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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 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

PEOPLE'S REPLY BRIEF ON THE MERITS

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ORIGINAL

February 24, 2009

Ms. Henrietta Miner
Office of the Clerk
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102-4797

RE: Barnett v. Superior Court
California Supreme Court No. S165522

Dear Ms. Miner:

Pursuant to our phone conversation of today's date, please find enclosed the "People's Reply Brief on the Merits" reprinted with a white cover and without a duplicative page 20.

Thank you for your courtesy in this matter.

Sincerely,

WARD A. CAMPBELL
Supervising Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

WAC:wac

cc: The Honorable Michael Ramsey, Butte County District Attorney's Office
Robert D. Bacon
Jennifer M. Corey
The Honorable William R. Patrick, Butte County Superior Court
Third Appellate District, Court of Appeal of the State of California

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ARGUMENT

I.

OUT-OF-STATE AGENCIES THAT PROVIDED POLICE REPORTS WERE NOT PART OF THE PROSECUTION TEAM IN THIS CASE

Barnett argues that the multiple out-of-state agencies that provided the prosecutor with police reports of Barnett's prior crimes were part of the prosecution team under California discovery laws and *Brady v. Maryland* (1963) 373 U.S. 83. Barnett's arguments are unpersuasive.

This issue ultimately involves *Brady's* application to materials that are not in the actual possession of the prosecution. This Court must determine the extent that materials in the possession of agencies outside the prosecution should be deemed to be in the constructive possession of the prosecutor. The "constructive possession" and "prosecution team" concepts are necessary to preventing individual prosecutors from operating in deliberate ignorance of information possessed by other law enforcement agencies. Those concepts, however, should not be expanded to place unreasonable demands on the prosecution. An overly-expansive definition of the prosecution team will

unnecessarily punish diligent prosecutors failing to disclose evidence that is beyond their control.

A. The Scope Of The "Prosecution Team" Is The Same In California Discovery As Under The United States Constitution

Barnett argues that the scope of the prosecution team under California discovery law is broader than under *Brady v. Maryland*. (Barnett's Answering Brief "AB" at 27.) Barnett is incorrect.

The scope of the prosecution team was no greater under pre-Proposition 115 law than it is today. (*See In re Littlefield* (1993) 5 Cal.4th 122, 134-135.) In *Littlefield*, the defendant claimed that disclosures from the prosecution under Penal Code[1/] section 1054.1 were limited to "information that is in [the prosecution's] possession." (*Id.* at p. 134.) However, this Court noted that the law prior to Proposition 115 required disclosure of information beyond that in the actual possession of the prosecution. (*Id.* at p. 135.) This Court concluded that nothing in Proposition 115 "was intended to abrogate" prior law regarding the prosecution team. (*Ibid.*) Thus, the scope of the prosecution team under California discovery law has remained consistent both before and after Proposition 115.

In addition, this Court has determined that discovery pursuant to section 1054.9 should be consistent with the general discovery provisions in sections 1054 et seq. (*In re Steele* (2004) 32 Cal.4th 682, 696.) This Court also held that the scope of section 1054.9 discovery was "consistent with the scope of the prosecution's constitutional duty to disclose exculpatory information." (*Id.* at p. 696.)

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

Thus, in California, the scope of the prosecution team for discovery purposes is the same under statutory and constitutional requirements. (*See People v. Zambrano* (2007) 41 Cal.4th 1082, 1133-1134 [noting that the prosecutor's statutory duty to "disclose evidence in the hands of other agencies" is no broader than under *"Brady* and its progeny."].) Pursuant to *Steele* and *Zambrano*, the scope of the prosecution team under both California discovery laws and *Brady* are the same. Barnett's efforts to apply a broader definition to this case should be rejected.[2/]

B. Respondent's Expansive Definitions Of The Terms "Possession And Control" And"Reasonably Accessible" Are Too Imprecise To Define The Prosecution Team

Barnett chastises the People for developing a "new test" for determining when an agency is part of the prosecution team and insists that existing tests should govern. (AB at 25-26.) The People, however, are not advocating a new test but are simply refining the definition of "prosecution team" already in place. (POB at 10).

Barnett prefers the terms "possession and control" and "reasonably accessible" to define the scope of the prosecution team. However, neither of

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2. Barnett's analogy to third party discovery of police personnel records under (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 is inapt. (AB 32-33.) Case law does allow a movant to seek police personnel records under Evidence Code section 1043(a). However, *Pitchess* motions are not based on the *Brady* "prosecution team" concept. They are "in essence a special instance of third party discovery." (*Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1109 quoting *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.) The prosecution must also file a *Pitchess* motion for access to these records. (*Alford, supra*, at 1046.) Moreover, in pre-trial proceedings, the materiality standard for *Pitchess* motions is not the same as the *Brady* materiality standard. Rather, it is a state statutory standard for a particular type of record that is more lenient than the *Brady* materiality standard. (*City of Los Angeles v. Superior Court* (*Brandon*) (2002) 29 Cal.4th 1, 10.) The *Pitchess* motion did not redefine the "prosecution team" in California for any other purposes.

these labels were developed to describe a "prosecution team" for discovery purposes. They are too imprecise to guide courts in determining the prosecution's disclosure obligations. This case provides a excellent example their inadequacy.

