
California Dreaming? The Golden State’s Restless Approach to Newly Discovered Evidence of Innocence

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INTRODUCTION

The emergence of DNA testing has jolted the criminal justice system in a fashion akin to a California-style earthquake, resulting in the post-conviction exoneration of 194 innocent defendants nationwide since 1989.¹ In response to this new technology, forty-one state legislatures have passed laws allowing inmates to request DNA testing and gain access to the biological evidence from their cases.² Enacted in 2000, California's post-conviction DNA testing statute contains many praiseworthy features, including the absence of a statute of limitations period³ and standards of relief seemingly less restrictive than in many other jurisdictions.⁴ Moreover, California offers statutory safeguards for the retention of biological evidence after trial; pursuant to the state penal code, the government must preserve all such evidence for the duration of a defendant's incarceration unless it gives the inmate notice of its intent to destroy the items and an opportunity to respond.⁵

¹ For a current tally of DNA exonerations, see Innocence Project, <http://www.innocenceproject.org> (last visited Jan. 30, 2007).

² E-mail from Rebecca Brown, Policy Analyst, Innocence Project, to policy@innocencenetwork.org (Nov. 8, 2006, 04:00:00 EST) (on file with author) (indicating that only nine states currently lack post-conviction DNA testing statutes: Alabama, Alaska, Massachusetts, Mississippi, Oklahoma, South Carolina, South Dakota, Vermont, and Wyoming).

³ CAL. PENAL CODE § 1405(a) (West 2006) ("A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing.").

⁴ See Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 383 (2002) ("[T]o obtain testing under the California statute, a petitioner must meet two substantive pleading requirements: he must explain 'why the identity of the perpetrator was, or should have been, a significant issue in the case' and why, 'in light of all the evidence, how the requested DNA testing would raise a reasonable probability that [his] verdict or sentence would be more favorable if the results of the DNA testing had been available at the time of the conviction.' This showing is certainly far lower than the requirements of the Maine and Michigan statutes, which require, inter alia, a demonstration that 'only the perpetrator of the crime' could be the source of the biological material."). Even so, as Swedlow notes, the California statute is confusing in some respects: "One can imagine a factual scenario where the petitioner could meet the California 'reasonable probability' standard but not the more stringent 'only the perpetrator' standard, which begs the question of the type of demonstration a California petitioner be required to make after testing excludes him? Certainly, the State would be expected to argue that the petitioner prove something more than a 'reasonable probability.'" *Id.*

⁵ See CAL. PENAL CODE § 1417.9 (West 2006).

Even so, only an estimated ten to twenty percent of criminal cases in the United States have any biological evidence suitable for DNA testing.⁶ This statistic suggests that documented DNA exonerations likely represent a mere fraction of the total number of innocent prisoners who are currently incarcerated.⁷ In cases without biological evidence, prisoners maintaining their innocence typically must put forth non-scientific “newly discovered evidence,” such as recantations by trial witnesses, disclosures by previously unknown witnesses, or confessions by the true perpetrator.⁸ To be sure, defendants face an uphill battle in non-DNA cases due to the inherent subjectivity in assessing most forms of new evidence and the lack of a means to demonstrate innocence to a scientific certainty.⁹ This intrinsic difficulty is aggravated by the fact that inmates often must resort to burdensome state court procedures that ultimately fail to provide potentially innocent defendants with adequate access to the courts.¹⁰

⁶ See Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656 n.5 (2005); see also *id.* at 656-57 (“Even where biological evidence conducive to a DNA test is present at the outset of a particular case, the evidence is often lost, destroyed, or degraded over time.”); Ted S. Reed, *Freeing the Innocent: A Proposed Forensic Evidence Retention Statute to Optimize Utah’s Post-Conviction DNA Testing Act for Claims of Actual Innocence*, 2004 UTAH L. REV. 877, 882-84 (discussing problems with evidence destruction in Utah); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 346 (2006) (“The death penalty exonerations have established that DNA identifies only a small subset of people who never should have been convicted of any crime or sentenced to death. But a mere 12% of the 123 death penalty exonerations identified by the Death Penalty Information Center were based on DNA evidence.”).

⁷ For development of my general thesis regarding the state court treatment of newly discovered non-DNA evidence in another article, see generally Medwed, *supra* note 6. I hope to apply my theories specifically to California in this paper. See also Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 533-35 (2005) (finding that between 1989 and 2003, courts exonerated 196 defendants in cases that lacked DNA testing, not counting approximately 135 innocent defendants falsely implicated by law enforcement officers in Rampart Scandal in Los Angeles and in Tulia, Texas); Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1328-29 (2000) (“[A]ssuming that even a small fraction — say five percent — of the acquitted and dismissed defendants are factually innocent, the numbers are impressive: it would mean that nationwide, well over ten thousand innocent defendants are charged each year, a rate of more than two hundred people per week.”).

⁸ See Medwed, *supra* note 6, at 658 nn.12-13.

⁹ *Id.* at 658 n.14.

¹⁰ See also Stevenson, *supra* note 6, at 339 (“There is growing evidence that the dramatic rise in the number of people being sent to prison has also resulted in an

California has a somewhat unique approach to newly discovered non-DNA evidence claims. That is, California is one of only twelve states whose primary post-conviction remedy is in the nature of habeas corpus,¹¹ a post-conviction remedy that historically did not count newly discovered evidence among its causes of action.¹² Although newly discovered evidence is now recognized as a ground for relief under California's habeas corpus remedy, obtaining such relief is difficult in practice given the existence of onerous evidentiary, legal, and procedural requirements.¹³ Moreover, the state's apparent generosity in allowing petitioners to file their habeas corpus claims in a range of courts is undermined by the reality that appellate review of the decisions on these petitions is extremely circumscribed.¹⁴

Along with habeas corpus, California offers other potential avenues for litigating claims of innocence predicated on new evidence — including ordinary new trial motions¹⁵ and the common law writ of error coram nobis¹⁶ — that boast procedural and substantive obstacles

extraordinary increase in the number of wrongful convictions, illegal sentences, and unjust imprisonments. Rather than expand and facilitate increased review of larger numbers of prisoner appeals, lawmakers and state and federal courts have sought to dismantle collateral appeal mechanisms, bar substantive remedies for constitutional violations, and restrict review of federal habeas corpus applications.”); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem*, 2006 WIS. L. REV. 739, 810 n.451 (“Once convicted, procedural rules frequently bar defendants from litigating certain issues and may even prevent them from establishing their innocence.”).

¹¹ See I DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF: WITH FORMS § 3-2, at 188-89 (2001) [hereinafter WILKES, REMEDIES AND RELIEF].

¹² See, e.g., LARRY W. YACKLE, POSTCONVICTION REMEDIES § 3 (1981) (“The writ in theory has nothing to do with the prisoner’s guilt or innocence but is concerned only with the process employed to justify detention under attack.”).

¹³ See, e.g., *In re Clark*, 855 P.2d 729, 739 (Cal. 1993) (holding that conviction may only be attacked collaterally on grounds of newly discovered evidence if new evidence creates fundamental doubt about reliability and accuracy of proceedings); *In re Weber*, 523 P.2d 229, 243 (Cal. 1974) (holding that newly discovered evidence fails to warrant habeas relief unless it undermines entire structure of prosecution’s case, and such evidence undermines prosecution’s case only if it is conclusive and unerringly points to innocence).

¹⁴ California permits state petitions for writs of habeas corpus to be filed originally in a variety of courts: the superior court, the state court of appeal, or the state supreme court. CAL. PENAL CODE § 1508(a)-(c) (West 2006); see also *In re Reed*, 663 P.2d 216, 217 n.2 (Cal. 1983) (noting that statutory law in California provides no appeal from denial of habeas corpus petition by superior court, and that proper remedy would be to file new habeas petition in court of appeal).

¹⁵ See CAL. PENAL CODE § 1181(8) (West 2006).

¹⁶ See generally Morgan Prickett, *The Writ of Error Coram Nobis in California*, 30 SANTA CLARA L. REV. 1 (1990) (discussing obscure but theoretically potent writ of

in their own right.¹⁷ The presence of high hurdles for proving innocence through newly discovered evidence in California derives, in part, from the state courts' historic skepticism of the validity of such evidence, and the bulk of other states share this cynical view.¹⁸ Still, the lessons learned from the DNA revolution indicate that wrongful convictions occur with greater frequency than previously imagined, and suggest that courts should put aside their traditional wariness and display greater openness to the potential legitimacy of innocence claims, whether based on scientific or non-scientific evidence. After all, justice for an innocent prisoner should not depend on the off chance that the actual perpetrator left biological evidence at the crime scene that was found by the investigating officers and properly inventoried and preserved over time.¹⁹

The treatment of non-scientific newly discovered evidence of innocence is an issue of critical importance in California. The state's criminal justice system has recently faced attack for its perceived propensity to convict the innocent at a startling rate.²⁰ What is more,

error coram nobis in California).

¹⁷ See, e.g., *People v. Beyea*, 113 Cal. Rptr. 254, 271 (Ct. App. 1974) (listing requirements for granting new trial based on newly discovered evidence: "1) that the evidence, and not merely its materiality, is newly discovered; 2) that the evidence is not merely cumulative; 3) that it would render a different result probable on retrial of the cause; 4) that the party could not with reasonable diligence have discovered and produced it at trial; and 5) that these facts have been shown by the best evidence of which the case admits"); *Prickett*, *supra* note 16, at 24 ("Issuance of the writ [of error coram nobis] will be 'most rare' and confined to a 'very limited class of cases.'") (internal citations omitted).

¹⁸ See, e.g., *People v. Sutton*, 15 P. 86, 88 (Cal. 1887) (mentioning that claims of newly discovered evidence warranting new trial "are to be regarded with distrust and disfavor"); *Sanders v. State*, 370 N.E.2d 966, 968 (Ind. Ct. App. 1977) ("A motion for a new trial on the basis of newly discovered evidence should be received with great caution, and the alleged new evidence should be carefully scrutinized."); see also *Medwed*, *supra* note 6, at 664-65 ("[S]tate courts have traditionally viewed newly discovered evidence claims with disdain, fearing the impact of such claims on the finality of judgments and the historic role of the jury as the true arbiter of fact, and harboring doubts about the underlying validity of new evidence.").

¹⁹ See *Medwed*, *supra* note 6, at 660 ("Little-altered in decades beyond the trend toward recognizing the benefits of DNA testing, the structure of most state [post-conviction] procedures means that a prisoner's quest for justice may turn on the fortuity that a biological sample was left at the crime scene and preserved over time.").

²⁰ See Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 78, 84 ("Few criminal justice experts doubt that California . . . has put more innocent people behind bars than any other state. In the past 15 years, with surprisingly little fanfare, at least 200 Californians have been freed after courts found they were unjustly convicted — nearly twice the number of known exonerations as in Illinois and Texas combined."). For information on the Rampart police scandal in Los Angeles, which resulted in the

California annually vies with Texas for the dubious honor of leading the nation in the size of its state prison population;²¹ some observers have speculated that California's penal system comprises the third largest in the world.²² Similarly, the state's death row is the largest in the country,²³ and defendants subject to capital charges in California have struggled to acquire competent representation and have experienced delays in the resolution of their cases.²⁴ A 2005 study

dismissal of at least 100 convictions in 1999 and 2000, see generally Carol A. Chase, *Rampart: A Crying Need to Restore Police Accountability*, 34 LOY. L.A. L. REV. 767 (2001); Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545 (2001); Stanley A. Goldman, *Running from Rampart*, 34 LOY. L.A. L. REV. 777 (2001); Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787 (2001); Gary C. Williams, *Incubating Monsters? Prosecutorial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 829 (2001).

²¹ See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 2004, at 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf> (noting that California had second highest number of prisoners among 50 states at end of 2004 with 166,556 inmates, approximately 1500 fewer prisoners than Texas). Moreover, California's administration of its prison system has received much criticism in recent years. See Jennifer Steinhauer, *Bulging, Troubled Prisons Push California to Seek New Approach*, N.Y. TIMES, Dec. 11, 2006, at A18 ("By nearly every measure, the California prison system is the most troubled in the nation. Overcrowding, inmate violence, recidivism, parole absconders and the prison medical system are among its many festering problems.").

²² See Martin, *supra* note 20, at 84.

²³ See THOMAS P. BONCZAR & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2004, at 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf> (noting that California had largest number of prisoners on death row of any state as of end of 2004, totaling 637). In December 2005, Stanley "Tookie" Williams was executed, representing the twelfth prisoner put to death since the reinstatement of the death penalty in California in 1978. See Gordon Smith, "You Doing That Right?" *Williams Speaks to Attendant as Witnesses Watch Execution Unfold Like a Surreal Play*, SAN DIEGO UNION-TRIB., Dec. 14, 2005, at A3. Despite concerns raised about the propriety of the death penalty in the aftermath of the Williams execution, the state proceeded to execute Clarence Ray Allen, a 76-year-old inmate, in 2006. See Randal C. Archibold, *California Executes 76-Year-Old in Murders of 3 People*, N.Y. TIMES, Jan. 18, 2006, at A16. In the time since the Allen execution, however, a federal magistrate judge has issued an order halting the use of the death penalty in California until the state revises its lethal injection procedure given the risk that this method could cause an agonizing and painful death. See Denny Walsh, *Deal on Execution Review: Inmate's Lawyer, Media Agree State Can Develop New Protocol in Secrecy*, SACRAMENTO BEE, Feb. 24, 2007, at A3.

