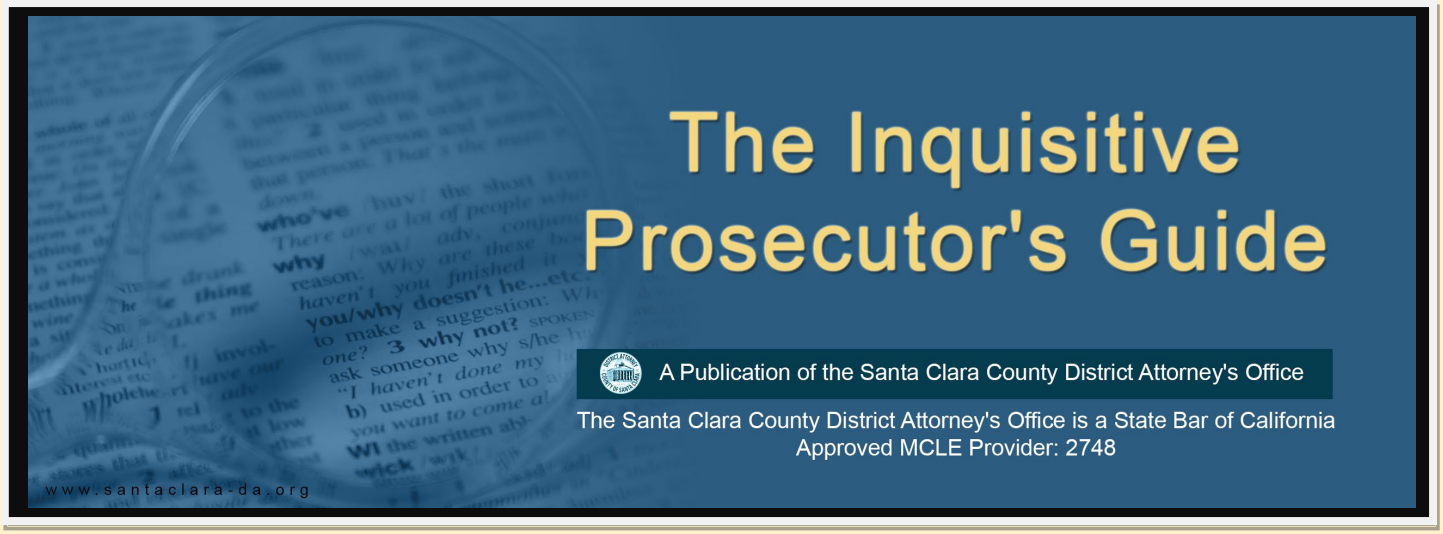

December 12, 2023

2023-IPG-58 (DISCLOSURE OF INFORMATION IN RAP SHEETS & OF EXCULPATORY INFORMATION IN GRAND JURY RECORDS)

This edition of the Inquisitive Prosecutor's Guide discusses prosecutorial obligations when it comes to the criminal history records (rap sheets) of defendants, victims, and witnesses in general as well as obligations to provide exculpatory information in grand jury records in light of the most recent Attorney General opinions on these obligations. (See 105 Ops.Cal.Atty.Gen. 146; 105 Ops.Cal.Atty.Gen. 157; 2023 WL 6009198, at p. *1 (Cal.A.G. Aug. 24, 2023).)

Plus, we will cover amendments to the statute governing disclosure of local rap sheets made by Assembly Bill 709 (going into effect on January 1, 2024) and its impact on Brady list disclosures.

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I. DISCOVERY OBLIGATIONS REGARDING CRIMINAL HISTORY RECORDS OF PROSECUTION WITNESSES AND DEFENDANTS

1. Are individual county prosecutors deemed to be in possession of Department of Justice (CII/CLETS) criminal history records of prosecution witnesses or defendants for purposes of their disclosure obligations?

"The Department of Justice, under the direction of the Attorney General, maintains a compilation of criminal history information that is officially known as 'state summary criminal history information' and is commonly known as an individual's 'RAP sheet.'" (105 Ops.Cal.Atty.Gen. 146, at p. *1 [citing to Pen. Code, § 11105(a)(2)(A)].)

***Editor's note:** "RAP" stands for "record of arrests and prosecutions." (See, e.g., Cal. Code Regs., tit. 15, § 2449.4 [Board of Parole Hearings].)

"This is a 'master record of information' pertaining to the identification and criminal history of a person, 'such as name, date of birth, physical description, fingerprints, photographs, dates of arrests, arresting agencies and booking numbers, charges, dispositions, sentencing information, and similar data about the person.'" (105 Ops.Cal.Atty.Gen. 146, at p. *1 [citing to Pen. Code, § 11105(a)(2)(A)].)

This record of information is sometimes referred to as a "CLETS" rap sheet (short for "California Law Enforcement Telecommunications System" because CLETS is the system by which local law enforcement agencies can request and access the criminal history. (**See *People* v. *Martinez*** (2000) 22 Cal.4th 106, 124-125 [discussing the CLETS systems and statutes relating to CLETS]; 105 Ops.Cal.Atty.Gen. 146 at p. *1.) It is also sometimes referred to as a "CII" record because someone authorized to use CLETS obtains criminal history information about a person does so by "entering into the computer a California Identification Index (CII) number." (**See *People* v. *Martinez*** (2000) 22 Cal.4th 106, 121.)

Are these rap sheets, which are maintained by an agency (i.e., the Department of Justice) that *does not* participate in any way in the investigation of county criminal prosecution, deemed to be in possession of a county prosecutor for purposes of a prosecutor's constitutional or statutory discovery obligations?

Ordinarily, prosecutors are not deemed to be in possession of information neither actually possessed nor known to any member of the prosecution team. (**See** generally ***In re Steele*** (2004) 32 Cal.4th 682, 696-697 ["a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information"].) And thus, a prosecutor "does not have a duty to search for or to disclose such material" in the possession of third-party law enforcement agencies who have no connection to the investigation or prosecution of the criminal charge against the defendant. (**See *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 903; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133; ***In re Steele*** (2004) 32 Cal.4th 682, 697.) And if nobody on the prosecution team is actually aware of information in a person's criminal history records, then under the general principles dictating when the prosecution is in possession of information – either for purposes of the prosecution's constitutional or statutory discovery obligations - the information possessed by the Department of Justice should not *technically* be deemed to be in possession of the prosecution team. However, ***an exception to this general rule has developed*** when it comes to criminal history records in databases that are easily (but only) accessible to prosecutors, and which are routinely checked by prosecutors preparing for a criminal prosecution. (**See** 105 Ops.Cal.Atty.Gen. 146 at p. *1 ["unlike the district attorney, defense counsel do not have direct access to CLETS"].)

For ***Brady*** purposes, California courts have held the prosecution to be in possession of information, *without considering whether the information is actually known to any member of the prosecution team*, when the information is found in criminal history records that are very easily and routinely accessed by the prosecution and which are not accessible to the defense. (**See *People* v. *Martinez*** (2002) 103 Cal.App.4th 1071, 1078 [prosecution has due process duty to check rap sheets of witnesses]; ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 177 [ruling evidence of witness misdemeanor convictions disclosable under ***Brady*** necessarily presumed convictions within possession of prosecution]; ***People* v. *Hayes*** (1992) 3 Cal.App.4th 1238, 1244 [ruling that evidence of victim's criminal convictions, pending charges, status of being on probation, acts of victim's dishonesty, and false reports of sexual assault were disclosable under ***Brady*** necessarily presumed convictions within possession of prosecution]; **see also *Briggs* v. *Raines*** (9th Cir. 1981) 652 F.2d 862, 865 ["The State concedes that failure to obtain and disclose a homicide victim's FBI rap sheet can constitute a *Brady* violation."]; ***United States* v. *Perdomo*** (3d Cir.1991) 929 F.2d 967, 971 [local criminal history rap sheet from Virgin islands was within possession of federal prosecution team because it was "readily available" to the prosecution]; ***Sutton* v. *Bell*** (E.D. Tenn. 2011)

2011 WL 1225891, *14, fn. 21 [in "certain cases courts have found knowledge outside the prosecution team's files may be imputed to the prosecutor or a duty to search may be imposed where a search for readily available background information is routinely performed, such as routine criminal background checks of witnesses"]; ***Bowling* v. *Com***. (Ky. 2002) 80 S.W.3d 405, 410-411 ["knowledge may be imputed to the prosecutor, or a duty to search may be imposed, *in cases where a search for readily available background information is routinely performed, such as routine criminal background checks* of witnesses" but "the government has no duty to disclose what it does not know and could not have reasonably discovered" and "[a]bsent a showing that the prosecution would have turned up an indictment pending in a different county *as part of a routine criminal background check*, knowledge of the indictment cannot be imputed upon the prosecution" emphasis added]; ***Hollman* v. *Wilson*** (3rd Cir. 1998) 158 F.3d 177, 181 [noting there is a duty to search "accessible files," but finding no discovery violation for failure to turn *over criminal records of a witness* where the information was overlooked because the witness was given two different criminal identification numbers and thus the missing information was not "readily available" to the prosecution]; ***People* v. *Stacy*** (unpublished) 2002 WL 475382, at *7 ["Because the CII rap sheet referenced out-of-state criminal contacts not disclosed and because the FBI rap sheet was easily obtainable, the prosecution should have obtained and turned over an FBI rap sheet to respondent's counsel."]; **see also *People* v. *Lopez*** (unpublished) 2016 WL 1244729 [treating CalGang database as equivalent to rapsheets]; **but see *In re State ex rel. Munk*** (Tex. App. 2014) 448 S.W.3d 687, 692-693 [*disagreeing* that prosecution is in possession of certain national criminal data bases just because prosecution has access to those databases, and noting "the fact that one may have access to information does not mean that the person has possession of all information that he or she could potentially access," and finding "access to information does not equate to knowledge that the information exists, which is a component under ***Brady***"].)

Similarly, for purposes of the statutory obligation under Penal Code section 1054.1 to disclose material 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," criminal history records that are routinely checked and which are reasonably and solely accessible to the prosecution are also deemed to be in the possession of the county prosecutor. (**See *People* v. *Little*** (1997) 59 Cal.App.4th 426, 428 ["an informal request for standard reciprocal discovery is sufficient to create a prosecution duty to disclose the felony convictions of all material prosecution witnesses if the record of conviction is 'reasonably accessible' to the prosecutor."]*; **see also *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335.)

Editor's note:** In coming to its conclusion that there is a duty to check and disclose felony convictions found in the criminal history records of a prosecution witness, the appellate court in ***People* v. *Little (1997) 59 Cal.App.4th 426 cited to the California Supreme Court decision in ***In re Littlefield*** (1993) 5 Cal.4th 122 for the proposition "that 'possession' includes information the prosecution possesses or controls, and encompasses information reasonably accessible to the prosecution." (***Little*** at p. 438.) As explained more fully in the 2022-IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline] at pp. 239-243, to the extent this language can be taken as suggesting that *any* information "reasonably accessible" to the prosecution is within the possession of the prosecution (as opposed to simply criminal history databases easily accessed and ordinarily checked), this suggestion is erroneous. If it were not, information reasonably available but unknown to the prosecution on the *entire Internet* would be deemed to be in the prosecution possession. (**See *People* v. *Hood*** [unreported] 2016 WL 4547854, at *3 [questioning whether ***Little*** remains good law in light of the California Supreme Court's subsequent interpretation of the plain language of the Criminal Discovery Act in ***People* v. *Whalen*** (2013) 56 Cal.4th 1, 65, fn. 27 and ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1131, 1133.) The ***Hood*** court noted that even if the holdings of ***Littlefield*** and ***Little*** remain good law, their holdings were "quite narrow" and "[n]either case purported to alter the principle that 'the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense'. . ." (***Hood*** at p. *3.; **see also *People* v. *Dorrough*** (unpublished) 2019 WL 3822004 at p. *5 [also suggesting that ***Littlefield*** and ***Little*** are no longer good law and finding them inapplicable where, "there is no evidence that the prosecutor was willfully choosing not to learn information or had special access to the information."]; **see also** 105 Ops.Cal.Atty.Gen. 146 ["unlike the district attorney, defense counsel do not have direct access to CLETS"].)

Criminal history records are the *only* type of record that has been deemed to be in the possession of the prosecution team in a published decision – notwithstanding the fact nobody on the prosecution team is *actually* aware that exculpatory evidence exists in that record.

Bottom line: County prosecutors *are* in possession of California Department of Justice criminal history records relating to prosecution witnesses.

2. Are individual county prosecutors deemed to be in possession of local criminal history records of prosecution witnesses or defendants for purposes of their disclosure obligations?

The same rationale for imputing constructive possession to the local prosecutor of the state criminal history records (**see** this IPG, section I-1 at pp. 2-5) applies equally, if not with greater force, to local criminal history records (**see** Pen. Code, § 13100-13370) that are routinely checked, and which are solely and reasonably accessible to members of the prosecution team. (**See also** this IPG, section I-7 at pp. 26-31 [discussing local rap sheets].)

3. *Can* or *must* local prosecutors provide the *full* state Department of Justice criminal history record of a charged criminal *defendant* to the attorney for the criminal defendant?

A. *Must* a local prosecutor provide the Department of Justice rap sheet of defendant to defense counsel?

California Penal Code section 11105 governs when the ***Attorney General*** of California has an obligation to furnish ***state*** summary criminal history information (i.e., California Department of Justice rap sheets). The statute lists categories of individuals who *must* be provided such information. Among the persons to whom the information must be provided if needed in the course of their duties are: "(9) A public defender or attorney of record when representing a person in a criminal case ***or a juvenile delinquency proceeding, including all appeals and postconviction motions,*** or a parole, mandatory supervision pursuant to paragraph (5) of subdivision (h) of Section 1170, or postrelease community supervision revocation or revocation extension proceeding ***if the information is requested in the course of representation***." (Pen. Code, § 11105(b)(9), emphasis added.)

The emphasized language was added (effective January 1, 2019) by Assembly Bill 2133. Prior to that amendment the statute simply required disclosure to criminal defense counsel of the RAP sheet information—if defense counsel was "otherwise authorized access by statutory or decisional law." (Former Pen. Code, § 11105(b)(9); 105 Ops.Cal.Atty.Gen. 157 at p. *3.)

Penal Code section 11105 does not *impose* any discovery obligations on *county* prosecutors to disclose *state* rap sheets. On its face, it states "(b) The *Attorney General* shall furnish state summary criminal history information to the following . . .". (Pen. Code, § 11105(b).) Any disclosure obligations regarding *local* rap sheets imposed on *county* prosecutors are governed by Penal Code sections 13300 et seq. (**See** this IPG, section I-7 at pp. 26-31.)

Moreover, the discovery statutes "provide that, unless production of information is mandated by statute, by the United States Constitution, or by the court, the district attorney need not produce the information for defense counsel." (105 Ops.Cal.Atty.Gen. 146 at p. *1; **see also** Pen. Code, § 1054.1.) And "[n]either the Constitution nor any statute requires the prosecutor to give a copy of defendant's RAP sheet to defense counsel." (*Ibid.*) Indeed, even before the enactment of section 1054.1, pre-Proposition 115 California cases held there was no duty for

local prosecutors to obtain defendant's state rap sheets. (**See e.g.**, ***People* v. *Webber*** **(**1991) 228 Cal.App.3d 1146, 1167 ["appellant's suggestion that his rap sheet information should have been provided is without merit since sections 11105, subdivision (b)(8) and 11120–11126 provide the means by which a defendant's attorney can obtain the defendant's rap sheet information. There is no reason for a prosecutor to do defendant's work for him."].)

This does not mean that if, for some reason, defendant's rap sheet contained exculpatory information, there would be no duty to provide that information. There would be - under Penal Code section 1054.1(e) – it's just that the duty does not extend to the rap sheet itself.

B. *May* a local prosecutor provide the Department of Justice rap sheet of defendant to defense counsel??

Whether local county prosecutors may voluntarily provide Department of Justice rap sheets is a different question than whether they *must* do so. The former question was addressed in a 2022 opinion from the California Attorney General which responded to a question posed by San Luis Obispo District Attorney Dan Dow. The question was: "During the criminal discovery process, may a district attorney voluntarily provide a public defender, or other defense counsel of record, with a copy of the adult or juvenile defendant's state summary criminal history information ("RAP sheet")? ((105 Ops.Cal.Atty.Gen. 146 at p. *1.) The Attorney General opined: "Yes. During the criminal discovery process, a district attorney may voluntarily provide a public defender, or other defense counsel of record, with a copy of the adult or juvenile defendant's own RAP sheet." (***Ibid***.)

