LexisNexis®

User Name: Whalen Robert
Date and Time: May 20, 2015 4:07 p.m. PDT
Job Number: 20148118

Document(1)

1. *1-1 California Criminal Discovery § 1:29*

Client/Matter: -None-
Narrowed by:

Content Type	Narrowed by
Secondary Materials	-None-

1-1 California Criminal Discovery § 1:29

§ 1:29 Promises, offers, benefits, and inducements

Promises, offers, benefits, and inducements extended to prosecution witnesses can undermine the credibility of those witnesses, and evidence of these promises, offers, benefits, and inducements constitute evidence favorable to the defendant pursuant to Brady v. Maryland (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Defense complaints of denied discovery frequently involve evidence of promises, offers, benefits, or inducements given to prosecution witnesses.

This category of evidence favorable to a defendant can take many forms.

There is no magic in the word "promise" in the context of the *Brady* rule. Although a promise of benefit offered to a prosecution witness is evidence favorable to a defendant, a "promise" is often not the crucial undisclosed evidence at issue. "Although *Giglio* and *Napue* use the term 'promise' in referring to covered-up deals, they establish that the crux of a Fourteenth Amendment violation is deception. A promise is unnecessary. Where, as here, the witness's credibility 'was ... an important issue in the case ... evidence of *any understanding or agreement as to a future prosecution* would be relevant to his credibility and the jury was entitled to know of it.' [citation omitted]" Tassin v. Cain (2008, CA5 LA) 517 F.3d 770, 778 [italics in original].

Any consideration that the prosecution gives a witness in exchange for his or her testimony pursuant to an agreement is impeachment evidence under Brady. People v. Kasim, 56 Cal.App.4th 1360, 1380 (1997); cf. United States v. Davis, 609 F.3d 663, 696–97 (5th Cir. 2010) (witness's participation in relocation program might be favorable, if not outweighed by inference that witness needed protection from defendant). When that consideration is contingent upon the prosecutor's satisfaction with the witness's testimony, the impeachment value of the agreement is even greater. Tassin v. Cain, 517 F.3d 770, 778 (5th Cir. 2008).

Benefits the prosecution unilaterally confers can also be impeachment evidence. When a prosecutor intervenes in the witness's other court proceedings on the witness's behalf, that intervention must be disclosed if it occurs prior to the witness's testimony in the defendant's case. Belmontes v. Brown, 414 F.3d 1094, 1113 (9th Cir. 2005), overruled on other grounds, 549 U.S. 7 (2006); cf. Parker v. Allen, 565 F.3d 1258, 1277–78 (11th Cir. 2009). Benefits conferred unilaterally *after* the witness testifies are not impeachment evidence, primarily because the witness would have had no reason to alter his or her testimony due to an unexpected, post-testimonial benefit. Hovey v. Ayers, 458 F.3d 892, 917–18 (9th Cir. 2006) (prosecutor's post-testimonial attempts to have witness transferred to a different facility not "favorable"). Courts will not generally infer a pre-existing agreement from a post-testimonial benefit. Akrawi v. Booker, 572 F.3d 252, 263 (6th Cir. 2009) ("the mere fact of favorable treatment received by a witness following cooperation is also insufficient to substantiate the existence of an agreement"); Bell v. Bell, 512 F.3d 223, 234 (6th Cir. 2008) (same). However, some courts view a witness's cooperation with law enforcement as an ***informant*** in prior cases as evidence of a longer-term cooperative relationship (and thus a basis for impeachment) that must be disclosed. Maxwell v. Roe, 628 F.3d 486, 511–12 (9th Cir. 2010).

A witness's unilateral hope or expectation of a benefit does not usually constitute impeachment evidence. Akrawi, 572 F.3d at 263; Hovey, 458 F.3d at 917. Witness-preparation meetings, and even plea negotiation meetings, between the prosecution team and a witness do not constitute impeachment evidence. United States v. Inzunza, 580 F.3d 894, 908 (9th Cir. 2009) (negotiations not impeachment); United States v. Davis, 609 F.3d 663, 696–97 (5th Cir. 2010) (same); Banks v. Thaler, 583 F.3d 295, 322–23 (5th Cir. 2009) (witness "prep" interviews not impeachment).

Penal Code section 1127a places a parallel duty to disclose any "consideration" "promised to, or received by," "in-custody ***informant***[s]." Pen. Code, § 1127(c), (d). However, this statutory duty does not apply when the

in-custody ***informant*** is also a percipient witness to the events at issue. *People v. Bivert, 52 Cal.4th 96, 118–21 (2011)*.

§ 1:29.1 Explicit promises, offers, and inducements

The prosecutor has a duty to disclose any explicit promises, offers, benefits, or inducements extended to a material prosecution witness, because promises, offers, benefits, or inducements that are explicitly extended to a prosecution witness constitute evidence favorable to a defendant. Cases in which prosecution witnesses have been explicitly offered promises, offers, benefits, or inducements in return for their testimony that have not been fully disclosed to the defendant are a constant source of litigation in federal and state courts.

It is simply beyond debate that whenever the prosecution makes an explicit agreement with a prosecution witness to provide that witness with benefits or inducements in return for the testimony of that witness, the existence of that explicit agreement in its entirety is evidence favorable to the defendant. *People v. Dickey (2005) 35 Cal.4th 884, 909, 28 Cal.Rptr.3d 647, 111 P.3d 921*; *Horton v. Mayle (2005, CA9 Cal.) 408 F.3d 570, 578* [promise of immunity for any conduct by the witness on the weekend of the charged murder]; *Mataya v. Kingston (2004, CA7 Wis.) 371 F.3d 353* [agreement to dismiss four burglary charges with a sentence exposure of 40 years in prison]; *see also Barker v. Fleming (2005, CA9 WA.) 423 F.3d 1085, 1095*; and *Wisehart v. Davis (2005, CA7 Ind.) 408 F.3d 321, 323–324*.

Although the authorities listed above are among the most recent federal and California state court decisions on this subject, the principle of law they espouse is not recent. A review of some of these decisions is instructive.

In *United States v. Bagley (1985) 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481*, the government executed written contracts with two undercover witnesses to pay them for their services and did not disclose these contracts to the defendant. The Supreme Court held that the government's failure to disclose this information violated *Brady,* although the court remanded the case to the Court of Appeals to determine whether disclosure of the evidence would have produced a different result in the trial.

In *People v. Ruthford (1975) 14 Cal.3d 399, 121 Cal.Rptr. 261, 534 P.2d 1341*, the California Supreme Court reversed the defendant's conviction because an accomplice had testified for the People against the defendant in the belief that the accomplice's wife would not receive a state prison term, and the prosecution had not revealed this fact to the defendant.

In *In re Sassounian (1995) 9 Cal.4th 535, 37 Cal.Rptr.2d 446, 887 P.2d 527*, the California Supreme Court concluded that the prosecution had withheld evidence favorable to the defendant, when it failed to disclose to the defendant evidence of benefits provided, and evidence of promises that had been made, to a jailhouse ***informant*** who provided key testimony against the defendant. The ***informant*** was one of the subjects of a Los Angeles grand jury investigation that led to Penal Code amendments regulating the use by law enforcement of jailhouse ***informant*** information.

In *Singh v. Prunty (1998, CA9 Cal.) 142 F.3d 1157*, the Ninth Circuit Court of Appeals reversed a twelve-year-old murder conviction in a federal habeas corpus action because the prosecutor had knowingly and deliberately failed to reveal to the defendant evidence of substantial benefits granted by the prosecution to a critical prosecution witness in return for the testimony of that witness. The benefits consisted of refusing to file some criminal charges against the witness, releasing him from custody on other charges, and a negotiated plea disposition in which numerous charges against the witness were dismissed and in which the witness was granted probation on still other charges.

In *Benn v. Lambert (2002, CA9 WA.) 283 F.3d 1040*, the defendant was convicted of capital murder and sentenced to death in the State of Washington. The prosecution called as a witness a jailhouse ***informant*** who had shared a jail cell with the defendant. The ***informant*** testified that the defendant confessed the crime to him and asked him to find someone outside of the jail who would be willing to take the blame for the murders. The ***informant***-witness

testified that the defendant admitted that the murder of the two victims was planned to cover up the defendant's participation in an arson-insurance-fraud scheme with those victims, that the two victims had threatened to disclose the crimes to the police, and that the defendant killed them to prevent being exposed.

After his conviction and death sentence the prosecution disclosed substantial impeachment evidence about the ***informant***-witness. The impeachment evidence included evidence that the prosecution had provided numerous benefits and inducements to the ***informant*** while he was waiting to testify against the defendant. *283 F.3d at 1049*. Although the prosecution had disclosed evidence of some benefits conferred upon the ***informant***, many of the benefits had not previously been disclosed to the defendant. The defendant filed a federal habeas petition alleging *Brady* error in his trial. The district court granted the habeas petition.

The Ninth Circuit Court of Appeals affirmed the granting of the habeas petition, holding that the withheld impeachment evidence was sufficiently prejudicial to justify relief under *Brady, 283 F.3d at 1054*, and that the "number and nature of the undisclosed benefits was such that they would have impeached [the ***informant***] more effectively than the evidence that he was immune from arrest during the trial. The undisclosed benefits that [the ***informant***] received added significantly to the benefits that were disclosed and certainly would have 'cast a shadow' on [the ***informant***'s] credibility." *283 F.3d at 1058*.

In *Monroe v. Angelone (2003 CA4 Va.) 323 F.3d 286*, the Fourth Circuit Court of Appeals affirmed the granting of a habeas corpus petition that overturned a gunshot-murder conviction, because the prosecution committed numerous *Brady* violations in failing to disclose material, favorable evidence to the defendant. Among the suppressed items was evidence that the prosecution had agreed not to prosecute an important prosecution witness on a firearms charge in exchange for her testimony against the defendant that about a year before the murder the defendant tried to obtain an untraceable handgun. The prosecution also failed to disclose that it had agreed to help this witness obtain a reduction of her sentence in an unrelated case.

The Fourth Circuit Court of Appeals concluded that the suppressed evidence of promises and inducements made to this witness constituted evidence favorable to the defendant which could have been used by the defendant to impeach that witness. *323 F.3d at 300*.

The lesson of the multitude of federal and state cases that hold that evidence of an explicit agreement, promise, or offer to provide benefits to a prosecution witness in return for that witness's cooperation in testifying constitute evidence favorable to a defendant within the meaning of the *Brady* rule should be clear and unmistakable to every prosecutor and criminal defense attorney.

What should also be clearly understood is that the characterization of a promise or agreement is not critical to a determination of its nature. The word "promise" is not "a word of art that must be specifically employed." *Brown v. Wainwright (1986, CA11 Fla.) 785 F.2d 1457, 1464–1465*. "Even mere 'advice' by a prosecutor concerning the future prosecution of a key government witness may fall into the category of discoverable evidence." *Haber v. Wainwright (1986, CA11 Fla.) 756 F.2d 1520, 1524*.

Cases in which the prosecution has made undisclosed explicit promises to or deals with prosecution witnesses continue to confront the courts, although it appears that the cases involving these explicit promises and deals were tried many years ago and have only recently resulted in published opinions after percolating through state and/or federal habeas proceedings. *See, e.g., In re Miranda (2008) 43 Cal.4th 541, 577–580, 76 Cal.Rptr.3d 172, 182 P.3d 513* [prosecution made undisclosed explicit agreement with a whole cadre of important prosecution witnesses in a capital murder case, and dismissed and reduced pending charges against those witnesses in exchange for their testimony].

The principle that an explicit promise, offer, or inducement made to a prosecution witness constitutes evidence favorable to the defendant is not restricted to such promises that are contained in "formal plea bargains, immunity deals or other notarized commitments," but it also applies to less formal, unwritten, or tacit agreements "so long as

the prosecution offers the witness a benefit in exchange for his cooperation." *Harris v. Lafler (2009, CA6 MI) 553 F.3d 1028, 1034*.

While normally the words used by the prosecution agent to the witness are judged by their objective content, the Sixth Circuit Court of Appeals held in *Doan v. Carter (2008, CA6 OH) 548 F.3d 449*, that the statement of a prosecutor to two government witnesses that the State of Ohio would not prosecute them if they implicated Mr. Doan in the murder, and that "they would not be charged" unless they lied to the investigating officers, was not really a promise within the meaning of the *Brady* rule. The Court stated that the prosecutor did not make a promise to the witnesses that they would not be prosecuted in exchange for their providing testimony. Instead, the Court stated that the prosecutor "merely admonished Lori and Watkins that they needed to be truthful," *548 F.3d at 461*, and concluded that this was not evidence that the prosecution had to disclose under *Brady*. The Court's construction of the words spoken to the two witnesses appears to be a strained one.

When, however, an important prosecution witness who functioned as a professional ***informant*** for law enforcement personally negotiated a reduction in the sentence for his own pending criminal cases, that explicit promise and benefit constituted favorable evidence for the defendant against whom the witness testified. The favorable nature of the reduced sentence deal for the ***informant***-witness is especially compelling when the witness has negotiated a more favorable deal for himself than his attorney had previously negotiated. *Maxwell v. Roe (2010, CA9 CA) 628 F.3d 486, 509–510*. "[T]he details of Storch's plea negotiations would have helped to establish Storch's sophistication and directly contradicted the naivete he professed at trial. The fact that Storch had worked a deal with [the prosecution] without his public defender would have been the only evidence—other than the evidence of Storch's ***informant*** past, which was also suppressed—of Storch's ***informant*** sophistication." *628 F.3d at 510*.

