

**S150229**

Court of Appeal No. C051311  
Butte County Superior Court No. 91850

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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LEE MAX BARNETT,

*Petitioner,*

vs.

THE SUPERIOR COURT OF BUTTE COUNTY,

*Respondent,*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Real Party in Interest.*

On review from the decision of the Court of Appeal,  
Third Appellate District, granting a writ of mandate.  
Butte County Superior Court, Honorable William R. Patrick, Judge

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF REAL PARTY IN INTEREST**

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**To the Honorable Chief Justice of the Supreme Court  
of the State of California**

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of Real Party in Interest, the People of the State of California, pursuant to rule 8.520(f) of the California Rules of Court.

**Applicant's Interest**

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into

balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In 1990 the California electorate enacted Proposition 115, the Crime Victims Justice Reform Act. In addition to numerous other changes, Proposition 115 enacted a comprehensive discovery statute as Penal Code sections 1054-1054.7. The Criminal Discovery Statute provides that its provisions are the only means by which a criminal defendant may compel the disclosure or production of information from the prosecuting attorney or the law enforcement agencies which investigated or prepared the case against the defendant. The goals of the Criminal Discovery Statute include saving court time and avoiding frequent interruptions and postponements.

In 2002, the Legislature passed Senate Bill 1391. Senate Bill 1391 added Penal Code section 1054.9 to the Criminal Discovery Statute. Penal Code section 1054.9 provides that prosecutors and investigating law enforcement agencies must, upon request, provide postjudgment discovery to convicted and sentenced capital defendants who are preparing to file habeas corpus petitions or motions to vacate their judgments without the necessity of a court first issuing an order to show cause.

California's district attorneys offices have been inundated by an onslaught of section 1054.9 discovery requests. The efforts of these prosecution offices to comply with the repeated and time-consuming discovery requests that section 1054.9 has authorized in these capital cases have consumed large amounts of prosecution monetary and personnel resources. The protracted nature of these discovery requests has contributed significantly to delays in the finality of

capital murder judgments and thereby adversely impacted the families of the murdered victims. By providing convicted capital murder defendants with yet another tool to delay their postjudgment proceedings, Penal Code section 1054.9 has unduly prolonged the finality of capital case judgments, thereby harming the families of murder victims who want and need closure in these capital cases. All of this is contrary to the interests of justice and society that the CJLF was formed to protect.

### **Need for Further Argument**

CJLF is familiar with the arguments presented on both sides of this issue and believes that further argument is necessary.

CJLF will argue that section 1054.9 is an amendment of the Criminal Discovery Statute enacted by the People in Proposition 115. Because the bill enacting section 1054.9 did not pass the Legislature by the two-thirds vote required for such an amendment, the section is not valid. The rule of *People v. Gonzalez* (1990) 51 Cal.3d 1179 is therefore still in effect, and the Superior Court lacked subject-matter jurisdiction to order discovery.

Our brief is submitted with this application and ready for immediate filing.

October 31, 2007

Respectfully Submitted,

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**TABLE OF CONTENTS**

Motion for leave to file . . . . . i  
Table of authorities . . . . . viii  
Summary of facts and case . . . . . 1  
Summary of argument . . . . . 2  
Argument . . . . . 3

**I**

The constitutionality of section 1054.9 should be considered  
even though the issue has not previously been raised . . . . . 3

A. A court lacks subject-matter jurisdiction to order  
postjudgment discovery in the absence of a  
constitutionally valid statute authorizing such  
discovery . . . . . 3

B. A challenge to a court’s subject-matter jurisdiction  
may be raised by a party or by an amicus at any time  
and must be heard by the court . . . . . 5

**II**

Penal Code section 1054.9 is invalid as an act in excess  
of the amendatory powers granted to the Legislature by  
the electorate . . . . . 7

A. Legislation enacted by the electorate may not be  
amended by the legislature without the electorate’s  
approval . . . . . 7

B. The Criminal Discovery Statute enacted by initiative  
may be amended by the Legislature only by a two-  
thirds vote of the Legislature . . . . . 9

C. Penal Code section 1054.9 has amended the Criminal Discovery Statute . . . . .	10
1. What constitutes an amendment . . . . .	10
2. Section 1054.9’s amendments to the Criminal Discovery Statute . . . . .	12
a. Added a new section to the Criminal Discovery Statute . . . . .	12
b. Expanded the means by which defendants in criminal cases can obtain court orders to compel discovery from the prosecution . . . . .	13
c. Expanded the prosecution’s statutory disclosure duties to postjudgment proceedings in which no action is pending . . . . .	15
d. Expanded the prosecution’s statutory disclosure duties to postjudgment motions to vacate the judgment . . . . .	16
D. A discovery motion made in a court where no habeas is pending must be part of the “criminal case” . . . . .	17
E. Penal Code section 1054.9 did not receive a two-thirds vote in both houses of the Legislature . . . . .	20

### III

As an invalid act in excess of the amendatory powers granted to the Legislature, Penal Code section 1054.9 cannot be given effect . . . . .	23
---	----

### IV

A statute enacted in excess of the Legislature’s authority may not be judicially reformed . . . . .	25
---	----

V

Even if it has the power to do so, this court should decline to  
judicially reform Penal Code section 1054.9 . . . . . 27

A. Limiting section 1054.9 to pre-Proposition 115 cases  
would not cure the infirmity . . . . . 28

B. Authorizing discovery before the filing of the habeas  
petition was an essential motivation of the bill . . . . 29

C. Restricting section 1054.9 to pending habeas  
proceeding would raise additional constitutional  
questions . . . . . 30

Conclusion . . . . . 32

## TABLE OF AUTHORITIES

### Cases

Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal.4th 1243, 48 Cal.Rptr.2d 12, 906 P.2d 1112 . . . . .	8, 9, 23, 24
Avelar v. Superior Court (1992) 7 Cal.App.4th 1270, 9 Cal.Rptr.2d 536 . . . . .	17
Banning v. Newdow (2004) 119 Cal.App.4th 438, 14 Cal.Rptr.3d 447 . . . . .	24
Barnett v. Superior Court (2006) 146 Cal.App.4th 344, 54 Cal.Rptr.3d 283 . . . . .	2
Bracy v. Gramley (1997) 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 . . . . .	4
Bravo v. Cabell (1974) 11 Cal.3d 834, 114 Cal.Rptr.618, 523 P.2d 658 . . . . .	31
California Common Cause v. Fair Political Practices Com. (1990) 221 Cal.App.3d 647, 269 Cal.Rptr. 873 . . . . .	8
Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1, 74 Cal.Rptr.2d 248, 954 P.2d 511 . . . . .	7
City of Sacramento v. State of California (1990) 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522 . . . . .	6
DeVita v. County of Napa (1995) 9 Cal.4th 763, 38 Cal.Rptr.2d 699, 889 P.2d 1019 . . . . .	11, 12, 23, 24
Donald J. v. Evna M. (1978) 81 Cal.App.3d 929, 147 Cal.Rptr. 158	
Ensoniq Corp. v. Superior Court (1998) 65 Cal.App.4th 1537, 77 Cal.Rptr.2d 507 . . . . .	17
Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 209 Cal.Rptr. 682, 693 P.2d 261 . . . . .	6

