

1 ROBERT NORSE KAHN
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6 Defendant, in Pro Per

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CRUZ

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| <p>10 11 12 CITY OF SANTA CRUZ 13 14 Plaintiff, 15 16 v. 17 ROBERT NORSE KAHN, 18 19 Defendant.</p> | <p>Case Nos. S 0140653 & S 0144038</p> <p>MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT' MOTION TO COMPEL DISCOVERY RESPONSES AND TO CONTINUE TRIAL DATE PENDING RECEIPT OF THE REQUESTED DISCOVERY</p> <p>Date: June 17, 2016 Time: 10:00 a.m. Dept: 1</p> |
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23 INTRODUCTION

24 Due process of law requires the prosecution to “divulge all evidence to the
25 defense which is both favorable to the accused and material either to guilt or to
26 punishment”, including all information that could impeach the prosecution witnesses.
27 (*People v. Martinez* (2002) 103 Cal.App.4th 1071, 1078, citing *Brady v. Maryland*
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1 (1963) 373 U.S. 83, *United States v. Bagley* (1985) 473 U.S. 667, 675-76.) The
2 process for requesting and obtaining discovery is governed by Penal Code section
3 1054 et seq. Penal Code section 1054.1 governs what materials the prosecution is
4 required to provide to the defendant. In addition to the materials defined by section
5 1054.1, constitutional provisions and case law have defined the scope of additional
6 materials not specified within Section 1054.1, which should also be disclosed to the
7 defendant.

8 In this case, defendant Robert Norse Kahn, requested specific items of
9 discovery through informal channels, specifically by email, but to date, the
10 prosecuting Assistant City Attorney, has only provided a portion of the items
11 requested. Without these undisclosed and unproduced items, defendant cannot
12 competently represent himself, cannot sufficiently and completely prepare and present
13 a defense, or prepare for trial. Defendant is respectfully asking the court to order the
14 disclosure and production of the requested material pursuant to Penal Code section
15 1054.5, the Fifth and Fourteenth Amendments to the United States Constitution, and
16 Article I, section 7, and Article I, section 30 of the Constitution of the State of
17 California.

18 STATEMENT OF FACTS

19 On July 5, 2015, and August 12, 2015, defendant was engaged in a peaceful
20 protest at Santa Cruz City Hall in support of the rights of people experiencing
21 homelessness. The City of Santa Cruz has designated the grounds surrounding City
22 Hall to be a “park” for purposes of regulating its use by members of the public. A
23 curfew on that public use is imposed beginning at 10:00 p.m. and running until 6:00
24 a.m. the next morning. Public use of this “park” for any reason is prohibited during
25 these hours and anyone physically present on the grounds during these hours is subject
26 to citation under Santa Cruz Municipal Code Section 13.04.011(c). Defendant was
27 issued two citations for this offense. Defendant will present a defense at trial on the
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1 grounds that (1) the ordinance is unconstitutional on its face because the restriction of
2 access to this traditional public forum is not reasonable as to place, time and manner
3 and is, therefore, unconstitutional as a matter of law; (2) his presence in the park was
4 lawful in that he is entitled under the Brown Act to continuous access to notices of
5 public meeting 72 hours prior to any such meeting and (3) he was entitled to access
6 the park at any time using the ingress and egress pathways as provided for in the
7 ordinance.

8 LAW AND ARGUMENT

9 I.

10 PENAL CODE SECTION 1054 ET SEQ. IS NOT THE 11 EXCLUSIVE BASIS FOR DISCOVERY IN A CRIMINAL 12 CASE IN THE STATE OF CALIFORNIA

13 Penal Code Section 1054, et seq. governs discovery procedures in criminal
14 cases within California. Section 1054 et seq. was adopted pursuant to Proposition
15 115, during the June 1990 primary election and became effective as of June 6, 1990.
16 Penal Code section 1054 outlines the purposes of this chapter as follows:

17 This chapter shall be interpreted to give effect to all of
18 the following purposes:

19 (a) To promote the ascertainment of truth in trials by requiring
20 timely pretrial discovery.

