1. 05.03.2008 (2007 00050) Violence - section 391 no. 3 (new witness)
In 2006, a woman was sentenced to 30 days' imprisonment for violence against her husband. She claimed she had acted in self-defence but the court did not believe her, despite a witness supporting her testimony. She petitioned for the case to be reopened, pleading, i.a., a new witness.

The Commission examined the said witness, who supported the convicted person's and the other witness's version of the course of events. The Commission obtained additional information from the local women's aid refuge which illustrated the conditions under which the woman lived.

The Commission referred to the fact that the witness testimony from the new witness was new evidence in the case pursuant to section 391, no. 3 of the Criminal Procedure Act in that the witness was not known to the court that had imposed the conviction. This new evidence was likely to lead to an acquittal or to a substantially more lenient sanction.

The Commission unanimously decided to allow the petition to reopen the case.

The District Court thereafter acquitted the defendant.

2. 29.05.2008 (2005 00031) Fraud - Section 391 no. 3 - (new circumstances)
In 2000, a man was sentenced to imprisonment for 20 days for social security fraud. He petitioned to have the criminal case reopened in 2005. It was alleged, i.a., that the convicted person should not have stated the hours he worked for a company in 1997 on his notification card to Aetat (the Labour Market Administration) since the work was to be regarded as business activity while establishing his own company.

In the District Court judgment, the nature of the convicted person's work was described as switchboard and secretarial services. The convicted person had applied for – and been granted – the right to retain his daily unemployment benefits while establishing his own business.

Statements from the convicted person's employer during the period in question regarding the nature of his work for the company, as well as a tax office decision reclassifying the convicted person's incomes during the period from earned income to income from self-employment, were submitted to the Commission. There was also some, partially new, more general material from the labour market authorities concerning the scheme involving the right to retain daily unemployment benefits while establishing one's own business.

The Commission based its decision on the fact that the legal situation was such that the hours that the convicted person had spent on establishing his own business – irrespective of whether or not these generated self-employment income – were not to be stated on the notification form to the job centre (Aetat). It is clear that the convicted person worked for a company from May to September 1997. It was also clear that there is now a statement from the company describing the convicted person's work as consulting activities consisting of purchase planning and cost control for two specific projects. The Commission did not find it necessary to decide whether this fell within that which could reasonably be classified as "corporate advice to the target group" when seen in connection with the other activities which the convicted person intended to carry out as he had described these in his application to Aetat. This was because it apparently had to be stated that the work was not of the nature assumed by the District Court (secretarial and switchboard services), and that the nature of the work in any case was far closer to that which the convicted person himself had described in his application to Aetat.

The Commission also found – on the basis of the tax office decision – that it had to be assumed that the convicted person's activity in the company was in reality business activity, and that the way in which the formal aspects of his connection with the

company was organised did not prevent the work from being considered as self-employment activity.

The Commission otherwise understood the prosecuting authority and convicted person as stating that they agreed that, if his work for the company was covered by the description of his business activity (as this is stated on the application to Aetat), he would have had an opportunity to have self-employment income from the work during the period in question, so that there would not be any "purpose of obtaining for himself or another an unlawful gain", cf section 270 of the General Penal Code, when the work for the company was not stated on the notification cards. Thus, when the question to be determined by the Commission was whether the convicted person's work for the company was actually covered by the rather vague description of the work, and if so thereafter whether his possible ignorance regarding this point would be of importance, cf Rt 1994, page 1274, the Commission found that the new information on the nature of the convicted person's consulting work for the company was such a new circumstance that it seemed to be "likely to lead to an acquittal or to the application of a milder penal provision or a substantially more lenient sanction", cf section 391, no. 3 of the Criminal Procedure Act.

The Commission unanimously decided to allow the petition to reopen the case.

The District Court thereafter acquitted the defendant without a main hearing.

3. 06.06.2008 (2007 00036) Theft/embezzlement Section 391 no. 3 (new circumstances and evidence) - dissent

A rural policeman was in 1995 convicted of the gross embezzlement of a total of around NOK 220,000 from an elderly woman during the period from 1987-1992. The matter was reported to the police after the victim's death. He was given a suspended prison sentence of six months. The policeman was also removed from office by court order. The judgment was handed down with dissenting votes (3-2).