The Butte County prosecutor in this case was not in actual possession of the complete police files of the out-of-state law enforcement agencies at issue in this case. Furthermore, the prosecutor had no authority or control over the materials in the possession of the agencies. Thus, when applied to this case, the "possession and control" test actually suggests the materials were not subject to discovery from the prosecution. At least, it is a debatable point.

Similarly, there is nothing in the record that indicates that any materials beyond the police reports provided (such as original interview notes) were "reasonably accessible" to the prosecution. The fair inference from the record is that only those materials actually provided by the out-of-state agencies were accessible to the prosecution. There is no indication that the out-of-state agencies would have granted the prosecutor access to such materials as original notes or other records that were not official police reports from a case. (*See Moon v. Head* (11th Cir. 2002) 285 F.3d 1301, 1310 [noting that out-of-state officer "could have refused to share any information with the Georgia prosecutor."].) In the absence of evidence to the contrary, courts should not presume that prosecutors have access to information or materials beyond what the prosecutor actually receives.[3/]

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3. Barnett's expansive interpretation of "reasonably accessible" is at odds with this Court's decision in *Steele*, *supra*, 32 Cal.4th 682. In *Steele*, the prosecution had obtained access to the defendant's prison file, had reviewed the file for relevant information, and arranged to have copies made of select records in the file. (*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.*) Despite the "reasonable accessibility" of the defendant's

This case demonstrates the difficulties of using general terms such as "possession and control" and "reasonably accessible" to define the scope of the prosecution team for discovery purposes. Accordingly, the People encourage this Court to articulate additional factors relevant to the scope of the prosecution team. The specific factors discussed in the People's Opening Brief are designed to focus on the individual circumstances of each case. (*See United States v. Antone* (5th Cir. 1979) 603 F.2d 566, 569 [advocating a "case-by-case analysis of the extent of interaction and cooperation between the two governments"].) Government agencies can interact in a variety of ways that defy neat categorization under general terms. The factors articulated by the People will provided additional needed guidance in this area.

C. *Pennsylvania v. Ritchie* Does Not Establish A Standard For Evaluating The Scope Of The Prosecution Team

In discussing the scope of the prosecution team under *Brady*, Barnett relies on *Pennsylvania v. Ritchie* (1987) 480 U.S. 39. (AB at 26.) Barnett misinterprets *Ritchie*.

Ritchie concerned a defendant's ability to obtain materials possessed by a government agency (Children and Youth Services, CYS), but not available to the prosecution. (*Ritchie*, *supra*, 480 U.S. at pp. 43-45.) The defendant erved a subpoena on CYS seeking materials that he claimed were relevant to his defense and the credibility of the victim. (*Id.* at p. 43.) The materials were confidential as a matter of state law. (*Id.* at p. 44.) The Court held, as a matter of due process, the defendant was entitled to an in camera review by the trial court of the material "to determine whether it contain[ed] information that probably would have changed the outcome of his trial." (*Id.* at p. 58.) The

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prison file to the prosecution in *Steele*, this Court concluded that the prosecutor was not responsible for the entire contents of the file. Only those materials that the prosecution actually obtained from the file were subject to discovery.

Court was clear, however, that the defendant did not have a right to examine the materials himself and that he could "not require the trial court to search through the CYS file without first establishing a basis for his claim that it contains material evidence." (*Id.* at p. 58, n. 15.)

Although *Ritchie* addressed a defendant's due process right to access evidence in the possession of the government, it had no occasion to consider the scope of the "prosecution team." The prosecutor in that case had no authority to access the information. The Court did not conclude that the prosecution was in constructive possession of the materials or that the prosecution was at fault for failing to obtain the CYS evidence for the defense.

Ritchie is best understood as establishing only a defendant's due process rights to materials that are possessed by a third party government agency that is outside of the prosecution team. Since discovery pursuant to section 1054.9 is limited to materials in possession of the prosecution team, *Ritchie* is not relevant to this particular question.

D. The Activities Of The Out-Of-State Law Enforcement Agencies Beyond Providing Police Reports To The Prosecution Are Insufficient To Establish Their Membership On The Prosecution Team

The court below expressly held that simply providing police reports of prior crimes to the prosecution was sufficient to bring out-of-state law enforcement agencies into the prosecution team. (*Barnett v. Superior Court* (2006) 146 Cal.App.4th 344, 364.) Barnett agrees with that holding, and also argues that the record in this case demonstrates additional activities (AB at 34-37.). Although the nature and extent of the activities of an agency are an important factor in determining membership in the prosecution team (OBM at 13-14), the specific activities of the out-of-state agencies in this case were not sufficient to achieve that status.

