First Supplement to Memorandum 2024-09
Innocence, Wrongful Convictions, and Related Matters

Memorandum 2024-09 gave an overview of how factually innocent people can have their convictions vacated and how they can receive financial compensation. This supplement presents and summarizes written submissions from panelists scheduled to appear before the Committee on September 6, 2024.

Compensation for Innocence **Exhibit**

Proving Innocence and Wrongful Convictions

Discussion Panel 1:
Compensation for Innocence

Jon Eldan, Founder & Director, After
James Mink, Policy Lead, After Innocence

Mr. Eldan's and Mr. Mink's submission recommends replacing the current fragmented statutory scheme for wrongful compensation with a new, organized, and streamlined statute. The various paths to compensation in the statute would involve the same standard, instead of the four slightly different standards for innocence the law now contains. Among other things, the compensation statute should address all impacts of a wrongful conviction (time spent on other forms of supervision or incarceration), petitioners should be able to keep all of the money the Legislature intended for them to have (i.e. separate awards for attorneys fees and any child support arrears), and any major improvements should be applied retroactively.

Discussion Panel 2:
Proving Innocence and Wrongful Convictions

Joseph Trigilio, Associate Clinical Professor and Executive Director, Loyola Project for the Innocent, Loyola Law School

Mr. Trigilio's submission gives an overview and history of habeas corpus in California, drawing attention to the range of standards in the state's habeas statute. These various standards result in inconsistent application and unnecessary barriers when the innocent seek to have their conviction vacated. Mr. Trigilio proposes a uniform standard of materiality that would require a court to vacate a conviction upon a showing that the violation — whether new evidence, false testimony, or disputed science — undermines confidence in the outcome of the trial.

Jasmin Harris, Director of Policy, The Innocence Center

Ms. Harris's submission addresses two procedural obstacles for a person seeking to establish their innocence. First, access to discovery is a critical tool for anyone investigating their innocence, but in the post-conviction context it is only limited to people serving sentences of 15 years or more. Expanding eligibility would speed up the review process in order to reduce the number of years a person spends wrongfully incarcerated. Second, Ms. Harris notes that procedural bars may prevent an innocent person from getting into court and recommends specifying in statute what innocent people must show to overcome these bars.

Nisha Shah, Deputy Director of Litigation, Habeas Corpus Resource Center

Ms. Shah is the Deputy Director of the Habeas Corpus Resource Center, which represents people sentenced to death in state post-conviction proceedings throughout the state. The same post-discovery conviction applies to both capital and non-capital petitioners, but petitioners sentenced to death often do not receive habeas counsel until 25 years or more after judgment. Records may disappear or be destroyed during that time, such as recently happened with jury selection notes in Alameda County. Ms. Shah's submission recommends two amendments to the post-conviction discovery statute that would have a significant impact to capital habeas petitioners: adding a preservation requirement and expanding the definition of discovery materials to explicitly include jury selection notes.

Respectfully submitted,

Thomas M. Nosewicz
Legal Director

Joy F. Haviland
Senior Staff Counsel

Exhibit A

Jon Eldan, Founder & Director

James Mink, Policy Lead

After Innocence

A NEW APPROACH TO WRONGFUL CONVICTION COMPENSATION

As a result of incremental changes over the last two decades, California's current regime for wrongful conviction compensation has become needlessly complicated and confusing, with multiple standards and parallel factfinders. Rather than continuing to amend and update the exoneree compensation statutes in a piecemeal fashion,[1] it would be preferable to replace the fragmented statutes with a new, more organized statute, keeping the key elements of California's approach while integrating best practices from other jurisdictions.

The new wrongful conviction compensation statute should be guided by principles that rationally and adequately address the harms of wrongful conviction:

The paths to compensation should involve the same standard, with only one kind of factfinder. Instead of having four slightly different standards for innocence, the standard in all cases should be a finding by a preponderance that "the crime of which the petitioner was convicted was either not committed at all, or if committed, was not committed by the petitioner." Instead of having courts and the Victim Compensation Board as alternative factfinders, all claims should be brought in court, as they are in 27 of the 39 jurisdictions with wrongful conviction compensation statutes.

Prior court determinations should impact the burden of proof and benefits, regardless of the procedural path taken. Under current law, findings of innocence made by courts in rulings on vacatur/habeas corpus petitions are binding in compensation claims; dismissals or acquittals after successful vacatur/habeas corpus petitions shift the burden to the prosecution to prove guilt in order to defeat a compensation claim; and people released on bail or own recognizance after successful vacatur/habeas corpus petitions are entitled to gate money, and a housing stipend. The same effects should be given to findings of innocence on direct appeal, to dismissals and acquittals after reversal on direct appeal, and to release after reversal on direct appeal.

