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Izazaga v. Superior Court: Affirming the Public's Cry to Unshackle the Criminal Prosecution System

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Dissatisfied with a criminal justice system apparently viewed as unfairly favoring the rights of accused criminals at the expense of victims and taxpayers, a majority of Californians voted on June 5, 1990 to adopt the Crime Victims Justice Reform Act (Proposition 115).[1] Proposition 115 was designed to improve the

1. The voters' dissatisfaction can be inferred by the voters' approval of the initiative, which included a preamble stating:

(a) We the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system.

criminal prosecution system by promoting swift and fair justice.[2] As part of the plan to achieve these goals, Chapter 10 was added to the California Penal Code.[3] This Chapter establishes a reciprocal discovery scheme,[4] and defines new parameters of permissible discovery in criminal trials.[5] The stated purpose of the new discovery provisions is to promote the ascertainment of truth, to save court time, and to protect victims of crimes from danger, harassment, and undue delay.[6] Arguably the most significant and controversial portion of Chapter 10 is the enactment of California Penal Code section 1054.3. This section mandates that, upon the

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(b) In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth.

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

(d) With these goals in mind, we the people do hereby enact the Crime Victims Justice Reform Act.

Preamble of Proposed Law, in CALIFORNIA BALLOT PAMPHLET 33 (June 5, 1990), *reprinted in* CAL. CONST. art. I, § 14.1, note (Deerings Supp. 1992). Proposition 115 was passed by a 57 percent to 43 percent vote. L.A. Times, June 6, 1990, at A25, col. 2. *See generally Proposition 115: The Crime Victims Justice Reform Act*, 22 PAC. L. J. 1010 (1991) (reviewing Proposition 115).

2. *Preamble of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET 33 (June 5, 1990), *reprinted in* CAL. CONST. art. I, § 14.1, note (Deerings Supp. 1992).

3. *See* CAL. PENAL CODE §§ 1054-1054.7 (West Supp. 1992) (enacted by Proposition 115) (constituting Chapter 10).

4. Reciprocal discovery refers to a scheme of criminal discovery whereby both the prosecution and the defense are given, within constitutional limitations, equal access to information held by the opposition. 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE: CRIMINAL PRACTICE SERIES § 19.4(a) (1984). While few courts disagree with the general policies behind reciprocal discovery, there is often disagreement as to the extent to which a defendant's constitutional rights prohibit full reciprocity in discovery by the prosecution. *Id.* Courts also disagree as to the amount of reciprocity that can be allowed without disrupting the traditional adversarial balance in a criminal trial. *Id. Compare, e.g.*, Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970) (providing a narrow interpretation of the prosecution's reciprocal discovery rights) *with* State ex. rel. Keller v. Criminal Court, 262 Ind. 420, 317 N.E.2d 433, 438 (1974) (providing a broad interpretation of the prosecution's reciprocal discovery rights).

5. *See* CAL. PENAL CODE §§ 1054-1054.7 (West Supp. 1992) (providing the rules for discovery in criminal trials).

6. *Id.* § 1054(a)-(d) (West Supp. 1992).

prosecutor's request, a defendant and defense counsel must disclose the names and addresses of witnesses, other than the defendant, whom the defense intends to call at trial.[7] Section 1054.3 also mandates the disclosure of these witnesses' statements, and any reports or real evidence which are intended to be offered at trial.[8] The effect of section 1054.3 is to provide prosecutors with avenues of discovery which had previously been ruled impermissible by the California Supreme Court.[9] Additionally, the Chapter 10 discovery rules provide for the exclusion of evidence if a party fails to comply with the required discovery.[10]

The enactment of Chapter 10 dramatically reversed California law governing the scope of prosecutorial discovery.[11] The discovery provisions within the Chapter, however, are representative of rules previously adopted in other jurisdictions.[12] Moreover, many of these individual rules have previously faced and survived federal constitutional challenges in their respective jurisdictions.[13] Although the drafters of Proposition 115 appear to have been cognizant of these previous challenges, and took pains

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7. *Id.* § 1054.3 (West Supp. 1992).

8. *Id.*

9. *See infra* notes 132-189 and accompanying text (discussing the California Supreme Court decisions limiting the scope of prosecutorial discovery).

10. CAL. PENAL CODE § 1054.5(c) (West Supp. 1992). The exclusion of testimony is a sanction that can be used only after all other sanctions have been exhausted. *Id.*

11. *See infra* notes 132-189 and accompanying text (discussing the California Supreme Court decisions limiting the scope of prosecutorial discovery).

12. *See, e.g.*, ARIZ. R. CRIM. P. 15.2; ILL. ANN. STAT. ch. 110A, para. 413 (Smith-Hurd 1985); OR. REV. STAT. § 135.835 (1990) (permitting prosecutorial discovery of intended defenses, names, addresses, and statements of witnesses intended to be called at trial, and real evidence intended to be introduced at trial). *See also, e.g.*, FLA. R. CRIM. P. 3.200; MICH. COMP. LAWS ANN. .§§ 768.20 (West 1982) (permitting prosecutorial discovery of any alibi defense, and the names and addresses of alibi witnesses intended to be called at trial).

13. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 401-02 (1988), *reh'g denied*, 485 U.S. 983 (1988) (upholding the sanction of exclusion of evidence where a defendant fails to comply with a state discovery rule); Williams v. Florida, 399 U.S. 78, 83 (1970) (upholding a discovery rule requiring a defendant to disclose alibi defenses). *But see* Wardius v. Oregon, 412 U.S. 470, 472 (1973) (striking down a discovery rule because the rule failed to provide for reciprocity by the prosecution).

to conform the California rules to federal precedent,[14] at least one commentator predicted that a challenge to the new rules would quickly follow their adoption.[15] The case of *Izazaga v. Superior Court*[16] was the realization of that prediction.

This Note reviews the scope and validity of reciprocal discovery in California criminal proceedings in the wake of the *Izazaga* decision. Part I discusses the primary constitutional issues raised by prosecutorial discovery, and the legal background of prosecutorial discovery in California.[17] Part II summarizes the California Supreme Court's disposition of the state and federal constitutional issues raised in the *Izazaga* case.[18] Finally, Part III discusses the legal ramifications of the *Izazaga* decision and the future validity of reciprocal discovery in California.[19]

I. LEGAL BACKGROUND

A. *Rival Notions of the Proper Adversarial Balance in Criminal Trials*

The degree to which courts and commentators justify or reject the legitimacy of reciprocal discovery in criminal proceedings depends largely on their view of the respective rights of the state

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14. The drafters specifically limited the prosecution's discovery to witnesses and evidence that the defendant intends to introduce at trial. CAL. PENAL CODE § 1054.3(a)-(b) (West Supp. 1992). The "intends to introduce" limitation mirrors the language of the Florida discovery statute in *Williams v. Florida*, 399 U.S. 78 (1970), which was upheld as permissibly accelerating the timing of the defendant's disclosure. *Williams*, 399 U.S. at 85. *See* Izazaga v. Superior Court, 54 Cal. 3d 356, 398, 815 P.2d 304, 333, 285 Cal. Rptr. 231, 260 (1991) (Mosk, J., dissenting) (stating that the drafters of Proposition 115 evidently included the concept of reciprocity because of the United States Supreme Court decision in *Wardius v. Oregon*, 412 U.S. 470 (1973)).

15. *See* Uelmen, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL. L. REV. 2069, 2071 (1988) (predicting that the next state-wide ballot would contain the most far reaching criminal justice initiative in California history, and also that the initiative if enacted would be challenged in the California Supreme Court before November 1990).

16. 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991), *modified, reh'g denied*, 54 Cal. 3d 611a (1991).

17. *See infra* notes 20-212 and accompanying text.

18. *See infra* notes 213-413 and accompanying text.

19. *See infra* notes 414-580 and accompanying text.

and the accused to a fair trial.[20] The notion that an accused possesses a fundamental right to a fair trial arises from the enumeration of an accused's trial-related rights in the United States Constitution.[21] The notion that a state also possesses a right to a fair trial was developed by the United States Supreme Court in *Hayes v. Missouri*.[22] As a result of our adversarial system of justice, specific rules of procedure, such as those defining the scope of permissible discovery, often place the rights of the state and the accused in conflict.[23] In order to justify particular rules despite the conflict they create, several legal theories have been developed which explain the purpose and proper functioning of a criminal

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20. While the rights of the state and the accused are the primary factors balanced in determining fair trial procedures, the rights of victims should not be ignored. *See* Morris v. Slappy, 461 U.S. 1, 14-15 (1983) (arguing that the interests of crime victims should be placed in the balance). *See also Victims' Rights Symposium*, 23 PAC. L.J. 815 (1992); Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 948 (1985) (discussing the concept of victims' rights).

21. *See* U.S. CONST. amend. V, VI (enumerating the constitutional rights of a criminal defendant). The sixth amendment guarantees a criminal defendant the right to a speedy and public trial by an impartial jury, the right to be informed of the nature and cause of the accusation, the right to confront witnesses against him, the right to compulsory process for obtaining witnesses, and the right to assistance of counsel. U.S. CONST. amend. VI. Trial-related rights of an accused are also found in the fifth amendment, including the privileges against self-incrimination, the requirement of grand jury indictment, and the prohibition against double jeopardy. *Id.* amend. V. With the exception of the grand jury indictment, all of these rights have been incorporated into the fourteenth amendment, and are therefore applicable to the states. *See* Hurtado v. California, 110 U.S. 516 (1884) (holding that indictment by a grand jury is not a fundamental right which the states must respect). For cases discussing rights incorporated under the fourteenth amendment see Benton v. Maryland, 395 U.S. 784 (1969) (prohibition against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process and right to public trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel).

22. 120 U.S. 68 (1887). The Court in *Hayes*, dealing with an issue of juror impartiality, stated that a criminal trial requires not only freedom from any bias against the accused, but also freedom from any prejudice against the state. *Id.* at 70. The Court also stated that between the accused and the state, the scales are to be evenly balanced. *Id. But see* Bandes, *Taking Some Rights Too Seriously: The State's Right To A Fair Trial*, 60 S. CAL. L. REV. 1019, 1024 (1987) (stating that the notion of equality between the state and the accused in a criminal trial developed from dictum in *Hayes*, and is highly questionable). Apparently a majority of California voters believe that the state has a right to a fair trial. *See* CAL. CONST. art. I, § 29 (enacted by Proposition 115) (stating that in criminal cases, the state shall have a right to due process of the law and to a speedy and public trial).

23. *See* Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 121 (1987) (discussing the adversarial nature of a criminal trial in the United States).

trial.[24] The two most common theories have been referred to as the Search for Truth Model[25] and the Fair Play Model.[26]

It is almost universally agreed that the ultimate goal of a criminal trial should be the attainment of truth.[27] Those adhering to the search for truth model believe that the truth may be discovered only when all relevant evidence is accessible to both parties.[28] This gives each party the fullest opportunity to prepare its case, and avoids unfair surprise and trickery which can obscure the truth.[29] A search for truth approach was followed by the United States Supreme Court in *Williams v. Florida*,[30] where a statute requiring the pretrial disclosure of alibi defenses was upheld in the face of the defendant's claim of due process and self-incrimination violations.[31] In a statement representative of the search for truth model, the *Williams* Court noted that the adversary system is not a "poker game," rather, the pursuit of truth is enhanced by giving each party equal access to the other's information.[32] It follows that proponents of the search for truth model tend to favor liberal rules of discovery, much like those applicable in civil trials.[33]

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24. *See id.* at 121-154 (identifying six different theories explaining the essential purpose of a criminal trial).

25. *See* Bandes, *supra* note 22, at 1036-45 (labeling and describing the Search for Truth Model).

26. *See id.* (labeling and describing the Fair Play Model).

27. Lapides, *Cross-Currents in Prosecutorial Discovery: A Defense Counsel's Viewpoint*, 7 U.S.F. L.REV. 217, 230 (1973); Kane, *Criminal Discovery--The Circuitous Road to a Two-Way Street*, 7 U.S.F. L. REV. 203, 203 (1973); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 228 (1964).

28. *See* Traynor, *supra* note 27, at 228. Such a position is widely accepted in civil cases as the most effective way of attaining the truth. *Id.*

29. *Id.*

30. 399 U.S. 78 (1970).

31. *Id.* at 81-86. The *Williams* Court held that due process was not violated since the statute was narrowly tailored to achieve the legitimate state interest of advance disclosure. *Id.* at 81-82. The Court also held that the privilege against self-incrimination was not violated since the statute merely accelerated the disclosure of information which would eventually come out at the trial. *Id.* at 83-86.

32. *Id.* at 82. *See* United States v. Nixon, 418 U.S. 683, 709 (1974) (stating that the ends of criminal justice would be defeated if judgment were to be founded on partial or speculative presentation of the facts).

33. *See* Traynor, *supra* note 27, at 228.

In contrast, proponents of the fair play model believe the ultimate goal of finding the truth, if possible at all,[34] can only be achieved by providing sufficient advantages and protections to the accused.[35] Such advantages are necessary because, unlike a civil trial, a criminal trial necessarily places the defendant at a disadvantage.[36] The dissenting opinion of Justice Black in *Williams* illustrates the view that the prosecution and defense cannot be treated as equals, because the defendant enters a criminal proceeding at a disadvantage to the superior power of the state.[37] For example, the state controls the initiation of a proceeding with its powers of indictment, and has theoretically limitless investigative powers.[38] Therefore, a fair criminal trial must have an asymmetric shape.[39] The rights of the accused must be greater than those of the state in order to counterbalance the state's

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34. *See* Goodpaster, *supra* note 23, at 125 (stating that under the strictest fair play theory, the goal of a trial is not the search for the actual truth, rather it is simply a means of resolving a dispute, and should be as fair as possible). It has been suggested that if discovering the actual truth is the goal of a criminal trial, the adversarial system is not an effective means to achieve this goal. *Id.* Rather, an inquisitorial or investigative system would be a more efficient means for discovering the truth. *Id.*

35. *See Williams*, 399 U.S. at 112-14 (Black, J., concurring in part and dissenting in part) (arguing that the disadvantages of an accused should not be ignored in the quest for truth). *See also* Blumenson, *Constitutional Limitations on Prosecutorial Discovery*, 18 HARV. C.R.-C.L. L. REV. 123, 133 (1983) (arguing that a strict search for truth approach conflicts with the Bill of Rights, which was designed to redress the inherent disadvantages of an accused in a government prosecution); Arenella, *Rethinking the Function of Criminal Procedure: The Warren and Burger Court's Competing Ideologies*, 72 GEO. L.J. 185, 198 (1983) (claiming that characterizing the primary function of a criminal trial as the search for truth oversimplifies how the system is designed to determine guilt, and is therefore misleading).

36. *Williams*, 399 U.S. at 112-14 (Black, J., concurring in part and dissenting in part). *See* Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring) (stating that a defendant enters a criminal trial at a disadvantage).

37. *Williams*, 399 U.S. at 112-14 (Black, J., concurring in part and dissenting in part). *See Wardius*, 412 U.S. at 480 (Douglas, J., concurring) (stating that the framers of the Constitution recognized the awesome power of the indictment and the virtually limitless resources of government investigators).

38. *Williams*, 399 U.S. at 112-14 (Black, J., concurring in part and dissenting in part). *See Wardius*, 412 U.S. at 480 (Douglas, J., concurring) (identifying the power to indict and to conduct exhaustive investigation as advantages of the state). *See also* Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1018-19 (1972) (identifying other advantages held by the state including the ability to begin its investigation long before the defendant when witnesses are more likely to remember events, access to a great wealth of information in government files, and the fact that persons may be more willing to cooperate with the prosecution than with the defense).

39. Goodpaster, *supra* note 23, at 126 (explaining the underlying theory of the fair play approach).

inherent advantages.[40] Proponents of the fair play model believe that a defendant's privilege against self-incrimination, the right to a jury trial, the burden of proof beyond a reasonable doubt, and limited prosecutorial discovery are necessary advantages even if they have the practical effect of hindering the attainment of truth.[41]

Belief in one or the other of these rival models largely explains how courts and commentators arrive at contrary conclusions with respect to the constitutional validity of reciprocal discovery in the criminal setting. Proponents of the fair play model claim that discovery by the prosecution may violate a defendant's self-incrimination privilege, due process rights, or work product and effective assistance of counsel protections.[42] Proponents of the search for truth model on the other hand, more narrowly define these rights and protections so that prosecutorial discovery can exist without impairing a defendant's constitutional rights.[43]

B. Federal Constitutional Issues Raised By Prosecutorial Discovery

1. The Privilege Against Self-Incrimination

The United States Constitution grants no general right to discovery,[44] and the common law generally prohibited discovery in criminal trials.[45] The concept of fairness, however, eventually

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40. *Id.*

41. *Id.*

42. *See* Bandes, *supra* note 22, at 1032 (stating that a defendant's constitutional rights are at the foundation of a fair play approach, and that this approach embodies the concept that a defendant is under no obligation to aid the state in making its case).

43. *See* Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89, 91-95 (1965) (explaining the search for truth approach taken by Justice Traynor in *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962)).

44. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

45. *See* People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 32-34, 156 N.E. 84, 86-87 (1927) (adhering to the English common law prohibition on discovery in ruling that a court lacked power to grant discovery in the absence of legislative authority). The basis for the English common law prohibition was the case of *Rex v. Holland*, 100 Eng. Rep. 1248 (K.B. 1792). Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 866 (1968).

led courts in this century to permit discovery by the defendant.[46] This discovery was permitted in the absence of a substantial contrary governmental interest, such as the need to keep certain law enforcement information confidential.[47] Discovery by the prosecution did not, however, immediately follow.[48] The reluctance to allow prosecutorial discovery probably grew out of the ruling in *Boyd v. United States*,[49] where the scope of the fifth amendment privilege against self-incrimination was defined broadly to protect both testimonial and physical evidence.[50] The United States Supreme Court in *Boyd* held that any state action that compelled a defendant's oath or the production of the defendant's private books and papers was contrary to the principles of a free government.[51]

By 1966, the Supreme Court began to limit the broad scope of the privilege against self-incrimination.[52] Contrary to the position in *Boyd* that the privilege included both testimonial and physical evidence,[53] the Supreme Court in *Schmerber v. California*[54] held that the privilege applied only to testimonial evidence.[55] In *Schmerber*, where the defendant was required to give an incriminating blood sample, the Court held that compulsion which makes the defendant the source of real or physical evidence does not violate the privilege against self-incrimination.[56] Subsequently,

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46. *See, e.g.*, People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956), (departing from the common law prohibition and allowing discovery by the defendant) *cert. denied*, Riser v. California, 353 U.S. 930 (1957).

47. *See Riser*, 47 Cal. 2d at 586, 305 P.2d at 13 (stating that discovery was permissible in the absence of a substantial governmental interest).

48. *See* Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1571 (1986) (indicating that prosecutorial discovery developed after discovery by the defense because of a perceived imbalance created by providing the defense with a right to pretrial discovery).

49. 116 U.S. 616 (1886).

50. *Id.* at 631-32. *See* Scott v. State, 519 P.2d 774, 778 (Alaska 1974) (indicating that the reluctance to permit prosecutorial discovery resulted from the *Boyd* decision).

51. *Boyd*, 116 U.S. at 631-32.

52. *See* Schmerber v. California, 384 U.S. 757, 764 (1966) (limiting the privilege against self-incrimination to testimonial evidence).

53. *Boyd*, 116 U.S. at 631-32.

54. 384 U.S. 757 (1966).

55. *Id.* at 764.

56. *Id.*

the Supreme Court has reaffirmed that the privilege is not triggered by the compelled disclosure of private information; rather it is triggered by the testimonial content of the evidence and the testimonial communications associated with the act of production.[57]

The Court has further limited the broad definition of the privilege against self-incrimination annunciated in *Boyd* by holding that the privilege applies only to the personal testimony of a defendant.[58] In *Fisher v. United States*,[59] the Internal Revenue Service sought discovery of the workpapers of an accountant who had prepared the defendant's tax returns.[60] The Supreme Court, after explaining that *Boyd* had since been rejected, found the discovery constitutional, and stated that the privilege against self-incrimination applies only to information which is intimate and personal to the defendant.[61] The information must be the defendant's own testimonial communication.[62] Even though the accountant's workpapers undoubtedly contained a great deal of raw data that came directly from the defendant, it was not sufficient to transform the papers into the personal communications of the defendant.[63] The *Fisher* Court also noted that there may be cases where the act of production itself could be testimonial.[64] In the *Fisher* case, however, merely acknowledging possession and producing the workpapers was not incriminating.[65]

In light of the narrower definition of the privilege against self-incrimination established in *Fisher,* the United States Supreme

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57. Fisher v. United States, 425 U.S. 391, 396-408 (1976).

58. *Id.* at 397-98.

59. 425 U.S. 391 (1976).

60. *Id.* at 394.

61. *Id.* at 405-09.

62. *Id.*

63. *Id.* at 394.

64. *Id.* at 410-11. The Court indicated that if, in the act of production, the defendant was forced to restate or affirm the truth of the contents of the materials produced, the production might meet the testimonial requirement. *Id.* at 409.

65. *Id.* at 410-11. *See* Doe v. United States, 487 U.S. 201, 213 (1988) (holding that the act of handing over the statements of defense witnesses to the prosecution does not implicate the privilege because it does not reveal the defendant's knowledge of facts relating to the offense, nor does it require the defendant to share his or her thoughts and beliefs with the government).

Court held in *United States v. Nobles*[66] that a defendant could constitutionally be compelled to disclose the statements of third-party witnesses.[67] The *Nobles* Court explained that the privilege adheres to the defendant's personal statements, and not necessarily to all information that may incriminate the defendant.[68]

Not only must the information disclosed be the personal testimony of the defendant, it must be compelled by the state in order for the privilege to apply.[69] The predominant case dealing with the issue of compulsion in the area of criminal discovery is *Williams v. Florida.*[70] In *Williams*, a Florida statute required a criminal defendant to disclose the defendant's intention to utilize an alibi defense, as well as the names and locations of any alibi witnesses who were intended to be called at trial.[71] The defendant in *Williams* complied with the required discovery, and was convicted after the deposition of a disclosed witness was successfully used to impeach that witness.[72] The United States Supreme Court held that Florida's discovery statute did not violate the defendant's privilege against self-incrimination.[73] Since the statute required only the disclosure of witnesses who were intended to later testify at trial, and since the privilege would be waived when they did testify, the discovery provision merely accelerated the timing of the disclosure.[74] The Court's reasoning indicated that because the defendant was required only to disclose information intended to be introduced at trial, a waiver of the defendant's fifth amendment privilege could be implied.[75]

Prior to the Court's decision in *Williams*, at least one authority argued that this acceleration is impermissible because it forces a

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66. 422 U.S. 225 (1975).

67. *Id.* at 234.

68. *Id.* at 233 (citing Couch v. United States, 409 U.S. 322, 327 (1973)).

69. *Fisher*, 425 U.S. at 386-97. *See* U.S. CONST. amend. V (stating that no person shall be compelled in a criminal case to be a witness against himself).

70. 399 U.S. 78 (1970).

71. *Id.* at 79.

72. *Id.* at 80-81.

73. *Id.* at 85.

