INSIDE THE MINDS

Witness Preparation and Examination for DUI Proceedings

Leading Lawyers on Developing Questioning Strategies, Gathering Eyewitness Testimony, and Building a Successful Defense

ASPATORE

First Printing, 2009
10 9 8 7 6 5 4 3 2 1

The Examination of Prosecution and Defense Witnesses

Nafiz M. Ahmed

Partner

Ahmed and Sukaram, Attorneys at Law

ASPATORE

Key Witnesses

The witnesses called by the district attorney in a DUI case depend upon whether the defendant submitted to a blood, breath, or urine test. The witnesses called by the defendant, if any, depend upon whether there are witnesses to an alleged drinking pattern, passengers in the defendant's vehicle, or other witnesses to the field sobriety tests that the defendant performed (e.g., residents of a home or neighbors who witnessed the DUI stop and arrest).

Prosecution Witnesses

To begin, the district attorney will generally need to call at least one officer to the stand in the DUI prosecution. The district attorney will need to call the officer who observed the defendant's driving, or who was first to respond to the scene (e.g., after a reported accident, or a reported sleeping driver on the side of the road).

The district attorney will also need to call the officer who administered the field sobriety tests on the defendant, including the preliminary alcohol screening device test; this officer may not always be the same officer as the first officer who arrived on scene. For example, local officers may request the assistance of the California Highway Patrol in conducting the DUI investigation, or a less experienced officer may request the assistance of a more experienced officer.

It is common for other officers to arrive on scene after the first responding officer to act as a backup officer. Generally, the district attorney does not need to call this backup officer as a witness, but a lot of times the district attorney will, in order to corroborate the first officer's testimony, or to provide other damaging evidence that the first officer did not observe (e.g., beer cans under the front passenger seat).

Additionally, the district attorney may wish to call the arresting/transporting officer, who may not always be the same officer as those who first responded to the scene or who arrived as backup officers. The district attorney may wish to call this officer to admit the defendant's

"un-Mirandized" and alleged "spontaneous statements" that the defendant may have made in the car ride to the jail. It is not uncommon for the defendant to plead with this officer for a break or to admit guilt in some other direct or indirect fashion. Moreover, if the defendant was belligerent with this officer, the district attorney can argue that this evidence reflects a level of the defendant's intoxication.

The district attorney also needs to call the officer who issued the defendant his Miranda advisement in order to admit the defendant's post-Miranda statements concerning the alleged drinking and driving.

The district attorney must also call as a witness the officer who was present when, or who administered the defendant the blood, breath, or urine test pursuant to the Implied Consent Law.

To begin with a blood test, the district attorney must call the officer who was present when a phlebotomist, certified pursuant to Title 17 of the California Code of Regulations, administered the defendant the blood draw. This officer witness is necessary to verify that blood draw procedures were properly followed (with respect to the officer's duties only), such as verifying the blood evidence envelope is signed, dated, and affixed to the blood vial sample, and that such sample is promptly delivered to a refrigerator for storage and subsequent analysis.

As can already be guessed, the district attorney will need to call the phlebotomist to the stand to testify to the fact that proper blood draw procedures were followed with respect to the defendant's blood draw. This witness will be called unless the defense attorney stipulates to this evidence.

The district attorney will also need to call the officer who administered the defendant a breath test on either a Draeger Alcotest 7110 MK III-C or other breath-testing device, such as the Intoxilyzer 5000. This officer needs to be properly trained in accordance with Title 17 of the California Code of Regulations as to how to administer such a test.

Lastly, if there was a urine test, the district attorney will need to call the officer who was present when the defendant submitted their urine sample.

To testify to the significance of the blood, breath, or urine test, the district attorney will need to call an expert witness, likely from the laboratory that analyzed the defendant's blood, breath, or urine test, to testify to the accuracy of the blood, breath, or urine tests, the particular instruments used in the defendant's case, and the significance of the defendant's blood alcohol concentration on their ability to drive. This expert is likely going to be a forensic toxicologist and seems to be a catch-all expert for everything scientifically related to convicting this defendant.

If there are any percipient witnesses to the defendant's driving or to the field sobriety tests that will provide damaging testimony against the defendant, the district attorney will call these witnesses as well. Think about witnesses from a hospital, a sober environment the defendant is taken to if he or she is not immediately taken to jail, or emergency medical responders.

Defense Witnesses

Generally, the defendant has far fewer witnesses than does the prosecution. The defendant has an absolute privilege under the Fifth Amendment of the U.S. Constitution not to testify. However, depending upon the defense, such as a rising blood alcohol concentration defense or the "I was not driving" defense, the defendant may testify if he or she does not have other favorable independent witnesses to testify. The defendant's other witnesses will vary based upon the type of defense the defendant is presenting.

If the defendant has favorable percipient witnesses, the defendant will call these witnesses to testify. For example, if there are favorable witnesses to the defendant's field sobriety tests, such as a credible passenger or independent third party, the defendant will call these witnesses. If the defendant wants to establish a rising blood alcohol concentration defense, the defendant may call the bartender, waiter or waitress, and/or other friends or witnesses to the alleged drinking pattern. If the defendant is confronted by officers at his or her home following the report of an earlier suspected drunk driving hit-and-run accident, the defendant may call a spouse or roommate to testify to their observations of the defendant being coerced, tricked, or dragged out of his or her home by an aggressive

officer. The effect of this witness's testimony will call into question the officer's ability to impartially characterize the defendant's level of intoxication, depending on this witness's credibility before the jury.

Additionally, if the defendant has a certain medical condition that would impair his or her ability to perform well on the field sobriety tests, the defendant may want to call a treating physician or physical therapist. If the defendant was taken to a sober environment and did not appear to be under the influence (e.g., no slurred speech or bloodshot or watery eyes), and made friends with one of the staff members, the defendant may wish to call this person to testify to rebut the objective symptoms that the officer likely alleged that he or she observed and documented in the police report.

Also, the defendant will likely call his or her own forensic toxicologist to testify if his or her expert witness can help support a defense theory (e.g., no impairment or rising blood alcohol concentration defense), or attack a prosecution theory (e.g., retrograde extrapolation).

The attorney's role is truly a delicate one when it comes to preparing the defendant to testify or other third-party witnesses, excluding the defendant's expert witnesses. The defense attorney must be careful not to suggest what the witness's testimony should be, because this is a violation of the attorney's ethical duties. What the attorney must do depends on who the witness is.

For the defendant, the attorney should conduct the initial client interview with the defendant and simply listen to the client's version of events. The attorney should let the client explain his or her whole side, and the attorney should ask guiding questions to elicit a complete testimony. Thereafter, the attorney and client will discuss the case on many occasions and go over the prosecution's case and the defense case. The defense attorney will ask the defendant questions concerning the prosecution's allegations and likely theories, and the defense attorney should point out the strengths and weaknesses, if any, of the defendant's positions.

By the time the case is confirmed for trial, the defendant ought to know just about every question the district attorney may ask of him or her, because the defense attorney has asked the defendant these questions already on

numerous occasions. Therefore, without suggesting to the defendant how to testify, by going over the case thoroughly with the defendant, and even pretending to be the district attorney with the defendant, the defendant should be prepared to testify and to not be startled or tricked by any questions the district attorney will ask.

These same principles should be employed with third-party percipient witnesses. The fear of suggesting testimony to expert witnesses is far less likely because they are bound to only provide testimony they believe is scientifically accurate and consistent with their previous positions taken on similar issues. The defense attorney generally knows what he or she will get from his or her expert witness.

Process

Regardless of whether your client is going to testify, it is the attorney's duty to go over the police report with the client. This rule is not statutory—it is simply a matter of keeping your client informed about the nature of the charges against him or her and the evidence the district attorney will have to use in its case-in-chief against your client. Defense counsel should provide a copy of the police report to the client.

To the layperson or non-criminal defense attorney, this principle would seem axiomatic. However, because a defense attorney may be criminally prosecuted for willfully providing the defendant with the address or telephone number of any testifying witness the district attorney disclosed to the defense pursuant to Penal Code Section 1054.1(a), defense counsel can be understandably hesitant in providing their client with a copy of the police report. Cal. Penal Code § 1054.2(a)(1), (West, 2009).

Of course, some people like myself can argue that such a fear of prosecution is unfounded because a police report is not a witness list under Cal. Penal Code § 1054.1(a), and therefore defense counsel's production of the police report to the defendant does not fall within the prohibition of Cal. Penal Code § 1054.2(a). However, in this type of discovery debate, most even-keeled counsel likely would not want to be the test case to find out whether a judge would agree with their argument. Therefore, to avoid the issue entirely, defense counsel should simply redact the witnesses'

addresses and telephone numbers from the police report, and then provide a copy of the report to the client. The attorney is safe, the client is happy, and the court is uninvolved.

So at the very least, defense counsel should review the police report with their client. The next step would be to ask the client to take a copy of the redacted police report home to carefully review it for inaccuracies or other inconsistencies. Thereafter, the client should provide the defense attorney with a written summary of what he or she believes to be wrong in the police report. In addition, this written summary should include the client's version of the events in question.

However, since many clients do not wish to write this statement, the defense attorney should at least orally discuss with the client the police report and the client's version of events. The advantage of receiving a written statement from the client is that it preserves the client's memory of the DUI stop, investigation, and arrest, and it provides documentation to the attorney to refresh his or her memory of the client's case even after significant time has passed (e.g., when I am preparing for trial in a DUI case that is to occur in some cases almost a year and a half after the initial arrest). But if an oral dialogue is all the defense attorney can get, that attorney better take good notes.

It is only after the defense attorney knows their client's story that the attorney can truly know and appreciate the different recollections and memories of other defense witnesses. Defense witnesses generally don't need to be provided a copy of the police report. These witnesses have more limited roles in the DUI case, and they can be interviewed with a defense investigator or a tape recorder. This way, if a witness later changes his or her recollection of key facts in the case, this witness can be later impeached with their prior inconsistent statement.

It is always a good idea to talk to a defense witness after having personally investigated the scene of the DUI stop, investigation, and arrest. However, it is generally okay to talk to the defense witness (with an investigator or tape recorder) to get a preliminary idea of the defense witness's anticipated testimony before visiting the scene so that defense counsel can know what visual evidence to focus on at the scene.

However, the best advice for the defense attorney to follow is to visit the scene together with the defense witness.

Make sure to have a camera handy, because once defense counsel understands the defendant's case with the visual perspective of the scene itself, defense counsel should try to present the same impressions to the jury through photographic evidence. So take pictures with the witness describing why that area photographed is relevant. When it comes time to go through the story again on the stand, the witness knows why you are asking him or her certain questions, and the witness will appear more confident, reliable, and accurate in front of the jury. Confident and accurate witnesses generally appear to be truthful witnesses, which is a big plus when the witness is testifying in favor of the defendant.

However, truthfully witness preparation is not just about preparing defense witnesses. Preparing defense witnesses is easy. These people generally are amicable to our clients and are willing participants in the trial. Witness preparation really occurs with the prosecution's witnesses, whether they are officers, forensic toxicologists, or accident reconstruction specialists.

Witness preparation in this arena occurs in only one fashion: the hard way. Defense counsel can only effectively prepare for a prosecutor's witness to remain honest, un-embellishing, and cautious of what they say (i.e., harmful testimony to the defendant by knowing as much or more about what that witness is supposed to testify to than the actual witness themselves). In the context of the defense attorney's knowledge, I am referring to the defense attorney matching wits with the prosecution's witnesses in their capacity as an expert witness, and not a lay witness.

This means defense attorneys have to actually read books, articles, and other scientific studies that are put out by the U.S. Department of Transportation, the International Association of Police Chiefs, the American Prosecutor's Research Institute, and countless other prosecution-oriented powerhouses. Defense counsel needs to understand the science of breath testing and be thoroughly familiar with the various breath-testing devices. It is likely that if defense counsel becomes familiar with the science associated with DUI defense, defense counsel will know more about the subject than the judge, the district attorney, the witnesses, or any of the

jurors. There is no excuse for not attempting to obtain this advantage to use in your client's favor during *voir dire*, opening statement, direct and cross-examination, and closing argument. This is the core high-priced knowledge our clients pay for and expect from each of us.

Language barriers are addressed differently, depending on whether the defendant is assisted by the public defender or by private defense counsel. If the defendant is assisted by the public defender, the client will get a court-appointed interpreter to facilitate attorney/client discussions. However, these meetings may only occur limitedly, such as once at the pre-trial conference, and on the day of trial, and during trial.

If the defendant has retained counsel, that defendant can either meet with the attorney with a friend or family member who can act as an interpreter, or the client will have to hire an interpreter. This is assuming that the attorney does not have a staff member who speaks the defendant's language. At any court proceeding, however, the defendant will have to retain the assistance of a certified court interpreter.

If you have hired an experienced expert witness, very much preparation is generally not required. At a minimum, what must be done is that the expert has a copy of the police report and all relevant information sufficiently in advance of the trial. Because expert witnesses are notoriously busy, you want to contact your witness well in advance of trial and after their review of the report to make sure they have read the report and hear your view of the case. You want to let the expert know about the information you would like them to focus on, and get them to provide their opinion on the issue or agree to do further research on the issue. You also want to ask your expert about the prosecution expert's likely testimony and how to combat that. The expert witness should know what the other side's expert would testify to, because the experts should have similar training and knowledge concerning the subject in question. The experts' interpretations of a particular situation are what may vary. The defense attorney's role here is limited. It is like asking a doctor to explain why he or she agrees or disagrees with another doctor's opinion that surgery is necessary. The defense attorney frames the issue and asks the expert for an opinion. This is the same opinion the defense attorney will ask the expert witness to provide to the jury. By doing this, you get the witness ready for the prosecution's

cross-examination, as well as get yourself ready to cross-examine the district attorney's expert witness. In reality, however, the expert witness should be prepared for any cross-examination the district attorney may have without much preparation by the defense attorney.

You have to make sure your expert is talking about your case, as opposed to one of the hundreds or thousands of previous DUI cases the expert has worked on. It's about trying to make the expert focus on this defendant, this cop, and/or this breath test operator or phlebotomist.

Considerations

Witnesses should not be affected by discovery issues in a DUI case. When I read the word "discovery," I am reading it in the legal context of Cal. Penal Code § 1054 et seq., meaning the prosecutor's duty to turn over statements of witnesses including the defendant, real evidence (e.g., blood or breath test results), felony convictions of a material prosecution witness, and so on. If defense counsel is provided a copy of the police report, generally defense counsel has all relevant discovery he or she needs for witness preparation, because this report encapsulates statements the officer attributes to the witness. Or the report may encapsulate observations of the witness. Other discovery under Section 1054 et seq. should not affect the witness. If defense counsel doesn't have all the discovery he or she needs, defense counsel will request a continuance of the trial date until he or she is provided the discovery he or she is seeking.

But there are areas of discovery that defense counsel is not currently receiving, and this presents a big issue in that we cannot effectively confront and cross-examine the prosecution's experts, nor can we have independent review of the prosecution's scientific evidence.

I could write a great deal on a complete listing of DUI discovery issues, but that would be outside the scope of this chapter. The most troubling issue for me is concerning the breath-testing devices, particularly the Draeger Alcotest 7110 MK III-C. The fact that defense counsel doesn't have access to much of the information that is captured and stored on this instrument is problematic (e.g., breath temperature, blow duration, error code messages). Without full information concerning the defendant's breath test or the

breath-testing instrument the defendant submitted his or her breath test on, the defendant is precluded from due process of law as well as his or her Sixth Amendment right to confront and cross-examine the witnesses against him or her and effective assistance of counsel.

For example, to show that the Draeger Alcotest was working properly, the district attorney must demonstrate compliance with Title 17 of the California Code of Regulations. Among other things, Title 17 mandates that the Draeger Alcotest comply with certain prescribed parameters during accuracy checks. The Draeger Alcotest can be programmed to perform automatic accuracy checks on itself. If programmed to do so, the Draeger Alcotest will store the results of the automatic accuracy checks on itself (kind of like a computer, though Draeger Safety Diagnostics Inc. will strenuously argue that the Draeger Alcotest is not a computer). Draeger Inc. sells law enforcement a proprietary software—unavailable to defense counsel—that can automatically download the results of the automatic accuracy checks from the Draeger Alcotest itself and upload the results into a different format onto another computer. In San Mateo County, the district attorney will provide defense counsel with the automatic accuracy check results that have been downloaded from the Draeger Alcotest, and that have been converted into a different format. This is problematic for several reasons.

First, the converted automatic accuracy check results produced by the district attorney contain substantially less information than if they had been printed from the Draeger Alcotest itself. Secondly, in San Mateo County, there has been no independent verification since late 2004 that the numbers provided by the district attorney actually match up with the numbers as they exist on the individual Draeger Alcotest. This means defense counsel can be receiving erroneous results that the district attorney argues to the jury demonstrates that the Draeger Alcotest is functioning properly. (This is a problem across the state.) Clearly, this is a big issue. Thus far, the San Mateo County superior courts, including the Appellate Division of the San Mateo County Superior Court, have held that defense counsel is not entitled to this information. The lack of this discovery affects defense expert witnesses, because these witnesses can't verify the reliability of the Draeger Alcotest. This discovery also affects the prosecution's expert witness, because they don't have to worry about this line of attack.

