IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RON BRIGGS and JOHN VAN DE KAMP,

Petitioners,

v.

JERRY BROWN, Governor of California, et al.,

Respondents.

Case No. S238309

BRIEF OF AMICUS CURIAE HABEAS CORPUS RESOURCE CENTER IN SUPPORT OF PETITIONERS RON BRIGGS AND JOHN VAN DE KAMP

Michael J. Hersek (Bar No. 142065)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov

Attorney for Amicus Curiae Habeas Corpus Resource Center

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Attorney for Amicus Curiae Habeas Corpus Resource Center

TABLE OF CONTENTS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RON BRIGGS and JOHN VAN DE KAMP, Petitioners, v. JERRY BROWN, Governor of California, et al., Respondents.	Case No. S238309

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE HABEAS CORPUS RESOURCE CENTER
AND
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Michael J. Hersek (Bar No. 142065)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov

Attorney for Amicus Curiae Habeas Corpus Resource Center

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RON BRIGGS and JOHN VAN DE KAMP, Petitioners, v. JERRY BROWN, Governor of California, et al., Respondents.	Case No. S238309

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE HABEAS CORPUS RESOURCE CENTER

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Pursuant to California Rules of Court, rule 8.487(e), the Habeas Corpus Resource Center (HCRC), respectfully requests leave of this Court to file a Brief of Amicus Curiae in Support of Petitioners Ron Briggs and John Van de Kamp.

I. IDENTIFICATION AND INTEREST OF AMICUS

The Habeas Corpus Resource Center (HCRC) was created in 1998 by the California State Legislature to address the lack of counsel who were qualified and willing to represent condemned inmates in postconviction litigation. Senate Bill 513 (Ch. 869, 1998 Stats.). To that end, HCRC is charged with providing timely, high-quality, direct representation to indigent inmates on California's death row in state and federal habeas corpus and clemency proceedings. In addition, HCRC is responsible for serving as a resource to private counsel who accept appointments in capital cases.

Since opening its doors in 1999, HCRC has accepted appointments to represent 96 men and women on California's death row. HCRC has filed 66 state habeas petitions, 28 amended state habeas petitions, and 78 replies to informal responses. Orders to show cause are pending in 7 cases, and 2 clients' cases await initiation of clemency proceedings. HCRC currently represents 77 clients and continues to accept appointments from the California Supreme Court and the federal courts.

Through its direct representation and its role as a resource center to the California capital defense bar, HCRC has become a repository of experience and expertise on capital postconviction litigation in California. If it takes effect, Proposition 66 will directly affect HCRC's clients, as it will all condemned individuals in the state. Moreover, the Proposition's structural changes take clear aim at HCRC's ability to fulfill the core mission for which it was established: to provide high-quality representation to the many indigent men and women on death row whom the private bar is unable and unwilling to represent. Indeed, the Proposition would leave few aspects of HCRC's practice unaltered. Amicus is interested in ensuring that state habeas corpus proceedings remain a meaningful avenue for condemned individuals to vindicate their rights.

Dated: March 30, 2017

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____
Michael J. Hersek

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules of Court

Other Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RON BRIGGS and JOHN VAN DE KAMP, Petitioners, v. JERRY BROWN, Governor of California, et al., Respondents.	Case No. S238309

BRIEF OF AMICUS CURIAE HABEAS CORPUS RESOURCE CENTER IN SUPPORT OF PETITIONERS RON BRIGGS AND JOHN VAN DE KAMP

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Pursuant to California Rules of Court, rule 8.487(e), the Habeas Corpus Resource Center hereby offers the following amicus curiae brief in support of petitioners Ron Briggs and John Van de Kamp.

II. INTRODUCTION

A clear-eyed appraisal of Proposition 66 yields only one conclusion: it cannot work. That is, compliance with the timelines it proposes cannot be approached without both a tremendous infusion of money (nowhere provided for in the Proposition itself) and a profound intrusion into the ability of condemned inmates and their counsel to raise potentially meritorious habeas claims and of the courts to fairly adjudicate them. This measure promises disorder within the judiciary, confusion and delay for litigants in non-capital cases, the erosion of the judiciary's ability to enforce constitutional guarantees for criminal defendants, and – most disturbing of all – a

dangerous restriction of access to the courts for condemned inmates. Yet paying even that steep price will not purchase the efficiencies proponents purportedly seek, because the Proposition does little to address the underlying causes of delay, namely, the lack of qualified and willing counsel, the lack of judicial resources, and the delays in federal court.

If anything, Proposition 66 threatens to worsen rather than ameliorate the current problems. Instead of finding ways to attract, equip, and retain qualified counsel, this measure will drive them away. Instead of supporting the judiciary so it can allot capital cases the attention they require, it will further burden the already taxed court system and short-circuit meaningful appellate review. And instead of ensuring that potentially meritorious issues are investigated and presented to the state courts in the first instance, it will shift responsibility for enforcing core constitutional rights to the federal courts, increasing the time they must spend reviewing capital cases.

There is some obvious appeal to the proponents' belief that simply ordering various actors to work faster will speed up the entire process, but this facile approach disregards the complex balance of interests and constitutional concerns that informs the current system. The stakes in these cases could not be higher. This is not the place for experimenting with untested and illogical schemes.

The sections that follow build on the information offered in HCRC's amicus letter regarding the specific obligations of habeas corpus counsel, the risks to our clients and to the legal system as a whole if these obligations go unmet, and the ways in which Proposition 66 will directly interfere with our ability to effectively represent death-sentenced inmates, thus creating constitutional concerns. We hope this information will assist the Court in understanding this initiative's tangible consequences as they would unfold in the lives of our clients.

III. PROPOSITION 66 IS INCOMPATIBLE WITH THE FAIR AND EFFECTIVE ADJUDICATION OF CAPITAL HABEAS CORPUS CLAIMS

A. The Timeline for Filing and Resolving Initial Capital Habeas Corpus Petitions Will Deprive Condemned Inmates and Their Counsel of the Ability to Effectively Investigate and Raise Potentially Meritorious Habeas Corpus Claims.

Aggressively limiting the time in which to prepare and file an initial habeas corpus petition will do little or nothing to speed these cases through the system, and may actually slow them down. These limitations will, however, have profoundly negative consequences for the men and women on death row for whom state habeas review represents a crucial opportunity to seek relief for rights abridged at trial or on direct appeal. To understand the implications of the new timelines for the clients HCRC serves, it is necessary to describe in some detail the unique challenges of competently representing a condemned inmate in state habeas proceedings.

Under this Court's policies and governing legal precedent, capital habeas attorneys must "expeditiously investigate potentially meritorious bases for filing a petition," Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3 at ¶ 2-2, and, after a "diligent and thorough investigation," prepare and file "a habeas corpus petition presenting all potentially meritorious claims," *In re Sanders*, 21 Cal. 4th 697, 708, 727 (1999). These obligations require habeas corpus counsel to fully understand and carefully evaluate what was and was not done by trial counsel at both the guilt and penalty phases of the capital trial. At a minimum, trial counsel has a duty to investigate "the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). These duties

"comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (describing counsel's "obligation to conduct a thorough investigation of the defendant's background"); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (same). Thus, when it appears that trial counsel has failed to meet any part of the constitutional duty to investigate, discover, and present all reasonably available defense evidence, those same obligations fall to habeas corpus counsel.

Myriad discrete tasks are required to carry out the complex objectives that the law requires capital habeas counsel to fulfill. The mandate to identify and set forth all potentially meritorious claims requires a substantial investment of time at the outset to determine what happened during the initial investigation, at trial, and on appeal; a wide-ranging investigation likely encompassing multiple disparate issues; and finally the writing and submission of a petition covering all of these issues, accompanied by supporting lay witness and expert declarations and other relevant documents. There are no shortcuts to producing competent filings.

The thoroughness of the habeas investigation facilitates the Court's own review and is not replicated by any other party in the system. Accordingly, the following section sets forth a brief review of certain tasks that are central to habeas corpus litigation, as well as why they matter and how they are interconnected. Despite the demands outlined below, Proposition 66 seeks to reduce the amount of time habeas counsel has to file a petition to one year from the time of appointment. *See* Cal. Penal Code

§ 1509(c), (g);[1] Gov't Code § 68662. This one-year timeline is inadequate to discharge counsel's obligations. *See generally Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012). Attempting to adhere to it will ill serve our clients, the courts, and the interests of justice.

Corrected record and trial counsel's file. Because a complete and accurate record is essential to determine the constitutional adequacy of a condemned client's trial and sentence, *see, e.g.*, *People v. Alvarez*, 14 Cal. 4th 155, 196 n.8 (1996); *People v. Howard*, 1 Cal. 4th 1132, 1166 (1992), habeas counsel must be sure she has a fully corrected copy of the certified record on appeal and the entirety of trial counsel's file, as well as the files of any investigators who worked with the defense team at trial. It is only through a thorough review of the corrected trial record and the defense team's files that habeas corpus counsel begins to understand what the case is really about, what the defense team did and did not do at trial, and the scope of work that will be necessary to comply with this Court's policies.

Record correction is prone to delay because it requires several parties – appellate counsel, the District Attorney, and the trial court – to collaborate and ultimately agree on any corrections to the record. And the large volume of trial counsel's file in a typical capital case means that significant logistical planning is often needed to coordinate the location, inspection, inventory, and shipping of many boxes to habeas counsel. If there were two defense attorneys or multiple investigators who worked on the case at trial, locating and retrieving multiple sets of files can be even more laborious. A detailed review of both the record and trial counsel's file is a prerequisite to carrying out a competent investigation that will develop any potentially meritorious claims. In particular, of course, a review of trial counsel's entire file is crucial

[1] Citations are to the statutes as amended by Proposition 66 unless otherwise indicated.

to raising any claims of ineffective assistance of counsel. Delays in obtaining these foundational documents necessarily mean delays in all of the work that depends on careful review of these documents.

Client and family records. In addition to reviewing the corrected record and trial counsel's file, counsel must request and review records that were not obtained by trial counsel. These typically include records from schools, doctors and hospitals, former employers, and various federal and state agencies.[2] Some requests are made within California, but often counsel must reach far beyond the State's borders to seek records from across the country, or even from other countries. Even the most urgently worded requests are rarely enough to speed up the wheels of bureaucracy, and counsel may have no choice but to wait months to receive relevant records. Such records, however, are vital because they contain first-hand evidence of important events in the life of a client and his or her family – the foundation of the penalty-phase investigation – and they show the ineffectiveness of trial counsel in failing to uncover them. *See Wiggins*, 539 U.S. at 523-24 ("Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards"). These records can radically reshape the complexion of a case, as they did in *Williams v. Taylor*, where the high court quoted from horrific passages of the petitioner's juvenile records:

> "The home was a complete wreck . . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was

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[2] This Judicial Council's contract with the California Appellate Project to collect and preserve records relevant to the cases of unrepresented condemned inmates pending appointment of habeas counsel reflects the Court's understanding of the importance of these sometimes ephemeral documents, which are all too easily lost or destroyed if not obtained early on.

