IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| BRANDON MCINERNEY<br><br>Petitioner,<br><br>v.<br><br>SUPERIOR COURT OF VENTURA COUNTY,<br><br>Respondent,<br><br>PEOPLE OF THE STATE OF CALIFORNIA<br><br>Real Party in Interest. | ) | COA No. B213879<br><br>VENTURA COUNTY SUPERIOR COURT<br><br>VENTURA COUNTY CASE No. 2008005782 |

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**PETITION FOR REVIEW**

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**From the Court of Appeal of the State of California**
**for the Second Appellate District**
**From the Ventura County Superior Court**
**The Hon. Rebecca Riley, Judge**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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**From the Court of Appeal of the State of California for the Second Appellate District**

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

Petitioner respectfully requests that review be granted to address the important issue of law presented by his case.

## ISSUE PRESENTED FOR REVIEW

Whether a minor, whose case is discretionarily "direct-filed" in a criminal court pursuant to Welfare and Institutions Code section 707(d), may obtain a discovery order directing the district attorney to produce information relevant to his claims that the direct-filing amounts to an abuse of discretion, and that the prosecution deprives him of his liberty without due process of law.

## GROUND FOR REVIEW

Petitioner respectfully requests that the Supreme Court order review of the Second Appellate District's decision pursuant to Rule 8.500(b)(1) of the California Rules of Court, because a decision on this issue is necessary to settle an important question of law. Since Proposition 21 went into effect in March 2000, minors as young as 14 years old have been subjected to district attorneys' direct-filing determinations and practices. These direct-filed cases result from a district attorney's invocation of the discretionary authority contained in subdivision (d) of Welfare and Institutions Code section 707.

Section 707 is the statutory mechanism for assessing a minor's fitness for treatment under juvenile court law. While subdivisions (a) and (c) concern themselves with an express judicial determination of a minor's fitness, subdivision (d) allows an implied prosecutorial determination of precisely the same issue. This Court long ago held that judicial determinations of unfitness may be reversed for abuse of discretion. (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698.) However, no case currently exists with regard to the prosecutor's exercise of discretion, and no appellate court has yet opined about whether a prosecutor's direct-filing of a minor's case in criminal court and implied

finding of unfitness is similarly reviewable for abuse of discretion. Moreover in 2002, in *Manduley v. Superior Court*, this Court expressly left open "any issue regarding the superior court's authority to dismiss, in furtherance of justice, an action commenced in criminal court pursuant to 707(d)." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 555 (citing Pen. Code §1385, subd. (a)).)

In 2006, in *Rene C. v. Superior Court*, the Second District Court of Appeal determined that the juvenile court abused its discretion in finding a minor unfit, and granted his writ of mandate, ordering the Los Angeles County Superior Court to vacate its order finding that he was not a fit and proper subject to be dealt with under the juvenile court law *Rene C. v. Superior Court* (2006) 138 Cal.App.4th 1, 13-14.) In addition, the Appellate Court directed the superior court to issue a new order finding that the minor was fit. (*Id.*) Thereafter, this Court denied a request for the depublication of *Rene C.*, establishing important precedent to help guide lower courts and counsel with regard to significant issues relevant to assessing whether a minor is a fit and proper subject to be dealt with under juvenile court law. (2006 Cal.LEXIS 7195.)

The critical importance of settling this issue of law is clear when viewed through the lens of *Rene C.* That is, if instead of having filed Rene's case in juvenile court, the prosecution had elected to direct-file Rene's case pursuant to 707(d), would the minor have been absolutely barred from raising the same issues regarding his fitness in the criminal court that ultimately led the appellate court to determine that he was in fact fit for juvenile court treatment? If the minor's case had been direct-filed, and the district attorney's reasons for doing so mirrored the reasons for the juvenile court's erroneous

finding of unfitness, does the direct-filing constitute an abuse of discretion just as the judicial determination of unfitness did? If a prosecutor direct-files a minor's case, is the prosecutor's decision, unlike the judge's decision, unchallengeable and unreviewable? Because of the absence of precedent to help answer these questions, it is necessary, and petitioner respectfully requests that this Court grant review of his case.

## STATEMENT OF THE CASE

This is a petition for review of a summary denial by the California Court of Appeal, Second District, of the petition for writ of mandate filed by petitioner, Brandon McInerney, who is a minor defendant and petitioner in case number B213879.

Petitioner stands charged in respondent court by way of an amended criminal complaint filed on February 14, 2008, with one felony count of murder, in violation of Penal Code section 187, along with an enhancement for personally and intentionally discharging a firearm within the meaning of Penal Code section 12022.53(d), and a second enhancement in violation of Penal Code section 422.75(a). (Petition for Writ of Mandate at 2-3.)[1] The complaint further alleges that petitioner was 14 years old at the time he committed the crime alleged, within the meaning of Welfare and Institutions Code section 707(d)(2). (PWM at 2.)

