ORIGINAL

IN THE SUPREME COURT OF CALIFORNIA

LEE MAX BARNETT,	No. S165522
Petitioner,	Court of Appeal Case No. C051311
v.	
THE SUPERIOR COURT OF BUTTE COUNTY,	Butte County Superior Court Case No. 91850 (The Honorable William R. Patrick)
Respondent;	
THE PEOPLE OF THE STATE OF CALIFORNIA,	Related California Supreme Court Case Nos. S008113, S059885, S096831, S120570 & S150229
Real Party in Interest.	

PETITIONER BARNETT'S CROSS-REPLY BRIEF

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TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF CALIFORNIA SUPREME COURT:

I. Introduction

The Attorney General argues that the Court of Appeal correctly decided that petitioners must establish that the evidence they seek in discovery is material before they are entitled to discover it. Reply Brief at 16-25 (hereinafter "Reply"). That argument is consistent with the argument he made in his opening brief, that petitioners must establish that the discovery they seek actually exists before they are entitled to discover it. The common thread is that the Attorney General refuses to accept this Court's decision in *Steele*.[1]

The Attorney General filed his reply brief on February 20, 2009. On February 25, 2009, this Court granted Mr. Barnett's application for leave to file a reply to the issue that he presented in his petition for review, which is argument III in the Attorney General's reply.

II. Argument

A. Adopting the Attorney General's Arguments Would Eviscerate the Postconviction Discovery Statute

The Attorney General's briefing makes clear that he is dissatisfied with petitioners receiving *any* discovery pursuant to Penal Code section 1054.9.[2] His briefing on the materiality issue, as well as on the two other issues the parties have briefed, demonstrates that the Attorney General wants this Court to recede from its *Steele* opinion and adopt the interpretation of §1054.9 that the State proposed in that litigation, which

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[1] *In re Steele*, 32 Cal.4th 682 (2004).

[2] All statutory references are to the Penal Code unless otherwise specified.

this Court rejected. He argues that the Legislature's purpose was to create a file reconstruction statute, so that the prosecutor may not be required to provide any materials that the petitioner cannot establish had been provided to trial counsel and subsequently lost. Opening Brief on the Merits (hereinafter "OBM") at 26. The Attorney General's arguments regarding a petitioner's right to discover *Brady*[3] material, Reply 16-25, must be viewed through this lens. In this same case, in the lower court, the Attorney General admitted what he appears loathe to accept: "In *Steele*, the California Supreme Court [] rejected respondent's argument that [] §1054.9 was no more than a 'file reconstruction statute' and not the full blown discovery statute that was created by the court in *Steele*." Real Party in Interest's Supplemental Brief at 9, filed April 21, 2008, No. C051311. The Attorney General called this Court's interpretation of §1054.9 in *Steele* an "erroneous expansion" of the statute. *Id.* at 13. The fact remains that this Court rejected the Attorney General's arguments and held that petitioners are entitled to request in discovery anything they would have been entitled to at the time of trial.

The State's arguments must also be viewed against the backdrop of the Legislature's actions in enacting §1054.9. This Court has already determined what the Legislature likely had in mind when it enacted the postconviction discovery statute. The Legislature intended that petitioners use §1054.9 to seek discovery before they file a petition to assist in stating a prima facie case for relief. *Steele*, 32 Cal.4th at 691. While petitioners are not entitled to "free-floating" discovery "asking for virtually anything the prosecution possesses," *id.* at 695, this Court concluded that the Legislature intended for petitioners to have access to anything they would have been

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[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

entitled to at the time of trial. As much as the Attorney General may disagree with the Legislature's decision,[4] that is what Mr. Barnett is entitled to.

