

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

CURTIS F. PRICE,

On Habeas Corpus.

CAPITAL CASE
S069685

OPPOSITION TO MOTION FOR POST-CONVICTION DISCOVERY AND
FOR APPOINTMENT OF INDEPENDENT COUNSEL

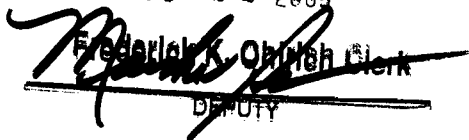
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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**CAPITAL
CASE
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ARGUMENT

I.

**PENAL CODE SECTION 1054.9 IS A FILE
RECONSTRUCTION STATUTE ONLY OPERABLE
UPON A SHOWING THAT TRIAL COUNSEL'S
FILES ARE MISSING**

A. Introduction

Petitioner claims that section 1054.9^{1/} creates a broad new entitlement

1. The express language of section 1054.9 reads:

(a) Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b).

(b) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.

to discovery. Petitioner claims the provision covers items never previously obtained in discovery by the defense, including items which only came into existence after the close of the trial. Petitioner also believes the provision covers items that only became of interest in light of theories developed after the trial. Plainly, section 1054.9 was never intended to overrule settled precedent of this Court that prohibits such discovery, nor was it otherwise intended to create a radical and wide-ranging change in post-conviction discovery law.

As we shall explain, numerous factors, including the plain language of the statute, demonstrate that this statute is only meant to address materials that were once in defense trial counsel's file, but which have been lost or destroyed by the time habeas corpus counsel takes on the case. Perhaps most conclusively of all, the legislative history of section 1054.9, from beginning to end, leaves no doubt that the scope and intent of the statute was strictly limited. For example, in an assembly committee report of August 14, 2002, shortly before the passage of the bill, the purpose of the statute is succinctly described as follows:

SHOULD THERE BE A MECHANISM BY WHICH HABEAS
ATTORNEYS CAN RECONSTRUCT DESTROYED OR

(c) In response to a writ or motion satisfying the conditions in subdivision (a), court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining access to physical evidence for purposes of postconviction DNA testing are provided in Section 1405, and nothing in this section shall provide an alternative means of access to physical evidence for those purposes.

(d) The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant.

MISSING TRIAL FILES?

(Sen. Com. on Public Saf. Rep. for hearing of April 23, 2002; emphasis in original. See Exh. M. at p. 6.)

This sharply limited rationale for the bill was repeated in every significant committee and floor report listed in the legislative history of SB 1391. Also included in every significant report was the following express statement of the author's rationale for the bill:

The problem that occurs all too often is this: a defendant's *files are lost or destroyed* after trial and habeas counsel is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order. This leads to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to re-access the materials and information originally available to him or her at trial.

Currently, as expressed in *People v. Gonzalez*, (1990) 51 Cal.3d 1179, habeas corpus counsel is required to establish all of the elements of a claim for habeas corpus relief before the court will entertain a motion to provide such original documents as police reports, ballistic tests and other materials and information. If habeas counsel cannot obtain the documents needed to meet this threshold showing because trial counsel's files have been *lost or destroyed*, the injustice is clear. The existing remedy, as discussed in *Gonzalez*, is woefully inadequate in cases *where a defendant's file, through no fault of their own no longer exists*. The purpose of the proposed legislation is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled.

(*Id.* at p. 4-5; emphasis added; see Sen. Rules Com., Sen. Floor Analysis, Rep. on Sen. Bill No. 1391 as amended Aug. 26, 2002 (2001-2002 Reg. Sess.) Aug. 30, 2002, pp. 4-5, (see Exh. G); Assem. Com. on Public Saf. Rep. for June 25, 2002, hearing at p. 3, (see Exh. J.) The purpose of the bill was plain and limited; it was promulgated only to allow habeas counsel to reconstruct an already existing file that was, through no fault of the petitioner, lost or destroyed. Petitioner's attempt to use the bill to create a sweeping new

entitlement to discovery is plainly beyond the intended scope of the legislation.

Further support for this view is provided by the discussion in the report created for the August 14th Assembly Committee hearing, which discusses the arguments against the bill advanced by the Attorney General's Office. (See Exh. M., *supra*.) Only two such counter arguments were advanced. First, the Attorney General's Office objected to the section's inclusion of "life" cases as well as death penalty cases, on the basis that files would have to be kept after the individual was released from custody. The author of the bill countered that point by pointing out that habeas corpus would lie only when the individual was still in custody. (*Id.* at p. 5.) The only other argument advanced by the Attorney General to oppose the bill is stated, and countered, as follows:

The Attorney General's Office also opposes including information that is in the possession of law enforcement. However, the author notes that this is information that *would have been in the original trial file*.

This passage makes several points. First, given that the legislators were given this report as a summary of arguments for and against the bill, the limitation of the Attorney General's counterarguments to these two minor quibbles utterly rules out the argument that anyone in the legislative process understood the bill to create a sweeping right to post-conviction discovery. Had the authors, the legislators, the proponents or the opponents at any time believed that the bill was intended to create a sweeping entitlement to post-conviction discovery, which would include every conceivable theory concocted by habeas attorneys in the decades following a conviction, and including every possible fact conceivably supporting such a theory (as illustrated by the 81 page list of particulars in this case), the arguments for and against the bill as stated in the committee reports would have been far more voluminous and spirited. The limitation by the author of the report to these small quibbles by the Attorney

General's Office plainly showed that the author, the proponents, the opponents, and therefore the legislators, understood the bill to provide merely for the reconstruction of items already once physically in the possession of trial defense counsel, but which, through misfortune, had been lost or destroyed.

Finally, the locution used by the "author" in the last quoted response is also telling. The author states that the information "would have been in the original trial file." It is significant that the author does not say that the information "should have been" in the file, or "might have been." Rather, we believe it clear that the term "would have been" means "was." This meaning, of course, comports with the statute itself, which, in subdivision (b), defines discovery materials as materials "to which the same defendant *would have been* entitled at time of trial." We now turn to a fuller discussion of the correct construction of this statute.

B. Legal Background

The starting point in statutory construction is the express language of the statute at issue. (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) Words used in a statute should be given the meaning they bear in ordinary use. (*Ibid.*; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) If the language is clear and unambiguous there is no need for further interpretation or construction. (*Deukmejian, supra.*) In other words, if the statute's plain meaning is apparent from the language, that is the interpretation that should be adopted. (*Birkett, supra*, 21 Cal.4th at p. 231.)

This "plain meaning" rule, however, does not require courts to interpret a statute in such a way as would lead to absurd results the Legislature could not have intended. (*Birkett, supra*, 21 Cal.4th at p. 231.) Thus, the rule does not "prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one

provision is consistent with other provisions of the statute.” (*Deukmejian, supra*, 45 Cal.3d at p. 735.) “Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.” (*Ibid.*)

Finally, it is important to remember that “[s]tatutory language should not be interpreted in isolation, but must be construed in the context of the entire statute of which it is a part, in order to achieve harmony among the parts.” (*People v. Morris* (1988) 46 Cal.3d 1, 16.) “The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.” (*Deukmejian, supra*, 45 Cal.3d at p. 735.)

C. Section 1054.9 Is Only Applicable Upon A Showing That Trial Counsel’s Files Have Been Lost Or Destroyed

The fundamental difference between petitioner’s and respondent’s differing interpretations of section 1054.9 involves the showing necessary to trigger the application of this statute. An evaluation of the plain language of the statute, the current law of postconviction discovery, and the relevant legislative history reveals that the Legislature intended section 1054.9 to be a remedial, file-reconstruction statute rather than a discovery statute. Therefore, section 1054.9 is only applicable upon a showing by a defendant that trial counsel’s files have been lost or destroyed.

1. The “Good Faith Efforts” Requirement

Section 1054.9 only becomes operative “on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful.” The fact that petitioners must first attempt to obtain these

materials from trial counsel is the key to determining the Legislature's intent behind section 1054.9. The Legislature obviously contemplated that section 1054.9 involved materials that were, at one time, in the possession of trial counsel. Indeed, a requirement to make good faith efforts to obtain documents that were never even in the possession of trial counsel would be absurd.

Petitioner may assume that the requirement to attempt to obtain the discovery materials from trial counsel is simply to avoid burdening the courts and prosecution with unwarranted requests. Such an interpretation of the "good faith efforts" requirement, however, will not limit the application of the statute at all. If this Court adopts such an interpretation, a section 1054.9 request should be expected in every capital and LWOP case that is in the postconviction stage.

If section 1054.9 covers documents that were never disclosed to the defense at trial, then every capital and LWOP prisoner should be expected to file a request for anything that he or she did not receive at trial, on the slight chance that something was not disclosed. At the very least, prisoners would use section 1054.9 to seek for evidence of a *Brady* violation, which, by definition, always involves a claim of evidence that was not disclosed at trial. If section 1054.9 requires disclosure of any materials that were never given to trial counsel, then every prisoner will be able to make the requisite showing of "good faith" efforts. Indeed, that is exactly what petitioner has done in this case. Petitioner asserted that habeas counsel conducted a good faith review of trial counsel's files and interviewed trial counsel and ascertained that the materials sought here were not provided to trial counsel. Petitioner did not allege that documents were missing from the defense file; rather, he alleged that he did not get all of the discovery to which he was entitled. Petitioner's actions in this case demonstrate how his interpretation of section 1054.9 will render the "good faith efforts" requirement meaningless.

Petitioner's interpretation also proves too much. When the Legislature adopted section 1054.9, it was already the law in California that "an attorney's litigation file is the property of the client and must be surrendered promptly upon request to the client or the client's new counsel once the representation has terminated." (*Rose v. State Bar* (1989) 49 Cal.3d 646, 655.) Thus, when the Legislature enacted section 1054.9, defendants' trial counsel were already obligated to transfer the case files to defendants' new counsel. The Legislature is presumed to be aware of existing law. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199.) There was no need for the Legislature to require a good faith effort to obtain "discovery materials" from trial counsel when that counsel already had to turn over all files, including the discovery received from the prosecution, to the new counsel. It was not necessary to spare the courts and the prosecution the burden of unwarranted requests when it was already trial counsel's burden to provide the necessary files. When viewed against this backdrop, the "good faith" requirement only makes sense when section 1054.9 is read as a means to reconstruct defendants' trial files when those files have been rendered incomplete due to loss or destruction. Although the prosecution cannot provide missing copies of defendants' trial counsels' work product or investigative files, it can substitute the portions of counsels' files which contained discovery previously provided by the prosecution.

The Legislature intended section 1054.9 to be a remedial statute. To adopt petitioner's interpretation would make it a sword that all prisoners in capital and LWOP cases would use. This was not what the Legislature intended. A statute designed to assist the few habeas petitioners who receive incomplete defense files should not be transformed into a mechanism that all capital and LWOP petitioners will routinely use to sift through prosecution and law enforcement files. (*See Birkett, supra*, 21 Cal.4th at p. 231 [statute should

not be interpreted in such a way as would lead to absurd results the Legislature could not have intended].)

2. The Definition Of “Discovery Materials”

An interpretation of the scope of section 1054.9 relying heavily on some alleged ambiguity in the definition of “discovery materials” provided in section 1054.9, subdivision (b), focuses too narrowly on this specific language and not on the statute as a whole. “The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.” (*Deukmejian, supra*, 45 Cal.3d at p. 735.) Petitioner apparently believes that, since the statute speaks in terms of materials to which he was entitled at trial, he is entitled now to obtain anything in the possession of the prosecution or law enforcement that conceivably was discoverable at trial, or even thereafter. As discussed above, however, given the requirement that the defendant first seek the materials from trial counsel, section 1054.9 plainly contemplates the replacement of lost discovery material and not a new round of discovery aimed at ferreting out all possible discoverable material in the possession of the prosecution.

The Legislature’s use of the precise definition of “discovery materials” in section 1054.9 is understandable when one considers that the purpose of the statute is to replace lost or destroyed defense files. When a defense file is lost, the easiest method of replacing the discovery materials, perhaps many years later, is to focus on the materials to which he or she would have been entitled at trial. Obviously, if the prosecution has kept an accurate record of the discovery provided at trial, then the prosecution would simply have to replicate that discovery to fulfill the requirements of section 1054.9. However, in the event that the prosecution’s files have become disorganized

over the passage of time (which seems likely), compliance with section 1054.9 would simply be a matter of reviewing the file and disclosing all materials that would have been discoverable at trial. This is the solution proposed by the author in the committee report cited above. (See Sen. Com. on Public Saf. Rep. for April 23, 2002 hearing, Exh. M, *supra*, at pp. 5-6.) Such a process would be significantly more efficient than requiring the prosecution or law enforcement to take the additional step of determining what materials were actually provided.

Petitioner's interpretation of the statute displays an inherent distrust of the prosecution and operates on the assumption that the prosecution did not adequately fulfill its discovery obligations at trial. Nothing in the language of section 1054.9, however, suggests that the Legislature was operating on such an assumption when it enacted the statute. Indeed, the opposite presumption is required by Evidence Code section 664, which provides, "It is presumed that official duty has been regularly performed. . . ." In the absence of evidence of a contrary intent, the Legislature's enactment of section 1054.9 should be viewed in light of the presumption of Evidence Code section 664. Therefore, the term "entitled to at trial" in subdivision (b) is founded on the presumption that the prosecution properly performed its discovery obligations and turned over all materials "to which the same defendant would have been entitled at time of trial." Thus, where, as here, nothing is alleged to have been lost or destroyed from trial counsel's files, this Court should presume that petitioner has all of the "discovery materials" contemplated by section 1054.9.

