No. S267391

In the Supreme Court of the State of California

IN RE JASMINE JENKINS,
ON HABEAS CORPUS.

Appellate District, Case No. B301638
Los Angeles County Superior Court, Case No. BA467828
The Honorable Lisa B. Lench, Judge

ANSWER TO PETITION FOR REVIEW

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March 29, 2021

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PRELIMINARY STATEMENT

As requested by this Court's letter dated March 22, 2021, respondent files this answer to the petition for review raising any procedural bars and responding to the merits of petitioner's claims, including the following issue: "Where a habeas petitioner claims he or she did not receive a fair trial because the District Attorney failed to disclose material evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83—and where the Attorney General has knowledge of, or is in actual possession of, such evidence—what duty, if any, does the Attorney General have to disclose that evidence to the petitioner?" This Court should deny the petition because petitioner fails to demonstrate that the Court of Appeal's decision was erroneous, petitioner's allegations do not address an important question of law or conflict in the law, and petitioner's *Brady* claim in Ground Three is not cognizable.

PROCEDURAL HISTORY

In an information, the Los Angeles County District Attorney charged petitioner with the murder of Brittneeh Williams (Pen. Code,[1] § 187, subd. (a); count 1), a felony, and it charged codefendant Kayuan Mitchell with one count of injuring a spouse, cohabitant, fiancé, boyfriend, girlfriend or child's parent—Brittneeh (§ 273.5, subd. (a); count 2), a felony.[2] It was

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[1] All further undesignated statutory references are to the Penal Code.

[2] This answer will refer to Brittneeh Williams and her sister, Sade Williams, by first name to avoid confusion. No disrespect is intended.

alleged as to count 1 that petitioner personally used a knife in the commission of the offense (§§ 12022, subd. (b)(1)). It was alleged as count 2 that Mitchell personally inflicted great bodily injury in the commission of the offense (§ 12022.7, subds. (e)). (1CT 52-54.)

The jury found petitioner guilty of voluntary manslaughter and found true the special allegation that petitioner personally used a knife. (2CT 195.) Mitchell pleaded guilty to count 2 and was placed on probation. (2CT 259.)

The trial court sentenced petitioner to 11 years in state prison for the voluntary manslaughter conviction, and it stayed the one-year section 12022, subdivision (b)(1) enhancement. The court awarded petitioner 359 days of presentence custody credit, consisting of 313 days of actual custody and 46 days of conduct credit. (2CT 340-342.)

Petitioner appealed her conviction to the Court of Appeal in Case Number B294747. On October 22, 2019, petitioner filed a petition for writ of habeas corpus in the Court of Appeal in Case Number B301638, arguing as follows: (1) the trial prosecutor improperly suppressed evidence of prior juvenile adjudications suffered by Brittneeh and her sister, Sade, who was a prosecution witness; (2) trial counsel was constitutionally ineffective for failing to discover and present evidence of the prior adjudications; and (3) cumulative error denied her right to due process. Respondent filed an informal response. On November 24, 2020, the Court of Appeal issued an order to show cause, requiring a return to be filed by December 7, 2020, any traverse to be filed by December 21, 2020, and a hearing on January 19, 2021. On

December 7, respondent filed a return. On January 22, 2021, the Court of Appeal issued a joint opinion denying the petition for writ of habeas corpus and affirming the judgment on direct appeal, finding petitioner's claims in both her writ petition and direct appeal to be without merit. (B294797, Opn. at 5-14.)

On March 3, 2021, petitioner filed a petition for review in this Court, alleging that the Court of Appeal erred in rejecting the claims in her habeas corpus petition and that the Attorney General improperly suppressed evidence of Sade's and Brittneeh's prior juvenile adjudications during the habeas corpus proceedings. (Pet. at 14-33.) On March 22, 2021, this Court ordered respondent to address any procedural bars and the merits of petitioner's claims, including the following issue: "Where a habeas petitioner claims he or she did not receive a fair trial because the District Attorney failed to disclose material evidence in violation of *Brady*, *supra*, 373 U.S. 83—and where the Attorney General has knowledge of, or is in actual possession of, such evidence—what duty, if any, does the Attorney General have to disclose that evidence to the petitioner?" Pursuant to that order, respondent files the instant answer opposing the petition for review.

QUESTIONS PRESENTED

1) Did the prosecutor suppress material exculpatory evidence, in violation of petitioner's Fourteenth Amendment rights, by failing to disclose the charged victim's prior convictions for three violent felonies? (Pet. at 7, 14-18.)

