IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA,

Respondent.

MICHAEL NEVAIL PEARSON,

Real Party in Interest.

Case No. S171117

Court of Appeal, First District, Division Five, No. A120430

Contra Costa County Superior Court Case No. 05-951701-2; Honorable Leslie G. Landau

(Related to California Supreme Court Case No. S058157)

CAPITAL CASE

ANSWER TO PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA, Respondent. MICHAEL NEVAIL PEARSON, Real Party in Interest.	Case No. S171117 Court of Appeal, First District, Division Five, No. A120430 Contra Costa County Superior Court Case No. 05-951701-2; Honorable Leslie G. Landau (Related to California Supreme Court Case No. S058157) **CAPITAL CASE**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA, Respondent. MICHAEL NEVAIL PEARSON, Real Party in Interest.	Case No. S171117 Court of Appeal, Third District, No. A120430 Contra Costa County Superior Court Case No. 05-951701-2; Honorable Leslie G. Landau (Related to California Supreme Court Case No. S058157) **CAPITAL CASE**

TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Real Party in Interest Michael Nevail Pearson ("Mr. Pearson") respectfully opposes the District Attorney's Petition for Review ("Petition").

INTRODUCTION

Petitioner seeks this Court's review of an issue presently before the Court in *Barnett v. Superior Court*, No. S165522: whether California Penal Code section 1054.9 ("section 1054.9") constitutes an invalid amendment of the statutory discovery provisions contained in Proposition 115. Petitioner, however, has not presented any good reason for this Court to expend scarce judicial resources by duplicating in this case its

consideration of the same issue that is pending before it in *Barnett*. Although a successful challenge to the validity of section 1054.9 might well be "a matter of statewide importance to California's prosecutors," (Petition at 3), Petitioner does not offer any basis to justify such a challenge or to question the well-reasoned analysis that led the Court of Appeal in this case to conclude that section 1054.9 did not amend Proposition 115.

Petitioner's second proposed reason to grant the petition is a *non sequitur*. Petitioner suggests that even if this Court *rejects* the challenge to section 1054.9 (as did the Superior Court and Court of Appeal), prosecutors still retain "a vital interest" in preventing courts from ordering discovery in "postconviction criminal proceedings such as motions for a new trial, sentencing hearings, motions to withdraw pleas, probation revocation hearings, and motions to vacate judgment." (Petition at 3.) Petitioner does not explain how its purportedly "vital interest" can be addressed, let alone vindicated, in the context of a challenge to section 1054.9, which does not even mention all but one of the other types of proceedings.[1] Nor does Petitioner explain the relevance of the other types of proceedings to the specific case here, which involved only the well-established application of section 1054.9 to habeas corpus. *See In re Steele*, 32 Cal. 4th 682 (2004).

Moreover, the District Attorney recently filed an amicus curiae brief in *Barnett* on behalf of the California District Attorneys Association ("CDAA"). In the CDAA brief, the District Attorney virtually duplicated the arguments presented in the Petition. Thus, to the extent the Petition contains any arguments that this Court may find helpful in resolving the

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[1] Section 1054.9 authorizes discovery in proceedings related to "a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed." Cal. Penal Code § 1054.9.

issue presented in *Barnett*, the amicus brief obviates the need for the Court to grant review, consolidate this case with *Barnett*, and accept further merits briefing from Petitioner.

Thus, the Court need not grant review in *this* case to decide any questions regarding the validity of section 1054.9, because the issue—as it relates to discovery in habeas corpus proceedings—is already before the Court in *Barnett*. Redundant review by the Court in this case will unnecessarily tax the Court's limited time and resources, and prejudice Mr. Pearson's preparation of his habeas corpus petition.

ARGUMENT

I. THERE ARE NO LEGAL GROUNDS FOR REVIEW.

Petitioner's proffered reasons for granting review fail to provide any legal basis for this Court to do so.