A petition to reopen this case had been submitted twice before, to the court and Commission, but had not been allowed.

Prior to this, private investigation work had been carried out, initiated by the convicted person himself. For the reopening question, it was not necessary to differentiate between that which had been discovered due to the private investigation work and due to the Commission's own investigations into the case.

It was undisputed in the case that the policeman had withdrawn money from the victim's post office and bank accounts. He claimed he had done this at the request of the victim, and that he did not know what she spent the money on after he had given it to her. An authorisation from the victim to the convicted person existed for most of the withdrawals, either as copies or original documents. There were corresponding receipts showing that the victim had received the money from the convicted person.

One of the main questions for the court at the time was what had happened to the money. Following the presentation of extensive evidence, the court found that the convicted person had embezzled the money. For the Commission, too, the question of what had happened to the money was a key one. The Commission's perspective was whether, during the period after the conviction, any evidence had appeared that shed light on this and which meant that it was reasonably likely that a different decision on the question of guilt would have been reached if the information had been available to the court which convicted the policeman.

The Commission's investigation did not lead to any specific information on what had happened to the money. However, some new information did become available, including regarding considerable anonymous gifts (NOK 140,000) for the building of a church hall during the period in question. It also appeared that the victim had told the parish priest that she was positive to the idea of giving money for this purpose. Documentation of four small gifts given anonymously to charity was also found. It also

became clear that the victim had rented a safe-deposit box during the period in question, so that she had had a possible storage place for the cash. There had also been a theft from the victim's home.

The majority of the Commission (four members) referred to the fact that the conviction was based on a chain of circumstantial evidence, according to which the court had, following a specific assessment, eliminated the possibility that the money had gone anywhere apart from into the convicted person's pocket. In the majority's view, the new evidence obtained during the investigation into the case weakened the arguments in favour of eliminating other alternatives on several points.

Emphasis was also placed on the fact that the victim was lucid and well informed right up to the end and had normal, good insight into her financial circumstances.

In the majority's view, a number of new circumstances and evidence had become known in this case. In that there was a reasonable possibility that this would have led to a different decision if the information had been known to the court which imposed the sentence, the case was reopened pursuant to section 391, no. 3 of the Criminal Procedure Act.

The Commission's minority (one member) to a large extent agreed with the presentation of the facts given by the majority, but meant that the new evidence and circumstances that had become known in the case were not likely to lead to an acquittal. The minority referred to the fact that the factors that were revealed did not directly touch on the issue of guilt. There were no clear new indications that the victim had used the money herself. The new evidence and circumstances were only indications in an overall picture of evidence that neither individually nor in total were sufficiently weighty to provide grounds for reopening the case pursuant to section 391, no. 3 of the Criminal Procedure Act. Section 392, second subsection of the Criminal Procedure Act was also considered but was also not found to be applicable.

The Commission's majority decided to allow the petition to reopen the case.

The convicted person died shortly after the case was reopened. Agder Court of Appeal thereafter delivered a judgment of acquittal pursuant to section 400, fifth subsection of the Criminal Procedure Act.

4. 19.06.2008 (2005 00148) Criminal fraud - Section 391 no. 3 (new circumstances)
A man (born in 1950) was convicted by the Court of Appeal on 23 March 1990 of contravening section 272, first subsection, second penal alternative of the General Penal Code, cf third subsection (three cases of insurance fraud).

The convicted person was the chairman of the board of a company that owned 1/3 of a fishing boat. In the judgment, it was assumed that he had submitted a claim for indemnification, based on a marine casualty (average) report, to the insurance company for an insurance event which he knew was fictitious and despite the fact that he knew that the marine casualty report was false. The report was signed by the vessel's captain. He was sentenced to imprisonment for six months, of which 60 days were immediately custodial.

Following the marine casualty, antagonism had developed between the ship's captain and the shipping company's management. This conflict culminated in the company reporting the captain to the police for threats. The captain responded to this by reporting the company to the police for insurance fraud, and he claimed that he had not signed the marine casualty report and that there had not been any marine casualty at all.

