# Preservation of Material Evidence in California: Does *Hitch* Survive *Trombetta*?

## Introduction

In 1974, the California Supreme Court held in *People v. Hitch*[1] that due process required law enforcement agencies to establish policies to preserve material evidence for the use of defendants in criminal prosecutions. When law enforcement intentionally but nonmaliciously has destroyed evidence, the court must determine whether it was material and, if so, whether the government agency involved has established, enforced, and attempted in good faith to adhere to rigorous and systematic procedures to preserve the evidence.[2] The court will find a due process violation when the evidence is material and the prosecution fails to show that the government had established, enforced, and made a good faith effort to adhere to procedures for preservation. If a court finds a due process violation, it must exclude any evidence based on or derived from the destroyed or lost evidence.[3]

In *Hitch,* a county crime lab destroyed the breathalyzer breath sample collected by the police and used to analyze the defendant's blood-alcohol content in a prosecution for driving while intoxicated (DWI).[4] The *Hitch* rule soon became established in California as the due process standard against which intentional, nonmalicious destruction of evidence would be measured in all criminal prosecutions.[5] Under *Hitch,* the prosecution has a duty to preserve and disclose evidence material on the issue of the defendant's guilt or innocence.[6] To establish the materiality of evidence no longer in existence, a defendant need show only a reasonable possibility the evidence would have been favorable on the issue of guilt or

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1. 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974).

2. *Id.* at 647-53, 527 P.2d at 365-69, 117 Cal. Rptr. at 13-17.

3. *Id.* No due process violation occurs if (1) the evidence is not material or (2) the evidence is material but the prosecution has shown that the government had established, enforced, and made a good faith effort to adhere to procedures for its preservation. *Id.*

4. *Id.* at 644-45, 527 P.2d at 363, 117 Cal. Rptr. at 11.

5. *See* People v. Nation, 26 Cal. 3d 169, 175-76, 604 P.2d 1051, 1054, 161 Cal. Rptr. 299, 302 (1980), discussed *infra* notes 53-56 and accompanying text.

6. 12 Cal. 3d at 649-50, 527 P.2d at 367, 117 Cal. Rptr. at 15. " 'The duty of disclosure is operative as a duty of preservation.' " *Id.* at 650, 527 P.2d at 367, 117 Cal. Rptr. 15 (quoting United States v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971) (italics deleted)).

innocence.[7]

The *Hitch* court did not specify whether its holding was based on the United States Constitution or the California Constitution. Since *Hitch,* two events have cast doubt on the continued viability of its due process analysis under either constitution. First, in 1982 the people of California passed Proposition 8, which in part amended the California Constitution to eliminate independent state grounds as a basis for excluding evidence in criminal prosecutions.[8]

Second, in 1984 the United States Supreme Court decided *California v. Trombetta*.[9] Four years earlier in *People v. Trombetta,*[10] a California Court of Appeal in reviewing a DWI conviction had extended the *Hitch* preservation duty to breath samples collected in the intoxilyzer. Relying heavily on *Hitch,* which it characterized as implementing a federal due process standard, the Court of Appeal held that when a law enforcement agency collects evidence with the intoxilyzer or any breath testing device, it must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the defendant.[11]

Upon petition by the California Attorney General, the United States Supreme Court reversed *Trombetta,* holding that the failure of law enforcement personnel to preserve a breath sample for the defendant does not violate the Fourteenth Amendment Due Process Clause.[12] The Court held that the Fourteenth Amendment requires the prosecution to preserve only "constitutionally material" evidence.[13] The standard of constitutional materiality in *Trombetta* differs significantly from the standard articulated in *Hitch*.

Because the Court of Appeal had relied exclusively on the *Hitch* materiality standard,[14] the Supreme Court's reversal of *Trombetta* poses serious questions about the continued validity of *Hitch*. This Note analyzes the effect of *Trombetta* on *Hitch*. First, it examines the due process analysis in *Hitch,* focusing on the "reasonable possibility" standard of materiality for lost or destroyed evidence. It then describes the important role of *Hitch* in California criminal procedure. Second, the Note analyzes the *Trombetta* decision, closely scrutinizing its standard of "constitutional materiality." Third, the Note compares the *Hitch* and

7. 12 Cal. 3d at 649, 527 P.2d at 367, 117 Cal. Rptr. at 15.

8. CAL. CONST. art. I, § 28(d). *See infra* notes 71-77 and accompanying text.

9. 104 S. Ct. 2528 (1984).

10. 142 Cal. App. 3d 138, 190 Cal. Rptr. 319 (1983). In *Trombetta,* the defendants' blood-alcohol content was tested by the intoxilyzer, a device which does not produce a preservable breath sample. The breathalyzer used in *Hitch* does produce a preservable breath sample. *See infra* note 17.

11. *Id.* at 144, 190 Cal. Rptr. at 323.

12. 104 S. Ct. at 2535.

13. *Id.* at 2534.

14. 142 Cal. App. 3d at 143, 190 Cal. Rptr. at 322.

*Trombetta* standards. The Note concludes that *Hitch* is no longer valid law because *Trombetta* in effect overruled *Hitch* to the extent it relied on the Fourteenth Amendment, and because Proposition 8 overruled *Hitch* to the extent it had relied on the California Due Process Clause.

## I. *People v. Hitch*

In *People v. Hitch,*[15] the California Supreme Court established the prosecutorial duty to preserve and disclose material evidence in California. Warner Hitch was arrested for driving while under the influence of alcohol.[16] He submitted to a breathalyzer test, which registered his blood-alcohol content at 0.20%.[17] After the test, the arresting officer

15. 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974). For law review commentary on *Hitch*, see Johnson, *The Supreme Court of California, 1975-76, Foreword: The Accidental Decision and How It Happens,* 65 CAL. L. REV. 231, 234-38 (1977); Note, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine,* 75 COLUM. L. REV. 1355 (1975); Comment, *The Prosecution's Duty to Preserve Evidence Before Trial,* 72 CAL. L. REV. 1019 (1984); Comment, *Breathalyzers: Should the State Be Required to Preserve the Ampoules?* 15 LAND & WATER L. REV. 299 (1980).

16. 12 Cal. 3d at 644, 527 P.2d at 361, 117 Cal. Rptr. at 11. Under California law, it is unlawful for any person to drive while under the influence of alcohol or with a blood-alcohol content of 0.10 percent or more. CAL. VEH. CODE § 23152 (West 1985). These are separate offenses. CAL. VEH. CODE § 23152(a), (b) (West 1985). Any person who drives a vehicle in California is deemed to have consented to a chemical analysis to determine the alcohol content of his blood. CAL. VEH. CODE § 23157(a)(1) (West Supp. 1986). If arrested, the driver may choose analysis of his blood, breath, or urine. CAL. VEH. CODE § 13353(b) (West Supp. 1986). The testing methods must be approved by the California Department of Health Services. CAL. HEALTH & SAFETY CODE § 436.52 (West Supp. 1986), CAL. ADMIN. CODE. tit. 17, R. 75, §§ 1220-1222.2. Failure to submit to one of the tests results in an automatic six-month suspension of the driver's license. CAL. VEH. CODE § 13353(a) (West Supp. 1986). Retestable samples of blood and urine must be preserved. CAL. VEH. CODE § 22157.5 (West Supp. 1986). Until 1974, law enforcement agencies had no duty to preserve retestable breath samples. *Hitch* established the requirement that breath samples must be preserved when the analysis is performed on the breathalyzer.

17. 12 Cal. 3d at 644, 527 P.2d at 363, 117 Cal. Rptr. at 11. The breathalyzer was the prevailing method of breath analysis until the mid-1970s. Brief for Petitioner at 6 n.6, California v. Trombetta, 104 S. Ct. 2528, 2530 n.1 (1984). The breathalyzer captures a breath sample in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the color and translucence of the solution. A beam of light is cast through the solution, and the relative light transmissibility of the solution is registered on a meter which calculates the percentage of alcohol in the blood. 12 Cal. 3d at 644, 527 P.2d at 363, 117 Cal. Rptr. at 11. The correlation between the test ampoule and a reference ampoule provides the reading.

