IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

MICHAEL EUGENE MAAS,	)	No. S225109
	)	
Petitioner,	)	San Diego County
	)	Sup. Ct. No. SCE185960
vs.	)	& SCE188460
	)	
SUPERIOR COURT (PEOPLE),	)	
	)	
Respondent.	)	
	)	

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

San Diego County Superior Court
The Honorable John M. Thompson, Judge

PETITIONER'S REPLY BRIEF ON THE MERITS

After the Decision by the Court of Appeal
Fourth Appellate District, Appeal No. D064639
Filed December 10, 2014

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Under the Appellate Defenders, Inc.
Independent Case Program

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The Honorable John M. Thompson, Judge

PETITIONER'S REPLY BRIEF ON THE MERITS

INTRODUCTION

When a judge decides whether or not to issue a writ of habeas corpus or an order to show cause, he or she resolves a question of law: Has the petition stated a prima facie case that the law, as applied to the assumed facts, entitles the petitioner to relief? (AOB 12-18.[1]) Respondent, however, contends that when reviewing a habeas petition, a judge neither tries a habeas proceeding nor hears a

[1] "OBM" refers to Petitioner's Opening Brief on the Merits, and "ABM" refers to respondent's Answering Brief on the Merits.

contested issue of law or fact. (ABM 16-21.) Respondent misunderstands the judge's task in deciding whether a habeas petition states a prima facie case. A judge who evaluates a habeas petition tries the proceeding and resolves contested issues of law by applying legal principles to the facts alleged in the petition. Even more important, when the judge summarily denies a habeas petition on the grounds that the petition failed to state a prima facie case for relief, the judge makes a determination on the merits. (*In re Clark* (1993) 5 Cal.4th 750, 769-770 & fn. 9 (*Clark*).) This determination on the merits necessarily requires the judge to resolve issues of law against the habeas petitioner.

Since the judge who issues a summary denial makes a determination on the merits that is adverse to the habeas petitioner, it would be fundamentally unfair to deny a petitioner the opportunity to peremptorily disqualify the judge before the judge issues the denial. Under respondent's interpretation, the People would *always* have a chance to peremptorily disqualify a judge before suffering an adverse decision, but habeas petitioners would *never* be able to peremptorily disqualify a judge before receiving a summary denial. This result

undermines the purpose of section 170.6, which allows parties to disqualify biased judges before allowing the judge to resolve a proceeding or hearing against them.

Respondent also tries to analogize a judge's decision on a habeas petition to a judge's decision on a demurrer. (ABM 1, 10-12, 19-20.) As this court has recognized, comparing civil procedures like a demurrer to the unique procedures of habeas corpus only has limited usefulness. (See *People v. Romero* (1994) 8 Cal.4th 728, 737 (*Romero*).) In this case, the analogy has no usefulness. In addition, respondent further spends a great deal of time discussing all-purpose assignments and the master-calendar rule, matters that in some circumstances can affect the timeliness of a peremptory disqualification under Code of Civil Procedure section 170.6,[2] but have no bearing whatsoever on the issue before this court. (ABM 12-14, 21-23.)

In this brief, petitioner only addresses specific contentions made in respondent's brief where it is necessary to present the issues more

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[2]All code sections refer to the Code of Civil Procedure unless otherwise indicated.

fully to the court. Petitioner does not reply to respondent's contentions that are adequately addressed in petitioner's opening brief on the merits. The absence of a response to any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief on the merits, does not constitute a concession, abandonment, or waiver of the point by petitioner (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects petitioner's view that the issue has been adequately presented and the positions of the parties fully briefed.

ARGUMENT

I.
A PETITIONER MAY ASSERT A PEREMPTORY CHALLENGE UNDER CODE OF CIVIL PROCEDURE SECTION 170.6 AGAINST A JUDGE WHO IS ASSIGNED TO ASSESS A PETITION FOR WRIT OF HABEAS CORPUS BEFORE AN ORDER TO SHOW CAUSE HAS BEEN ISSUED, IF THE JUDGE IS DIFFERENT FROM THE ORIGINAL TRIAL JUDGE

A. A Party May Peremptorily Disqualify a Judge From Trying a Special Proceeding or From hearing Any Matter in That Proceeding Which Involves a Contested Issue of Law or Fact

A judge may not "*try* a civil or criminal action or *special proceeding* of any kind or character *nor hear* any matter therein that involves a *contested issue of law or fact*" when it is shown that he is prejudiced "against a party or attorney or the interest of a party or attorney appearing in the action or proceeding." (§ 170.6, subd. (a)(1).) Respondent misinterprets this subdivision to mean that section 170.6 applies "only where there is a trial or a contested issue of law or fact" (ABM 4, fn. omitted) because the "limited right to disqualify a judge under section 170.6 does not accrue until there is a trial or a contested issue of law or fact" (ABM 5). In the habeas context, respondent contends that to "try" a "special proceeding," as

understood by section 170.6, would mean to have a "trial" on the facts alleged in the return. (ABM 7, 18.) Yet respondent offers no authority or argument for his interpretation, other than simply to assert that section 170.6 "applies solely to matters that are *tried*, that is *trials*." (ABM 15, original italics.)

