IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner, No. S171117

v.

SUPERIOR COURT, CONTRA COSTA COUNTY,

Respondent,

MICHAEL NEVAIL PEARSON,

Real Party in Interest.

After Decision by the Court of Appeal
First Appellate District, Division Five, No. A120430
Contra Costa County Superior Court No. 5-951701-2
The Honorable Leslie G. Landau, Judge

PETITIONER'S OPENING BRIEF ON THE MERITS

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v.

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ISSUES PRESENTED

1. Is Penal Code section 1054.9 unconstitutional, as an invalid amendment of Proposition 115?

2. When Proposition 115's voters declared that "[n]o order requiring discovery shall be made in criminal cases except as provided in [the Criminal Discovery Statute] . . ." (Pen. Code, § 1054.5, subd. (a)), did they intend for criminal cases to enjoy its commonly understood meaning, as reflected in other statutory and judicial sources, and as reflected elsewhere within Proposition 115, or did they intend to limit that phrase, to refer only to the pretrial and trial proceedings resulting in conviction or acquittal?

STATEMENT OF THE CASE

In 1996, the trial court sentenced Real Party (hereinafter "Defendant Pearson") to death for multiple murders. In 2007, he moved for post-conviction discovery under Penal Code section 1054.9. The People argued that section 1054.9 is an act in excess of the Legislature's amendatory powers. The trial court overruled our objection and ordered postconviction discovery in his underlying criminal case. (Defendant Pearson, who has yet to file his habeas petition, had no pending habeas proceeding to which his discovery motion could attach.) The People sought a writ of mandate. On February 6, 2009, the Court of Appeal issued its opinion denying our petition.

ARGUMENT

PENAL CODE SECTION 1054.9 AMENDED THE CRIMINAL DISCOVERY STATUTE

1. Regardless of the Criminal Discovery Statute's Initial Reach, Penal Code Section 1054.9 Amended It By Extending its Reach to Postconviction Proceedings

Penal Code section 1054.9 (Stats. 2002, c. 1105, § 1 (S.B. 1391)) amended the Criminal Discovery Statute. (Prop. 115, § 23; Pen. Code, § 1054 et seq.) The Court of Appeal sought to avoid section 1054.9's invalidity, by claiming it did not amend Proposition 115. It opined that the voters wanted to limit criminal cases, as used repeatedly within Proposition 115, to pretrial proceedings. But regardless of how one construes criminal cases, section 1054.9 amended the Criminal Discovery Statute by extending its reach to postconviction proceedings. An act is amendatory if it causes the original statute "to reach situations which were not covered by the original statute, . . . even though in its wording it does not purport to amend the language of the prior act." (*Franchise Tax Bd. v. Cory* (1978) 80

Cal.App.3d 772, 777; accord, *Mobilepark West Homeowners Assn. v. Escondido* (1995) 35 Cal.App.4th 32, 40; *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1201.)

"[A]mending a statute includes adding sections to . . . that statute . . . Where a new section affects the application of the original statute . . . , the new section is an amendment to the statute." (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 777.) "Section 1054.9 is part of the general discovery provisions of Penal Code section 1054 et seq." (*In re Steele* (2004) 32 Cal.4th 682, 696.) By virtue of section 1054.9's codification within the Criminal Discovery Statute, statutory authority to enforce postconviction discovery orders, and to sanction prosecutors for noncompliance, derives from Penal Code section 1054.5(b). That section authorizes trial courts to "make any order necessary to enforce the provisions of [the Criminal Discovery Statute] . . ." (Pen Code, § 1054.5, subd. (b).) In fact, before a section 1054.9 movant "may seek court enforcement of any of the disclosures required by [the Criminal Discovery Statute]," he must make an informal request for disclosure. (Pen. Code, § 1054.5, subd. (b).) "'[S]ection 1054.9 should be interpreted to promote informal, timely discovery between parties prior to seeking court enforcement.'" (*In re Steele, supra,* 32 Cal.4th at p. 692.)

As originally written, section 1054.5(b) neither required, nor contemplated, that defendants seeking postconviction discovery would first have to make an informal request for disclosure. As amended by section 1054.9, section 1054.5(b) now requires defendants seeking postconviction discovery to first make an informal request for disclosure. As originally written, section 1054.5(b) did not authorize trial courts to sanction prosecutors in order to enforce postconviction discovery orders. As amended by section 1054.9, however, section 1054.5(b) now permits trial courts to order postconviction discovery, and it requires trial courts to enforce those orders with section 1054.5(b)'s enforcement procedures.

Thus, section 1054.9 effectively amended the Criminal Discovery Statute. Its informal request and enforcement procedures now govern section 1054.9 postconviction discovery motions. By codifying section 1054.9 within the sole chapter governing discovery in criminal cases – the Criminal Discovery Statute – the Legislature extended its reach, so that now its informal request and enforcement procedures govern section 1054.9 motions. Since the new section affects the Criminal Discovery Statute's application, the new section is an amendment to it. (*Huening v. Eu, supra,* 231 Cal.App.3d at p. 777.)

Defendant Pearson agrees with the People – as originally written, the Criminal Discovery Statute's informal request and enforcement procedures did not reach beyond criminal cases' pretrial and trial proceedings.[1] Now, however, section 1054.5(b)'s informal request and enforcement procedures govern section 1054.9 motions. Even if we adopt the Court of Appeal's interpretation, and assume that criminal cases refers only to the pretrial and trial proceedings resulting in conviction or acquittal, the Legislature nevertheless extended section 1054.5(b)'s reach. Even if we employ the Court of Appeal's interpretation, section 1054.9 extended the Criminal Discovery Statute, so that some of its provisions now govern habeas proceedings, or at least or some other type of postconviction discovery proceedings.

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[1] Defendant Pearson reaches that conclusion by asserting that criminal cases, as used within Proposition 115, refers only to the pretrial and trial proceedings resulting in conviction or acquittal.

The People reach that conclusion because, while the Criminal Discovery Statute governs reciprocal discovery geared toward trial, at the same time it prohibits compulsory disclosures elsewhere within criminal proceedings. (Pen. Code, §§ 1054 subd. (e), 1054.5, subd. (a).)

In addition to amending the Criminal Discovery Statute by extending section 1054.5(b)'s reach, section 1054.9 entitles defendants to compel the disclosure, postconviction, of anything they were entitled to receive before trial. This includes, in addition to *Brady*[2] evidence, the list of discoverable items contained in Penal Code section 1054.1. Section 1054.9 thus expanded defendants' pre-existing statutory right to receive discoverable materials before trial. Section 1054.9 endows them with a new statutory right, to receive those materials anew, postconviction. Once again, even adopting the Court of Appeal's interpretation, section 1054.9 expanded the Criminal Discovery Statute, by making its provisions (the list of discoverable items set forth in Penal Code section 1054.1) apply to postconviction proceedings. By extending the reach of section 1054.1's mandated disclosures to postconviction proceedings, section 1054.9 amended the Criminal Discovery Statute. (Cf. *Franchise Tax Bd. v. Cory, supra,* 80 Cal.App.3d at p. 777 [an act is amendatory if it causes the original statute "to reach situations which were not covered by the original statute"].)

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2 *Brady v. Maryland* (1963) 373 U.S. 83 [10 L. Ed. 2d 215; 83 S. Ct. 1194]

Thus no matter whether or not the Criminal Discovery Statute, as originally enacted, regulated the availability or unavailability of postconviction discovery within criminal cases, section 1054.9 effectively amended its reach. But section 1054.9's failure to achieve a supermajority vote – it only received a 53% majority vote in both houses (5 Assem. J. (2001-2002 Reg. Sess.) p. 8239; 3 Sen. J. (2001-2002 Reg. Sess.) p. 4500) – renders it void. (Prop. 115, § 30;[3] Cal. Const., art. II, § 10, subd. (c).) Extending the Criminal Discovery Statute's informal request and enforcement procedures (Pen. Code, § 1054.5, subd. (b)), as well as some of its mandated disclosures (Pen. Code, § 1054.1), was impermissibly amendatory.

If we adopt the Court of Appeals' interpretation of criminal cases, then section 1054.9 extended the Criminal Discovery Statute's informal request and enforcement procedures, and some of its mandated disclosures, to non-criminal cases. Admittedly, extending the Criminal Discovery Statute's reach to non-criminal cases did not affect, directly, how its governs

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[3] "The statutory provisions contained in [Proposition 115] may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors." (Prop. 115, § 30.)

discovery in criminal cases. Nevertheless, the voters were explicit. They did not permit a 53% legislative majority to amend Proposition 115, provided the amendments did not affect how it governs discovery in criminal cases. They prohibited *any and all* legislative amendments accomplished with a 53% legislative majority. (Prop. 115, § 30.)

"[C]onflict with existing law is neither an essential, nor even a normal attribute of an amendment." (*Huening v. Eu, supra,* 231 Cal.App.3d at pp. 774-775; *Franchise Tax Bd. v. Cory, supra,* 80 Cal.App.3d at p. 776.) An amendment is "any change of the scope or effect of an existing statute . . . [even] by an act independent and original in form;" a "statute which adds to . . . an existing statute is considered an amendment." (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22; *Franchise Tax Bd. v. Cory, supra,* 80 Cal.App.3d at p. 776.) In determining whether a legislative act amends an initiative, "[i]t is 'the duty of the courts to jealously guard [the people's initiative and referendum power]' . . . '[I]t has long been . . . judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right [to initiative] be not improperly annulled.' [*Citation.*]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776; *Associated Home*

Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 591; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1485-1486.)

In limiting the Legislature's amendatory powers, Proposition 115's voters struck a delicate equilibrium. They effectively prohibitted a 53% legislative majority from extending any of the Criminal Discovery Statute's provisions "to reach situations which were not covered by the original statute." (Cf. *Franchise Tax Bd. v. Cory, supra,* 80 Cal.App.3d at p. 777.) They prohibited a deficient number of legislators from tinkering, in any way, with the Criminal Discovery Statute. The voters believed "the rights of crime victims are too often ignored by . . . our State Legislature." (Ballot Pamp., Primary Elec. (June 5, 1990) Text of Proposed Law, Prop. 115, § 1, subd. (a), p. 33].) They had no confidence in any legislative amendments that might derive from anything other than the collective, bipartisan wisdom of a two-thirds majority.

Thus the People need not disprove the purported Legislative wisdom underlying section 1054.9,[4] nor must we prove that section 1054.9 does not

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[4] Certainly not everyone agrees with whatever possessed the Legislature to tinker, albeit unsuccessfully, with Proposition 115. "In my view, section 1054.9 will further delay the final adjudication of death

further or impede the voters' purposes. (Compare *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1256.) The voters prohibited any amendment, no matter how minor or trivial, if accomplished by a mere 53% legislative majority. Although they knew that legislative enactments related to an initiative statute's subject matter may be allowed when they involve a

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penalty cases. The statute provides yet another excuse for a defendant to litigate, and litigate, and litigate. . . . [¶] This fixation with attempting to provide perfect justice has emasculated the death penalty in California. This is in absolute and complete derogation of the will of the voters of California who have repeatedly approved the death penalty by initiatives since 1978 . . . [¶] Something really must be done about the current state of death penalty litigation, and it is not to provide defendants (who have had the death penalty imposed by a jury) with more post-conviction discovery." (*Barnett v. Superior Court* (2006) 54 Cal.Rptr.3d 283, 339-343 [conc. opn., Sims, J., review granted].)

Following section 1054.9's enactment, prosecutors have been inundated by an onslaught of section 1054.9 discovery requests that have wastefully diverted and consumed large amounts of prosecutorial resources. They have contributed significantly to delay, thereby undermining the finality of judgments and the need for murder victims' families to receive closure. While the degree of legislative wisdom underlying section 1054.9 is subject to serious debate, it clearly faced substantial opposition within the Legislature. Those who opposed it succeeded in preventing it from garnering the supermajority vote that the voters required for any legislative amendment to Proposition 115.

"related but distinct area" (*Mobilepark West Homeowners Assn. v. Escondido, supra,* 35 Cal.App.4th at p. 43), they forbade an insufficient legislative majority from extending the Criminal Discovery Statute's informal request and enforcement procedures, as well as some of its mandated disclosures.

The voters may have feared that if an insufficient legislative majority employed the Criminal Discovery Statute as the foundation for a parallel discovery scheme governing habeas proceedings, it might threaten future electoral attempts to amend the Criminal Discovery Statute. Its extension to habeas proceedings both complicates and restrains any future electoral endeavor to amend or repeal the Criminal Discovery Statute's governance of criminal cases. As a result of its extension to habeas proceedings, any amendment or repeal of the Criminal Discovery Statute, aimed at just criminal cases, also would amend or repeal its provisions as they governed habeas proceedings. This would render any such future electoral endeavor vulnerable to a single subject challenge. (See, i.e., *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 247; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 347.) And using the Criminal Discovery Statute, as the foundation for a parallel discovery scheme governing habeas proceedings, complicates any

future electoral amendatory endeavors. It forces the proponents of such an initiative to address the ramifications and ripple effects that their amendatory effort would effectuate in habeas proceedings.

By burdening subsequent electoral attempts to amend the Criminal Discovery Statute, section 1054.9 effectuated an impermissible amendment. The voters were clear. An insufficient legislative majority, lacking sufficient collective, bipartisan wisdom, cannot extend any of the Criminal Discovery Statute's provisions, to reach situations not covered by the original statute. A 53% legislative majority cannot impede or complicate future voter amendments. Considered in that light, the voters' insistence was neither petulant nor nonsensical.

"'[T]he Constitution's initiative and referendum provisions should be liberally construed to maintain maximum power in the people. [*Citation*]." (*Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020, 1032.) This Court should not question the Legislative wisdom underlying the voters' decision to prohibit a 53% legislative majority from extending sections 1054.1's and 1054.5(b)'s reach. After all, the power vested in the electorate, to decide whether the Legislature can amend an initiative statute, "'is absolute and includes the power to enable legislative amendment subject to conditions attached by the voters.'" (*Amwest Surety*

Ins. Co. v. Wilson, supra, 11 Cal.4th at p. 1251.) The wisdom of the policies embodied in the voters' limitation, just like the choice among competing policy considerations in enacting such a limitation, is a legislative function. "'[A]ll power of government ultimately resides in the people,'" so that the constitutional right of the initiative is "'not . . . a right granted the people, but . . . a power reserved by them.'" (*Independent Energy Producers Ass'n v. McPherson, supra,* 38 Cal.4th at p. 1032; *Associated Home Builders etc. Inc. v. City of Livermore, supra,* 18 Cal.3d at p. 591.) It is not this Court's province to limit the voters' absolute right to limit the Legislature's amendatory powers, in order to reach what this Court might consider a more rational result.

