-defendants are adverse witnesses for the state regardless of the value of the information withheld from the jury. *See* *People v. Aranda*, 63 Cal.

social values codified into law²⁵ set limits on information gathering, acquisition and use, but also promote “legal truth” by creating procedures to test the reliability of information.²⁶ Institutional concerns further affect the fairness and reliability of results.²⁷ Prevailing public perceptions²⁸ and expectations,²⁹ changing social

2d 518, 530-31, 407 P.2d 265, 272-73 (1967) (indicating that if the prosecution seeks to introduce a statement of a defendant that implicates a co-defendant, the prosecution must either effectively delete the implicating statements in a joint trial or the court can grant a severance).

25. Evidence rules limiting the admission of hearsay evidence are designed to recognize a social tradition requiring witnesses to testify under oath, in person, and subject to cross-examination. See JOHN WILLIAM STRONG ET AL., 2 MCCORMICK ON EVIDENCE § 244, at 90-93 (4th ed. 1992). Evidence rules recognizing privileges protect “interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify” inhibiting access to the truth. 1 *id.* § 72, at 269. Evidence rules limiting the use of character evidence balances a concern for unfair prejudice and distracting from the issues in the case against an interest in testing a witness’s credibility. 1 *id.* § 40, at 137; 1 *id.* § 43, at 156.

For example, hearsay is inadmissible unless the proposed information falls within a specific exception. See CAL. EVID. CODE § 1200 (West 1995 & Supp. 1998) (setting forth the hearsay rule); see also *People v. Alvarez*, 14 Cal. 4th 155, 185, 926 P.2d 365, 382 (1996) (stating that hearsay, consisting of evidence of a statement made out-of-court offered as proof of what it states, is inadmissible unless it falls within an exception) (citations omitted), *cert. denied*, 118 S. Ct. 94 (1997). The assertion of a statutory privilege bars the introduction of evidence that might otherwise be relevant. See CAL. EVID. CODE §§ 930-1063 (West 1995 & Supp. 1998) (creating particular privileges). The use of character evidence is limited. See *id.* §§ 1101(a), 1103(a)-(c) (West Supp. 1998) (indicating when character evidence may appropriately be used). Evidence of the sexual conduct of a complaining witness offered in certain sex offense prosecutions may also be limited. See *id.* § 782 (West 1995). However, the California legislature added a section to the evidence code in 1995 providing for the admissibility of evidence of another sexual offense by a defendant. See *id.* § 1108 (West Supp. 1998). The California legislature also added a section to the evidence code in 1996 providing for the admissibility, in a criminal proceeding where the defendant is accused of an offense involving domestic violence, of a defendant’s prior acts of domestic violence. See *id.* § 1109 (West Supp. 1998) (establishing that evidence of prior acts of domestic violence must be disclosed to a defendant thirty days before trial and limiting the use of acts occurring more than ten years before the alleged offense); see also Rifkind, *supra* note 11, at 544-45 (discussing the filters and baffles in court proceedings that exclude information from court proceedings—such as assigning the burden of proof and excluding some types of information).

26. The California jury instruction regarding the credibility of witnesses states, in part, that “[i]n determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness” CA JURY INSTRUCTIONS, *supra* note 20, § 2.20. Proponents rely on the adversarial process as a mechanism for reconciling conflicting perceptions and conclusions. See CAL. EVID. CODE § 773 (West 1995 & Supp. 1998) (regulating cross-examination).

27. Examples of institutional limitations on the search for “legal truth” are statutes of limitations, time limits and standards for appellate review, limitations on deciding facts *de novo*, court rules, and burdens of proof.

28. Despite a 30% decline in California’s crime rate over a four-year period, “the public feels more threatened than ever,” reported Jerry Hill, California Field Director for Justice Fellowship. *California Crime Rate Continues Its Decline*, SAN DIEGO UNION-TRIB., Oct. 3, 1997, at A-3 [hereinafter *Crime Rate Continues*].

29. For example, one expectation is that the courts’ primary purpose is to resolve disputes between parties. See Edward J. Imwinkelried, *The Right to “Plead Out” Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341, 391 (1991) (arguing for an overhaul of the criminal justice system because the “[t]he courts’ primary function is dispute resolution”) (citation omitted); see also RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL

values,³⁰ and advances in human knowledge and experience³¹ create a catalyst for further modifications of the truth-seeking process. In addition, limiting access to post-conviction relief in the trial³² and appellate courts,³³ containing the social costs³⁴ involved in the

PRACTICE: PROBLEMS AND MATERIALS § 1.1 (2d ed. 1995) (stating that the function of the judicial system is to provide justice and to serve as a mechanism for dispute resolution); Bradley & Hoffmann, *supra* note 9, at 1274 (maintaining that society uses laws as the main method for settling disputes among people). *But see* Steve Holden, Note, *Izazaga v. Superior Court: Affirming the Public's Cry to Unshackle the Criminal Prosecution System*, 23 PAC. L.J. 1721, 1778-79 (1992) (recognizing that although dispute resolution, which is a primary goal of the civil system, is an integral component of the criminal justice system, the main goal of the criminal system is to search for actual truth and to punish those who violate criminal laws).

30. "The state's constituents no longer show any interest in limiting their state's punishment power or in forcing the state to justify the exercise of that power. On the contrary, the voting population calls for ever greater increases in the scope and severity of state punishment." Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 602 (1997); *see also id.* at 603-04 (criticizing plea bargaining in the American courts as inconsistent with the principle of autonomy and suggesting reforms by comparing the American criminal justice process to that used in Germany).

31. DNA testing and an increased understanding of the dynamics of eyewitness identification are examples of change in the search for reliable results. *See* Krajick, *supra* note 18, at 64 (explaining that DNA typing has become a powerful weapon in combating the unreliable results that stem from frequently incorrect eyewitness identifications); *see also* Hall et al., *supra* note 18 and accompanying text (discussing problems with unreliable eyewitness identifications due to post-identification feedback).

32. The limits on access to post-conviction relief may seem harsh in certain cases. For example, in a murder case in Los Angeles tried to two separate juries, the prosecutor told a jury that defendant was the triggerman. The next day, the same prosecutor told a different jury that the evidence was "100 percent consistent" with another defendant firing the round that killed the victim. *See* Minerva Conto, *Second "Triggerman" Sentenced to Life Term in One-Bullet Killing*, L.A. DAILY J., June 16, 1997, at 11 (reporting that both defendants were convicted of the same murder, sentenced to life in prison without parole, and denied new trials).

33. The showing necessary for a defendant to prevail on post-conviction review continues to increase. *See* *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (holding that habeas corpus relief is appropriate only where evidence accepted at trial demonstrates that no trier of fact could have found guilt beyond a reasonable doubt). The Court in *Jackson* concluded that, on habeas review of a bench-trial murder conviction, a sufficiency of evidence review requires that, on a record supporting multiple inferences, the reviewer must presume that the trier resolved those conflicts in favor of the prosecution and must defer to the trier's resolution. *See id.* at 326. In such an analysis, the final test for determining the appropriateness of habeas review is whether a fact-finder could reasonably find that the defendant committed the crime. *See id.*; *see also* *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (recognizing that newly discovered evidence of "actual innocence" found after conviction, without more, is not grounds for federal habeas relief). Justice Scalia, in his concurring opinion in *Herrera*, stated that:

There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after convictions. . . . With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.

Id. at 427-28 (Scalia, J., concurring). Two years later, in a six to three ruling, the U.S. Supreme Court again denied a defendant's application for stay of execution. *See* *Jacobs v. Scott*, 513 U.S. 1067 (1995). The prosecutor told the jury at defendant's sister's trial that she actually pulled the trigger. *See id.* at 1068 (Stevens, J., dissenting). However, at Jacob's trial (which occurred first), the same prosecutor told the jury that Jacobs was the triggerman. *See id.* (citing *Jacobs v. Scott*, 31 F.3d 1319, 1322 n.6 (5th Cir. 1994)). Jacobs was executed by lethal injection. *See*

criminal justice system, and increasingly mandatory sentences all set limits on the search for fairness and reliability. Finally, ethical obligations require or recommend conduct for lawyers that limits this search.³⁵

B. *The Function of Discovery*

Discovery is a fluid process conducted between the prosecution and defense after a criminal charge has been filed; a process that reflects the current balance struck between interests discussed earlier to achieve fairness and reliability.³⁶ As one commentator noted, “The basic purpose of . . . discovery is to protect the integrity of the fact-

Kathleen Adams et al., *The Week: January 1-7*, TIME, Jan. 16, 1995, at 13 (relating the facts of Jesse Jacobs’s execution). Furthermore, Title I of The Anti-Terrorism and Effective Death Penalty Act of 1996, tit. I, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.), made significant changes to federal habeas corpus procedure. The section applicable to state prisoners sets a one year limitations period for filing an application for a writ of habeas corpus, establishes procedural restrictions, and limits grounds for federal review. See 28 U.S.C. § 2244(a)-(b), (d) (West Supp. 1998). See generally RICHARD ERWIN ET AL., CALIFORNIA CRIMINAL DEFENSE PRACTICE §§ 101.36 (discussing appeals in California), 102.10 (discussing state habeas corpus), 102.11 (discussing federal habeas corpus) (1998).

34. Examples of social costs include the costs of operating the criminal justice system, the finality of judgments, the protection of society, and the efficiency of the process as a whole.

35. See John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45, 50-51 (1996) (discussing the ethical obligations of lawyers and how the adversarial process may pressure attorneys to compromise their ethical duties, such as the duty of candor to the court); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 5-6, 42 (1996) (arguing that “the adversary system is inadequate, indeed dangerous, in part” because it thwarts attorneys’ ethical obligations; instead of ethical reform, the justice system requires cultural change). See generally MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS (1990) (exploring the traditional role of the lawyer as an adversary); MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM (1975) (discussing the conflicts between moral obligations to the court and advocacy duties to the client); cf. Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63 (1996) (criticizing Menkel-Meadow’s alternative dispute resolution approach while supporting the adversarial system based on personal dignity and autonomy in which parties to disputes have discretion to resolve the dispute through nonviolent means of the parties’ choice).

36. Whether the balance struck by a discovery process facilitates or impedes fairness and reliability requires an understanding of the difference between the access of the prosecution and the defense to information about the case before a criminal charge is filed. Discovery obligations attach only after a criminal case is filed in court. Prior to filing the criminal charge, the prosecution has access to information not available to the defense, especially if the defendant is indigent. This information includes police reports (or at least verbal information from the law enforcement agency investigating the incident or affecting an arrest), lab reports, mental state assessments, medical reports, and information from law enforcement sources from other jurisdictions. In contrast, an indigent defendant is not entitled to counsel until she is arraigned; therefore, she has no advocate to collect information on her behalf prior to her first appearance to answer to a criminal complaint. See CAL. PENAL CODE § 859 (West Supp. 1998) (indicating that a defendant must be brought before a magistrate without unnecessary delay after being charged, and that counsel must be appointed to represent a defendant if she so desires and is unable to afford counsel). Moreover, a prosecutor may have been in possession of information about a case for months or years before deciding to file a criminal complaint. See Brennan, *supra* note 10, at 286 (“Criminal discovery would be one tool whereby [defendants] would have a better chance to meet on more equal terms what the state, at its leisure and without real concern for expense, gathers to convict them.”).

finding process in the criminal trial.”³⁷

Taken literally, this observation has two obvious shortcomings. First, the integrity of the fact-finding process in the trial itself depends on a pretrial discovery process that permits both the prosecution and defense to prepare their case adequately *before* trial. Pretrial proceedings, including preliminary hearings, should facilitate this process.³⁸ Second, if a fair and reliable result, or “legal truth,” is truly the primary objective of the criminal justice system as a whole, the discovery process should protect the integrity of the fact-finding process in the trial courts,³⁹ regardless of whether a final outcome is achieved by trial or guilty plea.⁴⁰

The perception that focuses on a trial as the crucible from which justice emerges is myopic. The vast majority of criminal cases are resolved without a trial.⁴¹ Because these dispositions are final, and more difficult to challenge than trial verdicts, *any* process that results in a criminal disposition in the trial courts, including dispositions in lieu of trial, should be reliable.

California courts have long recognized that the purpose of pretrial discovery has been to promote “the orderly ascertainment of the truth.”⁴² Clearly, a guilty plea, agreed to between the parties and sanctioned by the court, produces a “legal truth” that should be both reliable and fair.

37. Nakell, *supra* note 8, at 443. Professor Nakell argues for expanding discovery in the pretrial phase of criminal cases. *See id.* at 439.

38. *See* Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 845 (1995) (arguing that the U.S. Constitution provides support for pretrial discovery in criminal trials). Professor Montoya maintains that the Compulsory Process Clause of the Sixth Amendment constitutes a foundation for certain criminal discovery rights and provides a mechanism through which the presentation of evidence by the prosecution may be checked. *See id.* at 845-47; *see also* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.”).

39. *See* Ephraim Margolin, *Toward Effective Criminal Discovery in California—A Practitioner’s View*, 56 CAL. L. REV. 1040, 1043 (1968) (“For the great majority of California defendants, justice is what trial courts do.”); *see also id.* at 1059 (arguing for the expansion of criminal discovery).

40. For purposes of this Article, guilty pleas include pleas of *nolo contendere*.

41. *See infra* notes 208-10 and accompanying text (indicating that more than 95% of felony cases filed in California are resolved before trial).

42. *See* *Cohen v. Municipal Court*, 250 Cal. App. 2d 861, 866, 58 Cal. Rptr. 846, 850 (1967) (quoting *Jones v. Superior Court*, 58 Cal. 2d 56, 60, 372 P.2d 919, 921, from its holding that pretrial discovery would adequately inform the defendant of the nature of the charges). The California Court of Appeal has also recognized that an important function of discovery is to avoid surprise. *See* *Hobbs v. Municipal Court*, 233 Cal. App. 3d 670, 690, 284 Cal. Rptr. 655, 668 (1991) (“An important aim of discovery is to enhance the search for truth while at the same time reduce, if not eliminate, the elements of surprise and gamesmanship from the proceedings.”), *overruled on other grounds by* *People v. Tillis*, 18 Cal. 4th 284, 956 P.2d 409 (1998).

II. THE DEVELOPMENT OF COURT-ORDERED DEFENSE DISCOVERY AND THE SHIFT IN TIMING FROM TRIAL TO ARRAIGNMENT

A. *The Early Denial of Court-Ordered Defense Discovery*

The federal Constitution does not provide for court-ordered discovery to either prosecution or defense.⁴³ In the past, prosecutors required no judicial assistance to obtain information relating to a criminal charge.⁴⁴ Unlike prosecutors, however, those accused of crimes had no right to judicially-mandated discovery from the prosecution⁴⁵ and little or no independent access to such information.⁴⁶ California was no different in that its courts refused to

43. See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (explaining that there is no constitutional right to discovery in a criminal case); *People v. Gonzalez*, 51 Cal. 3d 1179, 1258, 800 P.2d 1159, 1204 (1990) (noting that the federal Constitution does not confer a general right to criminal discovery); H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1089-91 (1991) (discussing the rationale underlying criminal discovery restrictions). See generally FRANK & FRANK, *supra* note 17, at 242-49 (criticizing the lack of discovery for the defense as an injustice in the criminal justice system); LAFAVE & ISRAEL, *supra* note 12, at 836 (discussing the expansion of discovery); Brennan, *supra* note 21, at 2-3 (arguing for the continued expansion of criminal discovery); Nakell, *supra* note 8, at 449 (citing *Rex v. Holland*, 100 Eng. Rep. 1248 (K.B. 1792)) (stating that defendants had no right to discovery under common law).

44. See Nakell, *supra* note 8, at 439 (“The prosecutor, for his part, is well equipped with information gathering devices that include informal investigation by police . . . and even discovery directly from the accused himself.”). However, prosecutors have always needed the assistance of a judge to issue search and arrest warrants.

45. The notion of defense discovery has been roundly rejected by federal and state courts. See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (rejecting the notion that a defendant should “have the whole evidence against him to peek over at his leisure” because “the accused has every advantage”—including the right to plead the Fifth Amendment and the right to a jury trial); *State v. Tune*, 98 A.2d 881, 884 (N.J. 1953) (holding that “liberal fact-finding procedures are not to be used blindly where the result would be to defeat the ends of justice” and open the door for criminal defendants to use such information to procure perjured testimony, bribe or frighten witnesses either to change their testimony or to refuse to testify at all); *People ex rel. Lemon v. Supreme Court*, 156 N.E. 84, 84-87 (N.Y. 1927) (upholding the English common law prohibition of discovery); *People v. Jocelyn*, 29 Cal. 562, 564 (1866) (refusing to grant a new trial on the grounds that the defense was surprised by a witness not endorsed on the indictment, in part, because the defense did not allege the witness’s testimony was false); Michael Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 866 (1968) (“By 1928 it was safe to say that there was a ‘general rule that the accused has no right to the inspection or disclosure of evidence in the possession of the prosecution.’”) (quoting Annotation, *Right of Accused to Inspection or Disclosure of Evidence in Possession of Prosecution*, 52 A.L.R. 207 (1928)). But see *People v. Davis*, 18 N.W. 362, 363-64 (Mich. 1884) (involving an adultery prosecution where the prosecutor was required to provide the defense with the time and place of the alleged offense). The state’s interest

is that accused parties shall be acquitted, unless upon all the facts they are seen to be guilty, and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it.

Id.

46. See F. LEE BAILEY & HENRY B. ROTHBLATT, *INVESTIGATION AND PREPARATION OF CRIMINAL CASES* § 8.16, at 171 (2d ed. 1985) (“Most victims are reluctant to discuss a case with

order the prosecution to provide discovery, other than notice of the charges, to the defense.⁴⁷ This refusal effectively resulted in the prosecution's nearly exclusive possession of the information on which a criminal charge against a defendant was based unless prosecutors, or other law enforcement sources, chose to exercise their discretion to provide discovery to the defense voluntarily.⁴⁸

Gradually, as the view developed that ascertaining the facts to arrive at the truth outweighed other considerations, California courts and the legislature joined other states and the federal system in requiring the prosecution to disclose some information to the defense.⁴⁹ In contrast, there were only occasional efforts to create

defense counsel. To obtain an interview you must impress the victim with the need for fairness. Sometimes the prosecutor will be of assistance in arranging such an interview."); Rodney J. Uphoff, *Criminal Discovery in Oklahoma: A Call for Legislative Action*, 46 OKLA. L. REV. 381, 412 (1993) (noting that informal talks with the opponent's experts should be encouraged particularly by the "prosecutor given the superior access to expert assistance the State possesses in most criminal cases"); see also Paul C. Giannelli, "Junk Science": *The Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 105, 118-19 (1993) (discussing the need for a particular focus on the reliability of expert witnesses in criminal cases due to the unavailability of expert witness testimony for indigent defendants).

47. See *In re Hess*, 45 Cal. 2d 171, 175, 288 P.2d 5, 7 (1955) (recognizing that the defendant was entitled to sufficient notice of the charges to enable her to prepare and present a defense); cf. *People v. Tarantino*, 45 Cal. 2d 590, 598, 290 P.2d 505, 511 (1955) (dismissing the appellant's contention that the trial court erred in failing to order discovery of the prosecution's transcripts of the appellant's own statements not introduced into evidence on the grounds that the defense had neither taken advantage of the opportunity to access the evidence nor proved its relevance); *People v. Gallardo*, 41 Cal. 2d 57, 67, 257 P.2d 29, 35-36 (1953) (upholding the trial court's refusal to allow the defense to inspect a prosecution witness's notes that she examined prior to taking the stand); *People v. Bermijo*, 2 Cal. 2d 270, 276, 40 P.2d 823, 826 (1935) (upholding the trial court's refusal to order the prosecutor to allow the defense to see notes of the prosecutor's questions and the defendant's responses that were made shortly after the alleged crime, reasoning that the notes were not made by the defendant); *People v. Glaze*, 139 Cal. 154, 157, 72 P. 965, 966 (1903) (upholding the trial court's refusal to allow the defense access to an eye-witness' statement that the police reduced to writing). But see *People v. Riser*, 47 Cal. 2d 566, 586, 305 P.2d 1, 13 (1956) ("Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in this case."), *overruled on other grounds by People v. Morse* 60 Cal. 2d 631, 388 P.2d 33 (1964). See generally Thomas Havlena, *Proposition 115 and the Rebirth of Prosecutorial Discovery in California*, 18 W. ST. U. L. REV. 3 (1990) (describing the history of discovery in criminal cases in California).

48. Traditionally, prosecutors have enjoyed essentially automatic access to information obtained by law enforcement, public agencies, private citizens, and the suspect herself before the appointment or retention of counsel. See Nakell, *supra* note 8, at 439. "Even if [the defense] can learn the names of the witnesses against his client, those witnesses have already talked to the state's investigators and more frequently than not have been warned not to talk with anyone representing the accused." See Brennan, *supra* note 10, at 286.

49. See *Riser*, 47 Cal. 2d at 586, 305 P.2d at 13 (rejecting the argument that a complete ban on prosecutorial disclosure is justified by the risk of imbalance in advantage between the prosecution and defense because it loses sight of the truth-finding purpose of criminal law); see also Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 298 (1960) (discussing the parameters of pretrial discovery in criminal cases in California and criticizing the judiciary for ignoring statutory reforms that broadened a defendant's access to discovery materials).

Discovery in the federal system has given the defense little more than the constitutional bare

court-ordered discovery from the defense to the prosecution.⁵⁰ Until Proposition 115, these efforts were not successful. The following sections describe the gradual expansion of the timing and substance of court-ordered defense discovery and the brief period of prosecution discovery in California.

B. Court-Ordered Defense Discovery at Trial

In 1956, in *People v. Riser*,⁵¹ the California Supreme Court first embraced the notion that, at the time of trial, a defendant in a criminal case could compel the production of documents or other evidence possessed by the prosecution. The court explained that “[t]he decisions of this court have always impliedly recognized that on a proper showing a defendant in a criminal case can compel production when it becomes clear during the course of trial that the prosecution has in its possession relevant and material evidence.”⁵² In

minimum. See Brennan, *supra* note 21, at 9 (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) as holding that there is no general constitutional right to discovery). Consequently, federal rules serve as the primary basis for criminal discovery. See FED. R. CRIM. P. R. 16 (concerning discovery and inspection). In 1957, the defense in federal court was allowed to discover witness statements only for impeachment purposes. See Jencks Act, 18 U.S.C. § 3500 (1994). See generally FEDERAL DEFENDERS OF SAN DIEGO, INC., DEFENDING A FEDERAL CRIMINAL CASE Ch. 3 (1998 ed.) [hereinafter DEFENDING A FEDERAL CRIMINAL CASE] (discussing discovery in federal court); Brennan, *supra* note 10, at 279 (discussing whether civil pretrial discovery techniques should be extended to criminal trials); Brennan, *supra* note 21, at 9 (discussing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)); H. Lee Sarokin & William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1092 (1991) (stating that until 1946, no discovery rights existed at all); *Gordon v. United States*, 344 U.S. 414, 418 (1953) (concerning the production of credibility evidence); *United States v. Krulewitch*, 145 F.2d 76, 78 (2d Cir. 1944) (discussing a defendant’s access to inconsistent statements in the prosecutor’s possession); *Asgill v. United States*, 60 F.2d 776, 778 (4th Cir. 1932) (discussing access to letters written by a government witness); *People v. Walsh*, 186 N.E. 422, 425 (N.Y. 1933) (discussing access to prior inconsistent statements); *People v. Salimone*, 251 N.W. 594, 598-601 (Mich. 1933) (concerning access to prior statements of a prosecution witness). “The federal courts allow discovery only in isolated cases, and even then only when the moving party is able to particularize a need or interest.” Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 230 (1964) (discussing the federal discovery climate as it existed during the early 1960s). Although appellate courts articulated the principle that trial courts had the discretion to order discovery to the defense, like the *Riser* court they often refused to apply this principle to the cases before them. See *id.*

50. See *infra* notes 79-97 and accompanying text (discussing prosecutorial discovery).

51. 47 Cal. 2d 566, 305 P.2d 1 (1956), *overruled on other grounds by* *People v. Morse* 60 Cal. 2d 631, 388 P.2d 33 (1964).

52. See *id.*, 47 Cal. 2d at 585, 305 P.2d at 14. The cases cited for this proposition, however, like *Riser*, all denied discovery to the defense on the grounds that a proper showing had not been made. See *People v. Gallardo*, 41 Cal. 2d 57, 67, 257 P.2d 29, 35 (1953) (denying the defense access to a witness’s notes that she had referred to before taking the stand, but recognizing a right of inspection if “the party demanding the right of inspection lays a foundation by showing that the documents are in the possession of the government, were made by the government’s witness, and are contradictory of his present testimony as to relevant and important matters”); *People v. Bermijo*, 2 Cal. 2d 270, 276, 40 P.2d 823, 826 (1935) (refusing to order the prosecution to allow the defense to see the prosecutor’s notes of the defendant’s answers to questions made shortly after the alleged incident because the notes were not the

Riser, the defendant appealed a conviction imposing the death penalty and an order denying a new trial to the California Supreme Court.⁵³ Among various claims of prejudicial error,⁵⁴ the defense claimed that the trial court erred in denying the defense access to eyewitness statements that it wanted to use for purposes of impeachment.⁵⁵ The court concluded that “the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits.”⁵⁶ Although it found the denial of pre-trial discovery proper,⁵⁷ the *Riser* court stated that “[t]o deny flatly any right of production on the ground that an imbalance would be created between the advantages of the prosecution and defense would lose sight of the true purpose

statements of the defendant); *People v. Glaze*, 139 Cal. 154, 160, 72 P. 965, 967-68 (1903) (affirming the prosecution’s nondisclosure of an eyewitness’s statement, referred to on cross-examination, because it was not the witness’s own statement and there was no showing the document would be admissible); *Fletcher*, *supra* note 49, at 298-305 (demonstrating the reluctance of the state courts to apply the principle of discretionary discovery to particular cases).

53. *See Riser*, 47 Cal. 2d at 572, 305 P.2d at 4-5.

54. The defense claimed that the jurors were not impartial in assessing the punishment of the defendant, *see id.* at 573-76, 305 P.2d at 5-7, that some of the physical evidence was irrelevant, *see id.* at 576-78, 305 P.2d at 7-8, that the evidence of other crimes was prejudicial, *see id.* at 578-79, 305 P.2d at 8-9, that the prosecution failed to establish a chain of custody to admit properly other physical evidence, *see id.* at 579-81, 305 P.2d at 9-11, and that the jury received improper instructions, *see id.* at 581-84, 305 P.2d at 11-12.

55. *See id.* at 584, 305 P.2d at 12 (describing the defendant’s motion to order a subpoena *duces tecum* for witness statements, which were reported in a local newspaper, describing the man who committed the murder as having physical characteristics significantly different from the defendant). The defense moved to subpoena the statements because, on cross-examination, the witness made contradictory, perjurious statements. *See id.* at 584-85, 305 P.2d at 12. In declining to order defense discovery in this case, the trial court granted the prosecution’s request to vacate the subpoena on the grounds that the information sought was not admissible. *See id.* at 586, 305 P.2d at 13 (“Production has been denied, not on the ground that there was never any right to it, but because the requirements justifying production had not been met in the particular case.”); *id.* at 587, 305 P.2d at 14-15 (identifying the trial court’s error as illogical because “[o]bviously a defendant cannot show conclusively that a document is admissible without seeing it, and yet in order to see it he is told that he must show that it is admissible”).

56. *Riser*, 47 Cal. 2d at 586, 305 P.2d at 13.

57. The court stated that “to compel the prosecution to reveal its evidence beforehand would enable the defendant to secure perjured testimony and fabricate evidence to meet the state’s case.” *Id.* at 585, 305 P.2d at 13. The court observed that pretrial disclosure would also unfairly shift the advantage of the accused, who was already protected by the privilege against self-incrimination. *See id.* (citing *State v. Tune*, 98 A.2d 881 (N.J. 1953) (concerning a defendant’s right to inspection of a confession and other papers in the prosecutor’s files), *State ex rel. Robertson v. Steel*, 135 N.W. 1128 (Minn. 1912) (holding a defendant not entitled to inspect testimony furnished to the district attorney), and 6 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 475-76 (3d ed. 1940)). The *Riser* court recognized that disclosure during trial did not give rise to concerns about fabricating evidence and perjury. *See id.*

of a criminal trial, the ascertainment of the facts.”⁵⁸

C. Court-Ordered Pretrial Defense Discovery

One year later, in *Powell v. Superior Court*,⁵⁹ the California Supreme Court shifted the timing of defense discovery to the pretrial period. In *Powell*, the court found that the trial court erred in denying the defendant any opportunity to inspect his written confession prior to trial.⁶⁰ For the first time, the California Supreme Court not only recognized that the trial court had discretion to authorize pretrial disclosure in the interests of justice, but applied this principle to the case before it.⁶¹ In doing so, the court acknowledged the “evolving

58. *Id.* at 586, 305 P.2d at 13. Despite its strongly worded disassociation from the common law tradition of denying court-ordered defense discovery, the *Riser* court found the trial court’s error non-prejudicial and affirmed the defendant’s conviction for murder (and his death sentence). *See id.* at 588, 305 P.2d at 15 (finding that even if the witness’s inconsistent testimony were impeached, there existed sufficient physical evidence such as fingerprints to convict the defendant); *see also* *People v. Lawrence*, 149 Cal. App. 2d 435, 450-53, 308 P.2d 821, 830-31 (1957) (holding that the trial court did not err in refusing to order the prosecution to disclose during trial the name of an informant who had participated in the commission of the alleged offense because the defense indicated to the court a witness they wished to call was, in fact, the informant). *But see Riser*, at 592, 305 P.2d at 17 (Carter, J., dissenting) (arguing that the witness’s testimony was the most damaging and that the trial court’s error justified reversal of the trial court’s judgment and ordering a new trial). The trial court in *People v. Lawrence* was reversed because it granted the prosecutor’s objection to allowing this witness to testify, despite a defense offer of proof that the witness was the informant and at trial would contradict prosecution testimony. *See Lawrence*, 149 Cal. App. 2d at 449-50, 308 P.2d at 829. The *Lawrence* court held that a governmental privilege did not apply to an informant who participated in an offense; that person became a material witness. *See id.* at 450, 308 P.2d at 830.

59. 48 Cal. 2d 704, 312 P.2d 698 (1957).

60. *See id.* 707-08, 312 P.2d at 699-700 (stating that the court has the inherent power to permit pretrial inspection by an accused in the interest of justice (citing *Shores v. United States*, 174 F.2d 838, 844 (1949), and *State v. Cicienia*, 78 A.2d 568, 570-71 (N.J. 1951))); *Powell*, 48 Cal. 2d at 709, 312 P.2d at 701 (“If from the motion the document may be material, the right of inspection obtains.”). Consequently, to permit the defendant to refresh his recollection before trial, the court issued a mandate to restrain the respondent court from proceeding with the trial of the defendant and ordered that the defense be allowed to inspect and copy the defendant’s statements. *See id.* at 709, 312 P.2d at 701. *Compare id.* at 706, 312 P.2d at 699 (relating that the respondents admitted that the defendant’s statements were material and would be admissible at trial), *with Riser*, 47 Cal. 2d at 585, 305 P.2d at 13 (describing the prosecution’s motion to vacate the defendant’s subpoena on grounds that the evidence sought by the defense was not admissible).

