JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
January 29, 2019

To
Rules and Projects Committee

From
Family and Juvenile Law Advisory Committee
Hon. Jerilyn Borack, Co-Chair
Hon. Mark Juhas, Co-Chair

Subject
Appointment Request of VAWEP Sub-Committee Members

Action Requested
Please Approve appointment of VAWEP Sub-Committee Members

Deadline
April 1, 2019

Contact
Lisa Chavez
Senior Analyst
916-643-7021 phone
Lisa.chavez@jud.ca.gov

Tracy Kenny
Attorney
916-263-2838
Tracy.Keny@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends the appointment of one additional non-advisory committee member to the Violence Against Women Education Project (VAWEP) subcommittee of Family and Juvenile Law Advisory Committee to ensure that the membership remains represents key domestic violence prevention stakeholders.

Background

The Violence Against Women Education Project Planning Committee was formed as a working group of the Family and Juvenile Law Advisory Committee in 2002 and held its first meeting in 2003. Membership in the group was by invitation of the co-chairs of the Family and Juvenile

Law Advisory Committee and was designed to ensure that it could fulfill its charge to oversee the planning process for education programs funded by the federal STOP (Services, Training, Officers, Prosecutors) Violence Against Women Formula Grant Program via the Governor's Office of Emergency Services (OES).

In 2014, the Judicial Council took action to make the VAWEP Planning Committee a standing subcommittee of the Family and Juvenile Law Advisory Committee. At that time, the council approved the membership of the committee and charged it with providing guidance and evaluation of VAWEP grant funded projects and making recommendations to improve court practice and procedure in domestic violence cases as directed by the Family and Juvenile Law Advisory Committee. Since that time some members of the committee have moved on from the organizations that they were representing and as a result, the committee does not have members from those constituencies (see attached roster for current members of the subcommittee).

Recommendation

The Family and Juvenile Law Advisory Committee recommends that appointment of Karen Fletcher to the VAWEP Subcommittee (see attached Request for Appointment for specific biographical information about these proposed members).

Rationale for Recommendation

The purpose of the Violence Against Women Education Project grant is develop and provide trainings and conduct other activities dedicated to increasing the knowledge of tribal and state court personnel in cases involving violence against women. The Violence Against Women Education Project grant requires that the project team assemble and conduct a minimum of one, preferably two, VAWEP Planning Committee meetings per grant year. Pursuant to the grant, the committee must be comprised of judicial officers, attorneys, district attorney representatives, victim advocates, tribal representatives and other subject matter experts to guide project staff in identifying the training needs of California state and tribal court personnel in the area of domestic violence, sexual assault, stalking, dating violence, and human trafficking. The committee should also reflect the ethnic and geographical diversity of the state and ensure representation from rural, central valley, northern and southern California communities.

While the Family and Juvenile Law Advisory Committee has a breadth of expertise, and includes judicial officers and other important stakeholders on domestic violence issues, it only includes one law enforcement member of the committee and that person has resigned from the VAWEP subcommittee. For that reason, the committee is asking for the appointment of a Karen Fletcher, the Chief Adult Probation Officer for the City and County of San Francisco.

Chief Fletcher will bring a perspective necessary to fulfill the VAWEP mission and the specific grant requirement that the group be comprised of stakeholders including, but not limited to, judges, attorneys, district attorney representatives, victim advocates, tribal representatives and other subject matter experts in the field of domestic violence, sexual assault, stalking, dating violence, and human trafficking.

JUDICIAL COUNCIL OF CALIFORNIA

Request for Appointment to a Subcommittee

To request the appointment of a non-advisory committee member to a standing subcommittee, lead committee staff, on behalf of the committee chair, should complete a copy of this form for each prospective member, explaining the rationale for the request, and submit it to the Judicial Council internal committee that oversees the advisory committee(s). Once approval is granted by the Judicial Council internal committee, the advisory committee chair can then make an informal appointment to the subcommittee.

Requesting appointment as a member to:

Subcommittee: Violence Against Women Education Project

Subcommittee chair: Hon. Jerilyn L. Borack, Co-Chair and Hon. Mark A. Juhas, Co-Chair

Advisory Committee Information

Committee name: Family and Juvenile Law Advisory Committee

Committee chair: Hon. Jerilyn L. Borack, Co-Chair and Hon. Mark A. Juhas, Co-Chair

Lead staff: Tracy Kenny and Nicole Giacinti

Committee name: N/A Committee chair: _____

Lead staff: _____

Prospective Member Information

Candidate's name: ☐ Hon. ☐ Mr. ☒ Ms. Karen Fletcher

Title: Chief Adult Probation Officer

Court/entity/business name: San Francisco Probation Department

Particular area of expertise that is relevant to the work of subcommittee:

Karen Fletcher is the Chief Adult Probation Officer for the City and County of San Francisco. Chief Fletcher has twenty-five years of experience in the field of adult and juvenile community corrections. Chief Fletcher's experience includes crafting and implementing the Public Safety Realignment Implementation Plan as well as evidence-based practices training, policies and procedures in both the adult and juveniles services divisions in Santa Clara County. Her contributions in the area of juvenile detention reform aided in developing practices, which led to a reduction in the number of youth held in detention. Chief Fletcher continues to be committed to providing needed services to adult clients, which are family-focused and support successful re-entry and public safety.

Chief Fletcher began her career as a deputy probation officer, promoted through the ranks, serving as Deputy Chief Probation Officer in Santa Clara County for ten years. Chief Fletcher earned her Master of Arts degree in Speech Communication, with a concentration in Organizational Communication, and her Bachelor of Arts degree in Speech Pathology and Audiology from San Jose State University. Chief Fletcher is an alumni of the Harvard Kennedy School Senior Executives in State and Local Government program.

Chief Fletcher is a member of the American Probation and Parole Association, Harvard Kennedy School of Government Alumni Association, EBP Society Evidence Based Professionals and the California Probation, Parole and Corrections Association.

Recommended term of service on the subcommittee:

Check one: ☐ one year ☐ two years ☐ three years

☒ other: Effective until the individual is no longer willing to serve

Rationale for Appointment

Please use this section to provide the rationale for this appointment, any budgeting or cost implications, and additional information that is relevant to the Judicial Council internal committee's response to this appointment request.

The purpose of the Violence Against Women Education Project grant is develop and provide trainings and conduct other activities dedicated to increasing the knowledge of tribal and state court personnel in cases involving violence against women. The Violence Against Women Education Project grant requires that the project team assemble and conduct a minimum of one, preferably two, VAWEP Planning Committee meetings per grant year. Pursuant to the grant, the committee must be comprised of judicial officers, attorneys, district attorney representatives, victim advocates, tribal representatives, law enforcement, and other subject matter experts to guide project staff in identifying the training needs of California state and tribal court personnel in the area of domestic violence, sexual assault, stalking, dating violence, and human trafficking. The committee should also reflect the ethnic and geographical diversity of the state and ensure representation from rural, central valley, northern and southern California communities.

The committee requests the appointment of individuals bringing a diversity of perspective necessary to fulfill the VAWEP grant requirement, that the group be comprised of stakeholders including, but not limited to, judges, attorneys, district attorney representatives, victim advocates, tribal representatives, and other subject matter experts in the field of domestic violence, sexual assault, stalking, dating violence, and human trafficking. In addition to the individuals' professional experience, the individuals are also reflective California's geographical diversity, including rural, central valley, northern and southern California. VAWEP Planning Committee membership is voluntary and un-paid.

The Committee meetings include a report of the success of previous grant performance period objectives and trainings needs for the future gran performance period. Based on the recommendations from the VAWEP Planning Committee meeting, new and emerging trends may be taking into consideration in adding and/or deleting to the program objectives/course development and implementation.

Internal Committee Approval

Internal committee name: Judicial Council Rules and Projects Committee

Internal committee chair: Hon. Harry E. Hull, Jr.

On behalf of the internal committee, request for appointment is:

Check one: ☐ approved ☐ disapproved ☐ will be forwarded to the Chief Justice for further consideration

Date: _____

Violence Against Women Education Project Planning Committee

As of October 22, 2018

Hon. Jerilyn L. Borack, Co-Chair
Judge of the Superior Court of California,
County of Sacramento

Hon. Sue Alexander (Ret.)
Commissioner of the Superior Court of
California, County of Alameda

Dr. Bajlit Atwal
Director of Psychology Assessment Resource
Center (PARC)

Hon. Susan M. Breall
Judge of the Superior Court of California,
County of San Francisco

Ms. Emberly Cross
Coordinating Attorney
Cooperative Restraining Order Clinic

Ms. Mary Majich Davis
Chief Deputy Executive Officer
Superior Court of California,
County of San Bernardino

Hon. Sherrill A. Ellsworth (Ret.)
Judge of the Superior Court of California,
County of Riverside

Hon. Suzanne Gazzaniga
Judge of the Superior Court of California,
County of Placer

Hon. Scott M. Gordon
Supervising Family Law Judge of the Superior
Court of California, County of Los Angeles

Ms. Sandra Henriquez
Executive Director
California Coalition Against Sexual Assault
(CALCASA)

Hon. Joni T. Hiramoto
Judge of the Superior Court of California,
County of Contra Costa

Hon. Sam Lavorato, Jr.
Judge of the Superior Court of California,
County of Monterey

Mr. Rick Layon
Layon & Holck

Hon. Mark A. Juhas, Co-Chair
Judge of the Superior Court of California,
County of Los Angeles

Ms. Patricia Lee
Managing Attorney
San Francisco Public Defender's Office

Amanda Martin
Sr. Attorney
California District Attorneys Association

Ms. Krista Niemczyk
Public Policy Manager
California Partnership to End Domestic
Violence

Ms. Nancy O'Malley
District Attorney
Alameda County District Attorney's Office

Ms. Sudha Shetty
Assistant Dean
Goldman School of Public Policy at
UC Berkeley

Ms. Lynda Smallenberger
Executive Director
Kene Me-Wu Family Healing Center, Inc.

Deputy Roena Spiller
San Mateo County Sheriff's Office
North Coast Patrol Bureau

Hon. Glenda Veasey
Commissioner of the
Superior Court of California,
County of Los Angeles

Hon. Christine Williams
Chief Judge of the Shingle Springs
Tribal Court

Violence Against Women Education Project Planning Committee

As of October 22, 2018

JUDICIAL COUNCIL STAFF TO THE COMMITTEE

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Item number: 02

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: February 06, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Forms: Technical Changes to Judicial Council Forms to Reflect Federal Poverty Guidelines

Committee or other entity submitting the proposal:
Judicial Council Staff

Staff contact (name, phone and e-mail): Anne M. Ronan, 415-865-8933

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Technical proposal in compliance with statute
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
Judicial Council staff is recommending the revision of four Judicial Council forms containing figures based on the federal poverty guidelines, to reflect the changes in those guidelines recently published by the federal government. By statute (in the case of the Fee Waiver forms) and Judicial Council standard ((in the case of the Juvenile form) the revised figures are efective as soon as the new guidelines go int effect, and so the forms must be revised as soon as possible.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on March 14–15, 2019

Title
Rules and Forms: Technical Form Changes to Reflect Federal Poverty Guidelines

Rules, Forms, Standards, or Statutes Affected
Revise forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132

Recommended by
Judicial Council staff
Susan R. McMullan, Supervising Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
March 15, 2019

Date of Report
January 29, 2019

Contact
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Executive Summary

Judicial Council staff recommend the revision of four Judicial Council forms containing figures based on the federal poverty guidelines to reflect the changes in those guidelines recently published by the federal government.

Recommendation

Judicial Council staff recommend that the Judicial Council, effective March 15, 2019, revise the following documents to reflect 2019 increases in the federal poverty guidelines:

- *Request to Waive Court Fees* (form FW-001)
- *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC)
- *Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)* (form APP-015/FW-015-INFO)
- *Financial Declaration—Juvenile Dependency* (form JV-132)

The revised forms are attached at pages 4–14.

Relevant Previous Council Action

The council last revised these four forms on March 2, 2018, to reflect the last change in the federal poverty guidelines.

Analysis/Rationale

Judicial Council forms containing figures based on the federal poverty guidelines need to be revised to reflect the changes in those guidelines recently published by the federal government.

Fee waiver forms

The eligibility of indigent litigants to proceed without paying filing fees or other court costs is determined by California Government Code section 68632. Among other things, section 68632(b) provides that a fee waiver will be granted to litigants whose household monthly income is 125 percent or less of the current poverty guidelines established by the U.S. Department of Health and Human Services (HHS).

The Judicial Council has adopted rules of court and forms for litigants to obtain fee waivers. Three of the forms—*Request to Waive Court Fees* (form FW-001), *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC), and *Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)* (form APP-015/FW-015-INFO)—contain figures based on the monthly poverty guidelines. The tables in item 5b on the general fee waiver application form, in item 8(b) on the probate fee waiver form, and on page 1 of the appellate court information sheet provide monthly income figures on which a court may base a decision to grant a fee waiver in accordance with Government Code section 68632.

Juvenile form

The Judicial Council administers a program under Welfare and Institutions Code section 903.47 to collect reimbursement of the cost of court-appointed counsel in dependency proceedings from liable persons found able to pay. Under the statewide standard adopted by the council, an otherwise liable person is presumed to be unable to pay reimbursement if that person's monthly household income is 125 percent or less of the current federal poverty guidelines established by the HHS.

Financial Declaration—Juvenile Dependency (form JV-132) contains figures based on the poverty guidelines. The table in item 3 provides monthly income levels below which an individual is presumed to be unable to pay reimbursement for the cost of court-appointed counsel.

Revisions required

The monthly income figures currently on the four forms reflect 125 percent of the *2018* poverty guidelines established by the HHS. The HHS released revised federal poverty guidelines on

January 11, 2019.[1] As a result, these items on the Judicial Council forms must be revised to reflect the *2019* federal poverty guideline revisions.

To determine the new monthly income figures for the forms, the federal poverty guidelines must be multiplied by 125 percent and divided by 12.[2] The new figures are reflected in the revised tables on the attached forms.

Policy implications

Staff monitors revisions to the poverty guidelines and ensures that the forms are revised as necessary and submitted to the council. Revised forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132 should take effect immediately to ensure that litigants and courts are provided with accurate monthly income guidelines on which a court may base a decision regarding fee waivers or financial liability. This rapid change to the forms is necessary because the revised poverty guidelines take effect immediately on release. Once adopted by the council, the revised forms will be distributed to the courts and forms publishers and posted to the California Courts website.

