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8 **Superior Court of the State of California**
City and County of San Francisco

9
10 People of the State of California,
11 Plaintiff,
12 vs.
13 **Name of Client**,
14 Defendants.

MCN:
SCN:
Date:
Time:
Dept.:

15 **Motion to Set Aside the Information for Failure of Discovery**

16 Defendant moves the court for an order setting aside the Information under
17 *Merrill v. Superior Court*¹ and *Stanton v. Superior Court*,² for failure to discover
18 exculpatory evidence before the preliminary hearing. The issue is:

19 The state’s failure to discover exculpatory material before the preliminary hearing
20 may result in dismissal. Here, testimony showed that **Defendant** sold alleged
21 narcotics. The state failed to disclose exculpatory evidence suggesting tampering,
22 theft improper lab protocols and safeguards, and evidence of moral turpitude and
23 probation status of a material witness – Criminalist Debbie Madden – until **months**
24 after the preliminary hearing. Does this discovery breach call for dismissal?

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26 ¹ *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586.

27 ² *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265.

1 This motion is based upon this Notice, the attached Memorandum of Points and
2 Authorities, the attached Declaration of ATTORNEY, the files and records of this
3 case, the transcript of the preliminary examination, and any evidence, argument or
4 authorities to be presented at the hearing on the motion.

5 Memorandum of Points And Authorities

6 Statement of the Case

7 On [Date], 2010, [name of client] was arraigned on a complaint charging her with
8 a violation of Health & Safety Code § [fill in charge here]. (See attached as Exhibit
9 A). On [fill in date], the defense served an Informal Discovery Request on the
10 prosecutor, requesting among other items, impeachment material for all prosecution
11 witnesses. (See attached as Exhibit B). The preliminary hearing was held on [fill in
12 date of PX], after which [name of client] was held to answer. On [date of
13 arraignment], [name of client] pleaded not guilty on the Information. (See attached
14 as Exhibit C).

15 Statement of Facts

16 1. The crime

17 [FILL IN YOUR CASE FACTS HERE]. The suspected narcotics in this case
18 were tested and handled by criminalist Debbie Madden.

19 2. The discovery

20 Prior to the preliminary hearing, the state provided no discovery regarding a
21 material witness, Criminalist Debbie Madden.

22 As outlined in counsel's declaration, certain discovery was provided after the
23 preliminary hearing which, in counsel's judgment, would have altered the outcome
24 of that proceeding. This material was in the actual or constructive possession of the
25 state prior to the preliminary hearing. It includes the following:

1. Debbie Madden was convicted of domestic violence in San Mateo County in the first half of 2008.
2. As a condition of probation, Debbie Madden was undergoing drug and alcohol treatment.
3. In November or December of 2009, San Francisco Police discovered that an audit done by the American Society of Crime Laboratory Directors found that the San Francisco Crime Lab did not have a secure chain of custody for its evidence, failed to keep detailed case records and failed to meet standards of cleanliness.
4. Debbie Madden went on leave on December 8, 2009 – without explanation.
5. In December of 2009, San Francisco Police discovered that evidence was missing from the San Francisco Crime Lab.
6. In December of 2009, San Francisco Police discovered that evidence from the San Francisco Crime Lab showed signs of tampering.
7. In December of 2009, San Francisco Police discovered that practices at the San Francisco Crime Lab were “sloppy.”
8. In December of 2009, San Francisco Police discovered that Debbie Madden was using cocaine that had been evidence from the San Francisco Crime Lab.
9. Debbie Madden retired without explanation at the beginning of March, 2010.

Additionally, the defense believes the following information exists and that the prosecution was the entity in the best position to obtain it:

1. A copy of the statement given by Ms. Deborah Madden to authorities concerning the investigation of this matter;
2. All memoranda, reports, documentation, taped interviews of witnesses, relating to the investigation of Madden and/or other employees of the Crime Laboratory in this matter;

1 3. The specific date the District Attorney’s Office became aware of the
2 investigation relating to reports of evidence tampering in the crime lab and
3 Ms. Madden’s alleged involvement;

4 4. Madden’s California Criminal Identification Index (C.I.I. Record,
5 commonly known as a rap sheet – both local and statewide criminal history);

6 5. The specific date that the District Attorney’s Office became aware of
7 Madden’s prior criminal history.