On December 29, 2008, petitioner came before the Ventura County Superior Court for a hearing on a discovery motion he filed on December 8, 2008. (PWM at 3-4.) The sought a number of items in support of his claim that the Ventura County District

[1] Further references to the Writ of Mandate filed in the Second District Court of Appeal will hereinafter be referenced to as "PWM".

Attorney's office abused its discretion in direct-filing his case in criminal court pursuant to Welfare and Institutions Code section 707(d)(2), and that such prosecution denied him his liberty without due process of law in violation of the California and United States' Constitutions. (PWM at 3-4.) Petitioner's discovery motion cited several statements made by the Ventura County District Attorney's office to the media that he asserted established a prima facie showing of prosecutorial abuse of discretion. (PWM at 11.)

After consideration of Petitioner's motion, as well as the district attorney's opposition to the discovery motion, petitioner's reply and oral argument by counsel, the court issued its ruling summarily denying petitioner's requests for discovery. (PWM at 5.) The case was thereafter set for a preliminary hearing to be held on March 17, 2009. (PWM at 2.)

On February 6, 2009, petitioner filed a Petition for Writ of Mandate in the Second District Court of Appeal, seeking review of the court's order. On February 17, 2009, the Court of Appeal summarily denied the petition. (Copy of the Order attached.)

## STATEMENT OF THE FACTS

On February 14, 2008, prosecutor Maeve Fox, on behalf of the Ventura County District Attorney's Office, direct-filed a complaint in criminal court against 14 year old Brandon McInerney, petitioner in this matter. (PWM at 2-3.) On January 24, 2008, 19 days before the conduct alleged by the district attorney, petitioner turned 14 years old.

(PWM at 11.) At the time of the district attorney's filing, petitioner had no prior record in either the juvenile or criminal court. (PWM at 11.)

During the pendency of petitioner's case, numerous members of the Ventura County District Attorney's office, including Ms. Fox, made various statements to the media about the direct-filing of petitioner's case. (PWM at 11.) These statements to the media caused petitioner to seek discovery of information aimed at assessing whether the Ventura County District Attorney abused its discretion in direct-filing petitioner's case in criminal court, and whether the prosecution thereby deprived petitioner of his liberty without due process of law. (PWM at 11.) The district attorney's statements to the media were set forth in petitioner's discovery motion as follows:

> "In the approximately 10 months that have passed since the direct-filing of Brandon's case, the Ventura County District Attorney's office has made numerous statements to the media about this matter. According to the Los Angeles Times in a July 26, 2008 news article, Ventura County District Attorney Gregory Totten, "said the severity of the crime prompted him to try McInerney as an adult." [citation.]
>
> Regarding the District Attorney's direct-filing of Brandon's case, Ms. Fox reportedly indicated that, "she had been the one to file the charges against Brandon, and that she had filed them as she believed the law required her to." [citation.] According to other media sources, Chief Assistant District Attorney James Ellison said, "[w]e believe the crime is charged appropriately." [citation.] Mr. Ellison also reportedly said that his office would not disclose why they decided to charge Brandon as an adult, because that would require a discussion of the facts of the case before the preliminary hearing. [citation.]
>
> Regarding the Ventura County District Attorney's direct-filing prosecutions in general, Chief Deputy District Attorney Michael K. Frawley reportedly told the Ventura County Star, "The District Attorney prosecutes juveniles in adult courts if the juveniles are accused of committing serious felonies and generally have significant records in the juvenile justice system". [citation.] In the same article Senior Deputy District Attorney Brian Rafelson said, "If a juvenile commits one of 30 felony offenses spelled out in the law, ranging from murder to witness intimidation, the law allows prosecutors to send the case to adult court." [citation]

> He also said, "the district attorney takes into consideration prior criminal history and whether the crime was gang-related". [citation.]

Ms. Fox reportedly gave an extensive interview to The Advocate regarding Brandon's case. In that interview, Ms. Fox is quoted as saying,

> "When you kill someone, to me you need to be incarcerated away from the public for a long time. Because to me, you've demonstrated that you're dangerous. That's why we have such lengthy sentences for murderers, because you don't want to just say, 'Now don't ever do that again!'
>
> 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 some kind of plea or agreement. What I'm thinking of is battered women, people who kill under extreme circumstances.
>
> But if it's a situation where it's unprovoked and premeditated, then I would say in pretty much all of those cases, that public safety is a tremendous concern for me. And punishment is very high on my list of priorities. I'm very big on personal responsibility. And unless you can show me that you had a really, really, really good reason for doing what you did, I think you should stand up and be accountable for it. And you should be punished…" [citation.]

On July 24, 2008 a hearing was held in the Ventura County Superior Court regarding a demurrer filed by the public defender's office, which at the time represented Brandon. The Demurrer in essence argued that Welfare and Institutions Code section 707(d) was unconstitutional because it violates the 8th Amendment's prohibition against cruel and unusual punishment, and therefore the court did not have jurisdiction over Brandon's case. According to the Ventura County Star, after the court denied Brandon's demurrer Ms. Fox said that, "[Judge] Daily's ruling on the constitutionality of the state law "pretty much" eliminated the possibility of the district attorney sending [Brandon's] case to the juvenile justice system…". [citation.]

