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3
4 KEVIN DEAN BREWER,
5 aka MICHAEL GREEN,

6 Petitioner,

7 v.

8 MARCUS POLLARD,

9 Respondent.

10 Case No. 20-cv-03975-WHO (PR)

11 **ORDER OF DISMISSAL**

12 Dkt. No. 2

13 **INTRODUCTION**

14 Petitioner Kevin Dean Brewer, aka Michael Green, has filed another petition
15 challenging the same state convictions he challenged in three prior (and now closed)
16 habeas actions he filed in this district, *Green v. Knipp*, No. 12-01689 WHO, *Brewer v.*
17 *Perez*, No. 15-02456 WHO, and *Green v. Covello*, 19-00176 WHO. The instant petition
18 will be dismissed as second or successive to the prior petitions.

19 **BACKGROUND**

20 Petitioner's first habeas petition was denied on the merits. (*Green*, No. 12-1689,
21 Docket No. 43.) He appealed, but his appeal was terminated by the Ninth Circuit because
22 it was not timely filed. (*Id.*, Dkt. Nos. 45, 47 and 50.)

23 His second habeas action was dismissed as second or successive. (*Brewer*, No. 15-
24 02456, Dkt. No. 4.) He, but the Ninth Circuit terminated his appeal when it denied his
25 request for a certificate of appealability. (*Id.*, Dkt No. 9.)

26 His third habeas action was dismissed as second or successive. (*Green*, No. 19-
27 00176 WHO.) He appealed, but the Ninth Circuit terminated his appeal when it denied his
28

1 request for a certificate of appealability. (*Green v. Covello*, Ninth Circuit Case No. 19-
2 15204, Dkt. No. 2.)

3 These three prior petitions and the current petition are challenges to petitioner's
4 2009 state court convictions for the sexual abuse and sexual assault of a child, for which he
5 received a sentence of 61 years to life.¹

6 DISCUSSION

7 The instant petition is barred by the rule against filing a second or successive
8 petition. As noted, petitioner has filed at least one previous petition regarding the same
9 convictions at issue in the instant petition. In order to file a second or successive petition,
10 petitioner must obtain an order from the Court of Appeals authorizing the district court to
11 consider the petition. *See* 28 U.S.C. § 2244(b)(3)(A). Because petitioner has not shown
12 that he has received such authorization, the instant petition must be dismissed as second or
13 successive, the filing of which has not been authorized by the Court of Appeals.

14 Accordingly, the petition is DISMISSED.

15 CONCLUSION

16 The instant petition is DISMISSED as second or successive, the filing of which has
17 not been authorized by the Court of Appeals.

18 Petitioner's application to proceed *in forma pauperis* (IFP) is DENIED as
19 insufficient. (Dkt. No. 2.) It lacks the proper application form itself, a certificate of funds,
20 and a prison trust account statement showing transactions for the last six months. If
21 petitioner files the proper documents, the Court will reconsider his IFP application.

22 A certificate of appealability will not issue. Petitioner has not shown "that jurists of
23 reason would find it debatable whether the petition states a valid claim of the denial of a
24 constitutional right and that jurists of reason would find it debatable whether the district
25 court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

26
27
28 ¹ *People v. Brewer*, 192 Cal. App. 4th 457 (Cal. Ct. App. Feb. 1, 2011).

1 The Clerk shall amend the docket to reflect that Marcus Pollard, the warden of the
2 prison in which petitioner is housed, is the sole respondent in this action. Petitioner named
3 the warden (by title only) as well as the "Attorney General of Alameda County" and the
4 "Deputy District Attorney." Pollard, the Warden of the R.J. Donovan Correctional
5 Facility, is the sole proper respondent in this action, as he is the custodian having day-to-
6 day control over petitioner, the only person who can produce "the body" of the petitioner.
7 *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (quoting *Guerra v. Meese*,
8 786 F.2d 414, 416 (D.C. Cir. 1986)). The Clerk shall enter Pollard as respondent and
9 terminate the others.

10 The Clerk shall terminate all pending motions, enter judgment in favor of
11 respondent, and close the file.

12 **IT IS SO ORDERED.**

13 **Dated:** August 10, 2020


14 WILLIAM H. ORRICK
15 United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN DEAN BREWER,
aka MICHAEL GREEN,

Petitioner,

V.

MARCUS POLLARD,

Respondent.

Case No. 20-cv-03975-WHO (PR)

JUDGMENT

This federal habeas action having been dismissed, judgment is entered in favor of respondent.

IT IS SO ORDERED.

Dated: August 10, 2020

K. H. De

WILLIAM H. ORRICK
United States District Judge

20-16850

Michael Green, #AC-5033
RJDCF - R.J. DONOVAN CORRECTIONAL FACILITY
480 Alta Road
San Diego, CA 92179

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL GREEN, AKA Kevin Dean
Brewer,

Petitioner-Appellant,

v.

WARDEN, at RJ Donovan Facility; et al.,

Respondents-Appellees.

No. 20-16850

D.C. No. 3:20-cv-03975-WHO
Northern District of California,
San Francisco

ORDER

Before: IKUTA and MILLER, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEC 15 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL GREEN, AKA Kevin Dean
Brewer,

Petitioner-Appellant,

v.

WARDEN, at RJ Donovan Facility; et al.,

Respondents-Appellees.

No. 20-16850

D.C. No. 3:20-cv-03975-WHO
Northern District of California,
San Francisco

ORDER

Before: BYBEE and HURWITZ, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 6) is denied. *See* 9th Cir. R. 27-10.

Appellant's "motion for FRAP 22" (Docket Entry No. 7) and "motion for FRAP 44" (Docket Entry No. 8) are denied.

No further filings will be entertained in this closed case.

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 20-16850	Docketed: 09/23/2020		
Nature of Suit: 3530 Habeas Corpus	Termed: 11/23/2020		
Kevin Brewer v. Warden, et al			
Appeal From: U.S. District Court for Northern California, San Francisco			
Fee Status: Due			
Case Type Information:			
1) prisoner			
2) state			
3) 2254 habeas corpus			
Originating Court Information:			
District: 0971-3 : <u>3:20-cv-03975-WHO</u>			
Trial Judge: William Horsley Orrick, District Judge			
Date Filed: 06/15/2020			
Date Order/Judgment: 08/10/2020	Date Order/Judgment EOD: 08/10/2020	Date NOA Filed: 09/23/2020	Date Rec'd COA: 09/23/2020
Prior Cases:			
<u>14-15675</u>	Date Filed: 04/09/2014	Date Disposed: 05/13/2014	Disposition: Jurisdictional Defects – Judge Order
<u>14-16960</u>	Date Filed: 10/09/2014	Date Disposed: 11/25/2014	Disposition: COA Denied – Judge Order
<u>15-15285</u>	Date Filed: 02/18/2015	Date Disposed: 11/04/2016	Disposition: Vacated, Remanded – Memorandum
<u>15-16301</u>	Date Filed: 06/29/2015	Date Disposed: 01/19/2016	Disposition: COA Denied – Judge Order
<u>15-55854</u>	Date Filed: 06/05/2015	Date Disposed: 09/15/2015	Disposition: Vacated – Judge Order
<u>15-56509</u>	Date Filed: 10/01/2015	Date Disposed: 11/04/2016	Disposition: Vacated, Remanded – Memorandum
<u>16-70493</u>	Date Filed: 02/22/2016	Date Disposed: 06/20/2016	Disposition: Denied – Judge Order
<u>17-15140</u>	Date Filed: 01/24/2017	Date Disposed: 06/26/2017	Disposition: Dismissed – Clerk Order
<u>17-17155</u>	Date Filed: 10/23/2017	Date Disposed: 11/15/2017	Disposition: Dismissed – Judge Order
<u>17-55221</u>	Date Filed: 02/22/2017	Date Disposed: 06/26/2017	Disposition: Dismissed – Clerk Order
<u>18-16973</u>	Date Filed: 10/12/2018	Date Disposed: 04/25/2019	Disposition: Affirmed – Memorandum
<u>19-15204</u>	Date Filed: 02/05/2019	Date Disposed: 10/25/2019	Disposition: COA Denied – Judge Order
<u>19-16715</u>	Date Filed: 09/03/2019	Date Disposed: 09/17/2020	Disposition: Affirmed – Memorandum
Current Cases:			
None			

MICHAEL GREEN, AKA Kevin Dean Brewer (State
Prisoner: AC-5033)
Petitioner – Appellant,

Michael Green
[NTC Pro Se]
RJDCAF – R.J. DONOVAN CORRECTIONAL FACILITY
480 Alta Road
San Diego, CA 92179

v.

WARDEN, at RJ Donovan Facility
Respondent – Appellee,

ATTORNEY GENERAL OF ALAMEDA COUNTY
Respondent – Appellee,

DEPUTY DISTRICT ATTORNEY
Respondent – Appellee,

MICHAEL GREEN, AKA Kevin Dean Brewer,

Petitioner – Appellant,

v.

WARDEN, at RJ Donovan Facility; ATTORNEY GENERAL OF ALAMEDA COUNTY; DEPUTY DISTRICT ATTORNEY,

Respondents – Appellees.