Compensation for successful petitioners should aim to appropriately address all impacts of a wrongful conviction. Thus, California should add new provisions that include:

- Providing compensation for any time served that would not have been served but for the wrongful conviction.
- Compensating for time spent in either juvenile detention or involuntary hospitalization as a result of wrongful conviction, at the same rate as for incarceration time, as in CO, VA
- Compensating for time wrongfully spent on death row at a higher rate (e.g., 150% of the compensation paid for general incarceration, as in CO, ID, WA, Fed.)
- Compensating for time wrongfully spent on parole, probation, or the sex offender registry at no less than 50% of the rate for incarceration time, as in CO, D.C., ID, KS, MN, NV, OR,

[1] The Penal Code sections that directly address compensation for erroneous conviction (sections 4900-4904 and 1485.55) have been the subject of reform bills in nine of the last ten Legislative sessions.

TX, WA
- Allowing recovery of any economic damages (e.g. loss of income) that a petitioner can prove were caused by the wrongful conviction, as in NY, OH
- Providing a one-page certificate of innocence, signed on behalf of the Attorney General, listing the length of the sentence served, and describing the finding of factual innocence, as in ID, UT
- Annotating criminal history reports (RAP sheets) to reflect findings of innocence and awards of compensation for erroneous conviction.

Successful petitioners should be able to keep all of the money the Legislature intended them to have. Thus, California should add new provisions:
- Providing a separate award for reasonable attorney fees, costs, and expenses incurred in overturning, reversing, or vacating their convictions, and in obtaining the compensation award, as in CO, D.C., FL, HI, IA, ID, IL, KS, MA, ME, MI, MN, MS, NJ, NV, OH, OR, RI, VA, WA
- Provide compensation for arrears directly to any child support recipients, as in CO, DC, MN, TX, WA
- Including in the compensation award reimbursement of any fees/fines/restitution that were paid in connection with the wrongful incarceration, as in CO, FL, IA, ME, MN, NV, OH, VA, WA
- Adjusting compensation amounts to account for inflation since rates were set in 2016, and annually thereafter to account for future inflation, as in CT, FL, IL, OH, VA, WA

The statute of limitations for claims should be designed to ensure notice and equity in compensation. Under current law, notice of a right to bring a compensation claim is not required in most circumstances, the limitations period has four alternative potential triggers, and newly discovered evidence of innocence cannot revive time-barred claims. California should require notice (as in IA, MN, OH, TX), trigger the limitations period from the receipt of such notice (as in MN, OH), and re-open the limitations period upon the discovery of evidence of innocence that could not reasonably have been obtained during the initial limitations period.

Major improvements to the compensation statute should be applied retroactively. Unlike some other states (LA, MN, OH), when California has provided new benefits or more liberal standards to wrongful conviction compensation petitioners, it has not provided the benefit of those changes to earlier petitioners. California should provide a limited window for new or supplemental claims by petitioners who were subject to earlier more stringent requirements and limitations (such as the 180-day statute of limitations in place until 2010, or the aggregate $10,000 cap in place until 2000).

California should provide funding for post-release support. Annual grants should be made to community-based organizations equipped to provide post-release services to address the unique needs of people released from California prisons after wrongful incarceration.

Exhibit B

Joseph Trigilio

Associate Clinical Professor and Executive Director

Loyola Project for the Innocent, Loyola Law School

LOYOLA LAW SCHOOL
PROJECT FOR THE INNOCENT

Joseph Trigilio, Associate Clinical Professor
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Comments on Penal Code § 1473 Standards and Uniformity
California Commission on Revision of the Penal Code
Hearing Date: September 6, 2024

Committee Members,

Thank you for the opportunity to comment on Penal Code § 1473, its standards for habeas corpus relief, and proposals to ensure it is consistently applied and addresses wrongful convictions—convictions to which we can no longer have confidence—while balancing the interest of finality.

This written proposal covers three areas: (I) An overview of Penal Code § 1473's evolution, (II) The standards of relief set forth in Penal Code § 1473, et seq., and (III) two proposals to amend the statute to ensure uniformity of the standards and to reflect the current understanding of wrongful convictions.

I. Brief Overview of Penal Code § 1473

California Penal Code § 1473, et seq. has a storied history. The United States Constitution has served as the floor—the bare minimum—for what constitutes a fair trial. Claims raised under the Constitution must implicate some misconduct or state action that resulted in an unfair trial. For example, a claim of false testimony cognizable under the Fourteenth Amendment must show the prosecution knew or should have known that the witness's testimony was false. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Penal Code § 1473 goes further. Through it, the Legislature over the decades has made clear that its focus is not on the misdeeds of state actors leading to unfair trials, but whether—in fact—a convicted person's trial was fair regardless of whether a state actor is at fault. For example, in 1975, the Legislature amended § 1473 to permit habeas relief for false *testimony irrespective of whether the prosecution knew or should've known of it*. In recent years, the statute has expanded in similar ways—permitting a conviction to be vacated where a jury's verdict has been undermined, regardless of whether the prosecutor or another state actor did something wrong.