74. *Id.*

75. *See id.* (utilizing reasoning which indicated a theory of implied waiver supported the constitutionality of the Florida statute).

defendant to decide whether or not to utilize a specific witness before the prosecution presents its case.[76] However, the Supreme Court rejected this argument in *Williams* by stating that nothing in the fifth amendment privilege entitles a defendant to await the end of the prosecution's case before announcing the nature of the defendant's defense.[77] The *Williams* Court contended that allowing such a right would be akin to permitting a defendant to await the jury's verdict on the prosecution's case before deciding whether or not to take the stand.[78]

While the decision in *Williams* rested on the theory of accelerated disclosure and implied waiver, it has been suggested that limits on the privilege against self-incrimination, imposed by permitting prosecutorial discovery, might be constitutional even in the absence of a waiver by the defendant.[79] This suggestion is supported by the fact that the United States Supreme Court has often determined the constitutionality of state procedural rules by evaluating the burdens placed on a defendant's exercise of the fifth amendment privilege in light of the policies underlying the privilege.[80]

For example, in *McGautha v. California*[81] the Supreme Court found no fifth amendment violation in the state's utilization of a

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76. *See* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962) (Peters, J., concurring and dissenting).

77. *Williams*, 399 U.S. at 85. Although the Supreme Court in *Williams* found the acceleration of alibi defense information constitutional, the Court has not validated every rule of criminal procedure on similar grounds. *See* Brooks v. Tennessee, 406 U.S. 605, 606-12 (1972). In *Brooks*, the Court struck down a state rule which provided that if a defendant was to testify, the defendant was required to testify before any other defense witnesses or not at all. *Id.* The Court addressed the argument that the rule was a legitimate means to prevent perjury by insuring that a defendant did not tailor his or her testimony to fit the testimony of other witness. *Id.* at 611. By implication, the Court rejected any acceleration argument by stating that pressuring the defendant to testify before the defendant had a chance to evaluate the strength of the other evidence was not a constitutional means of preventing perjury. *Id.* at 611-12.

78. *Williams*, 399 U.S. at 85.

79. *See* Deitzler, *Prosecutorial Discovery: An Overview*, 83 W. VA. L. REV. 187, 192-93 (1980) (stating that even in the absence of a defendant's waiver, the privilege against self-incrimination may be limited).

80. For cases utilizing this approach see Brooks v. Tennessee, 406 U.S. 605 (1972); McGautha v. California, 402 U.S. 183 (1971), *reh'g denied*, 406 U.S. 978 (1972); Roviaro v. United States, 353 U.S. 53 (1957).

81. 402 U.S. 183 (1971), *reh'g denied*, 406 U.S. 978 (1972).

unitary proceeding for determining guilt and punishment in a capital case.[82] The defendant in *McGautha* argued that this procedure created an unconstitutional conflict between his privilege to remain silent with respect to the question of guilt, and his right to testify with respect to the question of punishment.[83] The Court recognized that the defendant had a constitutional right to choose between remaining silent or testifying, but held that the Constitution does not prohibit the state from forcing him to make that choice applicable to both the guilt and penalty phases of his trial.[84] Rather, the compulsion to make a choice would only be unconstitutional if the compulsion appreciably impaired the policies behind the rights involved.[85] The *McGautha* Court reasoned that the defendant's choice under the unitary procedure was analogous to the choice any defendant must make in deciding to take the stand or not, and therefore the compulsion of that choice did not to any appreciable extent impair the defendant's constitutional rights.[86]

Whether the Supreme Court will continue to narrow the privilege against self-incrimination with respect to prosecutorial discovery in the future is, of course, unknown. It is clear today, however, that there are four requirements that together trigger a defendant's fifth amendment privilege. First, the information sought by discovery must be incriminating.[87] Second, the information must be personal to the defendant.[88] Third, the information must be testimonial.[89] Finally, the information must be obtained by unjustifiable compulsion.[90]

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82. *Id.* at 213.
83. *Id.* at 210-11.
84. *Id.* at 213-17.
85. *Id.* at 213.
86. *Id.* at 216-17.
87. Fisher v. United States, 425 U.S. 391, 408 (1976).
88. Couch v. United States, 409 U.S. 322, 328 (1973).
89. Schmerber v. California, 384 U.S. 757, 761 (1966).
90. *Fisher*, 425 U.S. at 409.

2. *Due Process of Law*

Discovery by the prosecution has also been challenged as violative of a defendant's right to due process of law.[91] However, the notion that prosecutorial discovery *inherently* violates due process has been uniformly rejected by the United States Supreme Court.[92] In *Williams*, the Court upheld an alibi discovery rule in the face of both a self-incrimination and a due process challenge.[93] The Court justified its due process holding by pointing out that Florida had a legitimate interest in preventing fabricated defenses.[94] Further, the alibi disclosure rule was fairly constructed to achieve the state's interest.[95] The *Williams* Court stated that the adversarial trial is not an end in itself, and neither the defense nor the prosecution has an absolute right to conceal their strategy for presenting evidence.[96] The Court noted that the Florida rule provided the defendant with the right to reciprocal discovery of information held by the prosecution.[97] Therefore, as far as due process was concerned, there was ample room for the discovery statute, which was designed to enhance the search for truth by giving each party full opportunity to investigate crucial facts in the case.[98]

In the absence of such reciprocity, however, the Supreme Court has held that prosecutorial discovery violates the due process clause of the fourteenth amendment.[99] In *Wardius v. Oregon,*[100] a state statute required the defendant to disclose any alibi defenses, and the alibi witnesses intended to be called at trial.[101] Unlike the

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91. Williams v. Florida, 399 U.S. 78, 81 (1970); Wardius v. Oregon, 412 U.S. 470, 472-74 (1973).

92. *See, e.g., Wardius,* 412 U.S. at 474 (stating that nothing in the due process clause precludes a state from experimenting with systems of broad discovery).

93. *Williams,* 399 U.S. at 79-86.

94. *Id.* at 81.

95. *Id.* at 81-82.

96. *Id.* at 82-84.

97. *Id.* at 81.

98. *Id.* at 82.

99. Wardius v. Oregon, 412 U.S. 470, 472 (1973).

100. 412 U.S. 470 (1973).

101. *Id.* at 471.

statute in *Williams,* however, the prosecution had no duty to reciprocate.[102] This lack of reciprocity led the Supreme Court to find the statute violative of the defendant's due process rights.[103] The *Wardius* Court explained that the breadth of the mandated discovery does not implicate a due process violation.[104] Rather, it is the balance of forces between the state and the accused that determines if a specific discovery rule fails to ensure due process of law.[105] If a statute creates an imbalance in the discovery rights of the parties, that imbalance must work in the defendant's favor.[106]

Although both *Williams* and *Wardius* dealt with alibi defense discovery, the language used by the Supreme Court indicates that broader aspects of prosecutorial discovery may also meet the demands of due process, so long as sufficient reciprocity exists.[107] It seems clear that due process protection does not prevent discovery by the prosecution.[108] Due process merely requires a fair balance of discovery between the parties.[109]

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102. *Id.* Even after the defendant disclosed his alibi evidence, the prosecution could not be required to disclose the names and addresses it planned to use to refute the defendant's alibi. *Id.* at 474-75. In contrast, the Florida discovery scheme required the prosecution to disclose the names and addresses of rebuttal witnesses within five days of the defendant's disclosure. *Williams,* 399 U.S. at 104.

103. *Wardius,* 412 U.S. at 472.

104. *Id.* at 474. It should be noted that due process does specifically define the scope of one aspect of criminal discovery. The United States Supreme Court has ruled that a defendant's due process rights are violated if the prosecution fails to disclose exculpatory evidence which is material to the question of guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963). *See generally* Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review,* 53 FORDHAM L. REV. 391 (1984) (discussing the prosecutor's duty to disclose exculpatory evidence).

105. *Wardius,* 412 U.S. at 474.

106. *Id.* at 475 n.9.

107. The Court in *Wardius* stated that the growth of state notice-of-alibi rules was based on the theory that justice was best served by a system of liberal discovery. *Id.* at 473. Further, the growth of such discovery devices was a positive development, enhancing the fairness of the adversarial system. *Id.* at 474.

108. This conclusion is strongly supported by *Williams* and *Wardius,* and is also supported by state court decisions striking down prosecutorial discovery as a violation of the privilege against self-incrimination, which do not find any violation of due process. *See, e.g.,* Scott v. State, 519 P.2d 774, 777-78 (Alaska 1974) (holding that most discovery by the prosecution would violate the state privilege against self-incrimination, but indicating that such discovery would not violate due process rights).

109. *Wardius,* 412 U.S. at 474.

3. Work Product Protection

The United States Supreme Court in *Hickman v. Taylor*[110] created the protection against forced disclosure of an attorney's work product.[111] Work product refers generally to the materials prepared by an attorney or an attorney's agent in anticipation of litigation, and includes recorded interviews and statements, briefs, memoranda, and correspondence.[112] Work product is subdivided as either ordinary work product or core work product.[113] Core work product refers to those materials which contain the mental impressions or legal theories of the attorney.[114] The *Hickman* Court held that ordinary work product retains a qualified immunity from pretrial discovery in civil cases.[115] These ordinary work product materials are only discoverable upon a showing of necessity by the moving party.[116] On the other hand, core work product retains an almost absolute privilege against discovery.[117]

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110. 329 U.S. 495 (1947).

111. *Id.* at 510-13.

112. *Id.* at 510-11. The work product doctrine created in *Hickman* has been codified in the federal system. *See* FED. R. CIV. P. 26(b)(3) (providing for limited work product protection). In California, work product protection is also codified. *See* CAL. CIV. PROC. CODE § 2018(c) (West Supp. 1992) (providing for absolute work product protection).

113. *Hickman*, 329 U.S. at 510-12. Although the *Hickman* Court distinguished the two types of work product, the Court did not use the term "core" to describe work product containing an attorney's mental impressions and opinions. *Id.* This term was used by the Supreme Court in *Nobles*. United States v. Nobles, 422 U.S. 225, 238 (1975).

114. *Hickman*, 329 U.S. at 512; *Nobles*, 422 U.S. at 238.

115. *Hickman*, 329 U.S. at 510.

116. The *Hickman* Court did not specifically define what would constitute a sufficient showing of necessity in order to overcome work product protection, but judicial decisions have defined the required necessity. *See* Beesley v. Superior Court, 58 Cal. 2d 205, 208, 373 P.2d 454, 456, 23 Cal. Rptr. 390, 392 (1962) (holding that better and more timely access to witnesses can be enough to permit the discovery of ordinary work product in civil cases). The discovery of ordinary work product may be permitted where the party seeking discovery can show special circumstances, such as an inability to access the materials sought without undue hardship. 2 HOGAN, MODERN CAL. DISCOVERY § 13.8, at 231 (4th ed. 1988).

117. In *Hickman*, the Supreme Court indicated that core work product would be discoverable only in rare cases. *Hickman*, 329 U.S. at 513. *See* Upjohn Co. v. United States, 449 U.S. 383, 401 (1981) (holding that work product may not be discovered merely by making a showing of substantial need or undue hardship in obtaining the materials sought to be discovered). The *Upjohn* Court did not, however, articulate what standard should be used to determine when, if ever, work product could be discovered. *Id.* Some lower courts have been unwilling to grant core work product absolute protection from discovery. *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1200

The *Hickman* Court indicated that these levels of work product protection were essential in our adversarial system of justice.[118]

Although the work product doctrine was created in a civil context, it has been applied to criminal trials as well.[119] In *United States v. Nobles*[120] the Supreme Court stated that despite the fact that the work product doctrine is most frequently asserted as a bar to discovery in civil trials, it has an even more vital role in maintaining the proper functioning of the criminal justice system.[121] Consistent with this view, Rule 16 of the Federal Rules of Criminal Procedure contains a work product rule which prohibits the discovery of reports, memoranda, witness statements, and other internal documents prepared by an attorney or an attorney's agent in conjunction with the investigation, prosecution, or defense of a criminal case.[122] Additionally, most states have adopted work product rules that provide similar protection in state criminal proceedings.[123] A majority of these states, however, limit the protection to work product which contains the mental impressions or opinions of an attorney.[124]

(D.S.C. 1974); Xerox v. IBM, 64 F.R.D. 367, 381 (S.D.N.Y. 1974) (rejecting absolute work product protection). The United States Supreme Court has recognized that lower courts are in disagreement over the showing required to overcome core work product protection, but the Court has failed to provide a conclusive test. Upjohn Co. v. United States, 449 U.S. 383, 401 (1981). The Court would only go so far as to say that core work product was entitled to "special protection." *Id.* In California, core work product appears to have an absolute protection against discovery. *See* CAL. CIV. PROC. CODE § 2018(c) (West Supp. 1992) (stating that "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances"). *Cf.* FED. R. CIV. P. 26(b)(3) (stating that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation").

118. *Hickman*, 329 U.S. at 510-12.

119. *See* United States v. Nobles, 422 U.S. 225, 236 (1975); People v. Collie, 30 Cal. 3d 43, 59, 634 P.2d 534, 543, 177 Cal. Rptr. 458, 467 (1981) (stating that work product protection applies in criminal as well as civil cases).

120. 422 U.S. 225 (1975).

121. *Id.* at 238.

122. *See* FED. R. CRIM. P. 16 (defining the extent of work product protection).

123. *See, e.g.*, KAN. STAT. ANN. § 22-3212 (1975); LA. CODE CRIM. PRO. ANN. art. 723 (West 1980); DEL. R. CRIM. P. 16(b); VA. R. CRIM. P. 319:14(a)(2).

124. *See, e.g.*, FLA. R. CRIM. P. 3.220(c); MASS. R. CRIM. P. 14(5); MO. R. CRIM. P. 25-10(A). In California, both the defense and prosecution are provided with work product protection as defined in section 2018(c) of the California Code of Civil Procedure. CAL. PENAL CODE § 1054.6 (West Supp. 1992).

Despite the fact that Rule 16 appears to provide absolute protection for work product, the privilege has been limited by the United States Supreme Court.[125] For instance, in *Nobles* the Court held that the application of Rule 16 was limited to discovery conducted before trial.[126] At issue in *Nobles* was whether or not the prosecution was entitled to review the reports of a defense investigator called by the defense to testify as to the contents of his reports.[127] The Supreme Court noted that the privilege protecting work product from disclosure is a qualified privilege and can be waived.[128] The *Nobles* Court concluded that by taking the stand and testifying about the contents of the reports, the defense had waived any work product privilege.[129]

Since the *Nobles* Court disposed of the work product issue on the grounds of waiver, the Court did not expressly rule on the defendant's contention that discovery of work product violated his sixth amendment right to effective assistance of counsel.[130] Although the Court expressed doubt that discovery of work product implicated a violation of the sixth amendment, the issue remains unresolved.[131]

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125. *See Nobles*, 422 U.S. at 235 (holding that Rule 16 applies only to pretrial discovery).

126. *Id.*

127. *Id.* at 231-32.

128. *Id.* The Court stated that what constitutes a waiver will depend on the circumstances. *Id.* at 239 n.14. Counsel will necessarily rely upon work product materials throughout the trial in preparing the case and in examining the witnesses, and such use would not normally constitute a waiver. *Id.* But, where counsel seeks to make a testimonial use of the information, the normal rule of evidence would dictate the production of the work product. *Id.*

129. *Id.* at 239.

130. *Id.* at 240 n.15.

131. *Id. Compare* Pulaski, *Extending the Disclosure Requirements of the Jencks Act to Defendants: Constitutional or Nonconstitutional Considerations*, 64 IOWA L. REV. 1 (1978) (arguing that work product should be considered a constitutional privilege) *with* Feldman, *The Work Product Rule in Criminal Practice and Procedure*, 50 U. CIN. L. REV. 495 (1981) (arguing that work product should not be considered a constitutional privilege).

C. The Development of Prosecutorial Discovery in California

Discovery in California criminal proceedings was originally a creation of the courts.[132] Due to an absence of legislative authority, the power to order discovery was primarily vested in the discretion of the trial judge.[133] Over the past three decades, however, the California Supreme Court has taken widely disparate positions as to the permissible scope of discovery, especially with respect to discovery by the prosecution.[134] Moreover, the California Supreme Court has often cited legislative action as the panacea for the contrasting discovery orders issued by trial courts.[135]

The California Supreme Court's initial decision addressing the constitutionality of prosecutorial discovery was *Jones v. Superior Court.*[136] As noted above, the common law originally prohibited discovery, and the development of defense discovery did not immediately spark the development of prosecutorial discovery.[137] For the first time in California, the *Jones* court stated that discovery should not be a "one-way street."[138] The defendant in

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132. B.E. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 271, at 265 (1963). *See* People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956), (rejecting, for the first time in California, the common law prohibition against discovery in criminal trials) *cert. denied,* 353 U.S. 930 (1957). *See also* Castiel v. Superior Court, 162 Cal. App. 2d 710, 328 P.2d 476 (1958) (allowing pretrial discovery of the identity of informers); Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957) (holding that a defendant has a right to pretrial inspection of documents containing confessions or admissions).

133. W. LAFAVE & J. ISRAEL, *supra* note 4, § 19.3(b).

134. *Compare* Jones v. Superior Court, 58 Cal. 2d 56, 58-59, 372 P.2d 919, 920, 22 Cal. Rptr. 879, 880 (1962) (permitting broad prosecutorial discovery) *with* Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970) (defining the scope of permissible prosecutorial discovery very narrowly). *See also* Kane, *supra* note 27, at 205-10 (identifying the inconsistent positions taken by California courts with respect to discovery by the prosecution).

135. *See, e.g.,* People v. Collie, 30 Cal. 3d 43, 55, 634 P.2d 534, 541, 177 Cal. Rptr. 458, 465 (1981) (going so far as to rule that because of the complexity of constitutional issues surrounding prosecutorial discovery, trial courts could not order such discovery in the absence of enabling legislation).

136. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

137. *See supra* notes 44-48 and accompanying text (discussing the common law prohibition on discovery).

138. *Jones,* 58 Cal. 2d at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881. Although *Jones* was California's landmark embarkment into prosecutorial discovery, fourteen other states had experimented with such discovery in the form of notice-of-alibi rules between 1927 and 1942. Mosteller, *supra* note 48, at 1574 n.16. These alibi rules, which were the first form of prosecutorial

Jones, who was charged with committing rape, challenged a discovery order which required the pretrial disclosure of information supporting his defense of impotence.[139] Despite ultimately prohibiting enforcement of the order as issued, the *Jones* court held that it was constitutionally permissible to compel pretrial disclosure of the witnesses and evidence supporting the defendant's impotence defense.[140] The court noted that the witnesses the defendant intended to call would necessarily be identified and cross-examined during the trial.[141] Any reports and medical evidence would likewise be subject to study by the prosecution when introduced.[142] Therefore, pretrial disclosure of the same information would only provide for a more efficient trial.[143] Since this discovery did not compel the defendant to give any information that the defendant would not voluntarily reveal at trial, there could be no violation of the defendant's privilege against self-incrimination.[144] Writing for the majority in *Jones,* Justice Traynor reasoned that in the interest of accuracy and efficiency, and subject to the privilege against self-incrimination, neither the defense nor the prosecution had any valid interest in denying access to evidence which could shed light on issues in the case.[145]

After *Jones,* California courts quickly began embracing the idea of discovery as a "two-way street," and in fact began expanding the scope of prosecutorial discovery, to the point of allowing discovery orders requiring the pretrial disclosure of all defense witnesses and evidence intended to be introduced at trial.[146] This

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discovery, generally required a defendant to give notice of an intention to use an alibi defense, and to provide specific information as to the defendant's location at the time of the crime and the names and addresses of witnesses who would support the defense. *Id.*

139. *Jones* 58 Cal. 2d at 57, 372 P.2d at 920, 22 Cal. Rptr. at 880.

140. *Id.* at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

141. *Id.* at 61, 372 P.2d at 921, 22 Cal. Rptr. at 881.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 59, 372 P.2d at 920, 22 Cal. Rptr. at 880.

146. *See* People v. Pike, 71 Cal. 2d 595, 605, 455 P.2d 776, 781, 78 Cal. Rptr. 672, 677 (1969), (upholding an order which required the defense counsel to disclose the names and addresses and expected testimony of the defense witnesses) *cert. denied,* Pike v. California, 406 U.S. 971

expansion lasted only eight years. In the 1970 case of *Prudhomme v. Superior Court*,[147] the California Supreme Court halted any expansion of prosecutorial discovery by imposing considerable restrictions on its use.[148] In fact, the court's holding in *Prudhomme* was just short of completely rejecting the two-way street theory of *Jones*.[149]

The defendant in *Prudhomme* sought to enjoin the enforcement of a discovery order in her pending murder trial.[150] The order required defense counsel to disclose the names, addresses, and expected testimony of all witnesses intended to be called at trial.[151] Citing several United States Supreme Court cases decided after *Jones*,[152] the *Prudhomme* court noted that a defendant's constitutional privileges in state proceedings had been expanded

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(1972); McGuire v. Superior Court, 274 Cal. App. 2d 583, 594, 79 Cal. Rptr. 155, 161 (1969) (upholding a discovery order calling for all the witnesses and evidence that the defense intended to introduce at trial); People v. Dugas, 242 Cal. App. 2d 244, 249, 51 Cal. Rptr. 478, 481 (1966) (upholding a discovery order granted before the defendant had indicated that he would attempt to establish an affirmative defense); People v. Houser, 238 Cal. App. 2d 930, 936, 48 Cal. Rptr. 300, 304 (1965) (upholding an order to produce a copy of a report prepared by a defense psychiatrist); People v. Lopez, 60 Cal. 2d 223, 244, 384 P.2d 16, 28, 32 Cal. Rptr. 424, 436 (1963), (allowing discovery of the names and addresses of intended alibi witnesses as well as their written statements) *cert. denied*, 375 U.S. 994 (1965).

147. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

148. *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134. The supreme court's opinion in *Prudhomme* has been fiercely criticized as stating erroneous fifth amendment law, and as misapplying United States Supreme Court precedent. Craig v. Superior Court, 54 Cal. App. 3d 416, 424-31, 126 Cal. Rptr. 565, 568-73 (1976) (Elkington, J., concurring).

149. *Prudhomme*, 2 Cal. 3d at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134. Although the court did not overrule *Jones*, the court criticized the decisions in *People v. Pike*, 71 Cal. 2d 595, 455 P.2d 776, 78 Cal. Rptr. 672 (1969), *People v. Dugas*, 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1966), and *McGuire v. Superior Court*, 274 Cal. App. 2d 583, 79 Cal. Rptr. 155 (1969). *Prudhomme*, 2 Cal. 3d at 327 n.11, 466 P.2d at 678 n.11, 85 Cal. Rptr. at 134 n.11. Moreover, Justice Peters in his concurrence specifically stated that both *Jones* and *Pike* should be overruled because the two-way street theory of discovery ignores the fact that a defendant possesses constitutional rights which exceed the rights of the prosecution. *Id.* at 328, 466 P.2d at 678, 85 Cal. Rptr. at 134 (Peters, J., concurring).

150. *Id.* at 322, 466 P.2d at 674, 85 Cal. Rptr. at 130.

151. *Id.*

152. The *Prudhomme* court cited *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the fifth amendment privilege against self-incrimination into the fourteenth amendment, thereby binding state courts to uphold the privilege), *Griffin v. California*, 380 U.S. 609 (1965) (prohibiting the court or prosecution from commenting on an accused's silence), and *Miranda v. Arizona*, 384 U.S. 436 (1966) (broadening the application of the privilege against self-incrimination during the accusatory stage of a case). *Id.* at 323-24, 466 P.2d at 675, 85 Cal. Rptr. at 131.

since *Jones* by the incorporation of portions of the Bill of Rights into the fourteenth amendment.[153] According to the court, this expansion of individual rights indicated that greater emphasis must be placed on the fifth amendment protection against self-incrimination.[154] In light of these federal decisions, the *Prudhomme* court reasoned that any expansion of the two-way street theory would likely be a violation of a defendant's fifth amendment rights as incorporated under the fourteenth amendment.[155]

In order to determine the scope of prosecutorial discovery that would withstand federal constitutional scrutiny, the *Prudhomme* court looked to the discovery provisions promulgated by the United States Supreme Court in Rule 16 of the Federal Rules of Criminal Procedure.[156] Using the federal rule as a guidepost, the *Prudhomme* court found that a reasonable demand for *factual* information that the defendant *intends to introduce at trial* might not violate the privilege against self-incrimination.[157] However, the court added that discovery would be proper only if, on the particular facts and circumstances of a case, the trial judge could find that the disclosure *could not possibly* tend to incriminate the defendant.[158] The court held that the principle factor in determining whether a particular request for discovery by the prosecution should be allowed is whether the disclosure might

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153. *Id.* at 323-24, 466 P.2d at 675, 85 Cal. Rptr. at 131.