The making of explicit promises to prosecution witnesses to induce their testimony appears to be most commonly encountered when the prosecution witnesses are ***informants***. *See, e.g., Jackson v. Brown (2008, CA9 CA) 513 F.3d 1057*.

Explicit promises made to a prosecution witness constitute evidence favorable to the defendant even when the benefits of those promises do not flow directly to the prosecution witness, but inure to the benefit of the witness's family. *LaCaze v. Warden La. Corr. Inst. for Women (2011, CA5 LA) 645 F.3d 728, 735*.

§ 1:29.2 Implied or implicit promises, offers, and inducements

The prosecutor has a duty to disclose to the defendant any implied or implicit promises, offers, or inducements made to material prosecution witnesses. An implied or implicit promise is one in which the literal words do not express a promise, but the substance implies that the witness will receive a benefit or inducement in return for the cooperation of the witness.

In *Giglio v. United States (1972) 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104*, the prosecutor promised a government witness that if he did not testify against Giglio he would be prosecuted, and that if he did testify he would have to rely on the good judgment and conscience of the government on whether he himself would be prosecuted. This promise was not disclosed to Giglio or his attorney. The Supreme Court held that "evidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility and the jury was entitled to know of it." *405 U.S. at 155*.

Implied or implicit promises of leniency to a prosecution witness must be disclosed to the defendant in the same manner as express promises of leniency. *See In re Malone (1996) 12 Cal.4th 935, 976–977, 50 Cal.Rptr.2d 281, 911 P.2d 468*. Implied promises are treated as express promises for many purposes in the criminal law. *See, e.g., People v. Clark (1993) 5 Cal.4th 950, 988, 22 Cal.Rptr.2d 689, 857 P.2d 1099*; *People v. Cahill (1993) 5 Cal.4th 478, 485, 20 Cal.Rptr.2d 582, 853 P.2d 1037*; *People v. Benson (1990) 52 Cal.3d 754, 778, 276 Cal.Rptr. 827, 802 P.2d 330*.

The federal circuit courts of appeal have determined that implied or implicit promises to a prosecution witness constitute evidence favorable to a defendant. In *Wisehart v. Davis (2005, CA7 Ind.) 408 F.3d 321, 323–324*, the Seventh Circuit Court of Appeals stated:

> "The first and most common is by showing that the benefits were given in return for the witness's providing testimony that would help the prosecution... Or there might have been a tacit understanding that if his testimony was helpful to the prosecution, the state would give him a break on some pending criminal charge... Express or tacit, either way there would be an agreement, it would be usable for impeachment, and it would have to be disclosed to the defense."

A tacit or implied agreement can arise from conduct of the prosecution that is unaccompanied by words. In *United States v. Shaffer (1986, CA9 Cal.) 789 F.2d 682, 685*, the prosecution witness had acquired assets from his share of the profits of the narcotics operation. The government knew about these assets and did not initiate forfeiture proceedings against those assets. The Ninth Circuit Court of Appeals held that a tacit agreement had been created in which the witness could keep his assets in return for his testimony. The Court stated that it is clear "that facts which imply an agreement would also bear on [the witness'] credibility and would have to be disclosed." *789 F.2d at 690*.

Likewise, in *Reutter v. Solem (1989, CA8 S.D.) 888 F.2d 578*, the prosecution's star witness had applied for sentence commutation. The hearing for sentence commutation was set to take place soon after the witness's appearance at the defendant's trial. The Eighth Circuit Court of Appeals found a *Brady* violation for the prosecution's failure to disclose these facts, despite the lack of evidence of an agreement between the prosecution and the witness.

In *Bell v. Bell (2006, CA6 Tenn.) 460 F.3d 739*, a man approached the government and offered to testify against the defendant. Shortly thereafter, the government dismissed several charges against the witness; the witness received concurrent sentences for two convictions; and the prosecution wrote a letter to the parole board on behalf of the witness. Even though the evidence showed that there was no agreement between the witness and the government, the Sixth Circuit Court of Appeals concluded that there was a tacit agreement between the witness and the prosecution, and that "a tacit agreement is favorable evidence under Brady." *460 F.3d at 753*. The Court reasoned:

> "No principled reason exists for differentiating between spoken and unspoken agreements between the prosecution and a witness... An express agreement between the prosecution and a witness is impeaching because it is evidence that the witness has an interest at stake; in other words, the witness is not impartial. [citation omitted] This same interest and partiality exist under a tacit agreement... The fact that the agreement is unspoken does not lead to a diminishment of the witness' interest under the agreement." *Id.*

The *Bell* Court further explained that "a tacit agreement in this context is based on the transparent incentives for both the witness and the prosecution ... the arrangement is a *quid pro quo;* the ***informant*** knows he is giving something of value and expects something in return; the prosecution knows it is receiving something of value, and gives something in return. No written or spoken word is required to understand the nature of this tacit agreement." *460 F.3d at 753–754*.

There is contrary authority that holds that where there is no evidence of an express agreement between a prosecution witness and the prosecution, but the prosecution extended a benefit to the witness after his testimony, these facts were not evidence of a tacit agreement between the prosecution and the witness. *See, Shabazz v. Artuz (2003, CA2 N.Y.) 336 F.3d 154, 157*, in which the Second Circuit Court of Appeals held that "the fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony."

The Sixth Circuit in *Bell* declined to follow the holding in *Shabazz*, concluding that such a holding "leaves little room for a petitioner to establish a tacit agreement. By definition, a tacit agreement is an unspoken understanding and is identified primarily by actions in a particular context." *460 F.3d at 753*.

In *Hovey v. Ayers (2006, CA9 Cal.) 458 F.3d 892*, the Ninth Circuit Court of Appeals concurred that tacit or implied promises constitute evidence favorable to a defendant within the meaning of the *Brady* rule, *458 F.3d at 919*,

although the Court concluded that "in the absence of a promise or deal, a witness's subjective belief that he might receive lenient treatment in exchange for testifying does not render perjurious his testimony that he received no promises that he would benefit from testifying." *458 F.3d at 917*.

Although "[t]he existence of a less formal, unwritten or tacit agreement is also subject to *Brady* disclosure mandate," there must be some evidence that the prosecution and the prosecution witness have reached a mutual understanding, which can be an unspoken one. A mutual understanding "would qualify as favorable impeachment material under *Brady*." *Bell v. Bell (2008, CA6 TN) 512 F.3d 223, 233*. *Accord*, *Ragheed Akrawi v. Booker (2009, CA6 MI) 572 F.3d 252, 262* [" '[t]he existence of a less formal, unwritten or tacit agreement is also subject to *Brady's* disclosure mandate.' " [citations omitted] '*Brady* is not limited to formal plea bargains, immunity deals or other notarized commitments. It applies to 'less formal, unwritten, or tacit agreement[s],' so long as the prosecution offers the witness a benefit in exchange for his cooperation, ... so long in other words as the evidence is 'favorable to the accused.' " [citation omitted]]

However, a witness's expectation of future benefits does not necessarily mean that a tacit agreement subject to a *Brady* disclosure duty existed. A witness's expectation does not amount to an agreement with the prosecution. *Bell v. Bell, 512 F.3d at 233*. However, a witness's expectation of and efforts to get benefits in return for testifying for the prosecution can constitute evidence favorable to a defendant independent of any tacit agreement. See *Sections 1:29.11* and *1:29.13* of the text.

Nor does the conferring of assistance to a prosecution witness following that witness's testimony require a court to infer a preexisting deal between the prosecution and the witness that is subject to disclosure under *Brady*, particularly where the prosecutor who conferred the benefit had no knowledge about the case in which the witness testified. *512 F.3d at 233–234*.

§ 1:29.3 Secret promises, offers, and inducements

The prosecutor cannot evade the prosecution's duty to disclose promises, offers, inducements, and benefits by making an agreement with the witness's attorney to extend benefits to the witness's attorney accompanied by an agreement that the existence and details of the agreement will be withheld from the witness. This maneuver is likely to produce false testimony from the witness. The witness can honestly deny that he or she has received any promises, offers or inducements, leaving the trier of fact with a false belief that no promises, offers, inducements, or benefits have been extended.

In *People v. Morris (1988) 46 Cal.3d 1, 249 Cal.Rptr. 119, 756 P.2d 843*, the prosecutor promised a witness's attorney that he would assist the witness on pending charges in return for the witness's testimony against the defendant. The prosecutor and the attorney agreed to not inform the witness of the agreement. The California Supreme Court held that this agreement should have been revealed to the defendant, even though the promise had never been communicated to the witness. It did not matter that the specifics of the agreement had not been communicated to the witness, the court reasoned; where the witness does not know the specifics of the agreement, the witness is even more prone to color his testimony "so as to receive the most favorable treatment from the prosecutor." *46 Cal.3d at 32*, 33.

Likewise, in *People v. Phillips (1985) 41 Cal.3d 29, 222 Cal.Rptr. 127, 711 P.2d 423*, the prosecutor and the attorney for a prosecution witness made an agreement to secure the testimony of the witness. However, the agreement between the prosecutor and the witness's attorney provided that neither would tell the witness the substance of the agreement. The witness's attorney advised the witness to "have faith and trust" in her (the attorney) and to testify.

The defendant learned of the existence of this agreement and requested disclosure of the details and an opportunity to cross-examine the witness about the agreement. The prosecution refused to disclose the agreement and the trial court concluded that any agreement that had not been disclosed to the witness was irrelevant to the issue of the witness's credibility.

The Supreme Court held that the trial court erred. The Supreme Court characterized the prosecutor's conduct as "double talk" and concluded that "when an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility." *41 Cal.3d at 47*.

The Supreme Court, quoting Justice Fleming in *People v. Brunner (1973) 32 Cal.App.3d 908, 913–914, 108 Cal.Rptr. 501*, further observed that the "tactical device" of withholding the details of the agreement from the witness suffers from a defect that is even more insidious than when the details have been disclosed to the witness. The Court noted that the " 'witness may be so influenced by his hopes and fears that he will promise to testify to anything desired by the prosecution in order to obtain a grant of immunity. Because the satisfaction of the prosecution is the [witness's] ticket to freedom, the prosecutor, by dangling the promise of immunity, can put the words he wishes into the [witness's] mouth.' " *41 Cal.3d at 48*.

The Court finally observed that "unless the witness is informed both of the terms of the agreement *and that his receipt of the benefit cannot be denied so long as he testifies fully and truthfully at the criminal trial*, the witness cannot help but believe that his own treatment will depend on how 'well' he does ... in testifying against his accomplice. Consequently, a prosecutor's insistence that the witness not be informed of the terms of the bargain has the inevitable tendency to lead the witness to color his testimony, so as to receive the most favorable treatment from the prosecutor." *Id.* [italics in original]

The Supreme Court held that the trial court erred in concluding that the terms of an agreement that had not been disclosed to the witness were irrelevant to the issue of the witness's credibility, and that "defense counsel is entitled to discover the terms of any agreement for lenient treatment negotiated on behalf of a prosecution witness." *Id.*

After Phillips' conviction was affirmed on appeal he filed a federal habeas petition in which he argued that his due process rights were violated by the allegedly false testimony of the prosecution witness that she had not been offered a deal in exchange for her testimony. The district court denied the habeas petition. The Ninth Circuit Court of Appeals reversed the denial of the habeas petition, concluding that Phillips was entitled to an evidentiary hearing on his claim. The Court of Appeals concluded that the prosecutor's agreement with the agent of the prosecution witness constituted an agreement with that witness, even if the agreement had never been communicated to the witness. *Phillips v. Woodford (2001, CA9 Cal.) 267 F.3d 966, 983–985*.

The Ninth Circuit Court of Appeals reached a similar conclusion in *Killian v. Poole (2002, CA9 Cal.) 282 F.3d 1204*, a case in which the prosecution made an agreement with a state prisoner who had been convicted of and was serving a sentence of life without the possibility of parole for his participation in a murder. The prisoner agreed to testify against the defendant as the mastermind of the murder. The prosecution agreed to support the prisoner's resentencing in a letter that was sealed and probably not disclosed to the prisoner. The letter was not disclosed to Killian, who was convicted of murder and sentenced to a term of thirty-two years to life in prison.

After failing in her appeals and collateral review petitions in state court, Killian filed a federal habeas petition. The district court denied the petition. The Ninth Circuit Court of Appeals reversed the district court and granted the habeas petition, holding that the prosecution's failure to disclose its agreement with the prosecution witness constituted *Brady* error. The Court rejected an argument that since the witness did not know the contents of the sealed letter, its contents did not constitute an agreement with the witness for benefits. The Court stated:

> "Although it might not have been disclosed to Masse [the witness], and therefore not sufficient to constitute a plea bargain, the letter would still have been valuable to the defense in impeaching Masse's credibility before the jury. The undisclosed material, considered collectively, exposed Masse's motivation to lie and tended to show that he did lie." *282 F.3d at 1210*.

