ORIGINAL

S165522

IN THE SUPREME COURT OF CALIFORNIA

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

MR. BARNETT'S ANSWER TO ATTORNEY GENERAL'S PETITION FOR REVIEW

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

Lee Max Barnett respectfully opposes the Attorney's General's petition for review in this matter and urges that it be denied. This Court has earlier granted an almost identical petition filed by the Attorney General. *See* Attorney General's petition for review filed July 29, 2008 (hereinafter simply "Petition") at 1 (referring to No. S150229).

INTRODUCTION

The Attorney General's petition presents two arguments. The first argument attacks the Court of Appeal's holding that the prosecution is responsible for disclosing records from out-of-state law enforcement agencies that conducted interviews of witnesses who testified at trial against Mr. Barnett. *Barnett v. Superior Court*, 164 Cal.App.4th 18, 45 (2008). Within that argument, the Attorney General complains that the Court of Appeal's holding cannot be limited to Penal Code section 1054.9 cases, and will impact discovery obligations in any criminal case, an issue that the Attorney General neglected to timely raise in the Court of Appeal, and therefore forfeited pursuant to Rule 8.500(c), California Rules of Court. The non-forfeited issues within the argument are without merit.

The second argument is familiar to this Court because the Attorney General filed similar or identical arguments in petitions for review in *Curl v. Superior Court*, 140 Cal.App.4th 310 (2006), *review denied*, Sept. 20, 2006 (No. S145195); *People v. Superior Court (Maury)*, 145 Cal.App.4th 473 (2006), *review denied* March 21, 2007 (No. S149406); and *People v. Superior Court (Ervine)*, *review denied* March 21, 2007 (No. S149621). Just as it did in *Curl*, *Maury*, and *Ervine*, this Court should reject the Attorney General's argument that the Court of Appeal erred when it held

that petitioners seeking discovery pursuant to section 1054.9 do not have to prove that the evidence they seek exists. The Court of Appeal's decision reflects a straightforward application of §1054.9 consistent with both this Court's opinion in *In re Steele,* 32 Cal.4th 682 (2004), and the Fifth District Court of Appeal's opinion in *Curl*. Because the Attorney General's Petition does not address unsettled questions and because the courts are all in accord, the Attorney General presents no reason for this Court to grant review.

Additionally, the Attorney General's objection that the Court of Appeal held that § 1054.9 discovery is "actually limited only by the imagination of habeas counsel!" (Petition at 7, citing *Barnett*, 164 Cal.App.4th at 55) attacks a holding that the Attorney General invited the Court of Appeal to make. Attorney General's Answer to Petition for Rehearing at 5 ("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.").[1] Because the Attorney General invited the court below to make this holding, he cannot be heard to complain here when the court so holds.

In addition, the Attorney General notes that, in 2006, Justice Sims filed a concurring opinion. Petition at 7. The Attorney General quotes from the concurring opinion some language that he believes helps his cause.

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[1] Mr. Barnett filed his rehearing petition in response to the court's first opinion in this matter, issued in December 2006. Neither party filed a petition for rehearing after the lower court issued its June 2008 opinion. The language quoted from the 2008 opinion is identical to the language from the 2006 opinion, as modified after rehearing, which appeared at 146 Cal.App.4th 344, 384.

This quotation is improper. When presented with a second opportunity to address the case, Justice Sims did not write a concurring opinion; the 2008 opinion was unanimous. A judge should be permitted to decide which of his words stay in the public discourse. Justice Sims, for whatever reason, did not file a concurring opinion to the most recent decision.[2] The Attorney General should accept his decision and not try to re-animate the concurring opinion by attaching it as an exhibit to his petition and then citing it as if it had not been superseded by grant of review and then nullified by Justice Sims's own decision not to publish it again.

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[2] On February 13, 2007, along with his petition for review, Mr. Barnett had filed a request with this Court for depublication of Justice Sims's concurring opinion, as an alternative to a grant of review.

ARGUMENT

I. THE COURT OF APPEAL'S HOLDING REGARDING OUT-OF-STATE LAW ENFORCEMENT AGENCIES INVOLVED IN THE CASE WAS CONSISTENT WITH THIS COURT'S PRECEDENT

The Court of Appeal held that out-of-state law enforcement agencies that the Butte County District Attorney (hereinafter "the prosecution") used to assist in his prosecution of the capital case against Mr. Barnett were "involved in the investigation or prosecution of the case" against Mr. Barnett within the meaning of *Steele*. *Barnett*, 164 Cal.App.4th at 43. Mr. Barnett sought original notes of 22 law enforcement officers who had been involved in investigating alleged prior bad acts that the prosecution used against Mr. Barnett in the penalty phase. The officers worked for out-of-state prosecution and law enforcement agencies that provided reports to the Butte County District Attorney, assisted the Butte County investigator in locating witnesses, and interviewed witnesses on behalf of the Butte County District Attorney. Four law enforcement officers traveled to Butte County to testify against Mr. Barnett in the penalty phase.[3] *See* Exh. 49 at Vol. 33, pp. 6590-92.[4]

In *Steele*, this Court explained what agencies may be compelled to disclose documents pursuant to §1054.9 in a particular case:

> The statute also presents the question of exactly who

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[3] The involvement of these out-of-state law enforcement agencies was much greater than "simply provid[ing] information," as the Attorney General suggests. Petition at 12.