> ***Editor's note:** "Opinions of the Attorney General, while not binding, are entitled to great weight. [Citations.] In the absence of controlling authority, these opinions are persuasive 'since the Legislature is presumed to be cognizant of that construction of the statute.'" (***California Assn. of Psychology Providers* v. *Rank*** (1990) 51 Cal.3d 1, 17.) An interpretation of a statute by the Attorney General is presumed to "have come to the attention of the Legislature, and if it were contrary to the legislative intent that some corrective measure would have been adopted ...". (***Ibid***.)

The Attorney General noted that while "California law forbids an authorized recipient of state summary criminal history information, such as a district attorney, from furnishing that information to an unauthorized recipient," "Penal Code section 11105(b)(9) makes defense counsel authorized recipients of such information for purposes of preparing for trial." (105 Ops.Cal.Atty.Gen. 146 at p. *2.) "As a general proposition, California law does not forbid secondary disclosure of this information among authorized recipients, i.e., from one authorized recipient to another authorized recipient, only from one authorized recipient to an

unauthorized recipient." (***Id***. at p. *3.) Thus, "as a general matter, nothing forbids a prosecuting attorney from voluntarily providing more discovery to defense counsel than strictly required." (***Id***. at p. *2.)

The Attorney General rejected the notion that "either section 11105(b)(9) itself, or another statute, section 11125, preclude[d] a district attorney from voluntarily providing RAP sheet information to defense counsel." (*Ibid*.) Penal Code section 11105(b)(9) does not impliedly prohibit dissemination by local prosecutors as there is nothing in the statutory language or pertinent legislative history to support an implied prohibition against secondary dissemination to defense counsel. (*Id*. at p. *4) Penal Code Section 11125 makes it a misdemeanor for a "person or agency" to "require or request another person to furnish a copy of a [criminal history record] or notification that a record exists or does not exist, as provided in Section 11124." (**See** 105 Ops.Cal.Atty.Gen. 146 at p. *5.) However, the legislative history of that statute shows the statute was not aimed at preventing defense counsel from seeking rap sheets, it was aimed at stopping a prospective employer or licensing agency from circumventing labor laws (i.e., Labor Code § 432.7) that prevent certain types of questions regarding an applicant's criminal history by coercing the applicant into procuring "a copy of his or her own RAP sheet or evidence of its non-existence." (105 Ops.Cal.Atty.Gen. 146 at pp. *5-*6.) "[T]he 'person' being referenced in the statute's opening phrase—'No person or agency shall'—is not the person who is the subject of the record being sought, but rather a prospective employer or licensing agency." (***Id***. at p.*6.)

C. Before voluntarily providing the Department of Justice rap sheet of a criminal defendant to the defendant's attorney, must any information in that rapsheet be redacted?

The same Attorney General opinion that addressed the question of whether a local prosecutor could provide the Department of Justice rap sheet of a criminal defendant to the attorney for the defendant, also addressed the following question: "If voluntary compliance with defense counsel's request for the defendant's RAP sheet is permissible, must any information be redacted from the RAP sheet before furnishing it to defense counsel?" (105 Ops.Cal.Atty.Gen. 146 at p. *1.) The Attorney General answered: "Yes. Juvenile court information must be redacted from an adult defendant's RAP sheet. Counsel for a juvenile defendant, however, may receive an unredacted copy of the juvenile defendant's RAP sheet." (***Ibid***.)

The Attorney General observed that "[g]enerally, matters in a juvenile court file are confidential and may be inspected only by statutorily identified persons or by other persons

having the court's permission." (***Id***. at p. *6 citing to Welf. & Inst. Code, § 827, subd. (a)(4) ["A juvenile case file, any portion thereof, and information relating to the content of the juvenile case file, may not be disseminated by the receiving agencies to a person or agency, other than a person or agency authorized to receive documents pursuant to this section"].)

"Insofar as is relevant here, section 827 authorizes counsel for a minor defendant in an active criminal or juvenile delinquency proceeding to access the minor's records." (*Ibid* citing to Welf. & Inst. Code, § 827, subd. (a)(1)(E).) "Accordingly, if a juvenile defendant's RAP sheet is requested under section 11105(b)(9), the Department of Justice will provide a complete and unredacted copy to defense counsel. A district attorney may, therefore, do the same." (***Ibid***.)

On the other hand, "section 827 does *not* authorize counsel for an ***adult*** defendant to have access to that defendant's juvenile court information. Section 827(a)(1) specifies that, except in circumstances not relevant here, "a case file may be inspected only by" the specifically identified persons, and counsel for a defendant in an adult criminal proceeding is not among those listed. In such a case, the juvenile court has 'exclusive authority' to determine whether and to what extent to grant access to confidential juvenile records. It is the Department of Justice's practice to adhere to the plain language of section 827 and, therefore, to redact from an adult defendant's RAP sheet any juvenile court information before furnishing the RAP sheet to defense counsel under section 11105(b)(9). A district attorney should likewise ensure that such information is redacted from an adult defendant's RAP sheet before voluntarily providing the RAP sheet to defense counsel in a criminal proceeding. (***Id***. at p. *6.)

"[A] district attorney must redact juvenile court information from an adult defendant's RAP sheet before voluntarily providing it to counsel for the adult defendant, but may provide an unredacted copy of a juvenile defendant's RAP sheet to counsel for the juvenile defendant." (***Ibid***.)

Editor's note: Welfare and Institutions Code section 827(a)(1) provides, inter alia, that "[except as provided in Section 828, a case file may be inspected only by the following: . . . (C) The minor who is the subject of the proceeding." Presumably, if the minor personally requested their own rap sheet in their own juvenile proceeding from the DOJ, the DOJ would release the entire rap sheet (including the juvenile record) since paragraph (12) of subdivision (a) of section 11105 authorizes disclosure to "[t]he subject of the state summary criminal history information under procedures established under Article 5 (commencing with Section 11120)." (Pen. Code, § 11105(a)(12).) However, the Attorney General did not opine on whether the DOJ would redact the information before providing it to an adult (formerly prosecuted as a minor) who asks for his own rap sheet or if defendant were representing himself in a criminal proceeding, whether they would provide the rap sheet at all. (**See** this IPG, section I-5 at pp. 23-24.)

4. Can or must the Department of Justice provide the full Department of Justice (CII) summary of criminal history record of a person who is a witness/victim in a pending criminal case to the attorney for the criminal defendant against whom the case is pending?

As noted earlier in this IPG at p. 6, California Penal Code section 11105 governs when the ***Attorney General*** of California has an obligation to furnish ***state*** summary criminal history information (i.e., California Department of Justice rap sheets). As a result of an amendment to the language of section 11105 that went into effect in 2019, the rap sheet must be provided to defense counsel representing the person whose rap sheet is requested if needed in the course of their duties and "***if the information is requested in the course of representation***." (Pen. Code, § 11105(b)(9), emphasis added.)

The emphasized language was added (effective January 1, 2019) by Assembly Bill 2133. (Stats.2018, c. 965 (A.B. 2133), § 1, eff. Jan. 1, 2019.) Prior to that amendment the statute simply required disclosure to criminal defense counsel of the RAP sheet information—if defense counsel was "otherwise authorized access by statutory or decisional law." (Former Pen. Code, § 11105(b)(9); 105 Ops.Cal.Atty.Gen. 157 at p. *3.) Under that old (now deleted) language, "defense counsel was required to justify application to the Attorney General by reference to some other statutory or decisional law entitlement." (105 Ops.Cal.Atty.Gen. 146 at p. *4.) And, according to the proponents of the amendment, the requirement hindered defense counsel in obtaining the state rap sheet of victim or witnesses or at least the entire rap sheet in a timely fashion. (***Id***. at p. *3, fn. 26; Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 2133 (2018-2019 Reg. Sess.) as introduced Feb. 12, 2018, p. 4 (hearing date March 20, 2018).)

The newly added language created several questions, including whether the Attorney General should simply turn over a witness's or victim's entire state rap sheet upon request to defense counsel for a defendant. *That* question was answered by the Attorney General in the course of providing an opinion in response to a slightly different question posed by Riverside District Attorney Michael Hestrin. (**See** 105 Ops.Cal.Atty.Gen. 157.) The slightly different question posed by District Attorney Hestrin was whether *county* prosecutors could voluntarily, without redaction, provide Department of Justice rap sheets of witnesses or victims to defense attorneys. But in order to answer that question, the opinion had to analyze whether the *Attorney General* could provide those rap sheets without redaction to defense counsel. (***Ibid***.)

A. *Must* the Department of Justice provide a witness or victim's Department of Justice (CII) rap sheet to *defense counsel*?

As to the Department of Justice's *own* obligations to provide state rap sheets, the Attorney General reviewed the legislative history behind Penal Code section 11105(b)(9) and opined that section 11105(b)(9) encompasses the provision of *witness and victim* rap sheets *as well as* defendant's own rap sheets to defense counsel. (***Id***. at pp. *3-*4 [and noting specifically, at p. *4, that "the Legislature has mandated that the Attorney General furnish RAP sheet information to defense counsel"].)

In light of the current language of section 11105(b)(9), the Attorney General opinion explained that the policy of the Department of Justice (i.e., the Attorney General) is to provide defense counsel with ***a copy of a victim's or witness's RAP sheet*** subject to certain redactions upon proper application. (***Id***. at p. *4.)

First, defense counsel must fill out a form certifying their status and how the information provided by the Department of Justice will be used. The form states:

> I also certify and affirm that the information sought is for use only in this pending criminal action and for no other purpose. By this Certification, I acknowledge that I am authorized to share the information obtained in court only if necessary for the defense of my client(s) in the above-referenced pending action. I will not disseminate the information to anyone else, except those working on behalf of my client(s) and only when it is reasonably necessary for the defense of this case. As set forth in this Certification, should another person be provided access to the information obtained, that person must be provided a copy of the Certification and agree to be bound by its terms. The information may be disclosed in court in the pending criminal proceeding if necessary for the case. The information may not be used for any other proceeding other than the pending criminal proceeding underlying this request. (***Id***. at p. *2 citing to Certification of Attorney of Record, BCIA Form 8700 (Rev. 3/2021), https://tinyurl.com/bdwy6wjr (as of Sept. 6, 2022).*

*__Editor's note:__ The requesting form requires counsel, under penalty of perjury, to designate whether the rap sheet relates to a client, victim, or witness. The form does not state whether the term "victim" only refers to persons victimized in the present case or extends to victim in past cases (e.g., Evidence Code §§ 1101, 1108, 1109, or character witnesses). However, a representative of the Attorney General's office has stated *their* interpretation of the term "victim" is not limited to the particular case causing the request to be made.

Second, "[u]pon receipt of a request with proper certification, DOJ will produce for defense counsel a copy of an adult witness's RAP sheet, redacted as necessary." (***Ibid***.) The Attorney General opinion then described what information the Department of Justice believes must necessarily be redacted from the actual rap sheet. (***Id***. at pp. *5-*6.)

B. What *should* be redacted by the *Department of Justice* when providing a state rap sheet of a witness or victim to defense counsel?

In the Attorney General opinion provided in response to a question posed by Riverside District Attorney Michael Hestrin, the Attorney General agreed the Department of Justice must (and would) provide the rap sheets of witnesses or victims to defense counsel but opined that two types of redactions should (and would occur) before the rap sheets were released. (**See** 105 Ops.Cal.Atty.Gen. 157 at pp. *5-*6.)

The first type of redaction would be to redact information from the rap sheet relating to juvenile court information about a juvenile victim or witness. The AG reasoned that Welfare and Institutions Code section 827 forbids disclosure of information from juvenile court records to any person who is not listed in that statute or otherwise authorized by juvenile court order to receive the information. Even a defense counsel who is representing a minor in a juvenile proceeding only has access to the juvenile record of his own client. A defense counsel for someone *other than* a minor defendant in a criminal or delinquency proceeding does not have access to the juvenile court records absent a court order. (See Welf. & Inst. Code, § 827(a)(1)(E).) Thus, "[i]n the absence of court order, then, defense counsel may not have access to the juvenile court information about a juvenile victim or witness; nor may defense counsel have access to the juvenile court information about an adult witness." (105 Ops.Cal.Atty.Gen. 157 at p. *6.) Accordingly, "any juvenile court information that is included in an adult witness's RAP sheet must be redacted before delivery to defense counsel." (***Ibid***.)

The second type of redaction would be to redact information that is protected from disclosure by Marsy's law. "Marsy's Law added sections 28(b)(1) and (b)(4) to article I of the California Constitution. Subdivision (b)(1) declares that a victim has the right to be 'treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse throughout the criminal or juvenile justice process.' Subdivision (b)(4) guarantees that a victim has the right 'to prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.'" (105 Ops.Cal.Atty.Gen. 157 at p. *6.)*

*__Editor's note:__ "For purposes of Marsy's Law, a victim is 'a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act .... [and includes] the person's spouse, parents, children, siblings, or guardian, and ... a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated.'" (105 Ops.Cal.Atty.Gen. 157 at p. *6 citing to Cal. Const., art. I, § 28(b)(4).)

The Attorney General opinion was specifically answering what a *county* prosecutor had to redact rather than what the Department of Justice had to redact: "if a *district attorney* elects to furnish defense counsel with a copy of a victim's RAP sheet without a discovery order to do so, then the district attorney should either redact any information covered by Marsy's Law before providing the RAP sheet to defense counsel, or afford the victim an opportunity to object to disclosure of the information." (***Id***. at p. *6.) However, the opinion also covered what redactions the Department of Justice would impose on its own distribution of state rap sheets and noted that "[a]s a matter of practice, the *DOJ* redacts a victim's address if it appears on a RAP sheet that is requested under section 11105(b)(9)." (***Id***. at p. *6, fn. 54, emphasis added.)

***Editor's note:** There is no reason to believe that the obligations of the *Attorney General* to redact information covered by Marsy's Law from a victim's rap sheet *is any less expansive or onerous than the obligations* of a *county or city prosecutor* to redact information from a victim's rap sheet. However, aside from redacting a victim's address, there is no indication (at least in the opinion) that the Attorney General does anything more than redact the address of the victim in the case identified by defense counsel or verifies whether the person whose record is sought, is, a victim or not. It does not *appear* that the victim is being notified, that the address of someone who may have been a victim in a previous case involving the defendant (e.g., a witness testifying as a character witness or as an Evidence Code section 1101(b), 1108 or 1109 witness) is being redacted from that witness' rap sheet, or that any other information in the witness's rap sheet that might *indirectly* provide or lead to information which could be used to locate or harass the victim or the victim's family is being redacted.

The Attorney General opinion observed that "Marsy's Law focuses on the privacy interest of victims, in the context of criminal proceedings; it does not expressly speak to the rights of witnesses who are not victims." (***Ibid***.) And concluded that, aside from the redactions discussed when it came to juvenile records or information protected by Marsy's law, "we are not aware of any statute or judicial decision compelling redaction of information that might appear on the RAP sheet of an adult non-victim witness." (***Ibid***.)

The opinion dismisses without much discussion the notion that redaction (either by the Department of Justice or county prosecutors) would be required by the California state right of privacy, concluding that "the right of privacy is not absolute, however, and the *Legislature* or the courts may balance an individual's interest in preventing disclosure of his or her criminal

history information against other compelling interests favoring disclosure, such as those of a defendant in a criminal proceeding. The *Legislature* has thus determined that the Attorney General *must disclose* RAP sheet information to defense counsel for purposes of a defendant's representation." (***Id***. at p *7 [citing, at fn. 58, to ***Loder* v. *Municipal Court*** (1976) 17 Cal.3d 859, 865, emphasis added by IPG.)

i. Editor's thoughts: Is the Department of Justice correct in indicating that the California state right of privacy is not violated even if the information contained in the rap sheet that is disclosed is not information that qualifies as evidence required to be disclosed under *Brady* or section 1054.1?

The state constitutional right of privacy embodied in section 1 of article I of the California constitution is not absolute. (**See *Hill* v. *National Collegiate Athletic Assn.*** (1994) 7 Cal.4th 1, 37.) But before information protected by the right can be disclosed, a judge must determine: (i) if there is a protected privacy interest; (ii) whether there is a reasonable expectation of privacy in the circumstances; (iii) how serious is the invasion of privacy, and (iv) whether the invasion is outweighed by legitimate and competing interests. (***Hill* v. *National Collegiate Athletic Assn***. (1994) 7 Cal.4th 1, 39-40.) "The key element in this process is the weighing and balancing of the justification for the conduct in question against the intrusion on privacy resulting from the conduct whenever a genuine, nontrivial invasion of privacy is shown." (***Alfaro* v. *Terhune*** (2002) 98 Cal.App.4th 492, 509.) "[N]ot 'every assertion of a privacy interest under article I, section 1 must be overcome by a 'compelling interest.'" (***Williams* v. *Superior Court*** (2017) 3 Cal.5th 531, 556.) But a "compelling interest" is still required to justify "an obvious invasion of an interest fundamental to personal autonomy." (***Ibid***.) Most of the cases applying this balancing test are civil cases. But there is no reason the balancing test itself is not applicable in a criminal case.