Of course, membership in the prosecution team is not limited to law enforcement agencies. (*See, e.g., In re Brown* (1998) 17 Cal.4th 873, 880.) However, simply providing pre-existing police reports to a prosecutor is insufficient to render an out-of-state agency part of the prosecution team. (OBM at 16-18.) Otherwise, any private person or organization that provided evidence to the prosecution in a case would also be considered part of the team. No case has so broadly interpreted the scope of the prosecution team.[4/]

Barnett also argues that the out-of-state law enforcement agencies sent "law enforcement officers to California to testify in the penalty phase." (AB at 36.) While officers from some of the out-of-state agencies testified in the penalty phase, there is no evidence that the agencies affirmatively sent the officers. Those officer were called by the prosecution as witnesses to testify in the penalty phase. The prosecution had the power to compel the attendance of the out-of-state officers as witnesses pursuant to sections 1334, et seq. Thus, there is no evidence that the agencies "sent" officers rather than responded to a subpoena from the prosecution.

Barnett further argues that some of the out-of-state agencies assisted the prosecution in locating witnesses and providing addresses to the prosecutor.[5/] (AB at 36.) When preparing for the penalty phase, the prosecutor

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4. A general policy of encouraging inmates to provide useful information does not transform those inmates into police agents. (*In re Williams* (1994) 7 Cal.4th 572, 598.) Encouraging private citizens to be on the lookout for particular individuals does not transform them into police agents. (*People v. McKinnon* (1972) 7 Cal.3d 899, 915 fn. 7).

5. The evidence supporting this assertion came from reports attached to Barnett's motion to take documentary evidence. While neither the Court of Appeal nor the trial court had the benefit of this additional evidence, the evidence ultimately is insufficient to establish that the New York State Police was part of the prosecution team in this case. Accordingly, the People have no objection to this Court's consideration of the new evidence on this issue.

requested the assistance of the New York State Police in "locating and re-interviewing the key witnesses" in two of the cases from New York. On its face, this language does not indicate that New York officials did anymore than assist so that Butte County law enforcement could "reinterview" the witnesses. Nothing in the records supplied by Barnett suggest anything more. The New York authorities located at least one witness and put her in touch with the prosecutor. Simply providing current address information for a witness hardly qualifies as investigating or developing a case on behalf of the prosecution. The New York authorities did not generate new evidence relevant to Barnett's prior crimes.[6/] Rather, the authorities simply pointed the California prosecutor in the correct direction so California authorities could further their investigation of the incident. Significantly, the New York authorities did not undertake to develop the information themselves as agents of the California prosecutor by interviewing the witness themselves. Since the New York authorities did not develop new evidence on behalf of the California prosecutor, their actions were insufficient to render them part of the prosecution team.

Finally, Barnett reiterates that two out-of-state agencies (in Florida and Calgary, Canada) conducted interviews of witnesses in 1987. (AB at 20.) As discussed in the People's Opening Brief at p. 18 fn. 5, Barnett failed to provide any specifics about those interviews. Determining whether an agency is part of the prosecution team requires considering the specific activities conducted

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6. Contrary to Barnett's claim, the People do not contend that *Brady* does not apply to penalty phase evidence. (*See Steele, supra,* 32 Cal.4th at 698.) However, "[t]he presentation of evidence of past criminal conduct at a sentencing hearing does not place the defendant in jeopardy with respect to the past offenses. He is not on trial for the past offense, is not subject to conviction or punishment for the past offense, and may not claim either speedy trial or double jeopardy protection against introduction of such evidence." (*People v. Visciotti* (1992) 2 Cal.4th 1, 71.) Accordingly, investigators providing pre existing information on those previous crimes do not suddenly become members of the "investigative team" for Barnett's Butte County murder.

by the agency. Barnett has copies of the reports of the interviews in question, yet he has never provided any details regarding the circumstances of the interviews. As the movant, Barnett's burden was to establish his right to discovery, including which agencies were part of the prosecution team. Given Barnett's failure to provide the details of these interviews, Barnett has not established that either agency was part of the prosecution team. *See also* Evidence Code § 412.[7]

E. The Court Of Appeal's Decision Will Have A Broad Impact Beyond Section 1054.9 Proceedings

Barnett argues that the People did not raise this issue in the Court of Appeal below and therefore, there is no "reasoned analysis" for this Court to review. (AB at 46.) The impact is inherent in the court's decision itself. It is a direct consequence of the court's holding. Thus, this argument is fairly included within the issue granted review by this Court.[8]

Moreover, contrary to Barnett's argument, this holding will have

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7. Despite Barnett's bafflement (AB at p. 43), *United States v. Reyeros* (3rd Cir. 2008) 537 F.3d 270 supports the People's position that these out-of-state authorities were not part of the prosecution team. Although *Reyeros* involves cooperation between the United States and Colombian governments, its reasoning is applicable to Barnett's case. Based on the documents provided, Butte County did not "control" these out of state agencies. "Constructive possession" should not be imputed whenever another government responds to a request for investigative assistance. Nor was there any evidence of a "close working relationship" or "joint effort" beyond simply providing information about witnesses to the prior crimes. (*Id.* at 283). Finally, the fact that Butte County was able to acquire information from these other authorities does not establish "ready access" to other information sufficient to establish "constructive possession." (*Id.* at 283-284.) Out of state authorities were hardly so "intermingled" or "intimately" cooperating to the extent that they were functioning essentially as Butte County's agents. (*Id.* at. 282.)