While petitioner acknowledges that the legislative history has described the purpose of section 170.6 as "provid[ing] a remedy when 'a judge is prejudiced against any such party or attorney or his interest so that the party or attorney cannot or believes he cannot have a fair and impartial trial or hearing before the judge' " (*Truck Ins. Exchange v. Superior Court* (1998) 67 Cal.App.4th 142, 146, quoting Legis. Counsel, Rep. on Sen. Bill No. 829 (1957 Reg. Sess.) p. 103), that legislative history does not indicate the Legislature equated the trying of a special proceeding with a trial. The verb "to try" does not apply exclusively to trials. Although Black's Law Dictionary defines the verb to "try" as "to examine and resolve (a dispute) by means of a trial," it also defines to "try" as "[t]o examine judicially." (Black's Law Dict. (7th ed. 1999) p. 1520.) This latter definition is consistent with the way that California courts have described what judges do

when they decide questions of law. "Questions of law are to be *tried* by the court, while questions of fact are to be decided by the jury." (*People v. Superior Court (Plascencia)* (2002) 103 Cal.App.4th 409, 425, citing Code Civ. Pro. § 591, italics added.)

When used in its more general sense, "to try" an issue means the same thing as "to decide" an issue. California law uses the two verbs interchangeably in identical contexts, with no discernible difference in meaning. The Code of Civil Procedure, for example, requires that "[a]n issue of law be *tried* by the court" (§ 591, italics added), while the Evidence Code requires that questions of law be "*decided* by the court" (Evid. Code, § 310, italics added). When section 170.6 says that a judge may not "try . . . a special proceeding . . ." it means that a judge may not make any consequential decision in that proceeding. Such a decision, however, does not always involve a trial on disputed facts. As explained in greater detail below, in the case of habeas proceedings after a petition has been filed but before an order to show cause has issued, that decision may be made without resolving disputed facts. A judge's decision on whether a habeas petition has stated a prima facie case is part of the habeas proceeding that the

judge "tries."

Respondent's equation of "try" with "trials" contributes to another misreading of section 170.6. He claims that section 170.6 "applies solely to safeguard the right to fair trials and matters 'therein' that involve 'a contested issue of law or fact' . . . ." (ABM 7.) When respondent substitutes the noun "trials" for the verb "try," he loses sight of what the preposition "therein" refers to. The preposition "therein" refers not to trials, but to "a civil or criminal action or special proceeding of any kind or character." (§ 170.6, subd. (a)(1).) Therefore, not only may a judge not try a special proceeding if a party has moved to peremptorily disqualify him or her, but the judge may not hear any matter involving a contested issue of law or fact, either. As explained in greater detail below, a judge's decision whether to issue an order to show cause or to summarily deny a petition involves a contested issue of law.

B. In Deciding Whether a Habeas Petition States a Prima Facie Case for Relief, a Judge Tries a Habeas Proceeding and Resolves a Contested Issue of Law

As a result of respondent's misreading of section 170.6, he misstates the question faced by this court. The question is not "whether the mere filing of a habeas petition satisfies the requirement of either a trial or a hearing on a contested issue of law or fact." (ABM 16, original italics.) The question is whether a judge who decides whether a habeas petition has stated a prima facie case "tries" a habeas proceeding or hears a contested issue of law. As explained, below, a judge ruling on a habeas petition does both.

A habeas proceeding constitutes a "special proceeding." (*People v. Villa* (2009) 45 Cal.4th 1063, 1069.) And in deciding whether or not a habeas petition states a prima facie case for relief, a judge "tries" or decides that special proceeding. In describing habeas proceedings, courts have indicated that a judge may try a habeas without holding an evidentiary hearing, that is, without having a trial on any factual disputes. " 'Generally speaking, habeas corpus proceedings involving a factual situation should be tried in superior court rather than in an appellate court, *except where only questions of*

law are involved.' [Citation.]" (*In re Hillery* (1962) 202 Cal.App.2d 293, 294, italics added (*Hillery*).) The corollary of this statement is that habeas corpus proceedings involving only questions of law may be tried in the appellate court. In such situations where there is no factual dispute, the appellate court tries the habeas proceeding without holding a trial.