Foundation for Taxpayer & Consumer Rights v. Garamendi (2005) 132 Cal.App.4th 1354, 34 Cal.Rptr.3d 354 .....	9, 24
Hale v. Morgan (1978) 22 Cal.3d 388, 149 Cal.Rptr. 375, 584 P.2d 512 .....	5
Hodges v. Superior Court (1999) 21 Cal.4th 109, 86 Cal.Rptr.2d 884, 980 P.2d 433 .....	12
Huening v. Eu (1991) 231 Cal.App.3d 766, 282 Cal.Rptr. 664 .....	10, 11
In re Barnett (2003) 31 Cal.4th 466, 3 Cal.Rptr.3d 108, 73 P.3d 1106 .....	4
In re Marriage of Oddino (1997) 16 Cal.4th 67, 65 Cal.Rptr.2d 566, 939 P.2d 1266 .....	5
In re Paiva (1948) 31 Cal.2d 503, 190 P.2d 604 .....	16
In re Scott (2003) 29 Cal.4th 783, 129 Cal.Rptr.2d 605, 61 P.3d 402 .....	30, 31
In re Steele (2004) 32 Cal.4th 682, 10 Cal.Rptr.3d 536, 85 P.3d 444 .....	12, 13, 15, 19, 20, 25
In re Stephanie M. (1994) 7 Cal.4th 295, 27 Cal.Rptr.2d 595, 867 P.2d 706 .....	6
Kaiser Union Bldg., Inc. v. Burroughs (La.App. 1970) 239 So.2d 425 .....	21
Kennedy v. Superior Court (2006) 145 Cal.App.4th 359, 51 Cal.Rptr.3d 637 .....	4
Knight v. Superior Court (2005) 128 Cal.App.4th 14, 26 Cal.Rptr.3d 687 .....	11
Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607, 47 Cal.Rptr.2d 108, 905 P.2d 1248 .....	25, 26, 27, 30

Landgraf v. USI Film Products (1994) 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 .....	28
Leshar Communications, Inc. v. City of Walnut Creek (1990) 52 Cal.3d 531, 277 Cal.Rptr. 1, 802 P.2d 317 .....	23, 24, 26
Lungren v. Deukmejian (1988) 45 Cal.3d 727, 248 Cal.Rptr. 115, 755 P.2d 299 .....	14
Mayle v. Felix (2005) 545 U.S. 644, 125 S.Ct. 2562, 162 L.Ed.2d 582 .....	30
Metromedia, Inc. v. City of San Diego (1982) 32 Cal.3d 180, 185 Cal.Rptr.260, 649 P.2d 902 .....	30
Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal.App.4th 32, 41 Cal.Rptr.2d 393 .....	10
Myers v. Philip Morris Companies, Inc. (2002) 28 Cal.4th 828, 123 Cal.Rptr.2d 40, 50 P.3d 751 .....	28
People v. Acosta (2002) 29 Cal.4th 105, 124 Cal.Rptr.2d 435, 52 P.3d 624 .....	19
People v. Ainsworth (1990) 217 Cal.App.3d 247, 266 Cal.Rptr. 175 .....	3
People v. Alvarez (2002) 27 Cal.4th 1161, 119 Cal.Rptr.2d 903, 46 P.3d 372 .....	30
People v. Barnett (1998) 17 Cal.4th 1044, 74 Cal.Rptr.2d 121, 954 P.2d 384 .....	1
People v. Burks (1961) 189 Cal.App.2d 313, 11 Cal.Rptr. 200 .....	18
People v. Chadd (1981) 28 Cal.3d 739, 170 Cal.Rptr. 798, 621 P.2d 837 .....	6
People v. Cooper (2002) 27 Cal.4th 38, 115 Cal.Rptr.2d 219, 37 P.3d 403 .....	8, 10, 14

People v. Gonzalez (1990) 51 Cal.3d 1179, 275 Cal.Rptr. 729, 800 P.2d 1159 .....	3, 4, 7, 18, 29
People v. Johnson (1992) 3 Cal.4th 1183, 14 Cal.Rptr.2d 702, 842 P.2d 1 .....	3
People v. Jones (1957) 155 Cal.App.2d 149, 317 P.2d 108 .....	16
People v. Mower (2002) 28 Cal.4th 457, 122 Cal.Rptr.2d 326, 49 P.3d 1067 .....	6
People v. Superior Court (Barrett) (2000) 80 Cal.App.4th 1305, 96 Cal.Rptr.2d 264 .....	13
People v. Superior Court (Laff) (2001) 25 Cal.4th 703, 107 Cal.Rptr.2d 323, 23 P.3d 563 .....	7, 17, 31
People v. Williams (1999) 20 Cal.4th 119, 83 Cal.Rptr.2d 275, 973 P.2d 52 .....	18
Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal.App.4th 1473, 76 Cal.Rptr.2d 342 .....	9, 10, 11, 12, 23, 24
Raven v. Deukmejian (1990) 52 Cal.3d 336, 276 Cal.Rptr. 326, 801 P.2d 1077 .....	8
Rich v. Calderon (9th Cir. 1999) 170 F.3d 1236 .....	4
Tapia v. Superior Court (1991) 53 Cal.3d 282, 279 Cal.Rptr. 592, 807 P.2d 434 .....	28, 29
Weatherford v. Bursey (1977) 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 .....	4

### **Rule of Court**

Cal. Rules of Court, rule 8.520(f) .....	25
--	----

## **State Constitution**

Cal. Const., art. II, § 1 .....	7
Cal. Const., art. II, § 10, subd. (c) .....	8
Cal. Const., art. IV, § 2 .....	20
Cal. Const., art. IV, § 8, subd. (b) .....	22
Cal. Const., art. IV, § 12, subd. (d) .....	22

## **State Statutes**

Code Civ. Proc. §§ 21-24 .....	31
Code Civ. Proc., § 1003 .....	18
Code Civ. Proc., § 1004 .....	18
Pen. Code, § 7 .....	19
Pen. Code, § 685 .....	18
Pen. Code, § 1054.5, subd. (a) .....	13, 14, 17, 29
Pen. Code, § 1054.9 .....	3, 16, 17, 18, 19
Pen. Code, § 1473.6 .....	16
Proposition 115, § 1, Stats. 1990 .....	14
Proposition 115, § 23, Stats. 1990 .....	9
Proposition 115, § 30, Stats. 1990 .....	9, 21, 23
Pub. Resources Code, § 30315.1 .....	21
Stats. 2002, ch. 1105, § 1 .....	12, 20

## Secondary Sources

5 Assem. J. (2001-2002 Reg. Sess.) . . . . .	20
26 Ops. Cal. Atty. Gen. 168 (1955) . . . . .	22
3 Sen. J. (2001-2002 Reg. Sess.) . . . . .	21
Sen. Public Safety Committee, Bill Analysis of SB1391 (2001-2002 Reg. Sess.) Apr. 23, 2002 . . . . .	30
Standing Rules of the Assembly (2007-2008 Reg. Sess.) December 4, 2006, rule 105 . . . . .	21
Standing Rules of the Senate April 19, 2007, rule 47 . . . . .	21, 22
9 Witkin, Cal. Procedure (4th ed. 1997), Appeal § 398 . . . . .	5

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**BRIEF AMICUS CURIAE OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF REAL PARTY IN INTEREST**

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**SUMMARY OF FACTS AND CASE**

Petitioner Lee Max Barnett stands convicted of first degree murder with special circumstances, a crime for which he was sentenced to death on November 30, 1988. (Opening Brief on the Merits at pp. 1-2.) This Court affirmed his conviction and judgment on May 4, 1998. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1069.) Barnett has filed seven habeas corpus petitions in this court: S030713, S059885, S096831, S120570, S121027, S121032, S121035, and S150229.