2) Did the prosecutor suppress material exculpatory evidence,

in violation of petitioner's Fourteenth Amendment rights, by failing to disclose the state's key witness's prior convictions for three violent felonies? (Pet. at 7, 19-25.)

3) May the Attorney General's office, when defending against a *Brady* claim that the prosecutor suppressed material exculpatory evidence, suppress that same material exculpatory evidence? (Pet. at 7, 26-28.)

4) Did trial counsel's failure to uncover or introduce evidence of the Williams sisters' prior convictions deprive petitioner of her Sixth Amendment right to ineffective assistance of counsel? (Pet. at 7, 29-31.)

5) Did the prejudice from the errors identified in the habeas and direct appeal cumulate to deprive petitioner of her Fourteenth Amendment rights to due process and a fair trial? (Pet. at 7, 32-33.)

STATEMENT OF FACTS

For purposes of this answer, respondent refers to the factual statements set forth by the Court of Appeal (B294747 Opn. at 2-5) and respondent in its respondent's brief on direct appeal (B294747, RB at 15-30).

ARGUMENT

I. REVIEW SHOULD BE DENIED BECAUSE THE COURT OF APPEAL PROPERLY FOUND THAT EVIDENCE OF BRITTNEEH'S AND SADE'S ALLEGED PRIOR JUVENILE ADJUDICATIONS WAS NOT MATERIAL

In Grounds One and Two, petitioner asserts the Court of Appeal improperly rejected her claim that the prosecutor violated *Brady*, *supra*, 373 U.S. 83, by failing to disclose Brittneeh's and Sade's purported prior juvenile adjudications for an incident that

occurred in 2006 when they were both minors. (Pet. at 14-25.) However, review is not warranted because the Court of Appeal's holding—that, even if petitioner had sufficiently shown the prosecutor failed to disclose evidence of the prior juvenile adjudications, the evidence was not material—is strongly supported by the record and well-settled authority.

According to *Brady*, the prosecution has a duty under the due process clause of the Fourteenth Amendment to disclose evidence to a criminal defendant that is both favorable to the defendant and material on either guilt or punishment. (*Brady*, *supra*, 373 U.S. at p. 87; *In re Sassounian* (1995) 9 Cal.4th 535, 543, citing *United States v. Bagley* (1985) 473 U.S. 667, 674-678.) "Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." (*Sassounian*, *supra*, 9 Cal.4th at p. 544, citing *Bagley*, *supra*, 473 U.S. at p. 676.) Under the *Brady* rule, "[e]vidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.' [Citations.] The requisite 'reasonable probability' is a probability sufficient to 'undermine[] confidence in the outcome' on the part of the reviewing court. [Citations.] It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.]" (*Sassounian*, *supra*, 9 Cal.4th at pp. 544-545.)

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial,

understood as a trial resulting in a verdict worthy of confidence." (*Kyles v. Whitley* (1995) 514 U.S. 419.) A *Brady* violation is shown where the nondisclosed favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Id*. at p. 435, fn. omitted.)

"[T]he term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called '*Brady* material'—although, strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." (*Strickler v. Greene* (1999) 527 U.S. 263, 281, fn. omitted.)

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Id*. at pp. 281-282.) None of these were present here.

The Court of Appeal correctly held that there was no *Brady* violation. The Court of Appeal initially explained that petitioner had not established that the prosecutor failed to disclose the evidence or that the trial court would have permitted evidence of the 12-year-old prior adjudications to be presented to the jury. (B294747 Opn. at 13.) The court also agreed in a footnote that petitioner had not necessarily established that Britneeh and Sade

suffered those prior juvenile adjudications. (B294747 Opn. at 11, fn. 1.) However, assuming petitioner had established all of those points, the Court of Appeal rejected petitioner's allegation, finding the evidence was not material because it was not reasonably probable petitioner would have received a different result at trial. (B294747 Opn. at 11, fn. 1 & 13-14, citing *Banks v. Dretke* (2004) 540 U.S. 668, 699.) As the court found, the evidence of any prior adjudication that occurred when Brittneeh was a minor, approximately 12 years prior to the instant case, would have had little probative value in relation to petitioner's claim of self-defense. (B294747 Opn. at 13-14; see generally *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1554 [trial court did not abuse discretion in ruling 10-year-old juvenile adjudication was presumptively too remote to admit under section 352].) This is especially true when considering not only the circumstances of the instant case but also that the jury was presented with evidence that Brittneeh had previously been convicted of committing a battery *on petitioner*. (B294747 Opn. at 13-14; see, e.g., *People v. Leon* (2008) 161 Cal.App.4th 149, 169 [finding evidence of defendant's 13-year-old prior juvenile adjudication for robbery was merely cumulative regarding defendant's evidence of gang membership].)

