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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Jesse Arreguín, Chair  
2025 - 2026 Regular

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**Bill No:** AB 1036      **Hearing Date:** July 1, 2025  
**Author:** Schultz  
**Version:** May 23, 2025  
**Urgency:** No      **Fiscal:** Yes  
**Consultant:** CA

**Subject:** *Criminal procedure: postconviction discovery*

### HISTORY

**Source:** California Innocence Coalition

**Prior Legislation:** SB 651 (Glazer), Ch. 483, Stats. of 2019  
SB 1987 (Lackey), Ch. 482, Stats. of 2018  
SB 1391 (Burton), Ch. 1105, Stats. of 2002

**Support:** ACLU California Action; California Public Defenders Association; Catalyst California; Communities United for Restorative Youth Justice; Courage California; Death Penalty Focus; Ella Baker Center for Human Rights; Friends Committee on Legislation of California; Initiate Justice; Initiate Justice Action; Justice2jobs Coalition; LA Defensa; San Francisco Public Defender; Silicon Valley De-bug; Smart Justice California; The W. Haywood Burns Institute; University of San Francisco School of Law | Racial Justice Clinic

**Opposition:** One individual

**Assembly Floor Vote:** 53 - 13

### PURPOSE

***The purpose of this bill is to increase post-conviction discovery for felony defendants.***

*Existing law* provides that in a case in which a defendant is or has ever been convicted of a serious felony or a violent felony resulting in a sentence of 15 years or more, upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment, or in preparation to file that writ or motion, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided, order that the defendant be provided reasonable access to any of the materials, as defined. (Pen. Code, § 1054.9, subd. (a).)

*Existing law* provides that in a case in which a sentence other than death or life in prison without the possibility of parole is or has ever been imposed, if a court has entered a previous order granting discovery, a subsequent order granting discovery may be made in the court's discretion. The request for discovery shall include a statement by the person requesting discovery as to whether they have previously been granted an order for discovery. (Pen. Code, § 1054.9, subd. (b).)

*Existing law* defines “discovery materials” in this context as “materials in the possession of the prosecution and law enforcement authorities to which the defendant would have been entitled to at the time of trial.” (Pen. Code, § 1054.9, subd. (c).)

*Existing law* provides that in response to a writ or motion, the court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant’s effort to obtain relief. (Pen. Code, § 1054.9, subd. (d).)

*Existing law* does not require the retention of discovery materials not otherwise required by law or court order. (Pen. Code, § 1054.9, subd. (f).)

*Existing law* provides that in criminal matters involving a conviction for a serious or violent felony resulting in a sentence of 15 years or more, trial counsel shall retain a copy of a former client’s files for the term of imprisonment. An electronic copy is sufficient only if every item in the file is digitally copied and preserved. (Pen. Code, § 1054.9, subd. (g).)

*Existing law* provides that specified changes to the postconviction discovery laws are intended to only apply prospectively. (Pen. Code, § 1054.9, subd. (j).)

*Existing law* requires the prosecution to disclose the following evidence to the defendant or their attorney before trial, if it is possessed by the prosecution or the prosecutor knows it is possessed by the investigating agencies:

- Names and addresses of persons the prosecutor intends to call as witnesses at trial;
- Statements made by all defendants;
- All relevant real evidence obtained as part of the investigation of the charged offenses;
- The existence of felony convictions of material witnesses whose credibility is likely to be critical to the outcome of the trial;
- Any exculpatory evidence; and,
- Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial. (Pen. Code, § 1054.1.)

*Existing law* states that before a party may seek court enforcement of any of the required disclosures, the party shall make an informal request of opposing counsel for desired materials and information. (Pen. Code, § 1054.5, subd. (b).)

*Existing law* states that if within 15 days of the informal request, opposing counsel fails to provide the materials and information requested, the party may seek a court order and upon a showing that the moving party complied with informal discovery, a court may make any order necessary to enforce compliance, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the

jury of any failure or refusal to disclose and of any untimely disclosure. (Pen. Code, § 1054.5, subd. (b).)

*Existing law* provides that disclosure of the required materials and information shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure shall be denied, restricted or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. (Pen. Code, § 1054.7.)

