ORIGINAL

IN THE SUPREME COURT OF CALIFORNIA

LEE MAX BARNETT, Petitioner, v. THE SUPERIOR COURT OF BUTTE COUNTY, Respondent; THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	No. S165522 Court of Appeal Case No. C051311 Butte County Superior Court Case No. 91850 (The Honorable William R. Patrick) Related California Supreme Court Case Nos. S008113, S059885, S096831, S120570 & S150229

SUPREME COURT
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PETITIONER BARNETT'S ANSWER BRIEF

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	)	
Petitioner,	)	Court of Appeal Case No.
	)	C051311
v.	)	
	)	Butte County Superior Court
THE SUPERIOR COURT OF	)	Case No. 91850
BUTTE COUNTY,	)	(The Honorable William R.
	)	Patrick)
Respondent;	)	
	)	Related California Supreme
THE PEOPLE OF THE STATE	)	Court Case Nos. S008113,
OF CALIFORNIA,	)	S059885, S096831, S120570 &
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Real Party in Interest.	)	
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TABLE OF CONTENTS

Introduction 1

Argument 2

I. A Movant for Postconviction Discovery Need Not Demonstrate the Materiality of the Information Sought 2

A. *Brady v. Maryland* 2

B. *In re Steele* 9

C. *People v. Superior Court (Maury)* 12

D. Language of §1054.9 14

E. The Court of Appeal's Framework for §1054.9 Motions is Unworkable 15

II. The Lower Court's Decision Regarding Out-of-State Law Enforcement Agencies was Consistent with this Court's Decisions and *Brady* 19

A. Facts 19

B. Lower Court's Decision 21

C. Pre-1990 Criminal Discovery 22

D. Discovery of Penalty Phase Evidence 24

E. *Steele* 25

F. *Brady* 25

1. Scope of the *Brady* Obligation 25

2. This Court's *Brady* Jurisprudence 29

3. *Pitchess*: Giving Effect to *Brady* through Third Party Discovery 32

4. *Brady* Applies to Penalty Phase Evidence . . . 33

G. Application of Law to Mr. Barnett's Case 34

IV. Penal Code §1054.9 is Constitutional 62

Conclusion 62

CERTIFICATE OF COUNSEL 63

United States v. Antone, 603 F.2d 566 (5th Cir. 1979) 37, 40

United States v. Auten, 632 F.2d 478 (5th Cir. 1980) 37

United States v. Bagley, 473 U.S. 667 (1985) 3, 14, 25, 26

United States v. Beckford, 962 F. Supp. 804 (E.D. Va. 1997) 34

United States v. Blanco, 392 F.3d 382 (9th Cir. 2004) 29

United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989) 28

United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973) 28

United States ex rel. Smith v. Fairman,
769 F.2d 386 (7th Cir. 1985) 39

United States v. Guerrerio, 670 F. Supp. 1215
(S.D.N.Y 1987) 41

United States v. Kern, 12 F.3d 122 (8th Cir. 1993) 45

United States v. Rayeros, 537 F.3d 270 (3d Cir. 2008) 43

United States v. Risha, 445 F.3d 298 (3d Cir. 2006) 39

United States v. Santiago, 46 F.3d 885 (9th Cir. 1995) 28

United States v. Shakur, 543 F. Supp. 1059 (S.D.N.Y. 1982) 40

Wardius v. Oregon, 412 U.S. 470 (1973) 58

STATE CASES

Abatti v. Superior Court, 112 Cal. App. 4th 39 (2003) 32, 33

Alford v. Superior Court, 29 Cal. 4th 1033 (2003) 32

Ballard v. Superior Court, 64 Cal. 2d 159 (1966) 14, 15, 22

Barnett v. Superior Court, 146 Cal.App.4th 344 (2006) 50, 51

People v. Gonzalez, 51 Cal. 3d 1257 (1990) 9, 16

People v. Halvorsen, 42 Cal. 4th 379 (2007) 24

People v. Jennings, 46 Cal. 3d 963 (1988) 24

People v. Little, 59 Cal. App. 4th 426 (1997) 36, 60

People v. Luttenberger 50 Cal. 3d 1 (1990) 25

People v. Marshall, 13 Cal. 4th 799 (1996) 30, 31

People v. Memro, 38 Cal. 3d 658 (1985) 22. 48

People v. Mooc, 26 Cal. 4th 1216 (2001) 32

People v. Phillips, 41 Cal. 3d 29 (1985) 24

People v. Robertson, 48 Cal. 3d 18 (1989) 24

People v. Robinson, 31 Cal. App. 4th 494 (1995) 36

People v. Santorelli, 728 N.Y.S.2d 696 (2000) 41

People v. Superior Court (Maury),
145 Cal. App. 4th 473 (2006) 12, 48, 50, 52

People v. Superior Court (Mitchell),
5 Cal. 4th 1229 (1993) 24

People v. Webb, 6 Cal. 4th 494 (1993) 31, 32

People v. Zambrano, 41 Cal. 4th 1082 (2007) 30, 55

Pitchess v. Superior Court, 11 Cal. 3d 531 (1974) 23, 25

State ex. rel. Department of Transportation
v. Superior Court (Hall), 37 Cal. 3d 847 (1985) 22

State v. Bennett, 81 P.3d 1 (Nev. 2003) 9

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF CALIFORNIA SUPREME COURT:

Introduction

This case involves the scope of Penal Code section 1054.9,[1] which permits persons sentenced to death or life without possibility of parole who have filed or will file a postconviction action to seek discovery to which they would have been entitled at trial. This Court granted review of the Court of Appeal's holdings 1) petitioners must prove the materiality of favorable evidence they seek before the court will grant discovery; 2) granting discovery of notes of out-of-state police who assisted in investigating the case; 3) petitioners need not prove the existence of information they seek in order to obtain a discovery order; and 4) section 1054.9 is constitutional.

The lower court rejected Mr. Barnett's requests for exculpatory evidence because he failed to demonstrate that the evidence had a reasonable probability of changing the outcome of his trial. *Barnett v. Superior Court*, 164 Cal.App.4th 18, 48-55 (2008). The court further held that, because out-of-state police agencies provided records and otherwise assisted in the prosecution of the capital case against Mr. Barnett, the prosecution constructively possessed information known to those agencies for purposes of the discovery statutes. *Id.* at 40-43.

The lower court's decision that a petitioner need not show that the records he seeks actually exist is a straightforward, common-sense application of this Court's discovery law. Finally, the decision that §1054.9 is constitutional was undisputed by the parties below and should be affirmed.

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[1] Unexplained section citations are to the Penal Code.

Argument

I. A Movant for Postconviction Discovery Need Not Demonstrate the Materiality of the Information Sought

A. *Brady v. Maryland*[2]

Mr. Barnett's §1054.9 motion sought information that could have been used to impeach prosecution witnesses at trial, which is indisputably *Brady* material.[3] The prosecution violates due process when it withholds favorable evidence and, had the evidence been disclosed, there is a reasonable probability of a different outcome at trial. *Brady*, 373 U.S. at 87; *Kyles v. Whitley*, 519 U.S. 419, 432 (1995).

The court held that Mr. Barnett failed to show that the evidence he sought was material:

> [T]he fact that evidence could have been used for impeachment purposes alone does not mean that evidence is subject to the *Brady* duty of disclosure and therefore something to which the defendant is entitled under section 1054.9. Showing that evidence could have been used for impeachment purposes satisfies the requirement that the evidence must be "favorable" to the defendant; however, to fall within the constitutional duty of disclosure, the evidence must also be "material"—that is, it must be of such significance that considered collectively with any other evidence favorable to the defendant, its absence undermines confidence in the outcome of the trial.

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[2] 373 U.S. 83 (1963).

[3] Mr. Barnett sought, *inter alia*, discovery of "all pending criminal charges against [those witnesses] anywhere in the State of California, all information regarding the current parole and/or probation status of such persons, and all arrests, criminal charges, ongoing criminal investigations, or actions pending anywhere in the State of California since the date of the alleged offense charged in the Information." *Barnett*, 164 Cal.App.4th at 46.

164 Cal.App.4th at 49.

The court created an unworkable rule that is inconsistent with the United States Supreme Court's *Brady* line of cases. The court went astray in holding that the showing a petitioner must make to overturn a conviction after trial is the same that a petitioner seeking postconviction discovery must make. Cases in the *Brady* line address two situations: when defendants seek evidence prior to trial, and when petitioners seek to overturn their convictions based on evidence that was suppressed during trial. The difference between the two situations is not in elements, but in burdens.

In both situations, the concern is with favorable, material evidence. At trial, the prosecution is required to disclose favorable evidence that rises to the level of materiality. *United States v. Bagley*, 473 U.S. 667, 675-76 (1985); *United States v. Agurs*, 427 U.S. 97, 107-08 (1976). The prosecutor must determine when the cumulative effect of favorable evidence has reached the point of materiality, so that if it was considered by the jury, there would be a reasonable probability of a different outcome. "[T]here is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge." *Agurs*, 427 U.S. at 108. The burden is the prosecutor's because he alone is able to assess the materiality of favorable evidence he possesses but the defendant does not:

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. *But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of*

> *"reasonable probability" is reached*. . . . But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S. at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.
>
> ***
>
> [T]he prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government's only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record . . . . Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.
>
> This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See *Agurs*, 427 U.S. at 108 ("The prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. [citations] The prudence of the careful prosecutor should not therefore be discouraged.

Kyles, 514 U.S. at 437-40 (emphasis added).

At trial, the burden is on the prosecutor to decide when the cumulative effect of the favorable evidence in his possession has reached the level of materiality. After trial, that burden of establishing materiality shifts to the petitioner seeking to overturn his conviction. This makes sense. Before trial, the prosecutor knows what favorable evidence he possesses, and is able to assess the cumulative effect of that evidence. The defendant does not know what favorable evidence the prosecutor possesses but has not disclosed. After conviction, in the context of a *Brady* claim, the petitioner has already uncovered the heretofore suppressed favorable evidence. He knows what it is, knows why it is favorable, and is able to explain why it is material. Petitioner and the prosecutor are on equal footing in assessing materiality, once the evidence is known to both sides.

This case presents a situation more akin to pretrial discovery. Mr. Barnett does not know what evidence the State has not disclosed. The prosecutor alone is in a position to assess the favorable evidence in its possession and, as *Kyles* demands, to "gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability is reached.'" *Kyles*, 514 U.S. at 437 (emphasis added). Mr. Barnett, ignorant of what is in the State's files, is unable to demonstrate the materiality of documents he has never seen.

> The reality is also that the prosecution almost always knows what evidence is exculpatory in nature. Fundamentally, if the prosecution has failed in its *Brady* duty, the defense has no way of knowing this in a postconviction proceeding unless it asks for all relevant material and unless the prosecution undertakes an evaluation of its file to determine if all material subject to *Brady* disclosure was turned over.

Curl v. Superior Court, 140 Cal.App.4th 310, 324 (2006).

The lower court went awry by shifting the burden of establishing

materiality from the prosecutor to the petitioner. Without knowing what information the prosecution has, the petitioner cannot explain how that information would be material. This is the reason that, in the pretrial context, the United States Supreme Court placed the initial burden of determining materiality on the prosecutor. Only after favorable evidence becomes known to the petitioner does the burden of establishing materiality shift to the petitioner. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (if defendant is aware of specific information in an otherwise-sealed file, he is free to argue its materiality). A petitioner must know what the evidence is before he can argue it is material.

A petitioner can suggest categories of evidence that might be favorable, if they exist: undisclosed deals, consideration, felony convictions, pending charges – as Mr. Barnett did here. *See, e.g.*, Petition[4] 21-23, 24-25. But the court found that was insufficient. While recognizing that the categories of information that Mr. Barnett described as *Brady* material were favorable, 164 Cal.App.4th at 49, the court found Mr. Barnett's failure to establish materiality was "fatal" to his requests. *Id.*

The court adopted an unworkable procedure to implement its requirement that petitioners demonstrate materiality. *Id.* at 51-52. The court acknowledged that "there may appear to be a conceptual problem in requiring a defendant to demonstrate the materiality of evidence that may not even exist, but that difficulty is illusory." *Id.* at 51. Not only is this a "problem," it violates due process to require a petitioner to explain materiality when he has no notice of the withheld evidence and therefore has no meaningful opportunity to be heard in support of his discovery

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[4] "Petition" refers to Mr. Barnett's Petition for Writ of Mandate filed in the Court of Appeal on November 30, 2005 (No. C051311).

motion. The difficulty is not "illusory."