On the next page is an overview of these amendments to Penal Code § 1473
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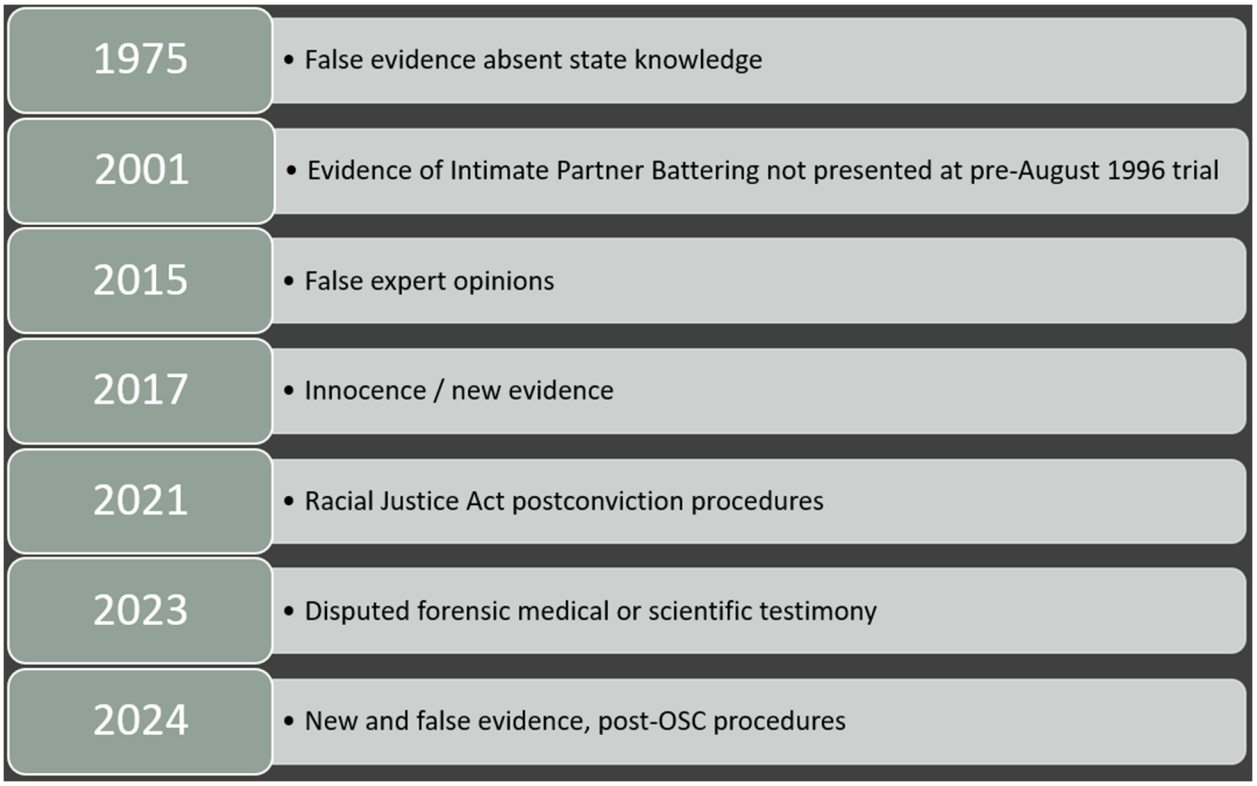


Additionally, in 2002 and 2016, the Legislature added Penal Code §§ 1473.6 and 1473.7, respectively. These statutes allow for a person *no longer in custody* to file a motion—as opposed to a writ of habeas corpus that is limited for people in custody—to vacate a conviction. Section 1473.6 provides for a conviction to be vacated upon a showing of newly discovered evidence of fraud, false testimony of a government official, or misconduct. Section 1473.7 permits a conviction to be vacated based on, among other things, newly discovered evidence of actual innocence that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

II. Standards of Relief Set Forth in Penal Code § 1473, et seq.

Penal Code § 1473 claims have a range of standards for vacating a conviction. The standards vary depending on the type of claim, leading to inconsistencies in their application. Below is a summary of these varying standards:

A. **Reasonable Probability Sufficient to Undermine Confidence in the Outcome (Less than Preponderance)**
   - **False Evidence [§ 1473(b)(1)(A)]**: Relief is granted when false evidence is material to the outcome, which has been interpreted as a reasonable probability of a different result. *See In re Richards*, 63 Cal. 4th 291, 312 (2016).
   - **False Physical Evidence [§ 1473(b)(1)(B)]**: Relief is similarly granted for material false physical evidence.
   - **Intimate Partner Battering (Pre-1997 Cases) [§ 1473.5(a)]**: Relief is based on a reasonable probability that the false evidence affected the outcome.