09/23/2020	<u>1</u>	Open 9th Circuit docket: needs certificate of appealability. Date COA denied in DC: 08/10/2020. Record on appeal included: Yes. [11834453] (JBS) [Entered: 09/23/2020 01:53 PM]
09/24/2020	<u>2</u>	Filed Appellant Michael Green motion for senate bill; additional documents in support of case. Deficiencies: None. No service date.. [11845157] (RL) [Entered: 10/02/2020 09:51 AM]
11/12/2020	<u>3</u>	Filed Appellant Michael Green motion for senate bill; motion for assembly bill. Deficiencies: None. Served on 11/06/2020. [11891043] (RL) [Entered: 11/12/2020 03:51 PM]
11/23/2020	<u>4</u>	Filed order (SANDRA S. IKUTA and ERIC D. MILLER) The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); Gonzalez v. Thaler, 565 U.S. 134, 140–41 (2012). Any pending motions are denied as moot. DENIED. [11903542] (OC) [Entered: 11/23/2020 01:39 PM]
12/01/2020	<u>5</u>	Received copy of District Court order filed on 11/30/2020 ORDER. Order granting motion to proceed in forma pauperis in District Court; Order certifying that any appeal will not be taken in good faith. [11911371] (RL) [Entered: 12/01/2020 02:48 PM]
12/07/2020	<u>6</u>	Filed Appellant Michael Green motion to reconsider Panel order of the Court filed on 11/23/2020 (entitled "Petition for panel rehearing"). Deficiencies: None. [11917324] (QDL) [Entered: 12/07/2020 02:37 PM]
12/07/2020	<u>7</u>	Filed Appellant Michael Green motion for FRAP 22. Deficiencies: None. [11917329] (QDL) [Entered: 12/07/2020 02:39 PM]
12/07/2020	<u>8</u>	Filed Appellant Michael Green motion for FRAP 44. Deficiencies: None. [11917331] (QDL) [Entered: 12/07/2020 02:40 PM]
12/14/2020	<u>9</u>	Filed Appellant Michael Green letter dated 12/08/2020 re: FRAP 5 appeal by permission. Paper filing deficiency: None. [11927235] (QDL) [Entered: 12/14/2020 05:13 PM]
12/14/2020	<u>10</u>	Filed Appellant Michael Green letter dated 12/10/2020 re: FRAP 44. Paper filing deficiency: None. [11927239] (QDL) [Entered: 12/14/2020 05:14 PM]
12/15/2020	<u>11</u>	Filed order (JAY S. BYBEE and ANDREW D. HURWITZ) Appellant's motion for reconsideration (Docket Entry No. [6]) is denied. See 9th Cir. R. 27-10. Appellant's "motion for FRAP 22" (Docket Entry No. [7]) and "motion for FRAP 44" (Docket Entry No. [8]) are denied. No further filings will be entertained in this closed case. [11928536] (OC) [Entered: 12/15/2020 02:09 PM]
12/22/2020	<u>12</u>	Filed Appellant Michael Green FRAP 27 motions. Deficiencies: No further filings per 12/15/20 order. Served on 12/16/2020. (sent copy of docket sheet & copy of 12/15/2020 order) [11937301] (RL) [Entered: 12/22/2020 03:26 PM]
12/22/2020	<u>13</u>	Filed Appellant Michael Green FRAP 44 motion. Deficiencies: No further filings per 12/15/20 order. Served on 12/15/2020. (sent copy of docket sheet & copy of 12/15/20 order) [11937307] (RL) [Entered: 12/22/2020 03:28 PM]
12/23/2020	<u>14</u>	Filed Appellant Michael Green FRAP Motion 27(b)(1). Deficiencies: None. Served on 12/23/2020. [11938086] (RL) [Entered: 12/23/2020 10:59 AM]
12/23/2020	<u>15</u>	Filed Appellant Michael Green motion procedural deficiencies FRAP 27 motions. Deficiencies: No further filings per 12/15/20 order. Served on 12/20/2020. [11938094] (RL) [Entered: 12/23/2020 11:02 AM]
12/30/2020	<u>16</u>	Filed Appellant Michael Green motion for FRAP 27(b) request for affirmative relief re: Paper filing

deficiency: No file order 12/15/2020. [11950537] (RR) [Entered: 01/04/2021 09:43 AM]

02/18/2021 17 Filed Appellant Michael Green letter dated 02/07/2021 re: Request copy of 11/23/20 order. Paper filing deficiency: None. (Sent copy of order & docket sheet) [12008269] (RL) [Entered: 02/18/2021 11:59 AM]

Page 6-6 ~~list by name and citations~~ ~~continued answer~~
reviewing a Judgment but determining whether the prisoner is in custody in violation of the Constitution or laws or treaties of the United States based upon the first filed Complaint there was never any crime under Supreme Court or 1st or state law precedent for a conviction question were is the case law this conviction would undermine the U.S. Constitution of the United States. Not being a United States citizen asking a question Lockhart v. Fretwell 506 U.S. 364 345-76 (1993) 78 Va. L. Rev. 1689, 1747 (1992) Penrukamp v. Florida, 328 U.S. 331, 335 (1946) Lambrix v. Singletary 520 U.S. 518 523 (1997) It really describes a legal answer

- 1) state appellate court
- 2) equal protection
- 3) defys the ~~U.S.~~ Constitution laws
- 4) actions against United States citizen corruption circumvents the United States Constitution
- 5) There is no one above the law

Constitutionality for Relief

The 14th amendment Due process Clause is a brief that was entirely devoted to state court law was insufficient to fairly present claim to state court if a petitioner cites to specific provisions of the U.S. Constitution to fairly present claims to state courts if a prisoner fairly presents the federal double jeopardy claim to the state even though argument to state appellate court relied almost entirely on state law because argument concluded by invoking state and federal constitutional protections against double jeopardy Hardwick v. Secretary 803 F.3d 541 549-50 (11th Cir 2015) Doe v. Ayers 782 F.3d 425 428-29 (9th Cir 2015)

Due Process Clause

- Wilcox v. McGee 241 F.3d 1242 1244 (9th Cir 2001)
- Jones v. Smith 231 F.3d 1227 1231 (9th Cir 2001)
- Hameen v. ~~Delaware~~ Delaware 212 F.3d 226 247 (3d Cir 2000) 532 U.S. 924 (2001) Richter v. Crandell 109 F.3d 515 517 (9th Cir) 522 U.S. 851 (1997)
- Sussex v. State Prison 591 F.3d 707 712-14 (4th Cir 2010) Casey v. Moore 386 F.3d 896 912, 13 (9th Cir 2004) (law citing) Assembly Bill No. 1909 CHAPTER # 879 An act to Amend Section 141 of the Penal Code relating to crimes. A.B. 1909, Lopez. Falsifying evidence (Starts 1/1/2017)

IV Questions Presented

petitioner prisoner is being unlawfully imprisoned in violation of the rights guaranteed to him by the Constitution of the United States for more than ten years now.

Not a single federal Judge has ever once been allowed to seek to discover whether that claim is true

- (1) ABF Freight System v NLRB 510 U.S. 314 325 (1994)
- (2) Piliteri v Ford 542 U.S. 225 239 240 (2004)
- (3) Baldwin v Reese 541 U.S. 27 32 (2004)
- (4) Jones v United States 527 U.S. 373 416 n 18 (1999)
- (5) Lambrix v Secretary 520 U.S. 518 (1994)
- (6) Gray v Wetherland 518 U.S. 152 (1996)
- (7) Coleman v Thompson 501 U.S. 722 (1991)

Habeas Corpus requires full reconsideration of Constitutional Claims

Citing — Steffel v Thompson 415 U.S. 452 482 n 3 (1974)
Freeman v Tare 962 F.2d. 1252 1258 (7th Cir 1992)

Citing — Green v Lambert 288 F.3d 1081 1081 (9th Cir 2002)

EXHIBIT COVER PAGE



EXHIBIT

Description of this exhibit:

Number of Pages to this exhibit: _____ Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

original Copy's

1 PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

2 Name: Brewes Kevin Dear
3 LAST FIRST MIDDLE INITIAL

4 Prisoner Number: AC 5633

5 Institutional Address: RJ Donovan Corr Facility 480 Alta Road
6 San Diego Calif 92149

7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA

10)
11)
12 Kevin Dear Brewes) Case Number: _____
13 Petitioner,) (Provided by the clerk upon filing)
14 vs. Warden RJ Donovan)
15 Attorney General Alameda County) PETITION FOR A WRIT
16 Deputy District Attorney) OF HABEAS CORPUS
17 Respondent(s).)
18)

19 I. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

20 A. What sentence are you challenging in this petition?

21 1. Name and location of court that imposed sentence (for example: Alameda County

22 Superior Court, Oakland): Alameda County

23 2. Court Superior Court Oakland

24 3. Location 1225 Fallon Street Oakland Calif
(1) Complaint # 538655

25 4. Case number, if known (2) Complaint # 160049

26 5. Date and terms of sentence 11/19/2004

27 6. Are you now in custody serving this term? ("In custody" means in jail, on parole or
28 probation, etc.) YES NO

1 Court of Appeal..... YES Year: _____ NO

2 Result: _____

3 Supreme Court of California..... YES Year: _____ NO

4 Result: _____

5 Any other court YES Year: _____ NO

6 Result: _____

7 2. If you appealed, were the grounds the same as those that you are raising in this
8 petition?..... YES NO

9 3. Did the court issue an opinion?..... YES NO

10 4. Did you seek permission to file a late appeal under Rule 31(a)?..... YES NO

11 If you did, give the name of the court and the result: _____

12 _____
13 I. Other than appeals, have you previously filed any petitions, applications or motions with
14 respect to this conviction in any court, state or federal?..... YES NO

15 *Note:* If you previously filed a petition for a writ of habeas corpus in federal court challenging the
16 same conviction you are challenging now and if that petition was denied or dismissed with
17 prejudice, you must first file a motion in the U. S. Court of Appeals for the Ninth Circuit
18 for an order authorizing this court to consider this petition. You may not file a second or
successive federal habeas petition without first obtaining such an order from the Ninth Circuit.
28 U.S.C. § 2244(b).