A workable solution would be to hold that a petitioner initially must establish that the evidence he seeks is favorable. This can be done by citing case law. For example, Mr. Barnett cited decisions holding that evidence that State witnesses had criminal convictions or pending charges was favorable because it could be used to impeach. *See* 164 Cal.App.4th at 50-51. If the petitioner establishes that he is seeking favorable evidence, the superior court will grant the discovery request. The burden then shifts to the prosecutor to assess the materiality of all the favorable evidence in prosecution files, as *Kyles* demands. The prosecutor must determine whether the level of materiality has been reached, that is, whether this evidence, considered cumulatively with all the other favorable evidence in the case, creates a reasonable probability of a different outcome. Just as at trial, it is the prosecutor's responsibility to assess materiality, and it is the prosecutor who bears the risk of being too stingy in his assessment of materiality. Just as at trial, "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles*, 514 U.S. at 439. This formulation gives the petitioner exactly what he is entitled to at trial, which is what he is entitled to under §1054.9. *Steele*, 32 Cal.4th 682, 697 (2004).[5]

In rejecting this argument, the lower court acknowledged that the *Brady* line of cases places the responsibility of determining materiality on the prosecutor in the first instance. 164 Cal.App.4th at 53. The court distinguished §1054.9 from pretrial discovery:

Nothing in the *Brady* line of cases requires us to place the

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[5]In *Steele*, this Court referred to pretrial discovery statutes (§§1054.1 & 1054.5) in explicating what §1054.9 meant. 32 Cal.4th at 696.

> burden of showing materiality on the prosecution in connection with a motion for postconviction discovery under state law. Indeed, such a motion involves federal constitutional principles under the *Brady* line of cases only indirectly.

Ibid. (emphasis original).

The lower court's conclusion is incongruous. The court appropriately indicated that it intended to adopt federal precedent with regard to *Brady*. 164 Cal.App.4th at 48-49, as this Court did in *Steele*, 32 Cal.4th at 697. A motion for postconviction discovery, then, *directly* involves federal constitutional principles. Having acknowledged that U.S. Supreme Court precedent places the burden on the prosecutor to "gauge the likely net effect of all [favorable] evidence and make disclosure when the point of 'reasonable probability [materiality] is reached,'" 164 Cal.App.4th at 53, citing *Kyles*, 514 U.S. at 437, the court erred by shifting the burden to petitioners to establish materiality. The fact that the petitioner bears the burden of establishing his entitlement to discovery, *see Barnett*, 164 Cal.App.4th at 53, is accommodated by the formulation Mr. Barnett suggests: once petitioner persuades the court that the evidence he seeks is favorable, the burden shifts to the prosecutor to determine whether any such evidence exists and whether it is material. Such a formulation is not only practical; it is constitutionally compelled.

The lower court's decision leaves petitioners in the impossible situation of being denied discovery of favorable evidence if they cannot 1) guess what it is and, 2) explain its materiality. These two factors essentially require the petitioner to uncover the evidence himself, so that he may seek discovery of it. The court's decision allows the prosecutor, either by design or by inertia, to withhold exculpatory evidence because petitioner has not guessed its existence and explained its materiality, thereby obligating the

prosecutor to search State files to determine whether such evidence actually exists.

In this respect, the decision is contrary to *Brady*, which places the obligation of disclosing exculpatory evidence on the prosecutor. The defendant need not even request such evidence; the prosecutor must disclose it. *Agurs*, 427 U.S. at 107; *see also Izazaga v. Superior Court*, 54 Cal.3d 356, 378 (1991). Yet under *Barnett*, the prosecutor has no role in revealing exculpatory evidence until the petitioner guesses its existence and proves its materiality. The lower court did not even acknowledge that the prosecutor's duty to disclose exculpatory information continues after the trial. *See People v. Gonzalez*, 51 Cal.3d 1179, 1260-61 (1990), citing *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976); *State v. Bennett*, 81 P.3d 1, 9 (Nev. 2003)(citing *Imbler* and *Gonzalez*).

The lower court's formulation violates due process. Petitioners do not have notice or a reasonable opportunity to be meaningfully heard in support of their discovery motions when they are required to explain the materiality of evidence they have never seen, and do not know in what form the evidence exists, if at all.

In shifting the burden of establishing materiality of requested discovery from the prosecutor to the petitioner, the Court of Appeal acted contrary to U.S. Supreme Court precedent.

B. *In re Steele*

The lower court's decision also is contrary to *In re Steele*, which held that the Legislature intended to modify the rule of *People v. Gonzalez*, 51 Cal.3d 1257, 1261 (1990), which stated that a habeas corpus petitioner could not obtain discovery until he stated a prima facie case for relief. "Section 1054.9 modifies this rule. Defendants are now entitled to

discovery to assist in stating a prima facie case for relief." *Steele*, 32 Cal.4th at 691. The statute "permits discovery as an aid in preparing the petition," and allows petitioners to seek discovery before they file a petition. *Id.*

Petitioners may use §1054.9 as an investigative tool to seek discovery before, or, like Mr. Barnett, after they have filed a petition to develop evidence to state a prima facie case. *Steele*, 32 Cal.4th at 691. Given *Steele*'s holding regarding the Legislature's abrogation of the *Gonzalez* rule, the lower court erred in holding that petitioners must demonstrate the materiality of the *Brady* evidence they seek.

The elements of a *Brady* claim are suppression, favorableness, and materiality. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). If a petitioner proves all three, he wins a new trial. The lower court erroneously equated these elements that a petitioner must prove to win a *Brady* claim with the showing he must make to obtain postconviction discovery. 164 Cal.App.4th at 48-49. The lower court denied Mr. Barnett's requests for *Brady* evidence because he "made no effort to show that the materials he is seeking meet this materiality standard, and this omission is fatal." *Id.* at 49. By requiring petitioners to prove that evidence they seek is favorable and material, when petitioner does not know what evidence the prosecutor has, the lower court adopted a standard more akin to *Gonzalez* than *Steele*: The petitioner must prove his *Brady* claim without discovery in order to get discovery. If a petitioner can establish the favorableness and materiality of evidence in prosecution or law enforcement files, he will have stated a prima facie case for a *Brady* claim.[6] He will have satisfied the *Gonzalez*

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[6] If petitioner already knows of favorable, material evidence that trial (continued...)

standard for discovery, the standard that this Court held that the Legislature intended to abrogate when it enacted §1054.9.

In rejecting this argument, the court exalted form over substance. It did not resurrect *Gonzalez*, the court reasoned, because *Gonzalez* required a petition filed under penalty of perjury, stating specific facts that would require issuance of the writ. "Now, however, a defendant may simply file a motion for discovery under section 1054.9." 164 Cal.App.4th at 54. But that motion must describe items petitioner seeks "with sufficient particularity to explain why -- assuming they exist -- they would have been both favorable and material." *Id.* There is no substantive difference between what a petitioner had to plead under *Gonzalez* and what the petitioner must plead under *Barnett*. The point that eluded the court is that, once a petitioner satisfies the burden the court has placed on him, he will have proven a *Brady* claim, or an ineffective assistance of counsel claim. He will have proven that there was favorable evidence in prosecution or law enforcement files, which the prosecutor was obliged to disclose at trial because it was material. The fact that the evidence was not in trial counsel's files means either the prosecutor never disclosed it, giving rise to a *Brady* claim, or the prosecutor disclosed it but defense counsel never used it, giving rise to an ineffective assistance of counsel claim. *See also Curl*, 140 Cal.App.4th at 323. In either case, the petitioner must show that the evidence was favorable, such that it would have been unreasonable for trial counsel not to use it at trial, and that it was material.[7]

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[6] (...continued)
counsel did not have, petitioner has the basis for a *Brady* claim or an ineffective assistance of counsel claim, depending on the facts.

[7] The materiality prong of *Brady* and prejudice prong of ineffective
(continued...)

C. *People v. Superior Court (Maury)*

The Court of Appeal rejected the State's argument that petitioners must prove that the materials they seek actually exist:

> [I]t erects a standard that is virtually impossible, if not absolutely impossible, for a defendant to meet. This is so because a defendant cannot prove what materials *actually and currently* exist in the possession of the prosecution and/or law enforcement authorities, unless, perhaps, the prosecution or a relevant law enforcement authority revealed its possession of those materials to the defendant immediately before the filing of the section 1054.9 motion. Even then, the defendant cannot prove the requested materials *actually* exist at the time the court rules on the motion; that is information only the prosecution and/or the law enforcement authorities themselves have until they disclose the materials.

People v. Superior Court (Maury), 145 Cal.App.4th 473, 480 (2006) (emphasis in original); *Barnett*, 164 Cal.App.4th at 44; *see* argument III, *infra*. Similarly, the court rejected the State's argument that Evidence Code section 664 required a court to presume that the State complied with its disclosure obligations at trial, because that argument would "essentially eviscerate the discovery rights the statute was designed to provide." *Maury*, 145 Cal.App.4th at 484; *Barnett*, 164 Cal.App.4th at 44. The court rejected the State's attempt to put the defendant "to the burden of proving the existence of documents he does not have – a burden he may have no means of meeting." *Maury*, 145 Cal.App.4th at 484; *Barnett*, 164 Cal.App.4th at 44.

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[7] (...continued)
assistance of counsel claims are identical: to prevail on either claim, the petitioner must show a reasonable probability of a different outcome had the information come to light at trial. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Conceptually, then, the court acknowledged that petitioners need not prove that of which they are ignorant. This commonsense approach is in accord with United States Supreme Court precedent, which places the obligation to disclose favorable, material evidence on the prosecutor, and places no burden on the defendant to ask the prosecutor for favorable, material evidence, the existence of which the defendant cannot know. *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."); *Agurs*, 427 U.S. at 110-13 (prosecution must disclose favorable, material evidence to defense without request).

The court's holding that petitioners seeking postconviction discovery of *Brady* material – the existence and identity of which they are ignorant – must "simply describe those materials with sufficient particularity to explain why – assuming they exist – they would have been both favorable and material," *Barnett*, 164 Cal.App.4th at 51, is contrary to the court's holding in *Maury* and elsewhere in its *Barnett* opinion. The court held in *Maury* that petitioners need not prove the existence of documents in the prosecution's files because petitioners had no way of doing so. The court rejected the same argument in *Curl*, characterizing the State's position as, "If you can show us what we've withheld, we'll give it to you." *Curl*, 140 Cal.App.4th at 318. Yet the court in *Barnett* requires petitioners to prove something equally daunting – that evidence that may or may not exist in prosecution files is favorable and has a reasonable likelihood of changing the outcome of the trial.

The court disagreed that the burden of "describing evidence that, if it exists, would be both favorable and material," is as daunting as proving the existence of such evidence. 164 Cal.App.4th at 54. But the court failed to

recognize the impossibility of guessing correctly everything that exists in the State's files that is favorable and material. A petitioner could imagine and describe one hundred items of favorable, material evidence that might exist (but do not), yet fail to imagine ten items of favorable, material evidence that actually do exist in the State's files. In such a circumstance, the petitioner is out of luck. Placing the burden of showing materiality on the petitioner is contrary to *Maury* as well as United States Supreme Court precedent, and *Steele*.

D. Language of §1054.9

Section 1054.9(b) permits petitioners to seek discovery of materials to which they would have been entitled at trial. Therefore, the starting point for determining the burden a petitioner must carry to obtain discovery in habeas is determining the burden he must carry to obtain discovery at trial.

At trial, the prosecutor's obligation to disclose *Brady* material is self-executing. *Izazaga v. Superior Court*, 54 Cal.3d 356, 378 (1991). The defendant need not show that favorable evidence is material in order to be entitled to such evidence. A defendant need not even request favorable evidence; the prosecutor is obliged to disclose favorable, material evidence absent a request. *Bagley*, 473 U.S. at 682, 685. Therefore at trial, a defendant has no burden.

