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**SUPREME COURT  
FILED**

**NOV 29 2011**

**Frederick K. Ohlrich Clerk**  

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**Deputy**

**In the Supreme Court of the State of California**

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

Plaintiff and Respondent,

v.

**LA TWON WEAVER,**

Defendant and Appellant.

**CAPITAL CASE**

Case No. S033149

Related Case No.  
S193534

San Diego County  
Superior Court, Case  
No. CRN22688

**REPLY TO OPPOSITION TO MOTION FOR ACCESS TO SEALED  
PENAL CODE SECTION 987.9 MATERIALS AND SEALED  
TRANSCRIPT FILED IN CASE NUMBER S033149**

Respondent submits this Reply to the Opposition filed by La Twon Weaver to respondent's Motion seeking access to the sealed records the Attorney General is entitled to obtain pursuant to Penal Code section 987.9, subdivision (d) (section 987.9(d)). Weaver opposes the release of the

records on the grounds respondent's motion (1) is a premature request for discovery (2) respondent has failed to make a showing of relevance; (3) application of section 987.9(d) to Weaver would give the statute impermissible retroactive effect; (4) section 987.9(d) violates his rights to equal protection and due process as an indigent criminal defendant; (5) and, in the event this Court finds that disclosure is appropriate, Weaver requests the matter be referred to a referee to make an *in camera* determination of which documents and transcript are sufficiently related to claims raised in Weaver's habeas petition to warrant disclosure, and to impose a protective order. Weaver's opposition is meritless.

**A. The Pending Motion For Access To Section 987.9(d) Materials Is a Timely Request For Disclosure And Not A Premature Request For Discovery**

Weaver erroneously contends that because this Court has not issued an order to show cause in his habeas case, no proceeding exists. (Opp. at p. 5.) He asserts that the filing of a habeas petition does not create a proceeding which would confer jurisdiction on a court to grant discovery until the court determines the allegations contained in the petition state a *prima facie* case for relief. (Opp. at p. 6.) He also argues that this Court cannot order the disclosure of documents that are protected by his privilege against self-incrimination, the attorney-client privilege and work product protection without first establishing a cause of action exists. Weaver's argument ignores the plain language of the statute, as well as the purpose of the issuance of an order to show cause in a habeas proceeding.

Respondent's motion is pursuant to Penal Code section 987.9, subdivision (d),<sup>1</sup> and "[t]he plain language of the statute establishes what

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<sup>1</sup>Penal Code section 987.9, subdivision (d) provides as follows:

(continued...)

was intended by the Legislature.” (*People v. Statum* (2002) 28 Cal.4th 682, 690.) Section 987.9(d) allows any court to provide the Attorney General access to a capital defendant’s trial counsel’s funding applications and disbursements made pursuant to the same statute. The statute does not characterize the Attorney General’s access as discovery, and it does not limit access to those situations where an order to show cause has issued. Nor does it condition access to the sealed records on satisfying any discovery requirements that may otherwise be applicable to habeas corpus proceedings.

The function of an order to show cause is to institute proceedings in which issues of fact are to be framed and decided, as it creates a “cause” giving the People “a right to reply to a petition by a return and to otherwise participate in the court’s decisionmaking process.” (*In re Serrano* (1995) 10 Cal.4th 447, 455.) However, the interests of the People in refuting the basis for a collateral challenge extend well before the period following the issuance of an order to show cause. (See Cal. Rules of Court, rule 8.385(b).) As this Court has recognized, it is appropriate for respondent to cite to legal authority and to submit factual materials in an informal response in an effort to demonstrate the lack of merit to claims and, therefore, that the court may reject them summarily, without requiring formal pleadings. (*People v. Romero* (1994) 8 Cal.4th 728, 742.)

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(...continued)

(d) The confidentiality provided in this section shall not preclude any court from providing the Attorney General with access to documents protected by this section when the defendant raises an issue on appeal or collateral review where the recorded portion of the record, created pursuant to this section, relates to the issue raised. When the defendant raises that issue, the funding records, or relevant portions thereof, shall be provided to the Attorney General at the Attorney General’s request. In this case, the documents shall remain under seal and their use shall be limited solely to the pending proceeding.