Extending the Criminal Discovery Statute's informal request and enforcement procedures, as well as some of its mandated disclosures, is not the only way that section 1054.9 is impermissibly amendatory. In addition to these amendments by extension, section 1054.9 accomplished a series of amendments by contravention. Section 1054.9 permits defendants to seek postconviction discovery within their underlying criminal cases. These amendments by contravention are at odds with the Criminal Discovery Statute's directive, as originally written, that "[n]o order requiring discovery shall be made in criminal cases except as provided in [the Criminal

Discovery Statute]." (Pen. Code, § 1054.5, subd. (a).) Section 1054.9 has effectuated a series of impermissible amendments by contravention. (Compare Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a), with Pen. Code, § 1054.9, subds. (a), (b).)

Before addressing how section 1054.9 permits defendants to seek postconviction discovery within their underlying criminal cases, however, we must examine how criminal cases, as used within the Criminal Discovery Statute, encompass postconviction criminal proceedings. In doing so, we will examine how the Criminal Discovery Statute prohibits compulsory disclosures within the myriad of postconviction criminal proceedings that occur within criminal cases.

2. The Criminal Discovery Statute Governs All Criminal Proceedings

The Court of Appeal opined that the voters limited the phrase "criminal cases," as used within the Criminal Discovery Statute, to refer only to the pretrial and trial proceedings resulting in conviction or acquittal. The Court of Appeal is mistaken. It confused compulsory disclosures within postconviction criminal proceedings (which Proposition 115 prohibits) with

compulsory disclosures within postjudgment habeas proceedings (discovery orders issued by habeas referees, within habeas proceedings, fall outside Proposition 115's ambit).[5] The Criminal Discovery Statute governs reciprocal discovery geared toward trial, while at the same time prohibiting compulsory disclosures elsewhere in criminal proceedings. This prohibition extends to postconviction criminal proceedings. Although the voters intended for reciprocal disclosures to occur before trial (Pen. Code, §§ 1054.1, 1054.3, 1054.7), they repeatedly took pains to ensure that additional compulsory disclosures would not occur, within criminal cases, after trial. (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a); *In re Littlefield* (1993) 5 Cal.4th 122, 129.)

The Court of Appeal ignored the well-established construction of criminal cases, and tried, rather, to define that term by looking exclusively within the Criminal Discovery Statute. But the voters made no express attempt to define criminal cases, nor did they need to.[6] That term required

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[5] The fact that the Criminal Discovery Statute, as originally enacted, does not govern habeas proceedings (*In re Scott* (2003) 29 Cal.4th 783, 813) in no way alters its prohibition of compulsory disclosures within the myriad of postconviction criminal proceedings that occur within criminal cases.

[6] "When a statute does not define some of its terms," this Court "generally look[s] to 'the common knowledge and understanding of

no explicit statutory definition, since it already enjoyed a well-established meaning within other legislative and judicial sources. At the time of Proposition 115's enactment, criminal cases had a definitive judicial construction, encompassing all postconviction criminal proceedings.

The Court of Appeal arbitrarily disregarded this judicial construction, it ignored the voters' use of criminal cases elsewhere within Proposition 115 in a manner encompassing postconviction proceedings, and it overlooked the ballot arguments supporting the term's well-established construction. It ignored this Court's equation of criminal cases with criminal proceedings, when this Court interpreted that phrase within the Criminal Discovery Statute. "In *criminal proceedings* . . . all court-ordered discovery is governed exclusively by – and is barred except as provided by – the discovery chapter newly enacted by Proposition 115." (*In re Littlefield, supra,* 5 Cal.4th at p. 129.)

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members of the particular vocation or profession to which the statute applies' for the meaning of those terms.'" (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 575; *Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 491 [when "technical words or words of art . . . are employed . . . , [this Court] must assume that they are used in their technical meaning"]; Pen. Code, § 7, subd. 16 ["words and phrases . . . as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning"].)

The Court of Appeal compounded its errors by endowing criminal cases with an artificial interpretation it has never received from the voters, from the Legislature, or from this Court. This erroneous definition impedes "the electorate's stated goals of reducing delay and unnecessary cost" (cf. *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 297), and it does serious violence to the interpretative goals that the voters established for the Criminal Discovery Statute. (Pen. Code, § 1054.)[7]

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[7] The Court of Appeal mistakenly proclaimed that nothing within the Criminal Discovery Statute refers to postconviction proceedings. In fact, Proposition 115's voters intended for criminal cases to encompass the myriad of postconviction criminal proceedings that occur within criminal cases. So interpreted, three of the Criminal Discovery Statute's statements of purpose refer both to pretrial *and* postconviction criminal proceedings.

"[N]o discovery shall occur in *criminal cases* except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (Pen. Code, § 1054, subd. (e), italics added.) "No order requiring discovery shall be made in *criminal cases* except as provided in [the Criminal Discovery Statute]." (Pen. Code, § 1054.5, subd. (a), italics added.) "[The Criminal Discovery Statute] shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys [in *criminal cases*]." (*Ibid.*)

By refusing to give criminal cases "its ordinary meaning as understood by the electorate" (cf. *Robert L. v. Superior Court* (2003) 30

a) Criminal Cases Has a Well-Established Meaning, Encompassing the Myriad of Criminal Proceedings That Occur Postconviction

Unable to cite a single instance where criminal cases ever has referred exclusively to the pretrial and trial proceedings resulting in conviction or acquittal, the Court of Appeal proclaimed that its own peculiar interpretation was "arguably the 'meaning that would be commonly understood by the electorate.'" That curious notion impugns the electorate's intelligence. After all, the voters were concerned with speedy punishment as well as with speedy trials. They sought "to create a system in which justice is swift and fair, and . . . in which violent criminals receive just punishment." (Prop. 115, § 1, subd. (c).) Post-trial delay weighed just as much upon their consciousness as did pretrial delay.

The Court of Appeal's dim assessment of the electorate's knowledge contravenes the presumption that "[t]he enacting body is deemed to be aware of existing laws and judicial constructions in effect at time legislation is

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Cal.4th 894, 901), the Court of Appeal repeatedly ignored the Criminal Discovery Statute's statutory admonition that it must "be interpreted to give effect to *all* of [its] purposes." (Pen. Code, § 1054, italics added.)

enacted [and] [t]his principle applies to legislation enacted by initiative." (*People v. Weidert* (1985) 39 Cal.3d 836, 844.) "When an initiative contains terms that have been judicially construed, 'the presumption is almost irresistible' that those terms have been used 'in the precise and technical sense' in which they have been used by the courts." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 23; *People v. Wheeler* (1992) 4 Cal.4th 284, 302 ["the voters intended legal terms to have their legal compass"].) For more than 150 years, criminal cases have encompassed postconviction proceedings such as motions for new trial,[8] sentencing hearings,[9] probation hearings,[10] and appeals.[11]

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[8] Motions for new trials occur within criminal cases. (Cf. *People v. Hedgecock* (1990) 51 Cal.3d 395, 415 ["new trial motion in a criminal case"]; *People v. Serrato* (1973) 9 Cal.3d 753, 760 ["motion for a new trial in a criminal case"]; see also Cal. Const., former art. VI, § 4½ ["[n]o new trial [shall be] granted in any criminal case . . . unless . . . a miscarriage of justice [has resulted]"].)

[9] Sentencing proceedings occur within criminal cases. (Cf. *People v. Evans* (2008) 44 Cal.4th 590, 599 ["sentencing statute applicable to criminal cases generally"]; *People v. Allen* (1986) 42 Cal.3d 1222, 1292 ["proportionality of a particular punishment in criminal cases"]; *People v. Tanner* (1979) 24 Cal.3d 514, 531, fn 5 ["individualized sentencing in criminal cases"].)

The voters also knew that this Court's construction of criminal cases incorporated postjudgment criminal proceedings for challenging convictions. A motion to vacate judgment "'must be regarded as part of the proceedings in the criminal case . . .' and it is an established remedy for challenging a criminal conviction." (*Ingram v. Justice Court for Lake Valley Judicial Dist. of El Dorado County* (1968) 69 Cal.2d 832, 843; *People v. Shipman* (1965) 62 Cal.2d 226, 231.) "'Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of' existing law. ([*Citation*].)" (*Horwich v. Superior Court* (1999) 21 Cal.4th

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[10] Probation revocation proceedings occur within criminal cases. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 912 ["petitioner's probation in the criminal case was revoked and he was sentenced to prison"]; *In re Armstrong* (1981) 126 Cal.App.3d 565, 569 ["probation revocation proceeding in a criminal case"].)

[11] Criminal cases encompass appeals. (Cf. *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 123, 124 [declaring "this is not a criminal case" where proceedings pertained to matter not cognizable in death sentence appeal]; *In re Benoit* (1973) 10 Cal.3d 72, 77 ["appeals in criminal cases"]; *People v. Williams* (1861) 18 Cal. 187, 194 [limitation on appellate courts' "power in criminal cases to affirm a judgment"]; see also Cal. Rules of Court, Rule No. 8.368; Cal. Const., former art. VI, § 4½ ["[n]o judgment shall be set aside . . . in any criminal case . . . unless . . . a miscarriage of justice [has resulted]"].)

272, 283.) Thus Proposition 115's voters expected and intended that their statutory language would govern motions to vacate judgment. "[I]n California, . . . *a motion to vacate a judgment* . . . must be regarded as a part of the proceedings in the criminal case." (*People v. Paiva* (1948) 31 Cal.2d 503, 510, italics added; compare with Pen. Code, § 1054.9, subd. (a) [authorizing postconviction discovery for, inter alia, "*a motion to vacate a judgment*"].)

The "writ of error, coram nobis, . . . [is] designat[ed] . . . by the more simple and appropriate name of a motion to vacate the judgment." (*People v. Paiva, supra,* 31 Cal.2d at pp. 509-510; accord, *People v. Griggs* (1967) 67 Cal.2d 314, 316; *People v. Shipman, supra,* 62 Cal.2d at p. 229, fn. 2.) While a motion to vacate the judgment "'is exercised by a mere motion to set aside a judgment after the time for appeal has expired and the judgment has become final.' [*Citation*]" (*People v. Paiva, supra,* 31 Cal.2d at p. 510), "a motion to vacate the judgment . . . does [not] initiate an independent action. [*Citation*]." (*People v. Adamson* (1949) 34 Cal.2d 320, 329-330.) It "is properly regarded 'as a part of the proceedings in the case to which it refers' rather than as 'a new adversary suit.'" (*People v. Paiva, supra,* 31 Cal.2d at p. 509.) The court's ruling on such motion "is an order in the original case" which affords either the defendant or the People the right to

appeal. (*People v. Paiva, supra,* 31 Cal.2d at p. 510.)[12] The trial court cannot vacate a judgment already affirmed on appeal; a nonstatutory motion to vacate judgment must be brought in the appellate court that affirmed the judgment. (Pen. Code, § 1265.)

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[12] The Legislature recently expanded upon the traditional, "nonstatutory motion to vacate a judgment" (*People v. Banks* (1959) 53 Cal.2d 370, 378), by creating a more limited, statutory motion to vacate a judgment. (Pen. Code, § 1473.6.)

To qualify for relief, using a nonstatutory motion to vacate judgment, newly discovered facts must establish a basic flaw that would have prevented rendition of judgment. (*People v. Hyung Joon Kim* (2009) 45 Cal.4th 1078, 1103; *People v. Shipman, supra,* 62 Cal.2d at p. 230.)

Section 1473.6 has expanded the nonstatutory motion's reach. It permits "[a]ny person no longer unlawfully imprisoned or restrained" to prosecute a motion to vacate judgment, in order to gain relief for a conviction caused by a government official's fraud, false testimony, or misconduct. (Pen. Code, § 1473.6, subds. (a)(1)-(3).) Section 1473.6, enacted simultaneously with Penal Code section 1054.9, comprises the legislative response to the Los Angeles Police Department's Rampart scandal. (Stats. 2002, c. 1105, § 2 (S.B. 1391); *People v. Villa* (2009) 45 Cal.4th 1063, 1076.)

Defendant Barnett complains that "a coram nobis petition is in the nature of a civil proceeding." (*People v. Lauderdale* (1964) 228 Cal.App.2d 622, 626.) But, "in California, whatever be the character of the proceeding when regarded as an entity in itself, and regardless of its character insofar as concerns the burden of proof and rules of procedure generally, a motion to vacate a judgment . . . must be regarded as a part of the proceedings in the criminal case." (*People v. Paiva, supra,* 31 Cal.2d at p. 510; accord, *People v. Shipman, supra,* 62 Cal.2d at p. 231.) "[A]lthough a proceeding for a writ has been traditionally characterized as civil in nature when viewed as an entity in itself, where it relates to and arises out of a criminal action, it must be regarded as a part of such criminal action." (*Bravo v. Cabell* (1974) 11 Cal.3d 834, 838.)

Accordingly, from California's inception, up through Proposition 115's enactment and into today, criminal cases have encompassed all criminal proceedings related to the accused's prosecution and punishment. They encompass motions for new trial, sentencing hearings, motions to withdraw pleas, probation revocation hearings, and nonstatutory motions to

vacate judgment.[13] Proposition 115's electorate also knew that this Court, in earlier decisions, had equated criminal cases with criminal proceedings. "[T]he electorate is aware of relevant judicial decisions when it adopts legislation by initiative. ([*Citations*].)" (*People v. Hernandez* (2003) 30 Cal.4th 835, 867.) Proposition 8's command – that "relevant evidence shall not be excluded in any criminal proceeding" (Cal. Const., art. I, § 28, subd. (d)) – repealed "both judicially created and statutory rules restricting admission of relevant evidence in criminal cases." (*People v. Harris* (1989) 47 Cal.3d 1047, 1081-1082; see also *People v. Valentine* (1986) 42 Cal.3d 170, 172-173 [constitutional command that prior convictions shall "be used without limitation . . . in any criminal proceeding" means they "shall be used 'without limitation . . .' in a subsequent criminal case"].)[14]

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[13] A criminal action is the proceeding wherein the accused is brought to trial and punishment. (Pen. Code, § 683.) It is inconceivable that the voters, in enacting Proposition 115, intended to endow criminal cases with a construction more restrictive than that which the Penal Code affords to criminal actions.

[14] The first comprehensive statutory framework adopted by the Legislature in terms of criminal procedure was "An Act to Regulate *Proceedings in Criminal Cases*." (Stats. 1850, c. 119, p. 275, italics added.) The Act regulated both trial and appellate proceedings. Section 499 of the Act – now substantially embodied in Penal Code section 1258 – directed

b) The Voters Employed Criminal Cases Elsewhere Within Proposition 115 in a Manner Indisputably Encompassing Postconviction Criminal Proceedings

Proposition 115's drafters and voters employed criminal cases elsewhere within Proposition 115, in a manner indisputably encompassing postconviction criminal proceedings. They voted in favor of amending our state charter so that "*[i]n criminal cases* the rights of a defendant . . . to not suffer the imposition of cruel or unusual punishment, shall be construed by

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appellate courts to "give judgment without regard to technical error or defect . . ." where substantial rights were not prejudiced. Accordingly, our legislators believed, at statehood's inception, that criminal appeals occurred within criminal cases.

