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

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*CALIFORNIA DREAMING? THE GOLDEN STATE'S RESTLESS APPROACH TO NEWLY DISCOVERED  
EVIDENCE OF INNOCENCE*

Daniel S. Medwed\*

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INTRODUCTION

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The emergence of DNA testing since 1989 has jolted the criminal justice system in a fashion akin to a California-style earthquake, its seismic tremors resulting in the post-conviction exoneration of 175 innocent defendants nationwide and causing many observers to recalibrate their views of the system's effectiveness.<sup>1</sup> In response to this new technology, thirty-eight state legislatures have passed laws allowing inmates to request DNA testing and providing procedures through which they may gain access to the biological evidence from their cases.<sup>2</sup> Enacted in 2000, California's post-conviction DNA testing statute contains many praiseworthy features, including the absence of a statute of limitations period<sup>3</sup> and standards of relief seemingly less restrictive than in many other jurisdictions.<sup>4</sup> Moreover, California offers statutory safeguards for the retention of biological evidence after trial; pursuant to the state Penal Code, all evidence must be preserved for the duration of a defendant's incarceration unless the government gives notice of its intent to destroy the item(s) and an opportunity for the inmate to respond.<sup>5</sup>

Even so, only an estimated 10-20% of criminal cases in the United States have any biological evidence suitable for DNA testing,<sup>6</sup> suggesting that documented DNA

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<sup>1</sup> For a current tally of DNA exonerations, see Innocence Project Homepage, <http://www.innocenceproject.org> (last visited Mar. 28, 2006).

<sup>2</sup> See THE INNOCENCE PROJECT: POST-CONVICTION DNA TESTING STATUTES, [http://www.innocenceproject.org/docs/Model\\_DNA\\_Access\\_FactSheet.html](http://www.innocenceproject.org/docs/Model_DNA_Access_FactSheet.html) (last visited Jan. 2, 2006) (noting that "thirty-eight states provide convicted persons access to DNA testing").

<sup>3</sup> CAL. PENAL CODE § 1405(a) (West 2005) ("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.").

<sup>4</sup> 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) (observing that "to 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.*

<sup>5</sup> See CAL. PENAL CODE § 1417 (West 2005).

<sup>6</sup> 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 at the outset of a particular case, the evidence is often lost, destroyed or degraded over time."). See also Ted S. Reed, *Freeing the Innocent: A Proposed Forensic Evidence Retention Statute to*

exonerations are just the tip of the innocence iceberg.<sup>7</sup> 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.<sup>8</sup> To be sure, defendants face an uphill battle in non-DNA cases considering the subjectivity inherent in assessing most forms of new evidence and the lack of a means to demonstrate innocence to a scientific certainty.<sup>9</sup> This intrinsic difficulty is aggravated by the fact that inmates often must resort to burdensome state court procedures that remain little-changed from their ancient British roots and that ultimately fail to provide potentially innocent defendants with adequate exposure to the courts.<sup>10</sup>

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,<sup>11</sup> a post-conviction remedy that historically failed to count newly discovered evidence among its causes of action.<sup>12</sup> Although newly discovered evidence is currently recognized as a ground for relief under California’s habeas corpus remedy, obtaining such relief is difficult in practice given the existence of onerous legal and evidentiary requirements.<sup>13</sup> Moreover, the state’s apparent generosity in allowing petitioners to file their habeas corpus claims in a range of courts is undermined by the fact that appellate review of the decisions on these petitions is

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*Optimize Utah’s Post-Conviction DNA Testing Act for Claims of Actual Innocence*, 2004 UTAH L. REV. 877, 882-84 (discussing the problems with evidence destruction in Utah).

<sup>7</sup> I have developed my general thesis regarding the state court treatment of newly discovered non-DNA evidence in another article, *see generally* Medwed, *supra* note 6, and 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 there have been 196 exonerations from 1989-2003 that lacked DNA testing, not counting the approximately 135 innocent defendants falsely implicated by law enforcement officers in the Rampart Scandal in Los Angeles and in Tulia, Texas).

<sup>8</sup> *Id.* at 658 n. 12-13.

<sup>9</sup> *Id.* at 658 n. 14.

<sup>10</sup> *See generally id.*

<sup>11</sup> *See* 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF: WITH FORMS, § 2-5, at 163-645 (2001); *id.* § 3-2, at 189 [hereinafter WILKES, REMEDIES AND RELIEF].

<sup>12</sup> *See, e.g.*, LARRY W. YACKLE, POSTCONVICTION REMEDIES, § 3, at 5 (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.”).

<sup>13</sup> *See, e.g.*, *In re Clark*, 855 P.2d 729, 739 (Cal. 1993) (holding that a conviction may only be attacked collaterally on grounds of newly discovered evidence if the new evidence creates fundamental doubt about the reliability and accuracy of the proceedings); *In re Weber*, 523 P.2d 229, 243 (Cal. 1974) (holding that newly discovered evidence fails to 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 unerringly points to innocence).

extremely circumscribed.<sup>14</sup> In addition to habeas corpus, California offers other potential avenues for litigating claims of innocence predicated on new evidence – including ordinary new trial motions<sup>15</sup> and the common law writ of error *coram nobis*<sup>16</sup> – that boast procedural and substantive obstacles in their own right.<sup>17</sup> The presence of high hurdles for proving innocence through newly discovered evidence in California derives in part from the state courts’ historic skepticism to the validity of such evidence.<sup>18</sup> Still, the lessons learned from the DNA revolution indicate that wrongful convictions occur with greater frequency than previously imagined and 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 the actual perpetrator left biological evidence at the crime scene that was found by the investigating officers and properly inventoried and preserved over time.

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.<sup>19</sup> What

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<sup>14</sup> 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 2005). *See also In re Reed*, 663 P.2d 216, 217 n.2 (Cal. 1983) (noting that statutory law in California provides no appeal from the denial of a habeas corpus petition by a superior court, and that the proper remedy would be to file a new habeas petition in the court of appeal).

<sup>15</sup> *See* CAL. PENAL CODE § 1181(8) (West 2005).

<sup>16</sup> *See* Morgan Prickett, *The Writ of Error Coram Nobis in California*, 30 SANTA CLARA L. REV. 1 (1990) (discussing the obscure but theoretically potent writ of error *coram nobis* in California).

<sup>17</sup> *See, e.g.,* *People v. Beyea*, 113 Cal. Rptr. 254, 271 (Cal. Ct. App. 1974) (noting that, to grant a new trial on the basis of newly discovered evidence, the following requirements must be met: “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 a ‘very limited class of cases’ (internal citations omitted)”).

<sup>18</sup> *See, e.g.,* *People v. Sutton*, 15 P. 86, 88 (Cal. 1888) (mentioning that claims of newly discovered evidence warranting a new trial “are to be regarded with distrust and disfavor”).