The court to a large extent accepted the fishing boat captain's testimony, and the company's chairman of the board and technical manager were convicted of insurance fraud.

The convicted man appealed to the Supreme Court but was refused permission to appeal on 28 June 1990. In 2001, a petition to reopen the case was submitted to Frostating Court of Appeal, but this petition was disallowed. In 2005, the convicted man petitioned the Norwegian Criminal Cases Review Commission to have the case reopened.

The new circumstances pleaded to the Norwegian Criminal Cases Review Commission were that it could be proven that the captain had been mentally ill and suffering from delusions when he reported the matter and when the case was heard by the court. The Commission obtained medical records which showed that he had been forcibly admitted to a psychiatric ward and that he may have been more strongly affected by his illness, including delusions that may have affected his perception of reality, than previously assumed. The medical records now provided grounds for questioning the correctness of his testimony.

The Commission found that the conditions for reopening the case were present, cf section 391, no. 3 of the Criminal Procedure Act.

The Commission unanimously decided to allow the petition to reopen the case.

5. 10.09.2008 (2008 00119) Violence, Section 391 no. 3 (new circumstances)
A man (born in 1943) was convicted in 1990 of assault causing bodily harm under aggravating circumstances. He was sentenced to imprisonment for one year and to pay NOK 78,040 to the victim.

The woman who had reported the matter explained to the police that she had been assaulted by an unknown man. She picked out the convicted man in a photo identification parade and the convicted was charged and indicted.

The convicted man denied any knowledge of the case right from the start, but was not believed. According to the indictment, he had apparently followed the woman into a courtyard. Completely without provocation, he had apparently put an arm around her neck and pulled sharply, with the result that her legs and left arm were paralysed. No damage to her spine or other injuries of a somatic nature were ever ascertained, but the court based its decision on medical statements regarding so-called functional paralysis.

In 2005, the woman was admitted to X University Hospital's emergency psychiatric department. While being admitted, she suddenly stood up and began to walk, to the amazement of those present. She told a psychiatric nurse in the department that there had never been any assault and that she had arbitrarily pointed out the convicted man as the assailant from the police's picture archive. A chief physician was summoned, and the woman told him that she had also stood up and walked before being admitted to hospital, while she was alone at home. X University Hospital chose to exercise its right to breach the duty of confidentiality and reported the information supplied by the woman to the police.

The prosecuting authority started to investigate the case and petitioned the Norwegian Criminal Cases Review Commission to reopen the case on 21 August 2008. The convicted man agreed to the petition.

Like the prosecuting authority, the Commission considered that the conditions for reopening the case pursuant to section 391, no. 3 of the Criminal Procedure Act were present. The new information seemed likely to lead to an acquittal.

The Commission decided unanimously to allow the petition to reopen the case.

The District Court thereafter acquitted the defendant without a main hearing.

6. 23.10.2008 (2006 00083) Robbery and deprivation of liberty - Section 392, second subsection (special circumstances and weighty considerations) - dissent

In 2005, Borgarting Court of Appeal sentenced a 33-year-old taxi driver to imprisonment for nine months for complicity in the robbery and deprivation of liberty of one of his passengers.

The taxi driver was at work in the early hours of Wednesday 26 March 2003. At one time, there were four passengers in his car. During the taxi trip, one of these was robbed. He was threatened with a knife by another passenger and ordered to take money out of various ATMs in Oslo, to which the taxi driver drove. The taxi driver was acquitted of complicity in the District Court but found guilty in the Court of Appeal.

The new circumstances pleaded to the Norwegian Criminal Cases Review Commission were that the taxi driver was in a 'principle of necessity' situation. When he saw the knife, he was scared stiff. He tried to say what he thought but was told to 'shut up'. He did not dare to protest any more and drove where he was told to drive. Nor did he dare to press the robbery alarm, since the others in the car were also taxi drivers so that they would have discovered this. He did not state this in court since he had been instructed what to say. He pleaded that there was a witness who could confirm that he was under pressure prior to the trial.

