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LA TWON WEAVER

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff / Respondent	No. S033149
vs.	Related Case No. S193534
LA TWON WEAVER,	
Defendant / Appellant.	San Diego County Superior Court Case No. CRN22688

OPPOSITION TO RESPONDENT'S MOTION FOR ACCESS TO SEALED PENAL CODE SECTION 987.9 DOCUMENTS AND SEALED CLERK'S AND REPORTER'S TRANSCRIPTS

TO: THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant La Twon Weaver filed his opening brief on direct appeal in this case on January 23, 2007. On November 1, 2007, respondent filed a motion requesting the Court unseal certain documents and transcripts that had been sealed in the Superior Court pursuant to Penal Code section 987.9.[1] Following the litigation of that motion, this Court denied respondent's request on January 23, 2008. *See* Order, *People v. Weaver*, S033149 (Cal. Jan. 23, 2008) ("Respondent's 'Application to Unseal Portions of Reporter's and Clerk's Transcripts of Trial Court Proceedings,' filed on November 1, 2007, is denied.").

Respondent subsequently filed its brief on March 20, 2008. Appellant filed his reply brief on December 14, 2010. The case is fully briefed and awaiting argument.

On May 31, 2011, Mr. Weaver filed a Petition for Writ of Habeas Corpus in this Court, in related case S193534. On June 1, 2011, this Court exercised its discretionary authority, pursuant to Rule 8.385(b) of the

[1] All further references are to the California Penal Code unless otherwise specified.

California Rules of Court, to request an informal response to the petition. Respondent's informal response is currently due on December 30, 2011.

On September 29, 2011, respondent again petitioned this Court for access to all material sealed by the trial court pursuant to section 987.9. *See* Motion for Access to Sealed Penal Code Section 987.9 Documents and Sealed Clerk's and Reporter's Transcripts ("Motion"). Respondent has styled its motion as a request for "access" to the sealed material, as opposed to the "application to unseal" the material that it filed in 2007. But the change in caption should not obscure the fact that respondent, via the same Deputy Attorney General, seeks the same material, in the same case, that this Court refused to provide several years ago.

All sealed portions of the record contain material that is confidential pursuant to section 987.9. The rights guaranteed to indigent defendants by section 987.9 are mandated not only by state law, but also by the rights to counsel, fair trial, equal protection, and due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and parallel provisions of the California Constitution. *See People v. Blair*, 36 Cal. 4th 686, 732-33 (2005) (citing *County of Los Angeles v. Commission on State Mandates*, 32 Cal.App.4th 805, 815 (1995)).

For the reasons stated below, appellant opposes respondent's request for access to the section 987.9 materials filed in this case. As it did in 2008, this Court should again reject respondent's request.

POINTS AND AUTHORITIES

I. THE DISCLOSURE PROVISIONS OF SECTION 987.9(D) DO NOT APPLY BEFORE THIS COURT ISSUES AN ORDER TO SHOW CAUSE

Respondent seeks access to confidential materials pursuant to section 987.9(d), which allows for limited disclosure where respondent makes a showing that certain confidential records "relate" to an issue raised on appeal or collateral review. By its very terms, however, section 987.9(d) requires that a "proceeding" must exist before its disclosure provisions come into play. The statute provides that "the documents shall remain under seal and their use shall be limited solely to the *pending proceeding*." Penal Code § 987.9(d) (emphasis added). A "judicial proceeding" in a habeas corpus action is instituted by the issuance of an order to show cause. As this Court has explained, "When we order the respondent to show cause . . . we do more than simply transfer the petition to that court and more than simply afford the petitioner an opportunity to present evidence in support of the allegations of the petition; we institute a *proceeding* in which issues of fact are to be framed and *decided*." *In re*

Hochberg, 2 Cal. 3d 870 (1970), *overruled on other grounds*, *In re Fields*, 51 Cal. 3d 1063, 1070 n.3 (1990) (emphasis in original).