<sup>19</sup> *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 dismissal of at least 100 convictions in 1999 and 2000, see the following series of articles: 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 Judge: 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).

is more, California annually vies with Texas for the dubious honor of leading the nation in the size of its state prison population,<sup>20</sup> with some observers speculating that its penal system comprises the third largest in the world.<sup>21</sup> The state's death row, similarly, is the largest in the country,<sup>22</sup> and defendants subject to capital charges in California have struggled to obtain competent representation and experienced delays in the resolution of their cases.<sup>23</sup> A 2005 study conducted by Glenn Pierce and Michael Radelet also demonstrates that there are vast racial and regional disparities in capital sentencing within the state.<sup>24</sup>

At present, there do not appear to be many adequate mechanisms to allow potentially innocent California inmates to win their freedom, let alone protections to prevent their initial incarceration. Federal habeas corpus has, in effect, disappeared as a viable post-conviction remedy for potentially innocent state prisoners over the past decade<sup>25</sup> and executive clemency is a rarity on the national level,<sup>26</sup> even more so in California where clemency has not been granted since 1967 when Governor Ronald Reagan spared a mentally ill man convicted of murder.<sup>27</sup> 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

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<sup>20</sup> 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> (last accessed Jan. 2, 2006) (noting that California had the second highest number of prisoners among the fifty states at the end of 2004, with 166, 556 inmates, approximately 1,500 fewer prisoners than Texas).

<sup>21</sup> See Martin, *supra* note 19, at 84.

<sup>22</sup> 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> (last accessed Nov. 15, 2005) (noting that California had the largest number of prisoners on death row of any state as of the end of 2004, a total of 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 Henry Weinstein & Michael Muskal, *Schwarzenegger Rejects Williams' Bid for Clemency*, L.A. TIMES, Dec. 12, 2005, available at 2005 WLNR 19952675.

<sup>23</sup> 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 petitions are heard by the California Supreme Court.").

<sup>24</sup> See generally Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA L. REV. 1 (2005).

<sup>25</sup> See Medwed, *supra* note 6, at 717 n. 380.

<sup>26</sup> *Id.* at 717 n. 382-84.

<sup>27</sup> See Weinstein & Muskal, *supra* note 22. Moreover, 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 (2005).

concerning newly discovered evidence claims in California state courts. Next, Part II describes the flaws with the current approach, and Part III then proposes several reforms designed to achieve greater 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 over a century, the California state courts have warned that newly discovered evidence claims should be “regarded with distrust and disfavor.”<sup>28</sup> Among the reasons mentioned by 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.<sup>29</sup> Apparently, the general admonitions with respect to how the substance of new evidence should be viewed have also infiltrated the myriad requirements governing the treatment of these claims in the state. To elaborate, inmates seeking to put forth nonscientific newly discovered evidence of innocence in California – whether presented in the form of 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*)<sup>30</sup> – normally encounter something more troubling than ethereal ‘distrust and disfavor’: high procedural, evidentiary and legal bars.

### A. Motions for a New Trial

In the late seventeenth century England started to allow new trials in criminal cases.<sup>31</sup> 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”;<sup>32</sup>

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<sup>28</sup> See, e.g., Sutton, 15 P. at 88.

<sup>29</sup> See, e.g., People v. Gaines, 22 Cal. Rptr. 556, 558-59 (Cal. Ct. App. 1962) (mentioning that “‘the 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, at 85 (2000).

<sup>30</sup> See Medwed, *supra* note, at 665 n. 65-68 (discussing the differences between direct and collateral remedies).

<sup>31</sup> *Id.* at 666 n. 71, citing Herrera v. Collins, 506 U.S. 390, 408 (1993).

<sup>32</sup> See Medwed, *supra* note 6, at 666 n. 72.

in due course, individual states embraced this practice as well.<sup>33</sup> Motions for a new trial have traditionally been filed with the judge who presided over the case originally.<sup>34</sup> The authority of a trial judge to grant a new trial stems from the notion that individual litigants and society deserve a means of redress to correct genuine miscarriages of justice.<sup>35</sup> In line with this equitable concept, over time newly discovered evidence surfaced across the country as one of the bases for new trial relief.<sup>36</sup>

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.<sup>37</sup> Indeed, a motion made after judgment is not considered timely.<sup>38</sup> The motion ought to be first raised orally in court, followed by a written motion containing supporting affidavits or declarations of the witnesses.<sup>39</sup> 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.<sup>40</sup>

The trial court itself decides the new trial motion, with the singular possibility for reassignment to another court when “necessity demands.”<sup>41</sup> On the one hand, 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.<sup>42</sup> The new trial, in turn, is defined in the California Penal Code as “a reexamination of the issue in the same court, before another jury, after a verdict has been given.”<sup>43</sup> The evidence at this new proceeding must be produced afresh, albeit in the same court, and the parties are banned

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<sup>33</sup> *Id.* at 666 n. 73.

<sup>34</sup> *Id.* at 666 n. 74, citing William Renwick Riddell, *New Trial in Present Practice*, 27 *YALE L.J.* 353, 360 (1917) (describing how the colonies followed the English common law system with respect to 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”). 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.” *Id.* at 361.

<sup>35</sup> See Medwed, *supra* note 6, at 666 n. 75.

<sup>36</sup> *Id.* at 666 n. 76.

<sup>37</sup> See CAL. PENAL CODE § 1182 (West 2005) (“The application for a new trial must be made and determined before judgment”).

<sup>38</sup> See LAURIE L. LEVENSON, CALIFORNIA CRIMINAL PROCEDURE § 28:7, at 1260 (2006).

<sup>39</sup> *Id.*, § 28:7, at 1259-60.

<sup>40</sup> *Id.*, § 28:7, at 1260.

<sup>41</sup> *Id.*, § 28:8, at 1260. See also *id.*, § 28:8, at 1260 n. 2, citing *People v. Moreda*, 13 Cal. Rptr. 3d 154 (Cal. Ct. App. 2004); *People v. Ross*, 253 Cal. Rptr 178 (Cal. 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, at 105 n. 3 (2000).

<sup>42</sup> See LEVENSON, *supra* note 38, § 28:1, at 1252.

<sup>43</sup> CAL. PENAL CODE § 1179 (West 2005).



from using or referring to the former verdict.<sup>44</sup> On the other hand, a trial court's denial of a new trial motion generally terminates its jurisdiction to reconsider the motion,<sup>45</sup> and California case law further suggests this barrier applies to second or successive motions for a new trial together with requests for reconsideration.<sup>46</sup>

The California Penal Code lists nine statutory grounds upon which a defendant may base a new trial motion, including newly discovered evidence.<sup>47</sup> 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 trial."<sup>48</sup> As in the case of other types of new trial motions, the defendant must orally announce her claim before entry of the judgment and later submit a written motion, accompanied by affidavits, to buttress these oral assertions.<sup>49</sup> 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 the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable."<sup>50</sup> A trial court's ruling on a newly discovered evidence claim may be based 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.<sup>51</sup>

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<sup>44</sup> CAL. PENAL CODE § 1180 (West 2005).

<sup>45</sup> See LEVENSON, *supra* note 38, § 28:10, at 1262.

<sup>46</sup> *Id.*, § 28:10, at 1261 ("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, at 1263. See also 22B CAL. JUR. 3d., CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 537, at 133-34 (2000) (suggesting that there is a "division of authority" regarding a trial court's ability to entertain a second new trial motion after one has been denied).

<sup>47</sup> CAL. PENAL CODE § 1181 (West 2005). The California courts have also recognized a handful of nonstatutory grounds for submitting a new trial motion. See LEVENSON, *supra* note 38, § 28:6, at 1258-59.

<sup>48</sup> CAL. PENAL CODE § 1181(8) (West 2005).

<sup>49</sup> *Id.* See also 22B CAL. JUR. 3d., CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 526, at 114 (2000) ("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.").

<sup>50</sup> CAL. PENAL CODE § 1181(8) (West 2005). See also *People v. Sarazzawski*, 161 P.2d 934, 937 (Cal. 1945) (noting it is not uncommon for a new trial motion to be made on one date and the argument on that motion held at a later date).