At the time of *Hitch*, law enforcement agencies were replacing the breathalyzer with the intoxilyzer. Brief for Petitioner at 6 n.6, California v. Trombetta, 104 S. Ct. 2528 (1984). The intoxilyzer is now the prevailing method of breath analysis in California. *Id.* The intoxilyzer captures a breath sample in a chamber within the machine. Infrared light is used to sense the alcohol content. The breath sample is not preserved. The chamber is purged with clean air before a breath sample is taken. Two samples of breath are analyzed. The results of the tests, plus the analyses of clean air samples, are printed on a card. The two breath samples must register within 0.02% of each other to be admissible in court. The machine is calibrated

poured the contents of the test ampoule into a bottle, discarded the empty ampoule, and delivered the bottle to the county crime laboratory, which eventually disposed of its contents. The actions of the officer and crime laboratory were in accord with established procedures.[18]

Before trial Hitch moved to suppress the results of the breathalyzer test on the ground that destruction of the test ampoule and its contents had deprived him of due process. The trial court sustained the motion and dismissed the prosecution.[19] The California Supreme Court granted a hearing.[20]

The *Hitch* court examined four separate issues: (1) whether intentional but nonmalicious destruction of material evidence by the prosecution violates due process,[21] (2) what principles should govern the determination whether lost or destroyed evidence is material and favorable to a defendant,[22] (3) whether sanctions should be imposed for the destruction or loss,[23] and (4) what sanctions would be appropriate.[24]

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weekly and the calibration results, as well as a portion of the calibration samples, are available to the defendant. People v. Trombetta, 142 Cal. App. 3d at 141, 190 Cal. Rptr. at 321.

A third breath testing device, the intoximeter, has been approved for use in California but is not widely used. CAL. ADMIN. CODE tit. 17, R. 75, §§ 1220-1221.5, Brief for Petitioner at 6 n.6, California v. Trombetta, 104 S. Ct. 2528. Approved for use with the intoximeter is the field-crimper indium tube encapsulation kit. A breath sample can be captured with the kit in the field and brought to the intoximeter for testing. 142 Cal. App. 3d at 142, 190 Cal. Rptr. at 321.

18. 12 Cal. 3d at 644-45, 527 P.2d at 363, 117 Cal. Rptr. at 11.

19. The trial court determined that it would have been possible to retest the chemical change that had occurred in the contents of the ampoule. It concluded that preservation of the test ampoule would have provided:

> information of value to both the prosecution and the defense; that the intentional but nonmalicious destruction of these items deprived defendant of due process of law by making valuable evidence unavailable; that [California] Vehicle Code section 13354 required preservation of such items, that the results of the breathalyzer test should be suppressed and that the action should be dismissed pursuant to [California] Penal Code section 1385.

12 Cal. 3d at 645, 527 P.2d at 364, 117 Cal. Rptr. at 12. The trial court and the Supreme Court were operating under a scientific misconception. Although the breath samples are preservable, they were not considered to be retestable when *Hitch* was decided. " '[A]t the present time, a scientifically valid procedure is not known to be available for the reexamination of a breathalyzer ampoule.' " Comment, 15 LAND & WATER L. REV. at 304-05 (quoting from JOURNAL OF FORENSIC SCIENCE, July 7, 1978 at 432). *See also* Thornton, *Uses and Abuses of Forensic Science*, 69 A.B.A. J. 288, 292 (1983).

20. 12 Cal. 3d at 645 n.2, 527 P.2d at 364 n.2, 117 Cal. Rptr. at 12 n.2:

> The Appellate Department of the Superior Court of Ventura County reversed the judgment of dismissal. Upon certification by that court that a transfer of the case to the Court of Appeal appeared necessary to secure uniformity of decision and to settle important questions of law, the Court of Appeal, Second Appellate District, ordered said case transferred to it for hearing and decision . . . Division One of said Court of Appeal reversed the judgment of dismissal and remanded the cause to the municipal court for trial. We granted a hearing in this court.

21. 12 Cal. 3d at 647-648, 527 P.2d at 365-66, 117 Cal. Rptr. at 13.

22. *Id.* at 648, 527 P.2d at 366, 117 Cal. Rptr. at 14.

23. *Id.* at 650, 527 P.2d at 367-68, 117 Cal. Rptr. at 15-16.

Only the second issue is relevant to the development of the reasonable possiblity standard of materiality of lost or destroyed evidence.[25]

### A. A Reasonable Possibility: The *Hitch* Materiality Standard

*Hitch* required the court to consider the appropriate standards for determining the materiality of lost or destroyed evidence. This was an issue of first impression in California. The *Hitch* court commenced its analysis by reviewing cases in which the prosecution had intentionally withheld evidence from the defense.[26]

To determine the materiality of intentionally withheld evidence, a reviewing court should "examine the suppressed evidence, decide whether or not it [is] favorable to the accused and ultimately . . . determine whether or not it [is] material by 'look[ing] to the entire record . . . in light of the circumstances . . . consider[ing] not only the other evidence of guilt but also any other defense evidence.' "[27] As the *Hitch* court noted, however, the intentionally withheld evidence was available for examination on appeal in the cases to which it looked for guidance. By contrast, in *Hitch* the evidence no longer existed. Accordingly, the court had to determine:

> [B]y what principles a court should determine a defendant's claim for relief where . . . the evidence subject to disclosure is no longer in existence and the court is therefore unable to ascertain whether such evidence was, or would have been, favorable to the defendant and material on the issue of his guilt or innocence.[28]

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24. *Id.* at 650-52, 527 P.2d at 367-69, 117 Cal. Rptr. at 15-17.

25. The court resolved the other three issues by determining first that the intentional, nonmalicious destruction of evidence can violate due process if the court finds the evidence to have been material and the prosecution had failed to take reasonable steps to preserve it. *Id.* at 647, 650, 527 P.2d at 365, 117 Cal. Rptr. at 13, 16. Sanctions should be invoked when good faith destruction of the evidence is found to have violated due process. *Id.* at 654, 527 P.2d at 371, 117 Cal. Rptr. at 19. The appropriate sanction is exclusion of prosecution evidence based on or derived from the destroyed evidence. *Id.* at 655, 527 P.2d at 371, 117 Cal. Rptr. at 19. In the *Hitch* setting, exclusion of the breathalyzer test results was the appropriate sanction. Another example is exclusion of a police report based on notes that have been lost or destroyed. *See* People v. Goss, 109 Cal. App. 3d 443, 167 Cal. Rptr. 224 (1980), discussed *infra* notes 67-70 and accompanying text.

26. 12 Cal. 3d at 645, 527 P.2d at 364, 117 Cal. Rptr. at 12. In these cases "the settled rule [is] that the intentional suppression of material evidence favorable to a defendant who has requested it constitutes a violation of due process, irrespective of the good or bad faith of the prosecution." *Id.* (citing Giglio v. United States, 405 U.S. 150, 153-54 (1971); Brady v. Maryland, 373 U.S. 83, 87 (1963); and *In re* Ferguson, 5 Cal. 3d 525, 532, 487 P.2d 1234, 1238, 96 Cal. Rptr. 594, 598 (1971)). Even in cases where the defendant has not made a specific discovery request, the prosecution's suppression of material evidence favorable to the accused could violate due process. 12 Cal. 3d at 646-47, 527 P.2d at 365, 117 Cal. Rptr. at 13.

27. 12 Cal. 3d at 647, 527 P.2d at 365, 117 Cal. Rptr. at 13 (quoting *In re* Ferguson, 5 Cal. 3d 525, 533, 487 P.2d 1234, 1240, 96 Cal. Rptr. 594, 600 (1971).

28. *Id.* at 648, 527 P.2d at 366, 117 Cal. Rptr. at 14.

In addressing this issue, the *Hitch* court looked to "another but cognate context"[29] in which the prosecution fails or refuses to disclose the identity of an informer.[30] In these cases, as in the case of lost or destroyed evidence, the materiality of the informer's testimony cannot be established by examining its probable impact on the trial result.[31]

Recognizing the impossibility of showing that the unknown informer would be a material and favorable witness, the court had not required the defendant to prove that the informer would give favorable testimony or was a participant in, or eyewitness to, the crime.[32] The court required the defendant to show only that "in view of the evidence the informer would be a material witness on the issue of guilt and nondisclosure of his identity would deprive the defendant of a fair trial."[33] That burden would be discharged "when [the] defendant demonstrates a reasonable possibility that the anonymous informant . . . could give evidence on the issue of guilt which might result in defendant's exoneration."[34]

Finding nondisclosure of an informer's identity closely analogous to the loss or destruction of evidence,[35] the court applied the reasonable

29. *Id.*

30. In the California informer decisions, which derived ultimately from Roviaro v. United States, 353 U.S. 53 (1957), the court had applied the following rule: "[w]hen it appears from the evidence that an informer is a material witness on the issue of the defendant's guilt, the informer's identity may be helpful to the defendant and nondisclosure would deprive him of a fair trial." Price v. Superior Court, 1 Cal. 3d 836, 842, 463 P.2d 721, 724-25, 83 Cal. Rptr. 369, 372-73 (1970).