19 If you sought relief in any proceeding other than an appeal, answer the following
20 questions for each proceeding. Attach extra paper if you need more space.

21 1. Name of court: Supreme

22 Type of proceeding: _____

23 Grounds raised (be brief but specific):

24 a. Supreme

25 b. _____

26 c. _____

27 d. _____

28 Result: _____ Date of result: _____

1 II. GROUND FOR RELIEF

2 State briefly every reason why you believe you are being confined unlawfully. Give facts to
3 support each claim. For example, what right or privilege were you denied? What happened?
4 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if
5 you need more space. Answer the same questions for each claim.

6 **Note:** You must present ALL your claims in your first federal habeas petition. Subsequent petitions
7 may be dismissed without review on the merits. 28 USC § 2244(b); *McCleskey v. Zant*, 499 U.S.
8 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).

9 ^{Information inside Habeas petition}
10 Claim One: ^{Information inside Habeas petition} ~~a review of the information shows two counts charged but~~
11 ~~Johnson sure 28 Cal 4th at p 244~~
12 ~~not in the alternative~~

13 Supporting facts: ~~did not give notice that this prosecution was~~
14 ~~(new evidence) Chapter 1879~~
15 ~~time barred~~ AB 1906 Lopez falsifying evidence
16 which is barred by statutes expost facts laws 159 article
17 1510 of the United States Constitution
18 charged with a crime at the time of preliminary hearing

19 Claim Two: ~~Victime was 18 years of age victim was not under~~
20 ~~or within the specified Reporting age) under 14 years of age~~

21 Supporting facts: ~~Since victim was no longer under 14 at the time~~
22 ~~of hearing west and Cal Penal Code § 803 17 Cal App 3d 8494 Cal Rptr~~
23 ~~449 west and Penal Code §§ 452 1009 § 110 110x2 limitation of~~
24 ~~criminal law 159 K amendments of proceeding~~
25 ~~prosecution~~

26 Claim Three: ~~Penal Code section 800 804~~ ^{Penal Code Section}
27 ~~859(a)~~

28 People v Richard (2007) 156 Cal App 4th 544, 589, 590

29 Supporting facts: ~~127 Cal App 4th 750 26 Cal Rptr 3d 4105 Cali~~
30 ~~daily op scv 2333 (2005) daily journal JAP 3207 C Remark~~
31 ~~people v Williams (1999) 21 Cal 4th 335 345 87 Cal Rptr 2d 412~~
32 ~~981 P 2d 42~~

33 If any of these grounds was not previously presented to any other court, state briefly which
34 grounds were not presented and why: I did not know at the time

35 ~~Wife~~

EXHIBIT COVER PAGE

1-2

EXHIBIT

Description if this exhibit:

Senate Bill No. 1134
Chapter 785

Number of Pages to this exhibit: #3 Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

To KEVIN -

Senate Bill No. 1134

CHAPTER 785

An act to amend Sections 1473, 1485.5, and 1485.55 of the Penal Code, relating to habeas corpus.

[Approved by Governor September 28, 2016. Filed with Secretary of State September 28, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1134, Leno. Habeas corpus: new evidence: motion to vacate judgment: indemnity.

Existing law allows every person who is unlawfully imprisoned or restrained of his or her liberty to prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint. Existing law allows a writ of habeas corpus to be prosecuted for, but not limited to, false evidence that is substantially material or probative to the issue of guilt or punishment that was introduced at trial and false physical evidence which was a material factor directly related to the plea of guilty of the person.

This bill would additionally allow a writ of habeas corpus to be prosecuted on the basis of new evidence that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.

Existing law requires the California Victim Compensation Board to recommend an appropriation be made by the Legislature for the purpose of indemnifying a person if the evidence shows that a crime with which the person was charged was either not committed at all, or, if committed, was not committed by that person. Existing law requires that the appropriation recommended shall be a sum equivalent to \$140 per day of incarceration served. If a court grants a writ of habeas corpus or vacates a judgment on the basis of new evidence and finds that the new evidence points unerringly to innocence, existing law requires the board to recommend an appropriation to the Legislature pursuant to these provisions without a hearing.

This bill would require the board, without a hearing, to recommend an appropriation to the Legislature if the court finds that the person is factually innocent. The bill would make additional clarifying and technical changes.

The people of the State of California do enact as follows:

SECTION 1. Section 1473 of the Penal Code is amended to read:

1473. (a) A person unlawfully imprisoned or restrained of his or her liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint.

(b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

(1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to his or her incarceration.

(2) False physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

(3) (A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.

(B) For purposes of this section, "new evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching.

(c) Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in paragraphs (1) and (2) of subdivision (b) is immaterial to the prosecution of a writ of habeas corpus brought pursuant to paragraph (1) or (2) of subdivision (b).

(d) This section does not limit the grounds for which a writ of habeas corpus may be prosecuted or preclude the use of any other remedies.

(e) (1) For purposes of this section, "false evidence" includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances.

(2) This section does not create additional liabilities, beyond those already recognized, for an expert who repudiates his or her original opinion provided at a hearing or trial or whose opinion has been undermined by later scientific research or technological advancements.

SEC. 2. Section 1485.5 of the Penal Code is amended to read:

1485.5. (a) If the district attorney or Attorney General stipulates to or does not contest the factual allegations underlying one or more of the grounds for granting a writ of habeas corpus or a motion to vacate a judgment, the facts underlying the basis for the court's ruling or order shall be binding on the Attorney General, the factfinder, and the California Victim Compensation Board.

(b) The district attorney shall provide notice to the Attorney General prior to entering into a stipulation of facts that will be the basis for the granting of a writ of habeas corpus or a motion to vacate a judgment.

(c) In a contested or uncontested proceeding, the express factual findings made by the court, including credibility determinations, in considering a petition for habeas corpus, a motion to vacate judgment pursuant to Section 1473.6, or an application for a certificate of factual innocence, shall be binding on the Attorney General, the factfinder, and the California Victim Compensation Board.

(d) For the purposes of this section, "express factual findings" are findings established as the basis for the court's ruling or order.

(e) For purposes of this section, "court" is defined as a state or federal court.

SEC. 3. Section 1485.55 of the Penal Code is amended to read:

1485.55. (a) In a contested proceeding, if the court has granted a writ of habeas corpus or when, pursuant to Section 1473.6, the court vacates a judgment, and if the court has found that the person is factually innocent, that finding shall be binding on the California Victim Compensation Board for a claim presented to the board, and upon application by the person, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid pursuant to Section 4904.

(b) In a contested or uncontested proceeding, if the court grants a writ of habeas corpus and did not find the person factually innocent in the habeas corpus proceedings, the petitioner may move for a finding of factual innocence by a preponderance of the evidence that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her.

(c) If the court vacates a judgment pursuant to Section 1473.6, on any ground, the petitioner may move for a finding of factual innocence by a preponderance of the evidence that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her.

(d) If the court makes a finding that the petitioner has proven his or her factual innocence by a preponderance of the evidence pursuant to subdivision (b) or (c), the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

(e) A presumption does not exist in any other proceeding for failure to make a motion or obtain a favorable ruling pursuant to subdivision (b) or (c).

(f) If a federal court, after granting a writ of habeas corpus, pursuant to a nonstatutory motion or request, finds a petitioner factually innocent by no less than a preponderance of the evidence that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

EXHIBIT COVER PAGE



EXHIBIT

Description of this exhibit:

(1) Assembly Bill No. 701 Chapter 435
(2) Senate Bill No. 269 Chapter 443

Number of Pages to this exhibit: _____ Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

Assembly Bill No. 701

CHAPTER 435

An act to amend Section 3007.05 of the Penal Code, relating to exonerated prisoners.

[Approved by Governor October 2, 2019. Filed with Secretary of State October 2, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 701, Weber. Prisoners: exoneration: housing costs.

Existing law requires the Department of Corrections and Rehabilitation to assist a person who is exonerated as to a conviction for which the person is serving a state prison sentence in accessing specified public services, including enrollment in the CalFresh and Medi-Cal programs. Existing law requires a person who is exonerated to be paid the sum of \$1,000 upon release from funds to be made available upon appropriation by the Legislature for this purpose.