Accordingly, access to records pursuant to 987.9(d) does not depend on issuance of an order to show cause by a state court. (See *People v. Superior Court (Berryman)* (2000) 83 Cal.App.4th 308, 311 [access to records granted pursuant to section 987.9(d) based on filing of federal habeas petition].)

In this case, the only requirement for access to the section 987.9 records was satisfied when Weaver raised issues on collateral review that relate to the records created pursuant to section 987.9. Specifically, Weaver has raised claims of ineffective assistance of counsel that include allegations that his counsel failed to investigate or otherwise prepare and present evidence. (See Claim Nos. 1, 3, 5, 9, 10, 19, 20; Petn. Case No. S193534.) Accordingly, the statutory requirement for access to the materials by the Attorney General is satisfied. (See Pen. Code, § 987.9, subd. (d).)

**B. Weaver's Claims of Ineffective Assistance of Counsel Triggers the Statutory Requirement for Access by the Attorney General to the Section 987.9 Records**

Weaver contends that respondent has failed to make a showing of relevance warranting access to section 987.9(d) materials. (Opp. at p. 11.) Section 987.9(d) mandates that the Attorney General shall have access to documents protected by this section when a defendant raises an issue on collateral review where the record created pursuant to this section relates to an issue raised by the defendant. (Pen. Code, § 987.9, subd. (d).) The record created pursuant to this section includes “funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense.” (Pen. Code, § 987.9, subd. (a).)

As respondent set forth above, Weaver has raised claims of ineffective assistance of counsel that include allegations that his counsel failed to investigate or otherwise prepare and present evidence or a defense. (See

Claim Nos. 1, 3, 5, 9, 10, 19, 20; Petn. Case No. S193534.) Therefore, funding records involving investigations “relate” to an issue raised by Weaver. Having raised issues regarding trial counsel’s investigations, or lack thereof, the funding records from Weaver’s defense below, or relevant portions thereof, “shall be provided to the Attorney General at the Attorney General’s request.” (Pen. Code, § 987.9, subd. (d); see also *People v. Superior Court (Berryman)*, 83 Cal.App.4th at p. 311 [access to records where petition made claims of ineffective assistance of counsel due to counsel’s failure to investigate and/or prepare a defense].)

**C. Application Of Section 987.9(d) Is Proper**

Weaver contends that applying section 987.9(d) to him would give impermissible retroactive effect to the statute. (Opp. at p. 13.) This assertion of impermissible retroactive application rests on the assumption that he enjoyed a right to “absolute confidentiality” regarding funding requests and information contained therein, and that the contours of this alleged right were subsequently changed by enactment of section 987.9(d).

This Court has held that a statute is not applied “retroactively” if “the measure does not change the legal consequence of past conduct by imposing new or different liabilities based on the same conduct.” (*Californians for Disability Rights v. Mervyns, LLC*. (2006) 39 Cal.4th 223, 232, citing *Elsner v. Uveges* (2004) 34 Cal.4th 915, 937.) Here there is no retroactivity because, prior to amendment of Penal Code section 987.9, the law was clear that the confidentiality of section 987.9 records could be affected by a defendant’s pursuit of post-conviction claims in either state or federal court. (See, e.g. *In re Scott* (2003) 29 Cal.4th 783, 814; *People v. Gonzales* (1990) 51 Cal.3d 1179, 1258; *Bracy v. Gramley* (1997) 520 U.S. 899, 904 [117 S.Ct. 1793, 138 L.Ed.2d 97].)

Moreover, habeas is an equitable remedy available to redress fundamental jurisdictional or constitutional errors occurring in a criminal

trial. (*In re Harris* (1993) 5 Cal.4th 813, 828.) There is no right permitting Weaver to conceal section 987.9 records that are related to issues raised by him in a habeas petition.

