IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ORIGINAL

LEE MAX BARNETT,

Petitioner,

v.

THE SUPERIOR COURT OF BUTTE COUNTY,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest and Petitioner.

S165522

Court of Appeal of the State of California, Third Appellate District No. C051311
Butte County Superior Court No. 91850
The Honorable William R. Patrick, Judge

OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE 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.	S165522

STATEMENT OF ISSUES

1. Does an out-of-state law enforcement agency become part of the prosecution team for discovery purposes when the agency's involvement is limited to providing the prosecution in the current case with previously existing records regarding prior crimes of the defendant?

2. Under Penal Code section 1054.9, is the requirement that a petitioner show "good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful" satisfied when a petitioner simply describes material, that if it exists, would be discoverable at trial, without consideration of the discovery already provided by the prosecution and obtained by the petitioner from trial counsel?

3. Does Penal Code section 1054.9 require that a person sentenced to death or life without possibility of parole show that there would have been a reasonable probability of a different outcome at trial-a showing not required to obtain pretrial discovery-to be entitled to postconviction discovery of favorable material?

4. Is Penal Code section 1054.9 unconstitutional as an invalid amendment of Proposition 115?

INTRODUCTION

This court is reviewing the constitutionality, reach, and interpretation of Penal Code section 1054.9[1/], the so-called "postconviction discovery" statute. This case arises from Barnett's partially successful postconviction discovery motion in the Butte County Superior Court and subsequent writ proceedings.

After upholding the constitutionality of section 1054.9, the appeals court agreed with the trial court for the most part, but that court granted Barnett's request for the original police witness interview notes of 22 "out of state" and foreign police officers from Florida, Massachusetts, New York, Arizona, and Canada. The court disagreed that these officers were not part of the "prosecution team." The court also rejected the People's argument that it was Barnett's burden to show that the requested documents existed and what documents he already possessed. On the other hand, to the extent that Barnett sought discovery based on the prosecution's duty to disclose under *Brady v. Maryland* (1963) 373 U.S. 83, the appeals court upheld the trial court's denial of those requests because Barnett failed to demonstrate the "materiality" of the requested items.

STATEMENT OF THE CASE

On May 4, 1998, this Court affirmed Barnett's conviction and death sentence for murdering Richard Eggett. (*People v. Barnett* (1998) 17 Cal.4th 1044.)

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1. Unless otherwise specified, all further statutory references are to the Penal Code.

In 2004, Barnett moved for discovery pursuant to section 1054.9 in the Butte County Superior Court. (Petition for Writ of Mandate ("Petition"), Exh 1.) The Superior Court granted a substantial number of Barnett's requests. (Petition, Exh 56.)

On November 30, 2005, Barnett filed a Petition for Writ of Mandate with the Court of Appeal, Third Appellate District which then issued an alternative writ. The Court of Appeal partially granted and partially denied relief. This Court granted the People's petition for review, but then transferred the case on the issue of the constitutionality of section 1054.9.

On June 19, 2008, the appeals court held that section 1054.9 was constitutional. (*Barnett v. Superior Court (People)* (2008) 164 Cal.App.4th 18). The court rejected the majority of Barnett's requests because he failed to establish that he was entitled to discovery under the "materiality" standard of *Brady v. Maryland*, *supra*, 373 U.S. 83. (*Id.* at p 55.) However, the Court granted his request for interview notes and held that out-of-state law enforcement agencies from four different states and one foreign country that provided pre-existing police reports "related to previous criminal conduct" by Barnett were sufficiently "involved" in the case so as to be part of the "prosecution team" for discovery purposes. (*Barnett, supra*, at p.p. 38-43.) The court rejected the People's argument that Barnett was not entitled to discovery under section 1054.9 because he failed to show that he was "unsuccessful" at obtaining the discovery materials requested, as required by the statute. (*Id.* at pp. 43-45 relying on *People v. Superior Court* (*Maury*) (2006) 145 Cal.App.4th 473.) The court also held that Barnett did not have a burden to overcome the presumption that the prosecutor had regularly performed his official duty at trial to provide discovery as part of his postconviction discovery

motion. (*Barnett,* supra, at pp. 43-45). The court also granted discovery of criminal background records of two jurors and of documentation of allegedly exculpatory "street talk". (*Id.* at 88-89.)

On September 17, 2008, this Court granted the People's and Barnett's timely filed petitions for review, ordered review on the constitutionality of section 1054.9 on its own motion, and designated the People as petitioner for briefing and argument. (Cal. Rules of Court, rule 8.520, subd. (a)(6).)

SUMMARY OF ARGUMENT

The trial court properly denied Barnett's section 1054.9 postconviction discovery motion for any original witness interview notes possessed by police officers in four other states and Canada who provided information about Barnett's prior crimes. Barnett's prosecutor did not constructively possess the material since these outside agencies were not part of the "prosecution team" within the meaning of *United States v. Giglio* (1972) 405 U.S. 150. These entities did not otherwise participate in investigating Barnett's case on the prosecutor's behalf or under his authority, but were simply third party sources of information about Barnett's violent background. The lower court's expansive definition of "prosecution team" places an impractical burden on prosecutors, burdens investigations of defendants' criminal pasts, and is not justified by Constitutional requirements for prosecutors to disclose exculpatory evidence. Accordingly, the lower court improperly ordered the prosecution to disclose original interview notes of these third party agencies.

Under section 1054.9, a court cannot order postconviction discovery without "a showing [by defendant] that good faith efforts to obtain discovery materials from trial counsel were unsuccessful...". Despite this threshold requirement, the lower court incorrectly held that a movant is not required to show that trial counsel's files are incomplete and that there is reason to believe the requested materials actually exist. Rather, a movant's right to postconviction discovery is limited only by his ability to imagine and describe requested materials based on some plausible theory. This essentially "free floating" standard permits movants to duplicate trial discovery without regard for the presumption that the prosecution performed its official duty in providing discovery at trial. It is inconsistent with section 1054.9's purpose to limit court congestion with these motions and with the limited role of habeas corpus. The appeals court ordered disclosure of criminal records of a juror and

documentation of allegedly exculpatory "street talk" despite the lack of any showing by Barnett that he had been unsuccessful in determining that his trial counsel had this information or that such information existed.

ARGUMENT
I.

DOES AN OUT-OF-STATE LAW ENFORCEMENT AGENCY BECOME PART OF THE PROSECUTION TEAM FOR DISCOVERY PURPOSES WHEN THE AGENCY'S INVOLVEMENT IS LIMITED TO PROVIDING THE PROSECUTION IN THE CURRENT CASE WITH PREVIOUSLY EXISTING RECORDS REGARDING PRIOR CRIMES OF THE DEFENDANT?

No. The Court of Appeal case incorrectly concluded that out-of-state law enforcement agencies in Florida, Massachusetts, New York, Arizona, and Canada that simply provided police reports of prior crimes by Barnett were part of the "prosecution team" within the meaning of *Brady v. Maryland, supra,* 373 U.S. at p. 83. (*Barnett, supra*, 164 Cal.App.4th at p. 41-43.) The decision improperly expands the prosecution's *Brady* obligations to agencies that have minimal connection to the prosecution.

At trial, the prosecutor obtained reports from out-of-state agencies regarding Barnett's prior crimes. During the penalty phase, the prosecution presented substantial evidence, through witnesses, of Barnett's prior crimes. (See *Barnett* v.Superior Court, 146 Cal.App.4th 344 (conc. opn. of Sims, J.), review granted April 25, 2007, S150229 and cause transferred January 23, 2008); Attachment I at pp. 2-3.)[2/] In his section 1054.9 motion, Barnett unsuccessfully sought discovery of original interview notes taken by out-of-state police officers relating to these witness who testified against him. (Petition, at p. 21; Exh 56.)

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2. The People cite Justice Sims' earlier concurring opinion in this case since the California Rules of Court only prohibit the citation of unpublished opinions "in any **other** action." (Cal.Rules of Court, rule 8.1115, subd. (a).) [emphasis added].

The appeals court held that "the trial court abused its discretion when it denied Barnett's request for any original notes taken by the 22 out-of-state law enforcement officers who conducted interviews of witnesses who testified at trial." (*Barnett*, *supra*, at p. 45.) The court determined that a "law enforcement agency that provides a report relating to previous criminal conduct by a defendant . . . can be deemed to have been 'involved in the investigation or prosecution of the case' against the defendant." (*Id.* at p. 41.) It expressly noted that the fact that an agency's "involvement may have been limited to providing reports the People requested from them" did not change the analysis. (*Id.* at p. 41.) The court concluded, "[T]he People had constructive possession of information possession by those [out-of-state] agencies, and the People's constitutional duty to disclose exculpatory information extended to information in the possession of those agencies." (*Id.* at p. 43.) Thus, the Court of Appeal's decision expressly rested on constitutional considerations and was not limited to section 1054.9.[3/]

A. *Brady* Disclosure Obligations Extend Beyond The Prosecutor To The Entire Prosecution Team

A prosecutor's constitutional duty to disclose material exculpatory evidence extends to materials outside of the actual possession or even knowledge of the prosecutor. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437; *In re Brown* (1998) 17 Cal.4th 873, 879.) "[T]he 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." (*Kyles*, *supra*, 514 U.S. at p. 437, *see also, Strickler v. Greene* (1999) 527 U.S. 263, 275, fn. 12.) "As

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3. The court determined that this Court "sought to establish parity between the prosecution's constitutional duty to disclose exculpatory information and the availability of discovery under section 1054.9 ." (*Id.* at p. 42, citing *In re Steele* (2004) 32 Cal.4th 682, 696-97.)

a concomitant of this duty, any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. 'The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation.'" (*In re Brown*, *supra*, 17 Cal.4th at p. 879, quoting *United States v. Payne* (2nd Cir. 1995) 63 F.3d 1200, 1208.) "Courts have thus consistently "decline[d] 'to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel.'" (*Ibid*, quoting *United States v. Auten* (5th Cir. 1980) 632 F.2d 478, 481.)

A prosecutor is responsible for information beyond what he or she personally knows or possesses because "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government." (*United States v. Giglio, supra*, 405 U.S. at 154.) Imposing responsibility on the prosecution ensures that "procedures and regulations [will] be established to carry that [disclosure] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." (*Ibid.*) "[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." (*Kyles*, *supra*, 514 U.S. at p. 438.) "If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the . . . Government. (*United States v. Auten*, *supra*, 632 F.2d at p. 481.)