[4] The exhibits referred to herein are the exhibits to the petition for writ of mandate in the Court of Appeal, No. C051311. The exhibits are consecutively paginated in a single sequence through all volumes, and each citation includes the exhibit number, volume and page.

> must possess the materials for them to come within its scope. Section 1054.9, subdivision (b), refers to "materials in the possession of the prosecution and law enforcement authorities ...." Thus, the materials include not only those the prosecution itself possesses but those that law enforcement authorities possess. The discovery obligation, however, does not extend to all law enforcement authorities everywhere in the world but, we believe, only to law enforcement authorities who were involved in the investigation or prosecution of the case. This conclusion becomes clear on reading the statue in context. Section 1054.9 is part of the general discovery provisions of Penal Code section 1054 et seq. Those provisions limit trial discovery to materials the prosecutor possesses or knows "to be in the possession of the investigating agencies ...." (Pen. Code, § 1054.1, italics added.) They also provide that the statutory provisions are the only means for the defendant to compel discovery "from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties." (Pen. Code, § 1054.5, subd. (a).) Section 1054.9 does not require that the prosecutor *know* the materials are in the possession of the investigating agencies, but we believe the reference to "law enforcement authorities" in section 1054.9, subdivision (b), must be read in light of these other provisions. *At trial*, these discovery obligations do not extend to materials possessed by law enforcement agencies that were not involved in investigating or preparing the case against the defendant. Section 1054.9, subdivision (b), should not be read as creating a broader postconviction discovery right.

In re Steele, 32 Cal.4th at 696. This Court also looked to cases interpreting *Brady v. Maryland*, 373 U.S. 83 (1963), holding that the prosecution must disclose favorable evidence known to others acting on the government's behalf. *Steele*, 32 Cal.4th at 696-97, citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). "Thus, the prosecution is responsible not only for evidence in its own files, but also for information possessed by others acting on the

government's behalf that were gathered in connection with the investigation." *Steele*, 32 Cal.4th at 697.

The Court of Appeal scrupulously followed *Steele* in holding that prosecution and law enforcement agencies that investigated alleged prior crimes or bad acts that the prosecution introduced as aggravating evidence in the penalty phase were agencies that assisted in the prosecution of the capital case against Mr. Barnett. The court relied on *People v. Superior Court (Barrett)*, 80 Cal.App.4th 1305 (2000), cited with approval in *Steele*. *Barnett*, 164 Cal.App.4th at 43.[5] *Barrett* held that the prosecutorial duty to disclose exculpatory information encompasses evidence possessed by investigative agencies to which the prosecutor has reasonable access. "A prosecutor has a duty to search for and disclose exculpatory evidence if the evidence is possessed by a person or agency that has been used by the prosecutor or the investigating agency to assist the prosecution or the investigating agency in its work. The important determinant is whether the person or agency has been 'acting on the government's behalf' [citation] or 'assisting the government's case.' [Citation.]" *Barnett*, 164 Cal.App.4th at 43, citing *Barrett*, 80 Cal.App.4th at 1314-1315.

The Court of Appeal held that the out-of-state agencies at issue assisted the Butte County District Attorney in his prosecution of the capital case against Mr. Barnett. "Accordingly, the People had constructive possession of information possessed by those agencies, and the People's

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[5] This Court in *Steele* cited *Barrett* with approval for the proposition that "information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecution does not have the duty to search for or to disclose such materials." *Steele*, 32 Cal.4th at 697, citing *Barrett*, 80 Cal.App.4th at 1315.

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*." *Barnett*, 164 Cal.App.4th at 43.

The Attorney General argues that the Court of Appeal's holding is contrary to *Barrett* and *Steele*. Petition at 10-12. The Attorney General misunderstands *Barrett*, which clearly held that "information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such materials." *Barrett*, 80 Cal.App.4th at 1315. The out-of-state prosecution and law enforcement agencies at issue here investigated prior offenses, some of which resulted in criminal convictions, which the Butte County District Attorney introduced against Mr. Barnett in the penalty phase to obtain a death sentence. These agencies provided records to the Butte County prosecutor, located and interviewed witnesses at his behest, and sent officers to Butte County to testify against Mr. Barnett. These agencies were connected to the investigation and prosecution of the criminal charge against Mr. Barnett. The criminal charge against Mr. Barnett was first-degree murder with special circumstances. The trial included a penalty phase. The out-of-state law enforcement agencies were critical in providing assistance to the Butte County prosecution in the penalty phase of its case against Mr. Barnett. The Court of Appeal's holding was consistent with *Barrett*.