Accordingly, the preclusion rule described in *Hillery* "ought not to be applied where there are no material factual disputes, ..." (*Simmons v. Municipal Court for San Francisco Judicial District* (1980) 109 Cal.App.3d 15, 25 (*Simmons*).) When there are no factual disputes, an appellate court may try the legal issues. That is what happened in *Simmons*, a case in which the appellate court granted five criminal defendants' petitions for writs of habeas corpus, discharged the defendants, and dismissed the complaints against them as a remedy for the violation of their speedy-trial rights. (*Id.* at pp. 25-26.) The court in *Simmons* therefore tried the habeas proceeding by deciding the pure questions of law presented by the defendants' petitions.

"A habeas corpus proceeding begins with the filing of a verified

petition for a writ of habeas corpus" (*Romero*, *supra*, 8 Cal.4th 728, 737) that "allege[s] unlawful restraint, name[s] the person by whom the petitioner is so restrained, and specif[ies] the facts on which [the petitioner] bases his claim that the restraint is unlawful." (*In re Lawler* (1979) 23 Cal.3d 190, 194; see Pen. Code, § 1474.) In reviewing a petition for a writ of habeas corpus, a court must determine whether the petition puts forward a prima facie case for relief by setting forth facts that, if true, would entitle a petitioner to relief, and whether the petitioner's claims are procedurally barred. (*Romero*, *supra*, 8 Cal.4th at p. 737.) If the petition either is procedurally barred or fails to state a prima facie case for relief, then the court may summarily deny it. (*Ibid.*) But if a habeas corpus petition "states a prima facie case on a claim that is not procedurally barred," then "the court is obligated by statute to issue a writ of habeas corpus." (*Ibid.*; Pen. Code, § 1476.)

The issuance of the writ orders whoever has custody of the petitioner to bring the petitioner "before the court or judge before whom the writ is returnable" (Pen. Code, § 1477) and to submit a return justifying his detention or other restraint of the petitioner (Pen.

Code, §§ 1480, 1481, & 1482). Instead of issuing the writ, it has become common practice to substitute an order to show cause, which does not require that the petitioner physically be brought before the court, but still "directs the respondent custodian to serve and file a written return." (*In re Hochberg* (1970) 2 Cal.3d 870, 874, fn. 2.)

Consequently, there is an asymmetry in habeas corpus proceedings: Before a judge decides to *grant* a habeas petitioner relief, he or she must first issue a writ or an order to show cause. (*Romero*, *supra*, 8 Cal.4th at p. 740; Pen. Code, § 1476.) But a judges does not necessarily need to issue a writ or an order to show cause before deciding to *deny* a habeas petitioner relief. A judge who determines that a habeas petition does not state a prima facie case for relief may summarily deny that petition. (*Romero*, *supra*, 8 Cal.4th at p. 737.) When a judge summarily denies a habeas petition because it fails to state a prima facie case for relief, he or she resolves a contested issue of law against the petitioner, i.e., by deciding that the facts do not entitle the petitioner to relief under the legal rules cited in the petition.

Therefore, a judge's decision that a petition does not state a prima

facie case constitutes a determination on a contested issue of law. For example, when an inmate, parolee, or probationer files a habeas petition alleging ineffective assistance of trial counsel, the People typically respond by claiming that the alleged error was harmless under the prejudice standard of *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*). Before issuing an order to show cause, the judge evaluating the petition may agree with the People and summarily deny it, after concluding that a prima facie case was not made because the evidence of the defendant's guilt was overwhelming. (See, e.g., *People v. Howard* (1987) 190 Cal.App.3d 41, 42-43 [although habeas petition "appear[ed] to state a prima facie case of ineffective assistance" of trial counsel, court denied the petition after finding no prejudice].) In that situation, the judge's decision to summarily deny the petition results from his or her determination that *Strickland*'s legal standard of prejudice was not satisfied by the facts alleged in the petition.