<sup>51</sup> See, e.g., *People v. Fairchild*, 25 Cal. Rptr. 717, 717-18 (Cal. Ct. App. 1962) (finding no abuse of discretion where a trial court refused to order a new trial on the ground of newly discovered evidence based on an affidavit of a co-defendant that defendant was in a drunken stupor and did not participate in robbery); *People v. King*, 231 P.2d 156, 163 (Cal. Ct. App. 1951) (observing that "wise discretion is vested in trial court in determining weight to be given to statements contained in affidavits on motion for new trial and that discretion is to be exercised in determining diligence

Defense attorneys, however, are not foreclosed from attempting to develop their newly discovered evidence claims through live testimony instead of affidavits.<sup>52</sup>

As noted above, early California case law exhibited disdain for newly discovered evidence as a matter of policy,<sup>53</sup> and this aversion 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 must be material and must not have been discoverable with due diligence prior to trial,<sup>54</sup> the state courts have further insisted that the facts must be such that they would probably generate a different result at a retrial and shown by the “best evidence” admissible in the case.<sup>55</sup> 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,<sup>56</sup> nor may it simply impeach or contradict a witness.<sup>57</sup> Also, not only does the defendant generally bear the burden of proof – especially concerning whether the evidence could not have been produced at trial<sup>58</sup> – but in evaluating a new trial motion, the trial court must endorse a presumption in favor of the

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shown, truth of matters stated, and the materiality and probability of effect of them, if believed to be true and trial court is justified in regarding with distrust affidavits with newly discovered evidence in motions for new trial’ (internal citations omitted).”).

<sup>52</sup> See, e.g., *People v. Trujillo*, 67 Cal. App. 3d 547, 557 (Cal. 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. . . . The decision not to produce the witness is a matter of trial tactics.”).

<sup>53</sup> See *supra* notes 28-29 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 22B CAL. JUR. 3d., CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 506, at 85 n. 3 (2000). Under the California new trial motion remedy, perjured testimony seems to be the least acceptable form of newly discovered evidence. See, e.g., *id.*, § 512, at 94-95; *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 (Cal. 1952) (noting that a showing based on perjured testimony alone is insufficient to yield a new trial). Even so, if a court finds a recantation believable, its next step would be ascertain whether that evidence would probably produce 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 22B CAL. JUR. 3d., CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 531, at 125-26 (2000).

<sup>54</sup> CAL. PENAL CODE § 1181(8) (West 2005). 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 (Cal. 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, e.g., that it would affect the trial result. See 22B CAL. JUR. 3d., CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 509, at 88-89 (2000).

<sup>55</sup> See, e.g., *Beyea*, 113 Cal. Rptr. at 271.

<sup>56</sup> *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.”).

<sup>57</sup> See 22B CAL. JUR. 3d., CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 511, at 93 (2000).

<sup>58</sup> 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.<sup>59</sup> California's judicial gloss on new trial motions based on newly discovered evidence is consistent with that imposed in other jurisdictions, and reflects the national trend toward viewing such claims with trepidation in state courts dating back to the nineteenth century.<sup>60</sup>

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 its appeal of the final judgment of conviction.<sup>61</sup> 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.<sup>62</sup> The California appellate courts have even characterized the trial judge's exercise of autonomy on new trial motions premised on newly discovered evidence as "an enlarged discretionary power."<sup>63</sup> 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

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<sup>59</sup> *People v. Seaton*, 28 P.2d 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 38, § 28:8, at 1261.

<sup>60</sup> See, e.g., *Berry v. Georgia*, 10 Ga. 511, 527 (1851) ("It is incumbent on a party who asks for a new trial, on the ground of newly 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.

<sup>61</sup> CAL. PENAL CODE § 1237(a) (West 2005) ("Upon appeal from a final judgment the court may review any order denying a motion for a new trial."); CAL. PENAL CODE § 1466(2)(A) (West 2005) (allowing a defendant the right to appeal, among other things, "any order denying a motion for a new trial."). 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 (Cal. 2004).

<sup>62</sup> See, e.g., *People v. Coffman*, 96 P.3d 30, 128 (Cal. 2004) (commenting that an appellate court must review a trial court's decision on a new trial motion "under a deferential abuse-of-discretion standard" (internal citations omitted)); *People v. Gaines*, 22 Cal. Rptr. 556, 558 (Cal. Dist. 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. Dist. Ct. App. 1941). Cf. 22B CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 540, at 136 (2000) ("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.")

<sup>63</sup> See *People v. Fluery*, 327 P. 2d 47, 50 (Cal. Dist. 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, at 140 (2000) ("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.").

in ruling on the motion.<sup>64</sup> 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.<sup>65</sup> Moreover, this standard of appellate review seemingly applies irrespective of whether the judge bases her decision on the affidavits submitted as part of the motion or whether live testimony is taken at the hearing on the motion.<sup>66</sup>

## 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 United States and California Constitutions,<sup>67</sup> traditionally applied to prisoners challenging the lawfulness of

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<sup>64</sup> See LEVENSON, *supra* note 38, § 28:8, at 1261. See also *People v. Taylor*, 23 Cal. Rptr. 2d 846, 848 (Cal. 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, at 137-38 (2000) (“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.”).

<sup>65</sup> ROGER PARK ET AL., EVIDENCE LAW § 12.01, at 540-41 & n.6 (1998) (terming the abuse of discretion standard of appellate review a “virtual shield from reversal”). See also 22B CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 540, at 136-37 (2000) (“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.* at § 541, at 138 (“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.”).

<sup>66</sup> See, e.g., *People v. Shoals*, 10 Cal. Rptr. 2d 296, 302-03 (Cal. Ct. App. 1992) (finding no abuse of discretion where the trial court denied a motion for a new trial predicated on purported newly discovered evidence based on the written declarations of a potential witness who was unavailable to give live testimony).

<sup>67</sup> U.S. CONST., ART. I, § 9; CAL. CONST. ART. I, § 11; CAL. CONST. ART. VI, § 10.

their detention in regard to errors of law.<sup>68</sup> The scope of the “Great Writ” was originally limited to resolving jurisdictional defects,<sup>69</sup> and it only emerged to address constitutional issues in the United States in the 1930s.<sup>70</sup> 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 assessment of a habeas corpus petition.<sup>71</sup> As for the writ’s other trademark requirements, states usually demanded that habeas corpus petitioners be in custody and that petitions be filed with a court in the inmate’s county of confinement.<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> 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.<sup>75</sup> Section 1473(a) of the 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.”<sup>76</sup> The Penal Code subsequently

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<sup>68</sup> See YACKLE, *supra* note 12, §§ 3-6, at 4-29.

<sup>69</sup> See 1 WILKES, REMEDIES AND RELIEF, *supra* note 11, § 2-2, at 136. See also LEVENSON, *supra* note 38, § 30:16, at 1367 (“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.”).

<sup>70</sup> See YACKLE, *supra* note 12, § 5, at 15-16. See also LEVENSON, *supra* note 38, § 30:16, at 1367 (noting that the “original function [of habeas corpus in California] has been expanded to review the constitutionality of statutes as well as the constitutionality of trial procedure.”).

<sup>71</sup> YACKLE, *supra* note 12, § 3, at 5 (“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.”)

<sup>72</sup> See 1 WILKES, REMEDIES AND RELIEF, *supra* note 11, § 2-2, at 137.

<sup>73</sup> *Id.* § 1-8, at 38. See also Bernard L. Lewis, *Case Note, Availability of Habeas Corpus Where Petitioner Does Not Seek Discharge*, 2 UCLA L. REV. 415 (1955) (noting that habeas corpus in California generally served only to secure release from custody).

