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.

S238309

APPLICATION FOR PERMISSION TO FILE SUPPLEMENTAL AMICUS CURIAE BRIEF AND SUPPLEMENTAL BRIEF OF AMICUS CURIAE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY, AND NINE (9) OTHER ASSOCIATIONS REPRESENTING DEPUTY DISTRICT ATTORNEYS, IN SUPPORT OF RESPONDENTS JERRY BROWN, GOVERNOR OF CALIFORNIA, XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, CALIFORNIA'S JUDICIAL COUNCIL, AND DOES I THROUGH XX

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APPLICATION FOR PERMISSION TO FILE SUPPLEMENTAL AMICUS CURIAE BRIEF

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

Amicus curiae - the Association of Deputy District Attorneys for Los Angeles County, and associations representing Deputy District Attorneys from nine (9) other counties – hereby request permission to file the enclosed supplemental amicus curiae brief in support of Respondents Jerry Brown, Governor of California, Xavier Becerra, Attorney General of California, California's Judicial Council, and Does I Through XX. On January 10, 2017, while this matter was in the preliminary briefing stage, amicus curiae filed with this Court an initial application for permission to file an amicus curiae brief and a brief of amicus curiae. Since that time, this Court issued an order to show cause and formal briefing was filed by the parties and additional arguments were presented for this Court's consideration. Amicus curiae now requests permission to file the enclosed supplemental amicus curiae brief to address these additional arguments.

As indicated in the initial application for permission to file an amicus curiae brief, the associations listed below represent deputy district attorneys from nine (9) counties in California. Deputy district attorneys are the public prosecutors acting on behalf of the People, and thus fulfill the critical responsibility of filing and prosecuting criminal charges against defendants, including special circumstance murders which involve the death penalty as an available punishment. While the elected district attorneys are responsible for the ultimate decision of whether to seek the death penalty in a special circumstance murder case, the assigned deputy district attorneys shoulder the responsibility for prosecuting such a case to trial, holding these capital defendants accountable, and seeking justice for their victims.

Consequently, this case presents issues of statewide interest to California prosecutors. Your amicus is familiar and experienced with the issues presented here, specifically the provisions of Proposition 66 that seek to amend and reform the death penalty procedures for the State of California, and with all of the briefing that has been filed with the Court in this case, including all of the briefing that has been filed since amicus curiae's initial application and brief.

Your amicus believes that the succinct and targeted supplemental briefing presented in the attached brief will be of benefit to the Court in its evaluation and resolution of this case, clarifying the issues (particularly the additional arguments raised since the issuance of the order to show cause) and the potential ramifications of this Court's decision on a matter of statewide impact.

Pursuant to California Rules of Court, rule 8.520(f)(4), applicant states that no party nor counsel for a party in this appeal authored in whole or in part the proposed supplemental amicus brief, nor made any monetary contribution to fund the preparation or submission of the proposed supplemental amicus curiae brief. Applicant further states that no person or entity made any contribution to fund the preparation or submission of the proposed supplemental amicus brief other than amicus curiae and its members.

Accordingly, applicant asks this Court to permit the filing of the attached supplemental amicus curiae brief and allow the deputy district attorneys of California to appear through their above-named association representatives as amicus curiae in support of respondents.

Date: March 29, 2017

Respectfully submitted,

/ s /

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY

PROCEDURAL SUMMARY

California voters approved Proposition 66 in the November 8, 2016, statewide election, and the Secretary of State certified Proposition 66 on December 16, 2016. On December 19, 2016, Petitioners filed a Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief, raising several causes of action attacking the constitutionality of Proposition 66 and requesting that this Court declare Proposition 66 null and void in its entirety. On December 20, 2016, this Court issued a stay of the implementation of all provisions of Proposition 66, and ordered preliminary briefing of the issues raised by Petitioners.

On January 9, 2017, "Californians to Mend, Not End, the Death Penalty - No on Prop. 62, Yes on Prop. 66" filed a motion to intervene. During January 2017, preliminary briefing was completed by all of the parties. Amicus curiae submitted its initial amicus brief on January 10, 2017. This Court issued an order to show cause on February 1, 2017, and on the same date, the Court also granted the motion to intervene. In its order to show cause, the Court set a briefing schedule for returns, replies, and submission of amicus curiae briefs.