The Norwegian Criminal Cases Review Commission found that the new information did not seem likely to lead to an acquittal. The new witness could not shed much light on that which had actually happened during the taxi trip. The Commission also found that there was no principle of necessity situation either. The driver's acts were not justifiable taking into consideration the act of robbery and the deprivation of liberty, and he had alternative ways of getting out of the situation.

However the Commission's majority found that doubt could be raised as to the taxi driver's complicity. The situation had arisen suddenly and unexpectedly, and was unclear and with limited alternative courses of action. The majority found therefore that there were special circumstances which made it doubtful whether the judgment was correct. Based on the seriousness of the case, the majority found that weighty considerations indicated that the case should be retried.

The minority were of the opinion that there were no special circumstances which indicated that the judgment was incorrect, and did not find that the conditions for reopening the case were present.

The Commission decided to allow the petition to reopen the case.

7. 23.10.2008 (2008 00052) Sexual offence - Section 391 no. 3 (new circumstance)
In December 2006, Borgarting Court of Appeal sentenced a 66-year-old man to imprisonment for three years for several cases of sexual assault on girls under 16 years of age and under 14 years of age.

He petitioned for the case to be reopened in 2008, based on the fact that the court-appointed psychiatric expert witness had been prejudiced during the case, and that the conditions for reopening the case pursuant to section 391, no. 1 of the Criminal Procedure Act were present. As a new circumstance pursuant to section 391, no. 3 of the Criminal Procedure Act, it was stated that, after the trial, it became publicly known that the expert witness and counsel for the victims in the case had moved in together as lovers in a house they had bought together in March 2007. The convicted person also claimed that this lovers' relationship had been established at least as early as in the late summer of 2006. It was the counsel for the victims who had proposed appointing the psychiatrist as an expert witness. The convicted person also claimed that the case had to be reopened because the expert witness's prejudice had to be assumed to have affected the content of the judgment, since the expert witness's report was the direct reason for the prosecuting authority amending the indictment during the main hearing.

The prosecuting authority stated that even if the expert witness was regarded as prejudiced, it found it difficult to see that this matter can have affected the content of

the judgment. In addition to the expert witness's report, other evidence of the harmful mental effects on the victims had been produced. In conclusion, it was alleged that there were other circumstances that would increase the penalty and that the acts had serious consequences for the victims. The sentencing would therefore be unaffected by the provision that the circumstances were subsumed under.

The Commission questioned the expert witness and counsel for the victims, as well as a third witness. Following an overall assessment, the Commission found that there was a new circumstance which gave grounds for reopening the case pursuant to section 391, no. 3 of the Criminal Procedure Act, and that it was therefore unnecessary to decide whether the conditions for reopening the case pursuant to section 391, no. 1 (prejudice) were present. The Commission found it to have been proven sufficiently probable that, at least when the case was tried by the Court of Appeal, such a close relationship had been established between the expert witness and the counsel for the victims that the expert witness was disqualified due to prejudice. The Commission also found that there was no doubt that both the District Court and Court of Appeal placed crucial weight on the expert witness's reports and testimony in court, and that this was what to a great extent led to the re-subsumption and grounds for the conviction.

In the Commission's view, the conditions for reopening the case pursuant to section 391, no.3 had been met, since there was a reasonable possibility that the new information which had been discovered was likely to lead to the application of a milder penal provision or a substantially more lenient sanction.

The Commission unanimously decided to allow the petition to reopen the case.

8. 23.10.2008 (2008 00067) Homicide -Section 392, second subsection (special circumstances)

On 20 September 1990, Agder Court of Appeal sentenced the convicted person to imprisonment for seven years and up to 10 years' preventive supervision for assault occasioning bodily harm and homicide. The convicted person, who is mentally retarded, had for several years stated that he had a strained relationship with his neighbour, while the court found that the neighbour only wanted to help and guide the convicted person when necessary. According to the conviction, the convicted person had unlocked and entered one of the neighbour's farmhouses on 10 February 1990, since he knew where the key was hidden. The neighbour came home and understood that there had to be someone in the house since the main door was unlocked. When the neighbour came up to the first floor, the convicted person took a brick and hit him on the head so that the neighbour fell to the floor and started bleeding heavily. The neighbour went down to the kitchen on the ground floor, probably to wash the blood off. The convicted person, who was afraid of being reported to the police, found a shotgun, took up position behind the neighbour and shot him at close range.

