IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner, No. S171117

v.

SUPERIOR COURT, CONTRA COSTA COUNTY,

Respondent,

MICHAEL NEVAIL PEARSON,

Real Party in Interest.

After Decision by the Court of Appeal
First Appellate District, Division Five, No. A120430
Contra Costa County Superior Court No. 5-951701-2
The Honorable Leslie G. Landau, Judge

PETITIONER'S SUPPLEMENTAL BRIEF, AND REQUEST FOR LEAVE TO FILE IT (Cal. Rules of Court, Rule No. 8.520.)

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APPLICATION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF
(Cal. Rules of Court, Rule No. 8.520.)

I, Doug MacMaster, do declare as follows:

I am the deputy district attorney assigned to prosecute the above-entitled case.

"A party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." (Cal. Rules of Court, Rule No. 8.520, subd. (1).)

On January 21, 2010, after the People had filed both our opening and reply briefs in this matter, this Court issued its decision in *People v. Kelly* (2010) _ Cal.4th _, _ [No. S164830].) In *Kelly*, this Court addressed the history of our state's initiative process, as well as what constitutes an amendment for purposes of California Constitution, article II, section 10, subdivision (c).

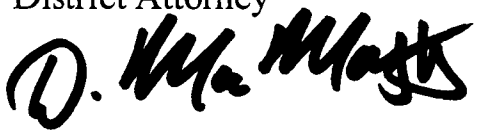
The People wish to address the impact, in the case before this Court, of this Court's decision in *People v. Kelly, supra,* _ Cal.4th _. We have prepared a supplemental brief discussing how that decision affects our pending case.

Accordingly, the People request permission of this Court to file our proposed supplemental brief, which we have included with this application.

DATED: February 8, 2010

Respectfully submitted,

ROBERT KOCHLY
District Attorney



DOUG MacMASTER
Deputy District Attorney

Attorneys for Petitioner

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ARGUMENT

THIS COURT'S RECENT DECISION IN *PEOPLE v. KELLY* SUPPORTS THE CONCLUSION THAT PENAL CODE SECTION 1054.9 AMENDED THE CRIMINAL DISCOVERY STATUTE

1. Penal Code Section 1054.9 Changed an Existing Initiative Measure – the Criminal Discovery Statute – By Taking Away From It

"[F]or purposes of article II, section 10, subdivision (c), an amendment includes a legislative act that changes an existing initiative statute by taking away from it. ([*Citations*].)" (*People v. Kelly* (2010) _ Cal.4th _, _ [No.

S164830].) Penal Code section 1054.9 comprises such an amendment; it is a legislative act that changes an existing initiative measure – the Criminal Discovery Statute – by taking away from it.

The Criminal Discovery Statute, as initially enacted, prohibits compulsory disclosures within any postconviction criminal proceeding. (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a).)[1] Section 1054.9 takes away from that existing initiative statute. It erodes the statutory protections that the voters enacted, in part, in order to shield prosecutors and law enforcement agencies from the burden of having to provide compulsory disclosures in postconviction criminal proceedings. As originally enacted, the Criminal Discovery Statute protected prosecutors and law enforcement

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[1] "[N]o discovery shall occur in *criminal cases* except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (Pen. Code, § 1054, subd. (e), italics added.) "No order requiring discovery shall be made in *criminal cases* except as provided in [the Criminal Discovery Statute]." (Pen. Code, § 1054.5, subd. (a), italics added.) "[The Criminal Discovery Statute] shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys [in *criminal cases*]." (*Ibid.*)

agencies against burdensome and one-sided discovery that might occur, in criminal cases, not only before trial, but after trial as well. Section 1054.9 has taken away some of those protections.

"Where a new section affects the application of the original statute . . . , the new section is an amendment to the statute." (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 777.) Nothing in this Court's recent decision in *People v. Kelly, supra,* _ Cal.4th _, affects that conclusion. In *Kelly*, this Court reiterated that the Legislature remains free to enact laws addressing an initiative's general subject matter, and it can enact laws addressing a related but distinct area of law that the initiative measure does not specifically prohibit. (*People v. Kelly, supra,* _ Cal.4th at p. _, fn. 19; *People v. Cooper* (2002) 27 Cal.4th 38, 47; *San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 830.) In doing so, this Court questioned language from earlier cases, suggesting an act is amendatory merely if its aim is to reach situations that the original statute did not cover. (*People v. Kelly, supra,* _ Cal.4th at p. _, fn. 19, questioning *Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 777.)