On July 19, 2004, while petitions S096831 and S120570 were pending in this court, Barnett filed a motion for discovery pursuant to Penal Code section 1054.9 in the Butte County Superior Court.

He captioned his motion under the criminal case, *People v. Barnett*, No. 91850, and it was docketed as a part of that case. Both of Barnett's remaining petitions in this court were denied before the Court of Appeal issued the writ of mandate being reviewed in the present case. As of October 26, 2007, Barnett's federal habeas petition was still pending. At no time relevant to the discovery motion at issue has any habeas corpus proceeding been pending before the Butte County Superior Court.

On November 10, 2005, the Superior Court granted a substantial number of Barnett's discovery requests. Barnett then filed a Petition for Writ of Mandate in the Court of Appeal, Third Appellate District. The Court of Appeal issued an opinion certified for publication in which the court granted in part and denied in part Barnett's Petition for Writ of Mandate. (*Barnett v. Superior Court* (2006) 146 Cal.App.4th 344, 418.) Both parties petitioned this court for review. On April 25, 2007, this court granted the People's petition and denied Barnett's petition for review.

## **SUMMARY OF ARGUMENT**

The Petitioner and the Real Party in Interest, the People, dispute the meaning and scope of the duty of the People to provide discovery to Petitioner under Penal Code section 1054.9. Amicus curiae CJLF believes that the People's interpretation is correct but that no further briefing on that point is needed. In this brief, we address the more fundamental question of whether Penal Code section 1054.9 was constitutionally enacted. We submit that the statute was unconstitutionally enacted by the Legislature in derogation of the right of the California electorate to enact statutes regulating discovery in criminal cases and to prescribe the terms by which the Legislature may later amend those discovery statutes.

## ARGUMENT

### **I. The constitutionality of section 1054.9 should be considered even though the issue has not previously been raised.**

#### *A. A Court Lacks Subject-Matter Jurisdiction to Order Postjudgment Discovery in the Absence of a Constitutionally Valid Statute Authorizing Such Discovery.*

Prior to the enactment of Penal Code section 1054.9 by the Legislature in 2002, courts had jurisdiction to order postjudgment discovery by a defendant in a criminal case only upon the issuance of an order to show cause following the filing of a petition for writ of habeas corpus. Once the criminal proceedings in a criminal case became final, the trial court lacked jurisdiction over that case for most purposes. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1256.) In the absence of the filing of a habeas corpus writ petition and the subsequent issuance of an order to show cause as to that petition, a trial court lacked subject-matter jurisdiction to issue discovery orders. (*Id.* at p. 1261; see also *People v. Johnson* (1992) 3 Cal.4th 1183, 1257-1258.) The reasoning behind this rule was that a discovery motion is “not an independent right or remedy. It is ancillary to an ongoing action or proceeding. After the judgment has become final, there is nothing pending in the trial court to which a discovery motion may attach.” (*People v. Ainsworth* (1990) 217 Cal.App.3d 247, 251, quoted with approval in *Gonzalez, supra*, at p. 1257.)

Penal Code section 1054.9 constitutes statutory authority for postjudgment discovery by a convicted and sentenced capital murder defendant. However, if Penal Code section 1054.9 was unconstitutionally enacted, that statute is void. (See part III, *infra*, at pp. 23-24.) If section 1054.9 is void because it was unconstitutionally enacted, then there is no longer any statutory

authority for a trial court to order postjudgment discovery where the defendant has not filed a habeas petition or the court has not issued an order to show cause on that petition. Without a statutory right to postjudgment discovery, a convicted and sentenced defendant would have only a constitutional right to discovery. However, the Constitution affords no postjudgment discovery assistance to a convicted and sentenced defendant. State habeas relief is entirely a statutory creation. California has no constitutional obligation to provide habeas relief proceedings, nor must the State provide counsel to habeas petitioners. (*In re Barnett* (2003) 31 Cal.4th 466, 474-475.) “[T]he federal Constitution does not confer a general right to criminal discovery.” (*People v. Gonzalez*, 51 Cal.3d at p. 1258; *Weatherford v. Bursey* (1977) 429 U.S. 545, 559.) A habeas petitioner “is not entitled to discovery as a matter of ordinary course.” (*Bracy v. Gramley* (1997) 520 U.S. 899, 903-905; *Rich v. Calderon* (9th Cir. 1999) 170 F.3d 1236, 1239.) There is no due process right to receive discovery in a habeas proceeding. (*Cf. Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 369.)

A challenge to the constitutional validity of Penal Code section 1054.9 challenges the subject-matter jurisdiction of the trial court to order the prosecution to provide postjudgment discovery in the absence of an order to show cause. This court held in *Gonzalez* that “the trial court exceeded its jurisdiction by ordering postconviction discovery in the absence of any proceeding pending before that court.” (*People v. Gonzalez*, 51 Cal.3d at p. 1261.) Therefore, if section 1054.9 is void as unconstitutionally enacted, the trial court lacked subject-matter jurisdiction to order postjudgment discovery in this case.

*B. A Challenge to a Court's Subject-Matter Jurisdiction May Be Raised by a Party or by an Amicus at Any Time and Must Be Heard by the Court.*

The constitutionality of Penal Code section 1054.9 was not raised or litigated in the Superior Court or in the Court of Appeal, nor was it stated as an issue in the petition for review in this court. While an issue that was not raised or decided below will not normally be considered on appeal or on review in this court, the rule against considering points not raised below “does not apply to . . . [a] noncurable defect of substance where the question is one of law, such as lack of jurisdiction . . . .” (9 Witkin, Cal. Procedure (4th ed. 1997), Appeal § 398, p. 450.)

In *Hale v. Morgan* (1978) 22 Cal.3d 388, 394, this court stated:

“We have held that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts. [Citations.] Moreover, although California authorities on the point are not uniform, our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved [citation], the asserted error fundamentally affects the validity of the judgment [citation], or important issues of public policy are at issue. [Citation.]”

At the forefront of issues that may be considered for the first time on appeal are questions of subject-matter jurisdiction. Questions of subject-matter jurisdiction not only may be considered, they must be considered. In *In re Marriage of Oddino* (1997) 16 Cal.4th 67, 73, this court considered on the merits an issue raised for the first time in the petition for review, stating, “As a matter of fundamental jurisdiction affecting the power of the lower courts to act, however, the issue *must be addressed*.” (Italics added.)

The rule that questions of subject-matter jurisdiction may be raised for the first time on appeal is not limited to the parties to a case. The rule extends also to amici curiae. In *In re Stephanie M.* (1994) 7 Cal.4th 295, 311, n. 6, this court considered jurisdictional questions that were raised only by an amicus, while declining to consider nonjurisdictional questions raised by the same amicus.

Even if no one, parties or amici, raises an issue of subject-matter jurisdiction, a court that becomes aware of a jurisdictional question should raise the issue *sua sponte* and take briefing on that issue. (See, e.g., *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 61.) The rule that challenges to subject-matter jurisdiction may be heard for the first time on appeal

“is a reflection of the fundamental principle of our law that ‘the power of the courts to proceed’— i.e., their jurisdiction over the subject matter—cannot be conferred by the mere act of a litigant, whether it amount to consent, waiver, or estoppel [citations], and hence that the lack of such jurisdiction may be raised for the first time on appeal.” (*People v. Chadd* (1981) 28 Cal.3d 739, 757.)

“Issues relating to jurisdiction in its fundamental sense indeed may be raised at any time.” (*People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 6.)