Apart from the *Brady* obligation, at the time of trial, Mr. Barnett was entitled to discovery of any unprivileged evidence or information that might lead to the discovery of evidence, if it appeared reasonable that such knowledge would assist him in preparing his defense, so long as he described such information with some degree of specificity and provided plausible justification. 164 Cal.App.4th at 73, citing *Ballard v. Superior Court*, 64 Cal. 2d 159, 167 (1966). For all the categories of *Brady* evidence

that Mr. Barnett sought, he explained that such evidence could have been used to impeach prosecution witnesses. Such is a plausible justification, which, at the time of trial, required disclosure. Even if Mr. Barnett was required to establish materiality and could not, he would nonetheless have been entitled to favorable evidence for which he provided plausible justification at trial.

It violates §1054.9, which permits access equivalent to that at trial, to place a higher burden on defendants to discover *Brady* material in habeas than at trial. This is particularly true given the remedial nature of the statute, which is designed to put the petitioner in the position he would have been in at trial if he had received all the discovery to which he was entitled. It is a shabby remedy indeed that makes the petitioner carry a heavy burden to prove his entitlement to something he should have had by right at the time of trial.

E. The Court of Appeal's Framework for §1054.9 Motions is Unworkable

The lower court provided no meaningful guidance to petitioners or to superior courts about how petitioners are to describe unknown materials "with sufficient particularity" to establish their materiality. The court instructed petitioners to "imagine and describe materials to which the defendant would have been entitled at time of trial based on some plausible theory." *Id.* at 55. This statement is no guidance at all. A petitioner and his counsel can never imagine every plausible theory that could lead to favorable evidence. Who could have imagined that a prosecutor would arrange with the lawyer for a witness to defer a psychological evaluation until after the witness testified, to avoid disclosing the psychological evaluation to the defense before the witness testified? Who could have imagined that a prosecutor would arrange with a witness's lawyer to give

the witness favorable treatment on his criminal charges, but that neither lawyer would tell the witness so the witness could testify that he received nothing in exchange for his testimony? No habeas lawyer could have imagined these outrageous situations, and yet both happened in California capital trials. *Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005); *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (*en banc*).

No petitioner can imagine all plausible theories that might lead to *Brady* material. Under the lower court's formulation, if the petitioner does not guess correctly what is in the prosecution files, he does not get discovery. The *Barnett* decision turns discovery into a game and discourages prosecutors from complying with *Brady*. Prosecutors have no incentive to voluntarily disclose favorable, material evidence, which is their obligation, even after trial,[8] because *Barnett* puts the burden on petitioners to establish materiality. If petitioners fail to show materiality, they get nothing.

The framework created in *Barnett* is unworkable for other reasons. The evidentiary showing the petitioner must make is profoundly burdensome. Describing why evidence is favorable is easy. Materiality is difficult.

Mr. Barnett asked for evidence of criminal activity by the prosecution witnesses. The court rejected the request because Mr. Barnett did not show materiality. He did not, for example, allege materiality of impeachment of witnesses whose testimony "was of little or no value in

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[8] *People v. Gonzalez*, 51 Cal.3d at 1260, 1261; *People v. Garcia*, 17 Cal.App.4th 1169, 1179 (1993).

securing his conviction." *Barnett*, 164 Cal.App.4th at 52.[9] Such evidence, the court held, even considered collectively with other favorable evidence, is not material. *Id.* Apparently, there is no way to gain discovery of impeachment material regarding non-"star" witnesses, even if the case is entirely circumstantial, as Mr. Barnett's is, and regardless of the quantum of other favorable evidence Mr. Barnett could present. This is an incorrect statement of law, but underscores how onerous the materiality burden is that the court would place on petitioners.

Even if a witness was important, Mr. Barnett could not discover favorable evidence about her unless he established that the witness had not already been impeached. *Id.* at 52. For every witness about whom a petitioner seeks impeachment material, therefore, the petitioner must recount for the court the witness's trial testimony, her relative importance, and whether she had been impeached at trial. *See also id.* at 74 (discovery denied because Barnett failed to "offer any explanation of what [witness]'s testimony was or why it was material.").[10]

From this, it is apparent that discovery motions following *Barnett* would be unbearably prolix. The theories that petitioners put forth will

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[9] If a witness had no value, the prosecutor would not have called the witness. Moreover, impeachment of a number of comparatively minor witnesses, considered cumulatively with other evidence, can create a reasonable probability of a different outcome by calling into question the credibility of the prosecution case generally.

[10] The petitioner must do this even if (as here) the motion is heard by the same judge who tried the case, and even if less time has elapsed since the trial than in this case (almost 20 years), in case writ review becomes necessary. This is so because the court elsewhere denied relief because the petition did not make materiality clear *to the Court of Appeal*, which will not have previous familiarity with the case. *See, e.g., Barnett*, 164 Cal.App.4th at 55.

need to be detailed and all-encompassing. The factual showing of what went on at trial will need to be exhaustive. And petitioners still bear the risk of guessing wrong.

The *Barnett* framework also creates a dilemma for petitioners regarding when to file §1054.9 motions. If a petitioner files early in his investigation, he will not yet have developed much favorable evidence. That will adversely affect his ability to establish materiality of evidence he seeks, because materiality must be assessed cumulatively: "[I]t must be of such significance that *considered collectively with any other evidence favorable to the defendant*, its absence undermines confidence in the outcome." *Barnett*, 164 Cal.App.4th at 49 (emphasis added). A petitioner will have developed more favorable evidence at the end of his investigation than he had at the beginning. But waiting until the end of the investigation to file a discovery motion defeats the whole purpose of §1054.9, which is to assist petitioners in stating a prima facie case for relief, *Steele*, 32 Cal.4th at 691. That is the conundrum that the Court of Appeal created.

The court's ruling regarding materiality conflicts with *Brady* and *Steele*, and is unworkable. This Court should reject it.

II. The Lower Court's Decision Regarding Out-of-State Law Enforcement Agencies was Consistent with this Court's Decisions and *Brady*

A. Facts

At trial, the court granted Mr. Barnett's discovery request for original interview notes of any witness who testified at trial. Exh. 1, Vol. 1, 54.[11] In the penalty phase, the prosecution introduced testimony and documentary evidence regarding seven out-of-state incidents of alleged prior criminality under §190.3(b).[12] *People v. Barnett*, 17 Cal.4th 1044, 1171, 1174, 1080-81 (1998).

In his §1054.9 motion, Mr. Barnett requested original notes of witness interviews – the same discovery he had been granted at the time of trial. Exh. 32, Vol. 31, 6144 (#6, #7). The prosecution provided no original notes in pretrial discovery. *Id.*, 6144:21.

The motion described the participation of out-of-state agencies in the penalty phase case. The New York State Police provided records. At Investigator Koester's request, they located and interviewed a witness. Two officers traveled to California to testify in the penalty phase. *Id.* at 6591.[13]

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[11] The exhibits cited refer to exhibits to the petition for writ of mandate in the Court of Appeal, No C051311.

[12] The State asserts that the prosecution's penalty phase presentation was made "through witnesses." Opening Brief on the Merits ("OBM") 7. The out-of-state agencies provided *documentary* evidence, which was introduced into evidence and was mentioned in this Court's opinion. *Barnett*, 17 Cal.4th at 1080, 1133-34 (Alberta convictions); 1081 (Massachusetts conviction); 1171-72 (New York State Police files).

[13] In the Motion to Take Documentary Evidence, filed this day, Mr. Barnett provides records regarding the New York State Police's involvement in the investigation of the penalty phase case.

After receiving Koester's request for assistance, the State Police assigned an investigator to "conduct the appropriate investigation, locate the pertinent witnesses, and assist the Butte County District Attorney's Office in any way possible." Mot. Take Evid. (Disc. 4154). The memo emphasized that, the "investigation and locating of the pertinent witnesses will be instrumental and extremely important to the prosecution's position at the penalty phase." *Id.*

Koester again sought the assistance of the State Police: "We are seeking your department's assistance in acquiring Ms. Torres' current address and phone number, or in the event she has no phone, set up some procedure to possibly speak to her by phone at your department's office." *Id.* at Disc. 4156. The State Police responded by ordering an officer to contact the witness, and using DMV records to locate her. *Id.* at Disc. 4157. After trying several locations, they found the witness and arranged for her to contact the Butte County district attorney. *Id.* at Disc. 4158. Ms. Torres testified in the penalty phase.

The Metro-Dade Police Department (Florida), provided records regarding Mr. Barnett's 1971 arrest. At the request of Butte County District Attorney Investigator Koester, the agency contacted and interviewed a witness, located a second witness, and provided her address to Investigator Koester. Metro-Dade Police Officer Jenkins traveled to California to testify in the penalty phase. Exh. 49, Vol. 33, 6590-91.

A Florida prosecutor assisted by locating a witness and providing records from Mr. Barnett's post-arrest hospitalization in 1971. Exh. 49, Vol. 33, 6591.

The Calgary, Canada, Police Department provided records regarding Mr. Barnett's 1970 convictions. At Koester's request, the police located and interviewed witnesses and provided their addresses to Koester.

Detective Beattie traveled to California to testify in the penalty phase. *Id.*, 6591-92.

Four other out-of-state agencies provided records to the Butte County prosecutor. *Id.*, 6590-92.[14]

B. Lower Court's Decision

The court determined that the superior court erred by denying discovery from out-of-state law enforcement agencies. The court noted that out-of-state officers interviewed witnesses who testified at trial and provided reports to the Butte County prosecutor. 164 Cal.App.4th at 41. The court asked, " whether a law enforcement agency that provides a report relating to previous criminal conduct by a defendant charged with a capital offense can be deemed to have been 'involved in the investigation or prosecution of the case' against the defendant, such that materials in the possession of that agency are subject to discovery under section 1054.9," and concluded the answer was "yes." *Id.*

Steele held that §1054.9 excluded agencies not involved in investigating or preparing the case against the defendant. 164 Cal.App.4th at 41, citing *Steele*, 32 Cal.4th at 696. Investigation, and preparation of evidence to prove, prior felony convictions is part of the prosecution of a capital case. *Barnett*, 164 Cal.App.4th at 41, citing §190.3(c).[15] "To the extent the out-of-state law enforcement agencies here provided the People,

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[14] The State's description of these agencies as having "minimal connection to the prosecution," OBM 7, is incorrect. Likewise, the State's discussion of the agencies' involvement, OBM 16-17, is contrary to the record. *Cf.* Exh. 49, Vol. 33, 6590-92.

[15] Out-of-state agencies also assisted the prosecution with investigation of evidence of alleged prior criminal activity pursuant to §190.3(b).

during their preparation of the capital case against Barnett, with reports of his prior criminal conduct that resulted in felony convictions, those agencies were without question 'involved in the investigating [and] preparing of the case against' Barnett." *Id.* As such, the court found that the superior court should have granted the request for original notes of out-of-state agencies that interviewed witnesses who testified in the penalty phase. *Id.* at 45.

C. Pre-1990 Criminal Discovery

This decision is consistent with this Court's decisions regarding the scope of criminal discovery at the time of Mr. Barnett's trial in 1988.

Section 1054.9(b) defines "discovery materials" as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." If the lower court was correct that notes of out-of-state agencies were discovery materials, then Mr. Barnett is entitled to them.

Mr. Barnett's discovery motion is governed by the law in effect at his trial in 1988, before Proposition 115. *Steele*, 32 Cal.4th at 695 n.3. At the time, the trial court had inherent power to order discovery in the interests of justice. *Hill v. Superior Court*, 10 Cal.3d 812, 816 (1974). "'In the absence of a countervailing showing by the prosecution that the information may be used for an improper purpose, discovery is available not merely in the discretion of the trial court, but as a matter of right.'" *People v. Memro*, 38 Cal.3d 658, 677 (1985). A ruling on a discovery motion must reflect "'our fundamental concern that an accused be provided with a maximum of information that may illumine [defendant's] case.'" *State ex. rel. Dep't of Transportation v. Superior Court (Hall)*, 37 Cal.3d 847, 852 (1985), quoting *Ballard*, 64 Cal.2d at 167.