This Court has not yet issued an order to show cause in appellant's habeas case. It is presumably undisputed that no cause of action or "proceeding" presently exists. Indeed, this is likely why respondent filed its request for access to the confidential documents in appellant's direct appeal case, S033149, not the habeas case, S193534. Under this Court's jurisprudence, "the [habeas corpus] petition itself serves a limited function." *In re Lawler*, 23 Cal. 3d 190, 194 (1979). It does not create a cause of action. *See People v. Romero*, 8 Cal. 4th 728, 740 (1994). Nor does the request for an informal response create a cause of action. As the Court explained in *Romero*, "The term 'informal' by itself implies that the . . . response is not a pleading, does not frame or join issues, and does not establish a 'cause' in which a court may grant relief." *Id.* at 741. Instead, it is the issuance of the order to show cause that "creates a 'cause' giving the People a right to reply to the petition by a return and to otherwise participate in the court's decisionmaking process." *In re Serrano*, 10 Cal. 4th 447, 455 (1995). Pursuant to this scheme, the return to an order to show cause – not the petition, and not the informal response – is the "principal pleading" in a habeas corpus proceeding. *Lawler,* 23 Cal. 3d at

194; *see also Serrano*, 10 Cal. 4th at 454-56 (describing generally the process by which issues are joined).

Second, the Legislature did not intend disclosure under 987.9(d) to occur at this stage of the litigation. It is assumed that when the Legislature drafted section 987.9(d) in 1998, it did so with awareness of, and in conformity with, relevant precedents. *See People v. Weidert,* 39 Cal. 3d 836, 844 (1985). At that time, this Court had already determined that the filing of a habeas corpus petition in state court did not confer jurisdiction on a court to grant discovery, *People v. Gonzalez,* 51 Cal. 3d 1179, 1256-58 (1990), or even to grant a request to preserve documents and records not introduced or used at trial for future litigation, *People v. Johnson,* 3 Cal. 4th 1183, 1257-59 (1992). As the Court explained in *Gonzalez,* this result follows from the fact that the filing of a petition "creates no cause or proceeding which would confer discovery jurisdiction" until the Court determines that the allegations state a prima facie case for relief. *Gonzalez,* 51 Cal. 3d at 1258.

In 2003, the Legislature modified the rule announced in *Gonzalez* by enacting section 1054.9, which established a mechanism through which habeas petitioners could obtain discovery "*before* they file the petition, i.e., before they must state a prima facie case." *In re Steele*, 32 Cal. 4th 682, 691 (2004) (emphasis in original). Although it could have done so, the

Legislature did not amend section 987.9(d) at the time it enacted section 1054.9, or at any other time. Thus, while section 987.9(d) provides for limited access under specified conditions to confidential documents, a court cannot grant respondent a free-floating right of access. Instead, it must exercise its authority in the context of an existing cause of action. Had the Legislature meant to provide otherwise, it would have done so, as it did when it enacted section 1054.9. Absent such an indication, this Court must assume that the Legislature meant to harmonize section 987.9(d) with existing law.

Existing law requires first that an appellate court receiving a petition evaluate the petition by asking whether, "assuming the petition's factual allegations are true, the petitioner would be entitled to relief." *People v. Duvall*, 9 Cal. 4th 464, 475 (1995) (internal citations omitted). If the court concludes that the petitioner has failed to state a prima facie case for relief, the court will summarily deny the petition. If, however, the court finds that the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an order to show cause. *Id.* When the court issues an order to show cause, "'it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues.'" *Id.* (quoting *In re Clark*, 5 Cal. 4th 750, 781 n.16 (1993)). The issuance of an order to show cause

announces the issuing court's preliminary assessment that the petitioner would be entitled to relief if his factual allegations are proved. *Duvall*, 9 Cal. 4th at 475. Then, and only then, may respondent seek access to confidential materials that are related to those specific claims pursuant to section 987.9(d).