*This bill* extends post-conviction discovery to include cases in which a defendant is or has ever been convicted of a felony resulting in incarceration in state prison or county jail, instead of those convicted of a serious or violent felony resulting in a sentence of 15 years or more.

*This bill* excepts from post-conviction discovery cases in which a protective order prohibits the disclosure.

*This bill* expands the definition of post-conviction “discovery materials” to include materials that tend to negate guilt, mitigate the offense, mitigate the sentence, or otherwise are favorable or exculpatory to the defendant.

*This bill* specifies post-conviction “discovery materials” also includes all materials that the convicted person would be entitled to if they were being tried today, irrespective of whether the materials were discoverable at the time of the convicted person’s original trial and the prosecution’s jury selection notes.

*This bill* requires the following regarding the production of jury selection notes:

- If the prosecution believes there is good cause to shield jury selection notes from disclosure, they shall make a foundational proffer describing how information in their file would inhibit their case strategy;
- If a court finds good cause to believe the jury selection notes would inhibit the prosecution’s case strategy, it must conduct an in camera review and order necessary redactions; and,
- The prosecution’s lack of exercised peremptory challenges during jury selection shall constitute good cause to withhold disclosure of jury selection notes.

*This bill* defines “the prosecution” as a prosecuting agency, as well as counsel for the respondent in a habeas petition.

*This bill* states that access to post-conviction discovery materials, as specified, does not impose an additional obligation to investigate the existence of new discovery materials or prohibit a court from ordering the prosecution or law enforcement to investigate the existence of new discovery materials when appropriate.

*This bill* clarifies that a defendant’s trial counsel shall maintain a copy of a former client’s case file for any felony conviction resulting in incarceration in state prison or county jail. Digital copies must be preserved in color.

*This bill* provides that to the extent this imposes new requirements on trial counsel, trial counsel shall begin retaining their physical files and digital color copies of evidence for all felony convictions on or after July 1, 2026.

## COMMENTS

### 1. Need for This Bill

According to the author:

AB 1036 seeks to remedy the restrictive nature of post-conviction discovery access. Under current law, individuals convicted of serious or violent felonies with sentences of 15 years or more who are preparing to file a habeas petition are the only individuals who have access to their discovery from their trial. Additionally, the existing definition of "discovery materials" does not guarantee access to exculpatory or mitigating evidence found post-trial or jury selection notes.

These limitations prevent many wrongfully convicted individuals from accessing critical evidence that could prove their innocence or support sentence reductions. The bill aims to expand access to discovery for all individuals convicted and sentenced to incarceration and broaden the scope of discovery to include all exculpatory, mitigating, and favorable evidence, as well as jury selection notes under certain circumstances.

### 2. Discovery in Criminal Trials

In 1963, the U.S. Supreme Court held that the constitutional principle of due process requires prosecutors to ensure the defense receives all evidence that is both favorable to the accused and material to their guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87-88 (*Brady*); *U.S. v. Bagley* (1985) 473 U.S. 667, 674-675.) Evidence is favorable, if it helps the defendant or hurts the prosecution, such as by impeachment of the prosecutor's witness. (*In re Miranda* (2008) 43 Cal.4th 541, 575.) For evidence to be material, there must be a reasonable probability that disclosure of the evidence would have led to a different outcome in a proceeding. (*Turner v. U.S.* (2007) 582 U.S. 313, 331.) This duty imposed upon the prosecutor applies whether or not a defendant requests the evidence, and whether or not the prosecutor intentionally or inadvertently did not disclose the evidence. (*Brady, supra*, 373 U.S. at 87-88.) The purpose of the *Brady* rule is "to ensure that a miscarriage of justice does not occur." (*Bagley, supra*, 73 U.S. at p. 675) Such evidence is generally referred to as *Brady* evidence and failure to turn it over will result in a verdict being overturned. (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1482-83.)