B. The Requests At Issue Were Made Under State Law As Well As *Brady*; The Lower Court and Respondent Err To The Extent They Overlook Mr. Barnett's State-Law Arguments

Mr. Barnett did not rely exclusively on *Brady* to justify his requests for impeachment material. The Attorney General is in error when he asserts the contrary. Reply 17, 21 & nn. 12, 13. The Court of Appeal likewise erred in analyzing these requests solely under a *Brady* theory, while

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[4] The Attorney General's citation to the now-withdrawn concurring opinion of Justice Sims demonstrates his continued dissatisfaction with this Court's decision in *Steele*. The Attorney General cited Justice Sims for the proposition that the statute injects further delay into an already protracted process. OBM 45. The Attorney General expressed his agreement with Justice Sims and his approval of Justice Sims's choice of words: "Associate Justice Sims' concurring opinion in this court's previous opinion in this case eloquently explains the interests and costs involved with this particular piece of legislation." Real Party in Interest's Supplemental Brief at 2 n.2, No. C051311. Justice Sims was criticizing the Legislature's enactment of §1054.9 and this Court's opinion in *Steele*: "Something really must be done about the current state of death penalty litigation, and it is not to provide defendants (who have had the death penalty imposed by a jury) with more post-conviction discovery." OBM, attachment 1 at 3. The Attorney General's disapproval of *Steele* notwithstanding, it is the law. This argument is inconsistent with the rule that, "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." *Superior Court v. County of Mendocino*, 13 Cal.4th 45, 53 (1996). And the views of a person strongly opposed to the existence of a statute are unlikely to be a reliable resource for a court attempting to interpret a statute in light of its apparent purpose.

ignoring the state-law grounds that Mr. Barnett also alleged.

A review of what Mr. Barnett requested would be helpful to the analysis. Mr. Barnett requested information about the State's witnesses who testified against him, arguing that everything he requested could have been used to impeach the State's witnesses. At the time of trial, Mr. Barnett had requested discovery of information about the State's witnesses. The trial court had granted some, but, as the Court of Appeal noted, denied his request for information about pending charges, current parole or probation status, arrests, criminal charges, ongoing criminal investigations or action as to anyone other than Mr. Barnett and his co-defendant (request #17). *Barnett v. Superior Court*, 164 Cal.App.4th 18, 48 n.14 (2008). In his §1054.9 motion, Mr. Barnett also requested discovery of other information he characterized as impeachment material, including (but not limited to) any information indicating that any of the State's witnesses had lied to law enforcement, were engaged in ongoing criminal activities, or had a bias against Mr. Barnett or for the prosecution or a motive to lie. Exh. 1, Vol. I at 29-30. Mr. Barnett had not requested this information at the time of trial.[5]

As justification, Mr. Barnett relied on *Brady* and cases interpreting *Brady*. But he also argued that California law, at the time of trial, permitted him to seek discovery to investigate the State's case and prepare a defense. *See* Exh. 38, Vol. 32 at 6244-45. A criminal defendant was entitled to discovery by demonstrating that the requested information would facilitate the ascertainment of facts and a fair trial. *Id.* at 6244, citing *Pitchess v.*

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[5] The trial court's denial of request # 17 of Mr. Barnett's trial discovery motion, therefore, did not encompass this information. *See* Exh. 1, Vol I at 56.

Superior Court, 11 Cal.3d 531, 536 (1974). "The court's duty in adjudicating a defendant's discovery request must be discharged with respect for the 'fundamental concern that an accused be provided with a maximum of information that may illumine his case.'" *Id.* at 6244-45, citing *Ballard v. Superior Court*, 64 Cal.2d 159, 167 (1966). Part of preparing his case, he argued, was preparing to impeach the State's witnesses. "The preparation of a defense necessarily includes investigation into the credibility of the prosecution's witnesses." Exh. 44, Vol. 32 at 6451.

> [T]he state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of a witness who has not been as rigorously cross-examined and as thoroughly impeached as the information available will permit.

Exh. 44, Vol. 32 at 6452, citing *People v. Riser*, 47 Cal.2d 566, 586, 305 (1956).[6] Discovery could be used to develop impeachment evidence of the State's witnesses. Exh. 38, Vol. 31 at 6245, citing *People v. Memro*, 38 Cal.3d 658, 677 (1985). This introductory section, entitled "Mr. Barnett's Right to Discovery at the Time of Trial," discussed California discovery law exclusively, and did not include any *Brady* cases. At the end of the section, counsel wrote, "With these principles in mind, we turn to Mr. Barnett's specific discovery requests." Exh. 38, Vol. 31 at 6245.