In addition to jurisdictional questions, this court has also considered threshold issues raised by an amicus when failure to consider those threshold issues would waste judicial resources. For example, in *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, an amicus raised the question whether a challenged ordinance violated federal antitrust law, and this court considered that question on the merits. Failing to consider a threshold question is wasteful, because deciding issues that could be rendered moot by the threshold issue “would risk rendering a purely academic and hypothetical decision.”

(*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6-7; see also *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 722, fn. 10.)

The question whether Penal Code section 1054.9 was unconstitutionally enacted is both a jurisdictional question under the principle of *Oddino, supra*, and a threshold issue under the principle of *Cedars-Sinai, supra*. Without the Legislature’s enactment of section 1054.9, the superior court would have had no jurisdiction to issue the discovery order at issue in this case. (*People v. Gonzalez*, 51 Cal.3d at p. 1261.) If section 1054.9 was unconstitutionally enacted, the *Gonzalez* rule remains in effect. And if section 1054.9 is unconstitutional, a discourse on the meaning of that statute would be a “purely academic and hypothetical decision.”

A challenge to a court’s subject-matter jurisdiction may be raised by any party or by an amicus at any time, even for the first time on appeal or review, and must be heard by the Court. Amicus CJLF requests that this court consider and decide whether Penal Code section 1054.9 was constitutionally enacted.

## **II. Penal Code section 1054.9 is invalid as an act in excess of the amendatory powers granted to the legislature by the electorate.**

*A. Legislation Enacted by the Electorate May Not Be Amended by the Legislature Without the Electorate’s Approval.*

Section 1 of article II of the California Constitution provides, “All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.” Section 8 of article II provides that the electorate has the power by

initiative to propose and adopt or reject statutes and amendments to the California Constitution.

Subdivision (c) of section 10 of article II provides that the electorate's initiative power is the supreme legislative power in California. The initiative power of the electorate is to be jealously guarded and liberally construed. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 341.)

Under subdivision (c) of section 10 of article II, the Legislature may amend or repeal an initiative statute by enacting another statute only if the amending or repealing statute is approved by the electorate, unless the electors have provided in their initiative statute that the Legislature may approve an amendment or repeal of the initiative statute without their approval. "A statute enacted by voter initiative may be changed only with the approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval." (*People v. Cooper* (2002) 27 Cal.4th 38, 44.)

"Under article II, section 10, subdivision (c), the voters have the power to decide whether or not the Legislature can amend or repeal initiative statutes. This power is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters.*" (*California Common Cause v. Fair Political Practices Com.* (1990) 221 Cal.App.3d 647, 652, italics in original, quoted with approval in *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251.)

"When a statute enacted by the initiative process is involved, the Legislature may amend it only if the voters specifically gave the Legislature that power, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (Cal. Const., art. II, § 10, subd. (c); *Amwest, supra*, 11 Cal.4th 1243, 1251.) The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes

is to ‘protect the people’s initiative powers by precluding the Legislature from undoing what the people have done, without the electorate’s consent.’ (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 781, 282 Cal.Rptr. 664 (conc. and dis. opn. of Raye, J.))” (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.)

The Legislature has repeatedly attempted to amend an initiative statute enacted by the electorate in 1988 as Proposition 103.<sup>1</sup> Each of these legislative efforts was invalidated because it failed to advance the purposes of Proposition 103. In the most recent Proposition 103 case, the Court of Appeal held: “The power of the Legislature may be ‘practically absolute,’ but that power must yield when the limitation of the Legislature’s authority clearly inhibits its action. [Citation.] Since Sen. Bill 841 flies in the face of the initiative’s purposes, it exceeds the Legislature’s authority.” (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1371.)

Legislation enacted by the electorate may not be overridden by the Legislature without the approval of the electorate.

*B. The Criminal Discovery Statute Enacted by Initiative May Be Amended by the Legislature Only by a Two-thirds Vote of the Legislature.*

The Criminal Discovery Statute was enacted by the electorate as section 23 of Proposition 115 on June 5, 1990. As originally enacted, the Criminal Discovery Statute consisted of Penal Code sections 1054 through 1054.7. Section 30 of Proposition 115 (Stats. 1990, p. A-256) established the conditions under which the statutes

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1. The first two legal challenges occurred in *Amwest, supra*, and *Proposition 103 Enforcement Project, supra*.

enacted by Proposition 115, including the Criminal Discovery Statute, may be amended:

“The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.”

Because the Legislature may amend a statute passed by initiative only if the voters have specifically given the Legislature that power, and then only upon whatever conditions the voters attached to the Legislature’s amendatory powers, the Legislature has the right to amend the Criminal Discovery Statute only by a two-thirds vote of each house of the Legislature.

*C. Penal Code Section 1054.9 Has Amended the Criminal Discovery Statute.*

*1. What Constitutes an Amendment.*

In *People v. Cooper* (2002) 27 Cal.4th 38, 44, this court held that a statute enacted by the Legislature constitutes an amendment when the statute “is a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision.” An amendment is “any change of the scope or effect of an existing statute” by “addition, omission, or substitution of provisions.” (*Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal.App.4th at p. 1484; *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 40.)

An amendment to an existing statute can take many forms. An amendment “could take the form of adding subdivisions to, deleting subdivisions from, or modifying subdivisions” of a code section. (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 777.) Amending a

statute also “includes adding sections to, deleting sections from, or modifying sections of that statute.” (*Ibid.*) “A statute which adds to or takes away from an existing statute is considered an amendment.” (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22.) When the amendment consists of an added code section, “it is the effect of the added section and not its label or the representations in the enactment creating it which controls. Where a new section affects the application of the original statute or impliedly modifies its provisions, the new section is an amendment to the statute.” (*Huening, supra*, at p. 777.)

It is not necessary that an act of the Legislature actually amend the express language of an initiative statute in order for the Legislature’s act to constitute an amendment of an initiative statute. (*Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal.App.4th at pp. 1484-1486.) “[T]he normal and customary meaning of the term ‘amended’ . . . encompasses new code sections affecting in some way the application of a statute or impliedly modifying provisions of the statute.” (*Huening*, 231 Cal.App.3d at p. 779.) The statute enacted by the Legislature need not even be contained within the provisions of the initiative statute in order to be considered an amendment of the initiative statute. As long as the legislative-enacted statute is “effectively an addition to” an initiative statute, it constitutes an amendment to the initiative statute. (*Ibid.*)

There is a clear presumption favoring an initiative statute over a legislatively enacted statute when it is possible that the latter has affected the former. When determining whether an act of the Legislature constitutes an amendment of an initiative statute, “[i]t is the ‘duty of the courts to jealously guard [the people’s initiative and referendum power]’ ” so that the people’s initiative power is not improperly annulled. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776.) “Any doubts should be resolved in favor of the initiative

and referendum power, and amendments which *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinances, where the original initiative does not provide otherwise.” (*Proposition 103 Enforcement Project*, 64 Cal.App.4th at p. 1486, italics in original; see *DeVita, supra*, at pp. 792-793.)

The ultimate objective of the protection given by the California Constitution to an initiative statute from legislative encroachment is this: “[T]he voters should get what they wanted, not more and not less.” (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

2. *Section 1054.9’s amendments to the Criminal Discovery Statute.*

Penal Code section 1054.9 amended the Criminal Discovery Statute in five ways.

a. *Added a new section to the Criminal Discovery Statute.*

Section 1054.9 amended the Criminal Discovery Statute by adding a new section to that statute. The Discovery Statute was enacted by the electorate in Proposition 115 as chapter 10 of title 6 of part 2 of the Penal Code. Senate Bill 1391 added section 1054.9 to chapter 10 of title 6 of part 2 of the Penal Code. (Stats. 2002, ch. 1105, § 1.) Thus, the Legislature placed section 1054.9 into the Criminal Discovery Statute.