This bill would additionally require the payment of \$5,000 to a person who is exonerated, upon release, to be used to pay for housing and would entitle the exonerated person to receive direct payment or reimbursement for reasonable housing costs, including, among others, rent and hotel costs, not to exceed specified limits, for a period of not more than 4 years. The bill would require the department to approve these payments and reimbursements from funds to be made available upon appropriation by the Legislature for this purpose.

The people of the State of California do enact as follows:

SECTION 1. Section 3007.05 of the Penal Code is amended to read:

3007.05. (a) The Department of Corrections and Rehabilitation and the Department of Motor Vehicles shall ensure that all eligible inmates released from state prisons have valid identification cards, issued pursuant to Article 5 (commencing with Section 13000) of Chapter 1 of Division 6 of the Vehicle Code.

(b) For purposes of this section, "eligible inmate" means an inmate who meets all of the following requirements:

(1) The inmate has previously held a California driver's license or identification card.

(2) The inmate has a usable photo on file with the Department of Motor Vehicles that is not more than 10 years old.

(3) The inmate has no outstanding fees due for a prior California identification card.

(4) The inmate has provided, and the Department of Motor Vehicles has verified, all of the following information:

- (A) The inmate's true full name.
- (B) The inmate's date of birth.
- (C) The inmate's social security number.
- (D) The inmate's legal presence in the United States.

(c) The Department of Corrections and Rehabilitation shall assist a person who is exonerated as to a conviction for which the person is serving a state prison sentence at the time of exoneration with all of the following:

(1) Transitional services, including housing assistance, job training, and mental health services, as applicable. The services shall be offered within the first week of an individual's exoneration and again within the first 30 days of exoneration. Services shall be provided for a period of not less than six months and not more than one year from the date of release unless the exonerated person qualifies for services beyond one year under existing law.

(2) Enrollment in the Medi-Cal program established pursuant to Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code.

(3) (A) Enrollment in the CalFresh program established pursuant to Chapter 10 (commencing with Section 18900) of Part 6 of Division 9 of the Welfare and Institutions Code.

(B) Exonerated persons who are ineligible for CalFresh benefits pursuant to the federal Supplemental Nutrition Assistance Program limitation specified in Section 2015(o) of Title 7 of the United States Code shall be given priority for receipt of the 15-percent exemption specified in Section 2015(o)(6) of Title 7 of the United States Code. The State Department of Social Services shall issue guidance to counties regarding that requirement.

(4) Referral to the Employment Development Department and applicable regional planning units for workforce services.

(5) Enrollment in the federal supplemental security income benefits program pursuant to Title XVI of the federal Social Security Act (42 U.S.C. Sec. 1381 et seq.) and state supplemental program pursuant to Title XVI of the federal Social Security Act and Chapter 3 (commencing with Section 12000) of Part 3 of Division 9 of the Welfare and Institutions Code.

(d) (1) In addition to any other payment to which the person is entitled to by law, a person who is exonerated shall be paid the sum of one thousand dollars (\$1,000) upon release, from funds to be made available upon appropriation by the Legislature for this purpose.

(2) In addition to any other payment to which the person is entitled to by law, a person who is exonerated shall be paid the sum of five thousand dollars (\$5,000) upon release, to be used for housing, including, but not limited to, hotel costs, mortgage expenses, a down payment, security deposit, or any payment necessary to secure and maintain rental housing or other housing accommodations. The exonerated person shall also be entitled to receive direct payment or reimbursement for reasonable housing costs for a period of not more than four years following release from custody. The

Department of Corrections and Rehabilitation shall disburse payments or reimbursements pursuant to this paragraph from funds to be made available upon appropriation by the Legislature for this purpose.

(3) As used in paragraph (2), the term "reasonable housing costs" means all the following:

(A) For hotel costs, the cost of lodging, not to exceed 25 percent above the federal General Services Administration's per diem lodging reimbursement rate.

(B) For payments necessary to secure and maintain rental housing, both of the following:

(i) The actual cost of any security deposits necessary to secure a rental housing unit.

(ii) The cost of rent, not to exceed 25 percent above the fair market value as defined by the United States Department of Housing and Urban Development.

(C) For mortgage expenses, the cost of mortgage payments, not to exceed 25 percent above the Federal Housing Administration's area loan limits.

(e) For the purposes of this section, "exonerated" means the person has been convicted and subsequently one of the following occurred:

(1) A writ of habeas corpus concerning the person was granted on the basis that the evidence unerringly points to innocence, or the person's conviction was reversed on appeal on the basis of insufficient evidence.

(2) A writ of habeas corpus concerning the person was granted pursuant to Section 1473, either resulting in dismissal of the criminal charges for which the person was incarcerated or following a determination that the person is entitled to release on the person's own recognizance, or to bail, pending retrial or pending appeal.

(3) The person was given an absolute pardon by the Governor on the basis that the person was innocent.

Senate Bill No. 269

CHAPTER 473

An act to amend Sections 1485.55, 4901, and 4903 of the Penal Code, relating to criminal procedure.

[Approved by Governor October 2, 2019. Filed with Secretary of State October 2, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

SB 269, Bradford. Wrongful convictions.

Existing law authorizes a person who has been convicted of a felony, imprisoned or incarcerated, and granted a pardon because either the crime was not committed or the person was innocent of the crime to present a claim against the state to the board for the pecuniary injury sustained by the person through the erroneous conviction and imprisonment or incarceration. Under existing law, if a court grants a writ of habeas corpus but does not find the person factually innocent or if the court vacates a judgment due to new evidence of innocence, the person may move for a finding of factual innocence by a preponderance of the evidence. Existing law requires the board, under any of those circumstances, if the court makes a finding that the petitioner has proven their factual innocence, upon application by the person, and without a hearing, to recommend to the Legislature that an appropriation be made and the claim paid, as specified.

This bill would make those provisions applicable to cases in which newly discovered evidence of actual innocence exists that requires vacation of a conviction.

Existing law requires the claim for compensation for wrongful convictions to be presented to the board within 2 years after the judgment of acquittal, pardon granted, or release from custody.

This bill would instead require the claim for compensation to be presented to the board within a period of 10 years after judgment of acquittal, dismissal of charges, pardon granted, or release from custody, whichever is later.

The people of the State of California do enact as follows:

SECTION 1. Section 1485.55 of the Penal Code is amended to read:

1485.55. (a) In a contested proceeding, if the court has granted a writ of habeas corpus or when, pursuant to Section 1473.6, the court vacates a judgment, and if the court has found that the person is factually innocent, that finding shall be binding on the California Victim Compensation Board for a claim presented to the board, and upon application by the person, the

committed at all, or, if committed, was not committed by the claimant, and the injury sustained by them through their erroneous conviction and incarceration.

(b) In a hearing before the board, the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus, a motion for new trial pursuant to Section 1473.6, or an application for a certificate of factual innocence as described in Section 1485.5 shall be binding on the Attorney General, the factfinder, and the board.

(c) The board shall deny payment of any claim if the board finds by a preponderance of the evidence that a claimant pled guilty with the specific intent to protect another from prosecution for the underlying conviction for which the claimant is seeking compensation.

board shall, without a hearing, recommend to the Legislature that an appropriation be made and the claim paid pursuant to Section 4904.

(b) In a contested or uncontested proceeding, if the court has granted a writ of habeas corpus or vacated a judgment pursuant to Section 1473.6 or paragraph (2) of subdivision (a) of Section 1473.7, the person may move for a finding of factual innocence by a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner.

(c) If the court makes a finding that the petitioner has proven their factual innocence by a preponderance of the evidence pursuant to subdivision (b), the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

(d) A presumption does not exist in any other proceeding for failure to make a motion or obtain a favorable ruling pursuant to subdivision (b).

(e) If a federal court, after granting a writ of habeas corpus, pursuant to a nonstatutory motion or request, finds a petitioner factually innocent by no less than a preponderance of the evidence that the crime with which they were charged was either not committed at all or, if committed, was not committed by the petitioner, the board shall, without a hearing, recommend to the Legislature that an appropriation be made and any claim filed shall be paid pursuant to Section 4904.

SEC. 2. Section 4901 of the Penal Code is amended to read:

4901. (a) A claim under Section 4900, accompanied by a statement of the facts constituting the claim, verified in the manner provided for the verification of complaints in civil actions, is required to be presented by the claimant to the California Victim Compensation Board within a period of 10 years after judgment of acquittal, dismissal of charges, pardon granted, or release from custody, whichever is later.

(b) For purposes of subdivision (a), "release from custody" means release from imprisonment from state prison or from incarceration in county jail when there is no subsequent parole jurisdiction exercised by the Department of Corrections and Rehabilitation or postrelease jurisdiction under a community corrections program, or when there is a parole period or postrelease period subject to jurisdiction of a community corrections program, when that period ends.

(c) A person may not file a claim under Section 4900 until 60 days have passed since the date of reversal of conviction or granting of the writ, or while the case is pending upon an initial refiling, or until a complaint or information has been dismissed a single time.

