

DEC 08 2008

MICHAEL D. PLANET,
Executive Officer and Clerk

BY: _____ Deputy

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14 SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

15 PEOPLE OF THE STATE OF
16 CALIFORNIA

17 Plaintiff,

18 vs.

19 BRANDON MCINERNEY

20 Defendant
21

Case No.: 2008005782

Department No. 14

Hearing Date: 12/29/08

Time: 8:30

NOTICE OF MOTION AND MOTION
FOR DEFENDANT'S FORMAL
DISCOVERY ORDER

22 TO: GREGORY TOTTEN, DISTRICT ATTORNEY FOR VENTURA COUNTY
23

24 PLEASE TAKE NOTICE that on 12/29/08, at 8:30, or as soon thereafter
25 as the matter may be heard in Department of the above entitled court, defendant,
26 Brandon McInerney, by and through attorneys, Robyn Bramson, Scott Wippert, Josh
27
28

1 Solberg and Summer Mckeivier will move the court for a discovery order directing the
2 People of the State of California to provide the requested discovery.
3

4 This motion is made pursuant to California Penal Code sections 1054.1 and
5 1054.5(b), relevant case law, and the due process provisions of the Constitutions of the
6 United States and the State of California.
7

8 The motion for defendant's discovery order will be based on this notice of motion,
9 the memorandum of points and authorities, the declaration of defense counsel, all papers
10 and records on file in this action, and such other and further oral and documentary
11 evidence as may be presented at the hearing on this motion.
12

13 Defendant respectfully requests production and disclosure or the right to examine,
14 inspect, copy, photograph, or make other facsimile copies of the following materials and
15 information that are within the possession, custody, or control of the prosecutor; the
16 existence which is known, or by the exercise of due diligence may become known:
17

18
19 1. Any and all notes, communications, correspondence, internal memoranda
20 and other material relating to internal standards or guidelines, whether or not previously
21 reduced to writing, used or referenced by the Ventura County District Attorney to
22 determine which cases involving minors to direct-file in criminal court.
23

24
25 2. Any and all materials related to training given to employees of the Ventura
26 County District Attorney regarding standards for direct-filing cases involving minors in
27 criminal court.
28

1 3. Any and all notes, communications, correspondence, internal memoranda
2 and other materials, whether or not previously reduced to writing, relating to the District
3 Attorney's decision to direct-file this case in criminal court.
4

5 4. The names and contact information of any and all persons consulted
6 regarding the decision to direct-file this case, and other cases involving minors in Ventura
7 County, in criminal court.
8

9 5. Any and all notes or summaries of conversations, whether or not previously
10 reduced to writing, relating to the decision to direct file this case and other cases
11 involving minors in Ventura County in criminal court.
12

13 6. Statistics since March 8, 2000 (Date that Proposition 21 went into effect)
14 relating to the percentage of cases involving minors charged with crimes that could
15 potentially be filed in criminal court, which in fact resulted in being direct-filed in
16 criminal court.
17
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19 7. Case names and case numbers of all direct-filed cases since March 8, 2000
20 (Date that Proposition 21 went into effect).
21

22 8. All materials as defined by Penal Code section 1054.1.
23

24 This motion is made on the basis that all information and materials sought
25 constitute or contain evidence material and relevant to the issues and subject matter of
26 this case and are necessary and material to the defense of this case without which the
27 defendant would be denied the effective assistance of counsel and due process of law
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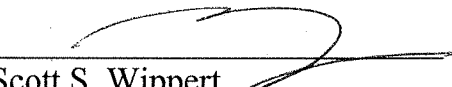
1 . The defendant made an informal discovery requests on October 28, 2008. A
2 Copy of the informal discovery request is attached hereto and incorporated as if fully set
3 forth as Exhibit "A". The prosecution has failed to provide the requested information.
4

5 DATED: December 8, 2008
6

7 Respectfully submitted,

8 

9 Robyn B. Bramson
10 Attorney at Law

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12 Scott S. Wippert
13 Attorney at Law
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17 Plaintiff,

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19 BRANDON MCINERNEY

20 Defendant

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MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR DEFENDANT'S
FORMAL DISCOVERY ORDER

21 INTRODUCTION

22 Due process of law requires the prosecution to “divulge all evidence to the defense
23 which is both favorable to the accused and material either to guilt or to punishment”,
24 including all information that could impeach the prosecution witnesses. (*People v.*
25 *Martinez* (2002) 103 Cal.App.4th 1071, 1078, citing *Brady v. Maryland* (1963) 373 U.S.
26 83, *United States v. Bagley* (1985) 473 U.S. 667, 675-76.) The process for requesting
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28