Over 100 years ago, our Legislature equated criminal cases with criminal proceedings. (See Cal. Const., former art. I, § 13 ["no person shall be compelled, in any criminal case, to be a witness against himself"]; former Pen. Code, § 1323 ["[a] defendant in a criminal action or proceeding cannot be compelled to be a witness against himself"]; see *Ex parte Gould* (1893) 99 Cal. 360, 361.)

the courts of this state in a manner consistent with the Constitution of the United States." (Prop. 115, § 3; Cal. Const., art. I, § 24, italics added, invalidated in *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 355.)[15]

The voters undeniably intended for criminal cases – as they used that phrase within Proposition 115, Section 3 – to encompass postconviction criminal proceedings. If, within the Criminal Discovery Statute, they had intended to impart a different meaning to that phrase than it unquestionably enjoys elsewhere within Proposition 115, they would have said so. (*People v. Acosta* (2002) 29 Cal.4th 105, 114 ["[a]s a matter of statutory construction, 'a word or phrase repeated in a statute should be given the same meaning throughout"].) Thus in 1990, a criminal case meant – as it does today – all criminal proceedings related to the accused's prosecution, including those criminal proceedings which occur after trial.

The Court of Appeal's error derived from its misguided attempt to construe the Criminal Discovery Statute in isolation, rather than construing it within Proposition 115 as a whole. "In interpreting a voter initiative . . .

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[15] Proposition 115 was drafted by 50 prosecutors (Ballot Pamp., rebuttal to arg. against Prop. 115, Primary Elec. (June 5, 1990) p. 35) who never intended to bestow criminal cases with a narrow definition contrary to its well-established usage, and fatally at odds with the expansive definition it receives elsewhere in their initiative.

[t]he statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]." (*Robert L. v. Superior Court, supra,* 30 Cal.4th at p. 900.) The Court of Appeal never addressed the well-established meaning that criminal cases had enjoyed for more than one hundred years before Proposition 115's enactment. It disregarded the voters' use of criminal cases, elsewhere within Proposition 115, in a manner indisputably encompassing postconviction criminal proceedings. Instead, it focused inordinately on just a single portion of Proposition 115, while ignoring its remainder.

If, however, the interpretative approach commences with the assumption that criminal cases deserves, at least initially, its well-established meaning, then the voters' use of that phrase elsewhere within Proposition 115, in a manner indisputably encompassing postconviction criminal proceedings, make perfect sense. We find further support for this interpretation by using criminal cases' well-established meaning to examine the Criminal Discovery Statute's enunciated purposes. (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a)). Employing this well-established meaning, it becomes readily apparent that the voters wove their desire – to prohibit

compulsory disclosures, in the myriad of postconviction criminal proceedings that occur within criminal cases – directly into the statutory fabric.

Furthermore, the Criminal Discovery Statute's interpretative guidelines differentiate between trials (Pen. Code, § 1054, subd. (a)), proceedings (Pen. Code, § 1054, subd. (d)), and criminal cases. (Pen. Code, § 1054, subd. (e).) If the voters had wished for the Criminal Discovery Statute to govern trials, they would have used that phrase throughout section 1054. But criminal cases encompass more than just trials; otherwise, the voters would not have differentiated between them. Accordingly, criminal cases encompass, inter alia, motions for new trial, sentencing hearings, motions to withdraw pleas, probation revocation hearings, and nonstatutory motions to vacate judgment.

c) Giving Criminal Cases Its Well-Established Meaning Effectuates the Voters' Desire to Reduce Delays and Unnecessary Costs

Proposition 115's supporters revised discovery law in order "[t]o protect victims and witnesses from . . . undue delay of the proceedings." (Pen. Code, § 1054, subd. (d).) They sought to "bring[ ] California back into

the mainstream of American criminal justice," thereby achieving "major time savings for the typical California criminal proceeding," and alleviating the "anguish . . . caused [to] victims through multiple, drawn-out court appearances." (Ballot Pamp., arg. in favor of Prop. 115, Primary Elec. (June 5, 1990) p. 34.) "[T]he voters . . . expressly declared that their purposes were to reduce the unnecessary 'costs of criminal cases' and to 'create a system in which justice is swift and fair . . .' (Prop. 115, § 1, subds. (b), (c).)" (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 293.)

The desire to eliminate excessive court-ordered discovery in all criminal proceedings comprised one of Proposition 115's primary purposes. Eliminating trial courts' ability to order unfair, burdensome, and one-sided postconviction discovery, in criminal cases, was consistent with that purpose.[16] The voters considered any delay that is not federally compelled

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[16] The voters' intent to deprive criminal defendants of all procedural protections beyond those guaranteed by the federal constitution provides an additional indicator that they relieved the People of any duty to provide postconviction discovery in criminal cases. Although the prohibition against constitutional revisions beyond the scope of the initiative process ultimately stymied the voters' desire to abrogate independent state grounds (*Raven v. Deukmejian, supra,* 52 Cal.3d at p. 355), they demonstrated their intent to divest criminal defendants of any discovery rights exceeding those afforded

to be needless, regardless of whether it occurs before or after trial. Relieving prosecutors and trial courts of any need to litigate, adjudicate, or comply with burdensome postconviction discovery requests effectuates "the electorate's stated goals of reducing delay and unnecessary cost." (Cf. *Tapia v. Superior Court, supra,* 53 Cal.3d at p. 297.) By proscribing all postconviction discovery in criminal cases – thereby eliminating opportunities for additional litigation that is not federally compelled – the voters eliminated "useless delays that frustrate[d] criminal justice in California" and that had left both "judges and prosecutors frustrated by delay." (Ballot Pamp., arg. in favor of Prop. 115, *supra*, p. 34.)

The only compulsory disclosures the voters tolerated were those necessary to enable prosecutors to receive reciprocal discovery before trial. The electorate divested criminal defendants of any discovery rights whatsoever, apart from *Brady* and those statutory rights necessary to effectuate reciprocal discovery. (Cf. *Wardius v. Oregon* (1973) 412 U.S. 470, 476 [93 S.Ct. 2208, 2212-2213; 37 L.Ed.2d 82] [due process requires reciprocal discovery when necessary to preserve the accused's right to a fair

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to them in federal court. (Cf. *Miller v. Superior Court* (1999) 21 Cal.4th 883, 896; Ballot Pamp., arg. in favor of Prop. 115, *supra*, p. 34.)

trial; statute cannot require defendants to give notice and details of their alibi defenses, without imposing reciprocal obligations on prosecution regarding its witnesses]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 373.)

Reciprocal discovery enables prosecutors to avoid undue surprise at trial. In order to enable prosecutors to receive compulsory disclosures from the defense (Pen. Code, § 1054.3), the voters imposed a reciprocal obligation upon prosecutors. (Pen. Code, § 1054.1) Undue surprise at hearings for motions for new trial, for sentencing, for motions to withdraw pleas, for probation revocation hearings, and for motions to vacate judgment hardly rose to the same level of concern. By prohibiting all compulsory disclosures within criminal cases, except for those necessitated by the desire for reciprocal trial discovery, the voters deprived criminal defendants of any ability to compel discovery for postconviction hearings in criminal cases.

Complying with burdensome, one-sided postconviction disclosure orders in criminal cases would render prosecutors less able to proceed to trial promptly in their other cases, further hampering the electorate's desire for speedy trials. (See Cal. Const., art. I, § 30, subd. (c).) Leaving prosecutors vulnerable to postconviction discovery orders for motions for new trial, for sentencing hearings, for motions to withdraw pleas, for probation revocation hearings, and for motions to vacate judgment would

comprise a diversion of scarce prosecutorial resources that the 50 prosecutors who drafted Proposition 115, as well as the voters, sought to avoid. They eliminated potential opportunities for postconviction delays that are not federally compelled, they eliminated potential delays in related cases, and they eliminated the potential for pointless proceedings that could increase costs needlessly.

The electorate sought to return California to the mainstream by adopting federal procedures (*Miller v. Superior Court, supra,* 21 Cal.4th at p. 896; Ballot Pamp., arg. in favor of Prop. 115, *supra*, 34.) Apart from *Brady* evidence, there is no federal right, constitutional or otherwise, to compel postconviction discovery. (Fed.R.Crim.P. 16; *In re Lawley* (2008) 42 Cal.4th 1231, 1249.)[17] Thus Proposition 115 prevented excessive court-

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[17] "[A]fter a conviction 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." (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25 [47 L.Ed.2d 128, 96 S.Ct. 984] [prosecutors who become aware, postconviction, of evidence "suggestive of innocence or mitigation," have an ethical duty to disclose it]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261.) That ethical duty endures, despite the recent ruling in *District Attorney's Office for Third Judicial Dist. v. Osborne* (2009) _ U.S. _, 129 S.Ct. 2308, _ L.Ed.2d _, where the Court held that defendants

ordered discovery not mandated by our federal charter. (Prop. 115, § 1, subd. (b).) The voters meant what they said: no compulsory discovery shall occur anywhere within a criminal case, except as authorized by the Criminal Discovery Statute. Proposition 115's discovery statutes provide the sole avenue for obtaining discovery in criminal cases, and they prohibit any compulsory disclosures in postconviction criminal proceedings, apart from those constitutionally compelled.

In *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, the court effectively ruled that probation revocation hearings occurred within criminal cases, and that the Criminal Discovery Statute controls whether or not parties can compel discovery in support of such hearings. "[W]e hold that . . . a probationer has no obligation to provide discovery to the prosecution in [a probation revocation] proceeding, because a probation revocation proceeding is not a criminal trial within the meaning of [Penal Code] section 1054.3 governing the scope of the discovery obligations of the defense; and neither the Criminal Discovery Statute, the Constitution of the United States, nor other statutory authority provides for such discovery." (*Id.*, at p. 62.)

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have no *Brady* right to access DNA evidence for postjudgment testing. (*Id.*, at p. _ [129 S.Ct. at p. 2320].)

Only by finding that the Criminal Discovery Statute governs postconviction discovery requests in criminal cases, did the *Jones* court reach its conclusion that no compulsory discovery is available for probation revocation hearings. (*Ibid.*)

Finally, the Penal Code's interpretative proviso specifies that, in general, the Penal Code's procedural rules govern all criminal proceedings. (Pen. Code, § 690.) Section 690 provides additional evidence of the voters' intent for the Criminal Discovery Statute to apply to postconviction criminal proceedings. "Penal Code section 690 specifies that the provisions of part 2 of that code 'shall apply to all criminal actions *and proceedings* in all courts, except where . . . special provision is made for particular courts or proceedings.' (Italics added.)" (*People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703, 729.) The voters deliberately codified the Criminal Discovery Statute within the Penal Code, Part 2. While they did not expect it to govern habeas proceedings, since those are not criminal cases, they were presumptively aware of section 690. (Cf. *People v. Weidert, supra,* 39 Cal.3d at p. 844 [electorate deemed to be aware of existing laws in effect].) Thus the voters rightfully assumed, and presumptively intended, that the Criminal Discovery Statute would "apply to all criminal actions and [to all criminal] proceedings in all courts." (Pen. Code, § 690.)

d) This Court Equates the Criminal Discovery Statute's Phrase, Criminal Cases, with Criminal Proceedings

The legislative and judicial practice for the 140 years leading up to Proposition 115's enactment had been to equate criminal cases with criminal proceedings. Thus it comes as no surprise that this Court equated those two terms, when it interpreted the former within the Criminal Discovery Statute. "In *criminal proceedings* . . . all court-ordered discovery is governed exclusively by – and is barred except as provided by – the discovery chapter newly enacted by Proposition 115." (*In re Littlefield, supra,* 5 Cal.4th 122 at p. 129, italics added; accord, *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106; *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 161; *Jones v. Superior Court, supra,* 115 Cal.App.4th at p. 56.)

This Court is not the only appellate court to equate criminal cases with criminal proceedings when interpreting the Criminal Discovery Statute. "[T]he parties to a *criminal proceeding* may not employ discovery procedures other than those authorized by [the Criminal Discovery Statute]." (*People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1312-1313, italics added.) "[U]nless a requested item is authorized by other statutes or

is constitutionally required, the parties to a *criminal proceeding* are entitled to obtain disclosure of only those items listed in [Penal Code] sections 1054.1 and 1054.3." (*People v. Superior Court* (*Barrett*), *supra*, 80 Cal.App.4th at p. 1313, italics added.) Thus the Criminal Discovery Statute governs trial discovery, while prohibiting compulsory disclosures elsewhere within criminal proceedings.

Proposition 115's drafters and voters were concerned with more than simply establishing the People's right to receive reciprocal discovery. In addition to setting forth the timing and the nature of the specifically enumerated disclosures that were to occur before trial, the voters prohibited other compulsory disclosures in postconviction criminal proceedings. (Cf. *Jones v. Superior Court, supra,* 115 Cal.App.4th at p. 62.) Proscribing compulsory disclosures for motions for new trial, for sentencing hearings, for probation revocation hearings, and for motions to vacate judgment was the natural and probable consequence of their statutory language that "[n]o order requiring discovery shall be made in *criminal cases* except as provided in [the Criminal Discovery Statute]." (Pen. Code, § 1054.5, subd. (a), italics added.)

e) The Court of Appeal Misinterpreted the Criminal Discovery Statute's Plain Language

In construing the Criminal Discovery Statute, this Court should consider "'the object to be achieved and the evil to be prevented by the legislation.'" (*In re Marquez* (2003) 30 Cal.4th 14, 20.) The voters sought to prevent judicially created discovery rules. Before Proposition 115's enactment, criminal discovery was a "'judicially created doctrine evolving in the absence of guiding legislation.'" (*Holman v. Superior Court* (1981) 29 Cal.3d 480, 483) and an accused only had to describe the discovery he sought with some specificity and to provide a plausible justification for its disclosure. (*Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 306.) But the voters declared "it is necessary to reform the law as developed in numerous California Supreme Court decisions" (Prop. 115, § 1, subd. (b).)

In response to the problem of unfettered judicial power to order discovery in criminal cases, the voters prohibited judges from implementing extra-statutory discovery procedures that do not derive from legislative text. Following Proposition 115's enactment, and in obedience to Penal Code section 1054(e)'s exclusivity guidelines, the judiciary is no longer free to create discovery rules, in criminal cases, "untethered to a statutory or

constitutional base." (*Verdin v. Superior Court, supra,* 43 Cal.4th at p. 1116.) The Court of Appeal's dubious pronouncement laid down a doubtful statutory interpretation, which would subject prosecutors and law enforcement agencies to judicially created discovery – untethered to a statutory or constitutional base – in all postconviction criminal proceedings.[18]

The Court of Appeal mistakenly assumed that the Criminal Discovery Statute's exclusivity provisions were limited to one particular evil that its proponents had in mind, despite their broader language. Although Proposition 115's proponents were concerned, in part, with burdensome and one-sided discovery that might occur before trial, they deliberately employed well-accepted, expansive language encompassing discovery that might occur after trial as well. If the Fourteenth Amendment's Equal

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[18] "Where uncertainty regarding a statute's construction exists, the court must consider the consequences that will flow from a particular interpretation. ([Citation].)" (*People v. Garrett* (2001) 92 Cal.App.4th 1417, 1432.) The Court of Appeal's anomalous interpretation endows those found guilty, at trial, with substantially broader discovery rights than those available, before trial, to those presumed innocent. The voters had no interest in limiting defendants facing trial to statutorily enumerated disclosures (Pen. Code, § 1054.1), and then entitling convicted felons to much broader, untethered, judicially created discovery.