The Attorney General further criticizes the Court of Appeal for holding that, even if the out-of-state law enforcement agencies were not

part of the prosecution team, the State used those agencies to assist in its prosecution of the capital case against Mr. Barnett, and therefore had constructive possession of information possessed by those agencies. Petition at 11, citing *Barnett*, 164 Cal.App.4th at 43. The Attorney General complains that the court extended the *Brady* obligation to agencies beyond the "prosecution team" to agencies that provided records, without providing any support for its "novel conclusion that *Brady* obligations extend beyond the 'prosecution team.'" *Id.*

The Attorney General is taking the phrase out of context. The sentence immediately follows a quotation from *Barrett*, which uses the phrase "prosecution team": "Conversely, a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information." *Barnett*, 164 Cal.App.4th at 43, quoting *Barrett*, 80 Cal.App.4th at 1315. The court of appeal then held:

> 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*.

Barnett, 164 Cal.App.4th at 43. There is nothing novel in this holding; it is a straightforward recitation of the holdings of *Steele* and *Barrett*.

The Attorney General protests that *Steele* held that simply providing records was not enough to make an agency part of the prosecution team. Petition at 9-12. The records at issue in *Steele* were Steele's own prison

records. *Steele* sought his prison records to show that he had cooperated with prison authorities to expose the crimes of a prison gang. Had he had those records at trial, Steele argued, he could have presented them as mitigating evidence in the penalty phase. *Steele*, 32 Cal.4th at 698.

This Court agreed that the information Steele sought could have been mitigating. *Id.* at 698-99. The Court held that the prosecution had no obligation under *Brady* to disclose information relevant solely to a defendant's character or record, *id.* at 699, but that the prosecution would be obliged to disclose such information if the defense specifically requests and the prosecution possesses it. *Id.* at 701.

In *Steele*, the prosecution's case had nothing to do with petitioner's behavior in prison:

> The prosecution case in aggravation consisted entirely of crimes committed before he was in prison. *Prison officials did not investigate or help prosecute any of these crimes. Thus, the prosecution was generally not responsible for information prison officials possessed that might help the defense.* (See *People v. Superior Court (Barrett), supra*, 80 Cal.App.4th 1305 [the prosecutor's duty to disclose information favorable to the defense does not extend to information the California Department of Corrections possesses unrelated to the charges].)

Id. at 701 (emphasis added).

Steele supports the Court of Appeal's decision here. The out-of-state law enforcement agencies *did* investigate and/or prosecute the crimes that the prosecution used in its case in aggravation against Mr. Barnett. Under *Steele* and *Barrett*, therefore, the prosecutor's duty to disclose does extend to those agencies.

In Argument I.B, the Attorney General raises an issue that he did not raise in the Court of Appeal. He argues that the court's holding that the

California prosecutor's duty to disclose extends to information possessed by out-of-state law enforcement agencies that assisted the prosecution in the investigation or prosecution of the capital case will wreak havoc with criminal trials because prior crime evidence may be used in numerous circumstances in criminal trials, both in guilt and sentencing determinations. Petition at 11. The Attorney General did not raise this issue in a petition for rehearing following either opinion of the Court of Appeal. As such, this Court should not consider the issue pursuant to Rule 8.500(c)(1), California Rules of Court: "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 Attorney General should have given the Court of Appeal the first opportunity to address this issue.

On the merits of the issue, the Attorney General's argument is puzzling. Once a prosecutor decides to use prior crime evidence in her case, the prosecutor is bound by *Brady* to disclose exculpatory information about those prior crimes. Nothing in the *Barnett* opinion created new law in this regard.

Indeed, the trial prosecutor disclosed hundreds of pages of discovery, at the time of trial, from out-of-state law enforcement agencies, regarding Mr. Barnett's alleged prior criminal activity. *See, e.g.*, Exh. 23 at Vol. 22, pp. 4286-89 (trial discovery from New York State Police); Exh. 23 at Vol. 22, pp. 4294-4301 (trial discovery from Phoenix Police Department). He apparently had no trouble obtaining the cooperation of these out-of-state law enforcement agencies when he asked them to provide records, locate witnesses, and provide officers to testify at the time of Mr. Barnett's trial.