**D. Releasing Section 987.9 Records to the Attorney General Does not Violate Weaver's Right to Equal Protection or Due Process**

Weaver contends that releasing funding records to the Attorney General violates his right to equal protection and due process because it discriminates against indigent criminal defendants who are required to seek section 987.9 funds. (Opp. At p. 16.) This contention assumes non-indigent defendants who raise ineffective assistance of counsel claims are entitled to conceal information relevant to that claim. Weaver cites no authority to support that contention, and it is mistaken. Section 987.9 is simply the means by which indigent defendants secure funding in trial courts. Access to section 987.9 records, therefore, is simply the means by which the Attorney General is afforded essential information when indigent defendants raise claims of ineffective assistance of counsel. Comparable access will be afforded to analogous information sources when non-indigent defendants attack their counsel.

Weaver also argues that a procedure permitting discovery of attorney-client privileged information based on an indigent defendant's need for section 987.9 funding does not comport with due process. (Opp. at pp. 16-17.) Weaver's argument ignores the fact that if a non-indigent criminal defendant is similarly situated, raising issues on collateral review that relate to sealed records that are part of the court record in the criminal case that is the subject of collateral attack, the limitations on discovery in a habeas corpus proceeding would not preclude a motion for access to sealed records by the Attorney General, or to unseal those records, in order to fairly litigate the contentions that have been raised by the petitioner. (See Cal.

Rules of Court, rule 8.160(f) [unsealing a record in the reviewing court]; rule 8.328(b)(4)(5)(6) [procedure for releasing *Marsden* hearing transcripts].)

**E. Section 987.9(d) Does Not Contemplate *In Camera* Hearings, And No Protective Order Is Warranted**

Weaver requests that if this Court finds that disclosure is appropriate, the matter be referred to a referee to make an *in camera* determination as to what documents and transcripts are sufficiently related to warrant disclosure under section 987.9(d). (Opp. at p. 17.) But nothing in section 987.9(d) contemplates *in camera* hearings prior to providing the Attorney General with access to the records being sought. In fact, the statute explicitly contemplates 987.9 records being provided to the Attorney General without an *in camera* hearing.

As for Weaver's request for a protective order, section 987.9(d) expressly provides that the records "shall remain under seal and their use shall be limited sole to the pending proceeding." (Pen. Code, § 987.9, subd. (d).) Therefore, no protective order is needed.

Weaver notes the denial of an earlier request to access sealed records that was sought in order to address issues raised in his pending automatic appeal. He also observes that the same deputy attorney general who pursued that motion is pursuing the pending motion. From this he makes the unsupportable request that the Attorney General's access to the section 987.9 materials be restricted such that the deputy attorney general representing the People in his automatic appeal not be privy to the section 987.9 materials. (Opp. At p. 22.) The applicable statute does not condition or restrict the Attorney General's access in the manner suggested by Weaver. Nor is there any legitimate need for this Court to limit or restrict access. Weaver's concern that the same deputy attorney general handling both his automatic appeal and habeas proceeding would somehow gain an

unintended or inappropriate advantage from access to the section 987.9 materials is illusory. The issues and record in the direct appeal remain the same regardless of whether the Attorney General is permitted access to the section 987.9 records, and the statute makes it clear that the triggering event that permits that access can be based on issues raised in either the direct appeal or on habeas. (Pen. Code, § 987.9, subd. (d).) Accordingly, where as in this instance, Weaver raises issue on habeas that permit access by the Attorney General, that access need not be restricted such that the People must otherwise have separate deputy attorneys general handling the automatic appeal and the related habeas proceeding.


### CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Attorney General's motion be granted in its entirety.

Dated: November 28, 2011

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Weaver*  
No.: S033149

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 28, 2011, I served the attached **reply to opposition to motion for access to sealed Penal Code section 987.9 materials and sealed transcript filed in case number S033149** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 28, 2011, at San Diego, California.

\_\_\_\_\_  
Kimberly Wickenhagen  
Declarant

\_\_\_\_\_  
*Kimberly Wickenhagen*  
Signature