IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Petitioner,

vs.

SUPERIOR COURT OF GUAM,
Respondent,

vs.

OLIVER LINTAG LAXAMANA,
Real Party in Interest.

Supreme Court Case No. WRP01-001
Superior Court Case No. CM0302-01

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on September 18, 2001
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice, F. PHILIP CARBULLIDO, Associate Justice, and BENJAMIN J.F. CRUZ, Justice *Pro Tempore*.

SIGUENZA, C.J.:

[1] This matter is before the court upon the People's Emergency Petition for Peremptory Writ of Prohibition, Alternative Writ of Mandate and Stay filed July 12, 2001. Petitioner People of Guam (hereinafter "People") seeks this court's review of: (1) the hearing of an *ex parte* motion by a judge that was not the assigned *ex parte* judge for that day; (2) the request by the lower court judge that a specific attorney be present in the courtroom when the People argued its motion; (3) the lower court's order that the People preserve investigative field notes taken by police officers; and (4) the lower court's order that the People disclose the preserved field notes to Laxamana. After reviewing the petition and response, and after hearing oral arguments, this court will issue a peremptory writ of mandate directing the lower court to vacate its order requiring the People to disclose the preserved field notes. However, the court declines to grant a peremptory writ of prohibition or alternative writ of mandate with respect to any other conduct by the lower court. This opinion is being issued to further expound this court's ruling.

I.

[2] Real Party in Interest and Defendant Oliver Lintag Laxamana (hereinafter "Laxamana") was charged with fourth degree criminal sexual conduct as a misdemeanor and harassment as a petty misdemeanor. During the pretrial stages of the case, the People provided Laxamana with seventeen pages of discovery. After receiving this discovery, Laxamana's attorney filed an *ex parte* motion with the judge assigned the case, seeking an order to preserve witness statements and investigative notes taken by the

Office of the Attorney General and the Guam Police Department (hereinafter "GPD") during their investigation of Laxamana. The People were served notice of the *ex parte* motion and were represented at the *ex parte* hearing by Assistant Attorney General Barbara P. Cepeda (hereinafter "Cepeda"). Following the *ex parte* hearing, the court ordered that all written statements or investigative notes generated in Laxamana's case be preserved for an in-camera review. At the request of the People, the court permitted the parties to brief the issue of the discoverability of the field notes.

[3] The People then filed a Motion to Vacate the court's June 21st order preserving the field notes. On July 6, 2001, the motion was heard by the court. At this hearing, Assistant Attorney General Leonardo M. Rapadas appeared on behalf of the People. The court requested the presence of Cepeda to address issues that relied on familiarity with the procedural and factual background of the case. Transcript vol. --, p. 16 (Hearing on People's Motion to Vacate Order or Stay Decision, July 6, 2001). Cepeda appeared and argued the People's motion. At the conclusion of the hearing, the court ruled that the field notes were discoverable and ordered that the People submit them to Laxamana. The People immediately petitioned this court for a peremptory writ of prohibition, alternative writ of mandate, and stay.

[4] By Order of July 13, 2001, this court denied the Petition for Peremptory Writ of Prohibition but stayed the July 6th order of the lower court to submit the disputed police field notes to Laxamana pending determination of the Petition for Alternative Writ of Mandate. After submission of briefs by the Parties, the petition came for hearing before a single justice. However, upon reconsideration, a full panel was called and oral arguments reheard on the merits of both writs.

II.

[5] This court maintains original jurisdiction over petitions for writs of mandamus and prohibition. Title 7 GCA § 3107(b) (1998). The issuance of a writ is a drastic remedy and may only be used where there is "no plain, speedy, and adequate remedy available in the ordinary course of law." Title 7 GCA §§ 31203, 31302 (1998); *see also Topasna v. Superior Court*, 1996 Guam 5, ¶ 5. Whether the issuance of an extraordinary writ is the appropriate remedy lies in the discretion of the court. *See Gray v. Superior Court*, 1999 Guam 26, ¶ 12.

III.

[6] The People petitioned this court for both a peremptory writ of prohibition and an alternative writ of mandate. With respect to the writ of prohibition, the People allege that the lower court exceeded its jurisdiction by taking the following actions: (1) entertaining Laxamana's *ex parte* motion in violation of Rule 9; and (2) requesting that a particular Assistant Attorney General argue the People's position in violation of the doctrine of separation of powers. Pursuant to the writ of mandate, the People seek to vacate the lower court's June 29th order of preservation and July 6th order of disclosure.

[7] Extraordinary writs are used by courts to provide a petitioner relief not available in the ordinary course of appeal. However, a writ of prohibition and a writ of mandate operate differently. "Mandate lies to compel the performance of official duty . . . and prohibition to restrain judicial acts in excess of jurisdiction . . . where there is no adequate legal remedy." *Dix v. Superior Court*, 807 P.2d 1063, 1066, 53 Cal. 3d 442, 450 (1991).

A. Writ of Prohibition

[8] The issuance of a writ of prohibition is governed by Title 7 GCA §§ 31301, 31302 (1998). The statutes collectively set forth three requirements for the proper issuance of a writ of prohibition: (1) proceedings without or in excess of a tribunal's jurisdiction;[1] (2) petitioner is without a plain, speedy, and adequate remedy at law; and (3) petitioner is a beneficially interested party. 7 GCA §§ 31301, 31302. Because Guam's statute is derived from the California Code of Civil Procedure, we look to the substantial precedent developed within that state to assist in interpreting parallel Guam provisions.

[9] The People argue that, pursuant to Rule 9 of the Rules of the Superior Court of Guam, the assigned judge lacked the jurisdiction to entertain Laxamana's *ex parte* motion. Rule 9 reads, "[E]xcept for good cause shown, all applications for ex parte orders shall be heard . . . by the judge designated by the Presiding Judge." GUAM CT. R. 9. Neither party disputes that the assigned judge was not the judge designated to handle *ex parte* matters on the day she heard Laxamana's *ex parte* motion. Additionally, neither party disputes the fact that the preferred practice which has developed in the court below is for *ex parte* motions to be brought directly before the judge assigned the case. While Laxamana's counsel is correct in his assertion that he simply followed what he knew to be the general practice, this does not justify conduct that is in clear violation of Rule 9. This court expects compliance, by both court and counsel, with the procedural rules set forth in the Superior Court. Under Rule 9, the assigned judge, being the non-*ex parte* judge, should have first established good cause before proceeding with the *ex parte* application.