What a judge does in making this initial determination of law on a habeas petition involves a hearing on a contested issue of law, within the meaning of section 170.6. When interpreting the phrase "nor hear

any matter . . . that involves a contested issue of law or fact" in section 170.6, subdivision (a)(1), courts have concluded that the Legislature "used the word 'hear' in its legal sense, i.e., a hearing wherein the court is called upon to rule upon some disputed issue of law or fact based upon legal argument or evidence before the court." (*Mezzetti v. Superior Court* (1979) 94 Cal.App.3d 987, 991 (*Mezzetti*).) The court in *Mezzetti* found support for this interpretation in a Report of the Senate Judiciary Committee on section 170.6: "Freedom from the imputation of disqualification on the part of the judge determining all contested matters better serves the administration of justice." (*Mezzetti*, *supra*, 94 Cal.App.3d at p. 991, quoting Sen. Com. on Judiciary, Appen. to J. of the Sen., Vol. 1 (1957 Reg. Sess.) p. 104.) Even if the People do not file an informal response to a habeas petition, whether because they were never asked or they chose not to do so, the legal ruling made by a judge on a habeas petition still involves a *contested* issue of law. Indeed, "[c]ourts presume the correctness of a criminal judgment. [Citation.]" (*In re Reno* (2012) 55 Cal.4th 428, 450.)

C. A Petitioner May Peremptorily Disqualify the Judge Assigned to Decide Whether the Habeas Petition States a Prima Facie Case Because the Judge's Summary Denial of the Petition Would Constitute a Decision on the Merits

A judge's decision whether a habeas petition states a prima facie case can be a dispositive decision that determines whether a habeas petition survives. If the judge decides that a prima facie case has not been stated, the resulting summary denial constitutes a decision on the merits. The issuance of a writ or an order to show cause "signifies the court's *preliminary determination* that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief." (*People v. Duvall* (1995) 9 Cal.4th 464, 475, italics added.) Such a preliminary determination may be "only the first step" (ABM 18), but it is a necessary step, one in which the judge resolves contested issues of law.

The flaw in respondent's argument, however, is that he focuses only on the minority of cases in which a judge issues an order to show cause. (ABM 16-21.) In the majority of petitions, a judge will determine that they have not stated a prima facie case. For these petitions, the judge's preliminary determination will not only be the

first step, it will be the last step. When a court decides that a petition has not stated a prima facie case, the court "will deny the petition outright, such dispositions commonly referred to as '*summary denials*.' " (*Romero*, *supra*, 8 Cal.4th at p. 737, italics added.) A habeas court's summary denial of a petition constitutes a determination on the merits. "The denial of a habeas corpus petition, without issuance of an order to show cause, often referred to as a 'summary denial,' does not mean that the court has not considered the merits of the claims. Unless a procedural bar is apparent, the court will determine whether the petition states a prima facie case for relief, i.e. whether it states facts which, if true, entitle the petitioner to relief." (*Clark*, *supra*, 5 Cal.4th 750, 769, fn. 9, citing *In re Lawler*, *supra*, 23 Cal.3d at p. 194.)

In evaluating a habeas petition for a prima facie case, a judge assumes that the facts are true, and then considers issues of law. Some of those issues of law may, however, turn on undisputed issues of fact. For example, after reviewing a petition alleging that the defendant's prosecution was barred by the statute of limitations, a judge may conclude that a prima facie case has not been made by

applying the applicable statute of limitations to the facts alleged in the petition. Similarly, in reviewing a petition alleging that the defendant's prosecution was barred by double jeopardy, the judge applies the legal rules governing double jeopardy to the facts alleged in the petition. (Cf. *People v. Bell* (2015) 241 Cal.App.4th 315, 341 [a plea of double jeopardy becomes a question of law when the underlying facts are undisputed and those facts permit only one reasonable inference].) While respondent is correct that a judge evaluating a habeas petition does not resolve contested factual disputes, he wrongly concludes that "there can be no contested issue of fact or *law* for the purposes of section 170.6 until after the court has issued the writ or an [order to show cause]." (ABM 12, italics added.)

If a habeas petition at this stage did not present either a contested issue of fact or a contested issue of law, then there would be no grounds for a judge's summary denial of a habeas petition, other than his or her determination that a procedural bar applied. But a judge may summarily deny a habeas petition either because it was procedurally barred or because it failed to state a prima facie case for

relief. (*Clark*, *supra*, 5 Cal.4th at p. 769-770 & fn. 9; *Romero*, *supra*, 8 Cal.4th at p. 737.) This latter determination necessarily requires the court to determine a question of law.

This same reasoning applies to situations in which a judge decides to limit the number of issues in the order to show cause. When a petition raises multiple claims of error, a court may find the petition states a prima facie case for relief on some claims, but not on others. In those cases, the court will issue a summary denial for the issues in which a prima facie case was not made. (See *People v. Miranda* (1987) 44 Cal.3d 57, 119, fn. 37 [limiting issues in order to show cause "was an implicit determination that in his petition for habeas corpus defendant failed to make a prima facie case as to the other issues presented"].) For those claims of error that have been summarily denied, the judge has made a determination on the merits. (*Clark*, *supra*, 5 Cal.4th at p. 769-770 & fn. 9.)