> impossible to step any place on the kitchen floor where there was no trash. The children were all dirty and none of them had on under-pants. [Petitioner's parents] Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them . . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey."

529 U.S. at 395 n.19 (2000) (quoting juvenile records); *see also Doe v. Ayers*, 782 F.3d 425, 436 (9th Cir. 2015) (holding that trial counsel's failure to obtain defendant's prison records constituted deficient performance and contributed to counsel's ineffectiveness at the penalty phase); *Bloom v. Calderon*, 132 F.3d 1267, 1274 (9th Cir. 1997) (discussing evidence of mental illness documented in psychiatric and jail reports that trial counsel deficiently failed to obtain). Rushing the record collection process, as Proposition 66 aims to do with its deadlines, risks leaving records such as these uncovered and repeating the same harms to the client that flowed from trial counsel's failure to obtain them initially.

Lay witness declarations. Once the relevant materials have been reviewed and habeas corpus counsel has identified potentially meritorious issues, the postconviction team can begin the process of contacting, establishing rapport with, and interviewing witnesses. A typical capital case includes scores of witnesses to be interviewed, many of whom live across the country and, in some cases, abroad. Multiple interviews (necessitating rounds of planning and logistical coordination) may be needed before an investigator can ask a witness about deeply personal events relating to her family or her past. *See Doe*, 782 F.3d at 437 (noting that "most people" do not "volunteer deeply painful, shameful information" in the first instance). Establishing relationships that support the disclosure of these stories is an integral part of habeas representation. In the case of witnesses who do not speak English, the process may be further slowed by the need to have their

statements officially translated. *See* Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings in the California Supreme Court, § 1.3 (Guidelines for Fixed Fee Appointments) (listing non-English speaking witnesses as a factor affecting fee categories).

Expert consultations and declarations. Retaining and consulting with experts is another crucial part of the process. Habeas counsel works with ballistics experts, DNA experts, crime scene reconstruction experts, and others, to help analyze the evidence presented (or not presented) at the guilt phase. *See* Guidelines for Fixed Fee Appointments, § 1.3 (listing forensic testing and analysis of evidence as a factor affecting fee categories); *In re Richards*, 63 Cal. 4th 291, 309 (2016) (relying on expert opinion regarding false evidence at trial); Return at 11, *In re Vicente Benavides Figueroa*, No. S111336 (filed on June 12, 2015) (Respondent conceding after presentation of expert opinions and medical evidence developed in state postconviction proceedings that "the evidence regarding the sexual assault . . . cannot now be relied upon").[3] Counsel also works with mental health and social history experts on mitigation and other penalty-phase claims. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945, 949-50 (2010) (relying in part on the "well-credentialed expert's assessment, based on between 12 and 16 hours of interviews, testing, and observations [citation] that Sears suffers from substantial cognitive impairment" in remanding for lower court to reassess prejudicial impact of

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[3] Amicus curiae requests that the Court take judicial notice of this and other publicly filed court records cited in this Brief. *See* Cal. Evid. Code § 452(e). Courts commonly take notice of court orders, pleadings, briefs, and other records filed in the courts of this State and of the United States. *See People v. Sanchez*, 12 Cal. 4th 1, 85 n.10 (1995), *overruled on other grounds by People v. Doolin*, 45 Cal. 4th 390, 421 n.22 (2009); *People v. Putney*, 1 Cal. App. 5th 1058, 1063 n.4 (2016); *Khodayari v. Mashburn*, 200 Cal. App. 4th 1184, 1196 (2011).

trial counsel's deficient penalty-phase performance) (footnote omitted); *see also Hamilton v. Ayers*, 583 F.3d 1100, 1117, 1132 (9th Cir. 2009) (failing to retain a mental health expert and to "provide[ ] the expert with the information needed to form an accurate profile" was prejudicially deficient where defense counsel was on notice that defendant suffered from mental health problems; listing cases to that effect).

It is not possible to determine which experts to retain, let alone to actually retain them, until counsel has concluded a thorough review of the records discussed above. Other preparatory steps may be required, as well. In guilt-phase matters, counsel often needs a court order to allow experts to review the physical evidence. *See* Cal. Penal Code § 1054.9(c) (providing that a court may grant a habeas petitioner access to physical evidence upon the filing of a qualifying writ or motion). For mental health and social history experts, counsel must provide scores of records and allow the experts sufficient time to review those records and to meet with and conduct testing of clients. Without time for habeas counsel to vet, consult, and collaborate with experts, the courts will be denied the technical analysis that is essential to evaluating both guilt and penalty claims.

Discovery. As the investigation proceeds, counsel must also obtain discovery materials, including those that could have been, but were not, obtained by trial counsel. *See* Cal. Penal Code § 1054.9; *Barnett v. Super. Ct.*, 50 Cal. 4th 890, 898-99 (2010); *In re Steele*, 32 Cal. 4th 682, 693 (2004). The preferred course is for the parties to resolve all discovery matters informally. *Steele*, 32 Cal. 4th at 691-92. Often, however, habeas counsel is not provided with all requested discovery to which she is entitled, and must file a discovery motion in superior court, followed in some cases by a petition for writ of mandate. This process can take months, if not years, to complete. *See, e.g.*, *Sturm v. Super. Ct.*, No. C82847, 2007 WL 416660, at *1 (Cal. Ct. App. Feb. 7, 2007) (almost two and a half years passed between the filing of

Mr. Sturm's discovery motion in superior court and the Court of Appeal's ruling on his petition for writ of mandate); *In re Bryant*, No. A711739 (Los Angeles Sup. Ct.) (ongoing litigation pending in the superior court on discovery motion filed on June 15, 2015). Without discovery, habeas counsel may remain unaware of key evidence indicating police or prosecutorial misconduct, among other issues. The process of developing the factual record through discovery is so important to the responsibilities of state habeas counsel that the legislature enacted a statute to facilitate it. Cal. Penal Code § 1054.9. Proposition 66, however, threatens counsel's ability to obtain this discovery in time to place it before the court.

Juror interviews and declarations. Interviewing jurors is another time-intensive task that cannot begin until habeas counsel has solidified her understanding of how events unfolded at trial. Facts suggesting juror misconduct may present themselves on the record, in trial counsel's file, through interviews with other lay witnesses, or during preliminary document collection. To follow up on these facts, postconviction counsel may have to litigate no-contact orders that were put in place decades earlier just to uncover potential misconduct. Juror-related investigation may also become entangled in the web of governing regulations, and thereby delayed. *See* Cal. Civ. Proc. Code § 237 (outlining the process for petitioning the court for juror information). Interviewing jurors and obtaining declarations is an indispensable step in raising juror misconduct claims. *See, e.g.*, Order to Show Cause, *In re James Robinson*, S044693 (issued on Oct. 1, 2014, regarding several instances of alleged juror misconduct as described in juror declarations).

Initial habeas corpus petition. Finally, habeas counsel must draft and file the habeas petition itself. This requires marshalling massive amounts of information – thousands of pages of trial transcripts and other records from the time of trial, all of the records that have been collected in the course of

the investigation, dozens of witness declarations, highly technical expert declarations – and using it to craft a compelling and persuasive petition that fairly presents all meritorious legal claims and places all relevant facts before the state court. *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011); *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). Impediments to counsel's completion of the preceding tasks will affect the quality and thoroughness of the petition.

Informal briefing and evidentiary hearings. Looking further ahead in the process, the Proposition's truncated timelines erode the opportunity for informal briefing or an evidentiary hearing to fully develop claims. The Proposition allows superior courts only one year to resolve petitions from the time they are filed, except in cases where an additional year is needed "to resolve a substantial claim of actual innocence." Cal. Penal Code § 1509(f). Yet far more time is required to file further informal briefing, file formal pleadings,[4] prepare for and hold an evidentiary hearing, and issue written findings of fact. *See, e.g.*, *In re Bacigalupo*, 55 Cal. 4th 312 (2012) (Court issued an order to show cause in March 2001 and referee did not file his report until June 2009 after holding multiple hearings and taking copious testimony); *In re Kenneth Earl Gay*, S130263 (Court issued an order to show cause in August 2008 and referee issued findings of fact in November 2015); *In re José Francisco Guerra*, S134332 (Court issued an order to show cause in January 2012 and the case remains ongoing in Los Angeles Superior Court); *In re Ignacio A. Tafoya*, S120020 (Court issued an order to show cause in January 2009 and the case remains ongoing in Orange County Superior Court); *In re Steve Allen Champion*, S065575 (Court issued an order to show cause in February 2002 and referee issued findings of fact in March

[4] Informal and formal briefing on claims raised in the habeas corpus petition is essential to clarify and define the issues in dispute for the court.

2009). By imposing deadlines that make it effectively impossible for the superior courts to carry out all the evidentiary proceedings and legal analysis required for granting relief, Proposition 66 sends a message that the judiciary should view these pleadings as formalities to be rushed through and not as a proper focus of the courts' reasoned consideration.

Client abandonment. Completing the core tasks outlined above is challenging enough when habeas counsel do not simultaneously have to bear heavy non-capital caseloads and when cases are assigned to competent counsel who work diligently on the claims. Unfortunately, this description does not apply to all appointed counsel. *See Sanders*, 21 Cal. 4th at 708-09 (describing situations in which counsel can be considered to have abandoned a client); *see also Maples v. Thomas*, 565 U.S. 266 (2012). In *Sanders,* this Court established an exception to the bar on untimely petitions where "counsel abandons his or her client during the postconviction period, failing to conduct a reasonable investigation and file a petition if the facts so warrant." 21 Cal. 4th at 720.

The situation addressed in *Sanders* is all too common. *See, e.g.*, Docket (Register of Actions): *People v. Randall Clark Wall*, S044693;[5] Docket (Register of Actions): *People v. John Cunningham*, S051342;[6] Docket (Register of Actions): *People v. Demetrius Charles Howard*, S196958;[7]

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[5]http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1776455&doc_no=S044693 (last visited Feb. 27, 2017) (initial habeas counsel's appointment vacated almost six years after appointment, with Court referring initial counsel to the State Bar).

[6]http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1783102&doc_no=S051342 (last visited Feb. 27, 2017) (initial habeas counsel's appointment vacated more than eight years after appointment, with Court referring initial counsel to the State Bar "in light of [initial counsel's] apparent abandonment of his condemned client").