In 1990, California voters approved Proposition 115 (hereafter Prop 115), which, among other things, established a statutory framework of reciprocal discovery whereby both the prosecution and defense are required to turn over specified information and materials such as the names and addresses of witnesses that will be called to testify at trial, any real evidence, and any exculpatory evidence. (Pen. Code, § 1054 *et seq.*) Generally, discovery must be given to opposing counsel as soon as possible but no later than 15 calendar days after it is informally requested. (Pen. Code, § 1054.5, sub. (b).) Additionally, regardless of a request, the law requires discovery to be given to opposing counsel at least 30 calendar days before trial, unless good cause is shown why disclosure should be denied, restricted or deferred.

(Pen. Code, § 1054.7.) Failure to disclose evidence under Prop 115’s statutory framework can lead to court sanctions such as contempt proceedings, limiting the testimony of a witness, continuing a matter, and informing the jury of any failure or refusal to timely disclose. (Pen. Code, § 1054.5, subd. (b).) However, a court may only prohibit the testimony of a witness when all other sanctions have been exhausted, and a court can never dismiss a charge unless it is required to do so by the Constitution of the U.S. (Pen. Code, § 1054.5, subd. (c).)

### 3. Post-Conviction Discovery

Existing law generally allows for limited discovery in post-conviction proceedings like petitions for habeas corpus or motions to vacate. Penal Code section 1054.9 allows for reasonable access to any discovery available to the defendant at the time of trial, but only in cases where the defendant was sentenced to 15 years or more on a serious or violent felony. However, the defendant must demonstrate that efforts to obtain the trial attorney’s file were unsuccessful. Defense attorneys must retain client files when the person was incarcerated for more than 15 years on a serious or violent felony for the period of the person’s confinement. (Pen. Code, § 1054.9, subd. (a).)

Penal Code section 1054.9, subdivision (c) only allows discovery of materials to which the defendant would have been entitled at time of trial. This includes discovery of materials to which the defendant was entitled at trial but did not receive. (*Barnett v. Superior Court* (2010) 50 Cal.4<sup>th</sup> 890, 898.)

This bill proposes to allow for post-conviction discovery in any felony case resulting in incarceration – not just serious and violent felonies for which the defendant is sentenced to 15 years or more – and clarifies that discoverable materials includes any evidence that may be available to the defendant today, regardless of whether it would have been available at the time of trial. Finally, this bill proposes to require criminal defense attorneys to retain records for any felony resulting in a sentence of a year or more for the term of the defendant’s incarceration.

Over the past several years, California has enacted various post-conviction remedies. (See e.g., Pen. Code, §§ 1170, subd. (d), 1172.1, 1385, subd. (c), and 1473, subd. (e).) Given the plethora of new opportunities for post-conviction relief, this bill requires an opportunity for post-conviction discovery beyond just *Brady* material at the time of trial. For instance, the Racial Justice Act (Pen. Code, § 1473, subd. (e)) confronts the possibility that a defendant suffered racial bias in their charge, conviction, or sentence. Therefore, something more than just *Brady* material may be necessary to demonstrate the bias.

This bill also specifically allows access to the prosecution’s “jury selection notes” presumably prepared by the prosecuting attorney in determining which jurors to select and which to strike using a peremptory challenge.

In *People v. Superior Court (Jones)* (2021) 12 Cal.5<sup>th</sup> 348, the California Supreme Court addressed a post-conviction motion under Penal Code section 1054.9 which sought access to the prosecution’s jury selection notes as relevant to a claim of racial bias in jury selection. Our High Court initially noted:

More than four decades ago, this court ...held that the use of peremptory challenges to remove prospective jurors on the basis of race or other forms of

group bias violates article I, section 16 of the California Constitution. Several years later, the United States Supreme Court ... reached the same conclusion under the equal protection clause of the Fourteenth Amendment to the United States Constitution. As a result of these decisions, a litigant has the right to challenge an opponent's discriminatory use of peremptory challenges. But as both the United States Supreme Court and this court have repeatedly made clear, the harm of the practice is not limited to individual litigants. Discrimination in jury selection also does grievous injury to the jurors and to "the very integrity of the courts" charged with ensuring equal justice for all comers in a diverse society.

(*Jones, supra*, 12 Cal.5<sup>th</sup> at p. 356; see *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.)