<sup>74</sup> See CAL. PENAL CODE §§ 1473 et seq. (West 2005). 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 (Cal. 2003).

<sup>75</sup> 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 to be 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, PT. 1, HABEAS CORPUS §§ 5-8, at 12-24 (1997).

<sup>76</sup> CAL. PENAL CODE § 1473(a) (West 2005).

offers minimal guidance as to the precise contours of the grounds upon which a habeas corpus petition must be based.<sup>77</sup>

Case law has clarified that newly discovered evidence is an appropriate ground for seeking – and obtaining – relief via California’s habeas corpus procedure.<sup>78</sup> Still, the theoretical availability of habeas relief for new evidence claims is offset by the presence of common law and statutory roadblocks.<sup>79</sup> The legal requirements for procuring a writ of habeas corpus, most importantly, are much more rigorous than those in the new trial motion context.<sup>80</sup> 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 unerringly points to innocence.”<sup>81</sup> This rule has been strictly construed to the extent that evidence that would weaken the prosecution’s case and yield a more

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<sup>77</sup> The Penal Code does, however, cite the example of “false evidence” that led to a conviction as a proper ground for habeas relief. CAL. PENAL CODE § 1473(b) (West 2005). Seeking habeas corpus relief on the basis of false evidence is distinguishable from claims of newly discovered evidence. 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, 927 (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 structure of the case upon which the prosecution was based.”). Moreover, a 1975 amendment to the Penal Code expressly provided for habeas relief on the basis of “[F]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration.” CAL. PENAL CODE § 1473(b)(1) (West 2005). 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 (Cal. 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.”).

<sup>78</sup> *See, e.g., LEVENSON, supra* note 38, § 30:17, at 1369 (citing “new evidence” as one of “the more common issues” raised in a California state habeas corpus petition).

<sup>79</sup> *See Medwed, supra* note 6, at 683-83 (noting that, 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”).

<sup>80</sup> 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 (Cal. 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.”).

<sup>81</sup> *In re Weber*, 523 P.2d 229, 243 (Cal. 1974). *See also In re Clark*, 855 P.2d 729, 739 (Cal. 1993) (citing that a conviction may be attacked collaterally on the basis of newly discovered evidence only if the new evidence generates fundamental doubt regarding the reliability and accuracy of the proceedings); *Ex parte Lindley*, 177 P.2d at 927 (Cal. 1947) (noting that “newly 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. 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.’”); *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.”).

difficult decision for the trier of fact will not suffice.<sup>82</sup> Despite this demanding requirement, California courts have on occasion expressed a willingness to order relief, including new trials, with respect to habeas corpus petitions grounded in newly discovered evidence.<sup>83</sup>

Additionally, California state petitioners for the writ bear a “heavy burden” in both initially pleading for relief and later proving their claims.<sup>84</sup> Habeas corpus, viewed as a collateral 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.<sup>85</sup> Indeed, the California Supreme Court has stated that a court’s discretion to grant relief on habeas corpus is “much narrower” than the discretion to grant a motion for a new trial.<sup>86</sup>

In terms of procedure, a prisoner may file a habeas corpus petition in either the superior court, court of appeal, or the California Supreme Court,<sup>87</sup> with some restrictions

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<sup>82</sup> 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 obtaining relief, the 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, PT. 1, HABEAS CORPUS § 50, at 95 (1997) (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”).

<sup>83</sup> *People v. Faulkner*, 2003 WL 1852058, at \*5 (Cal. Ct. App. 2003) (ordering a new trial in a child sex abuse case where the 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*, 170 Cal. Rptr. 223 (Cal. 1981) (granting habeas corpus relief on the basis of newly discovered evidence and remanding the matter to the Superior Court).

<sup>84</sup> See generally LEVENSON, *supra* note 38, § 30:16, at 1368. See also *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 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). 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 2005); 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 either the habeas corpus remedy . . .”).

<sup>85</sup> See, e.g., *In re Martha*, 265 P.2d 527 (Cal. 1954) (observing that there is a presumption of regularity regarding a judgment that is attacked collaterally via habeas corpus); *People v. Ault*, 95 P.3d 523, 533-34 (Cal. 2004) (observing that, 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.’”).

<sup>86</sup> *People v. Ault*, 95 P.3d at 533.

<sup>87</sup> CAL. CONST. ART. VI, § 10 (vesting original jurisdiction over habeas corpus proceedings in these courts).

depending on the nature of the underlying claim.<sup>88</sup> 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 the county of incarceration.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

The habeas corpus petition itself must state the factual basis for the purported illegal restraint on the petitioner's liberty.<sup>92</sup> 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 the petition is deemed lacking.<sup>93</sup> If the petition survives 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,<sup>94</sup> after which the petitioner must file a

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<sup>88</sup> See LEVENSON, *supra* note 38, § 30:21, at 1374 (“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.”).

<sup>89</sup> See *id.* Cf. 36 CAL. JUR. 3D, PT. 1, HABEAS CORPUS § 61, at 115-16 (1997) (“Former provisions that included specific geographic 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 of those proceedings. *Id.*, § 61, at 116.

<sup>90</sup> CAL. PENAL CODE § 859c (West 2005); Fuller v. Superior Court, 23 Cal. Rptr. 3d 204 (Ct. App. 2004) (holding that the superior court's practice of allocating a habeas corpus petition, which challenged the denial of a motion to dismiss a misdemeanor complaint, to the same judge who denied the motion to dismiss was improper); LEVENSON, *supra* note, § 30:21, at 1375. See also CAL. R. CRIM. P. 4.551(a)(A) (“Upon filing, the clerk of the court must immediately deliver the petition to the presiding judge or his or her designee.”).

<sup>91</sup> See Bennett v. Mueller, 273 F.3d 895, 899 (9<sup>th</sup> 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, PT. 1, HABEAS CORPUS § 66, at 122-25 (1997); LEVENSON, *supra* note 38, § 30:21, at 1375; 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.”).

<sup>92</sup> See 36 CAL. JUR. 3D, PT. 1, HABEAS CORPUS §§ 65, 67, at 119-22, 125-28 (1997).

<sup>93</sup> See *id.*, § 98, at 170-71; LEVENSON, *supra* note 38, § 30:18, at 1370. See also People v. Espinoza, 116 Cal. Rptr. 2d 700, 727-28 (Cal. Ct. App. 2002) (finding that the defendant failed to establish a *prima facie* case for habeas corpus relief on the basis of newly discovered evidence).

<sup>94</sup> LEVENSON, *supra* note 38, § 30:18, at 1370-71 (noting that the court may issue either a writ directing the custodian to produce the inmate and file a written response or an order to show cause as to why the relief should not be afforded and ordering the custodian to file a written response); *id.*, § 30:22, at 1376 (“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.”).



“traverse” answering the response.<sup>95</sup> 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.<sup>96</sup> When there is a factual dispute apparent from the pleadings, both the Penal Code and case law suggest the court should order an evidentiary hearing.<sup>97</sup> 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.<sup>98</sup> 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 a hearing on a habeas corpus petition.<sup>99</sup>

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.<sup>100</sup> If the petition originates in the court of appeal, the litigant is circumscribed in automatically appealing that decision directly and, instead, may file a new petition or petition for review in the California Supreme Court.<sup>101</sup> Where the superior court 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*.<sup>102</sup> In grappling with how to treat the superior court’s findings of

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<sup>95</sup> *Id.*, § 30:24, at 1378-79.