154. *Id.*

155. *Id.* at 324, 466 P.2d at 675, 85 Cal. Rptr. at 131. The court stated that the United States Supreme Court's increasing emphasis on the role played by the privilege against self-incrimination was cause to reexamine the policies underlying prosecutorial discovery. *Id.* Further support for a reexamination was the fact that several commentators had concluded that the *Jones* decision not only reached, but in fact had exceeded federal constitutional limits. *Id.* at 324 n.7, 466 P.2d at 676 n.7, 85 Cal. Rptr. at 132 n.7.

156. *Id.* at 324, 466 P.2d at 675, 85 Cal. Rptr. at 131. The court noted that Rule 16, which was adopted in 1966, permitted only the discovery of scientific and medical reports, books, papers, and other physical evidence. *Id.* Further, such discovery was conditioned upon the discretion of the court in finding the requested discovery reasonable and necessary. *Id.* Requiring the discovery of the names, addresses, and expected testimony of defense witnesses went beyond the scope of the discovery allowable under Rule 16, which itself had been attacked as violating the privilege against self-incrimination. *Id.*

157. *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.

158. *Id.*

conceivably lighten the prosecution's burden of proving its case-in-chief.[159] The *Prudhomme* court concluded that the discovery order at issue might have served as a link in the chain of evidence tending to establish guilt.[160] Since the trial court had failed to inquire into the possible incriminatory effect, the order was void and unenforceable.[161]

In departing from the *Jones* precedent, the California Supreme Court in *Prudhomme* stated that the *Jones* decision was based upon the assumed constitutionality of state alibi statutes,[162] thus indicating the court's belief that the United States Supreme Court would soon strike down statutes allowing discovery of alibi defenses and witnesses.[163] Just two months after the decision in *Prudhomme*, however, the federal trend upon which the California Supreme Court had relied was abruptly terminated by the United States Supreme Court's decision in *Williams v. Florida*.[164]

In *Williams*, the Supreme Court upheld a Florida statute which required the pretrial disclosure of alibi defenses and witnesses that were intended to be introduced at trial.[165] Since the defendant was only required to disclose witnesses whom the defendant intended to call at trial, the Court reasoned that the statute merely accelerated the timing of disclosure from the time of trial to the pretrial stage.[166] Such an acceleration, the Court held, was not a violation of the defendant's privilege against self-incrimination since the information was not in fact compelled within the meaning

159. *Id.* at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

160. *Id.* at 327, 466 P.2d at 677-78, 85 Cal. Rptr. at 133-34.

161. *Id.*

162. *Id.* at 324, 466 P.2d at 676, 85 Cal. Rptr. at 132.

163. To support its contention that such statutes would soon be struck down by the United States Supreme Court, the California Supreme Court cited *Cantillon v. Superior Court*, 305 F. Supp. 304 (C.D. Cal. 1969), where a discovery order calling for the disclosure of alibi witnesses was held invalid. *Id.* at 325, 466 P.2d at 676, 85 Cal. Rptr. at 132. The court also noted that the United States Supreme Court had recently granted certiorari in the case of *Williams v. State*, 224 So.2d 406 (Fla. Dist. Ct. App. 1969), *aff'd*, Williams v. Florida, 399 U.S. 78 (1970) which involved a challenge to a statute permitting pretrial discovery of alibi defenses. *Id.*

164. 399 U.S. 78 (1970).

165. *Id.* at 83.

166. *Id.* at 85.

of the fifth amendment.[167] The Court's holding in *Williams* was not only seen by state legislatures as an invitation to expand prosecutorial discovery,[168] it was stated to be such by the Supreme Court itself in *Wardius v. Oregon.*[169]

Despite a national trend toward expanding discovery by the prosecution in the wake of *Williams*, California courts were unwilling to move away from the narrow interpretation of permissible discovery established in *Prudhomme.*[170] For example, the First District Court of Appeals held in *Rodriguez v. Superior Court*[171] that in the absence of the kind of statutorily required discovery involved in *Williams*, the prosecution could not discover the defense's alibi witnesses.[172] The *Rodriguez* court based its refusal to allow discovery in the absence of statutory authority on the doctrine of judicial abstention,[173] and noted that the California Legislature had specifically refused to pass such legislation.[174]

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167. *Id.* at 85-86.

168. Between 1942 and 1970, only two states had adopted notice of alibi discovery rules, but in the 14 years following *Williams*, 25 states adopted such rules. Mosteller, *supra* note 48, at 1577 n.25. Not only did states take to expanding prosecutorial discovery, the *Williams* decision influenced the American Bar Association to approve far-reaching discovery provisions as part of its Standards Relating to Discovery and Procedure Before Trial. *See id.* at 1577-78 & nn.26-32 (outlining the adopted standards and discussing the influence of the *Williams* decision).

169. 412 U.S. 470, 474 (1973). The *Wardius* Court described the *Williams* opinion as follows:

> The growth of such discovery devices [notice of alibi provisions] is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in *Williams*, nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve these goals.

Id.

170. *See In re* Misener, 38 Cal. 3d 543, 558, 698 P.2d 637, 647-48, 213 Cal. Rptr. 569, 579-80 (1985); Allen v. Superior Court, 18 Cal. 3d 520, 527, 557 P.2d 65, 68, 134 Cal. Rptr. 774, 777 (1976); Reynolds v. Superior Court, 12 Cal. 3d 834, 850, 528 P.2d 45, 55, 117 Cal. Rptr. 437, 447 (1974); Rodriguez v. Superior Court, 9 Cal. App. 3d 493, 498-99, 88 Cal. Rptr. 154, 157 (1970) (holding that discovery ordered by the trial court violated the standards of permissible prosecutorial discovery established in *Prudhomme*).

171. 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970).

172. *Id.* at 497, 88 Cal. Rptr. at 156.

173. The *Rodriguez* court stated that the doctrine of judicial abstention persuades courts not only to refrain from declaring statutes invalid except for the most cogent reason, but also to decline to adopt new and important procedural rules which the legislature has considered and rejected. *Id.*

174. *Id.* A statutory discovery plan had been proposed by the California Law Revision Commission and considered by the legislature in 1961. 3 CAL. LAW REVISION COM. REP. REC. & STUDIES pp. J-5 at J-21 (1961); A. B. 464, Reg. Sess. (1961). The plan, however, was ultimately

In order to avoid a repeat of the *Rodriguez* holding, proponents of reciprocal discovery attempted to pass legislation which would expand the availability of such discovery.[175] During the 1972 session of the California State Legislature, Assembly Bill 2128 and Senate Bill 87 were introduced, which would have permitted discovery of alibi defenses and witnesses, as well as the sanction of exclusion of all alibi evidence in the event of noncompliance.[176] These measures, however, never passed out of the Assembly Committee on Criminal Justice, apparently because of opposition from the California Public Defender's Association.[177]

In the absence of legislative authority sanctioning discovery by the prosecution, California courts continued to follow the narrow interpretation of permissible discovery laid down in *Prudhomme.*[178] The courts did so, however, on the theory that more expansive prosecutorial discovery would constitute a violation of the California Constitution.[179]

In *Reynolds v. Superior Court,*[180] the California Supreme Court indicated that discovery which was broader than that

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rejected. *Rodriguez,* 9 Cal. App. 3d at 497, 88 Cal. Rptr. at 156. Until 1981, the California Supreme Court held the position that prosecutorial discovery would not be permitted in the absence of statutory law. People v. Collie, 30 Cal. 3d 43, 48, 634 P.2d 534, 536, 177 Cal. Rptr. 458, 460 (1981).

175. Senator Deukmejian introduced a bill which proposed the addition of a notice-of-alibi rule to the Penal Code. S. B. 87, Reg. Sess. (1972). Assemblyman Murphy introduced a similar bill with the stated purpose of promoting the expeditious and fair determination of criminal cases. A. B. 2128, § 1, Reg. Sess. (1972). *Compare* Kane, *supra* note 27, at 210-15 (claiming that there was no need for legislation because the United States Supreme Court's decision in *Williams* sufficiently guided courts as to the scope of permissible discovery) *with* Lapides, *supra* note 27, at 210-11 (claiming that there was no need for legislation because the California Supreme Court's decision in *Prudhomme* sufficiently guided the courts as to allowable discovery).

176. *See* S. B. 87, § 1, Reg. Sess. (1972); A. B. 2128, § 1, Reg. Sess. (1972) (requiring a defendant, upon request, to disclose any alibi defenses, witnesses, or evidence which the defendant intended to introduce at trial).

177. *See* Lapides, *supra* note 27, at 230 n.63 (stating that AB 2128 and SB 87 were opposed by the California Public Defenders' Association and the Northern California American Civil Liberties Union on constitutional grounds).

178. *See In re* Misener, 38 Cal. 3d 543, 558, 698 P.2d 637, 647-48, 213 Cal. Rptr. 569, 579-80 (1985); Allen v. Superior Court, 18 Cal. 3d 520, 527, 557 P.2d 65, 68, 134 Cal. Rptr. 774, 777 (1976); Reynolds v. Superior Court, 12 Cal. 3d 834, 850, 528 P.2d 45, 55, 117 Cal. Rptr. 437, 447 (1974) (striking down various prosecutorial discovery orders).

179. *See, e.g., Reynolds,* 12 Cal. 3d at 842-43, 528 P.2d at 50, 117 Cal. Rptr. at 442.

180. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).

permitted in *Prudhomme* might violate the California Constitution.[181] The *Reynolds* court, faced with a challenge to a pretrial discovery order fashioned on the requirements laid down in *Williams,* stated that *Prudhomme* had put California on record as being considerably more solicitous of the privilege against self-incrimination than was required by federal law.[182] The theory that *Prudhomme* defined the state constitutional standards for prosecutorial discovery was confirmed in *Allen v. Superior Court.*[183]

In *Allen,* the California Supreme Court was asked to prohibit enforcement of an order which required the defendant to disclose the names of intended witnesses for the sole purpose of determining if any of the prospective jurors knew the witnesses.[184] The *Allen* court held that the strict standards set out in *Prudhomme* defined the parameters of permissible prosecutorial discovery under the California Constitution, and issued the writ of prohibition requested by the defendant.[185]

If any question remained as to the potential validity of an order compelling the discovery of defense information other than purely nontestimonial evidence such as fingerprints and blood samples,[186] the California Supreme Court clearly answered in the negative in *In re Misener.*[187] In that case, the court struck down the Legislature's attempt to fashion a reciprocal discovery rule,[188]

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181. *Id.* at 842-43, 528 P.2d at 50, 117 Cal. Rptr. at 442.

182. *Id.*

183. 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976).

184. *Id.* at 523, 557 P.2d at 66, 134 Cal. Rptr. at 775. The order contained the restriction that the prosecution could not contact any of the defenses witnesses until the witness's name was otherwise disclosed at trial. *Id.*

185. *Id.* at 526-27, 557 P.2d at 67-68, 134 Cal. Rptr. at 776-77.

186. The California Supreme Court in *People v. Collie,* 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981), continued to follow the decisions in the *Prudhomme* line of cases, but noted that the prosecution was permitted to discover non-testimonial evidence such as fingerprints, blood and breath samples, appearances in lineups, and handwriting and voice exemplars. *Id.* at 56 n.7, 634 P.2d at 541 n.7, 177 Cal. Rptr. at 465 n.7.

187. 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985).

188. *Id.* at 545, 698 P.2d at 638, 213 Cal. Rptr. at 570. The rule, Penal Code section 1102.5 (repealed by Proposition 115, June 5, 1990), permitted the prosecution to discover from the defendant or defense counsel the statements of defense witnesses, other than the defendant, following the direct examination of those witnesses. *Id.*

holding that to the extent a compelled disclosure is in any way *useful to the prosecution's case*, it violates the defendant's constitutional privilege against self-incrimination.[189]

D. Prosecutorial Discovery Under Proposition 115

Faced with a state supreme court unwilling to expand prosecutorial discovery through judicial decision,[190] and also unwilling to validate specific legislative attempts to bring about such an expansion,[191] California voters, in June of 1990, adopted by initiative the Crime Victims Justice Reform Act.[192] The Act had the stated purpose of reforming California criminal procedure law.[193] As part of this comprehensive reform, the Act amended the state constitution[194] and enacted a statutory reciprocal discovery scheme.[195] Article I, section 24 of the California Constitution was amended to state that certain rights of a criminal defendant under the state constitution, including the rights of due

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189. *Id.* at 555, 698 P.2d at 648, 213 Cal. Rptr. at 580. The court stated that a defendant has absolute right to force the prosecution to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. *Id.* at 558, 698 P.2d at 646, 213 Cal. Rptr. at 578. To the extent that the prosecution gains information through a discovery rule that tends to negate a defense, it is not investigating its own case, proving its own facts, or convincing the jury through its own resources. *Id.*

190. *See supra* notes 132-189 and accompanying text (discussing the California Supreme Court's rulings on the permissible scope of prosecutorial discovery).

191. *See In re* Misener, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985) (invalidating discovery provisions enacted by the legislature).

192. The Crime Victims Justice Reform Act of 1990, Prop. 115, §§ 1-30, 1990 Cal. Legis. Serv. A22-31 (West) (codified at CAL. CONST. art. I, §§ 14.1, 24, 29, 30; CAL. CIV. PROC. CODE §§ 223, 223.5 (West Supp. 1992); CAL. EVID. CODE § 1203.1 (West Supp. 1992); CAL. PENAL CODE §§ 189, 190.2, 190.41, 190.5, 206, 206.1, 859, 866, 871.6, 872, 954.1, 987.05, 1049.5, 1050.1, 1054, 1054.1, 1054.2, 1054.3, 1054.4, 1054.5, 1054.6, 1054.7, 1102.5, 1102.7, 1385.1, 1430, 1511 (West Supp. 1992)).

193. *See supra* notes 1-2 and accompanying text (identifying the purpose of Proposition 115).

194. *See* CAL. CONST. art. I, § 24 (amended by Proposition 115); CAL. CONST. art. I, §§ 29, 30(a)-(c) (enacted by Proposition 115). The Proposition also made other additions to the California Constitution, which are beyond the scope of this Note. For an examination of some of the issues related to Proposition 115 see generally *Victims' Rights Symposium*, 23 PAC. L.J. 815 (1992).

195. *See* CAL. PENAL CODE §§ 1054-1054.7 (West Supp. 1992) (enacted by Proposition 115). Proposition 115 also made other additions and amendments to the Civil Procedure, Evidence, and Penal Codes, which are beyond the scope of this Note. For an examination of some of the issues related to Proposition 115 see generally *Victims' Rights Symposium*, 23 PAC. L.J. 815 (1992).

process of law, equal protection of the law, assistance of counsel, and the privilege against self-incrimination, should not be construed to afford greater protections than those afforded by the Constitution of the United States.[196] Article I, section 30(c) was added to the California Constitution specifically stating that in order to promote speedy and fair trials, discovery in criminal cases must be reciprocal in nature.[197] Finally, Chapter 10 was added to the Penal Code, setting out the specific provisions under which discovery is to take place in criminal proceedings.[198]

These provisions specifically vest the prosecution with a right to discovery of witnesses, statements, and reports the defense intends to introduce at trial, as well as the sanction of excluding these witnesses and evidence in the event the defense refuses to disclose the information.[199] Such pretrial access to the defense's information is in direct conflict with the *Misener* rule that any

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196. CAL. CONST. art. I, § 24. Section 24 was originally added to the constitution in 1974, and provided only that the rights guaranteed by the California Constitution were not dependant on those guaranteed by the United States Constitution. CAL. CONST. art. I, § 24 (1974, amended 1990). Section 24, as amended by Proposition 115, was held unconstitutional. Raven v. Deukmejian, 52 Cal. 3d 336, 355, 801 P.2d 1077, 1089, 276 Cal. Rptr. 326, 338 (1990), *reh'g denied*, 1991 Cal. Lexis 663 (1991). *See infra* notes 205-211 and accompanying text (discussing the *Raven* case).

197. CAL. CONST. art. I, § 24(c).

198. *See* CAL. PENAL CODE §§ 1054-1054.7 (West Supp. 1992). The stated purposes of Chapter 10 are the ascertainment of truth, the saving of court time, and the protection of victims. *Id.* § 1054(a)-(e) (West Supp. 1992). Chapter 10 requires the prosecution to disclose the names and addresses of witnesses intended to be called at trial, statements of all defendants, all relevant real evidence, the felony record of any material witness, any exculpatory evidence, and relevant statements or reports which are intended to be offered at trial. *Id.* § 1054.1(a)-(f) (West Supp. 1992). Chapter 10 prohibits disclosure of the address and phone number of a victim to the defendant, absent court order. *Id.* § 1054.2 (West Supp. 1992). Chapter 10 requires the defendant and defense counsel to disclose the names and addresses of witnesses intended to be called at trial, as well as any statements, reports, or real evidence which the defense intends to offer at trial. *Id.* § 1054.3(a)-(b) (West Supp. 1992). Chapter 10 states that nothing in the Chapter shall be construed as limiting the prosecution from obtaining nontestimonial evidence as allowed by law. *Id.* § 1054.4 (West Supp. 1992). Chapter 10 provides that allowable discovery shall be made pursuant to an informal request by the opposing party, and that if such request is not complied with, the court may order discovery. *Id.* § 1054.5(b) (West Supp. 1992). In the event a party refuses to disclose discoverable information, the court may impose sanctions, including the exclusion of testimony if all other sanctions have been exhausted. *Id.* § 1054.5(b)-(c) (West Supp. 1992). Chapter 10 excludes from discovery materials or information that are privileged or protected as work product. *Id.* § 1054.6 (West Supp. 1992). Finally, Chapter 10 allows the court to grant a party an *in camera* review for the purpose of making a showing of good cause for the denial of disclosure. *Id.* § 1054.7 (West Supp. 1992).

199. *Id.* §§ 1054.3(a)-(b), 1054.5(b)-(c) (West Supp. 1992).

compelled disclosure useful in proving the prosecution's case is a violation of a defendant's privilege against self-incrimination.[200] As evidenced by the preamble of Proposition 115, however, the drafters of Chapter 10 were well aware of the fact that the proposed discovery provisions were in direct contrast to the then-current law in California.[201] The preamble specifically stated that in order to accomplish the goals of the Proposition, it was necessary to reform the law as previously developed by California Supreme Court decisions.[202] It was clear that the drafters were referring to the law developed in the *Prudhomme/Misener* line of cases.[203]

As might be expected, such a dramatic reversal of the law quickly sparked a challenge to Proposition 115 by opponents of reciprocal discovery.[204] The challenge was launched in *Raven v. Deukmejian*,[205] where the Proposition was attacked on its face as improperly presented to the voters.[206] The Proposition was also attacked as enacting amendments which could not be validly adopted through the initiative process.[207]

The California Supreme Court answered the challenge by striking down section 3 of the Proposition, which would have amended section 24 of Article I of the Constitution.[208] This amendment would have prohibited California courts from

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200. *See* Izazaga v. Superior Court, 54 Cal. 3d 356, 371, 815 P.2d 304, 313, 285 Cal. Rptr. 231, 241 (1991) (stating that the concept of reciprocal discovery embodied in Proposition 115 is inherently inconsistent with the *Prudhomme/Misener* line of cases), *modified, reh'g denied*, 54 Cal. 3d 611a (1991).

201. *See Preamble of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET 33 (June 5, 1990), *reprinted in* CAL. CONST. art. I, § 14.1, note (Deerings Supp. 1992) (reprinting section 1(b) of the preamble of Proposition 115) (stating an intention to overturn past California Supreme Court decisions).

202. *Id.*

203. *See Izazaga*, 54 Cal. 3d at 398, 815 P.2d at 332, 285 Cal. Rptr. at 259 (Mosk, J., dissenting) (stating that the drafters of Proposition 115 intended to remove the roadblock preventing prosecutorial discovery which had been established by the *Prudhomme/Misener* line of cases).

204. *See* Raven v. Deukmejian, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990) (challenging the enactment of Proposition 115 as invalid), *reh'g denied*, 1991 Cal. Lexis 663 (1991).

205. 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990), *reh'g denied*, 1991 Cal. Lexis 663 (1991).

206. *Id.* at 340, 801 P.2d at 1079, 276 Cal. Rptr. at 328.

207. *Id.*

208. *Id.* at 341, 801 P.2d at 1080, 276 Cal. Rptr. at 329.

construing the state constitution as providing criminal defendants with greater rights than those afforded by the United States Constitution.[209] The court in *Raven* held section 3 to be a qualitative constitutional revision which was beyond the reach of the initiative process.[210] The court stated, however, that the remaining sections of Proposition 115, including the amendment to section 30 of the state constitution and the Chapter 10 discovery provisions, were severable, and could properly be given effect.[211] Despite the fact that the new reciprocal discovery provisions were held to be validly enacted, the question remained whether the mandated discovery was substantively constitutional. This question was answered in *Izazaga v. Superior Court.*[212]

II. THE CASE

A. The Facts

On June 18, 1990, Javier Valle Izazaga and a codefendant were charged with two counts of forcible rape and one count of kidnapping.[213] The People, under newly adopted Penal Code

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209. *See* CAL. CONST. art. I, § 24 (held to be unconstitutional in the *Raven* case).

210. *Raven*, 52 Cal. 3d at 341, 801 P.2d at 1080, 276 Cal. Rptr. at 329. Amendments to the state constitution may be accomplished through the initiative process. CAL. CONST. art. XVIII, § 3. Constitutional revisions on the other hand, may only be accomplished by convening a constitutional convention and obtaining popular ratification, or by legislative submission of the revision to the voters. *Id.* §§ 1, 2. The state constitution does not define the terms "amendment" or "revision," but court decisions have set forth an analysis for determining whether a specific change is an amendment or a revision. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 260, 651 P.2d 274, 288, 186 Cal. Rptr. 30, 44 (1982); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 223, 583 P.2d 1281, 1286, 149 Cal. Rptr. 239, 244 (1978). Under the judicial analysis, both the quantitative and qualitative effects of a measure are examined, and if either effect is substantial, the measure is likely to be deemed a revision. *Raven*, 52 Cal. 3d at 350, 801 P.2d at 1085, 276 Cal. Rptr. at 334. Such was the case with the amendment to Article I, section 24 of the California Constitution adopted under section 3 of Proposition 115. *Id.* at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 332.

211. *Raven*, 52 Cal. 3d at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 332.

212. 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991), *modified, reh'g denied*, 54 Cal. 3d 611a (1991).

213. *Id.* at 363, 815 P.2d at 308, 285 Cal. Rptr. at 235.

section 1054.5(b),[214] served Izazaga with an informal discovery request seeking the names, addresses, and statements of the witnesses whom Izazaga intended to call at trial.[215] Izazaga refused to disclose this information.[216] In response, the prosecution filed a motion to compel discovery under Penal Code section 1054.5(b).[217]

Izazaga opposed the prosecution's motion, claiming that the requested discovery violated his protections under the United States Constitution.[218] Specifically, Izazaga claimed that the state's motion violated the privilege against self-incrimination under the fifth and fourteenth amendments,[219] the right to effective assistance of counsel under the sixth and fourteenth amendments,[220] and the right to due process of the law under the fourteenth amendment.[221]

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214. Section 1054.5(b) was adopted as part of Chapter 10 of the California Penal Code under section 23 of Proposition 115, and provides the following:

> Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.