Furthermore, the Legislature had no need to include *Brady* material in section 1054.9 because the prosecution already has a duty to disclose such materials, at any time, to defendants, without the need for a request. In California prosecutors have a continuing obligation to disclose material exculpatory evidence to the defense, even after conviction. (*People v. Gonzalez*

(1990) 51 Cal.3d 1179, 1260-1261.) Surely the Legislature was aware of this continuing obligation when enacting section 1054.9 and did not intend to enact redundant legislation. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th, at p. 199.)

3. The Intent Of The Legislature In Section 1054.9 Should Be Determined In The Context Of The Existing Law Of Post-Conviction Discovery

In *People v. Gonzalez*, *supra*, 51 Cal.3d 1179, this Court defined the right to post-conviction discovery. Specifically, this Court held that “discovery will not lie in habeas corpus with respect to issues upon which the petition fails to state a prima facie case for relief.” (*Id.* at p. 1261.) Moreover, “there is no postconviction right to ‘fish’ through official files for belated grounds of attack on the judgment, or to confirm mere speculation or hope that a basis for collateral relief may exist.” (*Id.* at pp. 1259-1260.)

The significant difference between the status of a convicted prisoner in a post-conviction setting compared to that of a presumptively-innocent defendant at trial was a major factor in this Court’s holding.

The initial burden of proving guilt beyond a reasonable doubt is on the prosecution, and the panoply of rights accorded an accused person prior to his conviction supports the presumption that he is innocent. Different considerations apply, however, to collateral review of a final criminal judgment. *For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them.* Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.

(*Id.* at p. 1260, emphasis added.)

However, this Court did note that the prosecution, even post-conviction, is obliged to “disclose information materially favorable to the defense, even absent a request therefor.” (*Id.* at pp. 1260-1261.) This Court

held that “the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of . . . information that casts doubt upon the correctness of the conviction.” (*Id.* at p. 1261, quoting *Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25.) This Court ultimately concluded that it “expect[ed] and assume[d] that if the People's lawyers have such information in this or any other case, they will disclose it promptly and fully.” (*Ibid.*)

Thus, after *Gonzalez*, the right to postconviction discovery was available when the petitioner established a prima facie case for relief. It is against this backdrop that the Legislature enacted section 1054.9, and the Legislature's intent behind section 1054.9 should be evaluated with this backdrop in mind. Indeed, the legislative history confirms that the Legislature was expressly aware of *Gonzalez* when enacting section 1054.9 and that the statute was designed to provide relief in an unusual circumstance that was understandably not addressed by this Court in *Gonzalez*—the loss of trial counsel's original files. (Exh. G., Sen. Rules Com., Sen. Floor Analysis, Rep. on Sen. Bill No. 1391 as amended Aug. 26, 2002 (2001-2002 Reg. Sess.), Aug. 30, 2002, pp. 4-5.)

Nothing in section 1054.9 indicates an intent by the Legislature to overrule the discovery limitations set forth in *Gonzalez*. Rather, the language we quoted above shows the author was aware of *Gonzalez*, and expressly limited the scope of this bill to filling a gap left unaddressed in that case. In the absence of any language expressing such an intent, this Court should interpret section 1054.9 in a manner consistent with *Gonzalez*. This Court does “not presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied.” (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th, at p. 199, citing *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92.) Rather, this Court “must assume that, when enacting section [1054.9], the Legislature

was aware of existing related laws and intended to maintain a consistent body of rules.” (*Ibid.*) Indeed, it would be most unusual for the Legislature to create a right of discovery for the parties in an action in which there may not even be a “cause” under California law. (*People v. Romero* (1994) 8 Cal.4th 728; *People v. Pacini* (1981) 120 Cal. App.3d 877.)

Accordingly, section 1054.9 should be read not as a discovery statute, but as a remedial statute designed to place a habeas petitioner in the position he or she was immediately after trial. Such an interpretation harmonizes section 1054.9 with *Gonzalez*, the statute does not operate to provide discovery, but simply to ensure the return of materials to which the petitioner already had access at trial. Allowing a habeas petitioner to supplement a complete defense file with additional materials, as petitioner argues section 1054.9 provides, would conflict with the restrictions in *Gonzalez*. While the Legislature has the power to authorize discovery in this situation, it should not be presumed that the Legislature intended to abrogate *Gonzalez*, especially where, as here, the statute and *Gonzalez* can as easily be harmonized

4. The Legislative History Of Section 1054.9

Respondent maintains that the meaning and scope of section 1054.9, when read in context, is clear. However, to the extent that this Court finds ambiguity in the language of the statute, reference to the legislative history is appropriate. “If our examination of the statutory language leaves doubt about its meaning, we may consult other evidence of the Legislature's intent, such as the history and background of the measure.” (*People v. Birkett, supra*, 21 Cal.4th at pp. 231-232.) “The [legislative] intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.” (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735.) Here, the legislative history conclusively confirms the correctness of our analysis.

As we discussed above, according to the sponsor of the bill, Senator Burton, the purpose of the bill was to address:

The problem that occurs all too often that a defendant's files are lost or destroyed after trial and habeas counsel is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order. This leads to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to re-access the materials and information originally available to him or her at trial.

(Exh. G., Sen. Rules Com., Sen. Floor Analysis, Rep. on Sen. Bill No. 1391 as amended Aug. 26, 2002 (2001-2002 Reg. Sess.), Aug. 30, 2002, pp. 4-5, emphasis added.) Senator Burton noted that this bill was to address the situation when files are “lost or destroyed” and the habeas petitioner needs to “re-access” such materials. It is clear that the purpose of this law was to allow a habeas petitioner to reconstruct the original defense file when that file has been either partial or totally lost or destroyed. In other words, it was to allow petitioners to “re-access” materials. Certainly the use of the term “re-access” implies that the law involves materials to which the defendant already had access at trial. The analysis further notes that *People v. Gonzalez, supra*, 51 Cal.3d 1179, does not provide an adequate remedy in cases where “trial counsel’s files have been lost or destroyed” and “where a defendant’s file, through no fault of their [sic] own no longer exists.” (Exh. G., Sen. Rules Com., Sen. Floor Analysis, Rep. on Sen. Bill No. 1391 as amended Aug. 26, 2002 (2001-2002 Reg. Sess.), Aug. 30, 2002, p. 5.)

In addition, the bill analysis from The Senate Committee on Public Safety recognized the key issue regarding this statute:

SHOULD THE LAW CREATE A PROCESS IN WHICH A HABEAS ATTORNEY IN A DEATH PENALTY OR LIFE IMPRISONMENT CASE CAN GET ACCESS TO DISCOVERY MATERIAL IN POSSESSION OF THE DISTRICT ATTORNEY OR LAW ENFORCEMENT WHEN THE TRIAL ATTORNEY’S

FILE HAS BEEN DESTROYED OR IS UNOBTAINABLE?

(Exh. M., Sen. Com. on Public Safety, Rep. on Sen Bill No. 1391 as amended April 10, 2002 (2001-2002 Reg. Sess.), April 23, 2002, p. 1; emphasis in original.) Moreover, the Senate Appropriations Committee indicated that the bill “provides a means by which habeas attorneys can reconstruct destroyed or missing files.” (Exh. L., Sen. Appropriations Com., Fiscal Summary on Sen. Bill No. 1391 as amended April 10, 2002 (2001-2002 Reg. Sess.) May 24, 2002.)

Furthermore, initial versions of the statute permitted access to materials “to which the defendant would have been entitled had the discovery materials been known” at trial. (See Exh. E, Sen. Bill No. 1391 as amended April 10, 2002 (2001-2002 Reg. Sess.)) That provision was later deleted and the statute applies only to materials to which the defendant “would have been entitled at time of trial.” (Exh. D., Sen. Bill No. 1391 as amended August 23, 2002 (2001-2002 Reg. Sess.); § 1054.9.) The Legislature’s deletion of this provision establishes that the Legislature intended section 1054.9 to return a defendant to the status quo after trial and not provide him or her additional material that was not available at trial.

Here, petitioner seeks not only much broader discovery than he sought at trial, but also materials that did not exist at the time of trial. As plain as it is that the statute only addresses materials actually given to counsel at trial, it is, if possible, even more plain that materials that did not exist at the time of trial are not covered. It simply cannot be urged that petitioner “would have been entitled at time of trial” to materials that did not then exist. As such, petitioner’s current request for materials that did not exist at the time of trial are easily rejected.

Finally, as we set out above, the arguments for and against the bill confirm this understanding. The author repeatedly and consistently made plain

that the Attorney General's fear of "fishing expeditions" was baseless, because the bill covered only materials that "would have been" in the trial prosecutor's original file. (See, e.g., Exh. M at pp. 5-6.) Against this backdrop, it cannot be argued that anyone in the legislative process envisioned that this bill would apply to materials that were not actually in the possession of trial defense counsel, or, at minimum, the trial prosecutor, at the time of trial. The legislators thus could not have intended this bill to apply to materials that were not possessed by trial counsel, or *a fortiori*, material which did not then exist, or which would only be sought to prove subsequently developed theories.

Thus, the legislative history confirms respondent's interpretation of section 1054.9. The Legislature clearly intended section 1054.9 to address the difficulty a habeas petitioner faces when trial counsel's files have been lost or destroyed, and, the members of the Legislature could have had no other intent when enacting this law. Section 1054.9 was plainly designed to restore a habeas petitioner to his position at trial. Absent a showing that trial counsel's files have been either partially or totally lost, section 1054.9 simply does not apply.

II.

EVEN UNDER PETITIONER'S INCORRECT INTERPRETATION OF SECTION 1054.9, HE IS NOT ENTITLED TO THE MATERIALS HE REQUESTED

We believe that the arguments in the previous section, including in particular the statutory construction argument, persuasively defeat any possible argument that petitioner has a legal right to any post-conviction discovery in this case. Nevertheless, for the court's benefit, we briefly discuss why, even under petitioner's interpretation of section 1054.9, the circumstances of this case rule out any possible entitlement of discovery.

The basic duties of the prosecution to disclose evidence that is favorable and material to the defense are well established.

“The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant” when the evidence is “both favorable to the defendant and material on either guilt or punishment.” (*In re Sassounian* (1995) 9 Cal.4th 535, 543, citing *United States v. Bagley* (1985) 473 U.S. 667, 674-678; see also *Brady v. Maryland* (1963) 373 U.S. 83, 87.) Evidence is “favorable” if it hurts the prosecution or helps the defense. (*In re Sassounian, supra*, at p. 544.) “Evidence is ‘material’ ‘only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.’” (*Ibid.*, quoting *United States v. Bagley, supra*, at p. 682; accord, *Kyles v. Whitley* (1995) 514 U.S. 419, 433-434.)

(*People v. Earp* (1999) 20 Cal.4th 826, 866.)

An important requirement for a *Brady* violation is that the evidence must be suppressed by the state. The United States Supreme Court described the *Brady* rule as involving “the discovery, after trial, of information which had been known to the prosecution but *unknown to the defense*.” (*United States v. Agurs* (1976) 427 U.S. 97, 103, emphasis added.) Thus, there is no obligation to disclose evidence to the defendant that is already known to the defendant or that could have been discovered through reasonable diligence. (*Boss v. Pierce*

(7th Cir. 2001) 263 F.3d 734, 743; *United States v. Deavault* (8th Cir. 1999) 190 F.3d 926, 929; *Wright v. Hopper* (11th Cir. 1999) 169 F.3d 695, 701; *United States v. Zagari* (2d Cir. 1997) 111 F.3d 307, 320; *Barnes v. Thompson* (4th Cir. 1995) 58 F.3d 971, 975 & fn. 4 and cases cited therein including *McCleskey v. Zant* (1991) 499 U.S. 467, 498; *United States v. Aichele* (9th Cir. 1991) 941 F.2d 761, 764; *United States v. Newman* (5th Cir. 1988) 849 F.2d 156, 161; *United States v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1501 fn.5; *Frierson v. Calderon* (C.D. Cal. 1997) 968 F.Supp. 497, 506 and cases cited therein; *Conner v. Indiana* (Ind. 1999) 711 N.E.2d 1238, 1246; *Freeman v. Alabama* (Ala.Crim.App. 1998) 722 So.2d 806, 811; *North Dakota v. Sievers* (N.D. 1996) 543 N.W.2d 491, 496; *Connecticut v. Shannon* (Conn. 1989) 563 A.2d 646, 654; *Ragsdale v. Florida* (Fla. 1978) 720 So.2d 203, 207; *Anderson v. Leeke* (S.C. 1978) 248 S.E.2d 120, 122; but see, *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, 1062 [characterizing *Aichele* as overbroad dictum]; *Banks v. Reynolds* (10th Cir. 1995) 54 F.3d 1508, 1517 [prosecutor's responsibility to disclose is independent of defendant's knowledge].)

