
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 2988 **Hearing Date:** June 26, 2018
Author: Weber
Version: May 25, 2018
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Criminal Procedure: Disposition of Evidence*

HISTORY

Source: California Innocence Coalition
San Diego County District Attorney

Prior Legislation: SB 238 (Hertzberg), Ch. 566, Stats. 2017
AB 1128 (Weber), 2017, held in Assembly Appropriations Comm.
AB 1352 (Levine) Ch. 274, Stats. 2013
SB 1489 (Harman), Ch. 283, Stats. 2012
AB 1926 (Evans), Ch.167, Stats. 2010

Support: American Civil Liberties Union of California; American Civil Liberties Union of San Diego and Imperial Counties; California District Attorneys Association; California Public Defenders Association; County of San Diego Department of the Public Defender; Los Angeles County District Attorney

Opposition: None known

Assembly Floor Vote: 78 - 0

PURPOSE

The purpose of this bill is to extend the time period that exhibits must be retained by the court, custodian, or appropriate governmental entity in certain specified cases.

Existing law requires that all exhibits which have been introduced or filed in any criminal action or proceeding shall be retained by the clerk of the court who must establish a procedure to account for the exhibits properly until final determination of the action or proceedings and the exhibits shall thereafter be distributed or disposed of, as provided. (Pen. Code, § 1417.)

Existing law prohibits a court from ordering the destruction of an exhibit prior to the final determination of the action or proceeding. Defines the date when a criminal action or proceeding becomes final as follows:

- 1) When no notice of appeal is filed, 30 days after the last day for filing that notice;
- 2) When a notice of appeal is filed, 30 days after the date the clerk of the court receives the remittitur affirming the judgment;

- 3) When an order for a rehearing, a new trial, or other proceeding is granted, and the ordered proceedings have not been commenced within one year thereafter, one year after the date of the order; or,
- 4) In cases where the death penalty is imposed, 30 days after the date of execution of sentence or one year after the defendant's death awaiting execution. (Pen. Code, § 1417.1.)

Existing law provides that the court may, upon application of a party entitled thereto or an agent designated in writing by the owner, order the exhibit delivered to that party prior to the final determination of the action or proceeding, upon stipulation of the parties or upon notice and motion under the following circumstances:

- 1) Neither party will suffer prejudice; and
- 2) A full and complete photographic record is made of the released exhibit and provided by the party to whom it is returned. (Pen. Code, § 1417.2.)

Existing law provides that prior to the final determination of the action or proceedings, exhibits offered by the state or defendant shall be returned to the party offering them by order of the court when an exhibit poses a security, storage, or safety problem. The clerk, upon court order, must substitute a full and complete photographic record of any exhibit or part of any exhibit returned to the state, as recommended by the clerk of the court. If the exhibit is severable, the court shall order the clerk to retain portion of the exhibit and return the balance to the district attorney. The party to whom the exhibit is being returned must provide the photographic record. (Pen. Code, § 1417.3, subd. (a).)

Existing law states that where the court finds good cause for introduction of a toxic exhibit, rather than a photographic record or written chemical analysis, the court is not required to store the toxic exhibit. The party who introduced the exhibit is responsible for it. (Pen. Code, § 1417.3, subd. (b).)

Existing law provides that 60 days after the final determination of a criminal action or proceeding, the clerk of the court must dispose of all exhibits introduced or filed in the case and remaining in the clerk's possession, as specified. (Pen. Code, § 1417.5, subd. (a).)

Existing law provides for the destruction or disposition of illegal or dangerous property no sooner than 60 days following the final determination of the criminal action or proceeding. (Pen. Code, § 1417.6, subd. (a).)

Existing law states that not less than 15 days before any proposed disposition of an exhibit pursuant to law, the court shall notify the district attorney (or other prosecuting attorney), the attorney of record for each party, and each party who is not represented by counsel of the proposed disposition. Before the disposition, any party, at his or her own expense, may have a photographic record of all or part of the exhibit prepared by a person who is not a party or attorney of a party. The clerk of the court shall observe the taking of the photographic record and, upon receipt of a declaration of the person making the photographic record that the copy and negative of the photograph delivered to the clerk is a true, unaltered, and unretouched print of the photographic record taken in the presence of the clerk, the clerk shall certify the photographic record as such without charge and retain it unaltered for a period of 60 days following the final determination of the criminal action or proceeding. (Pen. Code, § 1417.7.)