8. The People specifically alleged the broad impact of this decision as a basis for review. (Petn Rev. at pp. 12-14.)

broad implications in criminal cases throughout California. No California court has ever held that the act of providing the prosecution with pre-existing reports is sufficient to elevate an agency to the prosecution team, especially when the other entities are out of state. The Court of Appeal expanded the scope of the prosecution team. That expansion will have a significant impact throughout California.

II.

PENAL CODE SECTION 1054.9 REQUIRES A MEANINGFUL THRESHOLD SHOWING BEFORE A PETITIONER IS ENTITLED TO POST-CONVICTION DISCOVERY

Without directly address the People's statutory language and legislative intent arguments, Barnett claims that the Court of Appeal's interpretation of section 1054.9 was correct. (AB at 48.) Neither Barnett nor the court properly interpreted the threshold showing necessary to trigger section 1054.9 discovery obligations.

A. The Court Of Appeal's Recognition That Its Interpretation Of The Statute Was Limited Only By The Imagination Of Petitioners Was Not Invited Error

Barnett claims that the People invited error in this case by accurately describing the Court of Appeal's interpretation of section 1054.9. (AB at 37-39.) Barnett is incorrect.

Barnett's argument stems from the People's brief in opposition to Barnett's petition for rehearing filed in the court below after the lower court's original opinion in this case. The People concluded that the Court of Appeal's interpretation of section 1054.9 limits discovery only to the imagination of a petitioner. In the subsequent modification to its opinion, the court adopted the People's characterization.

The court's adoption of the People's language was not "the essence

of invited error." (AB at 38.) When the People used the "imagination" language in its briefing, the error had already occurred, and it was the Court of Appeal's own doing. The People had argued in that court that such an interpretation of the statute was incorrect. Once the court issued its initial panel opinion, however, the People merely described the logical implications of the court's interpretation.

The People did not "invite" the Court of Appeal to erroneously interpret section 1054.9, but has consistently argued a contrary interpretation. The Court of Appeals RSVP'd to an invitation that the People never sent. Barnett's contrary argument should be rejected.

B. Barnett Presented No Argument Regarding The Meaning Of The Statutory Requirement That A Defendant Show That He Or She Was "Unsuccessful" At Obtaining The Discovery Materials From Trial Counsel

Barnett fails to address the People's central argument that the statutory language of section 1054.9 requires an affirmative showing that the "discovery materials" obtained from trial counsel are incomplete. Section 1054.9 expressly conditions discovery on a threshold showing "that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful." (OBM at 24-28.) Barnett ignores the language altogether.

Barnett criticizes the People's interpretation of the statute, but offers no reasonable alternative reading. Indeed, Barnett does not even mention the term "unsuccessful" nor offer any argument regarding how that language should be interpreted. Barnett's failure to address the meaning of the term "unsuccessful" in section 1054.9 is conspicuous by its absence. The starting point in statutory construction is the express language of the statute. (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) The fact that neither Barnett nor the lower court offered any interpretations of the meaning of "unsuccessful" in section 1054.9 suggests that the interpretation by the People is the only

reasonable explanation for that language.

Barnett erroneously argues that he has complied with the threshold showing advocated by the People. Barnett notes that he "identified the missing pages from the sequence" of numbered trial discovery and therefore "satisfied that showing." (AB at 49-50). The People agree, as to the missing pages of numbered discovery, that Barnett satisfied the threshold showing for those pages. He has not, however, made the necessary showing as to the other discovery materials sought. A showing that a petitioner was unsuccessful at obtaining one type of discovery material should not throw the door open so the petitioner can ask for anything he or she can imagine.[9/]

C. Barnett's Opinion Of The Purpose Of Section 1054.9 Is Unsupported By The Statutory Language And The Legislative History

The People have discussed the purpose and legislative intent underlying section 1054.9. (OBM at 29-33.) The Court of Appeal's interpretation of the purpose of the statute is unduly expansive and conflicted with the statutory language. (OBM at 29-35.) Barnett now argues that the People's interpretation of the statute would frustrate legislative intent. (AB at 49.)

The Opening Brief sufficiently explains why Barnett's (and the Court of Appeal's) interpretation of the statute's purpose is incorrect. The law intends to provide a reasonable remedy to petitioners who have already determined that the "discovery materials" obtained from trial counsel are incomplete. This purpose is evident from the statute's plain language and its history (See OBM at 27-33.)

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9. In the context of access to evidence, the Supreme Court has rejected a similar "conceivable benefit" materiality standard since it is a "test limited only by the imaginations of judges or defense counsel." *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867.)

Barnett's interpretation of the legislative intent[10/] fails for lack of support. There is no evidence that the Legislature intended section 1054.9 for petitioners who have no evidentiary basis to believe they are missing discovery materials. Barnett's attack on the People's interpretation of the statute that is based on his unsupported view of legislative intent should be rejected.