When imputing knowledge to the prosecutor, the "important determination is whether the person or agency has been 'acting on the government's behalf' or 'assisting the government's case.'" (*People v. Jordan*

(2003) 108 Cal.App.4th 349, 358 [citations omitted].) This Court's cases provide guidance regarding the parameters of the "prosecution team." In *Brown*, this Court concluded a crime lab employed by the prosecution "was part of the investigative 'team'" in that case. (17 Cal.4th at p. 880.) The crime lab "'worked closely with the District Attorney's Office in assisting it in the prosecution of cases.'" (*Ibid.*) Accordingly, "the crime lab's failure to apprise the prosecution of the worksheet did not relieve the prosecutor of his obligation to review the lab's files for exculpatory evidence." (*Id.* at p. 881.) However, in *Steele,* the Department of Corrections was not part of the prosecution team because "[p]rison officials did not investigate or help prosecute any of [Steele's] crimes." (32 Cal.4th at p. 701.) There, the prosecution had access to Steele's prison file, reviewed the file for relevant information, and copied select records. (*Id.* at p. 702.) However, since "the prosecution's case had nothing to do with petitioner's prison behavior . . . the prosecution was generally not responsible for information prison officials possessed that might help the defense." (*Ibid.*)

B. Numerous Factors Contribute To An Agency's Status As A Member Of The Prosecution Team

Despite their ephemeral involvement, the appeals court determined that multiple out-of-state agencies were part of the Butte County prosecution team. Though *Brown* and *Steele* provide guidance regarding the scope of the prosecution team for *Brady* purposes, this case demonstrates the need for further refinement of that concept. Courts should consider factors that include: (1) the relationship between the prosecution and the agency, (2) the level of activity engaged by the agency in the case, and (3) the motivation of the agency that developed the information at issue. (See also *United States v. Rayeros* (3rd Cir. 2008) 537 F.3d 270, 282 (listing similar criteria regarding relationship and

activity level); *Stano v. Dugger* (11th Cir. en banc 1990) 901 F.2d 898, 906-907 (Edmondson, J. conc..) (discussing similar criteria).)

1. Relationship Between The Prosecution And The Other Agency

The nature and extent of the relationship between the prosecution and a government agency is an important factor when determining if that agency is part of the prosecution team. The closer the relationship between the prosecution and the agency, the more likely the agency is part of the prosecution team.

Ordinarily, the prosecution and local police have a close enough relationship to impose a duty on the prosecutor to learn of exculpatory evidence in possession of the police. (See *Kyles v. Whitley*, *supra*, 514 U.S. at p. 437 [*Brady* duty extends to police].) They are considered "closely aligned" agencies for *Brady* purposes. (*United States ex rel. Smith v. Fairman* (7th Cir. 1985) 769 F.2d 386, 391; see also, *Fero v. Kerby* (10th Cir. 1994) 39 F.3d 1462, 1472, fn. 12 ["police are considered agents of the prosecution"].) Their common purpose of enforcing law in the same geographic area creates an interconnected relationship.

Similarly, 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. (*Brown*, *supra*, 17 Cal.4th at p 880) (prosecution employment of local crime lab sufficient to make crime lab part of prosecution team.).

When an agency outside of the prosecution's jurisdiction engages in a joint investigation with the prosecution, it will generally be considered part of the prosecution team. The United States Supreme Court found that a prosecutor was in constructive possession of information in the hands of a police officer from a neighboring county who participated in the investigation

of the murder for which the defendant was being prosecuted. (*Strickler, supra*, 527 U.S. at p. 275, fn. 12.) In *United States v. Antone* (5th Cir. 1979) 603 F.2d 566, 569-70, the federal prosecutor was responsible for information possessed by state investigators because "federal and state agencies [had] cooperated intimately from the outset of [the] investigation." (*See also United States v. Shakur* (S.D.N.Y. 1982) 543 F. Supp. 1059, 1060 [imputing knowledge to federal prosecutor because there was no "dispute that there has been and still is cooperative activity between him and the District Attorney of Rockland County with respect to the alleged crime . . .".].)

However, the lack of any joint investigation between an agency and the prosecution is often fatal to a defendant's claim that the agency was part of the prosecution team. Tennessee law enforcement officials were not part of the prosecution team of a Georgia prosecutor because of the lack of evidence the two agencies "engaged in a joint investigation." (*Moon v. Head* (11th Cir. 2002) 285 F.3d 1301, 1310.) The court in *United States v. Guerrerio* (S.D.N.Y. 1987) 670 F.Supp. 1215, 1219, fn 3, refused to impute constructive possession to a federal prosecutor of records in the hands of state officials when there was no joint investigation between the agencies. (*See also People v. Santorelli* (2000) 718 N.Y.S.2d 696, 700-701 [state prosecutors not responsible for information possessed by FBI when no joint investigation occurred]; *Pina v. Henderson* (2nd Cir. 1985) 752 F.2d 47, 49 [exculpatory evidence known to parole officer "who did not work in conjunction with either the police or the prosecutor" should not be imputed to prosecution].)

An agency with little or no relationship or connection to the prosecution is not generally considered part of the prosecution team. This may be demonstrated by the lack of reciprocity between the agencies. (See, e.g., *Steele, supra*, 32 Cal.4th at p. 701.) In *Steele*, the relationship between the prosecutor and prison officials was limited to providing the prosecutor with

access to Steele's prison file. Since prison officials did not jointly investigate Steele's crime, nor did the prison receive any assistance or benefit from the prosecution, the prison was not part of the prosecution team. (*Ibid.*)

Accordingly, courts should consider the extent and nature of the relationship between the prosecution and an agency when determining whether the prosecution's *Brady* obligations extend to materials in the possession of that agency. This is especially important in situations when the agency in question operates outside of the prosecution's jurisdiction. A passive relationship marked by lack of mutual interest should be generally insufficient to elevate an outside agency to membership in the prosecution team.

2. Nature And Extent Of The Agency's Activity And Involvement

Another significant factor is the nature and extent of an outside agency's activity in the case. An agency that takes an active role in developing evidence in a case is likely to be considered part of the prosecution team. Conversely, when an agency's activity is simply providing pre-existing information requested by the prosecution, everything else possessed by such an agency should not be imputed to the prosecution.

An agency will generally be part of the prosecution team when that agency actively develops evidence of a particular crime or supports the prosecution of a specific case. (See *Strickler*, *supra*, 527 U.S. at p. 270, 275, fn 12 [police officer from neighboring county was part of prosecution team because he investigated the crime for which *Strickler* was charged and interviewed a key eyewitness]; *Brown, supra*, 17 Cal.4th at p 880 [crime lab that developed evidence in the case was part of the prosecution team].) However, when an agency's activity does not involve developing information specifically for the case against the defendant, that agency is not part of the prosecution team. (See, *Steele*, *supra*, 32 Cal.4th at p. 701 [providing the

prosecution with pre-existing prison records unrelated to the crime did not elevate prison to part of the prosecution team].)

Steele suggests that when an agency simply provides information to the prosecution and does not actively develop information to further the case, the agency is not part of the prosecution team. A third party agency providing information to the prosecution is doing nothing greater than could be compelled by a subpoena. However, a subpoena could not force an agency to actively investigate and develop a case for the prosecution. An agency that provides voluntarily what it could be compelled to provide by law does not suggest that the agency is actively involved in developing the case to assist the prosecution (Compare, *Rayeros, supra*, at 537 F.3d at pp. 283-285.). Thus, the nature of an agency's activity in a case is an important factor in determining if that agency is part of the prosecution team because it serves as a good measure of the extent of an agency's involvement in the case.

3. The Underlying Motivation Of The Outside Agency

Law enforcement agencies investigate and generate information for a variety of reasons. The reason why the evidence is gathered in the first place is perhaps the most important factor in determining whether the agency was "acting on behalf" of the prosecution in a particular case. When a crime has been committed, local police investigate the crime to try to ascertain the perpetrator and to gather evidence to support a prosecution for that particular crime. In a subsequent prosecution for that crime, the local police are part of the prosecution team because the evidence was gathered primarily to assist the prosecution in securing a conviction for that crime.

People v. Superior Court (*Barrett*) (2000) 80 Cal.App.4th 1305, illustrates how an agency's motivation in gathering information can be crucial when evaluating the prosecution's *Brady* obligations. In *Barrett*, the court considered whether prison officials were part of the prosecution team in a case

involving a homicide in prison. "[P]rison officials interviewed crime witnesses, prepared reports and performed other investigative tasks in connection with the homicide that took place inside the prison." (*Id.* at p 1317.) In addition to the evidence generated by the prison's criminal investigation, the trial court ordered discovery of information possessed by the prison that did not relate to the charged crime. (*Id.* at pp. 1309-10) The reviewing court concluded "CDC clearly was an investigatory agency in the case and part of the investigative team." (*Id.* at p. 1317.) As such, the defendant was entitled to "discovery of materials generated or maintained by CDC relating to its investigation of the April 9, 1996 homicide." (*Ibid.*) However, the defendant was not entitled to the bulk of his discovery requests because those materials were "not gathered by CDC in connection with its [criminal] investigation." (*Id.* at p. 1318) The requested discovery involved "records kept by CDC in the course of running the prison." (*Ibid.*) The defendant was not entitled to discovery from the prosecution "of materials CDC generated when it was not acting as part of the prosecution team." (*Ibid.*) To obtain those materials, the defendant would have to use under third party discovery. (*Ibid.*)

In *Steele*, this Court applied this principle when it held the Department of Corrections was not part of the prosecution team. (32 Cal.4th at p. 701.) Though the DOC possessed substantial evidence regarding Steele's incarceration for a prior murder, that evidence was not gathered to assist the prosecution in its case against Steele for the murder he committed after being released from prison. Therefore the prison was not part of the prosecution team. (*Ibid.*)

As *Steele* and *Barrett* show, the agency's motivation to gather information is vital to determining if that agency is part of the prosecution team. When an agency gathers information for its own purposes that are not related to or even parallel to the purposes of the prosecution, the prosecution

should not be considered in constructive possession of such materials. (See *Harm v. State* (Texas 2006) 183 S.W.3d 403, 407 [CPS reports "created in the course of an non-criminal investigation that was unrelated to appellant, but within the duties of CPS to protect the welfare and safety of the children of Texas" not possessed by the prosecution.].) This is especially true when the gathering of the information predates the crime for which the defendant is being prosecuted. (See *Steele, supra*, 32 Cal.4th at p. 701.)