Protection Clause were limited to the particular evil its proponents sought to address, the judiciary would have limited its protection to African-Americans victimized by racial discrimination. (Cf. *Slaughter-House Cases* (1873) 83 U.S. 36, 81 [21 L.Ed. 394, 16 Wall. 36].) It would not, for example, extend its protection to Chinese aliens. But it does. (*Yick Wo v. Hopkins* (1886) 118 U.S. 356, 369 [6 S.Ct. 1064, 1070; 30 L.Ed. 220].)

Statutes as well as constitutional provisions can extend further than their particular targets. "When the [enacting body] has made a deliberate choice by selecting broad and unambiguous statutory language, 'it is unimportant that the particular application may not have been contemplated.' [*Citation*]." (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 51.) "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 79 [118 S.Ct. 998, 1002; 140 L.Ed.2d 201].) Where, as here, the clear meaning of sections 1054(e) and 1054.5(a) is neither incompatible with the voter's purpose nor absurd, this Court should not disregard it.

Proposition 115's framers were concerned with unfair, burdensome, and one-sided pretrial discovery because that, undoubtedly, was a problem existing at the time. Yet the Criminal Discovery Statute's prohibition against additional compulsory disclosures in criminal cases is considerably broader than that. The framers foresaw that additional discovery burdens might be laid upon prosecutors and upon law enforcement. To prevent this, they included sections 1054(e)'s and 1054.5(a)'s sweeping prohibitions. Those prohibitions mean what they say. Proposition 115's discovery statutes provide the sole avenue for obtaining discovery in criminal cases, period. Even though Proposition 115's proponents chose not to emphasize this in their ballot arguments, this burden still falls within the scope of the voters' prohibitions.

The Court of Appeal apparently felt that Proposition 115's ballot arguments provided insufficient support for prohibiting compulsory disclosures in postconviction criminal proceedings. But ballot arguments typically "are stronger on political rhetoric than on legal analysis" (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 143, fn. 11), and they "are not legal briefs and are not expected to cite every case the proposition may affect." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 237.) "The most reasonable inference is that the proponents

chose to emphasize (in the limited space available for ballot arguments) what they perceived as the greatest need." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 802 [possible inference derived from ballot argument does not provide sufficient basis for ignoring measure's unrestricted language].)

The Attorney General contends that Proposition 115's proponents argued their initiative applied only to criminal trials. He lifted that assertion – responsive to opponents' suggestion that Proposition 115 would "threaten[ ] the right of women to safe and legal abortions" (Ballot Pamp., rebuttal to arg. in favor of Prop. 115, Primary Elec. (June 5, 1990) p. 35) – out of its proper context. In order to defuse opponents' abortion arguments, Proposition 115's proponents explained that it "affects only the rights 'to privacy' of criminals on trial – not your privacy rights, or the constitutionally guaranteed civil right of a woman to an abortion . . ." (Ballot Pamp., arg. in favor of Prop. 115, *supra*, p. 34.) Their ballot argument emphasized that Proposition 115 would not criminalize abortion; it did not negate the voters' unambiguous statutory language establishing that "[i]n criminal proceedings, . . . all court-ordered discovery is . . . barred except as provided by-the discovery chapter newly enacted by Proposition 115." (*In re Littlefield, supra,* 5 Cal.4th at p. 129.)

After all, Proposition 115 made "numerous significant and complex changes in criminal law and in the judicial procedures that must be followed in criminal cases." (Ballot Pamp., Analysis by Legislative Analyst, Primary Elec. (June 5, 1990) p. 32.) Among its many changes, Proposition 115 revised or attempted to revise the judicial procedures at sentencing. (Prop. 115, § 3 [cruel or unusual punishment], § 12 [LWOP for minors convicted of special circumstance murder].) Its reach clearly was not confined just to criminal trials. Even a schoolchild understands that sentencing occurs after trial and conviction; if sentencings do not occur within criminal cases, it is difficult to conceive where the average voter might imagine they do occur.

In *Barnett v. Superior Court,* No. S165522, the Court of Appeal opined that the voters lacked any reason to address postconviction discovery. Relying upon *People v. Ainsworth* (1990) 217 Cal.App.3d 247, it proclaimed that before Proposition 115, there was no basis in California law for postconviction discovery in a criminal case. But the *Barnett* court ignored the fundamental distinction between postconviction and postjudgment proceedings. The *Ainsworth* court held that "after a judgment of conviction is final" a trial court is "without jurisdiction to entertain" a defendant's discovery motion. (*People v. Ainsworth*, *supra*, 217 Cal.App.3d

at p. 249.) But many criminal proceedings occur between conviction and judgment, and until judgment is final, the underlying criminal case remains pending.

Even after the *Ainsworth* decision, nothing prohibited trial courts from ordering prosecutors to provide discovery for motions for new trial, for sentencing hearings, for probation revocation hearings, and for motions to vacate judgment. The voters knew that "the Legislature could by statute extend the trial court's jurisdiction to hear a postjudgment discovery motion." (*People v. Ainsworth*, *supra*, 217 Cal.App.3d at p. 259.) They realized the *Ainsworth* decision was subject to judicial or legislative abrogation, and they had little confidence in either of those governmental branches. (See Ballot Pamp., *supra*, Text of Proposed Law, Prop. 115, § 1, subd. (a), p. 33 ["the rights of crime victims are too often ignored by our courts and by our State Legislature . . ."].) With Proposition 115, they insulated prosecutors and law enforcement agencies from the specter of having to provide both postconviction and postjudgment discovery in

criminal cases.[19] Accordingly, the Court of Appeal's pronouncement – that at the time of Proposition 115's enactment, there was no reason to address postconviction discovery – fails to withstand analytical scrutiny.[20]

3. Penal Code Section 1054.9 Amended the Criminal Discovery Statute by Permitting Postconviction Discovery in Criminal Cases

Section 1054.9 amended the Criminal Discovery Statute by providing a new mechanism, for compelling discovery within criminal cases, that exceeds what the voters put in place in 1990. As we will explain, section 1054.9 permits defendants to seek postconviction discovery within their underlying criminal cases, by revesting jurisdiction in the trial court, and by

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[19] Proposition 115 prevented the judiciary from ordering any such discovery on its own (cf. *Verdin v. Superior Court, supra,* 43 Cal.4th at p. 1116), and it requires the Legislature to muster a supermajority vote before requiring any such disclosures. (Prop. 115, § 30.)

[20] While Proposition 115's drafters might have been tempted to limit judicially created discovery not only in criminal cases, but in habeas cases as well, they operated under the specter of a single subject challenge. (See, i.e., *Brosnahan v. Brown, supra,* 32 Cal.3d at p. 247; *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 347.) Attempting to expand the Criminal Discovery Statute's exclusivity provisions, beyond criminal cases, would have risked voiding the entire measure.

permitting its movants to attach their postconviction discovery motions to their underlying criminal cases. Viewed accordingly, section 1054.9 expanded the means by which criminal defendants can obtain court orders to compel discovery in criminal cases. (Compare Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a), with Pen. Code, § 1054.9, subds. (a), (b).)

A nonstatutory motion to vacate judgment "is 'properly regarded 'as a part of the proceedings in the case to which it refers' rather than as 'a new adversary suit'" (*Bravo v. Cabell, supra*, 11 Cal.3d at p. 839; *People v. Paiva, supra,* 31 Cal.2d at p. 509.) As originally enacted, the Criminal Discovery Statute flatly prohibited defendants from forcing prosecutors to provide discovery in support of nonstatutory motions to vacate judgment. (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a).) Section 1054.9, however, would now permit such discovery. (Pen. Code, § 1054.9, subds. (a), (b).)

The Attorney General effectively concedes that section 1054.9 amended the Criminal Discovery Statute, by extending it to nonstatutory motions to vacate judgment. He attempts to extricate himself from his implied concession, by arguing that section 1054.9's provisions governing nonstatutory motions to vacate judgment are severable from those governing discovery aimed at habeas relief. His argument is unpersuasive. Section 1054.9 is a failed bill. Because it is an act in excess of the Legislature's

amendatory powers, it is invalid regardless of how it might be applied in any given case. (Cf. *Proposition 103 Enforcement Project v. Quackenbush, supra,* 64 Cal.App.4th at p. 1495 [upholding facial challenge to statute that had amended voter initiative, in violation of voters' explicit restrictions upon Legislature's amendatory powers]; *Huening v. Eu, supra,* 231 Cal.App.3d at pp. 779, 780 [impermissibly amendatory statute was not properly enacted, was invalid, was without force or effect, and had to be stricken]; see also *Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1373, fn. 11 [invalidating statute in "excess of the amendatory powers the voters granted to the Legislature"].)

As originally written, the Criminal Discovery Statute makes compulsory criminal discovery available before and during trial, in order to assist the parties "prepare their cases and reduce the chance of surprise at trial." (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201; Pen. Code, § 1054, subds. (a), (c).) Section 1054.9 amended the Criminal Discovery Statute by authorizing postconviction discovery in criminal cases. This non-reciprocal discovery is not intended to assist both parties at trial, but rather, to assist just defendants, preparing their habeas petitions and their motions to vacate judgment. (Cf. *In re Steele, supra,* 32 Cal.4th at p. 691.) That

fundamental change comprises an amendment. (*Huening v. Eu, supra,* 231 Cal.App.3d at p. 777 [amendment occurs where a new section affects the original statute's application or impliedly modifies its provisions].)

Section 1054.9 expanded the Criminal Discovery Statute's reach, not only to nonstatutory motions to vacate judgment, but also to postconviction proceedings intended to permit discovery in support of habeas claims. Postconviction discovery hearings under section 1054.9 occur within their underlying criminal cases. By establishing a mechanism for compelling additional discovery in criminal cases, in a manner different than that initially provided by the Criminal Discovery Statute, section 1054.9 amended it. Extending its informal request and enforcement procedures, as well as some of its mandated disclosures, to reach situations not covered by the original statute, amended the Criminal Discovery Statute.

Section 1054.9 also imposes new substantive conditions that appear nowhere in existing law. By requiring defendants to bear the costs of examination or copying in criminal cases (Pen. Code, § 1054.9, subd. (d)), section 1054.9 amended the Criminal Discovery Statute, which had been silent on that issue. And as originally enacted, the Criminal Discovery Statute said nothing about whether local agencies could seek reimbursement for discovery costs. Section 1054.9 – or, more appropriately, Senate Bill

No. 1391 – effectively amended the Criminal Discovery Statute, by entitling local agencies to seek reimbursement for discovery costs in criminal cases.[21] (Cf. *Mobilepark West Homeowners Assn. v. Escondido, supra,* 35 Cal.App.4th at p. 40 [any statute that adds to an existing statute constitutes an amendment].)

a) Section 1054.9 Discovery Hearings Occur Within Their Underlying Criminal Cases, and Not Within Some Other Type of Special Proceeding

Penal Code section 1054.9 permits criminal defendants to seek postconviction discovery within their criminal cases. It revests jurisdiction in the trial court, and permits those seeking its statutorily enumerated disclosures to attach their postconviction discovery motions to their underlying criminal cases. It permits them to seek postconviction discovery within their criminal cases, and not within a habeas proceeding, or within

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[21] "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 . . ." (Stats. 2002, c. 1105, § 4 (S.B. 1391) [Pen. Code, § 1054.9].)

some other type of special proceeding. In the case before this Court, Defendant Pearson moved for postconviction discovery within his underlying criminal case, and the trial court ordered postconviction discovery within that case.

"[A] discovery motion is not an independent right or remedy. It is ancillary to an ongoing action or proceeding. After the judgment has become final, there is nothing pending in the trial court to which a discovery motion may attach." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1257.) To rectify a perceived injustice, section 1054.9's supporters authorized criminal defendants to attach their postconviction discovery motions to their underlying criminal cases. They knew that when a movant had not filed his habeas petition, nothing was pending in the trial court to which a discovery motion could attach. (*In re Steele, supra,* 32 Cal.4th at p. 691.)

If Defendant Pearson did not move for postconviction discovery within his underlying criminal case, then where did he seek it? His options were limited. He moved for postconviction discovery, either (1) within his underlying criminal case, or (2) within a pending habeas proceeding, or (3) within some other type of special proceeding. As we will explain, section 1054.9's nomenclature, its codification within the Criminal Discovery Statute, and its harmonization within the broader, pre-existing

statutory scheme, establish that section 1054.9 permits defendants to seek postconviction discovery within their underlying criminal cases. But since its anemic vote tally failed to amend the Criminal Discovery Statute, the trial court had no jurisdiction to order postconviction discovery.

i. Section 1054.9 Discovery Motions Attach to Their Underlying Criminal Cases

Section 1054.9's backers knew that statutory authorization was required in order to bestow criminal defendants with the postconviction discovery that section 1054.9 contemplates. They intended to redress this, by attaching postconviction discovery motions to their underlying criminal cases. Without this statutory authorization, a section 1054.9 motion brought by a potential habeas petitioner could not attach to any other case, since nothing else would be pending in the trial court. "[A] trial court [lacks authority] to entertain a postjudgment discovery motion which is unrelated to any proceeding then pending before [that] court . . ." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1257.) "Once a criminal proceeding is final in the trial court, that court's subsequent direct jurisdiction over the case is strictly limited by statute and by the appellate remittitur. ([*Citations*].)" (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1256.)

Before section 1054.9's enactment, requests for postconviction discovery fell outside the trial court's jurisdiction, when unconnected with any criminal proceeding then pending before it. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1257.) Section 1054.9's proponents attempted to extend the trial court's jurisdiction over the underlying criminal case, after judgment's entry, where criminal proceedings otherwise would be final. Section 1054.9's proponents sought to "modif[y] [the earlier] rule" of *People v. Gonzalez, supra,* 51 Cal.3d 1179, where "after the judgment had become final, nothing was pending in the trial court to which a discovery motion may attach, and . . . the defendant had to state a prima facie case for relief before he may receive discovery." (*In re Steele, supra,* 32 Cal.4th at p. 691.) "But the only way this modification of the *Gonzalez* rule makes sense is to permit defendants to seek discovery before they file the petition, i.e., before they must state a prima facie case." (*Ibid.*) Accordingly, section 1054.9's supporters attempted to authorize criminal defendants to attach their postconviction discovery motions to their underlying criminal cases.

"A motion is an application to the court for an order." (*People v. Williams* (1999) 20 Cal.4th 119, 129; Code Civ. Proc., § 1003.) "[M]otions must be made in the court in which the action is pending." (Code Civ. Proc., § 1004.) A motion therefore implies the "pendency of [a] suit[ ] between the

parties." (*People v. Burks* (1961) 189 Cal.App.2d 313, 317; see also *People v. Sparks* (1952) 112 Cal.App.2d 120, 121 ["a motion relates to some question collateral to the main object of the action and is connected with, and dependent on, the principal remedy"].) Without Penal Code section 1054.9, there would be "no statutory authority for a trial court to entertain a postjudgment motion that is unrelated to any proceeding then pending before the court." (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 76-77; *People v. Ainsworth, supra,* 217 Cal.App.3d at p. 251.)