Comments

These proposals were not circulated for public comment because they are noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Alternatives considered

The alternative to updating the income tables using the 2019 federal poverty guidelines would be *not* to update them. Staff did not consider this option because of the provisions in Government Code section 68632 and in Judicial Council standard on financial liability.

Fiscal and Operational Impacts

If a court provides free copies of these forms to parties, it will incur costs to print or duplicate the forms. However, the revisions are required to make the forms consistent with current law.

Attachments and Links

1. Forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132, at pages 4–14
2. Attachment A: Computation Sheet
3. Link A: Poverty Guidelines, *https://aspe.hhs.gov/poverty-guidelines*

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[1] The 2019 figures have been issued, although not yet published in the Federal Register. See Poverty Guidelines, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, at *https://aspe.hhs.gov/poverty-guidelines*.

[2] See Attachment A for the Computation Sheet. The monthly income figures in the tables on the forms slightly exceed 125 percent of the poverty guidelines because they are rounded up to the nearest cent. The language on the forms reflects this slight excess in stating that the item should be checked if the household income is "less than" the amount in the chart.

FW-001 Request to Waive Court Fees

CONFIDENTIAL

Clerk stamps date here when form is filed.

DRAFT
Not approved by
the Judicial Council
01-23-2019

If you are getting public benefits, are a low-income person, or do not have enough income to pay for your household's basic needs and your court fees, you may use this form to ask the court to waive your court fees. The court may order you to answer questions about your finances. If the court waives the fees, you may still have to pay later if:

- You cannot give the court proof of your eligibility,
- Your financial situation improves during this case, or
- You settle your civil case for **$10,000** or more. The trial court that waives your fees will have a lien on any such settlement in the amount of the waived fees and costs. The court may also charge you any collection costs.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and name:

Case Number:

Case Name:

1 Your Information *(person asking the court to waive the fees):*

Name: _____

Street or mailing address: _____

City: _____ State: ____ Zip: _____

Phone: _____

2 Your Job, if you have one *(job title):* _____

Name of employer: _____

Employer's address: _____

3 Your Lawyer, if you have one *(name, firm or affiliation, address, phone number, and State Bar number):*

_____

_____

a. The lawyer has agreed to advance all or a portion of your fees or costs *(check one):* Yes ☐ No ☐

b. *(If yes, your lawyer must sign here)* Lawyer's signature: _____

If your lawyer is not providing legal-aid type services based on your low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.

4 What court's fees or costs are you asking to be waived?

☐ Superior Court (See *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001-INFO).)

☐ Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See *Information Sheet on Waiver of Appellate Court Fees* (form APP-015/FW-015-INFO).)

5 Why are you asking the court to waive your court fees?

a. ☐ I receive *(check all that apply; see form FW-001-INFO for definitions):* ☐ Food Stamps ☐ Supp. Sec. Inc. ☐ SSP ☐ Medi-Cal ☐ County Relief/Gen. Assist. ☐ IHSS ☐ CalWORKS or Tribal TANF ☐ CAPI

b. ☐ My gross monthly household income (before deductions for taxes) is less than the amount listed below. *(If you check 5b, you must fill out 7, 8, and 9 on page 2 of this form.)*

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	
1	$1,301.05	3	$2,221.88	5	$3,142.71	*If more than 6 people at home, add $460.42 for each extra person.*
2	$1,761.46	4	$2,682.30	6	$3,603.13	

c. ☐ I do not have enough income to pay for my household's basic needs *and* the court fees. I ask the court to: *(check one and you **must** fill out page 2):*

☐ waive all court fees and costs ☐ waive some of the court fees

☐ let me make payments over time

6 ☐ Check here if you asked the court to waive your court fees for this case in the last six months. (*If your previous request is reasonably available, please attach it to this form and check here:*) ☐

I declare under penalty of perjury under the laws of the State of California that the information I have provided on this form and all attachments is true and correct.

Date: _____

_____ ▶ _____

Print your name here *Sign here*

Your name: _____ **Case Number:**

*If you checked 5a on page 1, do not fill out below. If you checked 5b, fill out questions 7, 8, and 9 only. If you checked 5c, you **must** fill out this entire page. If you need more space, attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.*

7 ☐ Check here if your income changes a lot from month to month. If it does, complete the form based on your average income for the past 12 months.

8 Your Gross Monthly Income

a. List the source and amount of ***any*** income you get each month, including: wages or other income from work before deductions, spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.

(1) _____ $_____
(2) _____ $_____
(3) _____ $_____
(4) _____ $_____

b. **Your total monthly income**: $_____

9 Household Income

a. List the income of all other persons living in your home who depend in whole or in part on you for support, or on whom you depend in whole or in part for support.

	Name	Age	Relationship	Gross Monthly Income
(1)				$
(2)				$
(3)				$
(4)				$

b. **Total monthly income of persons above:** $_____

Total monthly income *and* household income *(8b plus 9b):* $_____

To list any other facts you want the court to know, such as unusual medical expenses, etc., attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.

Check here if you attach another page. ☐

***Important!* If your financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010.**

10 Your Money and Property

a. Cash $_____

b. All financial accounts *(List bank name and amount):*

(1) _____ $_____
(2) _____ $_____
(3) _____ $_____

c. Cars, boats, and other vehicles

	Make / Year	Fair Market Value	How Much You Still Owe
(1)		$	$
(2)		$	$
(3)		$	$

d. Real estate

	Address	Fair Market Value	How Much You Still Owe
(1)		$	$
(2)		$	$

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.):

	Describe	Fair Market Value	How Much You Still Owe
(1)		$	$
(2)		$	$

11 Your Monthly Deductions and Expenses

a. List any payroll deductions and the monthly amount below:

(1) _____ $_____
(2) _____ $_____
(3) _____ $_____
(4) _____ $_____

b. Rent or house payment & maintenance $_____
c. Food and household supplies $_____
d. Utilities and telephone $_____
e. Clothing $_____
f. Laundry and cleaning $_____
g. Medical and dental expenses $_____
h. Insurance (life, health, accident, etc.) $_____
i. School, child care $_____
j. Child, spousal support (another marriage) $_____
k. Transportation, gas, auto repair and insurance $_____
l. Installment payments *(list each below)*:

Paid to:

(1) _____ $_____
(2) _____ $_____
(3) _____ $_____

m. Wages/earnings withheld by court order $_____
n. Any other monthly expenses *(list each below)*.

	Paid to:	How Much?
(1)		$
(2)		$
(3)		$

Total monthly expenses *(add 11a –11n above):* $_____

FW-001-GC Request to Waive Court Fees (Ward or Conservatee)

CONFIDENTIAL

Clerk stamps date here when form is filed.

DRAFT
Not approved by
the Judicial Council
01-23-2019

This form must be used by a guardian or conservator, or by a petitioner for the appointment of a guardian or conservator, to request a waiver of court fees in the guardianship or conservatorship court proceeding or in any other civil action in which the guardian or conservator represents the interests of the ward or conservatee as a plaintiff or defendant.

If the ward or conservatee (including a proposed ward or conservatee if a petition for appointment of a guardian or conservator has been filed but has not yet been decided by the court) directly receives public benefits or is supported by public benefits received by another for his or her support, is a low-income person, or does not have enough income to pay for his or her household's basic needs and the court fees, you may use this form to ask the court to waive the court fees. The court may order you to answer questions about the finances of the ward or conservatee. If the court waives the fees, the ward or conservatee, his or her estate, or someone with a duty to support the ward or conservatee, may still have to pay later if:

- You cannot give the court proof of the ward's or conservatee's eligibility,
- The ward's or conservatee's financial situation improves during this case, or
- You settle the civil case on behalf of the ward or conservatee for **$10,000** or more. The trial court that waives fees will have a lien on any such settlement in the amount of the waived fees and costs. The court may also charge the ward or conservatee, or his or her estate, any collection costs.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and name:

Case Number:

Case Name:

1 Your Information *(guardian or conservator, or person asking the court to appoint a guardian or conservator):*

Name: _____ Phone: (___) ___-_____

Street or mailing address: _____

City: _____ State: ___ Zip: _____

2 Your Lawyer *(if you have one):* Name: _____

Firm or Affiliation: _____ State Bar No.: _____

Address: _____ Phone: (___) ___-____

City: _____ State: ___ Zip: _____ E-mail: _____

a. The lawyer has agreed to advance all or a portion of court fees or costs *(check one):* Yes ☐ No ☐

b. *(If yes, your lawyer must sign here.)* Lawyer's signature: _____
If your lawyer is not providing legal-aid type services based on your or the ward's or conservatee's low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.

3 Ward's or Conservatee's Information *(file a separate* Request *for each ward in a multiward case):*

Name: _____ Age and date of birth *(ward only):*

Street or mailing address: _____ _____

City: _____ State: ___ Zip: _____

Phone: (___) ___-____

4 Ward's or Conservatee's Lawyer, if any: Name: _____

Firm or Affiliation: _____ State Bar No.: _____

Address: _____ Phone: (___) ___-____

City: _____ State: ___ Zip: _____ E-mail: _____

5 Ward or Conservatee's Job *(job title; if not employed, so state):* _____

Name of employer: _____

Employer's address: _____ State: ___ Zip: _____

Name of (Proposed) Ward or Conservatee: _____ **Case Number:**

6 What court's fees or costs are you asking to be waived?

☐ Superior Court (See *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001-INFO).)
☐ Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See *Information Sheet on Waiver of Appellate Court Fees* (form APP-015/FW-015-INFO).)

7 ☐ Check here if you asked the court to waive court fees for this case in the last six months. *(If your previous request is reasonably available, please attach it to this form and check here):* ☐

8 Why are you asking the court to waive the ward's or conservatee's court fees?

a. ☐ The ward or one or both of the ward's parents, or the conservatee or the conservatee's spouse or registered domestic partner, receive *(check all that apply):*

☐ Supplemental Security Income (SSI) ☐ State Supplemental Payment (SSP) ☐ SNAP (Food Stamps)
☐ IHSS (In-Home Supportive Services) ☐ CalWORKS or Tribal TANF ☐ Medi-Cal
☐ County Relief/General Assistance ☐ CAPI (Cash Assistance Program for Aged, Blind, and Disabled)

(Names and relationships to ward or conservatee of persons who receive the public benefits listed above):

_____

_____

b. ☐ The gross monthly income of the ward's or conservatee's household (before deductions for taxes) is less than the amount listed below. *(If you check 8b, you **must** fill out items 14, 15, and 16 on page 4 of this form.)**

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	
1	$1,301.05	3	$2,221.88	5	$3,142.71	*If more than 6 people at home, add $460.42 for each extra person.*
2	$1,761.46	4	$2,682.30	6	$3,603.13	

c. ☐ The ward's or conservatee's household does not have enough income to pay for its basic needs *and* the court fees. I ask the court to *(check one, and you **must** fill out items 14, 15, 16, 17, and 18 on page 4):**

(i) ☐ Waive all court fees and costs. (ii) ☐ Waive some court fees and costs.
(iii) ☐ Let the (proposed) guardian or conservator, on behalf of the (proposed) ward or conservatee, make payments over time.

** (Do not include income of guardian or conservator living in the household in 8b or 8c or count him or her in family size in 8b. unless he or she is a parent of the ward or the spouse or registered domestic partner of the conservatee.)*

Guardians or petitioners for their appointment must complete items 9 and 10.

9 Ward's Estate: ☐ Person only, no estate. ☐ Inventory or petition estimated value:

Source *(e.g., gift, inheritance, settlement, judgment, insurance):* Est. collection date:

10 Ward's Parents' Information:

a. Name of ward's father: _____ ☐ Deceased *(date of death):* _____
Street or mailing address: _____
City: _____ State: ____ Zip: _____
Phone: ( ) -

b. Name of ward's mother: _____ ☐ Deceased *(date of death):* _____
Street or mailing address: _____
City: _____ State: ____ Zip: _____
Phone: ( ) -

c. Ward's parents are *(check all that apply):* ☐ married ☐ living together ☐ separated ☐ divorced
Support order for ward? ☐ No ☐ Yes Payable to *(name):* _____
Payor *(name):* _____
Court: _____ Case Number: _____
Date of order *(if multiple, date of latest):* _____ Monthly amount: _____

Name of (Proposed) Ward or Conservatee: _____ **Case Number:**

Conservators or petitioners for their appointment must complete items 11–13.

(11) Conservatee's Estate: ☐ Person only, no estate.

☐ Inventory or petition estimated value: Est. collection date:

(12) Conservatee's Spouse's or Registered Domestic Partner's Information:

Name of conservatee's spouse or registered domestic partner: _____ ☐ Spouse ☐ Partner

Date of marriage or partnership: _____ ☐ Deceased *(date of death):* _____

Street or mailing address: _____ Phone: ( ) -

City: _____ State: ___ Zip: _____

Name of employer *(if none, so state):* _____

Employer's address: _____ State: ___ Zip: _____

The conservatee's spouse or partner ☐ is ☐ is not managing, or following appointment of a conservator is planning to manage, some or all of the couple's community property outside the conservatorship estate.

If you selected "is" above: The income, money, and property shown on page 4 ☐ includes ☐ does not include the income and property managed, or expected to be managed, by the spouse/partner outside the estate.

☐ Divorced *(date of final judgment or decree):* _____

Court: _____

Case Number: _____ Support order for conservatee? ☐ No ☐ Yes

Date of support order *(if multiple, date of latest):* _____ Monthly amount: _____

(13) The Conservatee and Trusts:

The conservatee:

a. ☐ Is ☐ Is not a trustor or settlor of a trust.

b. ☐ Is ☐ Is not a beneficiary of a trust.

If you selected "Is" to complete any of the above statements, identify and provide, in an attachment to this *Request*, the current address and telephone number of the current trustee(s) of each trust, describe the general terms of and value of each trust and the nature and value of the conservatee's interest in each trust, and the amount(s) and frequency of any distributions to or for the benefit of the conservatee prior to your appointment as conservator of which you are aware. *(You may use Judicial Council form MC-025 for this purpose.)*

All applicants who checked item 8b or item 8c on page 2 must continue to and follow the instructions for completion of items 14–16 or items 14–18 on page 4, before signing below.