21 (b) To save court time by requiring that discovery be conducted
22 informally between and among the parties before judicial enforcement
23 is requested.

24 (c) To save court time in trial and avoid the necessity for frequent
25 interruptions and postponements.

26 (d) To protect victims and witnesses from danger, harassment, and
27 undue delay of the proceedings.

28 (e) To provide that no discovery shall occur in criminal cases
29 except as provided by this chapter, other express statutory provisions, or as
30 mandated by the Constitution of the United States.

31 As stated in subsection (e) of section 1054, pursuant to the very language of
32 the statute, this is not the exclusive means of discovery. This concept is supported by
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1 case law that has developed after the enactment of Proposition 115. After this new
2 discovery scheme was enacted it was challenged as being unconstitutional. In
3 addressing this issue, the California Supreme Court stated:

4 The prosecutor's duties of disclosure under the due process clause
5 are *wholly independent* of any statutory scheme or reciprocal
6 discovery. The due process requirements [of the United States
7 Constitution] are self-executing and need no statutory support
8 to be effective. Such obligations exist whether or not the state
9 has adopted a reciprocal discovery statute. Furthermore, if a statutory
10 discovery scheme exists, these due process requirements operate
11 outside such a scheme. The prosecutor is obligated to disclose
12 such evidence *voluntarily*, whether or not the defendant makes
13 a request for discovery.

14 No statute can limit the foregoing due process rights of criminal
15 defendants, and the new discovery chapter does not attempt to do
16 so. On the contrary, the new discovery chapter contemplates
17 disclosure *outside* the statutory scheme pursuant to constitutional
18 requirements as enunciated in *Brady, supra*, 373 U.S. 83, and its
19 progeny. Section 1054 expressly provides that the new discovery
20 chapter shall be interpreted to give effect to the provision that
21 "no discovery shall occur in criminal cases except as provided
22 by this chapter, other express statutory provisions, or *as mandated*
23 *by the Constitution of the United States.*" (§1054, subd. (e), italics
24 added.) We conclude there is no due process violation because the
25 new discovery chapter does not affect the defendant's constitutional
26 right to disclosure of all exculpatory evidence, in the hands of
27 the prosecution as mandated by the high court in *Brady, supra*,
28 373 U.S. 83, and its progeny.

29 (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378, footnote omitted,
30 italics in original.)

31 Therefore, the City Attorney is required under both the statutory requirements
32 of Penal Code section 1054, et seq., and the United States Constitution to provide the
33 requested discovery.

34 II.

35 AN ACCUSED IS ENTITLED TO DISCOVER ALL

1 concedes that there is a substantial government interest in conserving park property
2 See *Clark v. Community for Creative Non-Violence* 468 U.S. 288, 299 (1984)]the
3 curfew imposed by the ordinance cannot be viewed as “narrowly tailored” under
4 accepted constitutional analysis, nor as a “reasonably placed, time and manner”
5 restriction on the constitutionally guarantee rights to speak and assemble freely.” The
6 government may not regulate expression in such a manner that **a substantial portion**
7 **of the burden on speech does not serve its advanced goals”** *Hodgkins ex rel.*
8 *Hodgkins* 355 F.3^d, 1006 (7th Cir. 2004) Defendant respectfully submits that when the
9 burdens on free speech are balanced against the stated goals of the curfew, the
10 importance and weight of constitutional free speech in a traditional public forum such
11 a City Hall must hold sway. And this is particularly true as applied to late night
12 political protests, demonstrations or activities in traditional public fora.