Mr. Barnett repeated these citations to California discovery law in his briefing in the Court of Appeal. Petition for Writ of Mandate at 12-14 (hereinafter "Petition"). Mr. Barnett could not have made it more clear that

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[6] This argument is found in the section of Mr. Barnett's brief regarding his request for home addresses of trial witnesses, which is not at issue before the Court.

he was relying on California discovery law as well as *Brady*. If this Court agrees that petitioners must establish the materiality of evidence they have never seen in order to gain access to such evidence on a *Brady* theory, then Mr. Barnett is nonetheless entitled to discovery of the evidence he seeks without showing materiality because he articulated how each category of evidence he sought could have been used to impeach the State's witnesses, making it subject to discovery under California law.

The Attorney General mistakenly asserts that Mr. Barnett relied exclusively on *Brady* to justify his discovery requests. Reply 17, 21, nn. 12, 13. Mr. Barnett relied exclusively on *Brady* to justify one of his discovery requests, for criminal histories of trial witnesses which, as the Court of Appeal correctly noted, the trial court had denied at the time of trial. *Barnett*, 164 Cal.App.4th at 48 n. 14. As the foregoing discussion demonstrates, Mr. Barnett relied on both *Brady* and California law governing discovery in criminal trials as it existed in 1988 to justify his entitlement to the other categories of discovery he sought. The Court of Appeals erred to the extent that it analyzed Mr. Barnett's requests for discovery of information that could be used to impeach the State's witnesses exclusively under a *Brady* analysis.[7] A large part of the Attorney General's and the Court of Appeal's analysis collapses when the state-law portion of Mr. Barnett's arguments is considered."

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[7] The Court of Appeal understood that Mr. Barnett was relying on both *Brady* and California discovery law when it granted his petition and ordered the superior court to modify its discovery order by granting Mr. Barnett discovery of any records of anyone conveying to law enforcement that there was "street talk" that Mr. Barnett was innocent. The court analyzed Mr. Barnett's request under both *Brady* and California discovery law. *Barnett*, 164 Cal.App.4th at 78-80.

C. The State's Brief Failed to Address, Much Less Rebut, Many of Mr. Barnett's Arguments

The Attorney General recounted Mr. Barnett's objections to the lower court's decision – that in requiring petitioners to prove materiality of the evidence they seek, the decision fails to acknowledge that postconviction discovery is more akin to pre-trial discovery, in that the petitioner does not know what evidence the prosecutor possesses but has not disclosed, than it is like drafting a postconviction *Brady* claim, where the petitioner has discovered the undisclosed evidence himself. Reply 16-17. The Attorney General never rebutted this argument, and never explained why Mr. Barnett's complaint is invalid. The Attorney General's response is that, "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." Reply 17. The State never comes to grips with the points Mr. Barnett made in his answer brief at 2-9 (hereinafter "AB") about why requiring the Petitioner to establish materiality is unworkable. The entire argument, Reply 16-19, is essentially that there are two prongs to a *Brady* claim, and petitioners must meet both of them, without addressing any of the practical problems of this approach that Mr. Barnett raised in his brief.

In support of his argument that petitioners should not have to prove materiality of evidence they seek in postconviction discovery, Mr. Barnett cited to *Curl v. Superior Court*, 140 Cal.App.4th 310, 324 (2006), where the Court of Appeal wrote:

> The reality is also that the prosecution almost always knows what evidence is exculpatory in nature. Fundamentally, if the prosecution has failed in its *Brady* duty, the defense has no way of knowing this in a postconviction proceeding unless it asks for all relevant material and unless the prosecution

> undertakes an evaluation of its file to determine if all material subject to *Brady* disclosure was turned over.

AB 5. The Court in *Curl* was discussing the precise context at issue here -- postconviction discovery. There is no need to draw inferences or analogies from the reasoning. Yet the Attorney General declined to explain why the Court of Appeal in *Curl* was wrong, or even to cite to *Curl* in his brief.