CAL. PENAL CODE § 1054.5(b) (West Supp. 1992).

215. *Izazaga*, 54 Cal. 3d at 363, 815 P.2d at 308, 285 Cal. Rptr. at 235.

216. *Id.* at 364, 815 P.2d at 308, 285 Cal. Rptr. at 235.

217. *Id.*

218. *Id.*

219. *Id.* at 365, 815 P.2d at 309, 285 Cal. Rptr. at 236. Under the fifth amendment Izazaga argued that the forced disclosure of the names and addresses of *all* the witnesses the defense intends to call at trial effectively forced a defendant to become a witness against himself. *Id.* at 366, 815 P.2d at 310, 285 Cal. Rptr. at 237.

220. *Id.* at 379, 815 P.2d at 319, 285 Cal. Rptr. at 246. Under the sixth amendment Izazaga argued that forcing the defense to disclose statements of its witnesses would have the effect of chilling the defense counsel's motivation for making a thorough investigation into possible witnesses. *Id.*

221. *Id.* at 372-77, 815 P.2d at 314-18, 285 Cal. Rptr. at 242-46. Izazaga argued that the discovery rules violated his due process rights because various procedures lacked the necessary reciprocity, and because the prosecution was not sufficiently required by the rules to disclose exculpatory evidence. *Id.*

Following a hearing, the superior court granted the People's motion and issued an order allowing discovery.[222] The California Supreme Court, in response to a petition by Izazaga, stayed the enforcement of the discovery order and granted review.[223] The People then moved the court to decide the additional question of whether the new discovery provisions violated a criminal defendant's privilege against self-incrimination under the California Constitution.[224] Izazaga joined this motion and the California Supreme Court granted review of this additional question.[225]

Writing for the majority, Chief Justice Lucas, joined by Justices Panelli, Arabian, and Baxter, held that the new discovery rules did not violate either the federal or the state constitutions.[226] Justice Kennard concurred in the opinion.[227] Justices Mosk and Broussard each wrote a dissenting opinion.[228]

B. The Majority Opinion

1. The Privilege Against Self-Incrimination Under the United States Constitution

The majority's opinion initially addressed Izazaga's contention that the trial court's discovery order, which required the disclosure of the names, addresses, and statements of witnesses the defendant

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222. *Id.* at 364, 815 P.2d at 308, 285 Cal. Rptr. at 235.

223. *Id.* at 364, 815 P.2d at 309, 285 Cal. Rptr. at 236. The petition to the supreme court came after Izazaga sought a writ of prohibition or mandate from the Court of Appeals for the Fifth Appellate District. *Id.* The appellate court declined to hear the case on the procedural ground that the California Supreme Court was the appropriate forum. *Id.* at 389, 815 P.2d at 326, 285 Cal. Rptr. at 253 (Mosk, J., dissenting).

224. *Id.* at 389, 815 P.2d at 327, 285 Cal. Rptr. at 254 (Mosk, J., dissenting).

225. *Id.* at 390, 815 P.2d at 327, 285 Cal. Rptr. at 254 (Mosk, J., dissenting).

226. *See infra* notes 229-352 and accompanying text (discussing the majority opinion).

227. *See infra* notes 353-365 and accompanying text (discussing the concurrence of Justice Kennard).

228. *See infra* notes 366-413 and accompanying text (discussing the dissenting opinions of Justices Mosk and Broussard).

intended to introduce at trial,[229] violated the fifth amendment privilege against self-incrimination.[230] The majority rejected the claim that requiring pretrial disclosure of such information effectively forced the defendant to become a witness against himself.[231] Citing United States Supreme Court precedent that defined the scope of the privilege against self-incrimination, the majority noted that the privilege was only triggered if four requirements were met.[232] First, the information must be obtained by compulsion.[233] Second, it must be incriminating.[234] Third, it must be testimonial or communicative in nature.[235] Finally, it must be personal to the defendant.[236]

After establishing these requirements, the *Izazaga* majority evaluated whether the disclosures mandated by the trial court were valid under the fifth amendment to the United States Constitution.[237] The case of *Williams v. Florida*[238] was cited to show that a pretrial discovery order does not necessarily meet the compulsion requirement.[239] In *Williams*, the United States Supreme Court held that a discovery order which called for the pretrial disclosure of the names and addresses of alibi witnesses intended to be called at trial did not violate the fifth amendment

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229. The order also required the disclosure of any reports or statements of experts intended to be introduced at trial, as well as any tangible or physical evidence the defendant intended to introduce. *Izazaga,* 54 Cal. 3d at 364 n.1, 815 P.2d at 309 n.1, 285 Cal. Rptr. at 236 n.1. The order, made pursuant to Chapter 10 of the Penal Code, specifically excluded the disclosure of the defendant's statements or his intention to testify at trial. *Id.*

230. *Id.* at 365, 815 P.2d at 309, 285 Cal. Rptr. at 236.

231. *Id.*

232. *Id.* at 366, 815 P.2d at 310, 285 Cal. Rptr. at 237 (citing Fisher v. United States, 425 U.S. 391 (1976); United States v. Nobles, 422 U.S. 225 (1975); Schmerber v. California, 384 U.S. 757 (1966); Doe v. United States, 487 U.S. 201 (1988)). The majority also stated that the four requirements emanate directly from the wording of the self-incrimination clause. *Id.* at n.4.

233. *Id.* at 366, 815 P.2d at 310, 285 Cal. Rptr. at 237.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. 399 U.S. 78 (1970). *See supra* note 70-78 and accompanying text (discussing the *Williams* opinion).

239. *Izazaga,* 54 Cal. 3d at 366, 815 P.2d at 310, 285 Cal. Rptr. at 237.

privilege against self-incrimination.[240] The *Izazaga* majority stated that the self-incrimination holding in *Williams* was based on the fact that the disclosure did not satisfy the requirement of compulsion.[241] Rather, the disclosure in *Williams* was merely accelerated from the time of trial to the pretrial stage.[242] It was immaterial to the majority that the *Williams* case involved the disclosure of alibi witnesses, as opposed to any and all witnesses as in Izazaga's case.[243] The pretrial discovery of the names and addresses of witnesses the defense intends to call, whether supporting an alibi or not, merely forced the defendant to divulge earlier that which the defendant already intended to divulge at trial.[244] Therefore, no fifth amendment privilege was triggered by the pretrial discovery of the names and addresses of intended witnesses.[245]

With respect to the pretrial discovery of witness statements, the majority acknowledged Izazaga's argument that such disclosure might have the effect of compelling information from the defendant.[246] The majority also acknowledged the possibility that some of the disclosed statements would not actually be presented at trial, and therefore the disclosure of information would not be merely accelerated.[247] Moreover, some of the information in the witnesses' statements could possibly be incriminating, resulting in the compulsion of incriminating information.[248] Finally, the

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240. *Id.* Responding to Izazaga's argument that the United States Supreme Court decision in *Williams* should be distinguished from his case, the majority rejected the idea that the self-incrimination issue in *Williams* was based on the state's special interest in preventing the fabrication of eleventh-hour alibis. *Id.* The majority pointed out the issue of a special state interest related to the due process and fair trial issues in *Williams*, not the issue of self-incrimination. *Id.* The privilege was not triggered solely because a special state interest was absent--the interests of a state had no effect on the four elements required to trigger the privilege against self-incrimination. *Id.*

241. *Id.*

242. *Id.* at 367, 815 P.2d at 310, 285 Cal. Rptr. at 237.

243. *Id.*

244. *Id.*

245. *Id.* In a footnote the majority rejected a claim by Justice Broussard that the majority's analysis was flawed, and that the *Brooks* case, not *Williams*, was the controlling precedent on the self-incrimination issue. *Id.* n.5.

246. *Id.* at 367, 815 P.2d at 311, 285 Cal. Rptr. at 238.

247. *Id.*

248. *Id.*

majority acknowledged that the witness's statements would clearly be testimonial or communicative in nature as required by *Schmerber* in order to trigger the self-incrimination privilege.[249] The majority in *Izazaga* noted, however, that the compulsion of incriminating, testimonial information was, by itself, not enough to trigger the privilege against self-incrimination;[250] the information must also be personal to the defendant.[251] Citing *United States v. Nobles*,[252] the majority stated that the testimony or statements of witnesses was not information personal to the defendant.[253] The majority noted that in *Nobles*, the United States Supreme Court held that the self-incrimination privilege applied only to information obtained from the defendant, not information obtained from other sources that may incriminate the defendant, even if the statements were obtained on behalf of the defendant.[254] In addition, the physical act of handing over the statements by the defendant does not make the disclosure personal to the defendant, thereby triggering the privilege against self-incrimination.[255]

According to *Nobles*, the production of third parties' statements by the defendant does not trigger the privilege, because such production does not reveal the defendant's knowledge of facts relating him to the offense, nor does it require him to share his thoughts or beliefs with the prosecution.[256] Since the discovery order applied only to the statements of third parties, and not Izazaga's own statements, the majority concluded that *Nobles* was the applicable controlling precedent.[257] For these reasons, the majority held that discovery by the prosecution under Penal Code

249. *Id.*

250. *Id. See supra* notes 87-90 and accompanying text (discussing the four requirements necessary to trigger the fifth amendment privilege against self-incrimination).

251. *Izazaga*, 54 Cal. 3d at 368, 815 P.2d at 311, 285 Cal. Rptr. at 238.

252. 422 U.S. 225 (1975).

253. *Izazaga*, 54 Cal. 3d at 368, 815 P.2d at 311, 285 Cal. Rptr. at 238.

254. *Id.*

255. *Id.* at 369 n.8, 815 P.2d at 312 n.8, 285 Cal. Rptr. at 239 n.8.

256. *Id.*

257. *Id.* at 368, 815 P.2d at 311-12, 285 Cal. Rptr. at 238-39.

section 1054.3 was not violative of Izazaga's privilege against self-incrimination under the United States Constitution.[258]

2. *The Privilege Against Self-Incrimination Under The State Constitution*

After finding that the discovery provisions under Chapter 10 of the California Penal Code did not violate Izazaga's fifth amendment privilege against self-incrimination, the majority addressed the issue of a potential violation of the privilege under the California Constitution.[259] The majority began this portion of its opinion by observing that a criminal defendant is guaranteed certain procedural rights under Article I, section 15 of the California Constitution, including the privilege against self-incrimination.[260] Further, prior to the passage of Proposition 115, a long line of cases interpreting the right against self-incrimination had concluded that nearly any form of prosecutorial discovery would be a violation of the state constitution.[261]

The majority noted, however, that Proposition 115 not only added a reciprocal discovery scheme to the Penal Code, but also validly amended the state constitution to mandate reciprocal discovery in criminal cases.[262] The majority noted that fundamental principles of constitutional construction mandate that when a recently adopted provision can be reasonably construed to avoid conflict with existing law, such an interpretation should be adopted.[263] However, where a recent, specific provision creates a direct conflict with more general existing provisions, the old

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258. *Id.* at 369, 815 P.2d at 312, 285 Cal. Rptr. at 239.

259. *Id.*

260. *Id. See supra* notes 132-189 and accompanying text (discussing California cases interpreting the scope of the privilege under the state constitution).

261. *Izazaga,* 54 Cal. 3d at 369, 815 P.2d at 312, 285 Cal. Rptr. at 239. *See supra* notes 132-189 and accompanying text (discussing the scope of permissible prosecutorial discovery as interpreted by the California courts).

262. *Izazaga,* 54 Cal. 3d at 371, 815 P.2d at 313, 285 Cal. Rptr. at 240.

263. *Id.* at 371, 815 P.2d at 314, 285 Cal. Rptr. at 241 (citing Serrano v. Priest, 5 Cal. 3d 584, 596, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971)).

provisions must be viewed as limited.[264] Applying these rules of construction, the majority stated that the adoption of section 30 to Article I of the state constitution, which specifically mandated reciprocal discovery, could not coexist with the narrow *Prudhomme/Misener* interpretation of permissible prosecutorial discovery under the general privilege against self-incrimination included in Article I, section 15 of the state constitution.[265] Thus, the majority concluded that the adoption of section 30 should be interpreted as abrogating the narrow interpretation of permissible prosecutorial discovery announced in the *Prudhomme/Misener* line of cases.[266] The majority held that the general self-incrimination privilege under section 15 was limited by section 30, to the extent that the reciprocal discovery provisions of Chapter 10 did not conflict with a defendant's privilege against self-incrimination under the state constitution.[267] Therefore, the discovery ordered against Izazaga by the trial court pursuant to Chapter 10 was not contrary to the state privilege against self-incrimination.[268] The majority also indicated that such a finding was consistent with the intent of the voters in passing Proposition 115.[269] As a result, the majority declined to accept Izazaga's contention that compelled reciprocal discovery under Chapter 10 was a violation of his state privilege against self-incrimination.[270]

3. *The Sixth Amendment Right to Effective Assistance of Counsel*

a. *Trial Preparation by Defense Counsel*

The majority began its examination of possible sixth amendment violations by responding to Izazaga's claim that the

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264. *Id.*
265. *Id. See supra* notes 147-189 and accompanying text (discussing the *Prudhomme* line of cases).
266. *Izazaga*, 54 Cal. 3d at 371, 815 P.2d at 314, 285 Cal. Rptr. at 242.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*

liberal discovery of witnesses and their statements under Penal Code section 1054.3 chills defense counsel from conducting thorough pretrial investigations.[271] This chilling effect, according to Izazaga, resulted in a violation of his right to effective assistance of counsel under the sixth amendment.[272]

The majority initially noted that the United States Supreme Court had never struck down a discovery scheme on the basis of a violation of the right to effective assistance of counsel.[273] Next, the majority explained that the new California discovery provisions would not have the practical effect of chilling an exhaustive pretrial investigation by the defendant's counsel.[274] This was because the defense could prevent the prosecution from gaining access to witnesses and statements uncovered by the defense that would aid the prosecution.[275] The majority reiterated that the required disclosure under section 1054.3 applies only to those witnesses who the defense *intends to call at trial.*[276] The majority found it logical to assume that the defense will call only witnesses who are helpful to the defendant's case.[277] The defense need not disclose the names or statements of any witnesses that would aid the prosecution, so long as these witnesses were not to be called at trial.[278] In light of this protection, the majority saw no possibility

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271. *Id.* at 379, 815 P.2d at 319, 285 Cal. Rptr. at 246.

272. *Id.*

273. *Id.* at 379, 815 P.2d at 319, 285 Cal. Rptr. at 246. In his dissent, Justice Broussard attacked the majority's statement, by pointing out that even if true, it did not necessarily establish that discovery under Chapter 10 was constitutional. *Id.* at 407, 815 P.2d at 338, 285 Cal. Rptr. at 265 (Broussard, J., dissenting).

274. *Id.* at 379-80, 815 P.2d at 319-20, 285 Cal. Rptr. at 246-47.

275. *Id.*

276. *Id.* Section 1054.3 sets out the following requirements:

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

CAL. PENAL CODE § 1054.3 (West Supp. 1992).

277. *Izazaga*, 54 Cal. 3d at 379, 815 P.2d at 319, 285 Cal. Rptr. at 246.

278. *Id.*

of chilling an exhaustive investigation by the defense counsel which would impede a defendant's right to effective assistance of counsel.[279]

The majority noted that its reasoning was in line with the United States Supreme Court's decision in *United States v. Nobles*,[280] where the Supreme Court stated that the sixth amendment does not give a defendant the right to present evidence free from the legitimate demands of the criminal justice system.[281] In *Nobles*, the trial court ordered the defense, once it called its investigator as a trial witness, to disclose the investigator's report of statements made by the prosecution's witnesses.[282] The *Nobles* Court rejected the notion that requiring a defendant to disclose a report prepared by a defense investigator violated a defendant's right to effective assistance of counsel.[283] Izazaga argued that *Nobles* was distinguishable from his case because the defendant in *Nobles* had waived his sixth amendment rights by putting the investigator on the stand.[284] In Izazaga's case there could be no similar waiver since the trial court had ordered pretrial disclosure.[285]

The *Izazaga* majority acknowledged that in *Nobles* the defendant had waived his sixth amendment right by voluntarily making use of the investigator's report at trial, but pointed out that the United States Supreme Court had stated that even in the absence of a waiver, the sixth amendment was not violated.[286]

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279. *Id.*

280. 422 U.S. 225 (1975). *See supra* notes 120-131 and accompanying text (discussing the *Nobles* decision).

281. *Izazaga*, 54 Cal. 3d at 379, 815 P.2d at 319-20, 285 Cal. Rptr. at 226-27 (citing *Nobles*, 422 U.S. at 241).

282. *Id.* (citing *Nobles*, 422 U.S. at 240 n.15).

283. *Id.* (citing *Nobles*, 422 U.S. at 240 n.15).

284. *Id.* at 379-80, 815 P.2d at 320, 285 Cal. Rptr. at 227.

285. *See* CAL. PENAL CODE § 1054.7 (West Supp. 1992) (requiring that disclosures be made at least 30 days prior to trial).

286. *Izazaga*, 54 Cal. 3d. at 380, 815 P.2d at 320, 285 Cal. Rptr. at 247 (citing *Nobles*, 422 U.S. at 240 n.15). In a footnote, the majority rejected Izazaga's reliance on the case of *People v. Collie*, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981), to reach a contrary conclusion. *Id.* n.16. In *Collie*, the court stated that if discovery of a defense investigator's report is allowed, the defendant's constitutional right to assistance of counsel is potentially threatened. *Collie*, 30 Cal. 3d at 55-56, 634 P.2d at 540, 177 Cal. Rptr. at 464. The majority stated that this language was merely

According to the *Nobles* Court, the state has a legitimate interest in preventing testimonial half-truths.[287] Moreover, the Court's order in that case was limited to relevant portions of the investigator's report, and conditioned upon the investigator's testimony.[288] The majority in *Izazaga* stated that the discovery mandated under Chapter 10 was similarly designed to prevent the presentation of false or misleading testimony.[289] Further, discovery under the Chapter 10 provisions was limited to relevant statements and reports, and conditioned upon the defense's intent to introduce the witnesses or information at trial.[290] The majority also refused to distinguish *Nobles* in that, in *Nobles*, the disclosure took place during the trial, as opposed to the pretrial stage as was the case with the discovery order applied to Izazaga.[291] The majority could find no credible argument that the timing of the required disclosure would implicate any sixth amendment violation.[292] Therefore, the majority held that the pretrial discovery order granted against Izazaga did not violate his right to effective assistance of counsel.[293]

b. Work Product Doctrine Protection

After holding that the new discovery provisions did not violate the sixth amendment by discouraging exhaustive pretrial investigation, the majority examined Izazaga's facial claim that because of the work product doctrine,[294] the compulsion of witness statements gathered by the defense violated the sixth amendment right to effective assistance of counsel.[295] On this point, the majority stated that the work product doctrine, as

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dictum. *Izazaga*, 54 Cal. 3d at 380 n.16, 815 P.2d at 320 n.16, 285 Cal. Rptr. 247 n.16.

287. *Id.* at 379, 815 P.2d at 319-20, 285 Cal. Rptr. at 246-47 (citing *Nobles*, 422 U.S. at 241).

288. *Id.* at 380, 815 P.2d at 320, 285 Cal. Rptr. at 247.

289. *Id.* at 379, 815 P.2d at 320, 285 Cal. Rptr. at 247.

290. *Id.* at 380, 815 P.2d at 320, 285 Cal. Rptr. at 247.

291. *Id.*

292. *Id.*

293. *Id.*

294. *See supra* notes 110-131 and accompanying text (discussing the work product doctrine).

295. *Izazaga*, 54 Cal. 3d at 380-81, 815 P.2d at 320-21, 285 Cal. Rptr. at 247-48.

developed in *Hickman v. Taylor*[296] and as applied to criminal trials in *Nobles*, was not founded upon any sixth amendment right.[297]

In a footnote, the majority addressed Justice Kennard's assertion that perhaps work product protection was grounded in the sixth amendment.[298] The majority rejected Justice Kennard's contention that the United States Supreme Court in *Nobles* had "hinted" that work product might be constitutionally protected.[299] The majority did not find that same "hint" in *Nobles*, and found it untenable that a doctrine created by the Supreme Court in a civil case was actually founded upon the right to counsel clause applicable only to criminal defendants.[300] Further, in *Greyhound Corporation v. Superior Court*,[301] the California Supreme Court had held that the *Hickman* doctrine was a federally created privilege, based on federal policy, and was not a privilege that existed in California.[302] The privilege did not exist in California courts because it was founded neither in the federal nor the state constitutions, and because the privilege had not been codified in California when the *Greyhound* case was decided.[303]

Although there remains no constitutional work product protection under either the state or federal constitution, the *Izazaga* majority noted that, subsequent to the *Greyhound* decision, California had enacted statutory work product protection applicable

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296. 329 U.S. 495 (1947).

297. *Izazaga*, 54 Cal. 3d at 381, 815 P.2d at 320, 285 Cal. Rptr. at 247.

298. *Id.* at 381 n.18, 815 P.2d at 321 n.18, 285 Cal. Rptr. at 248 n.18.

299. *Id.* In *Nobles* the United States Supreme Court stated:

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

Nobles, 422 U.S. 225, 238 (1975).

300. *Izazaga*, 54 Cal. 3d at 381 n.18, 815 P.2d at 321 n.18, 285 Cal. Rptr. at 248 n.18.

301. 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961).

302. *Izazaga*, 54 Cal. 3d at 381, 815 P.2d at 321, 285 Cal. Rptr. at 247.

303. *Id.*

in civil trials.[304] Under section 2018 of the California Code of Civil Procedure, work product of an attorney is undiscoverable except where the court determines that preventing such discovery would unfairly prejudice the party seeking discovery, or would result in an injustice.[305] In addition, what has been called "core" work product, that is work product that reflects an attorney's mental impressions, conclusions, or opinions, may not be discovered under any circumstances.[306]

The *Izazaga* majority acknowledged that these civil provisions had been applied in California criminal cases by judicial decision.[307] The majority also pointed out that work product was specifically excluded from discovery under Chapter 10.[308] However, Chapter 10 specifically limited the definition of work product in criminal trials to include only core work product.[309] Despite the narrower definition under the criminal discovery provisions, the court held that the new discovery rules were not subject to Izazaga's facial challenge that the provisions violated the right to effective assistance of counsel.[310]

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304. *Id. See* CAL. CODE CIV. PROC. § 2018 (West Supp. 1992) (codifying work product protection).

305. *Izazaga*, 54 Cal. 3d at 381, 815 P.2d at 320, 285 Cal. Rptr. at 247. *See* CAL. CIV. PROC. CODE § 2018(b) (West Supp. 1992) (providing protection for ordinary work product).

306. *Izazaga*, 54 Cal. 3d at 381, 815 P.2d at 321, 285 Cal. Rptr. at 248. *See* CAL. CIV. PROC. CODE § 2018(c) (West Supp. 1992) (providing protection for core work product).

307. *Izazaga*, 54 Cal. 3d at 381, 815 P.2d at 321, 285 Cal. Rptr. at 248. *See* People v. Collie, 30 Cal. 3d 43, 59, 634 P.2d 534, 543, 177 Cal. Rptr. 458, 467 (1981) (holding that the work product doctrine applies in criminal cases).