1 and obtaining discovery is governed by Penal Code section 1054 et seq. Penal Code
2 section 1054.1 governs what materials the prosecution is required to provide to the
3 defendant. In addition to the materials defined by section 1054.1, constitutional
4 provisions and case law have defined the scope of additional materials not specified
5 within section 1054.1, which should be disclosed to the defendant.
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8 In this case, defendant, Brandon McInerney, requested specific items of discovery
9 through informal discovery, but to date the district attorney has failed to provide those
10 items. Without these items, defense counsel cannot competently represent Brandon,
11 cannot sufficiently and competently prepare and present a defense, or prepare for trial.
12 Due to the district attorney's failure to provide the requested specific items of discovery,
13 Brandon is respectfully asking the court to order the disclosure of the requested material
14 pursuant to Penal Code section 1054.5, the Fifth and Fourteenth Amendments of the
15 United States Constitution and article I, section 7, and article I, section 30 of the
16 Constitution of the State of California.
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20 **STATEMENT OF FACTS**

21 On February 14, 2008 Maeve Fox, on behalf of the Ventura County District
22 Attorney's office, direct-filed a complaint against minor Brandon McInerney, in the
23 Ventura County Superior Court, pursuant to Welfare and Institutions Code section
24 707(d)(2). The complaint alleged that on or about February 12, 2008 Brandon committed
25 a violation of Penal Code section 664/187, as well as enhancements pursuant to Penal
26 Code sections 12022.53(d) and 422.75(a). On January 24, 2008, 19 days before the
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28

1 conduct alleged by the District Attorney, Brandon turned 14 years old. Thereafter, Ms.
2 Fox filed an amended complaint against Brandon. This complaint was also direct-filed in
3 the Ventura County Superior Court. This complaint alleged that Brandon committed a
4 violation of Penal Code section 187, but otherwise mirrored the original complaint.
5

6 At the time the District Attorney filed both the original and amended complaints,
7
8 Brandon had no record in the juvenile justice system.

9 In the approximately 10 months that have passed since the direct-filing of
10
11 Brandon's case, the Ventura County District Attorney's office has made numerous
12 statements to the media about this matter. According to the Los Angeles Times in a July
13 26, 2008 news article, **Ventura County District Attorney Gregory Totten, "said the**
14 **severity of the crime prompted him to try McInerney as an adult."** (Catherine
15 Saillant, Lawyer for Oxnard Youth accused of Killing gay classmate wants trial to begin
16 soon, L.A. Times, July 26, 2008 (emphasis added.))
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18

19 Regarding the District Attorney's direct-filing of Brandon's case, Ms. Fox
20 reportedly indicated that, "she had been the one to file the charges against Brandon, and
21 that **she had filed them as she believed the law required her to**". (Michael Mehas, 14-
22 year-old Brandon McInerney: Ventura County's sacrificial lamb, (August 3, 2008) at
23 http:wwwstolenboy.com. (emphasis added.)) According to other media sources, Chief
24 Assistant District Attorney James Ellison said, "[w]e believe the crime is charged
25 appropriately." **Mr. Ellison also reportedly said that his office would not disclose**
26 **why they decided to charge Brandon as an adult**, because that would require a
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28

1 discussion of the facts of the case before the preliminary hearing. (14 year old pleads not
2 guilty in killing of gay classmate, (August 8, 2008), at
3 <http://shrewdnessofapes.blogspot.com> (emphasis added.))
4

5 Regarding the Ventura County District Attorney's direct-filing prosecutions in
6 general, **Chief Deputy District Attorney Michael K. Frawley** reportedly told the
7 Ventura County Star, "**The District Attorney prosecutes juveniles in adult courts if**
8 **the juveniles are accused of committing serious felonies and generally have**
9 **significant records in the juvenile justice system**". (Raul Hernandez, Juveniles tried as
10 adults up 170%, Ventura County Star, February 17, 2008 (emphasis added.)) In the same
11 article Senior Deputy District Attorney **Brian Rafelson** said, "If a juvenile commits one
12 of 30 felony offenses spelled out in the law, ranging from murder to witness intimidation,
13 the law allows prosecutors to send the case to adult court." He also said, "**the district**
14 **attorney takes into consideration prior criminal history and whether the crime was**
15 **gang-related**". (Raul Hernandez, Juveniles tried as adults up 170%, Ventura County
16 Star, February 17, 2008 (emphasis added.))
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21 Ms. Fox reportedly gave an extensive interview to The Advocate regarding
22 Brandon's case. In that interview, Ms. Fox is quoted as saying,
23

24 "**When you kill someone, to me you need to be incarcerated away from**
25 **the public for a long time.** Because to me, you've demonstrated that
26 you're dangerous. That's why we have such lengthy sentences for
27 murderers, because you don't want to just say, 'Now don't ever do that
again!'

28 They're dangerous people in most cases - - unless it's some extreme case
where the person was under duress - - in those cases we generally work out

1 some kind of plea or agreement. What I'm thinking of is battered women,
2 people who kill under extreme circumstances.

3 But if it's a situation **where it's unprovoked and premeditated, then I**
4 **would say in pretty much all of those cases**, that public safety is a
5 tremendous concern for me. And **punishment is very high on my list of**
6 **priorities**. I'm very big on personal responsibility. And unless you can
7 show me that you had a really, really, really good reason for doing what
8 you did, I think you should stand up and be accountable for it. And you
9 should be punished..."