Section 1054.9, however, accomplishes more than simply reaching situations not covered by the original statute. It provides for postconviction discovery, in criminal cases, in a manner specifically prohibited by the

initiative measure. The Criminal Discovery Statute, as initially enacted, governs reciprocal discovery geared toward trial, while at the same time prohibiting compulsory disclosures elsewhere in criminal cases. Although the voters intended for reciprocal disclosures to occur before trial (Pen. Code, §§ 1054.1, 1054.3, 1054.7), they prohibited additional compulsory disclosures from occurring, within criminal cases, after trial. (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a).) Section 1054.9 substituted the voters' statutory scheme prohibiting all postconviction compulsory disclosures in criminal cases, with one permitting such disclosures, in criminal cases, whenever certain defendants contemplate a habeas petition or a motion to vacate judgment.

Section 1054.9 is not a freestanding enactment, addressing the initiative's general subject matter, in a manner obedient to the voters' amendatory conditions. Nor does section 1054.9 regulate a related but distinct area of law, that the initiative measure does not specifically prohibit. (See *People v. Kelly, supra,* _ Cal.4th at p. _, fn. 19.) Rather, by virtue of its codification within the Criminal Discovery Statute, section 1054.9 affects the initiative measure's application.

Section 1054.9's codification within the Criminal Discovery Statute extended its reach to postconviction proceedings. Defendants seeking postconviction discovery must make an initial, informal request for disclosure (Pen. Code, § 1054.5, subd. (b)); trial courts enforcing postconviction discovery orders must comply with section 1054.5(b)'s enforcement procedures; and section 1054.1's mandated disclosures extend to postconviction proceedings. If Defendant Pearson is correct, and if section 1054.9 only addresses a related but distinct area of law – for present purposes, habeas proceedings – then section 1054.9 not only changed the Criminal Discovery Statute's reach, but its very nature as well.

Proposition 115's voters enacted a single-subject initiative measure. From June 5, 1990, through December 31, 2002, the Criminal Discovery Statute only governed discovery in criminal cases. If Defendant Pearson is correct, and if he moved for his 1054.9 discovery within a habeas proceeding, then following section 1054.9's enactment, the Criminal Discovery Statute's provisions are no longer restricted solely to criminal cases. Some of its provision now reach, and govern, discovery in habeas cases as well. Section 1054.9 transformed the Criminal Discovery Statute

from a single-subject statute into a multi-subject statute. It is no longer a criminal statute, but rather, a hybrid statute, governing criminal and habeas cases alike.

By affecting the original statute's application, and by extending its reach, section 1054.9 changed the initiative statute's very nature. If Defendant Pearson moved for his 1054.9 discovery within a habeas proceeding, then the Legislature unconstitutionally exceeded the boundaries of legislative power, by replacing our single-subject discovery statute with an amended, dual-subject discovery statute. Any amendment or repeal of the Criminal Discovery Statute, aimed at just criminal cases, would amend or repeal its provisions governing habeas proceedings. This renders future electoral amendatory endeavor vulnerable to a single subject challenge. It forces the proponents of such an initiative measure to address the ripple effects that their amendatory effort would effectuate in habeas proceedings. Changing the very nature of the Criminal Discovery Statute, by altering its application, by extending its reach, and by burdening future electoral attempts to amend it, have amended the existing initiative statute by taking away from it. (Cf. *People v. Kelly, supra,* _ Cal.4th at p. _.)

2. Penal Code Section 1054.9 Has No Residuary Constitutional Applications

Assuming that section 1054.9 comprises an act in excess of the Legislature's amendatory powers, "the appropriate remedy . . . is to disapprove, or disallow, only the unconstitutional application of section [1054.9], thereby preserving any residuary constitutional application with regard to the other provisions of [section 1054.9]. ([*Citation*].)" (*People v. Kelly, supra,* _ Cal.4th at p. _.) Section 1054.9's provisions, however, are incapable of any residuary constitutional application. Sustaining a valid part of section 1054.9 is not possible – not in this case, nor in any other case. None of section 1054.9's provisions trigger the commencement of a habeas proceeding, nor do they trigger some other type of special proceeding. The only discovery that section 1054.9 authorizes must occur within the underlying criminal case.