C. The Court Of Appeal Erroneously Concluded That Out-Of-State Agencies That Provided Reports To The Prosecution Regarding Barnett's Prior Crimes Were Part Of The Prosecution Team

The Court of Appeal in this case incorrectly held that the prosecution was responsible for materials possessed by the out-of-state agencies on the theory that those agencies were part of the "prosecution team." (*Barnett, supra*, 146 Cal.App.4th at p. 40-43.). The minimal contact between the California prosecutor with out-of-state agencies was insufficient to justify imposing constructive possession on the prosecution of everything those out-of-state agencies possessed.

1. Relevant Background

In 1987, the trial court ordered discovery of the original notes of witness interviews. The trial prosecution in this case obtained police reports from several out-of-state agencies regarding crimes Barnett had committed prior to the murder in this case. (*Barnett, supra*, 146 Cal.App.4th at p. 41.) "[I]t is apparent that the [prosecution] obtained the reports of the interviews from the out-of-state law enforcement agencies for the purpose of preparing the capital case against Barnett. (*Ibid.*) The prosecution disclosed copies of the out-of-state reports it received and called many of the witnesses to those prior crimes to testify in the penalty phase of Barnett's case. (*Ibid.*)

In his initial section 1054.9 motion, Barnett sought original notes from approximately 195 interviews of witnesses who testified at either the guilt or penalty phase of this case. (Petition, Exh 1 at pp. 10-24.) Approximately 52 interviews were conducted by out-of-state agencies. (*Ibid.*) All but two[4/] of those out-of-state interviews were conducted years before the crime in this case occurred, between 1965 and 1982.

In addition, the DA investigator assigned to the case, Tony Koester, conducted numerous interviews with the individual officers from the out-of-state agencies. Koester and the prosecutor Mike Ramsey also interviewed some of the witnesses to the prior crimes as well. (*Ibid.*)

2. Neither Their Relationship With The Prosecution, Nor The Activities And Motivations Of The Out-Of-State Agencies Justifies The Conclusion That The Agencies Were Part Of The Prosecution Team

The facts in this case do not support the lower court's conclusion that the out-of-state agencies that provided reports to the prosecution were part of the prosecution team and that the prosecution constructively possessed their original notes of witness interviews. Accordingly, the prosecution was not responsible for materials possessed by those agencies.

First, there were no substantial relationships between the prosecutor and these agencies. The prosecutor had no supervisory authority over agencies from independent sovereigns (including another country!). Moreover, there is

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4. Barnett alleges that two interviews were conducted by out-of-state agencies in 1988, one by a detective from the Metro-Dade Police Department in Florida (Petition, Exh 1 at p. 23) and one by the police superintendent of the Calgary Police Department in Canada. (Petition, Exh 1 at p. 23). Barnett provided no information regarding the circumstances of the two 1988 interviews. However, whether or not these agencies conducted interviews was irrelevant to the lower court's analysis. (*Barnett, supra*, 164 Cal.App.4th at p.41.)

no evidence these agencies engaged in a joint investigation with the prosecutor or California law enforcement personnel who were investigating this case. The investigation in this case occurred from 1986 to 1988 while the investigations into Barnett's prior crimes occurred years earlier.[5/] Thus, the relationships were generally limited to providing previously-generated information to the prosecutor. The limited nature of the relationships between the prosecutor and the agencies in question weighs against a finding that those agencies were part of the prosecution team.

Second, the agencies' activities were passive and did not involve any new investigative efforts or evidentiary development. The prosecutor could have obtained the same information by simply issuing a subpoena for the pertinent records and witnesses. Indeed, had the prosecutor obtained the reports via subpoena, it is unlikely that the Court of Appeal would have concluded that the agencies were part of the prosecution team. It would not make sense for the prosecution to subpoena records from a member of its own "team." Accordingly, the fact that the agencies in question voluntarily provided reports to the prosecution without a subpoena should not elevate those agencies to the status of a member of the prosecution team. (Compare *Rayeros*, *supra,* 537 F.3d at p. 284.)

Finally, when the out-of-state agencies originally investigated Barnett's prior crimes, it was not their purpose to assist the prosecution in this case. When the information contained in the police reports was generated and

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5. As discussed above, two interviews by out-of-state agencies allegedly occurred in 1988. However, Barnett has included no evidence regarding the content or scope of the interviews to support a finding that those agencies engaged in a joint investigation with the California prosecutor. In any event, Barnett's ultimate position, and that of the Court of Appeal below, is that providing reports from the original investigation was alone sufficient to render those agencies part of the prosecution team. (*Barnett*, *supra*, 164 Cal.App.4th at p. 41.)

collected, the relevant out-of-state law enforcement agencies were not acting on behalf of or otherwise assisting the Butte County prosecutor.

In this case, the prosecution directed an investigation, by its own investigator, into Barnett's past with an eye to finding evidence in aggravation for the penalty phase. This "is a standard part of the prosecution of a capital case." (*Barnett, supra*, 145 Cal.App.4th at p. 41.) The DA investigator, Tony Koester, conducted numerous interviews of out-of-state witnesses. (Petition, Exh 1 at pp. 10-24.) Obviously, Koester's evidence was actually or constructively possessed by the prosecution under *Brady*. The information was gathered, however, not to prosecute Barnett for his past crimes, but to support the Butte County capital prosecution. The reason or motivation behind the investigation was to secure a conviction and death sentence in this case.[6/]

In contrast, the out-of-state law enforcement agencies that originally investigated the prior crimes were not developing evidence to support the prosecution of the charged murder or a sentence of death. Rather, when those agencies investigated the prior crimes and generated the relevant reports, the agencies were focused on developing evidence to prosecute and punish Barnett for the specific crimes he had committed in their respective jurisdictions. At the time the information was generated, those agencies did not intend to support or assist a prosecution of a future, unrelated crime. It stretches logic to conclude that when the out-of-state agencies originally generated police reports and other evidence of Barnett's prior crimes, those agencies were working on behalf of the Butte County prosecutor in a case that would not even be charged for upwards of twenty years later!

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6. Prior crime evidence is not used in a subsequent prosecution to prove and punish the defendant for the prior crime. The prosecution uses that evidence in support of a sentence of death and not in an attempt to punish the defendant a second time for the conduct. (See *People v. Melton* (1988) 44 Cal.3d 713, 756, fn. 17.)

In sum, neither the relationship with the prosecution, the activities of the out-of-state agencies, nor the motivations of those agencies were substantial enough to impute knowledge to the prosecutor of everything those agencies possessed. The limited involvement of providing police reports from prior crimes was insufficient to elevate those agencies to membership in the prosecution team in this case. Two federal circuit cases support this conclusion.

In *Moon v. Head, supra*, 285 F.3d 1301, 1309-1310, the court held that the prosecution was not responsible for exculpatory information known to an out-of-state law enforcement officer who testified during the sentencing phase of Moon's capital trial. Moon was convicted of capital murder in Georgia. In the penalty phase, the Georgia prosecutor presented evidence of two murders committed by Moon in Tennessee. (*Id.* at pp. 1304-05.) A Tennessee Bureau of Investigation ("TBI") agent provided his investigative file to the prosecutor and testified regarding one of the Tennessee murders. (*Id.* at pp. 1305, 1308.) However, the agent failed to disclose to the Georgia prosecutor exculpatory evidence regarding the murder. (*Id.* at p. 1307.) After concluding that the Georgia prosecutor did not have actual possession of the exculpatory evidence, the federal court held that the Tennessee investigator was not a member of the prosecution team. The court noted there was no evidence the "'Tennessee law enforcement officials and Georgia prosecutors engaged in a joint investigation" of the murder. (*Id.* at pp. 1309-10.)

> Nor is there evidence that anyone at the TBI was acting as an agent of the Georgia prosecutor. Davenport [the Tennesssee investigator] was not under the direction or supervision of the Georgia officials, and, had he chosen to do so, could have refused to share any information with the Georgia prosecutor. At most, the Georgia prosecutor utilized Davenport as a witness to provide background information to the Georgia courts. This is insufficient to establish Davenport as part of the Georgia "prosecution team."

(*Id.* at p. 1310.) [7]

In *United States v. Kern* (8th Cir. 1993) 12 F.3d 122, the defendant was charged with bank robberies in federal court. In the course of the trial, the federal prosecutor introduced evidence of a hotel robbery committed by the defendant for a non-character purpose under Federal Rule of Evidence 404(b). (*Id.* at pp. 123-4.) The defendant had been charged with the hotel robbery in state court. After trial, the federal prosecutor received a supplemental report from the local police regarding the hotel robbery that arguably contained exculpatory evidence. (*Id.* at p. 124.) In rejecting the defendant's *Brady* claim, the court indicated, "We do not accept the defendants' proposal that we impute the knowledge of the State of Nebraska to a federal prosecutor." (*Id.* at p. 126.) Thus, in *Kern*, the fact that the local police had provided reports for a crime that the federal prosecutor actually used during trial was insufficient to render the local police part of the federal prosecution team.

Both of these cases demonstrate the scope of the prosecution team in the situation when the prosecution simply obtains records or testimony from out-of-state officials. Both cases involve a virtually identical situation to this case and both held that the out-of-state agencies were not part of the prosecution team. Furthermore, the People have been unable to find any case which holds that merely providing reports from an unrelated crime is sufficient to render an agency part of the prosecution team. Accordingly, the decision of the Court of Appeal on this issue should be reversed.

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7. The lower court misread *Moon* as limiting the duty to disclose only "to information in the actual possession of the 'prosecution team'." (*Barnett, supra*, 164 Cal.App.4th at 42.). There is no showing that the other states and Canada could not refused to share any information with Butte County.

D. The Court Of Appeal's Definition Of "Prosecution Team" Will Broadly Impact Criminal Discovery Beyond Section 1054.9 Cases

The Court of Appeal's definition of "prosecution team" is based on constitutional principles from the *Brady* line of cases. The appellate court made it clear that "the People had constructive possession of information possession by those [out-of-state] agencies, and the People's *constitutional duty* to disclose exculpatory information extended to information in the possession of those agencies." (*Barnett*, *supra*, 146 Cal.App.4th at p. 43, italics added.) Since *Brady* obligations exist in all criminal cases, the holding of the Court of Appeal in this case cannot reasonably be limited to section 1054.9 cases.