The State also ignored Mr. Barnett's argument that the lower court's opinion would allow the prosecutor, either by design or by inertia, to withhold exculpatory evidence because, if the petitioner failed to guess its existence and explain its materiality, the prosecutor would not search State files to determine whether such evidence actually exists. AB 9. Nor did the State discuss the case law that Mr. Barnett cited establishing that the prosecutor's duty to disclose exculpatory information continues after the trial. AB 9. The State did nothing to alleviate concerns that the Legislature's intent in enacting §1054.9, and this Court's interpretation in *Steele*, will be easily thwarted. It would not even require a negligent or corrupt prosecutor to frustrate the statute. Capital postconviction cases last for years. It is common for different prosecutors to handle the §1054.9 motion than those who tried the case years earlier. Unless the prosecutor who is unfamiliar with the case files is required to look through the files for evidence that she is obligated to disclose pursuant to *People v. Gonzalez*, 51 Cal.3d 1179, 1260-61 (1990) (prosecution's ongoing obligation to disclose exculpatory information), the necessary disclosure is unlikely to happen. The Attorney General had no response to this point.

The Attorney General failed to address in any meaningful way Mr. Barnett's argument that the system created by the Court of Appeal is unworkable. AB 15-18. The Attorney General had no comment on the argument that prosecutors have been found to have suppressed favorable,

material evidence that no one could have imagined. AB 15-16, citing *Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005); *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc). The Attorney General did not even attempt to explain how a petitioner could possibly anticipate all the ways in which a witness might be impeached. Instead, the Attorney General advised, "Rather than seek broad categories of materials, a petitioner's request should focus on specific information that a court can evaluate for materiality." Reply 23. At the risk of being redundant, if the petitioner did not know that the witness had psychological problems, but that the witness's lawyer had agreed with the prosecutor to defer a psychological evaluation until after the witness testified against the petitioner, as happened in *Silva*, how would the petitioner know to focus on that information? The Attorney General did not explain.

D. Requiring Petitioners to Establish Materiality in the Postconviction Discovery Context is Contrary to *Brady* and *Steele*

The State failed to rebut Mr. Barnett's point that the United States Supreme Court has recognized that "[T]here is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge." *United States v. Agurs*, 427 U.S. 97, 108 (1976), cited at AB 3. The State also failed to acknowledge that the Court assigned responsibility for determining what evidence is material to the prosecutor, because it is only the prosecutor who knows what the undisclosed evidence is. AB at 3-5, citing *Kyles v. Whitley*, 514 U.S. 437-40 (1995). Rather, the State focused on the strawman argument that *Brady* did not establish constitutionally mandated procedures to conducting discovery. Reply 19. Mr. Barnett never argued that it did. Mr. Barnett's argument is that *Brady*, *Agurs*, and *Kyles* make it clear that, when the prosecutor knows what

evidence he has and the petitioner does not, the Supreme Court requires the prosecutor, not the petitioner, to determine what evidence is material.

The State argued Mr. Barnett's discovery requests – for specific types of impeachment information regarding the State's witnesses – were for evidence that was simply favorable, but not material, and thus asked for more than §1054.9 allows. Reply 20. What is at issue here is a statute, passed by the Legislature, granting discovery to eligible petitioners. This Court held that one category of evidence petitioners were entitled to discover pursuant to §1054.9 was *Brady* material. *Steele*, 32 Cal.4th at 695. When this Court referred to *Brady*, it was in the context of explaining that §1054.9 allows petitioners to request materials that the prosecution should have provided at the time of trial. "Additionally, 'The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant' that is 'both favorable to the defendant and material on either guilt or punishment.'" *Id.*, citing *In re Sassounian*, 9 Cal.4th 535, 543 (1995); *Brady*, 373 U.S. 83. In the postconviction discovery context, this Court said that the prosecution has the duty to disclose favorable, material evidence. *Brady* indeed establishes a remedy for non-disclosure that is discovered after trial, *see* Reply 19, but this Court has adopted the *Brady* language to impose an obligation on the prosecutor to respond to a §1054.9 discovery motion by disclosing evidence "that is both favorable to the defendant and material on either guilt or punishment." Mr. Barnett requested exactly what this Court in *Steele* said §1054.9 allows.