308. *Izazaga*, 54 Cal. 3d at 381, 815 P.2d at 321, 285 Cal. Rptr. at 248. Chapter 10 contains the following provision relating to work product protection:

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

CAL. PENAL CODE § 1054.6 (West Supp. 1992).

309. *Izazaga*, 54 Cal. 3d at 382 n.19, 815 P.2d at 321 n.19, 285 Cal. Rptr. at 248 n.19.

310. *Id.* at 381-82, 815 P.2d at 321, 285 Cal. Rptr. at 248.

4. *The Right to Due Process of Law Under the Fourteenth Amendment*

In addition to addressing Izazaga's aforementioned fifth and sixth amendment claims, the majority examined Izazaga's claim that the discovery provisions within Chapter 10 were facially repugnant to the due process clause of the fourteenth amendment.[311] Initially, the majority examined the relationship between discovery in criminal cases and the requirements of due process.[312] Noting that the prosecution has a duty to disclose any exculpatory evidence it obtains,[313] the majority in *Izazaga* stated that due process does not define the amount of discovery permissible in criminal trials.[314] The due process clause, however, does define the balance of forces between the state and the accused.[315] Therefore, as the United States Supreme Court held in *Wardius v. Oregon*,[316] discovery must be reciprocal in order to meet the requirements of due process.[317]

According to the *Izazaga* majority, such mandated reciprocity was inherent in the new discovery provisions.[318] First, article I, section 30(c) of the state constitution, which was enacted contemporaneously with the Chapter 10 discovery provisions, requires reciprocal discovery in criminal cases.[319] The majority noted that it would be logical to assume that since Proposition 115 contained both section 30(c) and Chapter 10, the voters intended discovery under Chapter 10 to be reciprocal.[320] Second, the discovery provisions themselves provide for reciprocal discovery.[321] In order to illustrate this reciprocity, the majority

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311. *Id.* at 372, 815 P.2d at 314-15, 285 Cal. Rptr. at 241-42.
312. *Id.*
313. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the defendant has a constitutional right to discover any exculpatory evidence obtained or known by the prosecution).
314. *Izazaga*, 54 Cal. 3d at 372, 815 P.2d at 315, 285 Cal. Rptr. at 242.
315. *Id.*
316. 412 U.S. 470 (1973).
317. *Izazaga*, 54 Cal. 3d at 373, 815 P.2d at 315, 285 Cal. Rptr. at 242.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 374, 815 P.2d at 316, 285 Cal. Rptr. at 243.

compared discovery by the prosecution under Penal Code section 1054.3 with discovery by the defense under section 1054.1.[322] The majority concluded that if any imbalance exists, it favors the defendant as required by the *Wardius* holding.[323] Therefore, Izazaga's facial due process challenge was rejected.[324]

The majority also rejected Izazaga's argument that the new discovery provisions violated his due process rights because the provisions failed to provide for automatic reciprocal discovery.[325] The majority found no merit in the argument that the provisions provided inadequate protection because a defendant could be forced to disclose information without the prosecution automatically reciprocating.[326] In *Wardius,* the United States Supreme Court held that due process demands that a defendant be given notice of the opportunity to discover the prosecution's witnesses.[327] The *Izazaga* majority identified that Penal Code section 1054.5(b) provides such notice, and further that the procedural requirement of making a request for discovery was available equally to the prosecution and the defense.[328] Since both the prosecution and defense were given equal notice and opportunity to compel discovery, the majority was unable to find any denial of due process.[329]

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322. *Id.* The majority noted that both the prosecution and defense were required to disclose the names of witnesses intended to be called at trial, but the defendant need not disclose whether or not the defendant intended to testify. *Id.* The majority also noted that while the prosecution must disclose all relevant real evidence seized or obtained during its investigation, the defendant was required only to disclose real evidence which the defendant intended to introduce at trial. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* Under Chapter 10, a party may obtain discoverable material by making an informal request of the opposing counsel for the desired information. CAL. PENAL CODE § 1054.5(b) (West Supp. 1992). If the request is not complied with in 15 days, the party seeking discovery may seek a court order mandating the discovery. *Id.* A request must be made for any discoverable materials because the provisions do not provide for automatic reciprocal discovery. *Id.* §§ 1054-1054.7 (West Supp. 1992).

326. *Izazaga,* 54 Cal. 3d at 374, 815 P.2d at 316, 285 Cal. Rptr. at 243.

327. *Id.* at 374-75, 815 P.2d at 316, 285 Cal. Rptr. at 243 (citing Wardius v. Oregon, 412 U.S. 470, 479 (1973)).

328. *Id.*

329. *Id.*

The majority likewise rejected Izazaga's claim that under Chapter 10 the prosecution had no duty to disclose witnesses intended to rebut disclosed defense witnesses and evidence.[330] The majority did not accept Izazaga's theory that since the prosecution need only disclose those witnesses intended to be called at trial, the discovery rules did not require the prosecution to disclose rebuttal witnesses until the prosecution had seen who the defense actually called at trial.[331] The majority acknowledged that due process requires the defendant be given the opportunity to discover the prosecution's rebuttal witnesses, but found nothing in the new discovery provisions which denied the defendant such an opportunity.[332] In fact, the majority determined that the new provisions included rebuttal witnesses by implication.[333] The new rules require the disclosure of the names and addresses of persons the prosecution intends to call at trial.[334] The plain language of "at trial," according to the *Izazaga* majority, included both the prosecution's case-in-chief and any rebuttal.[335] Since the prosecution's discovery was triggered by the witnesses the defense intended to call, it must necessarily be assumed that the prosecution would intend to call any of its witnesses who could be used to refute any defense witness that might be called.[336] Since both the prosecution and defense were bound by the same definition of "intends to call," the majority found the new provisions provided sufficient reciprocity to satisfy due process requirements.[337]

The majority next rejected Izazaga's alternative argument that discovery under Chapter 10 violated due process in that, after the disclosure of defense witnesses, the prosecution was only required

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330. *Id.* at 375, 815 P.2d at 316-17, 285 Cal. Rptr. at 243-44.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* The majority went on in a footnote to adopt a definition for "intends to call" which the Ohio Supreme Court had established in *State v. Howard*, 56 Ohio St. 2d 328, 331, 383 N.E.2d 912, 915 (1978). *Id.* at 376 n.11, 815 P.2d at 316 n.11, 285 Cal. Rptr. at 244 n.11. According to the Ohio Supreme Court, "intends to call" includes all witnesses the prosecution reasonably anticipates it is likely to call at trial. *Id.*

337. *Id.* at 375, 815 P.2d at 316, 285 Cal. Rptr. at 243.

to disclose a list of rebuttal witnesses and their recorded statements.[338] Izazaga claimed that due process required the disclosure of all the information gathered by the prosecution which could be used to refute the disclosed defense witnesses, whether or not it was intended to be introduced at trial.[339] The majority cited the United States Supreme Court's decision in *Williams* to show that such disclosure by the prosecution was not required to satisfy due process.[340]

The discovery statute challenged in *Williams* did not require the prosecution to disclose all its rebuttal evidence.[341] It required only the disclosure of rebuttal witnesses and their statements which were intended to be introduced, and was found to adequately satisfy the requirements of due process.[342] The majority in *Izazaga* stated that the due process requirement of reciprocity called for a fair trade of information and nothing more.[343] Since the defendant was not compelled by the new discovery provisions to reveal any rebuttal evidence other than the witnesses' names, addresses, and statements, there was no requirement that the prosecution disclose more than the same.[344] Since the disclosure requirements under Chapter 10 were nearly symmetrical, with any imbalance of advantage favoring the defendant, the majority held that discovery under Chapter 10 did not violate a defendant's due process rights.[345]

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338. *Id.* at 376, 815 P.2d at 317, 285 Cal. Rptr. at 274.

339. *Id.*

340. *Id.*

341. *Id.* (citing Williams v. Florida, 399 U.S. 78, 81-82 (1970)).

342. *Id.* (citing *Williams*, 399 U.S. at 81-82).

343. *Id.* at 377, 815 P.2d at 317, 285 Cal. Rptr. at 245. The majority acknowledged that language in the *Wardius* opinion indicating that "it is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to a hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State," could be interpreted as supporting Izazaga's claim. *Id.* The majority stated that although this language could be interpreted as requiring the disclosure of all the prosecutor's rebuttal evidence, it was not a correct interpretation of the *Wardius* opinion and the due process clause. *Id.* All that was required by the due process clause was a fair trade of information. *Id.*

344. *Id.*

345. *Id. See supra* notes 244-258 and accompanying text (discussing the majority's analysis of how a defendant retains the advantage where the discovery provisions do not call for strict reciprocity).

Finally, the majority addressed Izazaga's claim that the new discovery provisions failed to require the disclosure of all exculpatory evidence as mandated by the United States Supreme Court's rulings in *Brady v. Maryland*[346] and its progeny.[347] The *Brady* line of cases established that in order for a defendant to receive a fair trial as required by the due process clause, the prosecution has an affirmative duty to disclose any substantial and material evidence which is favorable to the accused, whether or not such disclosure is requested.[348] The majority in *Izazaga* found it unnecessary to discuss the scope of Penal Code section 1054.1(e), which Izazaga argued defined the prosecutor's duty to disclose exculpatory evidence more narrowly than the duty had been defined by the *Brady* line of cases.[349] The majority pointed out that regardless of how the duty was defined in Chapter 10, the prosecutor was obligated to satisfy the requirements of *Brady*.[350] The prosecutor's duty to disclose exculpatory evidence under *Brady* operates independently of any state statutory scheme.[351] The majority in *Izazaga* held therefore, that even if the state provision could be more narrowly interpreted, it did not limit a defendant's due process rights to such evidence, because the United State Supreme Court's ruling in *Brady* would control the prosecutor's duty to disclose exculpatory evidence.[352]

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346. 373 U.S. 83 (1963).

347. *Izazaga*, 54 Cal. 3d at 377, 815 P.2d at 318, 285 Cal. Rptr. at 245. *See* United States v. Bagley, 473 U.S. 667, 674-83 (1985); California v. Trombetta, 467 U.S. 479, 485-91 (1984); United States v. Agurs, 427 U.S. 97, 103-14 (1976); Giglio v. United States, 405 U.S. 150, 152-54 (1972) (defining the constitutional requirements for the disclosure of exculpatory evidence).

348. *Izazaga*, 54 Cal. 3d at 378, 815 P.2d at 318, 285 Cal. Rptr. at 246.

349. *Id.* at 378, 815 P.2d at 318-19, 285 Cal. Rptr. at 245-46.

350. *Id.*

351. *Id.*

352. *Id.* The majority also addressed several other challenges Izazaga had leveled at the Chapter 10 discovery provisions. *Id.* at 382-83, 815 P.2d at 322-23, 285 Cal. Rptr. at 249-50. First, Izazaga argued that beyond the facial validity of Chapter 10, there could be instances where the discovery provisions as applied would violate the United States Constitution. *Id.* at 382, 815 P.2d at 322, 285 Cal. Rptr. at 249. The majority pointed out that Penal Code section 1054.6 prohibits the forced disclosure of any materials or information which are privileged under the United States Constitution, and therefore, a defendant retained adequate protection under the Constitution. *Id.* Next, Izazaga argued that the discovery provisions failed to provide any procedural means for raising constitutional issues which might arise out of the required discovery. *Id.* The majority rejected this argument, and stated that the constitutional rights of a defendant are self-executing and need no statutory

C. The Concurring Opinion of Justice Kennard

Justice Kennard began her concurrence by stating that she agreed with the greater part of the majority's opinion, but disagreed with the majority's analysis of Izazaga's claim that the new discovery scheme infringed upon his sixth amendment rights by violating the work product doctrine.[353] According to Justice Kennard, the majority, in reviewing the *Hickman* case and its progeny, leaped to the conclusion that there was no constitutional foundation for the work product doctrine.[354]

Justice Kennard stated that the United States Supreme Court in *Hickman* did not reach the question of whether there was a constitutional basis for the work product doctrine because the Court disposed of the *Hickman* case on statutory grounds.[355] Contrary to the majority's position, Justice Kennard contended that the Supreme Court's decision in *Nobles* could be viewed as implying that the work product privilege was an integral part of the sixth amendment right to effective assistance of counsel.[356] To support this implication, Justice Kennard noted that the Supreme Court in

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enforcement mechanism. *Id.* Furthermore, nothing in the new provisions prevented a defendant, as Izazaga did in his case, from utilizing existing avenues for challenging orders of a trial court. *Id.* Finally, Izazaga argued that section 3 of Proposition 115, which purports to require the interpretation of certain state constitutional rights be consistent with analogous rights in the United States Constitution, denied him equal protection of the law. *Id.* at 383, 815 P.2d at 323, 285 Cal. Rptr. at 250. The majority noted that its decision in *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990), striking and severing section 3 from Proposition 115, rendered Izazaga's argument moot. *Id.*

353. *Id.* at 383-84, 815 P.2d at 322-23, 285 Cal. Rptr. at 249-50. (Kennard, J., concurring).

354. *Id.* at 384, 815 P.2d at 323, 285 Cal. Rptr. at 250. (Kennard, J., concurring). In a footnote, Justice Kennard stated that the majority's reliance on *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961), case for the proposition that the work product doctrine was not rooted in the United States Constitution was in error. *Id.* n.1 (Kennard, J., concurring). Justice Kennard could find no discussion of the federal Constitution in the *Greyhound* opinion. *Id.* (Kennard, J., concurring). Further, since *Greyhound* involved a civil action, and sixth amendment rights applied only in criminal trials, any discussion of the relationship between the right to counsel and the work product doctrine would have been irrelevant to the case. *Id.* (Kennard, J., concurring).

355. *Id.* at 384, 815 P.2d at 323, 285 Cal. Rptr. at 250 (Kennard, J., concurring). *See* Hickman v. Taylor, 329 U.S. 495, 514 (1947) (deciding the case on statutory grounds).

356. *Izazaga*, 54 Cal. 3d at 384-85, 815 P.2d at 323, 285 Cal. Rptr. at 250 (Kennard, J., concurring).

Nobles cited *Hickman* for the proposition that in order to ensure protection of a client's interests a lawyer's work must be afforded a certain degree of privacy, free from unnecessary intrusions by opposing counsel.[357] After noting that *Hickman* was a civil case, the *Nobles* Court stated that the role of the work product doctrine was even more vital in the criminal justice system.[358]

Justice Kennard went on to note, however, that even if work product is constitutionally protected by the sixth amendment, there was no violation in Izazaga's case.[359] This was so because the United States Supreme Court acknowledged in *Nobles* that when a defendant calls a witness at trial, the privilege is waived.[360] Justice Kennard reasoned that under the new discovery provisions a waiver by the defendant could constitutionally be anticipated since the discovery was limited to the statements of those witnesses whom the defense intends to call at trial.[361] According to Justice Kennard, this does not mean that the information discovered before trial could validly be used by the prosecution if the defense does not call the witness.[362] In that situation, the prosecution would be prohibited from utilizing the disclosed information.[363] There was, however, no indication in Izazaga's case that the prosecution would make an improper use of the discovered statements.[364] Therefore, although Justice Kennard disagreed with the majority's analysis of the work product issue, she agreed that Izazaga's sixth amendment privilege was not violated.[365]

D. The Dissenting Opinion of Justice Mosk

Justice Mosk prefaced his dissent by stating that the discovery scheme adopted under Proposition 115 was invalid under the

357. *Id.* at 385, 815 P.2d at 323-24, 285 Cal. Rptr. at 250-51 (Kennard, J., concurring).
358. *Id.* (Kennard, J., concurring).
359. *Id.* at 387, 815 P.2d at 325, 285 Cal. Rptr. at 252. (Kennard, J., concurring).
360. *Id.* at 386, 815 P.2d at 324, 285 Cal. Rptr. at 251. (Kennard, J., concurring).
361. *Id.* (Kennard, J., concurring).
362. *Id.* (Kennard, J., concurring).
363. *Id.* (Kennard, J., concurring).
364. *Id.* (Kennard, J., concurring).
365. *Id.* at 387, 815 P.2d at 325, 285 Cal. Rptr. at 252 (Kennard, J., concurring).

California Constitution, and therefore the challenged discovery order was unsupported as a matter of law.[366] Justice Mosk maintained that the reciprocal discovery provisions violated the privilege against self-incrimination embodied in Article I, section 15 of the state constitution.[367] Accordingly, Justice Mosk limited his dissenting opinion to that proposition.[368]

Justice Mosk first discussed the interplay between compelled discovery and the privilege against self-incrimination as interpreted by the California courts.[369] Justice Mosk concluded his chronological review of previous decisions with a reference to the *Misener* case in which the California Supreme Court struck down, as a violation of the privilege against self-incrimination, the California Legislature's attempt to fashion a reciprocal discovery provision.[370] According to Justice Mosk, *Misener* established the rule that discovery is unconstitutional if it has the effect of assisting the prosecution in carrying the burden of proving the defendant's guilt.[371] In light of this precedent, Justice Mosk was compelled to find the new reciprocal discovery provisions violative of the state constitutional privilege against self-incrimination, since their very nature and purpose was to aid the prosecution in obtaining criminal convictions.[372]

Justice Mosk rejected the idea that the enactment of Proposition 115 altered or limited the privilege against self-incrimination provided in Article I, section 15 and as interpreted by the decisions in *Prudhomme* and *Misener*.[373] Justice Mosk contended that the drafters of Proposition 115 intended to remove the "roadblock" to

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366. *Id.* at 387, 815 P.2d at 325, 285 Cal. Rptr. at 252 (Mosk, J., dissenting).

367. *Id.* at 390, 815 P.2d at 327, 285 Cal. Rptr. at 254 (Mosk, J., dissenting).

368. *Id.* at 387-402, 815 P.2d at 325-335, 285 Cal. Rptr. at 253-62 (Mosk, J., dissenting).

369. *Id.* at 390-97, 815 P.2d at 327-31, 285 Cal. Rptr. at 254-58 (Mosk, J., dissenting).

370. *Id.* at 396, 815 P.2d at 331, 285 Cal. Rptr. at 258 (Mosk, J., dissenting). *See supra* notes 187-189 and accompanying text (discussing the *Misener* decision).

371. *Izazaga*, 54 Cal. 3d at 396, 815 P.2d at 331, 285 Cal. Rptr. at 258 (Mosk, J., dissenting).

372. *Id.* at 397, 815 P.2d at 332, 285 Cal. Rptr. at 259 (Mosk, J., dissenting).

373. *Id.* (Mosk, J., dissenting). Dissenting in the *Raven* case, Justice Mosk argued that section 30(c) could not be separated from the amendment to section 24 which was invalidated by the court, and therefore the whole of Proposition 115 was invalid and without effect. Raven v. Deukmejian, 52 Cal. 3d 336, 366, 801 P.2d 1077, 1096-97, 276 Cal. Rptr. 326, 345-46 (1990) (Mosk, J., concurring and dissenting).

prosecutorial discovery erected by the *Prudhomme/Misener* line of cases.[374] According to Justice Mosk, in order to accomplish this, the drafters utilized a three step approach.[375] First, Article I, section 15 of the state constitution, which contains the state privilege against self-incrimination was amended.[376] The amendment provided that the constitution was not to be interpreted to afford criminal defendants rights greater than those afforded by the United States Constitution.[377] This would have the effect of preventing the court from concluding, as it did in *Prudhomme* and *Misener,* that the state privilege against self-incrimination provided greater protection than the analogous privilege in the United States Constitution.[378] Next, the drafters created a discovery scheme providing the prosecution with broad discovery rights.[379] Finally, the drafters amended the state constitution to specifically mandate reciprocal discovery in criminal trials.[380]

Justice Mosk contended this three part plan was designed to do more than simply overrule *Prudhomme* and *Misener,* it was designed to abrogate the state constitutional privilege against self-incrimination as a privilege independent of its federal constitutional counterpart.[381] Nevertheless, Justice Mosk claimed that the drafters' goal was not achieved, since the amendment to section 24, which would have prohibited California courts from construing the California Constitution as providing greater rights than afforded by the United States Constitution, was struck down in *Raven.*[382]

Justice Mosk rejected the notion that the enactment of section 30(c), which mandated reciprocal discovery, could by itself achieve

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374. *Izazaga,* 54 Cal. 3d at 398, 815 P.2d at 332, 285 Cal. Rptr. at 259 (Mosk, J., dissenting).
375. *Id.* (Mosk, J., dissenting).
376. *Id.* (Mosk, J., dissenting).
377. *Id.* (Mosk, J., dissenting).
378. *Id.* (Mosk, J., dissenting).
379. *Id.* (Mosk, J., dissenting).
380. *Id.* at 398, 815 P.2d at 333, 285 Cal. Rptr. at 260 (Mosk, J., dissenting).
381. *Id.* at 398, 815 P.2d at 332, 285 Cal. Rptr. at 259 (Mosk, J., dissenting). Justice Mosk pointed to the language of Penal Code section 1054.6 which referred only to privileges under the United States Constitution, as support for the proposition that the drafters believed that they had abrogated the state self-incrimination privilege as separate from that guaranteed under the federal constitution. *Id.* (Mosk, J., dissenting).
382. *Id.* at 399, 815 P.2d at 333, 285 Cal. Rptr. at 260 (Mosk, J., dissenting).

the drafters' goal.[383] In the absence of the amendment to section 24, section 30(c) could not, expressly or implicitly, abrogate the state privilege against self-incrimination.[384] According to Justice Mosk, the mandate of reciprocity under section 30(c) did not conflict with the state privilege against self-incrimination, since the decisions in *Prudhomme* and *Misener* had recognized that some discovery by the prosecution would be permissible.[385] Nonetheless, Justice Mosk concluded that the discovery allowed under California Penal Code section 1054.3 would necessarily aid the prosecution in proving its case-in-chief, and therefore, violated the state constitutional privilege against self-incrimination.[386]

E. The Dissenting Opinion of Justice Broussard

Justice Broussard contended that the broad discovery scheme enacted by Proposition 115 could not withstand a federal constitutional challenge under the fifth amendment privilege against self-incrimination, or a challenge based on the sixth amendment right to effective assistance of counsel.[387] Justice Broussard believed the majority's reading of federal precedent, especially *Williams* and *Nobles*, to be misguided.[388] Justice Broussard stated that the scope of discovery under Proposition 115 was much broader than the discovery approved by United States Supreme Court in these cases.[389]

1. The Privilege Against Self-Incrimination Under the United States Constitution

Justice Broussard claimed that the majority mistakenly seized on the acceleration of disclosure theory presented in *Williams* to

383. *Id.* (Mosk, J., dissenting).
384. *Id.* at 399-400, 815 P.2d at 333, 285 Cal. Rptr. at 260 (Mosk, J., dissenting).
385. *Id.* at 400, 815 P.2d at 334, 285 Cal. Rptr. at 261 (Mosk, J., dissenting).
386. *Id.* at 401, 815 P.2d at 334-35, 285 Cal. Rptr. at 261-62 (Mosk, J., dissenting).
387. *Id.* at 402, 815 P.2d at 335, 285 Cal. Rptr. at 262 (Broussard, J., dissenting).
388. *Id.* (Broussard, J., dissenting).
389. *Id.* (Broussard, J., dissenting).

uphold the validity of the required disclosures under Penal Code section 1054.3 in the face of a fifth amendment challenge.[390] The majority had reasoned that because section 1054.3 applied only to those witnesses and information which the defendant intended to call at trial, the section merely required a permissible acceleration of disclosure.[391] Justice Broussard, however, would not interpret *Williams* so broadly as to permit any and all situations where a disclosure was accelerated.[392] The *Brooks v. Tennessee*[393] case, decided after *Williams*, was cited by Justice Broussard for the proposition that not all accelerated disclosure is constitutionally valid.[394]

In *Brooks*, the United Supreme Court struck down a state rule of criminal procedure which required a defendant to testify as the first defense witness or not at all.[395] Justice Broussard argued that after the *Brooks* decision, a court was required to evaluate any forced acceleration of disclosure by balancing the state's purpose for the acceleration against the defendant's privilege against self-incrimination.[396]

In order to show that *Brooks*, rather than *Williams* should be the controlling precedent in Izazaga's case, Justice Broussard distinguished the interests at stake in *Williams* from those at stake under section 1054.3 disclosures.[397] In *Williams*, the disclosure of alibi defenses and witnesses did not create a situation where the defendant would be providing incriminating evidence or evidence which would aid the prosecution in building its case-in-chief.[398] In contrast, discovery under section 1054.3 would, by its very nature, lead to the disclosure of evidence that could aid the

390. *Id.* at 402-03, 815 P.2d at 335-36, 285 Cal. Rptr. at 262-63 (Broussard, J., dissenting).