Since the summary denial of a habeas petition involves a determination on the merits, respondent's characterization of the judge's decision has a strange consequence. According to respondent, when a judge determines whether a habeas petition states

a prima facie case, he or she neither tries a special proceeding nor hears a contested issue of law. (ABM 4-6, 14-21.) If that were true, then a judge's summary denial of a habeas petition would constitute a determination on the merits, without the judge first trying or resolving a contested issue of law or fact. Such a determination, under respondent's theory, would never have tried or otherwise resolved any contested issues. But, as shown above, a court's summary denial of a habeas petition constitutes a dispositive resolution of the case, just like a trial.

Moreover, since a summary denial of a habeas petition constitutes a decision on the merits, precluding a petitioner from peremptorily disqualifying a judge before an order to show cause has issued would contravene the Legislative intent behind section 170.6, as it would deny habeas petitioners the statute's protection against biased judges. (See *Thompson v. Superior Court of Los Angeles* (1962) 206 Cal.App.2d 702, 707, fn. 3 [purpose of law was to cover all contested matters].) Respondent's position would also lead to an asymmetry in section 170.6's application, an asymmetry that would grant greater rights to the People.

If a peremptory challenge is only available *after* a writ or an order to show cause has issued, that would mean that the People would *always* be protected by the right to peremptorily disqualify a judge under section 170.6. The People can never lose a habeas proceeding on the merits before the writ or an order to show cause has issued. (*Romero*, *supra*, 8 Cal.4th at p. 740; Pen. Code, § 1476.) As respondent noted, "[a] court cannot grant relief without first issuing the writ (or order)." (ABM 18, citing *Romero*, *supra*, 8 Cal.4th at p. 734.) After an order to show cause has issued, the People have the opportunity to file a return. (*Adoption of Alexander S.* (1988) 44 Cal.3d 857, 865 ["if a petition for habeas corpus makes a prima facie showing, then the opposing side must be given an opportunity to file a return to the petition"].) Before filing the return, however, the People may peremptorily disqualify a judge, thereby protecting themselves from a biased judge. Consequently, the People can *never* suffer an adverse consequence without first having the opportunity to peremptorily disqualify a judge under section 170.6.

Yet, according to respondent, habeas petitioners should not be afforded coextensive rights with the People. Under respondent's

interpretation of section 170.6, subdivision (a)(1), habeas petitioners can have their petitions summarily denied by a biased judge before having the opportunity to peremptorily disqualify that judge. Such a theory undermines the central purpose of section 170.6, which is to preserve the perceived fairness of matters contested before a judge.

D. The Filing of a Habeas Petition Initiates a Habeas Corpus Proceeding and the California Rules of Court Contemplate a Contested Hearing on Issues of Law After the Petition Has Been Filed

A habeas proceeding "begins" when the petition is filed. (*Romero*, *supra*, 8 Cal.4th at 737.) Respondent admits that the petition "initiates the habeas proceeding." (ABM 21.) The "issuance of a writ of habeas corpus or an order to show cause" constitutes "an intermediate but nonetheless vital step" in the granting of relief to a petitioner. (*Romero*, *supra*, 8 Cal.4th at p. 740.) A writ or an order to show cause is not issued, however, if the judge summarily denies the petition. Respondent nevertheless insists that "habeas proceedings are not instituted until a writ or [an order to show cause] has issued." (ABM 5.) But the order to show cause does not initiate a habeas proceeding, it "creates a 'cause.' " (*Romero*, *supra*, 8 Cal.4th at p.

740.)

Respondent's claim appears to be based on this court's description of an order to show cause as "institut[ing] a proceeding in which issues of fact are to be framed and decided" (*In re Hochberg*, *supra*, 2 Cal.3d 870, 876, fn. 4, italics added.) Although this court has held that a habeas petition "creates no cause or proceeding which would confer discovery jurisdiction" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1259 (*Gonzalez*)), that holding's breadth has been superseded by the Legislature's enactment of Penal Code section 1054.9, which entitles defendants sentenced to death or life in prison without the possibility of parole to discovery, even before they file a petition (*In re Steele* (2004) 32 Cal.4th 682, 691). In any case, this court's statement in Gonzalez about "jurisdiction" applies only in the context of discovery. Such a rule makes sense, since a petitioner would not need to be able to prove the existence of any facts before first being granted the right to try those facts. But this court has never said that when a habeas petition has been filed, no special proceeding exists.