61. In particular, the *Powell* court referred to *State v. Tippett*, 296 S.W. 132, 135 (Mo. 1927), in which the Court extended a rule allowing for the inspection of documents in the hands of civil opponents to defendants in criminal cases by granting access to witness statements for impeachment purposes. *See Powell*, 48 Cal. 2d at 708-09, 312 P.2d at 700-01. The *Powell* court found the reasoning of several states compelling:

[I]t nevertheless is a widely recognized rule that application for pretrial inspection of a signed confession or admission or transcript of statements of an accused may be made by the latter and is addressed to the sound judicial discretion of the trial court, which has inherent power to order such an inspection in the interest of justice.

Id. at 708, 312 P.2d at 700 (citations omitted). Furthermore, the *Powell* court stated:

The prosecuting attorney is both an officer of the state and of the court, and his duty extends no further than an impartial, fair, and just trial of defendant That it was desired that the state’s evidence remain undisclosed, partakes of the nature of a game,

concern of the United States Supreme Court for fairness in criminal procedure.”⁶²

Subsequent cases in the California Supreme Court ended the decade by “catapulting California into [the] national lead in developing criminal discovery.”⁶³ In the absence of statutory guidance⁶⁴ and initially encouraged by the federal courts,⁶⁵ the California courts continued to decrease prosecutorial discretion to withhold discovery from the defense. To give effect to the “fundamental principle that an accused is entitled to a fair trial,”⁶⁶ California courts expanded⁶⁷ and protected⁶⁸ the substance of defense

rather than judicial procedure. The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.

Id. at 709, 312 P.2d at 701 (quoting *State v. Tippett*, 296 S.W. 132, 135 (Mo. 1927)); *see also* *Walker v. Superior Court*, 155 Cal. App. 2d 134, 140, 317 P.2d 130, 134 (1957) (holding that the trial court did not abuse its discretion in not permitting a pretrial inspection of a witness’ statement in the sheriff’s possession); *Fletcher*, *supra* note 49, at 302 (“For some years the California courts had acknowledged the trial court’s power to grant inspection but had complacently affirmed trial court denials of pretrial inspections.”).

62. *See Powell*, 48 Cal. 2d at 708, 312 P.2d at 700.

63. David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56, 75 (1961); *see id.* at 74 (“Federal criminal discovery, far from being the leader, is now a lagger, certainly vis-à-vis California.”); *see also* LAFAVE & ISRAEL, *supra* note 12, at 52-60 (discussing history, development, and application of fundamental fairness). “[I]t was not until the 1960s, almost 100 years after [the Fourteenth] Amendment’s adoption, that the Court finally concluded that the amendment made applicable to the states most of those Bill of Rights guarantees relating to criminal procedure.” *Id.* at 46. For example, it was not until 1963 that the U.S. Supreme Court held that a criminal defendant has a constitutional right to representation by counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

64. *See* LAFAVE & ISRAEL, *supra* note 12, at 837-41 (discussing the historical debates surrounding the merits of discovery in criminal cases); *see also* L. DOUGLAS PIPES & WILLIAM E. GAGEN, JR., CALIFORNIA CRIMINAL DISCOVERY 59 (1995) (noting that there were no statutes regulating criminal discovery in California before 1975).

65. *See, e.g.*, *Dennis v. United States*, 384 U.S. 855, 873 (1966) (“In our adversarial system . . . it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.” (citing numerous commentators favoring broadened defense discovery)); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (stating, without reversing the conviction, that the suppression of a confession by the defendant’s companion favorable to the defendant until after the defendant had been convicted and sentenced was a violation of due process); *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (holding that the defendant had a right to discover before trial the identity of an undercover government informer “[w]here the disclosure of an informer’s identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause”); *see also Jencks v. United States*, 353 U.S. 657, 667 (1957) (holding that evidence need only be “relevant, competent, and outside of any exclusionary rule” to be discoverable by the defense at trial (quoting *Gordon v. United States*, 344 U.S. 414, 420 (1953)). *But see Brady*, 373 U.S. at 90-91 (finding that “trial strategy” was not raised to the level of a constitutional right for due process purposes); *cf. Jencks Act*, 18 U.S.C. § 3500 (1998) (responding to the *Jencks* decision by allowing witness statements to be discovered by the defense for impeachment purposes only); *Traynor*, *supra* note 49, at 241 (noting the reluctance of federal courts to order pretrial discovery). Various commentators have reviewed the history and impetus of trial court judges ordering discovery in criminal cases.

66. *Cash v. Superior Court*, 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959) (allowing a defendant pretrial inspection and copying of his own conversations with a police officer).

67. For example, California courts recognized the fairness of permitting defendants to

inspect and copy recorded statements made to law enforcement officers in order to refresh their recollection in preparation for trial. *See Vance v. Superior Court*, 51 Cal. 2d 92, 93, 330 P.2d 773, 775 (1958) (ordering pretrial disclosure to the defense of recorded statements by the complaining witness and the defendant to the police). The *Vance* court granted mandamus ordering that the defendant, who had been indicted, was entitled to listen to statements made by the complaining witness to the police as well as statements made by himself to police while listening to the complaining witness's tape. *See id.*; *see also Cash*, 53 Cal. 2d at 74, 346 P.2d at 407-08 (ordering that the defense be allowed, before trial, to inspect and copy statements recorded between the defendant and a law enforcement officer posing as a prospective accomplice); *Cordry v. Superior Court*, 161 Cal. App. 2d 267, 269, 326 P.2d 222, 223 (1958) (granting mandamus for pretrial inspection by the defense of the defendant's statements to law enforcement); *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 520-21, 327 P.2d 68, 73-74 (1958) (allowing pretrial inspection of the defendant's own statement to police but denying inspection of the co-defendant's statement to police because neither defendant had been present during the other's statement), *overruled by People v. Garner*, 57 Cal. 2d 135, 142, 367 P.2d 680, 684 (1961) (holding that pretrial discovery extended to a joint confession given by a defendant and his codefendant).

The courts also ordered disclosure of written statements that witnesses made to the police. *See Funk v. Superior Court*, 52 Cal. 2d 423, 424, 340 P.2d 593, 594 (1959) (allowing the defense, following a preliminary hearing, to inspect and copy witness statements made to the police). The court in *Funk* also found no sound basis to distinguish pretrial from trial discovery. *See id.* at 424, 340 P.2d at 593-94; *see also Tupper v. Superior Court*, 51 Cal. 2d 263, 265, 331 P.2d 977, 978 (1958) (denying a writ of prohibition for a magistrate's decision to exclude statements to the police from the preliminary hearing because there was no presumption that the trial court would deny appropriate relief); *Norton v. Superior Court*, 173 Cal. App. 2d 133, 134-36, 343 P.2d 139, 139-41 (1959) (granting pretrial disclosure of the names and addresses of three eyewitnesses learned of during a defense pretrial interview of the victim after noting that the defense did not know who they were). *But see People v. Cooper*, 53 Cal. 2d 755, 770, 349 P.2d 964, 973 (1960) (denying a "blanket" pretrial request by the defense for all statements in the possession of the prosecution). The court in *Cooper* reasoned that because the defense knew who the witnesses were and, therefore, had the opportunity to interview them, there was no indication that non-disclosure would harm the defense. *See id.* at 770, 349 P.2d at 973 (finding the defense needed a better cause for inspection than a mere desire to benefit from using information gained by the prosecution's efforts). The court noted, apparently with some disapproval of the delay, that the defendants had been indicted on June 11, 1959, and that an August 10 trial was set on July 29, but that the request for discovery was not made until July 31. *See id.* at 771, 349 P.2d at 924.

The California courts ordered disclosure of the identity of the informants. *See Castiel v. Superior Court*, 162 Cal. App. 2d 710, 711, 328 P.2d 476, 477 (1958) (granting mandamus ordering the prosecution to disclose the name of an informant who was a participant in the alleged crime to the defense prior to trial because the informant's identity was "material and substantial to an adequate defense"). The court affirmed its earlier decision, one that had reversed an earlier trial because the prosecution did not disclose to the defense the identity of the same informant. *See id.* The second *Castiel* court commented that nondisclosure prior to the second trial was only a delaying action designed to hinder defense preparation. *See id.* In its earlier decision, the *Castiel* court commented that undisclosed state's evidence constituted a game rather than a judicial proceeding. *See People v. Castiel*, 153 Cal. App. 653, 315 P.2d 79, 81 (1957) (citing *State v. Tippett*, 296 S.W. 132, 135 (Mo. 1927)).

The courts ordered disclosure of autopsy and lab reports, photographs, and physical evidence. *See Walker v. Superior Court*, 155 Cal. App. 2d 134, 139, 317 P.2d 130, 133-34 (1957) (finding that because the defense showed good cause despite no inherent right to defense discovery, the defense should have access to an autopsy report and a lab report). The *Walker* court observed that the autopsy report was public information and the defense had no means of access to the information discussed in the lab report. *See id.* *But see Schindler v. Superior Court*, 161 Cal. App. 2d 513, 521, 327 P.2d 68, 74 (1958), *overruled on other grounds by People v. Garner*, 57 Cal. 2d 135, 367 P.2d 680 (1961) (declining to order that the defense have access to an autopsy report because the defendant had not requested access). However, the *Schindler* court did order that medical specimens taken from the body of the deceased be made available to the defense. *See id.* at 520-21, 327 P.2d at 73-74 (noting that an independent examination of

discovery, sanctioned violations,⁶⁹ defined limitations,⁷⁰ and struck

specimens might disprove the prosecution's theory of the cause of death). The court further held that the trial court's denial of a defense request to hire a pathologist at county expense was not an abuse of discretion because the trial court indicated it would do so if it were legal. *See id.* at 521, 327 P.2d at 74 (finding the decision to be solely within the discretion of the trial court). The courts ordered disclosure of photographs of the defendant for the purpose of impeaching a victim witness. *See Norton v. Superior Court*, 173 Cal. App. 133, 135, 343 P.2d 139, 140 (1959). At the preliminary hearing, the prosecutor had two pictures that the preliminary hearing witnesses had seen earlier. They had not been able to identify the defendant after viewing the pictures. The *Norton* court ordered the prosecutor to produce the pictures for the defense before trial. *See id.* (finding that petitioner had a legitimate reason to use the photographs).

Pretrial discovery was extended to juvenile delinquency proceedings in 1970. *See Joe Z. v. Superior Court*, 3 Cal. 3d 803, 804, 478 P.2d 26, 30 (1970) (holding that a court in a juvenile proceeding had discretion to order the prosecution to disclose to the defense "a minor's statements, admissions, recorded conversations, and the notes and memoranda concerning those conversations . . . even though the minor fails to allege non-recollection"). While recognizing that *Brady* required disclosure of exculpatory information contained in statements of the minor's "co-defendants" whose cases were no longer pending, the court held that the prosecution had no duty to provide the defense with information regarding witnesses the prosecution did not intend to call at trial. *See id.* at 805, 478 P.2d at 31.

68. *See, e.g., Walker*, 155 Cal. App. at 141, 317 P.2d at 134 (noting that the sheriff had told a witness not to discuss the case with anyone and stating that "a court can and should order [a] person to cease interfering with defense counsel's right to interview a witness"); *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 327 P.2d 68 (1958) (ordering pretrial inspection of the defendant's own statement to the police, but denying inspection of the codefendant's statement), *overruled by People v. Garner*, 57 Cal. 2d 135, 367 P.2d 680 (1961).

69. *See People v. McShann*, 50 Cal. 2d 802, 809-10, 330 P.2d 33, 37 (1958) (reversing a conviction for failure to disclose the name of an informant during cross-examination); *People v. Carter*, 48 Cal. 2d 737, 312 P.2d 665 (1957) (reversing a capital case because the prosecution did not disclose to the defense a statement by the defendant's wife made to the police that was used to cross-examine the wife at trial). The *McShann* court held that the informant became a material witness on the issue of guilt after the prosecution introduced telephone conversations involving the informant. *See* 50 Cal. 2d 802, 809-10, 330 P.2d 33, 37; *People v. Durazo*, 52 Cal. 2d 354, 355, 340 P.2d 594, 595 (1959) (en banc) (reversing a conviction for failure to disclose the name of an informant on cross-examination during trial); *People v. Chapman*, 52 Cal. 2d 95, 98-99, 338 P.2d 428, 430 (1959) (en banc) (reversing a conviction for failure by the prosecution to disclose a witness's statement prepared by the police and signed by the witness after the witness admitted the statement was related to the witness's trial testimony). The court in *Chapman* cited *Jencks* in holding that the defense is not required to show any inconsistency between the statement and trial testimony. *See id.* (stating that requiring proof of a conflict between a witness's two statements may deny the accused the benefit of relevant and material evidence). *But cf. Mitchell v. Superior Court*, 50 Cal. 2d 827, 830, 330 P.2d 48, 50 (1958) (en banc) (denying relief despite finding error in denying disclosure of the identity of two informants at a preliminary hearing because other competent evidence existed to support holding the defendant to answer for trial).

70. Limitations included requiring the defense to establish good cause, a concern for undue administrative burdens on the prosecution, the assertion of a privilege, and finding that the defense had equal access to the information. Concerns for defense perjury and fabricated defenses faded. *See People v. Cooper*, 53 Cal. 2d 755, 770, 349 P.2d 964, 973 (1960) (denying pretrial access by the defense to witness statements in the possession of the prosecution). The court in *Cooper* reasoned that because the defense knew the witnesses' identities and had the opportunity to interview them, there was no indication that non-disclosure would harm the defendant's case. *See id.*; *see also People v. Terry*, 57 Cal. 2d 538, 560-61, 370 P.2d 985, 998 (1962) (en banc) (upholding the trial court's modification of the defense request for the names, addresses, and statements of all eyewitnesses who had not testified at the preliminary hearing in the possession of the prosecution). The court held that the trial court acted within its discretion to require the prosecution to disclose only the statements of witnesses who testified at the preliminary hearing or who would testify at trial, as well as copies of police

balances.⁷¹ Concurrent with the development of court-ordered discovery and in furtherance of a fair trial, California courts ultimately recognized a prosecutor's duty to disclose information to the defense independent of either a defense request or a court order.⁷²

*D. Court-Ordered Preliminary Hearing and Pre-Preliminary Hearing
Defense Discovery*

By 1960, despite some opposition⁷³ and in contrast to the federal system,⁷⁴ the California judiciary had advanced the timing of some

reports for all charged crimes because the defense had not shown good cause for the remaining information and the trial court was willing to consider further requests from the defense. *See id.* at 561, 370 P.2d at 999. *But see* *People v. Lopez*, 60 Cal. 2d 223, 241-42, 384 P.2d 16, 26 (1963) (en banc) (describing a police show-up conducted in an auditorium seating 400 people following arraignment and before the preliminary hearing). The court denied a defense request to attend the show-up, and held that defense discovery could still be delayed if the prosecution could demonstrate good cause. *See id.* at 242, 384 P.2d at 27 (distinguishing between the right to counsel at pre-trial stages as opposed to "purely investigatory" phases). The trial court granted the prosecution's request to keep the names of prospective witnesses confidential until twenty-four hours before trial because of concerns for the witnesses' safety and the possibility of the defense influencing their testimony. *See id.* at 244, 384 P.2d at 28. The trial court did not consider the alternative of ordering disclosure to defense counsel with an admonishment not to disclose the information to the defendants. *See id.* at 245-46, 384 P.2d at 28-29.

71. The defense could require the complaining witness in a sex case to undergo a psychiatric examination. *See Ballard v. Superior Court*, 64 Cal. 2d 159, 171-77, 410 P.2d 838, 846-49 (1966) (holding that the trial court had discretion in sex cases to require the complaining witness to undergo a psychiatric examination, and authorizing a comment to the jury if the witness refused to undergo such examination). "Ballard motions" were eliminated in 1980. *See* CAL. PENAL CODE § 1112 (West 1985) (providing that "the trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility").

72. *See In re Ferguson*, 5 Cal. 3d 525, 534-35, 487 P.2d 1234, 1240-41 (1971) (remanded on grounds that the prosecution's failure to disclose a complaining witness's prior convictions denied the defense a chance to uncover and present credibility evidence to the jury); *see also* *People v. Morris*, 46 Cal. 3d 1, 756 P.2d 843 (1988) (holding that the prosecution's failure to disclose four letters for use at trial and discussing leniency for a prosecution witness's pending criminal matters was a violation of due process); *People v. Ruthford*, 14 Cal. 3d 399, 534 P.2d 1341 (1975) (en banc) (reversing a defendant's conviction due to the prosecutor's affirmative denial of the existence of testimonial inducements, thus denying the defense the opportunity to impeach fully a key prosecution witness). The court in *Morris* did not reverse, however, because the jury heard other impeachment evidence relating to this witness. *See Morris*, 46 Cal. 3d at 34, 756 P.2d at 864 (condemning prosecutorial misconduct but finding reversal not warranted). On a national level, the American Bar Association adopted provisions which expanded defense discovery to include the names and statements of prospective witnesses. *See* ABA MINIMUM STANDARDS ON DISCOVERY AND PROCEDURE BEFORE TRIAL Part II (1970) (enlarging the scope of information available during defense discovery). In 1980, the ABA expanded a prosecutor's disclosure obligation to include "all the material and information within the prosecutor's possession or control." ABA STANDARDS FOR CRIMINAL JUSTICE § 11-2.1 (2d ed. 1980).

73. *See* Traynor, *supra* note 49, at 246 n.98 (criticizing discovery before the preliminary hearing).

74. Federal pretrial discovery was, and still is, limited and intended to occur in anticipation of or during trial. *See* FED. R. CRIM. P. 16; *see also* Jencks Act, 18 U.S.C. § 3500 (1994) (stating

pretrial defense discovery to the preliminary hearing stage in felony cases, recognizing the preliminary hearing itself as a useful discovery device.⁷⁵ Over the next three decades, the timing of defense discovery was advanced by the courts to a period before the preliminary hearing,⁷⁶ and by the legislature to the arraignment

that the statements and reports of the witness for the federal government shall not be subject to discovery until the said witness has testified on direct examination in trial); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) (limiting the extent to which the defendant may seek pretrial disclosure of information that could contradict unfavorable testimony); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (holding that the prosecution must disclose to the defense both impeachment evidence and exculpatory evidence that is material); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (ruling that the prosecution's suppression of evidence that is favorable to the accused during pre-trial discovery that is material to guilt or punishment violates due process); *Roviaro v. United States*, 353 U.S. 53, 61 (1957) (limiting the scope of an informer's privilege in pretrial discovery in federal cases). See generally DEFENDING A FEDERAL CRIMINAL CASE, *supra* note 49, ch. 3 (discussing discovery in the federal courts).

75. See, e.g., *Mitchell v. Superior Court*, 50 Cal. 2d 827, 829, 330 P.2d 48, 50 (1958) (stating that disclosure at the preliminary hearing of the names of two informants enabled the defendant to cross-examine the prosecution's witnesses "to show there is no reasonable cause to commit him to trial and thus avoid the degradation and expense of a criminal trial"); see also, e.g., *Priestly v. Superior Court*, 50 Cal. 2d 812, 819, 330 P.2d 39, 43 (1958) (asserting that disclosure of an informant was necessary at the preliminary hearing to determine whether evidence acquired by a search is sufficient to support a belief of guilt).

Magistrates had the power to order the prosecution to provide discovery to the defense even before preliminary hearings to facilitate the determination of probable cause. See *Hoffman v. Superior Court*, 29 Cal. 3d 480, 484, 629 P.2d 14, 16 (1981) (citing several cases, including the court's 1958 decision in *Priestly*, that assume the magistrates' ability to direct limited discovery prior to preliminary hearings). By 1970, the defense could request the disclosure of the identity of an informant at the preliminary hearing. See *Eleazer v. Superior Court*, 1 Cal. 3d 847, 849, 464 P.2d 42, 43 (1970) ("[W]hen an informer becomes a material witness to the crime, the prosecution must demonstrate that it has attempted in good faith to locate him; the duty to disclose the identity of the informer cannot be evaded by deliberate failure to acquire information necessary to find him."); *id.* at 853, 464 P.2d at 46 (stating that due process required the prosecution to obtain sufficient information to allow either the defense or prosecution to subpoena the informant for trial); see also *Hawkins v. Superior Court*, 22 Cal. 3d 584, 588, 586 P.2d 916, 918-19 (1978) (holding that a preliminary hearing is a "critical stage" in the criminal process); *People v. Goliday*, 8 Cal. 3d 771, 779, 505 P.2d 537, 543 (1973) ("The prosecution . . . owed a duty to disclose the 'identity' of the two eyewitness informers at the preliminary hearing as well as at trial[]" whether or not they were paid informers); *Jennings v. Superior Court*, 66 Cal. 2d 867, 879-80, 428 P.2d 304, 312 (1967) (recognizing the right to present an affirmative defense at a preliminary hearing).

76. The defense could request a pretrial lineup to test the identification of the accused prior to a preliminary hearing. See *Evans v. Superior Court*, 11 Cal. 3d 617, 625, 522 P.2d 681, 686 (1974) (holding that due process required that a defense request for a pretrial lineup could be required where "eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve"). The court in *Evans* relied on the concerns for reciprocity expressed by the United States Supreme Court in *Wardius v. Oregon*, 412 U.S. 470 (1973), stating that the defense should have equal access to a lineup procedure. See *Evans*, 11 Cal. 3d at 623, 522 P.2d at 685. The court stressed the importance of timeliness, suggesting that a motion "be made as soon after arrest or arraignment as practicable." See *id.* at 626, 522 P.2d at 687. The court noted that "the People cannot escape a responsibility to disclose merely by passive conduct or the failure to acquire precise knowledge sought by but unavailable to an accused." *Id.* at 624, 522 P.2d at 685; see also *Holman v. Superior Court*, 29 Cal. 3d 480, 485-61, 629 P.2d 14, 17 (1981) (holding that discovery could be ordered for the defense before the preliminary hearing). For discovery to be ordered prior to the preliminary hearing it must be shown to be:

reasonably necessary to prepare for the preliminary examination, and that discovery

stage⁷⁷ in order “to facilitate the ascertainment of the facts and a fair trial.”⁷⁸

will not unduly delay or prolong that proceeding. Pretrial discovery is aimed at facilitating the swift administration of justice, not thwarting it Subject to the foregoing qualifications, however, we conclude that a reasonable, limited discovery directed to the restricted purpose of the preliminary examination should be available, in the discretion of the magistrate, prior to that examination.

Id.

77. From 1975 until Proposition 115’s passage in 1990, the prosecution was required by statute, in felony cases, to make available to the defense the police, crime, and arrest reports no later than two calendar days after arraignment. *See* CAL. PENAL CODE § 859 (West 1985).

The prosecuting attorney shall deliver to, or make accessible for inspection and copying by, the defendant or counsel, copies of the police, arrest, and crime reports, upon the first court appearance of counsel, or upon a determination by a magistrate that the defendant can represent himself or herself. If unavailable to the prosecuting attorney at the time of that appearance or determination, the reports shall be delivered within two calendar days.

Id.

Offices of the prosecution typically complied by providing copies of these reports for a nominal charge, making them available for copying by the defense, or by mailing copies to the offices of defense counsel. *See* *People v. Aguirre*, 193 Cal. App. 3d 1168, 1173, 238 Cal. Rptr. 750, 752 (1987) (emphasizing the importance of timely disclosure of reports pursuant to section 859, but finding that the prosecution’s failure to disclose in this case did not deprive the defendant of a fair hearing). Prosecutors in misdemeanor cases were required to make available the same information. *See* CAL. PENAL CODE § 1430 (West 1985). As the period for defense discovery expanded in breadth and became available earlier in the criminal justice process, the right to counsel also broadened. In 1951, the accused became entitled to seek court-appointed counsel at the preliminary hearing stage. *See id.* § 859 (West 1985) (“If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him.”); *see also* *Coleman v. Alabama*, 399 U.S. 1 (1970) (holding that a preliminary hearing is a “critical stage” in a criminal proceeding that requires the assistance of counsel); *People v. Williams*, 124 Cal. App. 2d 32, 34, 268 P.2d 156, 158 (1954) (holding that the defendant may not be examined unless represented by counsel or counsel is waived).

78. *Pitchess v. Superior Court*, 11 Cal. 3d 531, 535, 522 P.2d 305, 308 (1974). The courts exercised their discretion to liberalize the ability of the defense to discover evidence.

[Although] the right of an accused to seek discovery in the course of preparing his defense to a criminal prosecution is a judicially created doctrine evolving in the absence of guiding legislation[.] . . . [a] defendant’s motion to discover is addressed solely to the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand.

Id. (citations omitted). *See, e.g., City of Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 89, 776 P.2d 222, 231 (1989) (finding no personal knowledge is required to show good cause regarding a defendant’s motion for discovery); *Pitchess*, 11 Cal. 3d at 535, 522 P.2d at 307-08 (holding that the trial court did not abuse its discretion in issuing a subpoena *duces tecum* for the disclosure to the defense of law enforcement records regarding several officers’ propensity for violence, where officers were complaining witnesses).

The defense could discover the “rap sheet” of a prosecution witness. *See Hill v. Superior Court*, 10 Cal. 3d 812, 819, 518 P.2d 1353, 1356-58 (1974) (holding that the defense had shown good cause for the trial court to order the prosecution to provide the defense with copies of the felony conviction records of a prosecution eyewitness whose “credibility was likely to be critical to the outcome of the trial”). A prior felony conviction was admissible to attack the credibility of a witness. CAL. EVID. CODE § 788 (West 1995 & Supp. 1998). However, the *Hill* court did not hold that felony conviction records must be disclosed in every case. *See id.* at 819, 518 P.2d at 1358 (“[W]e do not hold that good cause exists in every case in which a defendant . . . seeks discovery of . . . any “rap sheet” of prosecution witnesses.”). The court was concerned about the administrative burden of providing felony conviction records in every case and of such discovery deterring people from reporting crime. *See id.* (noting the prosecution’s concern that defendants would routinely request “rap sheets”). *But see In re Ferguson*, 5 Cal. 3d 525, 531, 487

E. Court-Ordered Prosecution Discovery

In 1962, the California Supreme Court departed from well-established tradition⁷⁹ by developing the doctrine of prosecutorial discovery. In *Jones v. Superior Court*,⁸⁰ the court upheld the trial court's

P.2d 1234, 1238 (1971) (ordering a new trial because the prosecutor was aware of, but did not disclose to the defense, the criminal record of a witness). A prosecutor's duty is to "fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial" with or without a defense request. *See id.* 531, 487 P.2d at 1238.; *see also* *Murguia v. Municipal Court*, 15 Cal. 3d 286, 540 P.2d 44 (1975) (involving six members of the Union Farm Workers Union charged with misdemeanors who brought a motion to dismiss the charges as violating equal protection clauses of both federal and state constitutions). The court in *Murguia* relied on *Hill* and *Pitchess* in holding that the trial court erred in barring access to documentary and testimonial law enforcement information that would support a discriminatory prosecution claim, and recognizing the existence of the defense of invidious discrimination to a criminal charge. *See id.* 305 at 540 P.2d at 57.

The defense could obtain discovery in order for a magistrate to consider adequately the reduction of a felony to a misdemeanor. *See Stanton v. Superior Court*, 193 Cal. App. 265, 267, 239 Cal. Rptr. 328, 329 (Cal. 1987) (holding that "the prosecution's failure to disclose evidence material to defense cross-examination of eyewitnesses at a preliminary hearing" denied the defense a substantial right). The undisclosed reports impugned the credibility of prosecution witnesses and contained exculpatory information relevant to the defendant's statutory motion to have the felony charge reduced to a misdemeanor. *See* CAL. PENAL CODE § 17(b)(5) (West Supp. 1998). The court in *Stanton* relied on *Jennings v. Superior Court*, 66 Cal. 2d 867 428 P.2d 304 (Cal. 1967). *See Stanton*, 193 Cal. App. at 272, 239 Cal. Rptr. at 333 ("Nondisclosure of evidence impeaching eyewitnesses on material issues is the deprivation of a substantial right under *Jennings*."). Discovery would be ordered if the information would reasonably assist in preparing a defense. *See People v. Memro*, 38 Cal. 3d 658, 677, 700 P.2d 446, 459 (Cal. 1985) (quoting *Pitchess v. Superior Court*, 11 Cal. 3d 531, 535, 522 P.2d 305, 308). The privilege protecting medical or psychiatric records of a prosecution witness could be overcome by the defendant's right to a fair trial. *See People v. Boyette*, 201 Cal. App. 3d. 1527, 1538, 247 Cal. Rptr. 795, 801 (1988) (reversing because the trial judge had refused a defense motion to disclose the medical and psychiatric records of a minor who was a witness to the alleged burglary). Citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the court in *Boyette* required the trial court to review the records to determine whether the privilege should give way. *See Boyette*, 201 Cal. App. 3d at 1534, 247 Cal. Rptr. at 798.

79. *See Nakell, supra* note 8, at 479-514, (providing a history of prosecutorial discovery, dating back to *Boyd v. United States*, 116 U.S. 616 (1886)). Prosecutorial discovery allows the government to supplement its investigative resources by formally requesting some limited types of information directly from the defendant. *See id.* at 479. Unlike defense discovery, prosecutorial discovery must be tailored to accommodate defendant's Fifth Amendment right to be free from self-incrimination. *See id.* at 479-80 (listing three notable proposals for limiting prosecutorial discovery).

80. 58 Cal. 2d 56, 372 P.2d 919 (1962). In *Jones* the court reviewed the trial court's granting of a prosecutor's motion for discovery of information in the possession of the defense. *Id.* at 58-59, 372 P.2d at 920. In moving for a continuance of a trial on the charge of rape, the defense disclosed that more time was necessary to prepare a defense based on impotence. *See id.* The prosecution moved for discovery of the names and addresses of all the doctors subpoenaed to testify on the issue of impotence, the names and addresses of all doctors who had treated the defendant, all reports relating to the defendant's impotence, and all X-rays taken after the defendant's injuries. *See id.* The trial court ordered disclosure. *See id.* The California Supreme Court upheld the trial court order with the exception of the names and addresses of physicians to whom the defendant had been sent by his attorney and medical reports and X-rays of the defendant, on the grounds the prosecutor's request, in part, violated the privilege against self-incrimination and the attorney-client privilege. *See id.* at 61, 372 P.2d at 921. The court concluded that the prosecution was entitled to discover names of witnesses and any reports the defense intended to present at trial in support of his affirmative defense. *See id.* at 61, 372 P.2d at 922. The court relied on statutory provisions upheld in other states

grant of a prosecutor's motion for pretrial discovery of information in the possession of the defense.⁸¹ Justice Traynor, as he had written in *Riser*, concluded that the defense, like the state, "has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case."⁸² Upon determining that disclosure of the basis for an affirmative defense before trial would not assist the prosecution in preparing its case-in-chief but merely advance the timing of a disclosure that would already be made at trial, the court found that discovery "should not be a one-way street."⁸³ The court rejected the notion that defense discovery was required by due process, and therefore not available to the prosecution, and concluded that defense discovery was a procedural matter.⁸⁴ In 1969,

requiring disclosure of alibi witnesses. *See id.* at 61, 372 P.2d at 922.