The defense "is not entitled to inspect material as a matter of right without regard to the adverse effects of disclosure[.]" (***Bullen* v. *Superior Court*** (1988) 204 Cal.App.3d 22, 26.) The burden is greater when a discovery request seeks information implicating the constitutional right of privacy and requires more than a mere showing of relevance. (**See *Williams* v. *Superior Court*** (2017) 3 Cal.5th 531, 556.) The requesting party has the "heavy burden" of establishing more than "merely . . . a rational relationship to some colorable state interest[.]" (***Boler* v. *Superior Court*** (1987) 201 Cal.App.3d 467, 473.) "'Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation' on the right of privacy." (***Ibid***.)

Ordinarily, when determining whether privileged or private information should be disclosed in order to vindicate a competing need such as defendant's statutory, state, or federal constitutional right to discovery, it is proper (and likely mandatory) that a court hold an in camera review of the materials. (**See *People* v. *Webb*** (1993) 6 Cal.4th 494, 518 [when allegedly material evidence is subject to a state privacy right, and "the state seeks to protect such privileged items from disclosure, the court ***must*** examine them in camera to determine whether they are 'material to guilt or innocence", emphasis added]; ***Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39, 61; ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 717; ***Rubio* v. *Superior Court*** (1988) 202 Cal.App.3d 1343, 1349-1351; 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) § I-13 at pp. 194-201.) This rule applies when the discovery sought, either directly from the prosecution or from third parties, constitutes alleged third party culpability evidence. (**See *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 286-287; ***People* v. *Littleton*** (1992) 7 Cal.App.4th 906, 910-911.)

In his opinion at 105 Ops.Cal.Atty.Gen. 157, the Attorney General recognized that "the state Constitution does guarantee everyone a right to privacy, which extends to protect individuals from unjustified intrusion into their criminal history." (***Id***. at p. *7 citing to Cal. Const., art. I, § 1; ***International Federation of Professional & Technical Engineers, Etc.* v. *Superior Court*** (2007) 42 Cal.4th 319, 340; ***Westbrook* v. *County of Los Angeles*** (1994) 27 Cal.App.4th 157, 165-166; and ***Central Valley Ch. 7th Step Foundation, Inc.* v. *Younger*** (1989) 214 Cal.App.3d 145.)

In addition, the opinion acknowledged that "[g]overnmental custodians of records have a duty to 'resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be thus asserted.'" (***Ibid***, citing to ***Westbrook* v. *County of Los Angeles*** (1994) 27 Cal.App.4th 157, 165-166.) Moreover, the opinion was not directly analyzing the scope of the Attorney General's discovery obligations under section 11105. And while the opinion made it clear that "much, if not all, of the information contained in the rap sheets is discoverable," the opinion also made it clear that it was ***not*** stating that disclosure of the rap sheets themselves "was required as part of discovery." (***Id***. at p. *6, fn. 55.)

Nevertheless, the Attorney General opined that since the Legislature has determined that defense counsel is entitled to the criminal history information of a witness or victim, "that the Attorney General must disclose RAP sheet information to defense counsel for purposes of a defendant's representation." (105 Ops.Cal.Atty.Gen. 157 at p. *7, emphasis added by IPG.) The Attorney General then professed a lack of awareness of "any statute or judicial decision

compelling redaction of information that might appear on the RAP sheet of an adult non-victim witness." (***Id***. at p. *6.)

> ***Editor's note:** Per communications with the Department of Justice, the Department sends rap sheets to the office of the public defender or attorney of record who completes the required form under penalty of perjury. But the Department does not send rap sheets to defendants or anyone else outside of the attorney's office.

IPG respectfully submits that the Attorney General's opinion *may be incorrect to the extent the opinion suggests*: (i) that defense counsel, in general, is entitled to irrelevant information contained in a witness' or victim's rap sheet under section 11105(b)(9); (ii) that the Department of Justice is required to provide the *entire* rap sheet of a victim or witness to defense counsel, including information that would have no relevance in a pending criminal case, without taking into account the California state right of privacy or conducting a balancing test to determine whether that state right of privacy should be overridden; and (iii) that the *legislature* can dictate when and how the state right of privacy applies simply by passing legislation so stating.

Granted, the interest in disclosure of *some* of the arrest, conviction, or other type of information in a witness' or victim's rap sheet is sufficient to override the state right of privacy in a person's criminal history. The federal Due Process interest of a criminal defendant in receiving favorable material evidence under ***Brady*** or the state interest in ensuring that relevant and exculpatory evidence (as identified in Penal Code section 1054.1) is provided to the defense may outweigh a person's privacy interests in relevant or exculpatory evidence contained in their criminal history records. However, an individual may have a lot of information protected by the state right of privacy in their criminal history that is neither exculpatory nor relevant in any criminal prosecution. For example, an old arrest for trespassing or driving under the influence or another crime not involving moral turpitude or conduct that would have any bearing on the ability to defend a case. There is no interest at all, let alone a compelling interest, in disclosure of that information just because someone witnessed a crime or was the victim of a crime. (**Cf.**, ***People* v. *Castro*** (1985) 38 Cal.3d 301, 313 [finding courts may exclude impeachment with crimes not involving moral turpitude, notwithstanding passage of proposition amending state constitution barring the exclusion of all relevant evidence because "due process clause of the Fourteenth Amendment demands that even inferences—not just presumptions—be based on a rational connection between the fact proved and the fact to be inferred"]; ***Engstrom* v. *Superior Court*** (1971) 20 Cal.App.3d 240, 245, disapproved of by ***Hill* v. *Superior Court*** (1974) 10 Cal.3d 812 and superseded by

Proposition 115 [finding prosecutors need not disclose the entire state rap sheet, including "arrest records and other police records of criminal activity," whose "discovery could not be justified on impeachment grounds" even under a *more* expansive view of prosecutorial discovery obligations than currently exist].)

Indeed, a review of the legislative history behind the change in language to section 11105(b)(9) as amended by Assembly Bill 2133 reflects a belief (warranted or not) that ***relevant exculpatory*** information was not being provided in a timely fashion. *Not* a concern that defense counsel was failing to receive irrelevant, non-exculpatory information (to which they were not entitled either statutorily or constitutionally).

> "In most criminal cases, there is good reason for public defenders and criminal defense attorneys to be provided with information ***contained in*** the DOJ database. For example, evidence that a testifying witness has been convicted of a felony is generally admissible to attack the credibility of that witness (Evidence Code § 788), and misconduct bearing on a witness's propensity for honesty or veracity are likewise admissible, even where it falls short of felony conduct. (Evidence Code § 786; *People v. Wheeler* (1992) 4 Cal. 4th 284, 296.) Furthermore, the United States Supreme Court has made it clear that criminal defense attorneys are entitled to information that may cast doubt on the credibility of a prosecution witness. (See *Giglio v. United States* (1972) 405 U.S. 150)." (See Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. No. 2133 (2018-2019 Reg. Sess.) as amended March 22, 2018 in Assembly at p. 5; Sen. Com. on Public Safety, Analysis of Assem. Bill No. 2133 (2017-2018 Reg. Sess.) as amended March 22, 2018 in Assembly at p. 5, emphasis added by IPG.)
>
> "This bill makes it clear that public defenders and criminal defense attorneys can receive information to which they are legally entitled, and help prevent the possibility that they may be unable to adequately represent their clients." (***Ibid***, emphasis added by IPG.)

The case cited by the Attorney General for the idea that the Attorney General may disclose *irrelevant and non-exculpatory* information in a person's state rap sheet without engaging in a balancing test because "the Legislature has determined that the Attorney General must disclose RAP sheet information to defense counsel for purposes of a defendant's representation" (105 Ops.Cal.Atty.Gen. 157 at p. *7) is ***Loder* v. *Municipal Court*** (1976) 17 Cal.3d 859, 865. Reliance on ***Loder*** is certainly understandable but perhaps does not provide as solid a foundation for the principle cited as might appear at first glance as release of irrelevant and non-exculpatory arrests does not further a legitimate criminal justice purpose. (**Cf.**, ***Central Valley Chap. 7th Step Foundation* v. *Younger*** (1979) 95 Cal.App.3d 212, 236 ["the dissemination to public employers of arrest records containing nonconviction data does not further law enforcement or criminal justice" and violates the state right of privacy].)

In ***Loder* v. *Municipal Court*** (1976) 17 Cal.3d 859, an individual who had been charged with battery and other offenses that were later dismissed for lack of prosecution sought to compel the municipal court, the city police chief, and the records custodian to expunge or return to him the record of his arrest. (***Id***. at pp. 862-863.) One of the questions raised before the California Supreme Court was whether limited retention and specified dissemination of arrest records by the Department of Justice violated the state right of privacy (Cal. Const., art. I, § 1). The ***Loder*** court held that the state right of privacy required that the retention and specified dissemination be justified by a compelling interest. (***Id***. at p. 864.) The court held that "*limited* retention and dissemination of arrest records" was justified by a compelling interest in "the promotion of more efficient law enforcement and criminal justice; more specifically, the [protection of] "the public from recidivist offenders." (***Ibid***, emphasis added.) Still more specifically, the interests mentioned were being able to: (i) accurately identify persons arrested; (ii) identify adults currently charged with the commission of a crime and persuade eyewitnesses and character witnesses to testify; (iii) investigate and solve similar crimes in the future; (iv) determine the appropriate charges to file; (v) determine whether a person should be released pending trial; (vi) determine the appropriate sentence to impose; and (vii) determine whether to release a person on parole. (***Id***. at pp. 865-868.) But none of these interests are served by releasing information to defense counsel regarding a witness' arrest or conviction for crimes when the information is irrelevant to impeaching the witness or exculpating a defendant. And ***Loder*** did not address whether or how the Department of Justice should redact criminal history records in criminal cases.

The ***Loder*** court balanced the interests it identified as favoring maintenance and limited dissemination of the records by the Department of Justice against specified interests in ***not*** disseminating and maintaining the record. The ***Loder*** court identified these latter competing interests as avoiding the potential distribution of "inaccurate or incomplete arrest records, dissemination of arrest records outside the criminal justice system*, and reliance on such records as a basis for denying the former arrestee business or professional licensing, employment, or similar opportunities for personal advancement." (***Id***. at p. 868.) But those interests are *distinct* from the interest (i) of individuals not having irrelevant arrests and convictions provided to defense counsel and potentially to the person who committed a crime (often against the individuals whose records are sought); and (ii) in avoiding the risk of having that information improperly brought out in court (and hence public hereafter) - notwithstanding the restrictions placed on defense counsel in using the information** and the irrelevant nature of the information.

*__Editor's note:__ The dissemination *inside* the criminal justice system that the ***Loder*** court held was *favored* was not dissemination to defense counsel of *irrelevant* arrests and convictions. At the time of ***Loder***, defense counsel was only entitled to rap sheet information "otherwise authorized access by statutory or decisional law." (**See** Stats. 1975, ch. 1222, § 2, former Pen. Code, § 11105, subd. (b)(8); 105 Ops.Cal.Atty.Gen. 157 at p. *3, fn. 23.) And no law or statute authorized access to irrelevant arrests and convictions. The dissemination of the information in the criminal justice systems which was favored was the internal dissemination within the criminal justice system *as described* in ***Loder*** at pp. 865-868.

**__Editor's note:__ As noted in this IPG at p. 11, to obtain a criminal history record from the Department of Justice, a defense attorney must "certify and affirm that the information sought is for use only in this pending criminal action and for no other purpose" and that they are "authorized to share the information obtained in court only if necessary for the defense of my client(s) in the above-referenced pending action." (https://oag.ca.gov/system/files/media/bcia-8700.pdf). Moreover, the application form states the "information may be disclosed in court in the pending criminal proceeding if necessary for the case" and "may not be used for any other proceeding other than the pending criminal proceeding underlying this request." (https://oag.ca.gov/system/files/media/bcia-8700.pdf). However, this language does not necessarily prevent dissemination of the information to the defendant or use in court under an honest but incorrect understanding as to whether use is "necessary."

In finding the interest in retention and limited dissemination of information in the rap sheet outweighed the state right of privacy, the ***Loder*** court pointed out that California has enacted a substantial body of legislation to protect the individual from the improper use of arrest records and held that further regulation of the use and abuse of such records is *primarily* a legislative matter. (***Id***. at pp. 869-876.) Accordingly, the ***Loder*** court concluded judicial intervention was unwarranted, and it should "defer to the implied determination of the lawmakers that the compelling state interests identified hereinabove outweigh [the competing interests in protecting privacy (such as the then-existing absence of a provision for expungement)]." (***Id***. at p. 876; **see also *People* v. *Buza*** (2018) 4 Cal.5th 658, 680 ["the *retention* of an arrestee's fingerprints, photographs, and other identifying information in law enforcement files generally has not been thought to raise constitutional concerns, even though the arrestee may later be exonerated"], emphasis added by IPG.) The ***Loder*** court believed that the Legislature should be allowed "to address in the first instance the difficult task of striking the proper balance between these competing concerns." (***Ibid***.)

However, the ***Loder*** court never (i) addressed the issue of whether dissemination of *irrelevant* information in the record to defense counsel or whether the costs of having to redact the information from a rap sheet was of a sufficient compelling interest to override "the state

constitutional right of privacy [which] extends to protect defendants from unauthorized disclosure of criminal history records" (***Westbrook* v. *County of Los Angeles*** (1994) 27 Cal.App.4th 157, 163–164) nor (ii) whether the fact the Legislature has the task of regulating dissemination (either directly or by delegation to the Department of Justice) means the Legislature has carte blanch to dictate that an interest in disclosure is always sufficiently compelling to override the state constitution – a task reserved for the courts lest the law violate the separation of powers doctrine.

As to the first issue, it is significant that ***Loder*** pre-dated the expanded view of the state privacy right for victims enacted by Marsy's Law, which added sections 28(b)(1) and (b)(4) to article I of the California Constitution. And while the Attorney General opinion does recognize a limited redaction of the records to comport with Marsy's law (e.g., redaction of a victim's address if it appears on a RAP sheet that is requested under section 11105(b)(9)), it makes no mention of any specific further redactions that might be necessary to ensure that "a victim has the right to be 'treated with fairness and respect for his or her privacy and dignity," as required by Marsy's Law such as redaction of irrelevant arrests or convictions. But those Marsy's law rights should impact the balancing test used to determine whether an interest in disclosure outweighs the state privacy right.

In applying that balancing test, it should not be assumed that avoidance of the additional efforts on the part of the Department of Justice in having to redact irrelevant and non-exculpatory information from the rap sheets is a sufficiently compelling interest to allow unredacted rap sheets to be released over the rights of California citizens to privacy in their arrest and conviction records. For example, in ***Central Valley Chap. 7th Step Foundation* v. *Younger*** (1979) 95 Cal.App.3d 212, the plaintiffs were complaining, inter alia, that the Department of Justice was sending public employers (authorized by law to receive criminal offender record information, but prohibited by law from considering a record of an arrest which did not result in a conviction) records "without first deleting entries concerning arrests and detentions not resulting in a conviction, and without refusing to forward a record wherein all the entries pertain to arrests or detentions not resulting in convictions." (***Id***. at p. 222.) In providing guidance to the trial court after finding that the plaintiffs had made out a prima facie case for relief, the appellate court observed that "in the trial court [the Department of Justice] contended that their policy served the compelling state interest of "'the promotion of more efficient law enforcement'" because it 'is clearly reasonable to assume that the efficient administration of the state criminal record information system would be hampered if each

request from authorized officials or entities had to be screened to determine whether the information was sought for a purpose encompassed by Labor Code section 432.7(a) and if the dispositions appearing on the record had to be screened and edited before complying with the requests for records." (***Id***. at pp. 237-238.) The appellate court rejected this analysis, noting that the "alleged compelling state interest must be recognized for what it is: an interest in the avoidance of administrative burden. It is now well settled that administrative burden does not constitute a compelling state interest which would justify the infringement of a fundamental right." (***Id***. at p. 238.)