Generally, the California informer cases involved arrests and convictions for narcotics violations, in which the unidentified informer had cooperated with the police by setting up or participating in narcotics transactions which led to the defendants' arrests, People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958), which were suspected by the defendants of having played such a role, People v. Perez, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965), or in which the informers had provided incriminating information about the defendants which led to their arrest, Honore v. Superior Court, 70 Cal. 2d 162, 449 P.2d 169, 74 Cal. Rptr. 233 (1969).

The California informer cases on which the *Hitch* court relied were People v. Hunt, 4 Cal. 3d 231, 481 P.2d 205, 93 Cal. Rptr. 197 (1971); Price v. Superior Court, 1 Cal. 3d 836, 463 P.2d 721, 83 Cal. Rptr. 369 (1970); Honore v. Superior Court, 70 Cal. 2d 162, 449 P.2d 169, 74 Cal. Rptr. 233 (1969); and People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958). Other informer cases important in the development of the reasonable possibility standard were People v. Garcia, 67 Cal. 2d 830, 434 P.2d 366, 64 Cal. Rptr. 110 (1967); People v. Perez, 62 Cal. 2d 769, 401 P.2d 934, 44 Cal. Rptr. 326 (1965); People v. Williams, 51 Cal. 2d 355, 333 P.2d 19 (1958); and People v. Castiel, 153 Cal. App. 2d 653, 315 P.2d 79 (1957).

31. 12 Cal. 3d at 647-48, 527 P.2d at 366, 117 Cal. Rptr. at 14.

32. Honore v. Superior Ct., 70 Cal. 2d 162, 168, 449 P.2d 169, 172-73, 74 Cal. Rptr. 233, 236-37 (1969).

33. 70 Cal. 2d at 168, 449 P.2d at 172-73, 74 Cal. Rptr. at 236-37 (quoting People v. Garcia, 67 Cal. 2d 830, 839-40, 434 P.2d 266, 64 Cal. Rptr. 110 (1967)).

34. 12 Cal. 3d at 648-49, 527 P.2d at 366, 117 Cal. Rptr. at 14 (quoting Price v. Superior Ct., 1 Cal. 3d 836, 843, 463 P.2d 721, 725, 83 Cal. Rptr. 369, 373 (1970)).

35. 12 Cal. 3d at 649, 527 P.2d at 367, 117 Cal. Rptr. at 15.

possibility standard to the materiality determination in *Hitch*. The court stated: "If, given the availability of the test ampoule and its contents, and the reference ampoule, there is a reasonable possibility that they would constitute favorable evidence on the issue of guilt or innocence, then such evidence must be disclosed [and preserved]."[36] The *Hitch* court held that the destroyed evidence was material because there was a reasonable possibility that it would impeach the accuracy and credibility of the breathalyzer test results.[37]

The court did not refine or limit the reasonable possibility standard in transferring it from the undisclosed informer context to the unavailable evidence context. This may mean simply that the *Hitch* court intended the reasonable possibility standard be liberally construed when applied to unavailable evidence. However, if the *Hitch* court did not intend a liberal construction of the standard, its analysis appears faulty because it fails to account for the distinctions between the cases of unknown informers and unavailable evidence. For example, it is much more likely that an undisclosed informer, if available, would give favorable testimony than it is that destroyed physical evidence, if available, would be favorable. This is particularly true when the physical evidence has already yielded inculpatory evidence, as the breath samples had in *Hitch*. But "[n]o one knows what the undisclosed informer . . . might testify. He might contradict or persuasively explain away the prosecution's evidence."[38] The informer might "vindicate the innocence of the accused or lessen the risk of false testimony"[39] or amplify prosecution testimony. The informer might disclose an entrapment or confirm the defendant's testimony.[40] Nondisclosure of the informer's identity to a great extent deprives the defendant of the opportunity to challenge evidence offered against him.[41]

By contrast, there is little likelihood that lost or destroyed physical evidence, if available, would produce favorable evidence when it has produced unfavorable evidence already. The purposes for which lost or destroyed evidence is sought are limited. If such evidence were available, its use typically would be limited to disputing comparable specific evidence offered by the prosecution. For example, when the prosecution has introduced results of scientific analysis, such as analyses of breath, blood, or semen samples, availability of a sample for independent analysis by the defendant would be useful only for attacking the accuracy of the results

36. *Id.*

37. *Id.*; *but see supra* note 19.

38. People v. Castiel, 153 Cal. App. 2d at 659, 315 P.2d at 82.

39. People v. McShann, 50 Cal. 2d at 808, 330 P.2d at 36.

40. People v. Perez, 62 Cal. 2d at 773, 401 P.2d at 936, 44 Cal. Rptr. at 328.

41. 50 Cal. 2d at 808, 330 P.2d at 36.

of the prosecution's analysis.[42] As another example, the availability of a police officer's notes that have been destroyed after the information they contained has been transferred to a police report would serve the limited purpose of impeaching the accuracy of the report or the credibility of the police officer. In neither of these situations would the unavailability of the evidence deprive the defendant of the opportunity to challenge the evidence offered by the prosecution. With scientific analysis, the defendant still may attack the general accuracy of the analytic device or method, or he may impugn the accuracy of the specific test results offered by the prosecution by attempting to show machine or operator error or extraneous interference with the test.[43] With police notes, the defendant still may resort to traditional methods of impeaching the officer's credibility. Loss or destruction of physical evidence does not deprive the defendant of the opportunity of producing evidence which might result in his exoneration;[44] other means of producing such evidence are usually available.[45]

If the *Hitch* court had intended to restrict the reasonable possibility standard in the lost evidence context, it might have directed courts to ascertain the existence of a reasonable possibility by reference to the totality of the circumstances in each case.[46] For example, when all of the evidence linking the defendant to the crime is weak, and the lost or destroyed evidence, if available, could conclusively exclude as possible suspects a large majority of the population group of which the defendant is a member, there exists a reasonable possibility that the evidence would have been favorable on the issue of guilt or innocence.[47] However, when the evidence offered by the prosecution is very strong in the totality of circumstances, the possibility that the lost evidence, if available, would have been favorable becomes much less "reasonable."[48] The fact that the *Hitch* court chose not to restrict the reasonable possibility standard in any way suggests that it should be applied liberally.

42. In the case of scientific analysis, as the reliability and accuracy of a particular method or device increases, the likelihood that preserved evidence would be exculpatory decreases. *See Trombetta,* 104 S. Ct. at 2534 n.10.

43. *See, e.g., id.* at 2535.

44. In the informer context, it has been noted that "[i]t is the deprival of the defendants of the opportunity of producing evidence which *might* result in their exoneration which constitutes the error . . . ." People v. Castiel, 153 Cal. App. 2d at 659, 315 P.2d at 82 (emphasis in original).

45. *See* 104 S. Ct. at 2535.

46. This is essentially what the court did eight years later in People v. Hogan, 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982). *See infra* note 58 and accompanying text.

47. *See* People v. Nation, 26 Cal. 3d 169, 604 P.2d 1051, 161 Cal. Rptr. 299 (1980).

48. *See* People v. Hogan, 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982).

### B. Application of the *Hitch* Standard in California

The California Supreme Court has applied the *Hitch* materiality standard in a variety of cases involving lost or destroyed evidence, including a semen sample,[49] fingernail scrapings,[50] police notes,[51] and a urine sample.[52] Consistent with the apparent intention of the *Hitch* court, the court generally has accorded a liberal construction to the reasonable possibility standard.