81. *See id.* at 61, 372 P.2d at 922 (holding that the "prosecution is entitled to discover the names of the witnesses petitioner intends to call and any reports and X-rays he intends to introduce in evidence in support of his affirmative defense of impotence in a rape trial"). The appellate court, however, denied disclosure of the names and addresses of physicians to whom the defendant had been sent by his attorney and medical reports and X-rays of the defendant, on the grounds the prosecutor's request, in part, violated the privilege against self-incrimination and the attorney-client privilege. *See id.* at 60-61, 372 P.2d at 921-22. *See generally* Havlena, *supra* note 47 (discussing the history of prosecutorial discovery); Holden, *supra* note 29, at 1800-02 (explaining the advantages of reciprocal discovery).

82. *Jones*, 58 Cal. 2d at 59, 372 P.2d 920. This language was adopted thirty years later by Proposition 115 and upheld in *People v. Izazaga*, 54 Cal. 3d 356, 815 P.2d 304 (1991).

83. *See Jones*, 58 Cal. 2d at 61-62, 372 P.2d at 922; *see also id.* at 60, 372 P.2d at 921 (asserting that due process does not require that pretrial discovery only benefit defendants). In support of permitting prosecutorial pretrial discovery, the appellate court relied on statutory provisions upheld in other states requiring disclosure of witnesses to be called to testify for a defendant, such as alibi witnesses. *See id.* at 62, 372 P.2d at 922 (stating that such pretrial disclosure does not pose any harm to the defendant because the information will be disclosed anyway). The dissent felt prosecutorial discovery should be a legislative matter. *See id.* at 67, 372 P.2d at 926 (quoting *Jones v. Superior Court (County of Nevada)*, 17 Cal. Rptr. 575, 578-79 (1961) (Pierce, J., concurring) ("[I]f the innovation is to come it should be the product of the lawmakers not of the courts")). Several states either had or would soon have statutes or court decisions requiring the defense to notice the prosecution of an intent to rely on an alibi defense. *See id.*; *see also* *Williams v. Florida*, 399 U.S. 78, 82 n.11 (1970) (recognizing that at least 16 states had some form of alibi notice requirements); *People v. Lopez*, 60 Cal. 2d 223, 244, 384 P.2d 16, 28 (Cal. 1963) (holding that the lower court's order requiring defendants to disclose the names and addresses of prospective alibi witnesses did not deprive defendants of a fair trial); Holden, *supra* note 29, at 1740-41 n.138 (noting that, although *Jones* marked California's adoption of prosecutorial discovery, fourteen other states had signaled their approval for the doctrine by promulgating notice-of-alibi rules, which required defendants to notify the prosecution of their intention to use an alibi defense); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567 (1986) (criticizing judicial expansion of prosecutorial discovery after the *Williams* and *Wardius* decisions as diminishing Fifth and Sixth Amendment protections for defense secrets and confidences).

84. *See Jones*, 58 Cal. 2d at 59-60, 372 P.2d at 921. *But see id.* at 62-63, 372 P.2d at 922-23 (Peters, J., dissenting in part) (arguing that pretrial prosecutorial discovery violates constitutional guarantees against self-incrimination); *id.* at 68, 372 P.2d at 926 (Dooley, J., dissenting) ("If the defendant's traditional freedom of action is thus to be curtailed, that curtailment seems to me to be preeminently a legislative and not a judicial function."); *see also* *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 321, 466 P.2d 673, 674 (1970) (cautioning against extending *Jones* beyond its own facts); *People v. Lopez*, 60 Cal. 2d 223, 244-45, 384 P.2d 16, 28 (Cal. 1963) (finding the defendants were not denied a fair trial by a court order requiring the

the California Supreme Court expanded the doctrine of prosecutorial pretrial discovery in *People v. Pike*.⁸⁵ There the court stated that “[d]iscovery enables the prosecution to perform its trial function more effectively.”⁸⁶

In 1970, without expressly overruling either decision, the California Supreme Court retreated from its rulings in *Jones* and *Pike*. In *Prudhomme v. Superior Court*,⁸⁷ the court articulated a more stringent standard to govern prosecution requests for discovery from the defense.⁸⁸ The court limited any prosecutorial discovery to situations where “it clearly appear[s] from the face of the order or from the record below that the information demanded from petitioner cannot possibly have a tendency to incriminate him.”⁸⁹ The procedural efficiency that concerned the court in *Riser*, *Jones*, and *Pike* gave way to the defendant’s privilege against self-incrimination.⁹⁰ Prohibiting any

production of the names of alibi witnesses).

85. 71 Cal. 2d 595, 605, 455 P.2d 776, 782 (1969) (Peters, J., dissenting) (reviewing whether it was prejudicial error to require the defense to supply names and addresses and expected testimony of defense witnesses to the prosecution). Compare *id.* at 604, 455 P.2d at 781 (allowing prosecution discovery of the names, addresses, and expected testimony of trial defense witnesses), with *Jones*, 58 Cal. 2d at 61, 372 P.2d at 922 (allowing the prosecution to discover the names of witnesses that the petitioner intended to call and any reports and x-rays the defense intended to introduce in preparation of the defense’s affirmative defense).

86. *Id.* (quoting *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919 (1962)). In his dissenting opinion, Justice Peters accurately noted that *Jones* did not extend beyond the disclosure of affirmative defense witnesses to the prosecution. See *id.* at 785, 71 Cal. 2d at 610 (Peters, J., dissenting). Responding to the majority’s belief that disclosure would promote a more effective prosecution, Peters retorted: “So would the process of the inquisition, the rack and the screw and all other forms of coerced confessions. . . . [U]ntil today it has never been implied, far less held, that constitutional and statutory rights may be forgotten or disregarded simply because . . . to do so renders the prosecution more effective.” *Id.* at 611, 455 P.2d at 785-86 (Peters, J., dissenting). Despite the *Jones* decision limiting disclosure to only affirmative defense information to avoid bolstering the prosecution’s case-in-chief, the court in *Pike* did not address how such a broad rule would comport with constitutional protections against self-incrimination, an issue addressed in *Jones*. See *id.* at 611-12, 455 P.2d at 786 (Peters, J., dissenting).

87. 2 Cal. 3d 320, 327, 466 P.2d 673, 678 (1970).

88. See *id.* The prosecution in *Prudhomme* sought, and the trial court ordered, discovery from the defense of the names, addresses, and expected testimony of witnesses the defense intended to call at trial. See *id.* at 322, 466 P.2d at 674. The same request was made in *Pike*. See *Pike*, 71 Cal. 2d at 595, 455 P.2d at 776. In granting prohibition against enforcement of a pretrial prosecutorial discovery order of the names, addresses and expected testimony of defense witnesses, the *Prudhomme* court noted that the requested information exceeded disclosure of affirmative defense information as in *Jones*. See *Prudhomme*, 2 Cal. 3d at 327, 466 P.2d at 678 (finding that the discovery order violated the petitioner’s constitutional rights and, thus, was void and unenforceable).

89. *Prudhomme*, 2 Cal. 3d at 322, 466 P.2d at 674. This rule applied irrespective of whether the information sought related to an affirmative defense or general defense information. See *Bradshaw v. Superior Court*, 2 Cal. 3d 332, 333, 466 P.2d 680, 681 n.3 (1970) (“If the evidence might possibly incriminate petitioners, they cannot be compelled to disclose it at any time prior to its actual use at trial. As to such incriminatory evidence, petitioners must be permitted to wait until the last moment before deciding whether or not to introduce it at trial.”).

90. See *Bradshaw*, 2 Cal. 3d at 323, 466 P.2d at 674-75 (invalidating a pretrial discovery order compelling disclosure to the prosecution of the defense witness information because the

disclosure that would lighten the prosecution's burden of proof was paramount to the *Prudhomme* court in light of the pending *Williams v. Florida*⁹¹ matter in the United States Supreme Court.⁹²

information could incriminate the defendant). In 1964, the United States Supreme Court held that the privilege against self-incrimination embodied in the Fifth Amendment was applicable to the states. *See Malloy v. Hogan*, 378 U.S. 1 (1964).

91. 399 U.S. 78 (1970). Eight years after *Jones* and two months after *Prudhomme*, the Supreme Court adopted the *Jones* court's reasoning when it upheld a Florida discovery statute. The law required the defense to give notice of an alibi defense to the prosecution ten days before trial and to disclose the names and addresses of alibi witnesses the defense intended to call and any information regarding where the defendant was at the time of the alleged incident. *See id.* at 79 (citing FLA. RULE CRIM. PROC. § 1.200). The prosecution was then required to disclose to the defense within five days the names and addresses of witnesses to be called to rebut the defense. *See id.* Both sides were under a continuing duty to disclose; failure to do so could result in the trial court preventing each side from presenting an alibi defense or rebuttal. *See id.* The Florida statute specifically authorized the court to waive this discovery rule for good cause. *See id.* at 80 n.6 (citing FLA. RULE CRIM. PROC. § 1.200). The *Williams* court noted that notice-of-alibi statutes dated back to 1927 and existed in 15 other states besides Florida. *See id.* at 81-82. The court stated that "[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." *Id.* at 81. The court reasoned, like the *Jones* court, that because the prosecution was entitled to a continuance to prepare rebuttal evidence if the defense put on an alibi defense, then accelerating the timing of disclosure eliminated the "inefficiency" created by "surprising" the prosecution, without violating the defendant's privilege against self-incrimination. *See id.* at 86. Chief Justice Burger, in a concurring opinion, noted that notice-of-alibi statutes might encourage dispositions without trial, which he viewed as a benefit to overworked prosecutors, defense counsel, and courts. He stated:

The prosecutor upon receiving notice will, of course, investigate prospective alibi witnesses. If he finds them reliable and unimpeachable he will doubtless re-examine his entire case and this process would very likely lead to dismissal of the charges. In turn he might be obliged to determine why false charges were instituted and where the breakdown occurred in the examination of evidence that led to a charge.

Id. at 105 (Burger, C.J., concurring). Justice Douglas, however, in an emphatic dissent, recognized that while the defense might prepare a defense of alibi, it might never be offered. *See id.* at 109 (Douglas, J., concurring in part and dissenting in part). He observed that "[a]ny lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about." *Id.* Therefore, Justice Douglas predicted the majority view could be extended to require the defense to produce information not intended to be introduced at trial. *See id.* at 115. In contrast to the Chief Justice's remarks, Justice Douglas stated that "[t]here is no need to encourage defendants to take actions they think will help them If a defendant thinks that making disclosure of an alibi before trial is in his best interests, he will obviously do so." *Id.* at 111 (Douglas, J., concurring in part and dissenting in part); *see also* Mosteller, *supra* note 83, at 1577 (discussing the status of reciprocal discovery in other states).

92. *See Prudhomme*, 2 Cal. 3d at 323, 466 P.2d at 675. The court was cognizant of changes in the legal climate since *Jones*. The Fifth Amendment's privilege against self-incrimination "is now an element of due process protected against state action by the Fourteenth Amendment . . . ; the prosecution and trial court are now forbidden to comment or instruct upon the accused's silence, or his reliance upon the privilege . . . ; and the application of the privilege to the accusatory stage has been considerably broadened." *Id.* (citations omitted). The court in *Prudhomme* also noted the 1966 advent of Rule 16(c) of the Federal Rules of Criminal Procedure, providing for some prosecution discovery of certain documents, but not witnesses. *See id.* 2 Cal. 3d at 324, 466 P.2d at 675. The court also referred to the AMERICAN BAR ASSOCIATION'S ADVISORY COMMITTEE ON PRETRIAL PROCEEDINGS STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL Part III (Tentative Draft, 1969), recommending defense disclosure of only reports or statements of expert witnesses. *See id.*, 2 Cal. 3d at 324, 466 P.2d at 676 n.5.

In view of the decisions limiting *Jones*, the California Supreme Court in *Reynolds v. Superior Court*⁹³ declined to uphold a trial court order directing the defense to give the prosecution three days notice of an alibi defense and to disclose to the prosecution the names, addresses, and telephone numbers of alibi witnesses.⁹⁴ While the court agreed with the *Jones* court's assertion that the courts had the power to administer justice by implementing rules of criminal discovery, it deferred to the legislature the task of fashioning a statute requiring advance notice of alibi.⁹⁵ Recognizing that the United States Supreme Court had recently encouraged the states to experiment with reciprocal discovery provisions,⁹⁶ the *Reynolds* court

93. 12 Cal. 3d 834, 837, 528 P.2d 45, 46 (1974) (reviewing the trial court's order requiring the prosecution to disclose to the defense impeachment information obtained as a result of the defense disclosure).

94. *See id.* at 837, 528 P.2d at 46 (holding that any discovery procedures requiring a defendant to provide prosecutors with advance notice of alibis may only be enacted, if at all, by the state legislature). In *Reynolds*, the trial court ordered the prosecution to disclose to the defense impeachment information obtained as a result of the defense disclosure. *See id.* at 834, 528 P.2d at 45. The Supreme Court of California, however, found a lack of reciprocity (i.e., that the discovery order requiring the defendant to reveal information was less fair than a similar order to the prosecution) under the two-part test set forth in *Wardius v. Oregon*, 412 U.S. 470 (1973). *See Reynolds*, 12 Cal. 3d at 844-51, 528 P.2d at 51-52. The court found that: (1) the trial court's order did not specifically direct the prosecution to disclose the names and addresses of impeachment witnesses, and (2) it did not require the prosecution to set forth the specific times and places of crimes to which the defendant might offer alibis. *See id.* The sanction for noncompliance by either side was the preclusion of undisclosed testimony. *See id.* at 836-37, 12 Cal. 3d at 45-46.

95. *See Reynolds*, 12 Cal. 3d at 837, 528 P.2d at 46. The *Jones* court had rejected the notion that prosecutorial discovery required enabling legislation. *See Jones*, 372 P.2d at 921, 58 Cal. 2d at 59. The *Reynolds* court, however, noted that the California courts, unlike those in some sister states, did not have quasi-legislative power. *See Reynolds*, 12 Cal. 3d at 849 n.20, 528 P.2d at 54 n.20 (indicating that the only states in which courts had adopted notice-of-alibi discovery procedure were those in which the state constitutions expressly granted courts the authority to make quasi-legislative decision regarding judicial procedure). The *Reynolds* court further noted that the state legislature had had ample opportunity to enact a notice-of-discovery statute, but had not done so. *See id.* at 12 Cal. 3d at 846, 528 P.2d at 53 (“[i]n the last fifteen years, five notice of alibi bills have been placed before four sessions of the Legislature.”). Following *Reynolds*, there were unsuccessful further attempts to accept the *Reynolds* court's invitation by enacting reciprocal discovery statutes by the California legislature. *See Holden, supra* note 29, at 1747-48 (discussing how the California Supreme Court struck down the California reciprocal discovery rule).

96. *See Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (stating that the Due Process Clause does not prevent states from experimenting with discovery procedures). The Supreme Court encouraged the states to experiment with discovery procedures in order to enhance the “fairness of the adversary system.” *See id.* at 474. The Court in *Wardius* held that, if notice-of-alibi rules are to be enforced, reciprocal discovery is required by due process. *See id.* at 472 (determining that, because Oregon did not provide for reciprocal discovery, its notice-of-alibi statute was unenforceable). Oregon's prosecution discovery statute required the defendant to give notice of his intention to present an alibi defense five days before trial, to disclose where the defendant was at the time of the alleged offense, and to provide the prosecution with the names and addresses of potential alibi witnesses. *See id.* at 472 n.3 (quoting ORE. REV. STAT. § 135.875(1) (1997)). Under the Oregon statute, the penalty for noncompliance with the notice-of-alibi provision was the preclusion of alibi evidence, unless the court found good cause to order otherwise. *See id.* The court reversed the conviction because there was no reciprocal

noted that its recent decisions had “put this court on record as being considerably more solicitous of the privilege against self-incrimination than federal law currently requires.”⁹⁷

While recognizing the increasing disparity between federal and California decisions,⁹⁸ the California Supreme Court again reaffirmed its reasoning in *Prudhomme*.⁹⁹ The court ultimately resolved several years of conflict in the appellate courts resulting from *Prudhomme*'s implication that some prosecutorial discovery might be appropriate by flatly rejecting prosecutorial discovery absent enabling legislation in *People v. Collie*.¹⁰⁰ Also, for the first time in California, the court

requirement for the prosecution to disclose impeaching information obtained as a result of the defense disclosure. *See id.* at 478-79.

97. *Reynolds*, 12 Cal. 3d at 843, 528 P. 2d at 50.

98. *See Allen v. Superior Court*, 18 Cal. 3d 520, 524-25, 525 n.1, 557 P.2d 65, 66-67, 67 n.1 (1976) (citing *Williams v. Florida*, 399 U.S. 78 (1970), and *United States v. Nobles*, 422 U.S. 225 (1975)). The court in *Nobles* concluded that the privilege against self-incrimination “being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial.” *Nobles*, 422 U.S. at 234. The trial judge in *Nobles* refused to allow a defense investigator to testify to impeach prosecution witnesses unless, following the testimony, the defense turned the investigator’s report of interviews with the witnesses over to the prosecution. *See id.* at 229. The trial court intended to hold an in camera hearing before disclosure to remove irrelevant information. *See id.* (stating that the investigator’s report would be edited and inspected in camera). The defense refused to disclose the report and the investigator was prohibited from testifying. *See id.* The Supreme Court upheld the trial court’s disclosure order. *See id.* at 241 (deciding that it was in the trial’s court’s discretion to ensure that the investigator’s complete testimony would be presented to the jury).

99. *See Allen*, 18 Cal. 3d at 525-26, 525 n.3, 557 P.2d at 67-68, 67 n.3 (applying the test set forth in *Prudhomme* to determine the validity of the discovery order). The court in *Allen* invalidated a trial judge’s order that the prosecution and defense disclose the names of their witnesses on the day of trial in order to ascertain whether any prospective members of the jury were familiar with them. *See id.* at 523, 525, 18 Cal. 3d at 66, 68. The trial court in *Allen* indicated it would enjoin the prosecution from contacting any named defense witness until the witness’s name was revealed during trial. *See id.* at 523, 557 P.2d at 66. The *Allen* court noted that the trial court could have disclosed the names of potential prosecution and defense witnesses to prospective jurors prior to trial in the absence of counsel. *See id.* at 526, 557 P.2d at 67 (noting that disclosing witnesses’ names to jurors absent counsel could help ensure the protection of the state’s interests in preventing jury bias and reduce the chances of trial disruptions). The *Allen* court further relied on the independent force of the California State Constitution as a basis for its decision. *See id.* at 527, 557 P.2d at 68 (affirming the vitality of standards under *Prudhome* and the California State Constitution for the protection of the privilege against self-incrimination). Justice Richardson protested in his dissent that the majority based its holding on the California Constitution without adequately considering alternatives available under the developing federal law. *See id.* at 529-30, 557 P.2d at 69-70 (Richardson, J., dissenting) (arguing that the majority did not address the possibility that the material sought was nontestimonial and thus outside self-incrimination protection); *see also* Gordon Van Kessel, *Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation*, 4 HASTINGS CONST. L.Q. 855, 867, 867 n.57 (1977) (noting Judge Richardson’s opposition to establishing a separate level of state constitutional interpretations).

100. 30 Cal. 3d 43, 634 P.2d 534 (1981). In *Collie*, following cross-examination of an alibi witness, the prosecution requested, and the trial court ordered, discovery of defense investigator reports of the witness in order to impeach him. *See People v. Collie*, 30 Cal. 3d 43, 634 P.2d 534, 536 (1981). The court found that, although the United States Supreme Court had concluded that notice-of-alibi statutes may not violate the privilege against self-incrimination, *see id.* at 540 (citing *Nobles*, 427 U.S. at 233-34), it was less clear that the due process clause would not be adversely affected. *See id.* (citing *Wardius v. Oregon*, 412 U.S. 470

extended the protection afforded by the work product doctrine to criminal cases, citing federal law.¹⁰¹ The legislature accepted the *Collie* court's invitation by enacting Penal Code § 1102.5 in 1982.¹⁰² The statute's short life ended in 1985 with *In re Misener*.¹⁰³

(1973)). The court was careful to affirm the line of cases requiring nontestimonial disclosure by the defense. *See id.* at 541 n.7 (leaving intact precedent making the privilege against self-incrimination inapplicable to non-testimonial evidence). The court warned the legislature, however, that it faced an "almost insurmountable hurdle[]" in fashioning legislation that would pass constitutional muster. *See id.* at 540 (recognizing difficulties in drafting constitutionally allowable discovery rules applying to defense materials). Justice Richardson again protested, stating that the California courts were as capable as their federal counterparts in fashioning constitutional prosecutorial discovery rules. *See id.* at 547-48 (Richardson, J., concurring in part and dissenting in part) (maintaining that the courts have the inherent power to construct discovery rules that are reasonable and fair).

101. *See id.* at 543 (citing *United States v. Nobles*, 422 U.S. 225 (1975), extending the work product doctrine to defense investigator notes).

102. CAL. PENAL CODE § 1102.5 (West 1985). This provision stated:

(a) Upon motion, the prosecution shall be entitled to obtain from the defendant or his or her counsel, all statements, oral or however preserved, by any defense witness other than the defendant, after that witness has testified on direct examination at trial. At the request of the defendant or his or her counsel, the court shall review the statement in camera and limit discovery to those matters within the scope of the direct testimony of the witness. As used in this section, the statement of a witness includes factual summaries, but does not include the impressions, conclusions, opinions, or legal research or theories of the defendant, his or her counsel, or agent.

(b) The prosecution shall make available to the defendant, as soon as practicable, all evidence, including the names, addresses and statements of witnesses, which was obtained or prepared as a consequence of obtaining any discovery or information pursuant to this section.

(c) Nothing in this section shall be construed to deny either to the defendant or to the people information or discovery to which either is now entitled under existing law.

Id.

103. 38 Cal. 3d 543, 698 P.2d 637 (1985). Holding that the statute violated the California Constitution's privilege against self-incrimination (art. I, § 15), the California Supreme Court found that the statute eased the prosecution's burden of proof by requiring the defense to provide information which might tend to incriminate the defendant. "By requiring the defendant to hand over evidence that will impeach his witnesses, section 1102.5 undeniably lightens the prosecution's burden." *Id.* at 646. The trial court ordered the defense to comply with Penal Code § 1102.5 following the direct testimony of a defense witness, but the defense refused during an in camera hearing with the judge. *See id.* at 638. While approving disclosure to facilitate a search for the truth, the *Misener* court held that constitutional protections afforded only to the defendant precluded discovery that was truly a two-way street. *See id.* at 642. The court reasoned that "[w]hile it may be true that by putting witnesses on the stand the defendant waives any right to object to their vigorous cross-examination by the prosecution, he does not waive his right to refuse to supply the prosecution with the means to conduct that cross-examination." *Id.* at 647. The *Misener* court quoted Justice Black's opinion in *Williams* with approval: A defendant "has an absolute, unqualified right to compel the state to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources." *Williams v. Florida*, 399 U.S. 78, 112 (1970) (Black, J., concurring in part and dissenting in part).

III. THE PURPOSE AND NATURE OF PROPOSITION 115'S DISCOVERY CHANGES

A. *The Purpose of Discovery After Proposition 115*

In accordance with tradition, the preamble to Proposition 115 identifies the function of the judicial process as a “quest for the truth.”¹⁰⁴ However, in contrast to recent judicial and legislative thought, Proposition 115’s reforms are not intended to protect the accused.¹⁰⁵ In an explicit and continuing departure from California court decisions before 1982,¹⁰⁶ Proposition 115 offers “comprehensive reforms . . . in order to restore balance and fairness to our criminal justice system”¹⁰⁷ in favor of the prosecution, victims, and witnesses.¹⁰⁸ In furtherance of this new imbalance, Proposition 115 attempts to create a speedier¹⁰⁹ and less costly¹¹⁰ criminal process that more closely resembles the federal system.¹¹¹

104. See PROPOSITION 115, *supra* note 1, at § 1(b).

105. The section outlining the purposes to be used to guide interpretation of the discovery changes refer to victims and witnesses; there is no mention of the accused:

This chapter shall be interpreted to give effect to all of the following purposes:

- (a) To promote the ascertainment of truth in trials by requiring timely pretrial discovery.
- (b) To save court time by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested.
- (c) To save court time in trial and avoid the necessity for frequent interruptions and postponements.
- (d) To protect victims and witnesses from danger, harassment, and undue delay of the proceedings.

CAL. PENAL CODE § 1054(a)-(d) (West Supp. 1998).

106. In 1982, the California legislature created a bill of rights for crime victims to, among other things, increase their participation in the criminal justice process, increase the admissibility of certain types of evidence, limit mental defenses, and increase sentences of defendants meeting new criteria, limit plea bargaining, and add public safety as a criteria for determining bail. See Victims Bill of Rights, Initiative Measure Prop. 8 (approved June 8, 1982) (codified at CAL. CONST., art. I, § 28; codified as amended in scattered sections of CAL. PENAL CODE (West 1995 & Supp. 1998); CAL. WEL. & INST. CODE §§ 1767, 1732.5, 6331 (West Supp. 1998)). In enacting Proposition 115, legislators recognized that “numerous California Supreme Court decisions and . . . statutes of this state . . . have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution.” PROPOSITION 115, *supra* note 1, § 1(b).

107. PROPOSITION 115, *supra* note 1, § 1(a).

108. See PROPOSITION 115, *supra* note 1, § 1(c).

The goals of the people in enacting this measure are to restore balance to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools.

Id.

109. Proposition 115 grants the prosecution the right to due process and a speedy trial. See CAL. CONST. art. I, § 29.

110. See PROPOSITION 115, *supra* note 1, § 1(b).

111. Proposition 115 amended a section of the California Constitution to read:

These goals are reflected in discovery and other related changes.¹¹² Ironically, some of the goals articulated in support of these changes, such as truth-seeking, efficiency, and respect for witnesses,¹¹³ are the same concerns that had motivated California courts to develop court-ordered defense discovery procedures.¹¹⁴ However, Proposition 115's changes are explicitly intended "to promote the ascertainment of truth *in trials*,"¹¹⁵ and to expedite *trials* without "frequent interruptions and postponements."¹¹⁶

For the first time in California, Proposition 115 codifies discovery for criminal cases into a single statutory scheme.¹¹⁷ To promote just and swift trials, Proposition 115 resurrects prosecution discovery,¹¹⁸

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

CAL. CONST. art. I, § 24 (codifying Proposition 115). *But see* *Raven v. Deukmejian*, 52 Cal. 3d 336, 351, 801 P.2d 1077, 1086 (1990) (invalidating the amendment as a "constitutional revision beyond the scope of the initiative process").

112. *See* CAL. PENAL CODE §§ 1054-1054.7 (West Supp. 1998) (imposing time limitations on discovery and prescribing the proper procedure for informal requests for discovery). For changes to preliminary hearings, see PROPOSITION 115, *supra* note 1, § 14.1 (stating that there shall be no post-indictment preliminary hearings in felony prosecutions); CAL. CONST. art. I, § 30(b) (stating that hearsay evidence is admissible in preliminary hearings as a means of protecting victims and witnesses); CAL. PENAL CODE § 866 (West Supp. 1998) (explaining that preliminary examinations are not to be used for discovery purposes); CAL. EVID. CODE § 1203.1 (West Supp. 1998) (disallowing the cross-examination of the declarant of hearsay evidence if the hearsay statement is proffered during a preliminary hearing).

113. *See supra* note 105 and accompanying text.

114. *See* discussion *supra* Part II.B. Proposition 115's changes are, however, in sharp contrast to the intent of the legislature which enacted Penal Code sections 859 and 1430 in 1975, requiring prosecutors to provide copies of crime, arrest, and police reports to the defense within two calendar days of arraignment. "It is the intent of the Legislature that nothing in [these sections] shall be construed to limit or impair any rights of discovery in a criminal case." 1975 Cal. Stat. 799, § 3.

115. CAL. PENAL CODE § 1054(a) (West Supp. 1998) (emphasis added).

116. *Id.* § 1054(c) (emphasis added).

117. *See id.* § 1054(e) ("[N]o discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.").

118. *See* CAL. CONST. art. I, § 30(c) ("In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process."); CAL. PENAL CODE § 1054.3 (West Supp. 1998) (stating that a defendant must disclose the names and addresses of possible trial witnesses, any relevant witness statements, any expert witness reports, and any real evidence to be admitted at trial). Proposition 115 repealed CAL. PENAL CODE § 1102.5, which the court in *In re Misener*, 38 Cal. 3d 543, 698 P.2d 637 (1985), had previously found unconstitutional, and Cal. Penal Code § 1102.7.

and delays and restricts court-ordered defense discovery from the prosecution and its assisting agencies.¹¹⁹ To accelerate the felony pretrial process, the California courts no longer may permit preliminary hearings to be used for discovery purposes,¹²⁰ and must admit certain hearsay evidence at preliminary hearings.¹²¹ Moreover, Proposition 115 preserves these changes by limiting legislative amendments¹²² and by precluding judicial involvement in the discovery process that may exceed the statute's express provisions.¹²³

*B. The Nature of Discovery Under Proposition 115—A Consolidated
Discovery Mechanism*

1. Timing changes

Proposition 115 eliminates mandatory and automatic defense discovery at the arraignment stage.¹²⁴ In accordance with

119. See CAL. PENAL CODE §§ 1054.1, 1054.5(a), 1054.7 (West Supp. 1998); see also *id.* § 866(b) (prohibiting the use of preliminary hearings for discovery); *id.* § 1054.5.

This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.

Id.

Proposition 115, however, does not apply to discovery from third parties. See *People v. Superior Court (Broderick)*, 231 Cal. App. 3d 584, 282 Cal. Rptr. 418 (1991) (holding that disclosure of a patient's confidential communication with her psychotherapist does not violate the patient's right against self-incrimination where the patient has waived the psychotherapist-patient privilege).

120. See CAL. PENAL CODE § 866(b) (West Supp. 1998) ("It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery.")

121. See *id.* § 872(b) ("Notwithstanding Section 1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted . . .") (added by Proposition 115 on June 5, 1990); CAL. EVID. CODE § 1203.1 (West 1995) ("Section 1203 is not applicable if the hearsay statement is offered at a preliminary examination, as provided in Section 872 of the Penal Code.") (added by Proposition 115 on June 5, 1990).

122. Proposition 115 prohibits amendments unless by a two-thirds vote of each house of the state legislature, or by initiative. See PROPOSITION 115, *supra* note 1, § 30 ("The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.")