The convicted person petitioned for the case to be reopened pursuant to section 391, no. 3 of the Criminal Procedure Act (new evidence) and section 392, second subsection (special circumstances).

The Commission found that the conditions for reopening the case pursuant to section 392, second subsection, were present. It referred initially to the fact that the Court of Appeal conviction was handed down before the court of first and second instance reform was implemented, so that the question of guilt was only determined by the Court of Appeal, which gives no reasons for its decision.

The Commission also commented that there was no technical evidence linking the convicted person to the actual homicide act. The homicide weapon has not been found, and it is not known with certainty which weapon was used, apart from the fact that it was a shotgun. Nor were there any witnesses to the actual homicide act. The Commission referred to the fact that technical examinations, analyses and questioning of witnesses had been carried out which indirectly shed light on the case. In the Commission's view, this evidence cannot, either individually or in combination, provide sufficient evidence of who perpetrated the homicide act. In the Commission's

view, the evidence was of interest when assessing the convicted person's testimony, in that his testimony must have been key to the Court of Appeal's assessment of the question of guilt. The Commission noted that, when assessing the convicted person's testimony, there is particular reason to look at his mental health. Reference was made to the fact that the Court of Appeal had appointed two expert witnesses to carry out a psychiatric assessment of the convicted person. In its decision, the Commission gave a further account of the expert witnesses' assessments and of later expert witnesses' examinations, including statements from the Institute of Forensic Medicine. The Commission also described blameworthy factors related to the interrogation situation that the convicted person was in. Based on the doubt linked to the convicted person's mental state and criminal-law responsibility for his actions on the date when the homicide took place, the Commission found no grounds to place crucial emphasis on the convicted person's statement to the police concerning his knowledge of the crime scene and/or of what he had allegedly seen.

In its decision, the Commission also considered other factors and, following an overall assessment, found that there were special circumstances which made it doubtful that the conviction is correct and that weighty considerations indicate that the question of the convicted person's guilt should be retried.

The Commission decided unanimously to allow the petition to reopen the case.

This decision has in its entirety been published on the Commission's website, www.gjenopptakelse.no.

9. 15.12.2008 (2005-00028 Arne Treholt) Espionage – not referred

On 20 June 1985, the then Eidsivating Court of Appeal sentenced Arne Treholt to imprisonment for 20 years for espionage for the Soviet Union and Iraq. Treholt has petitioned for the case to be reopened twice before. These petitions were rejected by the Appeals Committee of the Supreme Court in 1988 and 1992.

The Commission discussed three grounds for reopening the case:

- Whether there is any new evidence or circumstance which seems likely to lead to an acquittal or substantially more lenient sanction, section 391, no. 3 of the Criminal Procedure Act
- Whether any police officer has been guilty of a criminal offence or whether false evidence has been given in the case, section 391, no. 1 of the Criminal Procedure Act
- Whether there are special circumstances which make it doubtful whether the conviction is correct, section 392, second subsection of the Criminal Procedure Act.

The Commission assessed the new circumstances that are pleaded since the conviction in 1985, and concluded that there was no new evidence or circumstance which seemed likely to lead to an acquittal. Nor were there any grounds for stating that a police officer had been guilty of a criminal offence in connection with searches, etc.

One of the Commission's main tasks was to reanalyse the chain of evidence which led to the conviction. The question the Commission asked itself was whether such a review made the conviction appear in a doubtful light. The Commission had critical comments to make regarding several aspects of the case and conviction, but the majority nonetheless found that an overall, new analysis of the chain of evidence did not provide any grounds for stating that the result of the evidence was wrong. There was thus no special circumstance which made it doubtful whether the conviction was correct. The Commission's minority found that the weak parts of the chain of evidence were in total so strong that they had to be assigned crucial weight in favour of reopening the case.

The Commission decided not to allow the petition to reopen the case.

This decision has in its entirety been published on the Commission's website, www.gjenopptakelse.no.