Rather than accept that *Kyles* places responsibility on the prosecutor for disclosing evidence pre-trial, the Attorney General characterized the teaching of *Kyles* as "a prosecutor who does not want a conviction overturned must be mindful of *Brady* obligations before trial." Reply 19-20, citing *Kyles*, 514 U.S. at 437-40. This statement, along with the

Attorney General's characterization of *Brady* as a "remedy once a non-disclosure has been discovered," Reply 19, demonstrates that the Attorney General wishes to cut *Brady* loose from its moorings to the due process clause. *Brady* is grounded in the government's obligation to ensure fair trials. *Kyles*, 514 U.S. at 438. The United States Supreme Court held that due process requires prosecutors to give favorable, material evidence to the defense in order to further the truth-seeking function of the trial. "Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result." *Id.* at 439.

The *Brady* doctrine is not analogous to a remedy for a discovery dispute between civil litigants. The due process clause demands such disclosures from the prosecutor because the government is not an ordinary litigant. "Such disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Kyles*, 514 U.S. at 439, citing *Berger v. United States*, 295 U.S. 78, 88 (1935). The Attorney General is unwilling to acknowledge that the constitution places demands on the prosecutor prior to the trial to determine what is material, demands that have nothing to do with ensuring that a conviction is not overturned, Reply 19, but rather with ensuring that "criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth." *Kyles*, 514 U.S. at 440, citing *Alderman v. United States*, 394 U.S. 165, 175 (1969). The prosecutor's obligation continues after the trial, and informs how this Court must interpret §1054.9.

Mr. Barnett argued that the lower court revived the *Gonzalez*

standard for discovery in habeas corpus proceedings by requiring petitioners to prove that the State violated *Brady* by withholding favorable, material evidence in order to be entitled to discovery to prove a claim that the State violated *Brady*. AB 9-11. The Attorney General responded: to be discoverable under *Brady*, the requested materials must be both favorable and material. If both prongs are not met, the materials are not discoverable under *Brady*. Reply 21. Both parties agree: By the Court of Appeal's view, to obtain discovery to prove a *Brady* claim, the petitioner must first prove his *Brady* claim, which is what he had to do under *Gonzalez*. The Attorney General disagreed only with the import of what the lower court held. Mr. Barnett pled, "There is no substantive difference between what a petitioner had to plead under *Gonzalez* and what the petitioner must plead under *Barnett*." AB 11. But that cannot be the correct interpretation of §1054.9, because this Court recognized in *Steele* that §1054.9 served little purpose if it did not, at a minimum, abrogate the rule of *Gonzalez*. The Attorney General did not respond to this point.

E. The Lower Court's Decision Denies Petitioners' Due Process Rights

The State misapprehended the argument that the lower court's decision violates due process. Due process is violated because the petitioner is required to explain materiality when he has no notice of the withheld evidence and therefore no meaningful opportunity to be heard in support of his discovery motion. AB 6, 9. The State's arguments in response focus on arguments Mr. Barnett did not make. Reply 24. Mr. Barnett did not argue that he has a due process right to collateral review or to pre-petition discovery or to counsel to prepare his state habeas corpus

petition,[8] none of which are at issue here. At issue here, the legislature has created a statutory right to postconviction discovery. That right may not be arbitrarily denied by procedures that deprive the petitioner of meaningful notice and a meaningful opportunity to be heard in support of his motion for postconviction discovery. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). There is no meaningful notice or opportunity to be heard if the petitioner must guess about the existence of the evidence in the prosecutor's files.

F. The Lower Court's Decision in *Barnett* conflicts with *Maury*[9]

In *Maury*, the Court of Appeal rejected the Attorney General's argument that petitioners must prove that the discovery materials they seek actually exist. Mr. Barnett argued that the Court of Appeal's decision allocating the burden of proving *Brady* materiality to the petitioner conflicted with its decision in *Maury*. AB 12-14.

The Attorney General's response is illustrative of the problem with the lower court's opinion. "Barnett does not have to know what is in the prosecution's possession to articulate why requested materials would have been material . . . ." Reply 22. The lower court's formulation forces Mr. Barnett to ask for materials, "with sufficient particularity," when he does not know what the prosecution has, and he has to establish that those materials are favorable and material when, again, he does not know what the materials are. *Barnett*, 164 Cal.App.4th at 51. The Attorney General

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[8] However, by statute or court rule, California provides for all of those things in capital cases.