SEC. 3. Section 4903 of the Penal Code is amended to read:

4903. (a) Except as provided in Sections 851.865 and 1485.55, the board shall fix a time and place for the hearing of the claim. At the hearing the claimant shall introduce evidence in support of the claim, and the Attorney General may introduce evidence in opposition thereto. The claimant shall prove the facts set forth in the statement constituting the claim, including the fact that the crime with which they were charged was either not

EXHIBIT COVER PAGE

2

EXHIBIT

Description of this exhibit:

Notice of Demurrer and Demurred
Penal Code section 1004(5)

Number of Pages to this exhibit: # 2 Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

1 Law Office of Andrea Auer
2 1611 Telegraph Ave. Suite 1101
3 Oakland, CA. 94612
4 Ph: (510) 834-2300
5 Fax: (510) 834-2800

FILED
ALAMEDA COUNTY

MAR 12 2009

6 Andrea Auer [142132]
7 Attorney for Defendant Michael Green

CLERK OF THE SUPERIOR COURT
By *Lynne E. Johnson* DEPUTY

8
9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
10 RENE C. DAVIDSON COURTHOUSE

11 The People of the State
12 of California,

Dept. No. 10

13 Plaintiff,

No. 160049

14 v.

Hearing Date: 3/27/09
15 Time: 9:00 am

16 Michael Green,

17 Defendant.

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/

NOTICE OF DEMURRER AND DEMURRER (Penal Code section 1004 (5))

28 TO: THOMAS J. ORLOFF, DISTRICT ATTORNEY OF THE COUNTY OF
29 ALAMEDA, AND THE ABOVE-ENTITLED COURT

30 Please take notice that the above named defendant by his attorney, Andrea Auer,
31 will move the above-entitled Court on March 27, 2009 at 9:00 am, or as soon thereafter as the
32 matter may be heard, to demurrer to count one in the Information, a violation of Penal Code section
33 288.5, filed on December 30, 2008, because prosecution of this count is not timely and violates the
34 limitations of commencing prosecutions within the statutory framework directing such prosecutions
35 pursuant to Penal Code sections 800 and 804.

1 This motion will be based on this notice of motion and motion, on the attached
2 memorandum of points and authorities served and filed herewith, on all papers and records on file
3 in this action and on such oral argument as may be presented at the hearing on the motion.

4

5 Dated: March 13, 2009

6 Respectfully Submitted,

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8 Andrea Auer
9 Attorney at law

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**649 John F. Schuck Law offices of John F. Schuck for appellant over looking the real issue and the error ~~not~~ A127746 Feb 1st 2011
Court of Appeal First District Division #4 California FN** See footnote* ante
B. Proceeding in the Trial Court Cite as 192 Cal App 4th 457 (121 Cal Rptr 3d
649 a Complaint was filed against appellant on March 14, 2008
460 11 facts and procedural background by facts EN**
See ~~not~~ A 127746

EXHIBIT COVER PAGE

3

EXHIBIT

Description of this exhibit:

Memorandum of points and authorities in support of
Demurrer

Number of Pages to this exhibit: # 4 Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

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4 Andrea Auer [142132]
5 Attorney for Defendant Michael Green

6
7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
RENE C. DAVIDSON COURTHOUSE

8
9 The People of the State
of California

10 Plaintiff,

Dept. No. 10

11 v.

No. 160049

12 Michael Green,

Hearing Date: 3/27/09

13 Defendant.
14

15
16 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER**

17 **STATEMENT OF THE CASE:**



18 On March 14, 2008 The District Attorney filed a complaint against defendant
19 Michael Green in the Wiley W. Manuel Courthouse charging one count of Penal Code section
20 288.5 upon Jane Doe 1, alleged to have been committed between January 1, 1996 and December
21 31, 2002. On March 11, 2008 a Berkeley Police Officer had requested an arrest warrant naming
22 defendant for a violation of Penal Code section 288.5 for conduct alleged to have occurred
23 between the years of 1996 and 2002. A preliminary examination was heard on December 17,
24 2008 in Department 3 of the Rene C. Davidson Courthouse before the Honorable Trina
25 Thompson. Jane Doe 1 testified she was born January 19, 1990. (Reporter's Transcript. Herein
26 "R.T." pp 3, 4.)

27

1 At the conclusion of the preliminary examination Deputy District Attorney Brian
2 Owens requested that defendant Green be held to answer to a violation of Penal Code section
3 288.5 with the following dates reflecting the beginning and ending of the offense period; from
4 January 19, 1996 to January 18, 2004. The Court then sought clarification from the prosecutor
5 of the dates pertaining to the section 288.5 violation. Ultimately the Court asked the prosecutor;
6 "So you would like Count 1 to read January 1st, 1996 through January 19th 2004?" The
7 prosecutor responded; "Correct." (R.T. p. 62.)

8 Furthermore, the prosecutor specifically requested that defendant be held to
9 answer in the *alternative*, to a separate count in violation of Penal Code section 269 (a)(1) where
10 that offense is alleged to have been committed between January 19, 2002 and January 18, 2004.
11 (R.T. p. 62.) The Court held defendant to a violation of Penal Code section 288.5 as alleged in
12 the complaint but the transcript reflects that the court stated the dates bracketing this offense
13 were "January 1, 1996 to January 18 2002." (R.T. p. 65.) The court further held Defendant to
14 answer to one count in violation of Penal Code section 269 (a)(1) alleged to have occurred
15 "between the dates of January 19, 2002 and January 18, 2004." (R.T. p. 65.)

16 An Information was filed in this case on December 30, 2008. The Information
17 charged defendant in count 1 with a violation of section 288.5 alleged to have occurred between
18 the dates of January 19, 1996 to January 18, 2002 and a second count in violation of Penal Code
19 section 269(a)(1) alleged to have occurred between the dates of January 19, 2002 to January 18,
20 2004.

21 **ARGUMENT:**

22 * In this case it appears that for count one to withstand a challenge to dismiss, it
23 must satisfy two separate penal code statutes which dictate the time for commencing criminal
24 actions, sections 800 and 804. Penal Code section 800 states: "Except as provided in section
25 799, prosecution for an offense punished by imprisonment in the state prison for eight years or
26 more shall be commenced whin six years after commission of the offense." The language of
27 section 804, current through the year 2008, stated the following: *

1 "Except as otherwise provided in this chapter, for the purpose of this chapter,
2 prosecution for an offense is commenced when any of the following occurs:

3

4 (a) An indictment or information is filed.
5 (b) A complaint is filed charging a misdemeanor or infraction.
6 (c) A case is certified to the Superior Court.
7 (d) An arrest warrant or bench warrant is issued, provided the warrant names or
8 describes the defendant with the same degree of particularity required for an
9 indictment, information or complaint."

10 Section 804 provides several different ways to trigger the commencement of a
11 criminal action. But in defendant Green's case commencing a criminal action under section 804
12 must be read in conjunction with section 800. An information was filed on December 30, 2008,~~*~~
13 but filing on that date in regard to conduct that is alleged to have been completed by January 18,
14 2002 violated the six year statutory period proscribed by Penal Code section 800. In short, an
15 information had to have been filed by January 18, 2008 to have been timely.~~*~~

16 ~~*~~ The filing of the complaint in this matter on February 27, 2008 charging a
17 violation of section 288.5 alleging the dates of the offense to have fallen between January 1,
18 1996 and December 31, 2002 did not serve to toll the statutes of limitations. Penal Code section
19 804 in the year 2008 dictated only that the filing of a complaint charging a *misdemeanor* or
20 *infraction* served to commence a criminal action. The statute was changed as of January 1,
21 2009. Penal Code section 804 now decrees that prosecution for an offense is commenced
22 when... "(c) the defendant is arraigned on a complaint that charges the defendant with a felony."

23 In any event, because the complaint herein alleged a continuing course of conduct, with a
24 completion date of December 31, 2002, rather than a completion date of January 18, 2002 as
25 currently charged in the Information, the filing of the complaint did not give notice that this
26 prosecution was time barred.

27 Needless to say defendant did not plead out the Penal Code section 288.5
charge as alleged in the complaint. That would have tolled Penal Code section 800.
Consequently, the act of certifying a case to Superior Court is accomplished when a defendant
enters a plea of no contest or guilty to a felony before a magistrate. The magistrate then certifies

1 the proceedings to the Superior Court for pronouncement of judgement. (Penal Code section
2 859(a), *People v. Richardson* (2007) 156 Cal. App.4th 574, 589, 590.)

3 An arrest warrant was issued for defendant on March 11, 2008 alleging a
4 violation of Penal Code 288.5 but that warrant included a summary of the investigation in this
5 case reflecting an allegation of criminal conduct through the year of 2002. Thus, at the time of
6 the issuance of the arrest warrant defendant was not on notice that this prosecution was time
7 barred. The issuance of the arrest warrant was within six years of the completion of the
8 continuing offense as then described in the warrant, but not for the offense as it is now charged.

9

10 CONCLUSION:

11 At the conclusion of the preliminary examination the prosecution requested that
12 defendant be held to answer to two counts, in the alternative,¹ one of which carries a life
13 term. A review of the information shows two counts charged, but not in the alternative,
14 Count one as charged must be dismissed because its prosecution violates the six year
15 statute of limitations pursuant to Penal Code section 800.