The Ninth Circuit Court of Appeals repeated its criticism of secret promises and deals with prosecution witnesses in *Hayes v. Woodford (2002, CA9 Cal.) 301 F.3d 1054*. In *Hayes* the prosecution offered an inducement to a

potential prosecution witness to testify in a capital murder prosecution by making the offer of that inducement to the witness's attorney. The attorney did not share the prosecution's offer with the witness. When the witness testified against the defendant he denied being given any promises, offers, or inducements. The district court found that because the witness did not know of the prosecution's offer, the witness was not lying in his denial and had not committed perjury.

The Court of Appeals, while denying the defendant's claim that this process denied him due process of law, because the Court found that the withheld evidence of the agreement with the witness' attorney was not material, concluded:

> "This is not the first time that we have seen a prosecutor use the questionable tactic of 'insulating' witnesses from the knowledge that they will benefit from their testimony by telling just their attorney about a deal for leniency, but then requiring that the attorney not pass it on to the client." *301 F.3d at 1073, n.19*.

The concurring opinion of Judge Trott in *Willhoite v. Vasquez (1990, CA9 Cal.) 921 F.2d 247, 251* (Trott, J., concurring) on secret plea deals is instructive: "It [a side deal with the witness's attorney] involves a pernicious scheme without any redeeming features... ."

Despite these holdings of California state court and federal circuit court opinions dating back to at least 1973, cases continue to surface in which prosecutors have made secret deals with the attorneys for prosecution witnesses that have not been disclosed to the defendant. And the appellate courts continue to hold that such evidence is favorable to the defendant and must be disclosed pursuant to *Brady*. The latest such opinion is *Hayes v. Brown (2005, CA9 Cal.) 399 F.3d 972*, a case in which the prosecution and the attorney for a prosecution witness made a secret deal in 1980.

One federal circuit court has held that a benefit conferred on a government witness—a request that other jurisdictions not arrest the witness on outstanding warrants—was not a *Brady* secret promise, because the witness was unaware of the request. Thus, stated the Court, "the prosecution could not have made the request in exchange for [the witness's] testimony." *Doan v. Carter (2008, CA6 OH) 548 F.3d 449, 460*.

The fact that a prosecution witness does not know of even the existence of a deal, much less its details, might be the key difference from the cases discussed in the text in which the prosecution made a deal for benefits with the witness's attorney, the witness knew of the deal, but the witness did not know any details of that deal.

§ 1:29.4 Ambiguous promises, offers, and inducements

The Eleventh Circuit Court of Appeals has held in several cases that promises, agreements, or understandings between the prosecutor and a prosecution witness that are too ambiguous, too loose, or of too marginal a benefit to the witness need not be disclosed pursuant to the *Brady* rule. *See, e.g. Tarver v. Hopper (1999, CA11 Ala.) 169 F.3d 710, 717*; *Depree v. Thomas (1991, CA11 Ga.) 946 F.2d 784, 797–798*; and *McCleskey v. Kemp (1985, CA11 Ga.) 753 F.2d 877, 884*.

However, the same Eleventh Circuit Court of Appeals agreed with an analysis by the Fourth Circuit Court of Appeals that concluded that ambiguous and tentative promises have an even greater potential to impeach the government witness than an explicit deal. In *Boone v. Paderick (1976, CA4 Va.) 541 F.2d 447, 451*, the Fourth Circuit stated:

> "Rather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced [by the witness] the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor."

In United States v. Curtis (2004, CA11 Fla.) 380 F.3d 1311, 1316, the Eleventh Circuit Court of Appeals quoted *Boone* with approval, stating that "[t]he fact that [the government witness] did not have an explicit pro quo deal does not undermine, and may have even enhanced, his motivation to please the government."

ERRATA:

The citation of *Boone v. Paderick* on page 80 of the text is incorrect. The correct citation is Boone v. Paderick (1976, CA4 VA) 541 F.2d 447.

§ 1:29.4.1 Contingent promises, offers, and inducements

Closely akin to ambiguous promises, offers, and inducements are "contingent" promises, offers, and inducements. A contingent promise, offer, or inducement is one that holds out the possibility that the witness will receive a benefit that is dependent upon the achievement of a result that satisfies the prosecution. "Th[e] possibility of a reward gave [the witnesses] a direct, personal stake in respondent's conviction. The fact that the *stake was not guaranteed through a promise or binding contract*, but was expressly contingent on the Government's satisfaction with the end result, *served only to strengthen any incentive to testify falsely* in order to secure a conviction." Tassin v. Cain (2008, CA5 LA) 517 F.3d 770, 778. [italics in original]

§ 1:29.5 Promises, inducements, and benefits in prior cases

When a prosecution witness who is facing prosecution for current criminal charges has received promises, offers, inducements, or benefits to cooperate with law enforcement in prior criminal cases, one court has held that the prosecution has a *Brady* duty to disclose to the defendant the promises, offers, inducements, or benefits in those prior cases.

In People v. Kasim (1997) 56 Cal.App.4th 1360, 66 Cal.Rptr.2d 494, two participants in a conspiracy to commit aggravated mayhem testified as witnesses for the prosecution against the defendant. The witnesses, who were themselves facing life sentences in the current prosecution, had received benefits in the past because of their cooperation with law enforcement, and could have had reason to satisfy the prosecution in the current prosecution so that they could receive lenient treatment on their pending cases.

The Court of Appeal concluded that evidence of a witness's benefits and inducements from cooperating with law enforcement in prior cases, coupled with a possible benefit for current cooperation with law enforcement, constituted exculpatory evidence that must be disclosed to the defendant in the current prosecution. 56 Cal.App.4th at 1381–82. The court concluded that the jury "was entitled to know about all historical events bearing on these witnesses' propensity to be truthful or untruthful." *Id.*, at 1382.

Although the court did not explain its reasoning, the apparent rationale for concluding that evidence of prior cooperation with law enforcement can be evidence favorable to a defendant requires that three facts be true about the prosecution witness: (1) the witness has cooperated with law enforcement in the past; (2) the witness has received a benefit, offer or inducement for the cooperation; and (3) the witness could benefit by cooperating with law enforcement in the current prosecution—for example, the witness could receive favorable disposition in a pending case against the witness.

If a prosecution witness meets the above three criteria, the prosecutor must disclose to the defendant the witness's prior ***informant*** cooperation. However, if disclosure of the witness's prior ***informant*** status would endanger the witness, the prosecutor should invoke the privilege against revealing the identity of a

confidential ***informant*** pursuant to Evidence Code 1041. However, *Brady v. Maryland* does not impose an obligation to necessarily produce the entire file of a confidential ***informant***. United States v. Bermudez-Chavez (Apr. 12, 2012, CA9 Ariz.) 2012 U.S. App. LEXIS 6739.

Penal Code section 1054.6 provides that the prosecuting attorney is not required to disclose any information that is privileged pursuant to an express statutory provision. In order to implement this claim of privilege, the prosecutor should make an *ex parte* request to the trial court pursuant to Penal Code section 1054.7 to issue an order denying, restricting or deferring disclosure of the information regarding the witness's prior ***informant*** status.

Prosecutors who utilize witnesses who have a history of receiving promises, inducements and benefits in return for their cooperation with law enforcement tread in dangerous territory. The possibility that such prosecutors will commit *Brady* error by failing to reveal the entire scope of the witness's relationship to the prosecution team and the full extent of the benefits received by the witness is very high. A prime example of these dangers is illustrated by In re Pratt (1999) 69 Cal.App.4th 1294, 82 Cal.Rptr.2d 260.

Geronimo Pratt (whose true name is Elmer Gerard Pratt) was a high profile member of the Black Panther Party who was convicted in August 1972 of a 1968 murder and assault with intent to commit murder. After the defendant had made numerous legal challenges to his conviction over a twenty-year period, Pratt filed a habeas corpus petition in which he alleged that the prosecution had committed *Brady* error "based on evidence neither disclosed nor available at the 1972 trial that demonstrated the close nature" of the relationship between a critical ***informant*** witness who had testified against the defendant in his 1972 trial and law enforcement personnel, and evidence showing the motivation of the ***informant*** witness for "seeking to curry favor with law enforcement." 69 Cal.App.4th at 1307.

Following an extensive evidentiary hearing, the trial court granted the writ petition in 1998. The trial court found that the witness had informed on the Black Panther Party and its members to law enforcement on a confidential basis for three years before the defendant's trial. The court also found that the witness had "significant motivations [] to identify [Pratt] as the killer, such as a desire to extricate himself from his own legal difficulties and/or to ingratiate himself with prosecution and law enforcement agencies in Los Angeles on an ongoing basis for his own personal benefit." 69 Cal.App.4th at 1311.

The prosecution appealed the granting of the habeas petition. The Court of Appeal affirmed the order of the trial court granting the habeas petition. In affirming the granting of the writ, the Court of Appeal concluded that the "evidence clearly established the existence of a cooperative relationship with various law enforcement personnel that was much closer than Pratt was able to show or argue at trial." *Id.*, at 1316. The Court of Appeal agreed with the trial court that "the information that was not available [to the defendant] at trial would have permitted 'potentially devastating cross-examination or other impeachment regarding [the ***informant*** witness] in important respects.' " *Id.*, at 1317. The Court of Appeal concluded that "the requirement of *Brady* that the suppressed evidence be 'favorable' was satisfied in this case" *Id.*

In Sanchez v. United States (1995, CA9 Cal.) 50 F.3d 1448, the Ninth Circuit Court of Appeals identified an additional scenario in which the prior ***informant*** status of a prosecution agent (who was apparently not a prosecution witness in the current prosecution) might be exculpatory for a defendant. In *Sanchez* the defendant was arrested in a joint investigation by the FBI and the Los Angeles Sheriff's Department for conspiracy to distribute cocaine and for possession of cocaine with intent to distribute the cocaine. He was charged with these crimes as violations of federal law in the United States District Court.

While the defendant was incarcerated prior to trial, he was visited by a man named Murcia, who apparently convinced the defendant to plead guilty to the charges on a promise that he could secure the defendant's release from custody after his conviction. Murcia had previously been an ***informant*** for the Los Angeles Sheriff's Department. Murcia's prior ***informant*** status was not revealed to the defendant.

More than a year after his sentence to federal prison on the charges, the defendant requested the District Court to set aside his guilty plea and the sentence, arguing that had he known of Murcia's ***informant*** status he never would have pled guilty. At the hearing on the defendant's motion, evidence was introduced that Murcia not only had been an ***informant*** for the Sheriff's Department but that Murcia had supplied some of the cocaine for the drug deal for which the defendant had been convicted. The federal prosecutors testified that although they knew of Murcia's ***informant*** status, they did not know of Murcia's involvement in the instant drug case. The U.S. District Court denied the defendant's new trial motion. The Ninth Circuit Court of Appeals affirmed the denial on the basis that the federal prosecutors were unaware of the involvement of Murcia in the drug sale or in convincing the defendant to plead guilty.

However, the court stated that "the ***informant*** status of individuals is ... exculpatory when coupled with the fact that those persons were acting as government agents in the present case." *50 F.3d at 1453–54*.

In *Benn v. Lambert (2002, CA9 WA.) 283 F.3d 1040*, the defendant was convicted of capital murder and sentenced to death in the State of Washington. The prosecution called as a witness a jailhouse ***informant*** who had shared a jail cell with the defendant. The ***informant*** testified that the defendant confessed the crime to him and asked him to find someone outside of the jail who would be willing to take the blame for the murders. The ***informant***-witness testified that the defendant admitted that the murder of the two victims was planned to cover up the defendant's participation in an arson-insurance-fraud scheme with those victims, that the two victims had threatened to disclose the crimes to the police,and that the defendant killed them to prevent being exposed.

After his conviction and death sentence the prosecution disclosed significant impeachment evidence about the ***informant***-witness. The impeachment evidence included evidence that the ***informant*** had been an ***informant*** in a previous murder case. This information had not been disclosed to the defendant. In fact, the ***informant*** had denied in his trial testimony that he had ever previously been an ***informant*** in a murder case.

The defendant filed a federal habeas petition alleging *Brady* error in his trial. The district court granted the habeas petition. The Ninth Circuit Court of Appeals affirmed the granting of the habeas petition, holding that the withheld impeachment evidence was sufficiently prejudicial to justify relief under *Brady.Brady, 283 F.3d at 1054*. The Court stated that in *United States v. Shaffer (1986, CA9 Cal.) 789 F.2d 682*, "we stated that undisclosed evidence that an ***informant*** had previously participated in a heroin investigation was important impeachment evidence that could have been used to discredit the ***informant***'s trial testimony that he had not previously participated in that type of investigation. The circumstances in *Benn* are identical." *283 F.3d at 1058*.

> **Practice Tip for Prosecution:** The lessons of these cases should be clear to prosecutors: when a material prosecution witness has a long history of cooperating with law enforcement, the full extent of that cooperation and motivations for the witness to cooperate in the instant case should be accurately disclosed to the defendant.

Evidence of a prosecution witness's experience as an ***informant*** in prior cases is evidence that can be favorable to the defendant. In *Maxwell v. Roe (2010, CA9 CA) 628 F.3d 486*, the prosecution used as a witness Sidney Storch, a man with a long record of ***informant*** activities, to testify against a defendant charged in the "Skid Row Stabber" killings in Los Angeles. The prosecution did not disclose to the defendant the long experience of Mr. Storch as an ***informant***. The defendant was convicted of two counts of first-degree murder and sentenced to life in prison without the possibility of parole.