In the returns and replies, the parties litigated additional arguments not raised in the preliminary briefing, and amicus curiae now respectfully submits this supplemental amicus brief to address a few of those additional arguments.

ARGUMENT

INTRODUCTION

With the rejection of Proposition 62 and the passage of Proposition 66, California voters chose to enact meaningful, common-sense reforms to the death penalty -- a punishment they clearly and consistently support. Despite this consistent public support and desire for reform, death penalty opponents, and now the instant petitioners, are attempting to subvert the will of the voters and frustrate the imposition of just punishment through fearmongering, baseless claims, obstruction, and delay. In other words, petitioners are utilizing the same tactics that resulted in our broken death penalty system in the first place in order to defeat the measure specifically designed to reform it. Amicus curiae, associations who represent thousands of prosecutors across our State, respectfully request that this Court reject petitioners' meritless claims, deny the requested injunctive relief, and respect the clear intent of the voters in rejecting Proposition 62 and enacting Proposition 66.

I.
THE TIME LIMITS IMPOSED BY PROPOSITION 66 DO NOT IMPAIR THE JURISDICTION OF CALIFORNIA'S COURTS

Petitioner's assertion that the time limitations of Proposition 66 violate separation of powers is based upon their predictions of how long appeals *should* take, which is in turn based upon the present condition of how long appeals *do* take. Yet, the current state of affairs is the result of intentional foot dragging on the part of defense counsel who would rather appeal-by-delay than on the merits. Petitioners' assertion that the five-year time limit for state appeal and habeas is "impractical or impossible" is wishful thinking without factual support.

Petitioner duly lists the steps involving in the state appeal and state habeas, but in numbering or listing them in sequence, does not acknowledge that the state appeal and state habeas would occur concurrently, not sequentially. Moreover, the contention that "in California, these steps take much longer" begs the very question behind the purpose of that time limit provision of Proposition 66.

The activities that Petitioner claims would have to be "squeezed into a five-year timeframe" include appointment of counsel, which is currently delayed by five or more years under the existing system. Because Proposition 66 requires the Judicial Council to develop and maintain a roster of qualified attorneys, as a practical administrative matter appointment will take no more time than what is needed to notify the panel coordinator of the appointment. And, once counsel is appointed and in receipt of the trial court records, it is not unreasonable to expect counsel to be able to review the trial record and prepare an opening brief within a year's time.

Without sounding too Horatio Alger-esque, anything is possible if one tries. The defense bar simply does not want to try. They are opposed to the completion of the process and for that reason, obstruct the process through delay.

Petitioner's claim that Proposition 66's deadlines "will immediately create an impracticable, inefficient system that will force the courts to unduly prioritize capital cases at the expense of other types of matters" and throw the courts into "chaos," fails based on Petitioner's own exhibits. Petitioner's Exhibit 3, the *2016 Court Statistics Report, Statewide Caseload Trends 2005-2006 Through 2014-2015*, indicates that criminal habeas filings totaled 7,898 cases in 2014-2015. During that time period, criminal felony filings represented 214,088 cases and misdemeanor filings totaled 922,730. Assuming generously that *none* of the criminal habeas filings

were capital cases and that the existing burden was added to by a new habeas filing for every single one of the 747 inmates on death row as of September 2015, the increased caseload for criminal courts would be less than one-tenth of one percent. Even when assuming all facts in favor of petitioner's argument, and excluding court caseloads for civil, family, juvenile cases and criminal infraction filings, the statistical increase in court caseloads is minimal if not insignificant.

The time limits imposed by Proposition 66 do not impair the jurisdiction of California courts.

II.
BECAUSE CAPITAL DEFENDANTS ARE NOT SIMILARLY SITUATED TO NONCAPITAL DEFENDANTS, PROPOSITION 66 DOES NOT VIOLATE EQUAL PROTECTION

Because capital defendants are not similarly situated to noncapital defendants, a law does not violate equal protection by denying capital defendants certain procedural rights given to noncapital defendants. (*People v. Cruz* (2008) 44 Cal.4th 636; *People v. Johnson* (1992) 3 Cal.4th 1183, 1242–1243; *People v. Allen* (1986) 42 Cal.3d 1222, 1286–1287.)