As the Court of Appeal noted, the jury was presented with much more directly relevant evidence showing that Brittneeh had more recently committed violence against *petitioner* in 2015 and 2016. (B294747 Opn. at 13; 5RT 1645-1646, 1648-1650, 1684-1687; 6RT 1813.) In other words, "[t]he jury thus already knew

that Brittneeh had a penchant for violence against [petitioner]." (B294747 Opn. at 13.) It is not reasonably probable that information about a separate offense unrelated to petitioner and Brittneeh's dispute would have caused the jury to view the case differently such that a different outcome would have resulted. (B294747 Opn. at 13-14.) Thus, the information regarding the unrelated, 2006, juvenile case was much less probative than the information that was presented to the jury. (B294747 Opn. at 13.) The Court of Appeal properly found that the 2006 arrest and alleged adjudication were therefore not material. (B294747 Opn. at 13-14.)

Similarly, the Court of Appeal properly found that evidence of Sade's alleged prior juvenile adjudication was not material. (B294747 Opn. at 14.) Petitioner contends that defense counsel could have used the prior adjudication evidence as a crime of moral turpitude to impeach Sade. (Pet. at 21.) However, "'a new trial is generally not required when the testimony of the witness is "corroborated by other testimony."'" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1050, quoting *United States v. Payne* (1995) 63 F.3d 1200, 1210.) And the Court of Appeal noted that Sade's testimony identifying petitioner as the aggressor was corroborated by the testimony of the other witnesses. (B294747 Opn. at 14.) Indeed, Sade testified that after Mitchell held Brittneeh back from petitioner in a bear hug, effectively creating a break in their confrontation, petitioner walked up to Brittneeh and stabbed her in the lower stomach area. (3RT 981, 985-986, 1000, 1021, 1036; 4RT 1236.) As the Court of Appeal noted,

Abigail V., a 10-year-old who was with her mother at a bus stop near the gas station during the incident, saw petitioner take out a six-to-eight-inch knife from her back pocket and stab Brittneeh in the stomach and forehead. (B294747 Opn. at 14; 3RT 929, 931, 933, 942, 944-945.) Abigail V. also testified that petitioner was smiling and angry, "like a psychopath," before going to her car and driving away. (3RT 949, 951.)

Additionally, Jashanee Spencer saw petitioner moving her hands in a downward motion during her interaction with Brittneeh. Spencer then saw petitioner put her hands back in the front pocket of her sweater and Spencer could see a green handle coming out of the pocket. (4RT 1237, 1239-1240.) Both Spencer and Abigail V. independently corroborated Sade's testimony that petitioner walked up to Brittneeh, stabbed Brittneeh with a knife in the lower stomach, and afterwards walked back to her car smirking and smiling. (3RT 986, 993, 1000, 1036; 4RT 1241-1242.) In light of this independent corroboration, it is not reasonably probable petitioner's use of the alleged prior juvenile adjudications would have produced a more favorable outcome for her. The Court of Appeal, therefore, properly found that the allegedly-undisclosed, juvenile, prior adjudication could not reasonably be said to "'put the whole case in such a different light as to undermine confidence in the verdict.'" (B294747 Opn. at 14, quoting *Kyles v. Whitley*, *supra*, 514 U.S. at p. 435.)

As petitioner fails to demonstrate any error by the Court of Appeal in rejecting her claims in Grounds One and Two, and/or

that the claims address an important question of law or conflict in the law, review should be denied. (See *United States v. Agurs* (1976) 427 U.S. 97, 113-114 [finding no *Brady* violation by prosecutor for failing to turn over victim's criminal record to defense counsel, in part, because defense counsel did not request the arrest record, the prior adjudications did not contradict any evidence offered by the prosecutor, and it was largely cumulative of the evidence of the victim's violent nature already presented at trial].)