"California courts long have interpreted the prosecutorial obligation to disclose relevant materials in the possession of the prosecution to include

information 'within the possession or control of the prosecution.'" *In re Littlefield*, 5 Cal.4th 122, 135 (1993)[16], citing *Hill*, 10 Cal.3d at 816. The obligation included information that was "reasonably accessible" to the prosecution. *Pitchess v. Superior Court*, 11 Cal.3d 531, 535 (1974). *See also Engstrom v. Superior Court*, 20 Cal.App.3d 240, 243-44 (1971), *disapproved on other grounds in Hill*, 10 Cal.3d at 820; *People v. Coyer*, 142 Cal.App.3d 839, 843 (1983).[17]

Defendants also had statutory discovery rights in 1988. The *Pitchess* procedure for seeking citizen complaints regarding police officers was codified in 1978. Defendants had the right to subpoena records from third parties. *Millaud v. Superior Court*, 182 Cal.App.3d 471, 475 (1986). For example, in *People v. Superior Court (Barrett)*, 80 Cal.App.4th 1304 (2000), Barrett was charged with a prison killing. The Department of Corrections (CDC) investigated the killing. Barrett sought discovery of 17 categories of CDC documents, some related to the investigation and some unrelated. *Id.* at 1309-10.

By analogy to *Brady*, the court held that the prosecutor must provide discovery of materials from CDC's investigation of the killing. But Barrett could not compel the prosecutor to provide discovery of CDC records unrelated to the killing, related to its custodial role. In that role, CDC was a third party to the criminal prosecution and the discovery scheme of §1054

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[16] *Littlefield* interpreted the phrase "in the possession of the prosecuting attorney" in §1054.1. 5 Cal.4th at 134-35. This case involves the indistinguishable phase "in the possession of the prosecution" in §1054.9(b).

[17] *Littlefield* held that Proposition 115 did not abrogate the rule that information "in the possession" of the prosecution is that to which the prosecution has reasonable access.

did not apply. *Barrett*, 80 Cal.App.4th at 1317-18. However, as a third party, CDC was subject to discovery by means of subpoena duces tecum, assuming Barrett could show good cause. *Id.* at 1318.

D. Discovery of Penalty Phase Evidence

California provides for discovery of penalty phase evidence. Section 190.3 provides that "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." The law requires notice of the actual evidence on which the State intends to rely to establish aggravating factors. *People v. Jennings*, 46 Cal.3d 963, 987 (1988); *People v. Phillips*, 41 Cal.3d 29, 72 n.25 (1985).

People v. Breaux, 1 Cal.4th 281, 311 n.10 (1991), held that defendants may obtain discovery of penalty phase evidence. The Court held that "general principles of discovery regarding 'other crimes' evidence," applied "to the penalty phase of a capital case so long as the relitigation of the'other crime'. . . is circumscribed by the bounds of relevance and admissibility of evidence that prevails in the original prosecution." *Id. at* 311 n.10.

This holding is concordant with this Court's holdings that the "penalty phase of a capital trial is merely a part of a single, unitary criminal proceeding." *People v. Superior Court (Mitchell)*, 5 Cal.4th 1229, 1233 (1993), citing *People v. Robertson*, 48 Cal.3d 18, 45-46 (1989); *People v. Halvorsen*, 42 Cal.4th 379, 434 (2007) ("[T]he phases of a capital trial are stages of a unitary trial . . . ."). Recently this Court quoted its pre-§1054 discovery laws in discussing discovery of penalty phase evidence:

> We have also repeatedly stated that "a criminal defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an *intelligent defense* in light of all relevant and reasonably accessible

> information.'" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84, italics added, quoting *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535; accord, *People v. Luttenberger* (1990) 50 Cal.3d 1, 17.) Denial of discovery of potential rebuttal evidence thwarts defense counsel's ability to present an intelligent defense and to make an informed tactical decision whether to present mitigating evidence.

People v. Gonzalez, 38 Cal.4th 932, 960 (2006).

Therefore, it was settled at the time of Mr. Barnett's trial that he was entitled to discovery of the aggravating evidence that the State intended to present.

E. *Steele*

In *Steele*, this Court determined that §1054.9(b) defining "discovery materials" as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial" encompasses prosecution and law enforcement authorities "who were involved in the investigation or prosecution of the case." 32 Cal.4th at 696. This conclusion about exactly who must possess the materials for them to come within the scope of §1054.9 is consistent with the scope of the prosecution's constitutional duty to disclose exculpatory information. *Id.*

F. *Brady*

1. Scope of the *Brady* Obligation

Interpreting §1054.9 to encompass out of state agencies that assist in the investigation of the case is consistent with *Brady*. In *United States v. Bagley*, 473 U.S. 667 (1985), two state law enforcement officers employed as private security guards who assisted the federal Bureau of Alcohol, Tobacco and Firearms (ATF) in an undercover investigation accepted monetary rewards from the ATF for their roles in the investigation. The

prosecutor was ignorant of the payments. Nonetheless, the Court held that the prosecutor had suppressed the information. *Id.* at 670-671 & n.4, 676.

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), Ritchie was charged with sexually abusing his daughter. In 1979, the police charged Ritchie and referred the matter to Children and Youth Services (CYS). Pre-trial, Ritchie subpoenaed CYS for records regarding his daughter's allegations against him, as well as a CYS investigation from 1978, when an unidentified source reported that Ritchie's children were being abused. Ritchie's daughter had not reported the alleged sexual abuse to CYS during its 1978 investigation. *Id.* at 43 & n.1.

The Supreme Court held, "It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Ritchie*, 480 U.S. at 57. Because neither Ritchie nor the prosecutor had seen the CYS records, it was impossible to say whether any information in the records was material. *Id.* Because Pennsylvania law allowed CYS records to be disclosed if directed by a court, the Court could not "conclude that the statute prevents all disclosure in criminal prosecutions." *Id.* at 58. "In the absence of any apparent state policy to the contrary, we therefore have no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determines that the information is 'material' to the defense of the accused." *Id.* The Court ordered the trial court to review the CYS file to determine whether it contained favorable, material information.

Ritchie is relevant because it holds that CYS records come within *Brady,* even though the prosecutor did not have access to them and the CYS investigation was not part of the prosecutor's case against Ritchie. CYS was not even a law enforcement agency. Nonetheless, Ritchie was entitled to discovery of favorable, material evidence in CYS records.

Kyles v. Whitley, 514 U.S. 419, 437 (1995), held that, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." The State of Louisiana conceded that "the State is 'held to a disclosure standard based on what all State officers at the time knew.'" *Id.* at 438 n.11.

Strickler v. Greene, 527 U.S. 263 (1999), concerned notes taken by a detective in another county. *Id.* The Court reiterated that the prosecutor is responsible for "any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.* at 275 n.12.

The lower federal courts have relied on constructive possession – evidence deemed to be possessed by the prosecution because it is possessed by others acting on the government's behalf, as explained in *Kyles*. *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (*en banc*), granted habeas relief to a death row inmate because the prosecution failed to disclose favorable, material evidence in the prison file of the prosecutor's main witness, Dunbar.[18] The record was unclear whether the prosecutors ever actually possessed Dunbar's prison file, but this was "not determinative."

> Dunbar was the prosecution's star witness, and was known by police and prosecutors to be a career burglar and six-time felon, with a criminal record going back to adolescence. When the state decides to rely on the testimony of such a witness, it is the state's obligation to turn over all information bearing on that witness's credibility. [citations]. This must include the witness's criminal record, including prison records, and any information therein which bears on credibility. The state had an obligation, before putting Dunbar on the stand, to obtain and review Dunbar's corrections file, and to treat its contents in accordance with the requirements

[18] The information in the corrections file was available to the prosecution at the time of Carriger's trial.

of *Brady* and *Giglio*.

132 F.3d at 479-80 (citations omitted).

United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989), held that the prosecutor must disclose documents of which she has knowledge and access, including anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant.[19] *Id.* at 1036. This interpretation of the scope of the *Brady* obligation is consistent with the scope of the prosecutor's disclosure obligation in California discovery. *Littlefield*, 5 Cal.4th at 135.

United States v. Santiago, 46 F.3d 885, 894 (9th Cir. 1995), held that the prosecution had knowledge of and access to its witnesses' federal Bureau of Prisons (BOP) files. Because the witnesses were inmates, the prosecutor knew the files existed. The prosecution obtained Santiago's own BOP file, so it could not deny that it had access to the files of other inmates.

United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973), held the prosecution was responsible for nondisclosure of the personnel file of the government's star witness, a Postal Service employee. "The government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files. In fact it did not even deny access, but only present possession without even an attempt to remedy the deficiency." *Id.* at 57. The court concluded, "there is

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[19] While the quoted passage referred to the government's discovery obligations under Rule 16, Federal Rules of Criminal Procedure, the same rule applied to *Brady* material: "If a federal prosecutor has knowledge of and access to exculpatory information as defined in *Brady* and its progeny that is outside the district, then the prosecutor must disclose it to the defense." *Bryan*, 868 F.2d at 1037.

no suggestion in *Brady* that different 'arms' of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities." *Id.*

Brady requires federal prosecutors to disclose information from agencies that assist in their investigations. When an agency has actively participated in a criminal investigation or prosecution, "that is, has served in a capacity that exceeds the role of providing mere tips or leads based on information generated independently of the criminal case -- it likely has aligned itself with the prosecution and its files are subject to the same search as would those of an investigative law enforcement agency assigned to the case. For example, alignment likely exists where an intelligence agency has provided information to a law enforcement agency or to the prosecution, which information serves independently as a factual element in support of a search warrant, arrest warrant, indictment, etc." U.S. Attorneys Manual, Title 9, §2052.

In sum, *Brady* imposes obligations not only on the prosecutor, but on the government as a whole. *United States v. Blanco*, 392 F.3d 382, 394 (9th Cir. 2004).

2. This Court's *Brady* Jurisprudence

In re Brown, 17 Cal.4th 873 (1998), a capital, case, involved a crime lab worksheet that showed petitioner's blood tested positive for PCP, which would have contradicted the results of a negative PCP test that the prosecution introduced at trial. *Id.* at 877-78. This Court concluded that any favorable evidence known to others acting on the government's behalf is imputed to the prosecution. Because the lab "work[ed] closely with the District Attorney's Office in assisting it in the prosecution" of Brown, the lab was part of the investigative team. Favorable evidence in the possession of the crime lab was imputed to the prosecution. *Id.* at 880.

Brown, in discussing the prosecutor's duty to disclose favorable evidence in the possession of the investigative team, relied on *Smith v. Secretary of New Mexico Dep't of Corrections*, 50 F.3d 801 (10th Cir. 1995). *Brown*, 17 Cal.4th at 879 n.3. The Bernalillo County prosecutor was responsible for information in the files of the Torrance County investigators because the Bernalillo prosecutor had actual knowledge that the Torrance County law enforcement agencies had investigated the killings. *Smith*, 50 F.3d at 825 n.36.

This Court recently addressed the prosecution team concept in *People v. Zambrano*, 41 Cal.4th 1082 (2007). The defendant discovered that letters – which the defendant claimed were exculpatory – had been sent to a deputy at the jail where the defendant was housed pending trial, and to the prosecutor. *Id.* at 1131. This Court held that the prosecutor had no duty to disclose the letter sent to the jail. "[T]he sheriff was only the defendant's jailer, and was not involved in the investigation or prosecution of the charges against him." *Id.* at 1133. This Court held that the prosecution's *Brady* obligation does not extend to evidence in the possession of government agencies not involved in the case. *Id.*, *citing Steele*, 32 Cal.4th at 697. Because the sheriff was not involved in the investigation of the case, the prosecution was not responsible for materials in the sheriff's possession.

In *People v. Marshall*, 13 Cal.4th 799 (1996), the defendant sought Department of Corrections (CDC) records of a prosecution witness, believing the CDC file contained impeachment material about the witness's mental capacity. The trial court denied the discovery motion because the material sought was privileged. *Id.* at 839-40.