Even though a "cause" may not exist after a petition has been filed, a habeas proceeding has begun. Once this proceeding has

begun, various rights accrue to the parties and various procedural rules are triggered. (E.g. Cal. Rules of Court, rule 8.385 [court of appeal]; Cal. Rules of Court, rule 4.551 [superior court].) Respondent concedes that an "informal response" "may involve the citation to legal authority" but maintains it does not involve any contested issues of law because "it does not frame or join issues and does not establish a cause." (ABM 19.) While an informal response may differ from a return (ABM 19), that is only because the former does not involve contested factual issues, but is instead limited to contested legal issues.

The California Rules of Court contemplate this contest over disputed issues of law by establishing the back-and-forth of an informal response and a reply. If the government decides to file an informal response, the superior court or appellate judge may not deny the petition without first giving the petitioner an opportunity to reply. (Cal. Rules of Court, rule 8.385(b)(3) [court of appeal]; Cal. Rules of Court, rule 4.551(d)(3) [superior court].)

E. Respondent's Reliance on Section 170.6, Subdivision (a)(2), is Misplaced and a Judge's Summary Denial of a Habeas Petition Differs from a Demurrer and Other Routine Procedural Matters

Section 170.6, subdivision (a)(2) – a provision that is not at issue in this case – provides that a peremptory challenge may not be raised *after* a judge has presided over a proceeding involving a determination of contested issues of fact relating to the merits. This subdivision establishes when the door has closed on a party's opportunity to make a peremptory challenge under section 170.6. It does not, however, say anything about when section 170.6 first opens the door to a peremptory challenge. Even so, respondent contends that section 170.6, subdivision (a)(2), "is simply a compliment to the requirement of subdivision (a)(1) that a peremptory challenge is available only where there is a contested issue of law or fact." (ABM 10.) Respondent is wrong.

Before the amendments made to section 170.6, subdivision (a)(2), in 1965, "if a party failed to exercise his section 170.6 rights before a pretrial hearing involving a contested issue of law or fact, he lost his right to peremptorily disqualify the judge. [Citation.]" (*In re Abdul*

Y. (1982) 130 Cal.App.3d 847, 857 (*Abdul Y*).) That a party *lost* his right to peremptorily disqualify a judge after a hearing on a contested issue of law or fact means that a party already possessed that right. If the party had not already obtained that right, it could not be lost. The amendment identified in *Abdul Y.* changed the circumstances in which the door closed on a party's opportunity to peremptorily disqualify a judge. It did not affect when that door first opened.

That a party can now lose the right to peremptorily disqualify a judge after that judge has presided over a "hearing, proceeding, or motion" involving "a determination of contested fact issues relating to the merits" (§ 170.6, subd. (a)(2)) does not mean that a party cannot move to peremptorily disqualify a judge until the judge first presides over a hearing involving contested fact issues relating to the merits.

Further, respondent misconstrues the case law when he asserts that "courts have interpreted section 170.6 as not applying to demurrers." (ABM 19.) The cases he cites make clear that demurrers do not involve contested factual disputes related to the merits under section 170.6, subdivision (a)(2). (E.g. *Fight for the Rams v. Superior Court*

(1996) 41 Cal.App.4th 953, 957-958.) Whether section 170.6, subdivision (a)(2), "draw[s] [a] dichotomy between matters heard on the merits and those that are not" is irrelevant to this court's disposition of the present case. (ABM 11.) In any event, as petitioner has already shown above, a judge who evaluates whether a habeas petition presents a prima facie case for relief hears a contested issue of law and, if the judge summarily denies the petition, disposes of the petition on its merits. (*Clark*, *supra*, 5 Cal.4th 750, 769-770 & fn. 9.)

Even assuming, for the sake of argument, that respondent is correct, and section 170.6, subdivision (a)(2), somehow holds a clue to how section 170.6, subdivision (a)(1), should be interpreted, respondent's argument serves only to highlight the merits of petitioner's position, since a judge's evaluation of a habeas petition has nothing whatsoever in common with any of the routine procedural matters discussed by respondent. (ABM 10-12.) A habeas proceeding involves an "extraordinary remedy." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 468-469 [58 S.Ct. 1019, 82 L.Ed. 1461].) Likewise extraordinary is the summary denial of a habeas petition, as it determines the petition on its merits against the petitioner. (*Clark*,

supra, 5 Cal.4th at p. 769-770 & fn. 9 .)