First, under any scheme of discovery, petitioner would be required to show that the information he seeks to discover is material to the case. In our Brief in Opposition to the Petition for Writ of Habeas Corpus dated March 31, 1999, we explained in detail why the material petitioner has requested with regard to Michael Thompson, Clifford Smith, and Janet Myers is simply not material to any issue in this case. In particular, we explained in that brief that given the massive and conclusive impeachment evidence actually admitted at the trial below, no further impeachment evidence could be thought to have had any reasonable possibility of having an effect on the jury's deliberations.^{2/} As

2. We respectfully request the Court deem the Brief in Opposition, as well as the other previous briefs and letters to which we refer in this brief, as incorporated by reference in this brief.

such, the bulk of the discovery requested here by petitioner is unwarranted at the outset.

Next, in *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, the court explained that the prosecution's discovery obligation does not extend to materials held in the hands of third parties. *Barrett* explained that, analogously to this case, the California Department of Corrections is an agency with a dual mandate. *Barrett* held that while investigatory files of crimes committed in state prisons were discoverable, Department of Corrections files which dealt only with custodial duties of the Department of Corrections were not discoverable, because they were not reasonably chargeable as being in the possession of the prosecution or prosecution agencies. *Barrett* ruled as follows:

However, the status of CDC in this case is not straightforward. In addition to being an investigatory agency in the homicide prosecution, CDC first and foremost supervises, manages and controls the state prisons, including Calipatria. (§§ 5000, 5003, 5054.) CDC is a distinct and separate governmental entity from the District Attorney. In connection with its administrative and security responsibilities in housing California felons while they serve their sentences, CDC is not part of the prosecution team. Thus, for our purposes, CDC has a hybrid status: part investigatory agency, and part third party.

With respect to CDC's role as an investigatory agency, *Barrett* can only compel discovery of materials generated or maintained by CDC relating to its investigation of the April 9, 1996 homicide under the provisions of Chapter 10. (§ 1054.5, subd. (a).) Further, CDC materials relating to its investigation of the homicide are subject to defense discovery under section 1054.1 only if they come within the inclusive listing of discoverable items listed in the statute--that is, section 1054.1, subdivisions (a) through (f). To the extent the court ordered the prosecution to turn over such materials to *Barrett*, the order was proper. (§§ 1054.1, 1054.5, subd. (a).) The District Attorney shall turn over such materials to *Barrett*, subject to exceptions listed in sections 1054.6 and 1054.7. If the District Attorney refuses to comply with the discovery order, it exposes itself to the sanctions outlined in section 1054.5, subdivisions (b) and (c).

However, the bulk of the 17 categories of CDC documents that are

the subject of this writ proceeding was not gathered by CDC in connection with its investigation of the April 9, 1996 homicide. Rather, these CDC documents, most of which predate the homicide, are records kept by CDC in the course of running the prison. (See section 2081.5.) Barrett cannot rely on the provisions of Chapter 10 for discovery of materials from CDC that are strictly related to its operation of Calipatria State Prison, that is, materials CDC generated when it was not acting as part of the prosecution team. To the extent Barrett is seeking records that CDC maintains in the regular course of running Calipatria State Prison, Barrett is trying to obtain material from a third party. (Accord, *United States v. Aichele* (9th Cir.1991) 941 F.2d 761, 764, [federal prosecutor not in possession or control over witness's CDC file and not obligated "to turn over materials not under its control"].) The reciprocal discovery statutory scheme has no application to discovery sought from third parties. (*People v. Superior Court (Broderick)*, *supra*, 231 Cal.App.3d at p. 594, 282 Cal.Rptr. 418.)

(*Barrett, supra*, 80 Cal.App.4th at p. 1317-1318; footnote omitted.)

Barrett further held that, with regard to third party materials, the defense had an equal right as the prosecution to request such materials by way of subpoena, and that, given the defense knowledge of its particular theories, and the evidence which would support those theories, it made more sense to require the defense to subpoena and gather the material. Such is emphatically the case here with regard to the materials petitioner has requested which are in the possession of the Los Angeles County Jail. Materials such as visitors' records, etc., which petitioner requests, are part of the jail's custodial function, and therefore not part of the prosecutorial files in this case. Further, it is obvious that, given the breadth of the material requested, and given the defense's understanding of its own theories, it makes much more sense to require the defense to examine and secure the particular pieces of evidence it believes are relevant, rather than to force the prosecution to subpoena the files, and make judgments as to what the defense would desire. Petitioner may note that *Barrett* cites *Saulter v. Municipal Court* (1977) 75 Cal.App.3d 231, 241, which ordered the prosecution to subpoena certain federal files. That case is

broadly distinguishable on numerous grounds, including the fact that the defense in that case had previously requested documents by subpoena, and had been rebuffed by the federal government. Further, that case turned on the fact that specific federal requirements for prosecution request of discovery were involved. The case has no application to this one.

We would also note that, contrary to petitioner's claim, we believe that section 1054.9 must reasonably be read to embody rules of discovery promulgated after the passage of Proposition 115. In particular, the placing of section 1054.9 in the 1054 series of statutes evinces a statutory intent that the definition of discovery in section 1054.1 should apply to section 1054.9. The similarity in the wording of section 1054.1 and 1054.9 further argues that the materials required to be provided to the defense in section 1054.9 are identical to those defined by *Barrett* under section 1054.1, and thus that the language of section 1054.1, et seq. creates no significant change in the requirements of discovery from third parties from pre-existing law. Petitioner is mistaken that the prosecutor's discovery burden has changed significantly, or that section 1054.9 requires any greater discovery burden than that imposed in section 1054.1. As such, *Barrett's* definition of the boundaries of third party discovery applies in this case

Next, as to the supposed confession of the deceased third party, we discussed in our brief in opposition to the petition for writ of habeas corpus why such evidence is immaterial. (*Id.* at Arg. II.) Further, petitioner's acknowledgment that this evidence is newly discovered categorically defeats any claim of entitlement under section 1054.9, which plainly, under any reading, requires that the material would have been discoverable at the date of trial. Petitioner cannot persuasively argue that any materials not in existence at the date of trial, or any materials which would not have been requested by trial counsel because the theories had not factually arisen at the time of trial, are

discoverable under section 1054.9.

Next, we have previously discussed the issue of the “reel-to-reel” tape which petitioner speculates had something to do with Berlie Petry, and why this entire allegation is factually baseless, in our brief in opposition to the petition at page 44, et seq. Once again, petitioner makes no showing of materiality.

As to the bloody fingerprint photographs, we also showed why this allegation is without factual basis in our brief. (Inf. Resp., Arg. VIII.) We assert that all of these requests, and any other requests embodied in the detailed statement of discovery requests in petitioner’s current brief are immaterial, untimely, and without any justification in fact or precedent.

Finally, we would note that petitioner has raised innumerable factual issues in his requests for discovery, including questions relating to the materiality of each individual piece of evidence, whether each piece of evidence is within the possession of a prosecutorial agency or a third party, when a particular piece of evidence came to the attention of the defense, when a particular theory was formed, and which agencies would respond to subpoenas and which would not. Each of these factual issues would need to be decided before any discovery request could be considered, let alone granted. Under these circumstances, we think it plain that this Court, while the ultimate arbiter of any discovery issue in this case, is not currently in a position to dispose of any discovery request in this case. We would respectfully propose that, should this Court, contrary to our arguments, believe that some discovery is appropriate under section 1054.9, it should refer the matter to a factfinder for detailed determination of which items of discovery are appropriate and which are not.

Finally, as to petitioner’s calls for disqualification of any office or attorney, we have previously discussed these issues at length in our various briefings, including the letter briefs of June 1, 2001 and October 6, 2000. For the reasons stated in those briefs, and in the other briefings in this case, we

believe it is plain that petitioner has set out no factual or legal basis whatsoever for disqualification of any office or individual attorney.

CONCLUSION

In sum, the statute on which petitioner bases his current discovery requests is wholly unresponsive of his current theories. That statute requires only that the prosecution allow the defense to reconstruct the file actually obtained at trial by defense counsel. Given that petitioner here does not even claim that any part of the file was lost or destroyed, section 1054.9 simply does not provide any basis for further discovery in this case. At any rate, we have conclusively shown in past briefings that petitioner's current requests lack materiality, and are factually and legally without basis. Further, requests which involve facts or theories which post-dated the trial plainly are categorically outside the scope of section 1054.9. Finally, we have previously shown in detail why petitioner's requests for disqualification of attorneys are factually without basis. As such, for the reasons we have previously set out, petitioner has shown no basis whatsoever for disqualification of this office, or any individual deputy attorney general.

WHEREFORE, respondent respectfully requests this Court to incorporate by reference the previous briefs and letters in this case, including the documents discussed herein, and any other documents filed in this proceeding which the court finds relevant. Respondent requests this Court deny

the discovery request and deny petitioner's request for disqualification of any office or individual attorney in this case.

Dated: October 21, 2003

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
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GERALD A. ENGLER
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- B SB 1391 Enrolled (August 30, 2002)
- C SB 1391 Amendment (August 26 2002)
- D SB 1391 Amendment (August 23, 2002)
- E SB 1391 Amendment (April 10, 2002)
- F SB 1391 Introduced (February 13, 2002)
- G SB 1391 Senate Floor Analysis (August 30, 2003)
- H SB 1391 Assembly Floor Analysis (August 26, 2002)
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- J SB 1391 Assembly Committee on Public Safety Report (June 25, 2002)
- K SB 1391 Senate Floor Analysis (May 25, 2002)
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- M SB 1391 Senate Committee on Public Safety (April 23, 2002)

EXHIBIT A

Senate Bill No. 1391

CHAPTER 1105

An act to amend Section 1417.9 of, and to add Sections 1054.9 and 1473.6 to, the Penal Code, relating to criminal procedure.

[Approved by Governor September 29, 2002. Filed with Secretary of State September 29, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1391, Burton. Criminal procedure.

Under existing law, pretrial discovery in criminal cases is governed by a detailed statutory scheme, but discovery issues in postconviction habeas corpus proceedings are decided largely on a case-by-case basis.

This bill would require that discovery materials to which a defendant would have been entitled at the time of trial be made reasonably accessible to the defendant if he or she has been sentenced to death or life in prison without the possibility of parole and files a specified motion or writ of habeas corpus that makes a specified showing. This bill would require a defendant be given access to physical evidence only upon a separate court finding, as specified, and would specify that the only means of obtaining access to physical evidence for postconviction DNA testimony is through other specified procedures.

By authorizing the court to require local agencies to provide access to physical evidence under certain circumstances, this bill would impose a state-mandated local program.

Under existing law, although persons not presently restrained of liberty may seek certain types of relief from the disabilities of a conviction, the writ of habeas corpus is generally not available to them. A writ of habeas corpus generally will not issue unless all other remedies at law are exhausted, and must be filed within a reasonable time, as provided.

This bill would create an explicit right for a person no longer unlawfully imprisoned or restrained to prosecute a motion to vacate a judgment based on newly obtained evidence of fraud or misconduct by a government official, as specified. The right would extend for one year from the later of the effective date of the bill or the date that the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party's personal knowledge.

Existing law grants a person who was convicted of a felony and is currently serving a term of imprisonment the right to make a written

motion under specified conditions for the performance of forensic DNA testing. Existing law, to be repealed by its own terms on January 1, 2003, requires that DNA evidence secured in connection with a criminal case be retained by an appropriate governmental entity, and may be disposed of only at specified times and under specified conditions.

This bill would eliminate the repeal of these provisions relating to the retention of DNA evidence.

By requiring local authorities to maintain DNA evidence that would otherwise be subject to disposal after January 1, 2003, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 1054.9 is added to the Penal Code, to read:

1054.9. (a) Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b).

(b) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.

(c) In response to a writ or motion satisfying the conditions in subdivision (a), court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining

access to physical evidence for purposes of postconviction DNA testing are provided in Section 1405, and nothing in this section shall provide an alternative means of access to physical evidence for those purposes.

(d) The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant.

SEC. 2. Section 1417.9 of the Penal Code is amended to read:

1417.9. (a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.

(b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:

(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to Section 1405. However, upon filing of that motion, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

(3) No other provision of law requires that biological evidence be preserved or retained.

(c) Notwithstanding any other provision of law, the right to receive notice pursuant to this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere.

SEC. 3. Section 1473.6 is added to the Penal Code, to read:

1473.6. (a) Any person no longer unlawfully imprisoned or restrained may prosecute a motion to vacate a judgment for any of the following reasons:

(1) Newly discovered evidence of fraud by a government official that completely undermines the prosecution's case, is conclusive, and points unerringly to his or her innocence.

(2) Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the government official was substantially probative on the issue of guilt or punishment.

(3) Newly discovered evidence of misconduct by a government official committed in the underlying case that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. Evidence of misconduct in other cases is not sufficient to warrant relief under this paragraph.

(b) For purposes of this section, "newly discovered evidence" is evidence that could not have been discovered with reasonable diligence prior to judgment.

(c) The procedure for bringing and adjudicating a motion under this section, including the burden of producing evidence and the burden of proof, shall be the same as for prosecuting a writ of habeas corpus.

(d) A motion pursuant to this section must be filed within one year of the later of the following:

(1) The date the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party's personal knowledge.

(2) The effective date of this section.

SEC. 4. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one

million dollars (\$1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

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EXHIBIT B

Senate Bill No. 1391

Passed the Senate August 30, 2002

Secretary of the Senate

Passed the Assembly August 27, 2002

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day of
_____, 2002, at _____ o'clock __M.