The information I have provided on this form and all attachments about the (proposed) ward or conservatee is true and correct to the best of my information and belief. The information I have provided on this form and all attachments concerning myself is true and correct. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____

Print your name here *Sign here*

Name of (Proposed) Ward or Conservatee: _____

Case Number:

*If you checked 8a on page 2, do not fill out below. If you checked 8b, you **must** answer questions 14–16. If you checked 8c, you **must** answer questions 14–18. If you need more space, attach form MC-025 or attach a sheet of paper, and write "*Financial Information"* and the ward's or conservatee's name and case number at the top.*

14 ☐ Check here if the ward's or conservatee's income changes a lot from month to month. If it does, complete the form based on his or her average income for the past 12 months.

15 Ward's or Conservatee's Gross Monthly Income

a. List the source and amount of ***any*** income the ward or conservatee gets each month, including: wages or other income from work before deductions, spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.

(1) _____ $_____
(2) _____ $_____
(3) _____ $_____
(4) _____ $_____
(5) _____ $_____

b. **Total monthly income**: $_____

16 Ward's or Conservatee's Household's Income

a. List the income of all other persons living in the ward's or conservatee's home who depend in whole or in part on him or her for support, or on whom he or she depends in whole or in part for support.

	Name	Age	Relationship	Gross Monthly Income
(1)				$
(2)				$
(3)				$
(4)				$
(5)				$
(6)				$
(7)				$
(8)				$
(9)				$
(10)				$

b. **Total monthly income of persons above:** $_____

Total monthly income *and* household income *(15b plus 16b):* $_____

To list any other facts you want the court to know, such as the (proposed) ward's or conservatee's unusual medical expenses, etc, attach form MC-025 or attach a sheet of paper and write "Financial Information" and the (proposed) ward's or conservatee's name and case number at the top.

Check here if you attach another page. ☐

***Important!* If the ward's or conservatee's financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010-GC.**

Do not include income of guardian or conservator living in the household in item 16, his or her money and property in item 17, or his or her deductions and expenses in item 18 unless he or she is a parent of the ward or the spouse or registered domestic partner of the conservatee.

17 Ward's or Conservatee's Household's Money and Property

a. Cash $_____

b. All financial accounts *(list bank name and amount):*

(1) _____ $_____
(2) _____ $_____
(3) _____ $_____

c. Cars, boats, and other vehicles

	Make / Year	Fair Market Value	How Much You Still Owe
(1)		$	$
(2)		$	$
(3)		$	$

d. Real estate

	Address	Fair Market Value	How Much You Still Owe
(1)		$	$
(2)		$	$

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.):

	Describe	Fair Market Value	How Much You Still Owe
(1)		$	$
(2)		$	$

18 Ward's or Conservatee's Household's Monthly Deductions and Expenses

a. List any payroll deductions and the monthly amount below:

(1) _____ $_____
(2) _____ $_____
(3) _____ $_____
(4) _____ $_____

b. Rent or house payment and maintenance $_____
c. Food and household supplies $_____
d. Utilities and telephone $_____
e. Clothing $_____
f. Laundry and cleaning $_____
g. Medical and dental expenses $_____
h. Insurance (life, health, accident, etc.) $_____
i. School, child care $_____
j. Child, spousal support (another marriage) $_____
k. Transportation, gas, auto repair and insurance $_____
l. Installment payments *(list each below)*:

Paid to:

(1) _____ $_____
(2) _____ $_____
(3) _____ $_____

m. Wages/earnings withheld by court order $_____
n. Any other monthly expenses *(list each below)*.

Paid to: How Much?

(1) _____ $_____
(2) _____ $_____
(3) _____ $_____

Total monthly expenses *(add 18a –18n above):* $_____

INFORMATION SHEET ON WAIVER OF APPELLATE COURT FEES (SUPREME COURT, COURT OF APPEAL, APPELLATE DIVISION)

If you file an appeal, a petition for a writ, or a petition for review in a civil case, such as a family law case or a case in which you sued someone or someone sued you, you must generally pay a filing fee to the court. If you are a party other than the party who filed the appeal or the petition, you must also generally pay a fee when you file your first document in a case in the Court of Appeal or Supreme Court. You and the other parties in the case may also have to pay other court fees in these proceedings, such as fees to prepare or get a copy of a clerk's transcript in an appeal. However, if you cannot afford to pay these court fees and costs, you may ask the court to issue an order saying you do not have to pay these fees (this is called "waiving" these fees).

1. Who can get their court fees waived?

The court will waive your court fees and costs if:

- **You are getting public assistance**, such as Medi-Cal, Food Stamps, Supplemental Security Income (not Social Security), State Supplemental Payment, County Relief/General Assistance, In-Home Supportive Services, CalWORKS, Tribal Temporary Assistance for Needy Families, or Cash Assistance Program for Aged, Blind, and Disabled.
- **You have a low income level**. Under the law you are considered a low-income person if the gross monthly income (before deductions for taxes) of your household is less than the amount listed below:

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income
1	$1,301.05	3	$2,221.88	5	$3,142.71
2	$1,761.46	4	$2,682.30	6	$3,603.13

If more than 6 people at home, add $460.42 for each extra person.

- **You do not have enough income to pay for your household's basic needs *and* your court fees** .

2. What fees and costs will the court waive?

If you qualify for a fee waiver, the Supreme Court, Court of Appeal, or Appellate Division will waive the filing fee for the notice of appeal, a petition for a writ, a petition for review, or the first document filed by a party other than the party who filed the appeal or petition, and any court fee for participating in oral argument by telephone. The trial court will also waive costs related to the clerk's transcript on appeal, the fee for the court to hold in trust the deposit for a reporter's transcript on appeal under rule 8.130(b) or rule 8.834(b) of the California Rules of Court, and the fees for making a transcript or copy of an official electronic recording under rule 8.835. If you are the appellant (the person who is appealing the trial court decision), the fees waived include the deposit required under Government Code section 68926.1 and the costs for preparing and certifying the clerk's transcript and sending the original to the reviewing court and one copy to you. If you are the respondent (a party other than the appellant in a case that is being appealed), the fees waived include the costs for sending you a copy of the clerk's transcript. You can also ask the trial court to waive other necessary court fees and costs.

The court **cannot** waive the fees for preparing a reporter's transcript in a civil case. A special fund, called the Transcript Reimbursement Fund, may help pay for the transcript. (See *http://www.courtreportersboard.ca.gov/ consumers/index.shtml#trf* and Business and Professions Code sections 8030.2 and following for more information about this fund.) If you are unable to pay the cost of a reporter's transcript, a record of the oral proceedings can be prepared in other ways, by preparing an agreed statement or, in some circumstances, a statement on appeal or settled statement.

3. How do I ask the court to waive my fees?

- **Appeal in Limited Civil Case (civil case in which the amount of money claimed is $25,000 or less).** In a limited civil case, if the trial court already issued an order waiving your court fees *and that fee waiver has not ended* (fee waivers automatically end 60 days after the judgment), the fees and costs identified in item 2 above are already waived; just give the court a copy of your current fee waiver. If you do not already have an order waiving your fees or you had a fee waiver but it has ended, you must complete and file a *Request to Waive Court Fees* (form FW-001). If you are the appellant (the party who is appealing), you should check both boxes in item 4 on FW-001 and file the completed form with your notice of appeal. If you are the respondent (a party other than the appellant in a case that is being appealed), the completed form should be filed in the court when the fees you are requesting to be waived, such as the fee for the clerk's transcript or telephonic oral argument, are due.

- **Writ Proceeding in Limited Civil Case (civil case in which the amount of money claimed is $25,000 or less).** If you want the Superior Court to waive the fees in a writ proceeding in a limited civil case, you must complete a *Request to Waive Court Fees* (form FW-001). In item 4 on FW-001, check the second box. The completed form should be filed with your petition for a writ.
- **If You Are a Guardian or Conservator.** If you are a guardian or conservator or a petitioner for the appointment of a guardian or conservator, special rules apply to your request for a fee waiver on an appeal from an order in the guardianship or conservatorship proceeding or in a civil action in which you are a party acting on behalf of your ward or conservatee. Complete and submit a *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC) to request a fee waiver. See California Rules of Court, rule 7.5.
- **Appeal in Other Civil Cases.** If you want the court to waive fees and costs in an appeal in a civil case other than a limited civil case, such as a family law case or an unlimited civil case (a civil case in which the amount of money claimed is more than $25,000), you must complete a *Request to Waive Court Fees* (form FW-001). In item 4 on FW-001, check the second box to ask the Court of Appeal to waive the fee for filing the notice of appeal or, if you are a respondent (a party other than the one who filed the appeal), the fee for the first document you file in the Court of Appeal. Check both boxes if you also want the trial court to waive your costs for the clerk's transcript (if the trial court already issued an order waiving your fees *and that fee waiver has not ended,* you do not need to check the first box; the fees and costs identified in item 2 above are already waived, just give the court a copy of your current fee waiver). If you are the appellant, the completed form should be submitted with your notice of appeal (if you check both boxes in item 4, the court may ask for two signed copies of this form). If you are the respondent, the completed form should be submitted at the time the fee you are asking the court to waive is due. For example, file the form in the trial court with your request for a copy of the clerk's transcript if you are asking the court to waive the transcript fee or file the form in the Court of Appeal with the first document you file in that court if you are asking the court to waive the fee for filing that document. To request waiver of a court fee for telephonic oral argument, you should file the completed form in the Court of Appeal when the fee for telephonic oral argument is due.
- **Writ Proceeding in Other Civil Cases.** If you want the Supreme Court or Court of Appeal to waive the fees and costs in a writ proceeding in a civil case other than a limited civil case, such as a family law case or an unlimited civil case (a civil case in which the amount of money claimed is more than $25,000), you must complete a *Request to Waive Court Fees* (form FW-001). If you are the petitioner (the party filing the petition), the completed form should be submitted with your petition for a writ in the Supreme Court or Court of Appeal clerk's office. If you are a party other than the petitioner, the completed form should be filed with first document you file in the Supreme Court or Court of Appeal.
- **Petition for Review.** If you want to request that the Supreme Court waive the fees in a petition for review proceeding, you must complete a *Request to Waive Court Fees* (form FW-001) or a *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC). If you are the petitioner, you should submit the completed form with your petition for review. If you are a party other than the petitioner, the completed form should be filed with first document you file in the Supreme Court.

IMPORTANT INFORMATION!

- **Fill out your request completely and truthfully.** When you sign your request for a fee waiver, you are declaring under penalty of perjury that the information you have provided is true and correct.
- **The court may ask you for information and evidence.** You may be ordered to go to court to answer questions about your ability to pay court fees and costs and to provide proof of eligibility. Any initial fee waiver you are granted may be ended if you do not go to court when asked. You may be ordered to repay amounts that were waived if the court finds you were not eligible for the fee waiver.
- **If you receive a fee waiver, you must tell the court if there is a change in your finances.** You must tell the court immediately if your finances improve or if you become able to pay court fees or costs during this case (file form FW-010 with the court). You may be ordered to repay any amounts that were waived after your eligibility ended. If the trial court waived your fees and costs and you settle your case for $10,000 or more, the trial court will have a lien on the settlement in the amount of the waived fees.
- **The fee waiver ends.** The fee waiver expires 60 days after the judgment, dismissal, or other final disposition of the case or when the court finds that you are not eligible for a fee waiver.

CONFIDENTIAL

JV-132

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILDREN'S NAMES:	
FINANCIAL DECLARATION—JUVENILE DEPENDENCY	CASE NUMBER:

1. **Personal Information:**

Name:			Social Security Number:	
Other names used:				
I.D. or Driver's License Number:			Date of Birth:	Age:
Relationship to Child: ☐ Mother ☐ Father ☐ Other Responsible Person *(specify):*				
Street or Mailing Address:				
City:	State:	Zip:	Phone:	Alternate Phone:
Marital Status: ☐ Married ☐ Single ☐ Domestic partner ☐ Separated ☐ Divorced ☐ Widowed				
Name of Spouse/Partner:			Number of dependents living with you:	
Names and ages of dependents:				

2. I receive *(check all that apply):* ☐ Medi-Cal ☐ SNAP (food stamps) ☐ SSI ☐ SSP
   ☐ County Relief/General Assistance ☐ CalWORKS or Tribal TANF *(Temporary Assistance to Needy Families)*
   ☐ IHSS *(In-Home Supportive Services)* ☐ CAPI *(Case Assistance Program for Aged, Blind, and Disabled)*

3. ☐ My gross monthly household income *(before deductions for taxes)* is less than the amount listed below:

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	
1	$1,301.05	3	$2,221.88	5	$3,142.71	If more than 6 people at home, add $460.42 for each extra person.
2	$1,761.46	4	$2,682.30	6	$3,603.13	

4. ☐ I have been reunified with my child(ren) under a court order (attached).

5. ☐ I am receiving court-ordered reunification services.

Form Approved for Optional Use
Judicial Council of California
JV-132 [Rev. March 15, 2019]

Welfare and Institutions Code, §§ 903.1, 903.45(b), 903.47
www.courts.ca.gov

CHILDREN'S NAMES: RESPONSIBLE PERSON'S NAME:	CASE NUMBER:

6. **Employment:**

Your Employment				Your Spouse/Partner's Employment			
Employer:				Employer:			
Address:				Address:			
City and Zip Code:		Phone:		City and Zip Code:			Phone:
Type of Job:				Type of Job:			
How long employed:	Working now?	Monthly salary:	Take home pay:	How long employed:	Working now?	Monthly salary:	Take home pay:
If not now employed, who was your last employer? *(Name, Address, City, and Zip Code):*				If not now employed, who was this person's last employer? *(Name, Address, City, and Zip Code):*			
Phone number of last employer:				Phone number of last employer:			

7. **Other Monthly Income and Assets:**

Other Income	Assets: What Do You Own?
Unemployment .....$	Cash ..... $
Disability ..... $	Real Property/Equity ..... $
Social Security .....$	Cars and Other Vehicles ..... $
Workers' Compensation ..... $	Life Insurance ..... $
Child Support Payments .....$	Bank Accounts *(list below)*.....$
Foster Care Payments .....$	Stocks and Bonds ..... $
Other Income .....$	Business Interest ..... $
Total $	Other Assets ..... $
	Total $
	Name and branch of bank:
	Account numbers:

CHILDREN'S NAMES: RESPONSIBLE PERSON'S NAME:	CASE NUMBER:

8. **Expenses:**

Monthly Household Expenses		Reunification Plan: Monthly Cost of Required Services	
Rent or Mortgage Payment	$	Parenting Classes	$
Car Payment	$	Substance Abuse Treatment	$
Gas and Car Insurance	$	Therapy/Counseling	$
Public Transportation	$	Medical Care/Medications	$
Utilities *(Gas, Electric, Phone, Water, etc.)*	$	Domestic Violence Counseling	$
Food	$	Batterers' Intervention	$
Clothing and Laundry	$	Victim Support	$
Child Care	$	Regional Center Programs	$
Child Support Payments	$	Transportation	$
Medical Payments	$	In-Home Services	$
Other Necessary Monthly Expenses		Other	$
Total	$	Total	$

9. **Loan/Expense Payments *(other than mortgage or car loan):***

Name of lender and type of loan/expense	Monthly payment	Balance owed
	$	$
	$	$
	$	$
	$	$

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

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

FOR FINANCIAL EVALUATION OFFICER USE ONLY

TOTAL INCOME	$	COST OF LEGAL SERVICES	$
TOTAL EXPENSES	$	MONTHLY PAYMENT	$
NET DISPOSABLE INCOME	$	TOTAL COST ASSESSED	$

The above-named responsible person is presumed unable to pay reimbursement for the cost of legal services in this proceeding and is eligible for a waiver of liability because

- ☐ he or she receives qualifying public benefits
- ☐ his or her household income falls below 125% of the current federal poverty guidelines
- ☐ he or she has been reunified with the child(ren) under a court order and payment of reimbursement would harm his or her ability to support the child(ren).