II. REVIEW SHOULD BE DENIED BECAUSE PETITIONER'S CLAIM OF POSTCONVICTION *BRADY* ERROR IN GROUND THREE IS PROCEDURALLY BARRED AND NOT A COGNIZABLE CLAIM; IT ALSO FAILS TO MAKE A PRIMA FACIE SHOWING OF ERROR EVEN UNDER THE PROPER LEGAL FRAMEWORK

Petitioner argues in Ground Three that the Attorney General violated *Brady* by not providing additional evidence during the habeas corpus proceedings in the Court of Appeal to confirm that Brittneeh and Sade had, in fact, suffered the prior juvenile adjudications addressed by petitioner. (Pet. at 26-28.) Review should be denied because Ground Three was not presented in any original petition and is therefore procedurally barred, and it is not cognizable here in any event because *Brady* is a trial right that does not apply postconviction. Additionally, even when petitioner's allegation is evaluated under the proper legal framework, she fails to make a prima facie showing that California's postconviction process has flaws so "fundamental" that she was denied her constitutional rights and the ability to develop and present her claims, or that the Attorney General failed to abide by its ethical obligations in responding to

petitioner's claims. Finally, even if *Brady* applied, petitioner has not made a prima facie showing that the Attorney General failed to provide material, exculpatory evidence.

A. Ground Three is procedurally barred and is not a cognizable claim

As an initial matter, petitioner's claim is procedurally barred. Petitioner has not raised this claim in any habeas corpus petition before the Court of Appeal. As a result, the argument should not be considered for the first time in a review petition. (Cal. Rules of Court, rule 8.500(c)(1); see also *In re M.S.* (1995) 10 Cal.4th 698, 727 [declining to reach the merits of petitioner's claims on review because petitioner failed to raise the claim in any form in the California Court of Appeal].)

Even assuming Ground Three is not procedurally barred, it is not cognizable here because *Brady* is a trial right, not a postconviction right. The Supreme Court of the United States has held that an allegation of a prosecutor improperly withholding evidence in postconviction proceedings cannot be raised as a claim of *Brady* error. (*District Attorney's Office for the Third Judicial District v. Osborne* (2009) 557 U.S. 52, 69.) Indeed, "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." (*Id.* at p. 68.) This is because once a person has suffered a valid conviction, "the criminal defendant has been constitutionally deprived of his liberty," and "[t]he State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief." (*Id.* at pp. 68-69, internal quotations removed.)

The California Attorneys for Criminal Justice ("CAJC") filed an amicus brief suggesting *Brady* applies here, citing to *Banks v. Dretke* (2004) 540 U.S. 668. (CACJ letter at p. 4.) CAJC's reliance on *Banks* is misplaced. *Banks* conducted its analysis under *Brady* because the issue there addressed a prosecution team's suppression of evidence *during trial*. The postconviction proceedings in *Banks* addressed and focused on that initial claim of suppression of evidence during trial—the Court simply included discussion of the State's continued denials that the exculpatory evidence existed throughout the appellate and habeas corpus proceedings. (*Banks v. Dretke*, *supra*, 540 U.S. at p. 693.) In contrast, Ground Three here alleges a *Brady* violation by the Attorney General *during postconviction proceedings*. Thus, "*Brady* is the wrong framework" for petitioner's postconviction allegation. (*Osborne*, *supra*, 557 U.S. at p. 68.)

While one division of the Court of Appeal has found that *Brady* can apply postconviction (see *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179), that opinion predates the United States Supreme Court's 2009 holding in *Osborne* and does not control this Court's adjudication of the issue presented. "Instead, the question is whether consideration of [petitioner]'s claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" (*Osborne*, *supra*, 577 U.S. at p. 69, quoting *Medina*

v. California (1992) 505 U.S. 437, 446, 448.) As will be demonstrated below (see Arg. II (B)), it does not.

B. Petitioner's allegation in Ground Three fails to state a prima facie case for relief because it does not demonstrate that the Attorney General had an obligation to provide additional evidence confirming that Brittneeh and Sade had, in fact, suffered the prior juvenile adjudications and that any such information was material

Even in viewing petitioner's claim through the proper legal framework, she fails to make a prima facie showing for relief. Petitioner claims that, during the habeas corpus proceedings in the Court of Appeal, the Attorney General had a duty to provide her with evidence confirming that Brittneeh and Sade were, in fact, the minors who suffered the prior adjudications noted in the Court of Appeal opinion attached to her habeas corpus petition. (Pet. at 26-28; see also CAJC letter at 3-5.)[3] The Attorney