In sum, at a minimum, respondent's motion is premature. This Court cannot order the disclosure of documents that are protected by appellant's privilege against self-incrimination and the attorney-client and work product privileges without first establishing a cause of action and making a determination as to which habeas claims, if taken as true, would warrant relief. Only at that point would it be possible for this Court to determine, pursuant to section 987.9(d), whether any of the protected materials "relate" to any claims appellant has raised. Only at that point would a "proceeding" exist within which the Court could limit any disclosure under the statute.[2]

II. THE STATUTE REQUIRES A SHOWING OF RELEVANCE THAT RESPONDENT HAS NOT MADE

Section 987.9(d) requires a showing of relevance before the Court can authorize the disclosure of confidential materials sealed pursuant to

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[2] If an order to show cause is no longer a precondition to the creation of a cause of action, then this Court must revisit many of its habeas corpus precedents, including, as discussed above, *Duvall* and *Romero*.

section 987.9. As an initial matter, it would be impossible for respondent to make such a showing prior to the issuance of an order to show cause. Until that point, as discussed above, there is no pending "proceeding" through which appellant has raised an issue that might prompt disclosure under section 987.9(d).[3] But even if such a proceeding had been instituted, respondent has made no effort to demonstrate the relevance of any habeas claim to the sweeping set of documents to which it seeks access.

A. The Statute Requires a Showing of Relevance

At the time of appellant's trial, section 987.9 permitted counsel for a capitally accused defendant to request funds for investigators, experts, or other ancillary services by way of a confidential application. The fact of the request and its contents were confidential. The court's ruling on the request was also confidential. No provision for disclosure existed.

In 1998, at the urging of the Attorney General, the Legislature amended section 987.9 to add subsection (d). *See* Senate Committee Analysis of SB 1441 (May 12, 1998) (listing the Attorney General as a

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[3] Respondent cites *People v. Superior Court (Berryman),* 83 Cal.App.4th 308, 311 (2000), in which the California Court of Appeal for the Fifth District, in conclusory fashion, held that the mere filing of a habeas petition raising claims of ineffective assistance of counsel due to counsel's failure to investigate and/or prepare a defense "constitutes raising by collateral review an issue or issues related to the recorded portion of the record crated pursuant to Penal Code section 987.9." Particularly in light of the absence

supporter, and the source, of the bill). Subsection (d) states that the Attorney General may gain access to otherwise confidential 987.9 material "when the defendant raises an issue on appeal or [in] collateral review where the recorded portion of the record, created pursuant to this section, relates to the issue raised." Penal Code § 987.9(d). Thus, by its plain language, the statute authorizes disclosure only where there has been a showing that the confidential material "relates" to an issue raised on appeal or in a habeas corpus petition.

The history of the statutory language is instructive and supports this common sense reading of the statute. As originally introduced, Senate Bill 1441 would have terminated confidentiality upon finality of direct review or upon the filing of a post-conviction pleading to which the contents of the confidential file relates.[4] The bill was amended in several ways before it was passed by the Legislature.

First, the amended bill eliminated the automatic termination provision by requiring the Attorney General to obtain judicial permission to view the documents. The statute authorized the court to release only those

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of any analysis of the issue in that case, appellant respectfully suggests that this Court reject the court's holding in *Berryman*.

[4] The relevant portion of SB 1441 originally read: "(d) The confidentiality provided in this section shall exist only until the judgment is final on direct review or until the defendant raises an issue on appeal or collateral review

records that it found "relate[d]" to pending post-conviction claims. The amended statute also provided for continued "confidentiality." Finally, the Legislature inserted the words "relevant" and "relevant portion" into the final version of the bill. These amendments make it clear that the Legislature intended a prior judicial determination of relevancy before the release of any records, and eliminated any possibility that the statute would be self-executing.[5]

B. Respondent Makes No Attempt to Establish Relevance

Respondent seeks access to "all Penal Code section 987.9 records and the sealed Reporter's and Clerk's Transcripts" in this case. Motion at 6. While respondent states that access to the documents is "warranted" in light of appellant's habeas claims, it provides no argument or factual showing in support of this claim. Motion at 5. Respondent merely lists in a two-page footnote the many allegations of ineffective assistance of counsel

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where the record created pursuant to this section relates to the issue raised." *Sen. Bill No. 1441* (1997-1998 Reg. Sess.) as introduced Jan. 28, 1998.