As to second issue, to the extent that Attorney General opinion was relying on ***Loder*** for the proposition that the judiciary is *bound* by the legislature's interpretation of the scope of the state privacy right (as opposed to taking into consideration existing statutes to determine the scope of a right of privacy and simply giving the legislature some deference in assessing whether there is a reasonable expectation of privacy), it assumes *too much deference* on the part of the courts to legislative determinations as to the scope of the right. For example, in Penal Code section 11077, the legislature gave responsibility to the Attorney General to "[e]stablish regulations to assure the security of criminal offender record information from unauthorized access and disclosures by individuals and public and private agencies at all levels of operation in this state" and to "[e]stablish regulations to assure that this information is disseminated only in situations in which it is demonstrably required for the performance of an agency's or official's functions." (Pen. Code, § 11077(a)&(b).)* Nevertheless, an appellate court held that the Department of Justice "policies of disseminating to nonexempt employers and licensing entities information concerning arrests without supplying disposition information and disseminating pre–1962 juvenile arrests or detentions without dispositions" pursuant to section 11105 violated the state constitutional privacy guarantees. (***Central Valley Ch. 7th Step Foundation, Inc.* v. *Younger*** (1989) 214 Cal.App.3d 145, 165.)

*__Editor's note:__ On a slightly different note, it seems that the Department of Justice practice of not redacting information in witness's rap sheets of irrelevant and non-exculpatory convictions or arrests is inconsistent with the directive in Penal Code section 11077(b). This is because release of information regarding irrelevant and non-exculpatory convictions or arrests is **not** "demonstrably required for the performance of a [defense counsel's] functions." (Pen. Code, § 11077(b).) If release of that information *were* demonstrably required, then all the defense counsel who did not seek or receive such information (and that would be pretty much counsel in every case, given the lack of case law allowing for release of irrelevant and non-exculpatory arrests or misdemeanor convictions) would have provided ineffective assistance of counsel.

Ultimately, the judiciary has the responsibility to determine whether legislation violates a constitutional provision. Courts determine the scope of a constitutional provision. The legislature does not. Interpreting the scope of the state or federal constitution is a core judicial function. "[I]t is well established that it is a judicial function to interpret the law, including the Constitution." (***Schabarum* v. *California Legislature*** (1998) 60 Cal.App.4th 1205, 1213; **accord *Raven* v. *Deukmejian*** (1990) 52 Cal.3d 336, 354 ["'The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort'"].)

This responsibility cannot be abdicated by allowing the Legislature to dictate the scope of the constitutional provision, i.e., the California constitutional right of privacy. It is well-established that a state "statute cannot trump the Constitution." (***Krolikowski* v. *San Diego City Employees' Retirement System*** (2018) 24 Cal.App.5th 537, 553; ***County of Los Angeles* v. *Commission on State Mandates*** (2007) 150 Cal.App.4th 898, 904; ***City of San Diego* v. *Shapiro*** (2014) 228 Cal.App.4th 756, 788; **cf., *Marbury* v. *Madison*** (1803) 5 U.S. 137, 138 ["An act of congress repugnant to the constitution cannot become a law."]; **but see *People* v. *Simmons*** (2023) 96 Cal.App.5th 323 [314 Cal.Rptr.3d 319, 331] [majority allowing legislature to statutorily determine how language in article VI, section 13 of the California Constitution is to be defined (i.e., how "a miscarriage of justice" is to be defined)].)

If complete deference to the legislature in interpreting the scope of a constitutional provision was required, the courts would be condoning a legislative preemption of a core function of the judiciary - which would violate the separation of powers doctrine.* (**See *Nogues* v. *Douglass*** (1857) 7 Cal. 65, 70 ["It would be idle to make the Constitution the supreme law, and then require the judges to take the oath to support it, and after all that, require the Courts to take the legislative construction as correct."]; **see also *In re Marriage of Steiner & Hosseini*** (2004) 117 Cal.App.4th 519, 526 [ignoring legislature amendment of statute purporting to dictate that failure to comply with disclosure requirements of the Family Code "did not constitute harmless error" since the legislature does not get to say "Canute-like, that a given procedural failure is not 'harmless error.' Saying it isn't so doesn't make it not so. Indeed, such an approach could nullify anything in the Constitution simply by fiat."].)

Editor's note:** "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) "'The judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body.'" (McClung* v. *Employment Development Dept***. (2004) 34 Cal.4th 467, 472.) "Although the Legislature's activities can overlap with the functions of other branches to an extent, the Legislature may not use its powers to 'defeat or materially impair' the exercise of its fellow branches' constitutional functions, nor 'intrude upon a core zone' of another branch's authority." (***Howard Jarvis Taxpayers Assn.* v. *Padilla*** (2016) 62 Cal.4th 486, 499; **accord *In re Lira*** (2014) 58 Cal.4th 573, 583 ["The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch."].)

5. Can or must the Department of Justice or a local prosecutor provide the full Department of Justice (CII) summary of criminal history record of a person who is a witness in a pending criminal case to a *self-represented defendant*?

In 2022, the California Attorney General issued an opinion which answered, inter alia, the question of whether a *local district attorney* could "voluntarily provide to . . . a self-represented criminal defendant, an unredacted copy of a victim's or a witness's RAP sheet, with or without a protective order limiting distribution, during the criminal discovery process under Penal Code section 11105 as recently amended? (105 Ops.Cal.Atty.Gen. 157 at p. *1.) In answering that question, the opinion also opined on whether the Department of Justice was mandated and/or authorized to provide an unredacted copy of a victim's or a witness's RAP sheet during the criminal discovery process. (***Id***. at pp. *4-*5.)

The opinion first addressed whether the *Department of Justice* could provide the state witness or victim rap sheet directly to a self-represented defendant in a criminal case. The opinion concluded the Department of Justice **could not**. The opinion observed that "[a]though the Legislature has mandated that the Attorney General furnish RAP sheet information to defense counsel, there is no similar mandate for the Attorney General to do so for a self-represented defendant." (*Id*. at p. *4 [and noting, as well that the Legislature has not even vested the Attorney General with discretion to do so].)

The opinion did recognize that a self-represented defendant would be entitled to some information *contained in* the record as part of the criminal discovery process. For example, the defendant would be entitled to a "felony conviction information about any material witness

whose credibility is likely to be critical to the outcome of the trial" pursuant to Penal Code section 1054.1(d) and "to the extent dictated by constitutional considerations, . . . information about a witness's misdemeanor convictions." (***Id***. at p. *5.) But the opinion distinguished these "mandated disclosures by the prosecutor in criminal cases" from disclosing a state rap sheet to a self-represented defendant. (***Ibid*** [and noting that the legislature has taken measures to protect, in some regard, the personal identifying information of a victim or witness from disclosure to pro per defendants].)

Moreover, the opinion stated that, given the lack of "statutory or case law authorizing a self-represented defendant to receive state summary criminal history information except as mandated by the Constitution or the discovery statutes", "it would be unlawful, therefore, for a district attorney to voluntarily furnish a witness's or victim's criminal history information to a self-represented defendant, except such information as must be disclosed by statute or the federal Constitution." (***Id***. at p. *5.) "A self-represented defendant must seek discovery of non-mandated witness or victim RAP sheet information through court order." (***Ibid***.)

6. *Must* or *can* county or city prosecutors provide the *entire* Department of Justice (CII) summary of criminal history record of a person who is a witness in a pending criminal case to the attorney for the criminal defendant against whom the case is pending without redaction?

In the Attorney General opinion at 105 Ops.Cal.Atty.Gen. 157, the Attorney General recognized that while certain information *contained in* a prosecution witness's rap sheet must be disclosed (e.g., exculpatory evidence, including impeachment, felony convictions of material witnesses, misdemeanor convictions of moral turpitude, and arrests and information leading to federal or other-state criminal histories bearing on the witness's credibility), a local (i.e., county or city) prosecutor is ***not required*** to provide the entire Department of Justice rap sheet to a criminal defense attorney. (***Id***. at p. *1 ["No statute specifically requires a prosecutor to turn over a witness's RAP sheet to defense counsel."]; ***People* v. *Roberts*** (1992) 2 Cal.4th 271, 308 [finding, as a matter of state procedural law, it was error not to require disclosure of all felony convictions to the defense, but also finding the "rap sheets themselves" should not have been disclosed]; this IPG, section I-8 at pp. 39-48 [discussing, in greater depth, what must be disclosed by the prosecution from either the Department of Justice or local criminal history rapsheet].)

However, in that same opinion, the Attorney General addressed the issue of whether local prosecutors could ***voluntarily***, without redaction, provide Department of Justice rap sheets of witnesses or victims to defense attorneys. Specifically, the questions posed were: (1) "May a district attorney voluntarily provide to criminal defense counsel, or to a self-represented criminal defendant, an unredacted copy of a victim's or a witness's RAP sheet, with or without a protective order limiting distribution, during the criminal discovery process under Penal Code section 11105 as recently amended?" and (2) "If redaction is required, what information must be redacted before production?" (*Id*. (105 Ops.Cal.Atty.Gen. 157 at p. *1.)

As the first question, the Attorney General opined: "As a general proposition, a district attorney ***may*** provide a copy of an adult witness's or victim's RAP sheet to defense counsel during the criminal discovery process, provided that certain information is redacted. A district attorney may not voluntarily provide a copy of a victim's or witness's RAP sheet, unredacted or otherwise, to a self-represented defendant." (***Ibid***.) The Attorney General rejected the notion that section 11105(b)(9)'s mandate to the Attorney General preempts a district attorney from voluntarily providing witness or victim RAP sheets to defense counsel. (***Id***. at p. *4.)

The Attorney General opinion stated that certain information *contained within* the state rap sheet ***must*** be disclosed to defense counsel, including "exculpatory" evidence, felony convictions "of any material witness whose credibility is likely to be critical to the outcome of the trial," "evidence of misdemeanor convictions involving crimes of moral turpitude, as such crimes may bear on the credibility of a witness" and "exculpatory information in the form of arrests and information leading to federal or other-state criminal histories bearing on the witness's credibility." (***Id***. at p. *1.) Moreover, the Attorney General noted that "a prosecutor is allowed to disclose more than is minimally required by the discovery statutes." (***Ibid***.)

However, the Attorney General also opined that a local prosecutor would be obligated to redact from the rap sheet *certain* information. (*Id*. at pp. *5-*6.) Specifically, a local prosecutor voluntarily providing the Department of Justice rap sheet would have to redact "any juvenile court information that is included in an adult witness's RAP sheet" before delivering it to defense counsel and "should either redact any information covered by Marsy's Law before providing the RAP sheet to defense counsel, or afford the victim an opportunity to object to disclosure of the information." (***Id***. at pp. *6, *7; **see also** this IPG, section I-4-B at pp. 12-14.)

Aside from those redactions, the Attorney General concluded a local prosecutor choosing to voluntarily provide a Department of Justice rap sheet of a prosecution witness or victim, need

not further redact any information from the rap sheet: "we are not aware of any statute or judicial decision compelling redaction of information that might appear on the RAP sheet of an adult non-victim witness." (***Id***. at p. *7.)*

> ***Editor's note:** All the reasons for *disagreeing* with the conclusion that the *Attorney General* need not redact any information from a victim or witness' Department of Justice rap sheet beyond the juvenile history and the limited information the Attorney General determined would be protected by Marsy's Law apply equally for disagreeing with the conclusion that a *local prosecutor* may voluntarily provide that rap sheet without additional redaction for irrelevant information that is otherwise protected by the California state right of privacy. (**See** the editor's thoughts at pp. 14-23 of this IPG.)

7. Can or must a local prosecutor provide the entire *local* rap sheet of a person who is a witness or victim in a pending criminal case to the attorney for the criminal defendant against whom the case is pending?

The Attorney General opinions discussed earlier in this IPG (105 Ops.Cal.Atty.Gen. 157 and 105 Ops.Cal.Atty.Gen. 146) only addressed the statute governing the *Department of Justice* rap sheets (Pen. Code, § 11105) – not the statutes that govern distribution of local agency rap sheets. "Dissemination of the information in the hands of local criminal justice agencies ['local summary criminal history information'] is controlled by Penal Code sections 13200 through 13326, inclusive." (***Westbrook* v. *County of Los Angeles*** (1994) 27 Cal.App.4th 157, 162 [and noting, at p. 164, that "[t]he protections of Penal Code section 13300 apply to the master record of 'criminal offender record information,' as that term is defined in Penal Code section 13102"].)

"Local summary criminal history information" is defined in Penal Code section 13300 as "the master record of information compiled by any local criminal justice agency* pursuant to Chapter 2 (commencing with Section 13100) of Title 3 of Part 4 pertaining to the identification and criminal history of any person, such as name, date of birth, physical description, dates of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data about the person." (Pen. Code, § 13300(a)(1).) "'Local summary criminal history information' does not refer to records and data compiled by criminal justice agencies other than that local agency, nor does it refer to records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the local agency." (Pen. Code, § 13300(a)(2).)

*__Editor's note:__ District attorney offices are "criminal justice agencies" – which are defined as "those agencies at all levels of government which perform as their principal functions, activities which either: (a) Relate to the apprehension, prosecution, adjudication, incarceration, or correction of criminal offenders; or (b) Relate to the collection, storage, dissemination or usage of criminal offender record information." (Pen. Code, § 13101.)

A. *Must* a local prosecutor's office provide a witness or victim's *local* rap sheet to *defense counsel*?

Penal Code section 13300, in relevant part, provides: "[a] local agency shall furnish local summary criminal history information to any of the following, when needed in the course of their duties . . . : . . .

"(8) A public defender or attorney of record when representing a person in proceedings upon a petition for a certificate of rehabilitation and pardon pursuant to Section 4852.08.

(9) A public defender or attorney of record when representing a person in a criminal case, or a parole, mandatory supervision, or postrelease community supervision revocation or revocation extension hearing, ***and when authorized access by statutory or decisional law.***" . . .

(12) The subject of the local summary criminal history information." (Pen. Code, § 13300(a)(2), emphasis added by IPG.)

Significantly, the italicized language in section 13300 parallels the language *that was deleted* from Penal Code section 11105(b)(9) by Assembly Bill 2133 and replaced with the current language of section 11105(b)(9) ["*if the information is requested in the course of representation*"]. Under that old (now deleted) language from section 11105, "defense counsel was required to justify application to the Attorney General by reference to some other statutory or decisional law entitlement." (105 Ops.Cal.Atty.Gen. 146 at p. *4.) And, according to the proponents of AB 2133, the requirement hindered defense counsel in obtaining the state rap sheet of victim or witnesses or at least the entire rap sheet in a timely fashion. (***Id***. at p. *3, fn. 26; Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 2133 (2018-2019 Reg. Sess.) as introduced Feb. 12, 2018, p. 4 (hearing date March 20, 2018).)

Under the new language of section *11105*, the Attorney General concluded that while "California law forbids an authorized recipient of state summary criminal history information, such as a district attorney, from furnishing that information to an unauthorized recipient,"

"Penal Code section *11105(b)(9)* makes defense counsel *authorized recipients of such information for purposes of preparing for trial.*" (105 Ops.Cal.Atty.Gen. 146 at p. *2, emphasis added by IPG.)

> ***Editor's note:** In 2023, the legislature amended Penal Code section 13300 (**see** this IPG, section I-7-B at p. 32). The bill (Assembly Bill 709) making the amendments went through several versions. One of the earlier versions would have modified the current language of section 13300(b)(9) ("and when authorized access by statutory or decisional law") in the same way that Penal Code section 11105(b)(9) was modified, i.e., by substituting the phrase "if the information is requested in the course of representation." However, that version was later rejected, and the original language of section 13300(b)(9) was retained. (**See** Sen. Amend. to Assem. Bill No. 709 (2023-2024 Reg. Sess.) July 6, 2023.)

There is good reason to question whether the Attorney General is correct in opining that the current version of Penal Code section 11105(b)(9) generally requires the Attorney General to provide the *Department of Justice* rap sheet *itself* (subject to limited redactions for juvenile records and to comply with Marsy's law)* to defense counsel upon counsel's certification that they are representing a person "in a criminal case or juvenile delinquency proceeding," and that the information is "needed in the course of their duties" and "requested in the course of representation." (105 Ops.Cal.Atty.Gen. 157 at p. *2; **see also** the editor's thoughts at pp. 14-23 of this IPG.)

> ***Editor's note:** The Attorney General recognized that whether a district attorney can provide otherwise confidential information to defense counsel turns on whether defense counsel is an authorized recipient. Indeed, this is the reason that the Attorney General required redaction of juvenile court information about a juvenile victim or witness from the Department of Justice rap sheet. (105 Ops.Cal.Atty.Gen. 157 at p. *6.)

But even assuming that the Attorney General is correct when it comes to what section *11105* requires, the analysis would not apply to whether section *13300* requires *local prosecutors to provide the actual local rap sheet* - which can only be disclosed to defense counsel under specified circumstances. (**See** this IPG, section I-7-A at pp. 27-28.)