[1] Defining the phrase "lack of jurisdiction" has been the subject of much conflicting and inconsistent case law within California. Although we will tackle the issue with respect to the People's petition for mandate, our finding that a writ of prohibition is a remedy not available to the People precludes our need to define the term here.

Absent good cause, the *ex parte* application should not have been entertained.

[10] However, a writ of prohibition is not the appropriate method by which to redress this wrong. A writ of prohibition is a preventive, not remedial measure. *Donner Fin. Co. v. Municipal Court*, 81 P.2d 1054, 1056, 28 Cal. App. 2d 112, 114 (Ct. App. 1938); *Crittenden v. Mun. Court*, 31 Cal. Rptr. 280, 281, 216 Cal. App. 2d 811, 812 (Ct. App. 1963). Thus, it will not lie to suspend a judicial proceeding already completed. *Donner*, 81 P.2d at 1056, 28 Cal. App. 2d at 114. The People ask this court to issue the writ to arrest the proceedings of the lower court in this matter. However, the *ex parte* motion has been heard and an order rendered. There are no proceedings in violation of Rule 9 for this court to arrest.

[11] The lower court's conduct in the July 6th hearing - specifically its request that Cepeda appear to argue the People's motion before the court - is similarly moot. A writ of prohibition cannot operate to arrest proceedings that are already completed. Moreover, it is not clear to this court that the assigned judge was without authority to make the request. The judge expressed a preference that Cepeda, the attorney who previously represented the People at the *ex parte* hearing and who wrote the People's motion, argue the points of her brief before the court. Without objection, the People obliged the lower court's request and Cepeda appeared before the court. There is no evidence that the lower court would have refused to hear from the People if Cepeda could not be present. There is also no evidence that the People were prejudiced by having Cepeda argue the motion. While we recognize the People's right to select its counsel and discourage the lower court from intruding upon that right, the circumstances here do not warrant a finding that the lower court acted without jurisdiction. *See People v. Superior Court (Greer)*, 561 P.2d 1164, 1170-71, 19 Cal. 3d 255, 265 (1977) (discussing the executive's authority to

choose who will prosecute a case, but recognizing that once the jurisdiction of the court is invoked by the filing of a criminal charge, the disposition of the case becomes a judicial responsibility and the discretion of the executive becomes subject to the supervision of the trial court). We hold that a writ of prohibition is not the People's appropriate remedy.

B. Writ of Mandate

1. Limiting the writ of mandate in criminal cases.

[12] The People are requesting an alternative writ of mandate that requires the lower court to vacate its order to preserve the field notes made during the investigation of Laxamana's case. A writ of mandate is used to compel performance of a legal duty, and must be issued whenever a beneficially interested petitioner has no plain, speedy, and adequate remedy available at law. Title 7 GCA §§ 31202, 31203 (1998); *Bank of Guam v. Reidy*, 2001 Guam 14, ¶ 27; *San Francisco v. Superior Court*, 271 P. 121, 122, 94 Cal. App. 318, 320 (Ct. App. 1928); *Grant v. Bd. of Med. Exam'rs*, 43 Cal. Rptr. 270, 274, 232 Cal. App. 2d 820, 826-27 (Ct. App. 1965). Furthermore, since this is a criminal case and the People are the petitioners, the right to extraordinary review is further limited.

[13] While the statutes do not expressly differentiate between the issuance of a writ in a civil versus criminal case, California's Supreme Court has strictly limited the People's right to seek extraordinary review in a criminal case. This approach began with *People v. Superior Court (Howard)*, 446 P.2d 138, 69 Cal. 2d 491 (1968), which raised the following concern: "[t]he Legislature has determined that except under certain limited circumstances the People shall have no right of appeal in a criminal case." *Howard*, 446 P.2d at 143, 69 Cal. 2d at 498. Only by strictly limiting the People's right to seek an extraordinary

writ will the court avoid "giv[ing] the People the very appeal which the Legislature has denied to them." *Id.* at 144, 69 Cal. 2d at 499. *Howard* concluded by overlaying the statutory requirements for a writ of mandate with two judicially created rules: (1) writ of mandate will only issue if the court is acting in excess of its jurisdiction, *id.* at 143, 69 Cal. 2d at 498; and (2) writ of mandate will only issue if the need to correct error outweighs any harassment of the accused, *id.* at 145, 69 Cal 2d at 501. Further, *Howard* expressly held that a writ of mandate cannot be issued where there is a danger of further retrial. *Id.*

[14] The California Supreme Court followed its decision in *Howard* with *People v. Superior Court (Edmonds)*, 483 P.2d 1202, 4 Cal. 3d 605 (1971). In *Edmonds*, the court re-enunciated the concerns raised in Howard, stating "[w]e disapproved certain prior cases which had suggested that every judicial act in excess of power is also an excess of jurisdiction, and which had thereby extended the term 'jurisdiction' beyond its traditional sense . . . ." *Edmonds*, 483 P.2d at 1204, 4 Cal. 3d at 608. The court ultimately issued a writ of mandate after finding that the trial court erred because it lacked jurisdiction over the subject matter and concluding that the issuance of the writ posed no danger of further trial or retrial. *Id.* at 1204, 1206, 4 Cal. 3d at 609, 611. Thus, in determining the mandate was appropriate, the court relied on the principles set forth in *Howard*. *Id.* at 1204, 4 Cal. 3d at 609.