[9] *People v. Superior Court (Maury)*, 145 Cal.App.4th 473 (2006).

never comes to grips with this point, except to say that petitioner should be able to argue that evidence (whatever it may be) is material because the trial has already taken place. Reply 22. In support, the Attorney General cites to *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982). There, the defendant complained that the United States deported percipient witnesses before the defendant had an opportunity to interview them. The Court found no denial of compulsory process sufficient to violate the Sixth Amendment. The defendant and the witnesses were all present during the commission of the offense, wherein the defendant was charged with knowing transportation of an illegal alien. "No one knows better than [the defendant] what the deported witnesses actually said to him, or in his presence that might bear upon whether he knew that Romero-Morales was an illegal alien . . . ." *Id.* at 871. In such circumstances, the defendant could have made a "plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense," *id.* at 873, if indeed the witnesses had said or done anything in the defendant's presence that was favorable to him. In addition, the defendant must show that "there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* at 874." This standard is less onerous than the *Brady* materiality standard, which requires that petitioner establish a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different. *Barnett*, 164 Cal.App.4th at 48, citing *In re Sassounian*, 9 Cal.4th 535, 543-44 (1995).

Mr. Barnett's case is different. *Valenzuela-Bernal*, like *Brady*, is not a discovery case. It is a case establishing the burden of a defendant seeking to overturn a conviction based on the prosecution's actions in denying him access to witnesses for his trial. It is not a good fit in the postconviction discovery context just as *Brady* is not a good fit in the postconviction

discovery context. That Mr. Barnett knows the evidence that the prosecution used against him at trial, Reply 22, is not important. What is important, and what Mr. Barnett does not know, is the evidence that the prosecution has and did not disclose at or before the time of his trial.

The Attorney General analogized to federal discovery rules in habeas corpus cases. Reply 22 n.14. The analogy is inapt. Pursuant to Rule 6(a), Rules Governing Habeas Corpus Cases Under Section 2254 in the United States District Courts, both the petitioner and the State must establish good cause for discovery; there is no discovery of right in federal habeas corpus proceedings. There are no comparable provisions in California law governing discovery in habeas corpus proceedings.

The State's citation to *Strickler v. Greene*, 527 U.S. 263, 286 (1999), "Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review," is ironic, because speculate is exactly what the Court of Appeal told Mr. Barnett to do. "If the defendant seeks the discovery of materials under section 1054.9 on the ground he was entitled to them at time of trial because they fell within the prosecution's constitutional duty of disclosure, he must simply describe those materials with sufficient particularity to explain why—assuming they exist—they would have been both favorable and material and thus subject to disclosure." *Barnett*, 164 Cal.App.4th at 51. The lower court directed petitioners to speculate about what might exist and describe it with sufficient particularity to establish that it would have been favorable and material. The Attorney General is comfortable with requests that are "wholly speculative and not based on any facts." Reply at 22.

A system that requires petitioners to make requests that are wholly speculative, not based on any facts, yet at the same time demonstrate that

their baseless requests are for evidence that is favorable and material will waste time, exhaust scarce resources, and deny petitioners the discovery the Legislature intended that they have. Interpreting the statute in this way is not sensible. Statutes must be interpreted to avoid absurd results and to fulfill the intent of the Legislature. *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 245 (1978). Mr. Barnett has proposed an interpretation that avoids an absurd result and effectuates the discovery that the Legislature intended.

G. The Court of Appeal's Decision is Contrary to the Language of Section 1054.9

Section 1054.9(b) defined "discovery materials" to which petitioners are entitled as those materials to which the same defendant would have been entitled at the time of trial. Mr. Barnett argues that he should not have to satisfy a higher burden for discovery of *Brady* material in postconviction than he would have had to satisfy at the time of his trial. If at the time of trial, Mr. Barnett had requested the information he seeks here, and justified the request by saying that such information could be used to impeach the State's witnesses, such would have been a plausible justification, requiring disclosure. AB 14-15. The State did not dispute that seeking impeachment evidence is a plausible justification that would have entitled Mr. Barnett to discovery at the time of his trial. Rather, the State asserted generally that Mr. Barnett has not established that the evidence sought is information to which he would have been entitled at trial. Reply 23.

