

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JOSEF MICHAEL JENSEN,

Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E063774

(Super.Ct.No. RIF079628)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Mac R. Fisher, Judge.

Petition granted.

Josef M. Jensen, in pro. per., and Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Respondent.

Michael A. Hestrin, District Attorney, Alan D. Tate, Deputy District Attorney, for Real Party in Interest.

In this matter we have carefully reviewed the petition, the informal response by real party in interest and petitioner's informal reply, which he filed in propria persona. Having determined that petitioner may have established a right to relief, we appointed counsel for petitioner, set an order to show cause, and requested a return and traverse. Real party in interest opted to stand on its informal response, and petitioner, now acting through counsel, filed a traverse, which we have read and considered. Finally, we engaged in a lively and helpful discussion with counsel at oral argument. After oral argument, we are confirmed in our view that, should the parties fail to reach an agreement, the trial court rather than this appellate court is the proper forum for determining in the first instance: (1) the specific documents to which petitioner must be given "reasonable access"; (2) the details of how that reasonable access must be provided, i.e. through "examination or copying"; and (3) the particular mechanism by which petitioner is to be made to "b[ear] or reimburse" these costs.¹ (Pen. Code,

¹ Despite real party in interest's urging at oral argument that we not "drop this in the trial court's lap," we are mindful of the dangers of issuing an advisory opinion. Fact intensive decisions such as those required here are the province of the trial court precisely because it is in a better position to gather the relevant facts from the parties should they be unable to reach a settlement. Once these facts have "sufficiently congealed," the matter would be ripe for this court to make a definitive decision responsive to the needs of the parties, should that become necessary. (See *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 452, and the cases cited therein.) For these reasons, we entrust the trial court with the task of deciding this controversy in keeping with the criteria set forth herein, in accordance with Penal Code section 1054.9.

§ 1054.9.)² For the reasons we set forth *post*, we conclude a writ must issue to require the trial court to at least partially grant petitioner's request for postconviction discovery.

FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted petitioner of two counts of first degree murder of two separate victims, Kevin James and George Taylor. The trial court sentenced petitioner to 50 years to life, plus life without parole. (*People v. James* (Oct. 23, 2001, E026718) [nonpub. opn.])

In a letter dated February 25, 2015, petitioner wrote his former trial counsel, Bernard J. Schwartz, to ask for help reconstructing the file. On March 4, 2015, petitioner's former counsel, who is now a sitting judge in the Superior Court of Riverside County, issued a minute order indicating he could not produce the file because he no longer possessed it.

In a separate letter, also dated February 25, 2015, petitioner wrote the district attorney's office to request trial court records. In a letter dated March 16, 2015, he wrote to the district attorney's office and clarified that he was requesting postconviction discovery under section 1054.9. On March 25, 2015, the district attorney's office sent a responsive letter indicating it would provide discovery if petitioner specified what materials he wanted, showed their materiality, demonstrated good faith efforts to obtain the records from trial counsel, and proved a willingness and ability to pay for copies. Petitioner responded in a letter dated April 5, 2015, in which he argued he should not

² All further statutory references are to the Penal Code, unless otherwise stated.

have to pay for copies because his defense counsel is the one who destroyed the file and contended he could not pay due to indigence. Petitioner attached to this letter a list of specific items of discovery he was seeking. On April 14, 2015, the district attorney's office wrote petitioner to say there was no provision for waiver of the costs of reproducing the requested discovery.

Next, petitioner filed a writ of mandate in this court challenging the failure by his former trial counsel and the district attorney to provide him copies of the discovery he was seeking. On May 12, 2015, we denied the petition without prejudice to petitioner's ability to file a formal motion under section 1054.9 in the trial court.

Thereafter, petitioner filed a section 1054.9 motion in the trial court. The specific items of discovery he requested were: all briefing (including the information and any pretrial motions) and any transcripts that were filed or generated in the trial court; any "documentation" relating to the direct appeal or to a habeas corpus petition petitioner filed in the California Supreme Court; all documents related to the murder of one William Murphy; documents "prepared by law enforcement or prosecution officials" in relation to the murders of the victims (i.e. the "murder book"); statements to law enforcement by petitioner, either of his codefendants, or an accomplice named Terence Bledsoe; rap sheets for petitioner, his codefendants, Bledsoe, the murder victims, and someone named Greg Robinson; photographs from either crime scene; photographs from the victims' autopsies; tests, reports and other documents memorializing how evidence was collected and analyzed; documents relating to petitioner's incarceration in either county jail or state

prison; and “[a]ll documents maintained by the Riverside and Sacramento County Probation offices.” In addition, petitioner argued that requiring him to pay for copies of discovery would discriminate against him on the basis of poverty because he is indigent.

In response to this filing by petitioner, the trial court issued a minute order on June 2, 2015. It flatly denied the request for postconviction discovery without explanation.

DISCUSSION

In this court, petitioner argues the trial court abused its discretion by denying him discovery. He also repeats the contention that requiring him to pay discovery costs illegally discriminates against him. Because we agree with each premise at least in part, a writ must issue.