There simply is nothing new or of concern in the Court of Appeal's opinion. The court took *Steele*, *Barrett*, and the *Brady* cases and applied

them to the facts of Mr. Barnett's case, which happened to involve prior crime evidence from other states. There is no need for this Court to grant review.

* * * * *

II. THERE IS ALREADY UNIFORMITY OF DECISION ON THE ISSUES UPON WHICH THE ATTORNEY GENERAL SEEKS REVIEW IN ARGUMENT II

The Attorney General asks this Court to review the decision of the Court of Appeal that petitioners do not have to prove that the discovery they seek actually exists in order to be entitled to seek it. This Court should decline to review the decision of the Court of Appeal, as it declined to review the similar decisions in *Curl v. Superior Court*, 140 Cal.App.4th 310 (2006), and *People v. Superior Court (Maury)*, 145 Cal. App. 4th 473 (2006), because there is uniformity of decision on this question and this area of law is settled. As such, there are no grounds for review pursuant to Rule 8.500(b), California Rules of Court.

A

The Attorney General begins: "The pervasive, and ultimately incorrect, premise of the Court of Appeal's interpretation of section 1054.9 is the court's view that the statute is an actual investigatory tool . . . ." Petition at 14. This Court in *Steele* held that the statute *is* an investigatory tool. "Defendants are now entitled to discovery to assist in stating a prima facie case for relief." "The statute permits discovery as an aid in preparing the petition." *Steele*, 32 Cal.4th at 691. This Court characterized a §1054.9 motion as "a motion for postconviction discovery." *Steele*, 32 Cal.4th at 688. "Discovery" is a term of art, meaning "the pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial." *Arnett v. Dal Cielo*, 14 Cal.4th 4, 21 (1996), citing Black's Law Dict. at 466 (6th ed. 1990). Obtaining facts and information about the case *is* investigation. Section 1054.9 is, unmistakably, an investigatory tool.

The Attorney General's flippant characterization of the Court of

Appeal's holding that the statute is a "peace of mind" statute, concerned with a prisoner's "comfort level regarding the remote possibility that some additional materials exist," Petition at 16, ignores the reality of Mr. Barnett's case. Contrary to the Attorney General's assertion, Mr. Barnett established that materials were missing from his trial attorney's files. Because discovery was consecutively numbered, Mr. Barnett was able to identify what pages were missing from trial counsel's file. Exh. 1, Vol. 1 at 7-8. Additionally, during the section 1054.9 proceedings in the superior court, the prosecutor admitted that he and his investigator had interview notes, copies of which were not in trial counsel's files. Exh. 44, Vol. 32 at 6510.[6]

Here, the Attorney General asserts, "Barnett is missing nothing from trial counsel's files and has made no showing that any additional discovery materials exist." Petition at 16. The facts of the case belie this assertion, as well as the assertion on page 22 of the Petition that Mr. Barnett has "no evidentiary basis to believe that any discovery materials are missing from those obtained from trial counsel."

B

As noted, the Court of Appeal relied on *Maury* to reject the People's argument that petitioners must prove that the discovery they seek actually exists. *Barnett*, 164 Cal.App.4th at 43-44. In Argument II.B, the Attorney

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[6] The lower court's 2007 opinion mentioned this fact in the section of the opinion where the court held that petitioners do not have to prove that the documents they seek actually exist. *Barnett v. Superior Court*, 146 Cal.App.4th 344, 373 (2006). In the 2008 opinion, that section is substantially shorter and omits most of the analysis, citing instead to *People v. Superior Court (Maury)*, 145 Cal.App.4th 473, 479-486 (2006). *Barnett*, 164 Cal.App.4th at 43-44.

General accuses the Court of Appeal of ignoring the word "unsuccessful" in the statute. Petition at 18-22. It is the Attorney General who is ignoring the opinion of the Court of Appeal.

> Although the People purport to premise their argument on the word "unsuccessful," a careful examination of the argument reveals that it actually rests more substantially on the definition of "discovery materials" contained in subdivision (b) of section 1054.9. Subdivision (b) expressly 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." As the Supreme Court explained in *Steele*, this definition encompasses only those materials "in their possession *currently*." (*In re Steele, supra*, 32 Cal.4th at p. 695.) According to the People, under this definition "a finite set of [discovery] materials actually exists for every case" – specifically, those materials to which the defendant would have been entitled at time of trial that are currently in the possession of the prosecution or of a law enforcement authority that was involved in the investigation or prosecution of the case.

Maury, 145 Cal.App.4th at 479-480. The Court of Appeal found that the Attorney General's argument really turned on the meaning of "discovery materials," not on the meaning of "unsuccessful." The court did not ignore the term "unsuccessful"; it found that the Attorney General's argument did not implicate the word. Review is unnecessary because the lower court addressed the Attorney General's argument, rejected it, and properly interpreted the statute.