<sup>96</sup> *Id.*, § 30:25, at 1379. 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.*

<sup>97</sup> *Id.* See also CAL. PENAL CODE § 1484 (West 2005). 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, PT. 1, HABEAS CORPUS §§ 92-93, at 157-64 (1997).

<sup>98</sup> See 36 CAL. JUR. 3D, PT. 1, HABEAS CORPUS § 88, at 151-53 (1997); LEVENSON, *supra* note, § 30:25, at 1379.

<sup>99</sup> See *In re Branch*, 449 P.2d 174, 184 (Cal. 1969). Evidentiary hearings are rarely granted on habeas corpus petitions in general. See, e.g., Stephen J. Perrelo & Albert N. Delzeit, *Habeas Corpus in San Diego Superior Court (1991-93): An Empirical Study*, 19 T. JEFFERSON L. REV. 283, 283 (1997) (“In this study, the authors examined all of the habeas corpus prisoner petitions filed in the downtown San Diego superior court for a two year period, except for fourteen files which were missing or lost. Among the 312 examined cases, only two orders appointing counsel were made and only six hearings were held.”).

<sup>100</sup> See LEVENSON, *supra* note 38, § 30:26, at 1380.

<sup>101</sup> *Id.* See also CAL. PENAL CODE § 1506 (West 2005).

<sup>102</sup> See LEVENSON, *supra* note 38, § 30:26, at 1380. 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, PT. 1, HABEAS CORPUS § 9, at 24-27 (1997). 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 (Cal. 1993).

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.<sup>103</sup> 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.”<sup>104</sup> 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.”<sup>105</sup> The Supreme Court has clarified, however, 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.<sup>106</sup>

In sum, prisoners seeking to present newly discovered evidence of innocence through habeas corpus may file their petitions in an array of courts.<sup>107</sup> Moreover, inmates are not subject to a rigid time bar (yet must be mindful that dilatory filing risks dismissal from the courts).<sup>108</sup> 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.<sup>109</sup> It must be emphasized, though, that prisoners pursuing newly discovered evidence claims in the habeas corpus arena encounter daunting legal and evidentiary hurdles, most notably, the requirement that their petition must “unerringly” point to innocence and create “fundamental doubt” as to the propriety of the verdict.<sup>110</sup>

## 2. *Coram Nobis*

The remedy of *coram nobis*, which literally means “before us,”<sup>111</sup> is a common law remedy in California available in the court of original judgment to correct its own

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<sup>103</sup> *In re Wright*, 144 Cal. Rptr. at 543-44. For a discussion of how appellate courts in California may treat a referee’s fact findings, see 36 CAL. JUR. 3D, PT. 1, HABEAS CORPUS § 88, at 151-53 (1997).

<sup>104</sup> *In re Wright*, 144 Cal. Rptr. at 543-44.

<sup>105</sup> *Id.*

<sup>106</sup> *In re Cudjo*, 977 P.2d 66, 75 (Cal. 1999).

<sup>107</sup> See *supra* notes 87-90 and accompanying text.

<sup>108</sup> See *supra* note 91 and accompanying text.

<sup>109</sup> See *supra* notes 102-06 and accompanying text.

<sup>110</sup> See *supra* notes 80-82 and accompanying text.

<sup>111</sup> 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).

proceedings in both civil and criminal matters.<sup>112</sup> 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.<sup>113</sup> Traditional uses of the writ included rectifying clerical errors concerning notice and pleading.<sup>114</sup> The writ was cognizable “however late discovered and alleged”<sup>115</sup> – subject to the requirement that petitioners must proceed with due diligence in uncovering and presenting the new facts<sup>116</sup> – and granting of the writ resulted in vacating the conviction with an opportunity for the state to re-try the petitioner.<sup>117</sup>

The United States Supreme Court recognized *coram nobis* as early as 1810,<sup>118</sup> and California courts first mentioned the writ in a series of civil cases in the 1880s.<sup>119</sup> Unlike habeas corpus, neither the United States nor California Constitutions mention *coram nobis*; the writ exists purely as a judicially-invented (and judicially-perpetuated) “extraordinary remedy.”<sup>120</sup> As one might expect, California decisions treated *coram nobis* with caution from the outset,<sup>121</sup> but *coram nobis* began to surface in state criminal cases in the early twentieth century and swelled to a large number by the 1950s.<sup>122</sup> The California courts nonetheless clarified that the writ took a backseat to statutory remedies,

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<sup>112</sup> See generally Prickett, *supra* note 16. See also *Ex parte Lindley*, 177 P.2d at 929 (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, at 206 (2000) (“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, at 207 (“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.”).

<sup>113</sup> See Medwed, *supra* note 6, at 669 n. 102; Prickett, *supra* note 16, at 6.

<sup>114</sup> See Medwed, *supra* note 6, at 669 n. 103.

<sup>115</sup> Daniel F. Piar, *Using Coram Nobis to Attack Wrongful Convictions: A New Look at an Ancient Writ*, 30 N. KY. L. REV. 505, 507 n.20 (2003) (quoting Blackstone).

<sup>116</sup> See Medwed, *supra* note 6, at 670 n. 106 (“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.

<sup>117</sup> See Medwed, *supra* note 6, at 669-70 n. 105.

<sup>118</sup> See Piar, *supra* note 115, at 507 (citing *Strode v. The Stafford Justices*, 23 F. Cas. 236 (Marshall, Circuit Justice, C.C.D. Va. 1810) (No. 13,537)).

<sup>119</sup> See Prickett, *supra* note 16, at 7.

<sup>120</sup> See LEVENSON, *supra* note 38, § 30:35, at 1392.

<sup>121</sup> See Prickett, *supra* note 16, at 7.

<sup>122</sup> *Id.* at 9-14. See also 1 WILKES, HANDBOOK, *supra* note 84, § 7-47, at 362 (noting that “the first recorded postconviction coram nobis decision of the Court of Appeal” occurred in 1908).

such as motions for a new trial, and that its application would be confined solely to situations where no other remedy was available.<sup>123</sup>

There are other 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.<sup>124</sup> In a nutshell, 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 would have definitively prevented rendition of the verdict.<sup>125</sup> To exemplify the challenging nature of this legal standard, one need only survey California case law and discern something remarkable for its absence: no reported decisions of a defendant’s conviction upon a retrial following the issuance of *coram nobis*.<sup>126</sup> Second, courts have rigidly applied the principle that the alleged new fact(s) in a *coram nobis* petition may not go to an issue previously adjudicated.<sup>127</sup> 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,<sup>128</sup> even though such a claim may be satisfactory in the case of habeas corpus.<sup>129</sup> The stated rationale for

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<sup>123</sup> Prickett, *supra* note 16, at 7. See also 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 911, at 163 (2000) (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. *Id.*, § 914, at 169-71. See also *id.*, § 917, at 173 (“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*.”).

<sup>124</sup> 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 part’s case.” *Id.* at 43.

<sup>125</sup> See, e.g., 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 918, at 178-80 (2000).

<sup>126</sup> 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.

<sup>127</sup> See, e.g., *People v. Gallardo*, 92 Cal. Rptr. 2d 161, 172 (Cal. Ct. App. 2000) (holding that a “writ [of *coram nobis*] will properly issue only when the petitioner can establish (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, at 171-72 (2000) (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, at 196 (“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”).

<sup>128</sup> Prickett, *supra* note 16, at 44.