A. Review in This Case is Not Necessary to Settle an Important Issue of Law, Nor Has Petitioner Offered Any Reason to Question the Correctness of the Court of Appeal's Decision.

Petitioner argues that review is warranted because mounting a successful attack on the validity of section 1054.9 "is a matter of statewide importance to California's prosecutors." (Petition at 3); *see* Rule of Court 8.500(b)(1) ("[t]he Supreme Court may order review of a Court of Appeal decision . . . [w]hen necessary . . . to settle an important question of law"). Petitioner's substantive arguments for challenging the statute's validity, however, merely rehash those it already presented to the Court in the *amicus* brief filed on behalf of the CDDA, and thus do not identify any urgency for granting redundant review in this case. Equally important, Petitioner does not give this Court any reason to believe that the Court of

Appeal erred in concluding that section 1054.9 did not amend Proposition 115.

The Court of Appeal's straightforward analysis began by noting that the critical question concerned the scope of the term "criminal cases," as used in Penal Code section 1054.5(a), which mandates that "[n]o order requiring discovery shall be made in criminal cases except as provided in this chapter." *People v. Superior Court (Pearson)*, No. A120430, slip op. at 4 (Cal. Ct. App. Feb. 6, 2009) ("COA Op."). The Court of Appeal found the term to be ambiguous and susceptible to the interpretation that it refers only to "pretrial and trial proceedings," as Mr. Pearson argued; or includes any proceedings related to an original charge, even if they occur long after trial, as Petitioner urged. *Id.* at 6.

The appellate court resolved the ambiguity by examining "[t]he express purposes of the" statutory provisions as "set forth in section 1054," as well as "the chapter's substantive provisions." *Id.* at 6-7. Based upon its consideration of these indicators, the Court of Appeal concluded that "the more reasonable interpretation" was that voters understood "criminal case" to refer to pretrial and trial proceedings. *Id.* at 7. Because the provisions in section 1054.9 do not apply to such proceedings, they did not amend the original statutory provisions in Proposition 115. *Id.* at 8.

By contrast, the appellate court observed that "[p]etitioner point[ed] to nothing in the language of the initiative, statutes, or ballot arguments evidencing an intent to prohibit the type of postconviction discovery authorized by section 1054.9." *Id.* at 6. Nor did Petitioner "explain how such a limitation" on postconviction discovery "would serve the express purposes delineated in section 1054," which are limited to pretrial and trial proceedings. *Id.* at 7. Rather, Petitioner could offer "nothing other than the ambiguous language of section 1054.5(a) to suggest that the statutes are

intended to encompass, and limit *by silence*, postconviction discovery." *Id.* (emphasis added).

Petitioner's proposed expansive reading of the statute based solely on the silence of its provisions was inconsistent with the rule of statutory construction that prohibits courts from "'interpret[ing] the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.'" *Id.* at 5 (quoting *Hodges v. Superior Court*, 21 Cal. 4th 109, 114 (1999)). This rule is particularly fatal to Petitioner's position, in light of its concession in the Court of Appeal that if the drafters of Proposition 115, or the voters, intended that the initiative govern postconviction discovery, "they would have written such a requirement into Proposition 115." *Refiled* Petition for Review at 9, *People v. Superior Court (Pearson)*, No. A120430 (Cal. Ct. App. Feb. 6, 2009). By the same force of reasoning, and given the historic distinction between criminal trials and habeas corpus proceedings, if the proponents of Proposition 115 intended to limit or *preclude* the availability of postconviction discovery, they would have said that as well. Thus, while the provisions of Proposition 115 should be read to "mean what they say," (Petition at 22), it is equally clear that they should not be read to mean what they do not say.