Because section 13300(b)(9) retained comparable language to the former version of section 11105(b)(9), section 13300 should be interpreted in the manner that the former version Penal Code section 11105(b)(9) was interpreted and *not* as the *current* version of section 11105(b)(9) (which authorizes disclosure to defense counsel "*if the information is requested in the course of representation*") has been interpreted by the Attorney General in 105 Ops.Cal.Atty.Gen. 157 at pp. *3-*4.) Thus, a "public defender or attorney of record when representing a person in a criminal case, or a parole, mandatory supervision, or postrelease community supervision

revocation or revocation extension hearing" is *only* an authorized recipient when access to the records is authored "by statutory or decisional law" pursuant to Penal Code section 13300(a)(9).

Under statutory or decisional law, other than the information *contained in* the local rap sheets that must be disclosed pursuant to constitutional or statutory obligations (**see** this IPG, section II-8 at pp. 39-48), section 13300 does not permit the disclosure of the rap sheet itself. (**See *Craig* v. *Municipal Court*** (1979) 100 Cal.App.3d 69, 78 ["Penal Code section 13300(b)(8) [*now* (b)(9)] permits disclosure of *certain* criminal history information to an attorney representing a person in a criminal case *when access is authorized by statutory or decisional law*."], emphasis added by IPG]; ***People* v. *Roberts*** (1992) 2 Cal.4th 271, 308 [requiring prosecution to disclose felony convictions of witness but stating, "The rap sheets themselves, of course, did not have to be disclosed in order to provide the requested information."]; ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 176 [rejecting defendant's argument that rap sheets are discoverable because "[i]f the prosecution has, or obtains, [the witness's] 'rap sheet,' if it exists, *only* the record of felony convictions need be disclosed."];* ***People* v. *Little*** (1997) 59 Cal.App.4th 426, 433 [approvingly citing to ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 176 for the proposition that prosecution must disclose the record of a felony conviction, "but they need not disclose the actual rap sheets."].)**

*__Editor's note:__ In ***People* v. *Dalton*** (2019) 7 Cal.5th 166, the California Supreme Court disapproved of ***Santos*** to the extent ***Santos*** could be interpreted as always prohibiting impeachment of a witness to the felony conviction itself. That is, it is implicit in the ***Dalton*** court's holding that ***Santos*** is wrong insofar as it would *only* authorize disclosure of felony convictions, i.e., because a witness could potentially be impeached with other types of information in a rap sheet. (***Id***. at p. 214.) However, ***Dalton*** did not change the general rule that only the relevant contents of a rap sheets are discoverable not the rap sheet itself.

__Editor's note:__ The conclusions drawn in ***Roberts*, ***Santos***, and ***Little*** that the rap sheet itself did not have to be disclosed did not distinguish between the Department of Justice rap sheets and local rap sheets. The Attorney General opinion at 105 Ops.Cal.Atty.Gen. 157 cited to ***Roberts*** and ***Santos*** for the proposition "that disclosure of RAP sheets is not required as part of discovery" while suggesting that "much, if not all, of the information contained in the rap sheets is discoverable." (***Id***. at *6, fn. 55.)

No statutory or decisional law authorizes disclosure of the *entire* local rap sheet nor unilateral disclosure of *nonexculpatory and irrelevant* information contained in the local rap sheet *that is protected* by the California state right of privacy (Cal. Const., art. I, § 1) or Marsy's law (Cal. Const., art. I, § 28(b)(1) and (b)(4)) or the Penal Code (**see** Pen. Code, §§ 11142 ["Any person authorized by law to receive a record or information obtained from a record who knowingly

furnishes the record or information to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor.']; 13201 ["Nothing in this chapter shall be construed to authorize access of any person or public agency to individual criminal offender record information unless such access is otherwise authorized by law."].)

In sum, there is only a duty to provide *certain* information that is required to be disclosed by statutory or case law (**see** this IPG, section II-8 at pp. 39-48) that is *contained in* the local rap sheet. There is no duty to supply the local rap sheet *itself* under section 11300(b)(9) or irrelevant information in the rap sheet that is protected by the state privacy right. Indeed, a prosecutor is likely *prohibited* from doing so absent a court order.

B. *Can* a local prosecutor's office *voluntarily* provide a witness or victim's *local* rap sheet to *defense counsel*?

In the Attorney General opinion at 105 Ops.Cal.Atty.Gen. 157, the Attorney General opined that a local district attorney may voluntarily provide a public defender, or other defense counsel of record, with a copy of the adult or juvenile defendant's own *Department of Justice* rap sheet subject to limited redaction. (***Id***. at p. *1.) In a companion opinion from the Attorney General, the Attorney General explained why: "As a general proposition, California law does not forbid secondary disclosure of this information among *authorized recipients*, i.e., from one authorized recipient to another authorized recipient, only from one authorized recipient to an unauthorized recipient." (105 Ops.Cal.Atty.Gen. 146 at p. *3.) Moreover, that companion opinion stated, "as a general matter, nothing forbids a prosecuting attorney from voluntarily providing more discovery to defense counsel than strictly required." (*Id*. at p. *2.)

Other than the portion of the Attorney General analyses relating to what, at a minimum, must be redacted from the Department of Justice rap sheet, the analyses should <u>not</u> apply to the question of whether *voluntary* disclosure of the entire *local* rap sheet under section *13300* is permissible. This is because defense counsel is ***<u>not</u>*** an authorized recipient of criminal history when representing a person in a criminal case unless access is authorized "by statutory or decisional law." (Pen. Code, § 13300(b)(9); **see also** Pen. Code, § 13301(b) ["'A person authorized by law to receive a record' means any person or public agency authorized by a court, statute, or decisional law to receive a record."].) And while certain information contained in that local rap sheet may (and, indeed, must) be disclosed when access is authorized by statutory or decisional law (**see** this IPG section II-8 at pp. 39-48) disclosure of other irrelevant and protected information contained in local rap sheet and the rap sheet itself is not.

Penal Code section 13302 states: "An employee of the local criminal justice agency who knowingly furnishes a record or information obtained from a record to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor." And Penal Code section 13303 states: "Any person authorized by law to receive a record or information obtained from a record who knowingly furnishes the record or information to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor."

Unquestionably, it would be improper to provide that local rap sheet without redactions for juvenile record information or information squarely covered by Marsy's law. (**See** 105 Ops.Cal.Atty.Gen. 157 at pp. *5-*6.) But it is also highly inadvisable for a local prosecutor, subject to the exceptions for providing discovery authorized by statutory or decisional law (**see** this IPG, section II-8 at pp. 39-48), to provide information contained in a local rap sheet of a prosecution witness or victim without a court order permitting them to do so. (**Cf.**, 105 Ops.Cal.Atty.Gen. 157 at p. *6 and fn. 44 [explaining that that a local district attorney must redact juvenile court information from the Department of Justice rap sheet before providing that rap sheet to the defense because defense counsel is *not an authorized recipient* of a *witness's* juvenile court record] and at pp. *4-*5 [opining it would be unlawful for either the Attorney General or a local prosecutor to voluntarily furnish a witness's or victim's non-mandated Department of Justice sheet or criminal history information to a self-represented defendant, except such information as must be disclosed by statute or the federal Constitution absent a court order]; **but see** this IPG, section 7-B-i at pp. 32-38 [discussing new exception under Pen. Code, § 13300 for distribution of ***Brady*** information regarding peace officers].)

i. New exception for information concerning exculpatory or impeaching information involving peace officers: Penal Code section 13300(o).

As of January 1, 2024, the legislature authorized a limited form of voluntary disclosure of information contained in the local rap sheet when it comes to peace officers. (**See** Assem. Bill No. 709 (2023-2024 Reg. Sess.) Stats. 2023, ch. 453.) Newly created subdivision (o) of Penal Code section 13300 provides:

"A public prosecutor may provide a public defender's office, an alternate public defender's office, or a licensed attorney of record in a criminal case with a list containing only the names of the peace officer and defendant and the corresponding case number to facilitate and expedite notifying counsel representing criminal defendants whose cases may involve testimony by that peace officer of exculpatory or impeachment evidence involving that peace officer. Any disclosure made pursuant to this subdivision shall only be made upon agreement by the public defender's office, alternate public defender's office, or the licensed attorney of record in a criminal case. Any disclosure pursuant to this subdivision shall not constitute disclosure under any other law, nor shall any privilege or confidentiality be deemed waived by that disclosure. This subdivision shall not be construed to otherwise limit any legal mandate to disclose evidence or information, including, but not limited to, the disclosures required under Chapter 10 (commencing with Section 1054) of Title 6 of Part 2."

a. *What was the impetus for this amendment to section 13300?*

The language of Assembly Bill No. 709 underwent significant changes. The *original* version would simply have allowed prosecutors with actual possession of a transcript that contained potentially exculpatory or impeaching material involving a peace officer-witness to provide an unofficial copy of the transcript or relevant portion thereof to the defense and allow defense counsel to use it without having to pay a court reporter - **see** Assem. Bill No. 709 (2023-2024 Reg. Sess.) as introduced Feb. 13, 2023). A subsequent, *but later withdrawn version*, would have made changes to Penal Code section 13300(b)(9) conforming the language in that paragraph to the current language in Penal Code 11105(b)(9). (**See** this IPG, at p. 28, first editor's footnote.)

However, the purpose of the *final* version of the bill was described in the last analysis of the bill: "to facilitate and expedite *Brady* disclosures by allowing a prosecutor to provide a list of information to criminal defense counsel about cases that could possibly involve exculpatory or

impeachment evidence relating to testifying peace officers." (Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023, analysis at p. 2.) "According to the sponsors of the bill, this authorization would allow prosecutors to make 'quick, high-volume disclosures' of *Brady* information, and would relieve prosecutors of the burden of 'determin[ing] who defense counsel is on each case and send[ing] out individual letters to defense counsel with the information.'" (***Id***. at p. 6.)

The bill was also drafted to address a question left open in ***Association for Los Angeles Deputy Sheriffs v. Superior Court of Los Angeles County*** (2019) 8 Cal.5th 28 relating to whether *Brady* tip information may be released by a prosecutor's office to the defense without violating the ***Pitchess*** statutes. (See Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023, analysis at p. 3.)

Most prosecutor's offices compile lists of peace officers who the office has learned (either via a *Pitchess* motion or some other avenue) have potentially ***Brady*** material (i.e., favorable, material exculpatory or impeaching information) contained in their personnel file. Many law enforcement agencies also come to agreements with local district attorney offices to provide a list of officers falling into this category. To meet their constitutional and/or statutory discovery obligations in a pending case (or in some past cases where the prosecutor learns of new ***Brady*** information about an officer after a conviction), prosecutors will provide a "***Brady*** tip" to the defense and/or file their own ***Brady/Pitchess*** motion to obtain the information and then provide that information to the defense. Whether the entirety of this process was authorized was subject to some debate. (**See** the 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at pp. 34-53 [discussing ***Association for Los Angeles Deputy Sheriffs* v. *Superior Court of Los Angeles County*** (2019) 8 Cal.5th 28 and the issues it raises in greater depth].)

In the case of ***Association for Los Angeles Deputy Sheriffs* v. *Superior Court of Los Angeles County*** (2019) 8 Cal.5th 28 [hereafter "***ALADS***"], the Los Angeles County Sheriff's Department sought to compile and provide to the district attorney's office a list of the names of deputies with "founded administrative investigations" for various types of conduct potentially qualifying as ***Brady*** material, i.e., a ***Brady*** list. (***Id***. at p. 37.) The specifics of the investigation would not be provided, only the "***Brady*** tip." (***Ibid***.) The Association for Los Angeles Deputy Sheriffs then sought an injunction in the trial court preventing the Department "from disclosing the identity of deputies on the ***Brady*** list absent compliance with ***Pitchess*** procedures." (***Id***. at p. 38.)

The California Supreme Court held the Sheriff's Department *could* provide ***Brady*** alerts. "Viewing the ***Pitchess*** statutes 'against the larger background of the prosecution's [***Brady***] obligation'" (***id***. at p. 51), the court expressly held that "the Department ***does not violate*** section 832.7(a) by sharing with prosecutors the fact that an officer, who is a potential witness in a pending criminal prosecution, may have relevant exonerating or impeaching material in that officer's confidential personnel file." (***Id***. at p. 56.) Albeit, the ***ALADS*** court did not expressly ***require*** that such lists be provided.*

*__Editor's note:__ The California Supreme Court [***ALADS***] did not ***directly*** state that law enforcement agencies *must* create ***Brady*** lists or *must* provide ***Brady*** alerts to the prosecution. The ***ALADS*** court did, however, strongly suggest that, if ***Brady*** alerts are not provided, there *must* be *some* mechanism for law enforcement to provide the information to the prosecution:

> "The Fourteenth Amendment underlying ***Brady*** imposes obligations on states and their agents — not just, derivatively, on prosecutors. *Law enforcement personnel are required to share* ***Brady*** *material with the prosecution*. (**See, e.g.**, ***Carrillo* v. *County of Los Angeles*** (9th Cir. 2015) 798 F.3d 1210, 1219-1223 & fn. 12.) The harder it is for prosecutors to access that material, the greater the need for deputies to volunteer it. ¶ The Association's contrary view that "***Brady*** relates only to the prosecutor" and that "***Brady*** ... does not impose obligations on law enforcement" is distressing and wrong. The prosecution may bear ultimate responsibility for ensuring that necessary disclosures are made to the defense (**see *In re Brown***, ***supra***, 17 Cal.4th at p. 881, 72 Cal.Rptr.2d 698, 952 P.2d 715), but that does not mean law enforcement personnel have no role to play. This is not to imply that ***Brady*** alerts are a constitutionally required ***means*** of ensuring ***Brady*** compliance; only that ***disclosure of Brady material is required***, and that ***Brady*** alerts help to ensure satisfaction of that requirement." (***Id***. at p. 52, emphasis added.)

Moreover, the same reasoning the ***ALADS*** court used to justify why alerts were ***permitted***, also supports the notion that law enforcement is ***required*** to use ***Brady*** alerts or come up with an equivalent mechanism to alert prosecutors of ***Brady*** information in personnel files. For example, in explaining why "construing the ***Pitchess*** statutes ***to permit Brady*** alerts best 'harmonize[s]' ***Brady*** and ***Pitchess***," the court noted, inter alia, that since "[p]rosecutors are deemed constructively aware of ***Brady*** material known to anyone on the prosecution team and must share that information with the defense . . . construing the ***Pitchess*** statutes to cut off the flow of information from law enforcement personnel to prosecutors ***would be [an] anathema*** *to* ***Brady*** *compliance*." (***Id***. at p. 51, emphasis and bracketed information added.) Later, the ***ALADS*** court observed that: "Without ***Brady*** alerts, prosecutors may be unaware that a ***Pitchess*** motion should be filed — and such a motion, if filed, may not succeed. Thus, interpreting the ***Pitchess*** statutes to prohibit ***Brady*** alerts would ***pose a substantial threat to Brady*** *compliance*. (***Id***. at p. 52.) (Emphasis added by IPG.)

Perhaps because some of the rationale the court used to conclude "release" of personnel records by the law enforcement agency to the prosecution would not necessarily justify further release of the records without prosecution compliance with the ***Pitchess*** statutes, the ***ALADS court declined to address "whether it would violate confidentiality for a prosecutor to share an alert with the defense***." (***Id***. at p. 56 [albeit citing to ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 722].)

Moreover, the ***ALADS*** decision created some *ambiguity* as to the permissibility of a police department providing a ***Brady*** tip to the district attorney's office for inclusion on a list in *advance of a pending prosecution in which the officer was a potential witness*. It created this ambiguity by limiting its holding to the conclusion "that the [Los Angeles Sheriff's] Department does not violate section 832.7(a) by sharing with prosecutors the fact that an officer, ***who is a potential witness in a pending criminal prosecution***, may have relevant exonerating or impeaching material in that officer's confidential personnel file." (***Id***. at p. 56, emphasis added.)

That legislative analysis accompanying AB 709 discussed the case of ***ALADS***, noting, inter alia, that the list that would be provided would be based on confidential information protected by the ***Pitchess*** statutes, but that law enforcement agencies do not violate that confidentiality by sharing with prosecutors the identity of officers on the ***Brady*** list. (Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023, analysis at p. 3.) The analysis then observed that the ***ALADS*** Court "specifically declined to answer the question of whether 'it would violate confidentiality for a prosecutor to share a [*Brady* list] with the defense.'" (***Ibid***.)