The Attorney General insisted on placing the burden on Mr. Barnett, as the moving party in this postconviction discovery action, to establish his entitlement to *Brady* material. "To accept Barnett's interpretation, then a petitioner would not have to make a specific request at all for *Brady* materials because such request are not required pre-trial. Reply 23. To

accept the Attorney General's interpretation – that Mr. Barnett must make specific requests for *Brady* material and must establish that each item requested is favorable and material, without know what any item is or whether any item exists – is contrary to this Court's holding that the prosecution's *Brady* obligation continues after the trial. In discussing discovery during habeas corpus proceedings, this Court held that the prosecution has a well-established duty to disclose information materially favorable to the defense, even absent a request therefor. "We expect and assume that if the People's lawyers have such information in this or any other case, they will disclose it promptly and fully." *Gonzalez*, 51 Cal.3d at 1260-61.

Mr. Barnett has done all that §1054.9 requires him to do. He has made a good faith effort to obtain discovery from trial counsel. He then described to the prosecutor the kinds of information that he would have used to impeach the State's witnesses, if such evidence existed. Pursuant to *Gonzalez* and *Steele*, the burden is now on the State to produce such evidence.

H. Cases Requiring Petitioners to Show Different Standards of Materiality in Different Contexts are Distinguishable

The Attorney General argued that, in various pre-trial settings, defendants must establish materiality to access certain records. Reply 24. *Ritchie*[10] is distinguishable because, while it discussed pre-trial access to records, the case came to the United States Supreme Court post-trial. The Court decided that Ritchie's due process rights had been violated when the trial court denied him access to governmental files regarding the complainant's (his daughter's) contact with Children and Youth Services

[10] *Pennsylvania v. Ritchie*, 480 U.S. 39 (1989).

(CYS). Ritchie was convicted, and appealed. The Supreme Court affirmed the state court decision reversing Ritchie's conviction. The Court held that Ritchie was entitled to have the trial court examine the CYS file to determine whether it contained any material information. If it did, he would be entitled to a new trial. If it did not, the trial court could reinstate his conviction. *Ritchie*, 480 U.S. at 58. For present purposes, what is important is that Ritchie was not required to demonstrate the materiality of evidence he had never seen. The trial court was charged with examining the file and determining whether any documents therein probably would have changed the outcome of his trial. *Id.* The footnote in *Ritchie* that the Attorney General relied upon cites to *United States v. Bagley*, 473 U.S. 667, 682-683 (1985), for the proposition that the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from nondisclosure that such evidence does not exist. Rather than create a requirement that Ritchie establish materiality, the cited footnote, read together with the text, indicates the Court's direction that the trial court's search of the file would be more fruitful if Ritchie's request was as specific as possible. Reply 24, citing *Ritchie*, 480 U.S. at 58 n.15.

The Attorney General argued that in another area of pre-trial discovery, disclosure of police officer records pursuant to *Pitchess*, the requestor must establish materiality. Reply 24. The showing of materiality that a defendant must make to satisfy *Pitchess* is less onerous than the showing of materiality that a petitioner must make under *Brady*. To show materiality for *Pitchess* records, the defendant must establish a plausible factual foundation for an allegation, put the court on notice that the allegation will be an issue at trial, and articulate a valid theory of how the information sought might be admissible. *City of Santa Cruz v. Municipal*

Court, 49 Cal.3d 74, 86 (1989). This standard is a "relatively low threshold," requiring a logical link between the defense proposed and the pending charge and an explanation of how the discovery would support the proposed defense "or how it would impeach the officer's version of events." *Warrick v. Superior Court*, 35 Cal.4th 1011, 1019, 1021 (2005).

The materiality standard for *Pitchess* is reminiscent of the standard for pre-trial discovery that existed at the time of Mr. Barnett's trial, which required a plausible justification and some degree of specificity. *Barnett*, 164 Cal.App.4th at 72-73, citing *Ballard*, 64 Cal.2d at 167. As discussed in section II.B, *supra*, Mr. Barnett satisfied this showing when he explained that all the evidence he sought could be used to impeach the State's witnesses.