16

17 Respectfully submitted,

18 
19 Andrea Auer
20 Attorney at Law

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25 ¹Defendant is also charged with a prior conviction pursuant to Penal Code sections 1170.12(c)(1) and
26 2667(e)(1).

27

EXHIBIT COVER PAGE



EXHIBIT

Description of this exhibit: Assembly Bill No. 1909
CHAPTER 849

AB 1909, Lopez falsifying evidence

Docket No: 160049

new information filed # 160049

Number of Pages to this exhibit: # 3 Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

Starts 1/1/2017

Assembly Bill No. 1909

CHAPTER 879

An act to amend Section 141 of the Penal Code, relating to crimes.

[Approved by Governor September 30, 2016. Filed with
Secretary of State September 30, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1909, Lopez. Falsifying evidence.

Existing law makes it a misdemeanor for a person, or a felony for a peace officer, to knowingly, willfully, intentionally, and wrongfully alter, modify, plant, place, manufacture, conceal, or move any physical matter, digital image, or video recording, with the specific intent that the action will result in a person being charged with a crime.

This bill would make it a felony punishable by imprisonment for 16 months or 2 or 3 years for a prosecuting attorney to intentionally and in bad faith alter, modify, or withhold any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry.

By creating a new crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 141 of the Penal Code is amended to read:

141. (a) Except as provided in subdivisions (b) and (c), a person who knowingly, willfully, intentionally, and wrongfully alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, digital image, or video recording, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter will be wrongfully produced as genuine or true upon a trial, proceeding, or inquiry, is guilty of a misdemeanor.

(b) A peace officer who knowingly, willfully, intentionally, and wrongfully alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, digital image, or video recording, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter, digital image, or video recording will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by two, three, or five years in the state prison.

(c) A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

(d) This section does not preclude prosecution under both this section and any other law.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

EXHIBIT COVER PAGE



EXHIBIT

Description of this exhibit:

Number of Pages to this exhibit: 2 Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

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2 District Attorney
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6 (510) 272-6222

5 Brian Owens
6 Deputy District Attorney
State Bar Number 203715

113
FILED
ALAMEDA COUNTY

MAR 20 2009

CLERK OF THE SUPERIOR COURT
By *Filed Clerk* Deputy

7 SUPERIOR COURT, RENE C. DAVIDSON COURTHOUSE,
8 COUNTY OF ALAMEDA, STATE OF CALIFORNIA

9 THE PEOPLE OF THE STATE OF CALIFORNIA,

10 Docket No.: 160049

11 Plaintiff,

12 Department No.: 10

13 MICHAEL GREEN
aka KEVIN BREWER,

14 Date: March 27, 2009

Defendant.

15 Time: 9:00 a.m.

16 POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER

17 A demurrer tests only defects appearing on the face of the accusatory pleading. See Cal. Pen.
18 Code §§ 1002-1004; see also Shortridge v. Municipal Court, 151 Cal.App.3d 611, 616 (1984)
19 [overruled on other grounds by In re Manuel L., 7 Cal.4th 229, 232, 239 (1994)]; People v.
20 Williams, 97 Cal.App.3d 382, 387-88 (1979). Penal Code section 1004 sets out five grounds upon
21 which a demurrer may be brought. The enumerated grounds are exclusive, and a demurrer may not
22 be brought on any other ground. See People v. McConnell, 82 Cal. 620 (1895); People v. McAllister
23 99 Cal.App.37, 40, 44 (1929).

24 A demurrer must be filed before the entry of a plea, and the failure to do so constitutes a
25 waiver of all objections appearing on the face of the charging document except for lack of
26 jurisdiction or failure to state a public offense. See Cal. Pen. Code §§ 1002-03; see also In re Greer,
27 108 Cal.App.3d 1002, 1006 (1980); People v. Schoeller, 96 Cal.App.2d 61, 62 (1950).

Defendant asserts that Count 1 in the Information is time-barred. Count 1 alleges a violation of Penal Code section 288.5(a) between January 19, 1996 and January 18, 2002. Relying on Penal Code section 800, defendant claims that the limitations period for Count 1 is six years. Since the Information was not filed until December 30, 2008, defendant concludes that the offense is time-barred. Defendant's argument fails because the statute of limitations was extended to ten years under Penal Code section 801.1 prior to the expiration of section 800's six year statute of limitations. Accordingly, section 801.1's ten year statute of limitations controls and Count 1 is not time-barred.

“[T]he limitations period does not commence as to continuing offenses until the entire course of conduct is complete.” People v. Terry, 127 Cal.App.4th 750, 763 (2005). “Continuous sexual abuse of a child in violation of section 288.5 clearly is a continuing offense.” Id. at 763. Thus, in the instant case, the limitations period did not begin to run until the crime of continuous abuse of a child was completed on January 18, 2002.

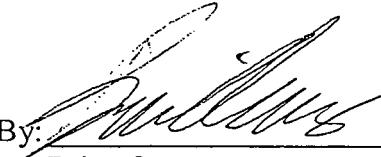
In 2002, the applicable statute of limitations for a violation of Penal Code section 288.5 was six years under Penal Code section 800. However, in 2005, prior the expiration of the applicable six year statute of limitations, the California Legislature enacted Penal Code section 801.1, which extended the statute of limitations for sexual offenses, including section 288.5, to ten years. It is constitutionally permissible for the Legislature to extend the statute of limitations in such an instance. See In re White, 163 Cal.App.4th 1576, 1583 (2008). Section 801.1 provides, in pertinent part, that “prosecution for a felony offense described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 290 shall be commenced within 10 years after commission of the offense.” Section 288.5 is listed under the specified portion of section 290. See Cal. Pen. Code § 290(a)(2)(A). Accordingly, prosecution of Count 1 is timely if commenced within ten years. Thus, the limitations period for Count 1 would not expire until January of 2012. Since prosecution has been initiated within the meaning of Penal Code section 804, the statute has been tolled and will not expire even then.

For the foregoing reasons, the People respectfully request that defendant's demurrer be overruled.

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2 DATED: March 20, 2009
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115

THOMAS J. ORLOFF
DISTRICT ATTORNEY

By: 

Brian Owens
Deputy District Attorney

See Cal Pwr Code §§ 1002-1004

A demurrer must be filed before the entry of a plea except for lack of jurisdiction or failure to state a public offense
see Cal Pwr Code §§ 1002-3; see also *Irre Grec* 108 Cal App 3d 1002, 1006 (1980)
people v Scheelte
96 Cal App. 2d 61, 62 (1950)

EXHIBIT COVER PAGE

4

EXHIBIT

Description of this exhibit:

original Complaint No # 538655
AJR 936 Ccr 8314263
3/14/2008 (filed)

Number of Pages to this exhibit: #3 Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

1-19-90 2008

Dept. No. 112
3/14 IN CUSTODY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA,
WILEY W. MANUEL COURTHOUSE

PEOPLE OF THE STATE OF CALIFORNIA

v.

MICHAEL GREEN
also known as KEVIN DEAN BREWER

NO.
COMPLAINT

PFN: AJR936

CEN: 8314263

Defendant(s):

Odd ~~not~~ 11 months

The Undersigned, being sworn says, on Information and belief, that MICHAEL GREEN also known as KEVIN DEAN BREWER did, in the County of Alameda, State of California, between January 1, 1996 and December 31, 2002, commit a Felony, to wit: CONTINUOUS SEXUAL ABUSE, a violation of section 288.5(a) of the PENAL CODE of California, in that said defendant(s) did unlawfully engage in three and more acts of "substantial sexual conduct", as defined in Penal Code section 1203.066(b), and three and more acts in violation of Section 288 with JANE DOE 1, a child under the age of 14 years, while the defendant(s) resided with, and had recurring access to, the child.

"NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c) and a violent felony within the meaning of Penal Code section 667.5(c)."

"NOTICE: Conviction of this offense will require you to register pursuant to Penal Code section 290. Willful failure to register is a crime."

"NOTICE: Conviction of this offense will require the court to order you to submit to a blood test for evidence of antibodies to the probable causative agent of Acquired Immune Deficiency Syndrome (AIDS). Penal Code section 1202.1."

"NOTICE: Conviction of this offense will require you to provide specimens and samples pursuant to Penal Code section 296. Willful refusal to provide the specimens and samples is a crime."

2001 to 2007 | Jan 1st 1996
15 | December 31 2002
12 years | is six years
12 years | -8- 30 days

1996 to 2008

13

13teen years

12

FIRST PRIOR CONVICTION AS TO DEFENDANT GREEN

The undersigned further alleges that before the commission of the offense specified above, said defendant MICHAEL GREEN also known as KEVIN DEAN BREWER, on or about March 18, 1982, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: SECOND DEGREE ROBBERY, a violation of section 211 of the PENAL CODE of California, and received a prison term therefor.

2 STRIKES (ONE PRIOR)

It is further alleged as to all charged counts that, having suffered the above prior conviction, defendant must be sentenced pursuant to Penal Code sections 1170.12(c)(1) and 667(e)(1).