[7]http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&

Docket (Register of Actions): *People v. Richard Leon*, S056766.[8] Under Proposition 66, an abandoned client's petition would be considered untimely one year from the appointment of initial habeas counsel. Even if, as Intervenor suggests, some form of equitable tolling may be available in certain situations, *see* Preliminary Opposition of Intervenor at 37, the Proposition risks drastically narrowing the rule embraced in *Sanders*. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (noting that equitable tolling is available only if a litigant can show "he has been pursuing his rights diligently" and that "some extraordinary circumstance stood in his way") (internal quotation marks omitted).[9] Proposition 66 thus threatens to curtail the right "to reasonable access to the courts, and to the assistance of counsel" for clients abandoned by counsel. *Sanders*, 21 Cal. 4th at 719, 723 ("If a death row prisoner can show he or she is otherwise entitled to relief due to an error in his or her trial, the cause of justice is hardly advanced by the

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doc_id=1993423&doc_no=S196958 (last visited Feb. 27, 2017) (over seven years passed from initial habeas counsel's appointment to the time the Court appointed second substitute counsel).

[8]http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1788509&doc_no=S056766 (last visited Feb. 27, 2017) (initial habeas counsel's application to withdraw granted over six years after appointment).

[9] Albert Holland was an exceptional petitioner by any measure: "Holland not only wrote his attorney numerous letters seeking crucial information and providing direction; he also repeatedly contacted the state courts, their clerks, and the Florida State Bar Association in an effort to have [his lawyer] Collins – the central impediment to the pursuit of his legal remedy – removed from his case. And, the *very day* that Holland discovered that his AEDPA clock had expired due to Collins' failings, Holland prepared his own habeas petition *pro se* and promptly filed it with the District Court." *Holland*, 560 U.S. at 653. Various mental, emotional, logistical, and material impairments tend to put such organized diligence beyond the reach of most condemned petitioners.

highest court in the State of California refusing even to consider the claim because the prisoner's former attorney abandoned the case at a time state law required him or her to be conducting a reasonable investigation into issues of potential merit.").

* * *

The factors that make the tasks described above intensely time-consuming – many of which depend on the cooperation of entities and individuals beyond counsel's control – cannot simply be dispelled by legislative fiat.[10] Instead, Proposition 66's accelerated timelines may force habeas counsel to sacrifice the completion of core tasks, leaving the state postconviction record underdeveloped. *See Pinholster*, 560 U.S. 170. Short-changing state court review will, in turn, shift procedural problems and delays downstream. *See Jones v. Chappell*, 31 F. Supp. 3d 1050, 1066 (C.D. Cal. 2014) ("When [habeas] counsel is appointed by the State, investigation of potential claims is hampered by underfunding, which in turns slows down the federal habeas review process . . . . Finally, even after filing a petition for federal habeas review, many inmates, often because of deficiencies rooted in the State's process, must stay their federal cases to exhaust claims in state court."), *overruled on other grounds by Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

If condemned inmates are left to proceed into federal court with an under-developed state court record, they will point to deficiencies in California's postconviction process to explain why federal courts should

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[10] Moreover, California's large death row population makes this state's postconviction procedures uniquely challenging compared to other states' postconviction procedures. The sheer number of death-sentenced individuals far exceeds the number of qualified counsel, the certification of the record alone takes years, and by the time state postconviction counsel undertakes the necessary investigation and preparation of the habeas petition, witnesses have died, files have been lost, and records have been destroyed.

consider constitutional claims that were developed substantially in federal proceedings, but were never fully presented or considered by the state courts due to Proposition 66's accelerated timelines. Principles of comity, finality, and federalism are ill-served when state courts are not given a full and fair opportunity to review a claim and correct any constitutional violation in the first instance. *Pinholster*, 560 U.S. at 185.

In sum, slashing the time available to investigate and file an initial habeas petition will not put a dent in the main drivers of postconviction delay, but will limit condemned inmates' ability to raise meritorious claims before the state courts and likely give rise to additional problems later on, particularly on federal review.

B. The Bar on Successive Petitions Will Undermine Condemned Inmates' Constitutional Rights.

The new time limitation for filing an initial petition must be considered in conjunction with the new bar on successive petitions, which would prevent condemned inmates from raising certain claims – including those that allege constitutional violations – if the supporting evidence is discovered after the initial petition is filed. Cal. Penal Code § 1509(d). This bar raises the stakes for the initial investigation and filing, since that pleading will become the sole opportunity an individual has to raise many categories of core claims in either state or federal court. *See Walker v. Martin*, 562 U.S. 307, 315-16 (2011) (noting that federal courts cannot review on the merits any claim that is barred by an independent state procedural rule).

Proponents make much of the exception for those petitioners who can raise a substantial claim of actual innocence, *see, e.g.*, Prelim. Opp'n of Intervenor at 34, but this argument ignores the range of fundamental constitutional rights a habeas petitioner is entitled to vindicate through the use of the Great Writ. *See Sanders*, 21 Cal. 4th at 703-04 ("Despite the

substantive and procedural protections afforded those accused of committing crimes, the basic charters governing our society wisely hold open a final possibility for prisoners to prove their convictions were obtained unjustly. [Citations.] A writ of '[h]abeas corpus may thus provide an avenue of relief to those unjustly incarcerated when the normal method of relief – *i.e.*, direct appeal – is inadequate' . . . . "); *In re Harris*, 5 Cal. 4th 813, n.6 (1993) ("[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside . . . and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.") (internal quotation marks omitted).[11] Procedural protections are necessary to ensure the fairness and accuracy of criminal proceedings and thus are integral to the proper functioning and legitimacy of the judicial system, but Proposition 66 gives such constitutional violations scant consideration where they are not connected to claims of actual innocence or ineligibility for the death penalty. *See Lankford v. Idaho*, 500 U.S. 110, 127 (1991) (observing that suspension of procedural protections impairs proper functioning of adversary process, increasing error and possibility of incorrect results); *Strickland*, 466 U.S. at 686-87 (noting importance of procedural

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[11] Intervenor also ignores the fact that in homicide cases, the average time to exoneration nationwide is over a decade. National Registry of Exonerations, Race and Wrongful Convictions in the United States, 7 (Mar. 7, 2017), *available at*: https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf (last visited March 8, 2017). State misconduct – a factor in seventy percent of homicide exonerations over the past thirty years – also extends the average time required to overturn a wrongful conviction by several years. *Id.* at 6 ("Official misconduct in criminal cases is under-reported because, by its very nature, most misconduct is deliberately concealed – and much if not most remains hidden."). Accelerating postconviction investigation and appellate review with an eye to hastening executions is unlikely to facilitate the careful scrutiny required to identify wrongful convictions.

protections to adversarial testing process and just results); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (same).

One group of petitioners who would have no remedy under Proposition 66 are those who learn of *Brady*[12] or *Giglio*[13] material after filing an initial petition, but do not have a claim of actual innocence or ineligibility. For example, under Proposition 66, the Court would have to deny successor petitions like the one filed in *Bacigalupo* without any consideration of the merits. 55 Cal. 4th 312. In that case, evidence was uncovered after the filing of a first petition that the prosecution had wrongfully suppressed witness statements indicating that Miguel Bacigalupo's participation in the capital offense was prompted by threats from a Colombian drug cartel. *Id.* at 334-35. Finding a reasonable probability that this evidence would have resulted in a non-capital sentence, this Court granted Mr. Bacigalupo relief from the judgment of death. *Id.* at 336.

Judicial intervention in cases like this – *i.e.*, those that involve constitutional violations, but where a petitioner might not be able to show actual innocence or ineligibility by a preponderance of the evidence – is crucial to enforcement of the prosecution's ongoing obligation to disclose material, favorable evidence. *See Bacigalupo*, 55 Cal. 4th at 336 ("the prosecution's disclosure obligations extend to evidence that is material on either guilt or penalty"). *Brady* evidence often takes years to uncover – the state, having failed to disclose such evidence at trial is hardly likely to be more forthcoming after having secured a conviction and death sentence. *See supra* note 11. Because of the time-consuming challenges inherent in

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[12] The petitioner in *Brady v. Maryland*, 373 U.S. 83 (1963), which concerned the suppression of evidence material only to the penalty phase of his trial, would be unable under Proposition 66 to raise his claim on a successor petition.

[13] *Giglio v. United States*, 405 U.S. 150 (1972).

uncovering *Brady* violations, Proposition 66 would all but foreclose such claims in the initial petition, and then drastically limit them in successor filings.

Similar concerns arise in cases involving *Batson* violations. In *Foster v. Chatman*, 136 S. Ct. 1737, 1743-46 (2016), for example, the Supreme Court reversed a death judgment based on a *Batson* violation that did not come to light until years after the conviction and death sentence. In cases in which the prosecutor's jury selection notes are essential to resolution of the claim, the truncated timelines imposed by Proposition 66 critically reduce the likelihood of their timely discovery and presentation in an initial state petition. *See* Order on Pet'rs. Mot. for Disc. at 1, *Morris v. Carey*, No. CV 06-00354-GEB-JFM (E.D. Cal. Dec. 14, 2007);[14] *see also Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) (observing the importance of prosecutor notes for establishing race as factor in peremptory strikes). The societal interest in eliminating racial bias in the process of jury selection makes adequate judicial oversight of that process essential. *See, e.g.*, Docket (Register of Actions): *People v. George Brett Williams*, S156682;[15] *People v. Williams*, 56 Cal. 4th 630, 700 (2013) (Liu, J., dissenting) (describing the "careful scrutiny that trial courts and reviewing courts must apply to ferret out unlawful discrimination in jury selection – a harm that compromises the right of trial by impartial jury, perpetuates group stereotypes rooted in, and reflective of, historical prejudice, and undermines public confidence in adjudication") (internal quotation marks and citation omitted).

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[14] https://www.gpo.gov/fdsys/pkg/USCOURTS-caed-2_06-cv-00354/pdf/USCOURTS-caed-2_06-cv-00354-10.pdf (last visited March 10, 2017).

[15] http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1888360&doc_no=S156682 (last visited March 1, 2017) (order to show cause issued on *Batson* claim).