A. Petitioner’s entitlement to postconviction discovery

Section 1054.9 allows inmates facing sentences of life or life without the possibility of parole who are prosecuting a writ of habeas corpus or a motion to vacate the judgment to demand the production of post conviction discovery. (§ 1054.9, subd. (a).) If such an inmate makes “a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful,” the trial court “shall” order that “discovery materials” be made available to the inmate. (§ 1054.9, subd. (a).) In essence, “If [a] showing [that defendant sought discovery from his or her trial counsel, but unsuccessfully] is made, the defendant is entitled to discovery.” (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 305, quoting § 1054.9.)

Of course, stating that an inmate is entitled to discovery does not answer what is often the thornier question: to what specific items of discovery is the inmate entitled? In the context of a section 1054.9 request, “ ‘discovery materials’ means materials in the possession of the prosecution and law enforcement authorities to which the . . . defendant would have been entitled at time of trial.” (Pen. Code, § 1054.9, subd. (b).) More specifically, an inmate who can show unsuccessful efforts to obtain items from trial counsel is entitled to receive discovery materials that “either (1) the prosecution did provide at time of trial but have since become lost to the defendant; (2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or (4) the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them.” (*In re Steele* (2004) 32 Cal.4th 682, 697 (*Steele*).) An inmate requesting postconviction discovery under section 1054.9 need only demonstrate a reasonable belief that the items he or she requests actually exist; he or she need not also prove the items’ materiality before being able to receive the discovery. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 899-900 (*Barnett*).)

In this case, petitioner requested several easily identifiable categories of discovery he was seeking, including the “murder book,” statements petitioner and the others involved in the murders made to law enforcement, photographs from the crime scene and related autopsies, and documents showing how evidence was collected and processed. These requests are specific, and they are so tailored to the facts of the case that petitioner has met his threshold burden of demonstrating a reasonable belief that the documents exist. In fact, in its March 25, 2015 letter to petitioner, the district attorney’s office admitted that the police reports about the murders were discoverable. We conclude petitioner is entitled to at least some of the discovery he seeks.

Real party in interest emphasizes that “section 1054.9 . . . does not allow ‘free-floating’ discovery asking for virtually anything the prosecution possesses.” (*Steele, supra*, 32 Cal.4th at p. 695.) It urges us to find the trial court acted properly when denying petitioner’s postconviction discovery request because many of his categories of discovery were impermissibly broad. In so contending, real party in interest appears to rely heavily on *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359 (*Kennedy*). There, the reviewing court held, in part, that, “The trial court was under no obligation to parse [the inmate’s] request and issue a discovery order for some subset of materials encompassed by his request.” (*Id.* at p. 372.)

We note, however, that the California Supreme Court has followed a more forgiving approach on section 1054.9 motions. For example, the inmate in *Barnett* sought 60 different items or categories of documents, some of which were “reasonably

specific, others open ended.” (*Barnett, supra*, 50 Cal.4th at p. 899.) Despite noting that the inmate “was on a proverbial fishing expedition,” (*ibid.*) the California Supreme Court ordered the matter remanded back to the trial court for informal efforts at settling the discovery dispute and, if needed, another trial court order regarding what was to be produced. (*Id.* at p. 906.) In addition, *Barnett*, which held an inmate need not prove materiality in order to be entitled to receive and view discovery under section 1054.9 (*Barnett, supra*, 50 Cal.4th at pp. 899-900), impliedly overruled *Kennedy*, which required the petitioner to explain with specificity how the discovery he requested would assist him in his case (*Kennedy, supra*, 145 Cal.App.4th at pp. 371-372, 374, 377, 379). We therefore decline the invitation to deny the petition simply because petitioner’s discovery request was partly overbroad.

Although we find petitioner is entitled to at least some of the discovery he requested, we do not now attempt to tell the trial court exactly what order it should make. This is because we cannot tell from the minute order denying the motion whether the trial court denied the motion after deciding that none of petitioner’s categories of discovery was appropriate, or whether it issued a flat denial because petitioner failed to pay for copies. If the trial court did not exercise any discretion in determining what specific items of postconviction discovery petitioner is eligible to receive, we may not and will not, at this juncture, tell that court what order it must make. (See fn. 1, *ante.*) We note that the list of materials identified in the traverse petitioner’s counsel filed seems unobjectionable; as explained *ante*, we have found unpersuasive real party in interest’s

objection to the breadth of some of petitioner's requests, and this is the only cogent objection real party in interest made in its response to the items specifically defended in the traverse. Nevertheless, we remand this matter to the trial court so it can exercise discretion regarding which specific items of discovery petitioner is entitled to receive.

B. Payment of costs associated with production of postconviction discovery

Subdivision (d) of section 1054.9 reads: "The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant." Here, the district attorney's office informed petitioner in its March 25, 2015 and April 14, 2015 letters that it would not produce any discovery unless he proved his willingness and ability to pay the costs of same. Petitioner argues that forcing him to pay for copies discriminates against him on the basis of his indigence. We have found no published authority discussing this apparent issue of first impression.