Prior crime evidence is used in numerous circumstances in a criminal trial, both for guilt and sentencing determinations. (See, e.g., §§ 667, 667.5, 667.51; Evid. Code §§ 1101, 1108, 1109.) If a prosecutor intends to prove and use an out-of-state prior in a current criminal prosecution, it is likely that the prosecutor will obtain some information related to that prior crime from the agencies that investigated and prosecuted the prior. Under the Court of Appeal's interpretation of *Brady*, however, once the prosecutor obtains information regarding that prior, the agency that provides the information becomes "involved" in the prosecution of the current case, and part of the prosecution team.

Given the Court of Appeal's decision, anytime the prosecution obtains information for use in a criminal case from another government agency, the prosecution will become responsible for everything possessed by that agency. However, in many cases, the prosecution will have little or no access to an agency's files beyond what the agency provided. (See, e.g., *Moon v. Head*, *supra*, 285 F.3d at pp. 1309-1310 [noting that out of state officer "had he chosen to do so, could have refused to share any information with the Georgia prosecutor."].) Certainly, in this case, the prosecution had no control over the

out-of-state agencies that provided information and may not have been able to get full access to all records possessed by those agencies that involved Barnett. It is unlikely that the prosecution in this case could have put in place any "procedures and regulations" that would have enabled the prosecution access to the records that Barnett seeks.

The concept of the "prosecution team" extends beyond postconviction discovery under section 1054.9. It applies to pre-trial discovery pursuant to section 1054.1 and throughout the entire criminal case under *Brady v. Maryland.* The Court of Appeal's expansive definition of the prosecution team will necessarily apply outside of section 1054.9 cases and should be reversed to avoid an unworkable expansion of this principle throughout the criminal justice system.

II.

UNDER PENAL CODE SECTION 1054.9, IS THE REQUIREMENT THAT A PETITIONER SHOW "GOOD FAITH EFFORTS TO OBTAIN DISCOVERY MATERIALS FROM TRIAL COUNSEL WERE MADE AND WERE UNSUCCESSFUL" SATISFIED WHEN A PETITIONER SIMPLY DESCRIBES MATERIAL, THAT IF IT EXISTS, WOULD BE DISCOVERABLE AT TRIAL, WITHOUT CONSIDERATION OF THE DISCOVERY ALREADY PROVIDED BY THE PROSECUTION AND OBTAINED BY THE PETITIONER FROM TRIAL COUNSEL?

No. The Court of Appeal interpreted section 1054.9 in a manner inconsistent with its statutory purpose. Section 1054.9 was enacted for the "limited" purpose of fixing "the problem that occurs when a defendants' files are lost or destroyed after trial" and providing "a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled." (*Steele*, *supra*, 32 Cal.4th at pp. 694-695.) However, the Court of Appeal in

this case interpreted section 1054.9 more broadly. Its interpretation forces the prosecution on a wild-goose chase for discovery that likely does not exist, based only on a capital or life prisoner's unsupported hope that something new will turn up regardless of what documents the prisoner already has.

The lower court interpreted section 1054.9 to allow a petitioner to request virtually anything the prosecution possesses. Indeed, the Court of Appeal opined that discovery under section 1054.9 is actually limited only by the imagination of habeas counsel! (*See Barnett, supra*, 146 Cal.App.4th at p. 55. ["[I]f 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"].) This case demonstrates that by limiting discovery only to a petitioner's imagination, the court has effectively eliminated any limitation to postconviction discovery.

The Court of Appeal's decision is based on an incorrect premise that ignores statutory language and accords trial prosecutors no confidence. This opinion virtually guarantees that section 1054.9 motions will occur in every capital case in California. Reversal is necessary to ensure that section 1054.9 is properly applied in the limited manner the Legislature intended.

A. The Legislature Intended Section 1054.9 To Provide A Reasonable Remedy To Habeas Petitioners Who Have Determined That The Discovery Materials Obtained From Trial Counsel Are Incomplete

Section 1054.9 was enacted to provide capital and LWOP prisoners with a "limited" right to postconviction discovery. (See, *Steele, supra*, 32 Cal.4th at p. 695 [indicating that section 1054.9 provides "limited discovery" and "does not allow 'free-floating' discovery asking for virtually anything the prosecution possesses"].) The statute expressly conditioned discovery on a threshold showing "that good faith efforts to obtain discovery materials from

trial counsel were made and were unsuccessful." (§ 1054.9, subd. (a).)[8/] This statutory language and the supporting legislative history confirm that the Legislature intended section 1054.9 to provide habeas petitioners a remedy once they have determined that the "discovery materials" from trial counsel are incomplete.

1. Section 1054.9's Plain Language Requires A Showing That The Materials Obtained From Trial Counsel Are Incomplete

The statute's plain language establishes the legislature's intent. (*People v. Statum* (2002) 28 Cal.4th 682, 690.) The starting point in statutory construction is the express language of the statute. (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) Words used in a statute should be given their ordinary meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) If the language is clear and unambiguous there is no need for further interpretation or construction. (*Deukmejian*, *supra*, 45 Cal.3d at p. 735.) If the statute's plain meaning is apparent from the language, that is the interpretation that should be adopted. (*Birkett*, *supra*, 21 Cal.4th at p. 231.)

Section 1054.9 requires petitioners to show that their efforts at obtaining the "discovery materials" from trial counsel were "unsuccessful." Any interpretation of section 1054.9 must give meaning to the term "unsuccessful" in the statute. (See, *Manufacturers Life Ins. Co. v. Superior Court* (1995)10 Cal. 4th 257, 274 ["Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative"].) The "discovery materials" of a case constitute

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8. In *Steele*, this Court expressly left open the question of what showing is necessary to satisfy the good faith requirement. (32 Cal.4th at p. 690 [indicating "the 'good faith effort' requirement is not at issue here"].) Because the People did not contest the initial showing, the Court did not have to address that issue.

materials "to which the same defendant would have been entitled at time of trial." (§ 1054.9, subd. (b).) Obviously, a petitioner who obtains all of the "discovery materials" from trial counsel is successful within the meaning of the statute and is not entitled to any discovery pursuant to section 1054.9. Therefore, the Legislature intended section 1054.9 to apply only to petitioners who do not have all of the discovery materials from their cases. Moreover, not only did the Legislature limit section 1054.9 to petitioners who are missing discovery materials, the Legislature placed an affirmative duty on petitioners to establish that important threshold showing before any discovery is authorized.

To make this "showing" that they were "unsuccessful," petitioners must establish that discovery materials obtained from trial counsel are incomplete. A petitioner seeking discovery under section 1054.9 must provide evidentiary support for the necessary assertion that he or she is missing some "discovery materials" in the case. A petitioner's unsubstantiated belief that "something more may be out there" is insufficient. To satisfy the burden, a petitioner must produce evidence tending to establish the asserted fact. (Evid. Code, §§ 110, 550.) [9/]

Obviously, the Legislature intended the term "unsuccessful" to have some operative effect on postconviction discovery. This Court should interpret section 1054.9 to give effect to this important threshold requirement intended by the Legislature.[10/]

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9. Since the Legislature did not specify a burden of proof for the showing necessary to trigger application of the statute, the showing should be preponderance of the evidence. (Evid. Code § 115.)

10. This interpretation of the term "unsuccessful" is consistent with *Steele*. That case identified four categories of materials that made up the "discovery materials" under section 1054.9. (32 Cal.4th at p. 697.) However, the reason why discovery materials are missing from trial counsel's files are irrelevant to the threshold issue of "unsuccessful." Once a petitioner shows that existing materials are missing from trial counsel's files, the threshold showing

2. Section 1054.9's Legislative History Is Consistent With The Statute's Plain Language

The legislative history of section 1054.9 also demonstrates that the Legislature intended the statute to apply only when a petitioner establishes that some "discovery materials" are missing. "If our examination of the statutory language leaves doubt about its meaning, we may consult other evidence of the Legislature's intent, such as the history and background of the measure." (*People v. Birkett*, *supra*, 21 Cal.4th at pp. 231-232.)

According to it's sponsor , section 1054.9 addressed:

> The problem that occurs all too often that a defendant's files are lost or destroyed after trial and habeas counsel is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order.

(Sen. Rules Com., Sen. Floor Analysis, Rep. on Sen. Bill No. 1391 as amended Aug. 26, 2002 (2001-2002 Reg. Sess.), Aug. 30, 2002, pp. 4-5.) "The purpose of the proposed legislation is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled." (*Id.* at p. 5.) The legislative history demonstrates that the Legislature intended to permit a habeas petitioner to obtain a compete set of the "discovery materials" in a case when the petitioner determines that the materials received from trial counsel are incomplete.

The Legislature was concerned about the difficulties faced by a habeas petitioner who is missing some or all of the discovery materials from trial. Prior to section 1054.9, a habeas petitioner was not entitled to any discovery absent the issuance of an order to show cause. (*Steele*, *supra*, 32 Cal.4th at p. 690, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179.) Thus, even a petitioner who could establish that discovery materials to which he was entitled at trial were

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has been satisfied.

missing and in the possession of the prosecution was not entitled to access that material.

Section 1054.9 confronted this unfair situation. The Legislature determined that a petitioner who can establish that she does not possess all of the discovery materials from the trial should be given reasonable access to such materials. Moreover, the Legislature did not limit section 1054.9 only to those situations in which trial counsel's records were lost or destroyed.[11/] It would make little sense to provide petitioners access to materials that have been lost but not provide access to materials that are missing for other, less likely, reasons.[12/] Once a petitioner determines that he or she is missing materials, for whatever reason, the Legislature determined that the petitioner should be given reasonable access to the missing materials.

Accordingly, section 1054.9 provided a mechanism for petitioners to obtain access to any missing discovery materials. Section 1054.9 was created to provide a remedy to petitioners who have *initially determined* that some of the discovery materials from trial are missing.

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11. However, this Court still found that replacement of lost files was the "main focus" of the Legislature when enacting section 1054.9. (32 Cal.4th at p. 694.)

12. It is not surprising that the bill's sponsor focused on the most likely reason that materials could be missing from trial counsel's files– that they had been lost or destroyed. As *Steele* notes, there is no indication that the Legislature was concerned with "other problems such as the possibility that prosecutors did not fulfill their duty to provide discovery." (32 Cal.4th at p. 694.)

B. The Court Of Appeal Misinterpreted Section 1054.9's Purpose, Disregarded Its Statutory Language, And Failed To Recognize The Application Of Evidence Code Section 664 To The Actions Of The Prosecution

The Court of Appeal in this case misinterpreted section 1054.9's purpose. This led the court to a misguided interpretation of the statutory language.