<sup>129</sup> See, e.g., *In re Branch*, 449 P.2d 174 (Cal. 1969).

treating this evidence less generously under *coram nobis* 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.<sup>130</sup> Third, even if a *coram nobis* petitioner manages to 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.<sup>131</sup>

Finally, it is crucial to grasp the relationship between habeas corpus and *coram nobis* in California, particularly since 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,<sup>132</sup> there are subtle distinctions between the two, differences 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.<sup>133</sup> In contrast to habeas corpus, moreover, *coram nobis* does not mandate that petitioners be in custody at the time of filing.<sup>134</sup> Therefore, if the habeas corpus statutory remedy is available – such as when a defendant remains incarcerated and wishes to present new evidence of innocence – then 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

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<sup>130</sup> 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 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)).

<sup>131</sup> See Prickett, *supra* note 16, at 53; 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 931, at 208-10 (2000).

<sup>132</sup> See *supra* notes 80-82, 110, 124-26 and accompanying text.

<sup>133</sup> See Prickett, *supra* note 16, at 68-69. As noted by the California Supreme Court, “[t]he 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 at 929.

<sup>134</sup> See Prickett, *supra* note 16 at 68-69

possibility.<sup>135</sup> In the words of one observer of California law, “[c]oram nobis emerges from beneath the shadow of habeas corpus if a person no longer incarcerated wishes to have a conviction set aside solely by virtue of previously unadjudicated errors of fact.”<sup>136</sup> And, without a doubt, the occasions in which *coram nobis* does slip by the long shadow cast by habeas corpus across the California coast and result in relief are few and far between.<sup>137</sup>

Together with judicial pronouncements categorizing *coram nobis* as an extraordinary or “rather unusual” remedy,<sup>138</sup> 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,<sup>139</sup> but Section 1265(a) of the California Penal Code provides that “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.”<sup>140</sup> 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.<sup>141</sup> In essence, *coram vobis* contains similar procedural and substantive traits to those of its trial court cousin, and the terms *coram nobis* and *vobis* are often used interchangeably.<sup>142</sup>

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<sup>135</sup> See 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 917, at 173-78 (2000). 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)).

<sup>136</sup> Prickett, *supra* note 16, at 68-69.

<sup>137</sup> *Id.* at 24 (“Issuance of the writ will be ‘most rare’ and confined 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 or fraud or false testimony by a government official. See CAL. PENAL CODE § 1473.6 (West 2005). The procedures for pursuing a motion to vacate under this statute are analogous to those pertaining to filing a habeas corpus petition. See LEVENSON, *supra* note 38, § 28:17, at 1268.

<sup>138</sup> *People v. Kelly*, 96 P.2d 372, 374 (Cal. 1939).

<sup>139</sup> See *supra* note 112 and accompanying text; 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS §§ 912, 930, at 167, 207-08 (2000).

<sup>140</sup> CAL. PENAL CODE § 1265(a) (West 2005). 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).

<sup>141</sup> See Prickett, *supra* note 16, at 64.

<sup>142</sup> *Id.* at 64-66 (mentioning that “[t]he requisites for *coram vobis* are substantially identical to those for *coram nobis*” but with some procedural differences regarding the granting or denial of a petition). See also 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 912, at 167 (2000) (noting that “the basis for issuance, 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

In the event that a *coram nobis* petition may be 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,<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> Should a court opt to hold an evidentiary hearing, then it may structure the hearing in almost any manner it sees fit; the court is not required to subpoena the petitioner's witnesses or even conduct proceedings in the inmate's presence.<sup>146</sup> Also, as discussed in the context of new trial motions,<sup>147</sup> a court's decision to deny a *coram nobis* application receives extensive deference on appeal; a clear abuse of discretion must be shown in order to warrant reversal.<sup>148</sup> Whereas successive *coram nobis* petitions are nominally permissible, the due diligence and “new fact” requirements render the prospect of multiple petitions uncommon in practice.<sup>149</sup>

## II. FLAWS WITH THE CURRENT APPROACH

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this distinction appears to be academic in modern practice . . .”); LEVENSON, *supra* note 38, § 30:35, at 1392 (“There is little real difference between the writs of *coram nobis* and *coram vobis*.”).

<sup>143</sup> It should be noted, however, that the statutory motion to vacate remedy mentioned above, see *supra* note and accompanying text, does have a limitations period. See CAL. PENAL CODE § 1473.6(d) (West 2005) (“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.”).

<sup>144</sup> See Prickett, *supra* note 16, at 33-41.

<sup>145</sup> *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.

<sup>146</sup> *Id.* at 54-55. See also 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 935, at 213 (2000) (noting that “neither the United States Constitution nor California law requires that the hearing on the petition be conducted as a formal trial.”).

<sup>147</sup> See *supra* notes 62-66 and accompanying text.

<sup>148</sup> See, e.g., *People v. Ibanez*, 90 Cal.Rptr.2d 536, 541 (Cal. 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 (noting that, while a ruling on a *coram nobis* petition is normally an appealable order, the standard of appellate review is typically abuse of discretion). It should be noted, however, the denial of a request for *coram vobis* in the appellate court does not allow for further appeal. 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 939, at 216-17 (2000).

<sup>149</sup> See Prickett, *supra* note 16, at 56-57; 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 937, at 215-16 (2000).

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 harsher over time as the date of final judgment recedes into the distant past. 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 – defendants seeking relief at a later date are subject to a more stringent legal test under habeas corpus. And if no other remedy is available, then *coram nobis* may be an alternative for a defendant who is no longer in custody and hopes to clear his 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, the oft-expressed goal of finality in criminal cases: the need for an end to litigation and closure for the victims of crimes.<sup>150</sup>

But, as is often the case in the criminal justice system, appearances can be deceiving. The manner in which these remedies intersect means that relief is difficult to achieve for potentially innocent California inmates with newly discovered evidence at their disposal, a phenomenon at odds with recent developments, both in the state and across the nation, suggesting that wrongful convictions occur with greater frequency than ever imagined.<sup>151</sup> 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

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<sup>150</sup> See Medwed, *supra* note 6, at 687-88.

<sup>151</sup> See *supra* notes 1, 7, 19 and accompanying text. See also Perrello & Delzeit, *supra* note 99, 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.”).



remedy.<sup>152</sup> New trial motions in general, however, must be made orally prior to the entry of the judgment,<sup>153</sup> posing a pragmatic obstacle the significance of which cannot be overstated. Even though defendants may be granted time to procure the necessary affidavits of witnesses through whom the new evidence is expected to be presented,<sup>154</sup> 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.<sup>155</sup> Litigants who lack the resources or sheer good luck to find newly discovered evidence, let alone the witnesses necessary to develop this evidence, before judgment – presumably, the overwhelming majority of criminal defendants – will be unable to avail themselves of this remedy.<sup>156</sup>

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 with this standard on a case-by-case basis.<sup>157</sup> California courts have permitted the filing of post-conviction claims even after a delay of several years so long as the defendant satisfactorily explains the reason for the holdup.<sup>158</sup> To protect the interests of the government 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.<sup>159</sup>

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<sup>152</sup> CAL. PENAL CODE § 1181(8) (West 2005).

<sup>153</sup> CAL. PENAL CODE § 1182 (West 2005).

<sup>154</sup> CAL. PENAL CODE § 1181(8) (West 2005).

<sup>155</sup> See *supra* notes 48-49 and accompanying text.

<sup>156</sup> See Medwed, *supra* note 6, at 676 (commenting that many motions for a new trial “are of limited utility to the bulk of criminal defendants who, in the immediate aftermath of their convictions, might not have the resources or the good fortune to find new evidence”).