The analysis explained that Assembly Bill 709 would legislatively answer the question left open in ***ALADS*** – albeit in a way that went beyond merely being able to provide a ***Brady*** tip. The analysis stated the bill "would allow a prosecutor to share *confidential Brady lists*, with the defense" (***id***. at p. 3, emphasis added by IPG) without regard to whether an officer on the list was going to be called as a witness in a particular case:

> Specifically, this bill would authorize a prosecutor's office to furnish a list containing names of the peace officers with potentially exculpatory or impeachment evidence obtained from personnel records (i.e., a ***Brady*** list) to the defense. Notably, this bill allows the information to be disseminated broadly, with entire public and alternative defender "offices" and "licensed attorneys of record," and ***contains no provisions that protect or limit further sharing or use of this information***. This is a significant departure from existing law, which allows the prosecuting attorney to disclose directly to the defendant or their attorney any exculpatory evidence. (Penal Code Sections 832.7(g) and (h); 1054.1(e); *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 715 ["The prosecutor's obligation to provide *Brady* material extends to what the police know about the *specific case*."] (emphasis original).)

> As a practical matter, this bill ***creates a new exception to the confidentially of peace officer personnel records***, namely by allowing prosecutors to widely disseminate confidential information obtained from peace officer personnel records (i.e., the identity of peace officer with potential exculpatory or impeachment material in their personnel file), ***without regard to whether the information is material to a specific case***."

(Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023, analysis at pp. 3-4, emphasis added by IPG.)

The analysis went on to describe the potential impact of the bill on ***Pitchess*** motions as well as its impact on Penal Code section 13300.

b. *What is the potential impact of AB 709 on Brady/Pitchess motions?*

As to AB 709's impact on ***Pitchess*** motions, the analysis stated: "Given that this bill would allow *Brady* lists to be disclosed broadly, without a prior assessment by the prosecutor about whether the disclosure of the officer's involvement is material in each case, this bill could increase *Pitchess* motions." (Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023 analysis at p. 5.)*

> ***Editor's note:** ***Pitchess*** motions might increase because, *if* a prosecutor's office chooses to provide a comprehensive ***Brady*** list (even though it is not required to do so), the defense might file *Pitchess* motions , since "[d]isclosure of the fact that an officer is on a ***Brady*** list both signals that it may be appropriate to file a [*Pitchess* motion] and helps to establish good cause for that inspection." (***Association for Los Angeles Deputy Sheriffs* v. *Superior Court*** (2019) 8 Cal.5th 28, 36; Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023 analysis at pp. 4-5.) In other words, it makes it more likely a ***Pitchess*** motion will be made based simply on the existence of the officer's name on the list without otherwise having to make the more standard plausible justification for review of the information. (**See** the 2022 IPG-54 (The Basic Brady, Statutory, and Ethical Discovery Obligations Outline) at pp. 479-482 [discussing the showing generally required for the defense to make the requisite showing for an in camera review of ***Pitchess*** materials].)

c. *What is the potential impact of AB 709 on the distribution of information hitherto protected under section 13300?*

As to the impact of Assembly Bill 709 on Penal Code section 13300, the accompanying analysis recognized that "[t]o the extent that listing the defendant's name and corresponding case number [i.e., the name of the defendant whose case the officer would be testifying or had testified] would be considered a 'master record of information' compiled by a local criminal

justice agency, that information may be considered private information that may not be disseminated except as expressly provided by the Local Summary Criminal History statute." (Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023, analysis at p. 5, fn. 2 [albeit also noting "that this information does not go beyond that which would routinely be found in a minute order, court file or the public index of criminal cases."].) Accordingly, the analysis stated the "bill would arguably allow prosecutors to share private *local* summary criminal history information with a public defender's office, alternative public defender's office, or a licensed attorney of record in a criminal case." (Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023, analysis at pp. 3-4, emphasis added by IPG.)

The analysis observed that adding paragraph (o) to section 13300 would result in some inconsistencies with how information subject to that section could be distributed and used. For instance, Assembly Bill AB 709 noted that under existing law, "[t]here is no provision that allows for disclosure [of local rap sheet information] beyond the individual public defender or the defendant's attorney of record" while "[t]his bill would further allow prosecutors to furnish lists of defendant's names and their associated criminal case number with *public and alternative defender's offices* and *licensed attorneys*. (Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023, analysis at p. 5, bracketed information and emphasis added by IPG.) Moreover, the analysis pointed out that, unlike section 13300(b)(9), "this bill does not require that the information be shared only 'when needed in the course of their duties' nor does this bill contain any requirement that the information be shared with only the defendant's attorney of record. Rather, the identity of the defendant and the fact that they are a defendant in a criminal case will be distributed more broadly." (***Id***. at p. 6.)*

> ***Editor's note:** The analysis appears to assume (***erroneously***) that local rap sheets may be provided whenever needed by counsel "in the course of their duties," without recognizing the qualification that disclosure is also contingent upon access being authorized "by statutory or decisional law." (**See** this IPG, at pp. 27-29.) If this assumption were correct, there would have been no need for the legislature to have eliminated identical language in Penal Code section 11105(b)(9) by passing Assembly Bill 2133 back in 2018. (**See** this IPG, at pp. 6, 27-29.)

The analysis did, however, caution that Assembly Bill 709 would potentially create problems because distribution of the rap sheet was not subject to the restrictions imposed on distribution under section 13300(b)(9) in general. The analysis stated:

> "[T]here are some potential privacy concerns with expanding the authorized recipients of criminal histories. (Penal Code Section 13303.) For example, if entities are provided with periodic lists that include the identity of the defendant and their corresponding criminal case number, the entities could compile private databases of that information. This could be problematic, if, for example, a court ordered a record maintained by a criminal justice agency to be sealed or destroyed because a defendant had been found to be factually innocent of the charges. The information would still be available to public defender's offices, alternative defender's offices and licensed attorneys. The defendant would not know that these records exists and would be unable to determine who has access to them." (*Id*. at p. 6.)

d. Does AB 709 permit prosecutors to voluntarily provide *something less than* a full *Brady* list of all officers, i.e., a *Brady* tip in an individual case where the officer is going to be a witness?

The analysis strongly indicates Assembly Bill 709 is geared to allowing disclosure of full *Brady* lists. (**See** Assem. Bill No. 709 (2023-2024 Reg. Sess.) concurrence in Senate Amendments as amended Sept. 9, 2023, analysis at p. 5 [noting the bill "would allow a prosecutor to share confidential *Brady lists*, with the defense" (***id***. at p. 3, emphasis added by IPG.) However, it is likely that the authorization given to a public prosecutor to provide "a licensed attorney of record in a criminal case with a list containing only the names of the peace officer and defendant and the corresponding case number to facilitate and expedite notifying counsel representing criminal defendants whose cases may involve testimony by that peace officer of exculpatory or impeachment evidence involving that peace officer" would also permit simply releasing a "list" of officers who the prosecution planned to call *in a particular* case solely to the defense counsel handling that particular case.

Subdivision (o) of the new version of section 13300 does state that "[a]ny disclosure made pursuant to this subdivision shall only be made upon agreement by the public defender's office, alternate public defender's office, or the licensed attorney of record in a criminal case." But, since disclosure is entirely voluntary on the part of the prosecution, it would defy logic for defense counsel to refuse to agree to simple disclosure of information about an officer in a pending or past case rather than insist on accepting disclosure of either an entire *Brady* list of all officers in any case or nothing at all. Indeed, it may be that the requirement of agreement by the public defender or alternate public defender's office was solely included to address concerns that confidential information about clients *other than* the defendant represented by those offices in the pending or past case would be disclosed.

8. What information *contained in* the Department of Justice (CII) *or* local rap sheet of a person who is a witness or victim in a pending criminal case ***must*** be disclosed by a local prosecutor to the attorney for a criminal defendant in a pending case?

Disclosure of the actual Department of Justice rap sheet *or* the local rap sheet of a witness or victim *itself* is not part of the discovery obligations of a local prosecutor. (**See** this IPG, section II-6 at pp. 24-26 [discussing Department of Justice rap sheets]; section II-7 at pp. 26-31 [discussing local rap sheets]; 105 Ops.Cal.Atty.Gen. 157, at p. *6, fn. 55; ***People* v. *Roberts*** (1992) 2 Cal.4th 271, 308; ***People* v. *Little*** (1997) 59 Cal.App.4th 426, 433; ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 176.) However, much of the information ***contained in*** the state or local rap sheets of witnesses or victims is discoverable. This portion of the IPG describes what that information would include and how it should be provided.

A. *Brady* discovery

Prosecutors have a duty to provide *any* information contained in the rap sheet of a prosecution witness or victim that would constitute favorable material evidence in the pending prosecution of the defendant (i.e., information the disclosure of which would be reasonably probable to change the outcome of a trial or other proceeding). (**See** the 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at pp. 1-2, 60-64.)* This includes material *impeachment* evidence. (***Ibid*** at p. 65-66.)

*__Editor's note:__ The 2022 IPG-54 (The Basic Brady, Statutory, and Ethical Discovery Obligations Outline) contains extensive discussions of what constitutes favorable and material evidence at pp. 1-71 and is available online at the CDAA and Santa Clara County District Attorneys' websites or upon request. An updated edition of that IPG will be issued in March of 2024 in conjunction with the CDAA discovery seminar on March 18-21 in Monterey, CA.

B. Penal Code section 1054.1 discovery

Any information contained in the rap sheet of a prosecution witness or victim that would fall under one of the categories of evidence listed in Penal Code section 1054.1 should be disclosed. (105 Ops.Cal.Atty.Gen. 157 at p. *1.) The categories of information most likely to be found in the rap sheet of a prosecution witness or victim would be "a felony conviction of any material

witness whose credibility is likely to be critical to the outcome of the trial" (Pen. Code, § 1054.1(d)) or "any exculpatory evidence" (Pen. Code, § 1054.1(e)).

"Exculpatory evidence" under subdivision (e) of section 1054.1 is a broader category of evidence than the favorable *material* evidence required to be disclosed by our Due Process (***Brady***) obligation. (**See *People* v. *Cordova*** (2015) 62 Cal.4th 104, 124; 2022 IPG-54 (The Basic Brady, Statutory, and Ethical Discovery Obligations Outline) at pp. 259-262.) Exactly how broad is subject to dispute, but prosecutors should assume it will include information that could be used to impeach a witness or cast doubt on their credibility. (**See** 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at p. 262.)

C. Types of information commonly found in rap sheets that are required to be disclosed under a prosecutor's constitutional or statutory discovery obligations

i. Felony convictions: Penal Code section 1054.1

Penal Code section 1054.1(d) requires the disclosure of "[t]he existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial." This requirement encompasses felony convictions regardless of whether the conviction was for a crime of moral turpitude. And the duty exists regardless of whether the conviction is admissible in evidence. (**See *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335] ***People* v. *Little*** (1997) 59 Cal.App.4th 426, 433; ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 177; 105 Ops.Cal.Atty.Gen. 157 at p. *1.)

Prosecutors should **not assume** that the obligation under Penal Code sections 1054.1(d) to disclose "[t]he existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial" is eliminated if the conviction of a prosecution witness has been dismissed pursuant to Penal Code sections 1203.4, 1203.41, or 1203.4a. (**See** the 2019-IPG-41(Impeachment with Convictions and Misconduct of Moral Turpitude at pp. 54-69 https://www.sccgov.org/sites/da/Documents/IPG%20Memos/2019-IPG-41.pdf

To be on the safe side, prosecutors should disclose felony convictions of witnesses even when it is debatable whether the witness is material or whether their credibility is likely to be critical to the outcome of the trial.

Editor's note: For a more expanded discussion of section 1054.1(d), see 2022 IPG-54 (The *Basic* Brady, Statutory, and Ethical Discovery Obligations Outline) at p. 258.)

Felony convictions *involving moral turpitude* are independently disclosable pursuant to the ***Brady*** (Due Process) or Penal Code section 1054.1(e) (exculpatory evidence) discovery obligation because they may be used to impeach the witness. (**See *People* v. *Santos*** (1994) 30 Cal.App.4th 169, 177; 105 Ops.Cal.Atty.Gen. 157 at p. *1, fn. 7; Evid. Code, § 788 [authorizing impeachment with felony convictions]; 2019-IPG-41(Impeachment with Convictions and Misconduct of Moral Turpitude at pp. 11-41 https://www.sccgov.org/sites/da/Documents/IPG%20Memos/2019-IPG-41.pdf.

ii. Misdemeanor convictions for crimes of moral turpitude (*People* v. *Wheeler* (1992) 4 Cal.4th 284)

In 1982, voters passed Proposition 8, which enacted article I, section 28 of the California Constitution. The "Right to Truth in Evidence" provision of Proposition 8 [formerly subdivision (d) but now currently codified as subdivision (f)(2)], provides, in pertinent part, that "relevant evidence shall not be excluded in any criminal proceeding." (***People* v. *Wheeler*** (1992) 4 Cal.4th 284, 291.) Based on Proposition 8, the California Supreme Court in ***People* v. *Wheeler*** (1992) 4 Cal.4th 284, held impeachment of witness or defendant was no longer limited to felony convictions. (***Id***. at pp. 294-295.) Rather, "[p]ast criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352." (***People* v. *Harris*** (2005) 37 Cal.4th 310, 337 citing to ***Wheeler*** at p. 294-296; **accord *People* v. *Smith*** (2007) 40 Cal.4th 483, 512.)

This means misdemeanor convictions involving moral turpitude should be disclosed: "While the actual record of the misdemeanor convictions involving moral turpitude is inadmissible hearsay, disclosure of the existence of such convictions will certainly assist the defendant in obtaining direct evidence of the misdemeanor misconduct itself. Therefore, the trial court erred by not allowing discovery of any misdemeanor convictions involving moral turpitude." (***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 178–179; **see also *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335; 2019-IPG-41(Impeachment with Convictions and Misconduct of Moral Turpitude at pp. 90-92, 98-99) https://www.sccgov.org/sites/da/Documents/IPG%20Memos/2019-IPG-41.pdf.)

iii. Arrests

As noted earlier, *regardless of* whether a conviction occurred, "[p]ast criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352." (***People* v. *Harris*** (2005) 37 Cal.4th 310, 337 citing to ***People v. Wheeler*** (1992) 4 Cal.4th 284 at p. 294-296; **accord *People* v. *Smith*** (2007) 40 Cal.4th 483, 512.) Under ***People* v. *Wheeler*** (1992) 4 Cal.4th 284, 292–293, "the court has broad discretion to admit *acts* of moral turpitude to impeach a witness's credibility." (***People* v. *Doolin*** (2009) 45 Cal.4th 390, 443, emphasis added by IPG; **see also *People* v. *Woodruff*** (2018) 5 Cal.5th 697, 763 ["evidence of misdemeanor *misconduct* is admissible to impeach a witness so long as it involves moral turpitude"], emphasis added by IPG; ***People* v. *Mickle*** (1991) 54 Cal.3d 140, 169 [evidence the defendant "threatened witnesses suggests he is the type of person who would harm others and subvert the court's truth-finding process for selfish reasons. Both traits are indicative of a morally lax character from which the jury could reasonably infer a readiness to lie."]; 2019-IPG-41(Impeachment with Convictions and Misconduct of Moral Turpitude at pp. 97-98.)

It is true that an ***arrest itself*** may not be used for impeachment because the fact a witness has been arrested for a crime suggests the witness has a bad character, and thus is prejudicial, even though the arrest does not prove the conduct occurred. (**See *People* v. *Woodruff*** (2018) 5 Cal.5th 697, 759; ***People* v. *Monterroso*** (2004) 34 Cal.4th 743, 778; ***People* v. *Medina*** (1995) 11 Cal.4th 694, 769; ***People* v. *Anderson*** (1978) 20 Cal.3d 647, 650; ***People* v. *Williams*** (2009) 170 Cal.App.4th 587, 629-630; ***People* v. *Lopez*** (2005) 129 Cal.App.4th 1508, 1523; ***People* v. *Bryden*** (1998) 63 Cal.App.4th 159, 183.) The fact of the arrest is, essentially, deemed more prejudicial than probative as a matter of law. (***People* v. *Lopez*** (2005) 129 Cal.App.4th 1508, 1523 [and finding this to be true even when the arrest is offered not merely as evidence bearing on the witness's credibility but to show a general bias against the police stemming from the prior arrest].)

However, the *conduct* of moral turpitude which led to the arrest *can potentially be used* to impeach if it can be proved up just as evidence underlying a conviction is potentially admissible subject to an Evidence Code section 352 objection. (**See *People* v. *Turner*** (2017) 13 Cal.App.5th 397, 411 [although the defendant's "possession of ammunition was uncovered during his arrest for vandalism, it was his possessing ammunition, not the arrest, that was

relevant to impeach his testimony"]; **see also *People* v. *Wheeler*** (1992) 4 Cal.4th 284, 292; this IPG, section I-8-C-i and ii at pp. 41, 42.)