8 **Argument**

9 **1. Failure to provide material discovery relating to impeachment of a**
10 **material witness in the prosecution’s case before the preliminary**
11 **hearing requires dismissal for denying defendant due process.**

12 The state’s failure to provide material discovery relating to impeachment of a
13 material witness in the prosecution’s case before the preliminary hearing requires
14 dismissal now because it denied defendant due process, the substantial right to cross
15 examine, the magistrate the information to use his discretion as to trustworthiness:
16 so this court should grant a nonstatutory motion to dismiss.

17 **A. To obtain dismissal the withheld evidence must be sufficient to defeat**
18 **the holding order.**

19 Exculpatory evidence known to or knowable by the prosecution at the time of the
20 preliminary examination must be provided to the defense for that hearing.³ Under a
21 nonstatutory motion to dismiss — the appropriate vehicle to redress errors not
22 known or visible at the hearing itself⁴ — the court looks to the materiality of the
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24 ³ *Merrill, supra*, 27 Cal.App.4th 1586, 1593-94; *Currie v. Superior Court* (1991)
25 230 Cal.App.3d 83, 96-98; *People v. MacKey* (1985) 176 Cal.App.3d 177; *Stanton,*
26 *supra*, 193 Cal.App.3d 265.

27 ⁴ *Stanton, supra*, 193 Cal.App.3d 265, 269; *Currie, supra*, 230 Cal.App.3d 83, 91.

1 withheld information and its effect on the probable cause determination.⁵ When the
2 undisclosed evidence could have furthered defense counsel's ability to overcome the
3 prosecution's case or establish an affirmative defense, the failure to provide
4 discovery before the preliminary hearing may require dismissal⁶ as in *MacKey*. The
5 *MacKey* Court found deprivation of due process at the preliminary hearing and
6 dismissed the information for failure to comply with a discovery order by not
7 disclosing a statement taken from the principal prosecution witness or disclosing that
8 the witness had been hypnotized.⁷

9 The appellate courts in *Merrill* and *Currie* demonstrate that the Information may
10 be dismissed when the prosecution fails to provide exculpatory evidence before the
11 preliminary hearing and the undisclosed evidence, as here, is sufficient to overcome
12 a holding order and not extraneous.⁸ Though the withheld evidence in *Merrill* (that
13 a witness had informed the prosecution that the defendant was not one of two men
14 he saw breaking into a car⁹) and *Currie* (that the victim was charged with falsely
15 reporting a crime¹⁰) were insufficient to overcome the holding orders there,¹¹ the
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19 ⁵ *Merrill, supra*, 27 Cal.App.4th 1586, 1596, citing *Stanton, supra*, 193 Cal.App.3d
20 265, 271-272, and *Currie, supra*, 230 Cal.App.3d 83, 93.

21 ⁶ *People v. Aguirre* (1987) 193 Cal.App.3d 1168.

22 ⁷ *MacKey, supra*, 176 Cal.App.3d 177, 185.

23 ⁸ *See, Merrill, supra*, 27 Cal.App.4th 1586, 1594 ; *Currie, supra*, 230 Cal.App.3d
24 83, 96-86.

25 ⁹ *Merrill, supra*, 27 Cal.App.4th 1586, 1590-1591.

26 ¹⁰ *Currie, supra*, 230 Cal.App.3d 83.

27 ¹¹ *Merrill, supra*, 27 Cal.App.4th 1586, 1594.

1 appellate courts found prosecutorial disclosure was required.¹²

2 **B. Here, the undisclosed material would have impaired the credibility and**
3 **reliability of the narcotics evidence against defendant and would have**
4 **defeated the holding order.**

4 Here, not only is the withheld evidence material, requiring disclosure before the
5 preliminary hearing, but it was also sufficient to overcome the holding order. One
6 the elements of the charged offense was whether the substance was in fact a
7 narcotic. Here, the credibility of the witness who tested the substance as well as the
8 reliability of her results were at issue in the hearing. Because this information was
9 not discovered before the hearing, the magistrate was deprived of an opportunity to
10 exercise its discretion and to evaluate the credibility and reliability of this evidence.

11 As stated in the declaration of counsel, the withheld evidence would have
12 provided counsel with significant information bearing on the credibility and
13 reliability of the evidence presented at the hearing.