This Court was guided by *Ritchie*. "[I]t is 'well settled' the government must turn over evidence in its possession that is both favorable

to the accused and material to guilt or punishment." *Marshall*, 13 Cal.4th at 841, *citing Ritchie*, 480 U.S. at 57. This Court faulted the trial court for short-circuiting *Ritchie*'s in-camera review process by "failing to require the prosecutor to assert the privilege now claimed." 13 Cal.4th at 842. Ultimately, this Court concluded the records were not material because the witness had been extensively impeached. *Id.* The important point is that the prosecutor was responsible for asserting the privilege on behalf of the CDC, and the CDC was part of the government from which the defendant had a due process right to exculpatory evidence under *Brady* and *Ritchie*, even though CDC was not part of the prosecution team.[20]

This Court also considered *Ritchie* in *People v. Webb*, 6 Cal.4th 494 (1993). There, the defendant subpoenaed psychiatric records of a prosecution witness from both "private and county therapists." *Id.* at 518. This Court questioned whether the records could be deemed to be "in the possession" of the "government." "The records were not generated or obtained by the People in the course of a criminal investigation, and the People have had no greater access to them than defendant. Given the strong policy of protecting a patient's treatment history, it seems likely that defendant has no constitutional right to examine the records even if they are

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[20] *People v. Superior Court (Barrett)* is inconsistent with *Marshall*. The *Barrett* court held that the prosecutor was not responsible for disclosing non-investigatory CDC records because CDC, in its custodial role, was not part of the prosecution team. 80 Cal.App.4th at 1317-18. *Barrett* did not cite *Ritchie* or *Marshall*, which likewise involved CDC records. This Court in *Marshall*, when it cited *Ritchie* and held the prosecutor was required to assert the privilege for CDC records, assumed that CDC came within the scope of the *Brady* obligation. *Marshall*, 13 Cal.4th at 841-42. The *Barrett* court held that the CDC would not come within the scope of *Brady*, but that the defendant could nonetheless compel discovery by means of third party subpoena. *Barrett*, 80 Cal.App.4th at 1318. To the extent they conflict, *Marshall* controls.

'material' to the case." *Id.* at 518.[21] After stating this dictum, this Court found no error because the records were examined in camera, and information bearing on the defendant, the crime, and the witness's credibility and ability to testify was disclosed. *Id.*

3. *Pitchess*: Giving Effect to *Brady* through Third Party Discovery

This Court has extended the concept of *Brady* beyond the "prosecution team" by allowing a defendant to seek discovery from agencies that were not necessarily part of the investigation, but that may nonetheless have relevant information. *Pitchess* allows a defendant to seek discovery of personnel records of law enforcement officers directly from the employing agency. *City of Santa Cruz v. Municipal Court*, 49 Cal.3d 74, 81-84 (1989). Evid. Code §1043(a). The prosecutor is not a party to *Pitchess* litigation. *Alford v. Superior Court*, 29 Cal.4th 1033, 1045 (2003).

The right to discover law enforcement personnel files is grounded in a defendant's due process right to favorable, material evidence. *People v. Mooc*, 26 Cal.4th 1216, 1225 (2001). While the defendant usually seeks records from the agency that investigated the charged crime, such is not always the case. In *Abatti v. Superior Court*, 112 Cal.App.4th 39 (2003), the defendant in an assault case sought records from the Calexico Police Department for a former officer who was not involved in the investigation of the assault, but was a lay witness. The assault did not occur in Calexico, and the Calexico Police Department apparently had no role in the

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[21] This statement is puzzling, for these very facts existed in *Ritchie*. The Supreme Court held that Ritchie did not have a right to examine the records himself, but that his due process right to exculpatory information in the possession of the government required the court to examine the records in camera to determine whether any exculpatory material existed, and if it did, to disclose it to Ritchie.

investigation. *Id.* at 44.

The court noted that the Calexico Police Department was not part of the prosecution team. Because the *Pitchess* procedure is the sole means by which information in peace officer files can be obtained, the defendant's constitutional right to exculpatory evidence required the court to permit review of the records of an officer who was a material prosecution witness even though the agency holding the files was not on the "prosecution team." *Id.* at 57-58 (citations omitted). Habeas petitioners may seek *Pitchess* records through §1054.9. *Hurd v. Superior Court*, 144 Cal.App.4th 1100, 1109 (2006).

4. *Brady* Applies to Penalty Phase Evidence

The Due Process Clause requires the prosecutor to disclose favorable evidence that is material either to guilt *or punishment*. *Brady*, 373 U.S. at 87 (emphasis added). In *Banks v. Dretke*, the suppressed evidence was penalty phase evidence. 540 U.S. at 700-01.

In *East v. Johnson*, 123 F.3d 235 (5th Cir. 1997), the court reversed a death sentence because the prosecution withheld evidence that the defendant could have used to impeach a penalty phase witness. The witness testified to an alleged prior violent act by the defendant, unrelated to the capital murder. *Id.* at 237-38. The prosecution suppressed that the witness was being prosecuted in a different county, and that she had undergone a competency evaluation that determined she was incapable of distinguishing reality from fantasy. *Id.* at 238.

Brady requires production of any evidence relevant to a statutory mitigating factor and any evidence that tends to negate any aggravating factor. *See, e.g., Mitchell v. Gibson*, 262 F.3d 1036, 1060-66 (10th Cir. 2001) (death sentence reversed; prosecution withheld evidence that prosecution's forensic chemist presented false testimony that the defendant

had raped and sodomized the decedent); *Johnson v. State*, 38 S.W.3d 52 (Tenn. 2001) (death sentence reversed; State withheld police report contradicting evidence supporting an aggravating circumstance); *Young v. State*, 739 So.2d 553 (Fla. 1999) (death sentence reversed; prosecution suppressed evidence that victim shot first; defense at trial was self-defense); *State v. Parker*, 721 So.2d 1147 (Fla. 1998) (death sentence vacated; prosecution withheld evidence that, in co-defendant's resentencing, the State argued co-defendant, not Parker, was the shooter); *United States v. Beckford*, 962 F.Supp. 804 (E.D. Va. 1997) (granting discovery motion for evidence establishing statutory mitigating factor).

The State argues that, for constructive possession, *Brady* applies only to the current case against the defendant. OBM 13-14. Under discovery law and *Brady*, a defendant is entitled to disclosure of evidence regarding the capital murder charges that are being prosecuted, which includes the penalty phase. "A capital case . . . frequently encompasses investigation and proof of prior felony convictions the defendant has suffered because the jury may consider such convictions in determining whether to impose the death penalty or life without the possibility of parole. (*People v. Gurule* (2002) 28 Cal.4th 557, 636; §190.3, subd. (c).) Thus, the investigation of prior felony convictions, and preparation of the evidence necessary to prove those convictions, is a standard part of the prosecution of a capital case." *Barnett*, 164 Cal.App.4th at 41. The term "case," as it is used in "law enforcement agencies who were involved in the investigation or prosecution of the case," *Steele*, 32 Cal.4th at 696, includes the penalty phase.

G. Application of Law to Mr. Barnett's Case

The Butte County prosecutor solicited and received assistance of out-of-state agencies in investigating the case against Mr. Barnett. At the

request of the Butte County prosecutor, these agencies sent records, interviewed witnesses and sent officers to California to testify in the penalty phase. Most of the prosecution's penalty phase case was evidence from out-of-state agencies. *Barnett*, 17 Cal.4th at 1080-81 (seven of 13 incidents presented in aggravation occurred outside of California). The lower court concluded that out-of-state law enforcement agencies that provide a California prosecutor with reports relating to criminal conduct by a defendant charged with a capital crime are "involved in the investigation and prosecution of the case," so materials in their possession are subject to discovery pursuant to §1054.9. 164 Cal.App.4th at 43. That conclusion is consistent with criminal discovery law, *Brady*, and *Steele*. If there is evidence in the files of those agencies that would mitigate the aggravating evidence, the prosecutor is responsible for producing it.

At the time of Mr. Barnett's trial, the prosecution was obliged to disclose information in its "possession or control," which encompassed information "reasonably accessible" to it. *Hill*, 10 Cal.3d at 816; *Pitchess*, 11 Cal.3d at 535. Evidently, the Butte County prosecutor had reasonable access to the records of the out-of-state agencies at issue. The prosecutor obtained records from those agencies, which he then used in the penalty phase. He was therefore obliged to disclose records from those agencies in discovery.

Steele further defined the scope of the discovery obligation with reference to *Brady*. *Brady* requires the prosecutor to disclose favorable evidence in the possession of the government and any favorable evidence known to others acting on the government's behalf.[22] If the prosecutor

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[22] That rule is sufficient for this case because the out-of-state agencies were acting on the Butte County prosecutor's behalf when they (continued...)

knows an agency has files and has access to those files, then he must disclose them. *Smith*, 50 F.3d at 825 n.36; *Bryan*, 868 F.2d 1036; *Deutsch*, 475 F.2d at 57. The prosecutor's disclosure obligation includes evidence in the possession or control of the prosecutor, encompassing information that is reasonably accessible to the prosecutor. *People v. Robinson*, 31 Cal.App.4th 494, 499 (1995). The prosecutor has reasonable access to all agencies that are part of the criminal justice system. *People v. Little*, 59 Cal.App.4th 426, 431 (1997).

The Butte County prosecutor had knowledge of and access to the files of out-of-state agencies, as evidenced by his ability to obtain records regarding Petitioner's alleged criminal activity in those states. Such access and knowledge made the prosecutor responsible for those agencies' records under *Brady*.

The lower court correctly concluded that, by providing interview reports, out-of-state law enforcement agencies became involved in the investigation and prosecution of the case. 164 Cal.App.4th. at 41. This conclusion is reinforced by considering the actions that the out-of-state agencies took at the California prosecutor's request: locating witnesses, providing their addresses, and sending law enforcement officers to California to testify in the penalty phase. Even though these agencies began their acquaintance with Mr. Barnett years before he was arrested in Butte County in 1986, they actively assisted the California investigation after 1986. Those agencies did not take those actions in 1986-1988 in

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[22] (...continued)
provided him records, interviewed witnesses at his request, and sent officers to Butte County to testify. However, *Ritchie* suggests a broader rule, because there, CYS was not acting on the prosecutor's behalf, yet its records were nonetheless subject to disclosure.

furtherance of their own investigations into Mr. Barnett's activities years earlier.[23] By assisting the Butte County prosecutor, the out-of-state agencies became involved in the investigation and prosecution of the case against Mr. Barnett. These agencies were part of the prosecution team, and as such, the prosecutor is responsible for providing discovery from these agencies.

H. The State's Arguments

1. A New Test

The State proposes a new test of whether an agency is part of the prosecution team, based on 1) the relationship between the prosecution and the agency; 2) the nature and extent of the agency's involvement, and 3) the agency's motivation. OBM 10-16.

The State does not explain many things: why this Court should abandon the "possession and control" test of *Pitchess* and *Hill*; why the "acting on the government's behalf in the case" test of *Kyles* does not answer the question; why it does not endorse the "knowledge and access" test of *Brady* cases such as *Bryan* and *Santiago*. The State urges this Court to adopt a new test, divorced from its *Hill/Pitchess* discovery cases, focusing solely on the prosecutor's *Brady* obligation, defined by the "prosecution team" concept.[24] This approach is contrary to *Steele*.

In *Steele*, this Court interpreted the prosecution's §1054.9 discovery

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[23] The alleged criminal activity from out-of-state dated from 1965 through 1982. *Barnett*, 17 Cal.4th at 1080-81.

[24] The provenance of "prosecution team" is in *Brady* cases. This Court used the term in *Steele*, 32 Cal.4th at 697, quoting from *Barrett*, 80 Cal.App.4th at 1315, which in turn cited *Brown*, 17 Cal.4th at 879. *Brown* quoted the term from *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980), which quoted from *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979).

obligation as consistent with its statutory discovery obligation at trial. *Steele*, 32 Cal.4th at 696. To delimit the postconviction right, the Court looked to the trial right, which limits trial discovery to materials the prosecutor possesses or knows "to be in the possession of the investigating agencies …." §1054.1. This Court also analogized to the prosecutor's *Brady* disclosure obligation, but the primary referent remained the prosecutor's trial discovery obligation. *Id*. at 696-97, citing *Brown* and *Kyles*.

In most cases, he discovery obligation and the *Brady* obligation are co-extensive. However, pre-Proposition 115 discovery was quite broad. Under the "possession and control" test of *Pitchess* and *Hill*, materials discoverable by the defense include information in the possession of all agencies to which the prosecution has access that are part of the criminal justice system.

Therefore, the State's focus on *Brady*, as opposed to the discovery obligation, is limiting in a way contrary to *Steele*. While the two often are co-extensive, in some circumstances, additional agencies will be encompassed by the prosecutor's discovery obligations. The inquiry is whether the information was reasonably accessible to the prosecution. *Littlefield*, 5 Cal.4th at 135. If so, then the prosecutor is responsible for disclosing it in postconviction discovery.