1. The Court Of Appeal Incorrectly Concluded That Section 1054.9 Was A "peace Of Mind" Statute For Habeas Petitioners

Rather than a remedy for petitioners who determine that the discovery materials obtained from trial counsel are incomplete, the Court of Appeal viewed section 1054.9 as an investigative tool to discover whether any documents were missing. In other words, according to the Court of Appeal, a petitioner may properly use section 1054.9 to determine if the statute applies to him or her in the first place.

As the court noted, it adopted this circular interpretation in *People v. Superior Court* (*Maury*) (2007) 145 Cal.App.4th 473, 482 in which it held that "a defendant seeking discovery under section 1054.9 will simply have no idea whether the materials he obtained from trial counsel—assuming he obtained any at all--amount to all of the materials the prosecution turned over during trial." (*Barnett*, *supra*, 164 Cal.App.4th at p. 43-44.)[13/] Given this inherent uncertainty, the Court of Appeal concluded that a petitioner need make no showing that he or she actually falls within the class of petitioners to which section 1054.9 was enacted to benefit. Even a petitioner who successfully obtained all of the "discovery materials" from trial counsel would suffer the uncertainty the court discussed and would be entitled to postconviction

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13. Indeed, the court simply relied on *Maury*.

discovery. Of course, such a petitioner would obtain no additional materials from the prosecution and would clog the courts with requests for materials he or she already possessed.

Unfortunately, this broad reading of section 1054.9's "limited purpose" fundamentally affects the court's interpretation of the statute. Litigants, on either side, do not really know if they have all of the discovery to which they are entitled. (See, e.g. *Kyles*, *supra*, 514 U.S. at 436-437.) But that unavoidable uncertainty does not support double or triple checking of discovery either at trial or in postconviction proceedings.

Yet, neither the language of the statute nor its legislative history support the court's premise that section 1054.9's purpose is to alleviate a prisoner's concerns that he might not have all of the discovery from a case. *Steele* concluded that the statute's "main focus was to permit reconstruction of lost files." (32 Cal.4th at p. 694.) Moreover, the legislative history did "not mention other problems such as the possibility that prosecutors did not fulfill their duty to provide discovery." (*Ibid.*) Nothing in the statute suggests that the Legislature was concerned about indulging a petitioner's speculative musings that additional discovery materials may exist. Rather, the Legislature was concerned about providing a remedy for prisoners who have already determined that they are missing some discovery materials.

Section 1054.9 is a remedial statute designed to provide petitioners with reasonable access to obtain materials they have determined are missing. It was not designed, as the Court of Appeal concluded, as a tool to determine if a problem even exists.

2. The Court Of Appeal Disregarded The Statutory Requirement That Petitioners Show They Were "Unsuccessful" In Obtaining Discovery Materials From Trial Counsel

The Court of Appeal indicated that the threshold showing under section 1054.9, subdivision (a) is a fundamental prerequisite to obtaining a discovery order. (*Barnett, supra*, 146 Cal.App.4th at p. 44 relying on *Maury, supra.*) The court failed, however, to give any effect to the statutory language requiring a "showing" that a petitioner was "unsuccessful." Though the court rejected the People's interpretation of the language, the court offered no guidance as to the meaning of this "fundamental prerequisite" to discovery. Indeed, it appears the court simply ignored the term "unsuccessful" in the statute.

The Court of Appeal clearly articulated its view on the showing necessary for discovery under section 1054.9. "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." (*Id.* at p. 55.) Conspicuously absent from that conclusion is any mention or definition of the term "unsuccessful."

"Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative." (*Manufacturers Life Ins. Co. v. Superior Court, supra,*10 Cal. 4th at p. 274.) Obviously, the Legislature intended for the term "unsuccessful" to have some operative effect on postconviction discovery. By ignoring the express language of the statute, the Court of Appeal eliminated a "fundamental prerequisite" to postconviction discovery erected by the Legislature.

Ultimately, the Court of Appeal chose to ignore express statutory language based on the belief that the People's interpretation of the term

"unsuccessful" set a "virtually impossible, if not absolutely impossible" standard for petitioners to meet. (*Barnett, supra*, 164 Cal.App.4th at p. 44 relying on *Maury, supra*.) The court was mistaken.

It is absurd to conclude that the Legislature intended to provide postconviction discovery to petitioners who have no evidentiary basis to believe they are missing any discovery materials. As discussed above, section 1054.9 discovery is only available when the discovery materials a petitioner receives from trial counsel are incomplete. All that the People are advocating is that when a petitioner seeks the benefit of section 1054.9, he or she present evidence which demonstrates that the petitioner falls within the class of petitioners that section 1054.9 was enacted to benefit. If a petitioner possesses no evidence that suggests additional discovery materials exist, then any request for postconviction discovery is based on mere speculation. Speculation is insufficient to establish the required showing of "unsuccessful."

This is not an onerous burden. A habeas petitioner has the benefit of the entire trial record and whatever materials obtained from trial counsel from which to make the necessary showing. For example, if a witness testifies about a particular report that the petitioner does not possess, the petitioner would have sufficient evidence to justify a request for that report under section 1054.9. It would also be appropriate for a petitioner to seek access to a report he or she does not possess that is cross-referenced in a police report possessed by the petitioner. Similarly, if evidence in the record indicates that a particular witness was interviewed three times and the petitioner has reports documenting only two interviews, that petitioner could make the necessary showing, based on the record, that a third report likely exists. Thus, the Legislature did not create an impossible burden for petitioners to obtain postconviction discovery, just a burden that required evidence to satisfy.

The Court of Appeal also erroneously concluded that the People would require a petitioner to establish that the prosecution "currently" possesses the requested material. (*Id.* at p. 43-44 citing *Maury, supra.*) The court misconstrued the People's argument. Evidence tending to establish that specific discovery materials existed at the time of trial is all that is required to make the proper showing under section 1054.9. Once evidence is presented that specific materials existed at the time of trial, the reasonable inference from such a showing is that the materials are still in possession of the relevant authorities. Courts should not assume that the prosecution and law enforcement authorities routinely destroy evidence and records in the most serious cases in California.[14/]

Furthermore, a petitioner who has no evidentiary basis to believe that any discovery materials are missing from those obtained from trial counsel should have an impossible burden to establish that he was unsuccessful. Unless a petitioner has an objectively reasonable belief (ie, supported by evidence) that he is missing discovery materials, then he should not be seeking discovery under section 1054.9 in the first place. Requiring an evidentiary showing to support postconviction discovery requests will discourage frivolous and speculative motions and will be consistent with habeas's limited role. (*In re Harris* (1993) 5 Cal.4th 813, 828.)

The Court of Appeal's interpretation of section 1054.9 eliminated statutory language intended by the Legislature to limit access to postconviction discovery. The appellate court's failure to accord any meaning to the statutory requirement that a petitioner show he was "unsuccessful" before discovery is authorized cannot stand.

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14. Since the District Attorney is generally tasked with responding to a condemned prisoner's request for clemency from the Governor (§ 4803), the prosecution has an especially strong incentive to retain files in capital cases.

3. The Court Of Appeal's Interpretation Of Section 1054.9's "Good Faith" Requirement is Meaningless

The Court of Appeal's decision also renders the "good faith efforts" requirement superfluous. To obtain discovery under section 1054.9, a petitioner must undertake "good faith efforts to obtain discovery materials from trial counsel." (§ 1054.9, subd. (a).) This Court noted, "The reason for the good faith effort requirement of section 1054.9, subdivision (a), is not difficult to discern—to prevent defendants from clogging the courts with requests to obtain materials they could simply get from trial counsel." (*Steele*, *supra*, 32 Cal.4th at pp. 693-94.) However, the Court of Appeal's statutory interpretation rendered this requirement wholly ineffectual in preventing petitioners from clogging the courts with postconviction requests that duplicate what they received from trial counsel.

According to the Court of Appeal, once a petitioner has obtained the discovery materials trial counsel has to offer, those materials have no impact on what a petitioner can properly request under the statute. This is because the Court of Appeal is concerned about a petitioner's inability to know, with absolute certainty, that what he or she obtained from trial counsel constitutes all of the discovery materials from the case, or even everything originally disclosed by the prosecution. (*Barnett*, *supra*, 164 Cal.App.4th at p. 43-44 citing *Maury, supra*.) For example, the court indicated that a request for "all of the materials that were subject to [a] discovery order" issued by the trial court would be proper because the petitioner would "not know if the materials he has obtained from trial counsel include all of the materials the prosecutor produced in compliance with that order." (*Ibid.* citing *Maury, supra*.) The court would permit such a request regardless of whether the petitioner had received 100 pages of discovery from trial counsel or 10,000 pages!

Given this interpretation, a petitioner is justified in requesting materials that duplicate what she received from trial counsel on the off-chance that additional materials might exist. Under the Court of Appeal's interpretation, if a petitioner obtains from trial counsel several statements from a particular witness, the petitioner could make a proper discovery request for any statements of that witness possessed by the prosecution. The court justifies this conclusion on the uncertainty that such petitioner would have regarding whether she had received all of the witnesses statements that may exist. Thus, the fact that the petitioner had obtained several statements from trial counsel would do nothing to prevent the petitioner from requesting any such statements pursuant to section 1054.9. In other words, according to the court of appeal, the good faith requirement does not limit a petitioner's ability to clog the courts with requests that duplicate materials already received from trial counsel. This is contrary to the observation in *Steele* regarding the obvious purpose of this requirement.

The lack of any effect of the good faith efforts requirement inherent in the Court of Appeal's interpretation is also reflected in the court's refusal to require a petitioner to provide an inventory of what discovery materials he or she currently possesses. (*Barnett, supra*, 164 Cal.App.4th at pp. 44-45.) Section 1054.9 "covers *only* materials to which 'defendant would have been entitled at time of trial' but does not currently possess." (*Steele*, *supra*, 32 Cal.4th at p. 695, italics added.) Thus, the prosecution has no obligation to disclose or otherwise make available discovery materials that a petitioner already possesses. However, absent disclosure from the petitioner, the prosecution will have no way of knowing what discovery materials are actually missing from the petitioner's files. Thus, for the "good faith efforts" requirement to have any meaning, a petitioner must establish what materials he or she actually received from trial counsel before requesting missing materials.

4. The Court Of Appeal's Interpretation Conflicts With Section 1054.9's Legislative History

As discussed above, the section 1054.9's legislative history indicates that the Legislature intended to create a simple remedy for a specific problem. That problem identified by the Legislature occurred when habeas petitioners determined that some (or all) of the discovery materials from trial were missing, but had no legal recourse to "re-access" those materials.