13 Defendant submits that laws curtailing the rights of citizens to participate in late
14 night assemblies reach “a substantial amount of protected conduct”. See *Hodgkins* 355
15 F. 3rd at 1062. While “no doubt many if not most of the participants would find it
16 more convenient to exercise their First Amendment rights **other** than at night”, it is
17 not coincidental that “so many of the expressed activities ... occur late in the evening”
18 *Id.* at 1062. Because, as in the instant case, so many expressive activities take place at
19 night, government actions that curtail nighttime assemblies necessarily impose a
20 burden on expressive First Amendment conduct. Moreover, when “the late hour is
21 closely linked with the purpose and message of the activity” great deference must be
22 given. Political movements often employ all night vigils because of their symbolic of
23 commemorative power: “It was after midnight one evening in October 1998 when
24 young Matthew Shepard was beaten, burned, and lashed to a fence, and left for dead
25 outside Laramie, Wyoming: so it is that candlelight vigils were and are being held in
26 the middle of the night to protest the homophobia that motivated his killers” *Id.*
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1 In the instant case, the protesters, of which Defendant is one, chose to conduct
2 all night vigils at City Hall to not only raise community focus and awareness on the
3 fact that many hundreds of men, women and children are unsheltered and outside in
4 the elements every night but also to dramatically bring this tragic and inhumane
5 situation to the very seat of power. Under the First Amendment, if the burdens
6 imposed on expressive activities are greater than necessary to serve the substantial
7 government interest, it is inadequate to claim that citizens could engage in “protected
8 activity during the ample [daylight] hours” or “during late night hours in other places”
9 *Id.* at 1062.

10 For the foregoing reasons, Defendant respectfully submits that the ordinance
11 challenged by this Demurrer which imposes a curfew on *all activities, expressive or*
12 *otherwise*, on City Hall grounds is not narrowly tailored to serve an important
13 government interest. Defendant thereon respectfully submits that the ordinance is
14 unconstitutional as applied to the facts of this case.

15 As such, defendant is entitled to any and all evidence in the hands of the City
16 Attorney that would aide him in the presentation of this constitutional challenge at
17 trial.

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19 **B. THE BROWN ACT MANDATES CONTINUOUS 72 HOUR**
20 **ACCESS TO POSTED NOTICES**

21 California’s Brown Act provides in pertinent part:

22 (a) (1) At least 72 hours before a regular meeting, the legislative
23 body of the local agency, or its designee, shall post an agenda
24 containing a brief general description of each item of business
25 to be transacted or discussed at the meeting, including items to be
26 discussed in closed session. A brief general description of an
27 item generally need not exceed 20 words. The agenda shall specify
the time and location of the regular meeting and shall be posted
in a location that is freely accessible to members of the public and
on the local agency's Internet Web site, if the local agency has one.

1 Defendant respectfully asks this court to take judicial notice of the fact that
2 Brown Act required notices were, at the time defendant was cited, posted on a wall
3 outside of the Santa Cruz City Council Chambers in compliance with the above-stated
4 provisions. Defendant would also ask this court to take similar judicial notice of the
5 fact that these notices were at the time defendant was cited, posted in an area which is
6 designated as a “city park” for purposes of the ordinance which is being challenged
7 herein. It is Defendant’s assertion that he was entitled to “continuous access” to the
8 notice(s) for the 72 hours directly prior to each meeting being notices. Therefore, any
9 restriction placed upon that access, i.e., closure of the park between the hours of 10
10 pm and 6 am improperly denied him access as provided by Brown. Indeed, the
11 California Attorney General agrees with this point. *In 78 Ops. Cal. Atty. Gen. 327, 331-*
12 *332 (1995)*, “this office concluded that the 72-hour notice requirement mandates local
13 agencies to post their notices in **locations which are accessible 24 hours a day for**
14 **the 72 hours prior to the meeting**. Accordingly, notices cannot be placed in
15 buildings which are locked for some portion of the 72 hours immediately prior to the
16 meeting”. Defendant respectfully submits and will testify to the fact that he was doing
17 nothing more than asserting his rights under the Brown Act when the citation in this
18 case was issued and, therefore, is not factually in violation of the offense with which
19 he is charged.