[15] The *Howard/Edmonds* balancing test was later expanded by a degree of judicial willingness to grant an extraordinary writ where the issue does not relate to questions of guilt or innocence, does not involve harassment of a defendant, or does raise issues of significant public interest. *People v. Municipal Court (Gelardi)*, 149 Cal. Rptr. 30, 33, 84 Cal. App. 3d 692, 697 (Ct. App. 1978) (citations omitted). However, the issue that both *Howard* and *Edmonds* left unclear, and the issue that has been the subject

of much conflicting case law in California, is how to define the phrase "in excess of jurisdiction." [2]

[16] Like most jurisdictional splits, the two sides of this issue are represented by two completely opposing definitions. The expansive concept of "in excess of jurisdiction" is derived from civil cases. In *Abelleira v. Dist. Court*, 109 P.2d 942, 17 Cal. 2d 280 (1941), the court determined that lack of jurisdiction refers to "any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis . . . ." *Abelleira*, 109 P.2d at 948, 17 Cal. 2d at 291. This broad concept of jurisdiction permits the issuance of a writ to correct errors that are an abuse of a court's discretion. *See Gelardi*, 149 Cal. Rptr. at 33, 84 Cal. App. 3d at 698 ("mandate or prohibition may be allowed, before trial of an accused and on the People's application, to rectify . . . an 'abuse of discretion' . . . .") (citation omitted); *see also People v. Municipal Court (Bonner)*, 163 Cal. Rptr. 822, 825-26, 104 Cal. App. 3d 685, 692 (Ct. App. 1980) (finding that a writ of mandate should issue where the court could only exercise its discretion in one way and it failed to do so). In criminal cases, courts that follow this broad approach rely instead on the second of *Howard's* two requirements, the balancing test, to limit the People's access to extraordinary review. *See People v. Municipal Court (Kong)*, 175 Cal. Rptr. 861, 865, 122 Cal. App. 3d 176, 182 (Ct. App. 1981); *see also People v. Superior Court (Himmelsbach)*, 230 Cal. Rptr. 890, 895, 186 Cal. App. 3d 524, 531-32 (Ct. App.

[2] Although most cases deal with this issue when considering a writ of mandate, how a court defines "excess of jurisdiction" affects both the writ of prohibition and writ of mandate. A writ of prohibition is only issued if a court is acting in excess of its jurisdiction. 7 GCA § 31301. Now, in accordance with the test set forth in *Howard*, a writ of mandate can only be issued if a court exceeds its jurisdiction. Thus, adopting a position that clearly defines when a court has exceeded its jurisdiction is essential to provide future guidance to this court in granting extraordinary relief.

1986) (overruled on other grounds by *People v. Norrell*, 913 P.2d 458, 13 Cal. 4th 1 (1996)) (summarizing cases that have adopted the broad view of jurisdiction in the wake of *Howard*).

[17] The restrictive concept of "in excess of jurisdiction" is derived from the traditional concept of jurisdiction, i.e., where the court has acted without jurisdiction of the subject matter or person. *Howard*, 446 P.2d at 144, 69 Cal. 2d at 500. Courts have interpreted *Howard* and *Edmonds* as rejecting the more expansive definition of jurisdiction in favor of the more traditional concept. *See Kong*, 175 Cal. Rptr. at 865, 122 Cal. App. 3d at 183 (stating that mandate will not issue unless the order complained of was made without jurisdiction in the traditional sense); *see also People v. Superior Court (Ludwing)*, 220 Cal. Rptr. 87, 88, 174 Cal App. 3d 473, 475 (Ct. App. 1985) (noting that the *Howard* test requires an act in excess of a lower court's jurisdiction in the traditional sense); *see also People v. Superior Court (Duval)*, 244 Cal. Rptr. 522, 525, 198 Cal. App. 3d 1121, 1128 (Ct. App. 1988). Under this more narrow approach, an abuse of discretion is not a sufficient basis upon which to issue a writ. *Kong*, 175 Cal. Rptr. at 864, 122 Cal. App. at 180.

[18] It is from these two divergent lines of cases that Guam must adopt its position. As previously noted, subsequent to the *Howard/Edmonds* ruling, many appellate courts followed the expansive concept of "in excess of jurisdiction" and combined it with the *Howard* balancing test. *Kong*, 175 Cal. Rptr. at 865, 122 Cal. App. 3d at 182; *see also Himmelsbach*, 230 Cal. Rptr. at 895, 186 Cal. App. 3d at 531-32 (summarizing the holdings of courts that adopted a broad view of jurisdiction). *Kong* was the first case that took this approach one step further, relying on its interpretation of the *Howard/Edmonds* decisions to expressly limit "jurisdiction" to its traditional definition. *See Kong*, 175 Cal. Rptr. at 864-66, 122 Cal.

App. 3d at 180-83. However, *Kong's* final step is neither warranted under *Howard/Edmonds* or necessary to achieve the goals expressed in those decisions.

[19] *Howard* expressly disapproved of a straight adoption of the *Abelleira* approach, fearing that this would provide the People with review of any claimed error occurring at any time in a criminal trial. *Howard*, 446 P.2d at 145, 69 Cal. 2d at 501. But instead of rejecting *Abelleira* altogether, *Howard* simply imposed an additional balancing requirement for the court to consider. *Id.* Thus, instead of limiting the People's right to extraordinary review by narrowing the definition of jurisdiction to its traditional scope, *Howard* added a second, balancing requirement.

[20] The tone in *Edmonds* also reflected a desire to bring the definition of "jurisdiction" more in line with the traditional concept, *see Edmonds*, 483 P.2d at 1204, 4 Cal. 3d at 608 (disapproving of those cases that extended jurisdiction beyond its traditional sense), and the facts of the case would clearly have permitted it, *id.* at 1204, 4 Cal. 3d at 609 (finding that the trial court lacked subject matter jurisdiction). However, instead of seizing the opportunity to unambiguously limit "jurisdiction" to its traditional scope, the court concluded by expressly reaffirming *Howard* and issuing the mandate based on those principles. *Id.* at 1204, 4 Cal. 3d at 609. In short, both cases raised the traditional definition, but neither case chose to go so far as to adopt it.

[21] This is because the more expansive approach, as set forth in *Gelardi*, strikes the balance strived for in *Howard* by providing the People with a means of correcting judicial error while remaining cognizant of the legislature's intent to restrict appeal by the People. *See Gelardi*, 149 Cal. Rptr. at 33, 84 Cal. App. 3d at 697. As noted in *Bonner*:

> We perceive no reason why the People should not be accorded a similar right to pretrial review by writ of a discovery order for which no support can be found in the record. . . . If such review is not accorded to [sic] People, they have no means by which to review a discovery order at all, even if it was made wholly without justification and imposes an outrageous burden on the prosecution and the public fisc [sic].

Bonner, 163 Cal. Rptr. at 828, 104 Cal. App. 3d at 695. Furthermore, if the express limitations set by the legislature are relied upon to limit the People's right to appellate review, then the legislature should be afforded similar deference when it expresses a desire that the People be permitted review. *See People v. Superior Court (Ongley)*, 240 Cal. Rptr. 487, 488 n.1, 195 Cal. App. 3d 165, 168 n.1 (Ct. App. 1987).