This Court recognized the significance of the placement of section 1054.9 into chapter 10 when defining which agencies are obligated to provide discovery pursuant to section 1054.9. They are the same as those obligated to provide preconviction discovery pursuant to Penal Code section 1054.1. In *In re Steele* (2004) 32 Cal.4th 682, 696, this court stated:

“Section 1054.9 is part of the general discovery provisions of Penal Code section 1054 et seq. Those provisions limit trial discovery to materials the prosecutor possesses or knows ‘to be in the possession of the *investigating* agencies . . . .’ (Pen. Code, § 1054.1, italics added.) . . . . *At trial*, these discovery obligations do not extend to materials possessed by law enforcement agencies that were not involved in investigating or preparing the case against the defendant. Section 1054.9, subdivision (b), should not be read as creating a broader *postconviction* discovery right.” (Italics in original.)

This court then reinforced its construction of the discovery reach of Penal Code section 1054.9 by quoting the holding of the Court of Appeal in *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315, in which the Court held that under the Criminal Discovery Statute “ ‘information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material.’ ” (*In re Steele*, 32 Cal.4th at p. 696.)

Thus, section 1054.9 amended the Criminal Discovery Statute by its addition as an integral part of the Criminal Discovery Statute.

*b. Expanded the means by which defendants in criminal cases can obtain court orders to compel discovery from the prosecution.*

Section 1054.9 also amended the Criminal Discovery Statute by expanding the means for criminal defendants to obtain court orders to compel prosecution disclosures. Penal Code section 1054.5, subdivision (a), provides, in part:

“No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law

enforcement agencies which investigated or prepared the case against the defendant . . . .”

The first sentence of subdivision (a) of section 1054.5 explicitly restricts discovery orders in criminal cases to those obtained under the authority of the Criminal Discovery Statute. The second sentence is sweeping and unqualified in its terms. It is not expressly limited to criminal cases. It protects not only the prosecution as such, but also law enforcement agencies and others who assisted such agencies from any other compelled production or disclosure. This is an antievasion provision. It prevents courts from making an end-run around the limits on discovery in the chapter by ordering disclosure under some other provision of law or by creating another kind of proceeding and declaring it to be a separate case.

As Petitioner notes, prior to Proposition 115 California criminal discovery law consisted entirely of case law by courts claiming inherent powers. (Answer Brief at pp. 6-7.) It was a one-sided, unfair system, and the people rejected it in an initiative intended to reduce unnecessary costs and make the system swift and fair. (Proposition 115, § 1, subds. (b) & (c), Stats. 1990, p. A-243.) To achieve the initiative’s purpose, it was necessary to prevent evasion by the same courts that had created the system rejected by the initiative. Hence a sweeping prohibition on any additional compelled disclosures was necessary. While statutory language must be considered in its context, it must also be considered with reference to its purpose. (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 734-735.) The sweeping language of this sentence must not be limited to “criminal cases” so narrowly defined as to enable the evasion it was intended to prevent.

The people did not entirely trust the Legislature, either. The power to amend the initiative, including the discovery chapter, was

limited to bills that pass by a two-thirds vote. (See part II B, *supra* at p. 5.) When section 1054.5 refers to “this chapter,” that is a specific reference to the chapter as enacted. (See *People v. Cooper* (2002) 27 Cal.4th 38, 44.) An amendment to authorize additional means of discovery beyond those authorized by “this chapter” as enacted would therefore be inconsistent with Proposition 115 unless it is made by a bill authorized to amend the initiative itself. The new mechanism and new means of discovery provided by section 1054.9 is therefore an unauthorized amendment of section 1054.5, subdivision (a).

*c. Expanded the prosecution’s statutory disclosure duties to postjudgment proceedings in which no action is pending.*

The third way in which section 1054.9 amended the Criminal Discovery Statute is that it expanded the reach of the prosecution’s mandatory trial disclosure duties of section 1054.1 to postjudgment proceedings in which no independent proceedings are pending, and it now requires the prosecution to provide repetitious discovery to the defendant.

In *In re Steele*, this court construed section 1054.9 to require the prosecution team to disclose discoverable materials to a defendant upon whom judgment has been imposed and who has not yet filed a postjudgment petition. (32 Cal.4th at p. 691.) This court held that section 1054.9 entitles a sentenced capital defendant to repetitious disclosure of materials already provided once and to disclosure of

“materials to which the defendant was *actually* entitled at the time of trial, but did not receive. This category includes specific materials that the defendant can show the prosecution should have provided (but did not provide) at the time of trial because they came within the scope of . . . a statutory duty to provide discovery. (See Pen. Code, § 1054 et seq.)” (*Id.* at p. 695, italics in original.)

Thus, section 1054.9 extended the reach of the prosecution team’s mandated disclosure duties under Penal Code section 1054.1 to postjudgment activities in which the sentenced capital defendant is preparing, but has not filed, a postjudgment petition. In this way section 1054.9 provides that the prosecution team must provide discovery mandated by section 1054.1 two times instead of one time—once for trial, and a second time for postjudgment preparation of a habeas petition or a motion to vacate the judgment.

*d. Expanded the prosecution’s statutory disclosure duties to postjudgment motions to vacate the judgment.*

The fourth way in which section 1054.9 amended the Criminal Discovery Statute is that it expanded the prosecution team’s mandated disclosure duties to postjudgment motions to vacate judgments of conviction. This addition must necessarily refer to the common law motion in the nature of *coram nobis* and not the new statutory motion of Penal Code section 1473.6. Although enacted together, these two sections have no cases in common. Subdivision (a) of section 1473.6 limits that section to persons no longer in custody, while section 1054.9 is limited to persons sentenced to death or life without parole, who are necessarily in custody.

A motion to vacate the judgment is part of the criminal case to which it refers.

“A motion to vacate a judgment in a criminal case is in this state in the nature of an application for a writ of error *coram nobis* and a proceeding of that nature is properly regarded ‘as a part of the proceedings in the case to which it refers’ rather than as ‘a new adversary suit.’” (*People v. Jones* (1957) 155 Cal.App.2d 149, 151.)

In reaching this conclusion, the *Jones* court quoted from this court’s holding in *In re Paiva* (1948) 31 Cal.2d 503, at page 510, in which this court stated, “a motion to vacate a judgment in a criminal case upon grounds which make such motion the equivalent of a proceeding in the nature of a writ of error *coram nobis*, must be regarded as a part of the proceedings in the criminal case . . . .”

Section 1054.9’s authorization of discovery in a motion to vacate the judgment is therefore an authorization of discovery in a “criminal case.” Because of the exclusivity provision of section 1054.5, subdivision (a), this constitutes an amendment of the Criminal Discovery Statute.