Moreover, arrests can be deemed relevant for *other* reasons than simply because the crime for which the arrest was made was a crime of moral turpitude. (**See e.g.**, ***People* v. *Panah*** (2005) 35 Cal.4th 395, 479 [evidence witness was arrested on an unrelated matter and unsuccessfully sought help on getting released was relevant to her credibility; it provided a reason for her hostility to the prosecution and undercut another portion of her direct testimony]; ***People* v. *Anderson*** (1978) 20 Cal.3d 647, 650 [noting, in a co-defendant case, showing the co-defendants had previously been arrested together was relevant "as demonstrating bias or interest because of the 'close affinity' between the codefendants" albeit still finding the evidence, under the specific circumstances of the case, to be more prejudicial than probative]; ***People* v. *Duncan*** (1981) 115 Cal.App.3d 418, 427-428 [defendant's use of an alias during a prior arrest was relevant, in light of his contradictory testimony, to show that he was attempting to avoid prosecution].)

Thus, if an arrest for a crime of moral turpitude shows up on a rap sheet, the existence of the arrest (along with the arresting agency report number) should be disclosed. In addition, *if* the arrest is for conduct that would be exculpatory regardless of whether it involved moral turpitude (e.g., a victim's arrest for a crime of violence where the defense is claiming self-defense – **see** this IPG, section II-8-C-vii at pp. 47-48) or an arrest indicating there is a pending case – **see** this IPG, section II-8-C-v at pp. 45-46) that arrest should also be disclosed. (**See also** 105 Ops.Cal.Atty.Gen. 157 at p. *1 ["A witness's RAP sheet may also include exculpatory information in the form of arrests and information leading to federal or other-state criminal histories bearing on the witness's credibility"].)

iv. Juvenile adjudications

Although the issue is not entirely resolved, it should be assumed that juvenile adjudications *themselves* are not admissible to impeach. (2019-IPG-41(Impeachment with Convictions and Misconduct of Moral Turpitude at pp. 117-119 https://www.sccgov.org/sites/da/Documents/IPG%20Memos/2019-IPG-41.pdf.) Moreover, because all juvenile records, regardless of whether they are physically in the possession of law enforcement agencies such as the district attorney's office, are deemed to be within the exclusive control of a third party (i.e., the juvenile court), **they are not subject to the discovery provisions** of Penal Code section 1054 et seq. (**See also** Pen. Code, § 1054(e)

[providing that discovery covered by other express statutory provisions remains effective post-Proposition 115].) All juvenile records are third party records. Indeed, even before the enactment of Proposition 115, discovery requests for juvenile records of prosecution witnesses were directed to the juvenile court. (**See e.g.**, ***Foster* v. *Superior Court*** (1980) 107 Cal.App.3d 218, 226; 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at p. 180.)

And, as opined by the Attorney General, juvenile records contained in a rap sheet may not be disclosed absent a court order made pursuant to Welfare and Institutions Code section 827. (**See** 105 Ops.Cal.Atty.Gen. 157 at pp. *5-*6; ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1337 [citing favorably to the San Diego County Juvenile Court's written policies for inspection of juvenile files, which states "that if the district attorney has inspected a juvenile file and finds discoverable material, the district attorney should first obtain a court order before turning the material over to the defense"]; ***People* v. *Stewart*** (2020) 55 Cal.App.5th 755, 776 [noting People may have been legally barred from turning over police report relating to juvenile to defense]; 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at p. 180.) And this holds true even when the juvenile records are contained in the rap sheet of an adult defendant. (**See** 105 Ops.Cal.Atty.Gen. 146 at p. *1 [albeit recognizing evidence of juvenile adjudications of a minor may be disclosed to the defense counsel representing that minor in pending juvenile proceeding]; this IPG, section I-3-C at pp. 8-9.)

On the other hand, in ***People* v. *Lee*** (1994) 28 Cal.App.4th 1724 the court held, "under ***Wheeler***, at least in cases which do not fall under Welfare and Institutions Code section 1772, the prosecution may introduce ***prior conduct evincing moral turpitude even if such conduct was the subject of a juvenile adjudication***, subject, of course, to the restrictions imposed under Evidence Code section 352 and other applicable evidentiary limitations." (***Id***. at p. 1740; **accord *People* v. *Bedolla*** (2018) 28 Cal.App.5th 535, 550 [criminal conduct that was the subject of a juvenile adjudication is admissible to impeach].)

And, if the prosecution *is aware of* ***Brady*** *information* contained in juvenile records of prosecution witnesses, the prosecution is not relieved of its ***Brady*** obligation to provide information known to it even if that information is encompassed in juvenile records. (***People* v. *Stewart*** (2020) 55 Cal.App.5th 755, 775-776; **see also *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335 ["Disclosure may be required even when the evidence is subject to

a state privacy privilege, as is the case with confidential juvenile records"]; 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at p. 181-187.)

To reconcile the disclosure obligations to reveal impeaching evidence in a witness's juvenile records that are present on a rap sheet with the confidentiality provisions of section 827, a prosecutor should either alert the defense to file a request for the records under Welfare and Institutions Code section 827 in juvenile court or file such a request in juvenile court on behalf of the prosecution. (**See *People* v. *Stewart*** (2020) 55 Cal.App.5th 755, 775-776; **see also *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335 ["Disclosure may be required even when the evidence is subject to a state privacy privilege, as is the case with confidential juvenile records"]; 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at p. 181-187; 105 Ops.Cal.Atty.Gen. 157 at p. *6, fn. 55 ["Nothing precludes a district attorney from advising defense counsel of the existence of the confidential information on the RAP sheet, so that defense counsel might seek an order requiring disclosure."].)

v. Information indicating witness is facing pending charges (*Coyer*)

If there is information contained in a witness' rap sheet indicating the witness is facing pending criminal charges, that information should be disclosed because it "constitutes evidence 'favorable' to the defense, in that a jury could view this circumstance as negatively impacting the credibility of testimony by the witness that was helpful to the prosecution." (***People* v. *Letner*** (2010) 50 Cal.4th 99, 176; **see also *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335; ***People* v. *Hayes*** (1992) 3 Cal.App.4th 1238, 1245 [a post-Prop 115 case citing to pre-Prop 115 case of ***People* v. *Coyer*** (1983) 142 Cal.App.3d 839, 842* for proposition that a "defendant is entitled to discovery of criminal charges currently pending against prosecution witnesses anywhere in the state']; ***Kennedy* v. *Superior Court*** (2006) 145 Cal.App.4th 359, 379 [fact charges are pending against a prosecution witness *at the time of trial* is relevant for impeachment purposes]; 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at p. 42.)

*__Editor's note__: Defense counsel often ask for discovery of pending charges, citing to ***People* v. *Coyer*** (1983) 142 Cal.App.3d 839. Although other cases stand for the same general proposition that pending charges should be disclosed, ***Coyer*** did not state the principle stemmed from the ***constitutional*** obligation under ***Brady*** to disclose as "***Coyer*** was decided under the case law that governed criminal discovery in California before 1990." (***Barnett* v. *Superior Court*** (2006) 54 Cal.Rptr.3d 283, 310 [review granted and opinion superseded sub nom. ***Barnett* v. *S.C.*** (Cal. 2007) 57 Cal.Rptr.3d 542].)

It does not make a difference whether the pending charge is a crime of moral turpitude. The theory that this evidence is that it may show that the witness, by testifying, is seeking favor or leniency. (***People* v. *Martinez*** (2002) 103 Cal.App.4th 1071, 1080.)

> **Editor's note**: While pending charges are discoverable, a trial court can probably exclude evidence of the pending charges pursuant to Evidence Code section 352 on relevancy grounds if it can be shown the witness is not actually seeking favor or leniency. (**See** 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at pp. 42-43; ***People* v. *Rivas*** (unreported) 2023 WL 4379055, at *5 [finding exclusion of evidence of pending charges against witness impeached with other convictions proper where there was no evidence suggesting witness expected to receive leniency and any inference of bias would have been purely speculative].)

vi. Information indicating witness is on parole, probation, or is under other court supervision (diversion, etc.).

Under the current law, the fact that a witness is presently on probation has generally been held to be information that may be used to impeach a witness ***regardless of the nature of the conduct*** for which the witness was placed on probation and is discoverable. (**See *People* v. *Dyer*** (1988) 45 Cal.3d 26, 49-50; ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335; ***People* v. *Hayes*** (1992) 3 Cal.App.4th 1238, 1245; ***Millaud* v. *Superior Court*** (1986) 182 Cal.App.3d 471, 476; ***People* v. *Jimenez*** (1985) 171 Cal.App.3d 411, 416; ***People* v. *Adams*** (1983) 149 Cal.App.3d 1190, 1193; ***People* v. *Espinoza*** (1977) 73 Cal.App.3d 287, 291.) The *rationale* for allowing such impeachment is that the witness will have a motive to lie so as to avoid revocation of probation, not because the *underlying crime* bears on the witness' credibility. (**See *Davis* v. *Alaska*** (1974) 415 U.S. 308, 317-318 [defense should have been allowed to impeach witness with fact witness was on juvenile probation under rationale that "vulnerable status as a probationer" permitted an "inference of undue pressure"]; ***People* v. *Adams*** (1983) 149 Cal.App.3d 1190, 1194-1995 [potential bias of a prosecution witness could be shown by evidence that he was on probation following his juvenile adjudication of grand theft because his status as a probationer left him vulnerable to law enforcement pressure; 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at pp. 40-42.)

Similarly, "[e]vidence about the status of a prosecution witness's parole is admissible to show the witness's potential bias resulting from concern about possible revocation." (***People* v. *Price*** (1991) 1 Cal.4th 324, 486; ***Patterson* v. *McCarthy*** (9th Cir. 1978) 581 F.2d 220, 221 [defense should have been allowed to question prosecution witness about his parole status to establish his motives for testifying].) The same rationale would apply to persons under any

kind of court supervision that could potentially be revoked. And thus, information regarding a defendant's parole or probation status or status as a person under court supervision (e.g., mandatory supervision, diversion, or PRCS) when contained in a rap sheet should be disclosed.

Editor's note: While the probationary or parole status of a witness is discoverable, a trial court can probably exclude evidence of the probationary or parole status under Evidence Code section 352 on relevancy grounds if it can be shown the witness is not actually seeking favor or that the witness status would affect her testimony. (**See *People* v. *Chatman*** (2006) 38 Cal.4th 344, 374; ***People* v. *Brady*** (2010) 50 Cal.4th 547, 560; ***People* v. *Carpenter*** (1999) 21 Cal.4th 1016, 1050-1051; ***People* v. *Harris*** (1989) 47 Cal.3d 1047, 1091; 2022 IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at pp. 41-43.)

vii. Information indicating victim has committed crimes of violence or aggression (*Engstrom*)

Defendants often ask for discovery under the decision in ***Engstrom* v. *Superior Court*** (1971) 20 Cal.App.3d 240 without saying anything more. However, only certain limited aspects of the decision in ***Engstrom*** survive. Namely, that the prosecution should disclose specific evidence that would be material to a claim of self-defense or where the defendant seeks to show mitigating circumstances to reduce the charge. (**See *Engstrom* v. *Superior Court*** (1971) 20 Cal.App.3d 240, 245; **see also *People* v. *Moreno*** (2011) 192 Cal.App.4th 692, 702 [finding evidence indicating officer had a propensity for violence or aggressive behavior is potentially relevant to defense of imperfect or perfect self-defense and citing to Evid. Code, §§ 1103, 1105].)* This type of information is disclosable because it is potentially favorable material (i.e., ***Brady***) evidence or exculpatory evidence under Penal Code section 1054.1.

***Editor's note**: In relevant part, Evidence Code section 1103 provides:
"a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:
(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.
(2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).
(b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)."

Evidence Code section 1105 provides: "Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom."

To the extent the defense is relying on ***Engstrom*** insofar as asking for evidence of a victim's prior acts of violence or aggression, the prosecutor *should* be supplying that information from the state or local criminal history rap sheets. However, to the extent the defense is relying on ***Engstrom*** for the proposition that the prosecution has an obligation to search for information outside the possession of the prosecution team or that a court has the discretion to order discovery outside the scope of the discovery statute, ***Engstrom*** is no longer good law.*

*__Editor's note__: In ***Engstrom***, the appellate court ruled that "where a claim of self-defense is offered, and the alleged victim of an offense is claimed to have been the aggressor, information concerning arrests for specific acts of aggression by the alleged victim must be produced if available to the prosecutor" and that this required the prosecutor to check the Department of Justice criminal rap sheets upon defense request where a showing of good cause was made. (***Id***. at pp. 244-245.) In so ruling, the ***Engstrom*** court stated that the trial "court should require the prosecution to make diligent good faith efforts to obtain and make available to the defense pertinent information in the possession of *other agencies which are parts of the criminal justice system*." (***Id***. at pp. 243-244, emphasis added by IPG.) Even before case law made it clear that not all law enforcement agencies are on the prosecution team for purposes of their discovery obligations (**see *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 903; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133; ***In re Steele*** (2004) 32 Cal.4th 682, 697, this IPG, section I-1 at pp. 3-4), the California Supreme court in ***Hill* v. *Superior Court*** (1974) 10 Cal.3d 812 disapproved of ***Engstrom***'s ruling, finding instead that a trial court had the *discretion* to require the production of information in the Department of Justice rap sheet upon a sufficient showing of good cause. (***Hill*** at pp. 818, 820; 105 Ops.Cal.Atty.Gen. 157 at p.*3.) Moreover, both ***Engstrom*** and ***Hill*** pre-dated Proposition 115 (the Crime Victims Justice Reform Act) and its incorporated discovery statutes (Pen. Code, §§ 1054-1054.7) which "sets forth an almost exclusive procedure for discovery in criminal cases" and superseded criminal discovery rules in California that "had largely been a judicially driven engine following the path of the common law." (***People* v. *Superior Court*** (2000) 80 Cal.App.4th 1305, 1311; **accord *Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1106 [overruled on other grounds] [finding court-ordered discovery prohibited by Proposition 115 unless authorized by the criminal discovery statutes or some other statute, or as mandated by the United States Constitution]; **see also** 105 Ops.Cal.Atty.Gen. 157 at p. *3, fn. 22.)

9. Should information contained in a rap sheet of a prosecution witness *that is discoverable* be turned over *directly* to the defense?

Given the fact that a federal constitutional right will trump any statute (**see *People* v. *Nieves*** (2021) 11 Cal.5th 404, 433 ["due process requires the government to provide a defendant with material exculpatory evidence in its possession even when it is subject to a state privacy privilege"]) and given the case law requiring the disclosure of ***Brady*** evidence notwithstanding the state constitutional privacy in arrest or conviction records (**see** 2022 IPG-

54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at pp. 194-197), as a matter of practice and practicality, information found in a rap sheet of a prosecution witness that must be disclosed under the ***Brady*** (Due Process) obligation should ordinarily be disclosed as a matter of course directly to the defendant without having to ask the court to conduct a balancing test.

Although, as a general rule, a prosecutor should not unilaterally decide to disclose information within the possession of the prosecution team directly to the defense that is protected by the state constitutional right of privacy or some other privilege **see** the 2022 IPG-54 (The *Basic* Brady, Statutory, and Ethical Discovery Obligations Outline at pp. 194-196), where published decisions or statutes have essentially pre-determined the outcome of the balancing test, the courts do not appear to require a prosecutor to seek judicial review before doing so. Thus, as with information contained in the rap sheet that constitutes favorable material information, when the type of information contained in a witness or victim's rap sheet that has been determined under the case law to be impeaching or exculpatory under the statutory obligation to disclose, it is likely unnecessary to ask a court to engage in the balancing test that is usually required when weighing a defendant's interest in disclosure against a privilege or privacy right before disclosing that information (e.g., information in the rap sheet) to the defense.

10. Does the additional access to Department of Justice rap sheets provided by the 2019 amendment to Penal Code section 11105(b)(9) relieve the prosecution of any discovery obligations?

Although one of the grounds for finding the Department of Justice rap sheets of prosecution witnesses to be in the constructive possession of the prosecution team was the lack of defense access to those rap sheets, it is unlikely the amendment to Penal Code section 11105(b)(9) giving the defense greater and easier access to those rap sheets (**see** this IPG, sections I-3-A at p. 6 and I-4 at p. 10) will relieve the prosecution of the duty of disclosure.

Penal Code section 1054.1 does not excuse a prosecutor from the statutory obligation to provide exculpatory information or felony convictions just because the defense can or has obtained that information via another avenue. (**See** the 2022 IPG-54 (The *Basic* Brady, Statutory, and Ethical Discovery Obligations Outline at pp. 286-287.)