The *Brady* inquiry is narrower. The *Brady* inquiry asks if the agency was acting on behalf of the prosecutor in the case, *Kyles*, 514 U.S. at 437, or whether the prosecutor had knowledge of and access to the agency's information. *Bryan*; *Santiago*.

Under all of these tests, the Butte County prosecutor is responsible for disclosing records from the out-of-state agencies.

The first factor of the State's proposed three-factor test for the

prosecution team is the relationship between the prosecution and the other agency. OBM 11-13. The cases cited do not limit the prosecution team to local police agencies. *Kyles*, *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985), and *Fero v. Kerby*, 39 F.3d 1462, 1472 n.12 (10th Cir. 1994), all hold that the police are part of the prosecution team, and none of those cases limit that holding to local police.

The State argues, without citation, that the prosecution and local law enforcement are tasked with enforcement of the law in the same geographic area, and that "[t]heir common purpose . . . creates an interconnected relationship." OBM 11. That may be, but the case law on discovery and *Brady* requires a court to evaluate the facts of each case to determine whether the prosecutor has possession and control of the agency's files, such that they are reasonably accessible to him; whether the agency is acting on behalf of the prosecutor; and whether the prosecutor has knowledge of and access to the agency's files. These questions could be answered in the affirmative between a prosecutor and a local police agency, and they could also be answered in the affirmative between a prosecutor and the FBI. *See, e.g., In re Pratt*, 69 Cal.App.4th 1294, 1308-10 (1999) (county prosecutor responsible for nondisclosure of FBI's relationship with witness). Every case turns on its own facts. *Antone*, 603 F.2d at 570 ("[W]e prefer a case-by-case analysis of the extent of interaction and cooperation between the two governments."); *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006) (same).

Petitioner agrees that "when the prosecution employs an agency to affirmatively assist in the prosecution of a case, that relationship will generally be sufficient to impute responsibility on the prosecution to information that agency possesses." OBM 11. Here, the prosecutor requested assistance (not just copies of records) from the out-of-state

agencies, which responded by sending records, interviewing witnesses the prosecutor asked them to interview, and sending officers to testify in the penalty phase. By so doing, they affirmatively assisted in the prosecution of the capital case against Mr. Barnett.

A joint investigation between jurisdictions results in all the agencies being considered part of a single "prosecution team." OBM 12, citing *Antone*, 603 F.2d 569-70; *United States v. Shakur*, 543 F. Supp 1059, 1060 (S.D.N.Y. 1982). *Antone* involved a joint investigation between state and federal agencies. State officers were witnesses in the federal prosecution. "The entire effort was marked by this spirit of cooperation . . . ." 603 F.2d at 569. The same is true here, where the out-of-state agencies actively cooperated with the Butte County prosecutor's requests.

The State cites *Moon v. Head*, 285 F.3d 1301 (11th Cir. 2002). OBM 12. The court of appeal addressed *Moon*:

> The People's reliance on *Moon* is misplaced. Unlike the Eleventh Circuit, California courts do not interpret the constitutional duty to disclose exculpatory information as limited to information in the actual possession of the "prosecution team." [Citing *Steele* & *Barrett*.]
>
> Here, even if the out-of-state law enforcement agencies were not part of the "prosecution team," the People used those agencies to assist in their prosecution of the capital case against Barnett. Accordingly, the People had constructive possession of information possessed by those agencies, and the People's constitutional duty to disclose exculpatory information extended to information in the possession of those agencies. It follows then that those agencies were "involved in the investigation or prosecution of the case" against Barnett within the meaning of *Steele*. Consequently, the People cannot avoid their duty of disclosure under section 1054.9 by claiming otherwise.

164 Cal.App.4th at 42-43.

In *United States v. Guerrerio*, 670 F. Supp. 1215 (S.D.N.Y 1987), OBM 12, there was no joint investigation between the U.S. Attorney and the Bronx prosecutor. The court found that the U.S. Attorney never had possession, custody or control of the Bronx prosecutor's documents, and had never seen the Bronx prosecutor's grand jury transcripts that the defendant sought. *Id.* at 1218, 1219 n.3. *Guerrerio* is simply an application of the knowledge and access test.

People v. Santorelli, 728 N.Y.S.2d 696 (2000), OBM 12, supports Petitioner's argument. There, the court found the New York prosecutor had no access to the FBI records that the defendant sought. Because the prosecutor had no access to the FBI's records, the prosecutor was not responsible for disclosing the records. *Id.* at 420-22. Here, the Butte County prosecutor had access to the files of the out-of-state agencies.

In *Pina v. Henderson*, 752 F.2d 47 (2d Cir. 1985), OBM 12, the defendant claimed that the prosecutor withheld a report written by defendant's parole officer. The court found the prosecutor was not responsible for disclosing the report because the parole officer had not worked with the police or prosecutor in prosecuting the defendant. *Id.* at 49. Here, the out-of-state agencies worked in conjunction with the Butte County prosecutor to investigate and prosecute the capital case against Mr. Barnett.

The State suggests that a "lack of reciprocity" between the agencies means the agencies are not part of a prosecution team. OBM 12. This Court in *Steele* did not discuss reciprocity, or whether the CDC received "any assistance or benefit" from the prosecution. In fact, no case cited by the State discusses reciprocity of benefits in determining whether an agency is part of the prosecution team. In *Steele*, this Court held that the prosecution was not responsible for disclosing CDC documents because the

CDC "did not investigate or help prosecute" any of Steele's crimes. *Steele*, 32 Cal.4th at 701. *Steele* supports discovery in Mr. Barnett's case, where the out-of-state law enforcement agencies *did* help the California prosecutor investigate and prosecute the capital case against Mr. Barnett. Reciprocity was no part of the analysis in *Brown*, 17 Cal.4th 873, where the crime lab provided scientific analysis to the prosecutor; there was no reciprocity on the part of the prosecutor, yet the crime lab was held to be part of the prosecution team.

The second factor the State urges this Court to adopt as part of a new test is the nature and extent of the agency's involvement in the case. OBM 13-14. The State urges that an agency that "simply provides pre-existing information requested by the prosecution" should not be considered part of the prosecution team. OBM 13.

These are not the facts of Mr. Barnett's case. While out-of-state agencies did provide the prosecutor with information that existed prior to 1986, the agencies also conducted investigations at the request of the California prosecutor. In 1986-1988, they located and interviewed witnesses at his request, wrote reports of those encounters and provided him with those reports, and sent officers to California to testify in the penalty phase.

The State cites nothing to support its argument that an agency that provides records to the prosecutor is not assisting with the investigation and prosecution of the case. The State cites *Steele*, 32 Cal.4th at 701, arguing that, "when an agency's activity does not involve developing information specifically for the case against the defendant, the agency is not part of the prosecution team." The State mischaracterizes *Steele*. CDC was not involved in the investigation and prosecution of the capital case against Steele: "The prosecution case in aggravation consisted entirely of crimes

committed before he was in prison." *Steele*, 32 Cal.4th at 701. In contrast, the prosecution's case in aggravation against Mr. Barnett consisted primarily of alleged crimes committed in other states, established by documentary evidence provided by out-of-state agencies, and testimony of out-of-state officers and lay witnesses who were located and interviewed in 1986-1988 by out-of-state officers at the request of the California prosecutor.

The State argues that an agency that provides voluntarily what it could be compelled to provide by subpoena[25] does not thereby become part of the prosecution team, citing *United States v. Rayeros*, 537 F.3d 270 (3d Cir. 2008). OBM 14. This is a curious citation indeed, for the records at issue there were in the hands of the Chilean government. The court found that the defendant failed to satisfy the three parts of the Third Circuit's test for constructive possession: he failed to prove that the Chilean government was acting on the federal prosecutor's behalf when it allowed federal agents to interview a Chilean suspect; he failed to prove that there was joint investigation by the federal prosecutors and the Chilean government, and he failed to prove that the federal prosecutor had "ready access" to the sought-after information. *Id.* at 281-84. Mr. Barnett satisfies all three prongs of the constructive possession test. The out-of-state agencies were acting on the California prosecutor's behalf when they provided records, interviewed witnesses, and sent officers to testify; there was a joint investigation into Mr. Barnett's alleged past criminal activities for purposes of establishing aggravating factors in the penalty phase; and the California prosecutor had ready access to the records and information of the out-of-state agencies.

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[25] The State cites to nothing establishing that a California prosecutor could issue a lawful subpoena compelling an out-of-state agency to produce records to him.

The third factor the State urges this Court to adopt as part of a new test for the "prosecution team" is the motivation of the agency that generated the information. OBM 14-16. The State relies principally on *Barrett*, 80 Cal.App.4th 1305. *Barrett* is a straightforward application of the "possession and control" test for discovery. 80 Cal.App.4th at 1318-19, citing *Littlefield*, 5 Cal.4th at 135, 136. Neither the prosecutor nor the defendant could access the CDC records without a subpoena. *Barrett*, 80 Cal.App.4th at 1319. The records, therefore, were not reasonably accessible to the prosecutor, so he had no obligation to disclose them.

Harm v. State, 183 S.W.3d 403 (Tex. Crim. App. 2006), OBM 16, is unpersuasive. *Harm* involved records of the Child Protective Services (CPS) agency. The court placed the onus of disclosure on the agency, not the prosecutor: "Even if we were to assume . . . that CPS acted in a law-enforcement capacity or as a state agent and that it willfully or inadvertently concealed the records . . ." *Id.* at 408. This is contrary to *Brady*. "Responsibility for *Brady* compliance lies exclusively with the prosecution. . . ." *Brown*, 17 Cal.4th at 878. Further, *Harm* does not mention *Ritchie*, the Supreme Court case governing disclosure of CPS records.

The State argues there was no joint investigation. OBM 18. In fact, at the request of the California prosecutor, the out-of-state agencies engaged in a joint investigation with the prosecutor to produce evidence for the penalty phase. The facts also belie the assertion that the agencies simply provided information that had been generated prior to 1986. OBM 18. The agencies also provided information generated through the investigation they conducted on the prosecutor's behalf after Mr. Barnett's arrest in 1986. It is untrue that the agencies' activities were "passive" and "did not involve any new investigative efforts or evidentiary development." OBM 18. *See* Exh. 49, Vol. 33, 6590-92; Motion to Take Evidence.

The issue is what the out-of-state agencies did from 1986-1988, when the California prosecutor asked for their help. They gave it, by providing records, locating and interviewing witnesses, and sending officers to California to testify. By doing those things (indeed, by simply providing records), the agencies made their files readily accessible to the prosecutor. Under California law, that was sufficient to obligate him to provide discovery from their files. *Littlefield*; *Hill*; *Pitchess*. Similarly, under *Brady*, by obtaining records from the out-of-state agencies, the prosecutor demonstrated that he had knowledge of and ready access to their files. As such, he obligated himself to provide documents from their files to the defense. *Bryan*; *Santiago*. Under *Brady*, by providing files, interviewing witnesses, and sending officers to testify, the agencies were acting on the prosecutor's behalf. As such, the prosecutor had a duty to learn of favorable evidence in their files. *Kyles*.

United States v. Kern, 12 F.3d 122 (8th Cir. 1993) (OBM 21), is a *Brady* case; it does not discuss the prosecutor's obligations under California discovery law. The *Brady* analysis is extremely brief, with no discussion of the extent of the involvement, if any, of the local police agency in the federal prosecution.

The State argues that it has not found a case in which providing records to a prosecutor was sufficient to make an agency part of the "prosecution team." OBM 21. That is looking at the problem backwards. In discovery, and under *Brady*, the prosecutor's actions that control discovery. If the prosecutor has possession and control of an agency's files, because they are readily accessible to him, then he must provide discovery from the agency's files. *Littlefield*; *Pitchess*; *Hill*. If the prosecution has knowledge of and access to an agency's files, then he must provide favorable material from those files. *Bryan*; *Santiago*. If the prosecutor

asks an agency to act on his behalf, then the prosecutor has a duty to learn of favorable evidence in the agency's files. *Kyles*.

2. The Lower Court Did Not Expand the Definition of "Prosecution Team"

The State did not raise this argument (OBM 22-23) in the Court of Appeal, so there is no reasoned analysis for this Court to review. This Court should not consider the issue pursuant to Rule 8.500(c)(1): "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal."