In Argument II.B.2, the Attorney General attacks the Court of Appeal for a holding that he invited it to make. "But if a defendant and/or his attorney can *imagine and describe* materials to which the defendant would have been entitled at time of trial based on some plausible theory, then a request for such material would be proper under section 1054.9."

Petition at 21, citing *Barnett*, 164 Cal.App.4th at 55 (emphasis added in Petition).

This language was not in the original opinion issued on December 5, 2006; the Court of Appeal added it when it modified the opinion after denying rehearing. The Attorney General filed an answer to Mr. Barnett's petition for rehearing in the Court of Appeal. In the petition for rehearing, Mr. Barnett focused on the issue he raised in both his petitions for review in this Court: the burden of pleading materiality in order to be entitled to *Brady* material. In response to the rehearing petition, the Attorney General wrote, "[THE COURT OF APPEAL'S] INTERPRETATION OF THE BURDEN OF ESTABLISHING MATERIALITY WAS PROPER." Answer to Petition for Rehearing (hereinafter "Ans. Rhrg.") at 4. The Attorney General continued: "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*." Ans. Rhrg. at 5 (emphasis added). The Attorney General repeated, "As discussed above, under 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.*" Ans. Rhrg. at 8 (emphasis added).

After receiving the Attorney General's answer to the rehearing petition, the Court of Appeal modified its first opinion and added the language of which the Attorney General now complains, that if a petitioner can imagine and describe materials to which he would have been entitled to at trial based on some plausible theory, then such a request is proper under § 1054.9. *Barnett*, 146 Cal.App.4th at 384.

This is the essence of invited error. When a party by its own conduct

induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error. *Mary M. v. City of Los Angeles*, 54 Cal.3d 202, 212 (1991). The "imagination" language came from the Attorney General's hand. The Court of Appeal adopted it. Now the Attorney General comes to this Court, claiming the Court of Appeal committed error in adopting it. The Attorney General invited the error, and should not be heard now to complain.

Mr. Barnett has filed his own petition for review, raising objections to the lower court's holding that petitioners must show materiality of *Brady* material in order to be entitled to it. This Court should grant Mr. Barnett's petition and reject the Attorney General's. This action would bring the "imagination" language of the lower court's holding under review without rewarding the Attorney General for his invited error.

C

In Argument II.C, the Attorney General urges this Court to review the decision of the Court of Appeal that the Legislature did not intend the presumption of Evidence Code section 664 to require eligible petitioners seeking discovery to prove the actual existence of the materials sought before the trial court may order discovery. Petition at 22-25. The linchpin of the Attorney General's argument is certain language in this Court's opinion in *Steele* that the Attorney General interprets as an endorsement of the use of Evidence Code section 664 to bar discovery in postconviction proceedings.

Of necessity, the Attorney General accedes to the determination of Court of Appeal that this Court's reference to Evidence Code section 664 in *Steele* was dictum. Petition at 23-24. Given that the Attorney General believes this Court's reference to section 664 was dictum, and given that

Curl, *Maury*, and the decision below are in accord in rejecting the Attorney General's argument that Evidence Code section 664 can bar postconviction discovery, it is difficult to discern how there could be an existing conflict of decision in need of remedying.

The Attorney General presented precisely the same argument regarding Evidence Code section 664 to the court of appeal in *Curl*, as well as in its unsuccessful petition for review in that case. He made the same argument below in the instant case, and repeats it yet again in the current Petition. He made the same argument below in *Maury*, and repeated it yet again in the petition for review in that case. The argument has been consistently rejected for the same reasons. The interpretation the Attorney General urges would create a virtually insurmountable burden for petitioners, requiring them to demonstrate that materials they do not possess and have never seen exist and were withheld by the government at trial. As the lower court held, the Attorney General's argument contradicts the express language and clear legislative purpose of section 1054.9 as explained in *Steele*.

The Attorney General is less than candid in his Petition when he says that:

> This case presents a perfect example of the problem of ignoring Evidence Code section 664. Here, Barnett expressly alleged that the prosecution committed discovery violations at trial. [citation]. However, Barnett should not be able to trigger section 1054.9 obligations based on his unsupported allegation, rather than competent evidence, that the prosecution failed to provide the discovery that was required at trial. The Court of Appeal in the case, by failing to apply Evidence Code section 664, gave credence to Barnett's baseless accusations of prosecutorial misconduct. As a result, the prosecution will be forced to prove that it did not commit any discovery violations at trial.

Petition at 25.