The defendant then filed a federal habeas petition, which was denied. On appeal from the denial of his habeas petition, Maxwell argued that the prosecution had violated its *Brady* duty by withholding material information concerning Storch's prior ***informant*** history. The Ninth Circuit Court of Appeals held that the withheld information "could have been used to discredit Storch had it been revealed at the time of trial," and

that this information "would have provided additional evidence that Storch was a sophisticated ***informant*** with developed connections and relationships within the LAPD." *628 F.3d at 511*. The Court concluded that had the prosecution disclosed Storch's prior ***informant*** history, the defense could have investigated Storch more carefully and learned that he was "an experienced ***informant*** with a history of lying." *628 F.3d at 512*. All of this evidence was favorable to Maxwell within the meaning of the *Brady* rule.

§ 1:29.6 Status benefits

The fact that a witness is a paid police ***informant*** qualifies as evidence favorable to a defendant by virtue of its impeaching character. *Banks v. Dretke (2004) 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166* ["As to the first Brady component (evidence favorable to the accused), beyond genuine debate, the suppressed evidence relevant here, Farr's paid ***informant*** status, qualifies as evidence advantageous to Banks."].

In *Kennedy v. Superior Court (2006) 145 Cal.App.4th 359, 380, 51 Cal.Rptr.3d 637*, the Court of Appeal noted that evidence that a prosecution witness had "a habit of snitching in exchange for leniency and other benefits" could be relevant to impeaching the trial testimony of that witness.

However, while evidence that a prosecution witness has a history of cooperating with the government as an ***informant*** can be facially favorable to the defendant, that evidence might also be a two-edged sword. The Fourth Circuit Court of Appeals observed in *Lovitt v. True (2005, CA4 Va.) 403 F.3d 171*, that "[t]he exculpatory value of evidence [that a prosecution witness has cooperated with the government on other occasions] is limited when the effect of disclosure might well be to emphasize to the jury that the prior testimony [of the ***informant*** in other cases] was in fact accurate." *403 F.3d at 185*.

Evidence that a prosecution witness has a long history of serving as a police ***informant***, receiving compensation for his or her work as an ***informant***, is evidence that can be used to impeach the credibility of the ***informant***, and is thus evidence favorable to the defendant. *See, Eulloqui v. Superior Court (2010) 181 Cal.App.4th 1055, 1068, 105 Cal.Rptr.3d 248*; *Wilson v. Beard (2009, CA3 PA) 589 F.3d 651, 662*; and *Robinson v. Mills (2010, CA6 TN) 592 F.3d 730, 737*.

Evidence of a prosecution witness's experience as an ***informant*** in prior cases is evidence that can be favorable to the defendant. In *Maxwell v. Roe (2010, CA9 CA) 628 F.3d 486*, the prosecution used as a witness Sidney Storch, a man with a long record of ***informant*** activities, to testify against a defendant charged in the "Skid Row Stabber" killings in Los Angeles. The prosecution did not disclose to the defendant the long experience of Mr. Storch as an ***informant***. The defendant was convicted of two counts of first-degree murder and sentenced to life in prison without the possibility of parole.

The defendant then filed a federal habeas petition, which was denied. On appeal from the denial of his habeas petition, Maxwell argued that the prosecution had violated its *Brady* duty by withholding material information concerning Storch's prior ***informant*** history. The Ninth Circuit Court of Appeals held that the withheld information "could have been used to discredit Storch had it been revealed at the time of trial," and that this information "would have provided additional evidence that Storch was a sophisticated ***informant*** with developed connections and relationships within the LAPD." *628 F.3d at 511*. The Court concluded that had the prosecution disclosed Storch's prior ***informant*** history, the defense could have investigated Storch more carefully and learned that he was "an experienced ***informant*** with a history of lying." *628 F.3d at 512*. All of this evidence was favorable to Maxwell within the meaning of the *Brady* rule.

§ 1:29.7 Benefits without explicit promise or agreement

A prosecutor's intervention on behalf of a prosecution witness need not be an express quid pro quo for the witness's testimony in order for the prosecutor's actions to be discloseable as evidence favorable to the defendant.

In *Belmontes v. Woodford (2003, CA9 Cal.) 335 F.3d 1024*, the prosecutor in a California capital case helped a prosecution witness achieve favorable dispositions on several traffic misdemeanor charges against the witness, even though the prosecutor's help was not given as consideration for the witness's testimony against the defendant and was not listed in a plea agreement in which the witness was granted immunity on a murder charge in return for his testimony against the defendant. On federal habeas proceedings the Ninth Circuit Court of Appeals concluded:

> "T]he fact that the prosecutor personally appeared in municipal court to argue for favorable dispositions of [the witness's] misdemeanor traffic offenses casts a shadow on [the witness's] credibility regardless of whether such intervention was mentioned in the plea agreement or offered as consideration for [the witness's] testimony. Even though [the witness] was not explicitly promised leniency [on his plea to burglary], the fact that the prosecutor helped [the witness] obtain dismissals or reduced punishments on his traffic misdemeanors makes it more likely that he would intercede on [the witness's] behalf when it came time for sentencing on the burglary charge." *335 F.3d at 1043*.

In *United States v. Sipe (2004, CA5 Tex.) 388 F.3d 471*, a case in which a border patrol agent was prosecuted for using excessive force and causing bodily injury to an arrested illegal alien, the government bestowed numerous benefits on aliens who testified for the government, and these benefits were not disclosed to the defendant. It appears that these benefits were bestowed without any agreement or promise having been made to the alien witnesses. The benefits consisted of Social Security cards, paid witness and travel fees, allowed travel to and from Mexico to visit family, allowed travel to another state to work, and use of government phones to contact relatives in Mexico.

Even though these benefits to these alien government witnesses were provided outside an agreement or a promise by the government, the Court of Appeals held that these benefits constituted evidence favorable to the defendant that the prosecution was required by *Brady* to disclose.

The provision of benefits to prosecution witnesses without a quid pro quo is evidence favorable to a defendant, as explained by the Seventh Circuit Court of Appeals in *Wisehart v. Davis (2005, CA7 Ind.) 408 F.3d 321*, because of the potential impact of such benefits upon the attitude of the prosecution witnesses—the lavishing of "benefits (sex, free long-distance calls, cash, or what have you) on its witnesses in the hope of making them feel part of the state's team and as a result inclined, out of gratitude, friendship, or loyalty, to testify in support of the prosecution." *408 F.3d at 324*.

The same impact on a prosecution witness can occur when the prosecution provides a "definite benefit that is neither a quid pro quo nor lavish, yet permits an inference that the witness's testimony would be affected. There would be an argument for requiring disclosure of such a benefit." *Wisehart v. Davis, supra.*

In *Belmontes v. Brown (2005, CA9 Cal) 414 F.3d 1094*, the Ninth Circuit Court of Appeals agreed that a prosecutor's assistance to a prosecution witness in the witness's own criminal cases can be evidence favorable to the defendant, even when the prosecution has not made an explicit promise to the witness. The Court stated that "the fact that the prosecutor helped [the witness] obtain dismissals or reduced punishments on his traffic misdemeanors makes it more likely that he would intercede on [the witness's] behalf when it came time for sentencing on the burglary charge. Thus, the evidence was clearly relevant and admissible for purposes of impeachment, and the district attorney should have disclosed it." *414 F.3d at 1113*.

For an excellent discussion of the manner in which benefits extended to a prosecution witness without any express agreement therefore can constitute a tacit agreement that is evidence favorable to a defendant, *see Bell v. Bell (2006, CA6 Tenn.) 460 F.3d 739*, which is discussed in greater detail in Section 1:29.2 of this text.

While a benefit conferred upon a prosecution witness need not result from an explicit promise or agreement in order to constitute evidence that can impeach the testimony of that witness, it appears that (1) there must

be a benefit to the prosecution witness, and (2) that any benefit must exchanged for the testimony of the witness. Thus, in *Lamarca v. Sec'y, Dep't of Corr. (2009, CA11 FL) 568 F.3d 929, 941*, the presence of one of Lamarca's prosecutors at the sentencing in another case of a prosecution witness against Lamarca, was not evidence impeaching that witness and was not required to be disclosed to Lamarca, without evidence that the prosecutor's presence produced a benefit for that witness. Likewise, where there is no evidence that a benefit received by a prosecution witness, such as a delay in sentencing in the witness's own case, was in exchange for the witness's testimony, the benefit is not evidence that impeaches the witness's testimony and is thus not favorable to the defendant. *See Lamarca v. Sec'y, Dep't of Corr. (2009, CA11 FL) 568 F.3d 929* [Defendant failed to establish that the delay in sentencing a second government witness until after the defendant's trial was "in exchange for his testimony." *568 F.3d at 941*.].

In *Ragheed Arkawi v. Booker (2009, CA6 MI) 572 F.3d 252, 263*, the Sixth Circuit Court of Appeals concluded that "the mere fact of favorable treatment received by a witness following cooperation is also insufficient to substantiate the existence of an agreement. '[I]t is not the case that, if the government chooses to provide assistance to a witness following trial, a court must necessarily infer a preexisting deal subject to disclosure under *Brady*.' [citation omitted] 'The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witness prior to the testimony.' [citation omitted] (*emphasis* in original)."

When, however, the government bestows benefits upon a prosecution witness, it can be difficult to dispel the conclusion that the benefits were provided in return for the witness's cooperation or otherwise motivated the witness to provide testimony to help the government in its prosecution of the defendant.

In *Simmons v. Beard (2009, CA3 PA) 590 F.3d 223*, a defendant was charged in Pennsylvania state court with the robbery and murder of an elderly woman. The prosecution introduced evidence against the defendant at trial of a potential sexual assault alleged to have been committed by the defendant against a second woman. That second woman testified against the defendant, who was convicted and sentenced to death.

Following his conviction the defendant filed a habeas corpus petition in federal court, alleging, *inter alia*, that the prosecution had withheld evidence that the second woman misrepresented her criminal history when signing a form under penalty of perjury in order to purchase a handgun—she failed to disclose that she had been convicted of felony burglary, a conviction that rendered her ineligible to purchase a firearm.

The prosecution also failed to disclose that the prosecution witness was charged with violating the Pennsylvania Uniform Firearms Act, which bars a convicted felon from purchasing a firearm. The charge was dropped, however, after the Simmons' investigating officer and prosecutor arranged for the witness to voluntarily surrender her gun to the police in exchange for the dismissal of the charge against her.

The Third Circuit Court of Appeals concluded that evidence of the help given to the prosecution witness was favorable to the defendant, even if the witness had provided law enforcement with the highly inculpatory evidence to which she testified at trial prior to receiving any benefits for her cooperation. The Court stated that "the chronology of events is irrelevant, since the defense could just as well have argued either that [the witness] came up with the [inculpatory] statements with the intent of leveraging them for help from the investigators, or that she was pressured into making those statements by the investigators armed with knowledge of her predicament." *590 F.3d at 236*.

In *United States v. Salem (2009, CA7 WI) 578 F.3d 682*, the government failed to disclose to a defendant charged in federal district court with witness intimidation offenses that a principal witness against him had not been charged for a lying-in-wait gang-related homicide in which law enforcement authorities had evidence of the witness's participation. The defendant's motion for a new trial was denied, and he appealed.

The Seventh Circuit Court of Appeals vacated the denial of Salem's new-trial motion, concluding that suppressed evidence of the witness's non-prosecution for a homicide was evidence favorable to Salem.

The Court stated that "[p]roof of bias or motive to lie is admissible impeachment evidence," that "courts routinely admit evidence suggesting a witness curried favor with the government in exchange for his testimony as proof of bias or motive to testify falsely." *578 F.3d at 686*. The Court concluded: "The plea agreement [of another suspect in the homicide] alone suggests that Lopez [the witness] was a participant in the lying-in-wait murder ... even without a note from the U.S. Attorney or the local D.A. expressly outlining a no-charges-for-testimony quid pro quo, such evidence could be admissible to show [the witness's] motive to testify against Salem." *578 F.3d at 687*.

An informal "tit-for-tat" arrangement between the prosecution and a prosecution witness "could be enough to show bias, even without evidence of an actual agreement between him and the government." *United States v. Salem (2011, CA7 WI) 643 F.3d 221, 228*.

§ 1:29.8 Prosecution leniency in other cases

One might reason that leniency given to a prosecution witness in that witness's own case(s) would fall into the same category as benefits without explicit promise or agreement, discussed above.

However, in *Wisehart v. Davis (2005, CA7 Ind.) 408 F.3d 321*, the Seventh Circuit Court of Appeals distinguished situations in which leniency has been provided to a prosecution witness from situations in which other benefits (cash, immunity, etc.) have been bestowed upon a prosecution witness without a quid pro quo. Citing and quoting from *Todd v. Schomig (2003, CA7 Ill.) 283 F.3d 842, 849*, and *Shabazz v. Artuz (2003, CA2 N.Y.) 336 F.3d 154, 165*, the *Wisehart C* ourt refused to recognize that *Brady* requires the prosecution to disclose when the prosecution "merely doesn't come down as hard on a witness as it could." *408 F.3d at 324*.