The Ventura County Star also reported that, "[Ms. Fox] said that while she might feel "sympathy" toward [Brandon] because of his age, there is no legal defense for not trying him in adult court". Additionally, the same article states that in the event that the judge ruled in favor of Brandon and granted the Demurrer, "Fox said she could, hypothetically, go back and file a "lying in wait" special circumstance against [Brandon] and by law, the case would have to be transferred back to adult court." [citation.] (PWM at 11.)

Based on these statements, petitioner enumerated various items of discovery he was seeking. Specifically, petitioner's discovery motion stated:

> "Defendant respectfully requests production and disclosure or the right to examine, inspect, copy, photograph, or make other facsimile copies of the following materials and information that are within the possession, custody, or control of the prosecutor; the existence which is known, or by the exercise of due diligence may become known:
>
> > Any and 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 criminal court.
> >
> > Any and all materials related to training given to employees of the Ventura County District Attorney regarding standards for direct-filing cases involving minors in criminal court.
> >
> > Any and 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 criminal court.
> >
> > The names and contact information of any and all persons consulted regarding the decision to direct-file this case, and other cases involving minors, in criminal court.
> >
> > Any and all notes or summaries of conversations, whether or not previously reduced to writing, relating to the decision to direct-file this case and other cases involving minors in criminal court.

> Statistics since March 8, 2000 (date that Proposition 21 went into effect) relating to the percentage of cases involving minors charged with crimes that could discretionarily be filed in criminal court, which in fact resulted in being direct-filed in criminal court.
>
> Case names and case numbers of all direct-filed cases since March 8, 2000 (date that Proposition 21 went into effect.)" (PWM at 3.)

The district attorney filed a written opposition to petitioner's discovery motion, wherein it objected to each and every item of discovery sought by petitioner. (PWM at 4.) In its written opposition the district attorney stated that, "[t]he filing decision in this case was based on…[the underlying facts of the charged offenses.] (PWM at 4.) No other reason was set forth with regard to the district attorney's decision to direct-file petitioner's case. In addition, the district attorney stated in its written opposition to petitioner's discovery motion that, "[a]nything other than an adult filing would constitute an abuse of discretion." (PWM at 4.) At oral argument, the district attorney indicated that the office had no guidelines, standards or criteria that it utilized in making its discretionary direct-filing decisions. (PWM at 4.)

Respondent superior court summarily denied petitioner's discovery motion. (PWM at 5.) Initially, the court indicated that it was denying the motion because there was "no basis for [the] motion" and stated, "…I don't feel that you have made a showing that would allow me to order the discovery that you have requested". (PWM at 5.) Thereafter, counsel for petitioner asked for clarification of the court's ruling by asking, "[i]s the court saying that there is theoretically a sufficient showing, but we haven't made [it]?" (PWM at 5.) The court responded to this inquiry by stating, "[n]o, I'm saying there's no authority that I see. The only way I could see this being possible [is] if there

was some showing of an actual abuse of discretion. If there was some showing that would fall under the sort of showing that would be required under *Murgia*. I just don't see it here at all." (PWM at 5.)

Counsel for petitioner sought further clarification of the court's ruling and began to ask, "[i]s it because of the lack"--, but the court prevented counsel from finishing the question. (PWM at 5.) The court interrupted counsel's question by stating, "[t]hat's all I'm gonna say. I understand. That's all I'm saying". (PWM at 5.) Counsel for petitioner tried once again to get clarification of the court's ruling and began asking, "[b]ut I mean can we make a sufficient"--, but the court again prevented counsel from finishing the question, and stated, "[n]o but anything. I have ruled." (PWM at 5-6.) Counsel for petitioner again attempted to ask the court about the ruling, stating, "[b]ut I need to"--, before the court stated, "[c]ourt's in recess", and physically removed herself from the bench precluding counsel from addressing the matter any further. (PWM at 6.)

## DISCUSSION

### I.
### THE COURT OF APPEAL ERRED IN DENYING THE PETITION FOR WRIT OF MANDATE BECAUSE THE SUPERIOR COURT ABUSED ITS DISCRETION IN SUMMARILY DENYING PETITIONER'S MOTION FOR DISCOVERY, AND FAILED TO RECOGNIZE THAT A DISTRICT ATTORNEY'S ABUSE OF DISCRETION AND VIOLATION OF A MINOR'S RIGHT TO DUE PROCESS MAY CONSTITUTE DEFENSES TO PROSECUTION, THUS TRIGGERING TRADITIONAL PRINCIPLES OF CRIMINAL DISCOVERY.

#### A. PETITIONER'S CONTENTION

Petitioner has with this petition exhausted all the avenues available to him at this point in an effort to avoid being tried without effective assistance of counsel pursuant to

the Sixth Amendment of the United States Constitution, and without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and their California state constitution equivalents. The Court of Appeal erred in denying the petition for writ of mandate because petitioner showed on the face of the record that sufficient evidence existed demonstrating that the Ventura County District Attorney abused its discretion in direct-filing petitioner's case in criminal court, that the prosecution therefore denied him of his liberty without due process of law, and that the validity and materiality of these defenses triggered traditional principles of criminal discovery, which entitled petitioner to seek discovery relevant to his claim.