(Karen Ocamb, Arrestment Postponed for Lawrence King's Accused
10 Shooter, (May 10-12, 2008) at <http://www.advocate.com/news> (emphasis
11 added.))

12 On July 24, 2008 a hearing was held in the Ventura County Superior Court
13 regarding a demurrer filed by the public defender's office, which at the time represented
14 Brandon. The Demurrer in essence argued that Welfare and Institutions Code section
15 707(d) was unconstitutional because it violates the 8th Amendment's prohibition against
16 cruel and unusual punishment, and therefore the court did not have jurisdiction over
17 Brandon's case. According to the Ventura County Star, after the court denied Brandon's
18 demurrer **Ms. Fox said that, "[Judge] Daily's ruling on the constitutionality of the state**
19 **law "pretty much" eliminated the possibility of the district attorney sending**
20 **[Brandon's] case to the juvenile justice system...**". (Raul Hernandez, Judge OKs adult
21 trial for teen suspect, Ventura County Star, July 25, 2008 (emphasis added.))

22
23 The Ventura County Star also reported that, "[**Ms. Fox**] **said** that while she might
24 feel "sympathy" toward [Brandon] because of his age, **there is no legal defense for not**
25 **trying him in adult court**". Additionally, the same article states that in the event that the
26 judge ruled in favor of Brandon and granted the Demurrer, "**Fox said she could,**
27 **hypothetically, go back and file a "lying in wait" special circumstance against**
28

1 [Brandon] and by law, the case would have to be transferred back to adult court.”

2 (Raul Hernandez, Judge OKs adult trial for teen suspect, Ventura County Star, July 25,
3 2008 (emphasis added.))
4

5
6
7 LAW AND ARGUMENT

8 I.

9
10 PENAL CODE SECTION 1054, ET SEQ. IS NOT THE
11 EXCLUSIVE BASIS FOR DISCOVERY IN A CRIMINAL
CASE WITHIN CALIFORNIA.

12 Penal Code section 1054, et seq., governs discovery procedures in criminal cases
13 within California. Section 1054, et seq., was adopted pursuant to Proposition 115, during
14 the June 1990 primary election and became effective as of June 6, 1990. Penal Code
15 section 1054 outlines the purposes of this chapter, indicating the following:
16

17 This chapter shall be interpreted to give effect to all of the following
18 purposes:

19 (a) To promote the ascertainment of truth in trials by requiring
20 timely pretrial discovery.

21 (b) To save court time by requiring that discovery be conducted
22 informally between and among the parties before judicial enforcement is
23 requested.

24 (c) To save court time in trial and avoid the necessity for frequent
25 interruptions and postponements.

26 (d) To protect victims and witnesses from danger, harassment, and
27 undue delay of proceedings.

28 (e) To provide that no discovery shall occur in criminal cases except
as provided by this chapter, other express statutory provisions, or as

1 mandated by the Constitution of the United States. (Cal. Pen. Code, §
2 1054.)

3 As stated in subsection (e) of Penal Code section 1054, this is not the exclusive
4 means of discovery, pursuant to the very language of the statute. This concept is
5 supported by case law that has developed after the enactment of Proposition 115. After
6 this new discovery scheme was enacted it was challenged as being unconstitutional. In
7 addressing this issue, the California Supreme Court stated:
8

9
10 The prosecutor's duties of disclosure under the due process clause
11 are *wholly independent* of any statutory scheme or reciprocal discovery.
12 The due process requirements [of the United States Constitution] are self-
13 executing and need no statutory support to be effective. Such obligations
14 exist whether or not the state has adopted a reciprocal discovery statute.
15 Furthermore, if a statutory discovery scheme exists, these due process
16 requirements operate outside such a scheme. The prosecutor is obligated to
17 disclose such evidence *voluntarily*, whether or not the defendant makes a
18 request for discovery.

19 No statute can limit the foregoing due process rights of criminal
20 defendants, and the new discovery chapter does not attempt to do so. On
21 the contrary, the new discovery chapter contemplates disclosure *outside* the
22 statutory scheme pursuant to constitutional requirements as enunciated in
23 *Brady, supra*, 373 U.S. 83, and its progeny. Section 1054 expressly
24 provides that the new discovery chapter shall be interpreted to give effect to
25 the provision that "no discovery shall occur in criminal cases except as
26 provided by this chapter, other express statutory provisions, or *as mandated*
27 *by the Constitution of the United States.*" (§1054, subd. (e), italics added.)
28 We conclude there is no due process violation because the new discovery
chapter does not affect the defendant's constitutional right to disclosure of
all exculpatory evidence, in the hands of the prosecution as mandated by
the high court in *Brady, supra*, 373 U.S. 83, and its progeny.

(*Izazaga v. Superior Court* (1991) 54 Cal.3rd. 356 at 378, footnote omitted, italics in
original.)