391. *Id.* (Broussard, J., dissenting).

392. *Id.* (Broussard, J., dissenting).

393. 406 U.S. 605 (1972).

394. *Izazaga*, 54 Cal. 3d at 403, 815 P.2d at 336, 285 Cal. Rptr. at 263 (Broussard, J., dissenting).

395. *Brooks*, 406 U.S. at 612.

396. *Izazaga*, 54 Cal. 3d at 403-04, 815 P.2d at 336, 285 Cal. Rptr. at 263 (Broussard, J., dissenting).

397. *Id.* at 404-05, 815 P.2d at 337, 285 Cal. Rptr. at 264 (Broussard, J., dissenting).

398. *Id.* (Broussard, J., dissenting).

prosecution in building its case.[399] Therefore, Justice Broussard concluded that discovery under section 1054.3, in so far as it required a defendant to disclose more than alibi defenses and witnesses, would be a violation of a defendant's fifth amendment privilege against self-incrimination.[400]

2. *The Right to Effective Assistance of Counsel*

While Justice Broussard reluctantly agreed with the majority that the compelled discovery of investigative materials prepared by the defendant's attorney and investigators would not violate the fifth amendment,[401] he believed such compelled action raised serious questions with regard to the defendant's right to effective assistance of counsel under the sixth amendment.[402] Unlike the majority, Justice Broussard contended that compelling the disclosure of witnesses' statements before the trial would have a chilling effect on the defense, and might negatively influence the defense counsel's decision to fully investigate all possible witnesses.[403]

Justice Broussard noted that although the main focus of the *Nobles* decision related to the work product doctrine, the Court in *Nobles* also addressed the defendant's claim that disclosure of an attorney's investigative materials violated the sixth amendment,

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399. *Id.* at 405, 815 P.2d at 337, 285 Cal. Rptr. 264 (Broussard, J., dissenting). Justice Broussard stated that the relative safety of disclosing alibi defenses stands in direct contrast to other forms of pretrial discovery, which will necessarily lead to the disclosure of incriminating evidence. *Id.* (Broussard, J., dissenting). For example, a defendant who anticipates calling a witness to testify that the defendant committed a homicide in self-defense, is faced with the choice of providing the prosecution with perhaps the sole witness to the killing or foregoing the use of the witness if the defendant wishes to test the state's ability to prove guilt beyond a reasonable doubt. *Id.* (Broussard, J., dissenting).

400. *Id.* at 406, 815 P.2d at 338 285 Cal. Rptr. at 265 (Broussard, J., dissenting).

401. *Id.* (Broussard, J., dissenting). Justice Broussard stated that the majority had correctly cited the United States Supreme Court's holding in *Nobles* for the proposition that the self-incrimination privilege applied only to testimonial disclosures by the defendant. *Id.* (Broussard, J., dissenting). The Justice stated, however, that he preferred the interpretation presented in Justice Black's dissent in *Williams*, which indicated that disclosures by a defense attorney or investigator could potentially violate the fifth amendment. *Id.* (Broussard, J., dissenting).

402. *Id.* (Broussard, J., dissenting).

403. *Id.* at 406-07, 815 P.2d at 338, 285 Cal. Rptr. at 265 (Broussard, J., dissenting).

independent of the work product doctrine.[404] Justice Broussard stated that although the Supreme Court found no violation in the *Nobles* case, the Court treated the claim seriously.[405] It was because the defendant in *Nobles* had waived his sixth amendment rights, and because of the limited and conditional nature of the ordered discovery, that the Court found no violation.[406] Justice Broussard noted that the discovery order in *Nobles* did not go so far as to allow the broad type of pretrial disclosures required under Penal Code section 1054.3.[407] In *Nobles*, the discovery order was limited to reach only relevant portions of the investigator's report, and only after the defense investigator had testified about the contents of the report at the trial.[408] Justice Broussard found it disingenuous to consider the "intends to introduce at trial" limitation applicable under Penal Code section 1054.3, as equivalent to the limitation which was the basis for the holding in *Nobles*.[409] Moreover, in the typical criminal prosecution, the discovery provisions of Chapter 10 will not include a waiver as in *Nobles*.[410] There is a strong possibility that prior to the trial, the defense would intend to introduce a piece of evidence, but decide later not to introduce that evidence.[411] Therefore, unless the evidence is actually used at trial, there could be no valid waiver.[412] The ultimate effect of the California discovery scheme, according to Justice Broussard, was to tie the defense attorney's hands, and thereby impermissibly impinge on the defendant's right to effective assistance of counsel under the sixth amendment.[413]

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404. *Id.* at 408, 815 P.2d 339, 285 Cal. Rptr. at 266 (Broussard, J., dissenting).
405. *Id.* (Broussard, J., dissenting).
406. *Id.* (Broussard, J., dissenting).
407. *Id.* (Broussard, J., dissenting).
408. *Id.* at 408, 815 P.2d at 339-40, 285 Cal. Rptr. at 266-67 (Broussard, J., dissenting).
409. *Id.* at 409, 815 P.2d at 340, 285 Cal. Rptr. at 267 (Broussard, J., dissenting).
410. *Id.* at 409, 815 P.2d at 340, 285 Cal. Rptr. at 267 (Broussard, J., dissenting).
411. *Id.* (Broussard, J., dissenting).
412. *Id.* (Broussard, J., dissenting).
413. *Id.* at 410, 815 P.2d at 340-41, 285 Cal. Rptr. at 267-68 (Broussard, J., dissenting).

III. LEGAL RAMIFICATIONS

A. The Legitimacy of Reciprocal Discovery in Criminal Trials

1. The Search for Truth Model is the Appropriate Model to Follow in Criminal Trials

In determining the validity of California's reciprocal discovery scheme in *Izazaga*, the California Supreme Court was guided by the search for truth approach.[414] The court claimed that Chapter 10 effectively reopened the two-way street of discovery in criminal trials.[415] Moreover, the court stated that prosecutorial discovery is a legitimate demand of the criminal justice system which is aimed at promoting the orderly ascertainment of truth.[416] The question remains, however, whether the adoption of the search for truth approach is appropriate.[417] The clear answer is yes.[418]

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414. *See supra* notes 27-33 and accompanying text (discussing the search for truth approach).

415. *Id.* at 363, 815 P.2d at 308, 285 Cal. Rptr. at 235.

416. *Id.* at 379, 815 P.2d at 320, 285 Cal. Rptr. at 247. The court in making this statement quoted language from Justice Traynor's opinion in *Jones*. *Id.* Justice Traynor was an outspoken proponent of prosecutorial discovery based on the underlying rationale that a criminal trial should be a search for the truth. *See Traynor, supra* note 27, at 228 (arguing that the adversarial system's primary goal should be determining the truth).

417. The search for truth model is not uniformly accepted as the appropriate model for guiding the proper adversarial balance in criminal trials. *See supra* notes 34-41 and accompanying text (identifying the rival fair play model and its proponents).

418. *See* M. GRAHAM, TIGHTENING THE REINS OF JUSTICE IN AMERICA: A COMPARATIVE ANALYSIS OF THE CRIMINAL JURY TRIAL IN ENGLAND AND THE UNITED STATES 242-49 (1983) (stating that if the our criminal justice system is not conducted as a search for truth, and if the dominance of advantages provided to defendants under fair play theory is not curtailed, the system will continue to inadequately respond to crime). Even if the fair play approach were to be universally accepted, its application would not necessarily invalidate discovery by the prosecution. The model is premised on the belief that a defendant's procedural advantages may not be reduced or eliminated without altering the traditional adversarial balance, a balance which is necessary to ensure the protection of constitutional rights. *See supra* notes 34-41 and accompanying text (discussing the fair play model). It must be remembered, however, that the traditional adversarial balance which existed when fifth and sixth amendment rights became applicable to the states was a far cry from the balance that existed when prosecutorial discovery was first introduced. The traditional advantages given to a defendant were developed in the absence of the defendant's right to discovery. *See supra* notes 44-48 and accompanying text (discussing the fact that neither the defense nor the prosecution were permitted discovery rights at common law). By allowing the defendant the right to discover the prosecution's information, the traditional balance was tipped in favor of the defendant. A strong argument can be made under the fair play approach that allowing reciprocal discovery by the

The merit of adopting a search for truth approach in criminal trials is supported by analogy to its use in civil trials. The approach is widely accepted in the context of civil litigation.[419] Liberal discovery by both parties is rarely questioned.[420] The adversarial clash between parties possessing equal information is widely considered to be the best means of arriving at the truth.[421] Of course, civil and criminal trials seek to achieve different aims.[422] Accepting, however, that the search for truth approach is appropriate for civil trials, it is even more germane when applied in the criminal context. The primary aim of a civil trial is to resolve a dispute between two private individuals. Society as a whole is unconcerned with discovering the actual truth behind the dispute.[423] If the discord can be resolved, regardless of whether the truth is ever known, the system has achieved its purpose of settling disputes in a peaceful and orderly fashion.

Conversely, discovering the actual truth is essential in a criminal trial. A primary function of the criminal justice system is to punish those who commit wrongs against society.[424] Society

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prosecution does little more than restore the original adversarial balance. The following statement of the eminent jurist Learned Hand provides a cogent argument for preventing the fair play approach from unduly burdening the criminal justice system:

> Under our criminal procedure the accused has every advantage . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

419. *See* Traynor, *supra* note 27, at 228 (indicating that the search for truth approach has gained general acceptance in civil litigation).

420. *See* Brooks-Bey v. Reid, 1992 U.S. Dist. LEXIS 103 (E.D. Pa. 1992) (No. 91-2726) (stating that the rule of liberal discovery in civil cases has long been accepted).

421. *See* Goodpaster, *supra* note 23, at 121 (stating that the most commonly held view is that the adversary system is the best means for discovering the truth in a criminal trial).

422. *See* Comment: *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 907 (1984) (indicating that although elements of the criminal and civil justice systems overlap, the goals of the systems are different).

423. *See* Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 359-60 (stating that the efforts of civil litigants to influence the outcome of their dispute does not benefit society).

424. *See* E. VAN DEN HAAG, PUNISHING CRIMINALS 3-7 (1975) (identifying the criminal justice system's role in administering punishment).

absolutely refuses to punish an accused unless the accused has been found guilty beyond a reasonable doubt.[425] Guilt or innocence is impossible to establish unless the actual truth is known. Although there is technically a dispute between the accused and the state, it is not the same type as is found between litigants in the civil setting.[426] The state has an obligation to prosecute wrongdoers, but it also has a duty to protect the innocent from being convicted.[427] These twin aims cannot be accomplished when doubt about the actual truth exists.[428]

The indispensable role of the search for truth approach in criminal trials is supported by the United States Supreme Court's continual reliance upon the approach in deciding the constitutionality of state discovery rules.[429] For example, in *Williams* the Court noted that reciprocal discovery rules, because they aim to promote the search for truth, are consistent with the goals of our criminal justice system.[430] According to the *Williams* Court, there is no absolute right to conceal information from discovery, because the adversary system is not an end in itself.[431]

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425. *See Arenella, supra* note 35, at 198 (identifying that our system of justice prefers an erroneous acquittal to an erroneous conviction).

426. *See* Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice?*, 44 VAND. L. REV. 45, 46 (1991) (pointing out that attorneys in civil litigation take on the sole role of aggressive advocate, while prosecutors in criminal cases have an ethical duty to act as ministers of justice).

427. *See* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3-1.1(c) (1979) (requiring the prosecution to ensure justice, and not merely seek convictions).

428. The search for truth approach also furthers the deterrent function of the criminal justice system. Markman, *Foreword: The 'Truth in Criminal Justice' Series*, 22 U. MICH. J. L. REF. 425, 428 (1989). If criminals perceive that the system is incapable of ascertaining the truth, they will be emboldened in their belief that they can escape punishment under the system. *Id.*

429. For cases identifying the importance of a search for truth approach see, e.g., Taylor v. Illinois, 484 U.S. 400, 410-16 (1988); United States v. Nobles, 422 U.S. 225, 230-31 (1975); Williams v. Florida, 399 U.S. 78, 81-82 (1970). The value of a search for truth approach has also been espoused by the California courts. *See* Evans v. Superior Court, 11 Cal. 3d 617, 622, 522 P.2d 681, 684, 114 Cal. Rptr. 121, 124 (1974) (stating that the search for truth is essential in the administration of the criminal justice system).

430. *Williams*, 399 U.S. at 82. *See* Bandes, *supra* note 22, at 1038 (stating that the *Williams* Court based its decision on the search for truth model).

431. *Williams*, 399 U.S. at 82. *See Evans*, 11 Cal. 3d at 622, 522 P.2d at 684, 114 Cal. Rptr. at 124 (stating that when the adversary system comes in conflict with the ultimate goal of discovering the truth, the system must yield to that goal).

The potency of the Court's commitment to the pursuit of truth is clear from the following language in *United States v. Nixon:*[432]

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depends on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[433]

In addition to the Supreme Court's acceptance of the search for truth model, the mainstream of American states have enacted reciprocal discovery provisions which foster the ascertainment of truth.[434] While it may be impossible to prove that these state legislatures intended to adopt the search for truth rationale,[435] it is difficult to reach any other conclusion.[436] Reciprocal discovery

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432. 418 U.S. 683 (1974).

433. *Id.* at 709.

434. *See, e.g.,* ARIZ. R. CRIM. P. 15.2(a)-(f); ARK. R. CRIM. P. 18.3; COLO. R. CRIM. P. 16 part II; HAW. R. PENAL P. 16(c); ILL. S. CT. R. CRIM. P. 413(d); MASS. R. CRIM. P. 14; MINN. R. CRIM. P. 9.02; MO. R. CRIM. P. 25.05; VT. R. CRIM. P. 16.1; WASH. SUPER. CT. CRIM. R. 4.7(b) (providing for reciprocal pretrial discovery in criminal cases).

435. *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) (stating that it is difficult or impossible to determine the subjective intent of a group of legislators). *See also* Dickerson, *Symposium: The Legislative Process: Statutory Interpretation: Dipping Into Legislative History,* 11 HOFSTRA L. REV. 1125, 1133 (1983) (stating that legislative actions result from disparate purposes which are impossible to determine).

436. There is a possible alternative explanation for the enactment of reciprocal discovery statutes. The development of discovery by the defense occurred prior to the development of prosecutorial discovery. *See supra* notes 45-49 and accompanying text (discussing the development of discovery for the defense and the prosecution respectively). Thus, for a time, the traditional adversarial balance between the defense and the prosecution was skewed in favor of the defendant. Therefore, some commentators believed that expanded prosecutorial discovery was required to restore the original adversarial balance. Louisell, *supra* note 43, at 99; Traynor, *supra* note 27, at 246. Even if this was the motivation behind the enactment of reciprocal discovery rules, it does not negate the validity of the search for truth approach. By increasing the information discoverable by both parties, reciprocal discovery provisions necessarily diminish a defendant's ability to conceal information from the state. If the states had been motivated by something other than the search for truth model (i.e.

was developed primarily to enhance the quest for truth.[437] By its very nature, reciprocal discovery increases both the prosecution's and the defense's access to factual information.[438] Moreover, the search for truth model is premised on the theory that greater access to information will lead to the eventual attainment of truth.[439] Therefore, it is logical to assume that the pursuit of truth is at the foundation of the criminal discovery provisions in the mainstream American jurisdictions.

The *Izazaga* court's application of the search for truth principle is further legitimized by the fact that the California Constitution implicitly commands such an approach. Article I, section 30 of the Constitution states that discovery in criminal trials shall be reciprocal in nature.[440] As previously noted, reciprocal discovery is grounded upon the search for truth rationale.[441] Moreover, the meaning of section 30 cannot be defined properly unless read in conjunction with the preamble to the proposition which enacted the section. The preamble clearly illustrates that section 30 was enacted to ensure that California criminal courts pursue the search for truth.[442]

The California Supreme Court was on solid ground in applying a search for truth approach in *Izazaga*. First, the approach is an essential component in achieving the policies underlying a criminal trial. Second, the United States Supreme Court has deemed the

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the fair play model), they could have attempted to restore the original adversarial balance by restricting defense discovery, not by opening up prosecutorial discovery.

437. *See* Jones v. Superior Court, 58 Cal. 2d 56, 60, 372 P.2d 919, 921, 22 Cal. Rptr. 879, 881 (1962) (stating that the ascertainment of truth was fostered by discovery which operates as a two-way street).

438. *See supra* note 4 (discussing reciprocal discovery).

439. Bandes, *supra* note 22, at 1037.

440. CAL. CONST. art. I, § 30.

441. *See supra* note 27-90 (discussing the relationship between the search for truth approach and the development of prosecutorial discovery).

442. *See Preamble of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET 33 (June 5, 1990), *reprinted in* CAL. CONST. art. I, § 14.1, note (Deerings Supp. 1992) (reprinting section 1(b) of the preamble of Proposition 115) (stating that the constitutional amendments enacted under the proposition are designed to restore the California criminal justice system's proper function as a means of discovering the truth).

approach appropriate.[443] Third, a majority of states have followed the approach.[444] Finally, the approach is rooted in the California Constitution.[445]

2. *Reciprocal Discovery Under Chapter 10 Does Not Violate A Defendant's Constitutional Rights*

A majority of the California Supreme Court in *Izazaga* held that the discovery provisions in Chapter 10 of the Penal Code are facially valid.[446] The provisions do not violate a criminal defendant's privilege against self-incrimination,[447] right to due process of the law,[448] right to effective assistance of counsel,[449] or protections under the work product doctrine.[450] The *Izazaga* holdings are difficult to refute.

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443. *See supra* note 429 (listing Supreme Court cases which have identified the relevance of the search for truth approach).

444. *See supra* note 434 (listing criminal discovery statutes based on the search for truth approach).

445. *Preamble of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET 33 (June 5, 1990), *reprinted in* CAL. CONST. art. I, § 14.1, note (Deerings Supp. 1992) (stating that the constitutional amendments enacted under the proposition are designed to restore the California criminal justice system's proper function as a means of discovering the truth).

446. Izazaga v. Superior Court, 54 Cal. 3d 356, 383, 815 P.2d 304, 322, 285 Cal. Rptr. 231, 249 (1991). *But see* CRIME VICTIMS JUSTICE REFORM ACT 1990, *Joint Hearing of the Senate Comm. on Judiciary and the Assembly Comm. on Public Safety*, at 88 (staff analysis) (predicting that section 1054.3 of the California Penal Code would violate the United States Constitution because the section permits broader discovery than allowable under Federal Criminal Procedure Rule 16(b) and United States Supreme Court cases).

447. *See supra* notes 229-270 and accompanying text (discussing the *Izazaga* court's disposition of the self-incrimination issue).

448. *See supra* notes 311-352 and accompanying text (discussing the *Izazaga* court's disposition of the due process issues).

449. *See supra* notes 271-293 and accompanying text (discussing the *Izazaga* court's disposition of the sixth amendment issue).

450. *See supra* notes 294-310 and accompanying text (discussing the *Izazaga* court's disposition of the work product issue).

a. The Privilege Against Self-Incrimination

The privilege against self-incrimination is not an absolute privilege.[451] The United States Supreme Court has utilized a balancing approach to test the validity of procedural rules which infringe upon the privilege.[452] Policies underlying the privilege are weighed against a state's need to infringe upon the privilege.[453] The Supreme Court's application of this balancing approach in the *Williams* and *Brooks* decisions created polar bench marks, which function as guides for determining the constitutionality of a criminal discovery statute.[454] Therefore, whether or not a reciprocal discovery statute violates the privilege against self-incrimination will likely depend upon whether it is more closely analogous to the statute in *Williams* or the statute in *Brooks*. The disagreement between the majority and Justice Broussard in *Izazaga* exemplifies the critical impact of analogizing to one case or the other. The majority found the discovery mandated under Penal Code section 1054.3 to be analogous to the discovery provision in *Williams*, and therefore constitutional.[455] Justice Broussard, on the other hand, found it analogous to the rule

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451. *See supra* notes 229-270 and accompanying text (discussing limitations of the privilege against self-incrimination). *See also* Dolinko, *Is There A Rationale For The Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1147 (1986) (stating that the development of the privilege against self-incrimination can be explained by history, but cannot be justified either functionally or conceptually).

452. *See supra* notes 80-86 and accompanying text (discussing the balancing approach used by the United States Supreme Court).

453. *Id.*

454. *Compare* Williams v. Florida, 399 U.S. 78, 79-86 (1970) (holding that a statute requiring the pretrial disclosure of alibi defenses and witnesses did not violate a defendant's privilege against self-incrimination) *with* Brooks v. Tennessee, 406 U.S. 605, 606-12 (1972) (holding that a statute requiring the defendant to testify before any other defense witness, if the defendant was to testify at all, violated a defendant's privilege against self-incrimination). Although the Tennessee statute in *Brooks* was not technically a discovery statute, the policy considerations underlying the privilege against self-incrimination that were addressed in *Brooks* can be applied when determining the constitutionality of a criminal discovery statute. *See* Izazaga v. Superior Court, 54 Cal. 3d 356, 403-06, 815 P.2d 304, 336-38, 285 Cal. Rptr. 231, 263-65 (1991) (Broussard, J., dissenting) (arguing that the *Brooks* decision should be relied upon as controlling precedent for determining the constitutional validity of criminal discovery statutes).

455. *Izazaga*, 54 Cal. 3d at 367, 815 P.2d at 310-11, 285 Cal. Rptr. at 237-38.

in *Brooks,* and therefore unconstitutional.[456] As discussed below, the discovery provisions under Chapter 10 are much more closely analogous to the constitutional statute in *Williams* than the unconstitutional statute in *Brooks.*

The discovery mandated by Chapter 10, unlike the rule in *Brooks,* is not adverse to the policies underlying the privilege against self-incrimination. In *Brooks,* the defendant challenged a Tennessee rule which required the defendant to testify as the first defense witness if the defendant was to testify at all.[457] The *Brooks* Court held that the rule unconstitutionally burdened the defendant's right to choose between testifying or remaining silent.[458] The Court noted that the defendant was faced with a severe hardship in making such a choice, because of the type of evidence which becomes admissible upon the defendant's choice to testify.[459] First, the decision to take the stand subjects the defendant to thorough cross-examination. Such cross-examination forces the defendant into a position of being faced with either answering the direct question of whether or not he or she committed the offense, or committing perjury. Shielding the defendant from this "cruel trilema of self-accusation, perjury, or contempt" is the primary purpose of the fifth amendment privilege.[460] Next, evidence of the defendant's prior convictions becomes admissible for impeachment purposes.[461] Such evidence is potentially devastating, even though unrelated to the charged offense. Finally, when the defendant testifies, the prosecution may introduce incriminating evidence obtained in violation of the defendant's *Miranda*[462] rights.[463]

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456. *Id.* at 406, 815 P.2d at 338, 285 Cal. Rptr. at 265 (Broussard, J., dissenting).