The *Wisehart* Court reasoned that when there is no agreement, when the government does not disclose its intention to bestow leniency on a prosecution witness prior to the testimony of that witness, and where there is no evidence that the prosecution knows that the witness expects favorable treatment in return for his or her testimony, the fact that the government has not exacted a full measure of punishment in its prosecutions of the witness is not a disclosure required by *Brady*. The Court's reasoning is worth quoting:

> " 'Rarely does the state end up charging a defendant with every possible crime that he may have committed. Because the state doesn't have the resources to do that, most criminal cases are disposed of pursuant to plea agreements that involve some concessions on its part. The implication of Wisehart's argument is that whenever the state uses a criminal as a witness, which it does very commonly in criminal cases, the entire history of the state's dealing with the individual must be excavated and displayed and inspected for intimations of leniency, and perhaps all his hypothetical future dealings as well, for he might think that cooperation now would yield benefits should he ever again become involved with the law. Any time the government had omitted to charge the witness with a crime, the omission would have to be disclosed to defense counsel and explained to the jury, unless the statute of limitations had run, since until then the government could punish the witness for unsatisfactory testimony by prosecuting him for the crime." *Id.*, at 325.

The *Wisehart* Court concluded:

> "Evidence presented in Wisehart's postconviction proceedings, and thus not available to the defense at trial, indicated that the state had not prosecuted Johnson for two burglaries that they suspected him of having committed, because they didn't want by doing so to dissuade him from testifying against Wisehart; they didn't want to antagonize him. But what would knowledge of this motive of the state's have added to the jury's consideration? Had the prosecutor testified that of course the state didn't want to risk losing a witness in a capital case merely to be able to convict the witness of burglary, this would not have helped Wisehart."

Yet

> "certainly Johnson was aware of the benefits he was receiving for providing what the police thought to be valuable testimony." *693 N.E.2d at 58 n.50*. And it's just a step from that to thinking that it would have been reasonable for Johnson to assume that if he failed to cooperate, the state might revive the charges against him. He thus had something to gain by testifying against Wisehart and much to lose if he stopped cooperating. But this just brings us back to the problem of indefinite boundaries. A criminal trial must not be allowed to turn into an inquiry into disparate treatment of criminals, with the witness being asked whether he'd received any benefit that he would not have received had the state not wanted his testimony and whether therefore he feared retaliation if he stopped playing ball." *Id.*, at 325–326.

Courts appear to reach different results when confronting cases in which prosecution witnesses who themselves are facing criminal charges receive favorable treatment following their testifying as prosecution witnesses. Some courts are inclined to conclude that such post-testifying benefits are evidence of tacit or explicit deals. Others are reluctant to reach that result.

> "[I]t is not the case that, if the government chooses to provide assistance to a witness following a trial, a court must necessarily infer a preexisting deal subject to disclosure under *Brady*. 'The government is free to reward witnesses for their cooperation with favorable in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony.' [citation omitted] To conclude otherwise would place prosecutors in the untenable position of being obligated to disclose information prior to trial that may not be available to them or to forgo the award of favorable treatment to a participating witness for fear that they will be accused of withholding evidence of an agreement." *Bell v. Bell (2008, CA6 TN) 512 F.3d 223, 234*. [italics in original]; *see also*, *Matthews v. Ishee (2007, CA6 OH) 486 F.3d 883, 896*.

§ 1:29.9 Victim compensation payments

A victim's receipt of compensation payments pursuant to state law might be evidence favorable to a defendant within the meaning of the *Brady* rule when an application for such payments requires the victim to establish that he or she was a victim and not a perpetrator of the crime.

In *Moore v. Marr (2001, CA10 CO.) 254 F.3d 1235*, the victim of a first-degree assault applied for $10,000 in victim compensation payments provided by law in Colorado. The Tenth Circuit Court of Appeals held that the victim's receipt of such payments "may well have been 'favorable' within the meaning of Brady. Because [the victim's] receipt of such payments depended on a finding by the Crime Victim Compensation Board that he did not substantially provoke Moore in the course of the altercation, introduction at trial of the fact of the application would have demonstrated that [the victim] had a financial interest in painting himself as the 'victim.' " *254 F.3d at 1244*.

§ 1:29.10 Federal witness protection program as benefit

The question has arisen whether a prosecution witness's inclusion in the federal witness protection program (called WITSEC) is a benefit that must be disclosed as evidence favorable to the defendant. This is an issue which has not yet been decided in a published opinion. The appellate authority discussing benefits to a prosecution witness who is in WITSEC appear to assume, without deciding, that the fact that a prosecution witness is in WITSEC is discloseable. *See, e.g.*, *Mastracchio v. Vose (2001, CA1 R.I.) 274 F.3d 590*; and *United States v. Wilson (2001, CA7 Ill.) 237 F.3d 827*.

On the one hand, the United States Attorney General, who administers WITSEC, is empowered to "refuse to disclose the identity or location of the person relocated or protected... ." *18 USC 3521(b)(1)(G)*. When the Attorney General is the source of the information that the prosecution witness has been accepted in the

witness protection program, *18 USC 3521(b)(3)* provides for a criminal penalty for "any person who, without the authorization of the Attorney General, knowingly discloses any information received from the Attorney General" regarding a person who is in the federal witness protection program.

On the other hand, prosecutors have a *Brady* duty to disclose material evidence favorable to a defendant, and a benefit afforded to a prosecution witness is such evidence. The *Brady* disclosure duty as a constitutional mandate would "trump" the statutory restriction against disclosure of the witness's status as a WITSEC protected witness. Faced with this dilemma, prosecutors should consider requesting the Attorney General to consent to disclosure of a prosecution witness's WITSEC status. If the Attorney General refuses to consent, the prosecutor should request a court order authorizing the prosecutor to disclose the fact of the witness's status in WITSEC.

However, except in an extreme situation, and then only after consultation with the Attorney General, the prosecutor should never disclose the location of the prosecution witness or any other fact that could endanger the safety of the WITSEC witness.

In *Hovey v. Ayers (2006, CA9 Cal.) 458 F.3d 892*, the Ninth Circuit Court of Appeals declined to hold that a letter written by the prosecutor to the state prison after a prosecution witness incarcerated in that prison had testified at the defendant's preliminary examination, asking that the witness be transferred to another security, was evidence favorable to the defendant. The Court concluded that "neither the letter nor the fact of the transfer were potentially exculpatory or impeaching, as neither one demonstrates, nor raises an inference, that [the witness's] testimony was preceded by a deal ... that [the witness] received favorable treatment after he testified does not have any bearing on the credibility of his testimony or on his motives in cooperating in the State's case against *Hovey." 458 F.3d at 917–918*.

The idea that evidence that a prosecution witness has been promised or received federal witness protection in return for the witness's testimony constitutes evidence favorable to the defendant is not without dispute. In *United States v. Davis (2010, CA5 LA) 609 F.3d 663*, the Fifth Circuit Court of Appeals, in rejecting the defendant's claim of a *Brady* violation from the government's failure to disclose an agreement to provide a government witness with witness protection, observed that "[t]he information about the witness protection was not favorable to [the defendant] because the jury may have assumed that [the witness] needed protection from Davis, who allegedly had [the murder victim] killed for filing a complaint against him." *609 F.3d at 696*.

§ 1:29.11 Unrelated post-testimony benefits

If benefits have been extended to a prosecution witness subsequent to the witness's testimony, and the benefits were extended by a different prosecutor who was not associated with the previous case in return for the witness's cooperation in ways that were unrelated to the witness's previous cooperation, the failure to reveal these benefits does not constitute *Brady* error. *Ortiz v. Stewart (1998, CA9 Cal.) 149 F.3d 923, 935*.

The prosecutor who extends such subsequent benefits to a cooperating prosecution witness must be extremely careful to ensure that the subsequent benefits are completely separable from the witness's prior cooperation and are not simply a ruse to hide benefits extended to the witness for his or her prior cooperation.

Evidence that a prosecution witness has received post-testimony benefits in another criminal case in another jurisdiction does not constitute evidence of benefits, offers, or inducements that may be used to impeach the testimony of that prosecution witness, unless there is evidence to connect the benefits in one jurisdiction to the witness's testimony in the other jurisdiction.

Thus, in *Parker v. Allen (2009, CA11 AL) 565 F.3d 1258*, the Eleventh Circuit Court of Appeals held that the prosecution did not commit *Brady* error in failing to disclose to a defendant that a prosecution witness had

been released from custody into a Supervised Intensive Restitution Program (SIR) in a different jurisdiction. The Court of Appeals held that there was no evidence the defendant's prosecutor knew anything about the witness's release, and no evidence connected the witness's release to his testimony against the defendant. The Court characterized the witness's release and his testimony against the defendant as a "coincidence of facts" that had no relationship to each other. *565 F.3d at 1277–1278*.

§ 1:29.12 Witness's efforts to obtain benefits for testifying

Even where the prosecution has not made a deal with a prosecution witness to secure that witness's testimony, evidence that the witness has made efforts to get benefits in return for his or her testimony is evidence favorable to the defendant. *See People v. Dickey (2005) 35 Cal.4th 884, 907–909, 28 Cal.Rptr.3d 647, 111 P.3d 921*; *United States v. Curtis (2004, CA11 Fla.) 380 F.3d 1311*.

A prosecution witness's offer to testify for the government should not automatically be construed as a request for benefits or as evidence favorable to the defendant. "A witness' offer to testify is not inherently impeaching; a witness may testify for any number of reasons that do not cast doubt as to his testimony. What makes a witness' testimony suspect is an offer to testify for a self-interested motive... ." *Bell v. Bell (2006, CA6 Tenn.) 460 F.3d 739, 759*.

The fact that a prosecution witness had discussed a plea agreement with the government in the witness's own criminal case does not necessarily mean that the witness made efforts to obtain benefits for his or her testimony. *See, e.g., United States v. Davis (2010, CA5 LA) 609 F.3d 663, 696*.

§ 1:29.13 Witness's hope of receiving benefits

In order for the prosecutor to have a duty to disclose an explicit promise, offer, or inducement, there must have been either a promise, offer or inducement by a member of the "prosecution team," or a member of the "prosecution team" must have actually made an agreement with the witness to provide a benefit or inducement. If the only evidence of a promise, offer, inducement, or agreement for benefits is the "**hope** [by the witness] that his testimony would result in a reduced sentence in the criminal case against him" or a **hope** of some other benefit, that **hope** "do[es] not establish the existence of the asserted agreement." *Williams v. Woodford (2002, CA9 Cal.) 306 F.3d 665, 695* [emphasis added].

Similarly, the **hope** of the witness's attorney that his or her client will receive more favorable treatment by cooperating with prosecution authorities does not constitute a *Brady/Giglio* promise, offer, inducement or agreement that the prosecution must disclose to the defendant. "The simple belief by a defense attorney that his client may be in a better position to negotiate a reduced penalty should he testify ... is not an agreement within the purview of *Giglio*." *Alderman v. Zant (1994, CA11 Ga.) 22 F.3d 1541, 1555*. *See also, Hovey v. Ayers (2006, CA9 Cal.) 458 F.3d 892, 917* ["in the absence of a promise or deal, a witness's subjective belief that he might receive lenient treatment in exchange for testifying does not render perjurious his testimony that he received no promises that he would benefit from testifying."

The Fifth Circuit Court of Appeals has held that a witness's mere "hope or expectation" of beneficial treatment in return for cooperating with the prosecution might not be sufficient to cross the threshold into *Brady* disclosure duties. *Tassin v. Cain (2008, CA5 LA) 517 F.3d 770, 779*.

The Sixth Circuit Court of Appeals expressed this concept in more firm terms, concluding that "the mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a *mutual* understanding or tacit *agreement*. [citation omitted]" *Ragheed Akrawi v. Booker (2009, CA6 MI) 572 F.3d 252, 263*. [italics in original]

§ 1:29.14 Witness's and witness's attorney's expectation/prediction of benefits

Where the prosecution has not done anything to cause a prosecution witness or the attorney for a prosecution witness to believe that the witness's testimony would be rewarded, the witness's expectation of help from the prosecution as a benefit for the witness's cooperation is not evidence favorable to the defendant. *Moore-El v. Luebbers (2006, CA8 Mo.) 446 F.3d 890, 900*; *Hill v. Johnson (2000, CA5 Tex.) 210 F.3d 481, 486, n.1*. A prosecution witness's "nebulous expectation of help from the state" is not sufficient evidence to constitute an agreement between the witness and the prosecution that would be favorable evidence to a defendant. *Goodwin v. Johnson (1997, CA5 Tex.) 132 F.3d 162, 187*

Moreover, the "educated prediction [of the witness's attorney] is not the equivalent of an affirmative act by the State to hold out a potential reward to the witness if his testimony proves helpful." *Moore-El v. Luebbers, supra.*

§ 1:29.15 Lawfulness of promises, offers, inducements, and benefits

The giving of inducements to persuade a person to be a prosecution witness is not per se unlawful as a violation of the federal anti-gratuity statute, *18 U.S. C sec. 201(c)(2)*. *United States v. Feng (2002, CA9 Cal.) 277 F.3d 1151*; *United States v. Smith (1999, CA9 Cal.) 196 F.3d 1034, 1038–1039*; *United States v. Murphy (1999, CA1 Mass.) 193 F.3d 1, 9*.