1 Therefore, the district attorney is required under both the statutory requirements of
2 Penal Code section 1054, et. seq., and the United States Constitution to provide the
3 requested discovery.
4

5 II.

6 AN ACCUSED IS ENTITLED TO DISCOVER ALL
7 INFORMATION THAT WILL ASSIST HIM IN THE
8 PREPARATION AND PRESENTATION OF HIS
9 DEFENSE, INCLUDING MATERIAL EVIDENCING THE
10 DISTRICT ATTORNEY'S FAILURE TO EXERCISE ITS
11 CHARGING DISCRETION.

12 **A. AN ACCUSED IS ENTITLED TO DISCOVER ANY MATERIAL THAT**
13 **MAY ASSIST HIM TO MOUNT A CONSTITUTIONAL DEFENSE.**

14 It is axiomatic that suppression by the prosecution of evidence favorable to an
15 accused violates due process of law where the evidence is material to either guilt or
16 punishment. (*Brady, supra*, 373 U.S. 83, *Bagley, supra*, 473 U.S. 667.) However, this
17 axiomatic principle applies even beyond the domains of guilt and punishment when a
18 "defense" consists of claiming a constitutional violation as the basis for a pretrial motion
19 to dismiss, or for other sanctions. (*Murgia v. Municipal Court for the Bakersfield*
20 *Judicial Dist. Of Kern County* (1975) 15 Cal.3d 286, See also *People v. Cruz* (1993) 16
21 Ca4th 322.)

22
23 The California Supreme Court decided in *Murgia v. Munipal Court* that a
24 prosecution's alleged "discriminatory enforcement of the laws" was a legally recognized
25 "defense" to a criminal charge, which would allow defendants to seek and obtain
26 discovery relevant to such a claim. In *Murgia*, criminal defendants filed a discovery
27 motion seeking documentary and testimonial evidence from law enforcement officials,
28

1 which they alleged, related to their claim of discriminatory prosecution. (*Id.* at 291.) In
2 support of their discovery motion, the defendants submitted numerous affidavits setting
3 forth various incidents of alleged discriminatory conduct by law enforcement, which
4 were aimed against the union that all of the *Murgia* defendants were members of. The
5 defendants cited the equal protection clauses of the United States and California
6 Constitutions as bases for their defense of discriminatory prosecution. (*Id.* at 294.)
7

8
9 After the trial court denied defendants' discovery requests because of its mistaken
10 belief that a defense of discriminatory prosecution was unavailable, the defendants filed a
11 petition for a writ of mandate with the California Supreme Court. (*Id.* at 290, 293, 306.)
12

13 The California Supreme Court issued a peremptory writ of mandate directing the trial
14 court to vacate its order denying discovery to the defendants. (*Id.* at 306.) In doing so, it
15 relied on precedent by the United States Supreme Court, which it found explicitly
16 allowed a criminal defendant to defend against a criminal prosecution on a claim that the
17 prosecution violated the defendant's Constitutional right to equal protection. (*Id.*) The
18 California Supreme Court concluded that the materiality of the defense of discriminatory
19 prosecution triggered traditional principles of criminal discovery, which entitled
20 defendants to seek discovery relevant to their claim. (*Id.*)
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23

24 In the wake of *Murgia*, additional case law emerged that addressed the issue of
25 what kind of showing a criminal defendant needed to make in order to obtain discovery
26 in support of a discriminatory prosecution claim based upon an equal protection
27 violation. (*People v. Superior Court of Santa Clara County (Baez)* (2000) 79 Cal.App.4th
28

1 1177, *United States v. Armstrong* (1996) 517 U.S. 456.) In *U.S. v Armstrong*, The United
2 States Supreme court adopted the rule that the Courts of Appeals had been applying,
3 which “require[s] some evidence tending to show the existence of the essential elements
4 of the defense, “discriminatory effect and discriminatory intent””. (*U.S. v Armstrong*,
5 *supra*, 517 U.S. at 468.) The Supreme Court held that a defendant must “produce some
6 evidence that similarly situated defendants of other races could have been prosecuted but
7 were not...” (*Id.* at 469.) The Court opined that *Armstrong’s* holding sufficiently
8 balanced the defendant’s interest in avoiding discriminatory prosecution, against the
9 government’s interest in vigorous prosecution. (*Id.* at 470.)
10
11
12

13 Beyond *Murgia* and *Armstrong’s* recognition that an equal protection violation is a
14 proper foundation upon which a criminal defendant may build a defense against
15 prosecution, there is a body of jurisprudence identifying additional defenses rooted in
16 other Constitutional rights, which similarly do not involve issues pertaining to the
17 defendant’s guilt. Such Constitutional defenses to criminal allegations range from
18 violations of the right to counsel, right to speedy trial, and right to due process of law.
19 (*People v. Coffey* (1967) 67 Cal.2d 204, *Jones v. Superior Court* (1970) 3 Cal.3d 734,
20 *People v. Archerd* (1970) 3 C3d 615.) Additionally, the longstanding existence of the
21 exclusionary rule as the appropriate sanction for government conduct that violates the
22 Fourth Amendment’s prohibition against unreasonable searches and seizures, further
23 exemplifies the legal principle that Constitutional violations often serve as a basis for a
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1 criminal defendant's defense against prosecution. (See e.g. *People v. Williams* (1999) 20
2 Cal.4th 119, *Mapp v. Ohio* (1961) 367 U.S. 643.)
3