Section 1054.9's proponents sought to permit defendants to seek postconviction discovery within their underlying criminal cases, by revesting jurisdiction in the trial court, and by permitting its movants to attach their postconviction discovery motions to their underlying criminal cases. Section 1054.9's nomenclature, its codification within the Criminal

Discovery Statute, and its harmonization within the broader, pre-existing statutory scheme, establish its supporters' intent that its movants seek postconviction discovery within their underlying criminal cases.

Having scrutinized section 1054.9's language, we cannot find any statutory provisions – like those remaining portions of Health and Safety Code section 11362.77, which this Court did not disallow, as invalid, in *People v. Kelly, supra,* _ Cal.4th _ – that deserve a residuary constitutional application. Section 1054.9 only permits postconviction discovery within its movants' underlying criminal cases.

Although not dispositive, we note that section 1054.9's enactment was not accompanied by a severability clause. (Stats. 2002, c. 1105 (S.B. 1391), § 1.) More importantly, section 1054.9 changed the very nature of the Criminal Discovery Statute, by altering its application, by extending its reach, and by burdening future electoral amendatory efforts. Accordingly, it has no constitutional statutory provisions that can be separated from its unconstitutional parts, without destroying the statutory scheme. (Cf. *In re Carlson* (1966) 64 Cal.2d 70, 72.)

Section 1054.9 has no statutory language that is grammatically, functionally, and volitionally separable from its language effectively changing the very nature of the Criminal Discovery Statute. It has no

constitutional language that is distinct and separate and, hence, can be removed as a whole, without affecting the wording of its other provisions. It has no severable language that is not necessary to the measure's operation and purpose. And it has no severable language that was not of critical importance to the measure's enactment. (See *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 960-961.) Thus section 1054.9, unlike the statute before this Court in *People v. Kelly, supra,* _ Cal.4th _, has no language that deserves a residuary constitutional application. It has no invalid parts that can be severed from any valid ones.

Accordingly, section 1054.9 remains a legislative act invalid at its inception; it is unworthy of judicial reformation. This Court cannot judicially reform section 1054.9, with confidence, in a manner that closely effectuates policy judgments clearly articulated by the enacting body. Nor can this Court say, with confidence, that a majority of the enacting body would have preferred a reformed construction to the statute's invalidation. (Cf. *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.) Section 1054.9's failure to garner sufficient votes is conclusively determinative that the chamber as a whole intended it to fail.

CONCLUSION

Nothing in this Court's recent decision in *People v. Kelly, supra,* _ Cal.4th _, casts sufficient doubt upon the conclusion that section 1054.9 remains an act in excess of the Legislature's amendatory powers. In fact, this Court's analysis in *Kelly* supports a finding of section 1054.9's unconstitutionality. Accordingly, the People ask this Court to reverse the Court of Appeal.

Respectfully submitted,

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State Bar No. 130122

Attorneys for Petitioner

RULE 8.360(b) CERTIFICATION

I, Doug MacMaster, certify that the number of words in this supplemental brief totals 1778 words.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: February 8, 2010

Doug MacMaster
Deputy District Attorney
State Bar No. 130122

Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

PEOPLE OF THE STATE OF CALIFORNIA v. MICHAEL NEVAIL PEARSON,

SUPERIOR COURT NO: 5-951701-2

APPEAL NO: A120430

I certify that my address is the District Attorney's Office of Contra Costa County, Courthouse, Post Office Box 670, Martinez, California 94553. I am a citizen of the United States, over eighteen years of age, a resident of the County of Contra Costa, and not a party to the within action;

On February 16, 2010, I mailed the original and 14 copies of PETITIONER'S SUPPLEMENTAL BRIEF, AND REQUEST FOR LEAVE TO FILE IT for filing as follows:

Attn: Clerk of Court
The Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

and I placed true and correct copies thereof in the U.S. Mail addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated:

2-10-10

Cynthia Julian
Senior Clerk