§ 1:29.16 California statutory restrictions on promises, offers, inducements, and benefits

Prosecutors who extend promises, offers, inducements, and benefits to "in-custody ***informants***" must also follow specific statutory provisions. *Penal Code section 4001.1(a)* provides that "[n]o law enforcement or correctional official shall give, offer, or promise to give any monetary payment in excess of fifty dollars ($50) in return for an in-custody ***informant***'s testimony in any criminal proceeding." Payments incidental to the ***informant***'s testimony are excluded from this limitation.

An "in-custody ***informant***" is "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the ***informant*** are held within a correctional institution." *Penal Code section 1127a(a)*.

A prosecutor who intends to call an in-custody ***informant*** is required, prior to trial, to provide the defendant or the defendant's attorney with a written statement setting forth any and all consideration promised to, or received by, the in-custody ***informant***. This statement must be filed with the court at the time the witness is called to testify at trial. *Penal Code section 1127a(c)*.

If the prosecutor makes any promises, offers or inducements to a witness to testify, no matter how vague or nonspecific they might be, he or she must reveal the existence and details of those matters to the defendant.

It appears that the requirements of Section 1127a, subdivision (c) apply only when the ***informant*** witness expects or receives any consideration for his or her testimony, and a reduced sentence for the witness in another case that is not the product of an agreement or promise in return for the witness's testimony is not covered by Section 1127a(c). *People v. Wilson (2005) 36 Cal.4th 309, 350, 30 Cal.Rptr.3d 513, 114 P.3d 758*.

In *People v. Wilson* the California Supreme Court left open the question whether Section 1127a, subdivision (c) requires the prosecution to file a written statement that there was no consideration when no consideration has been offered to or received by the ***informant*** witness. *36 Cal.4th at 351*.

§ 1:29.17 Required details regarding disclosure of promises, offers, inducements, and benefits

Where the withheld evidence of an inducement relates to a relatively minor detail concerning the inducement, such as the exact amount of a bonus to be paid to an ***informant*** witness in return for that

witness' cooperation where the disclosed contract with the ***informant*** described the bonus as a large one, the failure to disclose the precise detail does not constitute a *Brady* violation. *United States v. Villafranca (2001, CA5 Tex.) 260 F.3d 374, 379*.

Prosecutors should not, however, take comfort in the doctrine that withholding a minor detail of the promises, offers and inducements given to a prosecution witness will not usually constitute *Brady* error. Prosecutors should not play games in the disclosure of the full extent of promises, offers and inducements to a prosecution witness.

In *Mastracchio v. Vose (2001, CA1 R.I.) 274 F.3d 590*, the prosecution failed to disclose that an ***informant*** had received significant amounts of cash, that the prosecution had served as a reference for the ***informant***'s purchase of a new car, and that the ***informant***, while incarcerated prior to trial, had "enjoyed sybaritic treatment above and beyond what had been disclosed to the defense... state-sponsored skydiving lessons, and free passage throughout the Providence police station." *274 F.3d at 601*. Although in *Mastracchio* the Court of Appeals affirmed the district court's dismissal of the habeas petition, the Court termed the prosecution conduct as "an appalling chapter in the history of Rhode Island law enforcement—a chapter made all the more sordid by the ineptitude with which the prosecution handled its disclosure obligations... ." *Id.*, at 604.

§ 1:29.18 Burden of proof regarding promises, offers, inducements, and benefits

Unless the prosecution admits that promises, offers, inducements, or inducements have been extended to a prosecution witness, the defendant must prove their existence. *People v. Jones (2003) 30 Cal.4th 1084, 1108–1109, 135 Cal.Rptr.2d 370, 70 P.3d 359*; *Williams v. Woodford (2002, CA9 Cal.) 306 F.3d 665, 695*; *United States v. Cooper (1999, CA9 Cal.) 173 F.3d 1192*.

> **Practice Tip for Prosecution:** Do not make agreements with witnesses to induce their testimony that you do not reveal accurately and completely to the defense. Any explicit or implicit promises, offers or inducements made to the witness by you, by another member of your office, or by an employee of any other law enforcement agency must be disclosed to the defense.

§ 1:29.19 Timing of benefits as consideration

As long as there is an explicit or tacit agreement in place at the time that the prosecution witness testifies, it does not matter than the prosecution's extension of benefits occurs after the witness testifies. "*[W]hen* the prosecution makes good on the tacit agreement should not dictate whether the agreement should have been disclosed. It would be inconsistent to find a Brady violation when a prosecutor tacitly agrees to write a letter to the witness' parole board and does so before the petitioner's trial, but to not find such a violation with the same tacit agreement when the prosecutor writes the letter after the petitioner's trial. If such a distinction were made, then the prosecution would just wait until the petitioner's trial ended before it provided the witness any benefits to avoid Brady disclosure. A tacit agreement must be disclosed regardless of when the prosecution acts upon that agreement. In short, the formation of the agreement, not the execution of the agreement, is the critical point of interest." *Bell v. Bell (2006, CA6 Tenn.) 460 F.3d 739, 754–755*.

§ 1:29.20 Negotiations with non-testifying co-defendants

A prosecutor occasionally will enter into negotiations with a co-defendant in order to enable the prosecutor to call the co-defendant to testify against the defendant as a prosecution witness. Unless such negotiations result in an agreement and the co-defendant actually testifies against the defendant, the fact of the negotiations does not become evidence favorable to the defendant. In *United States v. Inzunza (2009, CA9 CA) 580 F.3d 894*, several defendants were indicted in federal court on charges of honest services fraud,

conspiracy to commit honest services fraud, and extortion. The prosecution entered into negotiations with one of the defendants to testify as a government witness. The negotiations did not result in testimony from the co-defendant.

The defendant was convicted. On appeal the defendant argued that the government's failure to disclose its negotiations with the co-defendant constituted *Brady* error. The Ninth Circuit Court of Appeals rejected the defendant's argument, stating: "There is no merit to [the defendant's] claim that the government made an impermissible 'side deal' with [the co-defendant], which, if known to the jury, might have cast doubt on the government's credibility. [The defendant] cites no authority for his argument that evidence of negotiations with non-testifying co-defendants, without more, is exculpatory. *Brady* is simply not implicated." *580 F.3d at 907*.

LexisNexis

User Name: Whalen Robert
Date and Time: 31 Mar 2016 4:33 p.m. EDT
Job Number: 30875291

Document(1)

1. *Cal Evid Code § 1041*
   Client/Matter: -None-

Cal Evid Code § 1041

This document is current for urgency legislation through Chapter 2 of the 2016 Session.

§ 1041. Privilege for identity of informer

(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing the person's identity, if the privilege is claimed by a person authorized by the public entity to do so and either of the following apply:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state.

(2) Disclosure of the identity of the informer is against the public interest because the necessity for preserving the confidentiality of his or her identity outweighs the necessity for disclosure in the interest of justice. The privilege shall not be claimed under this paragraph if a person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding shall not be considered.

(b) The privilege described in this section applies only if the information is furnished in confidence by the informer to any of the following:

(1) A law enforcement officer.

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated.

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2). As used in this paragraph, "person" includes a volunteer or employee of a crime stopper organization.

(c) The privilege described in this section shall not be construed to prevent the informer from disclosing his or her identity.

(d) As used in this section, "crime stopper organization" means a private, nonprofit organization that accepts and expends donations used to reward persons who report to the organization information concerning alleged criminal activity, and forwards the information to the appropriate law enforcement agency.

History

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967. Amended Stats 2013 ch 19 § 1 (AB 1250), effective January 1, 2014.

Historical Derivation:
(a) Former CCP § 1881, as enacted 1872, amended Stats 1893 p 301, Stats 1907 p 87, Stats 1911 p 113, Stats 1917 p 954, Stats 1927 p 1154, Stats 1933 p 1424, Stats 1935 p 1609, Stats 1939 p 1426, Stats 1957 ch 1961 § 1, Stats 1961 ch 629 § 1, ch 923 § 1, Stats 1965 ch 922 § 1, ch 923 § 1.
(b) Practice Act 395 (Stats 1851 ch 5 § 395, as amended Stats 1863 ch 528 § 1).
(c) Practice Act §§ 396, 397 (Stats 1851 ch 5 §§ 396, 397).
(d) Practice Act § 398 (Stats 1851 ch 5 § 398, as amended Stats 1861 ch 313 § 1).
(e) Practice Act § 399 (Stats 1851 ch 5 § 399).

Annotations

Notes

Amendments:

2013 Amendment:

(1) Amended the introductory language of subd (a) by (a) substituting "the person's" for "such"; and (b) adding "either of the following apply:"; (2) amended subd (a)(2) by (a) substituting "the necessity" for "there is a necessity"; (b) substituting "or her identity" for "identity that"; (c) substituting ". The privilege shall not" for "; but no privilege may"; (d) substituting "a person" for "any person"; and (e) substituting "shall not" for "may not"; (3) amended the introductory language of subd (b) by (a) adding "The privilege described in" before "this section"; and (b) adding "any of the following" after "the informer to"; (4) substituted a period for a semicolon in subd (b)(1); (5) substituted the period for "; or" in subd (b)(2); (6) added the last sentence of subd (b)(3); (7) amended subd (c) by (a) substituting "The privilege described in this section shall not be construed" for "There is no privilege under this section"; and (b) adding "or her" after "disclosing his"; and (8) added subd (d).

Commentary

Law Revision Commission Comments:

1965

Under existing law, the identity of an informer is protected by subdivision 5 of *Code of Civil Procedure Section 1881* (which, like Section 1041, prohibits disclosure when the interest of the public would suffer thereby). Section 1881 is superseded by the Evidence Code.

This privilege may be claimed under the same conditions as the official information privilege may be claimed, except that it does not apply if a person is called as a witness and asked if he is the informer.

Case Notes

1. In General

Though the prosecution need not produce an informer as a witness, it cannot withhold information that might assist the defense's efforts to locate and produce him; and the desire of police to foster the security of an informer does not afford sufficient justification for their deliberate resolve to make no effort to learn the informer's address or to establish a way by which to locate him, even though they have no motive to harm defendant. *Eleazer v. Superior Court (1970) 1 Cal 3d 847, 83 Cal Rptr 586, 464 P2d 42, 1970 Cal LEXIS 354.*

The rule requiring the prosecution to take reasonable steps to obtain information to enable the defense to locate a material witness informer is not limited to a regular or compensated police informant. *Disapproving Eleazer v.*

Superior Court (1970) 1 Cal 3d 847, 83 Cal. Rptr. 586, 464 P.2d 42, 1970 Cal LEXIS 354, to the extent that the footnote can be interpreted otherwise. *People v. Goliday (1973) 8 Cal 3d 771, 106 Cal Rptr 113, 505 P 2d 537, 1973 Cal LEXIS 257.*

Defendant is denied a fair trial whenever the police fail to undertake reasonable efforts to obtain information useful for locating a material witness informer who served as an active agent of the police. *People v. Goliday (1973) 8 Cal 3d 771, 106 Cal Rptr 113, 505 P2d 537, 1973 Cal LEXIS 257.*

With respect to the duty of the police in connection with obtaining and disclosing information as to the identity of an informer, the police bear no duty to obtain information about a person who is not a material witness and who merely points the finger of suspicion toward an asserted law violator. *People v. Goliday (1973) 8 Cal 3d 771, 106 Cal Rptr 113, 505 P2d 537, 1973 Cal LEXIS 257.*

Taken together, the People's privilege to protect the identities of its confidential informants (*Ev C § 1041*), the longstanding rule extending coverage of that privilege to information furnished by the informant which, if disclosed, might reveal his or her identity, and the codified rule that disclosure of an informant's identity is not required to establish the legality of a search pursuant to a warrant valid on its face (*Ev C § 1042(b)*), compel a conclusion that all or any part of a search warrant affidavit may be sealed if necessary to implement the privilege and protect the identity of a confidential informant. *Ev C § 915(b)*, expressly authorizes lower courts to utilize an in camera review and discovery procedure to effectuate implementation of the privilege. *People v. Hobbs (1994) 7 Cal 4th 948, 30 Cal Rptr 2d 651, 873 P2d 1246, 1994 Cal LEXIS 2790.*

Veh C § 1808(a) defines two separate and different categories of statutes, statutes that prohibit the disclosure of records and statutes that provide for confidentiality. A statute that prohibits the disclosure of records would invoke the absolute privilege of *Ev C §§ 1040* and *1041*, while a statute that provides for confidentiality would not. *Department of Motor Vehicles v. Superior Court (2002, Cal App 2d Dist) 100 Cal App 4th 363, 122 Cal Rptr 2d 504, 2002 Cal App LEXIS 4414.*

Trial court did not err in denying defendant's motions to traverse and quash a search warrant and to unseal a *Ev C § 1041* confidential attachment in a controlled substance case; probable cause existed for the search, and information contained in the confidential attachment would tend to reveal the identity of informants. *People v. Martinez (2005, Cal App 4th Dist) 132 Cal App 4th 233, 33 Cal Rptr 3d 328, 2005 Cal App LEXIS 1350.*