²⁴ See, e.g., Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 SANTA CLARA L. REV. 101, 105 (2003) ("People sentenced to death in California have to wait four to six years before counsel is appointed to represent them. In all, condemned people in California have to wait almost ten years before their direct appeals and post conviction

conducted by Glenn Pierce and Michael Radelet demonstrates also that there are vast racial and regional disparities in capital sentencing within the state.²⁵

At present, there do not appear to be sufficient mechanisms to allow potentially innocent California inmates to win their freedom, let alone protections to prevent their initial incarceration. Federal habeas corpus has effectively vanished as a viable post-conviction remedy for potentially innocent state prisoners over the past decade.²⁶ In addition, executive clemency is a rarity on the national level,²⁷ even more so in California where the gubernatorial exercise of the clemency power has diminished considerably.²⁸ Given the rash of wrongful convictions in California and the absence of significant alternatives for prisoners to pursue in alleging innocence, submitting newly discovered evidence in state court may theoretically constitute the best opportunity for innocent prisoners languishing in state correctional facilities.

Part I of this Article explores the full range of possible remedies concerning newly discovered evidence claims in California state courts. Next, Part II describes the flaws with the current approach. Part III then proposes several reforms designed to achieve greater

petitions are heard by the California Supreme Court.”).

²⁵ See generally Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1 (2005) (discussing differences in sentencing in capital cases throughout California and pinpointing race and region as significant factors in outcome of many sentencing decisions).

²⁶ See Medwed, *supra* note 6, at 717 n.380; Stevenson, *supra* note 6, at 349-53. For an interesting recent discussion of the historical evolution (and devolution) of federal habeas corpus jurisprudence, see generally Steven Semeraro, *Two Theories of Habeas Corpus*, 71 BROOK. L. REV. 1233 (2006). In addition, for an insightful description of the difficulties in litigating habeas corpus petitions over the past decade from the perspective of an inmate, see generally Thomas C. O’Byrant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299 (2006).

²⁷ Medwed, *supra* note 6, at 717 nn.382-84.

²⁸ See Henry Weinstein & Michael Muskal, *Schwarzenegger Rejects Williams’ Bid for Clemency*, L.A. TIMES, Dec. 12, 2005, available at <http://www.commondreams.org/headlines05/1212-10.htm> (claiming that clemency has not been granted since 1967 when Governor Ronald Reagan spared mentally ill man convicted of murder); see also *Governor Hands Out 3 Pardons*, LONG BEACH PRESS-TELEGRAM, Dec. 23, 2004, at A17, available at 2004 WLNR 14690376 (asserting that number of inmates pardoned by California governors has declined steadily in recent years and noting that only three have been pardoned since 1998). For a discussion of some of the problems with California’s parole system, see Daniel Weiss, Note, *California’s Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1576-77 (2005).

access to the courts and thereby better effectuate the goal of freeing the wrongfully convicted in California.

I. NEWLY DISCOVERED EVIDENCE IN CALIFORNIA:
AVAILABLE POST-TRIAL REMEDIES

For more than a century, the California state courts have warned that newly discovered evidence claims should be “regarded with distrust and disfavor.”²⁹ Among the reasons mentioned by California judges to justify this skeptical vision of new evidence are the need for finality in litigation and the desire to spur litigants to make extensive efforts to produce all evidence at trial.³⁰ The general skepticism toward newly discovered evidence has also infiltrated the precise requirements governing the treatment of these claims in the state. To elaborate, inmates seeking to put forth non-scientific newly discovered evidence of innocence in California — whether through a direct remedy (motion for a new trial) or a collateral remedy (petition under the state habeas corpus statute or request for the common law writ of error coram nobis)³¹ — normally encounter something more troubling than ethereal “distrust and disfavor”: high procedural, evidentiary, and legal bars.³² Motions for a new trial, in particular, are subject to severe time restrictions and deferential standards of appellate review.

A. *Motions for a New Trial*

In the late seventeenth century, England started to allow new trials in criminal cases.³³ The First Congress of the United States recognized this remedy, sanctioning new trials for the “reasons for which new trials have usually been granted in courts of law”;³⁴ in due course, individual states embraced this practice as well.³⁵ Motions for a new

²⁹ *People v. Sutton*, 15 P. 86, 88 (Cal. 1888).

³⁰ *See, e.g., People v. Gaines*, 22 Cal. Rptr. 556, 558-59 (Ct. App. 1962) (“[T]he claim of newly discovered evidence as a ground for a new trial is uniformly ‘looked upon with disfavor,’ for there must be an end to litigation.”) (internal citations omitted); 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 506 (2006) (“It has been observed that the claim of newly discovered evidence as a ground for a new trial is uniformly looked on by the courts with distrust and disfavor . . .”).

³¹ *See Medwed, supra* note 6, at 665 nn.65-68 (discussing differences between direct and collateral remedies).

³² *See generally id.* at 665 n.62 (describing procedural barriers to litigating newly discovered evidence claims in state courts).

³³ *Id.* at 666 n.71 (citing *Herrera v. Collins*, 506 U.S. 390, 408 (1993)).

³⁴ *Id.* at 666 n.72 (citing *Herrera v. Collins*, 506 U.S. 390, 408 (1993)).

³⁵ *Id.* at 666.

trial have traditionally been filed with the judge who presided over the case originally.³⁶ The authority of a trial judge to grant a new trial stems from the notion that individual litigants deserve a means of redress to correct genuine miscarriages of justice.³⁷ In line with this equitable concept, newly discovered evidence gradually surfaced across the country as one of the bases for new trial relief.³⁸

California currently permits defendants to move for a new trial on a variety of grounds at the close of a criminal matter, namely, after the rendering of the verdict but prior to the entry of judgment.³⁹ Indeed, a motion made after judgment is not considered timely.⁴⁰ The motion ought to be first raised orally in court, followed by a written motion containing supporting affidavits or declarations of the witnesses.⁴¹ Failure to comply with these requirements, including a party's neglect to raise the claim initially in court by oral motion, may constitute a waiver of the right to utilize this remedy.⁴²

The trial court itself decides the new trial motion, with the singular possibility for reassignment to another California court when "necessity demands."⁴³ The granting of a new trial motion essentially transforms the earlier proceeding into a nullity; the parties assume the same posture as though no trial had occurred.⁴⁴ The new trial, in turn, is defined in the California Penal Code as "a reexamination of the issue in the same [c]ourt, before another jury, after a verdict has been

³⁶ *Id.* at 666 n.74 (describing how colonies followed English common law system for new trials and noting how "the trial judge (at least in most cases) sat as the court and not as a mere commissioner; and he it was to whom the application for a new trial was made" (citing William Renwick Riddell, *New Trial in Present Practice*, 27 YALE L.J. 353, 360 (1917))). Riddell also observed that "[a]t the present time in practically every state of the Union, the trial judge has power to grant a new trial." William Renwick Riddell, *New Trial in Present Practice*, 27 YALE L.J. 353, 360 (1917).

³⁷ See Medwed, *supra* note 6, at 666.

³⁸ *Id.*

³⁹ See CAL. PENAL CODE § 1182 (West 2006) ("The application for a new trial must be made and determined before judgment . . .").

⁴⁰ LAURIE L. LEVENSON, CALIFORNIA CRIMINAL PROCEDURE § 28:7 (2006).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* § 28:8; see also *id.* (citing *People v. Moreda*, 13 Cal. Rptr. 3d 154, 159 (Ct. App. 2004); *People v. Ross*, 253 Cal. Rptr 178, 181 (Ct. App. 1988)). Although California courts have held that it is preferable to direct the new trial motion to the original trial judge — because of that person's familiarity with the case and the notion that justice will be better served by such a procedure — it should be noted that there is no statutory bar to directing the motion to another judge. See, e.g., 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 519 (2006).

⁴⁴ LEVENSON, *supra* note 40, § 28:1.

given.”⁴⁵ The evidence at this new proceeding must be produced afresh, albeit in the same court, and the parties are banned from using or referring to the former verdict.⁴⁶ A trial court’s denial of a new trial motion generally terminates its jurisdiction to reconsider the motion,⁴⁷ and California case law further suggests that this barrier applies to second or successive motions for a new trial together with requests for reconsideration.⁴⁸

The California Penal Code lists nine statutory grounds, among them newly discovered evidence, upon which a defendant may base a new trial motion.⁴⁹ A defendant may file a new trial motion “[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.”⁵⁰ As in the case of other types of new trial motions, the defendant must orally announce her claim before the entry of judgment and later submit a written motion, accompanied by affidavits, to buttress these oral assertions.⁵¹ In regard to newly discovered evidence claims, the legislature has provided that “if time is required by the defendant to procure [the affidavits of the witnesses by whom such evidence is expected to be given], the court may postpone

⁴⁵ CAL. PENAL CODE § 1179 (West 2006).

⁴⁶ *Id.* § 1180 (West 2006).

⁴⁷ *See* LEVENSON, *supra* note 40, § 28:10.

⁴⁸ *See id.* (“Considerations of fairness and judicial economy weigh heavily against allowing a defendant to raise ‘interminable’ new trial motions.”). Only two narrow exceptions apply to the rule preventing successive new trial motions: claims based on (1) the ineffective assistance of the counsel who submitted the first motion or (2) a change in the state of the law before judgment that would make reversal on appeal inevitable. *See id.* § 28:11; *see also* 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 537 (2006) (suggesting division of authority in trial court’s ability to entertain second new trial motion after one has been denied).

⁴⁹ CAL. PENAL CODE § 1181 (West 2006). The California courts have also recognized a handful of non-statutory grounds for submitting a new trial motion. *See* LEVENSON, *supra* note 40, § 28:6.

⁵⁰ CAL. PENAL CODE § 1181(8).

⁵¹ *Id.*; *see also* 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 526 (2006) (“In addition to affidavits of prospective witnesses, the motion should be supported by an affidavit of the defendant himself or herself unless a valid and sufficient reason for the omission is shown, and this affidavit is required to show that the defendant did not know of the existence of the evidence at the time of trial, or that the defendant used due diligence to discover it and could not discover it by the exercise of reasonable diligence.”). Case law suggests that a new trial motion based on newly discovered evidence must contain an affidavit from the witness whom the defendant wishes to put forth to develop the new evidence. *See, e.g.,* *People v. Beeler*, 891 P.2d 153, 185 (Cal. 1995). Without such an affidavit, the California Supreme Court has found insufficient legal grounds for ordering a new trial. *Id.*

the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.”⁵² A trial court’s ruling on a newly discovered evidence claim may depend solely on its interpretation of the motion and affidavits, given that the state penal code does not obligate judges to hold full-fledged evidentiary hearings and receive testimony from the affiants on new trial motions.⁵³ Courts, however, do not foreclose defense attorneys from attempting to develop their newly discovered evidence claims through live testimony instead of affidavits.⁵⁴

As noted above, early California case law exhibited disdain for newly discovered evidence as a matter of policy,⁵⁵ and this aversion

⁵² CAL. PENAL CODE § 1181(8); *see also* *People v. Sarazzawski*, 161 P.2d 934, 937 (Cal. 1945) (noting it is not uncommon for new trial motion to be made on one date and argument on that motion held at later date).

⁵³ *See, e.g., People v. Fairchild*, 25 Cal. Rptr. 717, 717-18 (Ct. App. 1962) (finding no abuse of discretion where trial court refused to order new trial on ground of newly discovered evidence based on affidavit of co-defendant that defendant was in drunken stupor and did not participate in robbery); *People v. King*, 231 P.2d 156, 163 (Cal. Ct. App. 1951) (“[W]ise discretion is vested in the trial court in determining the weight to be given to the statements contained in affidavits upon motion for new trial [and that] [t]his discretion is to be exercised in determining the diligence shown, the truth of the matters stated, and the materiality and probability of the effect of them, if believed to be true . . . [and] a trial court is justified in regarding with distrust affidavit[s] with newly discovered evidence in motions for new trial.”) (internal citations omitted).

⁵⁴ *See, e.g., People v. Trujillo*, 67 Cal. App. 3d 547, 557 (Ct. App. 1977) (“A new trial motion on the basis of newly discovered evidence need only be supported by declarations or affidavits, and it is not necessary to produce the witness at the hearing. . . . A decision not to produce the witness is a matter of trial tactics . . .”).