Private Secretary of the Governor

└

CHAPTER _____

An act to amend Section 1417.9 of, and to add Sections 1054.9 and 1473.6 to, the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

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This bill would require that discovery materials to which a defendant would have been entitled at the time of trial be made reasonably accessible to the defendant if he or she has been sentenced to death or life in prison without the possibility of parole and files a specified motion or writ of habeas corpus that makes a specified showing. This bill would require a defendant be given access to physical evidence only upon a separate court finding, as specified, and would specify that the only means of obtaining access to physical evidence for postconviction DNA testimony is through other specified procedures.

By authorizing the court to require local agencies to provide access to physical evidence under certain circumstances, this bill would impose a state-mandated local program.

Under existing law, although persons not presently restrained of liberty may seek certain types of relief from the disabilities of a conviction, the writ of habeas corpus is generally not available to them. A writ of habeas corpus generally will not issue unless all other remedies at law are exhausted, and must be filed within a reasonable time, as provided.

This bill would create an explicit right for a person no longer unlawfully imprisoned or restrained to prosecute a motion to vacate a judgment based on newly obtained evidence of fraud or misconduct by a government official, as specified. The right would extend for one year from the later of the effective date of the bill or the date that the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party's personal knowledge.

Existing law grants a person who was convicted of a felony and is currently serving a term of imprisonment the right to make a written motion under specified conditions for the performance of forensic DNA testing. Existing law, to be repealed by its own terms on January 1, 2003, requires that DNA evidence secured in connection with a criminal case be retained by an appropriate governmental entity, and may be disposed of only at specified times and under specified conditions.

This bill would eliminate the repeal of these provisions relating to the retention of DNA evidence.

By requiring local authorities to maintain DNA evidence that would otherwise be subject to disposal after January 1, 2003, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 1054.9 is added to the Penal Code, to read:

1054.9. (a) Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b).

(b) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement

authorities to which the same defendant would have been entitled at time of trial.

(c) In response to a writ or motion satisfying the conditions in subdivision (a), court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining access to physical evidence for purposes of postconviction DNA testing are provided in Section 1405, and nothing in this section shall provide an alternative means of access to physical evidence for those purposes.

(d) The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant.

SEC. 2. Section 1417.9 of the Penal Code is amended to read:

1417.9. (a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.

(b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:

(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to Section 1405. However, upon filing of that motion, the governmental entity shall retain the



material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

(3) No other provision of law requires that biological evidence be preserved or retained.

(c) Notwithstanding any other provision of law, the right to receive notice pursuant to this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere.

SEC. 3. Section 1473.6 is added to the Penal Code, to read:

1473.6. (a) Any person no longer unlawfully imprisoned or restrained may prosecute a motion to vacate a judgment for any of the following reasons:

(1) Newly discovered evidence of fraud by a government official that completely undermines the prosecution's case, is conclusive, and points unerringly to his or her innocence.

(2) Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the government official was substantially probative on the issue of guilt or punishment.

(3) Newly discovered evidence of misconduct by a government official committed in the underlying case that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. Evidence of

misconduct in other cases is not sufficient to warrant relief under this paragraph.

(b) For purposes of this section, “newly discovered evidence” is evidence that could not have been discovered with reasonable diligence prior to judgment.

(c) The procedure for bringing and adjudicating a motion under this section, including the burden of producing evidence and the burden of proof, shall be the same as for prosecuting a writ of habeas corpus.

(d) A motion pursuant to this section must be filed within one year of the later of the following:

(1) The date the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party’s personal knowledge.

(2) The effective date of this section.

SEC. 4. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars (\$1,000,000), reimbursement shall be made from the State Mandates Claims Fund.



Approved _____, 2002

Governor

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EXHIBIT C

AMENDED IN ASSEMBLY AUGUST 26, 2002

AMENDED IN ASSEMBLY AUGUST 23, 2002

AMENDED IN SENATE APRIL 10, 2002

SENATE BILL

No. 1391

Introduced by Senator Burton

February 13, 2002

An act to amend Section 1417.9 of, and to add Sections 1054.9 and 1473.6 to, the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

SB 1391, as amended, Burton. Criminal procedure.

Under existing law, pretrial discovery in criminal cases is governed by a detailed statutory scheme, but discovery issues in postconviction habeas corpus proceedings are decided largely on a case-by-case basis.

This bill would require that discovery materials to which a defendant would have been entitled at the time of trial be made reasonably accessible to the defendant if he or she has been sentenced to death or life in prison without the possibility of parole and files a specified motion or writ of habeas corpus that makes a specified showing. This bill would require a defendant be given access to physical evidence only upon a separate court finding, as specified, *and would specify that the only means of obtaining access to physical evidence for postconviction DNA testimony is through other specified procedures.*

By authorizing the court to require local agencies to provide access to physical evidence under certain circumstances, this bill would impose a state-mandated local program.

Under existing law, although persons not presently restrained of liberty may seek certain types of relief from the disabilities of a

conviction, the writ of habeas corpus is generally not available to them. A writ of habeas corpus generally will not issue unless all other remedies at law are exhausted, and must be filed within a reasonable time, as provided.

This bill would create an explicit right for a person no longer unlawfully imprisoned or restrained to prosecute a motion to vacate a judgment based on newly obtained evidence of fraud or misconduct by a government official, as specified. The right would extend for one year from the later of the effective date of the bill or the date that the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party's personal knowledge.

Existing law grants a person who was convicted of a felony and is currently serving a term of imprisonment the right to make a written motion under specified conditions for the performance of forensic DNA testing. Existing law, to be repealed by its own terms on January 1, 2003, requires that DNA evidence secured in connection with a criminal case be retained by an appropriate governmental entity, and may be disposed of only at specified times and under specified conditions.

This bill would eliminate the repeal of these provisions relating to the retention of DNA evidence.

By requiring local authorities to maintain DNA evidence that would otherwise be subject to disposal after January 1, 2003, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1054.9 is added to the Penal Code, to
2 read:

3 1054.9. (a) Upon the prosecution of a postconviction writ of
4 habeas corpus or a motion to vacate a judgment in a case in which
5 a sentence of death or of life in prison without the possibility of
6 parole has been imposed, and on a showing that good faith efforts
7 to obtain discovery materials from trial counsel were made and
8 were unsuccessful, the court shall, except as provided in
9 subdivision (c), order that the defendant be provided reasonable
10 access to any of the materials described in subdivision (b).

11 (b) For purposes of this section, "discovery materials" means
12 materials in the possession of the prosecution and law enforcement
13 authorities to which the same defendant would have been entitled
14 at time of trial.

15 (c) ~~The~~ *In response to a writ or motion satisfying the conditions*
16 *in subdivision (a), court may order that the defendant be provided*
17 *access to physical evidence for the purpose of examination,*
18 *including, but not limited to, any physical evidence relating to the*
19 *investigation, arrest, and prosecution of the defendant only upon*
20 *a showing that there is good cause to believe that access to physical*
21 *evidence is reasonably necessary to the defendant's effort to obtain*
22 *relief. The procedures for obtaining access to physical evidence*
23 *for purposes of post-conviction DNA testing are provided in*
24 *Section 1405, and nothing in this section shall provide an*
25 *alternative means of access to physical evidence for those*
26 *purposes.*

27 (d) The actual costs of examination or copying pursuant to this
28 section shall be borne or reimbursed by the defendant.

29 SEC. 2. Section 1417.9 of the Penal Code is amended to read:

30 1417.9. (a) Notwithstanding any other provision of law and
31 subject to subdivision (b), the appropriate governmental entity
32 shall retain all biological material that is secured in connection
33 with a criminal case for the period of time that any person remains
34 incarcerated in connection with that case. The governmental entity
35 shall have the discretion to determine how the evidence is retained
36 pursuant to this section, provided that the evidence is retained in
37 a condition suitable for deoxyribonucleic acid (DNA) testing.

1 (b) A governmental entity may dispose of biological material
2 before the expiration of the period of time described in subdivision
3 (a) if all of the conditions set forth below are met:

4 (1) The governmental entity notifies all of the following
5 persons of the provisions of this section and of the intention of the
6 governmental entity to dispose of the material: any person, who as
7 a result of a felony conviction in the case is currently serving a term
8 of imprisonment and who remains incarcerated in connection with
9 the case, any counsel of record, the public defender in the county
10 of conviction, the district attorney in the county of conviction, and
11 the Attorney General.

12 (2) The notifying entity does not receive, within 90 days of
13 sending the notification, any of the following:

14 (A) A motion filed pursuant to Section 1405. However, upon
15 filing of that motion, the governmental entity shall retain the
16 material only until the time that the court's denial of the motion is
17 final.

18 (B) A request under penalty of perjury that the material not be
19 destroyed or disposed of because the declarant will file within 180
20 days a motion for DNA testing pursuant to Section 1405 that is
21 followed within 180 days by a motion for DNA testing pursuant
22 to Section 1405, unless a request for an extension is requested by
23 the convicted person and agreed to by the governmental entity in
24 possession of the evidence.

25 (C) A declaration of innocence under penalty of perjury that
26 has been filed with the court within 180 days of the judgment of
27 conviction or July 1, 2001, whichever is later. However, the court
28 shall permit the destruction of the evidence upon a showing that
29 the declaration is false or there is no issue of identity that would
30 be affected by additional testing. The convicted person may be
31 cross-examined on the declaration at any hearing conducted under
32 this section or on an application by or on behalf of the convicted
33 person filed pursuant to Section 1405.

34 (3) No other provision of law requires that biological evidence
35 be preserved or retained.

36 (c) Notwithstanding any other provision of law, the right to
37 receive notice pursuant to this section is absolute and shall not be
38 waived. This prohibition applies to, but is not limited to, a waiver
39 that is given as part of an agreement resulting in a plea of guilty or
40 nolo contendere.

1 SEC. 3. Section 1473.6 is added to the Penal Code, to read:
2 1473.6. (a) Any person no longer unlawfully imprisoned or
3 restrained may prosecute a motion to vacate a judgment for any of
4 the following reasons:

5 (1) Newly discovered evidence of fraud by a government
6 official that completely undermines the prosecution's case, is
7 conclusive, and points unerringly to his or her innocence.

8 (2) Newly discovered evidence that a government official
9 testified falsely at the trial that resulted in the conviction and that
10 the testimony of the government official was substantially
11 probative on the issue of guilt or punishment.

12 (3) Newly discovered evidence of misconduct by a government
13 official committed in the underlying case that resulted in
14 fabrication of evidence that was substantially material and
15 probative on the issue of guilt or punishment. Evidence of
16 misconduct in other cases is not sufficient to warrant relief under
17 this paragraph.

18 (b) For purposes of this section, "newly discovered evidence"
19 is evidence that could not have been discovered with reasonable
20 diligence prior to judgment.

21 (c) The procedure for bringing and adjudicating a motion under
22 this section, including the burden of producing evidence and the
23 burden of proof, shall be the same as for prosecuting a writ of
24 habeas corpus.

25 (d) A motion pursuant to this section must be filed within one
26 year of the later of the following:

27 (1) The date the moving party discovered, or could have
28 discovered with the exercise of due diligence, additional evidence
29 of the misconduct or fraud by a government official beyond the
30 moving party's personal knowledge.

31 (2) The effective date of this section.

32 SEC. 4. Notwithstanding Section 17610 of the Government
33 Code, if the Commission on State Mandates determines that this
34 act contains costs mandated by the state, reimbursement to local
35 agencies and school districts for those costs shall be made pursuant
36 to Part 7 (commencing with Section 17500) of Division 4 of Title
37 2 of the Government Code. If the statewide cost of the claim for
38 reimbursement does not exceed one million dollars (\$1,000,000),

1 reimbursement shall be made from the State Mandates Claims
2 Fund.

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EXHIBIT D

AMENDED IN ASSEMBLY AUGUST 23, 2002

AMENDED IN SENATE APRIL 10, 2002

SENATE BILL

No. 1391

Introduced by Senator Burton

February 13, 2002

An act to *amend Section 1417.9 of, and to add Sections 1054.9 and 1266 to 1473.6 to, the Penal Code, relating to criminal procedure.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1391, as amended, Burton. Criminal procedure.

Under existing law, pretrial discovery in criminal cases is governed by a detailed statutory scheme, but discovery issues in postconviction habeas corpus proceedings are decided largely on a case-by-case basis.

This bill would require that discovery materials to which a defendant ~~was would have been~~ entitled at the time of trial, ~~or to which the defendant would have been entitled had they been known,~~ be made reasonably accessible to the defendant; if he or she has been sentenced to death or life in prison *without the possibility of parole* and files a *specified* motion ~~which or writ of habeas corpus~~ that makes a specified showing. *This bill would require a defendant be given access to physical evidence only upon a separate court finding, as specified.*

By authorizing the court to require local agencies to provide access to physical evidence under certain circumstances, this bill would impose a state-mandated local program.

Under existing law, although persons not presently restrained of liberty may seek certain types of relief from the disabilities of a conviction, the writ of habeas corpus is generally not available to them. A writ of habeas corpus generally will not issue unless all other

remedies at law are exhausted, and must be filed within a reasonable time, as provided.