4 In underscoring the power of fundamental rights granted to an accused by the
5 United States Constitution, the California Supreme Court stated,
6

7 "While the courts have regularly adopted and enforced legislative interpretation of
8 [a] constitutional provision..., [a] constitutional provision is self-executing. [] The
9 provisions of the Penal Code are merely "supplementary to and a construction of"
10 the Constitution. It is thus unnecessary ..., in asserting [a] constitutional right...,
11 to rely on specific statutory provisions.... (*Jones* at 738-39 (relying on *Harris v.*
Municipal Court (1930) 209 Cal. 55; *People v. Wilson* (1963) 60 Cal.2d 139).

12 **B. BRANDON HAS THE RIGHT TO DISCOVER WHETHER THE**
13 **DISTRICT ATTORNEY VIOLATED HIS DUE PROCESS RIGHT WHEN**
14 **IT DECIDED TO DIRECT-FILE HIS CASE.**

15 Among those fundamental rights granted to an accused in a criminal prosecution is
16 the right to due process of law.

17 "Under the Due Process Clause of the Fourteenth Amendment, criminal
18 prosecutions must comport with prevailing notions of fundamental fairness. [The
19 United State Supreme Court] ha[s] long interpreted this standard of fairness to
20 require that criminal defendants be afforded a meaningful opportunity to present a
21 complete defense. To safeguard that right, the Court has developed "what might
22 loosely be called the area of constitutionally guaranteed access to evidence."
(*California v. Trombetta* (1984) 467 U.S. 479, 485 (quoting U.S. Valenzuela-
Bernal (1982), 458 U.S. 858, 867.

23 In addition, "[t]he due process clause of both [the] United States and California
24 Constitutions is a bar to the deprivation of liberty except by the regular administration of
25 the law and in accordance with general rules designed to protect individual rights."
26 (*People v. Ventura County Municipal Court* (1972) 27 cal.app.3d 193.) When the
27 district attorney makes a decision to prosecute, that decision serves to deprive a person of
28

1 their liberty. (See *People v. Tenorio* (1970) 3 cal.3d 89.) Such a decision must therefore
2 comply with fundamental principles of due process of law as guaranteed by the United
3 States and California Constitutions.
4

5 Under California law, the district attorney as public prosecutor "...shall attend the
6 courts, and *within his or her discretion* shall initiate and conduct on behalf of the people
7 all prosecutions of public offenses. (*Cal Gov Code* §26500 (emphasis added.) This
8 discretionary mandate is also expressly contained in Welfare and Institutions Code
9 section 707 with regard to the district attorney's ability to permissively file an accusatory
10 pleading against a minor in a court of criminal jurisdiction. (*Welf & Inst Code* §707(d)).
11 Welfare and Institutions Code section 707(d)(2) states that, "[e]xcept as provided in
12 subdivision (b) of Section 602, the district attorney...*may* file an accusatory pleading
13 against a minor 14 years of age or older in a court of criminal jurisdiction...". The statute
14 then goes on to enumerate the various circumstances under which a district attorney is
15 required to exercise their discretion in making a determination about whether to file in
16 criminal or juvenile court. (*Welf & Inst Code* §707(d)(2)(A)-(C).)
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21 The statutory duty imposed upon the district attorney to exercise discretion applies
22 generally to the manner in which they prosecute all public offenses, as well as
23 specifically to those cases in which they must determine whether to file an accusatory
24 pleading against a minor in criminal court. With regard to the latter, such a filing
25 decision clearly and significantly implicates a person's liberty interest, as the decision to
26 file in criminal court exposes an individual to a period of incarceration, while the juvenile
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1 court subjects a minor under its jurisdiction to the rehabilitative remedy of wardship.
2 (See e.g. *Penal Code* §190; See also *Welf & Inst Code* §602, §607, §725(b).)
3
4 Furthermore, Brandon currently faces a mandatory prison sentence of 53 years to life,
5 whereas if under the jurisdiction of the juvenile court any commitment to the California
6 Department of Corrections and Rehabilitation Division of Juvenile Justice (formerly the
7 California Youth Authority) must end upon his 25th birthday. Where a decision by a
8 district attorney affecting a criminal defendant's liberty, which statutorily requires the
9 exercise of discretion as an essential legal prerequisite to making such a decision, is made
10 without due consideration given as to whether they will exercise this discretion, that
11 defendant is deprived of their liberty without due process of law.
12

13
14 A prosecution that denies a criminal defendant due process of law is susceptible to
15 a motion to dismiss. (*Scherling v. Superior Court of Santa Clara County* (1978) 22
16 Cal.3d 493.) Like a motion to dismiss based on a claim of discriminatory prosecution for
17 an equal protection violation, a motion to dismiss based upon a prosecutor's abuse of
18 discretion amounting to a deprivation of liberty without due process of law, triggers
19 traditional principles of criminal discovery, which thus entitles a defendant to seek
20 discovery relevant to his claim. (See *Murgia, supra* 15 Cal.3d 286.)
21
22