⁵⁵ *See supra* notes 29-30 and accompanying text. For a series of decisions in which California courts have expressed general doubts about the validity of newly discovered evidence in the context of new trial motions, *see generally* 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 506 (2006). Under the California new trial motion remedy, perjured testimony seems to be the least acceptable form of newly discovered evidence. *See, e.g., In re Cox*, 70 P.3d 313, 327 (Cal. 2003) (“It has long been settled that ‘the offer of a witness, after trial, to retract [her] sworn testimony is to be viewed with suspicion.’”) (internal citations omitted); *People v. Frankfort*, 251 P.2d 401, 418 (Cal. 1952) (noting that showing based on perjured testimony alone is insufficient to yield new trial); 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 512 (2006). Even so, if a court finds a recantation believable, it would then have to ascertain whether that evidence would likely yield a different result on a retrial; conceivably, if the recantation would have such an effect, then a court may be justified in ordering a new trial. *See People v. Minnick*, 263 Cal. Rptr. 316, 317 (Ct. App. 1989) (“While it is true, generally, that motions for new trial are looked upon with disfavor and that the recantation of a witness should be given little credence, it is within the trial judge’s discretion whether or not the showing merits the granting of a new trial.”); 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 531 (2006).

has manifested itself in the common law formation of a slew of burdens on defendants. That is, in addition to the statutorily prescribed requirements that newly discovered evidence be material and must not have been discoverable with due diligence prior to trial,⁵⁶ the state courts have insisted that the facts be such that they would probably generate a different result at a retrial.⁵⁷ Furthermore, the facts must be shown by the “best evidence” admissible in the case.⁵⁸ To prevail under this prong of the new trial motion remedy, the evidence may not be merely cumulative of other facts presented in the matter,⁵⁹ nor may it simply impeach or contradict a witness.⁶⁰ Also, not only does the defendant generally bear the burden of proof,⁶¹ but, in evaluating a new trial motion, the trial court must presume the

⁵⁶ CAL. PENAL CODE § 1181(8); *see also* *People v. Clauson*, 80 Cal. Rptr. 475, 479 (Ct. App. 1969) (noting that underlying trial court’s exercise of discretion in evaluating new trial motion is “public policy which demands that a litigant exhaust every reasonable effort to produce at his trial all existing evidence in his behalf, to the end that the litigation may be concluded”); *cf.* *People v. Martinez*, 685 P.2d 1203, 1208 (Cal. 1984) (“That policy [of exhausting every reasonable effort], however, itself serves a more fundamental purpose — the determination of guilt and innocence. Loyal to that higher purpose, some California cases suggest that the standard of diligence may be relaxed when the newly discovered evidence would probably lead to a different result on retrial.”). The requirement that the newly discovered evidence must be material has been interpreted to signify that the evidence, and not just its materiality, must be newly discovered. *See, e.g., People v. Owens*, 60 Cal. Rptr. 687, 691 (Ct. App. 1967). Moreover, “materiality” appears to be linked to the “probability” component of the test in that evidence must be material to the defendant’s guilt or innocence (i.e., that it would affect the trial result). *See* 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 509 (2006).

⁵⁷ *See, e.g., People v. Beyea*, 113 Cal. Rptr. 254, 271 (Ct. App. 1974) (noting that “trial court must consider the following factors: 1) that the evidence, and not merely its materiality, is newly discovered; 2) that the evidence is not merely cumulative; 3) that it would render a different result probable on retrial of the cause; 4) that the party could not with reasonable diligence have discovered and produced it at trial; and 5) that these facts have been shown by the best evidence of which the case admits”).

⁵⁸ *Id.*

⁵⁹ *Id.*; *cf. People v. Shepherd*, 58 P.2d 970, 972 (Cal. Ct. App. 1936) (“Respondent contends in the instant case that the newly discovered evidence is merely cumulative to the alibi evidence offered at the trial of these appellants; but, conceding such to be the case, that is not necessarily determinative as to whether a new trial should be granted, because, assuming that the evidence may be cumulative, still, if it is such that a different result upon a retrial is reasonably probable as the result of such new evidence, and the showing made by the applicant is sufficient in other respects, the new trial should be granted.”).

⁶⁰ *See* 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 511 (2006).

⁶¹ *See, e.g., People v. Addington*, 111 P.2d 356, 358 (Cal. Ct. App. 1941) (“The burden was upon [defendant] to establish that the proffered evidence could not have been discovered with reasonable diligence in time for presentation at the trial.”).

correctness of the verdict.⁶² California's judicial gloss on new trial motions based on newly discovered evidence is consistent with that of courts in other jurisdictions, reflecting the historical trend toward viewing such claims with trepidation.⁶³

Although the denial of a new trial motion is not independently appealable in California, a defendant may seek review of that determination as part of his or her appeal of the final judgment of conviction.⁶⁴ The standard of appellate review regarding the denial of a new trial motion is exceedingly deferential to the lower court; a decision will be overturned only if the trial judge abused her discretion.⁶⁵ The California appellate courts have even characterized

⁶² See, e.g., *People v. Seaton*, 28 P.3d 175, 233 (Cal. 2001) (“In reviewing a motion for a new trial, the trial court must weigh the evidence independently. It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it.”) (internal citations omitted); see also LEVENSON, *supra* note 40, § 28:8.

⁶³ See, e.g., *Berry v. Georgia*, 10 Ga. 511, 527 (1851) (“[I]t is incumbent on a party who asks for a new trial, on the ground of new discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only — viz.: speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.”); see also *Medwed*, *supra* note 6, at 668 n.92.

⁶⁴ CAL. PENAL CODE § 1237(a) (West 2006); *id.* § 1466(2)(A) (West 2006) (allowing defendant right to appeal, among other things, “any order denying a motion for a new trial”).

⁶⁵ See, e.g., *People v. Coffman*, 96 P.3d 30, 124 (Cal. 2004) (commenting that appellate court must review trial court's decision on new trial motion “under a deferential abuse-of-discretion standard”) (internal citations omitted); *People v. Delgado*, 851 P.2d 811, 820 (Cal. 1993) (“The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.”) (internal citations omitted); *People v. Gaines*, 22 Cal. Rptr. 556, 558 (Ct. App. 1962) (“There is no question that a motion for new trial is addressed to the sound legal discretion of the trial court and its action will not be disturbed on appeal except where an abuse of discretion is clearly shown.”). This standard pertains not only to the judge's ultimate ruling on the motion, but also possibly to the decision whether to permit oral argument on the motion at all. See, e.g., *People v. Norton*, 115 P.2d 44, 45 (Cal. Ct. App. 1941); cf. 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 540 (2006) (“However, a trial court's denial of a motion for a new trial after refusing the defendant's right to oral argument on the motion should be sustained only if it appears that the defendant has not been deprived of a substantial right.”). The standard of review that applies to the prosecution's appeal of an order granting a new trial motion is also abuse of discretion. See *People v. Ault*, 95 P.3d 523, 525 (Cal.

the trial judge's exercise of autonomy on new trial motions premised on newly discovered evidence as "an enlarged discretionary power."⁶⁶ A trial court's discretion, to be sure, may not be exercised in a vague, arbitrary, or fanciful manner, and courts are cautioned to be cognizant of the importance of achieving justice in ruling on the motion.⁶⁷ Yet the abuse of discretion standard, with its forgiving view of trial judges' rulings, ensures that virtually all lower court decisions on new evidence claims survive appellate scrutiny in California.⁶⁸ Moreover, this standard of appellate review appears to apply irrespective of whether the judge bases her decision only on the affidavits submitted as part of the motion or whether live testimony is taken at the hearing on the motion.⁶⁹ On the whole, the evidentiary, legal, and procedural

2004).

⁶⁶ See *People v. Fluery*, 327 P.2d 47, 50 (Cal. Ct. App. 1958) ("In determining [a new trial motion based on newly discovered evidence], an enlarged discretionary power is committed to the trial court and a reviewing court will not disturb its ruling unless a clear and unmistakable abuse of discretion is shown.") (internal citations omitted); see also 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 543 (2006) ("The rule that the decision on a motion for a new trial rests largely in the sound discretion of the trial court is, if anything, more applicable to a motion on the ground of newly discovered evidence than to a motion made on any other ground. It is almost axiomatic that the decision of the trial court on a motion for a new trial on the ground of newly discovered evidence is rarely interfered with, and the exercise of the trial court's discretion in granting or denying a motion for a new trial on that ground will not be disturbed except in a case of manifest abuse.").

⁶⁷ See LEVENSON, *supra* note 40, § 28:8; see also *People v. Taylor*, 23 Cal. Rptr. 2d 846, 853 (Ct. App. 1993) ("Although we acknowledge that the trial court has broad discretion in granting a motion for new trial, that discretion is 'not arbitrary, vague, or fanciful, nor is it to be controlled by humor or caprice, but to be governed by principle and regular procedure for the accomplishment of the ends of right and justice.'") (internal citations omitted); cf. 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 541 (2006) ("There is a strong presumption that the trial court properly exercised its broad discretion in ruling on a motion for a new trial . . . where a new trial has been denied, it is presumed that the court has performed its official duty, and has considered the disputed questions of fact and resolved them against the losing party.").

⁶⁸ See ROGER PARK ET AL., EVIDENCE LAW § 12.01, at 540-41 & n.6 (1998) (terming abuse of discretion standard of appellate review "virtual shield from reversal"); see also 22B CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 540 (2006) ("In reviewing a ruling on a motion for new trial, the reviewing court accepts the trial court's credibility determinations and findings on questions of historical fact, if they are supported by substantial evidence."); *id.* § 541 ("If the court denied a new trial, it must be assumed on appeal that any doubt that the court may have had as to the correctness of the verdict was not such as to warrant setting it aside.").

⁶⁹ See, e.g., *People v. Shoals*, 10 Cal. Rptr. 2d 296, 302-03 (Ct. App. 1992) (upholding denial of new trial motion where defendant presented alleged newly discovered evidence only in form of written declarations of potential witness).

hurdles that defendants must clear in litigating new trial motions are high indeed. Similar obstacles emerge as well, if in modified fashion, in the area of collateral remedies.

B. Collateral Remedies

In light of the time restrictions attached to new trial motions in California state courts (i.e., the requirement that motions must be made orally before judgment), this remedy is of little use to defendants unable to find convincing new evidence in such short order. For those California defendants who unearth newly discovered evidence of innocence after the entry of judgment, there are two conceptually overlapping, yet distinguishable, collateral options available to them: a statutory remedy crafted in the nature of habeas corpus and the common law writ of error coram nobis.

1. Habeas Corpus

The writ of habeas corpus, a remedy guaranteed by both the U.S.⁷⁰ and California Constitutions,⁷¹ traditionally applied to inmates contesting the lawfulness of their detention in regard to errors of law.⁷² The scope of the “Great Writ” was originally limited to resolving jurisdictional defects,⁷³ and it only emerged to address constitutional issues in the United States in the 1930s.⁷⁴ In most jurisdictions, even those that soon recognized constitutional errors on habeas corpus petitions, factual issues of guilt or innocence did not bear upon a court’s evaluation of a habeas corpus petition.⁷⁵ As for the writ’s other trademark requirements, states usually demanded that habeas corpus petitioners be in custody and that petitions be filed with

⁷⁰ U.S. CONST. art. I, § 9, cl. 2.

⁷¹ CAL. CONST. art. I, § 11; *see also id.* art. VI, § 10.

⁷² *See* YACKLE, *supra* note 12, §§ 3-6, at 4-29.

⁷³ *See* 1 WILKES, REMEDIES AND RELIEF, *supra* note 11, § 2-2, at 136; *see also* LEVENSON, *supra* note 40, § 30:16 (“Historically, the writ would only lie for the limited purpose of releasing a person imprisoned or restrained as a result of a void proceeding or jurisdictional defect in the imprisoning authority.”).

⁷⁴ *See* YACKLE, *supra* note 12, § 5; *see also* LEVENSON, *supra* note 40, § 30:16 (noting that “original function [of habeas corpus in California] has been expanded to review the constitutionality of statutes as well as the constitutionality of trial procedure”).

⁷⁵ *See* YACKLE, *supra* note 12, § 3 (“The writ in theory has nothing to do with the prisoner’s guilt or innocence but is concerned only with the process employed to justify detention under attack.”).

a court in the inmate's county of confinement.⁷⁶ The form of habeas corpus relief, if and when granted, often consisted of release from custody and a rescission of further proceedings against the petitioner.⁷⁷

In 1872, California abandoned the common writ of habeas corpus and in its place enacted a statutory post-conviction remedy in the nature of habeas corpus.⁷⁸ Over time, California's statutory version of habeas corpus has added some modern twists to the writ's historic traits, the most important of which — for the purposes of this Article at least — is the remedy's permissive definition of the grounds for relief.⁷⁹ Section 1473(a) of the California Penal Code concisely provides that “[e]very person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.”⁸⁰ The penal code subsequently offers minimal guidance as to the exact contours of the grounds upon which a habeas corpus petition must be based.⁸¹

⁷⁶ See 1 WILKES, REMEDIES AND RELIEF, *supra* note 11, § 2-2, at 137.

⁷⁷ *Id.* § 1-8, at 38; see also Bernard L. Lewis, Note, *Availability of Habeas Corpus as a Remedy Where Petitioner Does Not Seek Discharge*, 2 UCLA L. REV. 415, 416 (1955) (noting that habeas corpus in California generally served only to secure release from custody).

⁷⁸ See CAL. PENAL CODE §§ 1473-1508 (West 2006). In California, habeas corpus is treated as an independent civil proceeding designed to pose a collateral attack on a previously entered judgment. See, e.g., *In re Barnett*, 73 P.3d 1106, 1112 (Cal. 2003) (commenting that there is no federal constitutional right to counsel in state post-conviction proceedings, in part because such actions are civil in nature).

⁷⁹ The fact that many grounds for relief are cognizable in a habeas corpus application, however, does not mean that use of the procedure is without limitation. On the contrary, habeas corpus is considered an “extraordinary remedy” in California, as elsewhere, and the courts have taken care to clarify that the remedy must not be utilized as a second appeal or to address issues of minor significance. See, e.g., 36 CAL. JUR. 3D *Habeas Corpus* §§ 5-8 (2006).

⁸⁰ CAL. PENAL CODE § 1473(a).