10. 7.12.2008 (2008 00132) Storage of amphetamine - Section 391 no. 3 (new circumstances)

In March 2008, Frostating Court of Appeal sentenced the convicted person to imprisonment for nine months for storing 74 grams of amphetamine.

When the convicted person's home was searched, a consignment of 74 grams of amphetamine was found in his garage, divided into two parcels in a zipped bag. The convicted person's DNA was found on the zipped bag.

The new circumstances which were pleaded to the Norwegian Criminal Cases Review Commission were that a friend of the convicted person had admitted to the police in July 2008 that it was he who had placed the amphetamine in the convicted person's garage, without the convicted person being aware of this. He had used a zipped bag he had found in the convicted person's home to pack the amphetamine in.

The prosecuting authority has commented to the Commission that it would not have charged the convicted person if it had known of his friend's confession. The prosecuting authority agreed with the petition to reopen the case.

The Norwegian Criminal Cases Review Commission found that there was new information in this case and that this was likely to lead to an acquittal.

The Commission decided unanimously to allow the petition to reopen the case.

11. 17.12.2008 (2008 00139) Criminal fraud, contravention of the accounting legislation - Section 391 no. 2b (decision by the UN's human rights committee)

In 2006, Sarpsborg District Court sentenced the convicted person to imprisonment for one year and eight months for criminal fraud, handling stolen goods and several contraventions of the accounting legislation. The convicted person appealed against this conviction to the Court of Appeal. In a decision on 1 June 2006, Borgarting Court of Appeal refused to hear the appeal, referring to section 321, second subsection, first sentence of the Criminal Procedure Act. No grounds were given for this refusal, other than that the Court of Appeal summarily stated that it found it "clear" that the appeal would not succeed. The Court of Appeal's decision was appealed against. The Appeals Committee of the Supreme Court rejected the interlocutory appeal on 19 July 2006.

The case was brought before the UN's human rights committee, which allowed the appeal to be heard. On 17 July 2008, the human rights committee decided that Norway had infringed the convicted person's right to have his conviction and sentence tried by a court of higher instance. The Committee concluded that there had been a breach of the UN Convention on Civil and Political Rights, article 14, no. 5. With reference to the committee's decision, the convicted person petitioned to have the case reopened and alleged that the conditions for reopening the case pursuant to section 391, no. 2, letter b of the Criminal Procedure Act were present.

The Director General of Public Prosecutions agreed with the petition, with the comment that it had to be the Appeals Committee of the Supreme Court's ruling of 19 July 2006 which was to be reviewed.

A reopening pursuant to section 391, no. 2 of the Criminal Procedure Act can be requested when the UN's human rights committee has found, in a case against Norway, that "the procedure on which the decision is based conflicts with a rule of international law that is binding on Norway if there is reason to assume that the procedural error may have influenced the substance of the decision and that a reopening of the case is necessary in order to remedy the harm that the error has caused."

The Norwegian Criminal Cases Review Commission placed emphasis on the fact that the Director General of Public Prosecutions agreed that the case should be reopened since the conditions pursuant to section 391, no. 2, letter b of the Criminal Procedure Act seemed to have been met. The Director General of Public Prosecutions found no reason to make a problem of whether or not the lack of grounds "may have influenced the substance of the decision". The Commission also referred to the Director General of Public Prosecutions' comments in 1996 on the Ministry of Justice's proposed changes to the Criminal Procedure Act, included in Proposition to the Odelsting no. 70 (2000-2001), which states, i.a.:

"Should these bodies find that the procedure has contravened the convention, there will probably often be a presumption that the deviation may have influenced the decision."

With this as its starting point, the Commission found that the error could have influenced the substance of the decision. There did not seem to be any other way of remedying the harm which had occurred other than reopening the case.

The Appeals Committee of the Supreme Court's ruling of 19 July 2006 was thus reopened for review.

The Commission unanimously decided to allow the petition to reopen the case.

A brief version of the decision, which is published on the Commission's website, contains quotes from the decision of the UN's human rights committee and a slightly more detailed account of the Commission's decision. Reference is made to this.