In *People v. Nation,*[53] the court held that the prosecution must not only retain material evidence but also take reasonable measures to preserve it.[54] In *Nation,* a semen sample had been retained but had deteriorated because it had not been refrigerated.[55] The court found a reasonable possibility that analysis of the semen sample not only might have impeached the credibility of the prosecution's witnesses but also might have exonerated the defendant.[56]

In *People v. Hogan,*[57] the court rejected the appellant's contention that *Hitch* imposed a duty on the prosecution to obtain scrapings from the fingernails of a murder victim.[58] In reaching its holding, the *Hogan* court departed from the liberal application of the *Hitch* standard and determined the reasonable possibility question in light of all of the evidence, rather than on the sole basis of the unavailable evidence. "Considering the totality of circumstances," the court found it "highly implausible that the scrapings could have produced favorable evidence on the issue of guilt."[59]

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49. People v. Nation, 26 Cal. 3d 169, 604 P.2d 1051, 161 Cal. Rptr. 299 (1980).

50. People v. Hogan, 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982).

51. People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981).

52. People v. Moore, 34 Cal. 3d 215, 666 P.2d 419, 193 Cal. Rptr. 404 (1983).

53. 26 Cal. 3d 169, 604 P.2d 1051, 161 Cal. Rptr. 299 (1980).

54. *Id.* at 177, 604 P.2d at 1055, 161 Cal. Rptr. at 303.

55. The conviction was not reversed on this ground, however, because the state had delivered the sample to the defense at its request. Because the defense had neither delivered the sample to a laboratory for analysis nor taken measures to preserve it, it could not be stated that the state's inaction had caused the deterioration. *Id.* at 177, 604 P.2d at 1055, 161 Cal. Rptr. at 303. The reversal was based on the court's finding that Nation had been denied effective assistance of counsel because his trial attorney had failed to object to impermissibly suggestive pretrial identifications. *Id.* at 181-82, 604 P.2d at 1058, 161 Cal. Rptr. at 306.

56. *Id.* at 176 n.2, 604 P.2d at 1055 n.2, 161 Cal. Rptr. at 303 n.2.

57. 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982).

58. Summarizing its holdings in *Hitch* and *Nation,* the *Hogan* court stated that the prosecution was under a duty to preserve evidence already obtained. However, "[n]either case imposed a duty to obtain such evidence or to conduct any particular tests." *Id.* at 851, 647 P.2d at 114, 183 Cal. Rptr. at 838. The prosecution cannot be expected to gather all evidence that might eventually prove useful to the defense. However, "[t]here might be cases in which this court would impose sanctions for a failure to obtain evidence." *Id.* The court did not elaborate on the circumstances that might lead it to impose sanctions.

59. *Id.*

In *People v. Murtishaw*[60] a police officer had destroyed his handwritten notes of an unrecorded interrogation of the defendant. Although the *Hitch* issue was not dispositive of the case, the court found a close resemblance between the officer's destruction of the notes and the destruction of the breath sample in *Hitch*.[61] The court reasoned that, just as Hitch was "effectively precluded . . . from verifying the accuracy of [the test] results,"[62] in *Murtishaw,* the destruction of the notes and the failure to record the interrogation "made it impossible for the defense to verify whether the typed transcript reflects the handwritten notes or the reality of the interrogation."[63]

In *People v. Moore,*[64] the defendant had been convicted of narcotics violations. He was granted probation on condition that he submit to periodic narcotics testing. Moore supplied a urine sample for analysis. Three separate tests indicated the presence of PCP. Based on these tests, the probation department requested a probation hearing. At the hearing Moore's counsel requested the urine sample, which was the only evidence of the alleged probation violation. The sample had been discarded.[65] The court held that a urine sample which had yielded traces of narcotics should have been preserved because "there exists a reasonable possibility that independent testing of the urine sample in this case could yield results that would undermine the prosecution's case."[66]

In *People v. Goss,*[67] a decision of the Court of Appeal a tape record-

60. 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981).

61. *Id.* at 755, 631 P.2d at 458, 175 Cal. Rptr. at 750.

62. *Id.*

63. *Id.*

64. 34 Cal. 3d 215, 666 P.2d 419, 193 Cal. Rptr. 404 (1983).

65. *Id.* at 218-19, 666 P.2d at 420, 193 Cal. Rptr. at 405.

66. *Id.* at 221, 666 P.2d at 421, 193 Cal. Rptr. at 406.

67. 109 Cal. App. 3d 443, 167 Cal. Rptr. 224 (1980). The *Hitch* materiality standard has been applied to evidence in a variety of California Supreme Court and Court of Appeal cases. *People v. Goss* was selected by the author not because it is of particular importance but because of the nature of the evidence to which the *Hitch* standard was applied. In People v. Zamora, 28 Cal. 3d 88, 615 P.2d 1361, 167 Cal. Rptr. 573 (1980), the Supreme Court applied the standard to police records of unsustained citizen complaints of racial prejudice and excessive use of force against officers who arrested the defendant. The records had been destroyed before the defendant was arrested pursuant to a city council resolution approving destruction of various city records. The Supreme Court found that the defendant had met the *Hitch* standard. The following cases are samples of the Court of Appeal's application of the *Hitch* standard. In People v. Brown, 138 Cal. App. 3d 832, 188 Cal. Rptr. 324 (1982), stolen bathrobes found in defendant's possession were returned to the store from which they were stolen and sold before trial. The defendant did not meet his burden under *Hitch*. In People v. Hunt, 133 Cal. App. 3d 543, 184 Cal. Rptr. 197 (1982), a police officer destroyed a list of vehicle license plate numbers he made at the scene of a crime. The defendant failed to show a reasonable possibility that the list would have constituted favorable evidence on the issue of guilt or innocence. In People v. Bailes, 129 Cal. App. 3d 265, 180 Cal. Rptr. 792, (1982), a prosecution for burglary, the prosecution lost photographs of a window screen to the burgled house. A fingerprint conclusively established as belonging to the defendant was found on the screen. The defendant

ing of a conversation between the defendant and a police officer was erased inadvertently. After learning of the erasure, the officer prepared a supplemental report.[68] The defendant denied having made specific incriminating statements attributed to him in the report and moved to suppress the officer's testimony.[69] The Court of Appeal found a reasonable possibility the tapes could have impeached the officer's account of the incriminating statements. The court asserted that the defendant's denial of the admissions attributed to him in the report established the tape's materiality because there was "a reasonable possibility that the tape could have impeached the officer's account of appellant's statement."[70]

The California Supreme Court in *Hitch* apparently intended the reasonable possibility standard to be interpreted liberally. California courts have indeed interpreted the *Hitch* standard liberally in applying it to cases involving lost or destroyed material evidence. Under *Hitch,* courts for the most part have applied the reasonable possibility standard in a vacuum, without regard to the totality of the circumstances in each case.

## II. The Impact of Proposition 8

In June 1982, the California electorate adopted Proposition 8, the so-called Victim's Bill of Rights, as an amendment to the California Constitution.[71] Included in Proposition 8 was a provision entitled the "Right to Truth-in-Evidence," now Article I, section 28(d) of the Constitution. Section 28(d), which severely limits the use of the exclusionary rule in California, reads as follows:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, includ-

failed to meet his burden under *Hitch*. In People v. Ammons, 103 Cal. App. 3d 20, 162 Cal. Rptr. 772 (1980), tape recordings of communications between a police dispatcher and an officer in the field were erased. In People v. Swearingen, 84 Cal. App. 3d 570, 148 Cal. Rptr. 755 (1978), police officers stopped a van for driving without a front license plate. One officer saw a vial containing marijuana on the floor of the van. Searching the van, the officers discovered a bag of marijuana and in the defendant's house they discovered hashish. The vial was lost while in police possession. The defendant alleged that the vial was opaque and the officer could not have recognized its contents. If the defendant's allegations were true, the subsequent searches were illegal and the evidence inadmissible. The court found that the defendant had shown a reasonable possibility that the lost evidence would have been favorable on the issue of guilt or innocence. In People v. Vera, 62 Cal. App. 3d 293, 132 Cal. Rptr. 817 (1976), a prosecution for burglary and burning of a public building, the defendant's fingerprints were found on a deep fat fryer inside the building. Latent fingerprints were lifted from the fryer and placed on a card. The defendant argued that the police officers should have preserved the fingerprints in place on the fryer or should have photographed it while the fingerprints were still on it or should have preserved the fryer itself. The defendant failed to meet his burden under *Hitch*.

68. 109 Cal. App. 3d at 450, 167 Cal. Rptr. at 228.

69. *Id.* at 451, 167 Cal. Rptr. at 228.

70. *Id.* at 454-55, 167 Cal. Rptr. at 230.