23
24 In the instant case, Brandon McInerney is a minor 14 years of age charged in a
25 court of criminal jurisdiction pursuant to Welfare and Institutions Code section 707(d)(2).
26 By and through his attorneys, Brandon is seeking discovery from the district attorney that
27 is relevant to his claim that in this case they abused their discretion by filing an
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1 accusatory pleading in criminal court, and that in so doing the prosecution denies him of
2 his liberty without due process of law as guaranteed by the United States and California
3 Constitutions. Furthermore, Brandon is seeking this discovery as it relates to his claim
4 that in this case the district attorney abused their discretion by filing an accusatory
5 pleading against him in criminal court, and that this filing decision lacked sufficient
6 consideration by the district attorney regarding whether to invoke the permissive power
7 granted to them in Welfare and Institutions Code section 707(d)(2), which in turn
8 constitutes a violation of the statute. Finally, Brandon seeks this discovery as it is
9 relevant to his claim that the district attorney violated their duty as set forth in
10 Government Code section 26500, by initiating and conducting a prosecution for a public
11 offense in a manner that exceeds the permissible bounds of their discretion.
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15
16 The three theories of relevance and materiality articulated above are posited based
17 on numerous statements made by the Ventura County District Attorney's office regarding
18 their prosecution of this case. These statements, taken together, demonstrate a sufficient
19 showing to warrant discovery of the requested materials.
20

21 III.

22 PENAL CODE SECTION 1054.1 OUTLINES SIX TYPES
23 OF DISCOVERY THAT THE PROSECUTION IS
24 REQUIRED TO PROVIDE TO DEFENSE COUNSEL.

25 Pursuant to Penal Code section 1054.1, the prosecuting attorney shall disclose the
26 following items to the defendant. The prosecuting attorney must provide this information
27 if it is either in the possession of the prosecuting attorney or if the prosecuting attorney
28

1 knows it to be in the possession of the investigating agencies. (Cal. Pen. Code, § 1054.1.)

2 The items statutorily mandated to be disclosed are:

3
4 (a) The names and addresses of persons the prosecutor intends to call
5 as witnesses at trial.

6 (b) Statements of all defendants.

7 (c) All relevant real evidence seized or obtained as a part of the
8 investigation of the offenses charged.

9 (d) The existence of a felony conviction of any material witness
10 whose credibility is likely to be critical to the outcome of the trial.

11 (e) Any exculpatory evidence.

12 (f) Relevant written or recorded statements of witnesses or reports of
13 the statements of witnesses whom the prosecutor intends to call at the trial,
14 including any reports or statements of experts made in conjunction with the
15 case, including the results of physical or mental examinations, scientific
16 tests, experiments, or comparisons which the prosecutor intends to offer in
17 evidence at the trial. (Cal. Pen. Code, § 1054.1.)

18 Although Penal Code section 1054.1 outlines six specific areas of discovery which
19 the prosecution must provide to the defendant, each of these six areas of discovery have
20 relevant case law which broadens and clarifies the scope of materials to be provided by
21 the prosecution.

22 IV.

23 THE COURT MUST ORDER THE PRODUCTION OF
24 APPROPRIATE DISCOVERY WHEN THE DISTRICT
25 ATTORNEY REFUSES OR FAILS TO COMPLY WITH
26 PENAL CODE SECTION 1054, ET. SEQ.

27 The California Legislature enacted the rules governing the enforcement of
28 discovery in Penal Code section 1054.5. It states:

1 (a) No order requiring discovery shall be made in criminal cases
2 except as provided in this chapter. This chapter *shall be the only*
3 *means* by which the defendant may compel the disclosure of
4 production of information from prosecuting attorneys, law
5 enforcement agencies which investigated or prepared the case
6 against the defendant, or any other persons or agencies which the
7 prosecution attorney or investigating agency may have employed to
8 assist them in performing their duties.

9 (b) Before a party may seek court enforcement of any of the
10 disclosures required by this chapter, the party shall make an informal
11 request of opposing counsel for the desired materials and
12 information. If within 15 days the opposing counsel fails to provide
13 the material and information requested, **the party may seek a court**
14 **order**. Upon a showing that a party has not complied with Section
15 1054.1 or 1054.3 and upon showing that the moving party complied
16 with the informal discovery procedure provided in this subdivision,
17 **a court may make any order necessary to enforce the provision**
18 **of this chapter**, including, but not limited to, immediate disclosure,
19 contempt proceedings, delaying or prohibiting the testimony of a
20 witness or the presentation of real evidence, continuance of the
21 matter, or any other lawful order. Further, the court may advise the
22 jury of any failure or refusal to disclose and of any untimely
23 disclosure.

24 (Cal. Pen. Code, §1054.5, emphasis added.)

25 This section defines the process by which a party to a criminal action is to seek
26 discovery. The requesting party must first submit an informal request to opposing
27 counsel. If that party's request is not complied with, then that party may seek a formal
28 order from the court. Once the moving party, in this case the defendant, demonstrates
that Penal Code section 1054.1 has not been complied with, then the "court may make
any order necessary to enforce the provisions of this chapter." (Cal. Pen. Code, § 1054.5

(b.)