20 Subsequent to defendant’s receipt of the citations, plaintiff has changed the
21 location of the posting of the agenda to a site outside of the city hall “park” thereby
22 making it continuously accessible for 72 hours in accordance with the Brown Act.
23 See Declaration of defendant Robert Norse Kahn attached hereto and incorporated
24 herein.

25 As such, plaintiff has made a de facto admission that depriving defendant of his
26 right of access to the agenda was a violation of his rights under the Brown Act.
27 Defendant asserts that this fact serves as a valid ground for the dismissal of the
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1 citations against him. Defendant is therefore entitled to any evidence he may present
2 at trial as to this issue.

3 **C. THE ORDINANCE UNDER WHICH DEFENDANT WAS CITED**
4 **MAKES SPECIFIC EXEMPTIONS FOR INGRESS AND EGRESS**

5 Ordinance 13.04.011 (c) states in pertinent part:

6 No one shall enter or remain in any park, building, facility, grounds or park road
7 (except a specifically designated, and clearly marked, public access way through a
8 park), during those hours that the place or facility is closed to the general public.

9 It is defendant's assertion that he was on the designated public access way
10 through the city hall "park" and is therefore exempt from citation under the specific
11 terms of the ordinance. Defendant further asserts that Santa Cruz City Police officers
12 were videotaping the events on the days he was cited and that those videotapes will
13 provide support for his claim that he was on the designated public access way when he
14 was cited. Defendant is an eye witness to the fact of the videotaping of the incidents.
15 Furthermore, Alex Darocy was present at the time of the issuance of the citations to
16 defendant and not only did he witness the videotaping, he took photographs of an
17 officer videotaping the event. See Declaration of Alex Darocy and exhibits filed
18 herewith and incorporated herein by reference.

19 Access to these videotapes is crucial evidence as to the issue of his location at
20 the time of the citations and will serve as a basis for dismissal on the grounds that he
21 was exempt from citation in accordance with the specific language of the ordinance.
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24 **III.**

25 **THE COURT MUST ORDER THE PRODUCTION OF APPROPRIATE**
26 **DISCOVERY WHEN THE CITY ATTORNEY REFUSES OR FAILS TO COMPLY**
27 **WITH PENAL CODE SECTION 1054, ET SEQ.**

1 The California legislature enacted the rules governing the enforcement of
2 discovery in Penal Code section 1054.5. This section defines the process by which a
3 party to a criminal action is to seek discovery. The requesting party must first submit
4 an informal request to opposing counsel. If that party's request is not complied with,
5 then that party may seek a formal order from the court. Once the moving party, in this
6 case the defendant, demonstrates that Penal Code section 1054.1 has not been
7 complied with, then the "court may make any order necessary to enforce the
8 provisions of this chapter." (Penal Code § 1054.5(b))

9 In this case, defendant submitted informal discovery request pursuant to Penal
10 Code section 1054.5. The requests were made to the City Attorney. See Declaration
11 of Robert Norse Kahn filed herewith and incorporated herein by reference. The City
12 Attorney only partially complied. Defendant is therefore asking that the court order
13 the production of the requested discovery.

14 CONCLUSION

15 Defendant has fulfilled the procedures for obtaining discovery as defined in the
16 Penal Code and the City Attorney has failed to comply. Pursuant to the foregoing,
17 defendant is entitled to the requested discovery which is within the City Attorney's
18 possession. As such, defendant respectfully requests that the court grant defendant's
19 formal discovery request pursuant to Penal Code section 1054.5. Defendant
20 additionally requests that the trial date be continued to enable time for the receipt of
21 the discovery and the preparation of his defense based on the evidence produced.

22 Dated:

23 Respectfully submitted,

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26 _____
ROBERT NORSE KAHN, defendant in pro per