> [T]he legislature has expressly authorized the People to employ the device of extraordinary writ. . . . The statute, on its face, is applicable to all petitions from any party to a superior court writ proceeding. Had the Legislature intended no review by the People, it would have clearly so provided. . . .

Id. Based on these principles, this court declines to adopt the traditional definition of jurisdiction in its issuance of extraordinary relief. Instead, we adopt the more expansive approach and use it in connection with the *Howard* balancing test.

[22] In summary, the issuance of a writ of mandate requires a petitioner to satisfy both statutory and judicial requirements. The statute requires the petitioner to show both that there is no plain, speedy, and adequate remedy in the ordinary course of law and that he is a beneficially interested party. 7 GCA § 31202. Under judicially imposed constraints, the People must show that the lower court acted in excess of its jurisdiction and that the need to correct the error outweighs any harassment of the accused. *See Howard*, 446 P.2d at 143, 145, 69 Cal. 2d at 498, 501; *see also Bonner*, 163 Cal. Rptr. at 827-28, 104 Cal. App. 3d at 694-95 (citations omitted).

2. Statutory Requirements.

[23] As the petitioner, the burden lies with the People to satisfy 7 GCA § 31202.[3] *See People v. Superior Court (Bruneman)*, 1998 Guam 24, ¶ 3; *see also Grant*, 43 Cal. Rptr. at 274, 232 Cal. App. 2d at 826-27. Whether a petitioner has a plain, speedy, and adequate remedy in the ordinary course of law is a question of fact to be determined by the court on a case-by-case basis. *San Francisco*, 271 P. at 122, 94 Cal. App. at 320. Title 8 GCA § 130.20 (1998) enumerates the grounds for a government appeal in criminal cases. No provision within 8 GCA § 130.20 permits the People to appeal a pretrial discovery order. Thus, the People are without a plain, speedy, and adequate remedy at law.

[24] A beneficially interested party is a person that "has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." *Cartsen v. Psychology Examining Comm.*, 614 P.2d 276, 278, 27 Cal. 3d 793, 796 (1980). The petitioner must establish both that a substantial right needs protection and that a substantial injury was or will *in fact* be suffered. *See id.* at 278, 27 Cal. 3d at 796-97; *see also Associated Builders &*

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[3] In *Guam Publ'n, Inc. v. Superior Court*, 1996 Guam 6, this court set forth the following guidelines for the issuance of a writ of mandate:

> (1) The party seeking writ has no other adequate means, such as direct appeal, to attain the relief he or she desires; (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) The court's order is clearly erroneous as a matter of law; (4) The court's order is an oft-repeated error, or manifests a persistent disregard of the rules; and (5) The court's order raises new and important problems, or issues of law or first impression.

Guam Publications, 1996 Guam 6 at ¶ 11 (citing *Bauman v. United States*, 557 F.2d 650, 654-55 (9th Cir. 1977)). However, these factors were derived from the Ninth Circuit. *See Bauman*, 557 F.2d at 654-55. The issuance of an extraordinary writ under the federal standard, which is found in the All Writs Statute, 29 U.S.C. § 1651, sets forth a different standard that the standard found in Title 7 GCA § 31203. Under Guam's writ statute, if a *beneficially interested* party establishes that he has *no plain, speedy, and adequate remedy at law*, then the statutory requirements for the issuance of a writ are satisfied, irrespective of the remaining factors. 7 GCA § 31203. While the factors considered in *Guam Publications* remain relevant to a court's determination of mandamus, it must be noted that the two controlling factors are clearly dictated by statute.

Contractors, Inc. v. San Francisco Airports Comm'n, 981 P.2d 499, 504, 21 Cal. 4th 352, 361-62 (1999) (finding that the requirement that a party be "beneficially interested" is equivalent to the federal "injury in fact" test); *see also Braude v. City of Los Angeles*, 276 Cal. Rptr. 256, 258, 226 Cal. App. 3d 83, 87 (Ct. App. 1990) (noting that a petitioner must have a substantial interest in the outcome of the proceedings); *see also Grant*, 43 Cal. Rptr. at 274, 232 Cal. App. 2d at 827 (stating that a writ of mandate will not issue unless it is necessary to protect a substantial right from substantial damage). More specifically, the petitioner must show that "it has suffered an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Associated Builders*, 981 P.2d at 504, 21 Cal. 4th at 362 (internal quotations and citations omitted).

[25] The People argue that the lower court's order of preservation harmed it in two ways. First, the court denied the People due process of law by hearing Laxamana's motion for preservation *ex parte*. Second, the court rendered the People vulnerable to contempt charges by demanding field notes in the possession of the GPD be preserved. The People must establish that they suffered one of the above two injuries to establish that they are a party with a beneficial interest.

[26] As discussed previously, the assigned judge should neither have heard nor rendered an order in response to Laxamana's *ex parte* motion. However, the lower court's violation of Rule 9 is not, in and of itself, sufficient to establish a beneficial interest. *See Personnel Comm'n v. Barstow Unified Sch. Dist.*, 50 Cal. Rptr. 2d 797, 801, 43 Cal. App. 4th 871, 880 (Ct. App. 1996). It is the People's position that, in addition to violating Rule 9, hearing the matter *ex parte* constituted a violation of their due process rights. "The basic elements of due process are reasonable notice and an opportunity to be heard." *City*

of Alhambra v. Superior Court, 252 Cal. Rptr. 789, 797, 205 Cal. App. 3d 1118, 1131 (Ct. App. 1988). In *City of Alhambra*, the People argued that the court denied it due process by considering an *ex parte* motion for pretrial discovery under seal. *Id.* at 800, 205 Cal. App. 3d at 1135. The court found no due process violation, in part, because the People were well prepared and argued the motion at length, thereby demonstrating that they were in fact afforded a fair hearing. *Id.* The People in the instant case were also granted the opportunity to fully brief and argue the merits of their position. At the initial *ex parte* hearing, the court simply ordered the field notes be preserved for a later determination of discoverability. Later, the People provided the lower court with a 24-page brief of the issues and argued their motion at length before the court. Like the court in *City of Alhambra*, we find this evidences that the People were provided a fair hearing and sufficient due process.