D. Evidence Code Section 664 Applies To Post-Conviction Discovery

Barnett argues that Evidence Code section 664 should not apply to section 1054.9 proceedings because "it would deny a petitioner access to materials that come within the scope of [ ] trial discovery." (AB at 43.) Barnett's argument is unpersuasive.

Barnett simply repeats the lower court's arguments. As discussed in the Opening Brief, when a petitioner seeks post-conviction discovery of materials that should have been disclosed at trial, the petitioner necessarily asserts the prosecution committed a discovery violation. In the absence of any supporting evidence, a petitioner's mere assertion that a discovery violation occurred should not be sufficient to trigger post-conviction discovery of such materials. (See OBM at 34-36.)

In *Steele*, this Court provided an example of how Evidence Code section 664 should apply in the post-conviction setting. "[U]nless 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).) Other than point out that this language was dicta, Barnett has not established

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10. Barnett does not clearly articulate the legislative intent behind section 1054.9 that he asserts will be frustrated by the People's interpretation. The People assume that Barnett shares the same expansive view of the statute as the Court of Appeal.

that this Court's view of the applicability of Evidence Code section 664 to post-conviction discovery was incorrect.

This Court has recognized that courts should not accept a defendant's mere assertion, absent supporting evidence, that the prosecution failed to fulfill its statutory and constitutional discovery obligations at trial. Barnett's argument to the contrary should be rejected.

E. The Elimination of The Good Faith Effort Provision Under The Court Of Appeal's Interpretation Of Section 1054.9 Is Properly Before This Court

Barnett argues this Court should not address the People's argument that the Court of Appeal's decision renders the "good faith efforts" requirement superfluous. (AB at 47-49.) Barnett argues that the good faith requirement is not at issue.. The People agree that this case does not involve a question of whether good faith efforts occurred. Rather this case involves the consequences of the Court of Appeal's interpretation of the threshold showing necessary under section 1054.9. One such consequence is that the "good faith efforts" requirement will be rendered superfluous. (*See* OBM at 34-36.)

Thus, the People's discussion of "good faith efforts" was to demonstrate the impact that the Court of Appeal's interpretation of the statute will have if it is adopted by this Court. Specifically, that interpretation renders the "good faith efforts" requirement meaningless. "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* (1995) 10 Cal. 4th 257, 274.)

This Court granted review on the question of the proper threshold showing under section 1054.9. The extent that an interpretation of that threshold showing renders another part of the statute meaningless is an issue properly before this Court.

F. The Question Of Whether An Inventory Is Required As Part Of The Threshold Showing Under Section 1054.9 Is Fairly Included In The Issue Presented

In the Opening Brief, the People noted that the Court of Appeal had rejected the argument that an inventory of the "discovery materials" already possessed by a petitioner be required. (OBM at 34-35.) Barnett claims this argument is not properly before this Court. (AB at 49-50.) Barnett's argument fails.

This Court granted review on the issue of the threshold showing required by section 1054.9 to trigger post-conviction discovery.[11/] That issue expressly considers the extent that the "discovery already provided by the prosecution and obtained by the petitioner from trial counsel" affects a petitioner's post-conviction discovery rights. Under the Court of Appeal's interpretation, materials in the petitioner's possession are irrelevant to section 1054.9 discovery. The need for an inventory of "discovery materials" as part of the necessary threshold showing under section 1054.9 is a key point of disagreement between the People and the Court of Appeal. Accordingly, this issue properly falls within the overall question granted review by this Court.

G. The People Did Not Forfeit The Argument That The Court Of Appeal's Opinion Discourages Informal Discovery

Barnett asserts that the People's argument that the Court of Appeal's interpretation of section 1054.9 will discourage informal discovery (OPM at 41-

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11. The issue as presented in the People's Petition for Review reads: 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?

42) has been forfeited. (AB at 50.) However, this argument is fairly included in the issue granted review.

The People's argument that the Court of Appeal's interpretation of the statute will discourage informal discovery is simply states the inevitable consequences of the court's statutory interpretation. The People's disagreement with this construction of the threshold showing necessary under section 1054.9 is at the core of the issue before this Court. Fairly included in that issue are the likely consequences of the Court of Appeal's interpretation.

III.

A PETITIONER SEEKING POST-CONVICTION DISCOVERY PURSUANT TO PENAL CODE SECTION 1054.9 BASED ON *BRADY V. MARYLAND* MUST ESTABLISH THE REQUESTED DISCOVERY IS BOTH FAVORABLE AND MATERIAL

Although Barnett acknowledges that *Brady* discovery requires evidence be both favorable and material, he claims that under Penal Code section 1054.9, he need only establish that the requested evidence is favorable to be entitled to discovery. (AB at 2). However, the lower court considered Barnett's concerns "illusory" because he need only explain how the requested evidence would be material to his case if the evidence exists. (*Barnett, supra*, 164 Cal.App.4th at 51.)