The limits on successive petitions imposed by Proposition 66 similarly bar other claims raised to vindicate fundamental constitutional rights. Claims alleging the admission of false evidence, *see, e.g.*, *In re Richards*, 63 Cal. 4th 291 (2016); extreme instances of ineffective assistance of counsel, *see, e.g.*, *Buck v. Davis*, 137 S. Ct. 759 (2017), *In re Hardy*, 41 Cal. 4th 977 (2007) (granting relief on successive petition on the basis that trial counsel's failure to gather and present evidence of third-party culpability prejudiced the petitioner during the penalty phase of his trial, while rejecting the same claim with respect to the guilt phase), and *In re Jones*, 13 Cal. 4th 552 (1996); juror misconduct, *see, e.g.*, *Young v. Gipson*, 163 F. Supp. 3d 647, 729-32 (N.D. Cal. 2015); or claims of prosecutorial or judicial misconduct would all be barred when evidence of the violations emerged only after resolution of the initial petition, unless actual innocence or ineligibility could also be established by a preponderance of the evidence. The stringent limitations Proposition 66 imposes on capital habeas petitioners deprive them of access to the courts and, thereby, deprive them of protections guaranteed to them by the Constitution.[16]

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[16] Proposition 66 would also have the anomalous effect of allowing non-capital inmates the ability to challenge an illegal sentence without having to overcome procedural bars, but prohibiting capital inmates from doing the same unless they have a claim of ineligibility. *See In re Huffman*, 42 Cal. 3d 552, 555 (1986) ("The writ [of habeas corpus] will lie where the trial court has exceeded its jurisdiction by sentencing a defendant 'to a term in excess of the maximum provided by law' . . . .) (internal citation omitted); *In re Harris*, 5 Cal. 4th 813, 838-40 (1993) (collecting cases where the Court allowed inmate challenges to illegal sentences raised in habeas); *In re Birdwell*, 50 Cal. App. 4th 926, 931 (1997) ("[A]n unauthorized sentence may be corrected at any time."); *People v. Sanchez*, 245 Cal. App. 4th 1409, 1417 (2016) (same) (citing *People v. Scott*, 9 Cal. 4th 331, 354 (1994); *Montgomery v. Louisiana*, 136 S. Ct. 718, 723 (2016) (defendant permitted to challenge sentence as cruel and unusual punishment 50 years after his arrest). Thus, capital inmates with a valid constitutional basis for penalty-

C. Proposition 66 Violates the Equal Protection Rights of Capital Petitioners.

Proposition 66 violates the Equal Protection Clauses of the state and federal Constitutions because the differences in the way it treats capital and non-capital inmates are not rationally related to the advancement of any legitimate governmental interest. Indeed, the differences in treatment Proposition 66 proposes for capital, compared to non-capital, inmates actually work against proponents' stated goal of accelerating capital postconviction litigation. Where the means are not rationally related to the legislation's ends, the law fails under equal protection analysis.

Rational-basis review "require[s] the court to conduct a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals." *Newland v. Bd. of Governors*, 19 Cal. 3d 705, 711 (1977). A difference in treatment between two groups must have "a fair and substantial relation to the object of the legislation." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). "[T]he standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). "[A]n independent and legitimate legislative end" for the difference in treatment is required so "that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

By contrast, where the difference in treatment does not advance a legitimate governmental interest – and, especially, where it harms the interest that it is supposed to be advancing – the legislation cannot satisfy rational

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phase relief, discovered after the initial petition, will be left without a remedy, while non-capital inmates with claims of an illegal sentence will remain free to raise such claims in successive petitions. This is yet another example of how Proposition 66 strips capital inmates of fundamental rights retained by non-capital inmates.

basis review. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1000 (N.D. Cal. 2010) (rejecting, on rational basis grounds, Proposition 8's restrictions on same-sex marriage: "None of the interests put forth by proponents relating to parents and children is advanced by Proposition 8; instead, the evidence shows Proposition 8 disadvantages families and their children."). "A statutory classification which does not bear a rational relationship to the purpose which the statute is intended to serve violates the equal protection clause." *Parr v. Mun. Ct.*, 3 Cal. 3d 861, 864 (1971).

Proponents of Proposition 66 attempt to rebut the equal protection claim in two interrelated ways. First, they assert that capital and non-capital petitioners are not similarly situated. Respondent's Preliminary Opposition to Petitioner's Amended and Renewed Petition for Extraordinary Relief at 22-23; Respondent's Return at 51; Prelim. Opp'n of Intervenor at 45. Second, they claim that the differences in the way the law treats the groups are justified by differences between the groups. Resp. Prelim. Opp'n at 24; Prelim. Opp'n of Intervenor at 46-47.

To proponents' first point, no two groups of people are the same in all respects. It does not resolve the question to say, as proponents do, that capital and non-capital inmates have been deemed dissimilar in prior cases. *See, e.g.*, Resp. Prelim. Opp'n at 22-23; Resp. Return at 51. The cases on which Respondent relies – *People v. Manriquez*, 37 Cal. 4th 547, 590 (2005), *People v. Jennings*, 50 Cal. 4th 616, 690 (2010), and *People v. Virgil*, 51 Cal. 4th 1210, 1289-90 (2011) – considered whether capital and non-capital defendants were similarly situated *with respect to particular* trial procedures, not whether they were similarly situated with respect to access to the courts' habeas jurisdiction. These cases do not – and could not – stand for the proposition that capital and non-capital inmates will always be differently situated with respect to every law that might distinguish between them.

Moreover, identifying a difference between two groups is only the first

part of the equal protection analysis, and proponents also fail at the next step: explaining how the difference in treatment of the two classes is justified by the differences that may exist between the groups. Proponents are quite clear about why they think capital and non-capital inmates may be treated differently under the law. Respondent asserts the groups are not similarly situated because capital petitioners receive more resources for their defense than non-capital petitioners do. Resp. Prelim. Opp'n at 23. Intervenor agrees about the difference in resources and states: "It is no exaggeration to say that this difference is more important than all other differences combined." Intervenor's Return to the Order to Show Cause at 48 (internal citations omitted).

But the equal protection question is whether the differences between the two groups justify the particular difference in treatment that the law imposes. *See People v. Brown*, 54 Cal. 4th 314, 328 (2012) (describing equal protection inquiry as "not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged.") (internal quotations marks omitted); *see also Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (noting that a legislative distinction cannot stand if its "purported justifications" make "no sense in light of how the [government] treat[s] other groups similarly situated in relevant respects").

Proponents fail to show that the different legal treatment Proposition 66 applies to capital and non-capital inmates – *i.e.*, the means of the legislation – is rationally related to achievement of a goal, legitimate or not. Without a rational connection between means and ends, the legislation cannot survive rational-basis review. For example, misdemeanants are different from felons, but this Court struck down – on rational-basis grounds – a law that gave "preferential treatment for felons over misdemeanants" in obtaining a community college teaching credential.

Newland, 19 Cal. 3d at 707. The poor fit between means and ends, even under rational basis review, is what caused this Court to find an equal protection violation in *Newland*: "This statutory discrimination against misdemeanants can claim no rational relationship to the protective purpose of section 13220.16." *Id.* at 712. Likewise, same-sex and opposite-sex couples differ in some respects, but a law denying marriage licenses to same-sex couples failed rational basis review because the difference in legal treatment was not rationally related to a legitimate governmental interest. *Perry*, 704 F. Supp. 2d at 997-1002.

Are the means rationally related to the ends? Admittedly, there is a high bar for showing that a legislature's means are so unlikely to satisfy its goals that a rational relationship does not exist between means and ends. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462-64 (1981). But rational-basis review is not a rubber stamp.[17] And Proposition 66 is one of those cases where the legislation is so patently unworkable that the reasons identified for distinguishing between the two groups – capital and non-capital inmates – cannot be justified by the pursuit of a legitimate goal. That

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[17] The state Constitution may provide for an even more searching version of rational basis review than its federal analogue. *People v. Barrett*, 54 Cal. 4th 1081, 1144, (2012) (Liu, J., dissenting) (applying greater scrutiny under state equal protection analysis than federal equal protection equivalent). *See also Warden v. State Bar*, 21 Cal. 4th 628, 664-65 (1999) (Brown, J., dissenting) (endorsing "greater precision" in state, than federal, equal protection analysis and "requiring courts to scrutinize the means the Legislature chose to advance its purposes. Rather than merely 'rubberstamping' the legislative categories at issue," courts should "engag[e] in a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals and . . . ask[ ] whether the legislative classifications substantially advance the legislative purposes without being grossly overinclusive or underinclusive.") (internal citations and quotation marks omitted).

is because the difference in treatment actually impedes the very goals the Proposition purports to pursue. Petitioners explain why Proposition 66's treatment of successive petitions violates equal protection. This amicus brief shows why the initiative's deadlines for filing and deciding capital inmates' initial petitions fail rational-basis review.[18]

Hastened timelines for filing and deciding initial petitions. Under Proposition 66, capital inmates would be limited to one year to file a habeas petition, with the clock starting to run once counsel is appointed. Non-capital inmates have no such time limit – they must simply file within a "reasonable" amount of time. *See Walker*, 562 U.S. at 310. In addition, courts reviewing capital habeas petitions would be required to issue a decision in one year for capital cases, or two years if there is a substantial claim of actual innocence; meanwhile, courts reviewing non-capital cases have no deadlines imposed on their review.

Proponents justify these differences on the grounds that the hastened timelines will accelerate postconviction proceedings. *See, e.g.*, Intervenor's Return at 51. But the means are not rationally related to the ends because the truncated deadlines will actually make cases take longer to resolve. That is in large measure because the principal cause of delay is not the time it takes to research and write the petition, but the time it takes for the appointment of habeas counsel – which is itself a function of counsel's scarcity.[19] The

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[18] The Court's unique familiarity with the adjudicatory matters Proposition 66 seeks to regulate makes it particularly well suited to evaluate whether the means chosen actually advance the professed purposes of the initiative or merely serve the purpose of disadvantaging the group burdened by the law.

[19] California Commission on the Fair Administration of Justice, Final Report (2008), at 123, 134 (warning eight to ten years passes, on average, from the death judgment to the appointment of habeas counsel, the longest leg in the twenty-five year timeline of postconviction review); *Jones v.*

truncated timelines imposed by Proposition 66 will *worsen* the existing scarcity of qualified lawyers willing to accept appointment in capital habeas cases, thus making the most significant driver of delay even worse. Letter Br. of Amicus Curiae California Appellate Project In Supp. of Pet'r's Req. for Writ of Mandate at 7; Amicus curiae letter of California Appellate Defense Counsel at 2 (describing the "career- and life-altering choice" that attorneys will face in deciding whether to cease accepting appointments in criminal cases so as to avoid being forced to take capital cases against their conscience or better judgment).[20] Proposition 66's accelerated deadline for

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Chappell, 31 F. Supp. 3d at 1057-59 (describing significant delays in appointment of state habeas counsel and noting that 159 inmates "have been awaiting appointment of [habeas] counsel for more than ten years" and 76 inmates with completed direct appeals "have already waited an average of 15.8 years . . . for habeas counsel to be appointed"); *see also In re Morgan*, 50 Cal. 4th 932, 937-38 (2010) (noting delay in appointment of habeas counsel and identifying "serious shortage" of qualified attorneys as a source of the difficulty: "Quite few in number are the attorneys who meet this court's standards for representation and are willing to represent capital inmates in habeas corpus proceedings. The reasons are these: First, work on a capital habeas corpus petition demands a unique combination of skills . . . . Second, the need for qualified habeas corpus counsel has increased dramatically in the past 20 years[.]").