457. *Brooks,* 406 U.S. at 606.

458. *Id.* at 609.

459. *Id.*

460. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (characterizing a defendant's choices and stating that the privilege against self-incrimination reduces the hardship of such choices).

461. *Brooks,* 406 U.S. at 609. *See* CAL. EVID. CODE §§ 788, 1101(c) (West 1966 & Supp. 1992) (permitting the use of prior bad acts for impeachment purposes).

462. Miranda v. Arizona, 384 U.S. 436 (1966). The United States Supreme Court in *Miranda* held that the privilege against self-incrimination is fully applicable during any custodial interrogation, and that prior to any such interrogation an accused must be given a specific statement of his or her rights in order for statements made during the interrogation to be admissible in a subsequent trial.

It is critical to note that all of these concerns are unique to the testimony of the defendant, and therefore weigh heavily upon the policies underlying the privilege.[464] These concerns, however, are not implicated by the disclosure of third-party witnesses and their statements as required under Chapter 10. In fact, the defendant is immunized from providing his or her own statement, or even disclosing whether or not he or she will testify.[465] It is true that the requirements of Chapter 10 may present the defendant with a difficult choice, disclose the witness or do not put the witness on the stand. Yet, the Supreme Court has found no constitutional barrier forbidding difficult choices.[466]

Unlike the rule in *Brooks,* the disclosure of *intended* witnesses does not subject the defendant to the cruel trilemma of self-accusation, perjury, or contempt. The forced disclosure of *any known* witness might. Chapter 10, however, protects the defendant from self-accusation in that the defendant need not disclose the names or statements of any witnesses whom the defendant believes would be incriminating. The defendant need only disclose those witnesses he or she intends to call at trial.[467] Moreover, Chapter 10 discovery does not open the door to the introduction of prior

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Id. at 444. *See generally* Markman, Miranda v. Arizona: *A Historical Perspective,* 24 AM. CRIM. L. REV. 193 (1986) (discussing the *Miranda* decision and its impact on the law of pretrial interrogation).

463. Oregon v. Hass, 420 U.S. 714, 722 (1975); Harris v. New York, 401 U.S. 222, 226 (1971). The *Hass* and *Harris* cases held that a confession obtained in violation of a defendant's *Miranda* rights, but otherwise voluntary, may be used to impeach the defendant's testimony if the defendant takes the stand, even though such a confession is not admissible in the prosecution's case-in-chief. *Hass,* 420 U.S. at 722; *Harris,* 401 U.S. at 226.

464. It is clear that a defendant's right to present or withhold his or her own testimony is afforded almost absolute protection, unlike the right to present third-party testimony. For example, in *Brooks* the Court held that the exclusion of the defendant's testimony as a sanction for refusing to testify first was an unconstitutional infringement upon the defendant's right to testify personally. *Brooks,* 406 U.S. at 612. The exclusion of a third-party witness's testimony, however, has been squarely upheld as a valid sanction. Taylor v. Illinois, 484 U.S. 400, 416 (1988).

465. *See* CAL. PENAL CODE § 1054.3(a) (West Supp. 1992) (specifically excluding the defendant from those witnesses who, together with their statements, must be disclosed).

466. *See* McGautha v. California, 402 U.S. 183, 213 (1971) (stating that the criminal justice system is replete with situations where a defendant is faced with difficult choices as to which course to follow). In fact, in *McGautha* the defendant was tried under a unitary system where the questions of guilt and punishment were decided in the same proceeding. *Id.* at 213. Therefore, the defendant faced an extremely difficult choice, either subject himself to cross-examination in the guilt phase, or completely forgo the right to speak on his own behalf in the penalty phase. *Id.*

467. CAL. PENAL CODE § 1054.3(a) (West Supp. 1992).

bad acts of the defendant.[468] Finally, the discovery of third-party witnesses under Chapter 10 does not provide the prosecution with the opportunity to utilize illegally obtained statements of the defendant.[469]

Not only is the rule in *Brooks* distinguishable because of its direct conflict with fifth amendment policies, the state's interest in compelling the defendant to testify first is far less substantial than the interests at stake under Chapter 10. The stated purpose of the Tennessee rule in *Brooks* was to prevent defendants from falsely conforming their testimony to that of other witnesses.[470] While preventing testimonial influence may be an important interest,[471] the rule in *Brooks* was poorly suited to achieve its purpose. Defendants testify after the prosecution's case-in-chief, at which point they have heard the primary evidence which they would need to counter if they chose to commit perjury. Moreover, it is unlikely that defense witnesses testifying prior to a defendant would reveal information not already uncovered by the defense's investigation of its own witnesses.

The questionable significance, and the utter ineffectiveness of the Tennessee rule stands in stark contrast to the fundamental interests well served by reciprocal discovery under Chapter 10. The United States Supreme Court has stated that pretrial discovery, like cross-examination, reduces the hazard that a final judgment will be based on incomplete, misleading, or intentionally false testimony.[472] The Supreme Court has also stated that discovery rules are a salutary development which promote the fairness of the criminal justice system by increasing the evidence available to each

468. Only if the defendant chooses to testify will the prosecution be allowed to introduce evidence of prior conduct. CAL. EVID. CODE § 1101(a) (West Supp. 1992). Even then, such evidence is limited to impeachment use. *Id.* § 788 (West 1966).

469. *See* James v. Illinois, 493 U.S. 307, 309 (1990) (holding that the prosecution may not use illegally obtained evidence to impeach defense witnesses other than the defendant).

470. Brooks v. Tennessee, 406 U.S. 605, 607 (1972).

471. The Court in *Brooks* expressed doubt that the state even regarded the expressed interest as more than minimally important. *Id.* at 611 n.7. The Court indicated that the state's expressed interest must not be substantial since the state allowed the rule to be waived by the prosecution. *Id.*

472. Taylor v. Illinois, 484 U.S. 400, 411-12 (1988).

party.[473] Not only is Chapter 10 expressly designed to achieve such legitimate goals, it is also designed to reduce the detrimental effects of trial delays.[474]

Consistent with what the United States Supreme Court considers a legitimate goal of criminal trials, the Chapter 10 discovery provisions are designed to enhance the ascertainment of truth;[475] the provisions effectively facilitate this goal. Mandating pretrial discovery of relevant information ensures that illuminating facts will not escape the record upon which the trier of fact must base its verdict. The discovery provisions are also designed to reduce trial time by avoiding the necessity for frequent interruptions and delays.[476] The provisions accomplish this goal by greatly reducing the need for granting continuances. Pretrial access to the names, addresses, and statements of witnesses intended to be used during the trial forecloses the need to delay a trial in order to permit counsel to investigate a surprise witness prior to cross-examination.

The legitimate state interests in discovering the truth and preventing unnecessary and costly delays that characterize the Chapter 10 discovery provisions are the same interests served by the notice-of-alibi rule upheld in *Williams*.[477] The Court in *Williams* found that the notice-of-alibi rule fostered the ascertainment of truth by ensuring both the state and the defense ample opportunity to investigate the crucial facts of the case.[478] Chapter 10 is designed to provide just such opportunity for thorough pretrial investigation.

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473. Wardius v. Oregon, 412 U.S. 470, 474 (1973).

474. CAL. PENAL CODE § 1054(c) (West Supp. 1992). The state's substantial interest in increasing the efficiency of criminal trials was not an interest served by the rule in *Brooks*. Moreover, Chapter 10 is designed to protect victims and witnesses from danger, harassment, and undue delay in the proceedings. *Id.* § 1054(d) (West Supp. 1992). These interests were also not served by the rule in *Brooks*.

475. *Id.* §1054(a) (West Supp. 1992).

476. *Id.* § 1054(c) (West Supp. 1992).

477. *See* Williams v. Florida, 399 U.S. 78, 81-82 (1970) (discussing the state interests served by a notice-of-alibi statute).

478. *Id.* at 82.

Moreover, the *Williams* Court held that the notice-of-alibi rule did not impermissibly infringe upon the policies underlying the privilege against self-incrimination.[479] Forcing the defendant to disclose alibi defenses and witnesses before trial or forgo their use required the defendant to make a choice.[480] The choice, however, is the same choice the defendant must make during the trial.[481] The defendant can introduce the evidence and risk incriminating rebuttal evidence, or choose to withhold the evidence.[482] The *Williams* Court stated that requiring the defendant to make this choice before the trial was not contrary to the protections built into the privilege against self-incrimination.[483]

The same can be said about the discovery rules under Chapter 10. With respect to the policies underlying the privilege against self-incrimination, the Chapter 10 rules go no farther than the rule in *Williams.* Chapter 10 merely requires the defendant to disclose before trial that information which the defendant intends to introduce during the trial.[484] Therefore, characterizing Chapter 10 discovery as analogous to the discovery upheld in *Williams* appears well founded.

b. The Right to Due Process of the Law

There appeared to be little disagreement among the California Supreme Court justices that the discovery provisions under Chapter 10 provide a defendant with adequate due process protection.[485] A detailed examination of the information that the defense and

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479. *Id.* at 82-84.

480. *Id.* at 84-85.

481. *Id.*

482. *Id.*

483. *Id.*

484. *See* CAL. PENAL CODE § 1054.3(a)-(b) (West Supp. 1992) (requiring only the disclosure of the witnesses and evidence which is intended to be introduced at trial).

485. The majority rejected the claim that the discovery provisions violated the defendant's due process rights. *See supra* notes 311-352 and accompanying text (discussing the majority's disposition of the due process claims). Moreover, neither Justice Mosk nor Justice Broussard in their dissenting opinions questioned the majority's analysis of the due process issues. *See supra* notes 366-413 and accompanying text (discussing the dissenting opinions of Justice Mosk and Justice Broussard).

prosecution, respectively, must disclose under Chapter 10 explains this lack of disagreement.

In *Wardius,* the United States Supreme Court stated that the due process clause does not dictate the amount of discovery which is permissible in a criminal trial.[486] Rather, the clause requires a certain balance between the discovery rights of the prosecution and the defense.[487] Discovery must be reciprocal in nature, with any imbalance favoring the defendant.[488] The requirement of reciprocity is also a component of the California Constitution.[489] The provisions of Chapter 10 provide for nearly symmetrical reciprocity, with any imbalance weighted in the defendant's favor.[490]

First, California Penal Code section 1054.1(a) states that the prosecution, upon request, shall disclose the names and addresses of all persons intended to be called as witnesses.[491] The analogous provision applicable to the defense is slightly narrower. Under section 1054.3(a), the defense must disclose, upon request, the names and addresses of all persons intended to be called as witnesses.[492] However, this section specifically excludes the disclosure of the intent to call the defendant.[493] Second, the prosecution is required under section 1054.1(b) to disclose the statements of all defendants.[494] There is no corresponding duty on the part of the defense. Third, the prosecution is required to disclose relevant statements and reports of statements of any witness intended to be called at trial.[495] Such disclosure includes the reports of experts intended to be called, and the results of any

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486. Wardius v. Oregon, 412 U.S. 470, 474 (1973).

487. *Id.*

488. *Id.*

489. CAL. CONST. art. I, § 30(c).

490. Izazaga v. Superior Court, 54 Cal. 3d 356, 377 n.14, 815 P.2d 304, 318 n.14, 285 Cal. Rptr. 231, 245 n.14 (1991) (describing the provisions as providing near "mirror-image symmetry").

491. CAL. PENAL CODE § 1054.1(a) (West Supp. 1992). Although the prosecution must make full disclosure under section 1054.1(a) to the defense attorneys, the names or addresses of victims may not be given to the defendant. *Id.* § 1054.2 (West Supp. 1992).

492. *Id.* § 1054.3(a) (West Supp. 1992).

493. *Id.*

494. *Id.* § 1054.1(b) (West Supp. 1992).

495. *Id.* § 1054.1(f) (West Supp. 1992).

examinations, tests, or comparisons which are intended to be introduced.[496] The defense has a duty to disclose the same information, except that the defendant has the advantage of withholding his or her own statements from discovery even if the defendant intends to testify.[497] Fourth, all relevant real evidence seized or obtained by the prosecution as part of the investigation of the charged offense is discoverable by the defense.[498] The prosecution's ability to discover the defense's real evidence is not so broad. While the prosecution must disclose all real evidence, the defense is required to disclose only that real evidence which it intends to introduce at trial.[499] Fifth, the prosecution must disclose the existence of any felony convictions of any material witness whose credibility is likely to be critical in the trial.[500] The defense has no corresponding duty to disclose information which would be critical in assessing a witness' credibility. Sixth, the prosecution is compelled to provide the defense with any exculpatory evidence.[501] The defense, of course, has no duty to directly disclose incriminating evidence. Finally, the sanctions which may be utilized to enforce the required disclosure apply equally to the defense and the prosecution.[502]

The above review of Chapter 10 discovery appears to clearly indicate that the provisions meet the reciprocity requirements of *Wardius* and the California Constitution.[503] Nevertheless, a plausible argument could be made to the contrary. Section 1054.7 of the Penal Code requires the above disclosures be made in advance of trial, unless good cause can be shown why discovery should be prohibited.[504] Allowing a good cause exception, on its face, does not implicate any due process violation. In fact, the

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496. *Id.*
497. *Id.* § 1054.3(a) (West Supp. 1992).
498. *Id.* § 1054.1(c) (West Supp. 1992).
499. *Id.* § 1054.3(b) (West Supp. 1992).
500. *Id.* § 1054.1(d) (West Supp. 1992).
501. *Id.* § 1054.1(e) (West Supp. 1992).
502. *Id.* § 1054.5(b)-(c) (West Supp. 1992).
503. *See supra* notes 91-109 and accompanying text (discussing the requirements of due process).
504. CAL. PENAL CODE § 1054.7 (West Supp. 1992).

majority in *Izazaga* assumed that the provisions relating to timing of disclosure and the mechanics of enforcement were valid.[505] The provision, however, goes on to specifically define what will constitute good cause.[506]

Good cause is "limited to 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."[507] Under this definition, it would be seemingly only the most uncommon scenario that would permit the defense to meet this test for shielding information from discovery.[508] On the other hand, there would be frequent situations where the defense could not discover evidence in the hands of the prosecution.[509] In such cases, the equal discovery rights mandated in sections 1054.1 through 1054.6 appear to be effectively tilted in favor of the prosecution.[510]

The foregoing argument, however, should be rejected. First, the United States Supreme Court has held that a defendant does not have an absolute right to discover all witnesses and evidence held by the prosecution.[511] In *Roviaro v. United States*,[512] the Court

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505. *See* Izazaga v. Superior Court, 54 Cal. 3d 356, 374, 815 P.2d 304, 316, 285 Cal. Rptr. 231, 243 (1991) (stating that the enforcement provisions applied equally to the prosecution and defense), *modified, reh'g denied*, 54 Cal. 3d 611a (1991). The majority did not, however, specifically address the validity of the good cause exception as defined in section 1054.7. *Id.*

506. *See* CAL. PENAL CODE § 1054.7 (West Supp. 1992) (defining good cause).

507. *Id.*

508. In order for a defendant to show good cause, the defendant would need to show that information he or she wishes to exclude from discovery would endanger a victim or witness, or that it would lead to the destruction of evidence. *Id.* In order to make such a showing the defendant would have to prove that the information in the hands of the prosecution would in some way threaten victims or witnesses, or that the prosecution would destroy evidence.

509. It seems as though it would be relatively common that information held by the prosecution would present a danger to victims and witnesses or lead to the destruction of evidence. For example, where a defendant is a member of a street-gang, information disclosed by the prosecution would likely be quickly transmitted to sympathetic gang members who might seek revenge or seek to aid the defendant by destroying evidence.

510. Such a scenario appears to conflict with the statement in *Wardius* that "[t]he State may not insist that trials be run as a search for truth so far as defense witnesses are concerned, while maintaining poker game secrecy for its own witnesses." Wardius v. Oregon, 412 U.S. 470, 475 (1973).

511. *See* Roviaro v. United States, 353 U.S. 53, 60-62 (1957) (holding that a defendant does not have an absolute right to discover the identity of state informants). *Cf.* Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring the prosecution to disclose any exculpatory evidence).

stated that the scope of discoverable evidence should be determined by balancing the public interest in protecting the prosecutor's information, against the defendant's right to prepare a defense.[513] The definition of good cause under Penal Code section 1054.7 merely acknowledges the public interest in preventing the disclosure of information which threatens victims, witnesses, and on-going investigations. The section does not ignore the defendant's side of the balance. It requires the court to make an in camera review of the claimed good cause before issuing a protective order.[514]

Moreover, the reciprocity mandated by *Wardius* is not necessarily destroyed when the prosecution is able to shield information by showing good cause. Although section 1054.7 erects no specific barrier to discovery of defense information upon the granting of a good cause exception to the prosecution,[515] the trial judge has discretion to do so.[516] Section 1054.5(c) permits the court to block a discovery request if required to do so by the United States Constitution.[517] Since the due process clause mandates reciprocally balanced discovery,[518] the trial court would be required, upon a showing of good cause by the prosecution, to structure any discovery order imposed upon the defense with corresponding protection. The apparent lack of reciprocity on the face of section 1054.7 is just that, apparent. Therefore, it seems clear that the discovery mandated by Chapter 10 will withstand due process challenges.

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512. 353 U.S. 53 (1957).

513. *Roviaro,* 353 U.S. at 62.

514. CAL. PENAL CODE § 1054.7 (West Supp. 1992).

515. Section 1054.7 states that information *must* be disclosed unless good cause is shown. *Id.* Moreover, the definition of good cause is expressly limited. *Id.* Therefore, it would appear that after a showing of good cause by the prosecution, the defendant would be unable to escape disclosure unless the defendant could *also* make a showing within the limited definition of good cause. *Id.*

516. *Id.* § 1054.5(c) (West Supp. 1992).

517. *Id.*

518. *See supra* notes 91-109 and accompanying text (discussing the requirements of due process).

c. Work Product Protection

The question of whether or not discovery under Chapter 10 impermissibly conflicts with the work product doctrine depends on whether the doctrine has a constitutional foundation.[519] More precisely, it depends on whether or not ordinary, as opposed to core, work product is constitutionally protected. Since core work product is expressly shielded from discovery under Chapter 10,[520] no constitutional issue arises. The majority in *Izazaga* found no constitutional work product protection.[521] In contrast, Justice Kennard thought work product might be protected under the United States Constitution.[522]

To support her contention that work product might be protected under the sixth amendment, Justice Kennard pointed to language in the *Nobles* decision.[523] According to Justice Kennard, the United States Supreme Court's characterization of the work product doctrine as "vital" and "necessary" implies that the protection is an integral part of the sixth amendment right to counsel.[524] Aside from this language, Justice Broussard failed to provide any other authority for her proposition.[525] The better view is that work product is not constitutionally shielded from discovery.[526]

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519. In the absence of a constitutional foundation, work product protection is defined by statutory and common law. A new statutory provision does not violate older provisions, rather, it defines the law to the extent of any inconsistency between the old and new provisions. *See* United States v. Gooding, 477 F.2d 428, 431 (D.C. Cir. 1973), *aff'd*, 416 U.S. 430 (1974).

520. *See* CAL. PENAL CODE § 1054.6 (West Supp. 1992) (excluding core work product from discovery).

521. Izazaga v. Superior Court, 54 Cal. 3d 356, 381, 815 P.2d 304, 320-21, 285 Cal. Rptr. 231, 247-48 (1991), *modified, reh'g denied*, 54 Cal. 3d 611a (1991).

522. *Id.* at 386, 815 P.2d at 324, 285 Cal. Rptr. at 252 (Kennard, J., concurring).

523. *Id.* at 385, 815 P.2d at 323-24, 285 Cal. Rptr. at 250-51 (Kennard, J., concurring).

524. *Id.* at 385, 815 P.2d at 324, 285 Cal. Rptr. at 251 (Kennard, J., concurring).

525. *Id.* at 381 n.18, 815 P.2d at 321 n.18, 285 Cal. Rptr. at 248 n.18.

526. *See* Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1517 (1991) (arguing that the work product doctrine should be abolished entirely). Even if work product is considered a constitutionally protected privilege, it is unlikely that discovery under Chapter 10 would be a violation of the privilege. In *Nobles*, the United States Supreme Court held that the privilege derived from the work product doctrine is waived when the defense seeks to make testimonial use of the work product. United States v. Nobles, 422 U.S. 225, 239 n.14 (1975). The same sort of waiver is implicit under Chapter 10 discovery. *But see Izazaga*, 54 Cal. 3d at 409, 815 P.2d at 340, 285 Cal. Rptr. at 267 (Broussard, J., dissenting) (claiming that in a typical case there would be no waiver by

As the *Izazaga* majority stressed, it would be difficult to believe that a doctrine, created in a civil case, is rooted in a constitutional amendment which is applicable only to criminal defendants.[527] Still, a few authorities have indicated that work product protection is an integral component of a defendant's sixth amendment right to effective assistance of counsel.[528] It is essentially reasoned that the sixth amendment guarantee can only be meaningfully implemented if the defendant is secure in knowing that his or her attorney's trial preparations are free from government intrusion.[529] To support the claimed constitutional protection, these authorities point to cases holding that it is a constitutional violation for the prosecution to secretly intrude upon the preparations of defense counsel.[530] Aside from the obvious factual

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the defendant under Chapter 10). Although the waiver in *Nobles* took place during the trial, and discovery under Chapter 10 requires pretrial disclosure, the decision in *Williams* indicates that if a defendant intends to introduce information at trial, the defendant can constitutionally be compelled to accelerate his or her disclosure to the pretrial stage. *See* Williams v. Florida, 399 U.S. 78, 85-86 (1970) (holding that requiring pretrial disclosure of alibi defenses intended to be introduced at trial does not violate a defendant's privilege against self-incrimination). Chapter 10 requires the disclosure of only that information which is intended to be introduced at trial. CAL. PENAL CODE § 1054.3 (West Supp. 1992). In order to find a constitutional violation in accelerating work product disclosures, one would have to find some reason to regard work product protection as more sacred than the privilege against self-incrimination. This would seem a dubious proposition at best. *See generally* Moore, *supra* note 45, at 905 (stating that since the prosecution is able to rebut defense evidence presented at trial, the only difference between rebuttal at trial and anticipatory rebuttal in the form of pretrial discovery is the element of surprise, and a right to surprise seems unworthy of constitutional protection).

527. *Izazaga*, 54 Cal. 3d at 381 n.18., 815 P.2d at 321 n.18, 285 Cal. Rptr. at 248 n.18.

528. United States v. Mitchell, 372 F. Supp. 1239, 1245-46 (S.D.N.Y. 1973), *appeal dismissed* Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973); *In re* Terkeltoub, 256 F. Supp. 683, 685 (S.D.N.Y. 1966); Pulaski, *supra* note 132, at 28-29 & nn.155-56.

529. Pulaski, *supra* note 132, at 28 n.155.

530. *See* Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953), *cert. denied*, 349 U.S. 930 (1954); United States v. Coplon, 191 F.2d 749, 759-60 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952) (finding that secret intrusions upon the defense counsel's trial preparations violate the fifth and sixth amendments). These cases, however, do not establish a per se constitutional violation for intrusions by the prosecution. *See* Weatherford v. Bursey, 429 U.S. 545, 557 (1977) (holding that government intrusions into confidential attorney-client communications violate the Constitution only if the prosecution subsequently uses the obtained information against the defendant).

distinction between a secret intrusion and common pretrial discovery,[531] the reasoning contains some serious flaws.