The Petition repeats Petitioner's failure to support its expansive reading of the statute. Petitioner cites no authority for the proposition that at the time Proposition 115 was enacted, the term "'criminal cases' already had a definitive judicial construction encompassing postconviction criminal proceedings." (Petition at 6.) To the contrary, Petitioner later cites multiple cases—none of which involves habeas proceedings—that actually demonstrate the accuracy of the Court of Appeal's observation that "the phrase 'criminal case' does not have a single usual and ordinary meaning,"

and must be construed "in the context of the initiative's overall scheme." COA Op. at 5; (*see* Petition at 8-9); *see also*, *DuBois v. Workers' Comp. Appeals Bd.*, 5 Cal. 4th 382, 388 (1993) (principles of statutory construction obligate courts to consider a statute in the context of its entire statutory scheme, in order to achieve harmony among the parts).

The Petition is a not-so-thinly-veiled request for this Court to make the provisions in section 1054.5(a) "extend further than their particular targets." (Petition at 21.) By "particular," Petitioner means the "intended" targets of the original statutory provisions contained in Proposition 115. As the Court of Appeal noted, granting Petitioner's request "would greatly expand the impact of the initiative in the absence of any basis to conclude the voters were concerned with anything other than the fairness of pretrial discovery procedures. This [a court] may not do." COA Op. at 8.

Indeed, Petitioner's proposed expansion of the original scope of section 1054.5(a) to occupy the field of discovery in any proceeding occurring after the verdict in "criminal proceedings," and thereby excuse prosecutors from ever being compelled to disclose discovery materials after trial, (*see* Petition at 5-6), is a request for this Court not only to invalidate section 1054.9, but to overturn its precedent regarding postconviction discovery generally, and to strike down any California statute that was not adopted by a supermajority in both houses of the Legislature, but that requires prosecutors to turn over materials following the conclusion of trial.

The consequences of adopting Petitioner's argument would entail the repeal of statutes whose application requires prosecutors to preserve and/or turn materials over to convicted defendants post-trial. For example, Penal Code sections 1405 and 1417.9 govern the retention and granting of access to physical evidence for DNA testing. As with section 1054.9, such statutes provide for the post-trial disclosure of evidence in the custody of law

enforcement, and were not passed by two-third majorities in both house of the State Legislature. *See* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_00510100/sb_83_vote_20010913_0100PM_asm_floor.html]. Acceptance of Petitioner's argument that Proposition 115 was intended to govern all post-trial disclosures of evidence—even when predicated on factual occurrences that were not contemplated by Proposition 115—would necessitate invalidation of these DNA statutes.

Furthermore, Petitioner's contention that Proposition 115 occupies the entire field of discovery would preclude courts from granting discovery to habeas petitioners even if such orders were made pursuant to this Court's decision in *People v. Gonzalez*, 51 Cal. 3d 1179 (1990). The *Gonzalez* rule stated that habeas petitioners were entitled to postconviction discovery only after stating a prima facie case for habeas relief. *Id.* at 1255-61. Under *Gonzalez*, an order to show cause would create a cause of action to which postconviction discovery could attach. *Id.* at 1258. If, however, Petitioner is correct that the statutory discovery provisions in Proposition 115 preclude courts from compelling discovery after trial, then even after the issuance of an order to show cause, the court could not grant discovery.

In sum, acceptance of Petitioner's analysis would compel the conclusion that any decisional authority requiring the prosecution to disclose materials after trial is invalid; as are any similar statutory requirements—other than the provisions of Proposition 115—unless they were adopted by a two-thirds majority in both houses of the Legislature. Mr. Pearson submits that nothing in the explicit terms of Proposition 115, or implicit in the scope of its provisions, can justify such an extreme result.

Accordingly, Petitioner's request for this Court to re-draft the statutory provisions of Proposition 115 does not constitute a good reason to grant review in this case.

B. Petitioner Has Not Identified Any Conflict Among the Decisions Applying Section 1054.9 Following This Court's Holding in *Steele*.