[5] As amended on April 27, 1998 subsection (d) read: "The confidentiality provided in this section shall not preclude any court from providing the Attorney General with access to documents protected by this section when the defendant raises an issue on appeal or collateral review where the recorded portion of the record, created pursuant to this section relates to the issue raised. When the defendant raises that issue, the funding records, or portions thereof, shall be provided to the Attorney General at the Attorney General's request. In such a case, the documents shall remain under seal

that appellant raised in his habeas petition. Motion at 2-3. Respondent's position appears to be that the filing of a habeas petition alleging ineffective assistance of counsel entitles it to access to all material sealed pursuant to 987.9(d). As explained above, the statute does not provide for such a broad, free-floating request absent any showing of relevance.

Respondent does, on one page of its motion, appear to recognize that the statute requires a determination that the sealed portions of the record "are relevant to Weaver's allegations of ineffective assistance of trial counsel." Motion at 5. But it is not clear whether respondent believes it has made such a showing, or that it wishes the Court to do this work instead. In any event, the showing has not been made.[6]

If the Legislature meant to authorize disclosure based solely on a showing that a defendant had raised an ineffective assistance of counsel claim either on appeal or in a habeas corpus petition, it would have said so. Instead, the law requires that the requested confidential materials be "related" to an issue raised. Penal Code § 987.9(d). Because respondent

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and their use shall be limited solely to the pending proceeding." *Sen. Bill No. 1441* (1997-1998 Reg. Sess.) as amended April 27, 1998.

[6] The only sealed document about which respondent makes even a token relevance argument is the January 28, 1993 testimony of a witness named John Costa. Motion at 4-5. Respondent speculates that the testimony is relevant to the habeas claim that trial counsel was ineffective for failing to pursue a continuance, but provides no analysis of the habeas claim or how

fails to make any argument that the material it seeks is related to any specific claims in appellant's petition, its motion should be denied.

III. EVEN IF THE STATUTE PROVIDED FOR DISCLOSURE PRIOR TO THE INITIATION OF A CAUSE OF ACTION, AND EVEN IF RESPONDENT HAD MADE THE REQUISITE SHOWING, THE STATUTE CANNOT CONSTITUTIONALLY BE APPLIED TO APPELLANT

A. The Disclosure Provisions of Section 987.9(d) Were Not In Effect at the Time of Appellant's Trial and May Not Be Retroactively Applied to Him

For the reasons stated above, the statute does not provide for disclosure at this stage of the proceedings, and respondent has failed to make the requisite showing of relevance in any event. But even if the request were timely, and properly made, application of section 987.9(d) to appellant would give the statute impermissible retroactive effect neither contemplated by the Legislature nor appropriate in light of the constitutional and statutory rights implicated by such disclosure.

The confidential applications filed by appellant's counsel, the hearings conducted in connection with those applications, and the orders issued by the trial court were drafted and filed between 1992 and 1993.

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its inability to access Costa's testimony impacts its ability to file its informal response to the petition.

The Legislature added subsection (d) to section 987.9 in 1998, and it became effective on January 1, 1999. Section 3 of the Penal Code provides that no portion of the code is retroactive "unless expressly so declared." Section 3 is a codification of the principle, "familiar to every law student," *United States v. Security Industrial Bank,* 459 U.S. 70, 79 (1982), that "statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." *Aetna Casualty & Surety Co. v. Industrial Accident Commission,* 30 Cal. 2d 388, 393 (1947). A statute has a retroactive effect whenever the new law "attaches new legal consequences to 'events completed' before its enactment, and . . . such a determination must include consideration of fair notice, reasonable reliance, and settled expectations." *Buttram v. Owens-Corning Fiberglass Corporation,* 16 Cal. 4th 520, 536 n.6 (1997) (quoting *Landgraf v. USI Film Products,* 511 U.S. 244, 270 (1994)).