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF FINANCIAL EVALUATION OFFICER)

Computation Sheet

Number in Family	2019 Federal Poverty Guidelines (A)	125% of Poverty Guidelines (B) (B = A x 125%)	2019 California Monthly Income (C) (C = B / 12)*
1	$12,490.00	$15,612.50	$1,301.05
2	16,910.00	21,137.50	1,761.46
3	21,330.00	26,662.50	2,221.88
4	25,750.00	32,187.50	2,682.30
5	30,170.00	37,712.50	3,142.71
6	34,590.00	43,237.50	3,603.13
7	39,010.00	48,762.50	4,063.55
8	43,430.00	54,287.50	4,523.96
For each additional person, add:	4,420.00	5,525.00	460.42

*These amounts have been rounded up to the nearest whole cent. Language on the forms reflects this slight excess by stating that the household income is “less than” the amounts in the chart.

Item number: 03

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: February 6, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

Committee or other entity submitting the proposal:
Proposition 66 Rules Working Group

Staff contact (name, phone and e-mail): Michael I. Giden, 415-865-7977, michael.giden@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: The working group's charge is attached and is also in the "About" tab at the following link: http://www.courts.ca.gov/prop66-working-group.htm
Project description from annual agenda: n/a

If requesting July 1 or out of cycle, explain:
The working group previously requested that this proposal be circulated for public comment on a shortened special cycle, from October 19 through November 19, 2018, so that the proposal could be presented to the Judicial Council for adoption at its March meeting. RUPRO approved this request at its meeting on October 19, 2018.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
This report is submitted concurrently with working group's report titled: Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings, which is the subject of a separate RAR .

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on March 15, 2019

Title
Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rules 4.571–4.577

Recommended by
Proposition 66 Rules Working Group
Hon. Dennis M. Perluss, Chair

Agenda Item Type
Action Required

Effective Date
April 25, 2019

Date of Report
February 6, 2019

Contact
Michael I. Giden, 415-865-7977
michael.giden@jud.ca.gov
Seung Lee, 415-865-5393
seung.lee@jud.ca.gov

Executive Summary

The Proposition 66 Rules Working Group recommends the adoption of seven new rules of court to govern the filing, hearing, and adjudication of death penalty–related habeas corpus petitions in the superior courts. These proposed rules are intended to partially fulfill the Judicial Council's rule-making obligations under Proposition 66. The working group is concurrently submitting a separate report and recommendation to amend existing rules and adopt new rules and a form related to the appeals from superior court decisions in death penalty–related habeas corpus proceedings.

Recommendation

The Proposition 66 Rules Working Group recommends that the Judicial Council, effective April 25, 2019:

1. Adopt rule 4.571 to establish procedures related to the filing of death penalty–related habeas corpus petitions in the superior courts, including by:

a. Establishing the filing, service, and formatting requirements for the petition and related papers;

b. Establishing requirements for the supporting documents that accompany the petition;

c. Requiring the clerk of the superior court to file a petition submitted by an attorney notwithstanding noncompliance with the rule, and allowing the court to notify the attorney that the court may strike the petition or impose a lesser sanction if the petition is not brought into compliance within a reasonable time; and

d. Establishing a deadline for the superior court to take action following the filing of a petition in, or transfer of a petition to, the court;

2. Adopt rule 4.572 to provide a deadline for a superior court to transfer a death penalty–related petition to the superior court that imposed the sentence unless the court finds good cause to consider the petition;

3. Adopt rule 4.573 to establish procedures related to the filing of an informal response to an initial petition when the superior court requests an informal response by:

   a. Establishing the filing, service, and formatting requirements for an informal response and reply;

   b. Establishing deadlines for the service and filing of an informal response and reply and authorizing the superior court to extend the deadlines for good cause shown; and

   c. Establishing when the petitioner is entitled to the issuance of an order to show cause;

4. Adopt rule 4.574 to establish procedures following the issuance of an order to show cause by:

   a. Establishing the filing, service, and formatting requirements for a return and a denial;

   b. Establishing deadlines for the service and filing of a return and a denial and authorizing the superior court to extend the deadlines for good cause shown;

   c. Establishing a deadline for the superior court to act following expiration of the deadline for the filing of a denial;

   d. Establishing when the petitioner is entitled to an evidentiary hearing; and

   e. Establishing that a cause is deemed submitted at the conclusion of an evidentiary hearing, if one is held, or if supplemental briefing is ordered after the evidentiary hearing, when the supplemental briefing is filed with the court.

5. Adopt rule 4.575 to establish requirements for the statement of decision;

6. Adopt rule 4.576 to establish procedural requirements related to successive petitions by requiring a superior court to:

   a. Provide a notice to petitioner and an opportunity to respond before dismissing the successive petition; and

   b. Grant or deny a certificate of appealability concurrently with the issuance of its decision denying relief on the successive petition;

7. Adopt rule 4.577 to require counsel for a petitioner to deliver all files counsel maintains related to the proceeding to the attorney representing the petitioner in any appeal taken from the decision in the superior court proceeding; and
8. Refer to the Judicial Council's Rules and Projects Committee all proposals for additional substantive changes that the working group discussed or received from commenters, but that it was not able to address during its work, so that the Rules and Projects Committee may determine which advisory body, if any, should consider such proposals in the future.

The text of the new rules is attached at pages 23–29.

Relevant Previous Council Action

Before Proposition 66 took effect, death penalty–related habeas corpus petitions were almost always filed in and heard by the Supreme Court. There has been, therefore, no previous action by the Judicial Council governing the procedures for death penalty–related habeas corpus proceedings in the superior courts because, until the passage of Proposition 66, there was no need for such rules.

Since Proposition 66 went into effect the working group has recommended three proposals to the Judicial Council:

1. Rule amendments and new rules and forms governing the preparation of the record on appeal in capital cases. The Judicial Council adopted that proposal at its meeting on September 21, 2018;[1]

2. Rule amendments and new rules governing the qualifications of counsel for appointment in death penalty appeals and habeas corpus proceedings. The Judicial Council adopted that proposal at its meeting on November 30, 2018;[2] and

3. Rule amendments and new rules and forms governing the appointment by the superior court of counsel in death penalty–related habeas corpus proceedings. The Judicial Council adopted that proposal at its meeting on November 30, 2018.[3]

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[1] Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal and Appellate Procedure: Record Preparation in Death Penalty Cases* (Sept. 7, 2018), *https://jcc.legistar.com/View.ashx?M=F&ID=6613532&GUID=4A5A5D1E-8061-4339-AD6A-461BC0F34938*.

[2] Judicial Council of Cal., Proposition 66 Rules Working Group, *Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings* (Nov. 9, 2018), *https://jcc.legistar.com/View.ashx?M=F&ID=6786821&GUID=9BBA8EAC-8EDA-405D-B1A8-E1A0399A020D*.

[3] Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings* (Oct. 19, 2018), *https://jcc.legistar.com/View.ashx?M=F&ID=6786824&GUID=CA85EBD4-E947-4E81-A1B5-21B857789B56*.

All three proposals become effective April 25, 2019. In addition, this recommendation is being submitted to the council concurrently with the working group's report and recommendation regarding the adoption of rule amendments and new rules and a form related to appeals from superior court decisions in death penalty–related habeas corpus proceedings.[4]

Analysis/Rationale

Background

Proposition 66

On November 8, 2016, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. This act made a variety of changes to the statutes relating to review of death penalty (capital) cases in the California courts, many of which were focused on reducing the time spent on this review. Among other provisions, Proposition 66 effected several changes to the procedures for filing, hearing, and making decisions on death penalty–related habeas corpus petitions. Relevant here is that the act requires trial courts to offer and, unless the offer is rejected, appoint habeas corpus counsel for indigent persons subject to a judgment of death. (Pen. Code, § 1509(b); Gov. Code, § 68662.) In addition, the act calls for the Judicial Council to adopt, within 18 months of the act's effective date, "initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6(d).)

The act did not take effect immediately on approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, *Briggs v. Brown* (S238309). On October 25, 2017, the Supreme Court's opinion in *Briggs v. Brown* became final ((2017) 3 Cal.5th 808), and the act took effect. Shortly thereafter, the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the proposition. The council charged the working group with considering what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions, including, among other things, those governing the procedures for filing, hearing, and adjudicating death penalty–related habeas corpus proceedings in the superior courts. Copies of the working group's charge and a roster of the members are attached at pages 20–22.

Existing procedures for death penalty–related habeas corpus proceedings

Until the enactment of Proposition 66, death penalty–related habeas corpus petitions were almost always filed in and heard by the Supreme Court. The procedures for filing, hearing, and making decisions on these petitions in the Supreme Court are found in chapter 4 (Habeas Corpus Appeals and Writs) of division 1 (Rules Relating to the Supreme Court and Courts of Appeal) of title 8 (Appellate Rules) of the California Rules of Court (Cal. Rules of Court, rules 8.380–

[4] This report refers to several rules proposed in the companion report, Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings* (Feb. __, 2019).

8.388). These are the same rules that apply to noncapital habeas petitions filed in the Supreme Court and Courts of Appeal. Additional procedures, specific to review of capital cases, are found in the *Supreme Court Policies Regarding Cases Arising from Judgments of Death*[5] (*Supreme Ct. Policies*).

Changes in procedures required by Proposition 66

Chief among the changes effected by Proposition 66 is that superior courts will be hearing and making decisions on these petitions, unless there is good cause for another court to hear the petition:

> A writ of habeas corpus pursuant to this section is the exclusive procedure for collateral attack on a judgment of death. A petition filed in any court other than the court which imposed the sentence should be promptly transferred to that court unless good cause is shown for the petition to be heard by another court. A petition filed in or transferred to the court which imposed the sentence shall be assigned to the original trial judge unless that judge is unavailable or there is other good cause to assign the case to a different judge.

(Pen. Code, § 1509(a).)

Proposition 66 also shortened the time to file an initial death penalty–related habeas corpus petition. Proposition 66 provides, "[e]xcept as provided in subdivisions (d) and (g), the initial petition must be filed within one year of the order entered under Section 68662 of the Government Code," under which habeas corpus counsel is appointed.[6] (Pen. Code, § 1509(c).) This is considerably less time than has previously been allowed by the Supreme Court to file these petitions. Under the Supreme Court's policies, "[a] petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal or within 36 months after appointment of habeas corpus counsel, whichever is later."[7] (*Supreme Ct. Policies*, Policy 3, § 1-1.1.)

In addition to reducing the time in which counsel have to prepare and file an initial death penalty–related habeas corpus petition, Proposition 66 requires the dismissal of successive

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[5] Available at *www.courts.ca.gov/documents/Policies_Regarding_Cases_Arising_from_Judgments_of_Death.pdf*.

[6] Under Penal Code section 1509(d), an "initial petition which is untimely . . . shall be dismissed unless the court finds by a preponderance of all the available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." Under Penal Code section 1509(g), when a judgment of death was imposed but no habeas corpus petition had been filed prior to the effective date of the proposition, a petition that would otherwise have been untimely under subdivision (c) may be filed within one year of the effective date of Proposition 66 or within the time allowed under prior law, whichever is earlier.

[7] A petition filed outside these time frames "may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim." (*Supreme Ct. Policies*, Policy 3, § 1-1.2.)

petitions "unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." (Pen. Code, § 1509(d).)

Proposition 66 also imposed a deadline for resolving the petition that had not previously existed. Thus, under Penal Code section 1509(f), a superior court is to resolve the petition within one year of the filing of the petition unless the court finds that delay is necessary to resolve a substantial claim of actual innocence, but in no instance longer than two years total. In *Briggs v. Brown* the Supreme Court held that this deadline is "merely directive," but may also "serve as benchmarks to guide courts, if meeting the limits is reasonably possible." (*Briggs v. Brown*, *supra*, 3 Cal.5th at pages 848–860.)

The current practice in the Supreme Court is that a death penalty–related habeas corpus petition may be denied without an explanation of the basis for the denial. Proposition 66 provides that "[o]n decision of an initial petition, the court shall issue a statement of decision explaining the factual and legal basis for its decision." (Pen. Code, § 1509(f).)

Superior court procedures in noncapital habeas corpus proceedings

Although superior courts have generally not been responsible for handling death penalty–related habeas corpus proceedings, they do preside over noncapital habeas corpus proceedings. The statutory authority for habeas corpus proceedings is found at Penal Code sections 1473 through 1508. This statutory framework provides little in the way of deadlines. The Judicial Council, however, has adopted three rules of court and one form that govern noncapital habeas corpus proceedings. (Cal. Rules of Court, rules 4.550–4.552 and *Petition for Writ of Habeas Corpus* (form HC-001).) These rules of court provide extensive deadlines and procedures for noncapital habeas corpus proceedings in the superior courts.

There are significant differences between death penalty–related and noncapital habeas corpus proceedings. Most noncapital habeas corpus petitions are drafted and filed without the assistance of an attorney. In contrast to the explicit statutory authority requiring appointment of counsel for the initial petition in a death penalty–related habeas corpus proceeding, in a noncapital proceeding a petitioner does not become entitled to counsel unless the court issues an order to show cause because the petitioner made a prima facie showing that he or she is entitled to relief. (Cal. Rules of Court, rule 4.551(c).) In addition, the scope and complexity of a death penalty–related habeas corpus proceeding is typically far greater than the scope and complexity of a noncapital habeas corpus proceeding, as is evidenced by the much larger record on appeal (often exceeding 10,000 pages). This means that the deadlines, page limits, and other aspects of the current rules for noncapital petitions are inadequate for the new superior court death penalty–related habeas corpus proceedings.