B. **Preponderance**
   - **New Evidence [§ 1473(b)(1)(C)]**: Relief is granted if new evidence is "sufficiently material and credible that it more likely than not would have changed the outcome of the case."
   - **Significant Dispute on Expert Testimony [§ 1473(b)(1)(D)]**: To obtain relief, the disputed expert testimony must have "more likely than not affected the outcome of the case."

C. **Point Unerringly to Innocence and Undermine the Entire Prosecution's Case**
   - **Fraud by Government Official (No Longer in Custody) [§ 1473.6(a)(1)]**: An unerring standard applies, requiring clear and convincing evidence of fraud by a government official.
   - **Actual Innocence Exception to Procedural Bars**: Not set forth in any statute, the California Supreme Court has said that a procedural bar can be overcome upon a showing of actual innocence, defined as newly discovered evidence that points unerringly to innocence and undermines the entire prosecution's case. *See In re Reno*, 55 Cal. 4th 428, 474 (2012).
   - **Services for Exonerated persons**: Penal Code § 3007.05(j)(1) incorporates the "unerring" standard for purposes of defining "exoneration."

D. **Ambiguous Standards**
   - **False Testimony by Government Official (No Longer Imprisoned) [§ 1473.6(a)(2)]**: The standard here is ambiguous, described as "substantially probative on the issue of guilt or punishment," with no published case law that I could find indicating the appropriate standard.
   - **Misconduct by Government Official (No Longer Imprisoned) [§ 1473.6(a)(3)]**: This also has unclear language, requiring evidence to be "substantially material and probative."
   - **New Evidence of Innocence (Out of Custody) [§ 1473.7(a)(2)]**: The language here requires relief for "newly discovered evidence of actual innocence" that requires vacating the conviction "as a matter of law or in the interests of justice." There is no clear definition of the showing necessary for actual innocence, but at least one Superior Court has indicated in a tentative ruling that the standard is the "point unerringly to innocence" standard described above.

III. Proposals to Reform § 1473 by Making Standards Uniform

There are two separate reforms to Penal Code § 1473. et seq. that reflect our understanding of wrongful convictions and lessens the barriers for the innocent to have their conviction vacated.

First, the materiality standard for each claim set forth in § 1473 should be uniform, and it should require vacating a conviction where there is a reasonable probability of a different result *sufficient to undermine confidence in the outcome.*

Second, in the alternative, the definition of "actual innocence" should be explicitly codified and reflect the Legislature's view dating back to 2017 that a conviction be vacated if new evidence can show by a preponderance that the outcome of trial would have been different. This second proposal is consistent the proposal related to procedural bars discussed by my colleague and fellow panelist Jasmin Harris.

A. Adopt a Uniform Materiality Standard of "Reasonable Probability of a Different Result Sufficient to Undermine Confidence in the Outcome."

Penal Code § 1473 should adopt a uniform materiality standard that requires vacating a conviction upon a showing that the violation undermines confidence in the outcome of the trial. This "undermining confidence" materiality standard is already in place for several constitutional violations, state-law errors on appeal, and false testimony claims under § 1473.

For many **Federal Constitutional Claims**, including the withholding of exculpatory evidence or the ineffective assistance of counsel, the United States Supreme Court has said that "[t]he defendant must show that there is a reasonable probability that, but for [the constitutional violation], the result of the proceeding would have been different. **A reasonable probability is a probability sufficient to undermine confidence in the outcome**." *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (emphasis added); *see also People v. Salazar*, 35 Cal. 4th 1031, 1043 (2005) (discussing "reasonable probability" standard for claims that the prosecution withheld evidence). In California, the "undermining confidence" materiality standard is used to assess harmless error for violations of state law on appeal. *See People v. Hendrix*, 13 Cal.5th 933, 944 (2022).[1] This requires a showing of less than a preponderance of the evidence.

The reasons to apply this "undermining confidence" standard to all § 1473 claims are as follow:

- In 1989, the Innocent Project began using DNA to prove that innocent people were, in fact, getting convicted in numbers rarely thought possible. Since then, according to the National Registry of Exonerations, there have been 3,582 exonerations and 296 exonerations in California. No longer can we dispute that innocent people are wrongfully convicted even absent state misconduct.

- Continuing to incarcerate a person when we can show confidence in the conviction is undermined serves no one. It does not further the interests of finality or justice. This is true regardless of the *reason* we have lost confidence in the jury's verdict, whether it be due to false testimony, disputed science, or just new evidence developed after trial. If any of those bases undermine confidence in the outcome in the conviction, that conviction should not stand.

- This "sufficient to undermine confidence" standard will not result in automatic reversals. It is, for example, a harder standard to meet than when the prosecution commits misconduct by knowing they are putting on false testimony. *See Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) (discussing the different materiality standards).