Here, there is no reason to depart from these well-established rules. Nothing in the legislative history or the wording of section 987.9(d) suggests intent to depart from settled rules of statutory construction. The statute contains no express retroactivity provision, and there is no other language in section 987.9(d) on which this Court can rely to find that such intent is clear or that the Legislature considered retroactivity in amending section 987.9. The "presumption against statutory retroactivity is founded

upon sound considerations of general policy and practice," and it "accords with long held and widely shared expectations about the usual operation of legislation." *Landgraf,* 511 U.S. at 293. Consequently, this Court should not apply section 987.9(d) to the funding requests and related documents in appellant's case.

B. The Disclosure Provision of Section 987.9(d) Violates the Equal Protection and Due Process Clauses of the United States Constitution

The underlying principles of section 987.9's confidentiality provisions are the same as those supporting the work product doctrine. Both protect a lawyer's ability to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," and without which "the interests of the clients and the cause of justice would be poorly served." *Hickman* v. *Taylor,* 329 U.S. 495, 510-11 (1947). The work product doctrine extends to materials reflecting the "assistance of investigators and other agents in the compilation of materials in preparation for trial." *United States v. Nobles*, 422 U.S. 225, 238 (1975). Subsection (d), however, authorizes disclosure of billing, funding and related records for ancillary services obtained by an indigent defendant represented by private counsel, either court appointed or retained, or, as in this case, by a public defender office that does not fully fund its cases internally. As such,

the provision violates appellant's rights to Equal Protection and Due Process.

Section 987.9(d) does not provide for disclosure of confidential section 987.9 information in cases involving indigent defendants represented by a public defender office that fully funds its cases internally or defendants able to pay for such services from their own funds. Defendants such as appellant are singled out because of the happenstance that they were represented by attorneys who were required to seek section 987.9 funds. There is no rational basis on which to distinguish a defendant such as appellant, who was represented by a public defender's office that did not fully fund its cases internally, and a defendant who was represented by a public defender's office that did so. Yet section 987.9(d) provides for disclosure of confidential information related to the former, and not the latter. This distinction is not sufficiently related to the statute's purpose to withstand constitutional Equal Protection scrutiny. *See, e.g., Bearden v. Georgia*, 461 U.S. 660, 664-665 (1983).

Moreover, appellant has a Due Process right to fair adjudication procedures that provide "[m]eaningful access to justice." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). A procedure permitting discovery of attorney-client privileged information based on an irrational distinction between lawyers who can provide representation without the need for section 987.9

funds, and those that cannot, does not comport with due process. Such a scheme does not ensure that defendants represented by the latter category of lawyers have an "'adequate opportunity to present their claims fairly within the adversary system.'" *Id.* (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

IV. IN THE EVENT THE COURT ORDERS DISCLOSURE, IT MUST BE NARROWLY TAILORED AND SUBJECT TO A STRICT PROTECTIVE ORDER

Even assuming that any disclosure is appropriate and that it is appropriate at this time, this Court should refer this case to a referee to make an *in camera* determination of which specific documents and transcripts are sufficiently "related" to claims raised in appellant's habeas petition to warrant disclosure under section 987.9(d). In addition, the Court must impose a strict protective order that limits the use and exposure of any disclosed records.

A. Any Implied Waiver the Court Finds is Necessarily Limited in Scope and Must Be Carefully Policed Via an *In Camera* Review by a Referee

Respondent's position is that by filing a petition raising claims of ineffective assistance of counsel, appellant *a fortiori* "directly place[es] at issue all of trial counsel's decision-making, and the consultation, employment, and use of investigators, consultants, and experts, as well as court proceedings from which the prosecutor and public were excluded or

in which witness testimony was sealed." Motion at 2. As discussed above, respondent's construction of the statute defies both its plain language and legislative history. But even if appellant's habeas petition constituted an implied waiver of the attorney-client privilege or the work product doctrine, that waiver is limited in scope. *See Bittaker v. Woodford,* 331 F.3d 715, 720-21, 722 n.6 (9th Cir. 2003).