To avoid establishing materiality, Barnett argues that the timing of discovery under Penal Code section 1054.9 relieves him of that burden. He argues that the prosecution should be required to evaluate materiality because only the prosecution knows what it possesses. Barnett argues it is appropriate to require a petitioner post-trial to explain why evidence is material because "[h]e knows what it is, knows why it is favorable, and is able to explain why it is material." (AB at 5). Barnett argues that this burden is appropriate in a section 1054.9 discovery context because "it is more akin to pre-trial discovery"

and the prosecution "is able to assess the cumulative effect of [favorable] evidence." (*Ibid.*)

Nothing in the lower court's straightforward interpretation of the *Brady* materiality requirement is contrary to precedent of the United States Supreme Court or this Court. To be subject to discovery under *Brady*, evidence must be both favorable and material. If a petitioner seeks discovery based solely on *Brady*, then to establish a right to discovery of that evidence, the petitioner must establish both elements. Otherwise, the requested evidence is not *Brady* material to which the petitioner is entitled. This interpretation is consistent with the viewpoint that habeas corpus is a collateral attack on a presumptively valid judgment. (*In re Clark* (1993) 5 Cal.4th 729, 751 fn.19.)

Barnett's numerous requests for discovery based on *Brady* were insufficient because he did not establish how the requested information would have been material. The prosecution should not, however, be tasked with looking for evidence pursuant to *Brady* when the requested evidence is not material and therefore not discoverable under *Brady*.

Barnett consistently relied on *Brady* as the basis for his discovery requests. Accordingly, the Court of Appeals considered Barnett's requests through the lens of *Brady* and not on any other theory.[12/] Barnett disagrees with the People and the appellate court regarding the application of the materiality requirement of *Brady* in the context of post-conviction discovery. The lower court opinion below eloquently explains its reasoning sufficiently to refute Barnett's position.

Brady provides: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence

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12. The court was very clear in its decision that its analysis was limited to an application of *Brady* and not on any other discovery vehicle a defendant may attempt to use in a Penal Code section 1054.9 context. (*Barnett, supra*, at164 Cal.App.4th at 48 fn. 14.)

is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, supra*, 373 U.S. at 87. "The prosecution has a duty. . . to disclose evidence to a criminal defendant. . . . . But such evidence must be both favorable to the defendant and material on either guilt or punishment." (*In re Sassounian* (1995) 9 Cal. 4th 535, 543, citing *United States v. Bagley* (1985) 473 U.S. 667, 674-678.) Thus, "[i]t is plain that the federal constitutional provision requires disclosure [by the prosecution] *only* of evidence that is both favorable to the accused and material either to guilt or to punishment." (*Id.* at p. 543, fn. 5, internal quotations omitted, italics in original.) "Hence, it is not correct to state, for example, that 'the prosecution's duty of disclosure extends to *all* evidence that reasonably appears favorable to the accused . . . .'" (*Ibid.*, quoting *People v. Morris* (1988) 46 Cal.3d 1, 30, fn. 14, italics in original.)

By its terms, section 1054.9 limits discovery to materials to which the defendant was entitled at trial. A petitioner seeking discovery under section 1054.9 must establish that he would have been legally entitled to the discovery he is now seeking. Barnett argued that he was entitled to the discovery pursuant to *Brady v. Maryland.* However, as discussed above, to be discoverable under *Brady*, the requested evidence must be both favorable to the defendant and material to the case. Without both characteristics, the evidence is simply not *Brady* evidence and not subject to disclosure on that basis.

Accordingly, Barnett's argument that this Court's interpretation of section 1054.9 violates *Brady* is misguided. This Court's decision concerned the procedures that should be followed in a state post-conviction discovery statute, and not on the constitutional remedy that should be applied once non-disclosure of favorable evidence is discovered. Penal Code section 1054.9 is a statutory discovery right created by the Legislature. However, section 1054.9 is not required by the United States Constitution nor *Brady v. Maryland.*

Consequently, the Legislature is free to place reasonable restrictions on post-conviction discovery. The California Supreme Court's strict limitation on post-conviction discovery in *People v. Gonzalez* did not violate the United States Constitution, and neither did this Court's interpretation of Penal Code section 1054.9.

Barnett failed to carry his burden of establishing that the requested material was discoverable under *Brady* because he did not establish that the requested evidence was material. The lower court simply applied *Brady* to the facts of this case.

A. The Court Of Appeal's Application Of The Materiality Component Of *Brady v. Maryland* Is Not Contrary To United States Supreme Court Precedent

Barnett argues that the Court of Appeal's decision is contrary to United States Supreme Court precedent because the court failed to consider *Brady's* application to a pre-trial setting. (AB at 5.) Barnett misconstrues *Brady*.

Brady did not establish constitutionally-mandated procedures for conducting discovery either at trial or after trial. (*See, Weatherford v. Bursley* (1977) 429 U.S. 545, 559 ["There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"].) *Brady* and its progeny simply outline when due process is violated by the state's suppression of favorable evidence in the course of a criminal trial. That line of cases concerns the issue of a remedy once a non-disclosure has been discovered. Nothing in the *Brady* cases sets up any kind of procedures for discovering the existence of material, exculpatory evidence in the first place.