Hurd v. Superior Court, 144 Cal.App.4th 1000 (2006), Reply 24, weighs more in favor of Mr. Barnett's position than the State's. *Hurd* involved a petitioner who sought *Pitchess* records after trial by means of a §1054.9 motion. The Court of Appeal discerned a conflict between §1043, the statute authorizing access to *Pitchess* records, which requires petitioner to show the materiality of the records to the pending litigation, and §1054.9, which requires petitioner to show that he would have been entitled to the materials at the time of trial, but makes no reference to materiality. The court held that the Legislature did not intend §1054.9 to work an implied repeal of §1043's materiality requirement. *Hurd*, 144 Cal.App.4th at 1111. If §1054.9 required petitioners to show materiality, the *Hurd* court would not have needed to harmonize the statutes to account for the absence of a materiality requirement in §1054.9. Even so, the showing required in *Hurd* is the same showing required for a pre-trial *Pitchess* motion, which is a less onerous showing than the *Brady* materiality standard.

The State cited to California law requiring a defendant to show

materiality in order to require the prosecution to disclose the identity of a confidential informant. Reply 24, citing *People v. Gordon*, 50 Cal.3d 1223, 1246 (1990), *overruled on other grounds in People v. Edwards*, 54 Cal.3d 787, 835 (1991). As with the other examples the Attorney General cited, the standard of materiality discussed in *Gordon* is less onerous than *Brady* materiality. A defendant seeking an informant's identity need not show that he has information that has a reasonable probability of changing the outcome of his trial. Rather, he must demonstrate through "some evidence" that there exists "a reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration." *Gordon*, 50 Cal.3d at 1246.

Mr. Barnett addressed *Valenzuela-Bernal*, cited at Reply 24-25, in section II.F, *supra*. All the cases that the Attorney General cited that require some showing of materiality for pre-trial access to records are distinguishable. They all require a showing of materiality that is less onerous than the showing required for *Brady*. As such, they do not defeat Mr. Barnett's argument that the Court of Appeal's requirement that petitioners demonstrate the *Brady* materiality of the evidence they seek is unworkable in the postconviction discovery context.

I. Should this Court Agree that Mr. Barnett Must Plead Materiality, He has Done So

The State argues that Mr. Barnett did not establish how the requested information would have material. Without conceding that such a showing is required, Mr. Barnett satisfied this showing. In the Court of Appeal, Mr. Barnett pled:

> Mr. Barnett was sentenced to death 17 years ago today. The case against him was circumstantial. His defense at trial, and his defense today, is actual innocence. His investigation to date has uncovered witnesses who corroborate his innocence,

> and evidence with which all of the State's important witnesses against him could have been impeached, but were not. . . Mr. Barnett seeks discovery to prove his innocence and to prove that constitutional violations led to his conviction and death sentence.

Petition at 9. In the alternative, Mr. Barnett has satisfied the less onerous pleading standard required for pre-trial discovery as articulated in *Ballard*, in that he has stated a plausible justification for information he described with at least some degree of specificity when he argued that he could have used the information sought to impeach the State's witnesses and if such information was suppressed, it would form the basis of a *Brady* claim.

III. Conclusion

Brady places the burden of determining materiality of favorable evidence on the prosecutor in the first instance. Mr. Barnett established that he is entitled to the discovery he seeks pursuant to the discovery law in effect at the time of his trial, which required him to show plausible justification and at least some degree of specificity. As requested in Mr. Barnett's answer brief, this Court should vacate the decision of the Court of Appeal as to the *Brady* materiality issue, and affirm the decision of the lower court as to the other three issues under review.

Dated: March 12, 2009

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Jennifer M. Corey, counsel for Petitioner Lee Max Barnett, do hereby certify that the foregoing Petitioner Mr. Barnett's Cross-Reply Brief is 6,372 words in length.

Jennifer M. Corey

JENNIFER M. COREY
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PROOF OF SERVICE

I, the undersigned hereby declare:

I am over the age of eighteen years and am not a party to the within-entitled action. My business address is: Office of the Federal Defender, 801 I Street, Third Floor, Sacramento, CA 95814. On March 12, 2009, I served **PETITIONER BARNETT'S CROSS-REPLY BRIEF** by placing said copy in a postage-paid envelope addressed to the person(s) hereinafter listed and by depositing said envelope in the United States Mail

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 12th of March, 2009, at Sacramento, California

H. Diaz

Hermida I. Diaz