Nothing in the legislative history, however, supports the Court of Appeal's expansive reading of the statute. The Legislature was not concerned with habeas petitioners who had no reason to believe that the discovery materials obtained from trial counsel were incomplete. There is no indication that the Legislature intended section 1054.9 to be used to determine whether a problem exists in the first place. Rather, the Legislature intended to provide a reasonable remedy to petitioners who have already identified a problem.

Despite this lack of support in the legislative history, the Court of Appeal concluded the Legislature intended that postconviction discovery should be limited only by the petitioner's imagination. The Court of Appeal's interpretation of the statute conflicts with established legislative history and should be rejected.

5. The Court Of Appeal Failed To Apply The Presumption Of Evidence Code Section 664 To The Prosecutor's Actions

The Court of Appeal expressly rejected the People's argument that Evidence Code section 664 should apply when a petitioner is seeking discovery materials pursuant to section 1054.9. (*Barnett, supra*, 146 Cal.App.4th at pp. 369-73 citing *Maury, supra*.) The Court's decision ignores the Evidence Code and conflicts with *Steele*.

Evidence Code section 664 provides, in relevant part, "It is presumed that official duty has been regularly performed." This presumption has been repeatedly held to apply to prosecutors. (See, e.g., *People v. Superior Court of Contra Costa County* (1935) 4 Cal.2d 136, 147 ["The district attorney who participated in the proceeding, now deceased, is presumed to have had knowledge of the law and to have acted in compliance with its requirements."]; *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 747-748 [applying presumption to actions of prosecution]; *People v. Cummings* (1956) 141 Cal.App.2d 193, 200 [absent evidence of bad faith in cross examination, courts must presume the prosecutor acted in good faith].) Since providing discovery at trial is part of the official duties of a prosecutor, Evidence Code section 664 applies when a discovery violation is alleged. Absent contrary evidence, courts should presume a prosecutor properly fulfilled all discovery obligations.

In *Steele*, this Court specifically recognized the applicability of Evidence Code section 664 to section 1054.9 proceedings. This Court noted "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." (*Steele*, *supra*, 32 Cal.4th at p. 694 (italics added).) As the Court of Appeal recognized, this language was dictum, but there is no indication that this Court did not mean what it said about the applicability of Evidence Code section 664 to postconviction discovery. Indeed, this Court has expressed confidence in prosecutors to properly fulfill discovery obligations. (See, e.g., *Steele*, *supra*, 32 Cal.4th at p. 694 ["we expect and assume that they will perform this duty promptly and fully"]; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1261, ["We expect and assume that if the People's lawyers have such information in this or any other case, they will disclose it promptly and fully"].) Similarly, the United States Supreme Court similarly presumes, based on "'tradition and experience,'" that

prosecutors have fully "'discharged their official duties'" under *Brady*. (*Strickler, supra,* 527 U.S. at p. 286.)

The legislative history of section 1054.9 does not suggest that the Legislature was concerned about prosecutors failing to properly discharge their discovery obligations at trial. (See *Steele*, *supra*, 32 Cal.4th at p. 694 [noting that legislative "reports do not mention other problems such as the possibility that prosecutors did not fulfill their duty to provide discovery"].) Despite the confidence in prosecutors expressed by this Court, the United States Supreme Court and the Legislature, the Court of Appeal in this case disregarded Evidence Code section 664's evidentiary presumption.

The court's decision was based on the erroneous conclusion that to apply the presumption would impose "a burden he may have no means of meeting." (*Barnett*, *supra*, 146 Cal.App.4th at p. 372 citing *Maury, supra.*.) The court is incorrect. If a petitioner has evidence suggesting that materials that the prosecution should have provided in discovery at trial existed at the time of trial, the petitioner can use that evidence to rebut the presumption.[15/] However, a petitioner who has no evidence which suggests the prosecution did not fulfill its discovery obligations should not be entitled to discovery based on an unsupported allegation of a discovery violation.[16/] To allow a petitioner to obtain a discovery order under those circumstances would encourage petitioners

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15. The showing necessary to rebut the presumption is analogous to the showing a petitioner must make to demonstrate that he or she was unsuccessful at obtaining all of the discovery materials from trial counsel.

16. That discovery or *Brady* violations sometimes occur in the criminal justice system is insufficient, alone, to justify allegations in a particular case that the prosecution failed to fulfill its statutory and constitutional discovery obligations. (See, e.g., *McCleskey v. Kemp* (1987) 481 U.S. 279, 293-94 [petitioner claiming discriminatory prosecution "must prove that the decisionmakers in his case acted with discriminatory purpose" and could not rely on statistics to support an inference of discrimination].)

to engage in freefloating fishing expeditions based on nothing more than speculation.

This case demonstrates the pitfalls of ignoring Evidence Code section 664. Barnett expressly alleged that the prosecution committed discovery violations at trial. (*Id.* at p. 370, fn. 10.) 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.

When a petitioner seeks discovery of materials that should have been disclosed at trial, the petitioner necessarily asserts the prosecution committed a discovery violation. Despite the serious nature of such an accusation, the Court of Appeal does not require petitioners to present any evidence substantiating the claim. In contrast, this Court and the United States Supreme Court presume that prosecutors take their statutory and constitutional discovery obligations seriously. Accordingly, Evidence Code section 664 should apply when a petitioner seeks postconviction discovery that is nothing more than a re-submission of discovery requests that occurred at trial.

C. The Court Of Appeal's Interpretation Of Section 1054.9 Grants Petitioners Greater Discovery Rights Than Defendants At Trial, Discourages Informal Resolution Of Postconviction Discovery Issues And Encourages Frivolous Motions

The consequences of the Court of Appeal's interpretation of section 1054.9 are substantial and paradoxical. In disregarding the statutory language and the legislative history of section 1054.9, the Court of Appeal has expanded postconviction discovery beyond anything the Legislature intended and makes

it possible for any capital[17] petitioner in California to easily meet the conditions for postconviction discovery.

1. The Decision Below Grants Petitioners Greater Discovery Than Available To Defendants At Trial

Nothing in California trial discovery grants a defendant, at trial, the right to re-submit discovery requests because the defendant is not sure if he or she received everything to which he was entitled. However, the Court of Appeal determined that a habeas petitioner, in effect, can make such a repetitious request under section 1054.9. This contradicts *Steele*, "Section 1054.9, subdivision (b), should not be read as creating a broader postconviction discovery right" than that provided at trial. (32 Cal.4th at p. 696.)

Under current law, a defendant seeking additional discovery from the prosecution must establish that the prosecution "has not complied with Section 1054.1." If the prosecution already provided discovery pursuant to the reciprocal discovery provisions of section 1054.1, the dissatisfied defendant would then have the burden, under section 1054.5, to show that the prosecution had not fulfilled its discovery obligations. A defendant's speculation that the prosecution possessed additional discovery is inadequate. Even pre-Proposition 115, "the party moving to compel discovery must provide, inter alia, a 'plausible justification' for the information and/or material he seeks." (*People v. Ashmus* (1991) 54 Cal.3d 932, 979-80.) Thus, a defendant would have to present a "plausible justification" for her belief that the prosecution did not comply with a discovery order issued by the trial court.

A habeas petitioner seeking discovery for materials that the prosecution was obligated to provide at trial should at least make the same showing that he would have to make at trial. A defendant's right to compel

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17. The vast majority of section 1054.9 litigation has involved capital prisoners who are automatically entitled to representation on habeas.

discovery at trial does not remain static throughout the trial, but depends on the record and the discovery that has already been provided. Similarly, since a habeas petitioner pursuant to section 1054.9 should not have discovery rights greater than the same petitioner had at trial, the petitioner should make the same showing that he would have to make at trial. However, the Court of Appeal permits a habeas petitioner to simply request any materials that he can imagine that would be discoverable, despite the fact that a defendant at trial could not make such a request once he or she received discovery from the prosecution. Consequently, a habeas petitioner is given greater discovery rights than the same petitioner had at trial. Such a result is contrary to *Steele,* the intent of the Legislature to provide habeas petitioners access to discovery materials to the same extent available at trial, and the limited role of habeas. (*In re Harris, supra*, 5 Cal.4th at 828.).

2. The Decision Of The Court Of Appeal Discourages Informal Resolution Of Postconviction Discovery Matters

Given the ease with which habeas petitioners, under the Court of Appeal's interpretation, can formulate "proper" postconviction discovery requests, it is unlikely that any such requests will be resolved informally. between the parties. Consequently, the Court of Appeal's interpretation of the statute is inconsistent with this Court's directive that "section 1054.9 should be interpreted to promote informal, timely discovery between parties prior to seeking court enforcement." (*Steele*, *supra*, 32 Cal.4th at p.692.) Nothing in the appellate court's interpretation of the statute promotes informal discovery.

For instance, in this case, after Barnett filed his initial postconviction discovery motion, the prosecution tried to obtain the materials Barnett sought. The prosecution provided Barnett all of the numbered discovery that Barnett was either missing or was illegible. (Petition, Exh 44 at p. 6506.) The

prosecution directed the DA investigator , Tony Koester, to review the file to attempt to satisfy Barnett's requests. (Petition, Exh. 44 at pp. 6504-6518 [detailing investigator's efforts to comply with the request].) As to many of the requested items, the investigator indicated he did not uncover any additional materials. (See, e.g., Petition, Exh. 44 at p. 6508.) Yet, Barnett continued to seek discovery on numerous items and disregarded the investigator's report that no additional materials existed because the investigator did not swear a declaration under penalty of perjury regarding his inability to find the requested materials. (See, e.g., Petition, Exh 44 at p. 6462.) Barnett's insistence on a sworn declaration is the antithesis of informal cooperation between the parties.

Accordingly, the lack of any meaningful restrictions on a petitioner's ability to obtain a discovery order under section 1054.9 severely hampers informal resolution of postconviction discovery issues. Prosecutors faced with the prospect of conducting speculation-fueled hunts for additional materials have little incentive to try to locate any materials informally. Indeed, it would be more prudent to wait until an actual discovery order issues before undertaking any search to avoid duplication of effort. Similarly, petitioners who are permitted to ask for anything they can imagine (without any basis to believe such materials even exist) are unlikely to abandon such requests when it is likely they can obtain an order for such materials. At the very least, capital petitioners benefit from the additional delay the search for such materials will cause.