When the critical parts of a sealed search warrant affidavit have been disclosed to the defense, there is no need for further unsealing of confidential material or for the court to act on the defendant's behalf. At that point, the court should not proceed to the second stage of the Hobbs procedure developed under *Ev C §§ 1040*, *1041*, *1042*; instead, the suppression motion should proceed to decision with a further evidentiary hearing. *People v. Heslington (2011, 4th Dist) 195 Cal App 4th 947, 125 Cal Rptr 3d 740, 2011 Cal App LEXIS 619,* reh'g denied, *People v. Brian D. Heslington (2011, Cal. App. 4th Dist.) -- P.3d --, 2011 Cal. App. LEXIS 728,* review denied, *People v. Heslington (Brian David) (2011, Cal.) -- P.3d --, 2011 Cal. LEXIS 8793.*

2. Construction

The "weighing" language of *Ev C § 1041*, providing that a public entity may refuse to disclose the identity of an informer if the public interest in nondisclosure "outweighs the necessity for disclosure in the interest of justice," implies that the "balance" must be struck in favor of defendant and that disclosure must be ordered upon pain of dismissal if it is shown that the informer is a material witness for the defense and nondisclosure would deprive the defendant of a fair trial. *People v. Garcia (1967) 67 Cal 2d 830, 64 Cal Rptr 110, 434 P2d 366, 1967 Cal LEXIS 268.*

Ev C § 1041(a)(2), providing for the right of a public entity to refuse to disclose the identity of an informer, is based on former CCP § 1881(5), and is in substantial agreement with the predecessor section as interpreted by the decisions of the *Supreme Court. Honore v. Superior Court (1969) 70 Cal 2d 162, 74 Cal Rptr 233, 449 P2d 169, 1969 Cal LEXIS 323.*

The rule of *Eleazer v. Superior Court (1970) 1 Cal 3d 847, 83 Cal Rptr 586, 464 P2d 42, 1970 Cal LEXIS 354* that when an informer becomes a material witness the prosecution must demonstrate that it has attempted in good faith to locate him and cannot evade such duty by deliberate failure to acquire information necessary to find him was not applicable on appeal from a narcotic conviction, where the case was tried prior to the date of that decision, January 30, 1970; the purpose of the new standard enunciated is merely to enlarge the possibility of effective confrontation and does not favor retroactivity; law enforcement authorities have relied for at least 13 years on the former standard requiring only that they disclose information in their possession as to the identity and location of an informer who is a material witness; and a holding of retroactivity could be made only with a cavalier disregard for the realities of the administration of criminal justice. *People v. Helmholtz (1970, Cal App 4th Dist) 10 Cal App 3d 441, 88 Cal Rptr 743, 1970 Cal App LEXIS 1852.*

While the court may in trials beginning after January 30, 1970, require the prosecution at that time to make reasonable efforts to locate an informant, it should not be fatal to a successful prosecution if those efforts are rendered fruitless by the fact that the last meaningful contact with the informant occurred prior to the time that the police were required to obtain and provide the additional information. *People v. Pargo (1970, Cal App 2d Dist) 11 Cal App 3d 528, 89 Cal Rptr 857, 1970 Cal App LEXIS 1752.*

Under *Ev C §§ 1041* and *1042*, which provide for a public entity privilege of nondisclosure of the identity of a person confidentially supplying information regarding a crime to specified authorities, there is no requirement that the information be furnished as a part of an ongoing relationship with authorities or in exchange for some benefit, and the identity of an eyewitness to a stabbing was therefore properly subject to the privilege even though the witness had never provided the police with information in the past and received nothing in return for reporting the stabbing. *People v. Lanfrey (1988, Cal App 6th Dist) 204 Cal App 3d 491, 251 Cal Rptr 189, 1988 Cal App LEXIS 840,* review denied, (1988, Cal) *1988 Cal LEXIS 981.*

Under *Ev C §§ 1041* and *1042*, providing for a public entity privilege of nondisclosure of the identity of a person providing information in confidence to specified authorities, a nonparticipating eyewitness who furnishes information concerning a crime in confidence to police is both an "informer" and a "confidential informant" within the meaning of those sections. *People v. Lanfrey (1988, Cal App 6th Dist) 204 Cal App 3d 491, 251 Cal Rptr 189, 1988 Cal App LEXIS 840,* review denied, (1988, Cal) *1988 Cal LEXIS 981.*

In a drug prosecution, the trial court erred in dismissing the information on the ground that defendant was entitled to disclosure of the identity of the informant, whom the police declined to identify. The informant had been in police custody and released as a result of providing information, and the trial court erred in ruling the informant's information was not "furnished in confidence" within the meaning of *Ev C § 1041* (privilege for identity of informant). The confidentiality of § 1041 is a public interest in the confidentiality of the informant's identity for purposes of effective law enforcement, not the confidentiality of the given information. The test for confidentiality was not whether this particular informant demanded that his identity not be disclosed, or was in physical danger, but whether the investigation was of such a type that disclosure would cause the public interest to suffer. Further, nothing indicated the informant was involved in the charged crime, and thus his identity was not necessary to defendant's case. As the public interest would suffer from the disclosure, the trial court erred in determining the threshold question of whether information was furnished in confidence. *People v. Otte (1989, Cal App 2d Dist) 214 Cal App 3d 1522, 263 Cal Rptr 393, 1989 Cal App LEXIS 1117.*

3. Disclosure of Identity

Arrestees could not prevent the State from prosecuting them for possession of marijuana for sale, in violation of former H & S C § 11530.5, on the ground that the State refused to disclose the name of certain informants because former CCP § 1881.1 gave the trial court the discretion to permit nondisclosure of the identity of an informer after a determination that the informer was reliable. *Martin v. Superior Court of Los Angeles County (1967) 66 Cal 2d 257, 57 Cal Rptr 351, 424 P2d 935, 1967 Cal LEXIS 300.*

A person who may give evidence on the issue of entrapment is one whose identity must be disclosed as a material witness. *People v. Avila (1967, Cal App 1st Dist) 253 Cal App 2d 308, 61 Cal Rptr 441, 1967 Cal App LEXIS 2352,* cert. denied, *Avila v. California (1968) 390 US 1032, 88 S Ct 1427, 20 L Ed 2d 290, 1968 US LEXIS 1961.*

When it appears from the evidence that an informer has participated in the criminal activity or is an eyewitness-nonparticipant or a material witness on the issue of defendant's guilt, his identity is relevant and the defendant is entitled to disclosure. *People v. Williams (1967, Cal App 2d Dist) 255 Cal App 2d 653, 63 Cal Rptr 501, 1967 Cal App LEXIS 1325.*

A defendant who knew the identity of an informer whose information led to his arrest, ordinarily will not be prejudiced by a refusal to disclose that identity. *People v. Williams (1967, Cal App 2d Dist) 255 Cal App 2d 653, 63 Cal Rptr 501, 1967 Cal App LEXIS 1325.*

In a criminal prosecution, if an informant was a participant in the criminal act his identity must be revealed, but compulsory disclosure is not limited to the participant informer, and disclosure of the informant's identity is required whenever it might prove materially beneficial to a defendant. *People v. Scott (1968, Cal App 1st Dist) 259 Cal App 2d 268, 66 Cal Rptr 257, 1968 Cal App LEXIS 1971.*

When it appears from the evidence that an informer is a material witness on the issue of the defendant's guilt, the informer's identity may be helpful to the defendant and nondisclosure thereof deprives the latter of a fair trial. *Honore v. Superior Court (1969) 70 Cal 2d 162, 74 Cal Rptr 233, 449 P2d 169, 1969 Cal LEXIS 323.*

In order for defendant in a criminal case to compel disclosure of a police informant's identity, there is no requirement that the latter must have given the police information about the very crime charged; all that is necessary is that he be a material witness on the issue of defendant's guilt. Thus in a prosecution of two defendants separately charged with illegal possession of marijuana, the fact that the informant gave police information only about methedrine did not mean that what he saw there was any the less relevant on the marijuana charges, where his testimony concerning the apartment was material because of whom and what he saw, not because of his reasons for going there, and did not lose its significance because of the absence of methedrine. *Honore v. Superior Court (1969) 70 Cal 2d 162, 74 Cal Rptr 233, 449 P2d 169, 1969 Cal LEXIS 323.*

If the prosecution persists in its refusal to divulge an informant's identity after the defense demonstrates a reasonable possibility that the informant could give material evidence on the issue of guilt which might exonerate the defendant, the defendant is entitled to a dismissal. *People v. Singletary (1969, Cal App 4th Dist) 276 Cal App 2d 601, 81 Cal Rptr 79, 1969 Cal App LEXIS 1845.*

When a criminal defendant seeks information which might lead to the disclosure of the identity of a confidential informant, the public entity is entitled to invoke the privilege of nondisclosure of the identity of the informant (*Ev C § 1041*), and may request an in camera hearing on the issue of disclosure (*Ev C § 1042(d)*). When an in camera hearing has been held and the trial court has reasonably concluded that the informant does not have knowledge of facts that would tend to exculpate a defendant, disclosure of the identity of the informant is prohibited by *Ev C § 1042(d)*, providing for the in camera hearing, and *Ev C § 1041*, providing for the privilege of a public entity to refuse to disclose the identity of an informant. *People v. McCarthy (1978, Cal App 1st Dist) 79 Cal App 3d 547, 144 Cal Rptr 822, 1978 Cal App LEXIS 1531.*

In a case in which defendants argued that the sheriff violated their constitutional rights by using privileged information from their lawyer to obtain a search warrant, even assuming that a trial court erred by refusing to disclose the identity of the sheriff's informant, the error was harmless because if the informant's identity had been disclosed, and if the lawyer had been the informant, the results would have been the same both below and on appeal. By focusing on the complicity issue, the trial court's decision was necessarily predicated on the assumption that the lawyer had been the informant, and because the trial court did so, and because its findings on lack of complicity were correct, it did not matter that the informant's identity was not disclosed. *People v. Navarro (2005, Cal App 2d Dist) 131 Cal App 4th 1326, 32 Cal Rptr 3d 706, 2005 Cal App LEXIS 1270,* reh'g granted, depublished, *Navarro v. Superior Court (2005, Cal App 2d Dist) 2005 Cal App LEXIS 1526,* reh'g granted, depublished, *(2005) 2005 Cal. App. LEXIS 1525,* superseded, (2006, Cal App 2d Dist) *138 Cal App 4th 146, 41 Cal Rptr 3d 164, 2006 Cal App LEXIS 461.*

Motions to disclose the identity of an informant and to quash a search warrant were properly denied under *Ev C §§ 1041, 1042*, because there was no constitutional violation, even assuming that the informant was defendants' lawyer; the purported breach of attorney-client privilege came before the right to counsel attached, and there was not showing of government misconduct. The trial court properly conducted an in camera proceeding under *Ev C § 915*. *People v. Navarro (2006, Cal App 2d Dist) 138 Cal App 4th 146, 41 Cal Rptr 3d 164, 2006 Cal App LEXIS 461*, review or reh'g denied, *People v. Navarro (Donna) (2006, Cal) 2006 Cal LEXIS 7190.*

Although petitioner, who was charged with attempted murder, sought disclosure of the identity of a confidential informant who told the police he saw petitioner shoot the victim, disclosure would be required only if petitioner were to make an adequate showing at an in camera hearing that the informant could give exculpatory evidence. *Davis v. Los Angeles County Superior Court (2010, 2d Dist) 186 Cal App 4th 1272, 113 Cal Rptr 3d 365, 2010 Cal App LEXIS 1207*, review denied, *Davis (Adolfo) v. S.C. (People) (2010, Cal.) 2010 Cal. LEXIS 11806.*

4. Grounds for Disclosure

There are dual grounds for discoverability of the identity of a police informer: one is to test the reasonableness of police action claimed to be taken upon the basis of information received from the informer; the other, dependent on the nature of the information received, is to permit a defendant to discover possible witnesses whose testimony might be useful to the defense; the injustice of refusing discovery of the identity of one that might be a material witness on the issue of guilt arises largely from the fact that the withholding is by an agent of the *State. People v. Sullivan (1969, Cal App 4th Dist) 271 Cal App 2d 531, 77 Cal Rptr 25, 1969 Cal App LEXIS 2409*, cert. denied, *Sullivan v. California (1969) 396 US 973, 90 S Ct 463, 24 L Ed 2d 441, 1969 US LEXIS 241.*

When it appears from the evidence that an informer is a material witness on the issue of the defendant's guilt, the informer's identity may be helpful to the defendant and nondisclosure would deprive the latter of a fair trial, and when the accused seeks disclosure on cross-examination, the People must either disclose such informer's identity or incur a dismissal. *People v. Lynn (1969, Cal App 2d Dist) 271 Cal App 2d 670, 76 Cal Rptr 801, 1969 Cal App LEXIS 2425.*

The right of a public entity to refuse disclosure of an informant's identity may not be exercised where a defendant demonstrates a reasonable possibility the anonymous informant could give evidence on the issue of guilt. *People v. Singletary (1969, Cal App 4th Dist) 276 Cal App 2d 601, 81 Cal Rptr 79, 1969 Cal App LEXIS 1845.*

When an informer is a material witness on the issue of guilt, the People must disclose his identity, which includes not merely his name, but all pertinent information that might assist the defense to locate him; failing this disclosure, a dismissal is incurred. *Eleazer v. Superior Court (1970) 1 Cal 3d 847, 83 Cal Rptr 586, 464 P2d 42, 1970 Cal LEXIS 354.*

The privilege of *Ev C § 1041*, of a public entity to refuse to disclose an informer's identity, must yield when it is established that the informer is a material witness for the defense and that nondisclosure will deprive defendant of a fair trial. *People v. Sewell (1970, Cal App 2d Dist) 3 Cal App 3d 1035, 83 Cal Rptr 895, 1970 Cal App LEXIS 1195.*

A defendant seeking disclosure of an informer's identity sufficiently shows that the informer is a material witness, so as to compel disclosure, when defendant demonstrates a reasonable possibility that the anonymous informer can give evidence that might result in defendant's exoneration. Demonstration of that reasonable possibility requires more than speculation by defendant. *People v. Sewell (1970, Cal App 2d Dist) 3 Cal App 3d 1035, 83 Cal Rptr 895, 1970 Cal App LEXIS 1195.*

When the People withhold the name of an informant who might have material evidence which might exonerate a defendant, the trial court must order the People either to disclose his identity or to dismiss the case; nevertheless, to be exonerated, the defendant, without being required to show what the informant would actually testify to, must show what he might testify to and that such matter would be of substantial value for exoneration purposes. *People*

v. Uptgraft (1970, Cal App Dep't Super Ct) 8 Cal App 3d Supp 1, 87 Cal Rptr 459, 1970 Cal App LEXIS 2123, cert. denied, Uptgraft v. California (1970) 400 US 911, 91 S Ct 152, 27 L Ed 2d 151, 1970 US LEXIS 631.