- Indeed, a survey of other state laws surrounding "new evidence" claims, conducted in 2017 by the California Innocence Coalition, indicates four other states (Maryland, Massachusetts,

[1] This is in contrast with the easier-to-meet standard for federal constitutional violations shown on appeal, where reversal is required unless the state can show the error was harmless beyond a reasonable doubt. *See Id.* at 942.

Utah, and Wisconsin) already permit vacating a conviction upon a showing of *less* than a preponderance.

There is, therefore, no compelling reasons to have a harder-to-meet preponderance materiality standard for claims of new evidence or disputed science.

B. At the very least, the statute should ensure that the remaining remnants of the legislatively overruled "points unerringly to innocence" standard are replaced.

In a line of cases dating back to the 1940's, the California Supreme Court created a standard for vacating a conviction based on new evidence of actual innocence that requires that the new evidence "point unerringly to innocence" and "undermine the entire prosecution's case." *See In re Lawley*, 42 Cal.4th 1231, 1239 (2008) (citing decades-old precedent for this standard). This standard, therefore, dates back to a time when there was no proof—e.g. DNA evidence—that innocent people are in prison.

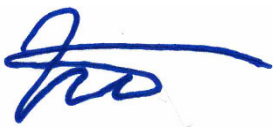
A survey of all fifty states conducted by innocence organizations in California revealed this to be the toughest standard to meet in the nation. It reflected a view that emphasized finality and doubted that innocent people could be convicted absent some separate misconduct or violation. *See, e.g., Herrera v. Collins*, 506 U.S. 390 (1992) (holding claims of actual innocence absent misconduct do not violate the Constitution); *see also Id.* at 429 (J. Scalia concurring) ("With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon").

In 2017, the Legislature effectively overruled the California Supreme Court's judicially created "unerring" standard by amending § 1473. It added a claim of new evidence that more probably than not affects the outcome.

While the Legislature adopted this standard to vacate a conviction for a person in custody, it has not yet addressed the remaining remnants of the "unerring" judicially created standard. This standard still explicitly exists in § 1473.6(a), has been interpreted to apply to § 1473.7(a)(2), is incorporated into § 3007.05(j)(1), and still is the standard for overcoming procedural barriers based on a showing of actual innocence.

The Legislature should now simply redefine "actual innocence" to be in line with §1473's new-evidence standard and remove the judicially created "unerring" standard in the remaining places it is applied. With this new-evidence standard already applying to substantive habeas relief, it is logical to apply it to *procedural* relief—as Jasmin Harris will discuss—and motion to vacate a conviction for people who are out of custody.

Sincerely,



Joseph Trigilio

Exhibit C

Jasmin Harris

Director of Policy, The Innocence Center

Jasmin Harris
Director of Policy, The Innocence Center (TIC)
Policy Advocate, California Innocence Coalition (CIC)

The increasing awareness of wrongful convictions and the impact of exonerations in the public consciousness marks a significant shift in how the public perceives justice. Despite this, the legal framework governing habeas relief, which allows petitioners to challenge their unlawful detention, is rooted in outdated statutes and case law that does not adequately address the complexities of modern-day exonerations.

In order to bring our criminal legal system into the modern day, it is imperative to expand access to post-conviction discovery and codify a fair standard in which petitioners can overcome procedural bars in habeas corpus relief when claiming innocence.

Background
Centurion Ministries, the pioneers of exoneration work, formed in 1983. The first Innocence Project in New York was formed in 1992. The first California innocence organization founded in 1999/2001.

As of August 29, 2024, The National Registry of Exonerations, has documented 3582 exonerations in the U.S. since 1989, with a steady increase each year.

Post-Conviction Discovery

Access to discovery is a critical tool for post-conviction review. Expanding post-conviction discovery eligibility would speed up the review process and reduce the number of years an innocent person spends wrongfully incarcerated.

Original discovery statute created by Prop 115 (1990). No post-conviction discovery included.

§1054.9 amended by AB 1391 (2002) Amended to allow discovery access to *only* death and life without parole (LWOP) sentences.

§1054.9 amended by AB 1987 (2018): Amended from just LWOP/death sentences to cases in which a defendant is convicted of a serious felony or a violent felony resulting in a sentence of 15 years or more could have access to their trial file if they're able to show a good faith effort in getting discovery before asking the prosecution. Practically, it was viewed as prospective only. Meaning, only people with sentences sentenced to 15 years or more after January 1, 2019, would have this access. This was not the intention of the sponsors for the statute.

§1054.9 amended by SB 651(2019) to a case in which a defendant is **or has ever been** convicted of a serious felony or a violent felony resulting in a sentence of 15 years or more could have access to their trial file if they're able to show a good faith effort in getting discovery before asking the prosecution. The bolded language was to ensure retroactivity.