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[3] Although petitioner fails to identify what specific evidence the Attorney General was in possession of that it allegedly failed to turn over, respondent presumes petitioner meant that the Attorney General's Office could have obtained its archived appellate file regarding that 2007 appeal from the juvenile adjudications. The Attorney General's Office did search for confirmation within its limited, readily-available electronic file for the appeal, but it was unable to obtain sufficient information, such as birthdates, to confirm the prior adjudications. Subsequently, the Attorney General did not attempt to retrieve the archived physical file for a few reasons, primarily because verifying that Brittneeh and Sade were the minors from the prior adjudication was unnecessary. Respondent briefly noted that although petitioner was obviously aware of the prior adjudication, she had not sufficiently supported her allegation as she is required to do, *but respondent assumed for purposes of the return, as did the Court of Appeal, that Brittneeh and Sade were*

(continued…)

General was under no such obligation here, and providing such evidence was not necessary in any event because respondent, as well as the Court of Appeal, assumed this part of petitioner's allegation was true for purposes of those habeas corpus proceedings.

1. A petitioner bears a heavy burden to plead sufficient grounds for relief on habeas corpus

A post-conviction habeas corpus attack on the validity of a judgment "is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension." (*In re Clark* (1993) 5 Cal.4th 750, 766-767.) Such challenges amount to a collateral attack upon a criminal judgment that, due to the societal interest in the finality of judgments, is presumed to be valid. (*In re Reno* (2012) 55 Cal.4th 428, 451; *People v. Duvall* (1995) 9 Cal.4th 464, 474.) "For purposes of a collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence[.]"

(…continued)

the minors who suffered those prior adjudications. (Return at pp. 15-20; B294747 Opn at 11.) Also, the Court of Appeal gave respondent only seven court days to file a return when it issued the order to show cause. The order was issued on November 24, 2020, and the return was due on December 7, 2020; November 26 and 27, 2020, were holidays. (B301638 Order to Show Cause, filed Nov. 24, 2020.) Obtaining an archived, 13-year-old appellate file can take three to four weeks. Respondent did not request the archived file because it was complying with the Court of Appeal's order requiring a return by December 7, 2020, and avoiding delaying the proceedings in an attempt to verify a point that was not necessary for the resolution of petitioner's claim.

(*Duvall*, *supra*, at p. 474, internal quotation marks and citation omitted; see also *Reno*, *supra*, at p. 451.) A petitioner thus bears "a heavy burden" to plead sufficient grounds for relief. (*Duvall*, *supra*, at p. 474; see also *In re Visciotti* (1996) 14 Cal.4th 325, 351.)

A petitioner must "state fully and with particularity the facts on which relief is sought" and "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (*Duvall*, *supra*, 9 Cal.4th at p. 474.) A reviewing court, "in determining whether a petition states a prima facie case for relief, must ask, whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." (*Id.* at pp. 474-475.) The petition must be judged on the factual allegations contained within it. (*Clark*, *supra*, 5 Cal.4th at p. 781, fn. 16.) New factual allegations, claims, or theories in a traverse or informal reply brief are not entitled to consideration. (*Reno*, *supra*, 55 Cal.4th at p. 458, fn. 15.) And courts will not assume all factual allegations to be true. (*See*, *e.g.*, *In re Swain* (1949) 34 Cal.2d 300, 302-304.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief" (*Duvall*, *supra*, 9 Cal.4th at p. 474, internal quotation marks and citation omitted), and the entire record of the case is considered when passing on the question of whether the petition alleges a prima facie case of constitutional defect (*Clark*, *supra*, at p. 770). If no prima facie case for relief is

stated, the reviewing court must summarily deny the petition. (*In re Robbins* (1998) 18 Cal.4th 770, 798, fn. 20.)

2. Petitioner fails to make a prima facie showing that the Attorney General had an obligation to provide additional evidence to confirm information that was already known to petitioner and that was not material or necessary for resolution of her allegations

At the outset, this Court has outlined that "[t]he People need not *prove* the habeas corpus petitioner's factual allegations are wrong." (*People v. Duvall* (1995) 9 Cal.4th 464, 483, original italics.) Instead, respondent "must either admit the factual allegations set forth in the habeas petition or allege additional facts that contradict those allegations." (*Ibid*.) Pursuant to this Court's holding in *Duvall*, "courts evaluating the return and traverse should endeavor to determine whether there are facts legitimately in dispute that may require holding an evidentiary hearing." (*Id*. at p. 485.)