Just as the remittitur revests jurisdiction in the trial court, for the limited purpose of carrying out the appellate court's judgment (Pen. Code, § 1265, subd. (a)), section 1054.9 revests jurisdiction in the trial court, for the limited purpose of "ordering that the defendant be provided reasonable access" to postconviction discovery materials. (Pen. Code, § 1054.9, subds. (b), (c).) By virtue of its codification within the Criminal Discovery Statute, section 1054.9 now authorizes trial courts to "make any order necessary to enforce the provisions of this chapter . . ." (Pen Code, § 1054.5, subd. (b).)

Section 1054.9's statutory language contemplates that movants will seek postconviction discovery within their underlying criminal cases:

> "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, . . . the court shall . . . order that the defendant be provided [postconviction discovery].*" (Pen. Code, § 1054.9, subd. (a), emphasis added.)

In *In re Steele, supra,* 32 Cal.4th 682, this Court partially construed this language. Section 1054.9 "permits the motion '[u]pon the prosecution of a postconviction writ of habeas corpus' . . . [T]he Legislature used the word 'prosecution' flexibly to include cases in which the movant is preparing the petition as well as cases in which the movant has already filed it." (*In re Steele, supra,* 32 Cal.4th at p. 691.) As judicially construed for habeas purposes, section 1054.9 reads as follows:

> "[Whenever the movant is preparing the petition, as well whenever the movant has already filed it (*In re Steele, supra,* 32 Cal.4th at p. 691),] *in a case in which [death or LWOP] has been imposed, . . . the court shall . . . order that the defendant be provided [postconviction discovery].*" (Pen. Code, § 1054.9, subd. (a), italics added.)

So construed, section 1054.9 authorizes courts, in cases in which death or LWOP has been imposed, to order postconviction discovery in those cases. In fact, "the [postconviction] discovery motion should first be filed in the trial court that rendered the underlying judgment" (*In re Steele, supra,* 32 Cal.4th at p. 691), whereas a habeas referee eventually appointed by this Court need not be the trial court that rendered the underlying judgment. Accordingly, section 1054.9 essentially reads, "[I]n a capital or LWOP case, the court shall order that the defendant be provided postconviction discovery in that case."

Section 1054.9's statutory nomenclature supports this conclusion. Its proponents repeatedly employed "the defendant" when referencing those whom they attempted to endow with postconviction discovery rights. They wanted that "the defendant be provided reasonable access to . . . materials . . ." (Pen. Code, § 1054.9, subd. (a)), that the "court may order that the defendant be provided access to physical evidence for the purpose of examination . . ." (Pen. Code, § 1054.9, subd. (c)), and that the "costs of examination or copying . . . be borne or reimbursed by the defendant." (Pen. Code, § 1054.9, subd. (d).) Their repeated statutory references to "the

defendant" – not to "the plaintiff," to "the petitioner," or to "the person convicted"– enabled postconviction discovery within the confines of defendants' underlying criminal cases, not within a special proceeding.

"The party prosecuted in a criminal action is designated [within the Penal Code] as the defendant." (Pen. Code, § 685.) On the other hand, "[t]he party prosecuting a special proceeding of a criminal nature is designated in [the Penal] Code as the complainant, and the adverse party as the defendant." (Pen. Code, § 1562; see also Cal. Rules of Court, Rule No. 4.550 et seq [habeas corpus rules repeatedly refer to "the petitioner," not to "the defendant"].)

In habeas proceedings the warden is the defendant, and the inmate seeking relief is the plaintiff or petitioner. Section 1054.9 makes no reference to plaintiffs or petitioners, and by no stretch of the imagination does it refer to wardens. By employing "the defendant," section 1054.9's proponents attached postconviction discovery proceedings directly to their underlying criminal cases. This Court's repeated procedural references, in *In re Steele, supra,* 32 Cal.4th 682, to "the defendant," as opposed to "the petitioner," further supports interpreting section 1054.9 as a procedural

vehicle for bringing postconviction discovery motions within their underlying criminal cases. (Cf. *In re Steele, supra,* 32 Cal.4th at pp. 691-697.)

The Attorney General seeks to avoid the clear implication of the Legislature's statutory precision, by arguing that this Court sometimes uses "petitioner" and "defendant" interchangeably. But unrelated judicial language does not affect legislative intent; section 1054.9's deliberate language bears far more significance than dicta in unrelated cases. "[T]he Legislature is presumed to have meant what it said, and the plain meaning of the statute governs." (*People v. Johnson* (2002) 28 Cal.4th 240, 244.)

"'[I]t is the language of the statute itself that has successfully braved the legislative gauntlet. It is that language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed . . . by the Governor . . ." (*Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 892-893.) That same care and scrutiny does not befall *obiter dictum* within judicial decisions. (Cf. *Trope v. Katz* (1995) 11 Cal.4th 274, 284.) If section 1054.9's backers had intended to impart a different meaning to "defendant"

than it enjoys elsewhere in the Penal Code, they would have said so. (Cf. *People v. Acosta, supra,* 29 Cal.4th at p. 114 [a word or phrase repeated in a statute should be given the same meaning throughout]; *People v. Superior Court* (*Kirby*) (2003) 114 Cal.App.4th 102, 106 ["[w]here the Legislature makes express statutory distinctions, we must presume it did so deliberately"].)

By codifying section 1054.9 within the Criminal Discovery Statute, its proponents authorized postconviction discovery within the underlying criminal case. If its backers had wanted to create an independent discovery vehicle, they would have codified section 1054.9 within the statutory provisions governing special proceedings in general, and habeas proceedings in particular. Section 1054.9's intentional codification within the Criminal Discovery Statute speaks volumes about its proponents' legislative intent. A code's internal organization aids in understanding its purpose (*Medical Board v. Superior Court* (2003) 111 Cal.App.4th 163, 175), and chapter and section headings in codes may be considered in determining legislative intent. (*People v. Superior Court* (*Laff*), *supra*, 25 Cal.4th at p. 727.) It is absurd to suggest the Legislature codified section 1054.9 within the Penal

Code's sole chapter governing discovery in criminal cases, yet somehow it did not intend for postconviction discovery hearings, under section 1054.9, to occur within criminal cases.

Classifying section 1054.9 motions as criminal proceedings is especially appropriate where, as here, it renders a result consistent with the statutory scheme's remainder. "[S]tatutes in pari materia should be construed together and harmonized to the extent possible." (*People v. Coria* (1999) 21 Cal.4th 868, 878.) Section 1054.9's proponents sought to preserve existing law wherein habeas proceedings "trial courts and referees . . . manage discovery on a case-by-case basis." (Cf. *In re Lawley*, *supra*, 42 Cal.4th at p. 1249; *In re Scott, supra,* 29 Cal.4th at p. 813.) Designed, in part, for potential habeas petitioners preparing their petitions (*In re Steele, supra,* 32 Cal.4th at p. 691), section 1054.9 provides a poor tool for petitioners seeking habeas discovery specifically related to the issues framed by an already-issued OSC. "[T]he discovery in a habeas corpus proceeding must be relevant to the issues upon which the petition states a prima facie case for relief and an order to show cause has issued." (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1243.)

Section 1054.9 does not authorize disclosures specifically geared to the issues upon which an OSC has issued – it does not compel disclosure of new experts' reports, statements of new witnesses, or other evidence produced or discovered postconviction that might impeach the evidence at reference hearings. Section 1054.9 does not permit the People to discover any newly discovered evidence that a habeas petitioner claims exonerates him.[22] Much of the evidence, relevant to the issues upon which a habeas petition states a prima facie case for relief, was neither available nor discoverable under the Criminal Discovery Statute, before a petitioner's original trial, so section 1054.9 frequently would prove useless as a discovery tool geared toward the reference hearing.

The Legislature did not want to preclude case-by-case discovery in habeas proceedings that is specifically geared toward reference hearings, yet unauthorized by section 1054.9. Classifying section 1054.9 motions as criminal proceedings left the door open, to additional case-by-case discovery in habeas proceedings that is uniquely relevant to the issues framed by the OSC. "*Expressio unis est exclusio alterius*" – the mention or inclusion of

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22 "If . . . discovery is reciprocal at the criminal trial itself – where Real Party is presumed innocent and has no burden of proof – it certainly should be so on habeas corpus, where guilt has been established and the petitioner bears the burden of proof." (*In re Scott, supra,* 29 Cal.4th at p. 814.)

one thing implies the exclusion of another. (*Strang v. Cabrol* (1984) 37 Cal.3d 720, 725.) If section 1054.9 governed discovery within habeas proceedings, its mention and inclusion, of the items the Criminal Discovery Statute requires to be disclosed for trial, ordinarily would exclude compulsory disclosures above and beyond those it specifically authorizes.

Statutory interpretations that lead to absurd results should be avoided. (*People v. Shabazz* (2006) 38 Cal.4th 55, 70.) By attaching section 1054.9 motions to their underlying criminal cases, its proponents enabled potential habeas petitioners to receive its limited, enumerated disclosures, before an OSC issues. At the same time, they preserved existing law, where discovery within habeas proceedings is focused upon the issues framed by the OSC. Thus section 1054.9 permits defendants to seek postconviction discovery in their underlying criminal cases, which is something that the Criminal Discovery Statute, as originally written, prohibited.

ii. Moving for Discovery Under Section 1054.9 Does Not Commence Habeas Proceedings

The Legislature never intended for potential habeas petitioners to seek discovery, under section 1054.9, within the confines of a pending habeas proceeding. Section 1054.9's supporters complained it was unfair to

force "the defendant . . . to state a prima facie case for relief before he may receive discovery." (*In re Steele, supra,* 32 Cal.4th at p. 691) "Currently, as expressed in *People v. Gonzalez* [, *supra,*] 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 [postconviction discovery] . . . The existing remedy, as discussed in *Gonzalez*, is woefully inadequate . . ." (Sen. Rules Com., Office of Sen. Floor Analyses [August 30, 2002], Unfinished Business, analysis of Sen. Bill No. 1391 (2001-2002 Reg. Sess.) as amended August 26, 2002, p. 5.)

Accordingly, a section 1054.9 motion is not brought within a pending habeas proceeding. "[A] discovery motion is not an independent right or remedy. It is ancillary to an ongoing action or proceeding." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1257.) The Legislature wanted criminal defendants to be able to seek postconviction discovery before having "to state a prima facie case for [habeas] relief." (Cf. *In re Steele, supra,* 32 Cal.4th at p. 691.) Since section 1054.9 governs "cases in which the movant is preparing the petition as well as cases in which the movant has already filed it" (*In re Steele, supra,* 32 Cal.4th at p. 691), postconviction discovery hearings under section 1054.9 occur within their underlying criminal cases.

Defendant Pearson argues that section 1054.9's postconviction proceedings are not criminal cases, and therefore not subject to section 1054.5(a)'s exclusive prohibition of other means of discovery. But if he did not move for discovery within his underlying criminal case, then wherein did he move for it? He sought his section 1054.9 discovery before he had filed any habeas petition – something that section 1054.9's proponents sought to enable (*In re Steele, supra,* 32 Cal.4th at p. 691) – so he could not have attached his discovery motion to any pending case, apart from his underlying criminal case.

Defendant Pearson maintains that counsel seeking pre-petition discovery pursuant to section 1054.9 does not move for discovery within his underlying criminal case. He insists that habeas counsel moves for discovery under the auspices of this Court's original habeas jurisdiction, pursuant to this Court's appointment of habeas counsel to prosecute postconviction actions, and in furtherance of counsel's duty to investigate, to prepare, and to file a habeas petition. He argues that a discovery motion filed pursuant to section 1054.9 is neither attached to, nor channeled into, its underlying criminal case, but rather addressed to this Court's jurisdiction to entertain a habeas petition and to assist the prisoner in preparing it.

This argument fails. Section 1054.9's proponents clearly were considering both habeas proceedings and the *Gonzalez* decision when they voted for section 1054.9. (*In re Steele, supra,* 32 Cal.4th at pp. 690-692.) Nevertheless, they made no attempt to commence habeas proceedings upon the movant's seeking discovery under section 1054.9. "The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended." (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 505-506.)

Section 1054.9 does not commence habeas proceedings when counsel begins preparing the petition. Its proponents made no attempt to authorize habeas referees to order postconviction discovery solely within the confines of habeas proceedings. And they made no attempt to alter the pre-existing statutory framework, so that habeas proceedings would commence upon the petition's filing.

"[T]he procedures set forth in Penal Code sections 1473 through 1508" govern habeas proceedings (*People v. Romero* (1994) 8 Cal.4th 728, 737), including their commencement. Section 1054.9 neither amended them nor repealed them impliedly. All presumptions act against statutory repeal

by implication. (*People v. Acosta, supra,* 29 Cal.4th at p. 122.) Section 1054.9 neither repealed nor rewrote our existing statutory framework governing habeas proceedings' commencement. (Cf. *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038 [courts "will infer the repeal of a statute only when . . . a subsequent act of the legislature clearly is intended to occupy the entire field covered by a prior enactment"].)[23]

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[23] A criminal action is the proceeding wherein the accused is brought to trial and punishment. (Pen. Code, § 683.) "Imprisonment pending execution of a death sentence is a part of the punishment for the crime." (*People v. Rittger* (1961)55 Cal.2d 849, 852.) Until his execution, Defendant Pearson's underlying criminal case will either be pending somewhere (postjudgment jurisdiction in capital cases lies either with this Court, or with the trial court upon remand to issue a death warrant (Pen. Code, § 1193, subd. (a)), or it will be capable of being revived by section 1054.9. The proponents of additional postconviction discovery channeled it directly into the underlying criminal cases, because they knew those cases, invariably, would provide a pre-existing proceeding to which discovery motions could attach.

In contrast, potential habeas petitioners who have not yet filed their petitions – such as Defendant Pearson – have no habeas proceedings to which they can attach their motions. Defendant Pearson is not yet a habeas petitioner in any pending habeas proceeding. Apart from his underlying

Habeas proceedings do not commence upon a potential petitioner's mere contemplation or preparation of a petition, nor even upon the petition's filing. Any habeas petition that does not state a prima facie case for relief and require issuance of an order to show cause "must be summarily denied [and] creates no cause or proceeding . . ." (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1258; *Curl v. Superior Court* (2006) 140 Cal.App.4th 310, 320; *Board of Prison Terms v. Superior Court, supra,* 130 Cal.App.4th at p. 1242.)