Discussion on 2018 and 2019 Amendments
The California Innocence Coalition sponsored both AB 1987 and SB 651. The arbitrary 15-year sentence threshold was the result of a compromise—a necessary concession during policy negotiations. While the California District Attorneys Association initially pushed for a 25-year threshold, the CIC agreed to 15 years as a middle ground.

In evaluating the 15-year sentence threshold, we must also turn our attention to group exonerations, particularly in cases related to drug or gun crimes where sentences often fall below the 15-year mark. These cases highlight the need to broaden the criteria for post-conviction discovery, ensuring that all wrongfully convicted individuals have the opportunity for exoneration, regardless of the length of their sentence.

Solutions

- §1054.9 access to discovery must be expanded to all incarcerated people. We can look to Massachusetts and North Carolina.

- We must standardize the process by which one can access discovery without needing formal litigation or involving the courts.

Potential Concerns
Confidentiality

- The protections in 1054.2 would remain in place to ensure witnesses and victims are protected.

Floodgates

- There is no risk of the proverbial "opening the floodgates." The amount of habeas petitions filed has steadily decreased. See Judicial Council of California Report Chart at page 59.
- Conviction Integrity Units/post-conviction units in most counties now have dedicated teams to post-conviction tasks.
- Safeguards are in place
    - Petitioners must continue to show a good faith effort and that they are primed to file a habeas petition.
    - Because of the many current procedural bars, petitioners know they likely only have one chance.

Costs

- 1054.9 states that the costs of copying or examination should be borne or reimbursed by the petitioner, which means the costs to the agencies are non-existent.
- Judicial efficiency will improve by moving to an informal process
- It costs the state $132, 860/year to incarcerate someone. One exoneration results in savings for the state.

Procedural Bars in Habeas Petitions

Discussion

Innocent incarcerated people (petitioners) file writ of habeas corpus petitions to raise claims of innocence in hopes that the court agrees with the merits in their case and reverses the conviction. *In re Clark* (1995) 5 Cal.4th 750 establishes that all habeas corpus petitions must be filed in a timely manner and cannot be successive. If a petitioner files an untimely or successive petition, it can be denied for procedural reasons.

Generally, Clark says a petitioner is expected to include all habeas claims in their first habeas petition, and habeas petitions should be filed as promptly as the circumstances of the case allow.

There are many reasons why a petitioner cannot file a timely petition and may have to file a successive petition: incarcerated people have limited access to discovery as discussed above; unless they are sentenced to death, they do not have a right to council; new evidence can become available at any time; some petitioners must rely on overburdened innocence organizations to assist them.

If a petitioner files a successive or untimely petition, the California Supreme Court says that a procedural bar can be overcome upon a showing of actual innocence, defined as newly discovered evidence that points unerringly to innocence and undermines the entire prosecution's case. *See In re Reno*, 55 Cal. 4th 428, 474 (2012).

This standard, as mentioned by my co-presenter, Joe Trigilio, is impossibly high and causes undue burden on wrongfully convicted incarcerated people.

Solutions

- The "points unerringly" standard is ripe for reform. As Joe suggests, the definition of "actual innocence" should be explicitly codified and reflect the Legislature's view dating back to 2017 that a conviction be vacated if new evidence can show by a preponderance that the outcome of trial would have been different.

- We propose creating (g) in §1473 to read: "In order to satisfy the actual innocence exception to dismissing a claim based on a timeliness or successiveness, a habeas petitioner must establish that in light of all of the evidence now before the court, it is more likely than not the outcome of the case would have been different."

Potential Concerns

Floodgates

- The process by which a court evaluates if a petitioner has overcome procedural bars already exists. Courts are engaging in this practice. We seek to articulate and codify the standard by which the court can evaluate if the procedural bar is overcome.

- Again, there is no risk of the proverbial "opening the floodgates." The amount of habeas petitions filed has steadily decreased. See Judicial Council of California Report Chart at page 59.

Exhibit D

Nisha Shah

Deputy Director of Litigation

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August 29, 2024

Comments on Penal Code § 1054.9
California Commission on Revision of the Penal Code
Hearing Date: September 6, 2024

Dear Committee Members:

Thank you for inviting me to provide information about Penal Code section 1054.9, and the ways in which its language could be more uniform and help the courts identify wrongfully-convicted people. My office, the Habeas Corpus Resource Center, represents people sentenced to death in counties throughout the state in their post-conviction proceedings in state and federal courts. One aspect of our litigation on behalf of our clients is engaging in discovery pursuant to Penal Code section 1054.9.