~~This bill would create an explicit right for a person no longer unlawfully imprisoned or restrained to make prosecute a motion to vacate a judgment, regardless of custody or restraint, as to a conviction based on fraud by, or false newly obtained evidence from, of fraud or misconduct by a government official, as specified. The right would extend for one year from the later of the effective date of the bill; or the date of discovery of substantial evidence of the fraud or falsity; or the date of a government action adversely affecting the petitioner as a result of the conviction, as specified. This time limit could be extended only upon a showing of extraordinary circumstances to explain any delay. The bill would declare that it is not to be construed to change the grounds for which a motion to vacate judgment or a petition in the nature of coram nobis may be prosecuted, or to preclude any other remedies.~~

~~The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.~~

~~This bill would provide that no reimbursement is required by this act for a specified reason: that the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party's personal knowledge.~~

~~Existing law grants a person who was convicted of a felony and is currently serving a term of imprisonment the right to make a written motion under specified conditions for the performance of forensic DNA testing. Existing law, to be repealed by its own terms on January 1, 2003, requires that DNA evidence secured in connection with a criminal case be retained by an appropriate governmental entity, and may be disposed of only at specified times and under specified conditions.~~

~~This bill would eliminate the repeal of these provisions relating to the retention of DNA evidence.~~

~~By requiring local authorities to maintain DNA evidence that would otherwise be subject to disposal after January 1, 2003, this bill would impose a state-mandated local program.~~

~~The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that~~

reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1054.9 is added to the Penal Code, to
- 2 read:
- 3 1054.9. (a) ~~On defendant's motion to the trial court~~ Upon the
- 4 prosecution of a postconviction writ of habeas corpus or a motion
- 5 to vacate a judgment in a case in which a sentence of death or of
- 6 life in prison without the possibility of parole has been imposed,
- 7 and on a showing that good faith efforts to obtain copies of
- 8 discovery materials from trial counsel were made and were
- 9 unsuccessful, the court shall, except as provided in subdivision (c),
- 10 order that the defendant be provided reasonable access to any of
- 11 the materials described in subdivision (b).
- 12 (b) ~~A defendant shall be provided access to discovery~~ For
- 13 purposes of this section, "discovery materials" means materials in
- 14 the possession of the prosecution and law enforcement authorities
- 15 to which the same defendant was would have been entitled at time
- 16 of trial, or to which the defendant would have been entitled had the
- 17 discovery materials been known.
- 18 (c) The court may order that the defendant be provided access
- 19 to physical evidence for the purpose of examination, including, but
- 20 not limited to, any physical evidence relating to the investigation,
- 21 arrest, and prosecution of the defendant for the purposes of
- 22 examination or copying only upon a showing that there is good
- 23 cause to believe that access to physical evidence is reasonably
- 24 necessary to the defendant's effort to obtain relief.
- 25 (e)
- 26 (d) The actual costs of examination or copying pursuant to this
- 27 section shall be borne or reimbursed by the defendant.



1 SEC. 2. Section 1266 is added to the Penal Code, to read:

2 1266. (a) ~~In addition to any other remedies provided by law,~~
3 ~~and despite any limitations in Section 1265 or elsewhere, a motion~~
4 ~~to vacate judgment may be made by any person convicted of a~~
5 ~~criminal offense, whether or not that person remains in prison or~~
6 ~~restrained upon that conviction, if the conviction was obtained as~~
7 ~~a result of any fraud by any government official or false evidence~~
8 ~~presented to any prosecutor or tribunal by any government official,~~
9 ~~when the fraud or false evidence was substantially material or~~
10 ~~probative on the issue of guilt or punishment or upon the legality~~
11 ~~of a search or seizure, or was a material factor directly related to~~
12 ~~that person's plea of guilty or no contest.~~

13 (b) ~~The motion shall be made in the first instance in the court~~
14 ~~in which the conviction was rendered, whether or not any appellate~~
15 ~~review of that conviction was conducted.~~

16 (c) ~~A motion pursuant to this section may be filed within one~~
17 ~~year of the latest of any of the following:~~

18 (1) ~~The petitioner's discovery of substantial evidence of the~~
19 ~~fraud or falsity, other than the petitioner's own knowledge of the~~
20 ~~fraud or falsity, if that evidence could not reasonably have been~~
21 ~~presented at the time of conviction.~~

22 (2) ~~Any action by a government agency adversely affecting the~~
23 ~~petitioner as a result of the conviction, including, but not limited~~
24 ~~to, use of the conviction to deny an occupational license, allegation~~
25 ~~of the conviction to enhance punishment, or reliance on the~~
26 ~~conviction in immigration proceedings.~~

27 (3) ~~The effective date of this section.~~

28 (d) ~~On a showing of extraordinary circumstances to explain~~
29 ~~any delay, a motion pursuant to this section may be prosecuted~~
30 ~~outside of the time limitations in subdivision (c).~~

31 (e) ~~Nothing in this section shall be construed as otherwise~~
32 ~~changing the grounds for which a motion to vacate judgment or a~~
33 ~~petition in the nature of coram nobis may be prosecuted or as~~
34 ~~precluding the use of any other remedies.~~

35 SEC. 3. ~~No reimbursement is required by this act pursuant to~~
36 ~~Section 6 of Article XIII B of the California Constitution because~~
37 ~~the only costs that may be incurred by a local agency or school~~
38 ~~district will be incurred because this act creates a new crime or~~
39 ~~infraction, eliminates a crime or infraction, or changes the penalty~~
40 ~~for a crime or infraction, within the meaning of Section 17556 of~~

1 ~~the Government Code, or changes the definition of a crime within~~
2 ~~the meaning of Section 6 of Article XIII B of the California~~
3 ~~Constitution.~~

4 *Section 1417.9 of the Penal Code is amended to read:*

5 1417.9. (a) Notwithstanding any other provision of law and
6 subject to subdivision (b), the appropriate governmental entity
7 shall retain all biological material that is secured in connection
8 with a criminal case for the period of time that any person remains
9 incarcerated in connection with that case. The governmental entity
10 shall have the discretion to determine how the evidence is retained
11 pursuant to this section, provided that the evidence is retained in
12 a condition suitable for deoxyribonucleic acid (DNA) testing.

13 (b) A governmental entity may dispose of biological material
14 before the expiration of the period of time described in subdivision
15 (a) if all of the conditions set forth below are met:

16 (1) The governmental entity notifies all of the following
17 persons of the provisions of this section and of the intention of the
18 governmental entity to dispose of the material: any person, who as
19 a result of a felony conviction in the case is currently serving a term
20 of imprisonment and who remains incarcerated in connection with
21 the case, any counsel of record, the public defender in the county
22 of conviction, the district attorney in the county of conviction, and
23 the Attorney General.

24 (2) The notifying entity does not receive, within 90 days of
25 sending the notification, any of the following:

26 (A) A motion filed pursuant to Section 1405. However, upon
27 filing of that motion, the governmental entity shall retain the
28 material only until the time that the court's denial of the motion is
29 final.

30 (B) A request under penalty of perjury that the material not be
31 destroyed or disposed of because the declarant will file within 180
32 days a motion for DNA testing pursuant to Section 1405 that is
33 followed within 180 days by a motion for DNA testing pursuant
34 to Section 1405, unless a request for an extension is requested by
35 the convicted person and agreed to by the governmental entity in
36 possession of the evidence.

37 (C) A declaration of innocence under penalty of perjury that
38 has been filed with the court within 180 days of the judgment of
39 conviction or July 1, 2001, whichever is later. However, the court
40 shall permit the destruction of the evidence upon a showing that



1 the declaration is false or there is no issue of identity that would
2 be affected by additional testing. The convicted person may be
3 cross-examined on the declaration at any hearing conducted under
4 this section or on an application by or on behalf of the convicted
5 person filed pursuant to Section 1405.

6 (3) No other provision of law requires that biological evidence
7 be preserved or retained.

8 (c) Notwithstanding any other provision of law, the right to
9 receive notice pursuant to this section is absolute and shall not be
10 waived. This prohibition applies to, but is not limited to, a waiver
11 that is given as part of an agreement resulting in a plea of guilty or
12 nolo contendere.

13 ~~(d) This section shall remain in effect only until January 1,~~
14 ~~2003, and on that date is repealed unless a later enacted statute that~~
15 ~~is enacted before January 1, 2003, deletes or extends that date.~~

16 *SEC. 3. Section 1473.6 is added to the Penal Code, to read:*

17 *1473.6. (a) Any person no longer unlawfully imprisoned or*
18 *restrained may prosecute a motion to vacate a judgment for any of*
19 *the following reasons:*

20 *(1) Newly discovered evidence of fraud by a government*
21 *official that completely undermines the prosecution's case, is*
22 *conclusive, and points unerringly to his or her innocence.*

23 *(2) Newly discovered evidence that a government official*
24 *testified falsely at the trial that resulted in the conviction and that*
25 *the testimony of the government official was substantially*
26 *probative on the issue of guilt or punishment.*

27 *(3) Newly discovered evidence of misconduct by a government*
28 *official committed in the underlying case that resulted in*
29 *fabrication of evidence that was substantially material and*
30 *probative on the issue of guilt or punishment. Evidence of*
31 *misconduct in other cases is not sufficient to warrant relief under*
32 *this paragraph.*

33 *(b) For purposes of this section, "newly discovered evidence"*
34 *is evidence that could not have been discovered with reasonable*
35 *diligence prior to judgment.*

36 *(c) The procedure for bringing and adjudicating a motion*
37 *under this section, including the burden of producing evidence and*
38 *the burden of proof, shall be the same as for prosecuting a writ of*
39 *habeas corpus.*

1 (d) A motion pursuant to this section must be filed within one
2 year of the later of the following:

3 (1) The date the moving party discovered, or could have
4 discovered with the exercise of due diligence, additional evidence
5 of the misconduct or fraud by a government official beyond the
6 moving party's personal knowledge.

7 (2) The effective date of this section.

8 SEC. 4. Notwithstanding Section 17610 of the Government
9 Code, if the Commission on State Mandates determines that this
10 act contains costs mandated by the state, reimbursement to local
11 agencies and school districts for those costs shall be made
12 pursuant to Part 7 (commencing with Section 17500) of Division
13 4 of Title 2 of the Government Code. If the statewide cost of the
14 claim for reimbursement does not exceed one million dollars
15 (\$1,000,000), reimbursement shall be made from the State
16 Mandates Claims Fund.



EXHIBIT E

Introduced by Senator Burton

February 13, 2002

An act to add Sections 1054.9 and ~~1473.6~~ 1266 to the Penal Code, relating to ~~habeas corpus~~ *criminal procedure*.

LEGISLATIVE COUNSEL'S DIGEST

SB 1391, as amended, Burton. ~~Habeas corpus~~ *Criminal procedure.*

Under existing law, ~~any person unlawfully imprisoned or restrained of liberty may prosecute a writ of habeas corpus to inquire into the cause of that restraint. This power to prosecute a writ of habeas corpus extends in certain circumstances to persons in constructive custody by virtue of parole, or conditional pretrial release~~ *pretrial discovery in criminal cases is governed by a detailed statutory scheme, but discovery issues in post-conviction habeas corpus proceedings are decided largely on a case-by-case basis.*

This bill would require that ~~evidence~~ *discovery materials* to which ~~trial counsel for the same~~ a defendant was entitled at the time of trial, or to which the defendant would have been entitled had they been known, be made reasonably accessible to ~~counsel preparing a habeas corpus petition on behalf of a person convicted of a felony, upon submission by that counsel of a specified declaration under penalty of perjury, as provided~~ *the defendant, if he or she has been sentenced to death or life in prison and files a motion which makes a specified showing.*

~~By expanding the purview of existing perjury provisions, this bill would impose a state-mandated local program.~~

Under existing law, although persons not presently restrained of liberty may seek certain types of relief from the disabilities of a conviction, the writ of habeas corpus is generally not available to them. A writ of habeas corpus generally will not issue unless all other remedies at law are exhausted, and must be filed within a reasonable time, as provided.

This bill would create an explicit right to ~~prosecute a writ of habeas corpus~~ *make a motion to vacate judgment*, regardless of custody or restraint, ~~to address as to~~ a conviction based on fraud by, or false evidence from, a government official, as specified. The right would extend for one year from the effective date of the bill; the date of discovery of substantial evidence of the fraud or falsity; or the date of a government action adversely affecting the petitioner as a result of the conviction, as specified. This time limit could be extended only upon a showing of extraordinary circumstances to explain any delay. The bill would declare that it is not to be construed to ~~preclude other~~ *change the grounds for habeas relief which a motion to vacate judgment or a petition in the nature of coram nobis may be prosecuted, or to preclude any other remedies.*

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1054.9 is added to the Penal Code, to
 2 read:
 3 1054.9. (a) ~~Upon submission of a declaration signed under~~
 4 ~~penalty of perjury stating~~ *On defendant's motion to the trial court*
 5 *in a case in which a sentence of death or of life in prison has been*
 6 *imposed, and on a showing that good faith efforts to obtain copies*
 7 *of evidence discovery materials from trial counsel were made and*
 8 *were unsuccessful, e*~~counsel preparing a petition for habeas corpus~~
 9 ~~relief on behalf of a person convicted of a felony shall be provided~~
 10 ~~reasonable access to any of the materials described in this section.~~

1 *the court shall order that the defendant be provided reasonable*
2 *access to any of the materials described in subdivision (b).*

3 (b) ~~Counsel A~~ *defendant shall be provided access to any*
4 *evidence discovery materials in the possession of the prosecution*
5 *and law enforcement authorities to which trial counsel for the*
6 *same defendant was entitled at time of trial, or to which the*
7 *defendant would have been entitled had the discovery materials*
8 *been known, including, but not limited to, any physical evidence*
9 ~~in the possession of the prosecution and law enforcement~~
10 ~~authorities relating to the investigation, arrest, and prosecution of~~
11 ~~the defendant for the purposes of examination or independent~~
12 ~~testing copying.~~

13 (c) The actual costs of ~~reproducing any documents~~
14 *examination or copying* pursuant to this section shall be borne or
15 reimbursed by defendant.