Defendant Pearson's habeas proceedings will not commence until after this Court issues an OSC. He must set forth, under penalty of perjury, "specific facts which, if true, would require issuance of the writ" before a cause or proceeding even exists. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1258.) "The issuance of either the writ of habeas corpus or the order to show cause creates a 'cause' . . ." (*People v. Romero, supra*, 8 Cal.4th at p. 740; *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4 [order to show cause

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criminal case, he has no pending proceeding to which his discovery motion can attach. Section 1054.9's proponents did not wish to deny defendants postconviction discovery simply because they had not yet filed their petitions. (Nor did they wish to deny postconviction discovery to inmates such as Defendant Barnett, whose initial habeas petitions were denied before their section 1054.9 claims could be adjudicated.)

"institute[s] a Proceeding in which issues of fact are to be framed and Decided"].) "The writ of habeas corpus . . . triggers adversarial proceedings and requires the respondent to file a return." (*Durdines v. Superior Court* (1999) 76 Cal.App.4th 247, 250, fn. 6, citing Pen. Code, §§ 1477, 1480.)[24]

Defendant Barnett argues that while a habeas cause commences with the OSC's issuance, a habeas proceeding commences with the petition's filing. He essentially urges this Court to ignore its earlier holding in *People v. Gonzalez, supra*, 51 Cal.3d at p. 1258 [a habeas petition which does not necessitate an OSC's issuance "must be summarily denied [and] creates no

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[24] The Judicial Council may only adopt rules consistent with statute. (Cal. Const., art. VI, § 6, subd. (d).) The well-established rule of habeas procedure, that a cause or proceeding does not even exist until an OSC issues (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1258), derives from Penal Code section 1477, whose import is not to effectuate habeas relief, but rather to commence adversarial proceedings. (*Durdines v. Superior Court, supra,* 76 Cal.App.4th at p. 251.) Thus despite Cal. Rules of Court, Rule No. 4.550, subd. (b)(1) (the petition for writ of habeas corpus is the petitioner's initial filing that commences a proceeding), the People question whether Rule No. 4.550(b)(1) actually gives rise to a proceeding upon the petition's filing, as opposed to an OSC's issuance. Nevertheless, our existing statutory framework makes clear that habeas proceedings do not commence upon the petitioner's mere contemplation or preparation of a petition. Nor do they commence upon a movant's seeking discovery under section 1054.9.

cause or proceeding"], in favor of this Court's dicta in *People v. Romero, supra,* 8 Cal.4th at p. 737 ["a habeas corpus proceeding begins with the filing of a verified petition for a writ of habeas corpus"].) Even in *Romero*, however, this Court reiterated that "[t]he function of the writ or [OSC] is to 'institute a proceeding in which issues of fact are to be framed and decided.'" (*People v. Romero, supra,* 8 Cal.4th at p. 740, citing *In re Hochberg, supra,* 2 Cal.3d at p. 875, fn. 4.)

Contrary to Defendant Barnett's assertion, no significant distinction exists between a habeas proceeding and a habeas cause. "The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court; a suit or action." (*Blyew v. United States* (1872) 80 U.S. 581, 595 [20 L.Ed. 638, 642].) "A cause is the proceeding before the court." (*Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 9.) "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings . . . [¶] Superior courts have original jurisdiction in all other causes." (Cal. Const., art. VI, § 10.) The OSC's issuance creates a cause, which triggers the state constitutional requirement that the cause be resolved "in writing with reasons stated." (*People v. Romero, supra,* 8 Cal.4th at p. 740; Cal. Const., art. VI, § 14.)

Section 1054.9's proponents made no effort to modify our statutory habeas provisions, nor did they abrogate this Court's authoritative statutory construction, wherein it held that neither a cause nor a proceeding exists until after an OSC issues. (Cf. *People v. Gonzalez, supra,* 51 Cal.3d at p. 1258.) A 53% legislative majority tried to remedy its dissatisfaction with this Court's decision in *Gonzalez*, by allowing section 1054.9 motions to attach to their underlying criminal cases. They directed their efforts at this Court's declaration that "[a]fter the judgment has become final, there is nothing pending in the trial court to which a discovery motion may attach." (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1257.)

Since "discovery will not lie in habeas corpus with respect to issues upon which the petition fails to state a prima facie case for relief" (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1261), and since the *Gonzalez* trial court "exceeded its jurisdiction by ordering postconviction discovery in the absence of any proceeding pending before that court" (*ibid*), section 1054.9's backers attempted to enable movants to render their underlying criminal cases pending, for postconviction discovery purposes. They enacted no specific provisions for commencing habeas proceedings. Their draftsmanship was simple and elegant, yet they failed to garner sufficient votes.

Defendant Pearson argues that "well-settled precedent recognizes that [judicial] jurisdiction over separate habeas corpus proceedings is invoked by the preparation of the habeas petition." He seeks refuge in this Court's language in *In re Steele, supra,* 32 Cal.4th 682. He argues that this Court held that "cases in which the movant is preparing the petition as well as cases in which the movant has already filed it" constitute "'prosecution of a postconviction writ of habeas corpus,'" which somehow triggers discovery jurisdiction pursuant to Penal Code section 1054.9. (See *In re Steele, supra,* 32 Cal.4th at p. 691.) But while the petition's preparation constitutes prosecution of a postconviction writ of habeas corpus for section 1054.9's limited purposes, its proponents intended for its discovery motions to attach to their underlying criminal cases. Those who voted for section 1054.9 made no effort to trigger a habeas proceeding's commencement upon the movant's seeking discovery.

If section 1054.9's proponents had intended to create an independent discovery vehicle, they would have codified section 1054.9 within the statutory provisions governing habeas. But instead they codified it within the Criminal Discovery Statute, they repeatedly employed "defendant" instead of "petitioner," they made no modifications to Penal Code section

1473 et seq.'s provisions governing habeas, and they failed to prohibit defendants, prosecuting nonstatutory motions to vacate judgment, from moving for postconviction discovery within their underlying criminal cases.

iii. Section 1054.9 Discovery Hearings Do Not Comprise Special Proceedings

Special proceedings are established by statute. "The term 'special proceeding' applies only to a proceeding that is distinct from, and not a mere part of, any underlying litigation. [*Citation*]." (*People v. Superior Court (Laff), supra*, 25 Cal.4th at p. 725.) But, "the pendency of a related criminal action may warrant classifying a special proceeding as a part of the criminal action." (*Id.*, at p. 723.) Those who voted for section 1054.9 never intended to give rise to an independent, special proceeding. If they had wanted to create a special proceeding, they would have codified section 1054.9 within the statutory provisions governing either special proceedings (Pen. Code, Part 2, Title 12 (Pen. Code, §§ 1473-1564)) or miscellaneous proceedings. (Pen. Code, Part 2, Title 10 (Pen. Code, §§ 1268-1424).)

Instead, they codified section 1054.9 within the sole chapter governing discovery in criminal cases. (Pen. Code, Part 2, Title 6, Chapter 10 (Pen. Code, § 1054 et seq.)) Since no discovery shall occur in criminal cases, except as provided in that chapter (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a)), section 1054.9's proponents evinced their desire for it to govern discovery in criminal cases. (See *People v. Yartz* (2005) 37 Cal.4th 529, 535-536 [Sexually Violent Predator Act's codification among other civil commitment schemes supports classifying SVP proceedings as special proceedings].) Section 1054.9's proponents codified it within the Criminal Discovery Statute, they repeatedly employed "defendant" instead of "petitioner," and they permitted defendants, prosecuting nonstatutory motions to vacate judgment, to move for postconviction discovery within their underlying criminal cases. Accordingly, section 1054.9 hearings do not comprise special proceedings.

A movant bringing a nonstatutory motion to vacate judgment does not do so within a special proceeding. A motion to vacate judgment "is 'properly regarded 'as a part of the proceedings in the case to which it refers' rather than as 'a new adversary suit.'" (*Bravo v. Cabell, supra*, 11 Cal.3d at p. 839; *People v. Paiva, supra,* 31 Cal.2d at p. 509.) Thus a motion under section 1054.9, seeking discovery for a nonstatutory motion to

vacate judgment, is properly regarded as a part of the proceedings in the underlying criminal case, rather than as a new special proceeding. (Cf. *Bravo v. Cabell*, *supra*, 11 Cal.3d at pp. 838, 840 [proceedings for extraordinary writs, which initiated no new controversy, but related only to their criminal actions, and which were "made necessary by events in the criminal action[s]," should be considered as a part of the criminal actions to which they refer].)

If hearings for postconviction discovery, under section 1054.9, comprised special proceedings, then a party challenging an adverse discovery ruling under section 1054.9 would enjoy a right to appeal. Unless the particular statute provides otherwise, final judgments and orders in special proceedings are appealable. (*In re Matthew C.* (1993) 6 Cal.4th 386, 395; *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 705.)[25]

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[25] A competency proceeding under Penal Code section 1368, "is a special proceeding rather than a criminal action." (*People v. Fields* (1965) 62 Cal.2d 538, 540.) Accordingly, an order finding a criminal defendant incompetent to stand trial is separately appealable, as a final order in a special proceeding. (*Id.*, at pp. 540-541.)

This Court's holding in *Fields* was based on former Code of Civil Procedure section 963, subdivision 1, which authorized an appeal "[f]rom a

A party challenging an adverse section 1054.9 ruling, however, seeks writ review. (*In re Steele, supra*, 32 Cal.4th at pp. 688, 692.) "[W]hen no execution is imminent, a person seeking specific discovery under section 1054.9 should first file the motion in the trial court that rendered the judgment. . . . [I]f necessary, after the trial court has ruled, either party may challenge that ruling by a petition for writ of mandate in the Court of Appeal." (*In re Steele, supra*, 32 Cal.4th at p. 692.)

Presumably, this Court interpreted section 1054.9 in this manner because it comports with the established remedy, for the People, when we suffer an adverse discovery ruling in a criminal case. The People can "seek review of an order granting a defendant's motion for . . . discovery by a petition for a writ of mandate." (Pen. Code, § 1512, subd. (a).) The appellate remedy for an adverse section 1054.9 ruling is inconsistent with the notion that the Legislature created a special proceeding.[26]

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final judgment entered in an action, or special proceeding." (Italics added.) While the currently applicable successor to this statute does not refer to special proceedings, and simply authorizes an appeal "[f]rom a judgment" (Code Civ. Proc., § 904.1, subd. (a)(1)), "[t]he meaning is the same." (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304.)

[26] Likewise, the appellate remedy for challenging an adverse section 1054.9 ruling is inconsistent with Defendant Pearson's contention that, by

Even if we assume, *arguendo*, that section 1054.9 hearings comprise special proceedings, section 1054.9 nevertheless amended the Criminal Discovery Statute. Section 1054.9 permits a criminal defendant, who already has filed his nonstatutory motion to vacate judgment, to move for and to compel postconviction discovery. (Pen. Code, §§ 1054.9, subds. (a), (b), 1054.5, subd (b).) But as originally enacted, the Criminal Discovery Statute flatly prohibited criminal defendants from forcing prosecutors to

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moving for discovery under section 1054.9, he automatically commenced a habeas proceeding.

The denial of a habeas petition is not an appealable order, and the petitioner's recourse is generally limited to filing a new petition in the reviewing court. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) "It has always been the law in this state that the decision of any court in a habeas corpus proceeding, provided the court has jurisdiction, cannot be reviewed by any other court in any way. The right of appeal has never been given, and no other method for such review has ever been provided." (*Matter of Zany* (1913) 164 Cal. 724, 726; *accord*, *People v. Garrett* (1998) 67 Cal.App.4th 1419, 1422-1423.) "[B]oth trial and appellate courts have jurisdiction over habeas corpus petitions, but a reviewing court has discretion to deny without prejudice a habeas corpus petition that was not filed first in a proper lower court." (*In re Steele, supra,* 32 Cal.4th at p. 692.)

provide discovery in support of nonstatutory motions to vacate judgment. (Pen. Code, §§ 1054, subd. (e), 1054.5, subd (a); *People v. Paiva, supra,* 31 Cal.2d at p. 510.)

Permitting defendants to force prosecutors to provide discovery in support of nonstatutory motions to vacate judgment effectively amended the Criminal Discovery Statute, even if accomplished under the rubric of a special proceeding.[27] A 53% legislative majority cannot enact a statute

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[27] The Criminal Discovery Statute's exclusivity provisions (Pen. Code, §§ 1054, subd. (e), 1054.5, subd. (a)), and the constitutional limitation on the Legislature's power to amend Proposition 115 (Cal. Const., art. II, § 10, subd. (c); Prop. 115, § 30) prohibit any elusion of Propositioin 115's terms.

Imagine, for instance, if a 53% legislative majority sought to evade Proposition 115 by enacting a new discovery statute, whereby a criminal defendant, facing trial, only has to describe – in a special proceeding – the discovery he seeks, with some specificity, and to provide a plausible justification for its disclosure. Neither the voters nor this Court would countenance such a transparent evasion of the Criminal Discovery Statute's exclusivity provisions. Section 1054.9's insufficient legislative majority should not be permitted its avoidance, merely because it effectively amended the Criminal Discovery Statute in a more subtle, less blatant fashion.

which contravenes Proposition 115's basic command: criminal defendants shall not obtain discovery, to assist them in their pending criminal cases, except as provided by the Criminal Discovery Statute, as originally written.

"The law respects form less than substance. (Civ. Code, § 3528) . . . The nature of the proceeding must be determined from the substance of the action taken regardless of its designation. ([*Citation*].) The end attained and not the form of the transaction must be considered by the court in determining its substance and legal effect. ([*Citation*].)" (*Proposition 103 Enforcement Project v. Quackenbush, supra,* 64 Cal.App.4th at p. 1487, fn. 9; see also *Wm. R. Clarke Corp. v. Safeco Ins. Co.* (1997) 15 Cal.4th 882, 890, citing Civ. Code, § 3528 [carefully articulated statutory scheme would amount to little, if parties could circumvent it by means having effects indistinguishable from those prohibited by statute].) "To give effect to the constitution, it is as much the duty of the courts to see that it is not evaded as that it is not directly violated." (*Sheehy v. Shinn* (1894) 103 Cal. 325, 340; *Proposition 103 Enforcement Project v. Quackenbush, supra,* 64 Cal.App.4th at p. 1487.) A 53% legislative majority cannot, under the guise of providing postconviction discovery in a special proceeding, evade the Criminal Discovery Statute's exclusivity provisions. An insufficient

majority cannot avoid the voters clear command, through the simple expedient of funneling postconviction criminal discovery through a special proceeding.

b) The Legislature Deliberately Classified Section 1054.9 Discovery Hearings as Criminal Proceedings

Why did section 1054.9's proponents deliberately subject their legislative efforts to a supermajority vote? Why not channel postconviction discovery proceedings directly into habeas proceedings, where a bare majority vote would suffice? The answer lies in the fact that classifying section 1054.9 hearings as either criminal, habeas, or some other type of special proceeding, dictates what rights and responsibilities inure to the parties. By classifying section 1054.9 hearings as criminal proceedings, its proponents tried to render the People parties to them (Pen. Code, § 684), they tried to endow the People with a constitutional right to reciprocal discovery (Cal. Const., art. I, § 30, subd. (c)) and due process (Cal. Const., art. I, § 29) at hearings on motions to compel postconviction discovery, they tried to provide both parties with the constitutional right to present all

relevant evidence at those hearings (Cal. Const., art. 1, § 28, subd. (d), and they tried to bestow upon potential habeas petitioners all the constitutional and procedural rights that criminal defendants enjoy, as opposed to those limited rights exercised by habeas and special proceeding litigants.