In the case at bar, petitioner alleged that Brittneeh and Sade suffered prior juvenile adjudications and provided the Court of Appeal with a copy of a prior Court of Appeal opinion in which two of the nine defendants were identified simply as "Brit. W." and "Sade W." (B301638 Pet. Exh. B, Attachment B.) Thus, she obviously was aware of the prior adjudications. And, contrary to petitioner's representation, respondent did not simply offer "a conclusory general denial of all of petitioner's allegations." (Pet. at p. 27.) Rather, respondent specifically alleged that no suppression occurred and that any evidence of Brittneeh's and Sade's prior juvenile adjudications was not material. (Return at p. 15-20.) In so doing, respondent briefly noted that petitioner's

evidence did not conclusively identify Brittneeh and Sade from petitioner's case as the defendants in the cited opinion. (Return at p. 15.) Respondent nevertheless addressed the merits of petitioner's arguments *under the assumption they were the minors who suffered those prior adjudications*. (Return at pp. 15-20.) Thus, there was no need or duty for respondent to search for confirmatory information and nothing was concealed.

Indeed, had the Court of Appeal determined that evidence confirming Brittneeh and Sade were the minors who suffered those prior adjudications was an important or controlling fact, it could have held an evidentiary hearing, during which petitioner and/or respondent could have provided more relevant evidence. But, even at this stage, this Court has held that it is the petitioner who bears the burden of proof. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 483 ["if an evidentiary hearing is held, it is the petitioner who bears the burden of proof"].) The Court of Appeal apparently found no need to hold an evidentiary hearing in order to adjudicate petitioner's claim because it also presumed Brittneeh and Sade were the minors named in petitioner's cited opinion and ultimately found that the evidence was not material. (B294747 Opn. at p. 11, fn. 1.) Thus, a procedure existed for additional evidence to be brought forth if necessary for resolution of the claim, but it was not needed here.

Even without an evidentiary hearing, petitioner had other opportunities to present additional evidence on the issue. Following respondent's pleadings, she could have filed a reply in which she presented additional evidence of Sade's and Brittneeh's

prior adjudications. She did not. If the necessary evidence to prove Brittneeh's and Sade's prior juvenile adjudications was not available to petitioner during her habeas corpus proceedings, she was required to explain that fact and seek discovery. (See *In re Avena* (1996) 12 Cal.4th 694, 730 [holding that "discovery may be available in a habeas corpus proceeding if, as here, an order to show cause has issued"].)

Petitioner has not stated a prima facie case that California's postconviction process has flaws so "fundamental" that she was denied her constitutional rights and the ability to develop and present her claims. (See *In re Reno* (2012) 55 Cal.4th 428, 456-457 ["vis-a-vis other states, we authorize more money to pay postconviction counsel, authorize more money for postconviction investigation, allow counsel to file habeas corpus petitions containing more pages, and permit more time following conviction to file a petition for what is, after all, a request for collateral relief" (fns. omitted)].)

Additionally, respondent fulfilled its ethical obligations in petitioner's case. Distinct from *Brady*, a prosecutor has an ethical obligation to turn over exculpatory evidence that they knowingly possess. As noted in this Court's order requesting an answer, under the American Bar Association Rules of Professional Conduct rule 3.8(d), "[t]he prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the

tribunal all unprivileged mitigating information known to the prosecutor." This rule, like *Brady*, appears to apply to a prosecutor's duties in a pre-conviction trial setting. (See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op.09-454 (effective Jan. 1, 2010) (hereinafter ABA Formal Opinion 09-454), available at http://www.abanet.org/cpr/09-454.pdf, *1 [discussing, inter alia, that evidence must be disclosed so that defense counsel can "make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation"].) However, a prosecutor's ethical duties continue after a conviction. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261 [at trial, the duty "is enforced by the requirements of due process, but [even] after a conviction the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of . . . information that casts doubt upon the correctness of the conviction"], superseded by statute as stated in *Satele v. Superior Court* (2019) 7 Cal.5th 852, 857.) And, as noted, in a return to a habeas corpus petition, respondent must either admit factual allegations or allege additional facts that contradict them. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 483.) Respondent therefore assumes the same principle applies postconviction and that the Attorney General is ethically required to disclose known exculpatory information relevant to the veracity of a petitioner's factual allegations.