Existing law provides that notwithstanding any other provision of law, the appropriate governmental entity must retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case, unless the following conditions are met:

- 1) The governmental entity notifies any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General of these provisions and the intent to dispose of the material; and
- 2) The notifying entity does not receive, within 180 days of sending the notification, any of the following:
 - a) A motion filed for DNA testing, as specified;
 - b) A request under penalty of perjury that the material not be destroyed or disposed of because within 180 days the declarant will file a motion for DNA testing, unless the convicted person requests an extension and the governmental entity in possession of the evidence agrees;
 - c) A declaration of innocence under penalty of perjury that has been filed with the court within one year of the judgment of conviction or July 1, 2001, whichever is later, as specified; or,
 - d) No other provision of law requires that biological evidence be preserved or retained. (Pen. Code, § 1417.9.)

Existing law provides notwithstanding any other provision of law, the right to receive notice regarding the intent to dispose biological material is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or no contest. (Pen. Code, § 1417.9, subd. (b)(3)(C).)

This bill clarifies that all exhibits introduced or filed in any criminal action or proceeding shall be retained in the custody and control of the court under the conditions and for the timeframes set forth in the bill as specified.

This bill states that the court in any county in which the court, the prosecution, and the defense have agreed to an alternative custodian for the retention, management, and preservation of exhibits, who is in possession of such exhibits as of January 1, 2018, or who thereafter enters into a written agreement for the retention and preservation of such exhibits in a manner suitable for potential review and testing in a postconviction, judicial, or extrajudicial process, is exempt from the requirement that the court retain custody of such exhibits.

This bill clarifies that an alternative custodian is subject to all of the same requirements that would apply if the exhibits were in custody of the court and states that this bill's provisions do not eliminate the need for court orders where required by law.

This bill prohibits the court from ordering the destruction of an exhibit sooner than one year after the term of imprisonment ends in a case charging a specified violent felony, a specified sex offense, aggravated assault on a child, or any charge that results in a life sentence and requires

that these exhibits be destroyed or disposed of no sooner than 60 days after this time period expires.

This bill provides that at any time before the expiration of the applicable timeframes, exhibits offered by the state or defendant shall be returned to the party offering them by order of the court when an exhibit poses a security or safety problem, as determined by the court and requires the clerk of the court to substitute a full and complete photographic or digital record of any exhibit or part of any exhibit returned as a security or safety problem. The party to whom the exhibit is being returned shall provide the photographic or digital record, according to the procedures specified.

This bill specifies if the size of the exhibit presents a storage concern, and the parties agree that the evidentiary value of an exhibit can by its nature be preserved by a photographic or digital record, or is severable so that only a portion a portion need to be retained to preserve its evidentiary value, the court may order the clerk to retain the evidentiary portion of the exhibit and return the balance of the exhibit to the party that offered it.

This bill authorizes a digital record may be made wherever the law already allows a photographic record.

This bill states that the court may elect the method to receive and store any digital record of any exhibit or partial exhibit returned under the provisions of this bill, whether electronically, through electronic transfer onto network servers or cloud storage that meets specified requirements for the storing and recording of documents in electronic media, or physically on electronic media storage devices including, but not limited to, external hard drives, solid state drives, magnetic tapes, and USB storage devices.

This bill prohibits a governmental entity from disposing of any object or material that contains or includes biological material in cases charging a specified violent felony, a specified sex offense, aggravated assault on a child, or any charge that results in a life sentence.

This bill states the intent of the Legislature to ensure that exhibits are preserved by the court in cases that may be reviewed in a postconviction, judicial, or extrajudicial process, and that biological evidence is retained for potential testing and retesting.