14 ***1) Had Madden testified, she would have been impeached with acts of moral***
15 ***turpitude and the magistrate would have exercised its discretion to accept or***
16 ***reject her testimony.***

16 **[ADD/DELETE THIS SECTION AS IT PERTAINS TO YOUR CASE FACTS]**

17 It is always proper to defend against criminal charges by showing that a witness
18 is not credible or the evidence not reliable.¹³ Any relevant evidence raising a
19 reasonable doubt about guilt is admissible.¹⁴ A conviction for felony corporal injury
20 under Pen. Code §273.5 is a crime of moral turpitude that may be used to impeach a
21 witness's testimony.¹⁵ Moreover, no case says that a misdemeanor violation of Pen.

23 ¹² *Merrill, supra*, 27 Cal.App.4th 1586, 1594; *Currie, supra*, 230 Cal.App.3d 83,
24 96.

25 ¹³ Pen. Code § 866; Evidence Code § 780.

26 ¹⁴ *People v. Babbitt* (1988) 45 Cal.3d 660, 682.

27 ¹⁵ *People v Rodriguez* (1992) 5 Cal.App.4th 1398.

1 Code § 273.5 is not moral turpitude. In fact, a misdemeanor violation of Pen. Code §
2 245(a) is a crime of moral turpitude under *Wheeler*. Here, Madden was arrested on
3 felony violations of Pen. Code §§ 273.5 and 245(a) – both of which are crimes of
4 moral turpitude.¹⁶ Thus, under *Wheeler* the prosecution should have discovered
5 these reports even if a misdemeanor 273.5 is not *Castro*¹⁷ impeachment because the
6 defense could try to impeach with the underlying facts under *Wheeler*. In criminal
7 cases, past conduct that evidences dishonesty or moral turpitude may be used to
8 impeach a witness if it has some logical bearing on the witness's veracity.¹⁸ Finally,
9 if a witness has been convicted of a misdemeanor involving dishonesty or moral
10 turpitude, the record of that conviction is admissible under Evidence Code §452.5(b)
11 to prove both the fact of conviction and the occurrence of the underlying act or
12 acts.¹⁹

13 Here, the undisclosed material would undermine the prosecution's evidence in
14 this case – at least sufficiently to raise questions about whether defendant committed
15 a crime. The nondisclosure hindered defendant's ability to probe competently and
16 effectively into the credibility and reliability of the evidence and to effectively
17 question the soundness of the prosecution's case. In sum, the materials provided
18 after the preliminary hearing, not to mention those still undisclosed, could have
19 overcome the preliminary hearing evidence and defeated the holding order.
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22 ¹⁶ *People v Elwell* (1988) 206 Cal.App.3d 171; see also *People v Thomas* (1988)
206 Cal.App.3d 689, holding that Pen. Code §245(a)(1) involves moral turpitude.

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24 ¹⁷ *People v. Castro* (1985) 38 Cal.3d 301: felony convictions involving “moral
turpitude” are admissible to impeach a witness's character for veracity.

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26 ¹⁸ *People v Wheeler* (1992) 4 Cal.4th 284, see also *People v Lopez* (2005) 129
Cal.App.4th 1508.

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28 ¹⁹ *People v Duran* (2002) 97 Cal.App.4th 1448, 1460.

1 Consequently, defendant is entitled to a new preliminary hearing.

2 **2) *The magistrate was deprived of exercising discretion regarding the credibility***
3 ***of hearsay testimony under Penal Code section 872.***

4 **[ADD/DELETE THIS SECTION AS IT PERTAINS TO YOUR CASE FACTS]**

5 Alternatively, the testimony of a criminalist is presented through a police officer
6 witness.²⁰ That, however, does not deprive the magistrate of exercising her
7 discretion as to the reliability of that hearsay. Of course, in a given case a magistrate
8 has the power to conclude that hearsay testimony does not provide a sufficient
9 indication of reliability to permit introduction of the extrajudicial statement.²¹ Here,
10 the magistrate was deprived of the opportunity to exercise discretion as to the
11 reliability of the hearsay. Had the magistrate been presented with the discovery, it is
12 likely the magistrate would have stricken the hearsay as untrustworthy.