As explained above, petitioner clearly knew about Britneeh's and Sade's purported prior juvenile adjudications here and attached some evidence of that, i.e., the Court of Appeal

opinion referencing the prior juvenile offenses by "Brit W." and "Sade W.", to her Court of Appeal petition. Respondent also presented petitioner and the court with evidence reflecting that, prior to trial, the trial prosecutor had told defense counsel about Sade's arrest for offenses that appear to match those noted in petitioner's exhibit. (B301638 Return, Exhs. 1 & 2.) Further evidence confirming Brittneeh and Sade were the minors who suffered those prior adjudications was unnecessary. Respondent argued the merits of petitioner's claims under the assumption that Brittneeh and Sade had, in fact, suffered the prior juvenile adjudications alleged. Indeed, the Court of Appeal analyzed and decided petitioner's claims under the same assumption. The Attorney General was not required to search for evidence confirming a fact not ultimately in dispute and already known by petitioner. Contrary to the CAJC's letter, nothing was concealed and respondent did, in fact, argue the case assuming Brittneeh and Sade suffered those prior adjudications. (Compare CACJ letter at p. 5, with Return at pp. 15-20.) The information simply was not material. (See B294747 Opn. at 13-14.)

3. Even if *Brady* applied to postconviction proceedings, petitioner fails to make a prima facie case for relief

Even assuming *Brady* applied to postconviction proceedings, petitioner's argument still fails. First, as noted, petitioner cannot show that the Attorney General failed to provide evidence of Brittneeh's and Sade's prior juvenile adjudications. This Court has held that, "[a]lthough the prosecution may not withhold favorable and material evidence

from the defense, neither does it have the duty to conduct the defendant's investigation for him." (*People v. Salazar*, *supra*, 35 Cal.4th at pp. 1048-1049.) "If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence." (*Id.* at p. 1049.) Thus, evidence is not suppressed unless petitioner was actually unaware of it and could not have discovered it through reasonable diligence. (See *People v. Morrison* (2004) 34 Cal.4th 698, 715.)

Here, petitioner provided evidence to the Court of Appeal suggesting that Sade and Brittneeh suffered the prior juvenile adjudications alleged. In addition, respondent provided the court and petitioner with evidence reflecting that, prior to trial, the trial prosecutor had told defense counsel about Sade's arrest for offenses that appear to match those noted in petitioner's exhibit. (B301638 Return, Exh. 1 & 2.) Petitioner, therefore, cannot say she was unaware that Sade and Brittneeh suffered prior juvenile adjudications. Further, as noted, procedures existed through which petitioner could have sought more evidence on the point. In other words, such evidence was obtainable through reasonable diligence.

Second, the evidence in question—confirmation from the Attorney General that Sade and Brittneeh suffered the prior juvenile adjudications—was not material because there was no reasonable probability its disclosure would have altered the

result of her habeas corpus proceedings. (See *Banks v. Dretke*, *supra*, 540 U.S. at p. 699.) As previously established, the Court of Appeal adjudicated petitioner's *Brady* claims *under the assumption that Brittneeh and Sade had suffered the prior juvenile adjudications that petitioner alleged*. (See B294747 Opn. at p. 11, fn. 1.) Moreover, for the purposes of the habeas corpus proceedings, the Court of Appeal assumed as true important additional factors that petitioner had not sufficiently established—that the prosecutor had a duty to disclose more information about the 2006 adjudications and "that had [petitioner] known of the 2006 adjudications, she would have been able to get them before the jury." (B294747 Opn. at p. 13.) Any confirmation provided by the Attorney General that Brittneeh and Sade had suffered the prior juvenile adjudications could not have affected the court's analysis of petitioner's *Brady* claims.

As petitioner fails to make a prima facie showing of error and fails to raise any important question of law or demonstrate any conflict in the law, review should be denied.

III. REVIEW SHOULD BE DENIED BECAUSE THE COURT OF APPEAL PROPERLY REJECTED PETITIONER'S CLAIM IN GROUND FOUR THAT HER TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

In Ground Four, petitioner claims that the Court of Appeal erred in implicitly rejecting her claim that she was denied her right to effective counsel because counsel did not discover evidence of Brittneeh's and Sade's alleged prior juvenile adjudications. (Pet. at 29-31.) But review is not warranted because the Court of Appeal's finding that it was not reasonably

probable petitioner would have received a different result at trial had the evidence of the adjudications been admitted also properly foreclosed petitioner's claim that her counsel was constitutionally ineffective for failing to discover the evidence.