[27] The next issue to address is whether the order of preservation itself constitutes sufficient injury to render the People a beneficially interested party. The People argue that the court's order subjects them to contempt charges for the actions of a third party. However, the precedent is firmly established that for purposes of pretrial discovery, police agencies are considered to be agents acting on behalf of the prosecution. *See United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) ("The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant."); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (determining that the prosecution's duty to search extends to branches of the government "closely aligned with the prosecution") (citation omitted); *see also United States v. Ramos-Cartagena*, 9 F. Supp. 2d 88, 91 (D.P.R. 1998) ("The 'prosecution' also includes

police officers, federal agents, and other investigatory personnel who participated in the investigation and prosecution of the instant case."); *see also People v. Johnson*, 608 N.Y.S.2d 995, 996-97 (App. Div. 1994) (providing a three prong test for determining whether an agency constitutes a "police agency," thereby placing upon the prosecution an affirmative obligation to search a police agency's files for discoverable material). To find otherwise would allow the prosecution to circumvent its duties of disclosure by "keeping itself in ignorance, or compartmentalizing information about different aspects of a case." *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984). Because we find that the People are imputed with possession of material within the control or possession of GPD, the court's order requiring the People to inform GPD to preserve the field notes was not improperly directed.

[28] Furthermore, there is nothing to indicate that the lower court intended or intends to hold the People in contempt for failure to preserve field notes already destroyed prior to the issuance of the June 21st order. Transcript, vol. --, p. 18-19 (Hearing on Defendant's Ex Parte Motion to Preserve Witness Statements and Investigative Field Notes, June 21, 2001) (ordering that investigative field notes that "may be available" be preserved "as of today"). The judge, knowing that it was the practice of GPD to routinely destroy field notes, issued the preservation order in an effort to save whatever field notes still existed to allow the issue of their discoverability to later be determined. The People were expected to contact GPD and notify GPD of the court's order. This is what the People did, and whatever field notes still existed were preserved. The court's order was fulfilled, and therefore, there is no actual or imminent threat of contempt.

[29] Because the People have suffered no injury in fact, they are not a beneficially interested party. The court's order requiring the preservation of GPD's field notes did not deprive the People of due process nor are the People facing any actual or imminent charges of contempt. Absent a showing of a beneficial interest, as required by 7 GCA §31203, the People cannot establish standing to seek a writ of mandate vacating the lower court's order of preservation. Therefore, we decline to issue the writ with respect to the June 21, 2001 order.

C. A writ of mandate will be issued ordering the lower court to vacate its order that the field notes be disclosed because the lower court abused its discretion in determining the field notes' discoverability.

[30] At the July 6th hearing, the assigned judge found GPD's field notes discoverable and ordered that they be disclosed to Laxamana. The People argue that field notes are not discoverable material under Guam statute and seek a writ of mandate vacating the lower court's order. Again, the burden is on the petitioner to show that the statutory and judicial requirements for a writ of mandate are met.

[31] An improper pretrial discovery order satisfies the statutory requirements for a writ of mandate. As noted above, the People cannot appeal from such an order, and are thus without a plain, speedy, and adequate remedy at law. Second, the People are a beneficially interested party, since an improper discovery order would require the People to give to the defense material in their possession that the defense has no statutory right to receive.

[32] However, the People must also show that their petition satisfies the requirements of *Howard*. The discoverability of police field notes is an issue that courts at both the federal and state level have struggled with. While remaining cognizant of the legislature's intent to restrict appeal by the People, we find this to

be a case which does not relate to any questions of guilt or innocence nor does it involve any harassment of the defendant. *Gelardi*, 149 Cal. Rptr.at 33, 84 Cal. App. 3d at 697 (citations omitted). Furthermore, the particular issue raised here, with respect to a defendant's right to pretrial discovery of police field notes, is of significant public interest. *Id.* Given the importance of the issue and the fact that it is a matter of first impression for our court, we hereby find that the balance favors review.

[33] In determining whether the lower court exceeded its jurisdiction in ordering the field notes discoverable, the court's focus rests on the potential discoverability of police field notes under Title 8 GCA § 70.10 (1998). In particular, we must determine the following: (1) how Guam defines the term "statement" as used in section 70.10; (2) whether field notes are potentially discoverable under section 70.10 and should hereinafter be preserved; and (3) whether the lower court properly found the preserved field notes discoverable under section 70.10.

1. Defining "Statement."

[34] Section 70.10 delineates materials that the prosecution is obligated to disclose to the defense in a criminal case. The statute reads in pertinent part:

> **§ 70.10. Matters Generally Discoverable; Prosecutors' Obligations.** (a) . . . upon noticed motion by the defendant, the court shall order the prosecuting attorney to disclose to the defendant's attorney or permit the defendant's attorney to inspect and copy the following material and information within his possession or control, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney:
>
> > (1) the name and address of any person whom the prosecuting attorney intends to call as a witness at the trial, together with his relevant written or recorded statement;[4]

[4] This section is similar to the Jencks Act, 18 U.S.C. § 3500 (2000), in that it concerns the disclosure of witness statements. However, there are substantial differences between section 70.10(1) and Jencks that will be discussed

> (2) any written or recorded statement and the substance of any oral statement made by the defendant or made by a co-defendant if the trial is to be a joint one;[5]
> . . .
> (7) any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.[6]

Title 8 GCA § 70.10 (1998). Focusing on subsections (1) and (2), it is evident that disclosure of witness and defendant statements depends on what qualifies under section 70.10 as a "statement." A survey of federal and state court decisions reveals that a surprisingly significant amount of litigation surrounds the construction of this seemingly unambiguous term.

[35] Cases that have faced the task of defining "statement" generally fall along one of two lines of thought. The Jencks Act represents the more restrictive approach, requiring a substantially verbatim recording to be produced contemporaneously with the making of the statement. 18 U.S.C. § 3500(e) (2000). Jurisdictions that have adopted the more restrictive approach believe that narrowly defining "statement" precludes counsel from unfairly using another's impression or interpretation of a witness' statement to harass or impeach that witness. ABA STANDARDS FOR CRIMINAL JUSTICE § 2.1 cmt. (Approved Draft 1970) [hereinafter "ABA Draft"]; *State v. Fukusaku*, 946 P.2d 32, 63-64 (Haw. 1997) (referring to the ABA Draft). The more liberal approach is represented by the ABA majority standard, which finds any utterance recorded in whole or in part sufficient to constitute a statement. ABA Draft §

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further.

[5] This section, requiring the discovery of a defendant's statement, parallels Rule 16 of the Federal Rules of Criminal Procedure.