16 SEC. 2. Section ~~1473.6~~ 1266 is added to the Penal Code, to
17 read:

18 ~~1473.6. (a) In addition to the remedies provided in this~~
19 ~~chapter, a writ of habeas corpus may be prosecuted~~

20 1266. (a) *In addition to any other remedies provided by law,*
21 *and despite any limitations in Section 1265 or elsewhere, a motion*
22 *to vacate judgment may be made by any person convicted of a*
23 *criminal offense, whether or not that person remains in prison or*
24 *restrained upon that conviction, if the conviction was obtained as*
25 *a result of any fraud by any government official or false evidence*
26 *presented to any prosecutor or tribunal by any government official,*
27 *when the fraud or false evidence was substantially material or*
28 *probative on the issue of guilt or punishment or upon the legality*
29 *of a search or seizure, or was a material factor directly related to*
30 *that person's plea of guilty or no contest.*

31 (b) *The motion shall be made in the first instance in the court*
32 *in which the conviction was rendered, whether or not any appellate*
33 *review of that conviction was conducted.*

34 (c) A ~~petition motion~~ pursuant to this section may be filed
35 within one year of the latest of any of the following:

36 (1) The petitioner's discovery of substantial evidence of the
37 fraud or falsity, other than the petitioner's own knowledge of the
38 fraud or falsity, if that evidence could not reasonably have been
39 presented at the time of conviction.

1 (2) Any action by a government agency adversely affecting the
2 petitioner as a result of the conviction, including, but not limited
3 to, use of the conviction to deny an occupational license, allegation
4 of the conviction to enhance punishment, or reliance on the
5 conviction in immigration proceedings.

6 (3) The effective date of this section.

7 ~~(c)~~

8 (d) On a showing of extraordinary circumstances to explain
9 any delay, a ~~writ~~ motion pursuant to this section may be prosecuted
10 outside of the time limitations in subdivision ~~(b)~~ (c).

11 ~~(d)~~

12 (e) Nothing in this section shall be construed as ~~limiting the~~
13 ~~grounds for which a writ of habeas corpus~~ otherwise changing the
14 grounds for which a motion to vacate judgment or a petition in the
15 nature of *coram nobis* may be prosecuted or as precluding the use
16 of any other remedies.

17 SEC. 3. No reimbursement is required by this act pursuant to
18 Section 6 of Article XIII B of the California Constitution because
19 the only costs that may be incurred by a local agency or school
20 district will be incurred because this act creates a new crime or
21 infraction, eliminates a crime or infraction, or changes the penalty
22 for a crime or infraction, within the meaning of Section 17556 of
23 the Government Code, or changes the definition of a crime within
24 the meaning of Section 6 of Article XIII B of the California
25 Constitution.

EXHIBIT F

Introduced by Senator Burton

February 13, 2002

An act to add Sections 1054.9 and 1473.6 to the Penal Code, relating to habeas corpus.

LEGISLATIVE COUNSEL'S DIGEST

SB 1391, as introduced, Burton. Habeas corpus.

Under existing law, any person unlawfully imprisoned or restrained of liberty may prosecute a writ of habeas corpus to inquire into the cause of that restraint. This power to prosecute a writ of habeas corpus extends in certain circumstances to persons in constructive custody by virtue of parole, or conditional pretrial release.

This bill would require that evidence to which trial counsel for the same defendant was entitled at the time of trial be made reasonably accessible to counsel preparing a habeas corpus petition on behalf of a person convicted of a felony, upon submission by that counsel of a specified declaration under penalty of perjury, as provided.

By expanding the purview of existing perjury provisions, this bill would impose a state-mandated local program.

Under existing law, although persons not presently restrained of liberty may seek certain types of relief from the disabilities of a conviction, the writ of habeas corpus is generally not available to them. A writ of habeas corpus generally will not issue unless all other remedies at law are exhausted, and must be filed within a reasonable time, as provided.

This bill would create an explicit right to prosecute a writ of habeas corpus, regardless of custody or restraint, to address a conviction based on fraud by, or false evidence from, a government official, as specified. The right would extend for one year from the effective date of the bill;

the date of discovery of substantial evidence of the fraud or falsity; or the date of a government action adversely affecting the petitioner as a result of the conviction, as specified. This time limit could be extended only upon a showing of extraordinary circumstances to explain any delay. The bill would declare that it is not to be construed to preclude other grounds for habeas relief, or any other remedies.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1054.9 is added to the Penal Code, to
2 read:

3 1054.9. (a) Upon submission of a declaration signed under
4 penalty of perjury stating that good faith efforts to obtain copies
5 of evidence from trial counsel were made and were unsuccessful,
6 counsel preparing a petition for habeas corpus relief on behalf of
7 a person convicted of a felony shall be provided reasonable access
8 to any of the materials described in this section.

9 (b) Counsel shall be provided access to any evidence to which
10 trial counsel for the same defendant was entitled at time of trial,
11 including, but not limited to, any physical evidence in the
12 possession of the prosecution and law enforcement authorities
13 relating to the investigation, arrest, and prosecution of the
14 defendant for the purposes of examination or independent testing.

15 (c) The actual costs of reproducing any documents pursuant to
16 this section shall be borne or reimbursed by defendant.

17 SEC. 2. Section 1473.6 is added to the Penal Code, to read:

18 1473.6. (a) In addition to the remedies provided in this
19 chapter, a writ of habeas corpus may be prosecuted by any person
20 convicted of a criminal offense, whether or not that person remains
21 in prison or restrained upon that conviction, if the conviction was
22 obtained as a result of any fraud by any government official or false
23 evidence presented to any prosecutor or tribunal by any

1 government official, when the fraud or false evidence was
2 substantially material or probative on the issue of guilt or
3 punishment or upon the legality of a search or seizure, or was a
4 material factor directly related to that person's plea of guilty or no
5 contest.

6 (b) A petition pursuant to this section may be filed within one
7 year of the latest of any of the following:

8 (1) The petitioner's discovery of substantial evidence of the
9 fraud or falsity, other than the petitioner's own knowledge of the
10 fraud or falsity, if that evidence could not reasonably have been
11 presented at the time of conviction.

12 (2) Any action by a government agency adversely affecting the
13 petitioner as a result of the conviction, including, but not limited
14 to, use of the conviction to deny an occupational license, allegation
15 of the conviction to enhance punishment, or reliance on the
16 conviction in immigration proceedings.

17 (3) The effective date of this section.

18 (c) On a showing of extraordinary circumstances to explain any
19 delay, a writ pursuant to this section may be prosecuted outside of
20 the time limitations in subdivision (b).

21 (d) Nothing in this section shall be construed as limiting the
22 grounds for which a writ of habeas corpus may be prosecuted or
23 as precluding the use of any other remedies.

24 SEC. 3. No reimbursement is required by this act pursuant to
25 Section 6 of Article XIII B of the California Constitution because
26 the only costs that may be incurred by a local agency or school
27 district will be incurred because this act creates a new crime or
28 infraction, eliminates a crime or infraction, or changes the penalty
29 for a crime or infraction, within the meaning of Section 17556 of
30 the Government Code, or changes the definition of a crime within
31 the meaning of Section 6 of Article XIII B of the California
32 Constitution.

EXHIBIT G

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	SB 1391
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UNFINISHED BUSINESS

Bill No: SB 1391
Author: Burton (D)
Amended: 8/26/02
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE : 4-2, 4/23/02
AYES: Burton, Polanco, Sher, Vasconcellos
NOES: McPherson, Margett

SENATE APPROPRIATIONS COMMITTEE : 8-3, 5/23/02
AYES: Alpert, Bowen, Burton, Escutia, Karnette, Murray,
Perata, Speier
NOES: Battin, McPherson, Poochigian

SUBJECT : Criminal procedure: history

SOURCE : California Attorney for Criminal Justice
California Public Defenders Association

DIGEST : This bill requires that discovery materials to which a defendant would have been entitled at the time of trial be made reasonably accessible to the defendant if he or she has been sentenced to death or life in prison without the possibility of parole and files a specified motion or writ of habeas corpus that makes a specified showing. This bill requires a defendant be given access to physical evidence only upon a separate court finding, as specified, and specifies that the only means of obtaining access to physical evidence for postconviction DNA testimony is through other specified procedures.

CONTINUED

This bill creates an explicit right for a person no longer unlawfully imprisoned or restrained to prosecute a motion to vacate a judgment based on newly obtained evidence of fraud or misconduct by a government official, as specified.

This bill eliminates the repeal of provisions relating to the retention of DNA evidence, which are to sunset on January 1, 2005.

Assembly Amendments recast the bill and narrow its scope. _

ANALYSIS : Existing law governs discovery in a criminal case including information that the prosecuting attorney shall disclose to the defendant.

Existing statutory law does not regulate post-conviction discovery.

This bill creates a process for attorneys in death penalty or life without the possibility of parole cases to obtain access to discovery materials. Permits convicted persons, whether or not in custody, to vacate a judgement based on newly discovered evidence of governmental fraud or other misconduct. Specifically, this bill:

1. Provides that upon the prosecution of a post-conviction writ of habeas corpus or a motion to vacate a judgement in a case in which a sentence of death or of life without the possibility of parole has been imposed, the court may order that counsel for the defendant be provided reasonable access to discovery materials.
2. Requires that before the court grants access to specified materials, the defendant must demonstrate that there have been good-faith efforts to obtain discovery materials from trial counsel that were unsuccessful.
3. Defines "discovery materials" as materials in the possession of the prosecution and law enforcement authorities to which the defendant would have been entitled at time of trial.
4. Permits the court to order that the defendant be provided access to physical evidence for the purpose of

examination upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The actual costs of examination or copying shall be borne or reimbursed by defendant.

5. Removes the sunset date of the provision in the Penal Code for the retention of biological evidence for purposes of DNA testing.
6. Provides that a person no longer unlawfully imprisoned or restrained may make a motion to vacate a judgment for any of the following reasons:
 - A. Newly discovered evidence of fraud by a government official that completely undermines the prosecution's case, is conclusive, and points unerringly to innocence.
 - B. Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the official was substantially probative on the issue of guilt or punishment.
 - C. Newly discovered evidence of misconduct by a government official that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. Evidence of misconduct in other cases is not sufficient to warrant relief.
7. Provides that the procedure for vacating a judgment, including the burden of producing evidence and proof, shall be the same as for a writ of habeas corpus. A motion must be filed within one year of either the date of discovery of the governmental misconduct or the effective date of this section.

Existing law provides that every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint. A writ of habeas corpus may be prosecuted for, but not limited to,

the following reasons: (1) false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his or her incarceration, and (2) false physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

According to the Senate Appropriations Committee:

Fiscal Impact (in thousands)

<u>Major Provisions</u> <u>2004-05</u>	<u>Fund</u>	<u>2002-03</u>	<u>2003-04</u>
Local mandate for DA's and law enforcement significant --		-- Unknown, General	
Trial court costs significant		-- Unknown, Special*	

*Trial Court Trust Fund

SUPPORT : (Verified 5/23/02) (Unable to verify at time of writing)

California Attorney for Criminal Justice (co-source)
California Public Defenders Association (co-source)
American Civil Liberties Union

(Note: The Attorney General removed opposition with the amendments of August 26, 2002..)

ARGUMENTS IN SUPPORT : According to the sponsor:

The problem that occurs all too often that a defendant's files are lost or destroyed after trial and habeas counsel

is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order. This leads to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to re-access the materials and information originally available to him or her at trial.

Currently, as expressed in People v. Gonzalez, (1990) 51 Cal. 3d 1179, habeas corpus counsel is required to establish all of the elements of a claim for habeas corpus relief before the court will entertain a motion to provide such original documents as police reports, ballistic tests and other materials and information. If habeas counsel cannot obtain the documents needed to meet this threshold showing because trial counsel's files have been lost or destroyed, the injustice is clear. The existing remedy, as discussed in Gonzalez, is woefully inadequate in cases where a defendant's file, through no fault of their own no longer exists.

The purpose of the proposed legislation is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled.

RJG:cm 8/29/02 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

EXHIBIT H

SENATE THIRD READING
SB 1391 (Burton)
As Amended August 26, 2002
Majority vote

SENATE VOTE : 21-14

PUBLIC SAFETY 4-1 APPROPRIATIONS 15-7

Ayes:	Washington, Cedillo, Goldberg, Keeley	Ayes:	Steinberg, Alquist, Aroner, Cohn, Corbett, Diaz, Firebaugh, Goldberg, Negrete McLeod, Papan, Pavley, Simitian, Washington, Wiggins, Wright
Nays:	Dickerson	Nays:	Bates, Ashburn, Daucher, Maldonado, Robert Pacheco, Runner, Zettel

SUMMARY : Creates a process for attorneys in death penalty or life without the possibility of parole cases to obtain access to discovery materials. Permits convicted persons, whether or not in custody, to vacate a judgement based on newly discovered evidence of governmental fraud or other misconduct. Specifically, this bill :

- 1) Provides that upon the prosecution of a post-conviction writ of habeas corpus or a motion to vacate a judgement in a case in which a sentence of death or of life without the possibility of parole has been imposed, the court may order that counsel for the defendant be provided reasonable access to discovery materials.
- 2) Requires that before the court grants access to specified materials, the defendant must demonstrate that there have been good-faith efforts to obtain discovery materials from trial counsel that were unsuccessful.
- 3) Defines "discovery materials" as materials in the possession of the prosecution and law enforcement authorities to which the defendant would have been entitled at time of trial.