The Judicial Council's responsibilities under Proposition 66

Before summarizing the details of the recommendation, it is worth reviewing the specific direction given to the Judicial Council regarding the rules required by Proposition 66. Proposition 66 specifically requires the adoption of rules "designed to expedite the processing of

capital appeals and state habeas corpus review." (Pen. Code, § 190.6(d).) This direction is consistent with the provision in Proposition 66 that provides that death penalty–related habeas corpus proceedings "be conducted as expeditiously as possible." (Pen. Code, § 1509(f).) That same provision, however, states that proceedings must be conducted "consistent with a fair adjudication." In making this recommendation, the working group attempted to craft a set of rules that would strike the right balance between these two principles established by Proposition 66. In addition, the Supreme Court raised a third principle the working group took into account: "The Judicial Council, in drafting the 'rules and standards of administration' for carrying out Proposition 66's reforms (§ 190.6, subd. (d)), must take care to preserve the courts' inherent authority over their dockets." (*Briggs v. Brown*, *supra*, 3 Cal.5th at p. 861.) These various directions presented a challenge as they were not always easy to reconcile, but the working group is of the view that the proposed rules strike an appropriate balance between the different demands, though it is also aware that this represents only a first step and that there are likely to be changes and refinements in the future. Such changes will be consistent with Proposition 66, which requires the Judicial Council to "continuously monitor the timeliness of review of capital cases" and amend the rules "as necessary." (Pen. Code, § 190.6(d).)

Proposed rules

As discussed, there are already two sets of rules of court that govern habeas corpus proceedings, one in title 4, which governs noncapital habeas corpus proceedings in the superior courts (Cal. Rules of Court, rules 4.550–4.552), and another in title 8, which governs habeas corpus proceedings in the Supreme Court and Courts of Appeal, including death penalty–related habeas corpus petitions in the Supreme Court (Cal. Rules of Court, rules 8.384–8.387). The working group recognized that death penalty–related habeas corpus proceedings represent a new responsibility for the superior courts. Members of the working group, therefore, advocated for making the rules as similar to the existing superior court rules as possible, so as to reduce the burden on the superior courts of learning new procedures. In addition, there was a recognition that Proposition 66 represented a deliberate shift of these proceedings from the Supreme Court to the superior courts and reliance on existing superior court procedures would be consistent with that shift. The proposed rules, therefore, are modeled in large part on the current rules in title 4. The proposed rules borrow provisions from the rules in title 8 when, as was often the case, the superior court rules were silent, or the appellate rules were more appropriate to death penalty–related proceedings. The proposed rules of necessity also include provisions that reflect the newly enacted requirements in Penal Code section 1509, including provisions on transfers and successive petitions, for which there were no current models in existing habeas corpus rules of court.

Proposed rule 4.571: Filing of petition in the superior court

Proposed rule 4.571 governs the filing of a death penalty–related habeas corpus petition in the superior court. It is modeled in large part on rule 4.551(a), but draws on rule 8.384 for provisions regarding supporting documents and noncomplying filings. Proposed rule 4.571:

- Prescribes the number of copies to be filed;

- Prescribes service requirements;
- Defines the supporting documents that must accompany the petition;
- Requires the petition and supporting memorandum to support any reference to the documents with a specific citation; and
- Requires the clerk of the court to file a noncomplying petition, and allows the court to notify the attorney that it may strike the noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time.

Proposed rule 4.571 incorporates by reference numerous superior court rules and practices, including rules 2.100–2.117 and portions of rule 3.1113, which relate to the formatting of documents filed with the court; rules 2.550 and 2.551, which relate to sealed documents; and rule 2.250, which relates to electronic filing and service. Subdivision (e) is modeled after rule 4.551(a)(3)(A) and (a)(4) and provides deadlines for the court to act on a petition or informal response and defines what it means to act on a petition—provisions not provided in the appellate rules. The 60-day deadline for the court to make an initial determination on the petition is triggered either by the filing of the petition in the superior court or by the transfer of a petition to the superior court.

Proposed rule 4.571 looks to appellate rules for two areas not covered in the superior court rules. First, the proposed rule incorporates by reference rules 8.47 and a portion of rule 8.45 to provide guidance on confidential documents. Second, the proposed rule tracks portions of rule 8.384 with respect to the documents supporting the petition, although some changes have been made to tailor the rule for use in these particular proceedings. Accordingly, the proposed rule deems that the supporting documents include the record on appeal (created for the direct appeal), including any exhibits admitted in evidence, refused, or lodged, and requires the supporting documents include a certified copy of the transcript of any hearing (not just an "evidentiary hearing") if the petition asserts a claim that was the subject of that hearing. The proposed rule also requires inclusion of any order from a different proceeding involving the judgment that disposes of any claim or portion of a claim raised by those petitions.

Rule 4.572: Transfer of petitions

Penal Code section 1509(a) requires a petition filed in a superior court other than the court that imposed the sentence to be promptly transferred to that court unless good cause is shown for the petition to be heard by another court. Proposed rule 4.572 tracks the language of the statute but also specifies that a superior court has 21 days in which to transfer a death penalty–related habeas corpus petition to an appropriate court. The proposed rule also requires the superior court to issue an order with the basis for its decision to transfer or retain the petition.

Rule 4.573: Proceedings after the petition is filed

Proposed rule 4.573 is modeled after rule 4.551(a) and (b), but, consistent with the broader scope and complexity of death penalty–related habeas corpus petitions, allows more time to prepare, file, and serve the relevant papers:

- The respondent's informal response must be served and filed within 45 days of the superior court's service of a request or later if the court so orders; and
- The petitioner's reply, if any, must be served and filed within 30 days or later if the court so orders.

Proposed rule 4.573(a) also incorporates by reference the applicable filing and formatting requirements governing papers and supporting documents in proposed rule 4.571 and prescribes service of the request for the informal response on the district attorney, the Attorney General, the petitioner, and on any assisting entity or counsel. The proposed rule also allows the court to extend for good cause a party's filing deadline and requires an attorney requesting an extension of a filing deadline to explain the additional work required to file the informal response or reply.

Under proposed rule 4.573(b), the superior court must issue an order to show cause if the petitioner has made the required prima facie showing, which is the same standard found in rules 4.551(c) and 8.385(d).

Rule 4.574: Proceedings following an order to show cause

Proposed rule 4.564 is generally modeled after rules 4.551(d)–(f) and 8.386, but, consistent with the broader scope and complexity of death penalty–related habeas corpus petitions, allows more time to prepare, file, and serve the relevant papers:

- The return must be served and filed within 45 days after the court issues the order to show cause or later if the court so orders; and
- The petitioner's denial (traverse), if any, must be filed and served within 30 days after the filing of the return or later if the court so orders.

Proposed rule 4.574 also incorporates by reference the applicable filing and formatting requirements governing papers and supporting documents in rule 4.571; allows the court to extend for good cause a party's filing deadline; and requires an attorney requesting an extension of a filing deadline to explain the additional work required to file the return or denial. As in rules 4.551 and 8.386, proposed rule 4.574 states that material allegations not controverted by the return or the denial are deemed admitted for purposes of the proceeding.

Evidentiary hearing. Subdivision (d)(1) is modeled after rules 4.551(f) and 8.386(f)(1) and requires an evidentiary hearing if, after considering the papers submitted, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.

Consistent with Penal Code section 190.9, which applies to superior court proceedings in which a death sentence may be imposed, proposed subdivision (d)(2) requires the court to assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this subdivision. Like Penal Code section 190.9, proposed subdivision (d)(2) requires any computer-readable transcript to conform to the requirements of Code of Civil Procedure section 271.

The court may order additional briefing during or following the evidentiary hearing under subdivision (e).

Submission of cause. Subdivision (f) is modeled after Superior Court of Los Angeles County local rule 8.33 and deems a death penalty–related habeas corpus proceeding submitted, for purposes of article VI, section 19 of the California Constitution, at the conclusion of the evidentiary hearing, if one is held, or if there is supplemental briefing after the conclusion of the evidentiary hearing, when all the supplemental briefing is filed.

Rule 4.575: Decision on death penalty–related habeas corpus petition

Penal Code section 1509(f), as amended by Proposition 66, requires that "[o]n decision of an initial petition, the court shall issue a statement of decision explaining the factual and legal basis for its decision." Although, as a general matter, the California Rules of Court typically do not repeat statutory provisions, proposed rule 4.575 does so in this case to make the rules a more comprehensive description of the superior court's duties and to provide context for prescribing the different entities on which the clerk must serve the statement of decision.

Rule 4.576: Successive petitions

Penal Code section 1509(d), as amended by Proposition 66, requires the dismissal of successive petitions "unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." Proposed rule 4.576(a) requires a superior court that receives such a petition to provide notice to the petitioner and opportunity to respond before the court dismisses the petition.

Proposed subdivision (b) requires the court to grant or deny a certificate of appealability concurrently with issuance of a decision denying relief on a successive petition. The superior court may order the parties to submit arguments on whether a certificate should be granted. If the superior court grants a certificate, the certificate must identify the substantial claim or claims shown by the petitioner as well as the substantial claim that the requirements of subdivision (d) of Penal Code section 1509 have been met. The clerk of the superior court must serve the certificate on the entities identified in the rule and must send the certificate to the Court of Appeal when it sends the notice of appeal.

Proposed rule 4.577: Transfer of files

Proposed rule 4.577 requires the attorney for the petitioner to deliver all files the attorney maintained related to the proceeding to the attorney representing petitioner in any appeal taken from the proceeding.

Policy implications

An issue that arose during many of the working group's discussions was the absence of funding for appointed counsel, assisting counsel or entities, and new superior court responsibilities associated with adjudicating death penalty–related habeas corpus petitions. Similarly, no funding has been provided for the Courts of Appeal, which will now be reviewing appeals from superior

court decisions on such petitions, or for paying for appointed appellate counsel for indigent petitioners. These same issues were raised by those who submitted comments on the proposed rules. Although the question of funding is outside the scope of the working group's charge, the uncertainty about funding had an impact on the working group's proposal. For example, because it is unclear whether counties or the state will be paying for appointed counsel for indigent petitioners, the rules could not be more specific about who would be serving as counsel, under what standards counsel should be paid, and whether some of these decisions should be made locally or at the state level. Likewise, Proposition 66 did not specify whether the local district attorney or the Attorney General would be representing the People, which raised a number of questions about which of the two should be filing or served with papers in these proceedings. As the source, distribution, and amount of funding become known, adjustments to the rules may become appropriate or necessary.

Many other aspects of the proposal raise policy implications; these are addressed in the discussion of particular topics in Comments, below.

Comments

This proposal was circulated for public comment in a special cycle between October 19 and November 19, 2018.[8] It was distributed to the standard list of presiding judges and justices, court executive officers, and bar associations. Working group members were also asked to distribute it to all those they thought might be interested in commenting.

The working group received 19 sets of comments on this proposal, which were submitted by one Court of Appeal, five superior courts and one superior court judge, 11 organizations or individuals that represent criminal defendants, one professional association, one victims' rights organization, one foreign government, and one private business.[9] One commenter indicated that it agreed with the proposal, five indicated that they agreed with the proposal if modified, and the remainder did not specify an overall position on the proposal but provided comments. Many commenters agreed with parts of the proposal but disagreed with or suggested modifications to other parts.

The text of comments directly addressed to specific aspects of the proposal, along with the working group responses, are in the comment chart attached at pages 30–95. The chart begins with a list of commenters with general comments and is followed by substantive comments organized by rule number or topic. Following the chart, at pages 96– 63are copies of a complete set of comments on this proposal in the format received by the working group. The name of the commenter in the first part of the comment chart links to the copy of the full text of that individual's or entity's comments.

[8] The invitation to comment is available on the Judicial Council's website at *www.courts.ca.gov/documents/SP18-22.pdf*.

[9] The five appellate projects submitted a single, joint set of comments and the Superior Court of Orange County submitted 2 sets for a total of 19 sets of comments received from 22 entities.

The working group received many suggestions from commenters over the course of its work on each of its five proposals. The working group appreciates all the comments it received. However, for a variety of reasons, the working group was not able to address some of these suggestions by the deadline necessary to make its recommendation to the Judicial Council for the initial set of rules required by Penal Code section 190.6(d). In some cases, the working group lacked the information necessary to consider the proposal (e.g., the entity responsible for funding appointed counsel for petitioners); in other cases, the working group lacked the time to discuss a suggestion, draft a proposal, and circulate it for public comment. The comment chart documents these reasons in greater detail. Although the working group has completed its charge, Penal Code section 190.6(d) requires the Judicial Council to amend the rules "as necessary." Therefore, the working group recommends that the Judicial Council refer to its Rules and Projects Committee all of the outstanding suggestions that the working group has collected during its tenure so that the Rules and Projects Committee can refer them to the appropriate advisory body or bodies, if any, to consider these proposals in the future.

Filing deadlines

The working group received numerous comments on the deadlines imposed on the parties and the superior courts in the proposed rules. Almost universally commenters considered the deadlines set in the rules to be insufficient for parties to adequately prepare the necessary papers or for the courts to adequately consider and make decisions on the petitions. After reviewing the comments, the working group concluded it was not in a position to establish longer deadlines.

The working group recognizes the deadlines in these rules are ambitious given the complexity of these petitions, the quantity of evidence, and the length of the papers filed by the parties. However, the deadlines provided in the proposed rules give parties, with one exception, longer time frames in which to submit papers than is required under the current rule for noncapital habeas corpus proceedings in the superior courts (rule 4.551) and the rules for habeas corpus proceedings in the Courts of Appeal and in the Supreme Court (rules 8.384–8.387). In addition, all the deadlines imposed on the parties in the proposed rules may be extended upon a showing of good cause. The working group considers the proposed deadlines to be in keeping with Proposition 66's mandate that these proceedings be conducted "expeditiously" and that the ability of courts to extend these deadlines is consistent with Proposition 66's requirement that the proceedings also be conducted "consistent with a fair adjudication." (Pen. Code, § 1509(f).) The requirement that attorneys who seek an extension submit a statement of the additional work necessary to meet the deadline will also give the superior courts an active role in monitoring and assessing counsel's progress.