71. CAL. CONST. art. I, § 28(d).

> ing pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.[72]

By its terms, the Truth-in-Evidence provision eliminated independent state grounds as a basis for excluding evidence in criminal trials. The only exceptions are those expressly or impliedly excepted in the provision itself. "The effect of [Article I, section 28(d)] was, inter alia, to require the courts of this state to look to federal law in deciding issues concerning the exclusion of evidence."[73]

After the initiative was adopted, the California Attorney General distributed a guide to Proposition 8 in which it asserted that "[u]nless *Hitch* can be based on federal due process, Proposition 8 abolishes its sanction [of exclusion of evidence]."[74] In *In re Lance W.*,[75] the Califor-

72. CAL. CONST. art. I, § 28(d). Evidence Code section 352 grants trial courts discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will unduly consume time, or create substantial danger of undue prejudice, confusing the issues, or misleading the jury. CAL. EVID. CODE § 352 (West 1966).

Evidence Code section 782 relates to the admissibility of evidence of the sexual conduct of the complaining witness in rape cases to attack the witness' credibility. CAL. EVID. CODE § 782 (West Supp. 1986).

Evidence Code section 1103 relates to the admissibility of evidence of the character of a victim of a crime to prove that the conduct of the victim was in conformity with his character. CAL. EVID. CODE § 1103 (West Supp. 1986).

73. People v. Tierce, 165 Cal. App. 3d 256, 262, 211 Cal. Rptr. 325, 328-29 (1985).

74. ATTORNEY GENERAL'S GUIDE TO PROPOSITION 8: VICTIMS' BILL OF RIGHTS, 4-48 (June 9, 1982). The elimination of independent state grounds was anticipated before Proposition 8 was adopted. *See* ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, ANALYSIS OF PROPOSITION 8, THE CRIMINAL JUSTICE INITIATIVE, 14-15 (March 24, 1982).

The California Supreme Court has rendered several decisions in which it has construed section 28(d). *In re* Lance W., 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985) held that section 28(d) eliminated the exclusionary rule as a remedy for searches and seizures that violate article I, section 13 of the California Constitution but do not violate the Fourth Amendment. *Id.* at 890, 694 P.2d at 754-55, 210 Cal. Rptr. at 642. The court also held that section 28(d) eliminated California's vicarious exclusionary rule. *Id.* at 887, 694 P.2d at 752, 210 Cal. Rptr. at 659. People v. Smith, 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983), held that section 28(d) applies only in trials for offenses committed after the effective date of Proposition 8 which was June 9, 1982. *Id.* at 262, 667 P.2d at 154, 193 Cal. Rptr. at 697. People v. Castro, 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985), held that section 28(d) did not abrogate a trial court's discretion to exclude evidence of prior convictions under California Evidence Code section 352. *Id.* at 306, 696 P.2d at 117, 211 Cal. Rptr. at 725. Ramona R. v. Superior Court, 37 Cal. 3d 802, 693 P.2d 789, 210 Cal. Rptr. 204 (1985), held that the express exception from section 28(d) for statutory rules of evidence related to privileges includes the immunity from use at trial of any statements made by a minor in a hearing to determine fitness to be tried in juvenile court or statements made to a probation officer. In *Ramona R.*, the court quoted Evidence Code section 940: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person

nia Supreme Court interpreted Proposition 8 as having eliminated the remedy for certain violations of rights afforded by the California Constitution, but not as having made such violations "constitutional."[76]

> What Proposition 8 does is to eliminate a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled . . . .
>
> The people have apparently decided that the exclusion of evidence is not an acceptable means of implementing [substantive rights protected by the state constitution].[77]

If the court is correct in asserting that Proposition 8 eliminated the remedy, but not the right which the remedy was designed to enforce, it may be said that a defendant's right to evidence found to be material under *Hitch* still exists, but that his ability to enforce his right through exclusion of evidence based on or derived from the lost evidence has been eliminated. Pragmatically, however, the *Hitch* right is illusory if no remedy exists to enforce it.

## III. *California v. Trombetta*

In *People v. Trombetta,*[78] a California Court of Appeal applied *Hitch* in a DWI prosecution in which the defendants' breath had been tested by the intoxilyzer.[79] The intoxilyzer, unlike the breathalyzer used in *Hitch,*

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has a privilege to refuse to disclose any matter that may tend to incriminate him." *Id.* at 808, 693 P.2d at 793, 210 Cal. Rptr. at 208. It appears from this decision that any privilege against self incrimination provided by the California Constitution that is additional to the privilege extended by the Fifth Amendment will survive Proposition 8 as an independent state ground for the exclusion of evidence.

75. 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

76. In *Lance W.*, the defendant moved to suppress prosecution evidence obtained through an illegal search of a vehicle owned and occupied by another person. *Id.* at 880-81, 694 P.2d at 248, 210 Cal. Rptr. at 635. The court found that Proposition 8 had eliminated the independent state grounds on which California's vicarious exclusionary rule was based and had prohibited exclusion of evidence obtained in violations of the California Constitution's search and seizure provision, article I, section 13. 37 Cal. 3d at 885-90, 694 P.2d at 751-55, 210 Cal. Rptr. at 638-42. Therefore, the defendant's only protections were to be found in the Fourth Amendment. Under the Fourth Amendment, as interpreted by the United States Supreme Court, the defendant in *Lance W.* had no standing to object to the evidence illegally seized from the vehicle. In addition, the search of the defendant's person did not violate the Fourth Amendment. *Id.* at 881-84, 694 P.2d at 748-50, 210 Cal. Rptr. at 636-37. Accordingly, the court held that the evidence was admissible. *Id.* at 896, 694 P.2d at 759, 210 Cal. Rptr. at 646.

77. *Id.* at 886-87, 694 P.2d at 752, 210 Cal. Rptr. at 639.

78. 142 Cal. App. 3d 138, 190 Cal. Rptr. 319 (1983).

79. In People v. Miller, 52 Cal. App. 3d 666, 125 Cal. Rptr. 341 (1975), the court addressed whether *Hitch* should be applied to the intoxilyzer. In *Miller* the court refused to interpret *Hitch* as requiring law enforcement to preserve all evidence that can be reduced to preservable form. *Id.* at 669, 125 Cal. Rptr. at 342. "*Hitch* considered only the breathalyzer. That device produces test material which can be retested if preserved. The intoxilyzer, how-

does not preserve breath samples; it holds samples only long enough to measure the suspect's blood-alcohol content.[80] Apparently relying on *Hitch*'s assertion that breath samples constitute material evidence in DWI prosecutions,[81] the *Trombetta* court held that the Fourteenth Amendment[82] requires law enforcement agencies to preserve intoxilyzer breath samples for DWI defendants.[83] In reaching its decision, the *Trombetta* court did not expressly apply the *Hitch* materiality standard to the unavailable breath samples.[84] As a result, the defendants were relieved of a significant portion of their burden under *Hitch*.

The *Trombetta* defendants contended that under *Hitch* "the failure of law enforcement personnel to capture and preserve a retestable breath sample violated due process and rendered the intoxilyzer results inadmissible."[85] The Court of Appeal agreed, reasoning that "a taking [by the intoxilyzer] is the collection of evidence within the *Hitch* rationale."[86] The court concluded that "[d]ue process demands simply that where evidence is collected by the state, as it is with the intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant."[87]

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ever, produces no such material." *Id.* at 668, 125 Cal. Rptr. at 342. *Miller* interpreted *Hitch* as holding that the prosecution must preserve only evidence that comes into its possession at some time. "The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath sample in the chamber, but it was not evidence of which the government could 'take possession.' " *Id.* at 669-70, 125 Cal. Rptr. at 343 (quoting United States v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971)).

80. *See supra* note 17.

81. 142 Cal. App. 3d at 143, 190 Cal. Rptr. at 322. *See Hitch*, 12 Cal. 3d at 647, 527 P.2d at 365, 117 Cal. Rptr. at 13.

82. 142 Cal. App. 3d at 143, 190 Cal. Rptr. at 322. "Since the *Hitch* rule implements a federal due process standard, it is unaffected by California Constitution, article I, section 28, subdivision (d)." *Id.* (citations omitted). *See supra* note 74 and accompanying text. *See infra* note 127.

83. 142 Cal. App. 3d at 144, 190 Cal. Rptr. at 323.

84. *Id.* at 143, 190 Cal. Rptr. at 322.

85. *Id.* at 142, 190 Cal. Rptr. at 321.

86. *Id.* at 143-44, 190 Cal. Rptr. at 322.