123. See CAL. PENAL CODE § 1054(e) (West Supp. 1998) ("[N]o discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.")

124. Proposition 115 repealed the following language in Penal Code section 859, relating to felony matters:

The prosecuting attorney shall deliver to, or make accessible for inspection and copying by, the defendant or counsel, copies of the police, arrest, and crime reports, upon the first court appearance of counsel, or upon a determination by a magistrate that the defendant can represent himself or herself. If unavailable to the prosecuting

“promot[ing] the ascertainment of truth in *trials*,”¹²⁵ and ostensibly to minimize court involvement in the discovery process,¹²⁶ counsel must participate in an informal discovery process before requesting court-ordered discovery.¹²⁷ Thereafter, presumably to assure an expedited trial,¹²⁸ all court-ordered discovery from both the prosecution and defense must occur no later than thirty days prior to trial,¹²⁹ unless good cause is shown for a delay, restriction, or denial.¹³⁰ If the

attorney at the time of that appearance or determination, the reports shall be delivered within two calendar days. Portions of those reports containing privileged information need not be disclosed if the defendant or counsel has been notified that privileged information has not been disclosed. If the charges against the defendant are dismissed prior to the time the above-mentioned documents are delivered or made accessible, the prosecuting attorney need not deliver or make accessible those documents unless otherwise so compelled by law. The court shall not dismiss a case because of the failure of the prosecuting attorney to immediately deliver copies of the reports or to make them accessible for inspection or copying.

CAL. PENAL CODE § 859 (West 1985) (amended by CAL. PENAL CODE § 859 (West Supp. 1998)). Proposition 115 also repealed language relating to misdemeanors in its entirety in Penal Code section 1430 that was identical to the language in Penal Code section 859. *See id.* § 1430 (repealed 1990).

125. *Id.* § 1054(a) (West Supp. 1998) (emphasis added); *see also supra* note 105 and accompanying text.

126. *See id.* § 1054(b) (West Supp. 1998) (noting that requiring parties to conduct informal discovery before requesting judicial enforcement will “save the court time”). In contrast, prior to the repeal of particular language by Proposition 115, Penal Code sections 859 and 1430 eliminated court involvement by requiring prosecutors to provide the defense with arrest and incident reports within 48 hours of arraignment without any judicial intervention. *See id.* § 859 (West 1985) (amended by CAL. PENAL CODE § 859 (West Supp. 1998)); *id.* § 1430 (repealed 1990).

127. The California Penal Code states:

Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order.

Id. § 1054.5(b) (West Supp. 1998).

This provision codifies a long-standing practice in some jurisdictions. Before 1990, some San Diego trial judges required defense counsel to send a “Levinson letter” (named for a Superior Court judge) to the prosecution requesting specific information as a pre-requisite to bringing a formal discovery motion.

128. *See id.* § 1054(c) (West Supp. 1998) (noting the objectives of saving the court time and avoiding postponements and interruptions).

129. One court has interpreted Proposition 115’s discovery provisions to be applicable to in-custody misdemeanor cases which must be tried within 30 days pursuant to Penal Code section 1382(3). This court stated that courts may order immediate disclosure, thereby overcoming the timing problem. *See Hobbs v. Municipal Court*, 233 Cal. App. 3d 670, 696, 284 Cal. Rptr. 655, 672 (1991), *overruled on other grounds by* *People v. Tillis*, 18 Cal. 4th 284, 956 P.2d 409 (1998). Nevertheless, the language of the statute referred to by the *Hobbs* court predicates an immediate disclosure order “upon a showing that the moving party has complied with the informal discovery procedure” and allows the opposing party 15 days to comply with a discovery request. *See* CAL. PENAL CODE § 1054.5(b) (West Supp. 1998).

130.

The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred.

defense or prosecution comes into possession or becomes aware of discoverable material within thirty days of trial, Proposition 115 imposes on either counsel a continuing duty to disclose.¹³¹ Unlike the years preceding 1990, this shift effectively delays the defense's ability to obtain court assistance in acquiring information from the prosecution or other law enforcement sources.

2. *Substantive changes*

Proposition 115 explicitly redefines the substance of court-ordered discovery by expanding prosecution discovery and restricting defense discovery.¹³² Proposition 115 identifies categories of information the prosecution¹³³ and defense¹³⁴ must exchange. The prosecution retains

"Good cause" is limited to threats of possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously unsealed matter.

CAL. PENAL CODE § 1054.7 (West Supp. 1998); *see also* People v. Superior Court (Mitchell), 5 Cal. 4th 1229, 1231, 859 P.2d 102, 104 (1993) (confirming that in the penalty phase of a capital case, discovery is expected to occur at least 30 days prior to trial unless the court finds good cause to deny, restrict, or defer); *cf.* Sandeffer v. Superior Court, 18 Cal. App. 4th 672, 678, 22 Cal. Rptr. 2d 261, 263 (1993) (recognizing that "[c]ourts must have the flexibility to order production by a specific date in complex litigation . . . where discovery at the tail end of the case would defeat [Proposition 115's] purposes" and holding that "disclosure may properly be compelled on a date more than 30 days preceding the date set for trial").

131. *See* CAL. PENAL CODE § 1054.7 (West Supp. 1998) (requiring a continuing duty to disclose absent good cause shown). Interestingly, before 1990, defense counsel in San Diego demanded the promulgation of a court policy requiring continuing discovery, albeit unsuccessfully.

132. *See generally id.* §§ 1054-1054.7 (West Supp. 1998) (incorporating the new discovery provisions of Proposition 115).

133. According to Proposition 115, the prosecution has the following disclosure obligations:

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

- (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
- (b) Statements of all defendants.
- (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
- (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
- (e) Any exculpatory evidence.

Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which

its right of access to all sources of information that existed prior to Proposition 115¹³⁵ and continues to enjoy unfettered access to nontestimonial evidence.¹³⁶ In contrast, the defense no longer is entitled to information that the prosecution does not intend to offer at trial unless that information is specified in the new statute or is recognized as an exception to Proposition 115's discovery provisions.¹³⁷ Proposition 115 curtails the defense's ability to obtain independently information from law enforcement agencies by issuing subpoenas. Information from these agencies is now included under

the prosecutor intends to offer in evidence at the trial. *Id.* § 1054.1; *see also* *People v. Tillis*, 18 Cal. 4th 284, 292-93, 956 P.2d 409, 414 (1998) (holding that a prosecutor was not required to disclose impeachment evidence, as opposed to names of witnesses, offered against a defense witness), *overruling Hobbs*, 233 Cal. App. 3d at 689, 284 Cal. Rptr. at 667 (holding that the prosecution was required to "disclose to the defense *new evidence* it obtains as a result of defense-supplied discovery") (emphasis added).

134.

The defendant and his or her attorney shall disclose to the prosecuting attorney:

(a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

(b) Any real evidence which the defendant intends to offer in evidence at the trial.

CAL. PENAL CODE § 1054.3 (West Supp. 1998).

The court in *Izazaga v. Superior Court* upheld Penal Code section 1054.3. *See* 54 Cal. 3d 356, 367-71, 815 P.2d 304, 311-14 (1991) (ruling that the discovery provisions of section 1054.3 do not violate federal or state constitutional guarantees of due process); *see also* *Thompson v. Superior Court*, 53 Cal. App. 4th 480, 484-85, 61 Cal. Rptr. 2d 785, 787 (1997) (requiring the defense to disclose the raw notes of interviews of a defense witness who might testify at trial); *Woods v. Superior Court*, 25 Cal. App. 4th 178, 183, 30 Cal. Rptr. 2d 182, 184 (1994) (holding that disclosure to the prosecution of the results of standardized tests taken by a psychologist could be compelled where "the psychologist was identified as a defense expert, the psychologist relied on the test results in forming an opinion and his opinion was disclosed to the district attorney"); *Hines v. Superior Court*, 20 Cal. App. 4th 1818, 1822-23, 25 Cal. Rptr. 2d 712, 714-15 (1993) (requiring the production of an expert's notes of factual determinations made during an examination where the expert has been identified as a trial witness); *Sandeffter v. Superior Court*, 18 Cal. App. 4th 672, 678-79, 22 Cal. Rptr. 2d 261, 264 (1993) (holding that the defense need not disclose the identity of a defense expert or produce reports from that expert if the defense has not yet decided to call that expert as a witness).

135. *See generally* FED. R. CRIM. P. 16 (setting forth the federal standard). Proposition 115 prosecution discovery is broader than that permitted under the federal rules.

136. *See* CAL. PENAL CODE § 1054.4 (West Supp. 1998) ("Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting agency from obtaining nontestimonial evidence to the extent permitted by law on the effective date of this section.").

137. Proposition 115 limits pretrial discovery as follows:

No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.

Id. § 1054.5(a); *see also id.* § 1054(e) ("[N]o discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.").

the umbrella of the new discovery statutes, which requires the defense to seek information through the new discovery process rather than to request it directly.¹³⁸

The new chapter recognizes several categories of protected information,¹³⁹ including work product and privileged information.¹⁴⁰ Access to otherwise discoverable information may be delayed, restricted, or denied upon a judicial finding of good cause.¹⁴¹ Judicial

138. Prior to Proposition 115, the defense was able to obtain law enforcement records such as jail records, 911 tapes, and criminal records directly from law enforcement agencies by issuing a *subpoena duces tecum*. See CAL. GOV'T CODE § 7476 (West Supp. 1998).

139. Section 1054.2 states:

(a) (1) No attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1 unless specifically permitted to do so by the court after a hearing and a showing of good cause.

(2) Notwithstanding paragraph (1), an attorney may disclose or permit to be disclosed the address or telephone number of a victim or witness to persons employed by the attorney or to person appointed by the court to assist in the preparation of a defendant's case if that disclosure is required for that preparation. Persons provided this information by an attorney shall be informed by the attorney that further dissemination of the information, except as provided by this section, is prohibited.

(3) Willful violation of this subdivision by an attorney, persons employed by the attorney, or persons appointed by the court is a misdemeanor.

(b) If the defendant is acting as his or her own attorney, the court shall endeavor to protect the address and telephone number of a victim or witness by providing for contact only through a private investigator licensed by the Department of Consumer Affairs and appointed by the court or by imposing other reasonable restrictions, absent a showing of good cause as determined by the court.

CAL PENAL CODE § 1054.2 (West Supp. 1998) (added by Proposition 115 on June 5, 1990).

140. Section 1054.6 states:

Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (c) of Section 2018 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

Id. § 1054.6 (added by Proposition 115 on June 5, 1990).

This provision was upheld by subsequent court decisions. See *Izazaga v. Superior Court*, 54 Cal. 3d 356, 379-81, 815 P.2d 304, 320 (1991); *Thompson v. Superior Court*, 53 Cal. App. 4th 480, 487-88, 61 Cal. Rptr. 2d 785, 789 (1997) (holding that both the prosecution and defense must disclose raw written notes of witness interviews, but not the impressions, opinions, or conclusions of the attorney or investigator); see also *Rodriguez v. Superior Court*, 14 Cal. App. 4th 1260, 1267-70, 18 Cal. Rptr. 2d 120, 124-26 (1993) (upholding the nondisclosure of communications protected by the attorney-client privilege); *Hobbs v. Municipal Court*, 233 Cal. App. 3d 670, 690-95, 284 Cal. Rptr. 655, 668-71 (1991) (upholding Proposition 115's explicit protection of work product), *overruled on other grounds by People v. Tillis*, 18 Cal. 4th 284, 956 P.2d 409 (1998).

141. See CAL. PENAL CODE § 1054.7 (West Supp. 1998) (limiting "good cause" to threats of possible danger to a victim or witness). Several courts have interpreted the meaning of "good cause." See *Reid v. Superior Court*, 55 Cal. App. 4th 1326, 1335-39, 64 Cal. Rptr. 2d 714, 720-22 (1997) (holding that embarrassment and right to privacy concerns was not good cause); *Montez v. Superior Court*, 5 Cal. App. 4th 763, 770 n.3, 7 Cal. Rptr. 2d 76, 81 n.3 (1992) (concluding that a showing of threats and harm was good cause); *Alvarado v. Superior Court*, 52 Cal. App. 4th 939, 60 Cal. Rptr. 2d 854 (1997) (holding that the trial court properly denied the defense discovery of the identities and photographs of three witnesses who were critical to

sanctions for noncompliance with the new chapter's provisions are specified and prioritized.¹⁴²

IV. THE IMPACT OF PROPOSITION 115 ON THE EFFECTIVENESS AND RELIABILITY OF PRELIMINARY HEARINGS AND PLEA BARGAINS

The majority of felony criminal cases in California, as in the federal system, are resolved without trials.¹⁴³ In order to screen cases,

the prosecution in a murder case because witness safety concerns were good cause).

142. The California Penal Code states:

(b) Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.

(c) The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted. The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States.

CAL. PENAL CODE § 1054.5(b)-(c) (West Supp. 1998). For example, see a California criminal jury instruction that was created to conform to California Penal Code § 1054.5(b), providing in part:

Although, the [People's] [Defendant's] . . . [concealment] [and] [or] [failure to timely disclose evidence] was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. The weight and significance of any [concealment] [and] [or] [delayed disclosure] are matters for your consideration. However, you should consider whether the [concealed] [and] [or] [untimely disclosed evidence] pertains to a fact of importance, something trivial or subject matter already established by other credible evidence

CA JURY INSTRUCTIONS, *supra* note 20, § 2.28. Courts have enforced compliance with this provision. *See, e.g., In re Littlefield*, 5 Cal. 4th 122, 137, 851 P.2d 42, 52 (1993) (holding that the defense counsel could be held in contempt for refusing to comply with a court order to acquire the address of a trial witness and disclose that address to the prosecution). In 1996, a bill was introduced into the California State Assembly which would add a section to Penal Code section 1054.5, providing for a finding of contempt, fines, and disclosing to the state bar for lawyers willfully failing to comply with judicial orders to provide pretrial discovery. *See* A.B. 2057, 1995-96 Reg. Sess. (Cal. 1996); Mike Lewis, *Lawyers May Face Fines for Hiding Discovery Matters*, L.A. DAILY J., May 13, 1996, at 1 (stating that California courts would discipline those attorneys who failed to comply with pretrial discovery procedures). The bill as introduced also provided for an in camera review of information a party believed might be withheld. *See* A.B. 2057, 1995-96 Reg. Sess. (Cal. 1996). The language that was enacted into law on Sept. 12, 1996, however, added a subsection to an existing penal code section authorizing the governor to offer a reward of up to \$100,000 for "information leading to the arrest and conviction of any person who commits arson upon a place of worship." 1996 Cal. Stat. 419, § 1 (enacting A.B. 2057); CAL. PENAL CODE § 1547(c) (West Supp. 1998). The original proposal was never passed.

143. For the 1995-96 fiscal year, approximately 95.8% of felony cases filed in California's superior courts were settled before trial. *See* JUDICIAL COUNCIL OF CALIFORNIA, 1997 REPORT ON COURT STATISTICS 53 [hereinafter 1997 JUDICIAL COUNCIL REPORT]. Only 2.6% of all felony filings in fiscal year 1995-96 proceeded to a jury trial. *See id.* at 54. During fiscal year 1995, 3.6% of criminal cases in the Ninth Circuit proceeded to jury trial, while 78.5% were disposed of by a plea of guilty. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, DEPARTMENT OF JUSTICE BUREAU OF STATISTICS, at 496 (Kathleen Maguire & Ann L. Pastore eds.) (reporting that during fiscal year 1995, 3.6% of criminal cases in the Ninth Circuit proceeded to jury trial, while 78.5%

California courts, unlike the federal system, have traditionally placed a heavy emphasis on preliminary hearings in addition to plea bargaining.¹⁴⁴ Preliminary hearings and plea negotiations facilitate efficient use of judicial resources by minimizing escalating court costs, crowded calendars, witness inconvenience, and the uncertainties inherent in trial.¹⁴⁵ Preliminary hearings and plea negotiations allow litigants and judges to dismiss legally or factually inadequate cases and to resolve strong cases without a trial. Additionally, preliminary hearings streamline cases which will ultimately go to trial by allowing prosecutors an opportunity to adjust charges to conform to the facts as they develop,¹⁴⁶ by enabling judges to resolve legal issues,¹⁴⁷ and by addressing other issues peculiar to particular cases.¹⁴⁸ Ideally, pretrial screening ensures that the court will use its resources to adjudicate genuine disputes.¹⁴⁹ This section discusses the role preliminary hearings traditionally played in screening cases, and analyzes the effect of Proposition 115's discovery changes on that function. This section then addresses Proposition 115's effect on plea bargaining, and concludes by discussing the inadequacy of other sources of information as substitutes for pre-

were disposed of by a plea of guilty).

144. California courts have employed preliminary hearings much more extensively than their federal counterparts. "Various U.S. Attorneys have been able to perfect this practice to the point where there are no more than one or two preliminary hearings for every hundred felonies processed." LAFAVE & ISRAEL, *supra* note 12, at 664 (discussing how the grand jury is the by-pass alternative that Assistant United States Attorneys use in lieu of preliminary hearings); *see also* DEFENDING A FEDERAL CRIMINAL CASE, *supra* note 49, § 3.7.2.

145. "In California, the average cost per case-related minute (judge plus indirect costs) is \$7.52, or \$2,588 per case-related day." JUDICIAL COUNCIL OF CALIFORNIA, 1989 ANNUAL REPORT 73, (cited in *Crime Victims Justice Reform Act: Joint Hearing on Proposition 115 Before the Senate Comm. on Judiciary and Assembly Comm. on Pub. Safety* (Dec. 11, 1989) (statement of C. Daniel Vencill, Ph.D.)). Using 1989 dollars, a typical five-day felony trial costs approximately \$12,940. According to David Yamasaki, Assistant Executive Officer with the San Diego Superior Court, a more current figure is \$9.84 per minute, raising the cost per day to \$3,383, and \$16,915 for a five-day trial. These figures exclude pretrial and trial costs for prosecutors, public defenders, law enforcement, staff, investigation, and other indirect costs.

146. Prosecutors may list charges on the information that are supported by the evidence introduced at a preliminary hearing, whether or not those charges were originally listed on the complaint filed in municipal court. *See* *People v. Superior Court*, 4 Cal. App. 4th 1217, 1225-26, 6 Cal. Rptr. 2d 242, 245 (1992) (allowing additional charges when there is sufficient evidence in the preliminary examination transcript). *See* CAL. PENAL CODE § 739 (West 1985 & Supp. 1998).

147. Other than probable cause, matters that may be addressed at a preliminary hearing are motions to suppress evidence because of an illegal search or an illegally obtained confession, motions to disclose the identity of an informant, and motions to reduce bail. *See id.* §§ 1270.2, 1538.5 (West Supp. 1998).

148. Examples of issues particular to a specific case might be the effect of pretrial publicity, the consideration of unusual defendant or victim characteristics, or unique victim input.

149. In addition to cases involving unresolved factual issues that ultimately proceed to trial, there are cases involving defendants who wish to exercise their constitutional right to trial regardless of the prosecutor's or defense counsel's assessment of the merits of the case or the wisdom of that choice.

Proposition 115 discovery.

A. *Preliminary Hearings*

1. *Prior to Proposition 115*

Preliminary hearings are the first post-arraignment screening mechanisms in felony cases and serve as checks on prosecutorial discretion.¹⁵⁰ In contrast to the federal system,¹⁵¹ the California Supreme Court in 1978 recognized the long-standing importance of preliminary hearings as a check on prosecutorial discretion by allowing indicted defendants to demand post-indictment preliminary hearings.¹⁵² In a preliminary hearing, the defendant is present with counsel¹⁵³ who may cross-examine witnesses¹⁵⁴ and present evidence.¹⁵⁵ At the conclusion of this adversarial hearing,¹⁵⁶ magistrates must

150. See *People v. Superior Court (Mendella)*, 33 Cal. 3d 754, 759, 661 P.2d 1081, 1084 (Cal. 1983) (“[T]ogether the preliminary hearing and the section 995 motion operate as a judicial check on the exercise of prosecutorial discretion.”); *Jaffe v. Stone*, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941) (“The purpose of the preliminary hearing is to weed out groundless or unsupported charges [and to] relieve the accused of the degradation and the expense of a criminal trial.”). California’s preliminary hearings were recognized in 1880 as a legal and constitutional alternative to indictment by grand jury. See *Kalloch v. Superior Court*, 56 Cal. 229, 241, 1880 Cal. LEXIS 390, *24 (1880) (“[A] prosecution by information takes from [the accused] no immunity or protection to which he is entitled under the law.”); see also *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that a preliminary proceeding, which does not result in a final judgment, does not violate the Fourteenth Amendment).

151. See *supra* note 49 and accompanying text.

152. See *Hawkins v. Superior Court*, 22 Cal. 3d 584, 592-93, 586 P.2d 916, 921-22 (1978) (holding that all defendants indicted by a grand jury were entitled to a post-indictment preliminary hearing).

153. Cf. CAL. PENAL CODE §§ 859, 860 (West 1985) (permitting a defendant reasonable time to obtain counsel).

154. See *id.* § 865 (“The witness must be examined in the presence of the defendant, and may be cross-examined on his behalf.”); see also *Jones v. Superior Court*, 4 Cal. 3d 660, 667, 483 P.2d 1241, 1245 (1971) (“[D]efendant at a preliminary examination has the right to examine and cross-examine witnesses for the purpose of overcoming the prosecution’s case or establishing an affirmative defense”); *Jennings v. Superior Court*, 66 Cal. 2d 867, 875, 428 P.2d 304, 309 (1967) (holding the right to cross-examine witnesses during preliminary examinations “essential”); *McDaniel v. Superior Court*, 55 Cal. App. 3d 803, 805, 126 Cal. Rptr. 136, 137 (1976) (stating that the preliminary examination is an important discovery tool which can be used by both sides). These cases established the defense’s right to cross-examine witnesses even though cross-examination would lead to discovery.

155. The pre-Proposition 115 Penal Code declared that “[w]hen the examination of witnesses on the part of the people is closed, any witness the defendant may produce must be sworn and examined.” CAL. PENAL CODE § 866 (West 1985); see also *Jennings*, 66 Cal. 2d at 875-76, 428 P.2d at 309-10 (confirming the right of the defense to present an affirmative defense at preliminary hearings).

156. See *Mills v. Superior Court*, 42 Cal. 3d 951, 957, 728 P.2d 211, 214 (1986) (describing the importance of adversarial proceedings); *Hawkins*, 22 Cal. 3d at 588-90, 586 P.2d at 918-19 (discussing the nature of preliminary hearings); *Jones*, 4 Cal. 3d at 667, 483 P.2d at 1245 (discussing preliminary hearing procedure); *Jennings*, 66 Cal. 2d at 978-80, 428 P.2d at 312 (specifying the purpose of preliminary hearings). In contrast, the alternative to preliminary hearings, the grand jury, is non-adversarial. See generally LAFAVE & ISRAEL, *supra* note 12, at 375-456 (discussing the history and function of the grand jury).

assess witness credibility and resolve conflicts in order to determine whether there is probable cause to believe a felony has been committed and whether the defendant before the court committed the charged offense.¹⁵⁷ To convince magistrates that a defendant should be brought to trial, prosecutors must present a prima facie case sufficient to support each element of the charges and the identification of the defendant as the perpetrator.¹⁵⁸

Magistrates have the power to check the exercise of prosecutorial discretion in several ways. Magistrates may determine whether felony charges should be reduced to misdemeanors,¹⁵⁹ enhancements should be stricken,¹⁶⁰ charges should be dismissed,¹⁶¹ reduced,¹⁶² or added,¹⁶³ and whether the evidence presented is competent and not legally flawed.¹⁶⁴ Magistrates can effectively perform this screening function

157. See CAL. PENAL CODE § 872 (West 1985) (stating that if the examination shows a public offense has been committed and there is sufficient cause to believe that the defendant is guilty, the magistrate shall endorse the complaint to that effect); see also *People v. Uhlemann*, 9 Cal. 3d 662, 668, 511 P.2d 609, 613 (1973) (holding that a magistrate lacks the power to make a finding as to guilt or innocence of the accused); *Taylor v. Superior Court*, 3 Cal. 3d 578, 581-82, 477 P.2d 131, 133 (1970) (holding that an information shall be set aside if the defendant was committed without reasonable or probable cause), *overruled on other grounds by* *People v. Antick*, 15 Cal. 3d 79, 539 P.2d 43 (1975); *Rideout v. Superior Court*, 67 Cal. 2d 471, 473, 432 P.2d 197, 199 (1967) (stating that a prosecution will not be prohibited if there is some rational ground for assuming the possibility that an offense has been committed by the accused).

158. See CAL. PENAL CODE § 872 (West 1985) (stating that a magistrate will endorse a complaint if the examination shows the public offense has been committed and sufficient evidence exists to believe that the defendant is the perpetrator).

159. See *id.* § 17(b)(5). This section states, in relevant part, that:

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . .

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

Id.; see also *Esteybar v. Municipal Court*, 5 Cal. 3d 119, 123 n.2, 485 P.2d 1140, 1142 n.2 (1971) (holding that the criteria for such a reduction include the nature of the alleged offense and the background of the defendant).

160.

To allow the prosecution to indiscriminately charge enhancements without subjecting such allegations to judicial scrutiny under a section 995 motion is to undermine the procedural rights guaranteed to the defendant by the preliminary hearing process Thus, together the preliminary hearing and the section 995 motion operate as a judicial check on the exercise of prosecutorial discretion.

People v. Superior Court (Mendella), 33 Cal. 3d 754, 759, 661 P.2d 1081, 1084 (1983).

161. See CAL. PENAL CODE § 871 (West 1985) (stating that the magistrate shall order a complaint dismissed and the defendant to be discharged if, after examination, it appears that no offense has been committed or that the defendant was not the perpetrator).

162. See *People v. Foster*, 198 Cal. 112, 121-23, 243 P.2d 667, 671 (1926) (discussing lesser included offenses).

163. See CAL. PENAL CODE. § 872(a) (West 1985) (stating that a magistrate shall endorse the complaint and declare that there is sufficient cause to believe that the defendant is guilty of the offense).

164. See *id.* § 1538.5(a) (West 1985) (stating that to assist magistrates in rejecting

only through an adequate adversarial presentation.¹⁶⁵

Before 1990, preliminary hearings served other, collateral, functions which contributed to systemic efficiency and reliability. Through a preliminary hearing screening, the prosecution and defense could evaluate the strength of the case and identify legal issues¹⁶⁶ by observing and examining witnesses.¹⁶⁷ Factually or legally strong cases sufficient to establish guilt could be resolved by guilty pleas to the original or reduced charges in lieu of trial. Should a trial ultimately occur, preliminary hearings preserved testimony for trial in the event a witness became unavailable.¹⁶⁸ Preliminary hearings also provided a basis for a trial utilizing the transcript, known as a “slow plea.”¹⁶⁹

Settled case law substantially expanded the function of the preliminary hearing from a perfunctory proceeding wherein a magistrate made the simple determination as to ‘whether there is sufficient cause to believe the defendant guilty (of a public offense)’ (Pen. Code § 872) to a full-blown hearing allowing for the

incompetent evidence, the prosecution is required to disclose the names and addresses of informants and the defense is entitled to challenge illegally obtained evidence).

165. The prosecution usually has no interest in challenging its own evidence. However, preliminary hearings have not always been optimally utilized. They have been criticized as pro forma proceedings that merely ratify charges chosen by the prosecution. *See* *People v. Gibbs*, 255 Cal. App. 2d 739, 743-44, 63 Cal. Rptr. 471, 475 (1967) (“In most California criminal prosecutions the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouement—an order holding the defendant for trial.”); JUDICIAL COUNCIL OF CALIFORNIA, 1967 ANNUAL REPORT 264 (indicating that, for fiscal year 1966-67, out “of 34,279 evidentiary hearings, 31,896 were uncontested in the sense that the defense produced no independent evidence whatever, either sitting in silence or confining itself to cross-examination of prosecution witnesses”). Preliminary hearings are the only fact-based screening device for felony cases prior to trial. *See generally* Kenneth Graham & Leon Letwin, *The Preliminary Hearings in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 UCLA L. REV. 635 (1971) (discussing the nature of preliminary hearings as a major source of pretrial discovery).

166. Legal issues that can be addressed at the preliminary hearing include bail, disclosure of an informant’s identity, and the legality of a search or seizure. *See* Graham & Letwin, *supra* note 165, at 695.

167. Preliminary hearings provided valuable information to both the prosecution and defense regarding the strength of the prosecution’s case in addition to the police and arrest reports. At preliminary hearings, counsel could determine the credibility of witnesses, and assess whether witnesses were likely to respond to subpoenas for trial. These hearings were also a defendant’s first opportunity to face her accusers. Preliminary hearings often served as the basis for a negotiated plea or a trial on the preliminary hearing transcript in lieu of a jury trial. *See id.* at 638. Besides cross-examining prosecution witnesses, the defense was entitled to call other witnesses without statutory restriction. As a practical matter, magistrates could request an offer of proof in the event cumulative testimony was offered.

168. *See* CAL. EVID. CODE § 1291 (West 1985) (“Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness . . .”).

169. *See* Comment, *Criminal Discovery At and Before the Preliminary Examination*, 15 SANTA CLARA L. REV. 665, 678 (1975) (“In 1968 roughly 80% of all criminal trials in Los Angeles County were based on submission of the transcript of the preliminary without further evidence.”) (citing Graham & Letwin, *supra* note 165, at 638 n.5).

presentation of affirmative defenses.¹⁷⁰

Therefore, defense discovery before preliminary hearings facilitated the magistrate's meaningful determination of probable cause. Requiring the prosecution to provide the arrest and incident reports to the defense within forty-eight hours of arraignment served several purposes. Mandatory disclosure of basic information supporting a criminal charge did not require judicial involvement in discovery at the inception of a case and discouraged disparate treatment of defendants and their counsel.¹⁷¹ Early disclosure allowed the defense to identify legal and factual issues not contained on the face of the criminal complaint in sufficient time to prepare competently for,¹⁷² or relinquish the right to a timely preliminary hearing.¹⁷³ The information in arrest and incident reports allowed the defense to cross-examine prosecution witnesses meaningfully and to call other witnesses to testify in order to assist magistrates in checking the exercise of prosecutorial discretion by identifying and resolving conflicts, assessing credibility, and adjusting charges.

Of necessity, the preliminary hearing itself was deemed a discovery process.¹⁷⁴ Information revealed at a preliminary hearing not only

170. See *People v. Hertz*, 103 Cal. App. 3d 770, 773, 163 Cal. Rptr. 233, 236 (1980) (holding that the defense of discriminatory enforcement could properly be raised at a preliminary hearing).

171. See William Bradford Middlekauff, *What Practitioners Say About Broad Criminal Discovery Practice, More Just—or Just More Dangerous?*, 9 CRIM. JUST. 14, 15-16 (1994) (discussing the advantages and disadvantages of broad discovery practice and stating that proponents of broad discovery argue that it results in more just outcomes while opponents state that it leads to a lack of conviction of criminals and decreases public safety).

172. See *People v. Pope*, 23 Cal. 3d 412, 423-24, 590 P.2d 859, 865 (1979) (stating that a substantial portion of a defense counsel's obligation to provide adequate representation involves investigation and advice at pretrial stages); see also CAL. RULES OF PROFESSIONAL CONDUCT 3-110(A) (stating that California attorneys are ethically required to perform competently); ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1996) ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1(a) (1992) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case . . . [t]he duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.").

173. See CAL. PENAL CODE § 859b (West 1985) ("Both the defendant and the people have the right to a preliminary examination at the earliest possible time . . ."). If a case was complex enough to justify a time waiver, the defense counsel could assess the information in arrest, incident, and police reports to give a magistrate a realistic idea of how much time the hearing would require.