Brady affects pre-trial discovery only to the extent that it establishes a remedy for non-disclosure after trial. Thus, a prosecutor who does not want a conviction overturned must be mindful of *Brady* obligations before trial. *See*

Kyles v. Whitley (1995) 514 U.S. 419, 437-440. However, *Brady* does not mandate any specific procedures for pre-trial discovery. Accordingly, the Court of Appeal's decision does not violate *Brady*.

Barnett argues the Court of Appeal "went awry" by "shifting the burden of establishing materiality in the discovery context from the prosecutor to the petitioner." (AB at 5-6.) However, *Brady* imposes no obligation on the prosecution to establish materiality. In the post-conviction context in which *Brady* operates, the petitioner always has the burden of establishing that the suppressed evidence is material. *Brady* involves no shifting of burdens at any stage because, as discussed above, *Brady* does not create constitutionally-compelled discovery procedures.

Barnett argues that he simply "can suggest broad categories of evidence that might be favorable" to satisfy his obligations under section 1054.9. (AB at 6.) Barnett's suggested solution, however, has no support from *Brady* or the text of section 1054.9. Barnett's request for evidence that is simply favorable does not necessarily involve a request for evidence to which he was entitled at trial under *Brady*. Thus, Barnett is attempting to obtain greater discovery than section 1054.9 allows. As discussed above, to be entitled to evidence under *Brady*, the evidence must be both favorable and material. The Court of Appeal correctly recognized that Barnett had not carried his burden of establishing that the requested material constituted *Brady* material.

B. The Court Of Appeal's Decision Does Not Conflict With *In Re Steele*

Barnett argues that the Court of Appeal's decision conflicts with *In re Steele, supra,* 32 Cal.4th at 682. Specifically, Barnett argues that the Court of Appeal effectively resurrected the rule from *People v. Gonzalez* (1990) 51 Cal.3d 1179 that section 1054.9 modified. (AB at 10-11.) Barnett is incorrect.

As discussed above, to be discoverable under *Brady*, the requested materials must be both favorable and material. Without both aspects, the requested materials are not discoverable under *Brady*.[13] Accordingly, the Court of Appeal's interpretation does not revive the *Gonzalez* standard of discovery, it simply involves an application of *Brady v. Maryland* to the discovery requests at issue. It is also consistent with *Steele*'s interpretation of section 1054.9 as limiting "free floating discovery.' (*Steele, supra*, 32 Cal.4th at 451.)

Barnett's difficulty appears to stem from the fact that the only basis he asserted to support his discovery requests was *Brady*. Since *Brady* evidence necessarily includes a materiality requirement, Barnett must establish how the requested evidence would be material to establish that it should have been disclosed at trial. Under the Court of Appeal's interpretation, not all requests for discovery pursuant to section 1054.9 require a showing of materiality. Indeed, the court did not require Barnett to make any showing of materiality as to the original notes of out-of-state police reports that it ordered discovered because Barnett was not seeking those materials pursuant to *Brady*.

C. The Court Of Appeal's Decision Does Not Conflict With *People v. Superior Court (Maury)*

Barnett argues the decision conflicts with *People v. Superior Court* (*Maury*) (2006) 145 Cal.App.4th 473. He points out that the court rejected the People's argument that petitioners must prove that the discovery materials actually exist to be entitled to discovery under Penal Code section 1054.9. According to Barnett, the court's requirement that a petitioner seeking *Brady* evidence must establish materiality imposes a similar burden that this Court

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13. Just because evidence is not discoverable under *Brady*, does not mean that a defendant would not be entitled to discovery of the evidence under some other discovery provisions. However, the Court of Appeal's decision in this case, and Barnett's theory of discovery, were limited to *Brady v. Maryland.*

rejected in *Maury*. (AB at 12-14.) Barnett is incorrect.

When a petitioner seeks post-conviction discovery specifically based on *Brady*, he must request materials that, if they exist, constitute *Brady* material.[14/] Thus, such a request, even if wholly speculative and not based on any facts, will be granted so long as the petitioner properly articulates the reason the requested materials are favorable and material. In the post-trial setting, the petitioner already knows the evidence that the prosecution used in the guilt and sentencing phases of the trial and can therefore argue how the requested evidence, if it exists, would have been material to either guilt or sentencing. *See United States v. Valenzuela-Bernal, supra,* 458 U.S. at 874 citing *United States v. Agurs* (1976) 427 U.S. 97, 112-113.

Barnett does not have to know what is in the prosecution's possession to articulate why requested materials would have been material to either guilt or punishment. There is no "impossible burden" in the application of the materiality standard of *Brady* in this case. Therefore, the court's decision is consistent with *Maury*.

D. The Court Of Appeal's Decision Is Not Contrary To The Plain Language Of Section 1054.9

Barnett argues the Court of Appeal decision conflicts with section 1054.9 because he has no burden at trial to request *Brady* material and therefore he should have no burden under section 1054.9. (AB at 14-15.) Barnett's interpretation of section 1054.9 is wrong.