87. *Id.* at 144, 190 Cal. Rptr. at 323. The Court of Appeal endorsed the following language from a Colorado Supreme Court decision: "The failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence." *Id.* (quoting Garcia v. District Court, 197 Colo. 38, 46, 589 P.2d 924, 929-30 (1979)). The Court of Appeal was "persuaded that the reasoning of the Colorado court— paralleling the *Hitch* rationale—is sound and that the same result should prevail in California." 142 Cal. App. 3d at 144, 190 Cal. Rptr. at 323. The Court of Appeal's endorsement of the *Garcia* reasoning supports the conclusion that implicit in the *Trombetta* holding is an affirmative duty on law enforcement to collect evidence for the use of the defendant in non-DWI prosecutions. Although the United States Supreme Court foreclosed such a duty under the Fourteenth Amendment in California v. Trombetta, 104 S. Ct. at 2534, such an affirmative duty has recently been urged upon the California Supreme Court by Chief Justice Bird in her dissent in *In re* Michael L., 39

### A. The Supreme Court's Decision

The California Court of Appeal's failure to apply the *Hitch* materiality standard, as well as its assertion that *Hitch* implemented a federal due process standard,[88] invited review of *Trombetta* by the United States Supreme Court.[89] After the California Supreme Court denied the petition for hearing,[90] the California Attorney General obtained a writ of certiorari in the United States Supreme Court.[91]

The Court initiated its analysis in *Trombetta* by noting that the due process requirement of fundamental fairness in criminal prosecutions had led it to develop " 'what might loosely be called the area of constitutionally guaranteed access to evidence.' "[92] Due process requires the prosecution to report to the defendant and the trial court whenever a government witness lies under oath;[93] to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt even in the absence of a specific discovery request;[94] to reveal the contents of plea agreements with key government witnesses;[95] and, in some circumstances, to disclose the identity of undercover informants who possess evidence critical to the defense.[96] A defendant also has a constitutionally protected right to request and obtain evidence material to guilt or relevant to punishment.[97] However, the Court had "never squarely ad-

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Cal. 3d 81, 702 P.2d 222, 216 Cal. Rptr. 140 (1985). In *Michael L.*, the police left a videotape of a store robbery with the store owner at the owner's request. The videotape was subsequently erased. The defendant sought to exclude evidence concerning the viewings of the videotape before its destruction as well as any evidence that might have been derived from them, including in-court identifications of the defendant. The Supreme Court found exclusion of the evidence to be "unwarranted even under our pre-*Trombetta* authority." *Id.* at 86, 702 P.2d at 225, 216 Cal. Rptr. at 143. The court declined to state whether *Hitch* survived *Trombetta. Id.* The Chief Justice criticized the majority for "declin[ing] to protect the integrity of [the *Hitch*] truth-finding process by failing to recognize a duty to *seize* [material] evidence [as defined in *Hitch*]." *Id.* at 90, 702 P.2d at 227, 216 Cal. Rptr. at 145 (Bird, C.J., dissenting).

88. *See infra* note 127.

89. *See* Michigan v. Long, 463 U.S. 1032 (1983).

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case in the way it did because it believed that federal law required it to do so.

*Id.* at 1040-41.

90. People v. Trombetta, 142 Cal. App. 3d at 145, 190 Cal. Rptr. at 323.

91. 464 U.S. 1037 (1984).

92. 104 S. Ct. at 2532 (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)).

93. *See* Napue v. Illinois, 360 U.S. 264, 269-72 (1959).

94. *See* United States v. Agurs, 427 U.S. 97, 112 (1976).

95. *See* Giglio v. United States, 405 U.S. 150, 153-54 (1972).

96. *See* Roviaro v. United States, 353 U.S. 53, 60-62 (1957).

97. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

dressed the Government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants."[98]

The Court began this inquiry in *Trombetta* by examining its decision on a related issue in *Killian v. United States.*[99] In *Killian,* an FBI agent destroyed his notes of a conversation with the petitioner after he had transferred the information they contained to his investigative report. In contrast to the claim in *Trombetta* that the destroyed evidence could have aided the defendant's case by impeaching the intoxilyzer test results,[100] Killian argued only that the reports did not contain all of the evidence the notes had contained, so that the amount of evidence available to him had been diminished.[101] The Court remanded the action for a determination of whether the evidence had, in fact, been lost.[102] In dicta, however, the Court remarked that if the notes were made only for the purpose of transferring their data to reports, and that transfer had been made,[103] destruction of the notes in good faith and in accord with established procedures would not violate due process.[104]

The Court found *Killian* analogous to the issue in *Trombetta.* Just as the purpose of the notes in *Killian* was providing information for the investigative report, the purpose of the breath sample in *Trombetta* was providing raw data to the intoxilyzer; just as the agent's notes had been sought in *Killian* to impeach the report, the breath samples in *Trombetta* were sought to impeach the intoxilyzer results.[105]

The Court then turned from *Killian* and, examining other precedents, concluded that the state's actions in *Trombetta* did not violate due process.[106] First, the Court reasoned that the failure to preserve the breath samples was not the result of "official animus towards respondents or of a conscious effort to suppress exculpatory evidence."[107] Relying on *Killian,* the Court found that the California authorities were acting " 'in good faith and in accord with their normal practices.' "[108]

Second, the Court found no constitutional defect in California's policy of not preserving breath samples.[109] For this proposition, the Court relied on its opinion in *United States v. Agurs.*[110] In *Agurs,* the defendant was convicted of second-degree murder in the stabbing death of a male

98. 104 S. Ct. at 2533.
99. 368 U.S. 231 (1961).
100. 104 S. Ct. at 2531.
101. 368 U.S. at 241-42.
102. *Id.* at 242.
103. The reports were in existence at the time of trial. *Id.* at 241.
104. *Id.* at 242.
105. 104 S. Ct. at 2533-34.
106. *Id.* at 2534.
107. *Id.*
108. *Id.* (quoting *Killian,* 368 U.S. at 242).
109. 104 S. Ct. at 2534.
110. 427 U.S. 97 (1976)

companion after a brief interlude in a motel room. Agurs argued that she had acted in self-defense after the victim had attacked her with a knife. The question before the Supreme Court was whether the prosecution's failure to provide defense counsel with certain background information about the victim, which would have tended to establish his violent character, deprived Agurs of a fair trial[111] under *Brady v. Maryland*.[112]

The *Agurs* Court noted that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[113] The proper standard of materiality must reflect the overriding concern that the defendant's guilt has been established beyond a reasonable doubt.[114]

> [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.[115]

The Court found that the evidence in *Agurs* was not constitutionally material.[116]

Under *Agurs,* the *Trombetta* court held that the due process duty to preserve evidence "must be limited to evidence that might be expected to play a significant role in the suspect's defense."[117] According to *Trombetta,* the *Agurs* standard of constitutional materiality requires that evidence "both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant

111. *Id.* at 98-100.

112. 373 U.S. 83 (1963). The *Agurs* court found that the *Brady* rule of disclosure applies in three different situations, each involving the post-trial discovery of information known to the prosecution but not to the defense, and each requiring a different standard of materiality. 427 U.S. at 103. The first type of information is undisclosed evidence that indicates that the prosecution's case included testimony which it knew or should have known was perjured. *Id.* The evidence is material if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Id.* The second category is specific information requested by the defense before trial which has not been disclosed by the prosecution. *Id.* at 104. The *Agurs* court did not expressly identify the appropriate materiality standard in this situation, but noted that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.* The third kind of evidence is undisclosed exculpatory evidence possessed by the prosecution but not requested by the defense. This was the situation the Court faced in *Agurs*. To be material in this context, the additional evidence must create a reasonable doubt about guilt that did not otherwise exist. *Id.* at 112-13.

113. 427 U.S. at 109-10.

114. *Id.* at 112.

115. *Id.* at 112-13.

116. *Id.* at 113-14.

117. 104 S. Ct. at 2534.

would be unable to obtain comparable evidence by other reasonably available means."[118] Neither condition was met in *Trombetta*.[119]

In determining that the respondents had not met the first requirement, the Court recognized the established reliability and accuracy of the intoxilyzer: "The materiality of breath samples is directly related to the reliability of the Intoxilyzer itself."[120] The more reliable the device, the less likely it is that preserved samples would have exculpatory value,[121] or, to use the language of *Hitch,* the less likely a defendant could show a reasonable possiblity that the evidence would be favorable on the issue of guilt or innocence. A showing that preserved samples "might conceivably have contributed to respondent's defenses"[122] does not meet the first requirement of constitutional materiality.