First, the claimed sixth amendment protection is premised upon the defendant actually possessing a constitutional privilege. Work product protection, however, was originally designed, and has been continuously characterized as, a privilege of the attorney, not the client.[532] Next, establishing a per se rule that discovery of work product violates a defendant's right to effective assistance of counsel is contrary to existing case law interpreting that right.[533] A violation of a defendant's sixth amendment right to effective assistance of counsel is not determined by reference to isolated conduct of the attorney.[534] Rather, the entire record of the representation must be reviewed in order to determine if the defendant was denied adequate representation.[535] Moreover, courts have been unwilling to second-guess an attorney's good-faith strategies and tactics when evaluating claimed sixth amendment violations.[536]

In addition to these theoretical problems with considering work product protection a constitutional privilege, there is a severe practical problem. If work product protection is a component of a defendant's right to effective assistance of counsel, the attorney would be unable to waive the protection without the client's

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531. Clearly, information secretly obtained by the prosecution would be considerably more devastating to the defendant's case. Since defense counsel would not know that the prosecution possessed the information, the defense would not prepare any effective means of countering the prosecution. This is not the case with open pretrial discovery. By knowing exactly what incriminating evidence must be rebutted, defense counsel can make preparations to minimize the incriminating effect of the disclosed evidence.

532. *See, e.g.*, Duplan Corp. v. Moulinage et Retorderie de Chavnaoz, 487 F.2d 480, 483 n.12 (4th Cir. 1973); Cohn, *The Work Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 936 (1983) (identifying that work product protection is designed as a protection for the attorney).

533. *See* Long v. State, 510 S.W.2d 83, 88 (Tenn. 1974); Holnagel v. Kropp, 426 F.2d 777, 779 (6th Cir. 1970) (stating that the entire record of representation, as opposed to single acts or omissions, must be viewed in order to determine if there has been ineffective assistance of counsel).

534. *Long*, 510 S.W.2d at 88; *Holnagel*, 426 F.2d at 779.

535. *Long*, 510 S.W.2d at 88; *Holnagel*, 426 F.2d at 779.

536. *E.g.*, United States v. DeCoster, 487 F.2d 1197, 1201 (D.C. Cir. 1973).

consent.[537] This would create serious administrative difficulties, since the client would have to be present any time defense counsel negotiates with the prosecution.[538] Moreover, because voluntary disclosure of work product is often used as part of a negotiation strategy,[539] constitutional protection for work product might take strategy decisions out of the attorney's hands, and place a potentially unschooled defendant in the position of retaining the ultimate responsibility for making critical strategy decisions.[540] Therefore, elevating work product protection to the level of a constitutional right may ironically lead to an actual reduction in the effectiveness of representation.

In reality, the work product doctrine is a protection, not a privilege.[541] Moreover, work product is a protection for the attorney.[542] The fact that an attorney, without consulting his client,[543] may waive work product protection seems clearly

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537. In those cases elevating work product protection to a constitutional privilege, the protection has been analogized with the attorney-client privilege. *See, e.g.*, United States v. Mitchell, 372 F. Supp. 1239, 1245-46 (S.D.N.Y. 1973) (likening work product protection to the attorney-client privilege). An attorney may not waive the attorney-client privilege in the absence of the client's consent. Benge v. Superior Court, 131 Cal. App. 3d 336, 344, 182 Cal. Rptr. 275, 279 (1982). It is, therefore, logical to assume that an attorney could not waive work product protection without actual consent from the client. *Cf.* Cohn, *supra* note 532, at 936 (stating that traditionally work product has been considered a protection of the attorney, and therefore, only the attorney can waive the protection).

538. The prosecution could almost never rely on the defense counsel's assertion that the defendant had agreed to waive work product protection. Unless the defendant was present or took extraordinary steps to acknowledge the defendant's consent to the waiver, the prosecution would be unable to show by clear and convincing evidence that the consent was the product of the defendant's freely expressed choice. *Cf.* Brewer v. Williams, 430 U.S. 387, 405-06 (1976) (requiring clear and convincing proof for consent to the waiver of sixth amendment rights).

539. Defense counsel will often reveal some of its possible defenses or strategies in order to convince the prosecution to drop or reduce charges. *See* Bundy & Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulations*, 79 CALIF. L. REV. 315, 406 (1991) (stating that the disclosure of work product materials during plea bargain negotiations is so common that attorneys must force themselves to withhold such information).

540. Worse yet, depending on how the issue of waiver is resolved, a defendant could simply choose to see if his attorney's disclosure of work product during negotiations proves beneficial. If it does not, the defendant could then have his case overturned by claiming an invalid waiver of his sixth amendment right.

541. *See* Cohn, *supra* note 532, at 943 (characterizing work product as a protection rather than as a privilege).

542. *Id.*

543. *See id.* at 936-38 (discussing the waiver of work product protection).

contradictory to the assertion that the protection is a defendant's constitutional right.

The work product doctrine was designed to maintain the adversarial nature of our civil justice system in the wake of the development of liberal pretrial discovery.[544] To be sure, the propriety of the strict adversarial system is subject to challenge.[545] Accepting, however, that a strict adversarial clash is desirable in civil cases, does not lead to the conclusion that absolute work product protection is appropriate in criminal cases.[546] Criminal trials have never been strictly adversarial.[547] In the criminal setting, the discovery of the truth is vital, and therefore a more inquisitorial approach has been adopted.[548] Since the work product doctrine was designed to protect the adversarial nature of a civil trial, and since a strict adversarial approach is inappropriate in criminal trials, work product protection should not be expanded to the level of a constitutional privilege.

d. The Sixth Amendment Right to Effective Assistance of Counsel

Closely related to Justice Kennard's belief that the Chapter 10 discovery provision might run afoul of the work product doctrine, is Justice Broussard's contention that the discovery provisions violated a defendant's sixth amendment right to effective assistance

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544. *See* Waits, *Work Product Protection For Witness Statements: Time For Abolition*, 1985 WIS. L. REV. 305, 306-07 (1985) (explaining the historical reasons for the development and maintenance of the work product doctrine).

545. *See id.* at 337-40 (claiming that the adversary system is not above reproach, and pointing out the flaws in a strict adversarial approach).

546. *But see* Stern, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1841 (1988) (arguing that work product in the criminal setting should receive greater protection than it is currently afforded).

547. *See, e.g.*, United States v. Nobles, 422 U.S. 225, 231 (1975) (stating that the judiciary has inherent power to order a party to disclose to the opposing party certain information); Williams v. Florida, 399 U.S. 78, 81-82 (1970) (permitting pretrial discovery of a defendant's intended alibi defenses and witnesses).

548. *See* Goodpaster, *supra* note 23, at 128-29 (stating that "[a] criminal trial is both an investigation and a contest").

of counsel.[549] Justice Broussard claimed that by requiring the disclosure of information gained through the defense's investigation, defense counsel would be chilled from conducting a zealous pretrial investigation.[550] Contrary to Justice Broussard's claim, discovery under Chapter 10 does not discourage exhaustive pretrial investigation, and therefore does not violate a defendant's right to effective assistance of counsel.[551]

It should be noted that fears of chilling pretrial investigation were strongly voiced when liberal discovery first came into use in civil trials.[552] After many years of experience with liberal civil discovery, the "chilling" argument has proven unfounded.[553] The argument ignores the realities of trial practice.[554] It is based on the assumption that defense counsel would rather enter a trial with an incomplete view of the case, than risk discovering incriminating facts. In order to maximize the chances for success under our adversarial system, however, an attorney must be prepared to counter the adversary's evidence. This cannot be accomplished without thorough pretrial investigation and preparation. The argument also ignores the powerful incentives compelling attorney preparation.[555] The rules governing professional conduct require

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549. *See supra* notes 400-413 and accompanying text (discussing Justice Broussard's dissenting view that Chapter 10 discovery violates a defendant's right to effective assistance of counsel).

550. Izazaga v. Superior Court, 54 Cal. 3d 356, 409, 815 P.2d 304, 340, 285 Cal. Rptr. 231, 267 (1991), *modified, reh'g denied,* 54 Cal. 3d 611a (1991).

551. *But see* Mosteller, *supra* note 48, at 1668 (arguing that liberal discovery chills pretrial investigation to the point of potentially violating the right to effective assistance of counsel).

552. *See* Waits, *supra* note 544, at 327-43 (identifying the adverse effects which would follow in the absence of work product protection). *See also* Note, *Discovery of an Attorney's Work Product on Subsequent Litigation,* 1974 DUKE L.J. 799, 807 (1974) (pointing out that the *Hickman* Court did not claim that empirical data supported the fears of chilling an attorney's preparation, but merely assumed such an undesirable effect).

553. *See* Waits, *supra* note 544, at 327-43. Professor Waits points out that it may be impossible to prove that the rationale underlying the work product doctrine is incorrect, but that it is perhaps more difficult to prove that it is correct. *Id.* at 327. Moreover, Professor Waits provides cogent arguments which indicate that the abolition of work product protection would not have the negative effects claimed by proponents of the protection. *Id.* at 327-47.

554. *See* Wells, *The Attorney Work Product Doctrine and Carry-Over Immunity: An Assessment of Their Justifications,* 47 U. PITT. L. REV. 675, 684-98 (1986) (claiming that the justifications for work product protection are, for the most part, invalid).

555. *See id.* (identifying reasons which motivate trial preparation and do not depend on work product protection).

an attorney to always undertake thorough trial preparations.[556] Failure to adhere to these rules can lead to sanctions and possible disbarment,[557] as well as opening the door to a malpractice action.[558] In addition to the incentives provided by the formal rules of conduct, informal incentives also ensure an attorney's diligent trial preparation. It is likely that an attorney would be stigmatized as incompetent by peers if the attorney failed to thoroughly prepare for trial on a regular basis. Moreover, an unprepared attorney will likely lose the great majority of his or her cases, resulting in a corresponding financial loss.[559] Opponents of pretrial discovery have been unable to cite empirical data which supports the claimed chilling.[560] In fact, discovery does not appear to negatively influence an attorney's trial preparation.[561] Both the formal and informal incentives to thoroughly prepare for trial explain why discovery does not chill attorneys. In the absence of any proof of a chilling effect, and with the experience in civil

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556. *See* MODEL RULES OF CONDUCT Rule 1.1 & comment (1983) (requiring thorough preparation and investigation of factual and legal elements of a case); *Id.* Rule 1.3 & comment (1983) (requiring an attorney to act with reasonable diligence); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 4-4.1 (1979) (requiring defense counsel to conduct a prompt and thorough investigation into all facts relevant to the merits of the case); *Id.* § 4-4.5 (instructing defense counsel to comply in good faith with applicable discovery provisions). *See also* CAL. BUS. & PROF. CODE § 6067 (West 1990) (requiring attorneys to take an oath that they will discharge their duties to the best of the their knowledge and ability).

557. *See* CAL. BUS. & PROF. CODE § 6100 (West 1990) (acknowledging the California Supreme Court's power to discipline, suspend, or disbar an attorney for failing to adhere to the rules of professional conduct).

558. Private attorneys in California may be held liable for malpractice in both civil and criminal matters. Briggs v. Lawrence, 230 Cal. App. 3d 605, 610-11, 281 Cal. Rptr. 578, 581 (1991). Whether or not a public defender may be held liable to a client for malpractice depends on a number of factors, as well as the statutory requirements under the California Tort Claims Act. *See id.* at 612-19, 218 Cal. Rptr. at 582-86. (discussing the conditions upon which a public defender may be liable for malpractice). *See also* Millich, *Public Defender Malpractice Liability in California,* 11 WHITTIER L. REV. 535, 536-42 (1989) (discussing the extent to which a public defender may be held liable for malpractice).

559. A financial loss results because a private attorney's client base will more than likely be reduced if the attorney has a reputation for losing the great majority of his or her cases. Even a public defender has a financial stake in winning cases, in that a consistently unprepared public defender will find it difficult to hold on to his or her job.

560. *See* Thornburg, *supra* note 526, at 1527-29 (pointing out the lack of support for the argument that pretrial discovery chills an exhaustive preparation).

561. *Id.*

trials countering such a conclusion, it is difficult to find any sixth amendment violation inherent in pretrial discovery.

B. Improved Functioning of the Criminal Justice System

Aside from any question about the constitutional validity of reciprocal discovery,[562] it is manifest that broad pretrial disclosure of evidence improves the functioning of the criminal justice system.[563] The overwhelming majority of courts and commentators agree that the primary function of a criminal trial is the ascertainment of the truth.[564] Moreover, these authorities recognize that broad discovery provisions are the best way to uncover the truth that can often be hidden in the myriad of facts and tactics making up a criminal trial.[565] This recognition goes to the very heart of the American system of justice, the notion that the truth will emerge from the contest of equally prepared adversaries. It was the very fact that the adversarial balance in California criminal trials was skewed too far in favor of the defendant, that prompted the enactment of Chapter 10.[566]

The reciprocal discovery scheme in Chapter 10 promotes the ascertainment of the truth. By mandating broad disclosure of evidence before trial, the scheme provides both parties with the

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562. *See* The Recorder, Mar. 22, 1991, at 1 (quoting Lawrence Sullivan, the supervising Deputy Attorney General in San Francisco, as stating that after the California Supreme Court disposes of the *Izazaga* case, there would not likely be further resistance to reciprocal discovery in California criminal trials).

563. *See* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U.L. REV. 641, 641 (1989) (stating that adopting rules providing for pretrial discovery will improve the administration of criminal justice).

564. *See* W. LAFAVE & J. ISRAEL, *supra* note 4, § 19.3(a) (stating that even opponents of expansive discovery do not deny that a trial should function as a search for the truth). *See also* Craig v. Superior Court, 54 Cal. App. 3d 416, 426, 126 Cal. Rptr. 565, 569-70 (1976) (Elkington, J., concurring) (stating that the only purpose of a criminal trial is the search for the truth).

565. *See, e.g.*, Schlesinger, *The 1976 James McCormick Mitchell Lecture - Comparative Criminal Procedure: A Plea For Utilizing Foreign Experience*, 26 BUFFALO L. REV. 361, 383 (1977) (stating that in the absence of broad discovery relevant facts will often remain hidden).

566. *See Preamble of Proposed Law, in* CALIFORNIA BALLOT PAMPHLET 33 (June 5, 1990), *reprinted in*, CAL. CONST. art. I, § 14.1, note (Deerings Supp. 1992) (reprinting section 1(a) of the preamble to Proposition 115) (stating that "comprehensive reforms are needed to *restore the balance* and fairness to our criminal justice system") (emphasis added).

opportunity to fully investigate and analyze the facts of the case. Such thorough pretrial preparation ensures that relevant evidence illuminating the truth will not be hidden or disregarded. The provisions under Chapter 10 ensure that the trier of fact will be presented with the most complete record, and therefore will have an enhanced opportunity to uncover the actual truth.[567]

Moreover, the new discovery scheme improves the efficiency of the system by reducing the needless waste of court time and money.[568] The criminal courts in California are currently overwhelmed by the tremendous flow of new cases and the lack of personnel, time, and space.[569] Pretrial reciprocal discovery reduces the opportunities for surprise defenses and witnesses which invariably lead to continuances and delay.[570] While the nature of the adversarial system may encourage some gamesmanship and surprise, such tactics are not necessary for the proper functioning of the system, nor do these tactics add to the achievement of just results.

Finally, the reforms adopted under Chapter 10 will increase respect for the criminal justice system, a system in dire need for

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567. *See* K. WELLS & P. WESTON, CRIMINAL PROCEDURE AND TRIAL PRACTICE 31 (1977) (stating that the goals of a criminal trial can only be achieved when the trier of fact is presented with a complete record of the facts from which to make an objective verdict).

568. Millions of dollars are spent on absurd trials, in large part because of unnecessary delays. CRIME VICTIMS JUSTICE REFORM ACT 1990, *Joint Hearing of the Senate Comm. on Judiciary and the Assembly Comm. on Public Safety*, at 30. For example in the defense of a single Orange County murder, the state spent in excess of eight million dollars. *Id.* Moreover, the national average for the time it takes to complete a felony trial is six months, while in California, the average time is more than two years. *Id.*

569. In 1988, California superior courts reported 115,595 criminal filings. *Id.* at part III, pg. 5. Although this figure represented only 13% of the total filings, these criminal cases consumed 38% of the courts' judicial time. *Id.* The problem of overburdened courts is so severe that it threatens the criminal justice system. *See Schlesinger, supra* note 565, at 382 (stating that the problem of overloaded courts places the criminal justice system on the brink of collapse). *See generally* Moore, *Courting Disaster*, NAT'L J. vol. 22, no. 9, at 502 (1990) (discussing the severe problem of exploding criminal caseloads).

570. *See Schlesinger, supra* note 565, at 382 (stating that procedural rules aimed at the ascertainment of truth tend to expedite criminal proceedings). *See generally, ABA Suggested Guidelines for Reducing Adverse Effects of Case Continuance and Delays on Crime Victims and Witnesses*, 1986 A.B.A. SEC. CRIM. JUST. REP. foreword, at iv (indicating that thorough pretrial preparation is essential to prevent unnecessary continuances and the devastating effect of such continuances).

increased respect.[571] A large segment of the public currently believes that the system is unnecessarily expensive, and too often yields results which are unfair.[572] By increasing the efficiency of the system, and promoting just results, the discovery provisions encourage respect for the system. This, in turn, cultivates vital public support for the system.[573] Such support improves the functioning of the system in that it not only ensures that the public will continue to adequately fund the system,[574] but also decreases the likelihood that the public will resort to self-help when victimized by crime.

It is unquestionably clear that the discovery provisions under Chapter 10 are a commendable addition to the California Penal Code. The provisions promote the ascertainment of truth, which enhances the efficiency of criminal proceedings and achievement of just results, which, in turn, encourages public support for the system. The net result is a substantial improvement of the California criminal justice system.

C. *A Remaining Question With Chapter 10 Discovery: Applicability to Municipal and Juvenile Court Cases*

Despite the *Izazaga* court's rather thorough analysis of the validity of the discovery provisions in Chapter 10, a question remains as to the applicability of the provisions in municipal and

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571. *See Criminal Justice in Crisis*, A.B.A. Report at 50-51 (1988) (report prepared by the Special Committee on Criminal Justice in a Free Society of the American Bar Association Criminal Justice Section) (stating that statistical surveys indicate that the public generally does not believe the criminal justice system functions well).

572. *See Report to the Attorney General on the Search and Seizure Exclusionary Rule*, 22 U. MICH. J.L. REF. 573, 610-11 (1989) (stating that studies indicate a widespread public perception that the criminal justice system fails to achieve just results because of a departure from its truth-seeking function). *See also* L.A. Times, May 15, 1990, at A1, col. 1 (indicating the need for criminal justice system reform is essential in order to keep the law-abiding public from losing faith in the system).

573. *See* Paulsen, *The Problem of Discovery in Criminal Cases*, A.L.I. REP. at vi (1961) (stating that if the criminal justice system fails to command public respect serious social consequences will result).

574. *See Criminal Justice in Crisis, supra* note 571, at 50-51 (stating that if the public continues to lack respect for the system, the public will not support it financially).

juvenile court cases.[575] The question arises because the disclosures mandated under Chapter 10 are required to be made at least thirty days prior to the trial.[576] Defendants in misdemeanor cases that are held in custody must be brought to trial within thirty days of arraignment.[577] Juveniles who are detained by court order must have their cases heard by the juvenile court within fifteen days from the time a petition for hearing is filed.[578] Therefore, it would be impossible to comply with the requirement that disclosure be made at least thirty days in advance of trial. These apparently conflicting time requirements have led some practitioners to conclude that the framers of Chapter 10 did not intend the discovery provisions to be applied in misdemeanor and juvenile cases.[579]

The timing requirements of Chapter 10, however, need not be interpreted to exclude the use of the mandated discovery in municipal or juvenile cases. In addition to setting forth the thirty day requirement, the provisions further state that if the material and information required to be disclosed becomes available to a party within 30 days of trial, disclosure must be made immediately.[580] Clearly, this language gives recognition to those situations where a party is unable to make the required disclosure thirty days prior

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575. The issue was not addressed by the California Supreme Court because Izazaga was charged with a felony. Izazaga v. Superior Court, 54 Cal. 3d 356, 363, 815 P.2d 304, 308, 285 Cal. Rptr. 231, 235 (1991), *modified, reh'g denied,* 54 Cal. 3d 611a (1991)..

576. CAL. PENAL CODE § 1054.7 (West Supp. 1992).

577. *See id.* § 1382(A)(3) (West Supp. 1992) (requiring a defendant to be brought to trial within 30 days after arraignment or the entering of a plea, whichever is later).

578. CAL. WELF. & INST. CODE § 334 (West 1984). Juveniles who are not detained must have their cases brought before the juvenile court within 30 days from the date of petition. *Id.*

579. *See* The Recorder, Mar. 22, 1991, at 1 (quoting the chief of research for the San Francisco Public Defender's Office as saying that unless the drafters of Proposition 115 were being nonsensical, the discovery provisions were not intended to be applicable to misdemeanor or juvenile cases). With respect to juvenile cases, the claim that the drafters did not intend Chapter 10 to apply may have some validity. The California Rules of Court establish a specific set of procedures governing pretrial discovery in juvenile cases. CAL. JUV. CT. R. 1420(a)-(k) (West Supp. 1991). In addition to being tailored to meet the specific needs of juvenile cases, the court rules provide for rather liberal reciprocal discovery, much like that mandated under Chapter 10. *See id.* Therefore, it is possible that the drafters of Proposition 115 did not believe the mandates of Chapter 10 were necessary in the juvenile court setting.

580. CAL. PENAL CODE § 1054.7 (West Supp. 1992).

to trial. Misdemeanor or juvenile proceedings are examples of these situations.

A fair interpretation of the statute is that, in those cases where a defendant must be brought to trial in less than thirty days, any mandated discovery under Chapter 10 must be disclosed immediately upon request. It would seem logical to assume that the drafters of Chapter 10 set the thirty day restriction in order to give the party seeking discovery time to thoroughly review the disclosures and prepare for trial. Permitting a party to hold on to discoverable materials up to the threshold of a trial would defeat the purposes behind pretrial discovery. In proceedings which must be initiated more rapidly, such as municipal and juvenile court cases, extensive pretrial review of evidence is an unavailable luxury. Therefore, it is logical to assume that the thirty day requirement was intended for those cases which are calendared for more than thirty days in the future, and for all others, disclosure should be made immediately. It is illogical to assume that the great value assigned to the policies underlying reciprocal discovery is not equally applicable in municipal and juvenile court cases.

IV. CONCLUSION

The California Supreme Court's decision in *Izazaga* gave recognition to the public's demand for a criminal justice system which operates efficiently and produces just results. By affirming the validity of the new criminal discovery provisions, the *Izazaga* decision is a positive step toward the attainment of the public's demands.[581] To be sure, *Izazaga* alters the adversarial balance between the state and an accused. The decision, however, merely rectifies what was an undue imbalance favoring the accused. In the process of restoring an equitable adversarial balance, the decision properly endorses the validity of a search

581. Of course, the decision would be subject to severe criticism if it rested wholly upon public opinion. It did not. The majority's thoughtful reasoning was grounded upon established precedent. For a discussion of incorporation of public values in statutory interpretation see generally Eskridge, *Public Values In Statutory Interpretation,* 137 U. PA. L. REV. 1007 (1989) (discussing the role of public values in constitutional and statutory interpretation).

for truth approach in California criminal trials. The decision also recognizes that reciprocal discovery under Chapter 10 does not violate a defendant's constitutional rights. Finally, the decision validates procedural rules which substantially improve the California criminal justice system.

Steve Holden