⁸¹ The penal code does, though, cite the example of “false evidence” that led to a conviction as a proper ground for habeas relief. *Id.* § 1473(b). Seeking habeas corpus relief on the basis of false evidence is distinguishable from newly discovered evidence claims. For years, California has treated newly discovered evidence somewhat differently than claims alleging that a conviction was secured through the presentation of perjured testimony at trial. See, e.g., *Ex parte Lindley*, 177 P.2d 918, 926-27 (Cal. 1947) (“In a habeas corpus proceeding, one who establishes by a preponderance of substantial, credible evidence that he was convicted by perjured testimony knowingly presented by representatives of the State, is entitled to a judgment discharging him from custody and the suppression by the State of material evidence will be considered in connection with such a charge. . . . Also, newly discovered evidence does not justify relief unless it is of such character as will completely undermine the entire

Case law has clarified that newly discovered evidence is an appropriate basis for seeking and obtaining relief via California's habeas corpus procedure.⁸² Still, the theoretical availability of habeas relief for new evidence claims is offset by the presence of common law and statutory roadblocks.⁸³ The legal requirements for procuring a writ of habeas corpus, most importantly, are much more rigorous than those in the new trial motion context.⁸⁴ Specifically, the courts have signaled that newly discovered evidence will not warrant habeas relief unless it thoroughly undermines the entire structure of the prosecution's case, and such evidence undermines the prosecution's case only if it is conclusive and "points unerringly to innocence."⁸⁵

structure of the case upon which the prosecution was based."). Moreover, a 1975 amendment to the penal code expressly provided for the possibility of habeas relief on the basis of "false evidence that is substantially material or probative on the issue of guilt or punishment . . . introduced against a person at any hearing or trial relating to his incarceration." CAL. PENAL CODE § 1473(b)(1). Evidently, this statutory change was not intended to alter the treatment of newly discovered evidence claims. *See, e.g., In re Wright*, 144 Cal. Rptr. 535, 545 (Ct. App. 1978) ("The 1975 amendment to Penal Code section 1473, which we hereinafter discuss in detail, dealt only with habeas corpus relief on the ground of false evidence. It did not change the law relating to the ground of newly discovered evidence.").

⁸² *See, e.g., In re Clark*, 855 P.2d 729, 739 (Cal. 1993) ("Postconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension."); LEVENSON, *supra* note 40, § 30:17 (citing "new evidence" as one of "the more common issues" raised in California state habeas corpus petitions).

⁸³ *See Medwed, supra* note 6, at 683 ("[In most states,] the actual availability of newly discovered evidence as a method to prove one's innocence in state post-conviction proceedings is tempered by the harsh reality inflicted by an array of procedural obstacles.").

⁸⁴ The new trial and habeas corpus remedies in California state court are conceptually similar in the realm of new evidence claims. *See, e.g., In re Cruz*, 129 Cal. Rptr. 2d 31, 38 (Ct. App. 2003) ("By analogy, a petition for a writ of habeas corpus based on newly discovered evidence resembles a motion for a new trial based on newly discovered evidence.").

⁸⁵ *In re Weber*, 523 P.2d 229, 243 (Cal. 1974); *see also In re Clark*, 855 P.2d at 739 (stating that conviction may be attacked collaterally based on newly discovered evidence only if new evidence generates fundamental doubt regarding reliability and accuracy of proceedings); *Ex parte Lindley*, 177 P.2d at 927 ("[N]ewly discovered evidence does not justify relief unless it is of such character as will completely undermine the entire structure of the case upon which the prosecution was based."); *In re Cruz*, 129 Cal. Rptr. 2d at 36 ("To warrant issuance of a writ, the new evidence must not merely weaken the prosecution's case. It must create fundamental doubt in the accuracy of the proceedings and 'point unerringly to innocence or reduced culpability.'"); *People v. Espinoza*, 116 Cal. Rptr. 2d 700, 726 (Ct. App. 2002) (noting that, in order to obtain habeas relief on the grounds of newly discovered evidence,

On the one hand, this rule has been strictly construed to the extent that evidence that would weaken the prosecution's case and yield a more difficult decision for the trier of fact will not suffice.⁸⁶ On the other hand, the California Supreme Court has declared that this standard should not be viewed as creating a "hypertechnical requirement that each bit of prosecutorial evidence be specifically refuted, or the virtually impossible burden of proving there is no conceivable basis on which the prosecution might have succeeded."⁸⁷ Overall, only on rare occasions have the California courts expressed a willingness to order relief, including new trials, with respect to habeas corpus petitions predicated upon newly discovered evidence.⁸⁸

As for the level of evidentiary proof, California state petitioners for the writ bear a heavy burden in both initially pleading for relief and later proving their claims.⁸⁹ Habeas corpus, viewed as a collateral

“[i]t is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury”) (internal citations omitted); *In re Wright*, 144 Cal. Rptr. at 544 (“To warrant habeas corpus relief new evidence must be such as to undermine the entire structure of the case upon which the prosecution was based; it must point unerringly to the petitioner's innocence and must be conclusive; it is not sufficient that the new evidence conflicts with that presented at the trial and would have presented a more difficult question for the trier of fact.”).

⁸⁶ See, e.g., *Ex parte Lindley*, 177 P.2d at 927-28 (“Although newly discovered evidence may justify relief by habeas corpus when it completely undermines the entire structure of the case presented by the prosecution at the time of the conviction, the testimony presented to the referee does not go that far and affords only a basis for speculation or conjecture. Proof that a red-headed man other than Lindley was in the vicinity of the boat house at the time the crime was committed, or the identification by a witness of this stranger as the ‘man in the willows’ would have weakened the prosecution's case and presented a more difficult question for the trier of fact. But the testimony in regard to the other man does not point unerringly to Lindley's innocence.”). In contrast to the arduous test for ultimately obtaining relief, California courts have seemingly been quite liberal in characterizing evidence presented in a habeas corpus petition as “new.” See, e.g., 36 CAL. JUR. 3D *Habeas Corpus* § 50 (2006) (observing that “‘new evidence’ includes any evidence not presented to the trial court that is not merely cumulative in relation to evidence that was presented at trial”).

⁸⁷ *In re Hall*, 637 P.2d 690, 698 (Cal. 1981); see also *In re Johnson*, 957 P.2d 299, 307 (Cal. 1998) (discussing legal standard for assessing actual innocence claims presented via California habeas corpus).

⁸⁸ See, e.g., *People v. Faulkner*, Nos. F035831, F041713, 2003 WL 1852058, at *5 (Cal. Ct. App. Apr. 10, 2003) (ordering new trial in child sex abuse case where Fifth District concluded that it had “no confidence in the outcome of this trial because the three witnesses on whom the People relied to prove intent all lied at trial”); see also *In re Hall*, 637 P.2d at 705 (granting habeas corpus relief based on newly discovered evidence and remanding to superior court).

⁸⁹ See *In re Lucas*, 94 P.3d 477, 483 (Cal. 2004) (“A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained

remedy, generally serves as an attack on a judgment that is presumptively final and, as such, each and every presumption must be interpreted in favor of the judgment.⁹⁰ Indeed, the California Supreme Court has stated that a court's discretion to issue relief on habeas corpus is "much narrower" than the discretion to grant a motion for a new trial.⁹¹

In terms of procedure, a prisoner may file a habeas corpus petition in the superior court, court of appeal, or the California Supreme Court,⁹² with some restrictions depending on the nature of the underlying claim.⁹³ Similarly, proper venue is ascertained according to the type of allegation; petitions contesting the judgment of conviction are directed to the county in which the judgment was rendered, whereas those taking issue with conditions of confinement belong in

is invalid. To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus."'); *In re Cudjo*, 977 P.2d 66, 74 (Cal. 1999) (same). See generally LEVENSON, *supra* note 40, § 30:16 (noting that "the habeas corpus petitioner bears a heavy burden initially of pleading sufficient grounds for relief, and then proving the grounds later"). Nevertheless, although prisoners bear a heavy burden of proof, the California legislature passed a statute in 2002 facilitating discovery for defendants in particular cases. See CAL. PENAL CODE § 1054.9 (West 2006); 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK: WITH FORMS, CALIFORNIA § 7-3, at 292-94 (2006) [hereinafter 1 WILKES, HANDBOOK] ("The statute authorizes discovery, in favor of the convicted person, of materials in the possession of prosecution and law enforcement authorities, in cases where (1) the convicted person has been sentenced to death or life in prison without parole, (2) the discovery sought consists of materials to which the convicted person would have been entitled at the time of the convicted person's trial, (3) good faith efforts to obtain the discovery materials have been unsuccessful, and (4) postconviction relief is being sought via . . . the habeas corpus remedy . . .").

⁹⁰ See, e.g., *People v. Ault*, 95 P.3d 523, 533-34 (Cal. 2004) ("[Unlike a new trial motion,] habeas corpus is a separate, collateral proceeding that attacks a presumptively valid judgment. . . . [and thus] 'all presumptions favor the truth, accuracy and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them.'"); *People v. Gonzalez*, 800 P.2d 1159, 1196 (Cal. 1990) ("In contrast with ineffective assistance [of counsel] claims, '[t]he high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.'") (citation omitted); *In re Martha*, 265 P.2d 527, 529 (Cal. Ct. App. 1954) (observing that presumption of regularity exists regarding judgment that is attacked collaterally via habeas corpus).

⁹¹ *Ault*, 95 P.3d at 533.

⁹² CAL. CONST. art. VI, § 10 (vesting original jurisdiction over habeas corpus proceedings in supreme court, courts of appeal, and superior courts).

⁹³ See LEVENSON, *supra* note 40, § 30:21 ("When the petition challenges a misdemeanor or infraction ruling or conditions of confinement, it should be filed in superior court. When it challenges a superior court order, it should be filed in the court of appeal.").

the county of incarceration.⁹⁴ Where the habeas corpus petition challenges a superior court order or ruling, the penal code dictates that the matter should be assigned to a superior court judge other than the one whose decision is the subject of the litigation.⁹⁵ It is significant that the California legislature provides for no statutorily mandated time limits on the submission of habeas corpus petitions, although the common law suggests that litigants must proceed with diligence in filing their claims or else face the prospect of being barred pursuant to the equitable doctrine of laches.⁹⁶

The habeas corpus petition itself must state the factual basis for the purported illegal restraint on the petitioner's liberty.⁹⁷ Upon receipt of a petition, the court must evaluate whether it states a prima facie case, and the court possesses the authority to render a summary denial where it finds the petition lacking.⁹⁸ If the petition withstands this analysis, the court may order the custodian of the prisoner (or real party in interest, e.g., the prosecution) to submit a written response,⁹⁹ after which the petitioner must file a "traverse" answering the

⁹⁴ See *id.*; cf. 36 CAL. JUR. 3D *Habeas Corpus* § 61 (2006) ("Former provisions that included specific geographical limitations on the habeas corpus powers of the superior courts and the individual justices of the court of appeal, have been repealed."). The court that first exercises authority to issue a writ of habeas corpus in a particular case gains exclusive jurisdiction over those proceedings. 36 CAL. JUR. 3D *Habeas Corpus* § 61 (2006).

⁹⁵ CAL. PENAL CODE § 859c (West 2006); see *Fuller v. Superior Court*, 23 Cal. Rptr. 3d 204, 206 (Ct. App. 2004) (holding that superior court's practice of allocating habeas corpus petition to same judge who denied motion to dismiss was improper); LEVENSON, *supra* note 40, § 30:21; see also CAL. R. CRIM. P. 4.551(a)(3)(A) ("Upon filing, the clerk of the court must immediately deliver the petition to the presiding judge or his or her designee.").

⁹⁶ See *Bennett v. Mueller*, 273 F.3d 895, 899 (9th Cir. 2001) ("Significant, unjustified delay in presenting habeas corpus claims to California state courts will bar consideration of the merits of the claims."); see also 36 CAL. JUR. 3D *Habeas Corpus* § 66 (2006); LEVENSON, *supra* note 40, § 30:21; 1 WILKES, REMEDIES AND RELIEF, *supra* note 11, § 1-5, at 18 (noting that "laches may operate to prevent an applicant for postconviction relief from obtaining relief, even though the claim is meritorious, if the applicant slumbered on his or her rights and the delay in applying for postconviction relief has prejudiced the government").

⁹⁷ See 36 CAL. JUR. 3D *Habeas Corpus* §§ 65, 67 (2006).

⁹⁸ See *id.* § 98; LEVENSON, *supra* note 40, § 30:18; see also *People v. Espinoza*, 116 Cal. Rptr. 2d 700, 727-28 (Ct. App. 2002) (finding that defendant failed to establish prima facie case for habeas corpus relief on basis of newly discovered evidence).

⁹⁹ LEVENSON, *supra* note 40, § 30:18; *id.* § 30:22 ("The court has no discretion to grant the relief requested in the petition for habeas corpus without first issuing either a writ or an order to show cause.").

response.¹⁰⁰ At this stage, the court may deny the petition summarily if it is persuaded, based on the documents alone, that the inmate's contentions are meritless.¹⁰¹ When there is a factual dispute apparent from the pleadings, both the penal code and case law suggest that the court should order an evidentiary hearing.¹⁰² In cases where the court granting an evidentiary hearing is an appellate body, which is typically ill-equipped to hold such events, the court may appoint a referee to receive evidence and offer recommendations.¹⁰³ California case law indicates, however, that evidentiary hearings are not granted indiscriminately; for instance, the presentation of "some evidence" of innocence not introduced at trial may be insufficient to prompt an order authorizing a hearing on a habeas corpus petition.¹⁰⁴ Empirical studies of the outcomes of habeas corpus petitions in California largely reinforce the harsh tenor of the case law.¹⁰⁵ Specifically, in a study of all the habeas corpus petitions filed by inmates in San Diego Superior Court over a two year period, one set of scholars concluded that evidentiary hearings were ordered in only 6 of the 312 cases examined.¹⁰⁶

The penal code does not provide for direct appellate review of a superior court decision rejecting a habeas corpus petition. Even so, while technically prevented from appealing a superior court's denial of a habeas corpus petition, litigants may simply file a new petition in the court of appeal.¹⁰⁷ If the petition originates in the court of appeal, the litigant is prevented from automatically appealing that decision directly and, instead, may file a new petition or seek discretionary review in the California Supreme Court.¹⁰⁸ Where the superior court

¹⁰⁰ *Id.* § 30:24.