*D. A Discovery Motion Made in a Court Where No Habeas Is Pending Must Be Part of the “Criminal Case.”*

Barnett made his discovery motion as a part of his criminal case, and it was so captioned. It had to be, as no other proceeding was pending before the Superior Court. Postconviction discovery conducted by a defendant who has not filed a habeas petition is necessarily an integral component of the underlying criminal action, and the motion is not a special proceeding of a criminal nature. (*Cf. People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 723-725; *Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270, 1275-1277; *Ensoniq Corp. v. Superior Court* (1998) 65 Cal.App.4th 1537, 1547.) “[T]he pendency of a related criminal action may warrant classifying a special proceeding as a part of the criminal action . . . .” (*People v. Superior Court (Laff)*, *supra*, at p. 724.) Special proceedings conducted during the pendency of a related criminal action are deemed to be part of that criminal action. These special proceedings do not initiate a new controversy; they relate only to their corresponding criminal actions. (*Cf. id.* at p. 723.) “The term ‘special proceeding’ applies only to a proceeding that is distinct

from, and not a mere part of, any underlying litigation.” (*Id.* at p. 725, citing *Avelar, supra*, at p. 1275.) “The term ‘has reference only to such proceedings as may be commenced independently of a pending action . . . .’” (*People v. Superior Court (Laff), supra*, at p. 725, quoting *In re Sutter-Butte By-Pass Assessment* (1923) 190 Cal. 532, 537.)

California law does not recognize a free-floating motion that is not tethered to a proceeding. “A motion is an application to the court for an order.” (*People v. Williams* (1999) 20 Cal.4th 119, 129; Code Civ. Proc., § 1003.) “[M]otions must be made in the court in which the action is pending.” (Code Civ. Proc., § 1004.) “[A] discovery motion is not an independent right or remedy. It is ancillary to an ongoing action or proceeding. After the judgment has become final, there is nothing pending in the trial court to which a discovery motion may attach.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1257.) “A motion is not an independent right or remedy; it is confined to incidental matters in the progress of a cause. A motion relates to some question that is collateral to the main object of the action and is connected with and dependent upon the principal remedy.” (*Donald J. v. Evna M.* (1978) 81 Cal.App.3d 929, 934.) A motion, therefore, implies the “pendency of [a] suit[] between the parties.” (*People v. Burks* (1961) 189 Cal.App.2d 313, 317.)

Finally, the language used in section 1054.9 demonstrates that, whatever else it might be, section 1054.9 is intended to be part of a criminal proceeding. Section 1054.9 contains six references to the person preparing for or prosecuting a postjudgment petition. Each time section 1054.9 refers to that person as the “defendant.” The repeated use of the term “defendant,” rather than “petitioner,” “complainant,” or “plaintiff,” is evidence that section 1054.9 authorizes discovery within the confines of the underlying criminal

case, as opposed to providing statutory authorization for discovery within an ancillary habeas proceeding.

Penal Code section 685 provides that “[t]he party prosecuted in a criminal action is designated in this code as the defendant.” On the other hand, in a habeas corpus proceeding, the person bringing the petition is designated as the “petitioner.” (See, e.g., *In re Steele*, *supra*, 32 Cal.4th at p. 688 [“Petitioner Raymond Edward Steele is under a judgment of death”].)

In habeas proceedings the jailer or warden is designated the defendant, and the defendant in the underlying criminal case is designated the plaintiff or petitioner. Section 1054.9 makes no reference to the plaintiff or petitioner who prosecutes a habeas writ in an ancillary special proceeding. By no stretch of the imagination does the term “defendant” in section 1054.9 refer to the jailer or to the warden. By employing the statutory phrase “the defendant,” section 1054.9’s drafters channeled postconviction discovery proceedings directly into a defendant’s underlying criminal case.

Technical words and phrases are construed according to their peculiar and appropriate meaning or definition, and words which have acquired a particular meaning in law are to be so construed. (Pen. Code, § 7, subd. 16.) Section 1054.9 repeatedly employs the statutory phrase “the defendant.” The codification of section 1054.9 within the Criminal Discovery Statute, where the phrase “the defendant” clearly refers to an accused in an underlying criminal case, is evidence that section 1054.9 is intended to provide postjudgment discovery in the convicted capital defendant’s underlying criminal case.

Section 1054.9 never refers to the intended recipient of the postconviction discovery as “the plaintiff,” “the complainant,” or “the petitioner.” If the Legislature had intended to give the term

“defendant” a different meaning in section 1054.9 from its ordinary meaning in the remaining sections in title 10 of chapter 6 of part 2 of the Penal Code, the Legislature would have said so. (See *People v. Acosta* (2002) 29 Cal.4th 105, 114 [“As a matter of statutory construction, ‘a word or phrase repeated in a statute should be given the same meaning throughout’ ”].)

In a similar vein, when this court construed Penal Code section 1054.9 in *In re Steele*, this court repeatedly used the term “defendant” or “defense” when referring to the person preparing for or prosecuting a postjudgment petition.<sup>2</sup> Because the Court used the terms “defendant” and “defense” to refer to the convicted defendant in a postjudgment context, we believe that this court in *In re Steele* considered that section 1054.9 provides postjudgment discovery within the parameters of the criminal defendant’s underlying criminal case.

The conclusion is inescapable that section 1054.9 provides postjudgment discovery within the confines of a criminal defendant’s underlying criminal case. Given the exclusivity provision of section 1054.5, subdivision (a), such discovery can only be authorized by amending the Criminal Discovery Statute.

*E. Penal Code Section 1054.9 Did Not Receive a Two-Thirds Vote in Both Houses of the Legislature.*

Penal Code section 1054.9 was enacted in 2002 as section 1 of Senate Bill No. 1391. (Stats. 2002, ch. 1105.) The Assembly has a membership of 80; the Senate a membership of 40. (Cal. Const., art.

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2. Amicus has counted more than 20 such references, and these do not include references to the defendant at the time of trial, nor do they include quotations from section 1054.9 in which the Court accurately quotes the language of the statute.

IV, § 2.) The Assembly floor vote on Senate Bill 1391 on August 27, 2002, was 42 Ayes, 31 Noes, and 7 Not voting. (5 Assem. J. (2001-2002 Reg. Sess.) p. 8239.) The Assembly floor vote on Senate Bill 1391 thus constituted a 53 percent majority (42/80 = 53 percent) of the membership of the Assembly. The Senate floor vote on Senate Bill 1391 was 21 Ayes and 10 Noes. (3 Sen. J. (2001-2002 Reg. Sess.) p. 4500.) The Senate floor vote on Senate Bill 1391 likewise constituted a 53 percent majority (21/40 = 53 percent) of the membership of the Senate. (Ibid.)

Section 30 of Proposition 115 provides that “[t]he statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, *two-thirds of the membership consenting*, or by a statute that becomes effective only when approved by the electors.” (Italics added.) This provision clearly requires that an amendment by the Legislature to Proposition 115 must receive the affirmative vote of two-thirds of the entire membership of each house of the Legislature, not simply two-thirds of the membership “present and voting.”<sup>3</sup> Where a statute provides that the legislative body may act by the affirmative vote of the membership “present and voting,” the statute uses that language.<sup>4</sup>

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3. There is a clear difference between the standard of “two-thirds of the membership” and the standard of “two-thirds of the membership present and voting.” (See *Kaiser Union Bldg., Inc. v. Burroughs* (La.App. 1970) 239 So.2d 425, 429-430.)

4. See, e.g., Pub. Resources Code, § 30315.1 (“Adoption of findings for any action taken by the commission requires a majority vote of the members from the prevailing side present at the meeting of the commission, with at least three of the prevailing members present and voting”).

“Membership” is defined as the full 80 Assembly members and 40 Senators. (Standing Rules of the Assembly (2007-2008 Reg. Sess.) December 4, 2006, rule 105; Standing Rules of the Senate, April 19, 2007, rule 47.) On the other hand, when a vote by “a majority of the members present” is the requirement, the Legislative rules specifically so state. (See, e.g., Standing Rules of the Senate, *supra*, rule 42.)