[20] Arthur L. Alarcón & Paula Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 Loy. L.A. L. Rev. S41, S84 (2011) (reporting that most attorneys are unwilling to take state capital habeas cases for fear of being unable to comply with the three-year filing timeline, resulting in the loss of the condemned inmate's opportunity to present his claims in federal court); Appendix A, Court of Appeal Projects of California, *Survey: Proposition 66 Death Penalty Initiative and Potential Effects on Court of Appeal Panel* 3, 5-8 (Sept. 9, 2016) (noting that seventy-four percent of all respondents – including those who are and are not currently handling a capital case – would not accept appointment to a capital case, even if their refusal required them to resign from the appellate panel; explaining reasons for refusal include time pressure, financial strain, tedium, lack of capital experience, constraints of Proposition 66 timelines, and resistance to

filing the initial petition will directly increase delays in getting counsel appointed, thus thwarting the very purpose of the hastened deadline.

Proposition 66's deadlines for filing and deciding cases would slow down the proceedings in other ways, too. Where the initial habeas petition (and associated factual development) is rushed and underdeveloped – as it will be, both because of the fast filing deadlines and the tight limits on how long the court may take to hold hearings and consider the claims in the initial petition – the task of reviewing the proceedings and correcting errors made in the initial petition will slow the work of the state's appellate courts, who will review any initial denials. Under Penal Code section 1509.1(b), on the appeal of an initial petition, these errors and omissions will presumably have to be examined by another qualified attorney, separate from the first habeas attorney. This subsequent attorney must be appointed by the judiciary and given the time and resources to become sufficiently familiar with trial counsel's performance to determine whether initial habeas counsel missed any ineffective-assistance-of-counsel claims that should have been raised. Quite obviously, this process will create delays. The time this attorney must take to review the case – not to mention the time the appellate courts must take to review this attorney's pleadings – will be increased as a direct result

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coercion); Cal. Assembly and Senate, Standing Committees on Public Safety, Hearing of May 17, 2016 (statement of Joseph Schlesinger, Exec. Dir., California Appellate Project) *available at*: https://ca.digitaldemocracy.org/hearing/1155?startTime=1120&vid=nbx8O9koBKE ("[P]roponents claim to have a better idea. They say, 'I know, let's impose a lot of draconian time limits on the entire process, that will make taking a capital appeal or habeas a really, really unattractive proposition. Sure, that will probably dry up the entire pool of lawyers now willing to take the cases, but here's the thing: we'll just force other lawyers to take these cases.' Does anybody seriously think that will work? You can't force people to take a case or work they don't want to take. And if anybody's going to resist something like that, it's going to be a group of lawyers.").

of the haste necessitated by the Proposition's accelerated filing and decision deadlines for the initial petition.

Proponents may claim that no delays will accrue in state court because there is an overall cap of five years on state proceedings. But such a claim would ring hollow in light of proponents' repeated assertions that the time to decide habeas cases can extend beyond the five-year deadline if the delay is justified. *See infra* at Section III.D. Moreover, even assuming there would be a hard cap on the time required for state proceedings, Proposition 66 has no control over how long the federal courts take to resolve cases. As noted above, the rapid deadlines Proposition 66 imposes on state habeas proceedings will require that quality, thoroughness, and accuracy are sacrificed for speed. In so doing, these deadlines will extend the time it takes for the federal courts to adjudicate these claims. Where there are errors and omissions in the rushed state habeas proceedings, federal courts will have to expend even more time and effort on the cases, further countering the Proposition's attempt to accelerate postconviction proceedings.

Furthermore, one of the stated goals of Proposition 66 was to "qualify the State of California for the handling of federal habeas corpus petitions under Chapter 154." Cal. Gov't Code § 68660.5. Qualifying for "fast-track" treatment would shorten the timeline for cases to be decided in federal court, thus speeding up the postconviction litigation. But a state can qualify for "fast-track" status only if its habeas system meets a number of benchmarks related to the appointment of counsel, as described by federal statutes and regulations. *See, e.g.*, *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996) (holding that "the Act establishes a quid pro quo relationship: A state seeking greater federal deference to its habeas decisions in capital cases must, by appointing competent counsel to represent indigent petitioners, further ensure that its own habeas proceedings are meaningful.") By worsening the scarcity of available and qualified state habeas attorneys,

Proposition 66 would directly undermine the State's chances of qualifying for "fast-track" status, because there will be fewer available and qualified attorneys and because those who remain will not have "the time required for developing and presenting claims," as necessitated by the implementing regulations of Chapter 154. *See* 28 C.F.R. § 26.21.[21]

In sum, the impracticable deadlines imposed on capital petitioners will result in time-consuming errors and omissions that slow, rather than advance, the goal of accelerating the proceedings, and these same deadlines will worsen the scarcity of qualified attorneys who can represent capital petitioners, thus exacerbating the most significant source of delay. In short, Proposition 66 will actually make the postconviction system *slower* than the status quo. Where, as here, the legislative means are directly at cross-purposes with the legislative ends, the legislation merely burdens a disfavored group to no rational end and thus cannot satisfy rational-basis review.

D. Proposition 66 Cannot Be Rescued Through Minor Procedural Adjustments or Creative Judicial Interpretation.

Proponents of Proposition 66 deflect concerns about its practical and legal infirmities with the assurance that this Court will interpret away the timelines imposed on the judiciary and that the Judicial Council will devise

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[21] Proposition 66's attempt to relax the qualifications of habeas counsel will likely exacerbate the problem. Cal. Gov't Code § 68665(b) mandates "reevaluating" standards this Court applies in determining the qualifications of capital habeas counsel, "to avoid unduly restricting the available pool of attorneys . . . . " As suggested by the Court's observation in *In re Morgan*, cited in footnote 19, *supra*, the qualifications required of counsel by this Court reflect the broad range of skills required for competent capital habeas representation. Assigning counsel without such skills cannot further the effort to qualify this state for the "fast-track" provisions of the AEDPA.

some means of making the new law functional. *See, e.g.*, Prelim. Opp'n of Intervenor at 39 (arguing that the "place to work out the details of implementation of this question of judicial administration is the Judicial Council"); Resp. Prelim. Opp'n at 13 (suggesting that the Court can "adopt[ ] a construction of the statute that would avoid constitutional friction"); Br. of Amicus Curiae Ass'n of Deputy District Attorneys at 21 ("To the Extent That the Time Limitations Imposed by Proposition 66 Appear to Interfere with the Court's Inherent Authority, They Should Be Interpreted as Directory Only").

These infirmities, however, are part of the basic blueprint of the Proposition and cannot be remedied by tinkering with the details of the initiative's implementation. Proponents go to great lengths to argue that there is flexibility built into Proposition 66 that will allow courts to bend the rules in the interests of justice. These arguments may be superficially reassuring, but, in failing to meaningfully address the specific problems detailed in the briefing of petitioners and amici, these arguments do not withstand closer consideration.

The hard deadlines for resolving capital litigation that the initiative's sponsors promised to voters are now, in Intervenor's words, just "[d]irection to reorder priorities so as to resolve capital cases within a reasonable time." Prelim. Opp'n of Intervenor, at 40. Intervenor assures this Court that, even if the superior courts take more than two years to decide an initial petition, they will not have to worry about a writ of mandate unless the delay is "*unjustified*," Prelim. Opp'n of Intervenor, at 40. (The text of 190.6(e) says the delay must be "extraordinary and compelling," not just "justified," to avoid mandamus. Cal. Penal Code § 190.6(e).)[22] Proponents further

[22] A separate problem with the initiative is its muddled language. The first sentence of section 190.6(e) applies only to the time limits set forth in section 190.6(b), which governs direct appeals and not habeas petitions. The

promise that the harsh bar on successive petitions will not be as inflexible as it sounds. "Details of its implementation can and should await concrete cases," Intervenor urges. Prelim. Opp'n of Intervenor, at 36. These "details," it is worth mentioning, are the due process procedures upon which our clients' lives and the justice system's integrity depend.

Claims about the Proposition's flexibility ignore the unequivocal statutory language to the contrary, focusing instead on generalized statements scattered throughout the law and untethered to the specific provisions that are at issue here. *See* Br. of Amicus Curiae Ass'n of District Attorneys at 23-24. Yet even the scattered sections amici point to for this supposed flexibility do not suggest that courts retain any "inherent authority," *id.*, when it comes to managing their dockets in a way that provides for both the fair adjudication of capital cases and the timely consideration of all other critical non-capital matters they are charged with deciding.[23] *See* Ltr. in Support of Pet'r's Req.

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second sentence of section 190.6(e) states: "If a court fails to comply without extraordinary and compelling reasons justifying the delay, either party or any victim of the offense may seek relief by petition for writ of mandate." Given its placement, and the absence of any language specifying its scope, this sentence is subject to two possible readings: either a writ of mandate is available whenever any court exceeds any of the deadlines described in any subdivision of section 190.6, or else it is available only where a court exceeds the deadline for deciding the direct appeal. The first reading seems more in keeping with the overall design of the initiative, but amicus does not assume that means it is the correct interpretation.

[23] Despite the severe impact that Proposition 66 is poised to have on the state judiciary as a whole – and particularly on the superior courts in Los Angeles, Riverside, and San Bernardino counties – this Court may not have another opportunity to rule on whether the initiative's reorganization of capital and non-capital judicial affairs crosses constitutional boundaries. The burdened judicial entities are unlikely to raise the issue through litigation and non-capital litigants whose cases are mired in system-wide delays will likely seek out avenues for relief that do not require initiating an independent constitutional challenge, especially in the very court system that is failing to

for Writ of Mandate from Los Angeles County Bar Association at 4-5. Indeed, Intervenor does not shy away from announcing that one of the Proposition's main goals is to impose a new prioritization scheme on the superior courts, effectively dictating their work flow on a case-by-case basis. *See* Prelim. Opp'n of Intervenor at 38 ("Experience in other jurisdictions indicates that [five years] is sufficient time [to complete full state review of capital judgments] even in the most complex cases when those cases are given *the priority that they deserve*.") (emphasis added).[24]

Proponents make the same claims about the Proposition's supposed flexibility to defend their assertion that it does not violate the original jurisdiction of the appellate courts. Despite proponents' assertions about flexibility, however, the text and structure of the Proposition show that it does violate the constitutional provisions that govern habeas jurisdiction. At its core, the basic scheme of the Proposition is to funnel all capital habeas cases

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timely resolve their initial dispute.