Other discovery issues that can affect defense and prosecution expert witnesses in the manner described above are with respect to knowing the volume of breath sample provided by the defendant in an alleged refusal case. This information is highly relevant and potentially exculpatory to our clients, because when the officer and district attorney claim that our clients didn't blow properly into the Draeger Alcotest or for a long enough period of time, we can actually verify whether what the officer and district attorney claim are true. However, to date the San Mateo County district attorney's office refuses to provided this breath volume information. (I have been successful in having the district attorney at least provide the defendant's blow time information.) I have argued that this information is required to be produced under Cal. Penal Code §§ 1054.1(f) and 1054.1(e) (i.e., as the result of a scientific test that the prosecution intends to introduce into trial; and *Brady v. Maryland*, 373 U.S. 83 (1963)) and Cal. Veh. Code § 23158(c), which specifically provides that, "Upon the request of the person tested, full information concerning the test taken at the direction of the peace officer shall be made available to that person or that person's attorney. (Cal. Veh. Code § 23158(c), (West 2007); See *McKinney v. Dept' of Motor Vehicles* (1992) 5 Cal.App.4th 519, 525 (applying this discovery provision to the Intoxilyzer breath test result); *Petricka v. Dept' of Motor Vehicles* (2001) 89 Cal.App.4th 1341; also see *Hines v. Superior Court*, 20 Cal.App.4th 1818 (1993).)

Other discovery issues that affect defense and prosecution witnesses in the same manner as above are the fact that Draeger Inc. did not wish for any non-law enforcement personnel to have access to the operator's manual for the Draeger Alcotest. Draeger Inc. argued that the materials are proprietary and protected under copyright laws. After I brought a motion in San Mateo County Superior Court (and before a hearing on the motion), Draeger Inc. acquiesced and produced a copy of the Draeger Alcotest's operator's manual for defense counsel to review, but only in the district attorney's office and not to be photocopied under any circumstances. Also per the request of my motion, the San Mateo County Sheriff's Office forensic laboratory also produced a copy of its contractual agreements between Draeger Inc. and the County of San Mateo. Lastly, because of that motion, the forensic laboratory began making available certain error code messages associated with defendants' breath tests that have previously been withheld.

Generally, if the defendant testifies in a criminal case and the defendant loses, the judge can then decide to sentence the defendant more severely than the sentence that was offered at the pre-trial conference. The judicial reasoning for this increase in penalty is because the judge believes or argues that the defendant lied, which is why the defendant was convicted. Although this reasoning can sometimes be flawed, it is commonly used to scare the defendant away from a trial in the case. The judge will discourage trial to save the jurors' time, as well as the officers', judge's, and district attorney's time.

Therefore, if you do not think your client sounds as if he or she will provide consistent and plausibly true answers while testifying, or if your client seeks to introduce extraneous evidence about some other injustice in order to avoid the present DUI prosecution, the defense attorney should caution the client against testifying.

However, clients should be placed on the stand whenever they choose to testify. It is their constitutional right to testify, and if they want to testify, they can. The defense attorney's role is to do the best he or she can to explain that a trial is not a circus, and that the types of responses the defendants can provide are limited. Once the defendants understand their parameters in testifying, it is entirely up to them whether they testify.

Moreover, the defense attorney will not truly know whether the client should testify until after the close of the prosecution's case. Many times, the defense attorney can feel as if he or she created enough doubt, or that the district attorney failed to prove beyond a reasonable doubt that the defendant is guilty. In this case, the defendant should be cautioned from taking the stand to fill holes in the prosecution's case or to confirm that he or she is guilty.

Witness Examination

The goal is always to attack the prosecution's case, support a defense, or impeach or bolster the credibility of a witness. The most effective questions are the ones that call for the witness to provide a direct and concise response. Questions calling for shorter answers are more effective because the attorney can control the pace of the examination, keep the testimony

fresh, keep the jury involved, and make the defense witness appear more knowledgeable and reliable. This type of questioning also limits the bad responses the prosecution's witnesses can provide, and forces the district attorney to stay sharp and remember to elicit whatever bad evidence they want from their witnesses to harm our clients.

The goal when examining one's client is to keep the client on the stand for the minimum time necessary to establish the client's defense. This is because the defendant is being carefully scrutinized by the district attorney and the jurors while testifying. Any inconsistencies in the client's story, whether material or not to the prosecution's claims or to the client's defenses, will be pounced on by the district attorney and explored by the district attorney for impeachment purposes. Furthermore, the judge can sentence the defendant to a greater punishment if the defendant is convicted and the judge suspects that the client perjured himself or herself. Unless the client is a natural star and comes off as inherently believable in response to the district attorney's questioning, it is probably better for the defense attorney to assume the star role in closing argument.

The type of examination of third-party witnesses depends on the type of witness that is testifying. The defense attorney does not want to be a bully with apparently unbiased third-party prosecution witnesses. Rather, the defense attorney may wish to simply appear as the person with a better understanding of what truly transpired in the case due to his or her extensive pre-trial investigation and preparation. Further, with respect to expert witnesses, a defense attorney is not generally going to blow the prosecution's expert witness out of the water. The prosecution's experts generally are not taking outrageous positions, and the defense attorney should be prepared to overemphasize minor concessions and victories that he or she can achieve on isolated questions. In closing, the defense attorney can argue that the small concessions he or she received from the prosecution's expert on minor points add up to a large victory, in that there is a reasonable doubt about the client's guilt.

The questions that are asked during witness examination of experts for the defense depend upon the type of defense that is being raised. The defense attorney can attack numerous aspects of the prosecution's case, including the officer's observations of the driving, the meaning of the field sobriety

tests, and the manner in which those tests were administered. The defense attorney's goal is to show that there are errors in the officer's and/or prosecution's case, and/or to explain other innocent reasons for the defendant's actions and/or test results. The defense attorney is trying to establish that, based on the district attorney's evidence and in light of the testimony of the defense expert, the prosecution cannot prove the defendant guilty beyond a reasonable doubt, or that the defendant was entirely wrongfully accused.

On the issue of medical conditions in DUI proceedings, the defendant's treating physician is the most credible witness. Physicians who have not treated the defendant are the least credible. The purpose of brining medical information is to present a defense, such as the fact that the defendant was injured and could not adequately perform the field sobriety tests due to the defendant's injury. Or the purpose of calling the doctor may be to establish that the defendant has a gastrointestinal disorder such as GERD, which will lead to unreliable breath test results.

Testifying officers generally eschew National Highway Traffic Safety Administration (NHTSA) training on field sobriety tests. Instead, they generally argue that they follow what they were taught by their local police academy, or tests they have created based on their own experience. This is because the NHTSA has much more stringent guidelines for administering field sobriety tests than do the local cops or, many times, the California Highway Patrol. Therefore, although the NHTSA standards are the only validated method for administering field sobriety tests and interpreting the results, if an officer has done the tests incorrectly or interpreted them incorrectly, you can bet the officer will significantly downplay NHTSA standards. This is why it is so important that the defense attorney actually have a physical copy of the NHTSA field sobriety test training manual and get the cop to agree that it is reliable authority, so the defense attorney can cross-examine the officer on it under Cal. Evid. Code § 721. Without complying with Cal. Evid. Code § 721, the defense attorney may never get to cross-examine the cop on NHTSA standards, and may be forced to introduce evidence concerning NHTSA standards from their forensic toxicologist expert witness.

Having an experienced and reputable expert witness on this point is crucial. This defense witness makes or breaks many DUI cases, because if the jury finds the defense expert believable, the cop is in trouble with the jury. A good defense attorney will then call the officer to the stand after the defense attorney has presented his or her forensic toxicologist's expert testimony on NHTSA and then ask the cop whether he or she agrees with what the expert said, and why or why not. A lot of ground can be gained with the officer here. But even if the cop is very credible and evasive, a lot of the same work can be done by cross-examining the district attorney's forensic toxicologist's expert witness on these same points.

Regarding blood alcohol concentration testing when cross-examining the chemist or scientific witnesses, these witnesses are the hardest to cross-examine. They appear to be the most independent and scientific. Dispassionate from the prosecution and the defendant, they appear only to be concerned with methodology and principles, which invariably sink the defendant's case.

Let us be clear: the district attorney's forensic toxicologist expert witnesses are generally employed by that county's sheriff's office. They are, for purposes of California discovery, part of the "prosecution's team."

In cross-examination, I focus on the fact that the results of the "scientific tests" verifying the accuracy of the breath-testing machines that defense attorneys are getting from the laboratory are the laboratory's refined, retyped, and edited version of the original raw data of these "scientific tests" as they exist on the breath-testing instruments themselves. I try to expose the district attorney's expert witnesses as the biased and secretive agents they really are.

In general, however, the district attorney's forensic toxicologist expert witness is also the defense attorney's best witness. Sometimes our most significant cross-examination is provided by their testimony. This is because these experts must testify generally consistently with what a defense expert would testify, so if there is any defense issue in the case, the defense attorney can use the district attorney's expert as a witness to preview the defense attorney's expert's testimony. Therefore, there will be two experts that are reasonably close on a defense theory. The type of questions the

defense attorney will ask truly depend on the discovery provided and the defense in the defendant's case.

The key technique to cross-examining the arresting officer is to focus on cross-examination in parts. The steps to view in cross-examination are the officer's observations prior to the stop (e.g., reasonable suspicion of Vehicle Code violation justifying the stop), the officer's observations during the stop (e.g., probable cause to arrest), the defendant's post-arrest statements, and the officer's role in the blood, breath, or urine test.

However, the real key to cross-examination is to focus on getting discovery from the officer through pre-trial *in limine* motions. For example, the defense attorney can discover a lot about the scene of the arrest by bringing a couple of simple motions, such as a motion raising a *Miranda v. Arizona*, 384 U.S. 436 (1966), violation, a motion to exclude the results of the horizontal gaze nystagmus test, or a motion to exclude the results of the preliminary alcohol screening test. By raising these motions, the defense attorney previews the officer's testimony, including testimony that was not mentioned in the officer's report. This means that if the defense attorney needs to know an answer to a question that was not addressed in the officer's report, the defense attorney can ask the officer this question during these pre-trial motions. The officer can provide a very damaging response, but at least it will be outside of the presence of the jury, and the defense attorney will know how to maneuver around the issue at trial. Moreover, the added advantage of bringing these motions is to lock the officer into certain testimony pre-trial, and to either confirm the same testimony at trial or impeach the recanting officer with it at trial.

The defense attorney needs to be thoroughly familiar with the NHTSA guidelines to DUI traffic stops and enforcements. The defense attorney should know about visual cues the officers are trained to detect in determining whether an individual is driving while under the influence of alcohol (e.g., the defendant was drifting, weaving, or swerving within their lane). It is important for the defense attorney to know that each of these terms has its own meaning. Often the officer uses these terms interchangeably. The defense attorney can really exploit the officer's lack of knowledge in this area, because if the officer is shown to have used

different terms to mean all the same thing, the credibility of his or her observations and competence have been severely put into question.

Moreover, the defense attorney should be highly familiar with the NHTSA guidelines for properly administering and evaluation field sobriety tests. The key point to cover when cross-examining enforcement/police officers on the field sobriety tests is that field sobriety tests are only to be afforded any scientific weight with the jury if the correct tests are given and are correctly administered. There are three standardized field sobriety tests (horizontal gaze nystagmus, walk-and-turn, and one-foot leg lift). Even if the officer gives the correct tests in the correct manner, the officer also has to be able to correctly interpret the meaning of the test results. This means the officer has to determine whether the defendant's performance on the field sobriety tests was due to alcohol intoxication or some other factor, such as trauma due to car accident, other injury, or medical condition. The district attorney will argue that the three NHTSA field sobriety tests are 80 percent reliable in differentiating subjects with a blood alcohol concentration of at least 0.10 percent from those at lower blood alcohol concentrations. (Nowaczyk and Cole, "Separating Myth from Fact: A Review of Research on the Field Sobriety Tests," *Champion*, August 1995, at 40) Defense experts can argue that accuracy of these field sobriety tests drops to as low as 70 percent for this purpose. However, regardless of whose expert is correct, ask the jury whether it is okay to convict no more than four out of twelve innocent persons and no less than two such innocent persons. This example should have some weight with them, given that there are traditionally twelve jurors to most criminal cases.

Nafiz M. Ahmed is a partner and criminal defense attorney at the law firm of Ahmed and Sukaram, Attorneys at Law located in Redwood City, California. Mr. Ahmed defends adults and juveniles across the state of California who have been accused of driving under the influence of alcohol or drugs, and charged with crimes such as vehicular homicide, felony DUI, misdemeanor DUI, or other related offenses.

Appendices

APPENDIX A

PETITION FOR TRANSFER

NAFIZ M. AHMED (State Bar No. 240069)
AHMED AND SUKARAM, ATTORNEYS AT LAW
600 Allerton Street, Suite 201
Redwood City, CA 94063
Telephone: (650) 299-0500
Facsimile: (650) 299-0510

Attorneys for Petitioner
CH

IN THE FIRST DISTRICT COURT OF APPEAL IN
AND FOR THE STATE OF CALIFORNIA

CH,
Petitioner

vs.

SAN MATEO COUNTY SUPERIOR COURT,
Respondent

THE PEOPLE OF THE STATE OF CALIFORNIA
Real Party in Interest.

PETITION FOR TRANSFER TO THE
1st DISTRICT COURT OF APPEAL

Following the Judgment of the Appellate Department of the San Mateo County Superior Court of February 23, 2009 that became Final on March 25, 2009

The Honorable XYZ, Presiding
Tel.: (650) 000-0000

From Orders of the Superior Court of the State of California
County of San Mateo
Case No. SMXXXXXXX
The Honorable ABC, Presiding
Tel.: (650) 599-1683

PETITION FOR TRANSFER OF CASE TO COURT OF APPEAL
(CAL. RULES OF COURT, RULE 8.1008)

TO THE HONORABLE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT:

Petitioner CH, by his counsel, petitions this Court to transfer this case to this Court pursuant to this Court's transfer authority. (Cal. Rules of Court, rule 8.1008, subd.(b)(1).)

This petition is timely.

On January 22, 2009, Petitioner filed in the Appellate Department of the San Mateo County Superior Court a Petition for Writ of Mandate from the trial court's order denying a motion to compel the production of discovery.

On February 23, 2009 the Appellate Department of the Superior Court for the County of San Mateo filed its unpublished Order Denying Petition for Writ of Mandate and Vacating Stay of Jury Trial on February 23, 2009. [Appendix 'Y'].

On March 3, 2009, Petitioner petitioned the Appellate Department for rehearing and for certification pursuant to Cal. Rules of Court, Rules 8.1002 and 8.1005(a).

On March 16, 2008, the Appellate Department filed its Order Denying Petition for Rehearing and Application for Certification to Court of Appeal. [Appendix 'Z'].

The judgment of the Appellate Department became final on March 25, 2009, 30 days after the judgment was pronounced. (Cal. Rules of Court, rule 8.888, subd.(a)(1).)

This petition is timely as it is being brought within 15 days of the Appellate Department's judgment having become final. (Cal. Rules of Court, rule 8.1008, subd.(b)(2).)

The grounds for transfer are set forth below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASE LAW

UNITED STATES SUPREME COURT
United States v. Nobles, 422 U.S. 225 (1975)

CALIFORNIA SUPREME COURT
Izazaga v. Superior Court, 54 Cal.3d 356 (1991)
Murgia v. Municipal Ct., 15 Cal.3d 286 (1975)

CALIFORNIA COURTS OF APPEAL
Hines v. Superior Court, 20 Cal.4th 1818 (1993)

II. STATUTORY AUTHORITY

Cal. Code Regs, Title 17
Cal. Pen. Code § 1054(f)
Cal. Veh. Code § 23152 (a) & (b)

III. CALIFORNIA RULES OF COURT

CAL. RULE OF COURT 8.204(C)(1)

CERTIFICATION OF WORD COUNT

I, Nafiz M. Ahmed, as the attorney for Petitioner herein, certify pursuant to California Rule of Court 8.204(c)(1), that the word count of the following brief is 3,642.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 20, 2009

Ahmed & Sukaram, Attorneys at Law

By: _____
Nafiz M. Ahmed, Esq.

VERIFICATION

I Nafiz M. Ahmed declare as follows:

I am an attorney licensed to practice in all courts of California.

In that capacity I was Petitioner's attorney of record in the proceedings underlying the foregoing petition and make this verification on Petitioner's behalf for the reason that the facts contained in the foregoing are within my personal knowledge based on my representation of Petitioner.

I have read the foregoing petition and the exhibits attached thereto or lodged with this Court, and know the contents thereof to be true based upon my representation of the petitioner.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on March 26, 2009, at Redwood City, California.

_____

Nafiz M. Ahmed

PETITION FOR TRANSFER

I. Issue Presented for Review

Under Penal Code § 1054.1(f) the District Attorney must produce the original results of a scientific test that it intends to introduce into evidence at trial. Does the District Attorney meet its obligation under 1054.1(f) by producing automatic accuracy check results of a breath testing instrument after these results have been formatted by a software program? Or, must the District Attorney produce the original automatic accuracy check results as they exist on the instrument itself?

II. Necessity for Review

There are no reported California decisions interpreting the scope of the prosecutor's duty of disclosure under Penal Code § 1054.1(f). Accordingly, trial courts remain unguided in their application of this statute to discovery disputes between District Attorneys and defense counsel. Precious judicial resources are consumed in these disputes and differing unreported results are likely being reached by judicial officers. Therefore, as forensic toxicology becomes increasingly complex, especially through the use of sophisticated breath testing technology, the courts and both the prosecution and defense will benefit from case law delineating a District Attorney's duty of disclosure under § 1054.1(f).