Disclosure of an informant's identity is required where the defense demonstrates a reasonable possibility that the informant would be a material witness on the issue of guilt and could give evidence which might result in the defendant's exoneration, but the privilege of nondisclosure of the informant's identity applies where the informant's role is limited to pointing the finger of suspicion at one who has violated the law, and where he has played no part in the criminal act with which the defendant is later charged, and is not a material witness on the issue of guilt. People v. McCoy (1970, Cal App 1st Dist) 13 Cal App 3d 6, 91 Cal Rptr 357, 1970 Cal App LEXIS 1213.

Where it appears from the evidence that an informer is a material witness on the issue of defendant's guilt and that nondisclosure would deprive defendant of a fair trial, the People must either disclose the informer's identity or incur a dismissal. People v. Hunt (1971) 4 Cal 3d 231, 93 Cal Rptr 197, 481 P2d 205, 1971 Cal LEXIS 309.

The common law informer's privilege against disclosure of the identity of persons who supply the government with information concerning the commission of crimes, now embedded in Ev C § 1041, must yield when it is shown that the informant whose identity is sought is a material witness for the defense and that non-disclosure would deprive defendant of a fair trial. Only after it is first determined that the informant is not a material witness on the issue of guilt may disclosure be denied. People v. Goliday (1973) 8 Cal 3d 771, 106 Cal Rptr 113, 505 P2d 537, 1973 Cal LEXIS 257.

5. Burden to Compel Disclosure

A defendant seeking to discover the identity of an informer bears the burden of demonstrating that, in view of the evidence (broadly defined to include such material as search warrant affidavits where relevant and material), the informer would be a material witness on the issue of defendant's guilt, and that nondisclosure of his identity would deprive defendant of a fair trial. Such burden is discharged when defendant demonstrates a reasonable possibility that the anonymous informer whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration. People v. Garcia (1967) 67 Cal 2d 830, 64 Cal Rptr 110, 434 P2d 366, 1967 Cal LEXIS 268.

Defendant in a criminal case need not prove that an informer could give testimony favorable to him in order to compel disclosure of his identity nor show that he was a participant in or an eyewitness to the crime. Defendant's burden extends only to a showing that, in view of the evidence, the informer would be a material witness on the issue of guilt and nondisclosure of his identity would deprive defendant of a fair trial; and the burden is discharged when defendant demonstrates a reasonable possibility that an anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration. Honore v. Superior Court (1969) 70 Cal 2d 162, 74 Cal Rptr 233, 449 P2d 169, 1969 Cal LEXIS 323.

On a motion of two defendants separately charged with illegal possession of marijuana for pretrial discovery to compel disclosure of the identity of a police informer, defendants met their burden of demonstrating a reasonable possibility that the anonymous informant could give evidence on the issue of guilt which might result in their exoneration, were entitled to know the name of the informant, and such disclosure was necessary to secure them a fair trial, where, while one defendant was in police custody on another charge, her apartment, in which the marijuana was later found and both defendants arrested, was visited by the informant, who subsequently told a police officer that he had seen four people there, where those persons might have brought the marijuana into the apartment and have been there when each defendant arrived, so that defendants might not have exercised that degree of dominion and control over the marijuana required to sustain a conviction for possession. Honore v. Superior Court (1969) 70 Cal 2d 162, 74 Cal Rptr 233, 449 P2d 169, 1969 Cal LEXIS 323.

On motions of two defendants separately charged with illegal possession of marijuana for pretrial discovery to compel disclosure of the identity of a police informer, all that defendants were required to do was to demonstrate

a reasonable possibility that the anonymous informer could give evidence on the issue of guilt which might result in their exoneration, where they did not know his identity and could not possibly state factually what he would say if required to testify, and where, thus, it was impossible for them to state facts which would show the materiality of the informant's testimony. *Honore v. Superior Court (1969) 70 Cal 2d 162, 74 Cal Rptr 233, 449 P2d 169, 1969 Cal LEXIS 323.*

On a motion to compel disclosure of an informer's identity, absent a showing of the theory of the defense or other pertinent material, a court may speculate on but cannot determine the existence of a reasonable possibility that the evidence to be obtained from the anonymous informer may be helpful to the defense. *People v. Sewell (1970, Cal App 2d Dist) 3 Cal App 3d 1035, 83 Cal Rptr 895, 1970 Cal App LEXIS 1195.*

A defendant in a criminal prosecution seeking to compel disclosure of an informant's identity need not prove that the informant could give testimony favorable to him nor show that the informant was a participant in or eyewitness to the crime, but he is not entitled to disclosure of the informant's identity upon a mere "speculation" that the informant could produce evidence favorable to the defense. *People v. McCoy (1970, Cal App 1st Dist) 13 Cal App 3d 6, 91 Cal Rptr 357, 1970 Cal App LEXIS 1213.*

In a prosecution for possession of heroin, the trial court correctly sustained a narcotics officer's claim of privilege under *Ev C § 1041*, as to disclosure of the name of a confidential informer who had advised the officer as to defendant's narcotic activity at his apartment and as to the location of heroin concealed in the apartment, where the officer did not ask the informer whether the informer had ever been in defendant's apartment or where and how the informer had obtained the information which he gave the officer, and the record contained nothing indicating that the informer himself had either been in defendant's apartment or in some other way had been personally involved in the heroin being placed or kept in hiding there. *People v. Johnson (1970, Cal App 2d Dist) 13 Cal App 3d 742, 92 Cal Rptr 105, 1970 Cal App LEXIS 1286.*

Defendant's burden in seeking disclosure of the identity of an anonymous informant is discharged by demonstrating that the informant could give evidence on the issue of guilt that might result in defendant's exoneration. *People v. Hunt (1971) 4 Cal 3d 231, 93 Cal Rptr 197, 481 P2d 205, 1971 Cal LEXIS 309.*

Where a defendant in a criminal prosecution moves to obtain the identity of an informant, and the prosecution invokes the privilege under *Ev C, § 1041*, the defendant has the burden of showing that the informer would be a material witness on the issue of guilt and that nondisclosure of his identity would deprive the defendant of a fair trial. The burden is discharged when the defendant demonstrates a reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in the defendant's exoneration. If he fails to discharge that burden, the state's claim of privilege must be sustained. *People v. Reel (1979, Cal App 2d Dist) 100 Cal App 3d 415, 161 Cal Rptr 43, 1979 Cal App LEXIS 2455.*

In a prosecution for constructive possession of phenycyclidine (PCP) (*H & S C § 11378.5*), defendant was not entitled to disclosure of an informant's identity, where, as a matter of law, the possibility that the nonparticipant, noneyewitness informant could provide information bearing on the circumstances of defendant's possessory status of PCP at the time of the underlying search and arrest was unreasonable. The affidavit setting forth the extent of the informant's observations indicated they were made at least eight days prior to the arrest, and it was further specifically alleged that the sales described by the informant were conducted by a single individual, defendant, and not in a joint manner. When an informant is not shown to be a participant in or an eyewitness to the specific events which result in a criminal prosecution, he is not a material witness to the issue of guilt, absent an articulable actual relationship to the commission, or the unbroken chain of events immediately preceding commission of the offense, as shown by specific facts in evidence. *People v. Hardeman (1982, Cal App 2d Dist) 137 Cal App 3d 823, 187 Cal Rptr 296, 1982 Cal App LEXIS 2173.*

6. Search Warrant

In granting a motion to suppress evidence found during a warranted search of defendant's home, it was error for the trial court to proceed to the second step of the Hobbs procedure and order disclosure of the entire search

warrant affidavit, which had been sealed to protect the identity of a confidential informant, because the disclosures already ordered were so substantial that the affidavit's remaining sealed material was insignificant to defendant's cause. *People v. Heslington (2011, 4th Dist) 195 Cal App 4th 947, 125 Cal Rptr 3d 740, 2011 Cal App LEXIS 619,* reh'g denied, *People v. Brian D. Heslington (2011, Cal. App. 4th Dist.) -- P.3d --, 2011 Cal. App. LEXIS 728,* review denied, *People v. Heslington (Brian David) (2011, Cal.) -- P.3d --, 2011 Cal. LEXIS 8793.*

Trial court did not err by denying discovery of unredacted supporting affidavits and refusing to suppress wiretap evidence. The privileges and procedures of *Ev C §§ 1040-1042* applied to the wiretap authorization affidavits. *People v. Acevedo (2012, 2d Dist) 209 Cal App 4th 1040, 147 Cal Rptr 3d 467, 2012 Cal App LEXIS 1038,* review denied, *People v. Acevedo (Rufino) (2013, Cal.) -- P.3d --, 2013 Cal. LEXIS 285.*

7. Constitutional Rights

Due process and defendant's right to a public trial were violated by raising bail to $1 million following an in camera ex parte hearing at which defendant was not present; the trial court improperly accepted at face value the prosecution's claims that its confidential information was reliable and acceded to its evaluation that nothing could be revealed to defendant. *In re Carrillo (2013, 2d Dist) 219 Cal App 4th 572, 161 Cal Rptr 3d 859, 2013 Cal App LEXIS 718,* op. withdrawn, (2013, Cal.) -- *P.3d --, 2013 Cal. LEXIS 10569.*

Research References & Practice Aids

Cross References:

"Public entity": *Ev C § 200*.

"State": *Ev C § 220*.

"Statute": *Ev C § 230*.

"Proceeding": *Ev C § 901*.

General provisions relating to privileges: *Ev C §§ 911* et seq.

Disclosure of identity of informer to court: *Ev C § 915*.

Communications to Insurance Commissioner in respect to resolution of complaint regarding insurance rates by invormal conciliation in official confidence: *Ins C § 1858.02*.

Communications to Insurance Commissioner as made in official confidence within meaning of this section: *Ins C § 12919*.

Collateral References:

Cal. Forms Pleading & Practice (Matthew Bender(R)) ch 429 "Privacy" § 429.60 et seq.

Cotchett, California Courtroom Evidence, § 18.109 (Matthew Bender).

Witkin & Epstein, Criminal Law (4th ed), Pretrial Proceedings §§ 164, 165.

Witkin & Epstein, Criminal Law (2d ed) § 2443.

2 Witkin Cal. Evidence (5th ed) Witnesses §§ 66, 90, 323-325, 338.

Cal Jur 3d (Rev) Criminal Law § 2852.

Jefferson's California Evidence Benchbook, 3rd Edition (CEB, 2003) §§ 43.1 et seq.

Rutter Cal Prac Guide, Civil Trials and Evidence §§ 8:2390 et seq.

Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, 10.03.

Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, 10.08.

Law Review Articles:

Supreme Court of California 1967-1968, and discovery of informer's identity. 56 CLR 1689.

Effect of Evidence Code on disclosure of informers' identities. 17 Hast LJ 99.

Practice Tips: Challenging DHS Temporary Actions Against Suspected Fraud. *27 Los Angeles Lawyer 18.*

Limitations on use of informers; adequacy of California safeguards. 3 USF LR 187.

Governmental privileges as roadblock to effective discovery; procedure when the government claims privilege for official information. 7 USF LR 300.

Prosecutor's duty to disclose; aim of informer. 7 USF LR 355.

California Criminal Discovery: Eliminating anachronistic limitations imposed on the defendant. 9 USF LR 259.

Ripe for Resolution: A Critique of the Surveillance Post Privilege. *36 USF LR 1067.*

Annotations:

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness. 54 ALR4th 1156.

Contingency fee informant testimony in state prosecutions. 57 ALR4th 643.

Application, in federal civil action, of governmental privilege of nondisclosure of identity of informer. 8 ALR Fed 6.

Admissibility in federal criminal trial of testimony of informer hired under contingent fee arrangement. 13 ALR Fed 905.

Government's privilege to withhold disclosure of identity of informer. *1 L Ed 2d 1998.*

Hierarchy Notes:

Div. 8, Ch. 4, Art. 9 Note

Forms

Suggested forms are set out below, following notes of decisions.

SUGGESTED FORMS

Notice of Motion to Discover Confidential Informant

Declaration in Support of Motion to Discover Confidential Informant