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14. "Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review." (*Strickler v. Greene* (1999) 527 U.S. 263, 286; *see also Tucker v. United States* (E.D.Ark 2003) 269 F.Supp.2d 1024, 1048 (movant in post conviction discovery action failed to show materiality—at the risk of mixing metaphors, the court would not condone "replow[ing] the same old ground" for a "fishing expedition.")

There is no support in the statutory language nor in *Steele* for the assertion that post-conviction discovery should proceed in the same manner as trial discovery. Subdivision (b) of the statute merely sets forth the scope of materials available under section 1054.9. However, section 1054.9 contains specific limitations, including a good faith effort requirement, that does not apply pre-trial. For that matter, it only applies when a movant is prosecuting a petition for writ of habeas corpus. To accept Barnett's interpretation, then a petitioner would not have to make a specific requests at all for *Brady* materials because such requests are not required pre-trial. However, as the moving party, a petitioner seeking material under section 1054.9 has the burden of establishing that the materials he or she is requesting fall within the scope of the statute. The way to carry this burden is to establish that the requested materials are "materials to which the defendant would have been entitled at trial." Absent such a showing, a petitioner has not established any right to discovery under section 1054.9.

Barnett balks at establishing that the items he requested are material under *Brady*. However, it is incumbent on Barnett to establish that entitlement by showing that the requested items are both favorable and material.

E. The Court Of Appeal's Interpretation Of *Brady v. Maryland* Does Not Create An Unworkable System

Barnett complains of the burden of describing requested discovery "with sufficient particularity" to establish materiality. (AB at 15.)

As discussed above, in the post-trial setting, the petitioner already knows the evidence that the prosecution used in the guilt and sentencing phases of the trial and can therefore argue how the requested evidence, if it exists, would have been material to either guilt or sentencing. Rather than seek broad categories of materials, a petitioner's request should focus on specific information that a court can evaluate for materiality. Barnett has no problem

placing a substantial burden on the prosecution to review all materials to determine materiality but complains at narrowing his requests to discrete items for which individual materiality determinations may be made.

Barnett contends that this "burden" violates due process. (AB at 6). Of course, Barnett had no due process right to collateral review, much less pre-petition discovery. (*Murray v. Giarratano* (1989) 482 U.S. 1; *Pennsylvania v. Finley* (1987) 481 U.S. 551.) No court has ever found a pre petition right to discovery. (*See Calderon v. U.S. Dist. Court* (*Nicolaus*) (9th Cir. 1996) 98 F.3d 1102, 1106; *People v. Gonzalez, supra*, 51 Cal.3d at 1203-1207.) A state is not required to provide counsel on habeas. (*Murray, supra.*) It is not expected that a state court or federal court on collateral review can provide discovery based on speculation. (*Strickler, supra*, 527 U.S. 286.)

In pretrial proceedings, the Supreme Court required showings of materiality for discovery of third party governmental records. (*Pennsylvania v. Ritchie, supra*, 480 U.S. at 58 fn.15.). California statutes require a showing of materiality to discover police personnel records. (*City of Los Angeles v. Superior Court, supra*, 29 Cal.4th at 10.) In fact, materiality must also be shown for such a specific post judgment motion under section 1054.9. (*Hurd v. Superior Court, supra* ,144 Cal.App.4th at 1109.) Accordingly, in postjudgment proceedings, the state may place a burden of showing materiality on the movant for general discovery requests under section 1054.9. Also, California law requires a showing of "materiality" for disclosure of an informant despite the "difficulties" caused by lack of access to the informer and first hand information. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1246).

In *United States v. Valenzuela-Bernal, supra*, the Supreme Court rejected the argument it was unreasonable to require a showing of materiality when the defendant has had no access to deported witnesses for trial. The Court did not wholly dispense with the requirement. (458 U.S. at 870).

The Court compared the issue to the showing a defendant was required to make for the disclosure of an informant's identity–"while a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one. In such circumstances it is not possible to make an avowal of *how* a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality." (*Id.* at 871.) Instructively, in the context of post conviction proceedings such as Barnett's, the Court went on to note that "determinations of materiality are often made in light of all the evidence adduced at trial. . . ." (*Id.* at 874 citing *Agurs, supra*, 427 U.S. at 112-113.)

CONCLUSION

For the foregoing reasons as well as those already set forth in the pleadings on file, the petitioner and real party in interest respectfully requests the Court to reverse the opinion below with the exception of the discovery order for juror C.L.'s criminal history information and to the extent that the opinion below holds that a movant under section 1054.9 must show materiality under *Brady v. Maryland, supra*, for any discovery requested pursuant to that decision.

Dated: February 19, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PEOPLE'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7420 words.

Dated: February 19, 2009

Respectfully submitted,

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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 February 20, 2009, I served the attached **PEOPLE'S REPLY 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, P.O. Box 944255, Sacramento, California 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 February 20, 2009, at Sacramento, California.

Declarant