174. See *Hawkins v. Superior Court*, 22 Cal. 3d 584, 588, 586 P.2d 916, 919 (1978) (exploring *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970), which holds that a preliminary hearing is a "critical stage" in criminal proceedings); see also *Jennings v. Superior Court*, 66 Cal. 2d 867, 879, 428 P.2d 304, 870 (1967) (holding that the defense had a right to present an affirmative defense at a preliminary hearing); *Mitchell v. Superior Court*, 50 Cal. 2d 827, 829, 330 P.2d 48, 50 (1958) (stating that disclosure at the preliminary hearing of the names of two informants enabled the defendant to cross-examine the prosecution's witnesses "to show there is no reasonable cause to commit him to trial and thus avoid the degradation and expense of a

assisted a magistrate in determining probable cause but was more likely to enable a magistrate to fulfill her obligations to adjust or dismiss charges.¹⁷⁵ Such discovery also promoted early settlement¹⁷⁶ and identified legal issues that could be resolved during the preliminary hearing, by a plea bargain, or in advance of trial.

2. Proposition 115's changes

Proposition 115's discovery provisions, together with other changes, may significantly undermine the quality of the pre-Proposition 115 presentation and thus, a magistrate's ability to do her job. Proposition 115 did not alter the primary purpose of preliminary hearings as a screening device to determine whether sufficient probable cause exists to hold a defendant to answer for trial.¹⁷⁷ Proposition 115 also did not affect a magistrate's power to reduce eligible charges to misdemeanors,¹⁷⁸ strike enhancements,¹⁷⁹ or disregard incompetent evidence.¹⁸⁰ However, by eliminating post-indictment preliminary hearings,¹⁸¹ explicitly prohibiting the

criminal trial"); *Priestly v. Superior Court*, 50 Cal. 2d 812, 819, 330 P.2d 39, 43 (1958) (asserting that disclosure of an informant was necessary by the preliminary hearing to determine whether evidence acquired by a search is sufficient to support a belief of guilt); *McDaniel v. Superior Court*, 55 Cal. App. 3d 803, 805, 126 Cal. Rptr. 136, 137 (1976) (holding that the purpose of defense examination of a witness is to discover what the facts are). "The magistrate's statutory role is directed toward making a preliminary assessment of the truth or falsity of the charges filed against the defendant; pretrial discovery may well assist in such a determination." *Holman v. Superior Court*, 29 Cal. 3d 480, 485, 629 P.2d 14, 17 (1981) (discussing the availability of discovery prior to a preliminary hearing in order to facilitate a determination of probable cause).

175. The defense is more likely than the prosecution to supply information regarding the credibility of informants, the excessive use of force by law enforcement, the illegality of a confession, the illegality of a search, or the circumstances of the case or the defendant which would justify a reduction of a felony to a misdemeanor.

176. In a strong case, a defendant may be more willing to plead guilty if she can see witnesses testify against her at a preliminary hearing. If the sole obstacle to a reliable plea is a defendant's reluctance, it is more efficient to demonstrate the strength of the case at a preliminary hearing than at trial.

177. See CAL. PENAL CODE § 866(b) (West Supp. 1998) ("It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony."); see also *Whitman v. Superior Court*, 54 Cal. 3d 1063, 1083, 820 P.2d 262, 274 (1991) (providing that the magistrate has the discretion and the authority to determine whether the evidence establishes probable cause to require the defendant to answer for the charged offense).

178. Proposition 115 did not affect Penal Code section 17(b)(5). See CAL. PENAL CODE § 17(b)(5) (West 1985) (allowing a magistrate to determine that an eligible felony offense may be reduced to a misdemeanor).

179. See *People v. Carreon*, 59 Cal. App. 4th 804, 805, 69 Cal. Rptr. 2d 438, 439 (1997) (recognizing a magistrate's power to strike an enhancement).

180. See CAL. PENAL CODE § 1538.5(a) (West 1985 & Supp. 1998) (stating that the defense retains the right to challenge evidence obtained as a result of an illegal search or seizure at a preliminary hearing).

181. Proposition 115 added a new section to the California Constitution that provides, "[i]f a felony is prosecuted by an indictment, there shall be no post-indictment preliminary hearing." CAL. CONST. art I, § 14.1. This new section nullified *Hawkins v. Superior Court*. See 22 Cal. 3d

utilization of preliminary hearings for purposes of discovery,¹⁸² permitting hearsay testimony from law enforcement officers with specified qualifications,¹⁸³ and allowing prosecutors to request that magistrates bar defense witnesses from testifying unless defense counsel's offer of proof meets specific criteria,¹⁸⁴ Proposition 115 significantly impairs the use of preliminary hearings as a screening device and check on prosecutorial discretion. These changes are discussed below.

Under Proposition 115, judicial pretrial screening of the exercise of prosecutorial charging discretion may never occur. Presumably to expedite trials, protect witnesses and victims, curtail costs, and restrict defendants' rights, Proposition 115 allows prosecutors to decide whether to submit to magisterial review. Most prosecutors choosing to avoid preliminary hearings are likely to be motivated by professional concerns, or at least self-interest,¹⁸⁵ to ensure that probable cause exists to proceed to trial. However, if prosecutors choose to bypass adversarial testing and an independent assessment of probable cause in a preliminary hearing,¹⁸⁶ the result is likely to include fewer adjustments to inappropriate charges, more limited testing of the credibility of witnesses, less frequent pretrial identification of factual conflicts and legal issues, more potentially unreliable guilty pleas, and more unnecessary trials.¹⁸⁷

584, 586-87, 586 P.2d 916, 917 (1978) (granting felony defendants the right to demand a post-indictment preliminary hearing). Furthermore, the court in *Bowens v. Superior Court* upheld this abolition of post-indictment preliminary hearings. See *Bowens v. Superior Court*, 1 Cal. 4th 36, 39, 820 P.2d 600, 602 (1991) (holding that a felony defendant is no longer entitled to a post-indictment preliminary hearing). Prosecutors now have the non-reviewable discretion to proceed by preliminary hearing or by grand jury indictment.

182. See CAL. PENAL CODE § 866(b) (West Supp. 1998) (forbidding the use of preliminary hearings for discovery purposes).

183. See *id.* § 872(b) (West 1985 & Supp. 1998) (requiring that a law enforcement officer must have five years of experience or have completed a training course in the investigation of cases and testifying at hearings); CAL. EVID. CODE § 1203.1 (West 1995) (disallowing the cross-examination of a hearsay declarant if the hearsay statement is offered at a preliminary hearing).

184. See CAL. PENAL CODE § 866(a) (West Supp. 1998). The offer of proof must disclose that the "testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of the offense charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness." See *id.*

185. But see Kelly Thornton, *Suicide, greed and death plot: Grand jury to review story of 2 surgeons, marine hero*, SAN DIEGO UNION-TRIB., July 24, 1995, at B-1 (indicating that prosecutors chose to proceed by grand jury indictment "to avoid having to disclose evidence to the defense").

186. A prosecutor who chooses to avoid a preliminary hearing must present her case to a grand jury in which the prosecutor selects which witnesses to subpoena and to question. See CAL. PENAL CODE § 889 (West 1985); *id.* § 939.2 (empowering the district attorney to subpoena any witness whom she deems material to the investigation).

187. These results occur because of the nature of grand jury proceedings. See *Cummiskey v. Superior Court*, 3 Cal. 4th 1018, 1024-27, 839 P.2d 1059, 1063-64 (1992) (describing the California grand jury process and noting that the grand jury, like the magistrate in a preliminary hearing, must determine whether sufficient evidence has been presented to

If a prosecutor elects to proceed with a preliminary hearing, Proposition 115 allows prosecutors to impair a magistrate's ability to screen cases effectively by decreasing informed participation by the defense in several respects. The elimination of statutorily mandated, post-arraignment discovery of the police and incident reports enables prosecutors to withhold from the defense law enforcement-generated information regarding the basis for criminal charges against particular defendants.¹⁸⁸ Unless prosecutors choose to provide arrest and incident reports voluntarily,¹⁸⁹ or choose to do the same with any other information in their possession between arraignment and a preliminary hearing,¹⁹⁰ the defense may be forced to prepare for a

support a holding that a defendant must answer a criminal complaint); *cf.* *United States v. Williams*, 504 U.S. 36, 48-51 (1992) (explaining the grand jury mechanisms which create a necessary institutional predisposition to issue indictments, and thereby contribute to the results listed above in the text). A prosecutor who chooses to avoid a preliminary hearing must present her case to a grand jury. A grand jury hearing, however, often serves as a one-sided discovery tool for the prosecution rather than as a check on prosecutorial discretion:

This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.

United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting) (quoting Judge William Campbell in *Hodgson v. District No. 5, United Mine Workers of America*, 55 F.R.D. 229, 253 (1972)). A prosecutor selects which witnesses to subpoena and question. *See* CAL. PENAL CODE § 939.2 (West 1985). Neither the defendant nor defense counsel can observe or participate, there is no judicial officer presiding, and grand jurors are not required to have any legal training. *See id.* §§ 893, 939, 939.7. The proceedings are not open to the public. *See id.* § 939. The defense is entitled to a copy of the grand jury transcript at least five days before trial. *See id.* § 869. In California, prosecutors must disclose evidence exculpating the defendant to the grand jury. *See Johnson v. Superior Court*, 15 Cal. 3d 248, 254-55, 539 P.2d 792, 795-96 (1975) (codified at CAL. PENAL CODE § 939.71 (West Supp. 1998)). Hearsay is inadmissible before a grand jury. *See* CAL. PENAL CODE § 939.6 (West 1985 & Supp. 1998).

According to Jacqueline Crowle, Deputy Alternate Public Defender and the Head of Writs and Appeals of the San Diego Department of the Alternate Public Defender, prosecutors are utilizing the grand jury procedure more often after Proposition 115 than they were before 1990. David Yamasaki, Assistant Executive Officer with the San Diego Superior Court, informed this author that the courts do not keep those numbers, but he estimates that there are about 100 indictments filed per year in San Diego.

188. *See* CAL. PENAL CODE §§ 859, 1430 (West 1990), *repealed by* CAL. PENAL CODE § 1054(e) (West Supp. 1998). Before Proposition 115, prosecutors were required to provide the defense with arrest and incident reports within 48 hours of arraignment without any judicial intervention. *See id.*

189. Prosecutors are not required to provide this information under Proposition 115 absentia request. *Cf.* CAL. PENAL CODE § 1054.5 (West Supp. 1998) (regulating disclosure of information supporting a criminal charge). Post-arraignment discovery is generally not burdensome for prosecutors. Most prosecutors responsible for issuing felony cases base a criminal complaint on written incident and arrest reports. The incident reports supply the basis for criminal charges, and the arrest reports typically supply the basis for the identification of the defendant as the perpetrator. These reports are therefore readily available and copying costs in many jurisdictions (San Diego, for example) are paid by the defense. Any concerns for the safety of potential witnesses can be addressed by the prosecution by requesting appropriate protective orders at arraignment.

190. Prosecutors are not required to provide these reports under Proposition 115 before a

preliminary hearing with no information beyond that contained in the criminal complaint.¹⁹¹ The defense's diminished access to information impairs its ability to test effectively the reliability of evidence presented at preliminary hearings. Absent information about the factual basis for the charges or the identification of the defendant in advance of a preliminary hearing, the defense is less likely to be able to assist magistrates in evaluating the evidence by locating and interviewing potential witnesses,¹⁹² inspecting crime scenes, retesting evidence of deteriorating quality (e.g., blood),

preliminary hearing. See CAL. PENAL CODE § 1054.5 (West Supp. 1998) (regulating the discovery process). Examples of information routinely available to prosecutors and not readily available to the defense include: lab reports, hospital records for crime victims and witnesses, law enforcement records, and child protective services records. The prosecutor is the "doorkeeper" of certain information, such as Department of Justice "rap sheets." In this instance, defense disclosure requests must go through the prosecutor's office. See *People v. Little*, 59 Cal. App. 4th 426, 432-33, 68 Cal. Rptr. 2d 907, 910-11 (1997) (stating that the prosecutor was the assigned "doorkeeper" of rap sheets and had a duty to disclose to the defendant the felony convictions of material witnesses).

191. Providing the accused with a copy of the complaint at arraignment notifies the accused of the nature and date of the alleged crimes. The recent relaxation of charging requirements for certain offenses, however, provides only a time frame rather than a date of the alleged offense. In serious cases, the statute of limitations is lengthy enough to create an insurmountable obstacle for the defense. See generally CAL. PENAL CODE § 803(g) (West Supp. 1998) (allowing a criminal complaint to be filed "within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of eighteen years, was the victim" of specified sexual offenses). If magistrates decide to order pre-preliminary hearing discovery for the defense at a post-arraignment hearing, the defense would have less time to digest the material to prepare for a timely preliminary hearing than was available with mandatory discovery following arraignment.

Proposition 115's discovery provisions allow a prosecutor to arrive at preliminary hearings with the same information available to her as before Proposition 115. The defense generally has no independent access to police or arrest reports, scientific results obtained by governmental labs, or information in law enforcement data banks. The defense may not know who potential witnesses are or how to locate them. If these potential witnesses are known, they will probably be more reluctant to speak with the defense than with the prosecution. A delay in speaking with potential witnesses may allow faulty memories to develop. See generally JONATHAN M. PURVER ET AL., CALIFORNIA TRIAL HANDBOOK (2d ed., Bancroft-Whitney 1987) (discussing the importance of careful examination of all witnesses and physical evidence when preparing for trial). However, Proposition 115 did not eliminate all sources of information from the defense prior to the preliminary hearing. Voluntary disclosure by prosecutors, access to resources not involved with the prosecution, pre-preliminary hearing court proceedings such as lineups and bail reviews, the defendant herself, and pre-preliminary hearing discovery motions may offer the defense access to some of the information Proposition 115 now allows prosecutors to withhold until the defense can meet the new procedural requirements.

192. It is axiomatic that early investigation is critical in order to locate and preserve evidence and interview witnesses while their recollections are fresh. See *Woman is Dead; Police Shootings Debate Lives On*, SAN DIEGO UNION-TRIB., Aug. 10, 1993, at B-1 (describing a police shooting in which the officers were not questioned about their conduct after they shot and killed a mentally disturbed woman and noting the importance of discussing an incident while participants' memories are fresh). Without some information regarding the basis for the charges, the defense may not be able to identify or locate witnesses in order to serve them with subpoenas. An example of how "time is of the essence" in locating and interviewing witnesses is demonstrated by the Gang Division of the San Diego District Attorney's Office; prosecutors are on call twenty-four hours a day in order to afford a quick response to crime scenes to preserve potential testimony.

obtaining physical evidence that degenerates or disappears over time,¹⁹³ or preparing an affirmative defense.¹⁹⁴

Proposition 115 creates additional barriers to effective screening during the proceeding itself. In contrast to California court decisions recognizing discovery as a collateral but important purpose of preliminary hearings,¹⁹⁵ Proposition 115 prohibits the use of preliminary hearings for purposes of discovery except when the magistrate requires additional information to determine probable cause.¹⁹⁶ This interpretation is in conflict with secondary, but systemically important magisterial functions that survived the passage of Proposition 115, such as reducing eligible charges to misdemeanors, striking enhancements, deciding legal issues, and resolving factual conflicts.

Proposition 115 affects the ability of magistrates to screen cases at preliminary hearings in two other respects. Ostensibly to protect victims and witnesses¹⁹⁷ and to shorten the length of the proceedings,¹⁹⁸ Proposition 115 permits prosecutors to present

193. Examples of physical evidence that can deteriorate over time include: police dispatch tapes, samples of bodily fluids that are improperly stored, bruises or other physical conditions, security videotapes that are periodically recycled, and business records that are routinely shredded.

194. Excluding the defense from early investigation may cause the irretrievable loss of information critical to the defense such as fresh recollections of potential alibi witnesses. Timing is particularly important when the information depends on memory rather than independent documentation. Law enforcement and the prosecution are historically less concerned with preserving evidence supporting a defense than a conviction. See Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993) (noting that law enforcement often conducts minimal investigations and reports are limited to inculpatory facts).

195. See *supra* note 174 and accompanying text.

196. See CAL. PENAL CODE § 866(b) (West Supp. 1998) ("It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery."); see also *People v. Lepe*, 57 Cal. App. 4th 977, 983-84, 67 Cal. Rptr. 2d 525, 529 (1997) (concluding that a magistrate's sustaining of objections that limited defense counsel's cross-examination of a prosecution witness whose testimony appeared unclear and confused was not a meaningful restriction on cross-examination in view of Proposition 115's prohibition on the use of preliminary hearings for discovery).

197. See CAL. CONST. art. I, § 30(b) (admitting hearsay evidence in preliminary hearings in order to protect victims and witnesses). The new hearsay provision spares witnesses the inconveniences brought about by continuances of a preliminary hearing, protects witnesses from cross-examination before trial, and shields witnesses from early accountability.

198. According to Jacqueline Crowle, Deputy Alternate Public Defender and Head of Writs and Appeals of the San Diego County Department of the Alternate Public Defender, preliminary hearings utilizing hearsay pursuant to Proposition 115 are much shorter than traditional preliminary hearings. She reports a sharp increase in the number of "ten-minute prelims" and frequent objections by the prosecutor to the use of a preliminary hearing for discovery. Vanessa Logan, Division Manager with the San Diego Municipal Court, reports that the average preliminary hearing lasts from thirty to forty-five minutes, contrasted with about an hour prior to Proposition 115.

hearsay offered by “qualified” law enforcement officers¹⁹⁹ to support a finding of probable cause.²⁰⁰ Additionally, magistrates must, at the request of prosecutors, demand an offer of proof from the defense that satisfies specific criteria before allowing defense witnesses to testify at preliminary hearings.²⁰¹ While hearsay testimony may shorten preliminary hearings, the absence of a hearsay declarant can impair cross-examination²⁰² and a magistrate’s ability to assess the credibility of the declarant,²⁰³ and thereby impair an accurate determination of the reliability of the hearsay testimony.²⁰⁴ If

199. In order to be considered qualified, the code sets out two criteria, at least one of which must be satisfied.

Any law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and testifying at preliminary hearings.

CAL. PENAL CODE § 872(b) (West Supp. 1998).

200. “Notwithstanding Section 1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted” *Id.* For further discussion on the impact of Proposition 115’s evidentiary changes on preliminary hearings, see Laura Berend, *Proposition 115 Preliminary Hearings: Sacrificing Reliability on the Altar of Expediency?*, 23 PAC. L.J. 1131 (1992).

201.

Upon the request of the prosecuting attorney, the magistrate shall require an offer of proof from the defense as to the testimony expected from the witness. The magistrate shall not permit the testimony of any defense witness unless the offer of proof discloses to the satisfaction of the magistrate, in his or her sound discretion, that the testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of the crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness.

CAL. PENAL CODE § 866(a) (West Supp. 1998).

202. Of particular concern is the opportunity for the defense to cross-examine witnesses competently. Obviously, a hearsay declarant whose information is relayed to a magistrate by a “115-qualified” law enforcement officer cannot be cross-examined at all. A mere opportunity to cross-examine this officer, or to cross-examine any other witness without benefit of discovery, is a hollow right indeed.

Bare existence of an opportunity for cross-examination in a prior proceeding supplies only a limited indicator of the opportunity’s adequacy. . . .

Qualitative factors play a role. The nature of the proceeding; the character of the witness and his connection with the events; the extent and subject of his direct testimony; the time and preparatory opportunities available to the accused and his attorney—these are some of the influential factors.

People v. Gibbs, 255 Cal. App. 2d 739, 743, 63 Cal. Rptr. 471, 474-75 (1967).

203. A 1991 study found judges, college students, and psychiatrists to be the worst of 509 persons tested in determining the truth. *See Judge found poor judge of the truth*, SAN DIEGO UNION-TRIB., Sept. 7, 1991, at A-30.

204. *See Whitman v. Superior Court*, 54 Cal. 3d 1063, 1078, 820 P.2d 262, 270 (1991) (conceding that the reliability of hearsay offered at preliminary hearings may remain untested until trial). In *Whitman*, the California Supreme Court did not address the consequences of dispositions arrived at in lieu of trial resting on less reliable evidence. *Cf.*, *People v. Muniz*, 16 Cal. App. 4th 1083, 1085-86, 20 Cal. Rptr. 2d 460, 462-63 (1993) (holding that Proposition 115 hearsay presented at a preliminary hearing was properly received into evidence during a trial on the preliminary hearing transcript alone, known as a “slow plea,” because defense counsel had not objected specifically to the use of hearsay at the preliminary hearing or as part of the

discovery is unavailable prior to a preliminary hearing, the defense may be unprepared to present testimony that may be relevant to a probable cause determination. If prosecutors request that magistrates demand offers of proof prior to allowing the defense to call witnesses, an inadequately informed defense may be unable to make a threshold showing complying with Proposition 115's new criteria,²⁰⁵ and fail to present otherwise relevant witnesses.

Following Proposition 115, the effectiveness of preliminary hearings as a screening device and a check on prosecutorial discretion has decreased. Prosecutors can now withhold discovery, present hearsay, and demand that magistrates restrict defense testimony for any reason. A prosecutor may implement Proposition 115's changes because she does not like defense counsel or a judge, because she wants to prolong a defendant's time in custody on a case that will probably be dismissed eventually, or because she genuinely wants to make a minimal showing on an ordinary, straightforward criminal case. Cases charged as felonies that may have been reduced to misdemeanors may be tried as felonies. Legal and factual issues may be first identified at trial, if there is one, necessitating an interruption of the proceedings, or an appeal, requiring a balancing of competing concerns to determine whether the case should be returned to the trial courts. Felony cases that would otherwise have settled without trial may be resolved later in the process, may be tried unnecessarily, or may be dismissed if the prosecution can produce no live witnesses at trial because a Proposition 115 preliminary hearing was conducted.²⁰⁶ While preliminary hearings may be shorter as a result of Proposition 115, postponing settlements, adjustments of the charges, or dismissals defeats Proposition 115's objective of streamlining the criminal process as a whole.²⁰⁷ In effect, Proposition 115 allows prosecutors to substitute their judgment for that of magistrates and insulate their cases from effective pretrial screening.

stipulation to a submission on the transcript).

205. See CAL. PENAL CODE § 866(a) (West Supp. 1998) (requiring that the offer of proof satisfy the magistrate that the testimony of the witness "would be reasonably likely to establish an affirmative defense, negate an element of a crime charged or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness").

206. See *People v. Lepe*, 57 Cal. App. 4th 977, 983-84, 67 Cal. Rptr. 2d 525, 529 (1997) (holding that the use of the preliminary hearing transcript of a prosecution witness who was unavailable for trial was proper, and that the magistrate did not unduly restrict defense counsel's cross-examination of a witness at the preliminary hearing by adhering to the limitations provided by Proposition 115).

207. PROPOSITION 115, *supra* note 1, §§ 1(c), 29.

B. Plea Bargains

1. Prior to Proposition 115

Before and after Proposition 115, courts have resolved over ninety-five percent of felony cases in California without a trial.²⁰⁸ Dismissals or resolutions without criminal convictions occur in a small number of cases;²⁰⁹ however, most dispositions are pleas of guilty.²¹⁰ Negotiated guilty pleas,²¹¹ while often criticized²¹² and sometimes restricted,²¹³ have long been recognized as a legitimate, or at least a necessary part of the criminal trial process.²¹⁴

208. In fiscal year 1989-90, before Proposition 115, only 2.3% of all felony filings beginning in municipal court in California proceeded to a jury trial in superior court. See 2 JUDICIAL COUNCIL OF CALIFORNIA, 1991 ANNUAL REPORT 74. Following Proposition 115, only 2.6% of all felony filings in fiscal year 1995-96 proceeded to a jury trial in superior court. See 1997 JUDICIAL COUNCIL REPORT, *supra* note 143, at 54.

209. In fiscal year 1995-96, courts dismissed 14% of felony filings in municipal courts before a preliminary hearing. See 1997 JUDICIAL COUNCIL REPORT, *supra* note 143, at 84. Of felony dispositions in superior courts in fiscal year 1995-96, 5.6% of criminal cases were dismissed before trial and 0.8% were resolved without a conviction following a court or jury trial. See *id.* at 54.

210. In fiscal year 1995-96 in California, 87.5% of defendants appearing in superior court on felony charges pled guilty to felonies before trial, and 1.8% pled guilty to misdemeanors before trial, for a total of 94.9% of all defendants in superior court. See *id.* at 53. A plea of nolo contendere has the same effect in California as a plea of guilty, except that a no contest plea to a misdemeanor "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." CAL. PENAL CODE § 1016 (West Supp. 1998).

211. Negotiated pleas are far more common than pleas of guilty to all charges, or "pleading to the sheet," or "pleading to the face of the information."

212. See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 (1981) ("[P]lea bargaining remains an inherently unfair and irrational process."); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1179 (1975) (discussing the role of the attorney in the equalization of the plea bargaining process); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 520 (1969) (discussing the prosecutor's motivations for offering a plea bargain); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059, 1060 (1976) (arguing that judicial bargaining is as coercive as prosecutorial bargaining); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 8 (1978) (comparing medieval notions of tortured confessions with the present-day plea bargaining process); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1981 (1992) (discussing the structural problems behind the distortion of an effective plea bargain plan); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1045 (1984) (comparing the viewpoints on the abolition of plea bargaining); cf. Robert E. Scott & William J. Stunts, *Plea Bargain as Contract*, 101 YALE L.J. 1909, 1912 (1992) (favoring plea bargaining but noting the contrary views of many commentators).

213. California voters attempted to prohibit plea bargaining in serious felony cases by approving an initiative on the June 8, 1982, ballot. See CAL. PENAL CODE § 1192.7 (West 1985 & Supp. 1998) (noting that this section was added by an initiative measure). Because the statute prohibits plea bargaining on charges contained in an indictment or information, the effect of the section only prohibits plea bargaining in superior court following a preliminary hearing. This change led to the development of plea negotiation calendars in municipal court prior to a preliminary hearing.

214. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 361 (1978) (stating that the plea bargain and guilty plea are "important components of this country's criminal justice system"); *Santobello v. New York*, 404 U.S. 257, 261 (1971) (noting that plea agreements are an essential,

The plea negotiation process reflects a judicially sanctioned balance struck between the benefits and the risks of case dispositions in lieu of trial.²¹⁵ Guilty pleas serve systemic interests of the prosecution and the criminal justice system as a whole.²¹⁶ Potential witnesses are spared the inconvenience and burden of testifying at trial. The uncertainty of jury or judge verdicts is avoided. Change of plea and sentencing hearings consume far less court resources than trials.²¹⁷ Prosecutors can propose pleas to charges that more accurately reflect investigation results without risking a dismissal or acquittal, thereby controlling their caseloads and focusing their energies on a smaller number of cases for trial. A plea agreement automatically limits many grounds for post-conviction challenges,²¹⁸ and can be structured to include specific additional appellate waivers.²¹⁹ Particular sentences or ranges of sentences can be

desirable part of the criminal process); *Brady v. United States*, 397 U.S. 742, 751 (1970) (asserting that a state, to some extent, encourages pleas of guilty "at every important step in the criminal process"); *People v. Vargas*, 13 Cal. App. 4th 1653, 1657, 17 Cal. Rptr. 2d 445, 448 (1993) (allowing a defendant to waive his statutory right to appeal as part of a plea agreement as long as the waiver is knowing and voluntary); *People v. Charles*, 171 Cal. App. 3d 552, 558, 217 Cal. Rptr. 402, 405 (1985) (upholding the waiver of the right to appeal the denial of a motion to suppress in exchange for a plea bargain); *People v. West*, 3 Cal. 3d 595, 604, 477 P.2d 409, 413 (1970) (stating that the plea bargain process is beneficial to both the state and the defendant); *In re Hawley*, 67 Cal. 2d 824, 828, 433 P.2d 919, 921 (1967) (providing that bargaining for pleas is an important factor in the administration of criminal law); *see also, e.g.*, Frank Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992) (defending plea bargaining); ERWIN ET AL., *supra* note 33, § 42.40 (discussing plea bargaining in California).

215. *See supra* note 214.

216. *See id.*

217. *See West*, 3 Cal. 3d at 604, 477 P.2d at 413 (stating that plea bargaining avoids the cost of a trial and increases the efficiency of the criminal process). According to David Yamasaki, Assistant Executive Officer of the San Diego Superior Court, in the San Diego Judicial District there are four judges who dispose of the 95% of the cases that do not proceed to trial (two Municipal Court judges who settle felony cases and two Superior Court judges), and about twenty judges who preside over the 3 percent to 4 percent of cases that actually proceed to trial.

218. *See CAL. PENAL CODE* § 1237.5 (West 1985 & Supp. 1998) (requiring a defendant wishing to appeal a guilty plea to show "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" and to obtain a certificate of probable cause from the trial court); *see also People v. Panizzon*, 13 Cal. 4th 68, 74-76, 913 P.2d 1061, 1064-65 (1996) (stating that the purpose of requiring a certificate of probable cause from the trial court is to preserve judicial economy, and observing that a guilty plea preserves the right to appeal from the denial of a Penal Code section 1538.5 motion and from proceedings that occur subsequent to a plea); *People v. Hoffard*, 10 Cal. 4th 1170, 1176-77, 899 P.2d 896, 899-901 (1995) (finding that California law requires the defendant to identify reasonable grounds for appeal in the trial court); *People v. Manriquez*, 18 Cal. App. 4th 1167, 1170-71, 22 Cal. Rptr. 2d 779, 780-81 (1993) (noting that Penal Code section 1237.5 is designed to weed out frivolous appeals). *See generally* David Kay, *Appellate Review After a Plea of Guilty*, in *Appellate Defenders Inc. Appellate Practice Manual* 84, (1993) (discussing procedural issues in appeals after guilty pleas are entered); *see also LAFAVE & ISRAEL, supra* note 12, at 941-43.

219. A defendant may waive her appellate rights as a condition of a negotiated plea so long as the waiver is knowing and intelligent. *See People v. Vargas*, 13 Cal. App. 4th 1653, 1658, 17 Cal. Rptr. 2d 445, 448 (1993) (permitting a criminal defendant to waive his right to appeal as long as it is knowing and intelligent); *People v. Nguyen*, 13 Cal. App. 4th 114, 118-19, 16 Cal. Rptr. 2d 490, 493 (1993) (finding that defendant knowingly, voluntarily, and intelligently

incorporated in the negotiation. Prosecutors can negotiate for a defendant's assistance in prosecuting other cases.²²⁰ By agreement in California, a sentencing court can consider unfiled or dismissed charges in determining punishment.²²¹ Guilty pleas can require defendants to acknowledge publicly their culpability for an offense by providing a factual basis for a plea of guilty under penalty of perjury.²²² In multiple defendant cases, pleas as well as sentences can be negotiated that reflect different degrees of culpability.²²³

waived his right to appeal despite the fact that he failed to bargain for a specific term of imprisonment). The right to appeal is a statutory, not a constitutional right. *See Vargas*, 13 Cal. App. 4th at 1658, 17 Cal. Rptr. 2d at 448. A waiver of a right to appeal errors occurring after the waiver is taken must explicitly refer to errors subsequent to the agreement. *See People v. Walker*, 17 Cal. App. 4th 1189, 1195, 21 Cal. Rptr. 2d 880, 884 (1993) (holding that a defendant who waived his right to appeal as part of his plea agreement did not knowingly waive his right to appeal subsequent errors because his waiver was not specifically referring to later errors). In 1985, California first recognized the validity of a waiver of a defendant's right to appeal the denial of a motion to suppress evidence pursuant to Penal Code section 1538.5 as a condition of a plea agreement. *See People v. Charles*, 171 Cal. App. 3d 552, 563-64, 217 Cal. Rptr. 402, 409 (1985) (holding that notwithstanding the defendant's claim that the waiver was coerced, a waiver of a right to appeal the denial of a motion to suppress evidence is valid as long as it is knowing and intelligent). The March, 1998, San Diego County Superior/Municipal Court guilty/no contest form for felony cases includes a provision for a defendant who pleads guilty/no contest to waive her right to appeal a denial of a motion to suppress, and three strikes, prior conviction, and stipulated sentence issues.