[24] The two jurisdictions on which Intervenor relies for this proposition are not comparable to California insofar as they had nowhere near the number of individuals in need of capital habeas representation during the relevant time periods. In 1997, the year that Timothy McVeigh was sentenced, there were fifteen individuals being held under a federal sentence of death. Tracy L. Snell, Bureau of Justice Statistics, Bulletin: Capital Punishment 1997 at 1 (Jan. 14, 1999), *available at*: https://www.bjs.gov/content/pub/pdf/cp97.pdf. In 2004, the year that John Allen Muhammad was sentenced, there were 23 individuals being held under a sentence of death by the State of Virginia. Tracy L. Snell, Bureau of Justice Statistics, Bulletin: Capital Punishment, 2005 at 5 (Jan. 30, 2007), *available at*: https://www.bjs.gov/content/pub/pdf/cp05.pdf. Amicus curiae requests that the Court take judicial notice of these figures pursuant to Evidence Code section 452(h). The Bureau of Justice Statistics was created by federal statute in 1979 to, among other things, "collect and analyze statistical information, concerning the operations of the criminal justice system at the Federal, State, tribal, and local levels." 42 U.S.C. § 3732(c)(4). Government reports of this nature are proper subjects of judicial notice. *See Powell v. Super. Ct.*, 232 Cal. App. 3d 785, 795 n.7 (1991).

to the superior courts, thus eliminating the appellate courts' constitutionally guaranteed jurisdiction. This obviously raises original jurisdiction concerns. Proponents insist that, under Penal Code section 1509(a), the appellate courts can still hold on to cases that are filed in their original jurisdiction, provided there is "good cause" to do so. Even if one could get past this stunning admission that Proposition 66's language in fact impairs the constitutional jurisdiction of the appellate courts by requiring them to find good cause before they are permitted to keep a case, there would be the further problem that the appellate courts' attempts to conduct a meaningful review of whether "good cause" exists would take so much time and effort as to defeat the Proposition's requirement that the transfer decision be made "promptly." *See* Cal. Penal Code § 1509(a). And if the appellate courts conduct only cursory review, more in line with the Proposition's emphasis on speed, then "good cause" would not be a meaningful protection of the original jurisdiction of the appellate courts. This is one example of how the constitutional infirmities of the Proposition cannot be papered over by claims that it will be read flexibly.

The structure of the Proposition gives further notice that the appellate courts will lose their original jurisdiction. The detailed choreography the Proposition creates for habeas proceedings is predicated on the assumption that the superior court will decide the initial petition. Section 1509(f), for example, puts a hard deadline on the superior court's resolution of an initial petition, but provides no indication of what the deadline would be, if any, for an initial petition decided by this Court or the Court of Appeal. Similarly, section 1509.1 sets out the framework for appealing the denial of an initial petition, but it refers only to petitions decided in the superior court, making no mention of petitions decided in the appellate courts' original jurisdictions. And section 190.6(e) threatens mandamus when the case is not resolved quickly enough. Query: In the case of an initial petition entertained by this

Court, would this Court have to issue mandamus to itself if it exceeded the statutory decision deadline? Would the Court of Appeal issue the mandamus to this Court? Neither scenario is reasonable. Quite simply, the Proposition's structure reveals what proponents try to conceal: the Proposition will eliminate the constitutionally created original jurisdiction of the appellate courts over capital habeas matters. Here, as in other parts of the Proposition, proponents offer no plausible explanation for how the initiative could operate without contravening the Constitution.

Intervenor suggests that nothing would be lost if the appellate courts' original jurisdiction over habeas petitions were replaced by an appeal from a superior court's denial and a subsequent petition for review in this Court. Intervenor's Return at 26. The right to file an original habeas petition in any court, however, is so important a procedural safeguard that it is enshrined in the state Constitution. Filing an original petition in an appellate court relieves a petitioner of the obligation of returning to the very judge who may have committed or tolerated constitutional violations that occurred at trial. Under the new regime, appellate review would be limited to "law alone," Cal. Penal Code § 1235(a), a much narrower scope than that afforded initial petitions. Further, a petitioner would have little hope of gaining access to this Court's substantial body of experience and special expertise in adjudicating capital habeas claims. Because this Court will grant a petition for review in only a few narrow circumstances,[25] Proposition 66 would place the correction of error in capital cases – no matter how egregious or how dire

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[25] "The Supreme Court may order review of a Court of Appeal Decision: (1) When necessary to secure uniformity of decision or to settle an important question of law; (2) When the Court of Appeal lacked jurisdiction; (3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or (4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order." Cal. Rules of Court, Rule 8.500(b).

the consequences – largely beyond this Court's ability to remedy by granting review. It is unreasonable to expect that abbreviated timelines, conscription of inexperienced counsel, and the redirection of cases to overburdened superior courts will result in the attentive review that these cases have received in this Court and that they merit by virtue of their gravity and complexity.

IV. CONCLUSION

The Proposition imposes strict deadlines in an attempt to fulfill its promise to voters to speed up postconviction litigation. Proponents' attempt to reframe Proposition 66 as a font of flexible guidelines and standards is not credible. The Proposition's commitment to haste is antithetical to the level of judicial attention required in death penalty cases, where the deliberate deployment of judicial scrutiny "allow[s] each case the necessary time, based on its individual facts and circumstances, to permit this Court's careful examination of the claims raised" and is "the opposite of a system of random and arbitrary review." *People v. Seumanu*, 61 Cal. 4th 1293, 1375 (2015). If Proposition 66 possessed the flexibility that its proponents now claim, it would impose impossible and destructive timelines on litigants and the courts, only to turn around and declare those same timelines merely optional. The end result would not be judicial efficiency, but randomness and inconsistent enforcement in the judicial system.

The problems in California's capital postconviction system stem from a mismatch between the allocated resources and the staggering backlog of cases, constantly fed by an overly broad death penalty law. *See* California Commission on the Fair Administration of Justice, Final Report (2008), at 138-42 (discussing problems, including delay, that result from the breadth of California's post-1978 death penalty statute). Proposition 66 does nothing

to alter the fact that neither this Court nor the Judicial Council can reduce the volume of cases charged capitally in the trial courts, unilaterally increase the judiciary's budget, or create new judicial positions.[26] Shuffling money from one overburdened superior court to another will not be enough to plug the staffing shortfalls certain to follow from implementing Proposition 66.[27] *See* Br. of Amicus Curiae California Appellate Project In Supp. of Pet'r's Req. for Writ of Mandate at 4-5. Nor can these institutions simplify the inherently complex business of capital postconviction litigation, as laid out in detail above.

Proponents' claim of flexibility in Proposition 66 is thus revealed for

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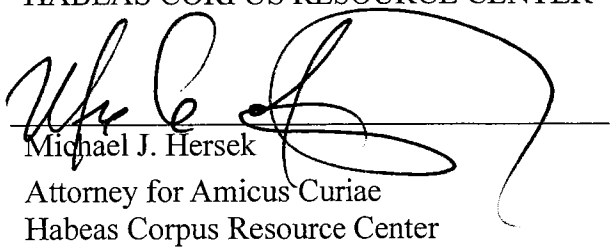
[26] *See* Cal. Gov't Code §§ 68502.5(a)(5) and (6) (Judicial Council can reallocate funds between courts, but Legislature must approve trial courts' budget), 69580-606 (setting forth the number of superior court judges for each county), 69614(c)(1) ("The Judicial Council shall report to the Legislature and the Governor on or before November 1 of every even-numbered year on the factually determined need for new judgeships in each superior court . . . . "), and 69619.5 ("The Legislature hereby ratifies the authority of the Judicial Council to convert 10 subordinate judicial officer positions to judgeships in the 2016-17 fiscal year when the conversion will result in a judge being assigned to a family law or juvenile law assignment previous presided over by a subordinate judicial officer . . . . ").

[27] The financial burden on counties to fund the shift of capital habeas cases to the superior courts would be enormous. Although Article XIII B, section 6(a) of the California Constitution requires the state to reimburse local governments for mandates imposed by the Legislature or any state agency, the courts have interpreted the term "Legislature" in this context as not including the people acting pursuant to the power of initiative. *See, e.g., California School Boards Ass'n v. State*, 171 Cal. App. 4th 1183 (2009) ("The State's constitutional duty to reimburse local governments for mandated costs does not include ballot measure mandates."). Competing budgetary commitments constrain the amount of funding the Legislature could devote to this purpose. *See, e.g., Brief of Loni Hancock, Mark Leno, and Nancy Skinner as Amici Curiae in Support of Ernest Dewayne Jones*, Case: 14-56363 (9th Cir. Mar. 6, 2015), ID: 9448794, DktEntry:36, at 35 ("Fiscal and political realities make clear that the funding needed to fix the dysfunctional death penalty system will not be forthcoming.").

what it is: a feint meant to distract from the Proposition's inherent structural flaws. There is no way to adhere to the plain terms of Proposition 66 without radically restructuring the business of the courts, either by adding staff, delaying other classes of cases, skimping on the review provided to capital cases, or – most likely – some combination of all three. And the attempt to implement this misguided measure appears destined to drag the system ever further off course.

Dated: March 30, 2017 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 

Michael J. Hersek
Attorney for Amicus Curiae
Habeas Corpus Resource Center

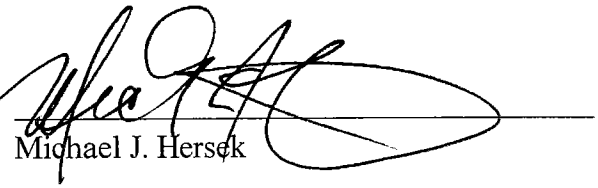
CERTIFICATE AS TO LENGTH

I certify that this Reply to the Informal Response contains 13,297 words, verified through the use of the word processing program used to prepare this document.