Attaching section 1054.9 motions to their underlying criminal proceedings would have facilitated more expeditious postconviction discovery litigation. It effectively would have forced the prosecutors who provided trial discovery, and whose offices bear the brunt of the postconviction discovery ordered under its auspices, to represent the People at the trial court level. The Legislature knew that section 1054.9's enactment would permit criminal defendants to seek discovery, years before the Attorney General came up to speed and could make intelligent materiality assessments. Since a substantial portion of the contested litigation in section 1054.9 proceedings revolves around the alleged materiality of items the defendant seeks under *Brady* (see *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 376), attaching section 1054.9 motions to their underlying criminal cases made eminent sense.

The rules of criminal procedure (Pen. Code, §§ 681-1471) differ significantly from those governing habeas proceedings. (Pen. Code, §§ 1473 - 1508; Cal. Rules of Court, Rule No. 4.550 et seq.) The People enjoy a

constitutional right to due process in criminal proceedings (Cal. Const., art. I, § 29), whereas respondents in habeas proceedings do not.

Different evidentiary rules govern criminal proceedings. Parties to criminal proceedings enjoy a constitutional right to present all relevant evidence (Cal. Const., art. I, § 28, subd. (d)); habeas litigants do not. (See *People v. Wheeler, supra,* 4 Cal.4th. at pp. 291-292 [broader evidence of prior criminal conduct is admissible to impeach a witness' credibility in criminal proceedings].) A criminal defendant enjoys a privilege not to be called as witness (Evid. Code, § 930); habeas petitioners do not. (*In re Scott, supra,* 29 Cal.4th at p. 815.) Habeas petitioners enjoy a physician-patient privilege (Evid. Code, § 994); criminal defendants do not. (Evid. Code, § 998.) The People enjoy a constitutional right to reciprocal discovery in criminal proceedings (Cal. Const., art. I, § 30, subd. (c)), but no such constitutional requirement governs habeas, despite this Court's suggestion about reciprocity. (See *In re Scott, supra,* 29 Cal.4th at p. 814.)

Courts in criminal proceedings cannot order disclosure of items not listed in the Criminal Discovery Statute. (*People v. Tillis* (1998) 18 Cal.4th 284, 294 [if federal due process or express statutory discovery provisions do not require disclosure of a particular evidentiary item, judiciary is "not at

liberty to create a rule imposing such a duty"].) As already discussed, habeas referees can order case-by-case discovery, specifically geared towards reference hearings. (*In re Lawley, supra,* 42 Cal.4th at p. 1249.)

Section 1054.9's proponents did not wish to endow potential habeas petitioners with a premature right to receive case-by-case discovery within habeas proceedings. Penal Code section 1054.9 "does not allow 'free-floating' discovery asking for virtually anything the prosecution possesses." (*In re Steele, supra*, 32 Cal.4th at p. 695.) By attaching section 1054.9 motions to their underlying criminal cases, its proponents guaranteed that free-floating discovery jurisdiction would not be conferred within habeas proceedings until after an OSC issues. (See *People v. Gonzalez, supra,* 51 Cal.3d at p. 1261.)

4. As a Failed Bill, Section 1054.9 Is Unworthy of Judicial Reformation

Defendant Pearson urges this Court to interpret section 1054.9 in contravention of its proponents' clear intent, which was to permit movants to attach their postconviction discovery motions to their underlying criminal cases. He argues that since the Legislature is presumed to have enacted a

constitutional statute, this Court should presume the 53% legislative majority intended for section 1054.9 motions to attach to, and in some instances to commence, habeas proceedings. Defendant Pearson has seriously misstated the appropriate standard of review.

"Any doubts should be resolved in favor of the initiative and referendum power, and amendments which *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinance, where the original initiative does not provide otherwise." (*In re Estate of Claeyssens* (2008) 161 Cal.App.4th 465, 471, italics in original, citing *DeVita v. County of Napa, supra,* 9 Cal.4th at p. 792; accord, *Proposition 103 Enforcement Project v. Quackenbush, supra*, 64 Cal.App.4th at p. 1486; *Mobilepark West Homeowners Assn. v. Escondido, supra,* 35 Cal.App.4th at p. 41.)

Since section 1054.9 failed to command a supermajority vote, this Court does not uphold its validity, "if, by any reasonable construction" (*Amwest Surety Ins. Co. v. Wilson, supra,* 11 Cal.4th at p. 1256), it can be said to further the Criminal Discovery Statute's purposes. Rather, any doubts should be resolved in favor of the initiative power, and amendments

which may conflict with Proposition 115's subject matter must be accomplished by popular vote (cf. *DeVita v. County of Napa, supra,* 9 Cal.4th at p. 792), or by a legislative supermajority. (Prop. 115, § 30.)

"Adoption of the standard of review proposed by [Defendant Pearson] might well have the ironic and unfortunate consequence of causing the drafters of future initiatives to hesitate to grant even a limited authority to the Legislature to amend those initiatives . . . In the absence of effective judicial review, drafters of future initiatives might well feel compelled to withhold such legislative authority completely, lest even the most limited grant of authority to amend be used by the Legislature to curtail the scope of the initiative . . . Such a result would diminish both the initiative process and the legislative process." (*Amwest Surety Ins. Co. v. Wilson, supra,* 11 Cal.4th at p. 1256.) The initiative power should be guarded jealously, and all reasonable doubts should be resolved in favor of its exercise. (*Independent Energy Producers Ass'n v. McPherson, supra,* 38 Cal.4th at p. 1031; *DeVita v. County of Napa, supra,* 9 Cal.4th at p. 776; *Legislature v. Eu* (1991) 54 Cal.3d 492, 501.)

In *Amwest Surety Ins. Co. v. Wilson, supra,* 11 Cal.4th 1243, this Court faced a different standard of review than the one governing the People's challenge to section 1054.9. The *Amwest* voters permitted

legislative amendments, without voter approval, but only "to further [the initiative's] purposes." (*Id.*, at p. 1251.) This Court ruled that the legislative amendment before it could only be upheld if, by any reasonable construction, it could be said to further those purposes. (*Amwest Surety Ins. Co. v. Wilson., supra,* 11 Cal.4th at p. 1256; see also *Proposition 103 Enforcement Project v. Quackenbush, supra,* 64 Cal.App.4th at p. 1490.)

In the case before this Court, however, whether or not section 1054.9 furthers the voters' purposes is irrelevant. Proposition 115 restricts the mode of amendment, by requiring a legislative supermajority, and not by insisting that any subsequent legislative amendment further the voters' purposes. The nature of section 1054.9's impermissibly amendatory effect is in dispute, not the number of votes it received. For that reason, any amendment which may conflict with Proposition 115's subject matter must be accomplished either by popular vote, or by a margin exceeding the meager 53% legislative majority that section 1054.9 received. The danger here is not that section 1054.9 *may* amend the Criminal Discovery Statute. It clearly does.

In voting upon section 1054.9's enactment, the Legislature did not purport to interpret the Constitution; it attempted to amend Proposition 115's statutory provisions. The rule of deference to the legislative interpretation of

the California Constitution, therefore, has no application to the case before this Court. (*Amwest Surety Ins. Co. v. Wilson, supra,* 11 Cal.4th at p. 1253.) And, while "'a strong presumption of constitutionality supports the Legislature's acts' [*Citation*]" (*ibid.*), the Legislature was presumptively aware that any amendment to the Criminal Discovery Statute required two-thirds of its membership to concur in that result. (Cf. *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780, fn. 3 ["the Legislature is presumed to be aware of all laws existent at the time it passes a statute"].)

Applying a strong presumption of constitutionality to the legislative process leads to the conclusion that section 1054.9's proponents attempted – albeit unsuccessfully – to accomplish the amendments indicated by their clear statutory language. "The plain language of [section 1054.9] establishes what was intended by the Legislature." (*In re Steele, supra*, 32 Cal.4th at p. 693.) Accordingly, no interpretational imperative calls for it to receive a construction suggesting it was intended to give rise to an independent, special proceeding.

Section 1054.9's clear language belies any suggestion that its 53% legislative majority intended for its motions to attach to, and in some instances to commence, habeas proceedings. As a failed legislative

endeavor, section 1054.9 should not be interpreted in a contorted manner, merely to effectuate the rubric that the Legislature intends to enact a constitutional statute. Endowing it with the interpretation that its plain language supports, while recognizing that its proponents failed to achieve a supermajority vote, is entirely consistent with the presumption of constitutionality supporting the legislative process. The chamber as a whole voted on its enactment; the chamber as a whole rejected it.

If section 1054.9 had achieved the requisite two-thirds vote, it indisputably would permit movants to seek postconviction discovery within their underlying criminal cases. Its nomenclature, its codification within the Criminal Discovery Statute, and its harmonization within the broader, pre-existing statutory scheme all permit section 1054.9 motions to attach to their underlying criminal cases. Accordingly, no presumption should arise that section 1054.9's supporters tried to accomplish anything other than their initial, amendatory purposes.

Section 1054.9 is a failed bill, not a duly enacted statute, so it enjoys no presumption of constitutionality. If this Court, in examining its plain language, determines that section 1054.9's proponents intended to permit postconviction discovery motions to attach to their underlying criminal

cases, then it failed to become law. This Court should decline Defendant Pearson's invitation to breathe life into it. Section 1054.9 deserves no interpretation apart from the one supported by its plain language.

Although "a statute, once duly enacted, 'is presumed to be constitutional'" (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1302), section 1054.9 was never duly enacted. It failed to command sufficient votes to accomplish its impermissibly amendatory purposes. "[T]he preemptive effect of the controlling state statute" – in this instance, Propostion 115, section 30 – invalidated section 1054.9 at its inception; it is a "void statute [which] cannot be given effect." (Cf. *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544; *Huening v. Eu, supra,* 231 Cal.App.3d at pp. 779, 780 [impermissibly amendatory statute was not properly enacted, was invalid, was without force or effect, and had to be stricken].)

Section 1054.9 cannot reasonably be interpreted to provide postconviction discovery in a manner that does not unlawfully amend the Criminal Discovery Statute. Furthermore, this Court cannot amend Proposition 115 under the guise of reinterpreting it. Reinterpreting the Criminal Discovery Statute's clear language, in an attempt to accommodate section 1054.9's constitutionality, would permit the latter to amend the

former, without the requisite two-thirds vote. A faction of those voting for section 1054.9 cannot accomplish Proposition 115's statutory reinterpretation, where they could not secure its amendment through the legislative process.

Defendant Barnett complains that legislative counsel opined that section 1054.9 would only require a majority vote. But the statements of a legislative analyst accompanying a failed bill are meaningless as an expression of legislative intent. (*Troy Gold Industries, Ltd. v. Occupational Safety & Health Appeals Bd.* (1986) 187 Cal.App.3d 379, 391, fn. 6.) Since section 1054.9 failed to muster sufficient votes to carry out its clear language, it would be both improper and unnecessary to seek support in the words of a Senate Rules Committee report which, as far as we know, not even the full committee, much less the full Assembly or the full Senate, agreed with. (See also *Foundation for Taxpayer and Consumer Rights v. Garamendi*, *supra*, 132 Cal.App.4th at p. 1371 [Legislature cannot evade voter initiative, under the guise of amending it, merely by professing its amendment furthers the initiative's purposes].)

Apparently Defendant Pearson seeks judicial reformation. His unstated premise appears as follows: "Section 1054.9 received a 53% majority in both houses. The Legislature could enact, with a 53% majority,

a statute governing discovery motions brought solely within habeas proceedings. A 53% majority could enact a statute commencing postconviction discovery proceedings whenever potential habeas petitioners move for discovery, and the Legislature could classify those proceedings as civil. Or, a 53% majority could create a special proceeding, wherein potential habeas petitioners could move for postconviction discovery. Section 1054.9's supporters wanted potential habeas petitioners to receive postconviction discovery before an OSC issues. Since they might have accomplished their desired goal with their 53% majority, this Court should judicially reform section 1054.9 to accomplish it."

The preceding argument suffers from the inconvenient fact that the 53% majority sought to permit postconviction discovery to occur within the underlying criminal case. This Court cannot judicially reform section 1054.9 without depriving its proponents of their legitimate expectations regarding the rights and responsibilities that attach to criminal discovery proceedings. This Court "may not rewrite a statute to conform to a presumed intent that is not expressed." (*People v. Statum* (2002) 28 Cal.4th 682, 692.)

Although this Court can judicially reform a duly enacted bill in order to render it constitutional (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 662-663), it cannot revive a failed one. A legislative act invalid at its inception is unworthy of judicial reformation. Just as severance is unavailable when a voter initiative violates the single subject rule (*Senate of State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1155, fn. 8), an act in excess of the Legislature's amendatory powers is invalid regardless of how it might be applied in any given case. (Cf. *Proposition 103 Enforcement Project v. Quackenbush, supra,* 64 Cal.App.4th at p. 1495; *Huening v. Eu, supra,* 231 Cal.App.3d at pp. 779, 780.)

Insofar as section 1054.9 is concerned, the Legislature enacted nothing. A failed or unenacted bill is meaningless as an expression of legislative intent. (Cf. *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 927; see also *People v. Mendoza* (2000) 23 Cal.4th 896, 921 [judiciary "can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law"].) Section 1054.9's fatal conflict with Proposition 115 rendered it invalid when passed; Proposition 115's preemptive effect (Prop. 115, § 30) invalidated section 1054.9 at its inception. (Cf. *Lesher Communications,*

Inc. v. City of Walnut Creek, supra, 52 Cal.3d at p. 544.) Judicially reforming section 1054.9's language would do nothing to remedy its unconstitutional manner of enactment.

Penal Code section 1054.9 was void ab initio. Senate Bill No. 1391 failed to become law back in August, 2002. This Court does not have a duly enacted bill before it, which it otherwise might judicially reform. While this Court can interpret legislation, it cannot enact it. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472; Cal. Const., arts. III, § 3, IV, § 1, VI, § 1.) This Court cannot resuscitate, via judicial reformation, a stillborn bill which failed to become law more than seven years ago. It would violate our separation of powers doctrine if this Court were to resurrect, under the guise of judicial reformation, a failed bill. (Cal. Const., art. III, § 3; cf. *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297.)

There is no duly enacted statute, presently before this Court, that otherwise might be subject to judicial reformation. The only duly enacted discovery statute, governing the case before this Court, is the Criminal Discovery Statute. "[T]he statute presently in effect [is binding], not . . .

a legislative statement of intent that failed to become law." (*Lolley v. Campbell* (2002) 28 Cal.4th 367, 379; *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52.)