220. *But see People v. Kasim*, 56 Cal. App. 4th 1360, 66 Cal. Rptr. 2d 494, (1997) (holding that a prosecutor's failure to disclose to the defense evidence regarding benefits received by a prosecution witness was a due process violation).

221. *People v. Harvey*, 25 Cal. 3d 754, 758, 602 P.2d 396, 398 (1979) ("In our view, under the circumstances of this case, it would be improper and unfair to permit the sentencing court to consider any of the facts underlying the dismissed count 3 for purposes of aggravating or enhancing the defendant's sentence."). Plea bargains are often conditional on a defendant's agreeing to a *Harvey* waiver. Such a waiver is included on the March, 1998, San Diego County Superior/Municipal Court change of plea form for felony cases.

222. Unless an exception applies, pleas must be personally entered by the defendant:

Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel. . . . This section shall be liberally construed . . . to promote justice.

CAL. PENAL CODE § 1018 (West 1985 & Supp. 1998).

223. Plea offers in multiple defendant cases are known as "package deals." Prosecutors may not make the same offer to all co-defendants. On July 1, 1977, California implemented determinate sentencing for most felonies committed after that date. *See ERWIN ET AL.*, *supra* note 33, § 91.01[1]. Judges wishing to impose state prison sentences for felonies covered by the determinate sentencing structure must impose one of three available terms. Aggravating and mitigating circumstances may be considered in determining an appropriate sentence. *See CALIFORNIA R. OF CT., SENTENCING R. FOR THE SUPER. CT.*, Rules 421, 423 [hereinafter SENTENCING RULES]; *People v. Charles*, 171 Cal. App. 3d 552, 558, 217 Cal. Rptr. 402, 405

Complaining witnesses may gain a sense of empowerment by being consulted by the prosecution in crafting a plea agreement²²⁴ or by making a statement to the court at a sentencing hearing.²²⁵ The risk of a defendant benefiting from a plea bargain based on unreliable information is reduced by a sentencing judge's ability to avoid honoring the agreement under some circumstances.²²⁶

Plea bargaining serves a defendant's interests as well. Some defendants plead guilty to the charges filed against them without any agreements from either a prosecutor or a judge regarding sentencing.²²⁷ However, most defendants plead guilty because the prosecution has offered, often with a judge's concurrence, to reduce charges, reduce sentencing maximums, or include other inducements.²²⁸ For an incarcerated defendant, lower bail or a release from custody may be obtained in exchange for a plea to a

(1985) (noting that plea agreements increase the flexibility of the criminal justice process).

224. See Bill Callahan, *Widows' pleas rule out death for SDSU killer*, SAN DIEGO UNION-TRIB., May 24, 1997 at A-1 (reporting that the San Diego District Attorney's Office, at the request of the victims' widows, agreed not to pursue the death penalty against a defendant accused of murdering three professors); Leslie Wolf, *Victim's mom spared ordeal; killer to live*, SAN DIEGO UNION-TRIB., Sept. 5, 1998, at B-1 (reporting that the San Diego District Attorney decided not to pursue the death penalty for a man convicted of murdering a 15-year-old girl at the request of her mother after the jury deadlocked 11-1 in favor of execution).

225. In 1982, crime victims were given the right to be present and to offer their views at sentencing hearings. See CAL. PENAL CODE § 1191.1 (West 1985 & Supp. 1998).

226. The non-binding nature of an approved plea is specifically provided for:

If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of the further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.

Id. § 1192.5; see also *People v. Stringham*, 206 Cal. App. 3d 184, 196, 199-201, 253 Cal. Rptr. 484, 490, 493-94 (1988) (indicating initial approval of a plea bargain, but properly withdrawing approval at the sentencing proceedings after a statement was made by the victim's next of kin denouncing the bargain; the bargain was not enforceable by the defendant because it never was finally accepted by the court). Penal Code section 1192.5 by implication vests the trial judge with broad discretion to withdraw approval of a bargain previously accepted. See CAL. PENAL CODE § 1192.5 (West 1985 & Supp. 1998); see also *People v. Johnson*, 10 Cal. 3d 868, 873, 519 P.2d 604, 607 (1974) (stating that the court has broad discretion to withdraw prior approval of a plea agreement); *People v. Delles*, 60 Cal. 2d 906, 910-11, 447 P.2d 629, 631-33 (1968) (finding that a judge has discretion to revoke a plea agreement but must allow the defendant to withdraw his guilty plea).

227. This is known as "pleading to the sheet."

228. See, e.g., *People v. Charles*, 171 Cal. App. 3d 552, 588, 217 Cal. Rptr. 402, 405 (1985) (stating that by reducing the charges, plea bargaining gives the defendant the benefit of lessening the punishment). Examples of inducements offered by a prosecutor to a defendant to encourage a guilty plea are an offer to dismiss other charges in the same case, dismiss other cases, not oppose treatment for substance abuse or mental problems, or an agreement not to file other charges.

lesser charge.²²⁹ Potential sentencing consequences may be minimized. A guilty plea constitutes an early acknowledgment of guilt that may be considered in a defendant's favor under California's determinate sentencing rules.²³⁰ The consequences of particular offenses may be minimized or avoided.²³¹ Particularly in jurisdictions with assigned settlement departments, one of the uncertainties inherent in going to trial, besides an unpredictable jury result, is which judge will be assigned the case. In California, a defendant who pleads guilty is entitled to be sentenced by the judge who accepts the plea.²³² A defendant is entitled to the benefit of the bargain or she may withdraw her plea.²³³ A negotiated plea allows a judge to sentence a defendant as an individual and consider mitigating circumstances not constituting a defense.²³⁴

Courts have created minimum requirements to render guilty pleas constitutionally acceptable substitutes for the adversarial testing of a trial.²³⁵ A defendant must plead guilty knowingly, voluntarily and intelligently rather than through "[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats."²³⁶ A

229. See Anne Krueger, *Plea deal resolves tangled shooting case*, SAN DIEGO UNION-TRIB., June 4, 1998, at B-1 (stating that Jemal Kasim, who had originally faced life in prison before his conviction had been overturned on appeal, pled guilty to a felony charge that was expected to result in his immediate release); Anne Krueger, *Man gets lighter sentence after conviction overturned, expected to be released soon*, SAN DIEGO UNION-TRIB., Sept. 20, 1997, at B-2 (noting that family members of Jerauld Harrel, who entered a guilty plea to voluntary manslaughter after serving the maximum sentence for that offense while his murder case was on appeal, indicated that the defendant only pleaded guilty "because he was assured of being immediately released from prison").

230. A sentencing court may mitigate a defendant's sentence because "[t]he defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process." SENTENCING RULES, *supra* note 223, R. 423(b)(3).

231. Convictions for certain offenses may require a defendant to register as a sex offender for the rest of her life, see CAL. PENAL CODE § 290 (West Supp. 1998), bar her from certain types of employment requiring licensing or bonding, constitute an admission for purposes of a civil suit relating to the same conduct, see *id.* § 1016(3), or subject her to deportation, see *id.* § 1016.5.

232. See *People v. Arbuckle*, 22 Cal. 3d 749, 757, 587 P.2d 220, 224 (1978) ("Because of the range of dispositions available to a sentencing judge; the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant's decision to enter a guilty plea."). However, a defendant may be required to waive her *Arbuckle* right as a condition of a plea bargain. A waiver to this effect is included on the March, 1998, San Diego County Superior/Municipal Court change of plea form for felony cases.

233. See CAL. PENAL CODE § 1192.5 (West 1985 & Supp. 1998).

234. See SENTENCING RULES, *supra* note 223, R. 423 (stating factors to be examined in mitigation); *People v. West*, 3 Cal. 3d 595, 605, 477 P.2d 409, 414 (1970) ("Plea bargaining also permits the courts to treat the defendant as an individual, to analyze his emotional and physical characteristics, and to adapt the punishment to the facts of the particular offense.").

235. See Nakell, *supra* note 8, at 443 (discussing the need to maintain the integrity of the trial process).

236. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); see also *In re Tahl*, 1 Cal. 3d 122, 133, 460 P.2d 449, 456-57 (1969) (holding that a plea must be made "knowingly and without threat or inducement").

defendant must explicitly waive her trial rights and demonstrate an understanding of the charges and the direct consequences of her plea.²³⁷ Both the United States and California Supreme Courts have approved negotiated pleas that are true “bargains” rather than an admission of criminal culpability by a provably guilty defendant so long as those standards are met.²³⁸ Consequently, a systemic interest in finality,²³⁹ combined with a defendant’s desire to ameliorate the consequences of a conviction at trial, can result in a judicially sanctioned exercise in risk assessment rather than an admission of participation in a criminal act.²⁴⁰

Although conviction by plea is the functional equivalent of a conviction following a jury trial, courts have not held that defense discovery is a prerequisite to a guilty plea.²⁴¹ The courts have been

237. See *Boykin*, 395 U.S. at 243 (“First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment Second, is the right to trial by jury Third, is the right to confront one’s accusers We cannot presume a waiver of these three important federal rights from a silent record.”); *People v. Walker*, 54 Cal. 3d 1013, 1020, 819 P.2d 861, 864 (1991) (holding that a defendant must be advised of the direct consequences of pleading guilty); *Bunnell v. Superior Court*, 13 Cal. 3d 592, 605, 531 P.2d 1086, 1092 (1975) (holding, in a case submitted for trial on the preliminary hearing transcript, that a defendant must be advised of all the direct consequences of a conviction); *In re Tahl*, 1 Cal. 3d at 132-33, 460 P.2d at 456-57, (stating that an express waiver on the record is required to waive the right to a jury trial). A defendant who pleads guilty must also be advised of the immigration consequences of the plea. See CAL. PENAL CODE § 1016.5 (West 1985 & Supp. 1998).

238. See *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (stating that a defendant voluntarily and knowingly may plead guilty even if she does not admit guilt); *West*, 3 Cal. 3d at 604, 477 P.2d at 417 (holding that there is nothing unconstitutional in the exchange of benefits between the state and defendant who is willing to plead guilty in return for a shorter sentence). For example, while the author was in practice in San Diego, some defendants charged with possession of heroin, a nonreducible felony, pled guilty (pursuant to *People v. West*), to possession of amphetamines, a reducible felony, irrespective of the fact that there was no doubt that these defendants did not possess amphetamines, in order to have the potential at reducing a felony conviction to misdemeanor at a later date.

239. See *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (recognizing the benefits to the criminal justice system of preserving the finality of guilty pleas); *People v. Panizzon*, 13 Cal. 4th 68, 80, 913 P.2d 1061, 1068 (1996) (stating that guilty pleas benefit the criminal justice system “by promoting speed, justice and finality of judgments”).

240. The inherent unpredictability of trial results, or, on the other hand, the apparent inevitability of a conviction, may sway a particularly risk-averse defendant to accept an otherwise unacceptable plea. See, e.g., Michael Harris, *Judge Throws Out Guilty Plea In Lance Helms Murder Case*, L.A. DAILY J., Sept. 15, 1997, at 1 (reporting that a defendant who had pled guilty to child endangerment at the urging of her attorney in exchange for the prosecution’s offer to dismiss a murder charge involving the death of her son was allowed to withdraw her plea and enter a new plea of not guilty following the discovery of compelling evidence that may have exonerated her).

241. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) (holding that the failure to provide pretrial discovery is not a violation of the Confrontation Clause). “The ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.” *Id.* at 53. Due process, however, does require the government “to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment” *Id.* at 57. “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment” *Brady v.*

unwilling to equalize the power imbalance between the parties by extending to the entry of a guilty plea the constitutional horizon mandating discovery from the prosecution to the defense.²⁴² Instead, the courts have relied on the Sixth Amendment's guarantee of effective assistance of counsel to assure the voluntariness of a guilty plea.²⁴³ Whether entering a guilty plea as a true admission of criminal culpability or as a bargain reached independent of the facts of the case, a defendant relies on the advice of counsel to assess the likelihood of a conviction at trial. Courts accord such assistance great deference in recognition of the validity of various tactical approaches to that decision.

Early and broad defense discovery prior to Proposition 115 provided a foundation of information upon which defense counsel

Maryland, 373 U.S. 83, 87 (1963); *see also* *People v. Pinholster*, 1 Cal. 4th 865, 941, 824 P.2d 571, 608 (1992) (holding that suppression of evidence did not violate due process because the evidence was not material); *People v. Pensinger*, 52 Cal. 3d 1210, 1272, 805 P.2d 899, 933 (1991) ("Under the federal Constitution, 'the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.'") (quoting *United States v. Bagley*, 573 U.S. 667, 678 (1985)).

242. The prosecution, having reviewed information provided by law enforcement to determine what charges to bring against a defendant, has sole discretion to choose whether to enter into plea negotiations. The San Diego District Attorney's Office considers the possible range of plea negotiations at the time a felony case is issued. "The prosecutor should not use the charging process to obtain leverage to induce a guilty plea to a lesser charge prior to trial. There should be a reasonable expectation of conviction on the designated charge." CALIFORNIA DIST. ATTORNEYS ASS'N., UNIF. CRIME CHARGING STANDARDS § III, at III-2 (1989). The commentary to this section states:

The use of the charging process simply to obtain plea leverage without any reasonable expectation of conviction on the designated charge cannot be reconciled with any of the prosecutor's legitimate goals in initiating prosecution. There is the additional risk that overcharging may induce innocent people to plead guilty to lesser charges to escape conviction on greater charges.

Id.

The prosecution can increase the pressure on the defense to accept a plea by increasing the consequences of a refusal. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (holding that a prosecutor carrying out a threat to indict a defendant under a charge subject to a mandatory life imprisonment term, where the defendant did not plead guilty to the existing charge which was punishable by a 2-10 year term, did not violate due process); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (concluding that the prosecutor's conduct did not violate due process). *But see Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (deciding that a prosecutor's escalation of charges against a defendant who had appealed violated due process because of a "realistic likelihood of vindictiveness").

243. *See Hill*, 474 U.S. at 58-59 (applying the two-pronged *Strickland* test of assistance of counsel that falls below an objective standard of reasonableness and resulting prejudice to challenges to guilty pleas based on ineffective assistance of counsel grounds) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)); *In re Alvernaz*, 2 Cal. 4th, 924, 936-37, 830 P.2d 747, 755-56 (1992) (holding that for a defendant to succeed in an ineffective assistance of counsel claim, he must show that the ineffective representation caused him to decline a valid plea offer and go to trial, irrespective of whether the defendant received a fair trial); *People v. Harvey*, 151 Cal. App. 3d 660, 666-71, 198 Cal. Rptr. 858, 861-64 (1984) (requiring counsel to advise a defendant of a potentially meritorious defense); *In re Tahl*, 1 Cal. 3d 122, 128, 460 P.2d 449, 453-54 (1969) (stating that the presence of counsel is the "crucial factor" in determining the voluntariness of a guilty plea).

could competently advise her client.²⁴⁴ California's pre-Proposition 115 experience with pretrial discovery proved arguments against discovery unpersuasive.²⁴⁵

2. *Proposition 115's changes*

Proposition 115 decreases the effectiveness of plea negotiations as a reliable substitute for trial to the extent that the defense may have less information on which to make an informed choice. By creating a discovery process in anticipation of trial and limiting access to law enforcement sources,²⁴⁶ Proposition 115's changes disengage defense discovery from the plea negotiation process and impair the reliability of early settlements in lieu of trial.

The effect of Proposition 115's provisions must be considered in the context of other dramatic changes to California's criminal justice system since Proposition 115 was enacted. Recent statutory changes in addition to Proposition 115 have increased the level of risk for the defense in going to trial to the extent that a decision to plead guilty, particularly at an early stage in the proceedings, may be inordinately affected by a defendant's fear of the consequences of a trial. The conversion of some determinate sentences to life terms,²⁴⁷ changes to

244. A study conducted in 1990 concluded that early and broad discovery in California not only encouraged more early guilty pleas, but had no impact on witness intimidation. Both prosecutors and defense lawyers reported increased efficiency in the criminal process. See Middlekauff, *supra* note 171, at 55-56.

245. For example, witness intimidation was unlikely, especially with protective orders. See John W. Katz, *Pretrial Discovery in Criminal Cases: The Concept of Mutuality and the Need for Reform*, 5 CRIM. L. BULL. 441, 460-61 (1969) (asserting that the judge should use protective orders to protect witnesses from potential intimidation); Middlekauff, *supra* note 171, at 56-57 (quoting a San Diego prosecutor who stated that discovery has no impact on witness intimidation). In addition, increased fabrication of evidence has never been established. See Katz, *supra*, at 461. The views expressed in opposition to defense discovery in *State v. Tune*, 98 A.2d 881, 884 (N.J. 1953), were abandoned by *State v. Johnson*, 145 A.2d 313 (N.J. 1958), indicating a presumption in favor of defense discovery. Cf. Michael Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 868-69 n.37 (1968) (stating that some states have a presumption in favor of discovery, and that California is the prime example).

246. See discussion *supra* Part III.B.1.

247. In 1994, the California legislature enacted a "Three Strikes You're Out" statutory scheme that further limits judicial discretion by mandating particular sentences for defendants meeting the statutory criteria, and by limiting judicial discretion to exempt a defendant from application of the new statutes. See CAL. PENAL CODE § 667(b)-(i) (West Supp. 1998). California voters passed a similar initiative measure in 1994, Proposition 184. See *id.* § 1170.12. Some judges, however, did not follow this law. See Marc Peyser & Donna Foote, *Strike Three, You're Not Out; Justice: California Judges Revolt Against the Law*, NEWSWEEK, Aug. 29, 1994, at 53. California courts have since held that judges retain the power to dismiss convictions. See *People v. Williams*, 17 Cal. 4th 148, 162, 948 P.2d 429, 437 (1998) (expanding on *Romero* and holding that a judge's decision to dismiss "strikes" must be accompanied by reasons entered in the court minutes); *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 529, 917 P.2d 628, 647 (1996) (holding that trial court judges retained their statutory power to dismiss convictions alleged as "strikes"). Also in 1994, the legislature mandated a sentence of twenty-five years to life for a first conviction for certain categories of rape. See CAL. PENAL CODE §§ 261, 667.61 (West Supp.).

federal immigration law,²⁴⁸ and the increasing difficulty of post-conviction challenges to guilty pleas,²⁴⁹ combined with existing restrictions on plea bargaining in superior court, have resulted in an increasing number in guilty pleas in municipal court in advance of a preliminary hearing.²⁵⁰

Proposition 115's changes increase the likelihood that a defendant's decision to plead guilty may be based on incomplete information about the strength of the charges. Defense counsel who is less able to assess the likelihood of a conviction at trial for a defendant who is less willing to risk the potential consequences of a trial,²⁵¹ particularly in California's current political climate,²⁵² is less likely to achieve a "legal truth" that is a reliable and fair substitute for a trial. Courts rely on the effective assistance of counsel to ensure that guilty pleas are constitutionally acceptable, whether or not discovery supporting a prosecutor's burden of proof has been provided to the defense. However, without access to discovery, that

1998); *see also id.* § 451.5 (providing a sentence of ten years to life for certain types of arson).

248. Judicial recommendations against deportation (known as "JRADs") offered protection against deportation for some categories of crimes committed by noncitizens. *See* 8 U.S.C. § 1251(b)(2) (1994). JRADs have been eliminated, and the immigration code was changed significantly in September, 1996, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act, which resulted in an incentive for a noncitizen defendant to enter into a plea bargain in order to plead guilty to a non-deportable offense. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.). The federal government is also more aggressively pursuing deportation. *See generally* DEFENDING A FEDERAL CRIMINAL CASE, *supra* note 49, at Ch. 17 (discussing immigration law in the context of criminal practice).

249. *See supra* notes 32-33.

250. In fiscal year 1986-87, 25% of felony filings were disposed of by felony pleas of guilty and 13% by guilty pleas to misdemeanors in municipal court before a preliminary hearing. *See* 1997 JUDICIAL COUNCIL REPORT, *supra* note 143, at 84. In fiscal year 1995-96, 43% of felony filings resulted in felony guilty pleas and 10% in misdemeanor guilty pleas before a preliminary hearing, an increase of 15 percentage points. *See id.*

251. Judges may strike "strikes" in exchange for a plea of guilty, with or without the consent of the prosecution, thereby effectively eliminating the risk of a 25-to-life sentence in the event of a trial. *See Romero*, 13 Cal. 4th at 532, 917 P.2d at 649 (noting that a court's willingness to "strike" a prior felony conviction in a "three strikes" case influenced the defendant's decision to plead guilty). The court's observations in *Romero* were repeated in *Williams*. *See Williams*, 17 Cal. 4th at 164, 69 Cal. Rptr. 2d at 927 (quoting *Romero*, 13 Cal. 4th at 532, 917 P.2d at 649). According to David Yamasaki, Assistant Executive Officer of the San Diego Superior Court, the San Diego Superior Court conducted jury trials for 4.3% of the felony filings beginning in Superior Court in 1993, 5.15% in 1994, 5.4% in 1995, 4.7% in 1996, and 4.4% in 1997. Although the Judicial Council does not keep separate statistics on dispositions in "three strike" or "one strike" cases, Mr. Yamasaki attributes the increases in 1994 and 1995 to the "Three Strikes and You're Out" statute. The bill was enacted in 1994, before the California Supreme Court in *Romero* held that judges had the discretion to strike "strikes" without the consent of the prosecution. Jacqueline Crowle, Deputy Alternate Public Defender and Head of Writs and Appeals at the San Diego Department of the Alternate Public Defender, and San Diego criminal defense attorney Thomas Ulovec agree with Mr. Yamasaki's assessment, reporting that "three strikes," "one strike," and immigration consequences have significantly decreased many defendants' willingness to risk exoneration at trial.

252. *See supra* notes 28, 30 and accompanying text.

assistance has little meaning.

Absent statutory, constitutional, or ethical support for pretrial discovery from the prosecution, unless a plea is envisioned within 30 days of trial, defense counsel is forced to rely on a prosecutor's ability or willingness²⁵³ to provide sufficient information to allow counsel to engage in a fact-based analysis of the case. This reliance may be misplaced. If the case is being prosecuted "horizontally,"²⁵⁴ the prosecutor assigned to a particular stage of a case in which a guilty plea is entered²⁵⁵ may have reviewed only notes in the file. Although a prosecutor maybe willing to provide discovery, she may possess less discovery to offer the defense, because Proposition 115 has eliminated the statutory leverage to request information from law enforcement at early stages of the proceedings.²⁵⁶ More ominously, Proposition 115 increases the ability of prosecutors to conceal discovery in proceedings in the trial courts as a whole²⁵⁷ without a realistic fear of penalty.²⁵⁸ The remaining sources of pretrial

253. For example, a prosecutor resisted discovery of the identity of three informants, but eventually disclosed them about a month before trial in response to a court order. *See* *People v. Pinholster*, 1 Cal. 4th 865, 940-41, 824 P.2d 571, 608-09 (1992) (holding that defendant's claim that the prosecutor withheld evidence was meritless because the prosecutor produced the witnesses in response to a court order); *see also infra* Part IV.C.1; *cf.* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1188 (1998) (suggesting that plea bargaining models be created by prosecution offices).

254. Prosecutors in a horizontal system are assigned to particular stages of cases, as opposed to a "vertical" prosecution that assigns a prosecutor to particular cases from the issuance of a complaint through sentencing, and are less likely to be familiar with the details of a case.

255. Guilty pleas typically can be entered before a preliminary hearing, following arraignment in Superior Court, at a pretrial motion, immediately before trial, and occasionally, during trial.

256. *See supra* Part III.B.1.

257. Sufficient numbers of recent cases revealing clearly undisclosed discoverable material in the context of trials argue for an examination of the inadequacy of the factual basis allowed by Proposition 115 for a defense determination to participate in a plea bargain. *See* *Merrill v. Superior Court*, 27 Cal. App. 4th 1586, 1596-97, 33 Cal. Rptr. 2d 515, 521-22 (1994) (ordering a new trial because a prosecutor not only failed to inform defense counsel of exculpatory evidence before trial, but allegedly attempted to dissuade a particular witness from testifying to exculpatory evidence at the trial). The court found that "the facts alleged, if true, present an appalling picture of official malfeasance," and found substantial and material error. *Id.* at 1592 n.3, 33 Cal. Rptr. 2d at 518-19 n.3; *see also* *People v. Robinson*, 31 Cal. App. 4th 494, 505, 37 Cal. Rptr. 2d 183, 190 (1995) (reversing for a *Brady* violation because the prosecutor withheld exculpatory evidence); *People v. Filson*, 22 Cal. App. 4th 1841, 1852, 28 Cal. Rptr. 2d 335, 340 (1994) (reversing the lower court's suppression of a possibly exculpatory tape); Edward J. Boyer, *Judge Reverses Conviction of Geronimo Pratt*, L.A. TIMES, May 30, 1997, at A-1.

258. Proposition 115's provisions for sanctions for statutorily required nondisclosure envision a trial. As yet, there is no evidence that these sanctions will be any more effective than sanctions available in the past. In a recent and particularly egregious case, the trial judge acquiesced in the prosecution's withholding of a witness's status as an informant at trial. *See* Anne Krueger, *Prosecutor says judge ordered lie*, SAN DIEGO UNION-TRIB., Sept. 19, 1994, at B-1. On appeal, the appellate court held that the prosecutor was not required to disclose that information to the defense, even if withholding that information required a lie. Anne Krueger, *Court OK's telling witnesses to lie*, SAN DIEGO UNION-TRIB., Oct. 27, 1995, at A-1. After the California Supreme Court granted review, a San Diego Superior Court judge vacated the

information—non-law enforcement sources,²⁵⁹ and the defendant herself²⁶⁰—are inadequate substitutes for access to the information upon which the charges are based.

Proposition 115 increases the difficulty for both the prosecution and defense to test the reliability of the information upon which a charge is based.²⁶¹ Of particular concern is the effect of Proposition 115's postponement of discovery on the defense's ability to examine scientific evidence from law enforcement sources. Proposition 115's changes do not discriminate between factually simple and complex cases. This is particularly troublesome in serious cases involving scientific evidence.²⁶² The increased sophistication of scientific analysis of physical evidence requires sufficient time to check the accuracy of results before a plea bargain as well as a trial. As a result, the concerns David Louisell articulated in 1961 are even more

convictions after a hearing because the conduct of the prosecutor was "illegal, improper, and dishonest." See Anne Krueger, *Man gets lighter sentence after conviction overturned, expected to be released soon*, SAN DIEGO UNION-TRIB., Sept. 20, 1997, at B-2. The defendant entered a plea of guilty to voluntary manslaughter, for which he had already served the maximum sentence. See *id.* More recently, the same prosecutor, who withheld information regarding the treatment of two witnesses who were informants at trial, was fired. See Anne Krueger, *Civil service panel upholds prosecutor firing*, SAN DIEGO UNION-TRIB., June 18, 1998, at B-1; see also Martin Berg, *Judge Throws Out Conviction Over Informant*, L.A. DAILY J., July 9, 1996, at 1; Anne Krueger, *Controversial case to be retried*, SAN DIEGO UNION-TRIB., Aug. 9, 1997, at B-3 (discussing *People v. Kasim*, 56 Cal. App. 4th 1360, 66 Cal. Rptr. 2d 494 (1997), the case that ultimately led to the firing of this particular prosecutor). See generally Paul Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997) (discussing the manipulation of scientific evidence in criminal cases).

California prosecutors are not disciplined for nondisclosure of discoverable material at trial. See Ephraim Margolin, *Toward Effective Criminal Discovery in California—A Practitioner's View*, 56 CAL. L. REV. 1040, 1055 (1968) (explaining that, as of 1968, fines and contempt had never been utilized as sanctions against prosecutors in criminal cases); see also Michael Hall & Jean Guccione, *Complaining Consumers Getting Scant Satisfaction*, L.A. DAILY J., July 7, 1994, at 1 (stating "[i]t is bar policy to dismiss-wholesale--entire categories of complaints, such as . . . almost all of those filed against criminal lawyers by their client . . ."). The article notes a reluctance by the bar to intervene in pending civil or criminal cases. See *id.*; see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violation: A Paper Tiger*, 65 N.C. L. REV. 693, 695 n.4 (1987) (arguing that there is a lack of sanctions for prosecutors violating *Brady* and suggesting solutions). California's ethical rules defer to statutory and case law, stating that prosecutors "shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or produce." CAL. R. OF PROFESSIONAL CONDUCT § 5-220.

259. See *infra* Part IV.C.4.

260. See *infra* Part IV.C.4.

261. For example, an accusation that a 15-year veteran of the San Diego Police Department had falsified his reports resulted in his firing and a review of at least 400 of his cases from 1987 to 1992. See Bill Callahan, *Officer's firing puts 400 cases under scrutiny*, SAN DIEGO UNION-TRIB., June 22, 1997, at A-1. Mandatory discovery is also a tool for prosecutors to use to induce law enforcement to provide information. See *Kyles v. Whitley*, 514 U.S. 419, 432 (1995).

262. Persons responsible for unreliable scientific results may be sanctioned or prosecuted. Punishment, however, may never occur or be disproportionately light. See Giannelli, *supra* note 258, at 449, 452, 457. But see Kelly Thornton, *Police lab accused of sloppy work, false data*, SAN DIEGO UNION-TRIB., May 24, 1997, at A-1 (reporting that a lab analyst was fired after she was "accused of lying about her credentials, falsifying notes in murder and child abuse cases, and testifying in court that examinations were performed on evidence when they were not").

troublesome today.²⁶³

The calls for early and broad discovery²⁶⁴ and expansion of *Brady* obligations remain inapplicable to guilty pleas in California.²⁶⁵ Since 1990, the defense has been entitled to discovery only in less than five percent of cases that proceed to trial or those cases resulting in guilty pleas during the thirty-day discovery window before trial. As a result, Sixth Amendment support for a constitutionally acceptable guilty plea may be more form than substance. The legal acumen of defense counsel is of little value without a foundation of information.