The State argues that the Court of Appeal's decision regarding out-of-state agencies will apply in all criminal cases, not just in §1054.9 motions. OBM 22. It will. As in *Steele*, where this Court looked to trial discovery law and *Brady* principles to interpret the prosecutor's obligations under §1054.9, the Court of Appeal did the same. Prosecutors utilize out-of-state prior convictions in a variety of contexts in criminal trials and sentencing proceedings every day. Prosecutors therefore understand their discovery obligations with respect to those convictions, and defense attorneys insist on compliance with those obligations. It defies belief that, in all the California criminal trials in which the prosecutor used out-of-state prior convictions, no defense attorney thought to ask for discovery regarding that prior conviction, and that undersigned counsel were the first to think of it. The more logical explanation is that such events occur every day, and prosecutors provide discovery regarding the out-of-state prior convictions as required by law.

Once a prosecutor decides to use prior crime evidence in her case, she is bound by law to provide discovery and *Brady* material about those prior crimes. Nothing in the *Barnett* opinion created new law in this regard.

Indeed, the prosecutor here disclosed hundreds of pages of discovery from out-of-state law enforcement agencies regarding Mr. Barnett's alleged prior criminal activity. *See, e.g.*, Exh. 23, Vol. 22, 4286-89 (trial discovery from New York State Police); Exh. 23, Vol. 22, 4294-4301 (trial discovery from Phoenix Police Department). He apparently had no trouble obtaining the cooperation of these agencies. He provided the records because the law required him to do so. By providing the records, he demonstrated that the records were reasonably accessible to him.

There is nothing new in the lower court's opinion. The court applied discovery law, *Steele*, and *Brady* to the facts of this case, which happened to involve prior crime evidence from other states.

III. The Court of Appeal Correctly Held that Petitioners Need Not Prove that Materials They Seek Actually Exist in Order To Be Entitled to Discovery

A. Introduction

In a confounding argument, the State posits that, in order to be entitled to discovery, a petitioner must prove that the documents he seeks actually exist. The lower court rejected this argument. 164 Cal.App.4th at 43-44; *accord Maury*, 145 Cal.App.4th at 479-86; *Curl*, 140 Cal.App.4th at 320-21 & n.2. This Court should likewise reject the argument.

This Court has rejected the same argument in other circumstances. In the *Pitchess* context, a defendant does not know what is contained in the records he seeks. "To require specificity in this regard would place an accused in the Catch-22 position of having to allege with particularity the very information he is seeking." *People v. Memro*, 38 Cal.3d 658, 684 (1985). *See also City of Santa Cruz v. Municipal Court*, 49 Cal.3d 74, 91 (1989) (proof of existence of citizen complaints is not required for discovery). Discussing criminal discovery, this Court held that "proof of the existence of the item sought is not required. [citation]. A requirement of such proof would, in may cases, deny the accused the benefit of relevant and material evidence." *Hill*, 10 Cal.3d at 817. As at trial, this Court should hold that in habeas, a petitioner need not prove the existence of discovery he seeks.

B. The State Invited the Lower Court to Make the Holding It Challenges

The State argues that the lower court "effectively eliminated any limitation to postconviction discovery" because the court held that §1054.9 discovery is "limited only by the imagination of habeas counsel!" OBM 24. The State attacks the lower court for a holding that it invited.

This language was not in the original opinion; the Court of Appeal added it when it modified its opinion while denying rehearing. In his rehearing petition, Mr. Barnett focused on the burden of pleading materiality in order to be entitled to *Brady* material. In response to Mr. Barnett's petition, the State wrote, "Because Barnett does not have to establish that the requested materials exist, a requirement to establish materiality presents little burden. Barnett's ability to request *Brady* material *is limited only by his imagination*." Attorney General's Answer to Petition for Rehearing (hereinafter "Ans. Rhrg." at 5 (emphasis added). "[U]nder this Court's interpretation, petitioners do not have to prove that anything exists to be entitled to discovery under section 1054.9. *They are restricted only by their imagination.*" *Id.* at 8 (emphasis added).

After receiving the State's answer, the lower court modified its opinion and added the language of which the State now complains. This is the essence of invited error. *Mary M. v. City of Los Angeles*, 54 Cal.3d 202, 212 (1991). The "imagination" language came from the Attorney General. The lower court adopted it. Now the Attorney General claims the court committed error. The Attorney General invited the error, and should not be heard to complain.

C. The State's Interpretation Would Frustrate the Purpose of §1054.9

The State argues that a petitioner is entitled to discovery only if discovery is missing from trial counsel's files, and that §1054.9 provides a remedy for petitioners who determine that trial discovery materials are missing. Once a petitioner shows that "existing materials" are missing from trial counsel's files, he has made the threshold showing and is entitled to discovery. OBM 25-26 & n.10.

Assuming *arguendo* that the Legislature so intended, Mr. Barnett

satisfied that showing. The prosecutor consecutively numbered the trial discovery. Mr. Barnett identified the missing pages from the sequence. 164 Cal.App.4th at 28. Not all prosecutors number the trial discovery. Under the State's scheme, defendants in such cases will be out of luck, with no way to know if trial discovery is missing. Such an arbitrary application of a statute violates the Due Process Clause of the Fourteenth Amendment. *See also Maury*, 145 Cal.App.4th at 480-81.

The State's flippant characterization of the lower court's holding that the statute is a "peace of mind" statute, OBM 29, ignores the reality of Mr. Barnett's case. As the court noted, Mr. Barnett established that materials were missing from his trial attorney's files. *Barnett*, 146 Cal.App.4th 344, 368 n.9 (2006).

The State urges that the burden on the petitioner to prove that trial discovery is missing not too onerous. OBM 32. There will be situations where no evidence exists to show that trial counsel's files are incomplete. For example, after the prosecutor provided some documents in response to Mr. Barnett's §1054.9 motion, it became apparent that he had not complied with the trial discovery order, which compelled disclosure of original notes of trial witnesses interviews.

> In moving for discovery of the original police notes, which were within the scope of a discovery order issued at time of trial, Barnett asserted that no such notes were ever provided; but he did not offer any assertion about whether such notes existed, nor does it appear he had any ability to prove the existence of such notes. If the People's argument were correct, then the People could have successfully opposed the motion solely on the ground that Barnett had not proved the existence of any original police notes and thereby avoided reviewing the prosecution's files again for discoverable materials. *Recall, however, that in response to Barnett's discovery motion, the district attorney and his chief investigator did review their files and "discovered a number*

> *of sheets of notes which appear[ed] to be interview notes of witnesses." Thus, documents within the scope of the discovery order that Barnett could not prove existed did exist, but probably never would have come to light if the People's interpretation of the statute were to prevail.*

Barnett, 146 Cal.App.4th at 373 (emphasis added).

If the State's interpretation of the statute is correct, then the legislative intent would be frustrated and petitioners who could not prove that discovery to which they are entitled is missing would never gain access to such material. The State believes that such petitioners *should* have an impossible burden in seeking discovery. OBM 33. Apparently, even though Mr. Barnett was entitled to the prosecutor's interview notes under *Steele* (because they were included in a discovery order entered at trial) the State would have this Court hold that he is not entitled to them now because he was unaware of their existence. The State would require Petitioner to prove what he does not have, an impossible burden. The prosecution knows what is undisclosed. *Kyles*, 514 U.S. at 437. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696.

D. The Court of Appeal Correctly Determined that Evidence Code §664 Had No Application to §1054.9

The State argues that Evidence Code §664 requires courts to presume the prosecutor complied with discovery obligations at trial. OBM 36-39. The lower court was correct to reject this argument.

In dicta in *Steele*, this Court observed, "the expectation and assumption [that prosecutors will promptly and fully disclose information favorable to the defense] merely mean that normally, and unless the defendant overcomes Evidence Code section 664's presumption as to

specific evidence, there will be no discovery for the trial court to order that the prosecutor should have provided at trial." *Id.*

The lower court found it was not bound by these dicta because this Court had not conducted a thorough analysis, reflecting compelling logic. *Maury*, 145 Cal.App.4th at 483. The court found that the evidentiary presumption of §664 has no bearing on a §1054.9 motion. The court rejected the argument that courts must presume that the prosecution provided whatever trial discovery it was required to provide, finding that acceptance of this argument would "essentially eviscerate the discovery rights the statute was designed to provide." *Id.* at 484.

> [A] defendant in a given case may have no idea whether the materials he obtained from trial counsel amount to all of the materials the prosecution turned over during trial. Consider, for example, a defendant who can prove there was a discovery order issued at time of trial but does not know if the materials he has obtained from trial counsel include all of the materials the prosecutor produced in compliance with that order. This defendant makes a motion for discovery under section 1054.9, explains his situation, and requests all of the materials that were subject to the discovery order. In the People's view, proof of the discovery order triggers the official duty presumption of Evidence Code section 664 and requires the court to assume that the prosecution has already turned over everything that it was required to turn over under that order. It then falls to the defendant to prove either that the prosecution did not turn over everything it was supposed to . . . or that he did not receive from his trial counsel everything that the prosecution turned over . . . . Regardless of the alternative, however, the defendant is put to the burden of proving the existence of documents he does not have -- a burden he may have no means of meeting.

Id. at 484. The Legislature could not have intended to impose such a requirement. *Id.* at 485.

The State urges this Court to adopt an interpretation of §1054.9 that

would deny a petitioner access to materials that come within the scope of a trial discovery order – which *Steele* held that petitioners were entitled to discover – because a petitioner could not prove that the prosecutor did not comply with his discovery obligations. But here, as the lower court observed, Mr. Barnett proved that the prosecutor did not comply with his discovery obligation because he and his investigator did not disclose interview notes. It is outrageous for the Attorney General to continue to argue that Mr. Barnett "should not be able to trigger section 1054.9 obligations based on his unsupported allegation . . . that the prosecution failed to provide the discovery that was required at trial." OBM 39.

In *Curl*, 140 Cal.App.4th 310, the court rejected the argument that Evidence Code §664 has any role in §1054.9 proceedings. That court paraphrased the argument as, "if you can show us what we've withheld, we'll give it to you." *Id.* at 318. The court noted that § 664 is one of the presumptions affecting the burden of proof. *See* Evid. Code, § 660.

> A defendant seeking section 1054.9 postconviction discovery is not seeking to prove anything and has no burden of proof. Such a defendant is merely seeking to obtain the materials the defendant is authorized by section 1054.9 to have "reasonable access to." (§ 1054.9, subd. (a).)

140 Cal.App.4th at 318-19.

Steele impliedly rejected the §664 argument. The materials at issue were Steele's own prison records. "[T]he court did not presume that 'official duty has been regularly performed' (Evid. Code, § 664) and deny the section 1054.9 request. The court instead remanded the matter to the superior court and directed that court to issue an order directing the People to provide the requested materials 'if any exist.'" *Curl*, 140 Cal.App.4th at 322, citing *Steele*, 32 Cal.4th at 703.

Curl concluded that imposing Evidence Code §664 as a barrier to §1054.9 discovery would defeat the purpose of the discovery statute:

> What is the point of the postconviction discovery envisioned by section 1054.9 if it is not, at least in part, to ascertain what was not turned over to trial counsel? Obviously, if material was not turned over, trial counsel was not aware that material had not been turned over. If trial counsel had been aware, he or she would have or should have demanded the material. If it is presumed that everything that was supposed to be turned over was in fact turned over then negligence and, worse, misconduct would not be disclosed absent some serendipitous event.

Id. at 323.

Curl relied on *Steele*, where this Court said the statute was meant to assist petitioners in stating a prima facie case for relief. *Id*., *citing Steele*, 32 Cal.4th at 691. A petitioner must examine trial counsel's files to ascertain whether the prosecution failed to disclose something it should have disclosed, giving rise to a *Brady* claim; or whether the defense failed to request something it should have requested, giving rise to an ineffective assistance of counsel claim. *Curl*, 140 Cal.App.4th at 323. "It is axiomatic that one cannot prove what was not turned over if one does not know what was not turned over. Likewise it is simply nonsensical to apply a presumption that a duty was regularly performed for purposes of barring a request for materials that would show a duty was not regularly performed." *Id*. at 324.

As did the courts of appeal in *Curl* and here, this Court should reject the application of Evidence Code §664 in §1054.9 proceedings.