Dated: March 30, 2017

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 

Michael J. Hersek

APPENDIX A

COURT OF APPEALS PROJECTS OF CALIFORNIA, *SURVEY: PROPOSITION 66 DEATH PENALTY INITIATIVE AND POTENTIAL EFFECTS ON COURT OF APPEAL PANEL*

(SEPT. 9, 2016)

APPELLATE DEFENDERS, INC.
555 WEST BEECH STREET
SUITE 300
SAN DIEGO, CA 92101
(619) 696-0282
Fax: (619) 696-7789
E-mail: eaa@adi-sandiego.com

SURVEY: PROPOSITION 66 DEATH PENALTY INITIATIVE AND POTENTIAL EFFECTS ON COURT OF APPEAL PANEL

by Court of Appeal Projects of California
September 9, 2016

The California Court of Appeal projects have been investigating the potential effects on the panel of Proposition 66,[1] an initiative intended to expedite imposition of the death penalty. It is on the November ballot.

Among the various provisions of Proposition 66, one is of special concern to the projects – the provision for making acceptance of death penalty appointments a condition of membership on the Court of Appeal panel. New Penal Code section 1239.1, subdivision (b) would state:

> When necessary to remove a substantial backlog in appointment of counsel for capital cases, the Supreme Court shall require attorneys who are qualified for appointment to the most serious non-capital appeals and who meet the qualifications for capital appeals to accept appointment in capital cases as a condition for remaining on the court's appointment list. A substantial backlog exists for this purpose when the time from entry of judgment in the trial court to appointment of counsel for appeal exceeds six months over a period of twelve consecutive months.

Other effects, less direct, on Court of Appeal panels could flow from the proposed short time frames for handling certain aspects of death penalty cases under Proposition 66. These could make death penalty cases less attractive to counsel. This might put additional pressure on the Supreme Court to invoke the provisions of new section 1239.1(b) – and also increase the chance the attorneys would simply turn away from appointed appeals altogether.

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[1]The full text of Proposition 66 is at http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0096%20%28Death%20Penalty%29_0.pdf?.

SURVEYS ON EFFECTS OF INITIATIVE ON APPELLATE PANELS

2014 Survey

A 2014 proposal had similar provisions, although the proposal ultimately was withdrawn and never appeared on the ballot.[2] The projects investigated the potential effects of that proposal at the request of the Legislative Analyst. Their analysis potentially could have been put to use in ballot materials.

The projects approached the task through a survey of the attorneys most likely to be subject to the restrictions on Court of Appeal panel membership – those taking life without possibility of parole (LWOP) cases. There were 148 attorneys surveyed; of these, 107 (72%) responded.

The survey consisted of four questions:

> 1. Are you currently counsel in an automatic appeal or capital habeas proceeding?
>
> 2. Would you accept a capital appeal if that were a condition of remaining on the Court of Appeal panel? (Or, if you already have a capital appointment, would you accept another one when your responsibilities in the present one permit?)
>
> 3. If the answer to question 2 is NO, please briefly explain the reason.
>
> 4. If you were to accept a capital case governed by the terms of the proposed initiative, how would that affect your ability to handle non-capital appointments?

2016 Survey

To assess the situation in 2016, the projects replicated the 2014 survey, asking the 117 attorneys they considered eligible for LWOP appointments the same four questions that had been on the 2014 survey. A total of 94 attorneys answered – a response rate (80%) even higher than it had been in 2014. The full text of the 2016 survey is in Appendix A.

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[2]The 2014 proposal would have moved initial death penalty appeals to the Court of Appeal, instead of the Supreme Court. That provision is not part of the 2016 initiative.

RESULTS OF SURVEYS

The responses to questions 1 and 2 in 2014 and in 2016 can be compared in the following charts:

2014 Survey

Would you take a capital case (or another) if required under the initiative?	Number and % of those currently handling a capital case	Number and % of those not currently handling a capital case	Total
Yes	8 (27%)	19 (25%)	27 (25%)
No	22 (73%)	55 (71%)	77 (72%)
No response / unsure	0 (0%)	3 (4%)	3 (3%)
Number and % of all 107 respondents	30 (28% of all respondents)	77 (72% of all respondents)	107 (100%)

2016 Survey

Would you take a capital case (or another) if required under the initiative?	Number and % of those currently handling a capital case	Number and % of those not currently handling a capital case	Total
Yes	11 (46%)	15 (21%)	26 (28%)
No	8 (33%)	54 (77%)	62 (66%)
No response / unsure	5 (21%)	1 (1%)	6 (6%)
Number and % of all respondents	24 (26% of all respondents)	70 (74% of all respondents)	94 (100%)

In the two survey years, the percentages of respondents who currently have a death penalty case were very similar, as can be seen in the bottom line of the charts: 28% in 2014 and 26% in 2016.

The second and third columns of each chart show the answers of attorneys within each of the two groups, those with and without a current capital case.

*Attorneys who are **not** currently handling a capital case*

The responses among those who are not currently handling a capital cases were similar in 2014 and 2016: In 2014, 71% of those attorneys said they would not take a capital case even at the cost of losing their Court of Appeal panel membership. In 2016

their response hardened even further: 77% would not accept a compulsory death penalty appointment.

As in 2014, the projects must caution that it is one thing to answer a survey question and another to give up one's means of livelihood. The explanations offered in Question 3 (below) for declining a capital case will help the committee decide how to weigh a "no" answer. Reasons such as the contemplation of retirement and perceptions of the financial hardships entailed in death penalty cases may indicate "firm" decisions, lending some credence to "no" answers. Other reasons may be "softer," subject to change when the time for decision arrives.

Attorneys who are currently handling a capital case

In contrast to the non-capital attorneys just discussed, the group of attorneys who currently have a capital case gave dramatically different responses in 2014 and 2016. In 2014 that group was even slightly more adamant than the group who did not have a capital case, with 73% saying they would not accept a capital appointment under compulsion versus 71% for the non-capital case attorneys. The pattern flipped in 2016, when a plurality (46% of the group) said they would accept an appointment under the initiative and only 33% said they would refuse. A large percentage (21%), though small actual number (5), in the group of those with a capital case indicated indecision by not answering the question; there were zero skipped responses in that group in 2014.

The reasons for the change in 2016 are a matter of speculation. One consideration is that only 24 attorneys are in that group, and the sample may be too small to allow statistically meaningful results. A small amount of turnover in such a group – e.g., the recruitment of a few new attorneys and the retirement of some between 2014 and 2016 – and a change of mind on the part of only a few could alter the percentages significantly. Another possibility is that some attorneys were swayed by the fact that the initiative is actually qualified for the ballot in 2016 and therefore the prospect of losing a Court of Appeal livelihood is more "real" than it was in 2014.

All responding attorneys

Of all respondents, only 25% in 2014 and 28% in 2016 said they would take a capital case under the initiative. A strong majority, 72% and 66%, would decline. The number of undecided attorneys doubled from 3 in 2014 to 6 in 2016, but those could be insignificant figures, statistically.

As in 2014, the overall results throw serious doubt on the prospect that the initiative would make major inroads on the capital backlog. A sizeable majority of all attorneys (66% in 2016) say they would leave the Court of Appeal panel rather than

accept such an appointment. It is true that 15 who do not now have a capital case would accept one under the initiative, but the gain of such attorneys is to some extent countered by the loss of attorneys now accepting capital cases: 8 of the 24 respondents with a current capital appointment would not accept another under the initiative. Of course, we cannot necessarily assume the attorneys in either group would stick with the status quo if the initiative were out of the picture: some now in the "no current capital case" may decide to take one for reasons other than the initiative, and some who have a capital case now may decide not to take any more, regardless of the initiative. Whatever the ultimate gain – perhaps a few capital attorneys – it could come at an enormous price to the non-capital appointed counsel system.

ATTORNEYS' EXPLANATIONS FOR THEIR RESPONSES

In addition to the Yes-No questions (numbers 1 and 2) of the survey discussed above in the RESULTS section, Questions 3 and 4 probed for narrative explanations of the attorneys' answers, to help the projects better assess the effects of the initiative on their program. Question 3 asked attorneys who had answered that they would not accept an appointment under the initiative to explain the reasons for their position. Question 4 asked attorneys how being appointed to a death penalty case they had not sought would affect their ability to handle a non-capital workload.

Question 3: If you would not accept a death penalty appointment under the initiative, even though you had to resign from the Court of Appeal panel, explain the reasons.

This report breaks down the attorneys' reasons for refusing to accept a death penalty appointment under the initiative into several groups, which mirror those analyzed in 2014. Some representative answers in each group are shown below. All responses in full are in Appendix B.

Stress and pressure

> There are many attorneys who have the emotional fortitude necessary to handle the real-life professional demands of a capital appeal. At this point in my life and career, I am certain I am not one. I was involved in capital work earlier in my career, and it was exceptionally unpleasant, at times even making me physically ill.
>
> [The] consequences of failure are greater in capital cases, making the work substantially more stressful on counsel, another reason I would not want to handle such a matter.
>
> Briefly stated, these cases carry too many negatives, such as additional stress, financial penalties . . . and the tedium of working on only one case for months at a time.

Having handled capital cases in the past, I know how emotionally draining they are. I do not want to undertake another such case.

Time commitment

Capital appeals are extraordinarily time-consuming & require substantial [attention] to detail. Even now, Cal Supreme Ct applies pressure as to deadlines, & if overall process is supposed to be sped up under Prop 66, ability to get work done as court demands may simply not be feasible.

Capital cases are not the same as LWOP cases. They are more time consuming and require different and deeper knowledge and experience to represent the client effectively. Despite my experience with LWOP cases, I would not feel comfortable assuming the responsibility of representing someone sentenced to death.

Based on talking to many colleagues who have taken at least one capital appeal - they take over your life and practice.

I am a sole practitioner and cannot devote the kind of extended time a capital case requires – either physically or financially.

Taking a capital case is incompatible with managing a caseload of noncapital appointments. It is also a 10-15 year commitment I am unwilling to make at this point in my career.

Near retirement

I am in my sixties and am not too far from retirement. It would not make sense to take on a capital case that could go on for years.

I am not going to be practicing law the number of years it would take to process a capital appeal.

I would likely retire (or die) before the case was completed, and I don't feel right about starting something I can't finish.

I am 61 years old; I likely will be retiring from all work (and thus all court of appeal appointments), within the next five years anyway. If a condition of remaining on the Court of Appeal panel is that I take a death penalty case (which I doubt could be completed within my five-year time frame), then passage of this bill would simply expedite my retirement.

I am 74 years old and do not want to take on the responsibility of a capital appeal at this point in my life.

I am nearing retirement. . . . Were I not retiring, this would present a very difficult situation for me since the bulk of my practice is court-appointed appeals in the Courts of Appeal. If I wanted to continue working, and Proposition 66 went into effect, I would have to find another way to make a living, perhaps by shifting to civil appeals.