C. The Inadequacy of Other Pretrial Sources of Information for the Defense

1. Voluntary disclosure by the prosecution

Proposition 115 does not prohibit voluntary disclosure by the prosecution. In fact, most prosecutorial agencies appear to be providing arrest reports and defendant rap sheets before preliminary hearings as required prior to Proposition 115.²⁶⁶ However, Proposition 115 offers no guidance for prosecutors in exercising their discretion to provide information voluntarily to the defense. Until a case reaches Proposition 115's "pretrial window" of approximately thirty days before trial, a prosecutor's choice of whether or not to provide discovery in particular cases is now governed by her conscience,²⁶⁷ organizational and preparation skills,²⁶⁸ caseload, or

^{263.}

The increasing significance of scientific evidence presents problems of proof, and hence of discoverability, unknown a generation ago. Mistakes can be made in laboratory analyses, as in other affairs involving human instrumentality. We conceded the utility and legitimacy of inquiring into the possibility of such mistakes at the trial by cross-examination. Is not discovery of such scientific evidence the logical fulfillment of the philosophy of cross-examination?

Louisell, *supra* note 63, at 86 n.140; *see also* Middlekauff, *supra* note 171, at 16-17. *See generally* Giannelli, *supra* note 46, at 118-19 (noting the lack of availability of forensic evidence to indigent litigants); Giannelli, *supra* note 258, at 473-74 (describing the problems of having no standards to evaluate expert testimony, and the difficulty for indigent defendants in obtaining scientific expert testimony).

^{264.} *See* Goldstein, *supra* note 13, at 1192-93 (arguing that a broader discovery system is essential to the fair and just operation of a court); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1998 (1992) (advocating "the expansion of pretrial discovery to something approximating the civil model, so that negotiating parties could more accurately estimate *ex ante* the likelihood of conviction at trial").

^{265.} *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

^{266.} According to practitioners and judges in San Diego, Bakersfield, and San Francisco, the prosecution practice of providing arrest reports and defendant rap sheets after arraignment in municipal court has been essentially unchanged since Proposition 115. Some individual prosecutors, however, are withholding information that would have been subject to mandatory disclosure before Proposition 115. The San Diego City Attorney's Office began delaying the availability of defense discovery in misdemeanor cases in September, 1998.

^{267.}

applicable office policy rather than by statute. Deciding whether and what information to provide the defense before a preliminary hearing or the completion of a plea bargain rests entirely on the exercise of prosecutorial discretion.²⁶⁹ As a practical matter, Proposition 115's postponement of discovery until the eve of trial may make it more difficult for prosecutors to obtain information from law enforcement that would facilitate pretrial screening, or more reliable dispositions,²⁷⁰ or even strengthen the prosecution's case.

2. Sources of information other than the prosecution

Proposition 115 does not preclude the defense from obtaining

On informal occasions, district attorneys will state, almost boast, that in fact they are willing freely to open up their files for inspection by defendant's counsel, when the latter is considered trustworthy in the sense that he would not be a party to subornation of perjury or an illegally fabricated defense, or kindred tactics.

David W. Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921, 934 (1961); see also John W. Katz, *Pretrial Discovery in Criminal Cases: The Concept of Mutuality and the Need for Reform*, 5 CRIM. L. BULL. 441, 444-45 n.11 (1969) ("The prosecutor's personal acquaintance with defense counsel is the single greatest determinant of the prosecutor's willingness to grant informal discovery.") (citing *Discovery in Federal Criminal Cases*, 33 F.R.D. 101, 116 (1963)).

268. Some prosecutors prepare extensively for preliminary hearings. Others rely on the investigating and/or arresting officers to carry the case through the preliminary hearing; some prosecutors are assigned to preliminary hearings minutes before they begin.

269. See Louisell, *supra* note 267, at 936-37 ("My own experience has made me acutely aware that the warning of Holt, C.J.—'discretionary' is 'but a softer word for arbitrary'—was not only for his time, but for the ages, or at least until human nature radically changes.") (quoting *Walcot's Case*, 90 Eng. Rep. 1275 (K.B. 1793) (Holt, C.J.)). Even if a prosecutor chooses to provide police and/or arrest reports, she can now delete information, disclose selectively, or eliminate follow-up reports until the case progresses to Proposition 115's discovery horizon. A prosecutor's discretion is non-reviewable. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (declining to issue mandamus compelling federal prosecutors to pursue a criminal case). A recent study confirmed that whether nonmandatory discovery was provided to defense counsel depended on a variety of factors, such as the experience of the prosecutor, the strength of the case, witness safety, and whether the prosecutor likes and respects the defense attorney. See Middlekauff, *supra* note 171, at 16-17; Kelly Thornton, *Evidence still missing in slaying case*, SAN DIEGO UNION-TRIB., May 24, 1997, at A-19 (reporting that in a San Diego homicide case involving evidence misplaced by the San Diego Police Department's Crime Lab, the prosecutor informed the defense of missing "bullet fragments, clothing of victims, and possibly photographs" only after a reporter became aware of the issue). According to the defense attorney, the prosecutor "basically admitted to me he wasn't going to tell me until he thought it was important." *Id.*; see also Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 451 (1992) ("That there exists a close nexus between limited discovery in criminal cases and enhanced opportunities for prosecutorial suppression of evidence is self-evident. The power to control evidence is the power to conceal it.").

270. A San Diego Municipal Court judge reported to the author that he recently presided over a misdemeanor trial involving a resisting arrest charge where the prosecution and defense requested a conference before selecting a jury. The police agency that was responsible for the arrest had not disclosed the existence of photographs of the defendant's injuries to the prosecution until immediately before the trial date because the arresting officers were concerned about a civil suit if the defense saw the photographs. See *People v. Luna*, No. S113988 (San Diego Mun. Ct., South Bay Judicial District filed March 31, 1997).

information from parties other than law enforcement officials or the prosecution. However, unlike the prosecution, the defense has little or no independent access to the enormous investigative and scientific resources available to the prosecution both before and after the defendant is charged.²⁷¹ Obtaining information from non-law enforcement sources may be time-consuming, depending on whether the source of the information is willing to provide that information to the defense,²⁷² and such information may not accurately reflect the basis for the charges or the identification of a particular defendant. Although making available copies of unprivileged information already in the possession of, or reasonably accessible to, the prosecution furthers the efficiency and truth-seeking goals of Proposition 115, the prosecution has no obligation to obtain evidence for the defense.²⁷³ Providing information to the defense also allows the defense an early opportunity to test the quality of the information rather than expend far more time and effort duplicating the information-gathering efforts of the prosecution. Prosecutors

271. Police observations recorded in reports are usually unobtainable by the defense independently. Law enforcement officers are not usually willing to talk with defense counsel, and access to evidence in police custody usually requires permission from the prosecution. While Proposition 115 may have attempted to relieve the police of any inconvenience in authorizing hearsay preliminary hearings, the protective orders created by Proposition 115 were probably not intended for law enforcement. Police officers who are witnesses routinely list their business addresses in their reports. For example, a photo lineup is an alternative to a live lineup. The prosecution and law enforcement have unrestricted access to photos of people taken at the time of their arrest (booking photos) or at the time of their detention that can be utilized to create a photo lineup composed of similar-looking people. The defense, in contrast, has no such access. Even large public defender offices with the capability of photographing clients and witnesses can construct photo lineups only with difficulty. Until the late 1970's, the defense community in San Diego had access to booking photos maintained by the San Diego County Sheriff's Department. The author was informed by a supervising deputy district attorney that, at the request of the District Attorneys Office, such access was eliminated. Additionally, a majority of crime laboratories are affiliated with law enforcement. See *infra* notes 308-13 and accompanying text.

272. The defense may be able to obtain some documents or tangible evidence by issuing a *subpoena duces tecum* requesting that these items be brought to a preliminary hearing. See CAL. GOV'T CODE § 7476 (West Supp. 1998) (outlining procedures for production of records pursuant to a *subpoena duces tecum*). While potential witnesses may be identified and located, however, most people are less willing to speak with the defense than with the prosecution. The defense may not know who the witnesses are, whether they are likely to be available for preliminary hearing or trial ("availability" encompasses geographical and physical availability as well as a willingness to participate in the criminal process), what the factual bases are for the charges, which police officers or agencies were involved, what the circumstances surrounding any identification of the defendant were, whether potential witnesses made statements, whether the defendant made any statements to law enforcement and under what circumstances, whether police investigation occurred, the existence and significance of any physical evidence, and whether there are legal issues affecting the competence of evidence (such as chain of custody, informant, search and seizure issues, or *Miranda* issues).

273. See *In re Littlefield*, 5 Cal. 4th 122, 135, 851 P.2d 42, 51 (1993) ("[T]he prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.").

continue to resist disclosure of information.²⁷⁴

3. *Other pretrial proceedings*

Pretrial proceedings other than preliminary hearings do not uniformly produce discovery useful to test probable cause at a preliminary hearing or to facilitate plea bargaining and trial preparation. Probable cause hearings following arrests,²⁷⁵ bail reviews,²⁷⁶ lineups,²⁷⁷ and pretrial motions²⁷⁸ brought by the defense²⁷⁹

274. See *Montez v. Superior Court*, 5 Cal. App. 4th 763, 770, 7 Cal. Rptr. 2d 76, 81 (1992) (holding that prosecutors could withhold four eyewitnesses' addresses and phone numbers from the defense, despite defense counsel's assurance that the names, addresses, and phone numbers would not be shared with the defendants, because the witnesses provided written statements indicating concerns about disclosure and expressed fears of harassment and threats that the trial judge found constituted good cause for nondisclosure). *But see Reid v. Superior Court*, 55 Cal. App. 4th, 1326, 1335, 64 Cal. Rptr. 2d 714, 720 (1997) (holding that, despite the wishes of fifteen victims not to be contacted by the defense, good cause had not been shown and the defense had a right to their names and addresses). In *Reid*, the prosecution provided the trial court with statements the prosecution had prepared for thirteen of the fifteen victims that declared that they did not wish to be contacted by the defense. See *id.* at 716-17. The trial court ruled that defense counsel could correspond in writing with the victims. See *id.* at 717; cf. Giannelli, *supra* note 46, at 113 (discussing the opposition of federal prosecutors to providing discovery in DNA cases).

275. A defendant arrested without a warrant is entitled to a probable cause hearing within forty-eight hours of arrest to determine whether there is sufficient evidence to continue to detain her. See *McLaughlin v. Riverside Co.*, 500 U.S. 44, 56 (1991) (holding that jurisdictions that provide judicial determinations of probable cause within 48 hours after arrest comply with the Fourth Amendment), *vacating and remanding* 888 F.2d 1276, 1278 (9th Cir. 1989) (finding that thirty-six hours provided adequate time for the county to conduct administrative procedures related to detention); see also CAL. PENAL CODE § 991 (West 1985) (regarding the immediate nature of probable cause hearings in misdemeanor cases when the defendant is in custody). The defendant has no right to be present, however, and has no right to counsel. See *id.*

276. The California State Constitution provides that persons accused of crime are entitled to reasonable bail except for persons charged with certain types of felonies, who are not entitled to bail. See CAL. CONST. art. I, § 12. Defendants who are unable to post bail after arraignment are entitled to a bail review:

When a person is detained in custody on a criminal charge prior to conviction for want of bail, that person is entitled to an automatic review of the order fixing the amount of the bail by the judge or magistrate having jurisdiction of the offense. That review shall be held not later than five days from the time of the original order fixing the amount of bail on the original accusatory pleading. The defendant may waive this review.

See CAL. PENAL CODE § 1270.2 (West Supp. 1998).

In setting, reducing, or denying bail, magistrates must address, among other things, the seriousness of the offense, including injuries allegedly inflicted, threats allegedly made, and weapons or drugs allegedly used by the defendant.

(a) In setting, reducing, or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing of the case. The public safety shall be the primary consideration. . . .

(b) In considering the seriousness of the offense charged, the judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or

may offer some information that could assist magistrates at preliminary hearings, and later screen cases for plea bargaining and trial by resolving legal issues applicable to particular cases. To the extent that a motion relies on, or is limited to, the preliminary

possession of controlled substances by the defendant.
See id. § 1275(a) (West Supp. 1998).

The information considered by the magistrate necessarily will be supplied by the prosecution in the presence of the defendant and counsel. However, because this proceeding is intended to address public safety issues and the likelihood of the defendant's return to court if released, rather than the sufficiency of the evidence, a bail review is generally an oral presentation that provides little more than a skeletal basis for the charges. *See id.* § 1275(a).

277. A motion for a live, distinguished from a photo, lineup is brought by the defense. *See Evans v. Superior Court*, 11 Cal. 3d 617, 675, 522 P.2d 681, 686 (1974) (establishing the right of an accused to a lineup when witness identification is a material issue and there is a reasonable likelihood of misidentification). Prosecutors or law enforcement interested in conducting a live lineup usually do so without court authorization prior to the filing of a complaint after the accused has been taken into custody. Lineup facilities in jails or police stations are only available with a court order allowing the defense to test the identification of the accused by potential witnesses; the motion is usually heard and the lineup held before the preliminary hearing. Defense counsel must make a threshold showing that identification is at issue in the case by setting forth in a declaration circumstances that support that conclusion. *See id.*

Without the benefit of the police and arrest reports, it may be more difficult after Proposition 115 for the defense to describe the circumstances leading to a potential misidentification. Police and arrest reports may describe: the time of day any identification was made; the age and abilities of any potential witnesses; the distance between a potential witness and the alleged perpetrator; the movements of a potential witness and the alleged perpetrator during the identification process; the physical characteristics and clothing worn by the perpetrator; the existence of any prior relationship between potential witnesses and the alleged perpetrator; any statements by the witnesses regarding any identification; and whether law enforcement conducted a curbside, photo, or live lineup following a detention or arrest. *See Deborah S. Emmelman, The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 L. & SOC. INQUIRY 927, 931 (1997) (describing the "critical" information contained within police reports and its use by defense attorneys).

Proposition 115's elimination of mandatory discovery prior to a preliminary hearing may make the threshold requirement of potential misidentification difficult to meet. In the event a lineup is ordered, the defense will be present and will have access to any identifications made by potential witnesses, based on physical appearance, voice, or a combination of these characteristics. Lineup results do not provide the defense with information regarding the circumstances or strength of any identification, however, and may be structured to conceal the identity of the lineup observers. As a practical matter, live lineups are usually conducted immediately before a preliminary hearing. This would prevent the defense from independently investigating the strength of any identifications prior to a preliminary hearing.

278. Because *in limine* motions are brought at the onset of trial, they are of limited usefulness in obtaining information with which to prepare for trial. Several pretrial motions are relevant to preliminary hearings. *See* CAL. PENAL CODE § 1538.5 (West 1985 & Supp. 1998) (providing for a motion to suppress evidence gathered as a result of an illegal search or seizure); CAL. EVID. CODE §§ 1040-1042 (West Supp. 1998) (motions to obtain privileged information pursuant to *Theodor v. Superior Court*, 8 Cal. 3d 77, 90, 501 P.2d 234 (1972), to disclose the identity of an informant); *id.* §§ 1043-1047 (outlining the scope of *Pitches* motions to obtain law enforcement personnel records related to the excessive use of force to support a self-defense argument). Vanessa Logan, Division Manager of the San Diego Municipal Court, reports that more section 1538.5 motions are being filed to be heard at a preliminary hearing. Notably, a 1998 amendment to the statute now requires the defense to provide five court days notice with which to bring a motion to suppress at a preliminary hearing. *See* CAL. PENAL CODE § 1538.5(f)(2) (West Supp. 1998).

279. As with preliminary hearings, the prosecution has little interest in challenging its own case, and usually already has access to the information the defense is seeking to obtain.

hearing transcript as a factual basis for the motion, Proposition 115's changes decrease the effectiveness of pretrial motions to screen cases.²⁸⁰ In addition, the particular circumstances of each case determine whether these motions are legally available.²⁸¹ They are, therefore, idiosyncratic substitutes for preliminary hearings.

4. *The defendant as a source of information*

A defendant herself may be able to provide information useful for pretrial screening or plea bargaining. However, the availability and value of information from a defendant can vary dramatically and presupposes that she has sufficient knowledge of the charge. An innocent defendant is unlikely to have any useful information, except perhaps an alibi.²⁸² A defendant may be unwilling to provide information to her lawyer as a result of fear²⁸³ or distrust.²⁸⁴ Even if a defendant is willing to assist her lawyer, she may be unable to provide information because she has an inability to communicate,²⁸⁵ has an impaired recollection,²⁸⁶ or much time has passed since the alleged incident,²⁸⁷ has been incarcerated.²⁸⁸

280. This is true particularly if a preliminary hearing involves hearsay and limited defense cross-examination. See CAL. PENAL CODE § 995 (West 1985 & Supp. 1998) (providing for a motion to set aside an information for insufficient evidence to constitute probable cause). Non-statutory motions to dismiss are also brought after a preliminary hearing. See *Stanton v. Superior Court*, 193 Cal. App. 3d 265, 271, 239 Cal. Rptr. 328, 332 (1987) (holding that a pretrial non-statutory motion to dismiss is an appropriate remedy to address "the deprivation of a substantial right").

281. The defendant may not be in custody and therefore is not entitled to a bail review. Identification may not be in issue, or the defense, perhaps as a result of Proposition 115, may be unable or unwilling to make the requisite threshold showing to support a lineup motion that identification is at issue. Under *Evans*, the defendant's right to compel a lineup is not absolute. See *Evans v. Superior Court*, 11 Cal. 3d 617, 625, 522 P.2d 681, 686 (1974) (noting that pre-trial lineup is required only in appropriate circumstances). It "arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." *Id.*, quoted in *Garcia v. Superior Court*, 1 Cal. App. 4th 979, 988, 2 Cal. Rptr. 2d 707, 713 (1991). Additionally, a *Pitches* motion lies only to determine whether there is information in law enforcement personnel records relating to an officer's use of excessive force that can support a defense of self-defense. See CAL. EVID. CODE § 1046 (West Supp. 1985). If the case does not involve a search or seizure, a motion to suppress does not lie. See *id.* § 1538.5 (West 1985 & Supp. 1998).

282. This possibility assumes that the charges relate to a time the defendant can remember and account for, and that the defendant can provide alibi witnesses.

283. A defendant may be fearful of the criminal justice system, or of retribution.

284. A defendant may distrust court-appointed counsel in particular. Because most felony defendants are indigent, the majority of counsel are appointed by the court.

285. A defendant may suffer from a disability, or may speak a different language from her attorney.

286. As a result of being emotionally upset, dependent on drugs or alcohol, or suffering from a mental impairment or physical injury, a defendant may not be able to recall events accurately.

287. A significant period of time may have elapsed since the alleged offense. Some crimes, like murder, have no statute of limitations. Cf. CAL. PENAL CODE § 799 (outlining limitations on the commencement of criminal prosecutions) (West 1985 & Supp. 1998).

Furthermore, a defendant cannot usually provide her counsel with the perceptions of others or scientific information relevant to the case. Additionally, a defendant may be unable to provide relevant information regarding the mental state required for a criminal violation.²⁸⁹ Most importantly, because the defense must respond to accusations determined by the prosecution, a defendant likely will be unable to inform her lawyer whether her statement to the police was recorded accurately, or whether misinformation or incompetent evidence serves as the basis for pending charges, without having access to that statement or report. The usefulness of any information in the possession of a defendant ultimately depends on how it relates to specific charges. Assuming that a defendant is an adequate substitute for discovery from the prosecution not only ignores the reactive position of the defense, but presumes guilt.²⁹⁰

D. The Redundancy of Other Pretrial Sources of Information for the Prosecution

In addition to reciprocal discovery from the defense, the prosecution has access to “instruments of fact ascertainment”²⁹¹ independent of Proposition 115’s discovery provisions,²⁹² including the defendant herself. The prosecution has access, often without charge, to information from crime information banks, laboratories

288. An incarcerated defendant may have difficulty providing defense counsel with specific directions or descriptions from a jail cell. For example, a defendant often can assist her attorney by examining the scene of the alleged offense to review the physical characteristics relevant to a charge or defense, such as lighting, access, use, and accuracy of law enforcement description. A defendant could also assist in locating witnesses for whom she has incomplete names or addresses but whom she recognizes by sight or whom she could locate in a particular vicinity, sometimes with the assistance of others she might only recognize by sight or be able to locate only by reputation or other personal characteristics.

289. CA JURY INSTRUCTIONS, *supra* note 20, §§ 3.30-.31, .36.

290. A former San Diego prosecutor, who is now a judge, in a San Diego delinquency case alleging drug possession, opposed the author’s request to test a substance confiscated from a minor represented by an in-house clinic student under the supervision of the author. Instead, this prosecutor suggested that we ask the minor to identify the substance. Even assuming that the minor had the requisite expertise and was willing to share that information, the prosecutor disregarded the ultimate issue of whether the case was provable. Discussing opposition to defense discovery in 1960, Abraham S. Goldstein stated, “[s]uch a view implies that the presumption of innocence is inapplicable before trial. Indeed, its operational assumption is that all persons are guilty” Goldstein, *supra* note 13, at 1193; *see also* Michael Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 871 (1968) (stating that an innocent defendant requires access to information from the prosecution).

291. *See* Louisell, *supra* note 63, at 61 (providing examples of various “instruments of fact ascertainment” that are available to the prosecution, including interrogation of the suspect before and after arrest, conferences with witnesses, procurement of blood samples and fingerprints, and real use of the defendant’s body, to name a few).

292. “Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting attorney from obtaining nontestimonial evidence to the extent permitted by law on the effective date of this section.” CAL. PENAL CODE § 1054.4 (West Supp. 1998).

and extensive and intrusive investigative techniques.²⁹³ The defense must give the prosecution notice of its intent to rely on an insanity defense.²⁹⁴ The defense must turn over physical evidence.²⁹⁵ The prosecution can require a suspect to participate in a lineup.²⁹⁶ The accused may be required to provide samples of blood, hair, and urine;²⁹⁷ voice exemplars;²⁹⁸ handwriting,²⁹⁹ and DNA.³⁰⁰ Law enforcement may speak to a suspect before arraignment or have her examined by medical experts.³⁰¹ The prosecution may issue

293. See *infra* notes 307-15 and accompanying text (discussing laboratories managed by law enforcement agencies and the potential for abuse of scientific evidence).

294. See CAL. PENAL CODE § 1026 (West 1985 & Supp. 1998) (discussing notification and procedures following an insanity plea); see also *People v. Coombes*, 56 Cal. 2d 135, 148-49, 363 P.2d 4, 12 (1961) (referring to the appointment of two psychiatrists to investigate the defendant's sanity, and noting that because the defendant need not submit to an examination, anything the defendant said to the psychiatrist did not violate the privilege against self-incrimination). The predecessor to Penal Code section 1026 required advance notice to the prosecution of an insanity defense. See *Louisell*, *supra* note 63, at 61 (discussing the requirement that the defendant give advance notice if relying on an insanity defense); see also David W. *Louisell*, *Roger Traynor Confronts the Dilemma*, 53 CAL. L. REV. 89, 120 (1965) (noting that statutes require pretrial discovery when a defendant pleads not guilty by reason of insanity).

295. See *People v. Fairbank*, 192 Cal. App. 3d 32, 39-40, 237 Cal. Rptr. 158, 163 (1987) (holding that defense counsel in possession of physical evidence must inform the trial court to ensure that the prosecution has timely access to that evidence).

296. See *People v. Johnson*, 3 Cal. 4th 1183, 1221-24, 842 P.2d 1, 21-22 (1992) (stating that a defendant's appearance in a lineup is nontestimonial physical evidence and not protected by the privilege against self-incrimination).

297. See *Schmerber v. California*, 384 U.S. 757, 760 (1966) (holding that the withdrawal of blood was not testimonial or communicative in violation of the Fifth Amendment self-incrimination protection); *Rochin v. California*, 342 U.S. 165 (1952).

298. See *Garcia v. Superior Court*, 1 Cal. App. 4th 979, 986, 2 Cal. Rptr. 2d 707, 711-12 (1991) (stating that the prosecution may compel a defendant to participate in a voice lineup or use his refusal to cooperate as evidence against him).

299. See *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (holding that a handwriting exemplar is an identifying physical characteristic not protected by the Fifth Amendment).

300. The majority of these sources of information have been available to prosecutors for decades. See *Louisell*, *supra* note 63, at 61.

301. A defendant is often subjected to pre-arraignment interrogations regarding the facts of an alleged incident or her mental state. *Miranda* protections apply only if the prosecution intends to introduce a defendant's statements into evidence, although statements made in violation of *Miranda* may be used for impeachment purposes. There are few limitations on the techniques or length of police interrogation. But see *People v. Esqueda*, 17 Cal. App. 4th 1450, 1484-85, 22 Cal. Rptr. 2d 126, 146-47 (1993) (overturning the defendant's murder conviction because of an eight-hour interrogation in which San Diego homicide detectives used "outrageous" tactics in getting a confession).

Where however, the waiver is defective, the defendant has indicated a desire for silence, and the police have taken advantage of his exhaustion, emotions, and minimal education, and have used lies and threats to achieve their result, we do not hesitate to declare such an interrogation violative of the fundamental constitutional protections guaranteed each citizen by the Fifth and Fourteenth Amendments.

Id. at 1487, 22 Cal. Rptr. 2d at 148.

Responding to the court's decision, San Diego homicide Lieutenant John Welter stated: "Just because a judge doesn't agree with their tactics doesn't mean they violated a law or procedure. But if the tactics result in the overturning of a conviction, we're very much concerned about that. We don't take that lightly." Kelly Thornton, *Police review ways they*

subpoenas for witnesses³⁰² or documents.³⁰³ The only source of information not routinely available to the prosecution is the defendant herself, once she is represented by counsel.

V. PROPOSALS FOR REFORM

A. *Equal and Early Access to Scientific Evidence*

Advances in forensic science have increased the criminal justice system's dependence on scientific evidence to determine "legal truth."³⁰⁴ However, there has been a significant increase in the unreliability of information proffered as scientific evidence that has resulted in a growing number of unreliable convictions.³⁰⁵

Professor Paul Giannelli has examined abuses of scientific evidence and the lack of competence of expert testimony as causes of

interrogate in wake of court's slap, SAN DIEGO UNION-TRIB., July 28, 1993, at B-3. Gary Nichols, in charge of appeals for the San Diego Public Defender's Office, stated: "The vast majority of the legal community and the general public has the perception that this is the 1990s and this stuff doesn't go on anymore, that we've progressed beyond that. Obviously we haven't." *Id.*

302. See CAL. PENAL CODE § 1326 (West 1985) (stating that a subpoena is used to require a witness to appear before the court).

303. See *id.* § 1327 (providing directions for subpoenaing documents).

304. See Giannelli, *supra* note 258, at 440-41 (discussing successful uses of scientific evidence in high profile prosecutions); see also Giannelli, *supra* note 46, at 112 (citing the availability of "DNA profiling, . . . neutron activation analysis, atomic absorption, mass spectrometry, . . . scanning electron microscopy, . . . electrophoretic blood testing, voice prints, bite mark comparison, hypnotically refreshed testimony, trace metal detection, voice stress analysis, and horizontal gaze nystagmus . . . [and] 'syndrome' evidence"). The evidentiary standard to determine reliability has been relaxed in federal courts. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993) (holding that the Federal Rules of Evidence standard of "any relevant evidence" is the proper standard in federal courts). California has retained the more stringent *Kelly-Frye* standard, however, requiring that in order to be admissible as scientific evidence, the relevant scientific community must accept the proposed scientific principle. See *Frye v. United States*, 293 F. 1013, (1923) (allowing use of expert witnesses as evidence of scientific acceptance); see also *People v. Leahy*, 8 Cal. 4th 587, 594-95, 882 P.2d 321, 325 (1994) (stating that *Kelly-Frye* formulation remains the proper evidentiary standard in California); *People v. Kelly*, 17 Cal. 3d. 24, 30-31, 549 P.2d 1240, 1244-45 (1976) (holding that general scientific acceptance is the standard for admissibility of evidence in California courts). See generally Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996) (discussing the heightened standard for the admissibility of scientific evidence).

305. See Giannelli, *supra* note 258, at 441-42 (discussing the growing number of cases involving abuse of scientific evidence in criminal prosecutions); see also Valerie Alford, *Is bogus evidence a worry here too?*, SAN DIEGO UNION-TRIB., Nov. 19, 1995, at B-1 (reporting that a murder case later dismissed on other grounds involved a report from the medical examiner that changed the original cause of death from an accident to a homicide); Charles Finnie, *Lab Problems May Affect 1,047 Cases*, L.A. DAILY J., Nov. 4, 1994, at 3 (reporting that a police lab technician was suspected of compromising 1,047 cases over a five-year period by conducting "presumptive" tests on evidence but not following up with a "conclusive" chemical test to determine if the substance was a narcotic); Kelly Thornton, *Police lab accused of sloppy work, false data*, SAN DIEGO UNION-TRIB., May 24, 1997, at A-1 (reporting that the firing of a lab analyst was recommended after she was "accused of lying about her credentials, falsifying notes in murder and child abuse cases and testifying in court that examinations were performed on evidence when they were not").

unreliable scientific evidence.³⁰⁶ He discusses in detail the prosecution bias inherent in the work done by crime laboratories affiliated with or working exclusively for law enforcement.³⁰⁷ This professional relationship creates several problems. First, a bias in favor of law enforcement can induce lab personnel to color the results in favor of the prosecution.³⁰⁸ The resulting contamination is exacerbated to the extent police or prosecutors convey their expectations for favorable findings.³⁰⁹ Second, a bias can produce unreliable results which are difficult or impossible to challenge effectively at the trial level,³¹⁰ and presumably even more difficult in the event a plea bargain is contemplated. An inability to challenge forensic evidence is compounded if use of the lab is not available to the defense.³¹¹ Third, exclusive access to scientific evidence can diminish the motivation of law enforcement and the prosecution to examine the credentials of the examiners and the strength of their findings.³¹² Fourth, exclusive access by law enforcement or an

306. See Giannelli, *supra* note 258, at 441 (stating that major abuses of scientific evidence, including perjury by experts testifying at trial, faked lab results, and testimony based on unproven scientific methods, have surfaced in recent cases).

307. "Seventy-nine percent of the labs are governed by the police, and most examine only evidence submitted by the prosecution team." Giannelli, *supra* note 258, at 470 & n.182 (citing Joseph L. Peterson et al., *The Capabilities, Uses, and Effects of the Nation's Criminalistic Laboratories*, 30 J. FORENSIC SCI. 10, 11 (1985)).

308. See *id.* at 470 (noting that objectivity of laboratory staff may be compromised if the lab is overseen by law enforcement agencies).

309. See *id.*

310. See *id.* While many of the convictions Professor Giannelli discusses appear to have resulted from trials rather than pleas, the people who were the sources of the unreliable scientific evidence appear to have compromised the factual foundation of many other cases. This result is a particularly serious problem if insufficient physical material is available for retesting.

311. Giannelli, *supra* note 258, at 471 n.183 ("Fifty-seven percent of laboratories controlled by law enforcement agencies would only examine evidence submitted by law enforcement officials." (citing Peterson et al., *supra* note 307, at 13)). Several years ago, the author of this article supervised a law student enrolled in an in-house criminal clinic defending a juvenile case that involved the alleged possession of narcotics. The arresting officer had done a presumptive test on the substance taken from the minor that revealed the presence of a controlled substance. At that time, more elaborate drug tests were not requested routinely by the prosecution unless the matter was set for trial. We asked the prosecutor to allow a defense expert to test the substance. He refused, telling us to ask the minor to identify the substance. The same prosecutor opposed our motion requesting a court order releasing a portion of the substance to a defense expert.