The increased accessibility of the information provided under the current version of Penal Code section 11105 may, however, prevent a failure to disclose the information from rising to the level of a ***Brady*** violation because failure to disclose evidence that is known and reasonably accessible to the defense is not a violation of federal due process, i.e., is not a ***Brady*** violation. (**See *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1134, citing to ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1048 1049; the 2022 IPG-54 (The *Basic* Brady, Statutory, and Ethical Discovery Obligations Outline) section I-15 at pp. 201-207.) Albeit

II. GRAND JURY DISCOVERY OBLIGATIONS

1. What are the general obligations to disclose exculpatory information regarding a defendant *to* the grand jury?

There is no duty imposed on the prosecutor to disclose exculpatory evidence to the grand jury by the United States Constitution. (***United States* v. *Williams*** (1992) 504 U.S. 36, 53; ***Berardi* v. *Superior Court*** (2007) 149 Cal.App.4th 476, 493; ***People* v. *Thorbourn*** (2004) 121 Cal.App.4th 1083, 1089 [albeit leaving it somewhat ambiguous as to whether disclosure would be required by the state constitution].) However, the prosecutor has a definite *statutory* duty to inform the grand jury of the nature and existence of exculpatory evidence and, thereafter, inform the grand jury of its power to order any additional evidence to be produced. In ***Johnson* v. *Superior Court*** (1975) 15 Cal.3d 248, the California Supreme Court construed section 939.7 to place an *implied* obligation on the prosecutor to disclose any known exculpatory evidence to the grand jury. (***Id***. at pp. 254-255.)

The ***Johnson*** ruling was later codified by the Legislature in Penal Code section 939.71. That section now states:

"(a) If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties under Section 939.7. If a failure to comply with the provisions of this section results in substantial prejudice, it shall be grounds for dismissal of the portion of the indictment related to that evidence.
(b) It is the intent of the Legislature by enacting this section to codify the holding in ***Johnson* v. *Superior Court***, 15 Cal. 3d 248, and to affirm the duties of the grand jury pursuant to Section 939.7." (Pen. Code, § 939.71.)

Penal Code section 939.7 provides: "The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses." (Pen. Code, § 939.7; ***Berardi* v. *Superior Court*** (2007) 149 Cal.App.4th 476, 490.)

"The key language in section 939.7 are the phrases 'reason to believe' and 'will explain away the charge.' Those words convey a broader concept than the operative words in section 939.71, which are 'exculpatory' and 'aware.' A comparison of the two statutes thus suggests that section 939.7 can encompass more than just testimony which, on its face, is 'exculpatory.'" (***McGill* v. *Superior Court*** (2011) 195 Cal.App.4th 1454, 1503.) Reading sections 939.7 and 939.71 together, the duty of the prosecutor is to disclose "information that reasonably tends to negate guilt." (**See *McGill* v. *Superior Court*** (2011) 195 Cal.App.4th 1454, 1507.) And this duty "does not depend on the prosecutor's estimation of the weight of the evidence, simply on whether the evidence reasonably tends to negate guilt." (***Id***. at p. 1517.)

To establish "substantial prejudice" from the failure to disclose exculpatory evidence, the defense must show "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (***Berardi* v. *Superior Court*** (2007) 149 Cal.App.4th 476, 493.)

2. Must the grand jury be informed of the criminal history of witnesses testifying before the grand jury?

Although the duty to inform the jury of exculpatory evidence does not likely require the disclosure of exculpatory evidence of very little probative value (**see e.g.**, ***People* v. *Remiro*** (1979) 89 Cal.App.3d 809, 837), given that there is a duty is to inform the grand jury of the nature and existence of "evidence reasonably tending to negate guilt" (***McGill* v. *Superior Court*** (2011) 195 Cal.App.4th 1454, 1507) and that such evidence can potentially include evidence of past criminal acts impeaching the credibility of a witness (**see *Page* v. *Superior Court*** (1979) 90 Cal.App.3d 959, 967), prosecutors should alert the grand jury to information contained in a criminal history record that bears on the credibility of a witness testifying before a criminal grand jury.

3. What are a prosecutor's disclosure obligations when a grand jury indictment does not issue but there is information elicited during the grand jury proceeding that might be exculpatory in a particular case?

Grand jury proceedings are generally confidential. "Although the grand jury was originally derived from the common law, the California Legislature has codified extensive rules defining it and governing its formation and proceedings, including provisions for implementing the long-established tradition of grand jury secrecy." (***Daily Journal Corp.* v. *Superior Court*** (1999) 20 Cal.4th 1117, 1122 [and describing variety of statutes, including Penal Code sections 911, 915, 924.1, 924.2, 924.3, 934, 939].) "Viewing that statutory scheme as a whole, it appears that the Legislature intended disclosure of grand jury materials to be strictly limited." (***Id***. at p. 1124.) Addressing the question of whether a superior court could order disclosure of information from a criminal grand jury that has not returned an indictment, the California Supreme Court concluded "that whatever exercise of authority to disclose grand jury materials has not been expressly permitted by the Legislature is prohibited." (***Ibid***.)

If an indictment is returned, there is nothing preventing a prosecutor from disclosing exculpatory information contained in that transcript. "California statutes expressly provide for disclosure of grand jury materials by the court in particular circumstances. For example, under [Penal Code] sections 938 and 938.1, if a grand jury returns an indictment against a defendant, the grand jury transcript shall be provided to the defense and soon after made public." (2023 WL 6009198, at *9, (Cal.A.G. Aug. 24, 2023).) In that circumstance, there should be no barrier to the prosecutor disclosing that information in a subsequent prosecution.

But let's say a witness testifies at a criminal grand jury proceeding and provides evidence that might exculpate the target of the investigation (or someone else) in a different pending prosecution *but no indictment issues*. Or let's say a police officer witness lies to the grand jury *but no indictment* on the target of the investigation issues and the police officer witness testifying as a witness in a separate unrelated subsequent case? What is the *prosecutor*'s obligation to disclose this information in a subsequent prosecution?

If an indictment is *not* returned, there are two statutes that potentially would allow prosecutors to meet their discovery obligations regarding the testimony that might be exculpatory in an unrelated prosecution: Penal Code sections 924.2 and 924.6.

Penal Code section 924.2 provides: "Any court may require a grand juror to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before the grand jury by any person, upon a charge against such person for perjury in giving his testimony or upon trial therefor."

If those circumstances allowing for disclosure exist, the statute appears to allow disclosure of a witness' testimony at a grand jury regardless of whether an indictment issued. A prosecutor could meet their obligation in that circumstance simply by asking the court to allow disclosure of the witness' testimony.

However, the exception allowing release under 924.2 is limited. "Section 924.2 permits disclosure only for purposes of impeachment. It does not authorize a litigant to obtain unlimited disclosure in advance of a witness's testimony. To preserve the narrow scope of the statute, the appropriate procedure is for the witness to testify first. Counsel may then request the court to examine the transcript of that witness's grand jury testimony in camera, to determine if it provides potentially relevant impeachment material. If it does, the court may release the relevant pages to counsel, with a protective order restricting the use of the material to impeachment." (***Goldstein* v. *Superior Court*** (2008) 45 Cal.4th 218, 234 [and rejecting defendant's request for all the grand jury transcripts and other evidentiary materials from a sealed investigation by the grand jury into the misuse of the jailhouse informants pursuant to section 924.2 because allowing such disclosure would "transform this narrow exception, expressly confined to impeachment, into a general discovery provision."].)

Penal Code section 924.6, on the other hand, seems to provide the easiest method for meeting a prosecutor's discovery obligations (statutory or constitutional). Penal Code section 924.6 states:

(a) *If no indictment is returned*, the court that impaneled the grand jury shall, *upon application of either party, order disclosure of all or part of the testimony of a witness before the grand jury* to a defendant and the *prosecutor in connection with any pending or subsequent criminal proceeding* before any court if the court finds following an in camera hearing, which shall include the court's review of the grand jury's testimony*, that the testimony is relevant, and appears to be admissible.*

(b) If a grand jury decides not to return an indictment in a grand jury inquiry into an offense that involves a shooting or use of excessive force by a peace officer described in Section 830.1, subdivision (a) of Section 830.2, or Section 830.39, that led to the death of a person being detained or arrested by the peace officer pursuant to Section 836, the court that impaneled the grand jury shall, upon application of the district attorney, a legal representative of the decedent, or a legal representative of the news media or public, and with notice to the district attorney and the affected witness involved, and an opportunity to be heard, order disclosure of all or part of the indictment proceeding transcript, excluding the grand jury's private deliberations and voting, to the movant, unless the court expressly finds, following an in camera hearing, that there exists an overriding interest that outweighs the right of public access to the record, the overriding interest supports sealing the record, a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed, the proposed sealing is narrowly tailored, and no less restrictive means exist to achieve the overriding interest. (Emphasis added.)

Because section 924.6 permits disclosure if the testimony is simply relevant and appears to be admissible, it should ordinarily allow prosecutors to obtain and disclose any testimony that falls into the broader category of "exculpatory" evidence under Penal Code section 1054.1(e) or constitutes *Brady* evidence. If physical evidence is introduced via the testimony of a witness, at least a description of the evidence could also be disclosed under section 924.6; **see** also this IPG, section II-3 at pp. 55-56 [discussing the Attorney General opinion 2023 WL 6009198, at p. *1 (Cal.A.G. Aug. 24, 2023).) All a prosecutor would have to do to meet their discovery obligations is request the court (or inform defense counsel of the need to request the court) to allow disclosure of the information.

This would be consistent with how prosecutors handle disclosure of information that might be confidential, privileged, or subject to a privacy right in any other circumstance. (**See** 2022-IPG-54 [Brady, Statutory, and Ethical Discovery Obligations] at pp. 194-200; ***People* v. *Webb*** (1993) 6 Cal.4th 494, 518 [When a state seeks to protect material, exculpatory but privileged evidence (i.e., psychiatric records) from disclosure, "the court must examine them in camera to determine whether they are 'material' to guilt or innocence."]; ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1336 ["Subsequent to ***Ritchie***'s selection of the ***in camera*** review procedure, courts have recognized that in camera inspection is appropriate when there is a 'special interest in secrecy' afforded to the files."]; ***Rubio* v. *Superior Court*** (1988) 202 Cal.App.3d 1343, 1349-1351 [requiring in camera review of videotape of sexual

relations between a married couple to determine whether criminal defendant's right to due process outweighs couple's constitutional rights of privacy and their statutory privilege not to disclose confidential marital communications]; Evid. Code, § 915(b) [procedure for in camera review when work product or official information privilege is asserted].)

In a recent Attorney General opinion sought by Yolo County District Attorney Jeff Reisig, the Attorney General addressed the question: "Do prosecutors' disclosure obligations under *Brady* v. *Maryland* (1963) 373 U.S. 83 and Penal Code section 1054.1 encompass materials from criminal grand jury proceedings, despite the fact that those proceedings are conducted in secret? (2023 WL 6009198, at p. *1 (Cal.A.G. Aug. 24, 2023).)

The Attorney General opined the answer was: "Yes. Prosecutors' disclosure obligations under *Brady* and Penal Code section 1054.1 encompass materials from criminal grand jury proceedings, despite the fact that those proceedings are conducted in secret." (***Ibid***.)

The Attorney General recognized that while "grand jury indictments and reports may eventually be disclosed, the grand jury operates in secret." (***Ibid***.) However, the Attorney General opined that a "California law on grand jury secrecy cannot override federal constitutional due process principles as enunciated by ***Brady*** and its progeny." (***Id***. at p. *10.) Thus, the prosecutor's disclosure obligations under ***Brady*** "encompass materials from criminal grand jury proceedings, despite the fact that those proceedings are conducted in secret." (***Id***. at p. *1.)

*__Editor's note:__ The general conclusion reached by the Attorney General (i.e., that the due process obligation to disclose ***Brady*** evidence would trump a non-constitutionally based statute precluding disclosure) is indisputable. However, the analysis appears somewhat odd. The analysis treats the question posed as whether there is "an exception" built into the ***Brady*** rule for information covered by the secrecy of the grand jury. (**See** 2023 WL 6009198, at p. *10 (Cal.A.G. Aug. 24, 2023) ["the question here is whether ***Brady*** itself recognizes a carve-out for materials from criminal grand jury proceedings. We conclude that it does not. ¶ The constitutional requirement described in ***Brady*** and its progeny contains no express exception for criminal grand jury materials, and we have found no authority implying the existence of such an exception. The lack of such an exception is sensible in our view."].) That is an unusual way of describing the question since the ***Brady*** rule is simply a judicial definition of what information is required to be disclosed by the Due Process Clause. It does not really have "exceptions" in the same way the Fourth Amendment has exceptions. Either the evidence falls within the definition of ***Brady*** material or not.

The Attorney General pointed out that to the extent that disclosures of certain evidence related to ongoing criminal grand jury proceedings would undermine [the interests served by grand

jury secrecy], "the answer is not to exclude those materials from the ***Brady*** right, but for the prosecution to seek a protective order to address any particularized concerns." (***Id***. at p. *11 [and citing to ***Millaud* v. *Superior Court*** (1986) 182 Cal.App.3d 471, 476 for the proposition that trial courts have broad power to fashion criminal discovery procedures satisfying the legitimate needs of all parties, including the power to issue protective orders preventing unjustified use of the requested materials].)

The Attorney General also observed "that just because material from a criminal grand jury proceeding may be listed in section 1054.1, disclosure of any given material could nevertheless be prohibited under another statute, such as the good-cause exception for 'threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.' And, of course, even where material does have to be disclosed to the defendant under section 1054.1, in appropriate circumstances the prosecutor may seek a protective order to prohibit the public dissemination of the document." (***Id***. at p. *12.)

Regarding disclosure of testimony, including nontestimonial materials (e.g., exhibits and comments by the district attorney to the grand jury), the Attorney General concluded, "we see no basis in section 1054.1 to exclude material from criminal discovery on the ground that it derives from criminal proceedings before a grand jury." (2023 WL 6009198, at p. *13 (Cal.A.G. Aug. 24, 2023).) The Attorney General relied on the case of ***People* v. *Superior Court (Moucharab)*** (2000) 78 Cal.App.4th 403, which held "although the grand jurors were sworn to secrecy regarding disclosure of evidence, after the indictment is handed down a transcription of the entire testimony is made available to the indicted defendant, to the district attorney and to the public," citing sections 938 and 938.1." (2023 WL 6009198, at p. *12 (Cal.A.G. Aug. 24, 2023).)

Exhibits introduced to the grand jury are not included with the transcript. (**See *Stern v. Superior Court*** (1947) 78 Cal.App.2d 9, 13.) But with regards to such nontestimonial material, the Attorney General pointed out that the ***Moucharab*** court recognized that section 1054(e) "allows for discovery authorized by 'other express statutory provisions" and that "sections 995, 939.71 and to a certain extent section 939.6 provide the requisite 'express statutory provisions,' within the meaning of section 1054, subdivision (e), authorizing discovery of *nontestimonial* grand jury proceedings[.]" (2023 WL 6009198, at p. *12 (Cal.A.G. Aug. 24, 2023) citing to ***Moucharab*** at pp. 429, 436, emphasis added by IPG; **see also**

Matter of Grand Jury Investigation (Mass. 2020) 152 N.E.3d 65, 80 [notwithstanding general confidentiality for grand jury testimony, once prosecutors learned of testimony given by officers at grand jury regarding the writing of false police reports, the prosecutors had "a ***Brady*** *obligation* to disclose the exculpatory information at issue to unrelated criminal defendants in cases where a petitioner is a potential witness or prepared a report in the criminal investigation", emphasis added].)

Editor's note: Assuming section 924.6 is not applicable (e.g., because the evidence is nontestimonial), to the extent the opinion can be read as suggesting that the prosecutor may simply turn over information protected by the grand jury secrecy rules to the defendant after asking a court to issue a protective order, it is respectfully recommended that the prosecutor also ask the court to do the standard balancing analysis of whether any confidentiality interest is outweighed by the interest of the defendant in disclosure. (**See** 2022-IPG-54 (The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline) at pp. 194-200; this IPG, section II-3 at pp. 53-54.)

Editor's note: There was another non-discovery related question posed the Attorney General opinion at 2023 WL 6009198, at p. *12 (Cal.A.G. Aug. 24, 2023). The question posed was: "Does Penal Code section 904.6 require a court to impanel a grand jury upon a district attorney's request?" The Attorney General opined: "No. Penal Code section 904.6 provides that a court *may* impanel a grand jury upon a district attorney's request, but does not require it." (***Ibid***.)

NEXT EDITION: ISSUES AND RECENT CASE LAW INVOLVING PROVING AGGRAVATING CIRCUMSTANCES IN LIGHT OF THE RECENT CHANGES TO PENAL CODE SECTIONS 1170 AND 1170.1 *OR* THE IMPACT OF THE INTRODUCTION OF INADMISSIBLE EVIDENCE (INADVERTENTLY OR NOT) AND HOW TO MITIGATE THE DAMAGE.

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.