- 4) Permits the court to order that the defendant be provided access to physical evidence for the purpose of examination upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The actual costs of examination or copying shall be borne or reimbursed by defendant.
- 5) Removes the sunset date of the provision in the Penal Code for the retention of biological evidence for purposes of DNA testing.
- 6) Provides that a person no longer unlawfully imprisoned or restrained by make a motion to vacate a judgment for any of the following reasons:
 - a) Newly discovered evidence of fraud by a government official that completely undermines the prosecution's case, is conclusive, and points unerringly to innocence;
 - b) Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the official was substantially probative on the issue of guilt or punishment; or,
 - c) Newly discovered evidence of misconduct by a government official that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. Evidence of misconduct in other cases is not sufficient to warrant relief.
- 7) Provides that the procedure for vacating a judgement, including the burden of producing evidence and proof, shall be the same as for a writ of habeas corpus. A motion must be filed within one year of either the date of discovery of the governmental misconduct or the effective date of this section.

FISCAL EFFECT : According to the Assembly Appropriations Committee analysis, potential annual General Fund cost to trial courts - in excess of \$150,000 - that could result in a backlog of cases.

COMMENTS : According to the sponsor, "The problem that occurs

all too often is this: a defendant's files are lost or destroyed after trial and habeas counsel is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order. This leads to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to re-access the materials and information originally available to him or her at trial.

"Currently, as expressed in People v. Gonzalez , (1990) 51 Cal. 3d 1179, habeas corpus counsel is required to establish all of the elements of a claim for habeas corpus relief before the court will entertain a motion to provide such original documents as police reports, ballistic tests and other materials and information. If habeas counsel cannot obtain the documents needed to meet this threshold showing because trial counsel's files have been lost or destroyed, the injustice is clear. The existing remedy, as discussed in Gonzalez , is woefully inadequate in cases where a defendant's file, through no fault of their own, no longer exists. The purpose of this bill is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled."

Please see the policy committee analysis for a full discussion of this bill.

Analysis Prepared by : Bruce Chan / PUB. S. / (916) 319-3744

FN: 0007245

EXHIBIT I

Date of Hearing: August 14, 2002

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Darrell Steinberg, Chair

SB 1391 (Burton) - As Amended: April 10, 2002

Policy Committee:
SafetyVote: 4-1

Public

Urgency: No
Yes Reimbursable:

State Mandated Local Program:
No

SUMMARY

This bill creates a process for attorneys in habeas corpus proceedings in death penalty or life imprisonment cases to obtain access to discovery materials and creates a process for convicted persons, whether or not in custody, to vacate a judgement based on fraud or the presentation of false evidence by the government. Specifically, this bill:

- 1) Requires, on a defendant's motion to the trial court, in a case in which a sentence of death or life in prison has been imposed, on a showing that good-faith efforts to obtain copies of discovery materials were made and were unsuccessful, the court to order the defendant be provided reasonable access to specified discovery materials.
- 2) Requires a defendant be provided access to discovery materials in the possession of the prosecution and law enforcement authorities to which the defendant was entitled at time of trial, or to which the defendant would have been entitled had the materials been known. The actual costs of examination or copying would be the responsibility of the defendant.
- 3) Allows a motion to vacate a judgment to be made by any person convicted of a criminal offense, whether or not that person is incarcerated, if the conviction was obtained as a result of fraud by a government official or false evidence presented by a government official.

FISCAL EFFECT

Potential annual GF costs to trial courts - in excess of

\$150,000 - that could result in a backlog of cases.

COMMENTS

1) Rationale .

a) Access to Discovery . According to proponents, a defendant's files may be lost or destroyed after trial and habeas counsel is unable to obtain the original documents because the state has no legal obligation to provide them, absent a court order. This causes delays and unnecessary public expenditures as counsel litigate whether the defendant can demonstrate a need to re-access the materials originally available to him or her at trial.

b) Motion to Vacate Judgement . Proponents cite the recent Rampart scandal in LA to illustrate the problem addressed by this bill. The misconduct of police officers, such as planting evidence, false police reports, perjury, and phony confessions, came to light years after the conduct occurred, preventing those who were no longer in custody from having their convictions set aside. The author contends that a person no longer in custody faces many significant consequences of having been convicted of a crime (for example, the requirement of pre-employment background checks is increasing), creating a clear need for a mechanism to challenge judgments in cases of official misconduct.

The existing procedure for a declaration of factual innocence does not apply to conviction. There is no remedy for an improperly obtained conviction.

2) Opposition . The Attorney General, the California District Attorneys Association and the California Judges Association contend that eliminating time limits on when a motion for discovery may be made imposes an unreasonable burden on law enforcement to maintain files and all types of evidence long after defendants have been discharged.

Analysis Prepared by : Geoff Long / APPR. / (916) 319-2081

EXHIBIT J

Date of Hearing: June 25, 2002
Chief Counsel: Bruce E. Chan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Carl Washington, Chair

SB 1391 (Burton) - As Amended: April 10, 2002

SUMMARY : Creates a process for attorneys in habeas corpus proceedings in death penalty or life imprisonment cases to obtain access to discovery materials. Creates a process for convicted persons, whether or not in custody, to vacate a judgement based on fraud or the presentation of false evidence by the government. Specifically, this bill :

- 1) Provides that on a defendant's motion to the trial court, in a case in which a sentence of death or life in prison has been imposed, on a showing that good-faith efforts to obtain copies of discovery materials from trial counsel were made and were unsuccessful, the court shall order the defendant be provided reasonable access to specified discovery materials.
- 2) Requires that a defendant shall be provided access to discovery materials in the possession of the prosecution and law enforcement authorities to which the defendant was entitled at time of trial, or to which the defendant would have been entitled had the materials been known. The actual costs of examination or copying shall be borne or reimbursed by the defendant.
- 3) Provides that a motion to vacate a judgment may be made by any person convicted of a criminal offense, whether or not that person remains in prison or restrained upon that conviction, if the conviction was obtained as a result of any fraud by any government official or false evidence presented to any prosecutor or tribunal by any government official, when the fraud or false evidence was substantially material or probative on the issue of guilt or punishment or upon the legality of a search or seizure, or was a material factor directly related to the person's plea of guilty or no contest.
- 4) Provides that the motion shall be made in the first instance in the court in which the conviction was rendered, whether or

not any appellate review of that conviction was conducted.

- 5) Provides that, unless there is a showing of extraordinary circumstances, a motion pursuant to this section may be filed within one year of the latest of any of the following:
 - a) The petitioner's discovery of substantial evidence of the fraud or falsity, other than the petitioner's own knowledge of the fraud or falsity, if that evidence could not reasonably have been presented at the time of conviction.
 - b) Any action by a government agency adversely affecting the petitioner as a result of the conviction, including, but not limited to, use of the conviction to deny an occupational license, allegation of the conviction to enhance punishment, or reliance on the conviction in immigration proceedings.
 - c) The effective date of this section.

EXISTING LAW

- 1) States that the purpose of discovery in criminal cases is to promote the ascertainment of truth in trials by requiring timely pretrial discovery. (Penal Code Section 1054.)
- 2) Provides that specified disclosures of evidence in criminal cases shall be made at least 30 days before trial unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the information becomes known within 30 days of trial, disclosure shall be made immediately. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. (Penal Code Section 1054.7.)
- 3) Provides that every person unlawfully imprisoned or restrained of his or her liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint. A writ of habeas corpus may be prosecuted for, but not limited to the following reasons:
 - a) False evidence that is substantially material or

probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his or her incarceration; or,

- b) False physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person. (Penal Code Section 1473.)

FISCAL EFFECT : Unknown

COMMENTS :

1) Access to Discovery : According to the sponsor, "The problem that occurs all too often is this: a defendant's files are lost or destroyed after trial and habeas counsel is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order. This leads to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to re-access the materials and information originally available to him or her at trial.

"Currently, as expressed in People v. Gonzalez , (1990) 51 Cal. 3d 1179, habeas corpus counsel is required to establish all of the elements of a claim for habeas corpus relief before the court will entertain a motion to provide such original documents as police reports, ballistic tests and other materials and information. If habeas counsel cannot obtain the documents needed to meet this threshold showing because trial counsel's files have been lost or destroyed, the injustice is clear. The existing remedy, as discussed in Gonzalez , is woefully inadequate in cases where a defendant's file, through no fault of their own, no longer exists. The purpose of this bill is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled."

2) Motion to Vacate Judgement : According to the sponsor, the recent Rampart scandal in Los Angeles illustrates the problem that this bill attempts to address. The misconduct of police officers, such as planting evidence, false police reports, perjury, and phony confessions, came to light many years after

the conduct had occurred, barring those who were no longer in custody from having their convictions set aside. There have even been cases in which prosecutors, appearing in the absence of the defendants and defense counsel, have convinced judges to terminate probation early, thereby eliminating any chance of equitable relief. The author notes that a person no longer in custody still faces many collateral consequences of having been convicted of a crime (for example, the requirement of pre-employment background checks is increasing); thus, it is important to have a mechanism for people to have the ability to challenge their judgments when there is evidence that there was official misconduct.

Unfortunately, the existing procedure for a declaration of factual innocence in Penal Code Section 851.8 does not apply to situations such as the Rampart scandal. The provisions for petitioning the court to make a declaration of factual innocence are inapplicable if there has been a conviction. There is no remedy for an improperly obtained conviction.

3) Arguments in Opposition : The Attorney General contends that with no time limitations on when a motion for discovery could be made, it would impose an unreasonable burden on law enforcement and prosecutors' offices to maintain files and all types of evidence long after defendants had been discharged from custody. Additionally, by including all materials in the possession of both the prosecution and law enforcement as subject to discovery, rather than limiting this new section to documents in the possession of the prosecution, this bill would require law enforcement and prosecutors to maintain all types of physical evidence indefinitely. Moreover, law enforcement agencies must maintain and disclose evidence unrelated to guilt or innocence.

The Attorney General also contends that the motion to vacate the judgement in this bill is unnecessary. Currently, a defendant who is convicted has a number of separate state procedures to challenge that conviction. The defendant may bring motion for new trial before judgement is rendered, an appeal (including review by the California Supreme Court), a petition for habeas corpus, and an application for the Governor's clemency (reprieve, commutation, or pardon). In each of these existing procedures, a guilty verdict based on fraud or false evidence may be challenged. Additionally, a defendant may file a petition for habeas corpus in the federal courts and a

petition for certiorari in the United States Supreme Court. With all of these current state and federal remedies, the interests of finality of judgments must prevail over creating an additional procedure that has not been shown to be necessary. Also, this new provision could be filed in any misdemeanor or felony case an unlimited number of years after a defendant was discharged from custody. This would require law enforcement to maintain every misdemeanor and felony file and accompanying evidence for an indefinite amount of time because of the possibility of a motion to vacate.

REGISTERED SUPPORT / OPPOSITION :

Support

American Civil Liberties Union
California Attorneys for Criminal Justice
California Public Defenders Association

Opposition

Attorney General
California District Attorneys Association
California Judges Association

Analysis Prepared by : Bruce Chan / PUB. S. / (916) 319-3744

EXHIBIT K

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 327-4478	SB 1391
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THIRD READING

Bill No: SB 1391
Author: Burton (D)
Amended: 4/10/02
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE : 4-2, 4/23/02
AYES: Burton, Polanco, Sher, Vasconcellos
NOES: McPherson, Margett

SENATE APPROPRIATIONS COMMITTEE : 8-3, 5/23/02
AYES: Alpert, Bowen, Burton, Escutia, Karnette, Murray,
Perata, Speier
NOES: Battin, McPherson, Poochigian

SUBJECT : Criminal procedure: history

SOURCE : California Attorney for Criminal Justice
California Public Defenders Association

DIGEST : This bill (1) creates a process in which the habeas attorney in a death penalty or life imprisonment case can have access to discovery materials in the possession of the prosecution of law enforcement at the time of trial when the trial attorney's file is unobtainable, and (2) creates a process by which a person convicted to a criminal offense, who is no longer in custody or on probation or parole, can move to have the judgment vacated when there has been fraud or fraudulent testimony by a government official.

ANALYSIS : Existing law governs discovery in a criminal
CONTINUED

case including information that the prosecuting attorney shall disclose to the defendant.

Existing statutory law does not regulate post-conviction discovery.

This bill provides that on a defendant's motion to the trial court, in a case in which a sentence of death or life in prison has been imposed, on a showing that good faith efforts to obtain copies of discovery materials from trial counsel were made and were unsuccessful, the court shall order the defendant be provided reasonable access to discovery materials in the possession of the prosecution and law enforcement authorities.

Existing law provides that every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint. A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons: (1) false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his or her incarceration, and (2) false physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

This bill provides that a motion to vacate a judgment may be made by any person convicted of a criminal offense, whether or not that person remains in prison or restrained upon that conviction, if the conviction was obtained as a result of any fraud by any government official or false evidence presented to any prosecutor or tribunal by any government official, when the fraud or false evidence was substantially material or probative on the issue of guilt or punishment or upon the legality of a search or seizure, or was a material factor directly related to the person's plea of guilty or no contest.