III. Statement of Case for Review

Petitioner, CH is being prosecuted in the above-mentioned case for a violation of Vehicle Code sections 23152 (a) & (b), arising out of an incident occurring at or around, 1:50 a.m., on October 18, 2007. After his arrest on this date, Mr. H submitted to a breath test as required by California's Implied Consent Law. Mr. H was administered a breath test on a breath testing instrument known as the Draeger Alcotest 7110 MK III-C (the "Draeger"). In particular, Mr. H submitted to a breath test on a Draeger Alcotest serially numbered ARNK-0089 ("Draeger 0089").

In this case, the District Attorney seeks to introduce into evidence the blood alcohol concentration ("B.A.C.") results of Mr. H's breath test obtained by the Draeger 0089 on October 18, 2007. In order to establish the validity of the B.A.C. results obtained by this Draeger 0089, the District Attorney must prove that the Draeger 0089 was in compliance with Title 17 of the California Code of Regulations on this date. Amongst the District Attorney's obligations to establish Title 17 compliance, the District Attorney must prove that for a relevant time period the Draeger 0089 passed an accuracy check every 10 days or 150 subjects, whichever comes first. [R.T.1, p.15: 8-12] .

The San Mateo County Sheriff's Office Forensic Laboratory (the "Laboratory") programmed the Draeger 0089 to perform an automatic accuracy check upon itself every Wednesday at 8:00 a.m. [R.T.1, p.15: 13-15]. The results from the Draeger 0089's automatic accuracy checks are electronically stored within the instrument itself. [R.T.1, p.14: 12-20]. The Laboratory can easily access these results using a software program called the MA-7110 by merely isolating the date of the accuracy check. [R.T.1, p.39-40]. The Laboratory can then print out the weekly automatic accuracy check results of the Draeger 0089 onto a single sheet of paper. [R.T.1, p.64: 11-13].

But, the Laboratory did not print the automatic accuracy check results from the Draeger 0089 in the manner described above. Instead, the Laboratory used a computer, commonly known as the Draeger Computer to download via modem the Draeger 0089's automatic accuracy check results. [R.T.1, p.14: 15-18; p.15: 15-16]. The Laboratory then used a software program to convert the Draeger 0089's automatic accuracy check results into a different format. [R.T.1, p.36: 7-26; p.37: 1]. Thereafter, the Laboratory printed these converted automatic accuracy check results and provided them to the District Attorney to use in its case-in-chief to attempt to establish that at the time of Mr. H's breath test that the Draeger 0089 was Title 17 compliant. [R.T.1, p.14: 1-4; p.15: 2-4].

Significantly, however, the only time that the Laboratory ever attempted to verify that the Draeger 0089's converted and printed automatic accuracy check results are the same as those that are stored on the Draeger 0089 itself was when the Laboratory first began using this Draeger in December

2004. [R.T.1, p.38: 3-21]. Here, Petitioner has simply requested that he be provided the printed version of the automatic accuracy check results that are stored on the Draeger 0089 itself as opposed to the converted accuracy check results that are provided to the District Attorney. Petitioner's request is for the relevant time period for which the District Attorney would have to establish Title 17 compliance. At most, this would require the Laboratory to print 8 to 10 sheets of paper. [R.T.1, p.64: 11-13].

IV. Grounds for Review

It is axiomatic that for the majority of counties in the State of California which use the Draeger Alcotest for evidential breath testing purposes that the issue of what discovery a defendant in a prosecution for an alleged violation of Vehicle Code § 23152(b) is entitled to is a significant. Previously, the California Supreme Court has held that that "in a criminal prosecution an accused is generally entitled to discover all relevant and material information in the possession of the prosecution that will assist him in the preparation and presentation of his defense." [Murgia v. Municipal Ct., 15 Cal.3d 286, 293 (1975)].

Here, the issue is whether Petitioner is entitled to discover the automatic accuracy check results for the Draeger 0089 from the instrument itself for a relevant time period, or must Petitioner be forced into accepting the Laboratory's representation that the converted automatic accuracy check results that it forwarded to the District Attorney in this case are accurate? By the Laboratory's own admission the only time that it has ever attempted to verify that the converted automatic accuracy check results that it provides to the District Attorney for Draeger Alcotest instruments such as the Draeger 0089 are accurate was over 4 years ago. Yet, the trial court and this Appellate Department have ruled that Petitioner is not allowed to know whether the automatic accuracy check results that the District Attorney will use against him in a criminal prosecution are truly the numbers that are stored on the Draeger 0089 itself.

Petitioner asserts that Hines v. Superior Court is the closest case to being controlling here because no other reported decisions have interpreted the scope of the prosecution's duty of disclosure under Penal Code § 1054.1(f). [Hines v. Superior Court, 20 Cal.4th 1818 (1993, 4th App.Dist.)]. Although

Hines specifically addressed Penal Code § 1054.3(a), due to the fact that there is near mirror image symmetry in California's discovery law, Hines also governs the interpretation of § 1054.1(f). [Izazaga v. Superior Court, 54 Cal.3d 356, 377 (1991); See, Hines at 1822]. Accordingly, Hines interpreted both the defendant's and prosecution's duty of disclosure under § 1054.3(a) and § 1054.1(f) as follows:

"It is our conclusion that the statutory phraseology of 'reports or statements … including the results of … examination, scientific tests, experiments or comparisons which the respective parties intend to offer in evidence …' reasonably should include the original documentation of the examinations, tests, etc. Original documentation, including handwritten notes if that be the case, would seem to be the best evidence of the test, experiment or examination. An expert should not be permitted to insulate such evidence from discovery by refining, retyping or otherwise reducing the original documentation to some other form." [Hines at 1822].

In the instant case, the trial court also agreed that Hines was the controlling case in interpreting the prosecution's duty of disclosure. Though, despite finding Hines controlling, the trial court denied Petitioner access to the discovery he requested because it held that the term "original documentation" was limited to hand written notes. This Court denied Petitioner access to the discovery at issue without a written opinion.

Petitioner respectfully requests that this Court reconsider its ruling and order the District Attorney to produce the discovery requested because the discovery requested is clearly encompassed within the definition of "original documentation" as set forth in Hines. In the alternative, Petitioner respectfully requests that this Court certify his case to the First District, Court of Appeal to settle the issue of what is "original documentation" within the meaning of Hines and whether the discovery at issue falls within this definition. Given that there are no reported cases even interpreting § 1054.1(f), or its application to technology more sophisticated than a pen and paper, this case should be certified to the First District, Court of Appeal to settle an important question of law.

V. Relief Requested

For the above reason(s), Petitioner requests a transfer of this case to this Court. In addition, Petitioner requests that this Court hold that the term "original documentation" within the meaning of Hines is limited to handwritten notes. Moreover, Petitoner requests that this Court hold that the term "original documentation" encompasses the automatic accuracy check records from the Draeger 0089 as they exist on the instrument itself.

Date: March 26, 2009

Respectfully submitted,

_____

Nafiz M. Ahmed, Attorney for Petitioner, CH

PROOF OF SERVICE

I, Nafiz M. Ahmed, am a citizen of the United States and a resident of the State of California. I declare that I am over 18 years of age, am not a party to the within case; my business address is 600 Allerton Street, Suite 201, Redwood City, CA 94063.

On March _____, 2009 I served the following documents:

PETITION FOR TRANSFER TO THE 1st DISTRICT COURT OF APPEAL

James P. Fox
District Attorney
San Mateo County
400 County Center, 4th Floor
Redwood City, CA 94063

Office of the Attorney General
455 Golden Gate Av., Ste. 11,000
San Francisco, CA 94102

Appellate Department
San Mateo County Superior Court
c/o Clerk,
Hall of Justice
400 County Center
Redwood City, CA 94063

[X] On the parties in this action by personal delivery.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: _____ Signature: _____

APPENDIX B

MOTION TO COMPEL DISCOVERY (1)

NAFIZ M. AHMED (State Bar No. 240069)
LAW OFFICES OF NAFIZ M. AHMED
600 Allerton Street, Suite 201
Redwood City, CA 94063
Telephone: (650) 299-0500
Facsimile: (650) 299-0510

Attorney for Defendant
AG

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

AG,
Defendant.

Case No.: NMXXXXXX

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY; DECLARATIONS OF KW, KM AND NAFIZ M. AHMED IN SUPPORT OF MOTION TO COMPEL DISCOVERY; REQUEST FOR JUDICIAL NOTICE

Hearing Date: November 16, 2007
Dept: PH
Time: 9:00 a.m.
Honorable: TBD

TO THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF SAN MATEO COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, on November 16, 2007, in Department PH at 9:00 a.m., or as soon thereafter as the matter may be heard, the defendant, AG will make a motion that this court compel the production of discovery that the defense has requested from the Office of the District Attorney for the County of San Mateo at least fifteen (15) days prior to the present motion.

The defense is entitled to the requested discovery under Penal Code Section 1054.1 and the Due Process Clause of the United States Constitution. This motion is based upon the attached: declarations of KW, KM and Nafiz M. Ahmed; the attached exhibits; all papers filed and records in this action; evidence taken at the hearing on this motion; and, argument at that hearing.

Dated: April 23, 2009

Respectfully submitted,

By: _____

Nafiz M. Ahmed, Attorney for ANA G

I. STATEMENT OF FACTS

FACTS OF THE CASE

Defendant, AG is being prosecuted in the above-mentioned case for a violation of Vehicle Code Sections 23152(a) and (b), arising out of an incident occurring at or around, 11:35 p.m., on December 31, 2006. After her arrest on this date, Ms. G submitted to a breath test as required by California's Implied Consent Law. Ms. G was administered a breath test on a breath testing instrument known as the Draeger Alcotest 7110 MK III-C (the "Alcotest"). In particular, Ms. G submitted to a breath test on an Alcotest numbered 0088 ("Alcotest 0088").

THE DRAEGER ALCOTEST 7110 MK III-C

The Alcotest is a breath alcohol analyzer used for evidential breath alcohol measurements. The Alcotest is the only evidential breath-testing instrument which uses a dual system of Infrared ("IR") absorption analysis and Electrochemical ("EC") sensor fuel cell technology to independently measure alcohol concentration in the same breath sample.

The entire system includes the breath analyzer, a special organizer stand with a drawer, a standard keyboard, an external laser printer, a wet bath simulator, and a temperature probe. The Alcotest weighs approximately 16.5 pounds and resembles a tool kit. It fits in a metal case with a cover that is removed when in use.

On its rear side, there are various interfaces including an exhaust port, an outlet port to deliver air to the simulator, and an inlet port to the IR absorption chamber (or cuvette). The top surface contains a flexible breath hose which is forty-six (46) inches long and heated with two temperature sensors to 43 plus or minus 0.3 degrees Celsius to prevent condensation and overheating of the hose material. A disposable mouthpiece fits onto the breath hose to ensure a better seal, make it easier to exhale, and aid hygiene. The mouthpiece is changed after each breath sample.

The top of the instrument contains a forty-character light emitting diode (LED) display screen which prompts the operator to take certain actions, describes the operation being performed, conveys error messages, and displays BAC results. It contains an internal printer which uses paper 2 ¼ inches in width and approximately 22 inches in length.

Like a computer, the Alcotest 7110 contains both hardware and software components, however, it is best described as an embedded system with a very specific, dedicated purpose. The hardware components include the IR absorption chamber, EC sampling system, sensors (flow and pressure), a signal processing system, and a microprocessor. Software components include firmware for the microprocessor and software to handle data communications, data retrieval, and operator input. The hardware components (e.g., wet bath simulator vs. dry gas standard) and software (firmware) components of the Alcotest are customized to the purchasing state's specifications.

The Alcotest is capable of storing the results of approximately One Thousand (1000) tests. After the memory is full, the data can be removed by an upload procedure to a computer. If the tests are not removed, they will be erased on a first-in, first-out basis. Depending on the specifications requested by the state, the Alcotest may be equipped with hardware capable of communicating with a remote or central computer.

DATA RECORDS MAINTAINED AT THE SAN MATEO COUNTY SHERIFF'S OFFICE FORENSIC LABORATORY

According to pages 31-33 and 54, of the January 31, 2005 version of the San Mateo County Sheriff's Office Forensic Laboratory (the "Forensic Laboratory") 'Breath Alcohol Operating Procedures (the "BAOP") ' for the Alcotest, the Forensic Laboratory maintains the following records demonstrating compliance with Title 17, Sections 1221.4(a)(6), 1222.1 [Forensic Alcohol Laboratory Records] and 1222.2 [Breath Alcohol Analysis Records]: (1) Records of each instruments determinations of accuracy; (2) Records of each Simulator Reference Solution; (3) Records of all instrument maintenance; and, (4) Records of analyses performed, results and identities of the persons performing the analyses. [Exhibit 'B'].

The manner by which these records are expressed are found in Appendices D, E, F, G, H, I, and K of the BOAP, pages 60-66, 68. [Exhibit 'C']. The information on these above-mentioned Appendices are handwritten records of the steps and results relating to the calibration, maintenance and determinations of accuracy of the Alcotest.

Notably, however, the express policy of the Forensic Laboratory with respect to the defense's access to such records is stated on page 32 of the BAOP as follows:

No breath alcohol analysis records, or copies thereof, shall be released to any unauthorized agency or person without a properly executed court order; or authorization of the prosecuting attorney; or on specific authorization from the person responsible for forensic alcohol analysis on the laboratory license.

Instead of producing the valuable hand-written information contained in Appendices D–I, and K, to defense attorneys, which demonstrate compliance with Title 17, the only records which defense attorneys receive from the Forensic Laboratory is found in Appendix L [Exhibit 'D'] - which is a type-written transcription of certain limited information from the above-mentioned Appendices, titled 'Maintenance and Accuracy Check Records.' Conceptually speaking, if the Appendices were a mathematical equation to demonstrate a properly working Alcotest, Appendices D–I, and K would represent the steps proving the working order of the Alcotest; whereas, Appendix L would represent the conclusion that Alcotest was working. [See Decl. of KW, page _, lines __].

THE INFORMAL DISCOVERY REQUESTS

Ms. G has informally requested several items of discovery from the Office of the District Attorney for the County of San Mateo ("District Attorney") dating back to May 22, 2007, pertaining to the Alcotest 0088 [Exhibit 'F']. Essentially, in her May 22, 2007 informal discovery request, Ms. G requested all writings (and specifically requested hand written records) intending the definition of a 'writing' as defined by Evidence Code Section 250, relating to: (1) the administration of the Alcotest 0088 on DUI suspects from 10-31-06 through 1-31-07; (2) maintenance records of the

Alcotest 0088 from 10-31-06 through 1-31-07; (3) error messages for the Alcotest 0088 from 10-31-06 through 1-31-07; and (4) "comments/resolution" records for Alcotest 0088 from 10-31-06 through 1-31-07. [Exhibit F]. In addition, Ms. G included as a catch-all provision, a request for "[a]ll other discoverable information relating to the [Alcotest] 0088 … pursuant to Penal Code § 1054 et seq. and Brady v. Maryland."

Ms. G was not provided any of the above-mentioned discovery, which would have necessarily included the information contained in Appendices D–I, K. Though Ms. G did not receive a written denial from the Office of the District Attorney to produce such records, her attorney did receive a written denial from the District Attorney to produce such records in another DUI case with an identical discovery request. [Exhibit 'G']. Essentially, the written denial from the District Attorney stated that the only information concerning the Alcotest that would be provided to Ms. G was the information already provided in Appendix L.

Thereafter, on August 23, 2007, Ms. G made another informal discovery request for a copy of all manuals possessed by the San Mateo County Crime Lab regarding the Alcotest, including but not limited to: (1) User Manual; (2) Instructor Manual; (3) Technical Manual; (4) Functions Manual; (5) Black Key Manual; and (6) Breath Simulator Manual [the "Manuals"]. In addition, Ms. G requested a copy of any and all agreements, including but not limited to, licensing agreements, between the County of San Mateo and Draeger Safety Diagnostics, Inc. ("Draeger"), 185 Suttle Street, Suite 105, Durango, Colorado 81303-7911. [Exhibit 'H']. On August 29, 2007, Ms. G received a response from the District Attorney that no such discovery would be forthcoming absent a "specific and legal articulation of how [the Manuals] are relevant to [Ms. G's] case." [Exhibit 'I'].

On September 11, 2007, Ms. G responded that Penal Code Section 1054.1 and the Due Process Clause of the United States Constitution mandate the production of the Manuals. [Exhibit 'J']. Specifically, she stated that the Manuals are substantial material evidence favorable to the accused because access to them will allow the defendant "his or her right to scientifically challenge the validity or trust-worthiness of the Alcotest blood alcohol content result offered against him. Otherwise, without access to these Manuals, and as it presently stands, every defendant in this county is forced

to accept the validity and accuracy of the aforementioned blood alcohol content test results without cross-examination concerning the Alcotest or its operator."

On September 27, 2007, Ms. G received written notice from the District Attorney that it would not provide the requested manuals to her because she failed to specifically assert how the Manuals were substantial material evidence favorable to the accused. [Exhibit 'K']. In addition, the District Attorney continued that it has fulfilled its discovery obligations to Ms. G because: (1) it has produced records which demonstrate the "Alcotest's compliance with Title 17;" (2) Ms. G has not cited binding California law mandating that the District Attorney provide the Manuals; and, (3) since Ms. G has failed to demonstrate what reason there is to question the reliability of the Alcotest … It is the People's position that without this evidence, there is no exculpatory material to disclose." [Exhibit 'K'].

Lastly, in its September 27, 2007 letter, the District Attorney refused to provide the licensing agreement between Draeger and San Mateo County because: (1) "the agreement is irrelevant to [Ms. G's] case," (2) Ms. G has not articulated her need for the licensing agreement; and, (3) the agreement is protected as work product under California Code of Civil Procedure section 2018.030." [Exhibit 'K'].