¹⁰¹ *Id.* § 30:25. Conversely, a court may grant relief without even holding an evidentiary hearing if the response admits claims in the petition that, if true, warrant the relief sought. *Id.*

¹⁰² *Id.*; see also CAL. PENAL CODE § 1484 (West 2006). At an evidentiary hearing on a habeas corpus application, the underlying judgment is still presumed to be valid and the petitioner assumes the burden of proving all facts essential to his claim by a preponderance of the evidence. See 36 CAL. JUR. 3D *Habeas Corpus* §§ 92-93 (2006).

¹⁰³ See 36 CAL. JUR. 3D *Habeas Corpus* § 88 (2006); LEVENSON, *supra* note 40, § 30:25.

¹⁰⁴ See *In re Branch*, 449 P.2d 174, 184 (Cal. 1969).

¹⁰⁵ See, e.g., Stephen J. Perrelo & Albert N. Delzeit, *Habeas Corpus in San Diego Superior Court (1991-1993): An Empirical Study*, 19 T. JEFFERSON L. REV. 283 (1997).

¹⁰⁶ See *id.* at 283 (discussing study and noting 14 files were missing or lost and not included in study).

¹⁰⁷ LEVENSON, *supra* note 40, § 30:26.

¹⁰⁸ *Id.*; see also CAL. PENAL CODE § 1506 (West 2006) (stating appeal may be taken).

has denied a habeas corpus petition and the inmate responds by submitting a new petition in the court of appeal, the appellate court need not afford tremendous deference to the ruling of the superior court; the new filing is not an appeal of that decision per se.¹⁰⁹ In grappling with how to treat the superior court's findings of fact, courts have analogized this successive writ situation to that of an appellate court itself appointing a referee to make factual determinations regarding a habeas application.¹¹⁰ In such instances, "the appellate court is not bound by the factual determinations of the referee but, rather, independently evaluates the evidence and makes its own factual determinations."¹¹¹ The referee's fact findings are only entitled to "great weight" where "supported by the record, particularly with respect to questions of or depending upon the credibility of witnesses the referee heard and observed."¹¹² The California Supreme Court has clarified, though, that deference is not warranted by the court of appeal when the superior court's findings of fact in analyzing a habeas corpus petition were based completely on documentary evidence.¹¹³

In sum, prisoners seeking to present newly discovered evidence of innocence through habeas corpus may file their petitions in an array of courts.¹¹⁴ Moreover, inmates are not subject to a rigid time bar, although they must be mindful that dilatory filing risks dismissal from the courts.¹¹⁵ Nor are prisoners who file a new petition in a court of appeal, after the denial of a comparable claim in superior court, hampered too much by the earlier decision; the appellate court does not necessarily look at the superior court's rulings with extraordinary deference.¹¹⁶ It must be emphasized, however, that prisoners pursuing

¹⁰⁹ See LEVENSON, *supra* note 40, § 30:26. The courts have expressed displeasure with the filing of successive petitions and piecemeal litigation in the context of habeas corpus. See, e.g., 36 CAL. JUR. 3D *Habeas Corpus* § 9 (2006). Even so, the California Supreme Court has clarified that, given that no appeal may be taken from a superior court order denying habeas corpus, filing a new petition in the court of appeal is an appropriate next step. *In re Clark*, 855 P.2d 729, 740 n.7 (Cal. 1993) ("Because no appeal lies from the denial of a petition for writ of habeas corpus, a prisoner whose petition has been denied by the superior court can obtain review of his claims only by the filing of a new petition in the Court of Appeal.").

¹¹⁰ *In re Wright*, 144 Cal. Rptr. 535, 543-44 (Ct. App. 1978). For a discussion of how appellate courts in California may treat a referee's fact findings, see 36 CAL. JUR. 3D *Habeas Corpus* § 88 (2006).

¹¹¹ *In re Wright*, 144 Cal. Rptr. at 543-44.

¹¹² *Id.*

¹¹³ *In re Cudjo*, 977 P.2d 66, 75 (Cal. 1999).

¹¹⁴ See *supra* notes 92-94 and accompanying text.

¹¹⁵ See *supra* note 96 and accompanying text.

¹¹⁶ See *supra* notes 109-13 and accompanying text.

newly discovered evidence claims in the habeas corpus arena encounter formidable legal obstacles, most notably, the requirement that their petition must “unerringly” point to innocence and create “fundamental doubt” as to the propriety of the verdict.¹¹⁷ Another collateral remedy in California, *coram nobis*, shares this forbidding legal standard as well as other features similar, yet not identical, in nature to habeas corpus.

2. *Coram Nobis*

The remedy of *coram nobis*, which literally means “before us,”¹¹⁸ is a common law remedy that allows the court of original judgment to correct its own proceedings in both civil and criminal matters.¹¹⁹ Originating in sixteenth century England, *coram nobis* in criminal cases historically served to address major errors of fact, not law; claims made collaterally, pursuant to this writ, cited previously unadjudicated facts extrinsic to the record that called into question the soundness of a conviction.¹²⁰ Traditional uses of the writ included fixing clerical mistakes concerning notice and pleading.¹²¹ The writ was cognizable “however late discovered and alleged,”¹²² subject to the requirement that petitioners must proceed with due diligence in uncovering and presenting the new facts.¹²³ Granting the writ normally resulted in vacating the conviction with an opportunity for

¹¹⁷ See *supra* notes 85-88 and accompanying text.

¹¹⁸ See Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 VA. J. SOC. POL'Y & L. 1, 9 (2003).

¹¹⁹ See *Ex parte Lindley*, 177 P.2d 918, 929 (Cal. 1947) (commenting that “the application for a writ of error *coram nobis* should be addressed in the first instance to the court in which the petitioner was tried and convicted”); 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 929 (2006) (“A petition for a writ of error *coram nobis* is not an independent proceeding, but is regarded as part of the original prosecution.”); *id.* § 930 (“An application for the writ should be addressed in the first instance to the court in which the defendant was tried and convicted, even though it may not be a court of record.”). See generally Prickett, *supra* note 16 (discussing history of *coram nobis* in California).

¹²⁰ See Medwed, *supra* note 6, at 669; Prickett, *supra* note 16, at 6.

¹²¹ See Medwed, *supra* note 6, at 669.

¹²² Daniel F. Piar, *Using Coram Nobis to Attack Wrongful Convictions: A New Look at an Ancient Writ*, 30 N. KY. L. REV. 505, 507 (2003) (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *406-07, *407 n.5).

¹²³ See Medwed, *supra* note 6, at 670 (“Despite the absence of a statute of limitations, parties seeking to use the remedy of *coram nobis* were required to prove they had proceeded with reasonable diligence.”); Prickett, *supra* note 16, at 33-41.

the state to re-try the petitioner.¹²⁴

The U.S. Supreme Court acknowledged *coram nobis* as early as 1810,¹²⁵ and California courts first mentioned the writ in a series of civil cases in the 1880s.¹²⁶ Unlike habeas corpus, neither the U.S. nor California Constitutions mention *coram nobis*; the writ exists purely as a judicially invented (and judicially perpetuated) “extraordinary remedy.”¹²⁷ As one might expect, California decisions treated *coram nobis* with caution from the outset.¹²⁸ *Coram nobis* only began to surface in state criminal cases in the early twentieth century and swelled to a relatively large number by the 1950s.¹²⁹ The California courts nonetheless insisted that the writ took a backseat to statutory remedies, such as motions for a new trial, and that its application would be confined solely to situations where no other remedy was available.¹³⁰

There are several reasons why the use of *coram nobis* has been limited in California, even in situations involving the discovery of new facts. First, the legal standard guiding the treatment of new evidence in the *coram nobis* context mirrors that of habeas corpus, requiring evidence that points unerringly to the litigant’s innocence and that completely undermines the prosecution’s entire case.¹³¹ In effect, the test is not whether the new evidence would probably have resulted in a different verdict had it been presented at trial, but rather whether it

¹²⁴ See Medwed, *supra* note 6, at 669-70.

¹²⁵ See Piar, *supra* note 122, at 507 (citing *Strode v. The Stafford Justices*, 23 F. Cas. 236 (C.C.D. Va. 1810) (No. 13,537)).

¹²⁶ See Prickett, *supra* note 16, at 7.

¹²⁷ See LEVENSON, *supra* note 40, § 30:35.

¹²⁸ See Prickett, *supra* note 16, at 7.

¹²⁹ *Id.* at 9-14; see also 1 WILKES, HANDBOOK, *supra* note 89, § 7-47, at 362 (noting that “the first recorded postconviction *coram nobis* decision of the Court of Appeal” occurred in 1908).

¹³⁰ Prickett, *supra* note 16, at 18; see also 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 911 (2006) (observing that *coram nobis* “has been rendered practically obsolete, however, by the extended powers of habeas corpus and the adoption of modern appellate procedure”). Some California courts have treated *coram nobis* as the legal equivalent of a motion to vacate or to set aside a judgment even though the remedies are not necessarily identical. See 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 914 (2006); see also *id.* § 917 (“The rapid growth of such statutory remedies as motion for new trial, motion in arrest of judgment, motion to recall the remittur, and appeal from judgment, has resulted in a corresponding reduction in the number of grounds available for review through the writ of error *coram nobis*.”).

¹³¹ Prickett, *supra* note 16, at 42. Prickett has characterized this test as follows: “To obtain *coram nobis*, the petitioner’s evidence must amount to a stake poised to plunge through the heart of the opposing party’s case.” *Id.* at 43.

would have definitively prevented rendition of the verdict.¹³² To exemplify the challenging nature of this legal standard, one need only survey California case law to discern something remarkable for its absence: no reported decisions of a defendant's conviction upon a retrial following the issuance of coram nobis.¹³³ Second, courts have rigidly applied the principle that the alleged new facts in a coram nobis petition may not go to an issue previously adjudicated.¹³⁴ As a sign of how California judges cling to this narrow vision of the writ, courts have consistently refused to recognize newly discovered evidence in the form of a third party confession to the defendant's crime as a proper basis for coram nobis relief.¹³⁵ The stated rationale for treating this evidence less generously under coram nobis than under habeas corpus, where such a claim may be satisfactory,¹³⁶ is that the issue of guilt has already been adjudicated and that the confession merely clashes with inculpatory evidence presented and accepted at the earlier trial.¹³⁷ Third, even if a coram nobis petitioner manages to

¹³² See, e.g., 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 918 (2006) ("A writ of coram nobis is granted only when the petitioner shows that some fact existed that, had it been presented to the trial court, would have prevented rendition of the judgment.").

¹³³ Prickett, *supra* note 16, at 44. I was unable to find any such reported decisions in the years following the publication of Prickett's article.

¹³⁴ See, e.g., *People v. Gallardo*, 92 Cal. Rptr. 2d 161, 172 (Ct. App. 2000) ("The writ [of coram nobis] will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not presented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence does not go to the merits of the issues of fact determined at trial; and (3) that he did not know, nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ."); Prickett, *supra* note 16, at 41-48; see also 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 916 (2006) (noting that "the court will give no consideration to an attempt to contradict or put in issue any fact directly passed on and affirmed by the judgment itself, because coram nobis does not lie to correct any issue of fact that has been adjudicated, even though wrongly determined"); *id.* § 925 ("In accordance with the rule that the error of fact must be one that was not before the court during trial, the writ of error coram nobis will not be granted to hear newly discovered evidence going to the merits of issues previously tried . . .").

¹³⁵ See Prickett, *supra* note 16, at 44.

¹³⁶ See, e.g., *In re Branch*, 449 P.2d 174, 184 (Cal. 1969) (demonstrating that court may consider habeas corpus petition's newly discovered evidence claim based on third party confession).

¹³⁷ See Prickett, *supra* note 16, at 44-45; see also *Mendez v. Superior Court*, 104 Cal. Rptr. 2d 839, 846-47 (Ct. App. 2001) ("It is settled in California that, absent extrinsic fraud or duress, a judgment predicated on perjured testimony or entered because evidence was concealed or suppressed cannot be attacked by a petition for a

find new evidence that fails to implicate a previously litigated issue and that unerringly points to innocence, he must overcome a heavy evidentiary burden, variously articulated in the California courts as “clear and convincing proof,” “clear and substantial proof,” “credible, clear and convincing evidence,” “a preponderance of strong and convincing evidence,” and a number of other formulations.¹³⁸

Finally, it is crucial to grasp the relationship between habeas corpus and coram nobis in California, particularly because this relationship directly affects (and curbs) the use of coram nobis for newly discovered evidence of innocence. Although both remedies seemingly may be utilized to vacate a conviction on the grounds of new evidence that points unerringly to innocence and undermines the prosecution’s case in its entirety,¹³⁹ there are subtle distinctions between the two that profoundly affect their relative worth as post-conviction options for an innocent defendant. As an initial matter, coram nobis only applies to previously unadjudicated errors of fact where no other remedy is available, while habeas corpus addresses a vaster range of errors, both factual and legal, and need not necessarily kowtow to any other prospective remedy.¹⁴⁰ In contrast to habeas corpus, moreover, coram nobis does not mandate that petitioners be in custody at the time of filing.¹⁴¹ Therefore, if the habeas corpus statutory remedy is available, for instance, when a defendant remains incarcerated and wishes to present new evidence of innocence, a defendant is prevented from seeking a writ of error coram nobis; a defendant would be similarly stymied if the new trial motion remedy were a possibility.¹⁴² In the words of one observer of California law, “Coram nobis emerges from beneath the shadow of habeas corpus if a person no longer

writ of coram nobis. In the eyes of the law, Mendez’s rights were adequately protected — by his right to proceed to trial, where he could have attacked Officer Mack’s credibility to the extent he could, by his right to move for a new trial, and by his right to appeal.” (internal citations omitted).