The true facts are that the trial discovery order directed the prosecution to disclose original notes of law enforcement interviews with witnesses. Exh. 1 at Vol. 1, p. 54, # 6. Mr. Barnett pled in his discovery motion that he did not receive any original notes. *Id.* at p. 10. There were no original notes of law enforcement interviews with witnesses in trial counsel's files. During the proceedings on the section 1054.9 motion, the prosecution disclosed original notes of law enforcement interviews with witnesses, as the Court of Appeal recounted in its 2006 opinion:

> Indeed, this case provides a prime example of why the Legislature could not have intended to impose such a requirement. 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. The facts are that the prosecutor did commit a discovery violation – he was ordered to disclose original notes of law enforcement interviews with witnesses. He did not. During section 1054.9 proceedings, he located interview notes and disclosed them.

This passage comes at the conclusion of the Court of Appeal's analysis of Evidence Code section 664. The court did not "ignore" it, as the Attorney General contends. Petition at 23. The court rejected the argument, based on the legislative intent behind section 1054.9 and the facts of Mr. Barnett's case, which the Attorney General apparently has forgotten.

Prior to the enactment of section 1054.9, postconviction discovery was governed by *People v. Gonzalez*, 51 Cal.3d 1179 (1990). *Gonzalez* held that "discovery will not lie in habeas corpus with respect to issues upon which the petition fails to state a prima facie case for relief." *Id.* at 1261. Habeas corpus petitioners attempting to satisfy the prima facie showing requirements of *Gonzalez* found themselves in a "Catch-22" situation: they were not entitled to the discovery materials necessary to make out a prima facie case for relief until they could make out the prima facie case for relief necessary to obtain the materials. *Id.* at 1259-60.

Under the former rule in *Gonzalez*, postconviction discovery took place after a habeas petition had been filed and was found to state a prima facie case for relief. The *Gonzalez* rule thereby encouraged inefficient, piecemeal litigation. It forced a full round of litigation in state court based on incomplete information, forestalling full adjudication of potentially meritorious claims and making poor use of the state's scarce judicial and criminal justice resources.

In *Steele*, this Court specifically found that "[s]ection 1054.9 modifies [the *Gonzalez*] rule. Defendants are now entitled to discovery to assist in stating a prima facie case for relief . . . i.e., before they must state a prima facie case." *Steele,* 32 Cal.4th at 691.) As this Court explained, section 1054.9 created a mechanism to facilitate pre-petition discovery in order to ensure that potential claims for relief may be fully developed prior

to the filing of the habeas petition. By fostering petitioners' ability to present to fully developed claims based on all the materials to which they would have been entitled at trial, section 1054.9 engenders timely development and efficient adjudication of claims for habeas corpus relief. In *Steele*, this Court held that, contrary to prior practice under the *Gonzalez* rule, under section 1054.9, a petitioner is entitled to the discovery materials available to him at trial, regardless of the prosecution's compliance with its trial discovery obligations. This Court stated:

> However, the expectation and assumption we stated in *Gonzalez* merely means 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. None of this changes the plain meaning of the statute's inclusion of materials to which the defendant "would have been entitled."

Steele, 32 Cal.4th at 694.

This Court made clear that, in the context of section 1054.9, the presumption of Evidence Code section 664 simply means that in cases where the government has timely met its statutory and constitutional discovery obligations, there will be no discovery material to disclose pursuant to a 1054.9 motion. If, however, these prosecution and law enforcement materials are not present in the trial file – whether because they were not originally disclosed or requested, or were lost – then the petitioner is entitled to discovery under section 1054.9. Evidence Code section 664 does not operate to bar discovery of items not present in the trial file. The petitioner need not – and often cannot – make a factual showing as to why the materials are not in the trial file. The Court of Appeal agreed that this was true. *Maury*, 145 Cal.App.4th at 484. The

purpose of the statute in abrogating the *Gonzalez* rule was precisely to facilitate disclosure of discovery by eliminating such a prima facie showing.

In order to prove that the prosecution did not act in accordance with the supposed presumption of Evidence Code section 664, the defendant would need to have knowledge not only of the whole universe of material the prosecution actually did provide, but also of the whole universe of material it should have provided but did not. As the Attorney General concedes in its petition, "Obviously, no litigant, on either side, really knows if they have all of the discovery to which they are entitled." Petition at 16. The Court of Appeal agreed, noting that it would be impossible for a petitioner to meet the burden suggested by the Attorney General and that imposing such a burden would be inconsistent with the statute's purpose. *Maury*, 145 Cal.App.4th at 484-85. The Court of Appeal properly concluded that it "will not attribute to the Legislature an intent to create a statutory scheme for discovery that in many cases will achieve nothing." *Id.* at 485.