A criminal defendant has a federal and state constitutional right to the effective assistance of counsel. To establish a claim of incompetence of counsel, a defendant must establish *both* that counsel's representation fell below an objective standard of reasonableness *and* that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; see U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) To prevail, a defendant must establish incompetence of counsel by a preponderance of evidence. (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 218.) Failure on either prong defeats the claim. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Defense counsel has a duty to make reasonable investigations or to make a reasonable decision not to do so. The reasonableness of a decision not to investigate must be assessed in light of all the circumstances, applying a heavy measure of deference to counsel's judgments. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691.)

Here, trial counsel was not constitutionally ineffective for failing to discover the prior adjudication evidence because petitioner failed to establish that she was prejudiced by the

alleged shortcoming. As previously established, it is speculative that defense counsel would have been able to introduce the prior adjudication under Evidence Code section 1103, and the evidence of any prior adjudication that occurred when Brittneeh was a minor, approximately 12 years prior to the instant case, would have had little probative value in relation to petitioner's claim of self-defense. This is especially true when considering that the jury had already heard about Brittneeh's prior battery against petitioner and the circumstances of the instant case. As the Court of Appeal found, it is not reasonably probable that information about a separate offense that was unrelated to petitioner and Brittneeh's dispute and over 10 years old would have caused the jury to view the case such that a different result was reasonably probable. (B294747 Opn. at p. 13.) And while petitioner contends defense counsel could have used the prior juvenile adjudication to impeach Sade, Sade's testimony about the events at the gas station was independently corroborated by other witnesses. (B294747 Opn. at pp. 13-14.) Accordingly, petitioner was not prejudiced by her attorney's alleged failure to discover the existence of any prior adjudication. Her claim of ineffective assistance of counsel must fail. (See *United States v. Agurs*, *supra*, 427 U.S. at p. 102, fn. 5 [finding defense counsel was not ineffective for failing to obtain victim's prior criminal record].)

IV. REVIEW SHOULD BE DENIED BECAUSE PETITIONER FAILS TO ESTABLISH A PRIMA FACIE CASE IN GROUND FIVE THAT SHE IS ENTITLED TO HABEAS CORPUS RELIEF BASED ON CUMULATIVE ERROR

In Ground Five, petitioner claims that she is entitled to habeas corpus relief based on the cumulative effect of the alleged errors discussed in the previous arguments. (Pet. at 32-33.) The claim is without merit because the foregoing arguments demonstrate "there was no error . . . to cumulate" (*People v. Phillips* (2000) 22 Cal.4th 226, 244), and there was no prejudice from any alleged error (*People v. Jenkins* (2000) 22 Cal.4th 900, 1056 ["trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred"]; accord, *People v. Sapp* (2003) 31 Cal.4th 240, 287; *People v. Jones* (2003) 29 Cal.4th 1229, 1268). No habeas corpus relief is warranted.

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CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be denied.

Respectfully submitted,

MATTHEW RODRIQUEZ
Acting Attorney General of California
LANCE E. WINTERS
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March 29, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER TO PETITION FOR REVIEW** uses a 13 point Century Schoolbook font and contains 6,315 words.

MATTHEW RODRIQUEZ
Acting Attorney General of California

PAUL S. THIES
Deputy Attorney General
Attorneys for Respondent

March 29, 2021

LA2021601143

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *In re Jasmine Jenkins*
No.: S267391

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 collecting and processing electronic and physical correspondence. 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 with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On March 29, 2021, I electronically served the attached ANSWER TO PETITION FOR REVIEW, by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 29, 2021, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Sherri R. Carter
Clerk of the Court
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
For delivery to Hon. Lisa B. Lench, Judge

On March 29, 2021, I served the attached ANSWER TO PETITION FOR REVIEW by transmitting a true copy via electronic mail as follows:

Lisa Kassabian
Deputy District Attorney

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 29, 2021, at Los Angeles, California.

A. D. Kartikarini	*/s/ A. D. Kartikarini*
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **JENKINS (JASMINE) ON H.C.**
Case Number: **S267391**
Lower Court Case Number: **B301638**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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3/29/2021
Date

/s/Anastasia Kartikarini
Signature

Thies, Paul (305084)
Last Name, First Name (PNum)

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