The deadlines imposed on the court are similarly ambitious and also reflect an effort to be consistent with the mandates of Proposition 66. Proposition 66 provides that a "superior court shall resolve the initial petition within one year of filing unless the court finds that a delay is necessary to resolve a substantial claim of actual innocence, but in no instance shall the court take longer than two years to resolve the petition." (Pen. Code, § 1509(f).) When the deadlines in the proposed rules are taken together, they provide for the adjudication of a petition in roughly

one year. Although the Supreme Court has held that the deadlines in Penal Code section 1509(f) are "directory" (*Briggs v. Brown, supra,* 3 Cal.5th at pp. 859–860), the working group was reluctant to make a recommendation that would incorporate into the Rules of Court deadlines that would exceed the time frames provided in Proposition 66. Nonetheless, the working group is cognizant of the Supreme Court's thoughts on Penal Code section 1509(f):

> If in a particular case the time limits imposed by section 1509, subdivision (f) are not "consistent with a fair adjudication," as the statute requires, the voters signaled that the interest of fairness must prevail. Moreover, . . . nothing in section 1509 suggests the voters contemplated that courts would neglect their other business in order to comply with the time limits. Proposition 66 presumes that the courts will have sufficient resources to manage their caseloads.

(*Id.* at p. 860.) Thus, although the rules provide fixed deadlines, each court will have to exercise its discretion and determine in the context of the proceedings before it how to comply with Proposition 66 and these rules.

Extensions

Several commenters noted that the language related to filing deadlines in the draft of the rules as circulated would have allowed courts to require parties to file papers in fewer days than specified in the proposed rules. Because commenters overwhelmingly suggested that the proposed rules should be revised to give parties more time to file papers, the working group concluded the proposed rules should be revised to make clear that courts have discretion to extend, but not shorten, the time to file papers. Accordingly, where a filing deadline stated "or as the court specifies," the proposed rules have been revised to instead state "or a later date, if the court so orders." This would make the deadlines the shortest period of time permitted but would allow the court to extend the deadlines when appropriate for good cause.

Another commenter suggested removing the provisions in the proposed rules that would require a party seeking an extension to state what additional work was required to meet the deadline in the applications. The working group disagreed. Requiring a statement of the remaining work permits the court presiding over the proceeding to have an active role in monitoring the progress of the attorneys and was not intended to either limit or define the circumstances under which there was good cause for the extension. The working group considered this role to be consistent with the mandates of Proposition 66 and declined to make the change.

Supreme Court transfer of petitions to a superior court

The working group considered whether the proposed rules should address in greater detail the Supreme Court's transfer of two distinct categories of death penalty–related habeas corpus petitions to or among the superior courts. The first group consists of those petitions currently pending in the Supreme Court, both those with and those without counsel. With respect to these petitions, the working group concluded that this was a matter best left to the judgment and policies of the Supreme Court, at least at this time.

Several commenters disagreed with the working group's conclusion and expressed the view that it would be helpful if the rules provided more guidelines related to such transfers. Since the proposal was circulated for public comment, however, the working group became aware that the Supreme Court is currently reviewing questions regarding the circumstances under which it would exercise its discretion to transfer pending petitions to a superior court under Penal Code section 1509(g). (*In re Joseph Mora on Habeas Corpus* (filed May 17, 2018, S248835).) This confirmed the conclusion of many on the working group that, although it might be helpful if there were rules that provided more guidance related to Supreme Court transfer of habeas corpus petitions to the superior courts, it was appropriate to defer to the Supreme Court on this matter, and it would be premature for the working group to recommend rules relating to such transfers.

The second category concerned petitions initially filed in the superior court that imposed the death sentence. There was a suggestion that the Supreme Court could transfer such petitions among the superior courts. The good cause for such transfers would be to balance the workload of these petitions. The working group elected not to propose such a rule as it considered such a procedure to be potentially inconsistent with Penal Code section 1509(a), which requires that petitions be heard in the court that imposed the sentence unless there is good cause for another court to hear the petition. Such transfers would also likely be inconsistent with the intent of Proposition 66 to localize the resolution of death penalty–related habeas corpus petitions in the courts that imposed the sentence. The working group received no comments that contradicted this conclusion. The working group notes that, to the extent there are issues related to workload, the Chief Justice has the discretion under article VI, section 6(e) of the California Constitution to provide for the assignment of a superior court judge from one superior court to another. However, it is outside the scope of the working group's charge to recommend how the Chief Justice might exercise this authority in connection with death penalty–related habeas corpus petitions.

Two commenters suggested that the working group should consider rules governing transfers when venue of the underlying trial had been changed. One suggested that petitions filed in the superior court that had imposed the sentence of death (the "receiving court") should always be transferred back to the superior court that had venue when the underlying case had originally been filed (the "transferring court"). The other commenter took the view that the receiving court should not automatically be required to hear such petitions, but did not propose a rule for when such petitions should be returned to the transferring court. The working group did not have an opportunity to review these suggestions, draft a proposal, and circulate a proposal by the deadline in Proposition 66 for the Judicial Council to adopt an initial set of rules. (Pen. Code, § 190.6(d).) The working group recommends that these suggestions may be considered in the future by the appropriate Judicial Council advisory body.

Amendment of petitions

The proposal circulated for public comment did not include any provisions governing the amendment of petitions. The working group did, however, include several questions asking for comments, and it received many comments in response. All were of the view that the working

group should develop and recommend rules regarding amendments to petitions. Commenters cited case law stating that amendments should be liberally granted and noted that the Supreme Court currently allows amendment of petitions in habeas corpus proceedings. Specifically, several commenters urged that the rules provide that so-called "*Morgan*" or "shell" petitions are authorized by the rules.[10]

As evidenced by those comments, there is already an extensive body of law on amendments, but there is also an argument, made by one commenter, that Proposition 66 was intended to limit the scope and time frame for making amendments to a petition. The use of *Morgan* petitions was authorized by the Supreme Court pursuant to case law and continued practice, but the justices were not unanimous in support of the procedure.[11] Because the case predates Proposition 66, it is uncertain whether its holding and rationale would apply to petitions filed in the superior courts. This poses a challenge to recommending rules. On the one hand, rules could help give the parties some clarity and direction. On the other hand, rules could stifle the more organic development of the law arising from specific fact patterns and, if the rules were challenged, could even be misleading or create more problems than they solve. After considering these various points, the working group declined to revise the proposal to recommend the adoption of rules governing amendment of petitions. The working group emphasizes that nothing in the proposed rules is intended to preclude amendments. In addition, this is an area that an appropriate Judicial Council advisory body may want to revisit at a later date.

Noncomplying filings

The working group received several comments on proposed rule 4.571(d), which requires the clerk of the superior court to accept petitions that do not comply with the formatting and filing requirements set forth in the rule. The language is modeled after rule 8.384, which is limited in scope to attorney-filed petitions. Although all indigent petitioners are entitled to counsel for the initial petition, the working group has revised the proposal to clarify that this provision is similarly limited to attorney-filed petitions. It is expected that attorneys will be familiar with relevant filing requirements and comply with those requirements. The provision assures that the clerk will accept the filing regardless of compliance with filing and formatting requirements.

The proposed rule also gives the court discretion to have the attorney correct any defects before a petition could be dismissed. The proposed rule does not *require* a court to dismiss the petition. The court may grant an extension of any reasonable length of time to correct the petition, so long as it gives at least five days; this will allow the court to tailor the length of the time to correct the petition to the scope of work necessary to bring the petition into compliance. Several commenters suggested the rule should be revised to specify five *court* days. Although it is only intended to be a minimum, the working group agreed with the comments and revised the proposed rule accordingly.

[10] *In re Morgan* (2010) 50 Cal.4th 932.

[11] *Id.* at pp. 942–950 (conc. & dis. opn. of Corrigan, J.)

In any event, the rule does not authorize the rejection of a petition filed by a self-represented petitioner and does not authorize dismissal of such a petition or any lesser sanction. Petitions filed by a self-represented petitioner should be treated the same way as a self-represented filing in any other proceeding.

Standard for evidentiary hearings

Proposed rule 4.574(d)(1) requires an evidentiary hearing if, after considering the papers submitted, "the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact." Two commenters took the position that this standard is inconsistent with the statement of the standard in Supreme Court case law. Specifically, these commenters contend requiring a "reasonable likelihood that the petitioner may be entitled to relief" is a higher standard than the one stated by the Supreme Court in *People v. Duvall* (1995) 9 Cal.4th 464, 475, that an evidentiary hearing must be ordered if "the court finds material facts in dispute." The working group had previously discussed this argument and there was a split among the members. Some believed the language of the proposed rule did not add a requirement and was consistent with case law; others agreed with the commenter's position.

The language in rule 4.574(d)(1) intentionally repeated the language in rule 4.551(f), which governs when an evidentiary hearing is required in a habeas corpus proceeding in the superior courts. There also is substantially similar language in rule 8.386(f)(1), which governs evidentiary hearings in habeas corpus proceedings in the appellate courts. The language has been in rule 4.574 or its predecessor since 1981 and was added to rule 8.386 in 2009. We have found no case law holding this language is incorrect and there is no basis for concluding that the standard in death penalty cases is different from those in noncapital cases. The working group is recommending proposed rules that use the same language found in the two long-standing rules. Were the Judicial Council to adopt language for capital cases that differed from that in noncapital cases, there would be a risk that the different language would be construed as setting two different standards. It may be appropriate for the relevant Judicial Council advisory bodies (the Criminal Law and Appellate advisory committees) to review this issue with regard to all three rules at a later date.

Responsibility for filing a notice of appeal

One commenter on the companion proposal related to the rules governing appellate review of superior court decisions on death penalty–related habeas corpus proceedings suggested that the rules should assign to petitioner's counsel responsibility for filing a notice of appeal. Staff circulated two drafts of such language for inclusion in proposed rule 4.577. The idea was more controversial than originally anticipated. Some members were concerned that counsel not be compelled to file a notice of appeal if counsel thought there were no legitimate grounds for appeal. Other members were concerned about the filing of a notice of appeal absent direction from the client. This led to questions about the obligation to inform and consult with the client and how conflicts between counsel and client concerning an appeal might be resolved. One member of the working group cited Penal Code section 1240.1 as a model. The exchange among

the members highlighted the complexity of the suggestion. The conclusion was that the working group could not make this type of change to the proposal without circulating draft language for public comment under rule 10.22. The working group recommends that this suggestion be considered by an appropriate advisory body at a later date.

Other comments

One commenter suggested the rules should explicitly call for mediation and settlement efforts. Another commenter noted that the current process for habeas corpus petitions (i.e., a petition, followed by informal briefing, an order to show cause, a return, a denial, and an evidentiary hearing, if needed) was not required by statute. Although all the procedures may be appropriate for petitions filed by self-represented petitioners, they may not be as necessary when the petition is prepared and filed by an attorney, as will be the case in virtually all initial petitions in death penalty–related habeas corpus proceedings. The commenter suggested there could be a streamlining of these procedures given this difference.

These are substantive suggestions, and the working group did not have time to discuss them, draft a proposal, and circulate the proposal by the deadline in Proposition 66 for the Judicial Council to adopt an initial set of rules. (Pen. Code, § 190.6(d).) The working group recommends that these suggestions may be considered in the future by the appropriate Judicial Council advisory body.

In preparing this report for the Judicial Council, the chair of the working group and staff realized that proposed rule 4.575 requires the superior court to prepare and file a statement of decision on an initial petition, but not on a successive petition. The statutory requirement for a statement of decision only applies to initial petitions (Pen. Code, § 1509(f)), but it would also be helpful to a reviewing appellate court if a superior court were required to issue a statement of decision when it grants a successive petition. Such a rule would not be inconsistent with statute, and it may be worthwhile for the appropriate Judicial Council body to consider in the future.

Alternatives considered

The working group considered many alternatives to the proposal it is recommending. Most have been addressed in Comments, above.

Challenges to methods of execution

The working group considered whether to develop proposed rules relating to challenges to methods of executions. Proposition 66 includes several statutory provisions relating to such challenges. Specifically, Penal Code section 3604.1:

- Exempts certain execution-related standards from the Administrative Procedure Act (*id.*, subd. (a));
- Provides that only the sentencing court may hear a challenge to the method of execution brought by a person under judgment of death (*id.*, subd. (c)); and

- Directs that, if a court concludes that a challenged method of execution is invalid, the court is to order a valid method of execution (*ibid.*).

Currently, there are no rules of court that specifically address challenges to methods of execution. The working group considered a number of possible subjects for rule-making, including the timing of raising a challenge, the mechanism or format (e.g., in a habeas corpus petition or a civil complaint), and the appropriate venue. However, as the working group observed, this area of law is characterized by uncertainty, including on basic questions of when and in what form a challenge may be raised.[12] Thus, any proposed rule would risk being too broad or too narrow, and have the unintended consequence of permitting or foreclosing challenges beyond what is prescribed by law and was desired by the electorate in approving Proposition 66. Concluding there exists a real possibility that rule-making could get ahead of or otherwise inhibit the development of this area of the law by the courts and interested parties, the working group declined to propose rules at this time.

Department of Corrections and Rehabilitation's duties to enable executions to proceed
Proposition 66 directs that "the court which rendered the judgment of death shall order" the California Department of Corrections and Rehabilitation, if it has failed to perform any duty necessary to enable it to execute a judgment of death, to perform that duty. (Pen. Code, § 3604.1(c).) The working group considered whether to propose rules describing—in greater detail than is currently specified by the statute—procedures for requesting, granting, or denying such relief. Concluding that this area of law may be better developed by courts actually faced with the issue in practice, with the benefit of arguments by interested parties, rather than through rule-making, the working group declined to propose rules at this time.

Fiscal and Operational Impacts

These proposed rules relating to superior court procedures for filing and making decisions on death penalty–related habeas corpus petitions are likely to require some initial training for judicial officers and court staff. There are likely to be no savings for the superior courts or Courts of Appeal, but more likely increased costs associated with the new caseload required by Proposition 66, as discussed in more detail under Policy implications, above. One superior court indicated that it would need 18 months to implement the new rules, although another expressed the view that 90 days should suffice.

Attachments and Links

1. Charge to Proposition 66 Rules Working Group, at page 20
2. Roster of Proposition 66 Rules Working Group, at pages 21–22

[12] See, e.g., *Nelson v. Campbell* (2004) 541 U.S. 637, 644 (declining to "reach here the difficult question of how to categorize method-of-execution claims generally"); *Cooper v. Rimmer* (9th Cir. 2004) 379 F.3d 1029, 1031 (declining to resolve "dispute whether . . . challenge to the California protocol may properly be brought as a § 1983 action, or should instead be recharacterized as an application to file a second or successive petition"); see also *In re Reno* (2012) 55 Cal.4th 428, 462, fn. 17 (rejecting challenge to lethal injection raised in a habeas corpus petition as premature).