¹³⁸ See Prickett, *supra* note 16, at 53; 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 931 (2006).

¹³⁹ See *supra* notes 85-88, 117, 131-33 and accompanying text.

¹⁴⁰ See Prickett, *supra* note 16, at 68-69. As noted by the California Supreme Court, “The grounds upon which a court may issue a writ of error coram nobis . . . are more narrowly restricted than those which allow relief by habeas corpus.” *Ex parte Lindley*, 177 P.2d 918, 928 (Cal. 1947).

¹⁴¹ See Prickett, *supra* note 16, at 68-69.

¹⁴² See 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 917 (2006); see also *People v. Carty*, 2 Cal. Rptr. 3d 851, 854 (Ct. App. 2003) (“Importantly, the ‘purpose [of a petition] is to secure relief, where no other remedy exists.’”) (internal citations omitted).

incarcerated wishes to have a conviction set aside solely by virtue of previously unadjudicated errors of fact.”¹⁴³ And, without a doubt, the occasions in which coram nobis does slip by habeas corpus’s long shadow and result in relief are few and far between in California.¹⁴⁴

Together with judicial pronouncements categorizing coram nobis as an extraordinary or “rather unusual” remedy,¹⁴⁵ there is another restriction on its use embedded in California’s statutory post-conviction regime. In accord with historic practice in England, requests for coram nobis in California are typically submitted to the same court that rendered the original judgment.¹⁴⁶ The main exception, however, is “if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error coram nobis shall be brought to procure the vacation of that judgment, except in the court which affirmed the judgment on appeal.”¹⁴⁷ Such a petition in the appellate court is technically termed “coram vobis,” and appellate courts in California may issue writs of coram vobis to correct errors of fact deriving from judgments of inferior courts either while the appeal from the judgment is pending or after that judgment has been affirmed on appeal.¹⁴⁸ In essence, coram vobis contains comparable procedural and substantive traits to those of its trial court cousin, and the terms “coram nobis” and “coram vobis” are often used interchangeably.¹⁴⁹

¹⁴³ Prickett, *supra* note 16, at 68-69.

¹⁴⁴ See *id.* at 24 (“Issuance of the writ will be ‘most rare’ and confined to a ‘very limited class of cases.’”) (internal citations omitted). In 2002, the state legislature created a statutory version of coram nobis that is available to defendants who are no longer in custody and aim to submit claims of newly discovered evidence based on government misconduct, fraud, or false testimony by a government official. See CAL. PENAL CODE § 1473.6 (West 2006). The procedures for pursuing a motion to vacate under this statute are largely analogous to those pertaining to filing a habeas corpus petition. See LEVENSON, *supra* note 40, § 28:17. One experienced California litigator, Linda Starr of the Northern California Innocence Project at Santa Clara University School of Law, has expressed concerns to me about the limited scope of this statute and the possibility that its very presence could inspire courts to grant common law coram nobis petitions more sparingly. On the whole, it remains to be seen whether section 1473.6 will benefit innocent prisoners, considering that the statute is still in its infancy.

¹⁴⁵ *People v. Kelly*, 96 P.2d 372, 374 (Cal. 1939).

¹⁴⁶ See 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* §§ 912, 930 (2006); *supra* note 119 and accompanying text.

¹⁴⁷ CAL. PENAL CODE § 1265(a) (West 2006); see also Prickett, *supra* note 16, at 13-14 n.51 (observing that section 1265 “constitutes the sole express statutory reference to coram nobis” in California).

¹⁴⁸ See Prickett, *supra* note 16, at 64.

¹⁴⁹ *Id.* at 64-66 (mentioning that “[t]he requisites for coram vobis are substantially

In the event that a coram nobis petition is legally cognizable in the realm of newly discovered evidence, a series of procedural impediments further obstruct a petitioner's path to relief. Although California's common law coram nobis remedy lacks a statute of limitations,¹⁵⁰ petitioners are still compelled to exercise due diligence in both finding and presenting their alleged new evidence and thereby always assume the risk of a potential time bar.¹⁵¹ Furthermore, the court may deny a coram nobis petition summarily without holding an evidentiary hearing and possesses *carte blanche* to reject the allegations in the petition even if uncontradicted.¹⁵² Should a court opt to hold an evidentiary hearing, it may then structure the hearing in almost any manner it sees fit — the court is not required to subpoena the petitioner's witnesses or even to conduct proceedings in the inmate's presence.¹⁵³ Also, as discussed in the context of new trial motions,¹⁵⁴ a court's decision to deny a coram nobis application receives extensive deference on appeal; the petitioner must show a clear abuse of discretion in order to prevail before the appellate court.¹⁵⁵ Whereas successive coram nobis petitions are nominally

identical to those for coram nobis" but with some procedural differences regarding granting or denying petition); *see also* 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 912 (2006) ("[T]he basis for issuance is, in either case, the same, so that the only fundamental difference is that coram nobis should be addressed in the first instance to the court in which the defendant was tried and convicted, and coram vobis should be used on application to a higher court. Even this distinction appears to be academic under modern practice . . ."); LEVENSON, *supra* note 40, § 30:35 ("There is little real difference between the writs of *coram nobis* and *coram vobis*.").

¹⁵⁰ It should be noted, however, that the statutory motion to vacate remedy, *see supra* note 144, does have a limitations period. *See* CAL. PENAL CODE § 1473.6(d) ("A motion pursuant to this section must be filed within one year of the later of the following: (1) The date the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party's personal knowledge. (2) The effective date of this section.").

¹⁵¹ *See* Prickett, *supra* note 16, at 33-41.

¹⁵² *Id.* at 51-52. Moreover, Prickett observes that "given the statistical likelihood of summary denial by the court *ex parte*, there seems scant reason to bother presenting formal opposition unless requested by the court." *Id.* at 54.

¹⁵³ *Id.* at 54-55; *see also* 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 935 (2006) ("[N]either the United States Constitution nor California law requires that the hearing on the petition be conducted as a formal trial.").

¹⁵⁴ *See supra* notes 64-69 and accompanying text.

¹⁵⁵ *See, e.g.,* *People v. Ibanez*, 90 Cal. Rptr. 2d 536, 541 (Ct. App. 1999) ("A writ of error coram nobis is reviewed under the standard of abuse of discretion."); *see also* Prickett, *supra* note 16, at 59-60 (commenting that, while ruling on coram nobis petition is normally appealable order, standard of appellate review is typically abuse of discretion). It should be noted, however, that the denial of a request for coram vobis

permissible, the due diligence and “new facts” requirements render the prospect of multiple petitions uncommon in practice.¹⁵⁶

Overall, prisoners filing coram nobis petitions in California, like those advancing claims through habeas corpus, must surmount a host of barriers in order to obtain relief. Significantly, the legal standard requiring petitioners to put forth evidence that unerringly points to innocence proves daunting. When coupled with the heavy evidentiary burden borne by petitioners and the deferential abuse of discretion standard of appellate review, the assortment of rules governing coram nobis in California ensures that defendants rarely triumph through that collateral remedy.

II. FLAWS WITH THE CURRENT APPROACH

At first blush, the three central procedures available to criminal defendants aiming to overturn their convictions via newly discovered evidence of innocence in California appear to interact rather well, with the requirements for relief becoming more exacting over time. Litigants able to secure new evidence in the immediate aftermath of a guilty verdict and prior to sentencing must prove, pursuant to the new trial motion remedy, that such evidence would have probably resulted in a different verdict, whereas defendants seeking relief at a later date are subject to a more stringent legal test under habeas corpus. And if other remedies are unavailable, then coram nobis may be an alternative for a defendant who is no longer in custody and hopes to clear his or her name with new evidence, subject to a legal standard even tougher than that afforded to habeas corpus petitioners. This gradual escalation of the legal test (and constriction of the courts’ discretion to grant relief) comports with common sense and, in particular, with the oft-expressed goal of finality in criminal cases: the need for an end to litigation and closure for the victims of crimes.¹⁵⁷

But, as is often the case in the criminal justice system, appearances can be deceiving. The manner in which these remedies intersect makes relief difficult to achieve for potentially innocent California inmates with newly discovered evidence at their disposal. This phenomenon is at odds with recent developments, both in California and across the nation, which suggest that wrongful convictions occur

in the appellate court does not allow for further appeal. 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 939 (2006).

¹⁵⁶ See 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 937 (2006); Prickett, *supra* note 16, at 56-57.

¹⁵⁷ See Medwed, *supra* note 6, at 687-88.

with greater frequency than ever imagined.¹⁵⁸ Upon reflection, the California post-trial scheme conveys a conflicted, almost restless view of newly discovered evidence in criminal cases — an appreciation for the possible legitimacy of some such claims coupled with unabashed skepticism toward this ground for relief on the whole.

A. Timing Restrictions

As noted above, the statutory provision governing new trial motions in California specifies that newly discovered evidence is an appropriate basis for relief under that remedy.¹⁵⁹ New trial motions in general, however, must be made orally prior to the entry of the judgment,¹⁶⁰ thereby posing a pragmatic obstacle the significance of which cannot be overstated. Even though the court may grant defendants time to procure the necessary affidavits of the witnesses through whom the new evidence is expected to be presented,¹⁶¹ the defendant's initial motion still must outline the nature of the evidence and demonstrate why it could not have been discovered with due diligence at the time of trial.¹⁶² Litigants who lack the resources or sheer good luck to find newly discovered evidence before judgment, much less the witnesses necessary to develop this evidence, will be unable to benefit from this remedy.¹⁶³ The majority of criminal defendants, save the fortunate few, presumably fit this description.

In contrast, the timing rules in California pertaining to habeas corpus and coram nobis are much more conducive toward allowing inmates to present their innocence claims without risking procedural default by virtue of a strict time barrier. That is, each of these remedies takes an equitable stance toward the time period for filing, mandating that defendants proceed with due diligence upon discovery of the new evidence and providing that courts evaluate whether a litigant has complied on a case-by-case basis.¹⁶⁴ California courts have permitted the filing of post-conviction claims even after a delay of

¹⁵⁸ See *supra* notes 1, 7, 20 and accompanying text; see also Perrelo & Delzeit, *supra* note 105, at 284 (“As California’s prison population and incarceration rate continue to increase, a sample of habeas petitions filed within San Diego fails to demonstrate that prisoners’ claims are uniformly being given (1) prompt and fair consideration (2) on the merits (3) with appropriate assistance of counsel.”).

¹⁵⁹ CAL. PENAL CODE § 1181(8) (West 2006).

¹⁶⁰ *Id.* § 1182 (West 2006).

¹⁶¹ *Id.* § 1181(8).

¹⁶² See *supra* notes 50-52 and accompanying text.

¹⁶³ See Medwed, *supra* note 6, at 676.

¹⁶⁴ See *supra* notes 96, 150-51 and accompanying text.

several years so long as the defendant satisfactorily explains the reason for the holdup.¹⁶⁵ To protect the government's interest in instances where it might be harmed by the due diligence benchmark (e.g., when its own evidence has deteriorated or otherwise become unavailable by the time a defendant finds and decides to present new evidence), judges might conceivably take into account any undue prejudice to the prosecution in determining whether to issue relief.¹⁶⁶

The due diligence standard in the sphere of newly discovered evidence properly acknowledges the fact-specific nature of each individual innocence claim and the challenges confronting prisoners trying to investigate their cases right after a guilty verdict.¹⁶⁷ Yet the standard simultaneously pays homage to the systemic goal of finality because inexcusably tardy filings face the prospect of dismissal.¹⁶⁸ By means of comparison, the restrictive timing rule of California's new trial remedy values finality, in effect, over the provision of a fair opportunity for a criminal defendant to put forth a viable innocence claim. This may be problematic, to put it mildly, given what we understand about the epidemic of wrongful convictions.¹⁶⁹

B. Rigid Legal Standards for Relief

The new trial motion timing rule discussed above is especially worrisome because the legal test governing newly discovered evidence

¹⁶⁵ Cf. *People v. Haymond*, No. B160018, 2003 WL 1963155, at *2 (Cal. Ct. App. Apr. 29, 2003) (finding that defendant did not state prima facie case for relief in his petition for writ of error coram nobis, where, among other things, over eight years had elapsed between sentencing and his petition). See generally *In re Gallego*, 959 P.2d 290, 294-95 (Cal. 1998) (“[I]n order to avoid the bar of untimeliness, [a habeas] petitioner has the burden of establishing either (i) ‘absence of substantial delay,’ (ii) ‘good cause for the delay,’ or (iii) that his claims fall within an exception to the bar of untimeliness.”) (internal citations omitted); *Ex parte James*, 240 P.2d 596, 600 (Cal. 1952) (excusing delay of six years in filing habeas corpus petition); 36 CAL. JUR. 3D *Habeas Corpus* § 66 (2006) (“A petition seeking a writ of habeas corpus should be filed without delay on learning of the grounds relied on. And where it is sought to attack a judgment of conviction by means of the writ the court will require the petitioner to explain any undue delay in raising the question.”); 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* §§ 919, 920 (2006) (noting that, in filing coram nobis petition, “the defendant must be given an opportunity to establish, if he or she can, that the delay in not presenting the matter was without fault or negligence on his or her part”); Prickett, *supra* note 16, at 33-41 (discussing due diligence requirement in regard to requests for writ of error coram nobis).