Appellant has not expressly waived any privileges. Consequently, in addressing respondent's request, this Court first must determine the parameters of any implied waiver and then "strictly police those limits." *Bittaker,* 331 F.3d at 728; *see also Webster v. Ornoski,* No. 93-cv-0306-LKK-DAD-DP, 2007 WL 1521048, at *2-3 (E.D. Cal. May 22, 2007) (noting that "[t]he court finds unpersuasive respondent's argument that the inclusion of an ineffective assistance of counsel claim in a habeas petition constitutes unlimited waiver of the attorney-client privilege," and ordering an *in camera* review to "closely tailor the scope of the implied waiver so that only those documents, or portions of documents, relating to the ineffective assistance of counsel claim are disclosed"); *People v. Superior Court (Laff),* 25 Cal. 4th 703, 720 (2001) (holding that the trial court is obligated to consider and determine attorney-client privilege and work-product protection for material seized pursuant to a search warrant from attorneys before any such material can be inspected by or disclosed to law

enforcement authorities); *cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-456 (2010) ("Permitting disclosure of confidential client information outside of court supervised proceedings undermines important interests protected by the confidentiality rule.").

Compelled broad and unmitigated access to materials regarding fees and funding requests violates the work product doctrine as set forth in section 1054.6. This section expressly states that attorney work product is non-discoverable. Protected work product is defined by reference to Code of Civil Procedure section 2018(a), which provides that "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." While section 1054.6 permits a court to impose limitations on discovery to protect a defendant's rights under the federal Constitution, *Izazaga v. Superior Court,* 54 Cal. 3d 356, 383 (1991), it lists no circumstances under which a court may expand such disclosure.

Appellant thus requests that, should this Court permit respondent access to any materials pursuant to section 987.9(d), it refer the case to a referee to conduct an *in camera* review of the requested records, with appellant's counsel present. As discussed above, the statute is not self-executing; any disclosure must be based on a judicial determination of the relevancy of each specific sealed item to a specific disputed claim or

allegation. The preferred method of determining relevancy in California is via an *in camera* hearing. *See Corenevsky v. Superior Court,* 36 Cal. 3d 307, 321, 325-26 (1984); *see also Kerr v. U.S. Dist. Court for the Northern Dist. of California,* 426 U.S. 394, 405 (1976) ("[I]t would seem that an *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioner's claims of irrelevance and privilege and plaintiff's asserted need for the documents is correctly struck.").

B. Any Disclosed Materials Must Remain Under Seal and Subject to a Strict Protective Order

Section 987.9(d) provides that, if the Attorney General is provided access to documents, they "shall remain under seal." Appellant's constitutional right to counsel includes the right to maintain the confidentiality of defense counsel's trial preparation. *See People v. Benally,* 208 Cal. App. 3d 900, 909 (1989). If defense documents are to be disclosed, any order granting access to respondent must be narrowly drawn to protect appellant's constitutional and statutory rights.

In addition to an ordering that any disclosed documents remain under seal, the Court must limit the use of the disclosed confidential

information "to the pending proceeding," as section 987.9(d) requires.[7] This is particularly necessary, where, as here, the same lawyer is representing respondent in both appellant's direct appeal proceedings and habeas proceedings. While the direct appeal has been fully briefed, it has not yet been argued. As noted above, this Court has already rejected respondent's request for access to the confidential records for use in responding to appellant's direct appeal. *See* Order, *People v. Weaver*, S033149 (Cal. Jan. 23, 2008). Respondent seeks access to the same material now, and has filed its request in the same case, S033149. If the Court orders disclosure now, to the same lawyer in the same case, the Court will, in effect, be nullifying its previous order.