Such a determination in no way resembles the kinds of " 'hearings on demurrers, pleadings, and other matters before trial [that] are comparatively routine and should not result in waiver.' " (ABM 12, quoting *Abdul Y, supra*, 130 Cal.App.3d at p. 858, quoting Rep. of the Com. on Admin. of Justice (1964) 39 State Bar J. 496, 498.) Unlike a "settlement or case management conference" (ABM 7), a judge's ruling on a habeas petition can constitute a determination on the merits.

Moreover, respondent's analogy of an informal response in a habeas proceeding to a demurrer does not resolve the issue. As this court has explained, "[i]n the sense that it performs a screening function, the informal response may be analogized to a demurrer in a civil action. Because habeas corpus proceedings and civil actions differ in many fundamental ways, however, all such analogies have *very limited usefulness*. (*Romero*, supra, 8 Cal.4th 728, 742, fn. 9, italics added.) In the present case, the analogy has no usefulness.

F. The Case Law Applying Peremptory Disqualifications in the Habeas Context Does Not Favor Respondent's Position

As petitioner explained in his opening brief, in *Yokley v. Superior Court* (1980) 108 Cal.App.3d 622 (*Yokley*), the court ruled that because the judge in the order-to-show-cause proceeding had been the judge in the petitioner's criminal trial, the petitioner could not use section 170.6 to challenge the judge. (*Id.* at p. 627; OBM 15-20.) The court, however, did note in dictum that as long as a judge who had "never previously participated in the case was assigned to the case, a party who had not yet exercised a section 170.6 challenge could exercise it against the new judge." (*Ibid.*)

Although respondent correctly points out that *Yokley* involved a habeas proceeding after an order to show cause issued, *Yokley* still does not offer support for respondent's position. (ABM 24-25.) The court in *Yokley* did not address the situation confronted by this court. As explained above, respondent's argument rests on the erroneous conclusion that a habeas proceeding before the issuance of an order to show cause does not involve the trying of a habeas proceeding or a contested issue of law. (ABM 25-26.) Since it does, petitioner

maintains that his discussion that a peremptory challenge is available if a habeas proceeding involves a different judge is germane to this court's decision. (OBM 17-22.)

G. Fundamental Fairness and Other Policy Considerations Require this Court to Allow Habeas Petitioners to Peremptorily Disqualify a Judge Before an Order to Show Cause Has Issued

In addition to the reasons given above, policy considerations require this court to allow habeas petitioners to peremptorily disqualify the judge who has been assigned to assess a habeas petition before an order to show cause has issued. As explained above, to deny this right to habeas petitioners would be fundamentally unfair. The People would always have a chance to peremptorily disqualify a judge before suffering an adverse decision, but habeas petitioners would never be able to peremptorily disqualify a judge before receiving a summary denial.

Respondent describes the initial steps after a habeas petition has been filed as a procedure designed to dismiss those petitions that do not state a prima facie case before the People have made an "appearance." (ABM 26.) While respondent does not explain what

he means by an "appearance" in this context, he neglects to mention that the rules of court contemplate that the People may appear before the reviewing court in the form of an informal response. (Cal. Rules of Court, rule 8.385(b)(3) [appellate court]; Cal. Rules of Court, rule 4.551(d)(3) [superior court].) Contrary, to respondent's claim, the initial steps in a habeas proceeding do contemplate the People's participation.

Even more important, respondent misunderstands the purpose of having a judge in a habeas petition issue the writ "without delay." (ABM 26, quoting Pen. Code, § 1476.) The purpose of issuing the writ expeditiously is to ensure that a petitioner illegally detained is released as quickly as possible. It is not, as respondent implies, out of concern for judicial economy. (AMB 26-27.) If a petitioner's decision to peremptorily disqualify a judge causes a delay in finding a new judge who is not biased, that delay is the petitioner's prerogative.

Before filing the peremptory disqualification, the petitioner presumably weighed the costs of having a biased judge against the benefits of an expeditious ruling on whether his or her petition stated a prima facie case. The petitioner's decision to file the motion under

section 170.6 reflects the petitioner's conclusion that the costs of a biased judge were too great. In other words, the petitioner has decided a delayed decision is preferable to a biased decision.

Moreover, respondent's proposal would not reduce unnecessary delays, it would increase them. The flaw in respondent's reasoning is that it assumes there will never be a biased judge who erroneously denies a habeas petition without issuing an order to show cause. If a biased superior court judge summarily denied a habeas petition, the petitioner's remedy would be to file a habeas petition in the court of appeal and argue that the petition presented to the superior court had stated a prima facie case. If the court of appeal agrees and after assuming the facts alleged in the petition are true, concludes that the petition has stated a prima facie case, then the court would issue an order to show cause, returnable to the superior court, where an evidentiary hearing will be held. This process would at least take many months. It could take even longer if the court of appeal asks the People for informal briefing, and the petitioner in turn files a reply. When the habeas proceeding returns to the superior court, it would simply end up where it should have started, only after a delay of many

months.