The Legislature is a collective entity, and it manifests its intentions primarily through its legislative acts. An insufficient 53% legislative majority attempted, unsuccessfully, to achieve a series of impermissibly amendatory goals. This insufficient majority managed to agree that certain defendant should receive postconviction discovery in their criminal cases. Some indeterminate percentage, of this insufficient majority, might have voted for postconviction discovery hearings to occur within special proceedings, if only such a bill had been presented. But that is hardly compelling evidence, of the Legislature's collective intent, that those same defendants should receive postconviction discovery in a special proceeding. Such an unfulfilled legislative desire does not empower this Court to revive a stillborn bill, null and void from its inception. This Court is bound by the statute presently in effect – the Criminal Discovery Statute – and not by some aborted legislative desire that failed to become law.

This Court's duty of deference to the legislative process is better served by acting consistently with the electorate's enacted will, than by trying to ratify the Legislature's later, unenacted will. (Cf. *People v. Tanner* (1979) 24 Cal.3d 514, 546.) Section 1054.9's failure to garner sufficient votes is conclusively determinative that the chamber as a whole intended it to fail. This Court should decline to infer, solely from the fact that an insufficient majority of those voting to amend the Criminal Discovery Statute desired postconviction criminal discovery, that the Legislature as a whole wanted it to occur outside criminal proceedings.

Consistent with the presumption that the Legislature is presumed to have existing law in mind when considering pending legislation (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 596), this Court should assume that section 1054.9's proponents were legally acute. They collectively knew that it failed to command sufficient votes to amend the Criminal Discovery Statute. They wanted to endow section 1054.9 litigants with the rights and responsibilities that inure to parties in criminal proceedings. Dissatisfied with the rights and responsibilities that habeas litigants exercise, the legally acute made no further efforts to authorize

postconviction discovery within habeas proceedings. This Court should not judicially reform a failed bill, in order to give life to a statute its proponents deliberately declined to enact.

Even if we assume that only some of section 1054.9's proponents knew it required a supermajority vote in order to become law, then presumably they notified their legally inept colleagues, when its anemic tally failed to amend the Criminal Discovery Statute. Its proponents then must have caucused among themselves, yet they made no effort to introduce a bill authorizing postconviction discovery within habeas proceedings. Their failure to enact such a bill apparently resulted from insufficient consensus; they could not muster sufficient votes to amend our habeas statutes in a manner satisfying their differing goals regarding reciprocity, admissibility, and the rights and responsibilities that inure to parties in criminal proceedings.

The legally inept – who initially assumed they were not voting for reciprocity or the admissibility of all relevant evidence in postconviction discovery proceedings – could not agree on a final bill satisfying the legally acute – who knew all along they had voted for reciprocity and such

admissibility.[28] If this Court were to judicially reform section 1054.9 so that it commences habeas proceedings upon the petition's filing, it would deprive the legally acute of their legitimate expectations regarding reciprocity and admissibility. This Court can only speculate as to what type of reciprocity or admissibility rules a two-thirds majority eventually would have arrived at, if the entire chamber had been fully aware of section 1054.9's constitutional defect.

The legally acute might only have voted for section 1054.9 grudgingly, assuming it would become law only if it garnered a two-thirds majority vote. Legally acute opponents might have muted their opposition after conducting a pre-vote head count, and determining that section 1054.9's supporters lacked sufficient votes. To judicially reform section 1054.9 at this late juncture would deprive some of those who voted for it of their assumption of legislative consensus. They might have reluctantly voted for it, against their better judgment, only because they assumed it deserved to become law if it could muster the bipartisan support necessary to

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[28] The legally acute who favored reciprocity might not have raised the fact that section 1054.9 contained no statutory provisions for reciprocity, precisely because they did not wish to give the legally inept an opportunity to remedy their oversight. The legally acute had no incentive to educate the legally inept.

muster a two-thirds majority. Judicial reformation would deprive them of their faith in bipartisan cooperation and in the collective wisdom of a legislative supermajority. Judicial reformation would deprive section 1054.9's legally acute opponents of their right to oppose it more vociferously. Realizing its proponents could not muster a supermajority vote, they might have muted their opposition, in the interest of legislative collegiality.

The only way that judicial reformation conceivably might make sense would require this Court to assume that each and every proponent of section 1054.9 was legally inept. This Court would have to presume that every single legislator who voted for it – all 21 senators and all 42 assembly members – failed to appreciate it required a supermajority vote. Thus despite its clear statutory language and codification classifying section 1054.9 hearings as criminal proceedings, the 53% legislative majority mistakenly voted in favor of postconviction criminal discovery, while actually attempting to enact something entirely different.[29]

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[29] If just one single proponent had been legally acute, he or she would have alerted the others that section 1054.9 comprised a failed bill when it only received a 53% majority. Their subsequent failure to introduce a bill authorizing postconviction discovery solely within habeas proceedings indicates they lacked sufficient votes to accomplish that feat.

An assumption of unanimous legislative ineptitude – no matter how closely that assumption might model the real world – provides a shaky foundation for judicial reformation. The People have never encountered a presumption that each and every legislator supporting a bill is an imbecile. As this Court has stated, "we are aware of no authority that supports the notion of legislation by accident." (*In re Christian S.* (1994) 7 Cal.4th 768, 776.) In fact, "the Legislature [is] deemed to be aware of laws in effect at the time [it] enact[s] new laws and [it is] *conclusively presumed* to have enacted the new laws in light of existing laws having direct bearing upon them." (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332, italics added, citing *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609.)

It would be pure speculation, based solely on the weak evidence of a failed bill, to somehow conjecture that every single proponent wanted to endow potential and actual habeas petitioners with additional discovery rights in non-criminal proceedings. This Court cannot judicially reform section 1054.9, with confidence, in a manner satisfying the legally acute's legitimate expectations, while satisfying those of the legally inept as well. This Court cannot say with confidence that it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by

the enacting body. Nor can this Court say with confidence that a majority of the enacting body would have preferred a reformed construction to the statute's invalidation. (Cf. *Kopp v. Fair Pol. Practices Com.*, *supra*, 11 Cal.4th at pp. 660-661.)

"[S]tatutory language is generally the most reliable indicator of legislative intent." (*People v. King* (2006) 38 Cal.4th 617, 622.) Section 1054.9's statutory text provides the true indicator of the legislative deal its proponents eventually struck. The realities of the legislative compromise demonstrate that its 53% majority wanted it to govern criminal proceedings. Judicial reformation would do violence to the legislative process. Instead of attempting a judicial reformation based upon conjecture, guesswork, supposition, and assumption, this Court should decline any implied invitation to rewrite section 1054.9, in a manner artificially transplanting its motions into habeas proceedings. Such determinations are better left to the Legislature.

If this Court were to judicially reform section 1054.9, in order to permit potential habeas petitioners to compel postconviction discovery in a special proceeding, that reformation unquestionably would permit defendants, bringing nonstatutory motions to vacate judgment, to compel postconviction discovery as well. By declaring that they wish to obtain

postconviction discovery, in contemplation of a potential habeas petition, defendants moving to vacate judgment would be entitled to compel postconviction discovery.

As originally enacted, the Criminal Discovery Statute flatly prohibited defendants from compelling prosecutors to provide them with discovery in support of nonstatutory motions to vacate judgment. (Pen. Code, §§ 1054 subd. (e), 1054.5, subd (a).) The ability of defendants, moving to vacate judgment, to compel postconviction discovery in special proceedings, might just be the inevitable byproduct of the Legislature's ability to permit potential habeas petitioners to obtain that discovery in special proceedings. But that is not what section 1054.9's clear language indicates.

If the Legislature wishes to address whatever inequity it believes arises from the *Gonzalez* decision, it can do so through the simple expedient of enacting a valid bill. But judicial reformation of a failed bill would countenance an evasion of the constitutional constraints on the exercise of both judicial and legislative power. Given the difficulty of resolving the various competing interests, this Court should decline any invitation – express or implied – to judicially reform section 1054.9. The Legislature is better equipped to consider expanding California law in this arena,

especially given the voters' clear desire that criminal defendants should receive no compulsory disclosures in support of nonstatutory motions to vacate judgment.

Even if section 1054.9's provisions governing motions to vacate judgment could be severed from those governing discovery aimed at habeas relief, a court will sustain the valid portion of an enactment only where the enacting body would have adopted it independently of the rest. (*People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 330-333.) This Court cannot declare confidently that the entire chamber would have adopted section 1054.9's habeas provisions, in a manner only governing habeas proceedings, independently of the rest. After all, those wrongly convicted in the Rampart scandal deserved considerably more sympathy and legislative attention than did convicted killers, sentenced to death or to LWOP. Section 1054.9's slim legislative majority, and its enactment in conjunction with section 1473.6's provisions for statutory motions to vacate judgment, cast serious doubt upon any suggestion that that chamber as a whole might have adopted section 1054.9's habeas provisions, in a manner only governing habeas proceedings, independently of the rest.

CONCLUSION

"Previous decisions should not be followed to the extent that error may be perpetuated and that wrong may result.'" (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1196.) The People have a vital interest in ensuring that compulsory discovery remains unavailable in the myriad of postconviction criminal proceedings that occur within criminal cases, such as motions for new trial, sentencing hearings, motions to withdraw pleas, probation revocation hearings, and nonstatutory motions to vacate judgment.

The voters' will – embodied within Proposition 115 – deserves protection against the unlawful encroachment represented by section 1054.9. The Legislature's failure to amend Proposition 115 with a supermajority vote precluded any postconviction discovery order from issuing within Defendant Pearson's underlying criminal case. Because section 1054.9 is an act in excess of the Legislature's amendatory powers, the People respectfully ask this Court to reverse the Court of Appeal, and to direct it to grant our petition for writ of mandate.

Respectfully submitted,

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State Bar No. 130122

Attorneys for Petitioner

RULE 8.360(b) CERTIFICATION

I, Doug MacMaster, certify that the number of words in this opening brief on the merits totals 17,864 words.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: July 30, 2009

Doug MacMaster
Deputy District Attorney
State Bar No. 130122

Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL
(C.C.P. 1012, 1013, 1013a, 2015.5 and EC 641)

Docket No. **5-951701-2**

Re: **PEOPLE v. MICHAEL NEVAIL PEARSON**

I certify that my address is: **Office of the District Attorney**
Contra Costa County
P.O. BOX 640
Martinez, CA 94553

and I am a citizen of the United States, over 18 years of age, a resident of the County of Contra Costa, and not a party to the within action;

I served a true copy of the attached **PETITIONER'S OPENING BRIEF ON THE MERITS**

By placing said copy in an envelope address as follows:

THE SUPREME COURT OF CALIFORNIA
ATTN: CLERK OF COURT
350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4783

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPEALLATE DISTRICT, COURT CLERK
350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4783

HABEUS CORPUS RESEARCH CENTER
ATTN: DAVID LANE & KEVIN MICHAEL BRINGUEL
303 SECOND STREET, SUITE 400 SOUTH
SAN FRANCISCO, CA 94107

which is a place having delivery service by U.S. Mail, which envelope was then sealed and postage fully prepaid thereon, and thereafter was, on this day, deposited in the United States Mail at Martinez , California, Contra Costa County, California 94805 ;

I certify under penalty of perjury that the foregoing is true and correct.

Maren Padilla Dated: **August 4, 2009**

MAREN PADILLA
SENIOR CLERK
Telephone (925) 957-8603 Fax (925) 957-2240

Signed at Martinez , Contra Costa County, California.

DA-20.3 (10/04)

CERTIFICATE OF SERVICE BY MAIL
(C.C.P. 1012, 1013, 1013a, 2015.5 and EC 641)

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P.O. BOX 640
Martinez, CA 94553

and I am a citizen of the United States, over 18 years of age, a resident of the County of Contra Costa, and not a party to the within action;

I served a true copy of the attached **PETITIONER'S OPENING BRIEF ON THE MERITS**

By placing said copy in an envelope address as follows:

CONTRA COSTA SUPERIOR COURT
ATTN: CLERK OF COURT
PO BOX 911
MARTINEZ, CA 94553

WARD CAMPBELL
OFFICE OF THE ATTORNEY GENERAL
1300 I STREET, PO BOX 944255
SACRAMENTO, CA 94244-2550

DOUG PIPES & KENT SCHEIDEGGER
CRIMINAL JUSTICE LEGAL FOUNDATION
2131 L STREET
SACRAMENTO, CA 95816

which is a place having delivery service by U.S. Mail, which envelope was then sealed and postage fully prepaid thereon, and thereafter was, on this day, deposited in the United States Mail at Martinez , California, Contra Costa County, California 94805 ;

I certify under penalty of perjury that the foregoing is true and correct.

Maren Padilla Dated: **August 4, 2009**

MAREN PADILLA
SENIOR CLERK
Telephone (925) 957-8603 Fax (925) 957-2240

Signed at Martinez , Contra Costa County, California.

DA-20.3 (10/04)

CERTIFICATE OF SERVICE BY MAIL
(C.C.P. 1012, 1013, 1013a, 2015.5 and EC 641)

Docket No. **5-951701-2**

Re: **PEOPLE v. MICHAEL NEVAIL PEARSON**

I certify that my address is: **Office of the District Attorney**
Contra Costa County
P.O. BOX 640
Martinez, CA 94553

and I am a citizen of the United States, over 18 years of age, a resident of the County of Contra Costa, and not a party to the within action;

I served a true copy of the attached **PETITIONER'S OPENING BRIEF ON THE MERITS**

By placing said copy in an envelope address as follows:

LINDA FREY ROBERTSON
CALIFORNIA APPELLATE PROJECT
101 SECOND STREET, SUITE 600
SAN FRANCISCO, CA 94105

SUPERIOR OURT OF BUTTE COUNTY
1 COURT STREET
OROVILLE, CA 95965

W. SCOTT THORPE
CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION
921 ELEVENTH STREET, THIRD FLOOR
SACRAMENTO, CA 95814

which is a place having delivery service by U.S. Mail, which envelope was then sealed and postage fully prepaid thereon, and thereafter was, on this day, deposited in the United States Mail at Martinez , California, Contra Costa County, California 94805 ;

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Maren Padilla

Dated: **August 4, 2009**

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By placing said copy in an envelope address as follows:

ROBERT D. BACON
ATTORNEY AT LAW
484 LAKE PARK AVE. PMB 110
OAKLAND, CA 94610

JENNIFER COREY
ASSISTANT FEDERAL DEFENDER
801 1 STREET
SACRAMENTO, CA 95814

MICHAEL L. RAMSEY
OFFICE OF THE DISTRICT ATTORNEY
25 COUNTY CENTER DRIVE
OROVILLE, CA 95965

which is a place having delivery service by U.S. Mail, which envelope was then sealed and postage fully prepaid thereon, and thereafter was, on this day, deposited in the United States Mail at Martinez , California, Contra Costa County, California 94805 ;

I certify under penalty of perjury that the foregoing is true and correct.

Dated: **August 4, 2009**

MAREN PADILLA
SENIOR CLERK
Telephone (925) 957-8603 Fax (925) 957-2240
Signed at Martinez , Contra Costa County, California.

DA-20.3 (10/04)