1. A district attorney must properly exercise discretion for a direct-filing pursuant to Welfare and Institutions Code section 707(d)(2) to be valid.

Welfare and Institutions Code section 707(d) "confers upon the [district attorney] the discretion to determine whether accusations of criminal conduct against [a] minor should be filed in the juvenile court or criminal court". (*Manduley supra.,* 27 Cal.4th at 555.) [2] A district attorney's prior determination that a minor is not fit for treatment under juvenile court law is implicit in a discretionarily direct-filed case pursuant to 707(d). (See *Welf & Inst Code §707*.) A determination that a minor is not fit for juvenile court treatment is reviewable and may be reversed upon a finding of abuse of discretion. (*In re Rene C. supra.,* 138 Cal.App.4th 1.)

The current incarnation of section 707(d) is the result of the enactment of Proposition 21 by the voters of California. (*Manduley* 27 Cal.4th at 544-45.) Proposition

[2] Unless otherwise noted, further statutory references are to the Welfare and Institutions Code.

21 made numerous procedural changes to the manner by which a minor either may or must be subjected to the jurisdiction of the criminal court. (*Id.* at 549-51.) Before its passage, section 707(d) mandated a hearing to determine whether a minor was a fit and proper subject to be dealt with under juvenile court law. (*Id.* at 549-50.) While 707(d) no longer requires a hearing or judicial determination of a minor's fitness, the goal of 707 as clearly expressed in the statute's title remains the same: "[A] determination of [a] minor's fitness for treatment under juvenile court law". (See *Welf & Inst Code §707.*)

For minors 14 years of age or older, who are alleged to have committed certain serious offenses, section 707 also allows a district attorney to file a petition in juvenile court rather than criminal court. (*Id.*, See also *Welf & Inst Code §602*(a).) Upon a filing of a petition in juvenile court, the district attorney may move the juvenile court for an order declaring the minor unfit, in order to try him as an adult. (*Welf & Inst Code* §707, *Rene C.*, *supra*, 138 Cal.App.4th at 2.) In these cases, the juvenile court must determine whether a particular minor is fit or unfit for treatment under juvenile court law. (*Rene C.* at 16-17.) A determination of a minor's unfitness will be reversed if the juvenile court abused its discretion in making such a finding. (*Id.* at 21-22; *Marcus W. v. Superior Court* (2002) 98 Cal.App.4$^{th}$ 36.)

As a result of the changes made to section 707(d) by Proposition 21, the district attorney, and not the court, is now charged with the responsibility of determining whether certain minors should be subjected to the jurisdiction of the criminal court. (*Manduley, supra,* 27 Cal.4$^{th}$ at 545.) Thus, by passing Proposition 21, the voters effectuated the statutory substitution in 707(d) of a district attorney's determination and discretion for the

judicial determination and discretion previously required. (*Id.*) This statutory shift in no way changes the purpose of the law, which is "to decide whether a minor accused of committing a crime should be treated as an adult and subjected to the criminal court system". (*Id.*) This decision is still an issue of a minor's fitness or unfitness for juvenile court treatment. (*Id.*) However, the responsibility of making it now rests in the hands of the district attorney. (*Id.*) It would be nonsensical if a judicial determination of unfitness were reviewable and could be reversed upon a finding of an abuse of discretion, while a district attorney's determination of unfitness, as implied in a direct-filing, were immune from such scrutiny.[3]

In the wake of Proposition 21, under section 707(d) the district attorney, while statutorily permitted to file an accusatory pleading against a minor in criminal court, is required to exercise its discretion in determining whether to do so. (*Id.* at 555.) This requirement is expressly contained in the statute as conveyed by the language "the district attorney… ***may file*** an accusatory pleading in a court of criminal jurisdiction …" (*Welf & Inst Code* §707(d)(1)-(3) (emphasis added).)

"In construing a statute, a court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining that intent, we first examine the words of the statute." (*In re Sean W.* (2005) 127 Cal.App.4th1177, 1182.) The language "may file" must be read to effectuate the purpose of 707(d). To interpret this language to mean merely that a district attorney is allowed to direct-file a minor's case in criminal court

[3] Indeed, in other contexts, such as that of discriminatory prosecution, the courts have previously determined that a district attorney's discretionary decision to file a criminal complaint is subject to court review. (*Murgia v. Municipal Court for the Bakersfield Judicial Dist. of Kern County* (1975) 15 Cal.3d 28615 Cal. 3d 286.)

without a proper exercise of discretion and consideration of fitness, negates the important discretionary function that the statute imposes upon the district attorney. In addition, such an interpretation undermines the very purpose of 707 as a whole, which is to determine whether a minor is fit for juvenile court treatment.