The *Trombetta* respondents also failed to establish the second requirement, that no comparable evidence be reasonably available to the defense. The Court noted that, even without preserved breath samples, there are several ways to impeach intoxilyzer results, including faulty calibration, extraneous interference with machine measurements, and operator error. "Respondents were perfectly capable of raising these issues without resort to preserved breath samples."[123]

Under *Trombetta,* therefore, the duty to preserve evidence is limited to evidence that meets the standard of constitutional materiality. To invoke sanctions for the good faith destruction or loss of evidence, a defendant must show both that the evidence possessed an exculpatory value that was apparent before it was destroyed or lost, and that he cannot obtain comparable evidence by other reasonably available means.

## IV. The Viability of *Hitch* after *Trombetta*

Although the *Trombetta* Court did not expressly pass judgment on *Hitch,* it discussed *Hitch* in a footnote:

> Relying on . . . *Brady v. Maryland* . . . and *Giglio v. United States* . . ., the California Supreme Court concluded that the Due Process Clause is implicated when a State intentionally destroys evidence that might have proved favorable to a criminal defendant. The *Hitch* decision was noteworthy in that it extrapolated from *Brady*'s disclosure requirement an additional constitutional duty on the part of prosecutors to preserve potentially exculpatory evidence.[124]

118. *Id.* These materiality criteria were not articulated in *Agurs. See supra* notes 110-116 and accompanying text.

119. *Id. Trombetta* was reversed and remanded to the California Court of Appeal for further proceedings not inconsistent with the Supreme Court's opinion. *See infra* note 127.

120. *Id.* at 2534 n.10.

121. *Id.*

122. *Id.* at 2534.

123. *Id.* at 2535.

124. *Id.* at 2531-32 n.5 (citations omitted).

*Hitch* now must be read in light of this comment by the United States Supreme Court. The Supreme Court appeared implicitly to reject the *Hitch* materiality standard when it articulated the more restrictive first requirement of constitutional materiality, that evidence possess an exculpatory value that was apparent before it was destroyed. The Court's comment in the *Trombetta* footnote also raises the question of whether the Court indirectly has criticized *Hitch* for extrapolating a constitutional duty exceeding the requirements of *Brady v. Maryland,* which the *Trombetta* Court expressly affirmed as the constitutional touchstone.

The *Trombetta* standard is significantly narrower than the *Hitch* standard. Under *Hitch,* a defendant must show only a reasonable possibility that the unavailable evidence would have been favorable. Under *Trombetta,* the defendant must show that the evidence possessed an exculpatory value that was apparent before it was destroyed and that comparable evidence is not reasonably available. While *Trombetta*'s first requirement, standing alone, could be interpreted as refining or limiting *Hitch*'s reasonable possibility standard, *Trombetta*'s second requirement is a significant addition to the *Hitch* standard. Together the *Trombetta* requirements place a much greater evidentiary burden on the defendant than did *Hitch* by requiring a defendant to show (1) that the evidence had exculpatory value that was apparent before it was destroyed and (2) that other means are not reasonably available to him to accomplish the purpose for which the unavailable evidence was sought.

If *Hitch* implemented a federal due process standard, as the Court of Appeal contended in *Trombetta,*[125] the Supreme Court's decision clearly overturned it. Under *Trombetta,* the Fourteenth Amendment does not require that the prosecution preserve evidence when a defendant establishes only a reasonable possibility that it would be favorable. The federal due process duty to preserve evidence arises only on a much greater showing by a defendant that the evidence would have played a significant role in his defense.[126]

In *Trombetta,* both the Court of Appeal and the United States Supreme Court assumed that *Hitch* implemented a federal due process standard.[127] Despite these assumptions, however, it is not clear whether

125. 142 Cal. App. 3d at 143, 190 Cal. Rptr. at 322. *See infra* note 127.

126. 104 S. Ct. at 2535. The California Supreme Court has expressly reserved the determination of whether *Hitch* survives *Trombetta. See In re* Michael L., 39 Cal. 3d 81, 86, 702 P.2d 222, 225, 216 Cal. Rptr. 140, 143 (1985). However, given the significant difference between the *Trombetta* and *Hitch* standards of materiality, the court's reservation of the determination appears merely to postpone the inevitable determination that *Hitch* does not survive. At least one Court of Appeal has not hesitated to state that *Trombetta* is now the standard in California. *See* People v. Tierce, 165 Cal. App. 3d 256, 262-63, 211 Cal. Rptr. 325, 329 (1985).

127. *See* 142 Cal. App. 3d at 143, 190 Cal. Rptr. at 322 ("[T]he *Hitch* rule implements a federal due process standard."); 104 S. Ct. at 2531 n.5 (stating that the *Hitch* rule is an extrapolation of federal due process decisions). On remand, No. A016358 (Cal. App., 1st Dist. Div. 4 filed Oct. 31, 1985), the California Court of Appeal, confronted directly with the question

*Hitch* established a federal due process duty.[128] In *Hitch,* the California Supreme Court relied heavily on both federal and California decisions.[129] In addition, the reasonable possibility standard applied in *Hitch* arose in

whether *Hitch* rested on the federal or state due process clause, People v. Trombetta, No. A016358, slip op. at 1, 4 (Cal. App. 1st Dist. Div. 4 filed Oct. 31, 1985), reiterated its earlier assertion that *Hitch* was indeed based on the federal Due Process Clause. *Id.* at 7. Recognizing that the *Hitch* opinion itself did not specifically refer to either the state or federal constitution, the Court of Appeal noted that the *Hitch* court had initiated its analysis with a review of the federal due process cases, Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). People v. Trombetta, No. A016358, slip op. at 5 (Cal. App. 1st Dist. Div. 4 filed Oct. 31, 1985). The court asserted that in later looking to the materiality standard developed in the California informer cases, the *Hitch* court "was not invoking the state Constitution independently in support of the underlying duty to preserve the evidence, but rather, in the absence of any relevant federal precedent, was applying what it believed the proper standard to be." *Id.* at 6. The Court of Appeal based its assertion in part on dictum in *In re* Michael L., 39 Cal. 3d 81, 702 P.2d 222, 216 Cal. Rptr. 140 (1985), that *Hitch* was based on the federal Due Process Clause. *Id.* at 85-86. The Court of Appeal did not mention that in Chief Justice Bird's strong dissent in *Michael L.,* she emphasized that *Hitch* rested on independent state grounds. *Id.* at 101 (Bird, C.J., dissenting). In addition, the Court of Appeal rejected the argument put forth by amicus curiae that the *Hitch* materiality standard had become so imbedded in California law that it now constituted independent state grounds. The court was not persuaded to accept in the lost evidence context the assertion by another Court of Appeal that the reasonable possibility standard, as applied in the witness-informer context, had become a "California doctrine of independent existence." People v. Trombetta, No. A016358 slip op. at 7 (Cal. App. 1st Dist. Div. 4 filed Oct. 31, 1985) (quoting from Cordova v. Superior Court, 148 Cal. App. 3d 177, 184, 195 Cal. Rptr. 758, 761 (1983)).

The Court of Appeal concluded, therefore, that the federal due process standard of materiality set forth in *California v. Trombetta* was the appropriate test to apply in the case before it. People v. Trombetta, slip op. at 8 (Cal. App. 1st Dist. Div. 4 Oct. 31, 1985).

Given the conclusion reached in this note that *Hitch* is no longer viable under either the federal or state Due Process Clause, *see infra* notes 131-133 and accompanying text, the Court of Appeal's assertion that *Hitch* implemented a federal standard foreclosed the one remaining option available to it. If the court had determined that *Hitch* rested on independent state grounds, it would remain a viable rule in prosecutions for offenses committed before June 9, 1982, the effective date of Proposition 8. *See* People v. Smith, 34 Cal. 3d 251, 262, 667 P.2d 149, 154, 193 Cal. Rptr. 692, 697 (1983); *see supra* note 74. The offenses in *Trombetta* occurred before June 9, 1982.