This court should not assume, as respondent does, that there has never been a biased judge who has wrongly denied a habeas petition. Under respondent's proposal, the habeas process could be expedited so quickly that it would risk having a biased judge make an erroneous decision. That decision would end up burdening the courts of appeal, which after remedying the superior court judge's erroneous ruling, would simply send the petition back to the superior court many months later to hold an evidentiary hearing. Respondent's proposal, in other words, does not "avoid unnecessary delay," it incorporates an unnecessary delay as a necessary feature. (ABM 26.)

Respondent also makes the peremptory disqualification process in a habeas proceeding appear much more burdensome than it would be. (ABM 27-28.) None of the extensive internal communications among superior court clerks or judges that respondent frets about would be necessary. (ABM 27-28.) In practice, the decision would be simple. Typically there is only one judge involved in a criminal trial, though occasionally there may be two or even three, if the defendant or prosecution made any pretrial motions. Usually the trial

judge and the sentencing judge are the same, with the exception of guilty pleas. Even if there were two or three judges involved, the judge who was assigned to review the habeas petition would know if he or she had been involved in the underlying criminal proceeding.

If a judge who had previously presided over the criminal trial or guilty plea received a motion to disqualify him or her under section 170.6, he or she could simply deny it. And if the judge assigned to evaluate the habeas petition is a different judge, he or she could readily determine if a peremptory disqualification had been previously been made in the criminal case by searching the case's minute orders. That task will become increasingly faster and easier as the superior courts digitize their files. Soon, it will only require entering the appropriate terms into a database's search engine.

Respondent claims petitioner "discounts the costs" involved in identifying the original trial judge and determining whether the habeas petitioner had previously moved to disqualify a judge. (ABM 30.) Yet respondent does not identify what these costs are. In fact, as just explained, the costs will be minimal, if any. And any such minimal costs are justified to protect habeas petitioners' right to an

unbiased judge.

Respondent also contends that "[a] habeas petitioner stands little to gain by challenging the judge assigned to determine whether his or her petition states a prima facie case." (ABM 28.) Petitioner reminds this court that respondent is not best positioned to determine what strategic decisions would or would not benefit a criminal defendant. In this case, obviously petitioner disagrees with respondent, since he himself told the appellate court that if he had been told that Judge Thompson would be the judge reviewing his petition, he would have filed a motion to disqualify him. (OBM 3.) Petitioner contends that respondent is not in a position to second-guess petitioner's decision. As petitioner explained above, a petitioner may decide that he would prefer having an unbiased judge consider his petition. Further, respondent's proposed remedy, that a habeas petitioner could always file a habeas petition in a higher court, offers cold comfort. (ABM 28-29.) As explained above, filing another habeas petition would create the unnecessary delay that respondent himself counseled against. (ABM 26.)

The same reasoning applies to respondent's claim that petitioner's

proposed rule would actually harm habeas petitioners. The right to make strategic decisions about the best way to prosecute a habeas proceeding should rest with the petitioner. If a habeas petitioner makes a bad decision, then he or she will have to live with that decision. But this court should not make a paternalistic rule designed to protect habeas petitioners from themselves. Moreover, petitioner disagrees with respondent's claim that it would somehow be to a petitioner's detriment to decide to peremptorily disqualify a judge before receiving legal advice from counsel. (ABM 29-30.) Many habeas petitioners, after all, are incarcerated in state prisons or county jails, where they have access to people with a wide range of experience before many different judges throughout the state. Petitioner contends that such habeas petitioners have the wherewithal to make the decision to peremptorily disqualify a judge on their own.

CONCLUSION

For the reasons given in this brief and in petitioner's opening brief on the merits, section 170.6 permits a peremptory disqualification, before an order to show cause has issued, against a judge who is assigned to assess a petition for writ of habeas corpus, if the judge is different from the original trial judge.

Dated: December 18, 2015

Respectfully Submitted,

Russell S. Babcock
Attorney for Petitioner MAAS

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Dated: December 18, 2015

Russell S. Babcock
Attorney for Petitioner

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(*Michael Eugene Maas v. Superior Court (People)*, No. S225109)

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Michael Eugene Maas
Petitioner

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Furthermore, I, Russell S. Babcock, declare I electronically served from my electronic service address of russbab@gmail.com the above-referenced document on December 18, 2015 to the following entities:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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