Under 707(d)(2), a district attorney's exercise of discretion in determining whether to file an accusatory pleading against a minor in criminal court must necessarily include a consideration of factors *in addition to* the age of the minor and offense(s) that he is alleged to have committed. This conclusion is compelled because the minor's age and alleged offense(s) are the very factors that trigger the discretionary direct-filing provisions in the first place. If the statute were to be read as merely requiring that the district attorney rely on the offense(s) and age of the minor as the only factors necessary to make a direct-filing determination, then the district attorney's discretionary role in the fitness determination as required by 707(d) would be meaningless. Such an interpretation would completely undermine 707(d)'s discretionary nature, as well as its purpose, which is to decide if juvenile or criminal court jurisdiction is appropriate in a particular case.

A determination under 707(d)(2) regarding a minor's fitness for treatment in juvenile court cannot reasonably be made by looking simply at the age of the minor and the alleged offense. Although 707(d) no longer expressly requires an analysis of specified statutory criteria, a decision regarding whether to file directly in criminal court still requires an analysis aimed at assessing the minor's fitness. As this Court noted in *Manduley*, "707(d) grants the district attorney the authority to establish and apply the criteria that guide his or her decision whether to file an accusatory pleading in criminal

court". (*Manduley, supra,* 27 Cal.4th at 556). Under 707(d)(2), this type of analysis by a district attorney becomes necessary when the minimal requirements of a minor's age and alleged offense are met.

"Statutory language must be viewed in context, keeping in mind the obvious purpose of the statute where the words appear." (*Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.* (2002) 100 Cal.App.4th 973, 986.) Viewed in context, it is noteworthy that Proposition 21's grant of discretionary direct-filing power to the district attorney remained expressly within the statutory scope of 707. Section 707 is an entirely procedural provision, establishing the method by which a determination is to be made regarding the proper jurisdiction for minors of certain ages who are alleged to have committed specific offenses. If the "may file" language that grants discretionary direct-filing power to the district attorney were not meant to require some additional fitness analysis, then its place within 707 would be meaningless.

Similarly, the supposition that 707(d)(2) requires a district attorney to engage in an additional fitness analysis inquiry above and beyond consideration of the minor's age and alleged offense(s), is buttressed by the fact that the law is the result of changes made to a preexisting subdivision (d), and not the addition of a new provision of law. In other words, granting the district attorney discretionary direct-filing power could easily have been achieved through the creation of another statutory provision separate and distinct from 707. [4]

[4] To be sure, Proposition 21 did bring about the entirely new addition of Article 20.5; Deferred Entry of Judgment. This augmentation of the Welfare and Institutions Code included sections 790-795, none of which existed prior to the passage of Proposition 21. (*Welf & Inst Code §§790-795.)*

If the advent of the discretionary direct-filing power had come by way of a separate statutory provision, then its meaning would not be impacted by the totality of 707. However, Proposition 21's grant of direct-filing power did so within the context of 707, and thus its meaning is informed by both the title and the remaining provisions of section 707. This further supports the conclusion that a district attorney's filing decision must be based on factors other than a minor's age and alleged offense(s).

An analysis of section 602(b) sheds further light on the exercise of discretion at issue in 707(d)(2). Section 602(b) sets forth the cases under which the age of the minor and alleged offense alone dictate that the case shall be filed directly in criminal court. (*Welf & Inst Code* §602.) Also having undergone changes as a result of Proposition 21, section 602(b) expanded the circumstances under which a direct-filing, based solely upon a minor's age and alleged offense(s), is both proper and mandated. (*Manduley, supra.,* 27 Cal.4th at 549-50, 557.) In this category of cases, a minor is statutorily unfit for juvenile court treatment, and the district attorney enjoys no discretion to refrain from filing in criminal court.

The mandatory direct-file provisions of 602(b) are incorporated by reference into 707(d), and juxtaposed with the discretionary direct-file provisions contained therein. In 707(d)(1), (2) and (3) prior to delineating the circumstances under which a district attorney has discretionary direct-filing authority, each subdivision states, "**except as provided in subdivision (b) of section 602**." This language serves to emphasize and contrast those cases in which the offense alone requires direct-filing due to statutory unfitness as in 602(b), with those cases in which the offense merely serves as a threshold

requirement after which further analysis regarding a minor's fitness is needed, as in 707(d)(2). If the age and alleged offense(s) in and of themselves were intended to warrant a discretionary direct-filing decision, then the circumstances listed in 707(d)(2) would have appeared instead in 602(b). That they do not further evidences that 707(d)(2) was intended to require a district attorney to engage in an additional fitness analysis, which takes into consideration factors besides the minor's age and alleged offense(s), in making a discretionary direct-filing decision.

2. There may be multiple potential bases for a district attorney's abuse of discretion in direct-filing a minor's case in criminal court pursuant to 707(d).

"The importance, to the public as well as to individuals suspected or accused of crimes, that [the district attorney's] discretion be exercised with the highest degree of integrity and impartiality, and with the appearance thereof cannot easily be overstated". (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1387.) A district attorney's exercise of discretionary functions occurs in a broad sense, in the manner in which she initiates and conducts prosecutions for public offenses. (*Cal Gov Code* §26500.) However, 707(d)(2) imposes upon a district attorney the additional and specific discretionary function of determining whether to direct-file a minor's case in criminal court.