[6] This section is the statutory codification of the decision in *Brady v. Maryland*, which held that the suppression by the prosecution of exculpatory evidence upon request by the defendant violates due process. *Brady v. Maryland*, 373 U.S. 83, 86-87, 83 S. Ct. 1194, 1196-97 (1963).

2.1 cmt. The policy supporting this viewpoint is that broader discovery encourages fairness by giving the defense access to written and recorded statements, while simultaneously discouraging the practice by some law enforcement of destroying original notes in order to avoid cross-examination. ABA Draft § 2.1 cmt.; *see also Campbell v. United States*, 373 U.S. 487, 495-97, 83 S. Ct. 1356, 1362 (1963) (holding that the discovery of interview notes furthers the fair administration of criminal justice). Guam's legislature did not expressly define the term "statement" in section 70.10. However, a review of the legislative history can guide this court in adopting a definition.

[36] In *Taitano v. Government of Guam*, 187 F. Supp. 75 (D. Guam A.D. 1960), Guam adopted the Jencks Act (hereinafter "Jencks"), a federal statute that sets forth two basic propositions. *Taitano*, 187 F. Supp. at 78. The first is that a witness' statement is not discoverable until after the witness testifies at trial. 18 U.S.C. § 3500(a). Second, Jencks defined a statement as being: (1) a written statement made by the witness and signed or otherwise adopted or approved by him; (2) a recording which is a substantially verbatim recital of the witness' oral statement and is made contemporaneously with the making of the statement; or (3) a statement made, however recorded, by a witness to the grand jury. 18 U.S.C. § 3500(e).

[37] Guam superceded the first of Jencks' two principles when it passed section 70.10(a), permitting the pretrial disclosure of a witness' statement. However, that statute is noticeably silent with respect to Jencks second principle, the definition of the term "statement." The People argue that the legislature's failure to expressly supplant the definition of "statement" in section 70.10 leaves the Jencks definition intact. We disagree. The advisory notes accompanying section 70.10 reveal that the statute was predicated on

section 2.1 of the ABA Draft and Rule 16 of the Federal Rules of Criminal Procedure. Both models advocate a position inconsistent with Jencks

[38] The ABA Draft did not expressly incorporate a definition of "statement" in its provisions. However, the Committee did state in its Commentary to section 2.1 that a substantial majority of the ABA Committee rejected the much-litigated, restrictive definition of "statement" contained in Jencks. ABA Draft § 2.1 cmt. The Commentary also stated that the "Advisory Committee intends that the term [statements] be given a broad meaning so as to include generally any utterances of the statement-giver which are recorded by any means in whole or in part, and regardless of to whom they were made . . . . It is also intended that the statements be discoverable regardless of how they are obtained, whether surreptitiously or voluntarily." *Id.* Clearly, the ABA Committee sought to expand its standards beyond Jencks, but left the extent of that expansion for individual jurisdictions to determine. *Id.*

[39] Section 70.10 is also based on Rule 16 of the Federal Rules of Criminal Procedure. There is evidence that Rule 16, which cited approvingly to the ABA Draft, adopts the broader approach for disclosure of a defendant's statements. FED. R. CRIM. P. 16 cmt.; *United States v. Lewis*, 511 F.2d 798, 803 n.8 (D.C. Cir. 1975). Both Rule 16 and the ABA Draft also favor the expansion of discovery, noting that "broad discovery contributes to the fair and efficient administration of criminal justice . . . ." FED. R. CRIM. P. 16 cmt.; ABA Draft § 2.1 cmt. A narrow definition of "statement" limits a prosecutor's obligation to disclose, thereby undermining a policy of broader discovery. Thus, a position that encourages broader discovery by implication discourages the narrow approach of Jencks.

[40] In Guam's discovery statue, the advisory notes that introduce Chapter 70 expressly advocate the

notion of expanding discovery, citing to *People v. Riser*, 47 C.2d 566, 586, 305 P.2d 1 (1956) (stating that "the state has no interest in denying the accused access to all evidence that can throw light on the issues in the case . . . ."). Title 8 GCA ch. 70 note (1998). This position is reflected throughout the Chapter's following sections, particularly section 70.10 because it relies on the ABA Draft and Rule 16, both of which pursue the same goal. Thus, upon review of the history of section 70.10 and in light of its aim to liberalize discovery, it is evident that the Legislature intended the term "statement" to be broadly construed. Therefore, we find that the enactment of section 70.10 superceded *Taitano* and any application of Jencks in Guam. Furthermore, we define "statement" as used in section 70.10 to include any record that embodies or summarizes, in whole or in part, a person's verbal utterance. ABA STANDARDS FOR CRIMINAL JUSTICE 11-2.1 cmt. (3d ed. 1996). This includes not only records created or adopted by the statement-giver, but any affidavits, police reports, tape recordings, interview notes, grand jury transcripts, letters, memoranda, or other documents or recordings of any type that reflect or summarize the statement made. *Id.*

2. Field notes are potentially discoverable and must be preserved.

[41] By defining "statement," we can now determine what is discoverable under section 70.10. *See State of Hawaii v. Maluia*, 539 P.2d 1200, 1209 (Haw. 1975) (noting that the definition of "statement" limits what is producible under the rule). Determining whether material is discoverable controls our inquiry because only items that may be discovered need to be preserved. Therefore, this court must first determine whether the material contained in police field notes is potentially discoverable under section 70.10. If so, then we must further determine whether GPD must cease its practice of routinely destroying field notes.

[42] Police field notes, particularly those made during an interview with a defendant or witness, often contain phrases or quotes that reflect what the interviewee communicated to the officer. Recording an interviewee's statement allows the officer to later transcribe that information into a more formal report. Material of this nature is likely to fall within our definition of "statement" and is thus potentially discoverable under section 70.10. Cases have found the information contained in rough notes of witness interviews discoverable, *Thompson v. Superior Court*, 61 Cal. Rptr. 2d 785, 787, 53 Cal. App. 4th 480, 485 (Ct. App. 1997), even under relatively narrow standards, *People v. Shaw*, 646 P.2d 375, 381 (Colo. 1982) (finding that original interview notes should have been preserved and disclosed under a standard that defined statements as substantial recitals reduced to writing contemporaneously with the making of the statement).