128. In her dissent in a recent case, Chief Justice Bird stated, "I believe it necessary to emphasize that the duty-to-preserve principles announced in *Hitch* rest on independent state grounds." *In re* Michael L., 39 Cal. 3d 81, 101, 702 P.2d 222, 235, 216 Cal. Rptr. 140, 153 (1985) (Bird, C.J., dissenting). The Chief Justice concluded, therefore, that *Hitch* survived *Trombetta. Id.* at 101-04, 702 P.2d at 235-37, 216 Cal. Rptr. at 153-55. She did not address the viability of *Hitch* on independent state grounds after the effective date of Proposition 8, however, noting that Proposition 8 did not apply to *Michael L.* because the offense occurred before Proposition 8 was passed. *Id.* at 105 n.9, 702 P.2d at 238 n.9, 216 Cal. Rptr. at 156 n.9. *See* People v. Smith, 34 Cal. 3d 251, 258, 667 P.2d 149, 152, 193 Cal. Rptr. 692, 695 (1983).

129. *In re* Ferguson, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971); People v. Hunt, 4 Cal. 3d 231, 481 P.2d 205, 93 Cal. Rptr. 197 (1971); Price v. Superior Court, 1 Cal. 3d 836, 463 P.2d 721, 83 Cal. Rptr. 369 (1970); Honore v. Superior Court, 70 Cal. 2d 162, 449 P.2d 169, 74 Cal. Rptr. 233 (1969); *In re* Lessard, 62 Cal. 2d 497, 399 P.2d 39, 42 Cal. Rptr. 583 (1965) (which relied on *Brady*); *In re* Imbler, 60 Cal. 2d 554, 387 P.2d 61, 35 Cal. Rptr. 293 (1963) (which relied on *Brady*); People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958).

a line of unidentified informer cases independent of *Brady v. Maryland*.[130]

If *Hitch* was based on the California Due Process Clause,[131] *Trombetta* did not overrule it. As the United States Supreme Court emphasized in *Trombetta:* "State courts and legislatures, of course, remain free to adopt more rigorous safeguards governing the admissibility of scientific evidence than those imposed by the Federal Constitution."[132] But *Hitch* fares no better on independent state grounds, because Proposition 8 eliminated independent state grounds as a basis for excluding evidence in criminal trials.[133] The ineluctable conclusion is that *Hitch* does not survive after *Trombetta* under either the federal or California Due Process Clause.

### A. The Effect of *Trombetta* on the *Hitch* Cases

Applying the *Trombetta* standard to the facts of *People v. Hitch*[134] compels the same conclusion as the Supreme Court reached in *Trombetta*. Although the breathalyzer used in *Hitch* may be somewhat less reliable than the intoxilyzer, it is still a reliable machine.[135] Once breath samples have been tested and have yielded unfavorable evidence, they are unlikely to have any apparent exculpatory value. In addition, comparable evidence, such as operator error or machine malfunction,

130. 12 Cal. 3d at 648, 527 P.2d at 366, 117 Cal. Rptr. at 14. *See supra* note 30. The California informer cases in which the reasonable possibility standard developed relied heavily on Roviaro v. United States, 353 U.S. 53 (1957), in which the Supreme Court held that the prosecution must disclose the identity of an informer whose testimony might be helpful to the defense. *Id.* at 63-64. Independent of *Roviaro,* a California Court of Appeal had reached the identical conclusion based on the California Constitution. People v. Lawrence, 149 Cal. App. 2d 435, 308 P.2d 821 (1957), relied on former article I, section 13 (now section 15) of the California Constitution, and California Penal Code section 686 to hold that nondisclosure of the informer's identity in the appropriate circumstances violates the principle that a defendant shall be accorded a full opportunity to defend himself. *Id.* at 450, 308 P.2d at 830. *Lawrence*'s independence from *Roviaro* is noted in People v. Castiel, 153 Cal. App. 2d 653, 658, 315 P.2d 79, 82 (1957). More recently, a California Court of Appeal has asserted that the reasonable possibility standard is independent of federal law:

> While the early California cases stating the test of witness materiality in informer cases did cite federal cases, California cases and other cases are also cited . . . .
>
> Whatever its origin, the California rule of materiality, as it relates to informer witnesses, has been thoroughly imbedded in California for a substantial period of time . . . . It has, in effect and in practice, become a California doctrine of independent existence.

Cordova v. Superior Court, 148 Cal. App. 3d 177, 183-84, 195 Cal. Rptr. 758, 761 (1983) (citations omitted).

131. CAL. CONST. art. I, § 7.

132. 104 S. Ct. at 2535 n.12.

133. *See supra* notes 71-77 and accompanying text.

134. 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974).

135. For a comparison of the technical aspects of the breathalyzer and intoxilyzer, see Harte, *An Instrument for the Determination of Ethanol in Breath in Law-Enforcement Practice,* 16 J. FORENSIC SCIENCES 493 (1971).

was available in *Hitch* for impeachment purposes, just as it was in *Trombetta*.[136] On its facts, *Hitch* would not have met the *Trombetta* standard. Accordingly, there appears to be no duty to preserve breathalyzer breath samples that can be enforced by the exclusionary rule.

In *People v. Nation*,[137] a rape case, a semen sample was collected but not properly preserved. The sample was not tested to identify the blood type of the rapist until after trial. Although some type B blood activity was observed at that time, a more extensive test could not be performed because the sample had deteriorated.[138] That test might have eliminated approximately 80% of the males of the defendant's race as donors of the semen sample.[139]

The *Nation* defendant easily met the *Hitch* standard.[140] Under *Trombetta*, the defendant could have shown that the sample had an exculpatory value that was apparent before it deteriorated, particularly in light of the victim's uncertain identification of the defendant.[141] Moreover, no comparable evidence was reasonably available to the defendant to show that he was not the donor of the semen sample. The defendant in *Nation* most likely would have met his burden under *Trombetta*, thereby successfully invoking the exclusionary rule.

In *People v. Moore*,[142] the defendant had been convicted of narcotics violations and placed on probation. A condition of probation was regular urinalysis for the presence of narcotics. Three tests on one of the samples indicated the presence of PCP. At the subsequent probation revocation hearing, the defendant's counsel requested the urine sample, but found that it had been discarded.[143]

The Supreme Court found that Moore had met his burden under *Hitch*.[144] Under the *Trombetta* standard, he would have failed. The fact that three tests had shown traces of PCP indicates that the urine sample had no exculpatory value apparent before the sample was discarded. On the contrary, it probably would have been inculpatory. Even if the defendant had met the first requirement, he could not have shown that comparable evidence was not reasonably available. As in *Trombetta*, other means of impeaching the test results existed, including challenging the general reliability of the test, the competence of the chemist, or the care with which the specific analyses had been performed.

136. 104 S. Ct. at 2535.
137. 26 Cal. 3d 169, 604 P.2d 1053, 161 Cal. Rptr. 301 (1980).
138. *Id.* at 173, 604 P.2d at 1055, 161 Cal. Rptr. at 303.
139. *Id.* at 176, 604 P.2d at 1055, 161 Cal. Rptr. at 303.
140. *Id.* at 177, 604 P.2d at 1055, 161 Cal. Rptr. at 303.
141. *Id.*
142. 34 Cal. 3d 215, 666 P.2d 419, 193 Cal. Rptr. 404 (1983).
143. *Id.* at 218, 666 P.2d at 420, 193 Cal. Rptr. at 405.
144. *Id.* at 223, 666 P.2d at 423, 193 Cal. Rptr. at 408.

In *People v. Goss,*[145] a tape of a conversation between the defendant and a police officer was erased inadvertently. In a supplemental report written after the erasure, the officer attributed several incriminating statements to the defendant. The defendant denied having made the statements and moved to suppress the officer's testimony.[146]

Under *Trombetta,* the defendant might have been able to meet the apparent exculpatory value requirement, although the tape, if available, was as likely to be inculpatory as exculpatory. He would not have been able to meet the second requirement, however, because comparable evidence was reasonably available. The defendant could have attempted to impeach the officer's credibility or memory of the taped conversation.

## Conclusion

The *Trombetta* standard of materiality is now the rule under the Fourteenth Amendment in cases of good faith loss or destruction of evidence. *Trombetta* rejected the reasonable possibility standard as a federal due process requirement, in effect overruling *Hitch* and most of its progeny. In adopting Propsition 8, the California electorate eliminated use of the exclusionary rule based on independant state grounds. Consequently, *Hitch* may no longer be used to invoke the exclusionary rule in California under either Constitution.

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145. 109 Cal. App. 3d 443, 167 Cal. Rptr. 224 (1980).

146. *Id.* at 451, 167 Cal. Rptr. at 228.

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