A proper exercise of discretion by a district attorney under 707(d)(2) cannot occur if the discretionary freedom of choice is not understood, appreciated or adhered to. Section 707(d) presents prosecutors with a choice between two possible jurisdictions, that of the juvenile court, and that of the criminal court. A filing in either court is statutorily available and within the discretion of the district attorney to determine.

A district attorney's subjective belief that filing a minor's case in juvenile court would constitute an abuse of discretion renders juvenile court jurisdiction unavailable to the minor. This effectively results in a direct-filing that does not reflect the district attorney's determination that the minor is unfit for juvenile court treatment, but instead the district attorney's erroneous perception of the unavailability of juvenile court jurisdiction. This result clearly defies the directive of 707(d)(2), which requires a district attorney to choose between two available jurisdictions, and thus would constitute an abuse of discretion.

Similarly, if a case were in juvenile court for a fitness determination, a juvenile court judge's finding of unfitness which is based on a belief that a finding of fitness would constitute an abuse of discretion, would amount to an abuse of discretion. Since a judicial ruling of this kind would be subject to review and reversal, so must a district attorney's direct-filing decision, which implicates the same flawed rationale. (See *Rene C., supra.,* 138 Cal.App.4th 1.)

Just as an abuse of discretion can occur by a district attorney's failure to understand the discretionary mandate of 707(d), so too can a district attorney's consideration of improper or irrelevant factors in making a discretionary direct-filing decision. For example, if a particular district attorney's office uses or seeks grant money, and does so by relying on statistics regarding the office's number of discretionary direct-file prosecutions, then there exists a very real possibility of an abuse of discretion, due to its consideration of factors not specific to an individual minor's fitness. At the very least, such a scenario calls into question the notion that a district attorney's "discretion be

exercised with the highest degree of integrity and impartiality, and with the appearance thereof…." (See *Dehle*, *supra.,*166 Cal.App.4th at 1387.) At the very worst, a district attorney's discretionary direct-filing practices are motivated by monetary considerations, instead of consideration of an individual minor's fitness for juvenile court treatment. Under circumstances such as these, a defense of a district attorney's abuse of discretion must be available and judicially recognized to protect the minor's right to due process.

An abuse of discretion can also occur if a district attorney fails to adequately consider relevant and material information in making a direct-filing decision. For example, a failure to give due consideration to a minor's developmental disability in making a direct-filing decision, may amount to an abuse of discretion. (*Rene C. supra.,*138 Cal.App.4th 1.) A failure to consider a minor's developmental immaturity may also constitute an abuse of discretion. (*Id.* at 13-14.) It follows that a district attorney's failure to consider a minor's mental illness may also constitute an abuse of discretion. (*Id*., See also *People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667.) In addition, a district attorney's failure to consider critical evidence in making a direct-filing decision may also constitute an abuse of discretion. (See *Rene C.,*138 Cal.App.4th at 11-14.) Furthermore, a finding of unfitness based on an improper reliance on a minor's involuntary, coerced confession also amounts to an abuse of discretion. (*Marcus W. supra.,* 98 Cal.App.4th at 45-46.)

In this case it appears that the district attorney may have abused its discretion, either by not fully appreciating the discretionary function that 707(d) commands, or disregarding it. This appearance of an abuse of discretion was initially created by the

numerous statements made by the district attorney's office to the media with regard to the direct-filing decision in this case. These statements suggested that the offense alone was the reason for the direct-filing decision, which alerted petitioner's counsel to the possible occurrence of an abuse of discretion by the district attorney, and formed the basis of his discovery motion.

While the statements made to the media were the foundation upon which petitioner built his discovery request and motion, additional assertions and admissions in the district attorney's written opposition to petitioner's discovery motion further evidenced an actual abuse of discretion. This showing was based on the district attorney's statements that the direct-filing decision was based upon the facts of the case, and that, "[a]nything other than an adult filing would constitute and abuse of discretion." In the aggregate, the district attorney's statements to the media and admissions made in its opposition and at the hearing lend further credence to the idea that not only is it possible for a district attorney to abuse its discretion in direct-filing a minor's case, but that such an abuse did in fact occur in the instant case.

3. Since the "may file" language of 707(d)(2) imposes an obligation on the district attorney to exercise discretion and consider factors in addition to the minor's age and the alleged offense prior to direct-filing, the mandatory effect of the failure to exercise proper discretion renders the act of direct-filing invalid.

When a statutory provision is obligatory, failure to comply with its dictates may invalidate a subsequent criminal prosecution. (*People v. Mcgee* (1977) 19 Cal.3d 948, 954-61.) A governmental entity is required to follow an obligatory procedure, while a

governmental entity is free to follow a permissive procedure, or not, as it chooses. (*Id.* at 958-59 (explaining *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.))