Penal Code section 1054.9 is the statute governing post-conviction discovery. It is the mechanism through which many wrongfully incarcerated people first discover exculpatory evidence that was not disclosed to them previously; sometimes, this is part of the "new evidence" a petitioner presents to a court under Penal Code section 1473. My co-panelist Jasmin Harris will touch on Penal Code section 1054.9's history, and my co-panelist Joe Trigilio will focus on Penal Code section 1473. My comments are limited to modest changes the Legislature could make to Penal Code section 1054.9 to streamline litigation and, hopefully, help wrongfully-convicted people litigate their cases more efficiently and quickly.

Neither Penal Code section 1054.9, nor any other statute, requires the prosecution to maintain its entire file in an individual cases. The same is true for law enforcement agencies. As such, individual capital defendants routinely move for preservation orders in their cases while they are awaiting appointment of habeas corpus counsel. At present, roughly 25-30 years elapse between the date of a death judgment and the time the state appoints habeas corpus counsel for a capitally-sentenced person, making preservation orders a necessity in each case. Preservation litigation wastes valuable court time that could be saved simply by aligning subdivision (f) with subdivision (g), and creating parity between the prosecution and defense. Preservation of records in cases resulting in felony convictions is in everyone's interests: petitioners will have access to material;

prosecution agencies will have material on which to rely in defending the conviction; and courts will have a clear picture of what was known at the time of trial and what was not when evaluating "new evidence" claims or claims involving suppression of evidence under *Brady v. Maryland* (1963) 373 U.S. 83.

That necessity of codifying such a requirement – perhaps with a sanction imposed when records are destroyed – has been made plain recently in Alameda County. As early as 2004, my office obtained and filed evidence of systemic patterns of discrimination in jury selection by the Alameda County District Attorney's Office in Fred Freeman's case. Deputy District Attorney Jack Quatman testified in 2005: "It was standard practice [in the Alameda County District Attorney's Office] to exclude Jewish jurors in death cases."[1] Alameda County Assistant District Attorney James Anderson explained the practice of excluding both Black and Jewish people from jurors as "not because of prejudice," but rather an "axiom" and "common sense."[2] HCRC's litigation on behalf of its capitally-sentenced client Mr. Freeman was unsuccessful at that time, but two decades later, in April 2024, a federal district court judge ordered the Alameda County District Attorney to review all capital convictions in the county given "strong evidence that . . . prosecutors from the office were engaged in a pattern of serious misconduct, automatically excluding Jewish and African American jurors in death penalty cases."[3] Following that order, the Attorney General stipulated that Curtis Ervin, a Black capital defendant who ADA Anderson prosecuted, was entitled to a full reversal of his conviction because ADA Anderson violated *Batson*[4] in Mr. Ervin's case, striking nine of eleven Black prospective jurors and one Jewish juror.[5]

Importantly, in the two decades between the 2004-05 *Freeman* litigation and today, critical notes suddenly went missing. "Of the 56 Alameda trials that led to death sentences since 1978, [Alameda County District Attorney] Price said 40 are missing jury selection documents."[6] The District Attorney has acknowledged that this suggests that once the practice of excluding Black people and Jewish people from juries was exposed in 2005, "there may well have been an effort [by district attorneys] to sanitize the files."[7] That the current District Attorney admits that members of that office likely intentionally destroyed notes reflecting their racist and bigoted jury selection practices is not just appalling; it is reflets the willful destruction of evidence that could have demonstrated the impacted defendants were wrongfully convicted and entitled to a new trial. Instead, in roughly 40 cases where the State sought and obtained the most severe sanction our state

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[1] Dean E. Murphy, *Case Stirs Fight on Jews, Juries and Execution*, N.Y. Times, Mar. 16, 2005, https://www.nytimes.com/2005/03/16/us/case-stirs-fight-on-jews-juries-and-execution.html#:~:text=%22It%20was%20standard%20practice%20to,has%20not%20been%20an%20issue.
[2] *Id*.
[3] *Dykes v. Martel*, No. 11-cv-04454-SI (VC), Order Lifting Confidentiality of Jury Selection Files (ECF Dkt.. 166), (N.D. Cal. Apr. 22, 2024).
[4] *Batson v. Kentucky* (1986) 476 U.S. 79 (holding the state may not exercise peremptory challenges against prospective jurors on the basis of race).
[5] Tim Fang, *Alameda DA says 1986 death row case overturned due to prosecutorial misconduct*, CBS News, Aug. 7, 2024, https://www.cbsnews.com/sanfrancisco/news/alameda-da-1986-death-row-case-overturned-prosecutorial-misconduct-curtis-lee-ervin/v.
[6] Annelise Finney, *Alameda County DA Seeks New Sentences for 3 People on Death Row Amid Misconduct, Record Destruction Claims*, KQED, July 17, 2024, https://www.kqed.org/news/11995937/alameda-county-da-seeks-new-sentences-for-3-people-on-death-row-amid-misconduct-record-destruction-claims.
[7] *Id*.

imposes, and in which there is good reason to believe the prosecutors engaging in discriminatory behavior, no one but the prosecutor who wrote the notes and whoever destroyed them will know ever what they said.