<sup>157</sup> See *supra* notes 91, 143-44 and accompanying text.

<sup>158</sup> See generally 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS §§ 919, 920, at 180-89 (2000); 36 CAL. JUR. 3D, PT. 1, HABEAS CORPUS § 66, at 122-25 (1997); *Ex parte James*, 240 P.2d 596, 600 (Cal. 1952) (excusing a delay of six years in filing a habeas corpus petition); Prickett, *supra* note 16, at 33-41 (discussing the due diligence requirement in regard to requests for a writ of error *coram nobis*). Cf. *People v. Haymond*, 2003 WL 1963155, at \*2 (Cal. Ct. App. 2003) (finding that the defendant did not state a *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).

<sup>159</sup> See Medwed, *supra* note 6, at 694 n. 256.

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 yet simultaneously pays homage to the systemic goal of finality – inexcusably tardy filings still face the prospect of dismissal.<sup>160</sup> 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.

B. Rigid Legal Standards for Relief

Now, the timing rule criticized above regarding the new trial motion procedure is particularly problematic because the legal test governing newly discovered evidence claims raised through that remedy is more favorable to defendants than those 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

- could not, with reasonable diligence, have been discovered and produced at trial;
- is not merely cumulative;
- is not merely impeaching or contradicting a witness;
- would render a different result probable on retrial of the cause; and
- is shown by the best evidence of which the case admits.<sup>161</sup>

Though rigorous,<sup>162</sup> 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, puts forth evidence satisfying the “probability” prong – then a new trial would indeed be a worthwhile endeavor; the defendant has raised

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<sup>160</sup> *Id.* at 693 n. 250-51.

<sup>161</sup> *See supra* notes 54-57 and accompanying text. Not incidentally, defendants also bear the burden of evidentiary proof. *See supra* notes 58-59 and accompanying text.

<sup>162</sup> *Id.*

credible doubts about his guilt. And that new trial itself serves as a further precaution to ensure that guilty defendants do not unjustifiably capitalize on this remedy by providing judges and juries a fresh opportunity, this time with the additional evidence at hand, to assess the defendant's culpability.<sup>163</sup> In many respects, though, this praise for California's new trial motion remedy rings hollow given that its timing limitations make it rarely available to defendants hoping to prove their innocence through newly discovered evidence. 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.<sup>164</sup> Whereas the test has been construed more strictly in regard to *coram nobis* than to habeas corpus, this standard emerges as a remarkably severe one to meet under either remedy. For example, as mentioned previously, evidence of a third-party confession automatically fails to warrant relief under *coram nobis*.<sup>165</sup> To be fair, this form of newly discovered evidence is not without its warts. 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 sheet.<sup>166</sup> Nevertheless, to essentially deprive defendants whatsoever from attempting to show their innocence through this method, a relatively common type of non-DNA newly discovered evidence,<sup>167</sup> implies that some potentially legitimate claims of innocence will be denied entry at the courthouse door, exacerbating the dilemma facing inmates whose cases, through no fault of their own, simply lack the magic bullet of scientific evidence.

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<sup>163</sup> See Medwed, *supra* note 6, at 693-94.

<sup>164</sup> See *supra* note 132 and accompanying text.

<sup>165</sup> See *supra* notes 128-30 and accompanying text.

<sup>166</sup> 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).

<sup>167</sup> 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 the typical kinds of newly discovered evidence, "including testimony by previously undiscovered witnesses, recantation of testimony given by key prosecution witnesses, confession by the real killer . . ." (internal footnotes omitted)).

More generally, the legal standard in the context of habeas corpus and *coram nobis* makes it difficult 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 problem. In regard to habeas 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.<sup>168</sup> The sole upside of this arrangement, for defendants at least, is that the appellate court has the power to make an independent evaluation of the claims, with the caveat that it should afford great weight to a superior court's findings of fact when supported by the record, especially credibility determinations made after observing witnesses at a hearing.<sup>169</sup> While this approach to a superior court's decision – no deference in general but deference 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 whereby there is no explicit check on the lower court's treatment of an innocence claim and, as a result, no genuine limit on a superior court's ability to wield its habeas corpus power arbitrarily.

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<sup>168</sup> See *supra* note 100 and accompanying text. Moreover, where the petition is filed initially in the court of appeal, the litigants is restricted in appealing the denial of that petition; it 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 101 and accompanying text.

<sup>169</sup> See *supra* notes 102-06 and accompanying text.

A defendant complaining of the denial of a new trial motion or *coram nobis* petition based on newly discovered evidence may appeal those decisions, albeit subject to an extraordinarily deferential standard of appellate review.<sup>170</sup> In particular, appellate courts 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 from the record.<sup>171</sup> What is notable about this standard is not that the abuse of discretion standard is the norm – many other jurisdictions utilize comparable standards in reviewing new evidence claims<sup>172</sup> – 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 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.<sup>173</sup> In the latter situation, though, the lower court made its decision on the written submissions alone, the type of analytic assessment normally undertaken by appellate courts, and arguably the appellate court stands in a better (or at a minimum no worse) position to rule on the innocence claim than the lower court.<sup>174</sup> 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.<sup>175</sup>

#### D. Limitations on Forum: The “Same Judge” Problem

Another worrisome aspect of California’s post-trial regime is its penchant for allocating newly discovered evidence claims to the judge who handled the case originally. As previously noted, new trial motions are invariably directed to the original trial judge, a predictable custom considering the motion must be made before entry of the

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<sup>170</sup> See *supra* notes 147-48 and accompanying text.

<sup>171</sup> See *supra* note 148 and accompanying text.

<sup>172</sup> See Medwed, *supra* note 6, at 680-81, 686.

<sup>173</sup> *Id.* at 713.

<sup>174</sup> *Id.* at 714.

<sup>175</sup> *Id.* at 709-10.

judgment in that court.<sup>176</sup> 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.<sup>177</sup> 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<sup>178</sup> – but 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.<sup>179</sup> Scholars of behavioral decisionmaking theory, 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. For instance, judges may be influenced by the “status quo bias,” which describes the tendency of people to prize too highly their prior decision in evaluating a situation for a second time.<sup>180</sup> According to research in this field, when a person makes a decision, that determination becomes the reference point to which she inevitably compares (and contrasts) any new facts that later bear upon the matter, and that reference point carries greater weight in any subsequent decisionmaking process than had a decision never been made.<sup>181</sup> The status quo bias, as applied to the newly discovered evidence realm, suggests that the trial verdict—“guilty”—becomes the reference point to which a judge may look 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 rendered.<sup>182</sup> The convention of assigning these claims to the original trial judge amplifies the impact of this bias because that judge herself observed the process through which

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<sup>176</sup> See *supra* note 41 and accompanying text.

<sup>177</sup> See *supra* notes 112-13 and accompanying text.

<sup>178</sup> See *supra* notes 87-90, 140-42 and accompanying text.

<sup>179</sup> See, e.g., Riddell, *supra* note 34.

<sup>180</sup> See Medwed, *supra* note 6, at 701-02.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 703-04.