Here, Petitioners complain that the restrictions on successive petitions in the absence of evidence of actual innocence violates equal protection. In this regard, noncapital defendants and capital defendants are not similarly situated. A defendant sentenced to death is automatically appointed counsel and an investigator, all of which are paid for by the State. He or she is afforded automatic direct appeal and collateral review by the Supreme Court. And, a condemned inmate has an absolute right to appeal a denial of an initial habeas petition. Even this Court, in *In re Reno* (2012) 55 Cal.4th 428, established rules for exhaustive petitions specific to capital habeas cases. To claim that capital and noncapital defendants are

similarly situated disregards the numerous procedural differences that already exist between them.

Although the specific issue has not previously been brought before this court, it has been addressed in other states. In both *State v. Beam* (1988) 115 Idaho 208 and *Lankford v. State* (1995) 127 Idaho 100, the Idaho Supreme Court rejected equal protection challenges to an Idaho statute that establishes time limitations for post-conviction proceedings in capital cases that did not apply in noncapital cases. The court, in *Beam,* said, "We hold the legislature's determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for [Idaho Code section] 19-2719. The legislature has identified the problem and attempted to remedy it with a statutory scheme that is rationally related to the legitimate legislative purpose of expediting constitutionally imposed sentences. Accordingly, [Idaho Code section] 19-2719 does not violate the defendant's constitutional right to equal protection, and the trial court correctly denied [the defendant's] post-conviction petition." (*Beam, supra*, at p. 213.)

In *Corcoran v. State* (2005) 827 N.E.2d 542, the Supreme Court of Indiana denied a similar equal protection claim. The petitioner in that case claimed that imposing a post-conviction filing deadline on persons sentenced to death when there was no counterpart for noncapital sentences violated the Equal Protection Clause. The Court denied the claim stating, "We believe that having a separate set of procedural requirements for the collateral review of the convictions and sentences of capital and noncapital litigants easily meets the rational basis and reasonableness requirements necessary to pass federal Equal Protection Clause and state Equal Privileges and Immunities Clause muster." (*Id.* at p. 546.)

Similar claims have also been rejected by the United States Ninth Circuit Court of Appeals. In *Massie v. Hennessey* (9th Cir. 1989) 875 F.2d

1386, the petitioner had pleaded guilty to a special circumstances murder and was sentenced to death. When his conviction and sentence were automatically appealed pursuant to California Penal Code section 1239, subdivision (b), Massie moved to dismiss the appeal on the grounds that he had the right to waive appeal. That motion was denied. Massie appealed the denial on equal protection grounds since state law allowed a noncapital defendant to waive appeal. The Ninth Circuit Court of Appeals held that a capital and noncapital defendant are not similarly situated and that there was no equal protection violation since the law did not treat similarly situated defendants differently.

Because capital defendants are not similarly situated to noncapital defendants, Proposition 66 does not violate equal protection.

CONCLUSION

For the reasons set forth above and in the initial amicus brief filed on January 10, 2017, amicus curiae respectfully request that the Petition be denied in its entirety.

Dated: March 29, 2017

Respectfully submitted,

/ s /

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CERTIFICATE OF WORD COUNT
Case No. S238309

The text of the ***SUPPLEMENTAL BRIEF OF AMICUS CURIAE*** consists of 1,531 words as counted by the Microsoft Word Program used to generate the said ***SUPPLEMENTAL BRIEF OF AMICUS CURIAE.***

Executed on March 29, 2017.

/ s /

MICHELE HANISEE
President
Association of Deputy District Attorneys for Los Angeles County Association

PROOF OF SERVICE BY MAIL
Case No. S238309

I, the undersigned, say: I am a resident of or employed in the County of Riverside, over the age of 18 years and not a party to the within action or proceeding; that my residence or business address is 3960 Orange Street, California 92501.

That on March 29, 2017, I served a copy of the paper to which this proof of service by mail is attached, **APPLICATION FOR PERMISSION TO FILE SUPPLEMENTAL AMICUS CURIAE BRIEF AND SUPPLEMENTAL BRIEF OF AMICUS CURIAE**, by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Postal Service mailbox, in the City of Riverside, State of California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on March 29, 2017, at Riverside, California.