Thus, at this moment, it appears as if the discovery process is at a standstill. Ms. G has not received any of the requested records from the District Attorney. Ms. G now respectfully asks the court to issue an order directing the District Attorney to produce the above-requested discovery, and any other discovery compelled under Penal Code § 1054 et. seq. and the Due Process Clause of the United States Constitution, in order to allow Ms G to prepare a constitutionally adequate defense.

II. POINTS AND AUTHORITIES

Ana G is hereby requesting that this Court order the District Attorney to produce the following discovery: (1) any and all contractual agreements between Draeger and the County of San Mateo and/or Forensic Laboratory; (2) all Manuals possessed by the Forensic Laboratory relating to the Alcotest; and, (3) all writings requested in Ms. G's May 22, 2007

informal discovery request. The defense is entitled to the above-requested discovery because it is "exculpatory" and "in the possession of the investigating agencies/prosecution team" within the definitions of Penal Code Section 1054.1 and the Due Process Clause of the United States Constitution. By ordering the District Attorney to produce the above-requested discovery, this Court would be upholding the well-established principle that, "in a criminal prosecution an accused is generally entitled to discover all relevant and material information in the possession of the prosecution that will assist him in the preparation and presentation of his defense." [Murgia v. Municipal Ct., (1975) 15 Cal.3d 286, 293].

A. THE ABOVE-REQUESTED DISCOVERY IS EXCULPATORY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

Prosecutors have a constitutional mandate to disclose exculpatory material evidence to defendants in criminal cases. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. [People v. Barrett, (2000) 80 Cal.App.4th 1305, 1314, citing to, Brady v. Maryland, (1963) 373 U.S. 83, 87]. The duty of the prosecution to disclose such evidence to the defense exists even without a request for such material. [Id.].

For Brady purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. [People v. Zambrano, (2007) 41 Cal.4th 1082, 1132, citing to, United States v. Bagley, (1985) 473 U.S. 667, 676]. Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. [Id.]. Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Id.].

For present purposes, the exculpatory nature of the above-requested discovery must be viewed in light of Vehicle Code § 23152(b), which provides that: "It is unlawful for any person who has a 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle…" [Cal. Veh. Code § 23152(b), (West 2007)]. Among the primary methods in this

county by which the determination of whether an individual is driving with a 0.08 percent or more, by weight, of alcohol in his or her blood, is by having that person submit to a breath test using the Alcotest.

The admission of the Alcotest breath test results against an accused in a criminal proceeding is only conditioned upon the prosecution showing compliance with Title 17 or an Adams Foundation, i.e., the foundational elements of: (1) the reliability of the instrument, (2) the proper administration of the test, and (3) the competence of the operator. [People v. Williams, (2002) 28 Cal.4th 408, 416, citing to People v. Adams, (1976) 59 Cal.App.3d 559, 567]. In explaining the basis for admission of the breath test results, the Williams court held:

"Adams expressly held that Title 17 compliance and the tripartite foundational requirements were distinct and independent means to support the admission of test results. Compliance with the regulations was sufficient … On the other hand, although the regulations are the standard of competency, they are not the only standard. Even absent compliance with the regulations, the People could obtain admission of the evidence through the general [Adams Foundation] …"

However, the Williams court explicitly cautioned, "[w]hile Adams may authorize the admission of test results where substantial compliance with Title 17 is shown, it does not authorize the negation of a mandatory duty, where as here, substantial compliance is not shown. To hold otherwise would render Title 17 a nullity." In conclusion, the Williams court said of admitting breath test results with Title 17, "[c]ompliance with the regulations, by contrast, guarantees the People quick and certain admission of evidence, eliminating laborious qualification, critical cross-examination, and the risk of exclusion. "

i. The Records Requested in the May 22, 2007 Informal Discovery Request are Exculpatory.

Presently, the only records which the defense receives from the Forensic Laboratory is Appendix L, which as was discussed above, is only a mere conclusion that Title 17 has been complied with. The District Attorney argues that it fulfills its discovery burdens to the defense by disclosing this

unitary record. However, the District Attorney's proffered justification for failing to provide Appendices D–I, K, are not in comport with the law.

The defense is entitled to access to all possible records which can demonstrate that there is not substantial compliance with Title 17. Under Williams, if the defense can present evidence that Title 17 has not been substantially complied with, the results of the breath alcohol tests cannot be admitted as evidence against the accused. The defense is seeking the information in Appendices D–I, K, which can demonstrate that there has not been substantial compliance with Title 17. Even more specifically, the defense is requesting the unadulterated hand written records from these Appendices. [See Hines v. Superior Court, (1993) 20 Cal.App.4th 1818, citing to People v. Estrada, (1960) 54 Cal.2d 713, 716 (handwritten notes of witness statements are discoverable even when not exculpatory within the meaning of Brady (Supra).)].

Obviously, this information which can potentially lead to the exclusion of a breath test result is substantial material evidence favorable to the accused - it can hurt the prosecution's case, as well as, help the defense case. Presumably, the California Legislature agrees that information regarding an individual's breath test is substantial material evidence. Vehicle Code § 23158(c) specifically provides that, "[u]pon the request of the person tested, full information concerning the test taken at the direction of the peace officer shall be made available to that person or that person's attorney. [Cal. Veh. Code § 23158(c), (West 2007); See McKinney v. Dept' of Motor Vehicles (1992) 5 Cal.App.4th 519, 525 (applying this discovery provision to the Intoxilyzer breath test result); Petricka v. Dept' of Motor Vehicles (2001) 89 Cal.App.4th 1341]. Therefore, the defense requests that this Court order the District Attorney to produce the hand written records contained in Appendices D–I, K, as well as, any other records pertaining to the Alcotest' compliance with Title 17 which is not being provided to the defense since this material is exculpatory within the definition of Brady (Supra).

ii. The Manuals are Exculpatory.

The Manuals are exculpatory evidence because without access to the Manuals there is no way for the defense to make an informed determination

of whether the Alcotest has been maintained in compliance with Title 17. Even if the District Attorney argues that the Forensic Laboratory's following of the procedures in the BAOP demonstrates that the Alcotest is being maintained in compliance with Title 17, without access to the Manuals, there is no way for the defense to determine whether the information in the BAOP is accurate. The defense should not be held to the mercy of the District Attorney's take-our-word-for-it approach to fulfilling its discovery obligations.

Moreover, without access to the Manuals there is no way for the defense to make an informed determination of whether the District Attorney can establish a proper Adams Foundation, i.e.,: (1) the reliability of the instrument, (2) the proper administration of the test, and (3) the competence of the operator. As is suggested by the names of the Manuals that the defense seeks, e.g., User Manual, Instructor Manual, and Technical Manual, etc., defense access to the Manuals will allow the defense the ability to determine whether the test was properly administered by an individual qualified to perform the test on correctly functioning equipment. The defense must be able to effectively cross-examine any person who maintains the Alcotest, as well as, any person who administers the test regarding whether all appropriate procedures were meticulously followed. Again, the defense is deprived of Due Process where it is forced to accept the District Attorney's 'trust us' approach to discovery.

iii. The Contractual Agreements between Draeger and the County of San Mateo and/or Forensic Laboratory are Exculpatory.

The defense is entitled to know exactly what instrument the County of San Mateo and/or Forensic Laboratory purchased from Draeger. The defense wants to know what firmware version is being used here , as well as, information concerning the hardware of the purchased instruments, the maintenance agreements with Draeger, the procedures by which the County and Draeger agreed that records would be stored, and a host of other information that the defense cannot know is exculpatory without actually examining the agreements themselves. The significance of defense access to the agreements rises with each passing moment, as the instruments are used more frequently, and are acquiring more data, and are more likely to break down.

B. THE DISTRICT ATTORNEY IS REQUIRED TO DISCLOSE THE ABOVE-REQUESTED EXCULPATORY EVIDENCE BECAUSE IT IS IN THE POSSESSION OF THE FORENSIC LABORATORY WHICH IS PART OF THE "PROSECUTION TEAM."

A prosecutor's duty under Brady to disclose material exculpatory evidence extends to evidence the prosecutor—or the prosecution team—knowingly possesses or has the right to possess. [Barrett, 80 Cal.App.4th at 1314-1315]. The prosecution team includes both investigative and prosecutorial agencies and personnel. [Barrett at 1315]. In addition, a prosecutor has a duty to learn of favorable evidence known to other prosecutorial and investigative agencies acting on the prosecution's behalf, including police agencies. [Id. at 1315]. The scope of the prosecutorial duty to disclose encompasses exculpatory evidence possessed by investigative agencies to which the prosecutor has reasonable access. [Id.].

The Forensic Laboratory is unambiguously on the prosecution team with respect to all phases of a criminal prosecution for a violation of Vehicle Code § 23152(b). The BAOP clearly states on page 40:

"The Laboratory's responsibilities in the breath alcohol program include maintenance, periodic determination of accuracy, and repair of instruments; maintenance of records which are specified in our method; training and certification of operators; and adherence to Title 17 requirements. The Laboratory is also responsible for providing expert testimony in court regarding theory and operation of the Draeger Alcotest 7110 MK III-C and interpretation of blood alcohol levels."

A deeper analysis of case law and whether the Forensic Laboratory is on the prosecution team is simply unwarranted by these facts. The District Attorney therefore has a duty to provide the requested Brady Material from Forensic Laboratory to the defense.

III. CONCLUSION

For the above reasons, Ms. G hereby requests that this Court order the above-requested discovery to be produced to her by the District Attorney.

Dated: April 23, 2009

Respectfully submitted,

By: _____
Nafiz M. Ahmed, Attorney for AG

DECLARATION OF NAFIZ M. AHMED IN SUPPORT OF MOTION TO CONTINUE TRIAL

I, Nafiz M. Ahmed, do hereby declare:

1. That I am the attorney for AG.

2. That I have complied with the statutory requirements of Penal Code Section 1054.5.

3. That the declarations of KM and KW are not presently filed with this motion, but that I will file these declarations as soon as they are completed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 23, 2009

Respectfully submitted,

By: _____
Nafiz M. Ahmed, Attorney for AG

PROOF OF SERVICE

I, Nafiz M. Ahmed, am a citizen of the United States and a resident of the State of California. I declare that I am over 18 years of age, am not a party to the within case; my business address is 600 Allerton Street, Suite 201, Redwood City, CA 94063.

On October 23, 2007 I served the following documents:

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY; DECLARATIONS OF KW, KM AND NAFIZ M. AHMED IN SUPPORT OF MOTION TO COMPEL DISCOVERY; REQUEST FOR JUDICIAL NOTICE

Office of the District Attorney
County of San Mateo
400 County Center, 4th Floor
Redwood City, CA 94063

[X] On the parties in this action by personal delivery.

I declare under the penalty of perjury that the foregoing is true and correct.

_____ _____

Date Signature

APPENDIX C

MOTION TO COMPEL DISCOVERY (2)

NAFIZ M. AHMED (State Bar No. 240069)
AHMED AND SUKARAM, ATTORNEYS AT LAW
600 Allerton Street, Suite 201
Redwood City, CA 94063
Telephone: (650) 299-0500
Facsimile: (650) 299-0510

Attorneys for Defendant
CH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

CH,
Defendant.

Case No.: SMXXXXXX

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY OF ORIGINAL AND UNTRANSCRIBED BREATH TEST RECORDS UNDER PENAL CODE § 1054 ET SEQ.

Hearing Date: September 24, 2008
Dept: PH
Time: 9:00 a.m.
Honorable: TBD

TO THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF SAN MATEO COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on September 24, 2008, in Department PH at 9:00 a.m., or as soon thereafter as the matter may be heard, that defendant, CH will make a motion that this court compel the San Mateo County District Attorney's Office to produce the untranscribed and original printed version of the electronic automatic accuracy check records for the Draeger Alcotest 7110 MK III-C serially numbered ARNK 0089 for the months of September 2007 through November 2007 pursuant to Penal Code Section 1054 et seq.

The defense is entitled to the requested discovery under, but not limited to, the Due Process Clauses of the United States and California Constitutions; the Sixth Amendment of the United States Constitution; Penal Code Section 1054.1; and, Evidence Code § 721. This motion is based upon the attached: declaration of Nafiz M. Ahmed; the attached exhibits; all papers filed and records in this action; evidence taken at the hearing on this motion; and, argument at that hearing.

Dated: April 23, 2009

Respectfully submitted,

By: _____

Nafiz M. Ahmed, Attorney for CH

I. STATEMENT OF FACTS

FACTS OF THE CASE

Defendant, CH is being prosecuted in the above-mentioned case for an alleged violation of Vehicle Code Sections 23152(a) and (b), arising out of an incident occurring at or around, 1:50 a.m., on October 18, 2007. After his arrest on this date, Mr. H submitted to a breath test as required by California's Implied Consent Law. Mr. H was administered a breath test on a breath testing instrument known as the Draeger Alcotest 7110 MK III-C (the "Draeger Alcotest"). In particular, Mr. H submitted to a breath test on a Draeger Alcotest serially numbered ARNK-0089 ("Draeger Alcotest 0089").

THE BREATH TEST RECORDS

Forensic Alcohol Laboratories that perform "Breath Alcohol Analysis" are regulated under Title 17 of the California Code of Regulations. [Cal. Code Regs., Title 17 §§ 1215.1; 1216; 1222 (West 2007)]. Such Laboratories are only permitted to use breath testing devices for breath alcohol analysis which are approved in the "Conforming Products List" published in the Federal Register by the National Highway Traffic and Safety Administration of the U.S. Department of Transportation. [See, Cal. Code Regs., Title 17 § 1221.3 (West 2007)]. The Draeger Alcotest is a breath testing device that is approved for breath alcohol analysis within the "Conforming Products List."

Pursuant to Title 17 of the California Code of Regulations, in order for a breath testing instrument, such as the Draeger Alcotest to meet minimum standards of accuracy, it must correctly detect the alcohol concentration of a "reference sample of known alcohol concentration within precision limits of plus or minus 0.01 grams % of the true value…" [Cal. Code Regs., Title 17 § 1221.4(a)(2)(A) (West 2007)]. Forensic Alcohol Laboratories are directed under Title 17 to determine the accuracy of such breath testing devices every 10 days or following the testing of every 150 subjects, whichever comes sooner. [Cal. Code Regs., Title 17 § 1221.4(a)(2)(B) (West 2007)]. Forensic Alcohol Laboratories are mandated to keep these records for a period of at least three years at a licensed forensic alcohol laboratory.

[Cal. Code Regs., Title 17 §§'s 1222.1(a); 1221.4(a)(6); 1221.4(a)(6)(A) (West 2007)]. Moreover, these records must be available for the California Department of Health Services upon request. [Cal. Code Regs., Title 17 § 1222 (West 2007)].

The San Mateo County Sheriff's Office Forensic Laboratory (the "Laboratory") is a Forensic Alcohol Laboratory governed by Title 17. The Laboratory uses the Draeger Alcotest as its breath testing device to determine the concentration of alcohol within an individual's breath sample. It schedules automatic accuracy checks of the Draeger Alcotest to determine whether it is working within the defined limits of accuracy as set forth by Title 17. The Laboratory retains the untranscribed and original printed version of the electronic automatic accuracy check records for the Draeger Alcotest pursuant to Title 17 mandates.

However, the Laboratory only produces to defense attorneys an edited, truncated and transcribed document, which purports to represent the records of the automatic accuracy checks. This document is commonly known as Appendix 'L' [Maintenance and Accuracy Check Records] of the San Mateo County Sheriff's Office Forensic Laboratory Draeger Alcotest 7110 MK III-C Breath Alcohol Operating Procedures Manual (the "BAOP"). The only method by which defense attorneys would have access to the untranscribed and original printed version of the electronic automatic accuracy check records for any Draeger Alcotest is by receiving such records from the Laboratory.

THE INFORMAL DISCOVERY REQUESTS

On July 25, 2008, Mr. H, by and through his attorney of record, requested pursuant to Penal Code § 1054 et seq. the "printed version of the automatic accuracy check records for the [Draeger Alcotest 0089] for the months of September–November 2007." [Exhibit 'A']. Mr. H received no response from the San Mateo County District Attorney's Office to his informal discovery request until August 22, 2008. On August 22, 2008, Mr. H received a forwarded letter from the Laboratory that no such records would be forthcoming because it "would require excessive work by the [L]aboratory." [Exhibit 'B'].

II. POINTS AND AUTHORITIES

Mr. H is hereby requesting that this Court order the District Attorney to produce the untranscribed and original printed version of the electronic automatic accuracy check records for the Draeger Alcotest 0089 for the months of September 2007 through November 2007 pursuant to the Due Process Clauses of the United States and California Constitutions, the Sixth Amendment of the United States Constitution, Penal Code § 1054.1(f) and California Evidence Code § 721. By ordering the District Attorney to produce the above-requested discovery, this Court would be upholding the well-established principle that "in a criminal prosecution an accused is generally entitled to discover all relevant and material information in the possession of the prosecution that will assist him in the preparation and presentation of his defense." [Murgia v. Municipal Ct., 15 Cal.3d 286, 293 (1975)].

A. THE ORIGINAL PRINTED VERSION OF THE ELECTRONIC AUTOMATIC ACCURACY CHECK RECORDS FOR DRAEGER ALCOTEST 0089 FOR SEPETEMBER 2007–NOVEMBER 2007 MUST BE DISCLOSED PURSUANT TO PENAL CODE § 1054.1(F).