Unless the statute specifies that the standard is a percentage “of the members present and voting,” the concurring votes are gauged against the entire membership of the legislative body. (See Cal. Const., art. IV, § 8, subd. (b) [“. . . No bill may be passed unless, by rollcall vote entered in the journal, a majority of the membership of each house concurs”]; Cal. Const., art. IV, § 12, subd. (d) [“Appropriations from the General Fund of the State, except appropriations for the public schools, are void unless passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring”].) The normal vote required to pass a bill is the concurrence of a majority of the members elected to each house of the Legislature. The Attorney General has concluded that this language means “the members elected to each house of the Legislature.” (26 Ops. Cal. Atty. Gen. 168 (1955).)

However, even if section 30 of Proposition 115 could be construed as allowing the Legislature to amend a statute enacted by Proposition 115 by a rollcall vote of two-thirds of the membership of each house present and voting, Penal Code section 1054.9 would still be invalid. Section 1054.9 did not obtain even a two-thirds affirmative vote of the members of each house present and voting. Although the Aye votes in the Senate constituted 67 percent of the membership present and voting, the Aye votes in the Assembly constituted only 57.5 percent of the membership present and voting.

To be a valid statute, Penal Code section 1054.9 must have received a two-thirds vote in “each house by rollcall vote.”

No matter which formula is utilized, Penal Code section 1054.9 did not receive a two-thirds affirmative vote in the Assembly. For these reasons, Penal Code section 1054.9 constitutes an unlawful amendment of the Criminal Discovery Statute.

**III. As an Invalid Act in Excess of the Amendatory Powers Granted to the Legislature, Penal Code Section 1054.9 Cannot Be Given Effect.**

Section 30 of Proposition 115 gives the Legislature the authority to enact legislation that amends any of the statutes passed by Proposition 115 only when that legislation receives a two-thirds affirmative vote in each house of the Legislature or when the Legislature enacts a statute that becomes effective only when approved by the electorate. Penal Code section 1054.9 was not enacted as a statute that becomes effective only when approved by the electorate. Nor was Penal Code section 1054.9 enacted by a rollcall vote of two-thirds of the membership of each house of the Legislature. Therefore, section 1054.9 was not validly enacted by the Legislature, because it was beyond the authority of the Legislature to enact. “[A]n act in excess of the amendatory powers granted to the Legislature by the voters . . . is invalid regardless of how it might be applied in any given case.” (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1495.) Whenever a legislative body such as the Legislature, a city council, or even the electorate, enacts legislation that exceeds its authority to adopt, the legislation is invalid *ab initio*—void at the time of its enactment. (See *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 779; see also *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544.)

In *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, this court held that former section 1861.135 of the Insurance Code, which was enacted by the State Legislature in 1990 to exclude surety insurance from insurance rate rollbacks required by Proposition 103, was beyond the authority of the Legislature to amend because it did not further the purposes of Proposition 103, and was thus invalid. This Court observed, “Under article II, section 10, subdivision (c) [of the California Constitution], the voters have the power to decide whether or not the Legislature can amend or repeal initiative statutes. This power is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters.*” (*Id.* at p. 1251, italics in original, citations omitted.)

Once this court in *Amwest* had determined that the statute in question was beyond the authority of the Legislature to enact without obtaining a two-thirds vote of each house of the Legislature, the court held that the statute was invalid (11 Cal.4th at p. 1265), without any consideration whether its application in a particular case could be found constitutional. In *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1373, the Court of Appeal reached the same conclusion—that a statute enacted in excess of the Legislature’s authority is invalid, and the statute’s invalidity obviates any need to determine its constitutionality. (*Id.* at p. 1373, fn.11.)

A statute that is beyond the authority of the Legislature to adopt without a two-thirds vote of each house of the Legislature is void at the time of its enactment. (*DeVita, supra*, 9 Cal.4th at p. 779; *Leshner Communications, supra*, 52 Cal.3d at p. 544.) “A void statute or ordinance cannot be given effect.” (*Leshner Communications, supra*, at p. 544.) Such a statute “is invalid regardless of how it might be applied in any given case.” (*Proposition 103 Enforcement Project, supra*, 64 Cal.App.4th at p. 1495.) When a statute enacted by the

Legislature is facially invalid, it does not matter how that statute might be applied in a particular case. (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 453-454.)

#### **IV. A Statute Enacted in Excess of the Legislature’s Authority May Not Be Judicially Reformed.**

Amicus expects that Petitioner might claim that even if Penal Code section 1054.9 is invalid as having been enacted in excess of the Legislature’s legislative authority, this court should “reform” section 1054.9 so as to make it constitutional.<sup>5</sup> We anticipate that Petitioner’s argument might read like this: Since section 1054.9 was unconstitutionally enacted because it amended the Criminal Discovery Statute, the court should construe section 1054.9 to apply only to defendants whose trials were completed prior to the effective date of the Criminal Discovery Statute, June 6, 1990, and whose right to discovery under 1054.9 would not be framed by the Criminal Discovery Statute. (See *In re Steele* (2004) 32 Cal.4th 682, 695, n. 3.) Alternatively, the Petitioner’s argument might be that the court should reform section 1054.9 to apply only to discovery orders issued as part of pending habeas corpus proceedings, on the theory that the Criminal Discovery Statute is inapplicable to such proceedings. Amicus believes that the Court does not have the lawful power to reform Penal Code section 1054.9 in either of these two possible ways. While this court is empowered to reform a statute in order to help it pass constitutional muster, judicial reformation of Penal Code section 1054.9 as invalidly enacted is not an allowable use of the Court’s power to reform a statute.

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5. Because amici are not generally allowed reply briefs (see Cal. Rules of Court, rule 8.520(f) [giving the parties the last word]), we must necessarily anticipate arguments that might be made.

When a statute is facially invalid because it has not been validly enacted, the doctrine of judicial reformation of that statute does not apply. While courts have the power to reform a statute in order to preserve its constitutionality (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 662-663), judicial reformation powers do not extend to statutes that are invalid or void because they have been enacted in excess of the Legislature’s authority. “A void statute or ordinance cannot be given effect.” (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544.)

This Court’s plurality opinion in *Kopp, supra*, does not authorize judicial reformation of Penal Code section 1054.9. The judicial reformation power discussed in *Kopp* is restricted to reforming statutes which are constitutionally invalid “as applied.” The plurality opinion in *Kopp* contains a comprehensive and detailed description of the kinds of cases in which the United States Supreme Court and the California courts have judicially reformed statutes in order to preserve their constitutionality. (11 Cal.4th at pp. 629-653.)

The *Kopp* lead opinion is noteworthy not only for what it says but also for what it does not say. Every case cited and discussed in *Kopp* by Chief Justice Lucas as having approved judicial reformation of a statute involved a statute that was unconstitutional because of the manner of its application. The categories of United States Supreme Court cases described in *Kopp* consist of the following: (1) cases concerning procedural safeguards required by the First Amendment or principles of procedural due process; (2) cases concerning classifications that are underinclusive under the equal protection clause; and (3) cases concerning otherwise vague or overbroad criminal statutes. (*Kopp*, 11 Cal.4th at p. 629.) The California cases described in *Kopp* are: (1) cases concerning classifications otherwise invalid under the equal protection clause, (2) cases involving criminal statutes otherwise unconstitutionally

vague or overbroad, (3) cases reforming statutes to confer necessary procedural due process protections, (4) cases reforming statutes to avoid classifications impermissible under the First Amendment, and (5) cases reforming statutes to avoid nullification under the judicial powers provision of our own Constitution. (*Id.* at p. 641.)