This Court should place reasonable limits on postconviction discovery, consistent with the statutory language, to encourage both the prosecution and petitioners to informally resolve discovery without resort to litigation. The decision of the Court of Appeal below discourages such informal resolution.

3. Permitting Postconviction Discovery On The Basis Of A Petitioner's Imagination Will Result In Needless Litigation And Substantial Work For The Prosecution And Trial Courts

The Court of Appeal candidly acknowledge that a petitioner's right to discovery under section 1054.9 is limited only by the petitioner's ability to "imagine and describe materials to which the [petitioner] would have been entitled at time of trial based on some plausible theory . . . ." (*Barnett, supra,* 164 Cal.App.4th at p.55.) Limiting postconviction discovery to a petitioner or his attorney's imagination amounts to no limitation at all.

The Court of Appeal itself recognized that its interpretation of the statute provides no limit to the ability of imaginative petitioners to obtain postconviction discovery orders. "The problem raised by this hypothetical is not the difficulty in imagining and describing such evidence, but rather the possibility that encouraging defendants and their habeas attorneys to imagine such evidence will 'turn [section] 1054.9 discovery into a game.'" (*Ibid.*) The court optimistically hopes that petitioners will not "formulate discovery requests based on nothing more than pure imagination" (*Ibid.*)

However, the court's interpretation does risk speculation and gamesmanship by petitioners. Habeas petitioners (especially in capital cases) have the benefit of hindsight and often several years to carefully examine the record for possible issues. (Attachment I at p. 1.) "[C]onfinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact." (*Harris v. Nelson* (1969) 394 U.S. 286, 300.) The decision of the Court of Appeal permits a petitioner to explore such paranoia at the expense of the courts and the prosecution.

As discussed above, under the Court of Appeal's interpretation, any habeas petitioner can easily satisfy the pleading requirements of section 1054.9 and force the prosecution to hunt for materials that likely do not even exist.

The work to the prosecution in these cases is substantial. Here, the prosecution assigned an investigator to review all of the files in the prosecution's possession and contact the law enforcement agencies involved to verify that additional discovery materials did not exist. As the investigator's report indicated, for many of the requests, no additional materials were located in possession of the state. (See Petition, Exh 44 at pp. 6508-6518.) Furthermore, the prosecutor had even

> "gotten some volunteers from the Sheriff's Office to assist us in going over a number of discovery matters, voluntarily going through those discovery matters, with the anticipation that we would be doing such things as rap sheets and so forth and have made the structure in place to try and get most of the material that . . . the federal public defender, has asked for; and it is a matter of, quite frankly, a number of hours, potentially hundreds of hours worth of work that is causing us a great deal of problems." (Petition, Exh. 37 at p. 6235.)

Thus, the record in this case demonstrates the substantial workload that prosecutors face in responding to discovery requests that are the product of imagination rather than evidence.

Similarly, this case demonstrates the workload to trial courts that inevitably will result if the Court of Appeals interpretation of the statute is permitted to stand. Barnett filed a total of ten substantive pleadings in the Superior Court during the discovery litigation in this case that included hundreds of pages of briefing and supporting documents. (See Petition, Exhibits 1, 32, 38, 39, 44, 46, 47, 49, 51, 53.) In addition, the court held in-court hearings on Barnett's motion. (See Petition, Exhibits 33, 34, 35, 37, 40, 41, 42, 48, 55, 56.) Despite the efforts of the prosecution to informally resolve many of Barnett's request, the trial court was required to rule on numerous speculative requests, including requests for materials that the DA investigator had already indicated did not exist.

Under the Court of Appeal's interpretation, every capital prisoner should be expected to file section 1054.9 motions. There is no downside for

petitioners because it is easy to ask for materials if one does not have to provide any basis to believe the materials even exist. At a minimum, capital prisoners will be able to delay resolution of their cases by using section 1054.9 because "the statute provides yet another excuse for a defendant to litigate, and litigate, and litigate." (Attachment I at p. 1). Capital petitioners "have a strong incentive for delay." (*In re Clark*, (1993) 5 Cal.4th 750, 796, fn.31.) The court's interpretation of the statute provides an easy means for capital prisoners to inject further delay into an already protracted process. (Attachment I at pp. 1-3.)

This Court should impose proper limitations on the application of section 1054.9.[18/] Granting postconviction discovery based only on the imagination of habeas counsel and/or capital prisoners invites substantial and meaningless litigation. The permissive standard set by the Court of Appeal to obtain discovery can be easily met by every capital and life prisoner in California, even prisoners who have no basis to believe any additional discovery materials exist. When enacting section 1054.9, the Legislative could not have intended to establish such a counterproductive system. (Attachment I at pp. 1-3.)

D. With One Exception, Barnett Failed To Make A Proper Showing Under Section 1054.9 For The Discovery Granted By The Court Of Appeal

The Court of Appeal granted Barnett discovery on three specific requests that had been denied by the superior court. In granting Barnett's requests, the court erroneously failed to require Barnett to make the showing required by section 1054.9.

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18. The People accept that a proper discovery request can cause a substantial workload. The People object to an increased workload due to conjecture and a petitioner's desire to simply double-check discovery that occurred at trial.

The first request granted was for the original notes of out-of-state police agencies–including Arizona, Massachusetts, New York, Florida, and Canada. (*Barnett, supra*, 164 Cal.App.4th at p. 88.) Barnett was not entitled to this discovery because the out-of-state agencies were not part of the prosecution team. Barnett presented no evidence that the requested materials even existed at the time of trial. Most of the original reports had been generated years before the murder in this case even occurred. Other than his speculative hope that something might turn up, Barnett has made no showing that such notes ever existed to be discovered either today or at trial. Therefore, even if the out-of-state agencies are part of the prosecution team, Barnett has failed to show that there is anything more to obtain from those agencies.

The second request granted by the court involved criminal information regarding two jurors, C.L. and L.F.[19/] (*Id.* at p. 88.). With regard to juror L.F., Barnett made no showing that the juror ever had a criminal history for the prosecution to obtain. Barnett presents no evidence that suggests such information even exists. Therefore the grant of discovery of juror L.F.'s criminal history was improper.

However, as to juror C.L., Barnett has presented sufficient evidence to suggest that criminal history information on juror C.L. does exist and therefore would be available to the prosecution.[20/] (Petition, Exh 24 at pp.

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19. In granting this request, the court extended this Court's decision in *People v. Murtishaw* (1981) 29 Cal.3d 733, 767.

20. The People note that the Court of Appeal did not rely on this evidence to grant Barnett's request and therefore erred under section 1054.9. (164 Cal.App.4th at p. 55 [indicating that it was not the court's duty to search through thousands of pages of exhibits filed by Barnett].) The fact remains that Barnett presented evidence supporting his claim that juror C.L. had a criminal history at the time of trial. (See Petition, Exh 24 at pp. 4441-4477.) Although Barnett should have presented this evidence specifically in support of his motion rather than burying it in thousands of pages of exhibits, the evidence is

4441-4477.) The evidence regarding juror C.L. sufficiently establishes the existence of criminal history information on the juror and therefore satisfies the "unsuccessful" showing of section 1054.9.

The third request granted by the court involved alleged "street talk" that Barnett had been framed for the murder. (*Id.* at p. 89.) Barnett presented no evidence which even suggested that any additional evidence regarding the alleged "street talk" existed. As Barnett pointed out in his supporting documents, "The prosecutor provided the defense with no discovery regarding any effort to investigate Olsen's allegation [of street talk]." (Petition, Exh 4 at p. 605.) Thus, Barnett himself acknowledges that there is no evidence that the prosecution ever investigated or developed any information regarding the "street talk." Given the record presented by Barnett, it appears that Barnett already has the sum total of all evidence regarding the "street talk" that the prosecution possessed at trial. Therefore, Barnett has not carried his burden of establishing that he was "unsuccessful" in obtaining all of the information regarding "street talk" possessed by the prosecution in this case. Moreover, to the extent that Barnett asserted that any "street talk" information was governed by the discovery order from trial or *Brady v. Maryland*, Barnett has failed to overcome the presumption pursuant to Evidence Code section 664 that the prosecution properly fulfilled its discovery obligations at trial.

In sum, the Court of Appeal improperly granted Barnett discovery for original notes of out-of-state witnesses, criminal history information on juror L.F. and the alleged "street talk" regarding Barnett. Barnett failed to properly carry his burden under section 1054.9 to establish his right to postconviction discovery of such materials.

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sufficient to carry his burden under section 1054.9.

III.

DOES PENAL CODE SECTION 1054.9 REQUIRE THAT A PERSON SENTENCED TO DEATH OR LIFE WITHOUT POSSIBILITY OF PAROLE SHOW THAT THERE WOULD HAVE BEEN A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME AT TRIAL-A SHOWING NOT REQUIRED TO OBTAIN PRETRIAL DISCOVERY-TO BE ENTITLED TO POSTCONVICTION DISCOVERY OF FAVORABLE MATERIAL?

Yes. The People did not seek review on these questions. However, the Court has designated the People as the petitioner for briefing and argument under rule 8.520 of the California Rules of Court. For now, the People join the reasoning of the court below and will address any arguments to the contrary in subsequent briefing

IV.

IS PENAL CODE SECTION 1054.9 UNCONSTITUTIONAL AS AN INVALID AMENDMENT OF PROPOSITION 115?

Yes. The People refer the court to its response to question III presented in this case.

CONCLUSION

For the foregoing reasons, the People respectfully request that the decision of the Court of Appeal be reversed with the exception of the discovery order for juror C.L.'s criminal history information.

Dated: October 17, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13601 words.

Dated: October 17, 2008

Respectfully submitted,

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ATTACHMENT I

Burnett v. Superior Court (People), 146 Cal.App.4th 344 (conc. opn. of Sims, J.), review granted April 25, 2007, S150229 and cause transferred January 23, 2008)

Concurring opinion of SIMS, J.

I concur in Justice Robie's thoughtful and thorough opinion. In my view, he has correctly construed Penal Code section 1054.9 (section 1054.9) in accordance with the intent of the Legislature.

I write separately to share my views on the current state of death penalty litigation and on the relationship of section 1054.9 to that litigation.

The typical modern death penalty case usually involves four trials.

The first trial determines whether the defendant is guilty of the offense. If the jury finds him guilty with special circumstances, the second trial determines the penalty: death or life without possibility of parole.