Penal Code § 1054.1(f) requires the prosecuting attorney to disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

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

Appendix L is a discoverable scientific test within the meaning of Penal Code § 1054.1(f). This is true because in a criminal prosecution of an alleged violation of Vehicle Code § 23152(b) the District Attorney routinely

offers Appendix L into evidence in its case-in-chief as the results of a scientific test. Based upon Appendix L, the District Attorney's expert witness from the Laboratory generally testifies that the Draeger Alcotest was working correctly at the time of the defendant's breath test.

Under well settled case law, Mr. H is entitled to the original documentation underlying the presently edited, truncated and transcribed data found in Appendix L. [See, Hines v. Superior Court, 20 Cal.4th 1818 (1993, 4th App.Dist.)]. Under Hines, the court interpreted the defendant's duty of disclosure under Penal Code § 1054.3(a) as follows:

"It is our conclusion that the statutory phraseology of 'reports or statements … including the results of … examination, scientific tests, experiments or comparisons which the respective parties intend to offer in evidence …' reasonably should include the original documentation of the examinations, tests, etc. Original documentation, including handwritten notes if that be the case, would seem to be the best evidence of the test, experiment or examination. An expert should not be permitted to insulate such evidence from discovery by refining, retyping or otherwise reducing the original documentation to some other form." [Hines at 1822].

Penal Code §§'s 1054.3(a) and 1054.1(f) are "virtually the same." [Hines at 1824; Izazaga v. Superior Court, 54 Cal.3d 356, 377 (1991) ("near mirror-image symmetry under California's new discovery chapeter)]. Thus, if the defense was required to produce such discovery under Section 1054.3(a), the prosecution would likewise have a similar burden under the Reciprocal Discovery Statutes - here Section 1054.1(f). Accordingly, the District Attorney's is obligated to produce the untranscribed and printed original documentation of the automatic accuracy check records for the Draeger Alcotest 0089 for the months of September 2007 through November 2007 .

B. THE LABORATORY IS AN "INVESTIGATIVE AGENCY" WITHIN THE MEANING OF PENAL CODE § 1054.1(F).

The role of the Laboratory with respect to criminal prosecutions of alleged violations of Vehicle Code § 23152(b) is clearly set out in the BAOP. Page 40 of the BAOP succinctly states:

"The Laboratory's responsibilities in the breath alcohol program include maintenance, periodic determination of accuracy, and repair of instruments; maintenance of records which are specified in our method; training and certification of operators; and adherence to Title 17 requirements. The Laboratory is also responsible for providing expert testimony in court regarding theory and operation of the Draeger Alcotest 7110 MK III-C and interpretation of blood alcohol levels."

Clearly, the Laboratory is an investigative agency within the meaning of Penal Code § 1054.1(f). [See, People v. Barrett, 80 Cal.App.4th 1305, 1317 (2000, 4th App.Dist.)].

III. CONCLUSION

For the above reasons, Mr. H hereby requests that this Court order the San Mateo County District Attorney's Office to produce the untranscribed and original printed version of the electronic automatic accuracy check records for the Draeger Alcotest 0089 for the months of September 2007 through November 2007 pursuant to Penal Code Section 1054.1(f).

Dated: April 23, 2009

Respectfully submitted,

By: _____

Nafiz M. Ahmed, Attorney for CH

DECLARATION OF NAFIZ M. AHMED IN SUPPORT OF MOTION TO CONTINUE TRIAL

I, Nafiz M. Ahmed, do hereby declare:

1. That I am the attorney for CH.

2. That I have complied with the statutory requirements of Penal Code Section 1054.5.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 23, 2009

Respectfully submitted,

By: _____
Nafiz M. Ahmed, Attorney for CH

PROOF OF SERVICE

I, Nafiz M. Ahmed, am a citizen of the United States and a resident of the State of California. I declare that I am over 18 years of age, am not a party to the within case; my business address is 600 Allerton Street, Suite 201, Redwood City, CA 94063.

On September 9, 2008 I served the following documents:

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY OF ORIGINAL AND UNTRANSCRIBED BREATH TEST RECORDS UNDER PENAL CODE § 1054 ET SEQ.

Office of the District Attorney
County of San Mateo
400 County Center, 4th Floor
Redwood City, CA 94063

[X] On the parties in this action by personal delivery.

I declare under the penalty of perjury that the foregoing is true and correct.

_____ _____

Date Signature

APPENDIX D

SUPPLEMENTAL POINTS TO MOTION TO COMPEL DISCOVERY (1)

NAFIZ M. AHMED (State Bar No. 240069)
LAW OFFICES OF NAFIZ M. AHMED
600 Allerton Street, Suite 201
Redwood City, CA 94063
Telephone: (650) 299-0500
Facsimile: (650) 299-0510

Attorney for Defendant
AG

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

AG,
Defendant.

Case No.: NMXXXXXXX

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL DISCOVERY

Hearing Date: November 16, 2007
Dept: PH
Time: 9:00 a.m.
Honorable: TBD

I. ARGUMENT

C. THE DEFENSE IS ENTITLED TO THE ABOVE-REQUESTED DISCOVERY IN ORDER TO UPHOLD THE DEFENDANT'S RIGHT TO CONFRONTATION UNDER THE 6TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In Davis v. Alaska, the United States Supreme Court held the defendant's right to confrontation under the 6th Amendment of the United States Constitution, i.e., by being able to impeach an eyewitness against him with evidence of the eyewitness's probation status for the purpose of suggesting that the eyewitness was biased, was paramount to the State of Alaska's interest and policy of protecting juvenile offenders. [Davis v. Alaska, (1974) 415 U.S. 308, 319]. The Court therefore overturned a conviction of the defendant because he was denied the ability to cross-examine the juvenile eyewitness with his probation status to impeach his credibility. [Id. at 320].

The Court reasoned that cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. [Davis at 316]. The cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has been traditionally allowed to impeach, i.e., discredit the witness. [Id. at 316]. The principal method by which this is achieved is by allowing the cross-examiner to cross-examine the witness toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. [Id.]. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. [Id.].

In the present case, the defendant is entitled to the above-requested discovery in order to confront and cross-examine the witnesses against her. Ms. G must be allowed under the 6th Amendment to impeach the credibility of the witnesses who maintain, operate and administer the Alcotest. To deny Ms. G this right would be reversible error.

II. CONCLUSION

For the above reasons, Ms. G hereby requests that this Court order the above-requested discovery to be produced to her by the District Attorney.

Dated: April 23, 2009

Respectfully submitted,

By: _____
Nafiz M. Ahmed, Attorney for AG

PROOF OF SERVICE

I, Nafiz M. Ahmed, am a citizen of the United States and a resident of the State of California. I declare that I am over 18 years of age, am not a party to the within case; my business address is 600 Allerton Street, Suite 201, Redwood City, CA 94063.

On November 1, 2007 I served the following documents:

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL DISCOVERY

Office of the District Attorney
County of San Mateo
400 County Center, 4th Floor
Redwood City, CA 94063

[X] On the parties in this action by personal delivery.

I declare under the penalty of perjury that the foregoing is true and correct.

_____ _____

Date Signature

APPENDIX E

SUPPLEMENTAL POINTS TO MOTION TO COMPEL DISCOVERY (2)

NAFIZ M. AHMED (State Bar No. 240069)
AHMED AND SUKARAM, ATTORNEYS AT LAW
600 Allerton Street, Suite 201
Redwood City, CA 94063
Telephone: (650) 299-0500
Facsimile: (650) 299-0510

Attorney for Defendant
CH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

CH,
Defendant.

Case No.: SMXXXXXXX

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL DISCOVERY OF ORIGINAL AND UNTRANSCRIBED BREATH TEST RECORDS UNDER PENAL CODE § 1054 ET SEQ.

Hearing Date: September 24, 2008
Dept: PH
Time: 9:00 a.m.
Honorable: TBD

I. ARGUMENT

A. THE DEFENSE IS ENTITLED TO THE UNTRANSCRIBED AND ORIGINAL PRINTED VERSION OF THE AUTOMATIC ACCURACY CHECK RECORDS OF DRAEGER ALCOTEST 0089 IN ORDER TO UPHOLD THE DEFENDANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND EVIDENCE CODE § 721.

In Davis v. Alaska, the United States Supreme Court held the defendant's right to confrontation under the Sixth Amendment of the United States Constitution, i.e., by being able to impeach an eyewitness against him with evidence of the eyewitness's probation status for the purpose of suggesting that the eyewitness was biased, was paramount to the State of Alaska's interest and policy of protecting juvenile offenders. [Davis v. Alaska, (1974) 415 U.S. 308, 319]. The Court therefore overturned a conviction of the defendant because he was denied the ability to cross-examine the juvenile eyewitness with his probation status to impeach his credibility. [Id. at 320].

The Court reasoned that cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. [Davis at 316]. The cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has been traditionally allowed to impeach, i.e., discredit the witness. [Id. at 316]. The principal method by which this is achieved is by allowing the cross-examiner to cross-examine the witness toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. [Id.]. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. [Id.].

Here, the defendant is entitled under the Sixth Amendment to the untranscribed and original printed version of the electronic automatic accuracy check records for the Draeger Alcotest 0089 for the months of September 2007 through November 2007. Mr. H is entitled to these records under the Sixth Amendment in order to confront and cross-examine the witness(es) against him who will testify that based upon these records that the Draeger Alcotest 0089 was working properly at the time of

his breath test. Mr. H's rights under the Sixth Amendment demand that he be allowed to impeach the credibility of the witness(es) who maintain, operate and administer the breath test using the Draeger Alcotest 0089.

Without this discovery, Mr. H would deprived of his Sixth Amendment right to counsel, as well as, communication with experts in preparing a defense. [See, Alford v. Superior Court, 29 Cal.4th 1033, 1046 (2003), citing to, Prince v. Superior Court, 8 Cal.App.4th 1176, 1180 (1992)]. Mr. H's rights under the Sixth Amendment, "logically extend[] to the opportunity to investigate and develop evidence generally, such as impeachment evidence," at issue here. [Alford at 1046]. Even under Evidence Code § 721, Mr. H is entitled to fully cross examine the District Attorney's expert witness from the Laboratory regarding the basis of his or her opinion that the Draeger Alcotest was working correctly at the time of his breath test . To deny Mr. H his rights under the Sixth Amendment of the United States Constitution and Evidence Code § 721 will be reversible error.

B. DUE PROCESS WITHIN THE MEANING OF THE UNITED STATES CONSTITUTION DEMANDS THE ABOVE-REQUESTED DISCOVERY BE PRODUCED BY THE PROSECUTION TO MR. H.

Prosecutors have a constitutional mandate to disclose exculpatory material evidence to defendants in criminal cases. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. [People v. Barrett, (2000) 80 Cal.App.4th 1305, 1314, citing to, Brady v. Maryland, (1963) 373 U.S. 83, 87]. The duty of the prosecution to disclose such evidence to the defense exists even without a request for such material. [Id.].

For Brady purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. [People v. Zambrano, (2007) 41 Cal.4th 1082, 1132, citing to, United States v. Bagley, (1985) 473 U.S. 667, 676]. Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. [Id.]. Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Id.].

Clearly, in the present case, the requested breath test records are favorable to Mr. H because he can use these records to impeach the Laboratory expert. This discovery is material because without these records Mr. H is absolutely prohibited from impeaching the Laboratory expert(s) with untranscribed and unadulterated data concerning the validity of Mr. H's blood alcohol concentration level as determined by the Draeger Alcotest 0089. Where a defendant can be convicted of violating Vehicle Code § 23152(b) solely based upon the numerical result expressed by the Draeger Alcotest 0089, Due Process of law would unmistakably be violated by denying that defendant access to the original data supporting the accuracy of the breath testing instrument.

II. CONCLUSION

For the above reasons, Mr. H hereby requests that this Court order the District Attorney to produce the untranscribed and original printed version of the electronic automatic accuracy check records for the Draeger Alcotest 0089 for the months of September 2007 through November 2007 to him.

Dated: April 23, 2009

Respectfully submitted,

By: _____
Nafiz M. Ahmed, Attorney for Defendant, CH

PROOF OF SERVICE

I, Nafiz M. Ahmed, am a citizen of the United States and a resident of the State of California. I declare that I am over 18 years of age, am not a party to the within case; my business address is 600 Allerton Street, Suite 201, Redwood City, CA 94063.

On September 12, 2008 I served the following documents:

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL DISCOVERY OF ORIGINAL AND UNTRANSCRIBED BREATH TEST RECORDS UNDER PENAL CODE § 1054 ET SEQ.

Office of the District Attorney
County of San Mateo
400 County Center, 4th Floor
Redwood City, CA 94063

[X] On the parties in this action by personal delivery.

I declare under the penalty of perjury that the foregoing is true and correct.

_____ _____

Date Signature

APPENDIX F

COMBINED PETITION FOR REHEARING APPLICATION FOR CERTIFICATION

NAFIZ M. AHMED (State Bar No. 240069)
AHMED AND SUKARAM, ATTORNEYS AT LAW
600 Allerton Street, Suite 201
Redwood City, CA 94063
Telephone: (650) 299-0500
Facsimile: (650) 299-0510

Attorneys for Petitioner
CH

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

CH,
Petitioner

vs.

SAN MATEO COUNTY SUPERIOR COURT,
Respondent

THE PEOPLE OF THE STATE OF CALIFORNIA
Real Party in Interest.

PETITION FOR REHEARING & APPLICATION FOR CERTIFICATION TO THE 1st DISTRICT COURT OF APPEAL

From Orders of the Superior Court of the State of California
County of San Mateo
Case No. SMXXXXXXX
The Honorable ABC, Presiding
Tel.: (650) 000-0000

I. Issue Presented for Review

Under Penal Code § 1054.1(f) the District Attorney must produce the original results of a scientific test that it intends to introduce into evidence at trial. Does the District Attorney meet its obligation under 1054.1(f) by producing automatic accuracy check results of a breath testing instrument after these results have been formatted by a software program? Or, must the District Attorney produce the original automatic accuracy check results as they exist on the instrument itself?

II. Necessity for Review

There are no reported California decisions interpreting the scope of the prosecutor's duty of disclosure under Penal Code § 1054.1(f). Accordingly, trial courts remain unguided in their application of this statute to discovery disputes between District Attorneys and defense counsel. Precious judicial resources are consumed in these disputes and differing unreported results are likely being reached by judicial officers. Therefore, as forensic toxicology becomes increasingly complex, especially through the use of sophisticated breath testing technology, the courts and both the prosecution and defense will benefit from case law delineating a District Attorney's duty of disclosure under § 1054.1(f).

III. Statement of Case for Review

Petitioner, CH is being prosecuted in the above-mentioned case for a violation of Vehicle Code sections 23152 (a) & (b), arising out of an incident occurring at or around, 1:50 a.m., on October 18, 2007. After his arrest on this date, Mr. H submitted to a breath test as required by California's Implied Consent Law. Mr. H was administered a breath test on a breath testing instrument known as the Draeger Alcotest 7110 MK III-C (the "Draeger"). In particular, Mr. H submitted to a breath test on a Draeger Alcotest serially numbered ARNK-0089 ("Draeger 0089").

In this case, the District Attorney seeks to introduce into evidence the blood alcohol concentration ("B.A.C.") results of Mr. H's breath test obtained by the Draeger 0089 on October 18, 2007. In order to establish the validity of the B.A.C. results obtained by this Draeger 0089, the District

Attorney must prove that the Draeger 0089 was in compliance with Title 17 of the California Code of Regulations on this date. Amongst the District Attorney's obligations to establish Title 17 compliance, the District Attorney must prove that for a relevant time period the Draeger 0089 passed an accuracy check every 10 days or 150 subjects, whichever comes first. [R.T.1, p.15: 8-12].

The San Mateo County Sheriff's Office Forensic Laboratory (the "Laboratory") programmed the Draeger 0089 to perform an automatic accuracy check upon itself every Wednesday at 8:00 a.m. [R.T.1, p.15: 13-15]. The results from the Draeger 0089's automatic accuracy checks are electronically stored within the instrument itself. [R.T.1, p.14: 12-20]. The Laboratory can easily access these results using a software program called the MA-7110 by merely isolating the date of the accuracy check. [R.T.1, p.39-40]. The Laboratory can then print out the weekly automatic accuracy check results of the Draeger 0089 onto a single sheet of paper. [R.T.1, p.64: 11-13].

But, the Laboratory did not print the automatic accuracy check results from the Draeger 0089 in the manner described above. Instead, the Laboratory used a computer, commonly known as the Draeger Computer to download via modem the Draeger 0089's automatic accuracy check results. [R.T.1, p.14: 15-18; p.15: 15-16]. The Laboratory then used a software program to convert the Draeger 0089's automatic accuracy check results into a different format. [R.T.1, p.36: 7-26; p.37: 1]. Thereafter, the Laboratory printed these converted automatic accuracy check results and provided them to the District Attorney to use in its case-in-chief to attempt to establish that at the time of Mr. H's breath test that the Draeger 0089 was Title 17 compliant. [R.T.1, p.14: 1-4; p.15: 2-4].

Significantly, however, the only time that the Laboratory ever attempted to verify that the Draeger 0089's converted and printed automatic accuracy check results are the same as those that are stored on the Draeger 0089 itself was when the Laboratory first began using this Draeger in December 2004. [R.T.1, p.38: 3-21]. Here, Petitioner has simply requested that he be provided the printed version of the automatic accuracy check results that are stored on the Draeger 0089 itself as opposed to the converted accuracy check results that are provided to the District Attorney. Petitioner's request

is for the relevant time period for which the District Attorney would have to establish Title 17 compliance. At most, this would require the Laboratory to print 8 to 10 sheets of paper. [R.T.1, p.64: 11-13].