[43] The People rely on a line of cases that find field notes *per se* not discoverable. *United States v. Harrison*, 524 F.2d 421, 431 n.25 (D.C. Cir. 1975) (citing to decisions from the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth circuits sanctioning the destruction of field notes); *United States v. Hinton*, 719 F.2d 711, 717 n.11 (4th Cir. 1983) (adding cites of decisions subsequent to *Harrison* adhering to the majority rule that the loss of field notes does not require sanctions under Jencks); *Maluia*, 539 P.2d at 1209; *State v. Morrison*, 575 P.2d 988, 990-91 (Or. Ct. App. 1978); *State v. Wilcox*, 758 A.2d 824, 831 n.18 (Conn. 2000); *People v. Holtzman*, 593 N.W.2d 617, 623 (Mich. Ct. App. 1999); *State v. Banks*, 446 So. 2d 497, 501-02 (La. 1984). The common thread weaving throughout these cases is an adoption of the Jencks narrow approach and a determination that the material written in field notes cannot qualify as a "statement" under such a restrictive definition. However, this court rejects Jencks

in favor of the ABA's more liberal approach. Thus, each of these cases becomes distinguishable.

[44] Moreover, section 70.10 allows for discovery beyond witness statements. Both defendant's statements and *Brady* material must be produced under section 70.10. There is precedent finding rough notes discoverable under Rule 16. *See Lewis*, 511 F.2d at 802 n.6 (citing to several cases that held agent notes discoverable if the notes contained the substance of defendant's words); *see also United States v. Harris*, 543 F.2d 1247, 1252 (9th Cir. 1976) (noting that several circuits have ruled rough notes of a defendant's statements discoverable under Rule 16); *see also United States v. Johnson*, 525 F.2d 999, 1003-04 (2d Cir. 1975) (noting a split in jurisdictions and finding that the a summary of defendant's words constituted a discoverable statement under Rule 16). In addition, pursuant to *Brady*, any exculpatory evidence, even if contained in field notes, must be produced. *See California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984); *see also Harrison*, 524 F.2d at 427. Thus, field notes that contain material falling into either one of the above categories become discoverable.

[45] Because field notes may contain information that can be discovered under section 70.10, they must be preserved. "[T]he duty of disclosure is operative as a duty of preservation." *United States v. Bryant*, 439 F.2d 642, 651 (D.C. Cir. 1971) (*overruled on other grounds by Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1998)); *Maluia*, 539 P.2d at 1211; *Shaw*, 646 P.2d at 381 ("The state has the duty to employ regular procedures to preserve such discoverable evidence"); *People v. Hitch*, 527 P.2d 361, 369, 12 Cal. 3d 641, 652 (1974) (*overruled on other grounds by California v. Trombetta*, 167 U.S. 479, 104 S. Ct. 2528 (1984)) (requiring the government to show that it promulgated, enforced, and attempted in good faith to follow rigorous and systematic procedures designed to preserve all discoverable

evidence); *State v. Wright*, 557 P.2d 1, 7 (Wash. 1976) (*overruled on other grounds by State v. Straka*, 810 P.2d 888 (Wash. 1991)).[7] The obligation of the prosecution to disclose certain items is rendered meaningless without a corresponding obligation on the part of the prosecution to preserve those potentially discoverable items. Simply put, the prosecution cannot disclose what it no longer possesses.

[46] Perhaps even more significant is the notion that failure by a state agency to preserve potentially discoverable material usurps a judicial function. *Harris*, 543 F.2d at 1248. Determining the scope of discovery is a role traditionally reserved for the court.[8] *Campbell*, 373 U.S. at 493, 83 S. Ct. at 1360 ("Final decision as to production must rest . . . within the good sense and experience of the district judge . . . ."); *Harrison*, 524 F.2d at 428 ("The decision on discoverability is emphatically a judicial decision."); *Harris*, 543 F.2d at 1250 ("[I]t is a judicial function to determine the issue of producibility.") (citation omitted). Allowing a government agency to institute a procedure of regularly destroying potentially discoverable material vitiates the court's authority, leaving the judiciary with the awkward task of guessing.

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[7] Several cases by the U.S. Supreme Court consider the issue of preservation of evidence. In *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1998), the U.S. Supreme Court held that, in order to establish a due process violation for failure to preserve evidence, a defendant must prove bad faith on the part of police officers. *Arizona*, 488 U.S. at 58, 109 S. Ct. at 337-38. In *California v. Trombetta*, 167 U.S. 479, 104 S. Ct. 2528 (1984), the Court commented on the government's affirmative duty to preserve evidence, finding that without a showing of materiality, a defendant cannot establish a due process violation under the fourteenth amendment. *Trombetta*, 167 U.S. at 488-89, 104 S. Ct. at 2534. These rulings, however, do not obviate the initial duty of the government to preserve discoverable evidence; they simply address the burden a defendant bears before he is entitled to remedial measures should the government fail to fulfill that duty.

The issues we are considering here do not raise a potential conflict with these established precedents. We do not purport to establish a rule that the failure of officers to preserve field notes alone violates due process. On the contrary, our imposition of a duty upon officers to preserve field notes is not a measure we find constitutionally required by due process. Instead, we are determining whether the preservation of field notes is necessary in light of the obligations imposed upon the government and the court in section 70.10.

[8] It is worth noting at this point that Guam adopted the ABA Draft with one important modification. The ABA Draft eliminated the language "the court shall order," making it clear that discovery is to be accomplished by the parties themselves without court involvement. Guam retained that language, indicating the legislature's desire that the court retain its traditional function of determining the producibility of evidence.

"Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." *Trombetta*, 467 U.S. at 486, 104 S.Ct. at 2533. Common sense dictates that the court cannot properly perform its inquiry if the material is destroyed. *Harrison*, 524 F.2d at 427-28.