Financial sacrifice

> [G]iven how long it takes to resolve a capital case, I would be concerned that the length of appointment would create a financial burden on me and my family as compensation for my work would be stretched out over a greater period of time. ¶ I have learned that the attorneys who do reasonably well financially with capital appeals are those who take a lot of them, and there is a huge learning curve with the first capital appeal – I know attorneys who have tried it once, it was an economic disaster, and being "on call" for a capital appeal every some number of years is likely to be akin to the economic disaster. Additionally, to do a reasonably professional job in a capital appeal, one has to learn a highly complex, entirely new and constantly changing nationwide body of law, capital appeals – even more of an economic investment that I couldn't be paid for, an investment not worthwhile at this late stage of my career.
>
> [T]he current rate of pay is inadequate. 2) [R]isk that substantial number of hours would be cut from comp. claims, as Calif. Supreme Court regularly did to me in my prior capital cases.
>
> [Would be a] disruption of cash flow over time.
>
> I currently have two pending capital cases and have one completed. The case timelines are too long. The compensation is inadequate.

Time frames of initiative

> Prop. 66 severely compresses the time period for handling a capital case; it would be difficult to handle capital cases in such a compressed time period; it would be difficult to handle my other cases while being under the time pressure of a compressed period to handle a capital case.
>
> [A] capital appeal with the kind of compressed five-year time span in the proposed initiative would present enormous, sometimes all-consuming demands on my caseload for protracted periods of time, which would make it effectively impossible to plan a caseload intelligently; this is a problem I do not have with noncapital appeals. In addition to that, a capital appeal compressed into such a short timespan would be so all-consuming that it would destroy the variety of appeals, which is much of what holds my interest in what is otherwise a difficult field (since even the best of us rarely wins an appeal), with nothing to balance that out.

Resistance to coercion

> I'm too close to retirement. But even if I weren't, I believe that forcing an attorney to accept any type of case as a condition of remaining on the court's appointment panel is just wrong.
>
> I would consider challenging the legality of requiring us to take capital cases as a condition for being on the appointment panel. Many of my cases involve mental health issues in the civil and quasi civil/criminal arenas, and I don't see why I should have to give those cases up to take a capital case for which I have had no experience. I should not be penalized for the fact that I have been deemed qualified to handle a few LWOP cases.
>
> Autonomy in general & specifically as it relates to ability to decide what cases to accept is one of few benefits of being a panel atty. . . . I personally do not decline any case except

based on workload. However, the idea that the government would force me to take a capital case in order for me to get other work of the type I have done competently for 20 years disturbs me. Even more disturbing is that they want me to do it so they can kill my client sooner, when the purpose of my representation is to prevent that. A lost LWOP appeal continues the status quo, but lost capital appeal triggers death. All of this perturbs me enough that I might not take another capital case if Prop 66 passes. If that means I am off the COA panels, so be it.

This is a highly personal, moral and ethical, decision. I would not allow anyone to dictate, force, or bribe me to take a capital case that was not of my own choosing.

I am not interested in doing capital appeals. I consider this measure involuntary servitude.

Opposition to death penalty

I do not believe in the death penalty and would not participate in the system.

I will not participate in the death penalty on moral grounds.
Out of religious conviction, [I] could not take part in a death penalty system.

I don't want to become a box that can be checked off before a person can be executed; . . .
I don't want to be forced to do something that I have moral qualms about.

I am opposed to the death penalty & will do nothing to help in its imposition. If that means finding another line of work, I will. There is a reason why no will take these cases & forcing people to take them is wrong for so many reasons. . . . I will not be part of that system or help the state put a person to death. The death penalty should be abolished.

For moral, religious and emotional reasons, I will not participate in defending capital cases. I reached this decision after having represented defendants at both the capital trial and appellate levels.

Question 4: If you were to accept a capital appointment under the initiative, how would that affect your ability to take non-capital cases?

For the most part, the attorneys' answers reflect the commonsense position that a capital appeal would make significant inroads on an attorney's non-capital work, if not overwhelm the practice completely for long periods of time. This means that, even if the attorneys protect their Court of Appeal panel membership by taking a capital case, they may simply be unavailable a great deal of the time. Sample estimates of the effect of capital appointments on non-capital work include:

[It] would make it impossible to handle non-capital appointments.

As a sole practitioner, I could not balance court of appeal cases with the work necessary to work on a capital case.

Since my case-load is limited, would completely eliminate ability to accept non-capital appointments.

Taking on a case of the magnitude of most capital appeals would greatly decrease my ability to handle non-capital appointments--especially given the time constraints on capital appeals in the proposition.

The time spent on the capital case would take away time I would spend on other cases, so existing non-capital cases would likely be delayed, and I might have to decline appointment on non-capital cases during certain periods while the capital case is pending. The longer time frame for the capital case, and greater delays in being able to submit claims, could well cause financial burdens that would necessitate seeking other work that pays at a higher rate and/or more regularly, which would also negatively impact my ability to handle non-capital cases. . . . Time is a finite resource, and time spent on one case cannot be spent on another. While I would take a capital case if I must in order to stay on the appellate panels, my experience with that case could affect future decisions.

I have done a capital appeal. It was a massive undertaking (and it didn't even have a huge record or a high statewide profile). I was essentially married to it for long stretches of time. It was extremely disruptive to my efforts to keep up with my noncapital appellate caseload during those periods of time, and after those stretches were done, my caseload then had a large number of overdue noncapital appellate matters that essentially had to be done all at the same time. It also significantly complicated my efforts to manage my noncapital appellate workload -- and at that time, my noncapital appellate workload was much less complex than it is now.

I've . . . handled a capital appeal before. It made it very difficult to work on non-capital appointments at the same time given how all-consuming the case was.

[It] would proportionately reduce my ability to handle non-capital appointments. Probable ratio: 5 to 10 LWOP appeals vs. one capital appeal.

I would have to reduce my caseload by an estimated 50%.

It would limit the number of new appointments I could accept, and likely cause other time-related problems with deadlines in current cases.

A death case would overtake my current caseload given the huge learning curve to become competent to represent a client. I am not willing to undertake the amount of training necessary to become competent. In addition, given the size and complexity of the cases, it would be impossible to maintain even close to the amount of cases I currently accept from the panels. This work is difficult enough as it is; forcing us to take death cases is insult to injury. Again, if this passes, I will not take a death case and, if forced to, will begin looking for another line of work.

It would limit my ability to handle non-capital appointments. From my understanding capital cases are extremely time-consuming. I am strapped for time enough as it is handling all of the non-capital cases I have. There simply is no room in my schedule to accommodate something as big as a capital case. Something would have to give.

> I would end up taking fewer non-capital cases – and there would be an overload of non-capital cases and too few attorneys to take them.
>
> It would drastically affect my ability to accept non-capital cases. I have spoken to several capital counsel who have completely stopped accepting non-capital cases as a result of their death penalty cases.
>
> This would be devastating to my career. . . . I would seriously consider retiring early if this was mandated.

All responses are reproduced in full in Appendix C.

CONCLUSION

To summarize:

The Proposition 66 survey of LWOP-eligible attorneys obviously dealt with a matter of great concern to those attorneys, given the 80% rate of responses and the heartfelt tone of many comments. Some of the main findings include:

- Among the group of those who have no capital case at present, the overwhelming majority – 77% – would not accept one even if rejecting it meant ineligibility for Court of Appeal panel membership. This is even more adamant than that group's position in 2014, when 71% gave that answer. A minority of the group (a total of 15 in 2016), however, *would* accept a capital case .

- Among the 24 respondents who have a capital case at this time, 33% would not accept a new one if Proposition 66 passes. This is a considerable shift from that group's position in 2014, when 73% said they would not accept another capital case under the terms of the proposed initiative. The 33% (8 attorneys) who would decline nevertheless would be a loss to the capital panel, partially offsetting the 15 non-capital attorneys discussed above who would join that panel after the initiative.

- Among *all* respondents, 66% would not accept a new capital case under Proposition 66.

- Those Court of Appeal panel attorneys who accept a capital appointment are likely to be unavailable for Court of Appeal cases for extended periods of time, despite the fact their panel membership is preserved by their agreeing to take a capital case.

Although further study of the factors affecting the decision to accept or reject a death penalty case is necessary if more precise predictions are desired, these results suggest the initiative will likely have only a limited effect on the availability of capital counsel.

On the other hand, unless implemented in a cautious way designed to minimize damage to the Court of Appeal panel, the initiative could be extremely destructive to that panel, potentially draining away its top ranks and, by ripple effect, the lower ones as well.

Elaine A. Alexander, Executive Director
Appellate Defenders, Inc.

Jonathan Soglin, Executive Director
First District Appellate Project

Jonathan Steiner, Executive Director
California Appellate Project, Los Angeles

George Bond, Executive Director
Central California Appellate Program

Dallas Sacher, Executive Director
Sixth District Appellate Program

Laurel Thorpe, Deputy Director of the Central California Appellate Program, participated in the preparation of this report.

PROOF OF SERVICE

1. I am over 18 years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place.
2. My business address is: Habeas Corpus Resource Center, 303 Second Street, Suite 400 South, San Francisco, California 94107.
3. Today, I mailed from San Francisco, California the following document(s):

- Application for Permission to File Brief of Amicus Curiae;
- Brief of Amicus Curiae Habeas Corpus Resource Center in Support of Petitioners Ron Briggs and John Van De Kamp
- Appendix A

4. I served the document(s) by enclosing them in a package or envelope, which I then deposited with the United States Postal Service, postage fully prepaid.
5. The package or envelope was addressed and mailed as follows:

Jose Alfonso Zelidon-Zepeda
Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA
(415) 703-5500
Counsel for Respondent

Kent S. Sheidegger
Criminal Justice Legal Foundation
2131 "L" Street
Sacramento, CA
(916) 446-0345
Intervenor

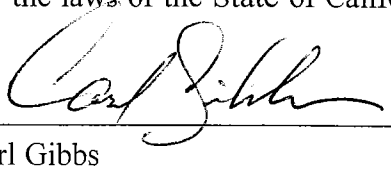
Christine Marie Von Der Ahe Rayburn
Orrick, Herrington & Sutcliffe, LLP
2050 Main Street, Suite 1100
Irvine, CA
(949) 567-6700
Counsel for Petitioner

Lillian Jennifer Mao
Orrick, Herrington & Sutcliffe, LLP
1000 Marsh Road
Menlo Park, CA
(650) 614-7400
Counsel for Petitioner

As permitted by Policy 4 of the California Supreme Court's *Policies Regarding Cases Arising from Judgments of Death*, counsel intends to complete service on Petitioner by hand-delivering the document(s) within thirty calendar days, after which counsel will notify the Court in writing that service is complete.

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

Date: March 30, 2017



Carl Gibbs