13 **3) *The lab test record was not shown to be trustworthy, a requisite to the official-***
14 ***records hearsay exception (Evid. Code, § 1280).***

15 **[ADD/DELETE THIS SECTION AS IT PERTAINS TO YOUR CASE FACTS]**

16 In other instances, the prosecution attempts to admit the results of a criminalist's
17 lab test through Evidence Code § 1280. The prosecution bears the burden of
18 establishing the foundational requirements to admit the lab test result.²² A one of the
19 key elements to establish trustworthiness, the state must show "the sources of
20 information and method and time of preparation were such as to indicate its
21 trustworthiness."²³ Here, with no statutory duty and no presumption, the prosecution

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23 ²⁰ Pen. Code § 872(b).

24 ²¹ *Hosek v. Superior Court* (1992) 10 Cal.App.4th 605,610.

25 ²² See *People v. Hovarter* (2008) 44 Cal.4th 983, 1101.

26 ²³ Evidence Code § 1280; See Jefferson's California Evidence Bench Book 3rd ed.,
27 CEB, 4th ed. 2009; sec 5.1.

1 needed to introduce independent evidence of trustworthiness.²⁴ None was adduced.

2 Section 1280 does not sanction admission of every report generated by every
3 employee of a public agency. Rather, it only permits admission of an official record
4 without *necessarily* requiring a witness to testify about its preparation if: 1) the court
5 takes judicial notice; or 2) sufficient independent evidence shows that the record was
6 prepared in such a manner as to assure its trustworthiness.²⁵ As to a “bare-bones”
7 narcotics lab report prepared for admission against a criminal defendant — like the
8 one here — there is ample authority condemning the wholesale admission of these
9 reports without independent evidence of trustworthiness.

10 In keeping with the trustworthiness element of 1280, California courts have
11 relied on independent evidence in evaluating the trustworthiness of narcotics lab
12 results. For example, in *People v. Parker*,²⁶ the court admitted lab reports analyzing
13 cocaine base of an absent criminalist under Section 1280. The court found no abuse
14 of discretion in admitting the reports, as their trustworthiness was supported by the
15 testimony of another criminalist who identified the reports, detailed the tests and
16 procedures used by all criminalists employed by the laboratory, and testified that the
17 absent criminalist’s notes indicated she had followed normal procedures. This
18 adequately supported the trustworthiness “independent of the reports themselves.”²⁷
19 Unlike *Parker*, the state here offered no independent evidence, but rather relied upon
20 unsound presumptions.

21 The United States Supreme Court has also weighed in on the propriety of
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23 ²⁴ See *Yordamlis v. Zolin* (1992) 11 Cal.App.4th 655.

24 ²⁵ *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1477.

25 ²⁶ *People v. Parker* (1992) 8 Cal.App.4th 110.

26 ²⁷ *Id.* at 117.

1 admitting reports of drug lab analyses. Its opinion in *Melendez-Diaz v.*
2 *Massachusetts*²⁸ — though not controlling here — spoke to the issue of
3 trustworthiness when it addressed the state’s claim that a report like the one here
4 was admissible over hearsay objections because it qualified as a “public record.”

5 The Court explained that while documents kept in the regular course of business
6 may ordinarily be admitted despite their hearsay status, this is not so “if the regularly
7 conducted business activity is the production for the use at trial.”²⁹ Thus, the Court
8 reinvigorated *Palmer v. Hoffman*,³⁰ in which it had rejected the use of the business-
9 records exception where the document was “calculated for use essentially in court,
10 not in the business.”

11 Similar to the document proffered in *Melendez-Diaz*, the narcotics lab report here
12 was prepared for admission against the defendant in a criminal prosecution. As the
13 lab report reflects, the criminalist is an employee of the San Francisco Police
14 Department Crime Lab whose job duties include analyzing evidence collected in
15 connection with criminal incident reports. There can be no serious claim that a
16 criminalist in this position would not know that the test result will be used in a
17 criminal prosecution.

18 In the high court’s view, then, this record would not even qualify as a public
19 record, let alone be admissible without *additional* evidence of trustworthiness. And
20 California courts are in accord, finding that the kind of public records admissible
21 with little additional verification are those *created for purposes other than*
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24 ²⁸ *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, 174 L.Ed.2d 314.

25 ²⁹ *Id.* at 27-28.

26 ³⁰ *Palmer v. Hoffman* (1943) 318 U.S. 109.

1 prosecution.³¹ But even in these cases, the courts relied on additional evidence of the
2 process used to create these documents. Here, there would have been evidence
3 diminishing the reliability of the hearsay evidence. Therefore, it would have been
4 unreasonable to admit the crime lab report with no independent evidence of its
5 trustworthiness. In fact, the undiscovered evidence would have impeached its
6 credibility.