IV. Grounds for Review

It is axiomatic that for the majority of counties in the State of California which use the Draeger Alcotest for evidential breath testing purposes that the issue of what discovery a defendant in a prosecution for an alleged violation of Vehicle Code § 23152(b) is entitled to is a significant. Previously, the California Supreme Court has held that that "in a criminal prosecution an accused is generally entitled to discover all relevant and material information in the possession of the prosecution that will assist him in the preparation and presentation of his defense." [Murgia v. Municipal Ct., 15 Cal.3d 286, 293 (1975)].

Here, the issue is whether Petitioner is entitled to discover the automatic accuracy check results for the Draeger 0089 from the instrument itself for a relevant time period, or must Petitioner be forced into accepting the Laboratory's representation that the converted automatic accuracy check results that it forwarded to the District Attorney in this case are accurate? By the Laboratory's own admission the only time that it has ever attempted to verify that the converted automatic accuracy check results that it provides to the District Attorney for Draeger Alcotest instruments such as the Draeger 0089 are accurate was over 4 years ago. Yet, the trial court and this Appellate Department have ruled that Petitioner is not allowed to know whether the automatic accuracy check results that the District Attorney will use against him in a criminal prosecution are truly the numbers that are stored on the Draeger 0089 itself.

Petitioner asserts that Hines v. Superior Court is the closest case to being controlling here because no other reported decisions have interpreted the scope of the prosecution's duty of disclosure under Penal Code § 1054.1(f). [Hines v. Superior Court, 20 Cal.4th 1818 (1993, 4th App.Dist.)]. Although Hines specifically addressed Penal Code § 1054.3(a), due to the fact that there is near mirror image symmetry in California's discovery law, Hines also governs the interpretation of § 1054.1(f). [Izazaga v. Superior Court, 54 Cal.3d 356, 377 (1991); See, Hines at 1822]. Accordingly, Hines interpreted

both the defendant's and prosecution's duty of disclosure under § 1054.3(a) and § 1054.1(f) as follows:

"It is our conclusion that the statutory phraseology of 'reports or statements … including the results of … examination, scientific tests, experiments or comparisons which the respective parties intend to offer in evidence …' reasonably should include the original documentation of the examinations, tests, etc. Original documentation, including handwritten notes if that be the case, would seem to be the best evidence of the test, experiment or examination. An expert should not be permitted to insulate such evidence from discovery by refining, retyping or otherwise reducing the original documentation to some other form." [Hines at 1822].

In the instant case, the trial court also agreed that Hines was the controlling case in interpreting the prosecution's duty of disclosure. Though, despite finding Hines controlling, the trial court denied Petitioner access to the discovery he requested because it held that the term "original documentation" was limited to hand written notes. This Court denied Petitioner access to the discovery at issue without a written opinion.

Petitioner respectfully requests that this Court reconsider its ruling and order the District Attorney to produce the discovery requested because the discovery requested is clearly encompassed within the definition of "original documentation" as set forth in Hines. In the alternative, Petitioner respectfully requests that this Court certify his case to the First District, Court of Appeal to settle the issue of what is "original documentation" within the meaning of Hines and whether the discovery at issue falls within this definition. Given that there are no reported cases even interpreting § 1054.1(f), or its application to technology more sophisticated than a pen and paper, this case should be certified to the First District, Court of Appeal to settle an important question of law.

V. Relief Requested

For the above reason(s), as well as the reasons advanced in Petitioner's opening brief, the judgment rendered against the Petitioner should be vacated by this court and a new order should issue directing the trial court to order the District Attorney to produce the discovery requested. In the

alternative, this Court should certify this case to the First District, Court of Appeal to settle an important question of law and to establish uniformity of decision.

Date: March 3, 2009

Respectfully submitted,

_____

Nafiz M. Ahmed, Attorney for Petitioner, CH

PROOF OF SERVICE

I, Nafiz M. Ahmed, am a citizen of the United States and a resident of the State of California. I declare that I am over 18 years of age, am not a party to the within case; my business address is 600 Allerton Street, Suite 201, Redwood City, CA 94063.

On March 3, 2009 I served the following documents:

PETITION FOR REHEARING & APPLICATION FOR CERTIFICATION TO THE 1st DISTRICT COURT OF APPEAL

James P. Fox
District Attorney
San Mateo County
400 County Center, 4th Floor
Redwood City, CA 94063
County Counsel
County of San Mateo
400 County Center, 6th Floor
Redwood City, CA 94063

Hon. ABC
Hall of Justice
400 County Center
Redwood City, CA 94063

[X] On the parties in this action by personal delivery.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: _____ Signature:_____

APPENDIX G

COMBINED WRIT OF MANDATE

NAFIZ M. AHMED (State Bar No. 240069)
AHMED AND SUKARAM, ATTORNEYS AT LAW
600 Allerton Street, Suite 201
Redwood City, CA 94063
Telephone: (650) 299-0500
Facsimile: (650) 299-0510

Attorneys for Defendant
CH

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

CH,
Petitioner
vs.
SAN MATEO COUNTY SUPERIOR COURT,
Respondent

THE PEOPLE OF THE STATE OF CALIFORNIA, and SAN MATEO COUNTY SHERIFF'S OFFICE FORENSIC LABORATORY,
Real Parties in Interest.

IMMEDIATE STAY REQUESTED

REQUEST FOR STAY; PETITION FOR ALTERNATIVE WRIT OF MANDATE DIRECTING TRIAL COURT TO ORDER PRODUCTION OF DISCOVERY UNDER PENAL CODE § 1054 ET SEQ., OR IN THE ALTERNATIVE, PENAL CODE §§ 1326–1327; MEMORANDUM

From Orders of the Superior
Court of the State of California
County of San Mateo
Case No. SM354358A
The Honorable ABC, Presiding
Tel.: (650) 599-1683

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASE LAW

II. STATUTORY AUTHORITY

III. CALIFORNIA RULES OF COURT

CERTIFICATION OF WORD COUNT

I, Nafiz M. Ahmed, as the attorney for Petitioner herein, certify pursuant to California Rule of Court 8.204(c)(1), that the word count of the following brief is 3,642.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 20, 2009

Ahmed & Sukaram, Attorneys at Law

By: _____
Nafiz M. Ahmed, Esq.

REQUEST FOR STAY OF JURY TRIAL

A jury trial is set in this case for February 17, 2009. This petition for a writ of mandate is not brought for the purpose of delay or obstruction. Instead, this petition for writ of mandate is brought for the sole purpose of enforcing the discovery rights of a particular defendant charged with driving under the influence in the County of San Mateo. Through this petition for writ of mandate, Petitioner seeks to uphold his fundamental Due Process rights to prepare a Constitutionally adequate defense and to a fair trial. For these reasons, Petitioner respectfully requests this Court stay the presently set jury trial date until this Court issues a decision on the merits of this petition for writ mandate.

Dated: _____

Respectfully submitted by,

_____

Nafiz M. Ahmed, Attorney for Petitioner, CH

VERIFICATION

I Nafiz M. Ahmed declare as follows:

I am an attorney licensed to practice in all courts of California.

In that capacity I was Petitioner's attorney of record in the proceedings underlying the foregoing petition and make this verification on Petitioner's behalf for the reason that the facts contained in the foregoing are within my personal knowledge based on my representation of Petitioner.

I have read the foregoing petition and the exhibits attached thereto or lodged with this Court, and know the contents thereof to be true based upon my representation of the petitioner.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on January 20, 2009, at Redwood City, California.

_____

Nafiz M. Ahmed

PETITION FOR WRIT OF MANDATE DIRECTING TRIAL COURT TO ORDER PRODUCTION OF DISCOVERY UNDER PENAL CODE § 1054 ET SEQ., OR IN THE ALTERNATIVE, PENAL CODE §§ 1326–1327

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE APPELLATE DEPARTMENT OF THE COUNTY OF SAN MATEO IN AND FOR THE STATE OF CALIFORNIA:

Petitioner, CH, respectfully petitions this Court for a writ of mandate and stay of proceedings directed to respondent court, and by this verified petition alleges that:

PROCEDURAL HISTORY

1. Petitioner is the defendant in the above-entitled action now pending in respondent court. The plaintiff in the above action is named in this petition as the real party in interest.

2. Petitioner was arraigned on an accusatory pleading numbered SM354358, alleging violations of Vehicle Code §§ 23152 (a) & (b).

3. A copy of the accusatory pleading is lodged with this Court and is made a part of this petition.

THE PROSECUTION'S CASE-IN-CHIEF

4. Defendant, CH is being prosecuted in the above-mentioned case for a violation of Vehicle Code sections 23152 (a) & (b), arising out of an incident occurring at or around, 1:50 a.m., on October 18, 2007.

5. After his arrest on this date, Mr. H submitted to a breath test as required by California's Implied Consent Law.

6. Mr. H was administered a breath test on a breath testing instrument known as the Draeger Alcotest 7110 MK III-C (the "Draeger").

7. In particular, Mr. H submitted to a breath test on a Draeger Alcotest serially numbered ARNK-0089 ("Draeger 0089").

8. As part of its case in chief, and to establish that Mr. H was operating a motor vehicle on the alleged offense date with a blood alcohol concentration (""BAC") of greater than a 0.08, the District Attorney will introduce documentary evidence at trial which they purport will establish that the Draeger 0089 was operating properly at the time of Mr. H's breath test. [R.T.1, p.11-18].

9. In order to establish this proposition the District Attorney will offer into evidence a document commonly known as the Maintenance and Accuracy Check Records ("Appendix L") for the Draeger 0089 for a period of at least 30 days prior to and after Mr. H's breath test. [R.T.1, p.41: 23-25].

10. Appendix L will contain information that the Draeger 0089 was maintained in compliance with Title 17 of the California Code of Regulations during this time period.

11. By the introduction of Appendix L, the District Attorney will argue that it has satisfied its burden to establish the accuracy of the Draeger 0089 and therefore the validity of Mr. H's BAC derived from his breath test on October 18, 2007. [See, People v. Williams, 28 Cal.4th 408, 417 (2002)].

AUTOMATIC ACCURACY CHECK RECORDS

12. Title 17 mandates that every breath testing device such as the Draeger, which is used for evidential purposes must pass an accuracy check every 10 days or 150 subjects, whichever comes first. [R.T.1, p.15: 8-12].

13. In order to comply with Title 17, the San Mateo County Sheriff's Office Forensic Laboratory (the "Laboratory") has programmed each Draeger instrument that it maintains to perform an automatic accuracy check upon itself every Wednesday at 8:00 a.m. [R.T.1, p.15: 13-15].

14. The results from the automatic accuracy check are electronically stored within each Draeger instrument. [R.T.1, p.14: 12-20].

15. The Laboratory has a computer, commonly known as the Draeger Computer, which downloads via modem the results of the automatic accuracy check results for each Draeger instrument daily at 9:00 a.m. [R.T.1, p.14: 15-18; p.15: 15-16].

16. The results are stored on the Draeger Computer in what the Laboratory describes as "raw data." [R.T.1, p.14: 18-20].

17. Daily, at 10:00 a.m., the raw data results of the automatic accuracy checks are converted into a different format so that these results can be ported over onto a web based Draeger Portal which is accessible from any computer in the Laboratory's network. [R.T.1, p.14-15].

18. The Laboratory then prints a document in tabular form from the Draeger Portal titled Automatic Accuracy Check Results, which they assert is a representation of the raw data captured by the Draeger instrument during its weekly automatic accuracy check. [R.T.1, p.14: 1-4; p.15: 2-4].

19. The document titled Automatic Accuracy Check Results (the "Draeger Portal Printout") is contained in Appendix L. [R.T.1, p.56: 2-7; Binder , Tab 3, p.5].

APPENDIX 'L'

20. As stated in paragraph 9 above, Appendix L is a document titled Maintenance and Accuracy Check Records.

21. Each Draeger instrument maintained by the San Mateo County Sheriff's Office Forensic Laboratory (the "Laboratory") has a corresponding Appendix L.

22. An Appendix L is created monthly by the Laboratory for each Draeger instrument that it maintains. [Binder, Tab 3].

23. Completed versions of Appendix L are maintained at the District Attorney's Office and are available for review by defense counsel. [R.T.1, p.19: 8-10; Binder, Tab 3].

24. The face sheet of Appendix L contains a number of rows and columns pertaining to automatic, manual and interactive accuracy check records for the Draeger 0089. [R.T.1, p.77: 1-8; Binder, Tab 3, p.1].

25. The face sheet of Appendix L is created using Microsoft Word. [R.T.1, p.56: 18].

26. The information contained on the face sheet of Appendix L is manually transcribed by CR from the Draeger Portal Printout. [R.T.1, p.12: 20-23; p.14: 1-4; p.56: 2-7; Binder, Tab 3, p.5].

27. This transcription typically occurs during the first week of the month. [R.T.1, p.12: 12-13; p.56: 2-7].

28. For example, the automatic accuracy check records for the month of September will usually be transcribed by Ms. R during the first week of October. [R.T.1, p.12: 13-15].

29. Ms. R's transcription of the Draeger Portal Printout to the face sheet of Appendix L is reviewed for accuracy by one of her peers before being turned over to defense counsel. [R.T.1, p.56: 6-7].

30. Presently, the only access that defense counsel has to the automatic accuracy check results of the Draeger 0089 is from the formatted and transcribed information found in the Draeger Portal Printout and the face sheet of Appendix L.

31. Defense counsel does not have access to the raw data results of the automatic accuracy checks which are stored on the Draeger Computer.

32. This is significant because the only time that the Laboratory has ever compared the raw data results of the automatic accuracy checks for the Draeger 0089 or any other Draeger instrument with the Draeger Portal Printout was when the Draeger instruments were first deployed by the Laboratory in December 2004. [R.T.1, p.38: 3-21].

33. The District Attorney argues that defense counsel's preclusion of access to these records is warranted because it claims that it will take the Laboratory too much time to produce the raw data records.

34. However, the Laboratory has conceded that the raw data results from the automatic accuracy checks are accessible merely by isolating these records by date and instrument number from the Draeger Computer by using a software program called the MA-7110. [R.T.1, p.39-40].

35. Moreover, the Laboratory admits that the raw data records for a relevant time period of sixty days would encompass a total of 8 to 10 records and each require just a single page of paper to print. [R.T.1, p.64: 11-13].

36. Not surprisingly, the raw data stored on the Draeger Computer contains substantially more information than the limited information produced for defense counsel's review of the Draeger Portal Printout contained in Appendix L. [R.T.1, p.59-61; p.64-72].

37. For example, the raw data page contains information concerning: (1) Firmware version; (2) Data blocks to send; (3) BRAC display units; (4) Passwords and serial number; (5) Calibration number; (6) Calibration date; (7) Test number; (8) Location; (9) Record type; (10) Test number; (11) Calibration number; (12) Date; (13) Tech's last name; (14) Tech's middle initial; (15) Title; (16) Error; (17) Calibration check start time; (18) Calibration check null one time; (19) Pre-blank results; (20) Calibration gas blow time; (21) Calibration gas measure time; (22) IR results; (23) EC results; (24) Calibration check null two times; (25) Post blank; (26) Simulator temperature; (27) Gas type; (28) Gas inlet; (29) Target concentration; (30) Relative tolerance; (31) Absolute tolerance; (32) Pretest diagnostic check; (33) Post test diagnostic check; and (35) Service notes. [R.T.1, p.59-61; p.64-72].

38. Whereas, the Draeger Portal Printout merely reflects: (1) Serial number; (2) Date and time; (3) Tech last name; (4) Standard IR; (5) Standard EC; and (6) Pre/Post Diagnostic. [Binder, Tab 3, p.5].

39. Notably, the Draeger Portal Printout does not contain any notation of error code messages documented by the Draeger instrument during an automatic accuracy check, even though the raw data records stored on the Draeger Computer does. [R.T.1, p.68: 8-14].

HEARING UNDER PENAL CODE §§ 1054 ET SEQ. FOR RAW DATA RECORDS

40. In order to discover the validity of the BAC result obtained as a result of Mr. H's breath test, Mr. H requested the raw data records of the Draeger 0089's automatic accuracy check results for the months of September 2007–November 2007 from the District Attorney's Office. [R.T.1; p.48: 24-26; p.49: 12-14].

41. Mr. H made this request to the District Attorney via Penal Code § 1054 et seq., and argued his entitlement to these records as well under the Due Process Clause and the Sixth Amendment of the United States Constitution, and Evidence Code § 721.

42. The District Attorney's Office disagreed, and Mr. H was forced to bring a motion to compel discovery, which was heard on September 24, 2008 before the Honorable ABC.

43. In denying the motion to compel discovery, the trial court only addressed Penal Code § 1054 et seq. [R.T.1, p. 87-90].

44. In denying the request under § 1054(e), the court stated in essence that since there were no error code messages for the automatic accuracy check records in Appendix L corresponding to the Draeger 0089 in this case that Mr. H should not be entitled to those records. [R.T.1, p. 88: 4-14].

45. But, the court didn't even have Appendix L for the Draeger 0089 before it in evidence.

46. In fact, when the District Attorney asked Ms. R "whether there is anything to indicate to you on the automatic accuracy check printout that there were any errors with the instrument that was used" Ms. R admitted

that she "would have to review them, and unfortunately I don't have all of them in front of me." [R.T.1, p.78: 5-11].

47. Following that question and response, the court even interjected that "that isn't really the issue before us." [R.T.1, p.78: 12-13].