This bill makes other conforming changes.

COMMENTS

1. Need for This Bill

According to the author of this bill:

[This bill] allows defendants, who may have been wrongfully convicted, to prove their innocence by prohibiting the courts from destroying certain court exhibits, including those that may contain biological material, by requiring specific court exhibits be retained exclusively by the courts and, in the most serious cases, retained for the length of incarceration so that the evidence will remain available for post-conviction testing. Technological advances in DNA have proven critical

in the exonerations of several wrongfully convicted defendants. Recently, there have been several instances where advanced DNA testing of biological material, post-conviction, have turned out to be the vital element needed to overturn a life sentence. AB 2988 will ensure that such exhibits will still be available for testing, years after a conviction, literally providing a lifeline to the innocent who remain incarcerated.

2. Defendant's Right to an Adequate Record in Postconviction Proceedings

A defendant may appeal from a judgment of conviction suffered in the trial court. In non-capital felony cases, a defendant has 60 calendar days to file the notice of appeal. (Pen. Code, § 1237; Cal. Rules of Court, rules 8.308.) In capital cases, the appeal is automatic. (Cal. Rules of Court, rule 8.600.)

The California Rules of Court specify the items that must be included in the record on appeal. (Cal. Rules of Court, rules 8.320, 8.610.) These items include exhibits admitted in evidence, refused or lodged in the trial court. (Cal. Rules of Court, rules 8.320(e), 8.610(a)(3).)

A defendant is entitled to an adequate record to permit meaningful review on appeal (*People v. Howard* (1992) 1 Cal.4th 1132, 1165 [impliedly considering state and federal law]; see also *id.* at p. 1166 [explicitly addressing Eighth and Fourteenth Amendment requirements].) The burden is on the defendant to show that the deficiencies in the record are prejudicial to him or her. (*Id.* at p. 1165.)

In some cases, missing portions of the record can be adequately reconstructed or a settled statement can be prepared which fills in missing portions of the record. For example, in *People v. Osband* (1996) 13 Cal.4th 622, lost trial exhibits did not require reversal of the judgment. There the parties were able to reconstruct and restore most of the record and to prepare a settled statement providing a satisfactory substitute for other portions. (*Id.* at pp. 661-664 [reconstruction of 68 exhibits lost by the superior court clerk's office; 62 could be reproduced from prosecution negatives, three were not admitted into evidence, and six more were properly the subject of a settled statement; resulting record was adequate to permit meaningful review]; see also *People v. Coley* (1997) 52 Cal.App.4th 964, 972-973 [appellate counsel did not seek reconstruction of lost exhibit consisting of the knife for which appellant was convicted of illegal possession; held that appellant could not complain of error related to the characteristics of the knife, because appellant had failed to perfect an appellate record by seeking reconstruction].)

While reconstructing the record or preparing a settled statement of lost or destroyed exhibits may be a viable option in some cases, reversal will nonetheless be required if the defendant shows the missing exhibit is critical to an issue the defense intended to raise on appeal and that an adequate substitute of the exhibit cannot be obtained. (See *People v. Galland* (2008) 45 Cal.4th 354, 370.) Moreover, settling the record, even when possible, is a lengthy process. (See *Marks v. Superior Court* (2002) 27 Cal.4th 176, 192.)

Besides direct appeal, defendants have a number of other postconviction remedies available to them. These remedies may include a state habeas petition. A habeas petition is directed at determining the lawfulness of prison confinement, conditions of confinement, or actual or potential restraints on personal liberty. Thus the person must be in actual or constructive custody. (Pen. Code, §§ 1473, subd. (a), 1474, subd. (2).) A parolee, for example, is restrained for purposes of a state habeas petition. (*In re Strum* (1974) 11 Cal.3d 258, 265.) A habeas petition

may be based on material false evidence, material false physical evidence, or material new evidence. (Pen. Code, § 1473.) False evidence includes expert opinions that have been repudiated or undermined by new scientific research or technological advances. (Pen. Code, § 1473, subd. (e).) While there are no statutory or other specific time limits for filing a state habeas petition, a court may decline to consider the petition if it finds unreasonable delay. (See *In re Sanders* (1999) 21 Cal.4th 697, 703.) In capital cases, there are presumptions regarding the timeliness of a petition. (See *In re Clark* (1993) 5 Cal.4th 750, 784.)