7 Also noteworthy is the United States Supreme Court’s rejection of the notion that
8 criminalist lab reports reflect merely “neutral scientific testing” that should generally
9 be considered reliable. The Court dispelled any claim that forensic evidence is
10 “uniquely immune from the risk of manipulation,” noting that a recent study found
11 that “[b]ecause forensic scientists often are driven in their work by a need to answer
12 a particular question related to the issues of a particular case, they sometimes face
13 pressure to sacrifice appropriate methodology for the sake of expediency. [Citation.]
14 A forensic analyst responding to a request from a law enforcement official may feel
15 pressure—or have an incentive—to alter the evidence in a manner favorable to the
16 prosecution.”³²

17 In sum, a bare-bones lab test reports, prepared specifically for introduction
18 against a criminal defendant, are not imbued with trustworthiness such that it can
19 stand alone, especially here, where the undisclosed discovery would have impeached
20 its trustworthiness.

23 ³¹ For example, rap sheets (*Dunlap, supra*, 18 Cal.App.4th 1468), medical records
24 associated with dental insurance plans (*Bhatt v. Dep’t of Health Services for State, supra*,
25 133 Cal.App.4th 923), and records of jail inmates’ locker use (*People v. George* (1994)
26 30 Cal.App.4th 262) have all been admitted without sworn testimony by the creator of the
record.

27 ³² *Melendez-Diaz, supra*, 129 S.Ct. at 2536.

1 **2. Nondisclosure violated defendant’s right to cross-examine and**
2 **confront witnesses, and to obtain effective assistance of counsel.**

3 The failure of discovery impinged on defendant’s statutory right to present
4 evidence and cross-examine witnesses during the preliminary hearing.³³ Denial of
5 cross-examination is a deprivation of a substantial right, rendering a holding order
6 unlawful.³⁴ Without the benefit of the discovery not disclosed by the state prior to
7 the preliminary hearing — discovery that would have substantially undercut the
8 state’s case — defendant was prejudiced at the preliminary hearing. In *MacKey*, the
9 court found the defendant was unable to effectively cross-examine the witness
10 during the preliminary examination, or present evidence of the hypnosis to the
11 magistrate.³⁵ Similarly here, defendant was unable to competently challenge the
12 evidence of the crime(s).

13 **3. The prosecution must provide all *Brady* material in its possession**
14 **and in the San Francisco Police Department’s possession.**

15 **A. Under *Brady*, evidence is “favorable” if it helps the defense or harms the**
16 **prosecution’s case**

17 Under state and federal law the prosecution must disclose relevant materials in its
18 possession and those materials “reasonably accessible” to it, including those within
19 the investigating agencies’ possession.³⁶ Under *Brady*, the prosecution has no
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21 ³³ Pen. Code, §§ 865, 866; *Whitman v. Superior Court* (1991) 54 Cal.3d 1063,
22 1079.

23 ³⁴ *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 877-880; *Priestley v. Superior*
24 *Court* (1958) 50 Cal.2d 812, 818-820; *Alford v. Superior Court* (1972) 29 Cal.App.3d
25 724, 727-730.

26 ³⁵ *MacKey, supra*, 176 Cal.App.3d 177, 185.

27 ³⁶ *In re Littlefield* (1993) 5 Cal.4th 122 at 135; *see also* Pen. Code, §1054.1.

1 general duty to seek out and disclose all evidence that might benefit the defense,³⁷
2 but only “favorable” evidence. “Evidence is ‘favorable’ if it either helps the
3 defendant or hurts the prosecution, as by impeaching one of its witnesses. Evidence
4 is ‘material’ ‘only if there is a reasonable probability that, had [it] been disclosed to
5 the defense, the result... would have been different.’ The requisite ‘reasonable
6 probability’ is a probability sufficient to ‘undermine confidence in the outcome’ on
7 the part of the reviewing court.”³⁸ The individual prosecutor is exclusively
8 responsible for the failure to disclose exculpatory evidence to the defense, and has a
9 duty to learn of and disclose favorable evidence known to others acting on the
10 government's behalf in the case.³⁹ “Favorable evidence” either helps the defendant or
11 hurts the prosecution, as by impeaching one of its witnesses.⁴⁰

12 The kind of material that can be exculpatory is nearly limitless.⁴¹ It can be
13 evidence of sloppy police investigation or misconduct;⁴² impeachment evidence;⁴³
14 recantation by a prosecution witness,⁴⁴ criminal charges pending anywhere against a
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16 ³⁷ *Littlefield, supra*, 5 Cal.4th 122, 135.