¹⁶⁶ See Medwed, *supra* note 6, at 694 n.256.

¹⁶⁷ *Id.* at 693 n.251

¹⁶⁸ *Id.* at 693 n.250.

¹⁶⁹ See *supra* notes 6-7 and accompanying text.

claims under that remedy is more favorable to defendants than the legal tests applicable to habeas corpus and coram nobis petitions. That is, the legal standard for relief under a motion for a new trial in California requires the discovery of new evidence material to the defendant that:

- (1) could not, with reasonable diligence, have been discovered and produced at trial;
- (2) is not merely cumulative;
- (3) is not merely impeaching or contradicting a witness;
- (4) would render a different result probable on retrial of the cause; and
- (5) is shown by the best evidence of which the case admits.¹⁷⁰

Though rigorous,¹⁷¹ this legal test is not insurmountable for defendants and, rather, evidently reconciles the goal for finality with the desirability of affording prisoners a chance to pursue their claims in full and fair fashion. If a defendant satisfies these requirements, and, in particular, presents evidence sufficient to “render a different result probable on retrial,” then a new trial would indeed be a worthwhile endeavor; the defendant has raised credible doubts about his or her guilt. Furthermore, that new trial serves as an extra precaution to ensure that a guilty defendant does not unjustifiably obtain relief by providing judges and juries a fresh opportunity, this time with the additional evidence at hand, to assess the defendant’s culpability.¹⁷² In many respects, though, this praise for California’s new trial motion remedy rings hollow given that its timing limitations make it seldom available to defendants hoping to prove their innocence through newly discovered evidence.¹⁷³ For defendants aspiring to do so, the more realistic options consist of habeas corpus and, to a lesser extent, coram nobis — remedies that possess problems in their own right.

Instead of obligating prisoners to offer evidence that would probably result in a different outcome, the legal standards in the realm of habeas corpus and coram nobis ask for much more: evidence that unerringly points to innocence and undermines the entire structure of the state’s case.¹⁷⁴ Even though the test has been construed more

¹⁷⁰ See *supra* notes 56-60 and accompanying text. Not incidentally, defendants also bear the burden of evidentiary proof. See *supra* notes 61-62 and accompanying text.

¹⁷¹ See *supra* notes 56-62 and accompanying text.

¹⁷² See Medwed, *supra* note 6, at 693-94.

¹⁷³ See *supra* notes 39-42, 51-52 and accompanying text.

¹⁷⁴ See *supra* text accompanying note 139.

strictly with regard to coram nobis than to habeas corpus, this standard emerges as a remarkably severe one to meet under either remedy. As mentioned previously, evidence of a third party confession automatically fails to warrant relief under coram nobis.¹⁷⁵ To be fair, this form of newly discovered evidence is often subject to attack on credibility grounds. Certain types of third party confessions may be found intrinsically wanting, such as those offered by prisoners currently serving long sentences with little to lose by the addition of another conviction to their rap sheets.¹⁷⁶ Nevertheless, to essentially preclude defendants from using third party confessions to prove their innocence, a relatively common type of non-DNA newly discovered evidence,¹⁷⁷ ensures that some legitimate claims will be denied entry at the courthouse door. Such presumptive rejection of non-DNA newly discovered evidence exacerbates the dilemma facing inmates whose cases, through no fault of their own, simply lack the magic bullet of scientific evidence.

More generally, the legal standard in the context of habeas corpus and coram nobis makes it hard for defendants to gain relief — even just a new trial — for any form of newly discovered evidence that does not rise to the level of unerring proof of innocence. Again, rules that prevent prisoners from thoroughly developing potentially meritorious innocence claims run counter to the lessons learned from the DNA revolution: that defendants are wrongfully convicted with stunning regularity and defendants should not be unduly harmed merely because they happen to fall within the bulk of criminal cases in which scientific evidence is absent.

C. Appellate Review

As if the legal standards regarding newly discovered evidence claims of innocence in California do not disadvantage potentially innocent prisoners enough, the rules attendant to appellate review of a court's denial of those claims magnify the quandary. With respect to habeas

¹⁷⁵ See *supra* notes 135-37 and accompanying text.

¹⁷⁶ For an overview of state court treatment of post-conviction claims based on third party confessions, see Thomas R. Malia, Annotation, *Coram Nobis on Ground of Other's Confession to Crime*, 46 A.L.R. 4TH 468 (1986 & Supp. 2000).

¹⁷⁷ See, e.g., Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 132-33 (1996) (mentioning that newly discovered evidence "includ[es] testimony by previously undiscovered witnesses, recantation of testimony given by key prosecution witnesses, confession by the real killer").

corpus, defendants are forbidden from appealing the denial of a habeas corpus petition by a California superior court judge, and the statutorily prescribed recourse is to submit a new petition in the court of appeal.¹⁷⁸ The sole upside of this arrangement, for defendants at least, is that the appellate court often has the power to make an independent evaluation, with the caveat that it should give great weight to a superior court's findings of fact when supported by the record, especially credibility determinations made after observing witnesses.¹⁷⁹ While affording deference only where the findings were based on close, live evaluations of the witnesses is admirable, the lack of direct appellate review for the denial of a habeas corpus petition creates a situation in which there is no explicit check on the lower court's treatment of an innocence claim. As a result, there is no genuine limit on a superior court's ability to wield its habeas corpus power arbitrarily. Under the current regime, when a new habeas petition is filed in the court of appeal after a superior court denial, the court of appeal admittedly must review both the legal and factual claims. In my view, however, this may not provide sufficient direct oversight regarding the initial superior court decision.

A defendant complaining of the denial of a new trial motion or coram nobis petition based on newly discovered evidence may appeal that decision, albeit subject to an extraordinarily deferential standard of appellate review.¹⁸⁰ Specifically, an appellate court may overturn a lower court's rejection of a new evidence claim presented through a new trial motion or request for coram nobis relief only if an "abuse of discretion" appears in the record.¹⁸¹ What is notable about this standard is not that the abuse of discretion standard is the norm,¹⁸² but that it apparently fails to distinguish between claims denied subsequent to an evidentiary hearing, at which witnesses were heard and evidence received, and those claims rejected summarily based solely on the written submissions. In the former situation, a lower court judge's opportunity to view the witnesses in a live setting and

¹⁷⁸ See *supra* note 107 and accompanying text. Moreover, where the petition is filed initially in the court of appeal, the litigant is restricted in appealing the denial of that petition; he or she may file a petition for review or a new petition in the California Supreme Court, but there is no appeal as of right. See *supra* note 108 and accompanying text.

¹⁷⁹ See *supra* notes 109-13 and accompanying text.

¹⁸⁰ See *supra* notes 154-55 and accompanying text.

¹⁸¹ See *supra* notes 64-69, 154-55 and accompanying text.

¹⁸² See *Medwed*, *supra* note 6, at 680-81, 686 (noting many other jurisdictions utilize comparable standards in reviewing new evidence claims).

admit evidence suggests she stood in a better position to evaluate the post-trial claim of innocence than an appellate court ever would and, therefore, deference may be warranted.¹⁸³ In the latter situation, though, the lower court made its decision on the written submissions alone, the type of analytic assessment usually undertaken by appellate courts. Thus, the appellate court arguably stands in a better (or, at a minimum, no worse) position to rule on the innocence claim than the lower court.¹⁸⁴ In fact, application of the abuse of discretion standard to summary denials of new evidence claims could provide a disincentive for lower court judges to even hold evidentiary hearings in the first place.¹⁸⁵

D. Limitations on Forum: The “Same Judge” Issue

Another bothersome aspect of California’s post-trial regime is its fondness for allocating newly discovered evidence claims to the judge who originally handled the case. As noted above, new trial motions are invariably directed to the original trial judge, a predictable custom considering the motion must be made before entry of the judgment in that court.¹⁸⁶ Moreover, petitioners historically sought and currently must seek the common law writ of error coram nobis in the original trial court so as to correct any injustice.¹⁸⁷ To be sure, not all newly discovered evidence claims of innocence in California must be submitted to the judge who presided over the case initially; many features of the habeas corpus and coram vobis remedies expressly allow, and even demand, filing in other courts.¹⁸⁸ Still, the suitability of sending such claims to the original trial judge at all deserves analysis.

Traditionally, the chief policy justification for assigning allegations of newly discovered evidence to the original judge lay in the idea that that jurist was already familiar with the litigation and, therefore, better situated to assess the merits of the innocence claim than a person without any prior link to the case, a practice deemed both more efficient and more likely to yield the proper outcome.¹⁸⁹ Behavioral

¹⁸³ *Id.* at 713.

¹⁸⁴ *See id.* at 714.

¹⁸⁵ *Id.* at 709-10.

¹⁸⁶ *See supra* note 43 and accompanying text.

¹⁸⁷ *See supra* notes 118-19 and accompanying text.

¹⁸⁸ *See supra* notes 92-95, 147-49 and accompanying text.

¹⁸⁹ *See, e.g.,* *Salinas v. State*, 373 P.2d 512, 513 (Alaska 1962) (“[T]he trial judge is in a better position to determine the possible effect and merit of the alleged newly

decision-making theory scholars, however, have pinpointed a number of cognitive biases that may hinder the ability of these judges to appraise the newfound information with the requisite detachment and equanimity.¹⁹⁰ For example, judges may be influenced by the “status quo bias,” which describes the tendency of people to overvalue their prior decision in evaluating a situation for a second time.¹⁹¹ According to research in this field, when a person makes a decision, that determination becomes the reference point to which he or she inevitably compares (and contrasts) any new facts that later bear upon the matter, and that reference point carries greater weight in any subsequent decision-making process than had a decision never been made.¹⁹² The status quo bias, as applied to the newly discovered evidence realm, suggests that the trial verdict — “guilty” — becomes the reference point in analyzing the new data, and much more evidence may be required to spur a judge to deviate from that reference point than had no verdict been delivered.¹⁹³ The routine of assigning these claims to the original trial judge amplifies the impact of this bias because that judge observed the process through which guilt was determined, in all likelihood making her more deeply committed to the status quo than a judge without any prior involvement in the matter.¹⁹⁴

Behavioral decision-making theorists have also studied the way in which people make choices that maximize or accentuate their “positive self-image.”¹⁹⁵ Individuals are often reluctant to acquire information that negates the affirmative view they tend to hold of themselves. When faced with information that could undercut that positive self-identification, people are less likely to consider it relevant or may devalue it entirely.¹⁹⁶ In addition to this concept of one’s adherence to a positive self-image, scholars have explored a comparable theory known as the “egocentric bias,” a term that refers to the inclination of people to paint extremely optimistic portraits of

discovered evidence since he presided over the original trial and heard all the evidence there.”); see also Medwed, *supra* note 6, at 678 n.169 (citing *Salinas*, 373 P.2d at 513).

¹⁹⁰ See Medwed, *supra* note 6, at 700-03 (discussing behavioral decision-making theories).

¹⁹¹ *Id.* at 701-02.

¹⁹² *Id.*

¹⁹³ *Id.* at 703-04.

¹⁹⁴ *Id.* at 704.

¹⁹⁵ *Id.* at 701 n.294 (citing Manuel Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 UTAH L. REV. 1329, 1368 n.143).

¹⁹⁶ *Id.* at 701 n.295.

their own skills.¹⁹⁷ The implications of the egocentric bias for judges surfaced in a questionnaire recently completed by a group of federal magistrate judges in which the data revealed that almost ninety percent of the judges thought they had lower individual reversal rates than at least half of their co-equals on the bench.¹⁹⁸

The interrelated concepts of positive self-image and egocentric bias probably affect the way in which judges respond to newly discovered evidence filings in cases they presided over beforehand.¹⁹⁹ Some judges may dread having made a mistake, on some level, at the earlier proceeding and fear the ramifications of publicly admitting that error.²⁰⁰ Likewise, a judge's positive self-image could be jeopardized by newly discovered evidence that proves an innocent person was convicted at a trial held by that judge.²⁰¹ With one's self-image potentially endangered by newly discovered evidence, a judge might unconsciously characterize the new facts as irrelevant or otherwise legally insufficient.²⁰² To that end, the researchers who conducted the aforementioned study of federal magistrate judges had concerns about the effect of egocentric biases in criminal cases, positing that judges may neglect to set aside convictions as frequently as they should in cases that they initially handled.²⁰³

Undoubtedly, allotting each newly discovered evidence claim to a new judge would not be without its pitfalls, including a degree of inefficiency (forcing the new judge to learn the case from scratch) and the possibility that the new judge will still overrate her colleague's

¹⁹⁷ *Id.* at 701 (citing Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2002)).

¹⁹⁸ *Id.* at 701 nn.297-98 (citing Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784, 814 (2002)).