[47] Not only does such a procedure impede on the court's authority, but it simultaneously undercuts a defendant's statutory rights. *Bryant*, 439 F.2d at 650 ("[T]he right to a fair trial would depend on the uncertain and uncontrolled decisions of Government investigators."). Every defendant is entitled to the material listed in the provisions of section 70.10. The language of the statute mandates that upon motion, the court order its discovery. If the court finds that the material falls within the statute, then the defendant has a statutory right to its disclosure. The systematic destruction by police of notes that may or may not be discoverable is insufficient to protect a defendant's right to discovery. *Id.* at 652. Preservation ensures that a defendant's future right to discovery is not diluted at another, less visible stage. *Id.*

[48] There is a growing concern with respect to the administrative burden a broad preservation rule would impose on abiding governmental agencies. The court must be careful to avoid "imposing on the police and undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337. However, the court here is faced with preserving only a limited and defined type of material - field notes that contain information potentially discoverable under section 70.10. The language of section 70.10, read liberally and in conjunction with the definition of "statement" as set forth in this opinion, provides state agencies with an adequate guideline by which to distinguish between potentially discoverable and non-

discoverable material. Moreover, a preservation rule does not impose upon agencies any new affirmative duty; it simply requires them not to destroy something already created. While this undoubtedly will impose some additional burden on the police department, administrative convenience is an unpersuasive justification for sacrificing an individual's rights. *Harrison*, 524 F.2d at 429. Thus, in the eyes of this court, considering the limited scope of preservation and balancing it against a defendant's statutory rights, the administrative burden that comes with preserving field notes is relatively minimal. *Id.*

[49] Lastly, some critics question whether a defendant that receives a final police report incorporating an officer's field notes is entitled to receive both the field notes and the police report. The Ninth Circuit found that the notes are producible even if it affirmatively appeared that the entire contents of the notes were included in a document that was turned over to the defense. *Harris*, 543 F.2d at 1250 (referring to *United States v. Johnson*, 521 F.2d 1318 (9th Cir.)) . The D.C. Circuit came to the same conclusion, reasoning that "even the most conscientious agent can err . . . . And certainly we cannot consider it beyond the bounds of possibility that a report be distorted because of overzealousness on the part of the agent preparing it . . . ." *Harrison*, 524 F.2d at 429-30. A glance over the shoulders of government agents may be required to safeguard and foster the search for truth in a criminal trial. *See id.* at 430; *see also Bryant*, 439 F.2d at 648. *Harrison* also notes that officers will not be deterred from making final reports, since the more formal reports are often just as useful to the prosecution as the defense. *Harrison*, 524 F.2d at 429 n.21.

[50] This court can elect to work either proactively, by preventing the destruction of field notes, or

reactively, by imposing sanctions following the destruction of field notes.[9] There is substantial case law addressing the reactive approach, most of which decline to impose sanctions for the destruction of discoverable material in light of the harmless error doctrine. However, many of these same courts have frowned when faced with an agency that employs a practice of routinely destroying items likely to contain discoverable material. *See Maluia*, 539 P.2d at 1211 (stating that a number of courts have cautioned against the destruction of interview notes upon preparation of the agent's report); *see also United States v. Johnson*, 337 F.2d 180, 202 (4th Cir. 1964) (criticizing the FBI practice of routinely destroying notes); *see also United States v. Williams*, 604 F.2d 1102, 1117 n.7 (8th Cir. 1979) (leaving open the issue of whether rough notes should be retained and produced, but noting that "such would be a better practice than routine destruction."). We similarly discourage such a practice but elect to work proactively, reserving reactive measures for those inevitable instances when field notes are inadvertently lost or destroyed. We believe that the best method of enforcing a defendant's statutory right to discovery and abiding by legislative intent is for GPD to cease its routine practice of destroying field notes and to institute procedures that preserve them.

[9] When addressing the issue of lost or destroyed evidence, cases have primarily developed along two lines of thought. *Maluia*, 539 P.2d at 1209. The first deals with the producibility of such material, considering whether there is even an obligation to preserve such items. *Hinton*, 719 F.2d at 715 n.3. The second focuses on the motives or reasons behind the destruction, imposing sanctions if the court finds the item was destroyed in bad faith and outside the regular practice of the agency. *Killian v. United States*, 368 U.S. 231, 242, 82 S. Ct. 302, 308 (1961); *Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337 (finding that the failure to preserve potentially useful evidence does not constitute a violation of due process without a showing of bad faith on the part of the government agency). Faced with a practice of routine destruction, this court felt the more pertinent inquiry was whether the material was producible thereby imposing an obligation to preserve.

3. The lower court erred in failing to review the field notes before ordering them discoverable.

[51] The scope of discovery lies within the sound discretion of the lower court and is generally reviewed for manifest abuse of discretion. *Campbell*, 373 U.S. at 493, 83 S. Ct. at 1360-61; *see also State v. Yates*, 765 P.2d 291, 293 (Wash. 1988); *see also Fukusaku*, 946 P.2d at 63. If the lower court abused its discretion in determining that GPD's field notes were discoverable, then it acted in excess of its jurisdiction, and a writ of mandate may be issued to correct the error.

[52] Discoverability turns, not on the form of the material, but on its content. Thus, whether information is contained in a police report or an officer's rough field notes is not determinative. A court must exercise its statutorily delegated power and review the substance of the recording to determine whether the defendant is entitled to its disclosure. Here, the lower court ordered the production of the preserved field notes without first inspecting them. "Inasmuch as the trial court failed to distinguish notes that qualify as a 'statement' from notes that do not, the order was too broad." *Fukusaku*, 946 P.2d at 64. Therefore, we find that the lower court abused its discretion in finding the field notes discoverable without first conducting an in-camera review to determine whether the field notes contained any section 70.10 material. Based on our finding that the lower court abused its discretion in ordering the disclosure of the field notes, we issue a writ of mandate directing the court to vacate its disclosure order.

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IV.

[53] In summary, we decline to grant the People's petition for a peremptory writ of prohibition or an alternative writ of mandate with respect to the lower court's order that the police field notes be preserved. However, an alternative writ of mandate shall issue directing the lower court to vacate its order that the People disclose the preserved field notes to Laxamana. We remand the case to the lower court in order to allow Laxamana to renew his motion for discovery in accordance with the provisions of section 70.10. A motion indiscriminately seeking the discovery of all investigative notes is not a proper request for section 70.10 material. We emphasize that the scope of section 70.10 is limited and only those field notes which contain material potentially discoverable under its provision need be preserved. However, in the same breath, we warn officers to read the provisions of section 70.10 broadly and liberally in order to avoid the negligent destruction of field notes that may contain discoverable material.

[54] Let a Peremptory Writ of Mandate issue, directing the lower court to vacate its July 6, 2001 order and remanding the matter for further proceedings consistent with this opinion.

BENJAMIN J.F. CRUZ
Justice *Pro Tempore*

F. PHILIP CARBULLIDO
Associate Justice

PETER C. SIGUENZA, JR.
Chief Justice