48. Thereafter, the court also denied the defense access to the discovery it requested under § 1054(f) because the court held that the raw data records of the accuracy check results do not fall within the definition of "original documentation," as described in Hines v. Superior Court, 20 Cal.4th 1818, 1822 (1993, 4th App.Dist.). [R.T.1, p.88-89].

49. Accordingly, the court expressed its interpretation of Hines as being limited to handwritten notes [R.T.1, p.88-89].

HEARING UNDER PENAL CODE UNDER §§ 1326 - 1327 FOR RAW DATA RECORDS

50. Mr. H issued a subpoena duces tecum ("SDT") to CR to bring the raw data records to the hearing on his motion to compel discovery. [R.T.1, p.59: 4-6].

51. Mr. H did so just in case the trial court ruled that the Laboratory was a third party for the purposes of maintaining and producing these records.

52. County Counsel filed a motion to quash Mr. H's SDT, and a hearing on the motion to quash was held on December 8, 2008 before the Honorable ABC .

53. At the hearing, Mr. H argued that the SDT was the proper vehicle for discovery because the Laboratory was a 3rd party with respect to the raw data results of the automatic accuracy check records under People v. Barrett, 80 Cal.App.4th 1305, 1317 (2000, 4th App.Dist.). [R.T.2, p.6: 15-19].

54. Mr. H's argument was based upon the fact that these records exist regardless of whether Mr. H was ever arrested or submitted to a breath test. [R.T.2, p.6: 15-19].

55. However, the court granted the motion to quash. [R.T.2, p.10: 18-19].

56. Again, Mr. H was left without any means for discovering the raw data records of the automatic accuracy check results corresponding to the Draeger 0089 for the months of September 2007–November 2007.

57. At no point prior to or during the hearing on the motion to compel discovery or the motion to quash SDT did Mr. H or his counsel ever view or gain access to the subpoenaed raw data records.

RELIEF REQUESTED

58. The parties directly affected by the instant proceeding now pending in respondent court are petitioner, by and through counsel; respondent court; and Real Party in Interest, the People of the State of California.

59. By this petition, an order is sought from this Court mandating respondent court to order the raw data records produced under either Penal Code § 1054 et seq., or Penal Code §§ 1326 -1327.

60. All the proceedings about which this petition is concerned have occurred within the territorial jurisdiction of respondent court and of this Court.

61. No other petition for a writ has been made by, or on behalf of, this petitioner relating to this matter.

62. Moreover, Petitioner has exhausted his remedies in the trial court below by seeking the raw data records via both §§ 1054 et seq., and §§ 1326 -1327.

63. Petitioner has no other plain, speedy or adequate remedy at law in this case because by this writ Petitioner does not have to show prejudice,

whereas he will not be entitled to relief on appeal after judgment without showing prejudice. [See, People v. Pompa-Ortiz, 27 Cal.3d 519, 528 (1980)].

64. Writ relief is appropriate when claims involve the scope of pretrial discovery. [Bravo v. Cabell, 11 Cal.3d 834, 837 (1974)].

65. A writ of mandate is available to both the prosecution and the defendant to enforce a right to pretrial discovery. [Hill v. Superior Court, 10 Cal.3d 812 (1974); Reid v. Superior Court, 55 Cal.App.4th 1326, 1332 (1997)].

WHEREFORE, petitioner prays that:

66. An alternative writ of mandate issue directing and requiring respondent court to act in the manner set forth in paragraph 59 above, or, in the alternative, to show cause before this Court at a specified time and place why the relief prayed for should not be granted; and that,

67. A stay of proceedings issue restraining respondent court from proceeding on this action until all matters before this Court are terminated; and that,

68. If this Court deems that a writ of mandate is not the appropriate writ in this action and that instead a writ of habeas corpus or writ of prohibition is the appropriate writ, that this Court deem the above-mentioned writ as either of the two appropriate writs. [See, Peck's Liquors, Inc., v. Superior Court, (1963) 221 Cal.App.2d 772, 775]; and that

69. This Court grant Petitioner such other and further relief as may be appropriate and just.

Dated: _____

Respectfully submitted by,

_____

Nafiz M. Ahmed, Attorney for Petitioner, CH

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

Paragraphs 1–56 of the Petition for Writ of Mandate are hereby incorporated by reference.

II. THE RAW DATA RECORDS SHOULD HAVE BEEN PRODUCED PURSUANT TO PENAL CODE § 1054.1(F).

Under Hines v. Superior Court, Mr. H is entitled to the raw data records of the automatic accuracy test results for the Draeger 0089 that are stored on the Draeger Computer. [See, Hines v. Superior Court, 20 Cal.4th 1818 (1993, 4th App.Dist.)]. In Hines, the court interpreted the defendant's duty of disclosure under Penal Code § 1054.3(a) as follows:

"It is our conclusion that the statutory phraseology of 'reports or statements … including the results of … examination, scientific tests, experiments or comparisons which the respective parties intend to offer in evidence …' reasonably should include the original documentation of the examinations, tests, etc. Original documentation, including handwritten notes if that be the case, would seem to be the best evidence of the test, experiment or examination. An expert should not be permitted to insulate such evidence from discovery by refining, retyping or otherwise reducing the original documentation to some other form." [Hines at 1822].

Penal Code §§'s 1054.3(a) and 1054.1(f) are "virtually the same." [Hines at 1824; Izazaga v. Superior Court, 54 Cal.3d 356, 377 (1991) ("near mirror-image symmetry under California's new discovery chapter)]. Thus, what the defense is required to produce under § 1054.3(a), the prosecution is clearly required under § 1054.1(f) of the Reciprocal Discovery Statutes to produce the same.

Here, the testimony from the Laboratory was clear that the Draeger 0089 is programmed to perform an automatic accuracy check once a week. The results of this check is then stored on the Draeger Computer as "raw data." The raw data of a single automatic accuracy check can be easily located on the Draeger Computer by using the MA-7110 software program to search

for a particular instrument number and date. This data can then be printed onto just a single sheet of paper.

But, the trial court held that Mr. H is not entitled to this raw data under Hines because in its view this raw data does not fall within the definition of "original documentation" as set forth in that case. The trial court interpreted "original documentation" as referring only to handwritten notes. Apparently, with respect to the phrase "original documentation, including hand written notes if that be the case" the court interpreted the word "including" as a limitation. [Hines at 1822]. However, the position taken by the trial court was clearly erroneous. As a result of the trial court's ruling, Mr. H was only permitted access to the formatted and substantially truncated accuracy check information that appears in the Draeger Portal Printout and which is transcribed into the face sheet of Appendix L. Such a result undeniably stands at direct odds with the mandate of Hines, which is that an expert should not be permitted to insulate the results of discoverable information under § 1054 et seq. by "refining, retyping or otherwise reducing the original documentation into some other form." Since the trial court has granted the Laboratory permission to do what is prohibited, a writ of mandate should issue directing the trial court to follow Hines, and to order the District Attorney to produce the raw data records .

III. IN THE ALTERNATIVE, MR. H IS ENTITLED TO THE RAW DATA RECORDS UNDER PENAL CODE §§ 1326 - 1327.

A single governmental entity may be both an investigative agency within the meaning of § 1054, as well as, a third party for purposes of §§ 1326 and 1327. [People v. Barrett, 80 Cal.App.4th 1305, 1317 (2000, 4th App. Dist.)]. Barrett confers upon such an agency a "hybrid status." [Barrett at 1317]. Whether a particular agency is an investigative agency or a 3rd party for purposes of discovery depends upon the type of discovery sought from the agency. [Id. at 1317-1319]. Thus, Barrett teaches that a governmental entity is treated as part of the prosecution team only with respect to discovery sought from its particular investigation of the case against the defendant, and, not from the records that it maintains or creates independently and regardless of the defendant's case. [Id. at 1317-1319].

In this case, the Draeger 0089 performed an automatic accuracy check on itself and its results were stored as raw data on the Draeger Computer by the Laboratory independent of the fact that Mr. H was arrested on October 18, 2008. Therefore, with respect to Mr. H's individual breath test results, the Laboratory is an investigative agency. But, with respect to the automatic accuracy check results that are collected by the Laboratory for the Draeger 0089 for the time period before and after Mr. H's breath test, the Laboratory is a 3rd party. Accordingly, since County Counsel's Office failed to establish any privilege for withholding the raw data in its motion to quash SDT, this Court should issue of writ of mandate directing the trial court to order the Laboratory to produce the subpoenaed records.

IV. CONCLUSION

An alternative writ of mandate should issue by this Court directing either the District Attorney or the Laboratory to produce the raw data records for the automatic accuracy check results of the Draeger 0089 for the months of September 2007–November 2007.

Dated: _____

Respectfully submitted by,

_____

Nafiz M. Ahmed, Attorney for Petitioner, CH

PROOF OF SERVICE

I, Nafiz M. Ahmed, am a citizen of the United States and a resident of the State of California. I declare that I am over 18 years of age, am not a party to the within case; my business address is 600 Allerton Street, Suite 201, Redwood City, CA 94063.

On January 20, 2009 I served the following documents:

REQUEST FOR STAY; PETITION FOR ALTERNATIVE WRIT OF MANDATE DIRECTING TRIAL COURT TO ORDER PRODUCTION OF DISCOVERY UNDER PENAL CODE § 1054 ET SEQ., OR IN THE ALTERNATIVE, PENAL CODE §§ 1326–1327; MEMORANDUM

James P. Fox
District Attorney
San Mateo County
1050 Mission Road
South San Francisco, CA 94080

Hon. ABC
Hall of Justice
400 County Center
Redwood City, CA 94063

[X] On the parties in this action by personal delivery.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: _____ Signature: _____

APPENDIX H

OPPOSITION TO MOTION TO QUASH SUBPOENA *DUCES TECUM*

NAFIZ M. AHMED (State Bar No. 240069)
AHMED AND SUKARAM, ATTORNEYS AT LAW
600 Allerton Street, Suite 201
Redwood City, CA 94063
Telephone: (650) 299-0500
Facsimile: (650) 299-0510

Attorney for Defendant
CH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

CH,
Defendant.

Case No.: SMXXXXXXX

DEFENDANT'S OPPOSITION TO AMENDED MOTION OF SAN MATEO COUNTY SHERIFF MUNKS TO QUASH SUBPOENA DUCES TECUM FOR FORENSIC LABORATORY RECORDS; DECLARATION OF NAFIZ M. AHMED; PROPOSED ORDER

Hearing Date: December 8, 2008
Dept: 22
Time: 9:00 a.m.
Honorable: ABC

I. STATEMENT OF FACTS

THE SUBPOENA DUCES TECUM

On September 12, 2008, defendant's counsel, Nafiz M. Ahmed prepared a subpoena duces tecum ("SDT") that he caused to be issued and served on September 16, 2008 to the San Mateo County Sheriff's Office Forensic Laboratory (the "Laboratory"). The SDT was served by KN on MR of the Sheriff's Office. The discovery requested by the SDT was to be produced in court on September 24, 2008 at 9:00 a.m. for the defendant Mr. H's Hearing on Motion to Compel Discovery. No dispute exists as to the proper service of the SDT in this case.

The SDT requested that the Laboratory provide the Court with the "[u]ntranscribed and original printed version of the electronic automatic accuracy check records for the Draeger Alcotest 0089 for the months of September 2007 through November 2007." The SDT sought identical materials to that which was the subject of Mr. H's formal discovery motion under Penal Code § 1054 et seq. on September 24, 2008. The SDT was issued in conjunction with the formal discovery motion because defendant did not know whether the Court would rule that the discovery requested was properly or improperly sought under Penal Code § 1054 et seq. [See, Decl. Nafiz M. Ahmed, p. 3: 12 - 13]. Therefore, in case the Court ruled that the Laboratory was a 3rd party for purposes of the discovery sought, the defendant intended upon having a validly issued and served SDT in place in order to receive the discovery requested.

At the hearing on the formal discovery motion this Court did not reach the issue of whether the Laboratory was an investigative agency or a 3rd party for purposes of the discovery motion. Instead, the Court ruled that the discovery requested was not subject to production under Penal Code §§ 1054.1(e) & 1054.1(f). [R.T. p. 87–89]. Therefore, the Court indicated that since the SDT was a separate issue from the formal discovery motion that the defendant would have to return to court to have the issue heard. [R.T., p. 91: 18–19; p. 92: 13–26; p. 93: 1-2]. At no time did the Court rule, state or intimate that the issue concerning the SDT had already been decided.

THE MOTION TO QUASH SUBPOENA DUCES TECUM

Prior to the September 24, 2008 deadline for the production of the subpoenaed materials, the County Counsel's Office did not contact either defense attorney on this case to discuss the SDT. The County Counsel's Office did not file a motion to quash Mr. H's SDT prior to September 24, 2008. Nor did it send a Deputy County Counsel to appear on behalf of the Laboratory on September 24, 2008 to express any objection to Mr. H's SDT.

Following the conclusion of the September 24, 2008 hearing, the Deputy District Attorney assigned to Mr. H's case called the County Counsel's Office and asked that a Motion to Quash Mr. H's SDT be filed. October 2, October 8, and November 19, 2008 were all dates set by the Court for either release of records pursuant to SDT or Hearing on Motion to Quash. Notably, the County Counsel's Office failed at every one of these occasions to file a Motion to Quash Mr. H's SDT. Moreover, prior to these dates, County Counsel's Office never contacted defense counsel either by telephone or written correspondence to express any objection to Mr. H's SDT in this case.

On November 19, 2008, Ms. Woodward appeared in court for the first time in this case as the Deputy County Counsel representing the Laboratory. She requested more time from the Court to file a Motion to Quash, and her request was granted. A hearing date was set for December 8, 2008 at 9:00 a.m. Importantly, Mr. H did not waive formal notice of any anticipated Motion to Quash SDT. On November 20, and November 21, 2008, respectively, the Deputy County Counsel caused the Motion to Quash and Amended Motion to Quash SDT to be mailed to defendant.

II. MEMORANDUM OF POINTS AND AUTHORITIES

CODE OF CIVIL PROCEDURE § 1008 DOES NOT APPLY IN A CRIMINAL CASE.

County Counsel's Office asserts in its Motion to Quash that defendant's "refusal to withdraw the subpoena duces tecum must be considered a motion to reconsider the Court's Order." [Emphasis added, Motion to

Quash, p. 5: 5-6]. Following this reasoning, the Deputy County Counsel asserts that Code of Civil Procedure § 1008 has been violated. She therefore represents to the Court that under § 1008(d) contempt and sanctions are warranted, and she asks this Court to issue an order of contempt.

But, no legal authority is cited to support the position taken by the Deputy County Counsel. This is likely because California case law, as recent as 2004, in Alvarez v. Superior Court, states that the "limitations found in Code Civ. Proc., § 1008 on motions for reconsideration in civil cases do not preclude a trial court in a criminal prosecution from reconsidering its previous ruling." [Alvarez v. Superior Court, 117 Cal.App.4th 1107, 1111 (2nd App. Dist., 2004) citing to People v. Castello, 65 Cal.App.4th 1242, 1246–1250 (4th App. Dist., 1998)]. The reasoning behind the rule is that, "[i]n general, to decide the proper rule of criminal procedure by reliance upon rules of civil procedure 'would be to ignore the underlying rights of the presumption of innocence and proof beyond a reasonable doubt." [Castello at 1246].

Since 1998, the law has been unambiguous that section 1008 does not apply to criminal cases. [Castello at 1247]. Castello decreed that "only those parts of the Code of Civil Procedure which are expressly made applicable to penal actions apply to criminal cases … [and] section 1008 is not so incorporated." [Castello at 1247]. But, even assuming that § 1008 applied, Castello teaches that section 1008 is inapplicable if the issue of law is the same "but the motion is different." [Castello at 1249]. Here, it should be undisputed, or at least unequivocal that a motion to compel is different than a subpoena duces tecum and a subpoena duces tecum is different than an opposing party's motion to quash a validly issued and served subpoena duces tecum—the issues of law in the latter example aren't even the same.

THE FORENSIC LABORATORY IS A HYBRID AGENCY AND MR. H'S SDT IS THE PROPER DISCOVERY TOOL FOR THE DRAEGER 0089'S AUTOMATIC ACCURACY CHECK RECORDS WHICH EXIST INDEPENDENTLY AND REGARDLESS OF MR. H'S DUI.

People v. Barrett is the seminal post Proposition 115 California case on whether discovery is governed under Penal Code § 1054 et seq., or whether discovery is governed by some other method, such as by statute, i.e., Penal

Code §§ 1326 and 1327 (3rd party discovery - subpoena duces tecum]. [People v. Barrett, 80 Cal.App.4th 1305 (4th App. Dist., 2000)]. Barrett teaches that a single entity may be both an investigative agency within the meaning of § 1054, as well as, a third party for purposes of §§ 1326 and 1327. [Barrett at 1317]. Barrett confers upon such an agency a "hybrid status." [Id. at 1317]. Whether a particular agency is an investigative agency or a 3rd party depends upon the type of discovery sought from the agency. [Barrett at 1317–1319]. The facts of Barrett are illustrious.

In Barrett, the defendant, who was serving a life sentence for murder, was charged with the April 9, 1996 murder of his cellmate in the administrative segregation unit at Calipatria State Prison. [Barrett at 1309]. In pre-trial discovery, the defendant in Barrett requested from the prosecution 73 categories of documents - 17 of which involved records maintained by the California Department of Corrections ("CDC") and which the trial court ordered that the prosecution produce, including amongst other things: (1) notes of interviews from the murder investigation; (2) "Tier Yard" policy; (3) records of assaults from January 1992 to present; (4) records identifying weapons manufactured by inmates and found at the prison during January 1992 through April 1996, etc. [Barrett at 1310].