This bill provides that the motion shall be made in the first instance in the court in which the conviction was

rendered, whether or not any appellate review of that conviction was conducted.

This bill provides that, unless there is a showing of extraordinary circumstances, a motion pursuant to this section may be filed within one year of the latest of any of the following:

1. The petitioner's discovery of substantial evidence of the fraud or falsity, other than the petitioner's own knowledge of the fraud or falsity, if that evidence could not reasonably have been presented at the time of conviction.
2. Any action by a government agency adversely affecting the petitioner as a result of the conviction, including, but not limited to, use of the conviction to deny an occupational license, allegation of the conviction to enhance punishment, or reliance on the conviction in immigration proceedings.
3. The effective date of this section.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

According to the Senate Appropriations Committee:

Fiscal Impact (in thousands)

<u>Major Provisions</u>	<u>2002-03</u>	<u>2003-04</u>
<u>2004-05</u>	<u>Fund</u>	

Local mandate for DA's and law enforcement significant --

-- Unknown, General

Trial court costs significant

-- Unknown, Special*

*Trial Court Trust Fund

SUPPORT : (Verified 5/23/02)

California Attorney for Criminal Justice (co-source)
California Public Defenders Association (co-source)
American Civil Liberties Union

OPPOSITION : (Verified 5/23/02)

California District Attorneys Association
California Attorney General
California Judges Association

ARGUMENTS IN SUPPORT : According to the sponsor:

The problem that occurs all too often is this: a defendant's files are lost or destroyed after trial and habeas counsel is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order. This leads to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to re-access the materials and information originally available to him or her at trial.

Currently, as expressed in People v. Gonzalez , (1990) 51 Cal. 3d 1179, habeas corpus counsel is required to establish all of the elements of a claim for habeas corpus relief before the court will entertain a motion to provide such original documents as police reports, ballistic tests and other materials and information. If habeas counsel cannot obtain the documents needed to meet this threshold showing because trial counsel's files have been lost or destroyed, the injustice is clear. The existing remedy, as discussed in Gonzalez, is woefully inadequate in cases where a defendant's file, through no fault of their own no longer exists.

The purpose of the proposed legislation is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled.

ARGUMENTS IN OPPOSITION : The Attorney General opposes this bill because they do not believe this new section is necessary because of the other procedures that exist. However, no remedy does currently exist, short of a pardon,

that allows a person to challenge a conviction once they are off parole or probation; and, this has become a very real problem for a number of individuals in Los Angeles who have only recently had the evidence to show that the law enforcement officers in their case committed fraud. These people are faced with the real collateral consequences of being convicted of a crime with no real remedy.

The Attorney General also opposes this bill because they believe it would require law enforcement to keep files for an indefinite amount of time and because it would permit a challenge to the legality of a search or seizure without any showing that the defendant was innocent. _

RJG:cm 5/23/02 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

EXHIBIT L

Appropriations Committee Fiscal Summary

1391 (Burton)

Hearing Date: 5/23/02
Consultant: Karen French
Safety 4-2

Amended: 5/10/02
Policy Vote: Public

BILL SUMMARY:

SB 1391 creates a process for a habeas attorney in a death penalty or life imprisonment case to have access to discovery material in possession of the district attorney or law enforcement when the trial attorney's file has been destroyed or is unobtainable. The bill creates a process for someone who has been convicted, but is no longer in prison or on probation or parole, to make a motion to vacate the judgment when the conviction was obtained as a result of fraud or false evidence.

Fiscal Impact (in thousands)

<u>Major Provisions</u>	<u>2002-03</u>	<u>2003-04</u>	<u>2004-05</u>
<u>Fund</u>			
Local mandate for DA's & law enforcement significant-----		Unknown,	
Trial court costs significant-----		Unknown,	
	Special*		

*Trial Court Trust Fund.

STAFF COMMENTS: SUSPENSE FILE.

Under existing law, every person unlawfully imprisoned or restrained of his liberty, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint. Existing law does not govern post-conviction discovery. This bill provides a means by which habeas attorneys can reconstruct destroyed or missing trial files. Existing law also does not permit a motion to vacate judgment if a person no longer is in prison or restrained upon that conviction.

EXHIBIT M

SENATE COMMITTEE ON Public Safety
Senator Bruce McPherson, Chair
2001-2002 Regular Session

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SB 1391 (Burton)
As Amended April 10, 2002
Hearing date: April 23, 2002
Penal Code
MK:mc

CRIMINAL PROCEDURE

HISTORY

Source: California Attorney for Criminal Justice; California
Public Defenders Association

Prior Legislation: None

Support: American Civil Liberties Union

Opposition: California District Attorneys Association; California
Attorney General

KEY ISSUE

SHOULD THE LAW CREATE A PROCESS IN WHICH A HABEAS ATTORNEY IN A
DEATH PENALTY OR LIFE IMPRISONMENT CASE CAN GET ACCESS TO DISCOVERY
MATERIAL IN POSSESSION OF THE DISTRICT ATTORNEY OR LAW ENFORCEMENT
WHEN THE TRIAL ATTORNEY'S FILE HAS BEEN DESTROYED OR IS
UNOBTAINABLE?

SHOULD THE LAW CREATE A PROCESS FOR SOMEONE WHO HAS BEEN CONVICTED
OF A CRIMINAL OFFENSE, BUT IS NO LONGER IN PRISON OR ON PROBATION OR
PAROLE TO MAKE A MOTION TO VACATE THE JUDGMENT WHEN THE CONVICTION

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WAS OBTAINED AS A RESULT OF ANY FRAUD BY ANY GOVERNMENT OFFICIAL OR FALSE EVIDENCE PRESENTED TO ANY PROSECUTOR OR TRIBUNAL BY ANY GOVERNMENT OFFICIAL?

PURPOSE

The purpose of this bill is to: (1) create a process in which the habeas attorney in a death penalty or life imprisonment case can have access to discovery materials in the possession of the prosecution of law enforcement at the time of trial when the trial attorney's file is unobtainable, and (2) create a process by which a person convicted to a criminal offense, who is no longer in custody or on probation or parole, can move to have the judgment vacated when there has been fraud or fraudulent testimony by a government official.

Existing law governs discovery in a criminal case including information that the prosecuting attorney shall disclose to the defendant. (See Penal Code 1054 et. seq.)

Existing statutory law does not regulate post-conviction discovery.

This bill provides that on a defendant's motion to the trial court, in a case in which a sentence of death or life in prison has been imposed, on a showing that good faith efforts to obtain copies of discovery materials from trial counsel were made and were unsuccessful, the court shall order the defendant be provided reasonable access to discovery materials in the possession of the prosecution and law enforcement authorities.

Existing law provides that every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint. A writ of habeas corpus may be prosecuted for, but not limited to the following reasons: false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at

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any hearing or trial relating to his or her incarceration; false physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person. (Penal Code 1473.)

This bill provides that a motion to vacate a judgment may be made by any person convicted of a criminal offense, whether or not that person remains in prison or restrained upon that conviction, if the conviction was obtained as a result of any fraud by any government official or false evidence presented to any prosecutor or tribunal by any government official, when the fraud or false evidence was substantially material or probative on the issue of guilt or punishment or upon the legality of a search or seizure, or was a material factor directly related to the person's plea of guilty or no contest.

This bill provides that the motion shall be made in the first instance in the court in which the conviction was rendered, whether or not any appellate review of that conviction was conducted.

This bill provides that, unless there is a showing of extraordinary circumstances, a motion pursuant to this section may be filed within one year of the latest of any of the following:

The petitioner's discovery of substantial evidence of the fraud or falsity, other than the petitioner's own knowledge of the fraud or falsity, if that evidence could not reasonably have been presented at the time of conviction.

Any action by a government agency adversely affecting the petitioner as a result of the conviction, including, but not limited to, use of the conviction to deny an occupational license, allegation of the conviction to enhance punishment, or reliance on the conviction in immigration proceedings.

The effective date of this section.

COMMENTS

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1. Discovery

According to the sponsor:

The problem that occurs all too often is this: a defendant's files are lost or destroyed after trial and habeas counsel is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order. This leads to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to re-access the materials and information originally available to him or her at trial.

Currently, as expressed in *People v. Gonzalez*, (1990) 51 Cal. 3d 1179, habeas corpus counsel is required to establish all of the elements of a claim for habeas corpus relief before the court will entertain a motion to provide such original documents as police reports, ballistic tests and other materials and information. If habeas counsel cannot obtain the documents needed to meet this threshold showing because trial counsel's files have been lost or destroyed, the injustice is clear. The existing remedy, as discussed in *Gonzalez*, is woefully inadequate in cases where a defendant's file, through no fault of their own no longer exists.

The purpose of the proposed legislation is to provide a reasonable avenue for habeas counsel to obtain documents to which trial counsel was already legally entitled.

This bill provides that a habeas attorney in a case where death or life imprisonment has been imposed may make a motion to a court showing that a good faith effort has been made to obtain copies of discovery materials from trial counsel. The court shall then order that reasonable access be given to the materials. The materials are defined as "discovery materials in the possession of the prosecution and law enforcement authorities to which the same defendant was entitled at time of

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trial, or to which the defendant would have been entitled had the discovery been known, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant for the purpose of examination or copying."

The Attorney General's Office objects to this section's inclusion of life cases as well as death cases saying that files would have to be kept after a person leaves custody. However, the author points out that it is unlikely that in a life case that a person will leave custody and this section would apply to a habeas petition which by its definition means a person is in custody.

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The Attorney General's Office also opposes including information that is in the possession of law enforcement. However, the author notes that this is information that would have been in the original trial file.

SHOULD THERE BE A MECHANISM BY WHICH HABEAS ATTORNEYS CAN RECONSTRUCT DESTROYED OR MISSING TRIAL FILES?

2. Vacate Judgment

This bill creates a motion to vacate a judgment when the person is no longer incarcerated or on probation or parole. Currently, other than a pardon, no remedy exists for those no longer in the system to challenge their judgment when they learn that their conviction was obtained in part because of fraud or false evidence by a government official. According to the sponsor, California Public Defender's Association:

The recent scandal in Los Angeles is illustrative of the problem. The misconduct of police officers, such as planting evidence, false police reports, perjury, and phony confessions, came to light many years after the conduct had occurred, barring those who were no longer in custody from having their convictions set aside. There have even been cases in which prosecutors, appearing in the absence of the defendants and defense counsel, have convinced judges to terminate probation early, thereby cutting off any chance of equitable relief.

The author notes that a person no longer in custody still faces many collateral consequences of having been convicted of a crime for example, the requirement of preemployment background checks is increasing, thus it is important to have a mechanism for people to have the ability to challenge their judgments when there is evidence that there was official misconduct.

Under this bill a person can bring a motion to vacate if the conviction was obtained as a result of any fraud by any

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government official or false evidence presented to any prosecutor or tribunal by any government official, when the fraud or false evidence was substantially material or probative on the issue of guilt or punishment or upon the legality of a search or seizure, or was a material factor directly related to that person's plea of guilty or no contest.

The bill provides that the motion shall be brought within one year of:

The petitioner's discovery of substantial evidence of fraud or falsity, other than the petitioner's own knowledge of the fraud or falsity, if that evidence could not reasonably have been presented at the time of conviction.

Any action by a government agency adversely affecting the petitioner as a result of the conviction, including, but not limited to, use of the conviction to enhance punishment, or reliance on the conviction in immigration proceedings.

The effective date of this section.

The Attorney General opposes this bill because they do not believe this new section is necessary because of the other procedures that exist. However, as stated above, no remedy does currently exist, short of a pardon, that allows a person to challenge a conviction once they are off parole or probation; and, this has become a very real problem for a number of individuals in Los Angeles who have only recently had the evidence to show that the law enforcement officers in their case committed fraud. These people are faced with the real collateral consequences of being convicted of a crime with no real remedy.

The Attorney General also opposes this bill because they believe it would require law enforcement to keep files for an indefinite amount of time and because it would permit a challenge to the legality of a search or seizure without any showing that the defendant was innocent.

SHOULD A PERSON WHO IS NO LONGER IN CUSTODY OR ON PROBATION OR PAROLE BE PERMITTED TO BRING A MOTION TO VACATE THE JUDGMENT WHEN HE OR SHE CAN SHOW EVIDENCE OF FRAUD OR FALSE EVIDENCE BY A

GOVERNMENTAL OFFICIAL?

DECLARATION OF SERVICE

Case Name: **In re Curtis F. Price**

No.: **S069685**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **October 22, 2003**, I placed the attached **OPPOSITION TO MOTION FOR POST-CONVICTION DISCOVERY AND FOR APPOINTMENT OF INDEPENDENT COUNSEL** in the internal mail collection system at the Office of the Attorney General, 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Karen S. Sorensen
Attorney at Law
PMB 394
336 Bon Air Center
Greenbrae, CA 94904-3017

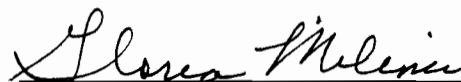
Robert L. McGlasson
Attorney at Law
1024 Clairemont Ave.
Decatur, GA 30030

California Appellate Project
One Ecker Place, 4th Fl.
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 22, 2003**, at San Francisco, California.

GLORIA MILINA

Typed Name



Signature