The prosecution in *Jones* argued their jury notes were absolutely protected as attorney work product and not discoverable. (*Jones, supra*, 12 Cal.5<sup>th</sup> at p. 360; see Pen. Code, § 1054.6 ["Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure ... ."]) Code of Civil Procedure section 2018.030 provides:

- (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
- (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

The United States Supreme Court has described the rationale of the work product doctrine, stating, "[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." (*Hickman v. Taylor* (1947) 329 U.S. 495, 510–511; see *Coito v. Superior Court* (2012) 54 Cal.4th 480, 489–494 [recounting the history of work product doctrine].)

In *Jones*, the Court concluded that the prosecution had impliedly waived the work product privilege by putting its juror rating system at issue when asked to defend the challenged strikes to jurors. The court reasoned, "The point, in the end, is simple: A striking attorney cannot both stand on such a rating system and assert privilege over it." (*Jones, supra*, 12 Cal.5<sup>th</sup> 348, 365.)

In *Box v. Superior Court* (2022) 87 Cal.App.5<sup>th</sup> 60, the Fourth District Court of Appeal, Division One, addressed post-conviction discovery of a prosecutor's jury notes to facilitate a group bias challenge to jury selection under *Batson/Wheeler*. The court held that when a prima facie case of racial bias under *Batson/Wheeler* has been made, a defendant is entitled to post-conviction discovery of the prosecution's jury selection notes under Penal Code section 1054.9. According to the court, those notes are not categorically shielded from discovery as absolute work product privilege under Penal Code section 1054.6 and Code of Civil Procedure section 2018.030, subdivision (a). Accordingly, to the extent the prosecution

maintained that those notes reflected their “impressions, conclusions, opinions, or legal research and theories *about case strategy* independent of conclusions or impressions about prospective jurors,” they bear the burden to make that foundational proffer and seek appropriate redactions from the trial court. (*Box, supra*, 87 Cal.App.4<sup>th</sup> at p. 68 [italics in original].)

This bill provides following with respect to post-conviction discovery of the prosecution’s jury notes:

- If the prosecution believes there is good cause to shield jury selection notes from disclosure, they shall make a foundational proffer describing how information in their file would inhibit their case strategy;
- If a court finds good cause to believe the jury selection notes would inhibit the prosecution’s case strategy, it must conduct an in camera review and order necessary redactions; and,
- The prosecution’s lack of exercised peremptory challenges during jury selection shall constitute good cause to withhold disclosure of jury selection notes.

To be more in line with what the *Box* court held, should the prosecution’s foundational showing instead be to show how information in their file reflects their impressions, conclusions, opinions, or legal research and theories *about case strategy* independent of conclusions or impressions about prospective jurors, as opposed to how it would inhibit their case strategy?

#### 4. Argument in Support

According to the California Public Defenders Association:

It is a sad truth that our system of justice is far from perfect, and that far too often innocent people are convicted for crimes they have not committed. (See, e.g., <https://www.nbclosangeles.com/news/local/california-man-exonerated-released-prison-1998-whittier-shooting-miguel-solorio/3274941/> [Californian man recently exonerated after spending 25 years in prison]; <https://www.eastbaytimes.com/2024/07/26/i-loved-her-temecula-man-exonerated-for-mistress-murder-says/> [California man recently exonerated after spending 20 years in prison]; <https://www.dailynews.com/2024/05/07/la-county-approves-24-million-for-exonerated-men-after-their-years-in-prison/> <https://www.dailynews.com/2024/05/07/la-county-approves-24-million-for-exonerated-men-after-their-years-in-prison/> [Two Californian men recently exonerated after spending 23 years in prison].)

Under current law, however, wrongfully convicted men and women are prevented from accessing the evidence necessary to prove their innocence, either because that evidence was not preserved, or because the state refuses to give them access.

Assembly Bill 1036 addresses this issue, in part, by requiring defense counsel to preserve trial records, and by requiring the state to give post-conviction

defendants access to relevant evidence, including evidence that tends to negate guilt, mitigate the offense, or prove that the conviction was wrongfully obtained.

Because a justice system that is unwilling to acknowledge its own errors is never just, AB 1036's push for transparency and fairness in the post-conviction context is a vital step in the right direction.

## **5. Argument in Opposition**

According to one individual:

This would increase potential for frivolous claims.

**– END –**