1 In this case, Client Name submitted informal discovery requests pursuant to Penal
2 Code section 1054.5. The requests were made to the district attorney on October 28,
3 2008 (see exhibit "A" attached hereto and incorporated as though fully set forth). The
4 district attorney failed to comply. Brandon McInerney is therefore asking that the court
5 order the production of the requested discovery.
6

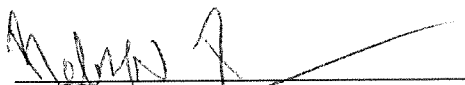
7
8 CONCLUSION

9 Defendant has fulfilled the procedures for obtaining discovery as defined within
10 Penal Code section 1054 et seq. However, the district attorney has failed to comply the
11 discovery procedures as outlined by section 1054 et seq. Pursuant to the foregoing,
12 defendant is entitled to the specific items of discovery which are within the district
13 attorney's possession. Therefore, defendant respectfully requests that the court grant
14 defendant's formal discovery request pursuant to Penal Code section 1054.5.
15
16

17 DATED: December 8, 2008

18
19 Respectfully submitted,

20
21 
22 Scott S. Wippert
23 Attorney at Law

24 
25 Robyn B. Bramson
26 Attorney at Law
27
28

1 The Law Offices of United Defense Group
2 Scott S. Wippert SBN 213528
3 Josh Solberg SBN 230277
4 Summer McKeivier SBN 230607
5 4181 Sunswept Drive, Suite 100
6 Studio City, CA 91604
7 (818) 487-7400

8 Law Office of Robyn B. Bramson
9 Robyn Bramson SBN 234888
10 8050 Melrose Avenue, 2nd Floor
11 Los Angeles, CA 90046
12 (916) 505-2666

13 Attorneys for Brandon McInerney

14 SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

15 PEOPLE OF THE STATE OF
16 CALIFORNIA

17 Plaintiff,

18 vs.

19 BRANDON MCINERNEY

20 Defendant

Case No.: 2008005782

Department No.

DECLARATION OF COUNSEL IN
SUPPORT OF FORMAL DISCOVERY
MOTION.

21 I, Scott Wippert, being duly sworn, depose and say:

22
23 1. I am a duly licensed attorney, authorized to practice law in the state of
24 California.

25
26 2. I am the attorney for Brandon McInerney in the above-entitled action and
27 as such, I have reviewed and am familiar with the facts of this case.
28

1 3. Brandon McInerney is currently charged with a violation of Penal Code
2 section 187, along with multiple enhancements.
3

4 4. I am informed and believe that an investigation of the charges alleged
5 against Brandon McInerney herein has been made by officers or agents of the Ventura
6 County District Attorney and by other law enforcement agencies.
7

8 5. I am informed and believe that some of the officers, agents, or agencies
9 have in their possession, under their control, or have easy access to the same the materials
10 and information described in the defendant's motion for formal discovery.
11

12 6. On October 28, 2008, the United Defense group made an informal request
13 of the district attorney for the requested materials and information. Fifteen (15) days or
14 more have elapsed since this request was made. The district attorney has failed to
15 provide the requested materials. (See: exhibit "A", attached hereto and incorporated as if
16 fully set forth.)
17

18 7. The materials and information sought are necessary for the preparation of
19 the defense of this case and are believed to contain favorable evidence, material to the
20 defendant's guilt or punishment, exculpatory evidence, or impeachment evidence.
21

22 8. The Ventura County District Attorney has made numerous statements to the
23 media about this case, which make a prima facie showing that they abused their
24 discretion in filing Brandon McInerney's case in criminal court.
25
26
27
28

1 9. The materials and information sought are within the actual or constructive
2 control of the district attorney, his officers, agents, or law enforcement agencies. These
3 materials are not known to the defendant or counsel, and cannot be examined prior to trial
4 other than by order of this court.
5

6 10. It is mandatory that all such materials and information be provided to the
7 defendant in advance of trial so that the defendant may appraise the same; so that the
8 defendant may know in what regard to exercise the constitutional right to compulsory
9 process to secure the attendance of witnesses; so that the defendant may exercise the
10 constitutional right to the effective assistance of counsel by having the defendant's
11 attorney in a position to know what witnesses to summon and what evidence to subpoena;
12 so that the defendant may effectively exercise the constitutional privilege against self-
13 incrimination; and so that the defendant may have a fair trial under the due process
14 requirements of *Brady v. Maryland* 373 U.S. 83.))
15
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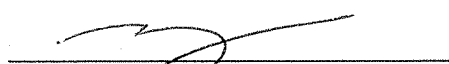
18 Therefore, I respectfully request that the relief sought by defendant's motion for a
19 discovery order be granted in all respects.
20

21 I declare under penalty of perjury that the foregoing is true and correct to the best
22 of my knowledge, except as to matters stated on information and belief, and as to those
23 matters, I believe them to be true.
24

25 Executed at Studio City, California.
26

27 DATED: December 8, 2008
28

Respectfully submitted,



Scott S. Wippert
Attorney at Law

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14 SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

15 PEOPLE OF THE STATE OF
16 CALIFORNIA

17 Plaintiff,

18 vs.