The Fifth District Court of Appeal came to the same conclusion in *Curl*, following this Court's decision in *Steele* to hold that petitioners are "not required to make a showing that the prosecution failed to turn over discovery materials it was obligated to produce at trial in order to obtain section 1054.9 post-conviction discovery." *Curl*, 140 Cal.App.4th at 313, 320-22. The courts of appeal are not in conflict on this question.

California courts have thus uniformly rejected the Attorney General's argument. They have done so by looking to both the plain language and the purpose of section 1054.9 as well as by examining *Steele* as a whole – not only this Court's comment there regarding Evidence Code section 664, but also how this Court actually applied the statute to the facts of the case. The

existing uniform body of law provides the lower courts clear direction concerning the threshold showing requirements embodied within section 1054.9. The law on this issue has been thoroughly and correctly settled, and further litigation surrounding this issue is unnecessary.

D

In Argument II.D, the Attorney General raises an issue that he did not present to the court below in a petition for rehearing following either opinion. As such, this Court should not consider the issue, pursuant to Rule 8.500(c)(1), California Rules of Court: "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 Attorney General should have given the Court of Appeal the first opportunity to address this issue.

On the merits, the Attorney General argues that the Court of Appeal failed to consider that postconviction discovery occurs after trial. Petition at 25-27. Pre-trial discovery will have already taken place, the Attorney General argues, therefore it is just to require eligible petitioners to identify materials that actually exist in the possession of law enforcement. Petition at 26.

To support this argument, the Attorney General looks to the law of other jurisdictions, arguing that the rules governing habeas corpus in federal court and the law governing state postconviction in six states require petitioners to show good cause for discovery. *Id.* There are three things wrong with this argument. First, the Legislature has already determined what eligible petitioners must establish at the threshold to be entitled to discovery, and the Legislature did not require petitioners to show good cause for discovery. Rather, the Legislature required only that a petitioner

be serving a sentence of death or life without possibility of parole, that he be preparing or have filed a postconviction petition; and that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful. *Curl*, 140 Cal.App.4th at 319. The Legislature included no additional requirements in the statute.

Second, the Attorney General is wrong about the law of some of the states he showcases as having what he characterizes as a proper understanding of the role of postconviction discovery. Mississippi allows capital postconviction petitioners *more* discovery than that permitted by section 1054.9. A capital petitioner in Mississippi is entitled as a matter of right to the complete law enforcement and prosecutorial files related to the investigation and prosecution of his or her case. Rule 22(c), Mississippi Rules of Appellate Procedure. In Louisiana, another state touted by the Attorney General as appropriately limiting postconviction discovery to petitioners who show good cause, once a conviction becomes final (i.e., affirmed on appeal), all law enforcement files (district attorney, police, coroner, state crime lab, etc.), are public records and may be reviewed in full by any member of the public under the Public Records Act, La. R.S. 44:1 *et seq.*, with minor exceptions such as for work product and grand jury transcripts. *Lemmon v. Connick*, 590 So.2d 574 (La. 1991); *Harrison v. Norris*, 569 So.2d 585 (La.App.2d Cir. 1990). The case the Attorney General cited, *State ex rel. Tassin v. Whitley*, 602 So.2d 721 723 (La. 1992), concerns discovery by means of deposition, interrogatories, and requests for admissions, which require good cause. Access to documents related to the case against the petitioner is governed by the Louisiana Public Records Act, which does not require petitioners to show good cause.

Like Louisiana and Mississippi, other states require far less of

petitioners seeking postconviction discovery of records related to their convictions, or grant them such access as a matter of right. North Carolina grants capital petitioners postconviction discovery by right of the prosecution and law enforcement files related to their crimes. N.C. Gen. Stat. sec. 15A-1415(f). In Florida, the prosecutors, law enforcement agencies and the Department of Corrections are responsible for copying records relevant to the investigation, prosecution and incarceration of capital petitioners and sending them to a record repository where the petitioners' counsel can access them. Rule 3.852, Fla. R. Crim. P. These records are considered public records pursuant to the Florida Public Records Act. Chapter 119, Fla. Stat. The Florida Supreme Court enacted Rule 3.852 to eliminate delays in the postconviction discovery process, so that the duty to provide the prosecution, law enforcement and corrections files to capital petitioners is now self-executing. *Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.993*, 802 So.2d 298, 301 (Fla. 2001) ("[T]he goal of these changes is to achieve a prompt, fair, and efficient resolution of capital postconviction proceedings."). If this Court feels the need to look to other states for guidance, it will find that other states have determined that discovery as of right expedites postconviction discovery and postconviction review as a whole.

Finally, the Attorney General has not pointed to case law, statute or rule of another jurisdiction that requires petitioners to prove the actual existence of discovery they seek. The Attorney General, apparently, is urging this Court to create a rule that would be unique.