***340** The third trial is the trial of the jurors who arrived at the decisions in the first two trials. The third trial is usually initiated by an investigator for the defendant, who locates trial jurors and gets one or more of them to supply an affidavit detailing what went on in the jury room. Then, the third trial examines the jurors' deliberations in minute detail in order to make sure that the jurors have not engaged in any "misconduct," such as telling other jurors about their own personal experiences in life. (See e.g., *People v. Schmeck* (2005) 37 Cal.4th 240, 292-294, 33 Cal.Rptr.3d 397, 118 P.3d 451; *People v. San Nicolas* (2004) 34 Cal.4th 614, 643, 651, 21 Cal.Rptr.3d 612, 101 P.3d 509.)

If the conviction and death penalty survive the third trial, the groundwork has been laid for the fourth trial, which is the trial of the attorneys (both prosecutor and defense counsel) who participated in the original trial. This fourth trial ordinarily arises in habeas corpus proceedings. The Legislature has seen fit to aid everybody in this fourth trial with the enactment of section 1054.9, which, as Justice Robie's opinion spells out, allows a defendant to "discover," among other things, every scrap of paper currently possessed by the prosecution or law enforcement that was prepared by any law enforcement agency that had anything to do with any witness. In this trial, appellate attorneys spend hours in the quiet of their offices composing attacks on the decisions of trial counsel made instantly in the heat and crush of trial.

One consequence of all these trials, and associated appeals and writ proceedings, is that there is an extraordinary delay between a defendant's commission of his crime and his execution. For example, the most recent execution in California was Clarence Ray Allen, executed on January 17, 2006, for killings committed in 1980 (by hit men he solicited from prison). (Doyle, Egelko, & Finz, *Ailing Killer Executed at Age 76* (San Francisco Chronicle (Jan. 17, 2006) p. A-1); see also *People v. Allen* (1986) 42 Cal.3d 1222, 1241, 1243-1244, 232 Cal.Rptr. 849, 729 P.2d 115.) So Clarence Ray Allen was executed some 26 years after he had committed his crime.

One month earlier than Allen's execution, Stanley "Tookie" Williams was executed for murders committed in February and March 1979. (Finz, Fimrite & Fagan, *Williams Executed* (San Francisco Chronicle, (Dec. 13, 2005) p. A-1); see *People v. Williams* (1988) 44 Cal.3d 1127, 245 Cal.Rptr. 635, 751 P.2d 901.) Again, the period between commission of the crime and execution was 25 or 26 years.

In my view, section 1054.9 will further delay the final adjudication of death penalty cases. The statute provides yet another excuse for a defendant to litigate, and litigate, and litigate.

These delays between commission of the crime and punishment are the direct result of attempts to create perfect due process for those receiving the death penalty. Section 1054.9 is simply the most recent manifestation of such attempts. Of course, when the time lag between crime and punishment is more than a quarter of a century, all deterrent effect of the punishment is lost. The truth of the matter is that opponents of the death penalty have won.

This fixation with attempting to provide perfect justice [FN1] has emasculated the death penalty in California. This is in absolute and complete derogation of the will of the voters of California who have repeatedly approved the death penalty by initiatives ***341** since 1978.[FN2]

FN1. There is, of course, no such thing possible in the affairs of men and women.

FN2. The last time the voters approved of the death penalty was in the March 7, 2000, Primary Election, when the voters approved amendments to the death penalty statute (Pen.Code, § 190.2) in Proposition 18 and (initiative measure) Proposition 21. (Historical and Statutory Notes, 47A West's Ann. Pen.Code (2006 Supp.) foll. § 190.2, p. 127; *People v. Shabazz* (2006) 38 Cal.4th 55, 65, 40 Cal.Rptr.3d 750, 130 P.3d 519 [stating voters approved Proposition 21].) Proposition 18 provided special circumstances warranting the death penalty for intentional murder committed in connection with kidnapping or arson or committed by "means of" (rather than "while") lying in wait. (Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 18, p. 117.) Proposition 21, section 11, added gang-related murder as a special circumstance warranting the death penalty. (Historical and Statutory Notes, 47A West's Ann. Pen.Code (2006 Supp.) foll. § 190.2, p. 127; Notes, Deering's Ann.Code Pen.Code (2006 Supp.) foll. § 190.2, p. 76 [quoting Proposition 21]; Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, p. 121 et seq.)Before that, the voters approved the death penalty in the March 26, 1996, Primary Election, when they approved Propositions 195 and 196, expanding the list of special circumstances warranting the death penalty. (Historical and Statutory Notes, 47A West's Ann. Pen.Code (1999 ed.) foll. § 190.2, pp. 207-208; Ballot Pamp., Primary Elec. (Mar. 26, 1996) text of Props. 195 & 196, pp. 56, 58.)Before that, the voters at the June 5, 1990, Primary Election approved Proposition 114, conforming § 190.2's special circumstance for murder of peace officer to legislative reclassification of peace officers. (*Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 983, 9 Cal.Rptr.2d 102, 831 P.2d 327; Historical and Statutory Notes, 47A West's Ann. Pen.Code (1999 ed.) foll. § 190.2, p. 207; Ballot Pamp., Primary Elec. (June 5, 1990) text of Prop. 114, p. 29.) Also at the June 5, 1990, Primary Election, voters approved initiative measure Proposition 115, which among other things restricted attorney voir dire in all criminal cases, including death penalty cases. (*People v. Ramos* (2004) 34 Cal.4th 494, 511, 21 Cal.Rptr.3d 575, 101 P.3d 478; Historical and Statutory Notes, 47A West's Ann. Pen.Code (1999 ed.) foll. § 190.2, p. 207; Ballot Pamp., Primary Elec. (June 5, 1990) text of Prop. 115, p. 33.)Before that, the voters at the General Election on November 7, 1978, adopted the death penalty initiative approving Penal Code section 190.2. (*People v. Hernandez* (2003) 30 Cal.4th 835, 865-866, 134 Cal.Rptr.2d 602, 69 P.3d 446; *People v. Teron* (1979) 23 Cal.3d 103, 123-125, 151 Cal.Rptr. 633, 588 P.2d 773, dissenting opinion of Clark, J., reciting history of death penalty in California.)

In the present case, defendant and petitioner, Lee Max Barnett, committed his crimes, including a murder that involved the infliction of torture, 20 years ago on July 6, 1986. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1069, 74 Cal.Rptr.2d 121, 954 P.2d 384.) He is just now getting the discovery described in Justice Robie's opinion. His case will be going on for a long, long time.

In its opinion affirming his death penalty sentence, our Supreme Court summarized evidence of defendant Barnett's background as follows:

"In addition to relying on the circumstances of the instant crimes, the prosecution presented evidence of defendant's prior felony convictions and evidence of his prior violent criminal activity, as follows:

"In 1965, defendant was being pursued in a vehicle when he injured a state trooper in New York by running him off the road. Defendant was convicted of second degree assault, transportation of a stolen vehicle across state lines, and felony attempted prisoner escape.

"In March of 1969, defendant robbed the clerk of a liquor store in New York at knife point. Prior to taking the money, defendant had proposed to the clerk that they split the proceeds. A week later, defendant robbed him again, this time claiming to have a gun in his coat. After his arrest, while the clerk was sitting near him in court, defendant repeatedly warned ***342** the clerk in a low voice to say he did not remember anything.

"In September of 1970, defendant was arrested for a series of robberies in the Calgary area. At the time of his arrest, defendant was a passenger in a truck and raised a loaded handgun up off the seat with his left hand. A second officer stopped defendant from using the gun. He was convicted of five counts of armed robbery.

counts of armed robbery.

"In December of 1971, defendant tried to rob the owner of a North Miami Beach restaurant at gunpoint. He was thwarted when the owner slammed the cash register drawer on his hand as he tried to grab the money. He fled and police pursued. During the pursuit, defendant backed his vehicle into a police officer, hitting him in the right leg. He also sideswiped a police car and ran into a fence. Defendant eventually was shot in the left leg after he pointed a gun at an officer.

"In April of 1972, defendant robbed the attendant of a Phoenix gas station at gunpoint. Prior to committing the robbery, defendant had tried unsuccessfully to get the attendant to set up a robbery and share the proceeds.

"In September of 1973, defendant, while in custody at a medical facility, resisted being transported back to jail. He broke away from officers and started smashing at the glass door of a fire extinguisher compartment. He had to be Maced before he could be handcuffed.

"On October 26, 1977, defendant raped 17-year-old Mae G. when they went for a drive in his car. Defendant took her to an isolated location where he raped her, sodomized her, and forced her at knife point to perform oral sex.

"In November of 1979, defendant was convicted of assault on David Sinopoli and sentenced to prison in Massachusetts.

"In November of 1982, defendant met Helen T. in a bar in Albany, New York, and got her in his car on the pretext of sharing some marijuana. He took her to an isolated area and raped her.

"On January 10, 1987, defendant, while incarcerated in jail, used a razor blade to slash the arm of Arthur Jordan, an inmate in the next cell, as Jordan was leaning on the bars watching television. Defendant had accused the victim of having his buddy, the former resident of the cell, moved.

"On May 13, 1987, defendant caused a disturbance in the jail yard by refusing to wear his jumpsuit as required by jail rules. As he was being led back to his cell, he threw his fist towards the head of one of the officers. The fist did not connect because another officer grabbed defendant's arm with both hands.

"On May 24, 1988, defendant spit at three correctional officers, hitting two in the face, as he resisted being loaded into a transportation van. Once in the van, defendant kicked out one of the windows.

"On July 22, 1988, defendant tried to kick out the windows of the patrol car he was riding in. When an officer tried to grab him, he spit in his face." (*People v. Barnett, supra,* 17 Cal.4th 1044, 1080-1081, 74 Cal.Rptr.2d 121, 954 P.2d 384.)

If the day ever comes when we have afforded perfect due process to this model citizen, Lee Max Barnett, and he is executed, few will remember the circumstances of his crimes, which involve the torture and stabbing to death of Richard Eggett. Few will remember that, before stabbing Eggett to death, Barnett snagged Eggett in the back with a treble fish hook and yanked on it. (*People v. Barnett, supra,* 17 Cal.4th at p. 1073, 74 Cal.Rptr.2d 121, 954 P.2d 384.) I say "few" will remember because one group of people will doubtless remember: the family of Richard Eggett, ***343** who will have endured painful decades of living with Eggett's murder without closure.

Something really must be done about the current state of death penalty litigation, and it is not to provide defendants (who have had the death penalty imposed by a jury) with more post-conviction discovery.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Barnett v. Superior Court, Butte County** No.: **C051311 / S150229**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 17, 2008, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 17, 2008, at Sacramento, California.

Declarant

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