The Alameda County pattern and practice of exercising peremptory challenges in a discriminatory manner brings to light another shortcoming of Penal Code section 1054.9. Section 1054.9 focuses on what it defines as discovery materials: "materials in the possession of the prosecution and law enforcement authorities to which the same defendant *would have been entitled at the time of trial*."[8] This language unnecessarily limits discovery. A prosecutor's jury selection notes are often shielded – or the prosecution attempts to shield them – from discovery using the work product privilege.[9] The Fourth District Court of Appeal has recently held that a defendant is entitled to discovery of jury selection notes whenever he can make out a prima facie showing of racial bias in the prosecutor's exercise of peremptory strikes at trial.[10] This approach, while an important step in the right direction, is still too narrow – sometimes, as is evident in Alameda County, the prosecutor's jury selection notes constitute the very evidence that establishes a prima facie showing of racial bias. And what is the need or justification for shielding a prosecutor's work-product after the prosecutor has obtained the conviction and sentence, it is final, and the jury has been discharged? It is difficult to understand why the prosecution needs to keep their notes about case strategy secret after they've obtained the conviction and sentence; much of their case strategy is now obvious from the transcript, and, if the conviction or sentence were reversed, it is unlikely the strategy would be identical on retrial. The law seems designed to keep hidden evidence of racism and bias that we know exists and to force petitioners to make some sort of threshold factual showing before obtaining evidence that could, in and of itself, establish the prosecution's discriminatory practices – evidence the prosecution otherwise has every incentive to keep hidden.

Section 1054.9's limitation of post-conviction discovery to that to which a defendant would have been entitled to at trial presents additional issues. It defines as discovery materials: "materials in the possession of the prosecution and law enforcement authorities to which the same defendant *would have been entitled at the time of trial*."[11] But exculpatory evidence can be generated post-trial by the prosecuting agency, law enforcement, or the Attorney General's Office. As late as last year, the Attorney General maintained that "he does not have a duty to disclose evidence under *Brady* in the postconviction context."[12] Although the California Supreme Court held otherwise, and imposed "a continuing duty of disclosure on the government,"[13] the Court provided no avenue for an incarcerated person to obtain such relevant information. That is, the caselaw relies on the good faith of a prosecutorial agency that may have suppressed exculpatory or otherwise relevant evidence to disclose it at a later date. Section 1054.9's express exclusion of material generated

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[8] Pen. Code, § 1054.9, subd. (c).

[9] See Pen. Code, § 1054.6 [specifying that neither party is required to disclose work product]; see also, e.g., *People v. Superior Court (Jones*) (2021) 12 Cal.5th 348 (district attorney arguing jury selection notes are entitled to absolute work-product protection, and court rejecting that argument and noting that in that case there was an implied waiver).

[10] *Box v. Superior Court* (2022) 87 Cal.App.5th 60. The California Supreme Court has not reached the issue and issued a much more narrow opinion on the same issue, finding that work-product privilege was waived based on the specific fats of the case. (*Jones, supra*, 12 Cal.5th 348.)

[11] Pen. Code, § 1054.9, subd. (c), italics added.

[12] *In re Jasmine Jenkins* (2023) 14 Cal.5th 493, 507.

[13] *Id*. at p. 508.

post-trial from its definition of "discovery materials" serves to encourage prosecutors and Attorneys General to suppress material generated post-trial. On the other hand, if the statutory language were expanded, and explicitly codified an ongoing duty of disclosure (as other states do[14]), that would help ensure relevant discovery continues to be disclosed. Moreover, if the statute encouraged or mandated "open file" discovery practices, a defendant would not have to wait for a prosecutor to identify material as exculpatory and decide he had an obligation to provide it. Rather, a defendant would get that material (along with a number of other documents) in 1054.9 discovery.

In sum, two minor amendments to section 1054.9 would have a significant impact: (1) adding a preservation requirement for the prosecution and law enforcement agencies; and (2) expanding the definition of discovery materials to explicitly include jury selection notes, and any other relevant categories of material that may have been shielded from disclosure at the time of trial but for which those protections no longer need to be imposed, as well as potentially exculpatory information, accounts of witness interviews, and information the prosecutor knows or reasonably should know tends to negate guilt, mitigate the offense, or mitigate the sentence. Requiring county district attorneys and the Attorney General to engage in "open file discovery" – i.e., discovery where they open up their files and allow petitioners to review and copy material contained therein – is likely the simplest path to accomplishing the latter goal.

Thank you for your consideration of my comments. I look forward to speaking with you.

Sincerely,

Nisha K. Shah
Deputy Director of Litigation

[14] Texas, for example, has codified an ongoing duty of disclosure for similar items. (Texas Code Crim. Proc. § 39.14, subd. (k) ["If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court."].)