The provision of 707(d)(2) stating that "a district attorney…**may file** an accusatory pleading against a minor 14 years of age or older in a court of criminal jurisdiction", although effectuating a grant of permissive power, is nonetheless obligatory. The "may file" provision denotes 707(d)'s procedural requirement that the district attorney exercise discretion in assessing which court's jurisdiction is appropriate.

The obligatory character of the "may file" provision is evident, because under 707(d) a district attorney cannot come to a direct-filing decision without a proper exercise of discretion. Accordingly, the "may file" language of 707(d), while appearing permissive in tone, actually imposes a mandatory statutory duty on the district attorney to exercise its discretion in making a filing decision and is thus obligatory. (See *Mcgee, supra.*,19 Cal.3d 948.)

Given the obligatory nature of 707(d)'s "may file" provision, a subsequent criminal prosecution initiated in the absence of a district attorney's proper exercise of discretion will be invalid if the statutory provision is deemed to have a mandatory effect. (*Id.*) In *People v. McGee*, in explaining the mandatory-directory effect doctrine, this Court pronounced,

> "when the requisitions prescribed are intended for the protection of the citizen,…and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid…." (*Id.* at 963.)

If a statutory provision was intended to "provide at least some modicum of protection to individuals [accused of a crime]" then the state's failure to adhere to the procedure "may be raised by a criminal defendant as a bar to such a prosecution". (*Id.* at 963-967.)

An application of this legal standard to section 707(d)(2) demonstrates that the "may file" provision is mandatory and not merely directory. Section 707(d)(2) provides some protection for minors within its scope, by providing them with the availability of and opportunity for juvenile court treatment, despite the permissible direct-filing of their case in criminal court. (See *Id.*) Thus 707(d), in a manner markedly different from 602(b), statutorily provides that minors be afforded consideration for juvenile court treatment.

Minors within the ambit of 707(d) are thus statutorily cloaked in the protection of the district attorney's mandatory exercise of discretion and assessment of their fitness for juvenile court. Indeed it is this discretionary choice, which may provide a minor with the rehabilitative efforts and jurisdiction of the juvenile court, as opposed to the lengthy sentences and punitive measures of the criminal court. The "modicum" of protection inherent in 707(d) is the procedural process and consideration it provides minors before they may be subjected to criminal court jurisdiction. (*Id.*) Such protection is absent from 602(b), which provides for no such procedure by the prosecutor.

Given the obligatory nature of 707(d)'s "may file" language and the mandatory effect of a district attorney's failure to comply with its discretionary mandate, a criminal prosecution initiated in the absence of a district attorney's adherence to this requirement

is invalid. (See *McGee, supra.,*19 Cal.3d 948.) Accordingly, a criminal defendant may raise such a failure as a defense to criminal prosecution. (*Id.*)

4. A criminal prosecution resulting from a district attorney's failure to exercise proper discretion under 707(d) denies a minor of his liberty without due process of law.

"The due process clause of both United States and California Constitutions is a bar to the deprivation of liberty except by the regular administration of the law and in accordance with general rules designed to protect individual rights." (*People v. Municipal Court* (1972) 27 Cal.App. 3d 193, 205.) "Due process of law requires that criminal prosecutions be instituted through the regular processes of law". (*Id*.)

In California, Welfare and Institutions Code section 707(d) sets forth the process of law governing a district attorney's ability to discretionarily-direct file a minor's case in criminal court. Under 707(d) a minor has a statutory right to a determination by a district attorney as to his fitness for treatment under juvenile court law. Absent a district attorney's adherence to the procedural process of law set forth in 707(d), a subsequent criminal prosecution deprives a minor of his liberty without due process of law. (See *Id.*) Similarly, a district attorney's improper determination that a minor is not fit for juvenile court treatment also violates a minor's right to due process. (*Id.*)

Government conduct that violates a person's constitutionally protected right to due process of law is grounds for a defense against criminal prosecution. (See *People v. Archerd* (1970) 3 C3d 615.) Accordingly, a minor charged in a court of criminal jurisdiction pursuant to 707(d) may defend against a criminal prosecution by demonstrating that the prosecution is not instituted through the regular process of law,

and thus deprives him of his liberty without due process. (*Id.*)

Petitioner, a minor endeavoring to make such a showing, seeks discovery to assist him in the preparation and presentation of his defense that the prosecution denies him of his liberty without affording him his Constitutional right to due process of law. This defense would be in the form of a pretrial motion to dismiss.

5. In a criminal prosecution an accused is entitled to discovery of all relevant and material information that will assist him in the preparation and presentation of his defense.

It is axiomatic that suppression by the prosecution of evidence favorable to an accused violates due process of law where the evidence is material to either guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83; *U.S. v. Bagley* (1985) 473 U.S. 667.) This principle applies even beyond the domains of guilt and punishment when a "defense" consists of claiming a constitutional violation as the basis for a pretrial motion to dismiss, or for other sanctions. **(***Murgia, supra.,* 15 Cal.3d 286, See also *People v. Cruz* (1993) 16 Ca4th 322.)