As a threshold matter, real party in interest contends petitioner failed to prove his alleged indigence. (Cf. *Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1245 (*Schaffer*) [writ petition arguing unconstitutionality of requiring criminal defendants to pay costs of copying pretrial discovery denied because the petitioner "did not contend or demonstrate that he was indigent or otherwise entitled to have the county pay for the costs associated with his defense"].) We do not agree that the petitioner in this case failed to demonstrate his inability to pay discovery costs. The declaration attached to petitioner's motion in the trial court referred to petitioner's "indigence," and the reply petitioner filed while representing himself includes a copy of a prison time log indicating

that, in June 2015, petitioner was only compensated for 96 hours of work at the rate of \$0.24 per hour. The trial court is free to further examine whether petitioner has any assets other than his prison paycheck, but we will not deny the writ petition on this ground, alone.

Petitioner asserts that forcing him to pay for copies of postconviction discovery violates his right to equal protection under the law because it places him on different footing from wealthier inmates who can afford to pay for the discovery they request. Real party in interest counters that the state's interest in offsetting its costs through revenue provides a rational basis justifying the allegedly differential treatment. As the record in this court contains no statistics or other evidence regarding the possible cost to the state should we hold that real party in interest must provide all section 1054.9 discovery at no cost to inmates like petitioner, we would have difficulty engaging in a thorough equal protection analysis were we forced to do so. (Cf. *M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 122 [analyzing data regarding the number of a particular type of appeal filed in the state of Mississippi and concluding no undue burden would result].) In addition, we once again cannot tell from the minute order denying the motion without explanation whether the trial court reasoned that petitioner could not be entitled to any postconviction discovery without paying for it or whether it instead concluded that petitioner was not entitled to any of the materials requested.

In this case, we need not reach the constitutional issue petitioner raises because we are mindful that “a court, when faced with an ambiguous statute that raises serious

constitutional questions, should endeavor to construe the statute in a manner which *avoids* any doubt concerning its validity.” (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 147, overruled on other grounds by *People v. Anderson* (1987) 43 Cal.3d 1104.) As we now explain, interpretation of section 1054.9 leads us to our holding without consideration of constitutional principles.

Quite simply, section 1054.9 does not require an inmate seeking postconviction discovery to pay in advance for copies of discovery. Instead, it requires such an inmate to either bear or “reimburse[.]” those costs. (§ 1054.9, subd. (d).) “Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.” (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) If we required any costs of discovery under section 1054.9 to be “borne” in the sense of paid in advance, we would eliminate the words “or reimbursed” from the statute. (§ 1054.9, subd. (d).)

Still, we do not and will not instruct the trial court as to exactly how to address the payment of costs by petitioner, as there are many ways in which an inmate may receive postconviction discovery without paying the copying costs in advance. (See fn. 1, *ante*.) For example, the parties might agree that petitioner can pay costs over time using his prison wages or other funds to which he has access. (See *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377 [trial courts may use prison wages to determine an inmate’s ability to pay a restitution fine].) Such an arrangement would be not unlike the system by which trial courts recoup filing fees over time by having them deducted from an inmate’s account at a prison. (Gov. Code, § 68635.) The parties might also agree that

real party in interest will make discovery available to petitioner’s counsel to view without taking or paying for any copies. (See *Shaffer, supra*, 185 Cal.App.4th at p. 1245 [“In the event a defendant or his counsel chooses not to pay reasonable duplication fees, the district attorney must make reasonable accommodations for the defense to view the discoverable items in a manner that will protect attorney-client privileges and work product.”].) We stress that these two suggestions are in no manner an exhaustive list of ways in which the parties might be able to ensure that petitioner receives the discovery to which he is entitled. Rather, “We assume the parties and their counsel will conduct themselves according to the high standards the legal profession demands. Should any dispute arise over the accommodations, we are confident the trial court will know how to resolve it.” (*Ibid.*) Today, we hold only that real party in interest may not completely prohibit petitioner from receiving postconviction discovery without first paying for copies of what he receives.

DISPOSITION

“We believe the instant discovery dispute[, including the issue of petitioner’s reimbursement of the costs of discovery,] is best resolved by remanding the matter back to the trial court, where the parties can try to settle it informally consistent with the views expressed in this opinion. If informal efforts fail, the trial court can issue a new order consistent with this opinion.” (*Barnett, supra*, 50 Cal.4th at p. 906.)

Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate the order denying petitioner’s request for postconviction discovery

under section 1054.9. Absent an agreement between the parties, the court is to consider petitioner's discovery requests in keeping with this opinion and order disclosure of those materials to which petitioner has demonstrated entitlement. Should the parties fail to agree on a reimbursement plan for any copying costs that are or will be incurred, the trial court is authorized to make an order on that issue that is consistent with this opinion.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.