3. Cal. Rules of Court, rules 4.571–4.577, at pages 23–29
4. Chart of comments, at pages 30–95
5. Copies of comments received, at pages 96–163
6. Link A: Ballot description and arguments for and against Prop. 66, and text of Prop. 66, *November 2016 Official Voter Information Guide* (pp. 104–109 and 212–218, respectively), *https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf*

Charge to Proposition 66 Rules Working Group

The Proposition 66 Rules Working Group is charged with reviewing California Rules of Court, Standards of Judicial Administration, Judicial Council forms, and other authorities relevant to the processing of capital appeals and state habeas corpus petitions to determine whether and what modifications should be recommended to fulfill the Judicial Council's rule-making obligations under Proposition 66, the Death Penalty Reform and Savings Act of 2016.

The working group will consider what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions, including those governing:

- Appointment of counsel for indigent capital inmates for both the direct appeal and habeas corpus proceedings, including the time frame for appointments and the qualifications necessary to achieve competent representation, the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code (Pen. Code, § 1509 and § 1239.1 and Gov. Code, § 68665);
- The filing of habeas corpus petitions and other matters in the sentencing court and all procedures attendant thereto, including those pertaining to assignment of habeas corpus matters, briefing requirements, certificates of appealability, successive or untimely petitions, and method of execution (Pen. Code, § 1509 and § 3601.1(c));
- Appeals of the sentencing court's rulings on capital habeas corpus petitions to the Court of Appeal and all procedures attendant thereto, including those pertaining to certificates of appealability, priority of such appeals, and the possibility of California Supreme Court review (Pen. Code, § 1509.1); and
- Supreme Court procedures and time frames pertaining to record preparation and briefing in capital appeals (Pen. Code, § 190.6).

In formulating any proposed new or amended court rule, judicial administration standard, or Judicial Council form, the working group will strive to promote the expeditious review of death penalty judgments while ensuring justice and fairness to both defendants and victims. The working group will take into account the language of the act, *Briggs v. Brown* ((2017) 3 Cal.5th 808), and constitutional standards and principles. While participating in the working group, members are expected to not act as advocates of the interests of any stakeholder group, but to contribute to this statewide endeavor by drawing on their expertise in capital litigation, court administration, or other matters relevant to the act.

The working group will propose recommendations to the Judicial Council for adoption, effective April 26, 2019.

Proposition 66 Rules Working Group

As of February 5, 2018

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Presiding Justice of the Court of Appeal
Second Appellate District
Division Seven

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Proposition 66 Rules Working Group

As of February 5, 2018

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Mr. Joseph Schlesinger
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Judge of the Superior Court of California,
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Rules 4.571–4.577 of the California Rules of Court are adopted, effective April 25, 2019, to read:

Title 4. Criminal Rules

Division 6. Postconviction, Postrelease, and Writs

Chapter 3. Habeas Corpus

Article 3. Death Penalty–Related Habeas Corpus Proceedings in the Superior Court

Rules 4.560–4.562 * * *

Rule 4.571. Filing of petition in the superior court

(a) Petition

(1) A petition and supporting memorandum must comply with this rule and, except as otherwise provided in this rule, with rules 2.100–2.117 relating to the form of papers.

(2) A memorandum supporting a petition must comply with rule 3.1113(b), (c), (f), (h), (i), and (*l*).

(3) The petition and supporting memorandum must support any reference to a matter in the supporting documents or declarations, or other supporting materials, by a citation to its index number or letter and page and, if applicable, the paragraph or line number.

(b) Supporting documents

(1) The record prepared for the automatic appeal, including any exhibits admitted in evidence, refused, or lodged, and all briefs, rulings, and other documents filed in the automatic appeal are deemed part of the supporting documents for the petition.

(2) The petition must be accompanied by a copy of any petition, excluding exhibits, pertaining to the same judgment and petitioner that was previously filed in any state court or any federal court, along with any order in a proceeding on such a petition that disposes of any claim or portion of a claim.

(3) If the petition asserts a claim that was the subject of a hearing, the petition must be accompanied by a certified transcript of that hearing.

(4) If any supporting documents have previously been filed in the same superior court in which the petition is filed and the petition so states and identifies the documents by case number, filing date and title of the document, copies of these documents need not be included in the supporting documents.

(5) Rule 8.486(c)(1) governs the form of any supporting documents accompanying the petition.

(6) If any supporting documents accompanying the petition or any subsequently filed paper are sealed, rules 2.550 and 2.551 govern. Notwithstanding rule 8.45(a), if any supporting documents accompanying the petition or any subsequently filed papers are confidential records, rules 8.45(b), (c), and 8.47 govern, except that rules 2.550 and 2.551 govern the procedures for making a motion or application to seal such records.

(7) When other laws establish specific requirements for particular types of sealed or confidential records that differ from the requirements in this subdivision, those specific requirements supersede the requirements in this subdivision.

(c) Filing and service

(1) If the petition is filed in paper form, an original and one copy must be filed, along with an original and one copy of the supporting documents.

(2) A court that permits electronic filing must specify any requirements regarding electronically filed petitions as authorized under rules 2.250 et seq.

(3) Petitioner must serve one copy of the petition and supporting documents on the district attorney, the Attorney General, and on any assisting entity or counsel.

(d) Noncomplying filings

The clerk must file an attorney's petition not complying with this rule if it otherwise complies with the rules of court, but the court may notify the attorney that it may strike the petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five court days.

(e) Ruling on the petition

(1) The court must rule on the petition within 60 days after the petition is filed with the court or transferred to the court from another superior court.

(2) For purposes of this subdivision, the court rules on a petition by:

(A) Requesting an informal response to the petition;

(B) Issuing an order to show cause; or

(C) Denying the petition.

(3) If the court requests an informal response, it must issue an order to show cause or deny the petition within 30 days after the filing of the reply, or if none is filed, after the expiration of the time for filing the reply under rule 4.573(a)(3).

Rule 4.572. Transfer of petitions

Unless the court finds good cause for it to consider the petition, a petition subject to this article that is filed in a superior court other than the court that imposed the sentence must be transferred to the court that imposed the sentence within 21 days of filing. The court in which the petition was filed must enter an order with the basis for its transfer or its finding of good cause for retaining the petition.

Rule 4.573. Proceedings after the petition is filed

(a) Informal response and reply

(1) If the court requests an informal written response, it must serve a copy of the request on the district attorney, the Attorney General, the petitioner and on any assisting entity or counsel.

(2) The response must be served and filed within 45 days of the filing of the request, or a later date if the court so orders. One copy of the informal response and any supporting documents must be served on the petitioner and on any assisting entity or counsel. If the response and supporting documents are served in paper form, two copies must be served on the petitioner.

(3) If a response is filed, the court must notify the petitioner that a reply may be served and filed within 30 days of the filing of the response, or a later date if the court so orders. The court may not deny the petition until that time has expired.

(4) If a reply is filed, the petitioner must serve one copy of the reply and any supporting documents on the district attorney, the Attorney General, and on any assisting entity or counsel.

(5) The formatting of the response, reply, and any supporting documents must comply with the applicable requirements for petitions in rule 4.571(a) and (b). The filing of the response, reply, and any supporting documents must comply with the requirements for petitions in rule 4.571(c)(1) and (2).

(6) On motion of any party or on the court's own motion, for good cause stated in the order, the court may extend the time for a party to perform any act under this subdivision. If a party requests extension of a deadline in this subdivision, the party must explain the additional work required to meet the deadline.

(b) Order to show cause

If the petitioner has made the required prima facie showing that petitioner is entitled to relief, the court must issue an order to show cause. An order to show cause does not grant the relief sought in the petition.

Rule 4.574. Proceedings following an order to show cause

(a) Return

(1) Any return must be served and filed within 45 days after the court issues the order to show cause, or a later date if the court so orders.

(2) The formatting of the return and any supporting documents must comply with the applicable requirements for petitions in rule 4.571(a) and (b). The filing of the return and any supporting documents must comply with the requirements for petitions in rule 4.571(c)(1) and (2).

(3) A copy of the return and any supporting documents must be served on the petitioner and on any assisting entity or counsel. If the return is served in paper form, two copies must be served on the petitioner.

(4) Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the proceeding.

(b) Denial

(1) Unless the court orders otherwise, within 30 days after the return is filed, or a later date if the court so orders, the petitioner may serve and file a denial.

(2) The formatting of the denial and any supporting documents must comply with the applicable requirements for petitions in rule 4.571(a) and (b). The filing of the denial and any supporting documents must comply with the requirements for petitions in rule 4.571(c)(1) and (2).

(3) A copy of the reply and any supporting documents must be served on the district attorney, the Attorney General, and on any assisting entity or counsel.

(4) Any material allegation of the return not controverted in the denial is deemed admitted for purposes of the proceeding.

(c) Ruling on the petition

Within 60 days after filing of the denial, or if none is filed, after the expiration of the deadline for filing the denial under (b)(1), the court must either grant or deny the relief sought by the petition or set an evidentiary hearing.

(d) Evidentiary hearing

(1) An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, exhibits, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.

(2) The court must assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this subdivision.

(A) All proceedings under this subdivision, whether in open court, in conference in the courtroom, or in chambers, must be conducted on the record with a court reporter present. The court reporter must prepare and certify a daily transcript of all proceedings.

(B) Any computer-readable transcript produced by court reporters under this subdivision must conform to the requirements of Code of Civil Procedure section 271.

(3) Rule 3.1306(c) governs judicial notice.

(e) Additional briefing

The court may order additional briefing during or following the evidentiary hearing.

(f) Submission of cause

For purposes of article VI, section 19, of the California Constitution, a death penalty–related habeas corpus proceeding is submitted for decision at the conclusion of the evidentiary hearing, if one is held. If there is supplemental briefing after the conclusion of the evidentiary hearing, the matter is submitted when all supplemental briefing is filed with the court.

(g) Extension of deadlines

On motion of any party or on the court's own motion, for good cause stated in the order, the court may extend the time for a party to perform any act under this rule. If a party requests extension of a deadline in this rule, the party must explain the additional work required to meet the deadline.

Rule 4.575. Decision on death penalty–related habeas corpus petition

On decision of the initial petition, the court must prepare and file a statement of decision specifying its order and explaining the factual and legal basis for its decision. The clerk of the court must serve a copy of the decision on the petitioner, the district attorney, the Attorney General, the clerk/executive officer of the Supreme Court, the clerk/executive officer of the Court of Appeal, and on any assisting entity or counsel.

Rule 4.576. Successive petitions

(a) Notice of intent to dismiss

Before dismissing a successive petition under Penal Code section 1509(d), a superior court must provide notice to the petitioner and an opportunity to respond.

(b) Certificate of appealability

The superior court must grant or deny a certificate of appealability concurrently with the issuance of its decision denying relief on a successive death penalty–related habeas corpus petition. Before issuing its decision, the superior court may order the parties to submit arguments on whether a certificate of appealability should be granted. If the superior court grants a certificate of appealability, the certificate must identify the substantial claim or claims for relief shown by the petitioner and the substantial claim that the requirements of Penal Code section 1509(d) have been met. The superior court clerk must send a copy of the certificate to the petitioner, the Attorney General, the district attorney, the clerk/executive officer of the Court of Appeal and the district appellate project for the appellate district in which the superior court is located, the assisting counsel or entity, and the clerk/executive officer of the Supreme Court. The superior court clerk must send the certificate of appealability to the Court of Appeal when it sends the notice of appeal under rule 8.392(c).

Rule 4.577. Transfer of Files

Counsel for the petitioner must deliver all files counsel maintained related to the proceeding to the attorney representing petitioner in any appeal taken from the proceeding.

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
1.	Aderant CompuLaw by Miri Wakuta, Associate Rules Attorney	NI	Aderant CompuLaw is a software-based court rules publisher providing deadline information to many firms practicing in the State of California. We expect these issues will be important to practitioners. We greatly appreciate your attention and consideration of our comment. Thank you. See comments on specific provisions below.	See responses to specific comments below.
2.	Robert D. Bacon, Attorney at Law Oakland, California	NI	Thank you for the opportunity to comment on these proposed rules. I hope you will find my comments useful. To introduce myself, I am in the fairly unique position of having been involved in the criminal justice system as an appellate court manager, an appellate prosecutor, and now an attorney representing persons under sentence of death on appeal and in state and federal habeas corpus. I have been found qualified to represent capital habeas petitioners by the California Supreme Court and by the federal district courts for the Northern and Eastern Districts. See comments on specific provisions below.	See responses to specific comments below.
3.	California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	NI	See comments on specific provisions below.	See responses to specific comments below.

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
4.	California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	NI	These comments reflect the concerns of California Attorneys for Criminal Justice (CACJ) regarding the proposed rules for filing habeas corpus petitions in superior courts, and filing appeals of habeas corpus decisions in the courts of appeals. CACJ understands that Proposition 66 was passed and is the law. We respect the Judicial Council's role in creating rules to implement the law. Our main concern is that implementation of Proposition 66 not infringe on the constitutional rights of condemned inmates. CACJ's main concern is to ensure that counsel for the condemned inmate have an unobstructed opportunity to investigate and litigate collateral relief issues, including ineffective assistance of trial counsel in the superior court, the opportunity to appeal the habeas corpus rulings of the superior court, and present new claims of ineffective assistance of habeas corpus counsel in the court of appeals. The Judicial Council should recognize that the habeas corpus process defined in Proposition 66 will necessarily be more time- and resource-intensive than current habeas corpus procedures. Currently, the Supreme Court has discretion to review only those claims it finds have merit. Proposition 66 demands that the superior courts review every claim raised by the capital habeas	

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
			corpus petitioner, determine and document the merits of each claim. Each petition will be different and may require vastly different court resources for resolution. Flexibility, where there is good cause, is necessary to adequately meet the petitioner's due process needs and the demands of the superior court. * * * ***Does the proposal appropriately address the stated purpose?*** The proposed rules do not properly address the procedures for capital habeas corpus proceedings in Superior Court. These rules cannot be implemented and will fail without defined sources and allocation of funding. Until the Judicial Council, Superior Courts, and the legislature have defined and allocated funding, appointed counsel, assisting entities, superior court judges and staff cannot implement these measures. See comments on specific provisions below.	See responses to specific comments below.
5.	California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs San Francisco, California and Katy Graham, Senior Appellate Court Attorney	NI	The Committee on Appellate Courts appreciates the Working Group's efforts to balance the mandates of Proposition 66 with the need to ensure reasonable procedures and qualifications for death penalty habeas proceedings. The current invitations to comment contain numerous issues, and the Committee provides the following responses for the issues on which	The working group appreciates the commenter's general support for the proposal.