19 BRANDON MCINERNEY

20 Defendant

Case No.: 2008005782
Department No.

DEFENDANT'S DISCOVERY ORDER

21 The defendant's motion for a discovery order having been read and considered and
22 GOOD CAUSE APPEARING,

23
24 IT IS HEREBY ORDERED that the defendant's motion for formal discovery be
25 GRANTED.

26
27 IT IS FURTHER ORDERED that this order is to be continuing through the
28 completion of the trial so that any items granted that actually or constructively are

1 obtained by the Ventura County District Attorney or by his investigators, agents, or
2 agencies, after the initial compliance with this order, shall be made available to defense
3 counsel forthwith.
4

5 DATED: December , 2008
6

7 JUDGE OF THE SUPERIOR COURT
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EXHIBIT A

THE LAW OFFICES OF
UNITED DEFENSE GROUP

VENTURA COUNTY
DISTRICT ATTORNEY

4181 Sunswapt Dr., Suite 100, Studio City, California 91604 (818) 487-7400 FAX (818) 487-7414
UNITEDDEFENSEGROUP.COM

County of Ventura
Office of the District Attorney
Deputy District Attorney Maeve Fox
800 South Victoria Avenue L #2730
Ventura, CA 93009

RE: *People v. Brandon McLnerney*, Case # 2008005782

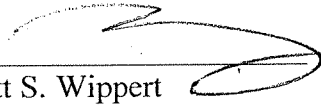
Pursuant to Penal Code §§ 1054 & 1054.1 and the California and United States Constitutions, the Defendant requests any and all supplemental discovery, including but not limited to:

1. All notes, communications, correspondence, internal memoranda and other material relating to internal standards or guidelines, whether or not previously reduced to writing, used or referenced by the Ventura County District Attorney to determine which cases involving minors to direct file in the Superior Court.
2. Any materials related to training given to employees of the Ventura County District Attorney regarding standards for direct filing cases involving minors in the Superior Court.
3. All notes, communications, correspondence, internal memoranda and other materials, whether or not previously reduced to writing, relating to the District Attorney's decision to direct file this case in the Superior Court.
4. The names and contact information of any and all persons consulted regarding the decision to direct file this case or other cases involving minors in the Superior Court.
5. Any notes or summaries of conversations relating to the decision to direct file this case or other cases involving minors in the Superior Court.
6. Statistics since March 8, 2000, relating to the percentage of cases involving minors charged with crimes that could potentially be filed in Superior Court, which in fact resulted in a direct filing in the Superior Court.
7. Case names and case numbers of all direct-filed cases since March 8, 2000.
8. Names and contact information for ***all witnesses*** the prosecution intends to call at trial.
9. All 911 tapes, dispatch tapes, certified copies of dispatch logs and computer printouts of ***communications with dispatch***.
10. All dispatch tapes, certified copies of dispatch logs and computer printouts of ***communications between responding and investigating officers (i.e. communications between patrol cars)***.
11. All ***photographs*** including booking photo.
12. All ***physical evidence*** obtained during the investigation of the charged offense(s).
13. All tape recorded, written statements and notes relating to:
 - a. All ***conversations involving prosecution witnesses*** including experts consulted and the results of examinations or tests to be offered at trial.
 - b. All ***exculpatory information*** under Brady v. Maryland (1963) 373 U.S. 83.
 - c. All statements of witnesses inconsistent with prior statements made by them.
14. The names, phone numbers and addresses of all people known to or contacted by the District Attorney's Office and law enforcement regarding this case.
15. All ***statements made by the defendant(s)*** prior to, at or since the alleged offense.

16. All statements made by all people contacted by the District attorney and law enforcement regarding this case.
17. All notes taken by District Attorney investigators and law enforcement during contact with all people contacted regarding this case.
18. Records of **arrests and convictions** for all felonies and misdemeanors involving moral turpitude for **all** witnesses **each** party intends to call at trial.
19. All police reports relating to records of **arrests and convictions** for all felonies and misdemeanors involving moral turpitude for **all** witnesses **each** party intends to call at trial.
20. Records of **arrests and convictions** for all felonies and misdemeanors involving moral turpitude for **all codefendants** charged in this case.
21. All police reports relating to records of **arrests and convictions** for all felonies and misdemeanors involving moral turpitude for **all codefendants charged in this case**.
22. All arrest/incident reports and/or statements of witnesses the District Attorney intends to introduce as evidence pursuant to California Evidence Codes § 1109, 1108, and 1001.

Thank you in advance for your anticipated courtesy and cooperation in providing all discoveries. If we do not receive the aforementioned materials within fifteen days of this request, we will consider that as a refusal of your statutory and Constitutional duty to comply.

Sincerely,



Scott S. Wippert
Attorney for Brandon McInerney