All of these categories of cases are ones in which the United States Supreme Court and California courts have judicially reformed statutes in order to make them constitutional as applied. No case cited in the *Kopp* plurality opinion involved judicial reformation of a statute declared void because it had been enacted in excess of the Legislature's authority. Amicus is not aware of any such case. It is one thing for a court to judicially reform ("construe") a statute to make its future application constitutional. It is quite another to attempt to reform a statute in an effort to rectify the unconstitutional nature of its enactment, which by definition is a completed event that has transpired in the past.

The Legislature's enactment of Penal Code section 1054.9 amending the Criminal Discovery Statute, is invalid not because the Legislature could not pass such a law at all, but because passage required a two-thirds concurrence of the membership in each house of the Legislature. Accordingly, Penal Code section 1054.9 was void *ab initio* because of the manner of its enactment, not because of the manner of its application, and the Court may not reform section 1054.9 to rectify its resulting invalidity.

**V. Even If it Has the Power to Do So,  
This Court Should Decline to Judicially Reform  
Penal Code Section 1054.9.**

Even if this court has the power to judicially reform Penal Code section 1054.9, the Court should not do so.

*A. Limiting Section 1054.9 to Pre-Proposition 115 Cases Would Not Cure the Infirmary.*

Petitioner may claim that the Court should reform section 1054.9 so that its provisions apply to all postjudgment cases in which the defendant's trial occurred prior to June 5, 1990, because a trial occurring prior to June 5, 1990, was not governed by the Criminal Discovery Statute. Such an argument would suffer from a fatal flaw.

Although the Criminal Discovery Statute did not govern criminal trials which predated its enactment, the Criminal Discovery Statute governs all criminal proceedings occurring subsequent to the enactment of that statute by the electorate on June 5, 1990. The general rule is that newly enacted statutes apply prospectively. This means that a newly enacted statute that affects the trial of a case generally applies to a criminal trial occurring after the effective date of the statute, unless the statute would have retroactive effect. (See *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 277; see *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839 [following *Landgraf's* approach].)

*Tapia v. Superior Court* (1991) 53 Cal.3d 282 addressed the application of Proposition 115 to then-pending cases. *Tapia* discusses the principle of prospective application of statutes to criminal "trials" because it was the trial that was at issue in *Tapia*, but the holding applies to criminal proceedings that are not trials, as well as to any posttrial proceedings that are part of a case that was pending on June 5, 1990. "Accordingly, the provisions enumerated above may be applied to pending cases regardless of when the

changed offense is alleged to have occurred.” (*Id.* at p. 300.)<sup>6</sup> Thus, the discovery provisions enacted by Proposition 115 also apply to any proceeding conducted after enactment of Proposition 115, whether it is a new action, a special proceeding, or a motion in a continuing case.

Penal Code section 1054.5, subdivision (a), provides, “No order requiring discovery shall be made in criminal cases except as provided in this chapter.” The same subdivision also provides, “This chapter shall be the only means by which the defendant may compel the disclosure or production of information” from the prosecution team. Reforming section 1054.9 to make its provisions apply to postjudgment proceedings in any criminal case whose trial pre-dated the adoption of the Criminal Discovery Statute would not cure the infirmity.

*B. Authorizing Discovery Before the Filing of the Habeas Petition Was an Essential Motivation of the Bill.*

As discussed *supra*, at 15, section 1054.9 authorizes additional discovery in a criminal case, and thereby amends Proposition 115, by authorizing a discovery order when no action or special proceeding other than the criminal case has been filed. The statute might be reformed to limit its application to orders by a court in which a habeas proceeding is pending, but this would be contrary to the central purpose of the bill.

The rule that the trial court cannot order “free-floating” postjudgment discovery after trial and with no habeas pending was clearly established in *People v. Gonzalez* (1990) 51 Cal.3d 1179,

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6. The sole exception, not pertinent here, was for compelled “production of evidence obtained by defense counsel prior to Proposition 115’s effective date . . . .” (*Ibid.*)

1256-1257. The principal purpose of the pertinent portion of the bill was to abrogate the *Gonzalez* holding. (See Sen. Public Safety Committee, Bill Analysis of SB1391 (2001-2002 Reg. Sess.) Apr. 23, 2002, p. 4.) The criterion of closely effectuating the policy judgment of the enacting body is lacking for any proposed reformation that would omit pre-habeas-filing discovery. (See *Kopp, supra*, 11 Cal.4th at p. 661.)

*C. Restricting Section 1054.9 to Pending Habeas Proceeding Would Raise Additional Constitutional Questions.*

Among the reasons for a court to refrain from reforming a statute is that the proposed reformation would itself produce “serious constitutional problems.” (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 190.) Even as applied to pending habeas proceedings, the constitutional status of section 1054.9 is shaky.

Amicus CJLF is aware, of course, that this court said in *In re Scott* (2003) 29 Cal.4th 783, 813 “that Penal Code section 1054.3 does not apply to habeas corpus proceedings. It applies to the underlying criminal proceeding.” However, that statement was made with no discussion or analysis. It did not focus on section 1054.5, subdivision (a), and it did not mention the sweeping prohibition of the second sentence of that subdivision. “[I]t is axiomatic that cases are not authority for propositions not considered.” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) *Scott* therefore does not settle the question of whether section 1054.5’s exclusivity requirement extends to habeas corpus.

In American law, habeas corpus proceedings have traditionally been “characterized as civil in nature” (*Mayle v. Felix* (2005) 545 U.S. 644, 654, fn. 4), but that is not how they are classified in California statutes. Judicial remedies in this state are classified as actions or special proceedings, and actions are further divided into

civil and criminal. (See Code Civ. Proc. §§ 21-24; *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 723.) Habeas corpus is codified in the Penal Code, in part 2, “Of Criminal Procedure,” in title 12, “Special Proceedings of a Criminal Nature.” *Scott, supra*, 29 Cal.4th at page 815, held that habeas was civil in nature for the purpose of Evidence Code section 930, but expressly disclaimed any holding on its classification for other purposes. (*Id.* at p. 815, fn. 6.)

*Bravo v. Cabell* (1974) 11 Cal.3d 834, 838 asked “whether a special proceeding, although normally regarded as civil in nature, may be considered as part of a criminal action.” The answer was yes, in part because the writ in question had “features inherently similar to an appeal from a judgment of conviction.” (*Id.* at p. 839.) If this is true for mandamus, it is more clearly true for habeas corpus, a special proceeding expressly classified as criminal in the Penal Code.

Any attempt to salvage section 1054.9 by limiting it to pending habeas proceedings would have to confront the question of whether such proceedings are part of the criminal case for the purpose of the first sentence of section 1054.5, subdivision (a). It would also have to create an implied exception to the clear, unequivocal, sweeping language of the second sentence of that subdivision. These are not easy questions, and there is no need to resolve them in this case. The fact that a possible reformation is itself constitutionally dubious is reason enough not to undertake it.

The problems the Legislature saw with this court’s decision in *Gonzalez* are not that difficult to resolve. The Legislature can pass a habeas discovery statute which is fair to both sides, provides reciprocal discovery, does not create excessive burden or delay, and authorizes pre-filing record reconstruction. With a *fair* statute, the requisite two-thirds majority can be achieved. And that is precisely why the people of California required such a supermajority.

## CONCLUSION

The decision of the Court of Appeal granting a writ of mandate should be reversed.

October 31, 2007

Respectfully Submitted,

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