A defendant who has exhausted his or her state remedies, and whose case raises an important federal question, may file a petition for writ of certiorari in the United States Supreme Court. (U.S. Sup. Ct. Rule 10.) However, few petitions are granted. (<http://www.supremecourt.gov/casehand/casehand.aspx>, Guide to Filing In Forma Pauperis Cases, at p. 1.)

A defendant who has exhausted his or her state court remedies may also file a federal habeas corpus petition to challenge the constitutionality of his or her state-court criminal conviction and sentence. A federal petition for writ of habeas corpus under 28 U.S.C. § 2254 is used by a (1) state prisoner (2) being held in state custody (3) to challenge the validity of a state criminal conviction or sentence (4) for the purpose of obtaining release from custody. Again, the custody may be physical or constructive, including for example, parole. (*Goldyn v. Hayes* (9th Cir. 2006) 444 F.3d 1062, 1063, fn. 2.) There is a one year limitation on the filing of the petition. (28 USC § 2244, subd. (d).) Though several things can trigger the running of this one-year period, the safest course of action for a defendant is usually to file the petition within one year of the date the California Supreme Court denies or dismisses review of the state court of appeal's decision or the period for granting review expires. (*Ibid.*)

The ruling on a federal habeas petition may be appealed to the Ninth Circuit Court of Appeal. (28 USC § 2253.) A defendant may seek further review of a Ninth Circuit decision by filing a writ of certiorari in the United State Supreme Court. (See 28 USC § 1254; U.S. Sup. Ct. Rule 10.)

3. Need to Revise Law on Retention of Exhibits and Biological Evidence

Current law provides that exhibits shall be retained by the clerk who is to establish a procedure to account for the exhibits until the final determination of the action or proceedings, as defined. No procedure to account for the exhibits is specified. (Pen. Code, § 1417.) This bill requires that exhibits be retained in the custody and control of the court for the time periods specified. As such, this bill will help ensure that trial court exhibits are not inadvertently lost or destroyed.

This bill also requires that, in the most serious cases, the court must retain exhibits for one year after incarceration ends, and that the appropriate government entity must retain any object or material that contains or includes biological material as long as the person remains incarcerated in connection with the case. This will help ensure that exhibits and biological evidence remain available for postconviction proceedings and testing. This, in turn, will help ensure that incarcerated defendants receive the benefit of advancements in forensic science.

In less serious cases, this bill requires the governmental entity to obtain proof of service that an incarcerated defendant has been notified before disposing of any object or material that contains or includes biological material before the expiration of the specified time periods. This extra step

will help ensure that defendants, whose custody locations change, receive this notice and have an opportunity to respond before the evidence is disposed of.

4. Planned Amendments

The author plans to amend the bill to define the term “digital record” and clarify the bill’s provisions related to the storage of these records.

5. Argument in Support

According to the San Diego County District Attorney, a co-sponsor of this bill:

AB 2988 further mitigates the costs associated with long term storage of critical evidence in the smaller subset of serious cases by providing greater efficiencies in the storage of exhibits in all cases; likely resulting in net zero storage costs. Specifically, in cases where the evidentiary value of an exhibit may be retained by digital or photographic representations, the representations may be retained in lieu of the original. The method of digital transfer and storage is at the courts’ discretion, whether it be done through the courts’ networks or on external hard or thumb drives. The bill also allows for exhibits to be severed so that only the portion having an actual evidentiary value need to be retained.

Our office knows firsthand that conviction review is heavily dependent on exhibit and evidence preservation. We have a Conviction Review Unit that relies on evidence preservation. Recently, we had a case where evidence found in our courthouse basement proved invaluable; it exonerated an innocent man. Fortunately, the court had retained the evidence despite current law, which would have allowed its earlier destruction.

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