The issue of whether a prosecution's alleged "discriminatory enforcement of the laws" was a legally recognized "defense" to a criminal charge, which would allow defendants to seek and obtain discovery relevant to such a claim, was addressed by this Court some 30 years ago. In *Murgia v. Municpal Court*, criminal defendants filed a discovery motion seeking documentary and testimonial evidence from law enforcement officials, which they alleged, related to their claim of discriminatory prosecution. (15 Cal.3d at 291.) The defendants cited the equal protection clauses of the United States and

California Constitutions as bases for their defense of discriminatory prosecution. (*Id.* at *294*.)

In *Murgia* the trial court denied defendants' discovery requests because of its mistaken belief that a defense of discriminatory prosecution was unavailable. (*Id.* at *290, 293*.) This Court acknowledged the validity of the defense of discriminatory prosecution, and concluded that the materiality of the defense triggered traditional principles of criminal discovery, which entitled the defendants to seek discovery relevant to their claims. (*Id.* at *306*.) In addition, this Court issued a peremptory writ of mandate directing the trial court to vacate its order denying discovery to the defendants. (*Id.*)

Beyond *Murgia's* recognition that an equal protection violation is a proper foundation upon which a criminal defendant may build a defense against prosecution, there is a body of jurisprudence identifying additional defenses rooted in other Constitutional rights, which similarly do not involve issues pertaining to the defendant's guilt. Such Constitutional defenses to criminal allegations range from violations of the right to counsel, right to speedy trial, and right to due process of law. (*People v. Coffey* (1967) 67 Cal.2d 204, *Jones v. Superior Court* (1970) 3 Cal.3d 734, *People v. Archerd* (1970) 3 C3d 615.) These defenses may properly be raised by a criminal defendant in a pretrial motion to dismiss. (*Id.*) Additionally, the longstanding existence of the exclusionary rule as the appropriate sanction for government conduct that violates the Fourth Amendment's prohibition against unreasonable searches and seizures, further exemplifies the legal principle that Constitutional violations often serve as a basis for a

criminal defendant's defense against prosecution. (See e.g. *People v. Williams* (1999) 20 Cal.4th 119, *Mapp v. Ohio* (1961) 367 U.S. 643.)

Application of these legal principles to petitioner's case demonstrates the availability of discovery with regard to his claim that the direct-file prosecution deprives him of his liberty without due process of law. Here, as in *Murgia*, the claimed Constitutional defense triggers traditional notions of criminal discovery. Although the Constitutional protection upon which petitioner relies is due process as opposed to equal protection, petitioner is nonetheless entitled to discovery to assist him in the preparation and presentation of his Constitutional defense.

B. THE COURT OF APPEAL OPINION

The Court of Appeal summarily denied the petition.

## CONCLUSION

A district attorney's direct-filing of a minor's case under Welfare and Institutions Code section 707(d), like a judicial determination of a minor's unfitness, must be subject to review for abuse of discretion. In order to present the superior court with evidence of an abuse of discretion, petitioner cannot be absolutely precluded by the superior court from the discovery of any relevant and material information from the district attorney to assist him in the preparation and presentation of this defense. Since petitioner's defense asserts that the direct-file prosecution violates his Constitutional right to due process of law, traditional principles of discovery must apply.

Notwithstanding petitioner's *prima facie* showing that the Ventura County District Attorney abused its discretion in direct-filing his case in criminal court, both the superior court's summary denial of petitioner's request for discovery and the Second District Appellate Court's summary denial of his petition for writ of mandate seeking review thereof, are currently preventing him adequately preparing and presenting his defense to the direct-filed prosecution of his case. Where, as here, the district attorney's own statements repeatedly suggest that insufficient consideration was given to the issue of petitioner's fitness for juvenile court treatment prior to the direct-filing decision, a defense of abuse of discretion may lie.

Absent review by this Court, petitioner, as well as minors in jurisdictions across the state who find themselves subject to district attorney's direct-filing decisions, will be unable to challenge these decisions in appropriate instances. Minors with mental illnesses and developmental disabilities, as well as those who are developmentally immature, those who lack criminal sophistication, and those without any prior delinquency or criminal history are among those impacted by this important issue of law. For these reasons, Petitioner respectfully requests the Court accept review of the instant case.

Dated: February 25, 2009

Respectfully Submitted,

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Robyn B. Bramson
Attorney for Petitioner

## CERTIFICATION OF WORD COUNT

I, Scott Wippert, hereby certify that this brief contains 8,372 words as indicated by my word processing program and utilizes 13 point Times New Roman font.

Dated: February 25, 2009

_____
Robyn B. Bramson
Attorney for Petitioner

**DECLARATION OF SERVICE BY MAIL**

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age and not a party to the within cause and am self-employed in the Law Office of Robyn B. Bramson at 8050 Melrose Avenue 2nd Floor, Los Angeles, California 90046 with a telephone number of 916-505-2666. On the date hereof, I served the attached document by depositing a true and correct copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

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Executed this 26th day of February, 2009, at Los Angeles, California.

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