The Court has made clear through its routine rejection of motions to consolidate capital appellate and habeas proceedings that it views the two proceedings as distinct cases. *See, e.g.,* Order, *People v. Pearson*, S191872 (Cal. Oct. 12, 2011) (denying appellant's motion to consolidate appellate and habeas corpus proceedings); Order, *People v. Tully*, S030402 (Cal. April 20, 2011) (same). Accordingly, where, as here, the same lawyer

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[7] As discussed above, the term "proceeding" is a term of art in this context, and no such proceeding has been initiated in this case. Under these circumstances, if the Court nevertheless orders disclosure pursuant to section 987.9(d), it should interpret "proceedings" to mean appellant's habeas corpus proceedings, as opposed the direct appeal proceedings, or

represents the respondent in both proceedings, the Court should be extremely reticent to disclose any confidential information without the clear showing of relevance required by the statute. If it finds that respondent has met that high standard, it should then strictly police the limitations on the use of the disclosed information.

Specifically, the Court should order that any information disclosed pursuant to section 987.9(d) be reviewed only by a lawyer in the Attorney General's Office who is not working on appellant's direct appeal. Such a procedure is similar to the "taint team" method of protecting privileged communications from inadvertent disclosure to attorneys within the same office who should not be privy to those communications. *See, e.g., S.E.C. v. Rajaratnam*, 622 F.3d 159, 183 n.24 (2d. Cir. 2010) ("[The] inevitable 'tainting' of the team of attorneys is the reason that so-called 'ethical walls' are erected to insulate attorneys from conflicts of interest, immunized testimony, or materials that may have been illegally obtained."); *United States v. Triumph Capital Gr. Inc.*, 211 F.R.D. 31, 43 (D. Conn. 2002) ("The use of a taint team is a proper, fair and acceptable method of protecting privileged communications . . . ."). In the alternative, at a minimum, the Court should order that respondent may not use the disclosed

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any subsequent re-trial of the underlying charges. *See Osband v. Woodford,* 290 F.3d 1036, 1042-43 (9th Cir. 2002).

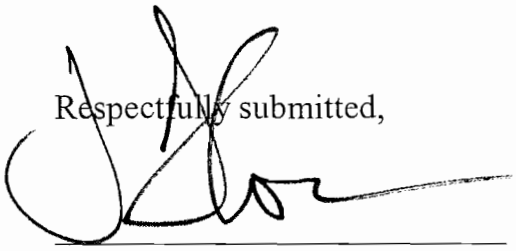
information – or any information directly or indirectly derived from such testimony – in any proceeding other than appellant's habeas case.[8]

CONCLUSION

For the reasons set forth above, respondent's motion for access to documents related to funding requests under section 987.9 should be denied.

DATED: November 9, 2011

Respectfully submitted,



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[8] In other words, the Court should borrow from the concept of derivative use immunity in crafting its limitations on the use of confidential section 987.9 information. *Cf. Kastigar v. United States*, 406 U.S. 441, 450, 453 (1972) (describing origins of use immunity); *United States v. Plummer*, 941 F.2d 799, 804-06 (9th Cir. 1991) (holding that use immunity presumptively includes derivative use immunity).

People v. Weaver; California
Supreme Court Case No. S033149

PROOF OF SERVICE

I, Jessica Michalski, declare:

I am employed in the County of Alameda, State of California. I am over the age of eighteen years and am not a party to the within-entitled action. My business address is 392 Simon Hall, School of Law, University of California, Berkeley, California, 94720. On November 9, 2011, I served the within **OPPOSITION TO RESPONDENT'S MOTION FOR ACCESS TO SEALED PENAL CODE SECTION 987.9 DOCUMENTS AND SEALED CLERK'S AND REPORTER'S TRANSCRIPTS** on the below-listed parties, by depositing true copies thereof in a United States mailbox regularly maintained by the United States Postal Service, in sealed envelopes, with postage paid, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on November 9, 2011, at Berkeley, California.

JESSICA MICHALSKI