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.<sup>183</sup>

Behavioral decisionmaking theorists have also studied the way in which people make choices that maximize or accentuate their “positive self-image.”<sup>184</sup> Individuals are often reluctant to acquire information that negates the affirmative view they tend to hold of themselves and, when faced with information that could undercut that positive self-identification, people are less likely to consider it relevant or may simply devalue it entirely.<sup>185</sup> 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 tendency of people to paint extremely optimistic portraits of their own skills.<sup>186</sup> 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 90% of the judges believed they had lower individual reversal rates than at least half of their co-equals on the bench.<sup>187</sup>

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.<sup>188</sup> Some judges may dread having made a mistake, on some level, at the earlier proceeding and fear the ramifications of publicly admitting that error.<sup>189</sup> 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.<sup>190</sup> 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.<sup>191</sup> To that end, the researchers who conducted the aforementioned study of federal magistrate judges had concerns about the impact of egocentric biases in criminal

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<sup>183</sup> *Id.* at 704.

<sup>184</sup> *Id.* at 701 n. 294.

<sup>185</sup> *Id.* at 701 n. 295.

<sup>186</sup> *Id.* at 701 n. 296.

<sup>187</sup> *Id.* at 701 n. 297-98, citing Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784, 814 (2002).

<sup>188</sup> See Medwed, *supra* note 6, at 703.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

cases, speculating that judges may neglect to set aside convictions as often as they should in cases they initially handled.<sup>192</sup>

Without a doubt, allotting each newly discovered evidence claim to a new judge would not be without its pitfalls, including (a) a degree of inefficiency (forcing the new judge to learn the case from scratch) and (b) the possibility the new judge will still overrate her colleague's original decision (a theory known as "conformity effects").<sup>193</sup> The advantages of sending new evidence claims to a new judge, however, seem greater than the disadvantages in that the influence of the cognitive biases discussed above will almost surely be less pronounced if a new judge were to evaluate the evidence – a judge unencumbered by any previous involvement in the case.<sup>194</sup> And, with the diminished impact of cognitive biases, there may be a higher chance that innocent prisoners will obtain justice in the end.

### III. SUGGESTIONS FOR REFORM

In attempting to bolster California's post-trial regime surrounding 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;<sup>195</sup>
- 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 some facsimile of the "probability test";<sup>196</sup>

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<sup>192</sup> *Id.* at 703 n. 309.

<sup>193</sup> *Id.* at 704 n. 312-13. For a discussion of the concept of conformity effects, see *id.* at 702-03 n. 303-06.

<sup>194</sup> *Id.* at 704-06.

<sup>195</sup> See 1 WILKES, REMEDIES AND RELIEF, *supra* note 11, § 1-13, at 56 (describing the array of time limitations on new trial motions in various states, and noting that nine states lack a specific time restriction).

<sup>196</sup> See, e.g., ARIZ. R. CRIM. PROC. 32.1(e) (providing, as a basis for post-conviction relief, a claim that "[n]ewly 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").



- considering allowing direct appellate review of denials of habeas corpus petitions by the superior court;<sup>197</sup>
- ensuring that the “abuse of discretion” standard of appellate review does not apply to summary denials of newly discovered evidence claims;<sup>198</sup> and
- abandoning the statutory preference, where applicable, for directing newly discovered evidence claims to the same judge who presided over the original trial.<sup>199</sup>

Nevertheless, 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, “[N]othing is simple in California, especially the law of criminal procedure.”<sup>200</sup> 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,<sup>201</sup> a risk accentuated by the absence of an automatic right to counsel for all California habeas corpus and *coram nobis* petitioners.<sup>202</sup> 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 danger that harms the legitimacy of the criminal justice system.<sup>203</sup>

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<sup>197</sup> Cf. Medwed, *supra* note 6, at 709 (noting that “it 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”).

<sup>198</sup> *Id.* at 714-15.

<sup>199</sup> *Id.* at 703-08.

<sup>200</sup> LEVENSON, *supra* note 38, at V.

<sup>201</sup> See Medwed, *supra* note 6, at 697.

<sup>202</sup> See, e.g., *In re Barnett*, 73 P.3d 1106, 1112 (Cal. 2003) (mentioning that “there 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, at 211-12 (2000) (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 a court that an evidentiary hearing is required). See also Perrello & Delzeit, *supra* note 99, at 285-86 (indicating that, with respect to 312 habeas corpus cases, “there were only two orders appointing counsel, 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.”).

<sup>203</sup> See Medwed, *supra* note 6, at 696-97 n. 273.

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.<sup>204</sup> In the past, New York recognized a litany of post-trial remedies, such as common law *coram nobis* and post-trial motions for a new trial on the grounds of newly discovered evidence.<sup>205</sup> The New York state legislature passed Article 440 of the Criminal Procedure Law in 1970 “collectively to embrace all extant non-appellate post-judgment remedies and motions to challenge the validity of a judgment of conviction.”<sup>206</sup> 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) [n]ew 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 evidence[.]<sup>207</sup>

Section 440.10(1)(g) currently covers all newly discovered non-DNA evidence claims in the state.<sup>208</sup> As I have stated in a previous article, “[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.”<sup>209</sup> Moreover, this statute explicitly adopts the “probability test” for all new evidence claims as opposed to a more forbidding standard along the lines of “unerring” or conclusive proof of innocence. 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

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<sup>204</sup> *Id.* at 697.

<sup>205</sup> *Id.* at 697 n. 276.

<sup>206</sup> *Id.* at 697-98 n. 277.

<sup>207</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2004).

<sup>208</sup> *See* Medwed, *supra* note 6, at 698.

<sup>209</sup> *Id.*

reviewing even summary rejections of these claims<sup>210</sup> – but it may serve as a fine starting point for California if the state were to consider simplifying its various procedures governing newly discovered evidence and molding a single procedure to capture all such claims.<sup>211</sup>

Creating a single procedure for all newly discovered evidence could lighten the overall administrative burden on California state courts, especially if restrictions were imposed upon the filing of second or “successive” filings,<sup>212</sup> as is already the case with respect to new trial motions and, to an extent, collateral petitions in the state.<sup>213</sup> 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 previous claim.<sup>214</sup>

## CONCLUSION

The wave of exonerations of innocent prisoners in the United States has not bypassed California’s shores. Indeed, the “innocence revolution” has caused a sea change in how many California scholars, practitioners, politicians and other observers perceive of the criminal justice system.<sup>215</sup> As part of this new vision of the potential legitimacy of innocence claims, California, like many states, has created a statute

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<sup>210</sup> *Id.* at 662-64 (discussing how these features of Section 440.10(1)(g) played out in the context of a single post-conviction case, *People of the State of New York v. Stephen Schulz*).

<sup>211</sup> *Id.* at 698-99.

<sup>212</sup> *Id.* at 699.

<sup>213</sup> *See supra* notes 46, 149 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, at 215 (2000) (“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 . . .”).

<sup>214</sup> *See Medwed, supra* note 6, at 699. California already takes just such a stance in regard to successive coram nobis petitions. *See, e.g.*, 22C CAL. JUR. 3D CRIMINAL LAW: POST-TRIAL PROCEEDINGS § 937, at 215-16 (2000) (mentioning that “the court will not consider a second petition if it contains only those issues previously taken up in the first application or on a 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.”).

<sup>215</sup> Larry Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004) (Stanford law professor noting that “[S]pawned 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.”).

providing for post-conviction DNA testing for prisoners whose case files contain biological evidence.<sup>216</sup> That reform is not enough. DNA cases are the exception, not the rule, and inmates whose cases lack scientific evidence deserve a comparable chance to develop their innocence claims as fully as possible. For California to adapt to the brave, new world of post-conviction litigation, it must re-examine its procedures and revise them so as to provide greater opportunities for non-DNA innocence cases to be heard: in other words, to help convert the dream of justice into reality.

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<sup>216</sup> See *supra* notes 3-4 and accompanying text.