Petitioner argues that review is needed because *irrespective* of the continuing validity of section 1054.9, prosecutors would "have a vital interest in ensuring that compulsory discovery remains unavailable in postconviction criminal proceedings."[2] (Petition at 3.) Petitioner then lists several types of proceedings not enumerated in section 1054.9. (*Id.* (referring to "criminal proceedings such as motions for new trial, sentencing hearings, motions to withdraw please, probation revocation hearings, and motions to vacate judgment").) No grant of review is warranted on this ground because Mr. Pearson's discovery motion was filed in aid of preparing his petition for writ of habeas corpus in a capital case, as he is unquestionably permitted to do under the terms of the statute. *In re Steele*, 32 Cal. 4th at 691 ("Reasonably construed, [section 1054.9] permits discovery as an aid in preparing the petition, which means discovery may come before the petition is filed."). Thus, if section 1054.9 is valid (which it is), there can be no basis to challenge the Superior Court's order in *this case* granting postconviction discovery.

In *Steele*, this Court clearly explained when in the course of capital habeas proceedings section 1054.9 could be invoked. The Court noted that section 1054.9 is intended to provide discovery rights to prisoners under a sentence of death or life in prison without the possibility of parole to assist

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[2] The District Attorney is acting as representative for the People in this case only for purposes of postconviction discovery litigation. The People are otherwise represented by the Attorney General in this Court in Mr. Pearson's appellate and habeas proceedings, and the Attorney General not only has conceded that section 1054.9 is valid, but has affirmatively defended the statute in *Barnett*.

those prisoners "in stating a prima facie case for [habeas] relief," and held that such a prisoner may seek discovery when "he or she is preparing to file the petition as well as after the petition has been filed." *Id.* To Mr. Pearson's knowledge, the Superior Courts and Courts of Appeal, in turn, have uniformly followed the teaching of *Steele*, and permitted prisoners under sentence of death or life without possibility of parole to invoke the authority under section 1054.9 when the movant is preparing to file, or has already filed, a habeas petition. Petitioner does not—because he cannot—identify any lack of uniformity of decision in applying the holding in *Steele* or permitting discovery pursuant to section 1054.9.

To the extent the District Attorney has a legitimate interest in guarding against the extension of section 1054.9 to sentencing hearings, probation revocation hearings, and the like, he must wait for such a case to arise, if it ever does. Such inchoate fears, however, do not provide any legitimate reason to grant review in this case.

II. REVIEW WILL UNNECESSARILY CREATE BURDENSOME DELAY AND COSTS FOR THE PARTIES AND TAX THE COURT'S TIME AND RESOURCES.

Given the current state of discovery in this case, and the fact that the Court is considering the validity of section 1054.9 in *Barnett*, the most efficient course is for the Court to deny review.

Mr. Pearson's efforts to obtain postconviction discovery began in June, 2005, approximately fifteen months after this Court's decision in *In re Steele*, when counsel for Mr. Pearson informally sought access to the requested materials. *See Steele*, 32 Cal. 4th at 692 ("section 1054.9 should be interpreted to promote informal, timely discovery between parties prior to seeking court enforcement"). After almost four years, the District Attorney still has not granted access to all the materials to which Mr.

Pearson is lawfully entitled. Mr. Pearson requires access to the discovery materials in order to fully prepare and present to this Court claims for relief in support of his habeas petition, which the Court will presume timely if it is filed on or before August 31, 2009.

As a practical matter, Petitioner's full compliance with the Superior Court's postconviction discovery order would create no significant burden for the District Attorney. While this case was pending before the Court of Appeal, Petitioner's counsel provided Mr. Pearson's counsel access to the District Attorney's trial file, thereby largely complying with the Superior Court's discovery order.[3] The discovery to which Mr. Pearson has not yet had access consists of materials in the possession of law enforcement agencies. Therefore, rather than creating "delay and unnecessary cost," (Petition at 16), Petitioner's compliance with the Superior Court's order is simply a matter of the District Attorney authorizing law enforcement agencies to allow counsel for Mr. Pearson access to materials in their custody or control.