17 ³⁸ *In re Sassounian* (1995) 9 Cal.4th 535, 544.

18 ³⁹ *Kyles v. Whitley* (1995) 514 U.S. 419, 437; *Bagley, supra*, 473 U.S. 667, 674; *Brady,*
19 *supra*, 373 U.S. 83; *In re Sassounian* (1995) 9 Cal.4th 535, 543; *see also In re Brown* (1998) 17
20 Cal.4th 873.

21 ⁴⁰ *Sassounian, supra*, 9 Cal.4th 535, 544; *In re Pratt* (1999) 69 Cal.App.4th 1294,
22 1311.

23 ⁴¹ *See, e.g., Gantt v. Roe* (9th Cir. 2004) 389 F.3d 908.

24 ⁴² *Kyles v. Whitley, supra*, 514 U.S. 419.

25 ⁴³ *United States v. Bagley, supra*, (1985) 473 U.S. 667, 676; *In re Ferguson* (1971)
26 5 Cal.3d 525.

27 ⁴⁴ *People v. Boyd* (1990) 222 Cal.App.3d 541, 568-569.

1 prosecution witness;⁴⁵ any felony or misdemeanor charges pending against an
2 alleged victim;⁴⁶ anything the might show a prosecution witness has a “morally lax
3 character,” from which a “readiness to lie” could be inferred;⁴⁷ evidence that a
4 prosecution witness has in fact lied.⁴⁸

5 **B. The prosecution has a duty to learn of any favorable evidence known to its**
6 **agents**

7 “[T]he individual prosecutor has a duty to learn of any favorable evidence known
8 to the others acting on the government's behalf in the case, including the police.”⁴⁹
9 Therefore, the prosecutor’s ignorance is irrelevant in determining whether a *Brady*
10 violation has occurred. For example, in *Brown*⁵⁰ the California Supreme Court
11 ordered a conditional new trial because a report in the possession of the sheriff's
12 crime lab supporting the diminished capacity defense at trial was not turned over to
13 the defense. The prosecution was unaware the report existed. The lab worked
14 closely with the prosecution and was part of the investigative team, so the prosecutor
15 had an obligation to determine if the lab's files contained any exculpatory evidence
16 and disclose it. Whether or not the prosecution actually did examine the files, the
17 lab's knowledge was imputed.⁵¹ Favorable evidence known to others acting on the

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19 ⁴⁵ *People v. Coyer* (1983) 142 Cal.App.3d 839, 842; *People v. Martinez* (2002) 103
20 Cal.App.4th 1071, 1079-1080.

21 ⁴⁶ *Currie v. Superior Court* (1991) 230 Cal.App.3d 83, 96-98.

22 ⁴⁷ *People v. Mickle* (1991) 54 Cal.3d 140, 168.

23 ⁴⁸ *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1210.

24 ⁴⁹ *Kyles v. Whitley*, supra, 514 U.S. at 437; see *In re Brown*, supra, 17 Cal.4th 873;
25 *People v. Robinson* (1995) 31 Cal.App.4th 494, 499.

26 ⁵⁰ *Brown*, supra, 17 Cal.4th 873.

27 ⁵¹ *Id.* at 880-881.

1 government's behalf is imputed to the prosecution; the individual prosecutor is
2 presumed to have knowledge of all information gathered in connection with the
3 government's investigation.⁵²