¹⁹⁹ *See id.* at 703 n.308 ("The trial judge is psychologically invested in the justness of the trial result; for instance, in a criminal case the trial judge likely denied a motion to dismiss and a motion for a directed verdict based on the insufficiency of the evidence." (citing Eli Paul Mazur, "I'm Innocent": *Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197, 232 (2003))).

²⁰⁰ *See id.* at 703 ("To begin with, professional interests in maintaining the result of the initial trial may affect how judges react to the new trial motion of post-conviction petition when it comes across the transom; judges may fear having 'gotten it wrong' and feel cowed by the ramifications of acknowledging that error publicly.").

²⁰¹ *See id.* (mentioning that "a particular judge's positive self-image could be threatened by the presentation of newly discovered evidence that, in theory, signals the possibility an innocent person was convicted at a trial held on that judge's watch and during which she issued evidentiary and legal rulings that bore upon the result").

²⁰² *See id.* at 703.

²⁰³ *Id.* at 703 n.309 (citing Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 815 (2002)).

original decision (a theory known as “conformity effects”).²⁰⁴ The advantages of sending new evidence claims to a new judge, though, seem greater than the disadvantages. The influence of any cognitive biases will almost surely be less pronounced if a new judge evaluated the evidence — a judge unencumbered by any previous involvement in the case.²⁰⁵ And, with the diminished impact of cognitive biases, there may be a higher chance that innocent prisoners will attain justice in the end.

III. SUGGESTIONS FOR REFORM

In attempting to bolster California’s post-trial regime governing newly discovered evidence, one approach might involve tinkering with each individual rule and keeping the larger system intact. For instance, feasible micro-level solutions might include:

- Extending the time period for submitting new trial motions premised on new evidence beyond the entry of judgment;²⁰⁶
- Altering the legal test for procuring habeas corpus and coram nobis relief on the grounds of newly discovered evidence from requiring unerring proof of innocence to simply demanding evidence that would have probably changed the outcome at trial;²⁰⁷
- Considering allowing direct appellate review of denials of habeas corpus petitions by the superior court;²⁰⁸

²⁰⁴ *Id.* at 704 nn.312-13. For a discussion of the concept of conformity effects, see *id.* at 702-03 nn.303-06.

²⁰⁵ *Id.* at 704-06.

²⁰⁶ See 1 WILKES, REMEDIES AND RELIEF, *supra* note 11, § 1-13, at 56 (describing array of time limitations on new trial motions in various states, and noting that nine states lack specific time restriction).

²⁰⁷ See, e.g., ARIZ. R. CRIM. P. 32.1(e) (Arizona’s criminal procedure code provides post-conviction relief when: “Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if: (1) The newly discovered material facts were discovered after the trial. (2) The defendant exercised due diligence in securing the newly discovered material facts. (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.”).

²⁰⁸ *Cf.* Medwed, *supra* note 6, at 709 (“[I]t may be impracticable to depart from the routine of allowing appeals only as a matter of permission in states where that is the norm, particularly in jurisdictions with high caseloads, and instead provide appellate review for every post-trial newly discovered evidence case . . .”).

- Ensuring that the “abuse of discretion” standard of appellate review does not apply to summary denials of newly discovered evidence claims;²⁰⁹ and
- Abandoning the statutory preference, where applicable, for directing newly discovered evidence claims to the same judge who presided over the original trial.²¹⁰

Even so, revamping California’s treatment of newly discovered evidence claims in such a piecemeal fashion, while a marked improvement, would fail to rectify what might be the current regime’s most glaring weakness: unnecessary complexity. As Professor Laurie Levenson has observed, “Nothing is simple in California, especially the law of criminal procedure.”²¹¹ This characterization seems particularly apt in the context of newly discovered evidence of innocence given the existence of three separate methods of presenting such claims, each of which contains divergent procedural, legal, and evidentiary requirements. The intricacy of each individual remedy, combined with the differences between them, may create a high risk of procedural default,²¹² a risk heightened by the absence of an automatic right to counsel for all California habeas corpus and coram nobis petitioners.²¹³ The presence of these disparate procedures also increases the possibility of unequal outcomes for factually analogous claims depending on the precise remedy used by a litigant, a state of affairs that impairs the legitimacy of the criminal justice system.²¹⁴

²⁰⁹ See *id.* at 712.

²¹⁰ See *id.* at 703-08.

²¹¹ LEVENSON, *supra* note 40, at vii.

²¹² See Medwed, *supra* note 6, at 697.

²¹³ See, e.g., *In re Barnett*, 73 P.3d 1106, 1112 (Cal. 2003) (“[T]here is no federal constitutional right to counsel for state habeas corpus proceedings, not even in a capital case. California likewise confers no constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings. Nonetheless, the long-standing practice of this court is to appoint qualified counsel to work on behalf of an indigent inmate in the investigation and preparation of a petition for a writ of habeas corpus that challenges the legality of a death judgment.”); 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 934 (2006) (noting that there is no right to counsel on all coram nobis applications, although petitioners may be entitled to counsel after stating sufficient facts to convince court that evidentiary hearing is required); see also Perrelo & Delzeit, *supra* note 105, at 285-86 (“[T]here were only two orders appointing counsel [out of 312 habeas corpus cases], with one of the orders being made on a judge’s own motion. Only once was the request for counsel addressed in any judge’s memorandum of reasons for denial.”).

²¹⁴ See Medwed, *supra* note 6, at 696-97 (“The availability of ‘incongruous’ procedures in the sphere of newly discovered evidence claims also enhances the risk

As a result, California should weigh the option of developing a single remedy for newly discovered non-DNA evidence claims — a remedy that fuses attributes of the new trial, habeas corpus, and coram nobis procedures. New York already embraces this type of model.²¹⁵ In the past, New York recognized a litany of post-trial remedies, such as common law coram nobis and motions for a new trial on the grounds of newly discovered evidence.²¹⁶ The New York state legislature passed article 440 of the Criminal Procedure Law in 1970 to “collectively . . . embrace all extant non-appellate post-judgment remedies and motions to challenge the validity of a judgment of conviction.”²¹⁷ Section 440.10(1)(g) of that article addressed the topic of newly discovered evidence:

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

. . .

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence²¹⁸

Section 440.10(1)(g) currently covers all newly discovered non-DNA evidence claims in the state.²¹⁹ As I have stated in a previous article,

of divergent outcomes for factually comparable claims depending on the specific procedure used by a litigant, a danger that undermines the legitimacy of the state court system.”).

²¹⁵ See N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2004); Medwed, *supra* note 6, at 697-98.

²¹⁶ See Medwed, *supra* note 6, at 697 & n.276 (citing Peter Preiser, *Practice Commentaries*, N.Y. CRIM. PROC. LAW § 440.10, at 246-49 (McKinney 2004)).

²¹⁷ Medwed, *supra* note 6, at 697-98 n.277 (citing Peter Preiser, *Practice Commentaries*, N.Y. CRIM. PROC. LAW § 440.10, at 247-48 (McKinney 2004)).

²¹⁸ § 440.10(1)(g).

²¹⁹ See Medwed, *supra* note 6, at 698 (mentioning that New York State Legislature amended article 440 to create specific remedy for claims based on DNA evidence, but section 440.10(1)(g) continues to govern litigation of all other newly discovered evidence claims).

“[b]y harmonizing new trial motion and collateral petition relief, section 440.10(1)(g) provides a single procedure whose foremost virtue, besides its relative clarity, is the omission of any statute of limitations on newly discovered evidence claims and, instead, espousal of the due diligence standard.”²²⁰ Moreover, this statute explicitly awards relief where the new evidence would have probably resulted in a more favorable verdict, as opposed to requiring unerring or conclusive proof of innocence.²²¹ Admittedly, the New York post-conviction regime is far from perfect. Among other features, clerks generally direct new evidence claims to the original trial judge, and the courts tend to utilize the abuse of discretion standard in reviewing even summary rejections of these claims.²²² Nonetheless, the New York model may serve as a fine starting point should California consider simplifying its various procedures into a single procedure that captures all newly discovered evidence claims.²²³

Creating a single procedure for all newly discovered evidence claims could lighten the overall administrative burden on California state courts, especially if restrictions were imposed upon the filing of second or “successive” filings,²²⁴ as is currently the case with respect to new trial motions and, to an extent, collateral petitions.²²⁵ It is important, however, that California not ban successive petitions altogether. Prisoners should be entitled to submit additional claims in specific circumstances, for example, after uncovering powerful “new” newly discovered evidence of innocence following the denial of a prior submission.²²⁶

²²⁰ *Id.*

²²¹ *See* § 440.10(1)(g).

²²² Medwed, *supra* note 6, at 662-64 (discussing how these features of section 440.10(1)(g) played out in context of single post-conviction case, *People v. Schulz*, 774 N.Y.S.2d 165 (App. Div. 2004)).

²²³ *Id.* at 698-99.

²²⁴ *Id.* at 699.

²²⁵ *See supra* notes 47-48, 156 and accompanying text; *see also In re White*, 18 Cal. Rptr. 3d 444, 465 (Ct. App. 2004) (noting that “a contention may be barred procedurally because it is untimely, repetitive, or raises issues that were, or could have been, raised on direct appeal”); 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 937 (2006) (“Although there is no legal limitation on the number of writs of error coram nobis that may be sought by a single litigant, the court will not consider a second petition if it contains only those issues previously taken up in the first application . . .”).

²²⁶ *See* Medwed, *supra* note 6, at 699. California already takes such a stance with regard to successive coram nobis petitions. *See, e.g.*, 22C CAL. JUR. 3D *Criminal Law: Post-Trial Proceedings* § 937 (2006) (“[T]he court will not consider a second petition if it contains only those issues previously taken up in the first application or on a

CONCLUSION

The wave of exonerations of innocent prisoners in the United States has not bypassed California. Indeed, the “innocence revolution” has not only freed many of the state’s prisoners,²²⁷ but it has also changed how many California scholars, practitioners, politicians, and other observers perceive the criminal justice system.²²⁸ As part of this new vision of innocence claims, California, like many states, has created a statute providing for post-conviction DNA testing for prisoners whose case files contain biological evidence.²²⁹

That reform is not enough. The evolution of DNA technology has provided scientific evidence of a phenomenon that previously had only been the subject of conjecture — that a significant number of criminal defendants have undeniably been wrongfully convicted. To that end, the formation of state-specific DNA testing statutes that facilitate the litigation of post-conviction innocence claims, as in California, should be praised. Yet DNA cases are the exception rather than the rule, and inmates whose newly discovered evidence lacks a scientific component deserve a similar chance to develop their innocence claims as fully as possible. That is, the emergence of DNA testing should not raise the bar for all inmates wishing to prove their innocence and necessitate that every claim match that level of scientific certainty. For California to adapt to the brave new world of post-conviction litigation, it must reexamine its procedures and revise them so as to provide greater opportunities for non-DNA-based innocence cases to be heard: in other words, to help convert the dream of justice into reality.

Converting the dream of justice into reality in California (and elsewhere) certainly entails more than modifying state post-conviction

motion to vacate the judgment. However, leave to renew may, in the discretion of the court, be granted if new facts have arisen since the former hearing, or even on the same facts more fully stated, if it appears that a proper showing was not made at the prior hearing by reason of the excusable neglect of the moving party.”).

²²⁷ See Henry Weinstein, *Victims of the Justice System: A Conference at UCLA Brings Together the State’s Wrongfully Convicted to Share Their Experiences and Push for Legal Changes*, L.A. TIMES, Apr. 9, 2006, at B1 (“More than 200 people have been wrongfully convicted in California since 1989, said Jeffrey Chin, assistant director of the Innocence Project at California Western School of Law in San Diego, one of the conference sponsors.”).

²²⁸ Lawrence Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004) (“Spawned by the advent of forensic DNA testing and hundreds of post-conviction exonerations, the innocence revolution is changing assumptions about some central issues of criminal law and procedure.”).

²²⁹ See *supra* notes 3-4 and accompanying text.

procedures. Greater resources must be afforded to prisoners and innocence projects to enable individual defendants to undertake thorough investigations of their cases and develop the newly discovered evidence that is vital to proving their innocence. There are dozens of innocence projects devoted to assisting inmates with investigating and litigating claims of innocence throughout the United States, including several affiliated with law schools in California.²³⁰ Virtually every innocence project, though, is plagued by unrelenting funding problems. Removing the potholes on the post-conviction road to exoneration is critical. Still, unless these repairs are accompanied by increased access to fuel en route, namely, the resources required to find new evidence in the first place, many innocent prisoners will never reach their destinations.

²³⁰ For instance, the Northern California Innocence Project is affiliated with the Santa Clara University School of Law, and the California Innocence Project is located at California Western College of Law. For information about the Northern California Innocence Project and the California Innocence Project, see Santa Clara University School of Law, Northern California Innocence Project, <http://ncip.scu.edu/law/ncip/index.html> (last visited Jan. 15, 2007); California Western School of Law, California Innocence Project, <http://www.cwsl.edu/main/default.asp?nav=cip.asp&body=cip/home.asp> (last visited Jan. 15, 2007); see also Erik Degrate, *I'm Innocent: Can a California Innocence Project Help Exonerate Me? . . . Not If the Antiterrorism and Effective Death Penalty Act (AEDPA) Has Its Way*, 34 W. ST. U. L. REV. 67, 68-71 (2006) (discussing role played by innocence projects in California in assisting with exoneration of innocent criminal defendants).