The District Attorney, on behalf of the CDAA, is presenting in *Barnett* his position with regard to section 1054.9. A grant of review in this case will necessitate further briefing and argument on behalf of the parties; will place a considerable burden on Mr. Pearson by delaying access to discovery materials with less than six months before he must file his habeas petition; and will further tax this Court's limited time and resources. The

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[3] Because the District Attorney's objective is to test the validity of section 1054.9, he allowed Mr. Pearson's counsel access to the trial file while explaining that he was not providing such access under compulsion of either the Superior Court's order or the provisions of section 1054.9. Upon reflection, the District Attorney then decided to withhold access to material in the possession of other law enforcement agencies' to avoid rendering his statutory challenge moot.

most efficient course is for this Court to deny review, and for the District Attorney to grant to Mr. Pearson access to the remaining discovery materials and shift his focus to *Barnett*, where he has presented arguments against section 1054.9 in the CDAA brief.

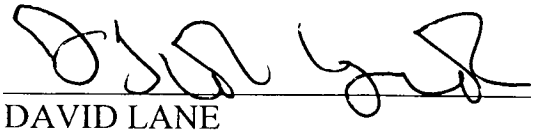
CONCLUSION

Given the fact that this Court is considering the validity of section 1054.9 in *Barnett*; the District Attorney in this case has presented the Court with his arguments against section 1054.9, via the CDAA amicus brief in *Barnett*; the extraordinary, far-reaching, and unwarranted effects of Petitioner's arguments; the absence of any conflict among the decisions regarding the types of proceedings in which courts may invoke authority pursuant to section 1054.9; and the risks of enormous disruption to the timely preparation of the habeas corpus petition in this case, the Court should deny review.

Respectfully submitted,

Dated: April 1, 2009

HABEAS CORPUS RESOURCE CENTER

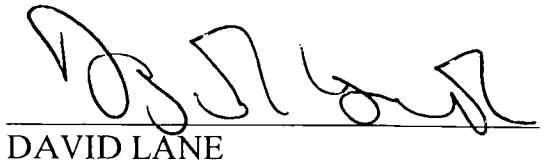
By: 

DAVID LANE
Attorneys for Real Party in Interest
Michael Nevail Pearson

CERTIFICATE OF COMPLIANCE

I certify that the foregoing ANSWER TO PETITION FOR REVIEW contains 3,200 words.

Dated: April 1, 2009



DAVID LANE
Attorney for Real Party in Interest
Michael Nevail Pearson

PROOF OF SERVICE BY MAIL

RE: *People v. Superior Court (Pearson)*; Case No. S171117 (Related to California Supreme Court Case No. S058157 [Capital Case])

I, David Lane, declare that I am a citizen of the United States, employed in the City and County of San Francisco; I am over the age of 18 years and not a party to this action or cause; my current business address is 303 Second Street, Suite 400 South, San Francisco, California, 94107.

On April 1, 2009, I served a true copy of the following documents:

ANSWER TO PETITION FOR REVIEW

on each of the following in said cause by placing true copies thereof in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Doug MacMaster
Office of the District Attorney
Contra Costa County
725 Court Street, 4th Floor
Martinez, CA 94523-0150

Gregg E. Zywicke
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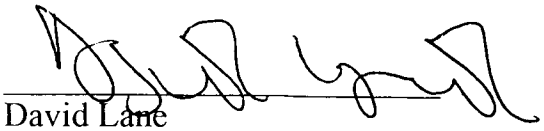
San Francisco, CA 94102-3664

Jeanne Keevan-Lynch
Attorney at Law
P.O. Box 2433
Mendocino, CA 95460

Service for Michael Nevail Pearson will be completed by utilizing the 30-day post-filing period within which we will hand deliver a copy to him at San Quentin State Prison.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 1, 2009, at San Francisco, California.



David Lane
Attorney