312. See Giannelli, *supra* note 258, at 456 (discussing the prosecution's repeated use of a scientific witness who lacked proper expertise and testified to unproven theories). A DNA criminalist in the San Diego Police crime lab "has been accused of lying about her credentials, falsifying notes in murder and child abuse cases and testifying in court that examinations were performed on evidence when they were not," jeopardizing the prosecution of "dozens of court cases." See Thornton, *supra* note 305, at A6. A reinvestigation of a San Diego murder case one year after the murder concentrated on the discovery of the victim's blood on a sweatshirt worn by a transient who was not considered a suspect initially, although the police detained him and confiscated his sweatshirt. See J. Harry Jones, *Expert faults cops in Crowe case*, SAN DIEGO TRIB., Mar. 2, 1999, at B-3. Experts participating in the reinvestigation criticized the initial examiners

impaired defense investigation discourages rigorous examination of the credentials and methods of sources of scientific evidence.³¹³

Professor Giannelli has suggested that, to counterbalance the bias inherent in the work of many crime labs across the country, the labs “should be transferred from police control to the control of medical examiner offices, which are agencies independent of the police.”³¹⁴ While some imperfections might remain,³¹⁵ neutralizing control of crime labs would remove the formulation of their analyses from the adversarial system to some degree. Contradictory findings by different experts would more likely be the result of professional disagreement rather than trial tactics.

Proposition 115 regulates the disclosure of scientific evidence under the control of law enforcement. Proposition 115 requires the prosecuting attorney to disclose to the defense “[a]ll relevant or real evidence seized or obtained as a part of the investigation of the offenses charged,”³¹⁶ and “the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial,”³¹⁷ at least thirty days before a trial that may never occur.³¹⁸ Even if relevant or real evidence is disclosed to the defense, there is likely to be further delay in examining the evidence in order to obtain funding for expert assistance and a court order releasing the evidence for examination, particularly if the defendant is indigent.³¹⁹ The scientific results

for failing to find the blood and for testing procedures employed in analyzing the sweatshirt. See Anne Krueger, *A Crowe case theory: tainted evidence*, SAN DIEGO-TRIB., Jan. 21, 1999, at B-1.

313. See Giannelli, *supra* note 258, at 456 (discussing the inadmissible use of a scientific witness who lacked proper expertise and whose testimony concerned unproven theories). The California Highway Patrol notified the San Diego District Attorneys Office of potential difficulties with 91 cases “because of the expert’s use of improper formulas to reconstruct the speed of crashed vehicles.” See Alford, *supra* note 305, at B-1. Rafael Garcia’s conviction for driving under the influence as a felony was reversed because prosecutors did not disclose this information to his lawyers. See *People v. Garcia*, 17 Cal. App. 4th 1169, 1184-85, 22 Cal. Rptr. 2d 545, 553-54 (1993) (ruling that the expert’s testimony was crucial to the prosecution’s case and necessitated a reversal). Only 35-40% of the nation’s crime labs are accredited by the American Society of Crime Lab Directors’ Laboratory Accreditation Board. See Thornton, *supra* note 305, at A1.

314. See Giannelli, *supra* note 258, at 470.

315. See *id.* at 471 (noting the Los Angeles Medical Examiner’s flawed results in the O.J. Simpson case).

316. CAL. PENAL CODE § 1054.1(c) (West Supp. 1998).

317. *Id.* § 1054.1(f).

318. See *id.* § 1054.7 (noting that disclosures should be made at least 30 days before trial unless good cause is shown for non-disclosure).

319. See Anne Krueger, *DNA offers biological body of evidence*, SAN DIEGO UNION-TRIB., Jan. 31, 1999, at B-1 (reporting that the San Diego District Attorney’s Office split the cost of a DNA test with the defense in a homicide case that was in the process of jury selection). Prosecutors were granted a one-month continuance because bloodstains on a sweatshirt belonging to a transient, who was dismissed by police as a suspect in the case one year earlier, matched that of the twelve year-old slaying victim; the testing was done at the urging of the defense by a private laboratory.

referred to may be oral or written, and may not include sufficient information to assure their reliability.³²⁰

Neutralizing the source of scientific evidence would allow the defense both early access and sufficient time to review often complex material. Although thereby outside the scope of Proposition 115's discovery provisions,³²¹ allowing the defense direct access to scientific evidence would further Proposition 115's stated goals of fairness and efficiency.³²² The economic burden to the criminal justice system of neutralizing crime labs should be minimal compared to the expense of identifying and relitigating contaminated cases. Because both the prosecution and defense would have early access to the results, discovery motions should decrease. Obviously, in recognition of budgetary constraints, judicial intervention would be required to monitor requests for additional or expensive examinations.³²³ However, a significant advantage to equal access would be a likely increase in the reliability of the evidence because of the ability of both the defense and prosecution to explore the foundation supporting the results.³²⁴

Early access to experts might reveal biased information early in the trial court proceedings when the reliability of the information would be most easily improved.³²⁵ The frequently expressed justification for

See Krueger, *supra* note 312, at B-1 (noting that the police obtained the sweatshirt from the transient the day after the stabbing, and reportedly found no blood).

320. *See In re Brown*, 17 Cal. 4th 873, 877, 952 P.2d 715, 717 (1998) (granting habeas corpus relief where exculpatory information was included on a lab's worksheet, which was not routinely provided to the prosecution or defense, but was not found on the result sheet, which had been provided to the prosecution and subsequently to the defense).

321. *See* *People v. Broderick*, 231 Cal. App. 3d 584, 594-95, 282 Cal. Rptr. 418, 424-25 (1991) (holding that Proposition 115's discovery provisions do not apply to discovery from parties other than the defense or prosecution).

322. *See* PROPOSITION 115, *supra* note 1, § 1(c); *see also* *Sandeff v. Superior Court*, 18 Cal. App. 4th 672, 677-78, 22 Cal. Rptr. 2d 261, 263-64 (1993) (holding that a court may order discovery from an expert to be provided more than thirty days before trial and recognizing that this flexibility is consistent with the purposes of Proposition 115).

323. Crime labs generally do not charge law enforcement for their work. "[T]he services of the FBI Laboratory are available to all duly constituted state, county, and municipal law enforcement agencies in the United States. These services, which are provided without charge, include both the examination of evidence and the court appearance of the expert." Giannelli, *supra* note 46, at 118 (citing FEDERAL BUREAU OF INVESTIGATION, HANDBOOK OF FORENSIC EVIDENCE 7 (rev. ed. 1984)).

324. Professor Giannelli notes that "the typical lab report is grossly inadequate" in that the methodology used, the qualifications of the expert, the ultimate conclusion and the bases for that conclusion, may not be specified. *See* Giannelli, *supra* note 46, at 126-27.

325. *See* B. Scott Bortnick, *False Testimony*, L.A. DAILY J., May 9, 1996, at 2 (reporting on the reversal of a conviction for child molestation after the defendant had spent 10 years in prison). While the victim repeatedly changed her account over several years, the case was ultimately reversed because the testimony of the physician who was the prosecution's expert was unreliable. Photographs taken by the doctor, then deceased, that were not disclosed to either the prosecution or defense, were discovered by sheriff's investigators in 1996. *See id.*

delaying disclosure, that of fabricating evidence, is inapplicable to scientific evidence.³²⁶ On the contrary, early access and disclosure is likely to increase dramatically the reliability of scientific evidence.

B. Pre-Preliminary Hearing Discovery Motions

Proposition 115 does not eliminate a magistrate's ability to strike enhancements, reduce felonies to misdemeanors, or rule on motions brought at a preliminary hearing. Magistrates have the power to consider defense discovery motions before a preliminary hearing in order to fulfill these functions. Proposition 115's explicit prohibition of discovery as a purpose of preliminary hearings³²⁷ by implication discourages pre-preliminary hearing discovery motions.³²⁸ As a result, the new statutory procedure creates impediments.³²⁹

Whether the defense³³⁰ request is for discovery addressed by or exempted from³³¹ Proposition 115, the statutory notice requirements for Proposition 115 discovery are ill-suited to pre-preliminary hearing discovery motions. Preliminary hearings must be set within ten calendar days of arraignment.³³² Because Proposition 115 discovery anticipates a trial,³³³ its procedures mandate a fifteen-day wait after an

326. Giannelli, *supra* note 46, at 127 (suggesting that concerns regarding perjury and witness intimidation do not apply to sources of scientific evidence).

327. See CAL. PENAL CODE § 866(b) (West Supp. 1998).

328. Pre-preliminary hearing discovery motions increase judicial involvement in a process that was self-executing before Proposition 115.

329. See *id.* § 1054.5(b) (detailing the procedure to be followed before a party may seek a court order for discovery).

330. Throughout the criminal process, and certainly at the beginning, prosecutors possess far more knowledge of the basis for the charges than the defense. It is highly unlikely that prosecutors would utilize Proposition 115's discovery procedures to request information from the defense at this early stage.

331. Proposition 115 exempts from the new procedures discovery provided by "other express statutory provisions, or as mandated by the Constitution of the United States." *Id.* § 1054(e). There is no statutory requirement mandating disclosure prior to the preliminary hearing for *Brady* or other federally mandated discovery; the cases clearly mandate discovery in anticipation of trial. *But see* *Raven v. Deukmejian*, 52 Cal. 3d 336, 338, 801 P.2d 1077, 1089 (1991) (invalidating Proposition 115's attempt to prohibit judicial interpretation of the State Constitution more broadly than the United States Constitution, so independent state grounds arguably have survived).

332.

Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later, or within 10 court days of the date criminal proceedings are reinstated

CAL. PENAL CODE § 859b (West Supp. 1998).

333. While Proposition 115 does not prohibit discovery at an early stage of the proceedings, some of the provisions specifying what the prosecution and defense must disclose clearly pertain to trial. See *id.* § 1054.1(a)-(f) (requiring, among other things, disclosure of information regarding the witnesses scheduled to testify). Prior to the preliminary hearing, the prosecution

informal request to seek court-ordered discovery.³³⁴ For discovery exempted from Proposition 115, local court rules may require similar notice. Therefore, unless the prosecution provides discovery voluntarily or magistrates exercise their discretion to waive notice requirements,³³⁵ the defense may be forced to choose between proceeding with a timely preliminary hearing with insufficient information or requesting a continuance to pursue court-ordered discovery.³³⁶ The choice between less informed, and perhaps less competent, participation in a timely preliminary hearing or postponing the hearing³³⁷ to litigate the discovery issue presents a

may not be able to determine which persons she intends to call as witnesses at trial: “material” witnesses “whose credibility is likely to be critical to the outcome of the trial” or “the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.” *Id.* § 1054.1 (a), (d), (f).

334. *See id.* § 1054.5(b) (noting that a party may request a court order if opposing counsel refuses to provide discovery within 15 days). Arguably, an informal request is required only for discovery covered by Proposition 115. Therefore, requests for discovery mandated by the United States Constitution or statutory authority may be calendared without an informal request and attendant delay. Prudent counsel, however, may wish to make an informal request in any event. *See Hobbs v. Municipal Court*, 233 Cal. App. 3d 670, 688, 284 Cal. Rptr. 655, 666 (1991) (explaining the due process requirement of reciprocity that creates a duty for the prosecution to reveal to the defense new evidence obtained from discovery supplied by the defense), *disapproved on other grounds by People v. Tillis*, 18 Cal. 4th 284, 295, 956 P.2d 409, (1998) (holding that the prosecution and defense must disclose the names and statements of witnesses only, as opposed to the *new evidence* required to be disclosed by *Hobbs*).

335. Despite Proposition 115, magistrates retain the discretion to make appropriate orders. *See Hobbs*, 233 Cal. App. 3d at 695, 284 Cal. Rptr. at 677 (stating that the court has discretion to issue any order needed to facilitate the discovery goals of Proposition 115); *see also Sandeffer v. Superior Court*, 18 Cal. App. 4th 672, 678, 22 Cal. Rptr. 2d 261, 263 (1993) (holding that a trial court may order disclosure of experts more than thirty days before trial).

336. The goals of Proposition 115’s discovery procedures include “sav[ing the] court time by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested” and “sav[ing the] court time in trial and avoid[ing] the necessity for frequent interruptions and postponements.” CAL. PENAL CODE § 1054(b), (c) (West Supp. 1998). Obviously, discovery motions prior to preliminary hearings necessitated by the elimination of mandatory, direct discovery defeat these goals by adding new congestion at the early stages of the process when far more cases are pending preliminary hearing than ultimately proceed to trial.

337. In the event the defense requests to continue the preliminary hearing in order to obtain discovery, other provisions of Proposition 115 add to the existing statutory barriers. At the time she accepts the case, the defense must represent to the court that she will be ready to proceed with the preliminary hearing within the statutory time:

In assigning defense counsel in felony cases, whether it is the public defender or private counsel, the court shall only assign counsel who represents, on the record, that he or she will be ready to proceed with the preliminary hearing or trial, as the case may be, within the time provisions prescribed in this code for preliminary hearings and trials, except in those unusual cases where the court finds that, due to the nature of the case, counsel cannot reasonably be expected to be ready within the prescribed period if he or she were to begin preparing the case forthwith and continue to make diligent and constant efforts to be ready. In the case where the time of preparation for preliminary hearing or trial is deemed greater than the statutory time, the court shall set a reasonable time period for preparation. In making this determination, the court shall not consider counsel’s convenience, counsel’s calendar conflicts, or counsel’s other business. The court may allow counsel a reasonable time to become

particularly difficult dilemma for the defense if the accused is in custody in lieu of posting bail.³³⁸

Despite Proposition 115, magistrates, both before and during preliminary hearings, retain the discretion to grant discovery requests that are relevant to their magisterial preliminary hearing functions.³³⁹ Pre-preliminary hearing discovery orders relating to the purpose of preliminary hearings are unlikely to prove burdensome to the prosecution.³⁴⁰ Additionally, pre-preliminary hearing discovery orders may further Proposition 115's goal of streamlining preliminary hearings as well as actually enhance the prosecution's ability to prepare. Early discovery may facilitate stipulations regarding information not in dispute for purposes of a probable cause determination, thereby eliminating the necessity of presenting testimony or evidence.³⁴¹ Particularly in jurisdictions practicing

familiar with the case in order to determine whether he or she can be ready
Id. § 987.05 (West Supp. 1998).

338. An incarcerated defendant who personally waives her right to a timely preliminary hearing is likely to remain in custody. *See id.* § 859(a), (b). This dilemma is particularly acute in a weak prosecution case.

339. Notwithstanding Proposition 115's attempt to limit judicial discretion, magistrates retain the discretion, as well as the responsibility, to decide independently whether probable cause has been established, and therefore can and should order discovery when necessary to achieve the objectives of preliminary hearings. Magistrates can also order appropriate prosecution disclosure to the defense during a preliminary hearing. *See Whitman v. Superior Court*, 54 Cal. 3d 1063, 1077, 820 P.2d 262, 270 (1991); *Hobbs*, 233 Cal. App. 3d at 680, 284 Cal. Rptr. at 657. Proposition 115 explicitly recognizes the defense's right to present an affirmative defense, impeach prosecution witnesses, and negate an element of the offense. *See CAL. PENAL CODE* § 866(a) (West Supp. 1998). Additionally, Proposition 115 implicitly recognizes the defense's right to present information to magistrates in support of a request to reduce eligible felony charges to misdemeanors. *See id.* § 866(b). Motions to suppress evidence obtained as a result of an illegal search or seizure remain available at a preliminary hearing. *See id.* § 1538.5(f)(2).

340. Because prosecutors typically base issuing decisions on the contents of police and arrest reports, these reports are generally readily available. Prosecution disclosure under Proposition 115 of the "[s]tatements of all defendants," "relevant real evidence," and "[a]ny exculpatory evidence" is not limited to evidence intended only for trial. *Id.* § 1054.1(b), (c), (e). Defense concerns that requesting discovery prior to the preliminary hearing might be conditioned by disclosure from the defense are ill-founded. All of the information Proposition 115 requires the defense to disclose to the prosecution clearly pertains only to trial. *See id.* § 1054.3. Because the defense generally has little knowledge of the nature or strength of the prosecution's case prior to a preliminary hearing, it is extremely unlikely that the defense would have a realistic idea at a preliminary hearing stage of the nature of a defense in the event of a trial. Additionally, the prosecution may have identified trial witnesses, including "material witnesses," prior to a preliminary hearing. *See id.* § 1054.1(a), (d).

Requiring disclosure to the defense may further Proposition 115's goal of "requiring timely pretrial discovery" without sacrificing other objectives. *See id.* § 1054(a). Proposition 115's concern for protecting witnesses and evidence can be recognized by enforcing the new provision prohibiting disclosing the addresses and telephone numbers of persons intended as prosecution witnesses to the defendant. *See id.* § 1054.2. This section raises interesting issues concerning the presumption of innocence. Proposition 115's provisions for protective orders address concerns for the safety of potential witnesses prior to a preliminary hearing as well as prior to trial. *See id.* § 1054.7.

341. It is common for the defense to stipulate to results of examinations of physical

horizontal prosecution,³⁴² pre-preliminary hearing discovery orders may alert the prosecutor to missing information that is essential to support a probable cause finding.³⁴³ Pre-preliminary hearing discovery orders also may assist the prosecutor in obtaining evidence in a timely manner or in identifying evidence that needs to be acquired from recalcitrant or overworked law enforcement agencies.³⁴⁴ Essential information is often unavailable as a result of inadvertence, lack of preparation, or lack of timing, as opposed to intentional non-disclosure.³⁴⁵

New support for pre-preliminary hearing discovery motions is found in Penal Code section 939.71, which requires prosecutors to provide exculpatory evidence to a grand jury.³⁴⁶ Requiring

evidence, such as drugs, fingerprints, ballistics, autopsies, for preliminary hearing purposes. The prosecution must provide sufficient information to the defense about the testing individual or agency, the testing procedure, and the results to obtain defense agreement to a stipulation. Although such evidence may be also offered as hearsay by a "115-qualified" law enforcement officer, stipulations eliminate the need for expert testimony, thereby achieving Proposition 115's goal of shortening the proceedings.

342. Many jurisdictions assign prosecutors to cases for the duration of particular procedures, such as issuing, arraignment, preliminary hearing, pretrial motions, or trial. Vertical prosecution, whereby one prosecutor follows the case throughout the trial process, is often reserved for the most serious cases or particular categories of cases, such as gang, child abuse, or domestic violence cases.

343. See *Murray's Law--The Twisted Tale of a San Jose Murder Case Where Anything That Could Go Wrong Did*, CAL. LAW., Sept. 1993, at 36 (describing a murder investigation where the police didn't preserve photo lineups shown to some witnesses, ignored possible suspects, and did not disclose relevant tape recordings, notes, memos and letters to either the defense or prosecution until jury selection was underway); see also Martin Berg, *L.A. Sheriff's Records Policy Criticized by Defense Lawyers*, L.A. DAILY J., June 13, 1996, at 1 (discussing *People v. Katz*). The Los Angeles Sheriff's Department destroyed original police reports pursuant to a department policy, despite a court order requiring disclosure to the defense issued five weeks before the destruction of the reports. See *id.*; WILLIAM F. McDONALD ET AL., NAT. INST. OF JUSTICE, POLICE-PROSECUTOR RELATIONS IN THE UNITED STATES (July 1982) (describing the tensions and conflicts between police and prosecution agencies).

344. See *id.*

345. Nevertheless, "the prosecutor's very knowledge that he may delay crucial investigation at will, and that courts will routinely admit evidence acquired by such investigations, encourages sloppy police procedure, delays vindication for the innocent defendant, and substitutes apparent compliance with pretrial discovery orders for effective disclosures thereunder." Ephraim Margolin, *Toward Effective Criminal Discovery in California--A Practitioner's View*, 56 CAL. L. REV. 1040, 1053 (1968). More recently, a prosecutor who assumed a drug test was positive for cocaine instead of actually examining the results before the preliminary hearing was sanctioned by a judge following a discovery hearing. Although the presumptive results were sufficient for the magistrate to bind the case over for trial, in fact, the actual drug test was negative. See Matthew Heller, *Riverside Judge Sanctions D.A. in Cocaine Case*, L.A. DAILY J., May 2, 1995, at 1; see also *In re Brown*, 17 Cal. 4th 873, 952 P.2d 715, (1998) (granting a writ of habeas corpus on the grounds that the prosecution was accountable for failing to obtain and disclose to the defense drug-testing results favorable to the defense in addition to results unfavorable to the defense that were disclosed).

346.

(a) If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties under Section 939.7. If a failure to comply with the provisions

prosecutors to furnish information that diminishes the strength of their case to members of a grand jury, while allowing prosecutors to withhold the same information from defense counsel until thirty days before trial if a felony proceeds by preliminary hearing, does not promote effective pretrial screening or trial preparation.³⁴⁷ A magistrate who presides over an adversarial preliminary hearing to decide whether there is probable cause to proceed to trial may be less informed than members of a grand jury who preside over a nonadversarial proceeding to decide whether to return an indictment.

C. Declaration by the Prosecution at the Entry of a Guilty Plea

Proposition 115's discovery changes decrease the likelihood that guilty or no contest pleas will be "legal truths" that are reliable substitutes for trials. Procedurally, at the entry of a guilty plea, a judge must be satisfied that a defendant knowingly, intelligently, and voluntarily waives her constitutional rights,³⁴⁸ and may request declarations from her lawyer, including a concurrence in a defendant's waiver of her constitutional rights, and a statement indicating the lack of meritorious defense.³⁴⁹ In contrast, prosecutors may only be required to concur in the entry of a plea.³⁵⁰ As a result,

of this section results in substantial prejudice, it shall be grounds for dismissal of the portion of the indictment related to that evidence.

(b) It is the intent of the Legislature by enacting this section to codify the holding in *Johnson v. Superior Court*, 15 Cal. 3d 248 [(1975)], and to affirm the duties of the grand jury pursuant to Section 939.7.

CAL. PENAL CODE § 939.71 (West Supp. 1998).

347. A grand jury transcript must be delivered to the court within ten days of an indictment, and to the defense no less than ten days before trial. *See id.* § 938.1 (West 1985). A preliminary hearing transcript must be delivered to the court within ten days of a bindover but to the defense no later than five days before trial. *See id.* § 869(e) (West Supp. 1998). Interestingly, the court clerk is required to deliver a transcript immediately only to the district attorney. *See id.* § 869(f).

348. *See supra* notes 235-37 and accompanying text.

349. In San Diego, defense counsel sign an "Attorney's Statement," stating that:

I, the undersigned, state that I am the attorney for the defendant in the above-entitled case; that I personally read and explained the entire contents, including each item of the above declaration and any attached addendum thereof to the defendant; that *no meritorious defense exists to the charge(s)* to which the defendant is pleading Guilty/No Contest; that I personally observed the defendant fill in and initial each item, or read and initial each item to acknowledge the explanation of the contents of each; that I observed the defendant date and sign the declaration and any attached addendum thereof; that I concur in the defendant's above plea and waiver of constitutional rights.

SUPERIOR/MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, PLEA OF GUILTY/NO CONTEST—FELONY FORM (revised March, 1998) [hereinafter FELONY PLEA FORM] (emphasis added).

350. Prosecutors in San Diego sign a "Prosecutor's Statement" on a change of plea form that states, "[t]he People of the State of California, plaintiff in the above-entitled criminal case,

defense counsel's acquiescence in a plea constitutionally insulates a plea from most challenges irrespective of whether discovery has been provided by the prosecution to allow an independent assessment of the strength of the case, or whether the prosecution believes there is sufficient evidence to sustain a conviction at trial.³⁵¹ Because Proposition 115 eliminated automatic defense discovery of police, crime, and arrest reports within two calendar days of arraignment,³⁵² a constitutionally acceptable guilty plea may be based on no information from the prosecution or law enforcement sources at all.

To increase the reliability of guilty or no contest pleas, a judge could require a prosecutor to affirmatively state on the guilty plea form that "[t]he People have provided all discovery in the possession of the 'prosecution team'"³⁵³ and that 'discovery is complete to the present knowledge of the People' if a guilty plea is entered during a period when a prosecutor is required to provide discovery by Proposition 115, or by the Constitutions of the United States or of California. Such an affirmation would afford judicial recognition that information provided by the prosecution to the defense is usually the primary foundation upon which a defendant and her counsel rely in agreeing to accept a plea bargain.³⁵⁴ This proposal would comply with Proposition 115's discovery changes and would allow a court to continue to accept *West* pleas that are true bargains, rather than admissions of guilt.³⁵⁵

Support for this proposal is found in the general ethical and legal obligation of prosecutors to "do justice."³⁵⁶ A prosecutor's due process discovery obligations offer substantive guidance. The prosecution is constitutionally required, albeit for purposes of trial, to

by and through its attorney, the District Attorney of San Diego County, concurs with the defendant's plea of Guilty/No contest as set forth above." FELONY PLEA FORM, *supra* note 349.

351. See *supra* notes 229-37 and accompanying text. A few years ago, after the passage of Proposition 115, the author was told the following story by a San Diego County Deputy District Attorney. Assigned to issue felony complaints, he had rejected a case on the grounds of insufficient evidence. Immediately thereafter, he received a telephone call from retained defense counsel suggesting that the case be disposed of quickly through a plea bargain without a preliminary hearing. The prosecutor agreed to take a plea without disclosing his earlier rejection of the case. Because prosecutors are not required to make any representations regarding evidence supporting a conviction at the time of a guilty plea, this defendant agreed to a conviction without knowing that he would not have been charged with a crime at all had his attorney not made that telephone call.

352. See *supra* notes 124-31 and accompanying text.

353. See *infra* note 358 and accompanying text.

354. A collateral benefit would be to set a specific time of disclosure for any subsequent challenges to a guilty plea based on undisclosed information.

355. See *supra* note 238 and accompanying text.

356. "Prosecutors have a special obligation to promote justice and the ascertainment of truth." *People v. Kasim*, 56 Cal. App. 4th 1360, 1378, 66 Cal. Rptr. 2d 494, 505 (1997) (citing *In re Ferguson*, 5 Cal. 3d 525, 531, 487 P.2d 1234, 1238 (1971)).

disclose evidence favorable to the defendant and material to guilt or punishment.³⁵⁷ “Material” is defined as “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”³⁵⁸ In turn, “reasonable probability” is defined as “sufficient to undermine confidence in the outcome.”³⁵⁹ Recently, a prosecutor’s obligations have broadened to include discovery in the possession of the “prosecution team”³⁶⁰ and a “duty to learn of any favorable evidence known to the others acting on the government’s behalf.”³⁶¹

In the event a judge interprets Proposition 115’s discovery changes or constitutionally mandated discovery to be inapplicable to a guilty plea entered early in the proceedings, a judge could compel a prosecutor to represent that she has adhered to the standards for filing a criminal charge promulgated by the California District Attorney’s Association, which requires a prosecutor to charge only if four criteria are satisfied:

- a. Based on a complete investigation and a thorough consideration of all pertinent data readily available, the prosecutor is satisfied that the evidence shows the accused is guilty of the crime to be charged;
- b. There is legally sufficient, admissible evidence of a corpus delicti;

357. See *In re Sassounian*, 9 Cal. 4th 535, 543, 887 P.2d 527, 532 (1995) (declining to grant habeas relief because the defendant’s allegation of false evidence introduced at trial was neither material nor probative, and did not undermine confidence in the verdict (citing *United States v. Bagley*, 473 U.S. 667, 674 (1985))); see also *Izazaga v. Superior Court*, 54 Cal. 3d 356, 377-78, 815 P.2d 304, 318 (1991) (explaining that the prosecutor’s duty to disclose is a due process requirement that operates independently of reciprocal discovery statutory schemes).

358. *Bagley*, 473 U.S. at 682.

359. *Id.* at 681.

360. See generally *Kyles v. Whitley*, 514 U.S. 419, 421 (1995) (holding that individual prosecutors are responsible for obtaining any favorable evidence in the possession of other government actors); *In re Jackson*, 3 Cal. 4th 578, 593-94, 835 P.2d 371, 379-80 (1992) (explaining the duty of the prosecution to disclose benefits given to prosecution witnesses); *People v. Wright*, 39 Cal. 3d 576, 591, 703 P.2d 1106, 1115-16 (1985) (holding that the prosecution’s failure to disclose evidence obtained by law enforcement supporting the defendant’s self-defense claim was improper but did not warrant a mistrial); *People v. Robinson*, 31 Cal. App. 4th 494, 503, 37 Cal. Rptr. 2d 183, 188 (1995) (reversing an arson conviction because the prosecution withheld exculpatory evidence obtained by an arson investigator).

361. See *Kyles*, 514 U.S. at 437 (noting that a duty to obtain and disclose favorable evidence is an inescapable responsibility of the prosecutor); see also *In re Brown*, 17 Cal. 4th 873, 874, 952 P.2d 715, 719 (1998) (finding that the prosecution had an obligation to study lab files for any exculpatory evidence warranting disclosure). While the “prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense,” Proposition 115 does create a prosecution duty to inquire and disclose. See *In re Littlefield*, 5 Cal. 4th 122, 135, 851 P.2d 42, 51 (1993) (referring to California Penal Code section 1054.1); *People v. Little*, 59 Cal. App. 4th 426, 435, 68 Cal. Rptr. 2d 907, 912-13 (1997) (finding that the prosecution had a duty to inquire about and disclose a material witness’s criminal record).

c. There is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime charged;

d. The prosecution has considered the possibility of conviction by an objective fact-finder hearing the admissible evidence. The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact-finder after hearing all the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defense that could be raised under the evidence presented by the prosecutor.³⁶²

A prosecutor would be simply acknowledging in writing that she had complied with the ethical obligations that govern her decision to charge a defendant with a felony in California, and would provide a judge some assurance that the evidence upon which a guilty plea is based would be sufficient to sustain a conviction at trial. Proposition 115's discovery changes do not preclude this alternative.

A judicially induced fusion of the Sixth Amendment guarantee of effective assistance of counsel, the ethical duties imposed on prosecutors, the mandates of *Brady* and progeny, and a systemic interest in fair and reliable dispositions in the trial courts is more likely to produce guilty pleas that are "legal truths."

CONCLUSION

Proposition 115's new discovery provisions create an informational imbalance that weakens preliminary hearings as pretrial screening devices and lessens the reliability of guilty pleas. The informational imbalance is caused by postponing discovery to a period in anticipation of trial, limiting defense access to information from law enforcement sources, and curtailing judicial discretion to facilitate discovery at early stages of the criminal justice process. The discovery provisions are only internally balanced; they disregard the vastly unequal access to resources independent of formalized discovery provisions. As a consequence, the fog of nondisclosure has returned to obscure over three decades of clearer vision when California courts began to recognize the relationship between pretrial discovery and "legal truth."³⁶³ More chillingly still, this fog may continue to drift over to other states as well.

362. CALIFORNIA DIST. ATTORNEYS ASS'N., UNIF. CRIME CHARGING STANDARDS § 11, A.1, at 11-1 (1989).

363. "The sum of the matter is that the defendant is not an effective participant in the pretrial criminal process. It is to the trial alone that he must look for justice." Goldstein, *supra* note 13, at 1192.