The Legislature has set forth what the petitioner must establish before he is entitled to discovery. It is not good cause; it is not the same showing required by Penal Code section 1054.5, as the Attorney General

suggests, Petition at 27; and it is not an evidentiary showing that some additional discovery materials exist. *See id.* To adopt the Attorney General's argument would "erect[] a standard that is virtually impossible, if not absolutely impossible, for a defendant to meet." *Maury*, 145 Cal.App.4th at 480. Such is not what the Legislature intended when it enacted a statute allowing postconviction discovery "to assist in stating a prima facie case for relief." *Steele*, 32 Cal.4th at 691.

E

In Argument II.E, the Attorney General warns that this Court must review the Court of Appeal's decision or every capital petitioner will file a postconviction discovery motion. Petition at 27-28. The Attorney General's alarm is puzzling. The Legislature enacted the statute to create a device whereby eligible petitioners could develop facts to "assist in stating a prima facie case" for habeas corpus relief. *Steele*, 32 Cal.4th at 691. A petition for writ of habeas corpus should "state fully and with particularity the facts on which relief is sought" and "include copies of reasonably available documentary evidence supporting the claim." *People v. Duvall*, 9 Cal.4th 464, 474 (1995) (citations omitted). Further, petitioners must fully develop the facts of their claims in state court, or risk forfeiting their opportunity to have their claims heard in federal court. 28 U.S.C. § 2254(e)(2).

When petitioners have such a burden, they must take advantage of the investigative tool that the Legislature has reserved for only those petitioners condemned to die in prison. However the lower court or this Court interprets the statute, capital petitioners will utilize section 1054.9. The Legislature created the discovery right; one presumes it intended for the right to be exercised. The Attorney General fears too much justice, but the

Legislature does not.

In the remainder of this section, the Attorney General returns to his complaint that the Court of Appeal's ruling will encourage petitioners to formulate discovery requests based on nothing more than imagination. Petition at 28. As discussed in response to Argument II.B.2, *supra*, the Attorney General suggested to the lower court that petitioners "are restricted only by their imagination," Ans. Rhrg. at 8, without arguing that such a holding would be incorrect. Now that the lower court made such a holding, the Attorney General argues it was error. Having invited the error, the Attorney General is estopped from raising it in this Court.

The Attorney General is concerned that section 1054.9 litigation will delay resolution of habeas corpus cases. Petition at 29. This concern is unfounded. The Attorney General has not shown in this case or any other that the habeas corpus proceedings have been delayed because of discovery proceedings. Indeed, this Court routinely denies requests to stay habeas corpus proceedings pending the outcome of discovery proceedings in the superior courts. *See, e.g., In re Coddington*, No. S107502, Order denying Petitioner's "Application for Stay of Habeas Corpus Proceedings Pending Resolution of Petitioner's Postconviction Discovery Motion in Superior Court" (June 15, 2005). In fact, this Court denied Steele's habeas corpus petition while his postconviction discovery proceedings were still ongoing in the superior court in accordance with this Court's remand in *In re Steele, supra*, 32 Cal.4th 682. There is no evidence that postconviction discovery

is delaying resolution of habeas corpus petitions.

In fact, the pendency of postconviction discovery proceedings has had no impact on the resolution of Mr. Barnett's own habeas corpus petitions in this Court. When he first filed his discovery motion in May 2003, he had a habeas corpus petition pending in this Court (S096831). He filed another habeas petition in this Court in June 2003 (S120570). By the time the appellate court issued its most recent opinion on June 19, 2008, the court noted that the California Supreme Court had denied both of the petitions that Mr. Barnett had pending during the litigation of his discovery motion. *Barnett*, 164 Cal.App.4th at 27 n.3. Evidently, the section 1054.9 proceedings did not delay resolution of Mr. Barnett's habeas corpus petitions in this Court.

CONCLUSION

For the reasons expressed herein, Mr. Barnett requests that this Court deny the Attorney General's petition for review.

Dated: August 18, 2008

Respectfully submitted,

ROBERT D. BACON

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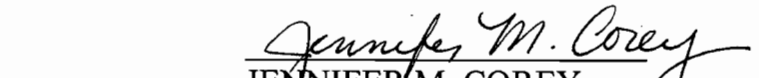

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CERTIFICATE OF COUNSEL

I, Jennifer M. Corey, counsel for Petitioner Lee Max Barnett, do hereby certify that the foregoing Answer to Attorney General's Petition for Review is 7,475 words in length.

Jennifer M. Corey

JENNIFER M. COREY
Assistant Federal Defender

Lee Max Barnett Case No. S 165522

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. On August 18, 2008, I served **MR. BARNETT'S ANSWER TO ATTORNEY GENERAL'S PETITION FOR REVIEW** 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 this18th of August, 2008, at Sacramento, California

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