E. Petitioner Need Not Prove a Discovery Violation to be Entitled to Postconviction Discovery

The State argues that §1054.5 requires defendants *at trial* to establish that the prosecutor has not complied with §1054.1, therefore postconviction petitioners must prove that the prosecutor did not comply with his discovery obligations in order to be entitled to discovery. OBM 40. This is another way of arguing that the petitioner must prove that the discovery he seeks actually exists.

Just as at trial, the petitioner has no way of knowing what exists but was not disclosed. This Court recognized this in the §1054.5 context, acknowledging that a defendant cannot request specific evidence of which he neither knows nor has reason to know. *Zambrano*, 41 Cal.4th at 1132 n.12.[26] The same is true in habeas – a petitioner cannot establish that evidence has been withheld if he does not know of its existence.

Moreover, Mr. Barnett was not bound by §1054.5, which did not exist at the time of his trial. The law at the time did not require defendants to establish that the discovery sought existed, or that the prosecutor had withheld it. *Hill v. Superior Court*, 10 Cal.3d at 817 (defendant entitled to discovery upon specifying the material sought and furnishing a "plausible justification" for inspection).

F. The "Good Faith Effort" Provision of §1054.9 Is Not At Issue

Throughout the litigation of this case, the State has admitted that the "good faith effort" provision of §1054.9(a) is not at issue. "In this case, there is no serious dispute that Barnett exercised good faith efforts to obtain

[26] *Zambrano* was discussing the provision of §1054.5(b) that requires a defendant to informally request discovery before filing a motion to compel.

discovery materials from trial counsel." Informal Response to Petition for Writ of Mandate at 6; *accord* Return to Order to Show Cause at 10. The State argues now that the Court of Appeal's opinion renders the good faith effort requirement of the statute meaningless. OBM 34-35.

This Court should not address this issue because the State did not raise it in a rehearing petition or in its petition for review. Rules 8.500(c)(1), 8.520(b)(3). There is no factual record upon which this Court can decide the issue.

If this Court were to reach this argument, it should reject it. The State relies on dicta from *Steele* discussing the reason for the good faith effort requirement. *Steele*, 32 Cal.4th at 693-94. This Court rejected the argument that §1054.9 was meant to be a file reconstruction statute, used when trial counsel failed to turn over their files to postconviction counsel. The reason for the good faith effort requirement of section 1054.9(a) is self-evident: to prevent defendants from filing motions for materials they could obtain from trial counsel. The requirement does not modify the definition of "discovery materials" in §1054.9 (b). *Id.*

What the Legislature and this Court in *Steele* envisioned is that petitioners obtain trial counsel's files before seeking discovery. This Court recognized that, even after obtaining trial counsel's files, petitioners could utilize §1054.9 to seek that which they were entitled to at the time of trial, including things that trial counsel never requested, but that petitioner would have been entitled to had he requested the items. *Steele*, 32 Cal.4th at 695-96. The State's vision of postconviction discovery does not take into account that petitioners are entitled to request materials that trial counsel never had because trial counsel never requested them. These items could never be "missing" from trial counsel's files.

The Attorney General's concern about requests for duplicate

discovery, OBM 35, is easily managed. For example, Petitioner gave the prosecutor a list of the numbered discovery he had, and asked for the missing pages. Exh. 1, Vol. 1, 7-8. Petitioner identified the witnesses who testified, but for whom he did not find rap sheets in trial counsel's files. Exh. 1, Vol. 1, 25-27. Many of these issues can be worked out informally. *See Steele*, 32 Cal.4th at 692. In this case, both sides worked together to resolve issues, resulting in the production of hundreds of pages of discovery before the superior court ordered the prosecutor to produce records.[27] The parade of horribles that the State envisions will not come to pass.

G. Whether an Inventory is Required Was Not Raised Below

The State did not petition for rehearing or review concerning the holding that petitioners need not provide an inventory of discovery materials they already possess. *Barnett*, 164 Cal.App.4th at 44-45. Under Rules 8.500(c) and 8.520(b)(3), this Court should not hear this issue.

If this Court does reach the issue, it should affirm the court below because the State's argument is unsupported in the statute and would violate due process and the work product privilege. Moreover, Petitioner did identify the trial discovery documents in trial counsel's files.

§1054.9 says nothing about a petitioner providing an inventory before he is entitled to seek discovery. *Barnett*, 164 Cal.App.4th at 44-45.

Nothing indicates the Legislature intended to abrogate work product protection. The State's demand for an inventory covers more than documents that Petitioner received in pretrial discovery.

Because Petitioner provided a list of the numbered discovery pages that he had, Exh. 1, Vol. 1, 7-8, the demand that Petitioner provide an

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[27] *See* Exh. 42, Vol. 32, 6385:16-21.

inventory must include documents that Petitioner gathered through his own investigation in addition to trial discovery documents. Material that Petitioner's counsel obtained through their own investigation is protected work product. Code Civ. Proc., §2018.030.

Finally, requiring Petitioner to inventory documents in postconviction counsel's files would violate due process because there is no reciprocal obligation on the Attorney General. In *Wardius v. Oregon*, 412 U.S. 470 (1973), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment speaks to the balance of forces between the accused and the prosecution. *Id.* at 474. The Court held that, "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Id.* at 475. "[T]he State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Id.* at 475 n.9. Because there is no obligation that the State provide an inventory of all documents in its possession, it would violate due process to require petitioners to provide such an inventory.

H. The State Forfeited the Argument that the Court of Appeal's Opinion Discourages Informal Discovery

At OBM 41-42, the State makes another argument that it did not present in a petition for rehearing or petition for review. This Court should not entertain this argument. Rules 8.500(c) and 8.520(b)(3).

The State's argument is based on Mr. Barnett's request that the prosecution declare under penalty of perjury that there was no additional discovery responsive to Petitioner's §1054.9 requests. The superior court granted this request, and the State did not challenge that order. The Court of Appeal did not rule on this issue because the State did not seek review of

it. 164 Cal.App.4th at 58 n.20. The State has forfeited this issue.

If the prosecution is willing to say there is no more discovery to be found, the prosecution should be willing to say so under oath. If the prosecution is unwilling to do so, then a petitioner is justified in doubting the thoroughness of the search and the good faith of the prosecution.

I. The Litigation of Mr. Barnett's Discovery Motion was Governed by *Steele*

The State recounts the history of the proceedings in the superior court, OBM 44, but fails to recount the enormous volume of discovery that the prosecution disclosed to Mr. Barnett pursuant to §1054.9: over 1500 pages, 64 audio recordings of witness interviews and other conversations, and photographs.[28] Mr. Barnett used some of the discovery as the basis for new claims.[29] The process worked exactly as this Court said it was supposed to work: Mr. Barnett used discovery to assist in stating a prima facie case for relief. *Steele*, 32 Cal.4th at 691. The proceedings in superior court were lengthy, but resulted in the disclosure of a great deal of discovery, which the trial court determined met the definition of 1054.9(b): materials to which Mr. Barnett would have been entitled at the time of trial. The State evidently agreed, because it did not seek mandamus review of the superior court's order.

The argument that petitioners will use §1054.9 as a delaying tactic, OBM 44-45, is a red herring. The State has not shown that habeas corpus proceedings have been delayed in any case because of discovery litigation. This Court routinely denies requests to stay habeas corpus proceedings pending discovery proceedings in the superior courts. *See, e.g., In re*

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[28] Petitioner's Replication at 13 (No. C051311).

[29] *See* Exh. 65, Petitioner's Replication.

Coddington, No. S107502 (June 15, 2005). This Court denied Steele's habeas corpus petition while discovery proceedings were ongoing in the superior court in accordance with this Court's remand in *In re Steele*, 32 Cal.4th 682. This Court denied Mr. Barnett's habeas corpus petitions while the §1054.9 writ proceedings were ongoing. 164 Cal.App.4th at 27 n.3.

The State urges this Court to "impose proper limitations" on the application of §1054.9, arguing that the Legislature could not have intended "such a permissive standard" for discovery. OBM 45. As authority, the State cites to the concurring opinion of Justice Sims from the 2006 *Barnett* opinion, which was superseded by this Court's grant of review. This quotation is improper. When presented with a second opportunity, Justice Sims did not write a concurring opinion; the 2008 *Barnett* opinion was unanimous. The Attorney General should accept his decision and not try to re-animate the concurring opinion by attaching it and citing it as if it had not been superseded by grant of review and then nullified by Justice Sims's decision not to publish it again.

J. Mr. Barnett Is Entitled To the Discovery the Court of Appeal Granted

The lower court found that Mr. Barnett was entitled to: 1) original notes of out-of-state law enforcement officers; 2) criminal records of two jurors; and 3) documentation regarding "street talk" that Mr. Barnett had been framed. 164 Cal.App.4th at 88-89. The State argues that Mr. Barnett is not entitled to this discovery, except for the criminal records of juror Leach, because he has not established that the materials exist. OBM 45-47.

As to one category – criminal records of juror Field – Petitioner can establish that his rap sheet exists because a rap sheet exists on every person, and the prosecutor has access to it. *Hill*, 10 Cal.3d at 817-18; *Little*, 59 Cal.App.4th at 431-33.

Should this Court agree that petitioners must establish that the discovery they seek actually exists, the appropriate remedy is to remand to the Court of Appeal with instructions to remand to the superior court so that Petitioner can make that showing. This is a fact-based determination, which this Court should not make in the first instance. *In re Zeth S.*, 31 Cal.4th 396, 405 (2003) (appellate courts ordinarily do not make findings of fact).

As to the jurors' criminal records, the State forfeited the issue by not seeking review of the lower court's decision.[30] Rule 8.520(b)(3).

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[30] In its brief in No. S150229, the State conceded as much. OBM 45 n.21. In its brief in No. S16522, the concession disappeared but the fact remains: the State did not seek review of the Court of Appeal's decision granting Petitioner access to jurors' criminal records, in either 2006 or 2008.

IV. Penal Code §1054.9 is Constitutional

Neither party sought review of this issue. Mr. Barnett adopts the reasoning of the court below and will address any arguments to the contrary in response to amicus briefing.

Conclusion

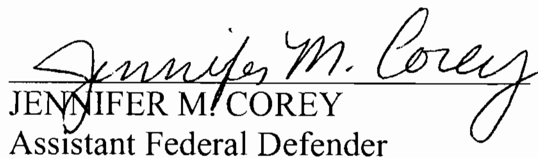
Brady places the burden of determining materiality of favorable evidence on the prosecutor in the first instance. Out-of-state law enforcement agencies, by participating in the investigation at the California prosecutor's request, were part of the prosecution team, and Mr. Barnett is entitled to discovery from those agencies. Nothing in §1054.9 requires Mr. Barnett to prove that the discovery he seeks actually exists before he may seek discovery. This Court should vacate the judgment of the Court of Appeal as to the first issue and affirm the judgment as to the second, third and fourth.

Dated: December 17, 2008

Respectfully submitted,

ROBERT D. BACON

DANIEL J. BRODERICK
Federal Defender



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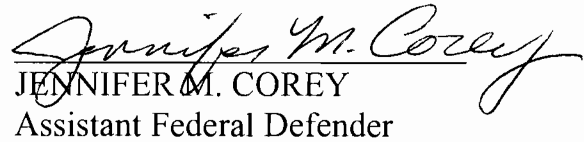
CERTIFICATE OF COUNSEL

I, Jennifer M. Corey, counsel for Petitioner Lee Max Barnett, do hereby certify that the foregoing Petitioner's Answer Brief is 17,902 words in length.



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PROOF OF SERVICE

I, the undersigned hereby declare:

I am over the age of eighteen years and am not a party to the within-entitled action. My business address is: Office of the Federal Defender, 801 I Street, Third Floor, Sacramento, CA 95814. On December 17, 2008, I served **PETITIONER BARNETT'S ANSWER BRIEF** by placing said copy in a postage-paid envelope addressed to the person(s) hereinafter listed and by depositing said envelope in the United States Mail

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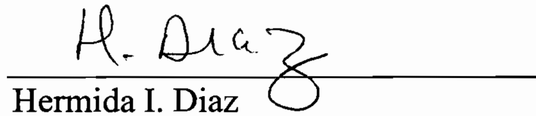
I declare under penalty of perjury that the foregoing is true and correct. Executed on this17th of December, 2008, at Sacramento, California



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