PRIOR SEPARATE PRISON TERM (PC 667.5(B))

It is further alleged that the above prior conviction is within the purview of Penal Code section 667.5(b) and that a separate term of imprisonment was served therefor as described in Penal Code section 667.5 for said offense, and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.

SECOND PRIOR CONVICTION AS TO DEFENDANT GREEN

The undersigned further alleges that before the commission of the offense specified above, said defendant MICHAEL GREEN also known as KEVIN DEAN BREWER, on or about January 15, 1985, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: BURGLARY, a violation of section 459 of the PENAL CODE of California, and received a prison term therefor.

THIRD PRIOR CONVICTION AS TO DEFENDANT GREEN

The undersigned further alleges that before the commission of the offense specified above, said defendant MICHAEL GREEN also known as KEVIN DEAN BREWER, on or about March 12, 1986, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: BURGLARY, a violation of section 459 of the PENAL CODE of California, and received a sentence of probation therefor.

FOURTH PRIOR CONVICTION AS TO DEFENDANT GREEN

The undersigned further alleges that before the commission of the offense specified above, said defendant MICHAEL GREEN also known as KEVIN DEAN BREWER, on or about July 20, 1990, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: VANDALISM OVER \$400 DAMAGE, a violation of section 594(a) of the PENAL CODE of California, and received a prison term therefor.

four right here

FIFTH PRIOR CONVICTION AS TO DEFENDANT GREEN

The undersigned further alleges that before the commission of the offense specified above, said defendant MICHAEL GREEN also known as KEVIN DEAN BREWER, on or about June 2, 1992, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: POSSESSION OF A CONTROLLED SUBSTANCE, a violation of section 11350(a) of the HEALTH AND SAFETY CODE of California, and received a sentence of probation therefor.

SIXTH PRIOR CONVICTION AS TO DEFENDANT GREEN

The undersigned further alleges that before the commission of the offense specified above, said defendant MICHAEL GREEN also known as KEVIN DEAN BREWER, on or about August 23, 1993, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: BURGLARY, a violation of section 459 of the PENAL CODE of California, and received a sentence of probation therefor. *five years*

SEVENTH PRIOR CONVICTION AS TO DEFENDANT GREEN

The undersigned further alleges that before the commission of the offense specified above, said defendant MICHAEL GREEN also known as KEVIN DEAN BREWER, on or about July 6, 1998, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: SALE OR TRANSPORTATION OF MARIJUANA, a violation of section 11360(a) of the HEALTH AND SAFETY CODE of California, and received a prison term therefor.

EIGHTH PRIOR CONVICTION AS TO DEFENDANT GREEN

The undersigned further alleges that before the commission of the offense specified above, said defendant MICHAEL GREEN also known as KEVIN DEAN BREWER, on or about May 16, 2006, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: SALE OR TRANSPORTATION OF MARIJUANA, a violation of section 11360(a) of the HEALTH AND SAFETY CODE of California, and received a sentence of probation therefor.

Pursuant to Penal Code Section 1054.5(b), the People are hereby informally requesting that defendant's counsel provide discovery to the People as required by Penal Code Section 1054.3.

Complainant therefore prays that a warrant issue and that said defendant(s) be dealt with according to law.

Subscribed and sworn to before me,
Wednesday, February 27, 2008

/s/ Berkeley PD-07-11183

MARTIN A. BROWN
Assistant District Attorney
State Bar #60684 mab/sc
Alameda County, California

EXHIBIT COVER PAGE

5

EXHIBIT

Description of this exhibit:

Amended New filed information # 160049

(PFIS AJR) CCR 8314263 file Date 12/31/2008
(AJR 93b)

Number of Pages to this exhibit: # 7 Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPEALATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

THOMAS J. ORLOFF
District Attorney
900 Courthouse
1225 Fallon Street
Oakland, CA 94612-4201
(510) 272-6222

MICHEAL T. O'CONNOR
Senior Deputy District Attorney I
State Bar #124655

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
RENE C. DAVIDSON COURTHOUSE

PEOPLE OF THE STATE OF CALIFORNIA

2 CTS
8 PRI

MICHAEL GREEN
also known as **KEVIN DEAN BREWER**

NO. 160049
INFORMATION

PFN: AJR936 CEN: 8314263

Defendant.

The District Attorney of the County of Alameda by this Information hereby accuses MICHAEL GREEN also known as KEVIN DEAN BREWER of a Felony, to wit: CONTINUOUS SEXUAL ABUSE, a violation of section 288.5(a) of the PENAL CODE of California, in that between January 19, 1996 and January 18, 2002, in the County of Alameda, State of California, said defendant did unlawfully engage in three and more acts of "substantial sexual conduct", as defined in Penal Code section 1203.066(b), and three and more acts in violation of Section 288 with JANE DOE, a child under the age of 14 years, while the defendant resided with, and had recurring access to, the child.

"NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7(c) and a violent felony within the meaning of Penal Code section 667.5(c)."

Office of the
District Attorney
Alameda County
California

1 "NOTICE: Conviction of this offense will require you to register pursuant to Penal Code section
2 290. Willful failure to register is a crime."

3 "NOTICE: Conviction of this offense will require the court to order you to submit to a blood test
4 for evidence of antibodies to the probable causative agent of Acquired Immune Deficiency
5 Syndrome (AIDS). Penal Code section 1202.1."

6 "NOTICE: Conviction of this offense will require you to provide specimens and samples
7 pursuant to Penal Code section 296. Willful refusal to provide the specimens and samples is a
8 crime."

11 **SECOND COUNT**

12 And the said MICHAEL GREEN also known as KEVIN DEAN BREWER is further accused by
13 the District Attorney of the County of Alameda, by the second count of this Information, of a
14 Felony, to wit: AGGRAVATED SEXUAL ASSAULT OF A CHILD - PC261(a)(2), a violation
15 of section 269(a)(1) of the PENAL CODE of California, in that between January 19, 2002 and
16 January 18, 2004, in the County of Alameda, State of California, said defendant did commit the
17 following act upon victim, LATRICE ~~JANE~~ DOE, who was under the age of 14 years, the defendant, being
18 more than 10 years older than the victim: rape, in violation of Penal Code section 261(a)(2).

19 *APR 2004
Amended
1-2-09*

20 NOTICE: It is further alleged that said defendant is/are ineligible for probation or suspension of
21 sentence pursuant to Penal Code section 1203.065(a).

22 "NOTICE: Conviction of this offense will require you to provide specimens and samples
23 pursuant to Penal Code section 296. Willful refusal to provide the specimens and samples is a
24 crime."

FIRST PRIOR CONVICTION AS TO DEFENDANT GREEN

The District Attorney of the County of Alameda further charges that before the commission of the offense specified above, said defendant MICHAEL GREEN, on or about March 18, 1982, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a FELONY, to wit: SECOND DEGREE ROBBERY, a violation of section 211 of the PENAL CODE of California, and received a prison term therefor.

2 STRIKES (ONE PRIOR)

It is further alleged as to all charged counts that, having suffered the above prior conviction, defendant must be sentenced pursuant to Penal Code sections 1170.12(c)(1) and 667(e)(1).

PRIOR SEPARATE PRISON TERM (PC 667.5(B))

It is further alleged that the above prior conviction is within the purview of Penal Code section 667.5(b) and that a separate term of imprisonment was served therefor as described in Penal Code section 667.5 for said offense, and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.

CAL PRIORITY-SERIOUS FELONY

It is further alleged as to all counts that the above prior conviction is within the purview of Penal Code section 667(a)(1).

SECOND PRIOR CONVICTION AS TO DEFENDANT GREEN

The District Attorney of the County of Alameda further charges that before the commission of the offense specified above, said defendant MICHAEL GREEN, on or about January 15, 1985, was convicted in the Superior Court of the State of California, in and for the County of

ALAMEDA, of the crime of a FELONY, to wit: BURGLARY, a violation of section 459-2ND of the PENAL CODE of California, and received a prison term therefor.

PRIOR SEPARATE PRISON TERM (PC 667.5(B))

It is further alleged that the above prior conviction is within the purview of Penal Code section 667.5(b) and that a separate term of imprisonment was served therefor as described in Penal Code section 667.5 for said offense, and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.

THIRD PRIOR CONVICTION AS TO DEFENDANT GREEN

* 2 strike them three

The District Attorney of the County of Alameda further charges that before the commission of the offense specified above, said defendant MICHAEL GREEN, on or about March 12, 1986, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: BURGLARY, a violation of section 459-2ND of the PENAL CODE of California, and received a sentence of probation therefor.

FOURTH PRIOR CONVICTION AS TO DEFENDANT GREEN

The District Attorney of the County of Alameda further charges that before the commission of the offense specified above, said defendant MICHAEL GREEN, on or about July 20, 1990, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: VANDALISM OVER \$400 DAMAGE, a violation of section 594(a) of the PENAL CODE of California, and received a prison term therefor.

PRIOR SEPARATE PRISON TERM (PC 667.5(B))

It is further alleged that the above prior conviction is within the purview of Penal Code section 667.5(b) and that a separate term of imprisonment was served therefor as described in Penal Code section 667.5 for said offense, and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.