4 Similarly, in *United States ex rel. Smith v. Fairman*,⁵³ an investigator examined a
5 gun the defendant allegedly shot at officers. The investigator recorded that he found
6 the gun inoperable,⁵⁴ but failed to include the information in his report because of
7 department procedure.⁵⁵ The firearms report was put in the investigator's files and
8 not disclosed to the prosecutor or the defendant. Though the prosecutor had no
9 actual knowledge of the information, the reviewing court found *Brady* error in light
10 of the "closely aligned" working relationship between the investigator and the
11 prosecution.⁵⁶ The court concluded: [T]he purposes of *Brady* would not be served
12 by allowing material exculpatory evidence to be withheld simply because the police,
13 rather than the prosecutors, are responsible for the nondisclosure."⁵⁷ As our Supreme
14 Court has said, "Despite any seeming unfairness to the prosecution, no other result
15 would satisfy due process in this context."⁵⁸ Thus, the prosecution here had a duty
16 to turn over the discovery at issue, whether or not it was specifically aware of its
17 existence. Its failure to do so prejudiced defendant's defense at the preliminary
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19 ⁵² *In re Steele* (2004) 32 Cal.4th 682, 697; *U.S. v. Payne* (2d Cir.1995) 63 F.3d
20 1200, 1208.

21 ⁵³ *United States ex rel. Smith v. Fairman* (7th Cir. 1985) 769 F.2d 386.

22 ⁵⁴ *Id.* at 389.

23 ⁵⁵ *Id.* at 389-390, fn. omitted.

24 ⁵⁶ *Id.* at 391.

25 ⁵⁷ *Id.* at 391-392.

26 ⁵⁸ *Brown, supra*, 17 Cal.4th 873, 881.

1 hearing and requires a new hearing.

2 **Conclusion**

3 Disclosure of all materials related to the credibility of prosecution witnesses and
4 the integrity of the crime lab was constitutionally required under *Brady*, and their
5 nondisclosure before the preliminary hearing here has violated defendant’s rights to
6 due process, confrontation, and effective assistance of counsel. As the *Merrill* Court
7 recognized, nondisclosure of this sort “undermines the public’s confidence in the
8 criminal justice system and creates an impression that our government officers are
9 our worst enemies, not our public servants.”⁵⁹ For all of these reasons, the court
10 should dismiss the information.⁶⁰

11 Dated: _____2010 Respectfully submitted,

12
13 [Your Name Here] _____
14 Deputy Public Defender
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25 ⁵⁹ *Merrill, supra*, 27 Cal.App.4th 1586, 1594.

26 ⁶⁰ *Stanton, supra*, 193 Cal.App.3d 265; *Aguirre, supra*, 193 Cal.App.3d 1168,
27 1171, fn.1.

- 1 4. Debbie Madden went on leave on December 8, 2009 – without explanation.
- 2 5. In December of 2009, San Francisco Police discovered that evidence was
- 3 missing from the San Francisco Crime Lab.
- 4 6. In December of 2009, San Francisco Police discovered that evidence from the
- 5 San Francisco Crime Lab showed signs of tampering.
- 6 7. In December of 2009, San Francisco Police discovered that practices at the
- 7 San Francisco Crime Lab were “sloppy.”
- 8 8. In December of 2009, San Francisco Police discovered that Debbie Madden
- 9 was using cocaine that had been evidence from the San Francisco Crime Lab.
- 10 9. Debbie Madden retired without explanation at the beginning of March, 2010.

11 Based upon my experience and expertise, I believe that had I been in possession
12 of the documents that I have learned about and/or was given after the preliminary
13 hearing, not to mention documents and discovery that I believe in good faith to exist
14 but are still undiscovered, I would have conducted the pre-hearing investigation and
15 the preliminary hearing itself in an entirely different manner. The previously
16 undiscovered information changes in a material and significant way my view of and
17 approach to the defense of this case. I believe that had I been in possession of this
18 information prior to the hearing, it would have substantially weakened the
19 prosecution’s theory and there is a significant likelihood that the magistrate would
20 not have issued the holding order.

21 I declare under penalty of perjury that the foregoing is true and correct, except as
22 to those matters stated on information and belief, and as to those matters I believe
23 them to be true. Executed this __ day of _____, 2010, at San Francisco,
24 California.

25 _____
26 [Your name here]
27 Attorney for Defendant

1 **Proof of Service**

2

3 I, the undersigned, say:

4 I am over eighteen years of age and not a party to the above action.

5 My business address is 555 Seventh Street, San Francisco, California
6 94103.

7 On _____ 2010, I personally served copies of the attached on the
8 following:

9 Office of the District Attorney
10 Attn: _____
11 City and County of San Francisco
12 850 Bryant Street, Room 300
13 San Francisco, California 94103

14 I declare under penalty of perjury that the foregoing is true and
15 correct. Executed on _____, 2010 at San Francisco, California.

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Exhibit A

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Exhibit B

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Exhibit C