In its petition for writ of prohibition, the District Attorney contended that it had no obligation to produce the discovery the trial court had ordered it to. [Barrett at 1311]. The Fourth Appellate District agreed in part. [Id. at 1317]. The Barrett court reasoned that the threshold issue on whether the district attorney must produce the discovery requested is to determine the status of the CDC, i.e., whether it is an investigative agency or a 3rd party. [Id.]. The Barrett court held that with respect to the CDC's role in "interviewing crime witnesses, preparing reports and performing other investigative tasks in connection with the homicide that took place inside the prison" the CDC is clearly an investigative agency and part of the investigative team. [Id. at 1317].

However, the Barrett court acknowledged that the CDC first and foremost supervises, manages and controls state prisons, including Calipatria. [Barrett at 1317]. With respect to its administrative and security responsibilities in housing California felons while they serve their sentences, the Barrett court declared that the CDC is not part of the prosecution team; and thus, in this

regard, it is a distinct and separate 3rd party governmental entity from the District Attorney. [Id.]. Therefore, the Barrett court held that under § 1054 et seq. the defendant "can only compel discovery of materials generated or maintained by the CDC relating to its investigation of the April 9, 1996 homicide." [Barrett at 1317].

To the extent that the defendant in Barrett sought records that the CDC maintained in the regular course of running Calipatria State Prison, regardless of whether the information sought was created before or after the homicide, the defendant was trying to obtain material from a third party. [Barrett at 1318]. The Barrett court reaffirmed that § 1054 does not apply to discovery from 3rd parties, and demonstrated that this proposition of law holds true even if the 3rd party is also an investigative agency. [Id. at 1318]. Thus, the rule learned from Barrett is that a governmental entity is treated as part of the prosecution team only with respect to discovery sought from its particular investigation of the case against the defendant, and, not from the records that it maintains or creates independently and regardless of the defendant's case.

Here, the issue has always been and remains quite simple. The issue is, are the automatic accuracy records for the Draeger 0089, which exist independently from Mr. H's breath test, and maintained by the Laboratory regardless of Mr. H's arrest and breath test, discovery from a 3rd party or from an investigative agency working on the prosecutions behalf? The answer under Barrett is that with respect to the discovery sought here, the Laboratory is patently a 3rd party. Mr. H's SDT is therefore the proper vehicle for discovery here; and, since the records sought here are not privileged and not claimed to be privileged, they are accordingly subject to disclosure to Mr. H by this Court on December 8, 2008 at 9:00 a.m.

As an aside, County Counsel's citation to Walters v. Superior Court, 80 Cal.App.4th 1074 (2000), as well as, her request for judicial notice that the Laboratory is part of the Sheriff's Office, simply do not shed any light on the issue here. First, Walters is overwhelmingly irrelevant to this case—Mr. H has never contended that the "Santa Ana Police Department [or here CHP] is a 3rd party holding evidence on behalf of the court." [Walters at 1076]. Moreover, with respect to her request for judicial notice, the lesson learned from Barrett, and from the California Supreme Court in People v.

Zambrano is that merely because the Laboratory has the word Sheriff associated with it doesn't classify it for all purposes as an investigative agency. [People v. Zambrano, 41 Cal.4th 1082, 1133 (2007) (A Sheriff can be just a mere jailer, and not an investigative agency within the meaning of Brady v. Maryland, 373 U.S. 83 (1962) or § 1054(e).)].

III. CONCLUSION

A subpoena duces tecum is properly issued to a third party. Here, the Laboratory is a third party with respect to automatic accuracy check records for the Draeger 0089 for the months of September 2007–November 2007. These records exist independently and regardless of whether Mr. H was ever arrested or breath tested on the Draeger 0089. Accordingly, Mr. H's SDT to the Laboratory for these records is proper and since these records are not subject to any privilege, this Court must disclose them to Mr. H on December 8, 2008 at 9:00 a.m. over County Counsel's objection.

Dated: April 23, 2009

Respectfully submitted,

By: _____
Nafiz M. Ahmed, Attorney for Defendant, CH

PROOF OF SERVICE

I, Nafiz M. Ahmed, am a citizen of the United States and a resident of the State of California. I declare that I am over 18 years of age, am not a party to the within case; my business address is 600 Allerton Street, Suite 201, Redwood City, CA 94063.

On December 3, 2008 I served the following documents:

DEFENDANT'S OPPOSITION TO AMENDED MOTION OF SAN MATEO COUNTY SHERIFF MUNKS TO QUASH SUBPOENA DUCES TECUM FOR FORENSIC LABORATORY RECORDS; DECLARATION OF NAFIZ M. AHMED; PROPOSED ORDER

County Counsel
County of San Mateo
400 County Center, 6th Floor
Redwood City, CA 94063

Office of the District Attorney
County of San Mateo
400 County Center, 4th Floor
Redwood City, CA 94063

[X] On the parties in this action by personal delivery.

I declare under the penalty of perjury that the foregoing is true and correct.

_____ _____

Date Signature

APPENDIX I

REPLY TO DISTRICT ATTORNEY'S OPPOSITION TO MOTION TO COMPEL DISCOVERY

NAFIZ M. AHMED (State Bar No. 240069)
AHMED AND SUKARAM, ATTORNEYS AT LAW
600 Allerton Street, Suite 201
Redwood City, CA 94063
Telephone: (650) 299-0500
Facsimile: (650) 299-0510

Attorney for Defendant
CH

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

CH,
Defendant.

Case No.: SMXXXXXXX

DEFENDANT'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL DISCOVERY OF ORIGINAL AND UNTRANSCRIBED BREATH TEST RECORDS UNDER PENAL CODE § 1054 ET SEQ.

Hearing Date: September 24, 2008
Dept: PH
Time: 9:00 a.m.
Honorable: TBD

I. STATEMENT OF FACTS

CORRECTIONS TO THE DISTRICT ATTORNEY'S ALLEGED STATEMENT OF FACTS

The District Attorney incorrectly summarizes the statement of facts concerning the Defendant's requests for discovery issued on June 25, 2008 , July 8, 2008 and July 25, 2008 . It is apparent from the District Attorney's Opposition that this mischaracterization is not intentional. Rather, it is merely the product of the District Attorney's misunderstanding of the discovery requests in this case.

Due to the District Attorney's misunderstanding of the discovery requests in this case, Mr. H's informal discovery request efforts have been mischaracterized as a confused and blunderous attempt by him to pursue discovery that he had previously deemed satisfied. However, quite the opposite is true. All along, Mr. H has merely sought the original documentation for the data contained in Appendix L [Maintenance and Accuracy Check Records] of the BAOP.

To briefly summarize, there are three types of records that correspond to the data referenced by Appendix L. The first is electronic data. This electronic data is generated by the Draeger Alcotest itself and is uploaded into the Laboratory's server. This electronic data is visible on the Laboratory's server only by way of Draeger Safety Diagnostic, Inc.'s proprietary software. The electronic data includes records such as, but not limited to, electronic automatic accuracy check records.

The second type of record is a printed record. The Laboratory maintains a printed version of the electronic data that is accessible only by Draeger's proprietary software. While it is not clear to what extent these printed records encapsulate the electronic data generated by any particular Draeger Alcotest, the Laboratory has disclosed that it prints the electronic automatic accuracy check records of its individual Draeger Alcotests. These printed records are stored on the Laboratory's premises. However, with respect to the Laboratory's production of these records, the Laboratory wrote on August 19, 2008 that "a printout of the electronic version accessed through the proprietary software would require excessive work by the laboratory.

Therefore, that documentation is not included in this response." [Exhibit 'B' of Defendant's Motion to Compel Discovery].

The third type of record corresponding to Appendix L is transcribed data. The automatic accuracy check records produced by the Laboratory in Appendix L consist solely of transcribed data. The automatic accuracy check records in Appendix L are transcribed from a printed document generally attached to Appendix L, which is titled "Auto Accuracy Check Results." The one page "Auto Accuracy Check Results" document is produced monthly by the Laboratory and is available at the District Attorney's for review by defense counsel. Ironically, the Laboratory does not assert that the printed "Auto Accuracy Check Results" is accessed using Draeger's proprietary software and then printed. Therefore, it is presently unknown where the "Auto Accuracy Check Results" document originates from, how it has been refined, and even whether it is itself a transcribed document .

THE DISCOVERY REQUESTS

On May 1, 2008, Mr. H requested, among other things, the following discovery:

"All original documentation, including hand written notes for the maintenance and calibration records of Draeger Alcotest 7110 MK III-C serial number ARSA—0089 ("Draeger—0089") for the months of September 2007–November 2007. This request shall encompass, but is not limited to Appendix L [Maintenance and Accuracy Check Records] of the January 31, 2005 San Mateo County Sheriff's Office Forensic Laboratory Draeger Alcotest 7110- MK III-C Breath Alcohol Operating Procedures (the "BAOP")."

Because Mr. H had not received any discovery from the District Attorney's Office as of June 25, 2008, Mr. H repeated the same request to the District Attorney on this date, with minimal modification.

On July 8, 2008, Mr. H by and through his counsel, contacted Ms. CR of the Laboratory. Ms. R agreed that the electronic version of the automatic accuracy check records are the original documentation of the automatic

accuracy check results. However, Ms. R advised that the Laboratory would not produce the electronic version of the automatic accuracy check records because Mr. H lacked access to Draeger's proprietary software to view them. Yet, she did disclose that the Laboratory prints a copy of the electronic accuracy check records which are stored at the Laboratory, and which are not presently being provided to defense counsel.

Because Mr. H, by and through his counsel, had already been denied access by Draeger Safety Diagnostics, Inc. to its proprietary software to view the electronic accuracy check records, Mr. H abandoned his effort to receive the electronic accuracy check data. Therefore, in a letter dated, July 8, 2008, Mr. H wrote to the District Attorney that since he was "unable to receive the original documentation (electronic version) of the automatic accuracy check records" for the months of September 2007–November 2007 "absent Draeger's proprietary software" he deemed "all previous informal discovery requests complied with."

On July 25, 2008, Mr. H made a new request for discovery pursuant to Penal Code § 1054 et seq. to the District Attorney. In his July 25, 2008 letter, Mr. H requested the "printed version of the automatic accuracy check records for the [Draeger 0089] for the months of September–November 2007." Mr. H made clear in this letter that he was not seeking the transcribed electronic accuracy check records already provided in Appendix L. Instead, he was seeking the untranscribed records that are not presently produced by the Laboratory. [Exhibit 'E'].

In hopes of avoiding an extensive discovery hearing, Mr. H requested the District Attorney's assistance in setting up a "meeting or conference call" between defense counsel and experts, Ms. R and the District Attorney to fully understand the reason behind the Laboratory's refusal to produce the printed version of the electronic accuracy check records. The District Attorney's Office advised that it is their policy not to set up such meetings, and then rebuffed this request. The last communication on this issue prior to the instant motion was by Ms. R on August 19, 2008, when she wrote that the Laboratory's reason for refusing to produce the printed version of the electronic accuracy check records is because "a printout of the electronic version accessed through the proprietary software would require

excessive work by the Laboratory." [Exhibit 'B' of Defendant's Motion to Compel Discovery].

II. MEMORANDUM OF POINTS AND AUTHORITIES

THERE IS NO "EXCESSIVE WORK" EXCEPTION TO THE DISTRICT ATTORNEY'S REQUIREMENT TO PRODUCE DISCOVERY UNDER PENAL CODE § 1054 ET SEQ.

Contrary to the District Attorney's assertion that counsel for Mr. H simply does not understand what he is asking for, Mr. H's counsel is unequivocally requesting a printout of the electronic accuracy check records accessed using Draeger's proprietary software for the Draeger 0089 for the months of September 2007–November 2007. The District Attorney refers to this documentation as the "computerized version" of the electronic accuracy check results that can be "manually [] printed." [See People's Opposition, p.5: 18-19]. Regardless of terminology, this information has not been provided to Mr. H, and is the subject of this motion.

It is apparent from each of our conversations with Ms. R that the District Attorney and counsel for Mr. H disagree as to whether the Laboratory already prints out the electronic accuracy check records accessed using Draeger's proprietary software and stores it on the Laboratory's premises. However, regardless of the correctness of the belief by either party, the legal framework for the analysis of whether Mr. H is entitled to these records remains unchanged. This discovery is subject to disclosure by the District Attorney under Penal Code § 1054.1(f) because it is the closest documentation that Mr. H can get to the original electronic accuracy check results absent Draeger's proprietary software. [See, Hines v. Superior Court, 20 Cal.App.4th 1818 (1993, 4th App.Dist.)].

Penal Code Section 1054 et seq. does not provide an exception to the District Attorney or the Laboratory to refuse to provide the printout of the electronic version of the automatic accuracy check records for the Draeger 0089 for the months of September 2007–November 2007 simply because the Laboratory claims that it would require excessive work by them. Penal Code § 1054.7 mandates that the District Attorney must disclose discovery to the defendant 30 days prior to trial under § 1054.1, "unless good cause is

shown why a disclosure should be denied, restricted, or deferred." [Cal. Pen. Code § 1054.7, (West 2007)]. By statute, "'Good cause' is limited to threats or possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." [Cal. Pen. Code § 1054.7, (West 2007)]. Clearly, excessive work by the Laboratory is not "Good cause" under § 1054.7 and the District Attorney has an obligation to produce the printed electronic accuracy check records to Mr. H. This Court must uphold Mr. H's right to the discovery requested here because it is "not at liberty to create new rules, untethered to any statute or constitutional mandate" which would except the District Attorney from producing the printed automatic accuracy check records. [Verdin v. Superior Court, 43 Cal.4th 1096, 1107 (2008)].

Furthermore, the Laboratory's claim that it would require "excessive work" to produce this discovery appears over exaggerated. Printing a document does not take excessive time; especially, if it has already been printed. The bulk of this "excessive work" appears to come from the Laboratory's anticipated need to redact information and then recompile the printed automatic accuracy check results into another transcribed document. It is entirely unclear as to why the Laboratory could not just print the electronic accuracy check records for the relevant time period from the Draeger, which the District Attorney described as "essentially a computer." [Opposition; page 5: 15]. Assuming that this is not possible, it is also unclear as to why a printed version of the electronic data needs to be redacted to begin with, and under what authority is that action authorized. It must be remembered that "[a]bsent some governmental requirement that information by kept confidential … the state has no interest in denying the accused access to all evidence that can throw light on issues in the case…" [People v. Riser, 47 Cal.2d 566, 586 (1956); 5 Witkin and Epstein, California Criminal Law, (3d ed. 2000) § 27, pp. 73-74].

III. CONCLUSION

The discovery requested by Mr. H is one step less removed from the original electronic accuracy check records than that data already produced by the Laboratory in Appendix 'L.' The District Attorney presents no case to the contrary that Mr. H is entitled to this discovery under Hines v. Superior Court. The United States and California Constitutions do not

mandate that Mr. H trust the District Attorney's experts that the results of their scientific tests which is reduced into some other form in Appendix 'L' and which allegedly demonstrate that he is guilty of violating Vehicle Code § 23152(b) are accurate and correct. In fact, Mr. H's Sixth Amendment and Due Process Rights under the United States Constitution must not be subverted to the convenience of the Laboratory's alleged work hours. Therefore, Mr. H hereby requests that this Court order the District Attorney to produce the untranscribed and original printed version of the electronic automatic accuracy check records for the Draeger Alcotest 0089 for the months of September 2007 through November 2007 to him.

Dated: April 23, 2009

Respectfully submitted,

By: _____
Nafiz M. Ahmed, Attorney for Defendant, CH

PROOF OF SERVICE

I, Nafiz M. Ahmed, am a citizen of the United States and a resident of the State of California. I declare that I am over 18 years of age, am not a party to the within case; my business address is 600 Allerton Street, Suite 201, Redwood City, CA 94063.

On September 22, 2008 I served the following documents:

DEFENDANT'S REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL DISCOVERY OF ORIGINAL AND UNTRANSCRIBED BREATH TEST RECORDS UNDER PENAL CODE § 1054 ET SEQ.

Office of the District Attorney
County of San Mateo
400 County Center, 4th Floor
Redwood City, CA 94063

[X] On the parties in this action by personal delivery.

I declare under the penalty of perjury that the foregoing is true and correct.

_____ _____

Date Signature

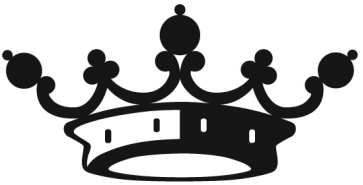
ASPATORE

www.Aspatore.com

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. C-Level Business Intelligence™, as conceptualized and developed by Aspatore Books, provides professionals of all levels with proven business intelligence from industry insiders—direct and unfiltered insight from those who know it best—as opposed to third-party accounts offered by unknown authors and analysts. Aspatore Books is committed to publishing an innovative line of business and legal books, those which lay forth principles and offer insights that when employed, can have a direct financial impact on the reader's business objectives, whatever they may be. In essence, Aspatore publishes critical tools for all business professionals.

Inside the Minds

The *Inside the Minds* series provides readers of all levels with proven legal and business intelligence from C-Level executives and lawyers (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. Each chapter is comparable to a white paper or essay and is a future-oriented look at where an industry, profession, or topic is heading and the most important issues for future success. Each author has been selected based upon their experience and C-Level standing within the professional community. *Inside the Minds* was conceived in order to give readers actual insights into the leading minds of top lawyers and business executives worldwide, presenting an unprecedented look at various industries and professions.



ASPATORE