FIFTH PRIOR CONVICTION AS TO DEFENDANT GREEN

stroke

The District Attorney of the County of Alameda further charges that before the commission of the offense specified above, said defendant MICHAEL GREEN, on or about June 2, 1992, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: POSSESSION OF A CONTROLLED SUBSTANCE, a violation of section 11350(a) of the HEALTH AND SAFETY CODE of California, and received a sentence of probation therefor.

SIXTH PRIOR CONVICTION AS TO DEFENDANT GREEN

*3 strike

The District Attorney of the County of Alameda further charges that before the commission of the offense specified above, said defendant MICHAEL GREEN, on or about August 23, 1993, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a Felony, to wit: BURGLARY, a violation of section 459-2ND of the PENAL CODE of California, and received a sentence of probation therefor.

SEVENTH PRIOR CONVICTION AS TO DEFENDANT GREEN

The District Attorney of the County of Alameda further charges that before the commission of the offense specified above, said defendant MICHAEL GREEN, on or about July 6, 1998, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a FELONY, to wit: SALE OR TRANSPORTATION OF MARIJUANA, a violation of section 11360(a) of the HEALTH AND SAFETY CODE of California, and received a prison term therefor.

strike

PRIOR SEPARATE PRISON TERM (PC 667.5(B))

It is further alleged that the above prior conviction is within the purview of Penal Code section 667.5(b) and that a separate term of imprisonment was served therefor as described in Penal Code section 667.5 for said offense, and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.

EIGHTH PRIOR CONVICTION AS TO DEFENDANT GREEN

strike

The District Attorney of the County of Alameda further charges that before the commission of the offense specified above, said defendant MICHAEL GREEN, on or about May 16, 2006, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a FELONY, to wit: SALE OR TRANSPORTATION OF MARIJUANA, a violation of section 11360(a) of the HEALTH AND SAFETY CODE of California, and received a sentence of probation therefor.

1 Pursuant to Penal Code Section 1054(b), the People are hereby informally requesting that
2 defendant's counsel provide discovery to the People as required by Penal Code Section 1054.3.
3

4 THOMAS J. ORLOFF
5 District Attorney

6 

7 By: MICHEAL T. O'CONNOR
8 Senior Deputy District Attorney I
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page # 65 line (8) through (12) preliminary Hearing Dec 17, 2008
with the following modifications of the Dates to Reflect
January 1st 1996 through January 18th 2002
(proof of the false evidence)
Case No # 160049

EXHIBIT COVER PAGE

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EXHIBIT

Description of this exhibit: (issues)

Case No #, 160049 which is barred by Statutes ex post
facto Laws §9 article §10 of the United States
Constitution which is barred by statute special Code section
(800) OR its face is time-barred
also Case No # 538655

Number of Pages to this exhibit: # 6 Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY

Ground 2 or ground #3

If applicable

alternative Case # 160049

Charged with a crime which is barred by Statute's
ex post facto Law's ^{189 article 1810} of the United States ConstitutionCharged with a crime which is barred by Statute's
Penal Code Section 800Charged with a crime at time of preliminary
hearing Victim was 18 years of age Victim was
not within the specified reporting age (under
¹⁴ ~~10, 558655~~ ^{Preliminary Hearing transcript}
~~years of age~~ ^{Page 14 (61) through (65)})The long-standing rule requires the prosecution
to file a charging document that is not of its
face time-barred127 Cal App 4th 750 26 Cal Rptr 3d 71 05 Cal
daily op serv 2333(2005) daily Journal DAR 3207

C Remand

People v Williams (1999) 21 Cal 4th 335 345 87
Cal Rptr 2d 412 981 P 2d 42

Supporting facts (A)

1 The preliminary hearing took place on Dec 17.
 2 2008

3 Case No 160049
 4 If the alternative T was charged with the
 5 offense of continuous sexual abuse of a child
 6 under 14 years of age 288.5(a) Also Penal Code
 7 Section 1203.066(b) Penal Code Section 288

8 Between January 19, 1996 and January 18, 2002

9 T was also charged with aggravated sexual
 10 assault of a child PC 261(a)(2) & A Violation of
 11 Section 269(a)(1) of the Penal Code who was
 12 under the age of 14 years

13 Between January 19, 2002 and January 18, 2004

14 Date of report 3-5-2007

15 Date Charges filed in Court (Dept No 112 3-14-08)

*15 Date of arrest 3-12-2008

16 Date for bracketing of the charged offense T is

17 Between January 19, 1996 through January 18, 2002

18 So T need to be charged with the offense by
 19 January 18, ~~2008~~ 2008***

20 T old Charging document reflects Date as

21 Charged T Charging document # Case No #

22 538655) Between January 1, 1996 through Dec

23 31, 2002) Seven years over Penal Code Section

24 800 for under Six years by Law

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28

Supporting facts (A)

T+ the alternative # 160049

1 Preliminary transcript reflects Hearing
 2 date Dec 17, 2008 Victim born ^{Transcripts page (4) 5-14, 19} January 19,
 3 1990) RTP 65 the Court held defendant to
 4 a violation of Penal Code Section 288.5 (a)
 5 as alleged in the first complaint But the
 6 transcript reflects that the Court clearly
 7 stated the date bracketing this offense
 8 were January 1, 1996 To January 18, 2002
 9 I was charged with the offense 3-14-2008
 10 Now charged T+ the alternative # 160049
 11 RTP 65) following modification of date to
 12 reflect January 1, 1996 To January 18, 2002
 13 (Page 65) 8-12)

14 The charged offense is barred by the
 15 Statute of Limitation of Penal Code Section
 16 800

17 (Also under) § 28 Ex post facto Law article
 18 189 article 1810 United States —
 19 Constitution

20 (Also under) Stogner vs. California

21 123 S Ct 2446 539 US 601 123 S Ct 2446

22 156 LED ~~156 LED~~ ~~156 LED~~ 2d 544 71

23 USLW 4588, 03 Cal daily op serv 5575 2003

24 daily journal DAR 6989 16 flg 1 weekly fed
 25 3 434

26

27

28

Supporting facts

Tip the alternative # 160049

127 Cal App 4th 750 (2005)

1 the preliminary hearing took place on Dec 1
 2 2008) At the time she testified the victim
 3 was 18 years of age consequently the victim
 4 was not ~~under~~ within the specified reporting
 5 age (under ~~14~~ years of age) At time of her
 6 testimony Our determination makes it un-
 7 necessary to decide whether her testimony
 8 would qualify as a report to a responsible
 9 adult or agency which is further defined to
 10 mean a person or agency required to report
 11 pursuant to Penal Code Section 11166 § 803(f)
 12

110 Criminal Law

110X Limitation of prosecution

110K 151 exception and suspension

110K 151.1 K + general most cited case
 19 Alleged victim's preliminary hearing testimony
 20 categorizing defendants as charged Child Sex
 21 Crimes did not constitute report of crime to
 22 responsible adult or agency So to extend
 23 limitation period under statute extending
 24 limitation period to one year after report is
 25 made by victim under ~~14~~ Since victim was
 26 no longer under ~~14~~ at the time of hearing
 27 West Att Cal Penal Code § 803

Supporting facts

T + the alternative

160049

17 Cal App 3d 8494 Cal Rptr 449

210 T + dictinct + information

210 XI amendment

210K 162K Complaint or affidavit must cite/cite

T + determining whether to allow an amendment

next to a Criminal Complaint test is whether the

amendment corrects a defect or is sufficient

+ original Complaint or whether amendment

Charges at offset are not attempted to be

Charged by original Complaint

West App Petal Code 952 1809

13

14 110 Criminal Law

15 110X limitation of prosecution

16 110K 156 Commencement of prosecution

17 110K 159K amendment of proceeding

If amendment to Criminal Complaint corrects a

defect or is sufficient + the original Complaint

amendment relates back to date of original filing

of information and has the effect of tolling

running of Statute of Limitation from date of

filing of original information But if amendment

Charges at offset are not attempted to be charged

by the original Complaint amendment does

not have effect of tolling running of Statute

of Limitation and If Statute has run charges

will be barred

Grounds for relief

160049

~~At the alternative~~

2 To the above - entitled Court doth, doth &
3 will move for and order dismissing The above
4 entitled prosecution

5

6 This motion will be based upon the ~~grants~~
7 that the Statute upon which this prosecution
8 is based Violates the prohibition against
9 ex post facto Laws contained in article
10 189 of the California Constitution and
11 article 1 § 10 of the United States Constitu-
12 tion

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14 Violating my equal protection and
15 my due process under the Law And United
16 States Constitution

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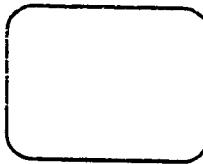
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EXHIBIT COVER PAGE



EXHIBIT

Description of this exhibit:

Number of Pages to this exhibit: _____ Pages.

JURISDICTION: (Check One Only)

- MUNICIPAL COURT
- SUPERIOR COURT
- APPELATE COURT
- STATE SUPREME COURT
- UNITED STATES DISCTRRICT COURT
- STATE CIRCUIT COURT
- UNITED STATES SUPREME COURT
- GRAND JURY