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
	Court of Appeal, Second Appellate District, Division Six Ventura, California		it has substantive suggestions. * * * The Committee on Appellate Courts supports this proposal [SP 18-22] as a whole, and responds as follows to the Working Group's request for specific comments. See comments on specific provisions below.	See responses to specific comments below.
6.	Court of Appeal, Sixth Appellate District by Hon. Mary J. Greenwood, Administrative Presiding Justice	NI	The Sixth District Court of Appeal has the following comment as to Proposed Rules 4.574(c) and 4.575: See comments on specific provisions below.	See responses to specific comments below.
7.	Court of Appeal Appellate Projects by Jonathan Soglin, Executive Director, First District Appellate Project	NI	From: Court of Appeal Appellate Projects[1] (Footnote 1: Appellate Defenders, Inc., the California Appellate Project-Los Angeles, Central California Appellate Program, the First District Appellate Project, and the Sixth District Appellate Program.) The Court of Appeal appellate projects provide the following comments and suggestions regarding the proposed rules governing superior court and Court of Appeal capital habeas corpus proceedings. See comments on specific provisions below.	See responses to specific comments below.

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
8.	Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	N	The Criminal Justice Legal Foundation, an organization dedicated to promoting the interests of victims of crime in the criminal justice system, submits these comments on SP18-22. * * * In conclusion, this proposal needs a lot of work to effectively perform the task assigned by the statute. We would be glad to work with the working group if further input from us is needed. See comments on specific provisions below.	See responses to specific comments below.
9.	Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	NI	On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the procedures for death penalty-related habeas corpus proceedings in superior courts. Mexico welcomes the opportunity to convey its views on this very important matter. **I. INTRODUCTION** The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their	

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			imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives[1]. While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad. Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the execution of Mexican nationals, Mexico respects the right of the States to determine the punishment for crimes [that] occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as they relate to Mexican nationals under sentence of death. As you may know, there are currently 39 Mexican nationals on death row in California. Please understand that these provisional comments are necessarily limited, and submitted with the November 19, 2018 deadline in mind. The SP18-22 proposal is extensive and the topic complex. My government cannot reasonably respond to all of the questions raised in this proposal within the time allotted. Additionally, given this complexity and the	Penal Code section 190.6(d), as enacted by Proposition 66 (the act), requires the Judicial Council to adopt "initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review" within 18 months of the effective date of the act. The act took effect on October 25, 2017, when the Supreme Court issued its

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			grave importance of these procedures, Mexico urges the Judicial Council to postpone implementation of these new rules beyond the April 25, 2019 date currently contemplated. More time is necessary to fully consider the implications of these proposals, and to develop and refine new proposals addressing topics the current proposal [omits]. As a general matter, Mexico agrees with the Judicial Council's findings that "[t]here are significant differences between death penalty-related and noncapital habeas corpus proceedings" and that the "scope and complexity of a death penalty-related habeas corpus proceeding is far greater than the scope and complexity of a noncapital habeas corpus proceeding" (Proposal SP18-22 p. 4). In this vein, the American Bar Association has advised that "Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation." American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition, Feb. 2003), Guideline 10.15.1(C). Thus, any new rules for death penalty cases must account for the unique needs these cases command. * * *	decision in *Briggs v. Brown et al.* (2017) 3 Cal.5th 808. The Judicial Council must therefore adopt *initial* rules of court on or before April 25, 2019. The working group emphasizes that these rules of court represent an *initial* set of rules. As a matter of the policy, any person or organization may at any time submit to the Judicial Council a request for a new or amended rule of court, form, or standard of judicial administration. With respect to this particular set of rules, Proposition 66 specifically imposed on the Judicial Council a continuing obligation to "monitor the timeliness of review of capital cases and shall amend the rules and standards as necessary to complete the state appeal and initial state habeas corpus proceeding . . . ." Although the working group recommends that the Judicial Council adopt these rules at its March 2019 meeting to become effective April 25, 2019, it anticipates there will be opportunities in the future to revisit and amend these rules as the Judicial Council finds necessary or appropriate.

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			Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States. [1] *See, e.g.,* Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261. See comments on specific provisions below.	See responses to specific comments below.
10.	Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	NI	The below comments to SP18-22 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients. See comments on specific provisions below.	See responses to specific comments below.
11.	Hon. Morris Jacobson, Judge, Superior Court of Alameda County	NI	I have reviewed the proposed Rules of Court 4.571-4.576, and have just a couple of brief comments to add for consideration. See comments on specific provisions below.	See responses to specific comments below.
12.	Office of the State Public Defender by Mary K. McComb, State Public Defender	NI	The Office of the State Public Defender ("OSPD") is the state agency with the "primary responsibility" of representing	

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	Oakland, California		death-sentenced inmates in direct appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD has many staff attorneys with significant experience in habeas proceedings. We submit the following comments on the proposed rules relating to Criminal Procedure: Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings, SP18-22. See comments on specific provisions below.	See responses to specific comments below.
13.	Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	AM	I am pleased to submit the following comments in regards to the proposed changes to the Rules of Court concerning Criminal Procedure: Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings, Item Number SP18-22. <u>Statement of Interest</u> I am the attorney supervising the homicide unit ("Special Trial Unit") of the Santa Clara County Public Defender's Office. I also continue to litigate murder cases, including as lead counsel in a pending death penalty case. I have been a public defender for over 37 years, and I have been counsel of record in death penalty cases throughout that time, with occasional short breaks in between capital cases. I have been	

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			lead counsel at the penalty or punishment phase of three death penalty jury trials, each of which resulted in verdicts, two of life imprisonment without the possibility of parole, and one of death. I was also counsel in over 20 other death penalty cases that eventually resolved for lesser sentences or resulted in the prosecution dropping the death penalty. I am the author of the chapter on Death Penalty Cases in *California Criminal Law, Procedure and Practice*, Continuing Education of the Bar, 2016-2018 annual editions; was the defense attorney consultant to the *Death Penalty Benchguide*, California Center for Judicial Education and Research, © Judicial Council of California, from its inception through 2011 (I believe that is the most recent edition); and have been the editor of, and author of selected chapters in, the *California Death Penalty Defense Manual*, California Attorneys for Criminal Justice and the California Public Defenders Association, from 2004 through the present. I have been active in training defense counsel in capital cases since 1990, and have authored well over 100 articles on various topics of capital defense. <u>Position</u> I agree with some of the proposals if they are modified. My position is spelled out in detail below.	

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			See comments on specific provisions below.	See responses to specific comments below.
14.	Superior Court of Los Angeles County	A	These comments are from the Los Angeles Superior Court and not from any one person in particular. See comments on specific provisions below.	The working group appreciates the commenter's support for the proposal. See responses to specific comments below.
15.	Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	NI	***Does the proposal appropriately address the stated purpose?*** Yes. See comments on specific provisions below.	 See responses to specific comments below.
16.	Superior Court of Orange County by Ada Maldonado, Administrative Analyst	AM	See comments on specific provisions below.	See responses to specific comments below.
17.	Superior Court of Riverside County by Susan Ryan, Chief Deputy of Legal Services	AM	See comments on specific provisions below.	See responses to specific comments below.
18.	Superior Court of San Bernardino County by Anabel Romero, Deputy Court Executive Officer	AM	See comments on specific provisions below.	See responses to specific comments below
19.	Superior Court of San Diego County by Mike Roddy, Executive Officer	AM	See comments on specific provisions below.	See responses to specific comments below.

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Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	Rule 4.571(c): The petition must be served on "the People." Clarify whether the District Attorney, the Attorney General, or both must be served. Also, current Supreme Court policies require the petition to be served on the petitioner himself, although service may be made in person within 30 days rather than by mail on the day of filing. (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4.) I suggest that this Supreme Court policy be incorporated into the rules.	It is not yet clear whether the district attorney or the Attorney General will be representing "the People" in death penalty–related habeas corpus proceedings in the superior courts. The working group has therefore revised the proposal to require service on both the district attorney and the Attorney General. The working group understands that attorneys are generally responsible for providing their clients with copies of papers filed with the court, unless the client does not want copies, and that there is no need to revise the proposed rule to require delivery of the petition to the client.
California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	**Proposed Rule 4.571 Filing of the petition in the superior court** **4.571(b): Supporting Documents** **4.571(b)(6)** Recommendation: CAP-SF recommends that the rule be modified to separately address the need for a clear process for confidential records. Rules 2.550 and 2.551 on their face address sealed records, but do not reference confidential records. Current Rule 8.47 ("Confidential Records") may serve as a useful guide in modifying Rule 4.571(b)(6).	The working group agrees with this recommendation and is revising the proposal to incorporate by reference the relevant portions of rules 8.45 and 8.47 to address confidential records.

Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
	4.571(c): Filing and service **4.571(c)(3)** Recommendation: CAP-SF recommends that the rule be revised to require all pleadings and supporting documents and orders to be served on the assisting counsel or entity. At stated above, the California Supreme Court requires counsel in capital cases to serve all pleadings on the assisting counsel or entity. (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4; *see also* Cal. Rules of Court, rule 8.630(g).) There is no reason to abandon a long-standing practice that serves the interests of both counsel and the assisting counsel or entity. *** * *** **4.571(e)(3)** Recommendation: CAP-SF recommends that the rule be modified so that the Court has 60 days after receipt of the informal reply, or 60 days after the time to file an informal reply has expired, to rule on the petition. The requirement for the Court to issue an order to show cause or deny the petition within 60 days of receipt of the informal response fails to take into account the current capital habeas practice that virtually all petitioners choose to file an informal reply.	Based on this comment and the suggestions of other commenters, the working group is revising the proposal to require service on an assisting entity or counsel, if any. The working group appreciates this suggestion and has revised proposed rule 4.571(e)(3) to give the court until 30 days after the filing of the reply, or if none is filed, after the expiration of the time for filing the reply under rule 4.573(a)(3). This recognizes the potential for the filing of a reply, as the commenter suggests, but retains the 60-day period from the filing of the informal response for the court to deny the petition or issue an order to show cause. Reference to proposed rule 4.573(a)(3) will make clear that the deadline for the court to act would be extended by any extension of the date to file the reply that the court authorizes.

Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
	4.571(e)(5) Recommendation: CAP-SF recommends that all rulings by the superior court be served on the petitioner, her counsel, and the assisting counsel or entity.	Please see the response to Robert D. Bacon, above, regarding an attorney's responsibility to provide a client with copies of papers filed in a proceeding, which would include a court's rulings.
Court of Appeal Appellate Projects by Jonathan Soglin, Executive Director, First District Appellate Project	**4. Record from the capital appeal (SP18-21 and SP18-22)** While the proposed rules go into detail about the composition of the appellate record for the habeas appeals, neither the superior court nor appellate rules say anything about access to the original trial record. At each level, each of the participants (the court, defense counsel, prosecution counsel) will need access to the complete trial record from the original capital appeal. It will be impossible to brief and decide the habeas claims without the trial record, especially as to prejudice. In most cases, at least for the foreseeable future, it may be possible for each side's record to be passed to successor counsel -- from direct appeal counsel to superior court habeas counsel to appellate habeas counsel. (This is assuming that, at least for first several years, all the new habeas appointments will be on post-affirmance cases.) However, the superior court and the appellate court will each need the record as well. For the appellate proceedings, one solution might be to add subdivision (a)(12) to proposed Rule 8.395 stating, (12) The entire record on appeal in the California Supreme Court on the defendant's related direct appeal. The superior court rules don't have a section governing the record, so some other solution might be necessary.	Proposed rule 4.571 explicitly deems the record on appeal (i.e., the trial court record) a part of the supporting documents for the petition. Please see also the response to the Habeas Corpus Resource Center, below.

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Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	As a final note on this point, the term "ruling on the petition" is used inconsistently in proposed Rules 4.571(e) and 4.573(a). The former says that asking for an informal response constitutes "ruling on the petition," while that latter says the court may ask for that response "[b]efore ruling on the petition" Consistent nomenclature is desirable.	The working group has modified the text of proposed rule 4.573(a) to remove this inconsistency.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	Specifically, proposed Rule 4.571(e) provides that a superior court "must rule on the petition within 60 days." Given the complexity and high stakes of capital habeas proceedings, it is unrealistic to expect that trial courts will be able to give petitions the thorough consideration they demand on this timeline, especially given their tremendous caseloads. The provision permitting parties to move to shorten or extend the time does not resolve this concern. For one thing, courts should never be permitted to order a shorter timeline for resolving a petition. The proposed rule would permit the state to move the court for an order requiring the petition to be ruled on within 30 days, or even 10 days, and a court to grant such a motion. Under no circumstances would this be appropriate. Nor does it make sense for parties to move courts to consider petitions for longer periods of time after they have been filed. Parties have no way to know what the court's other obligations are in a given timeframe, or how much consideration the court may already have given the petition. A motion to extend the timeframe for the court's consideration would necessarily be based on the length and complexity of what was filed; the rules should instead account for this length and complexity, which is predictable in capital habeas cases. Although the provision also permits courts to extend the time on their own motion "for good cause stated in the order," the	The working group received many comments expressing concern about the deadlines these rules would impose on the parties and the superior courts. The working group recognizes the deadlines these rules impose are ambitious given the complexity of these petitions, the quantity of evidence, and the length of the papers filed by the parties. However, the deadlines provided in the proposed rules, give parties, with one exception, longer timeframes in which to submit papers than is required under the current rule for noncapital habeas corpus proceedings in the superior courts (rule 4.551) and the rules for habeas corpus proceedings in the appellate courts (rules 8.384–8.387). In addition, the working group notes that all the deadlines on parties may be extended upon a showing of good cause. The working group believes these deadlines are in keeping with Proposition 66's mandate that these proceedings be conducted "expeditiously" and that the ability of courts to extend these deadlines is consistent with Proposition 66's requirement that the proceedings also be conducted "consistent with a fair adjudication." (Pen. Code, § 1509(f).) The requirement that attorneys who seek an extension submit a statement of the additional work necessary to meet the deadline will give the superior courts presiding over these proceedings an opportunity to monitor and assess counsel's progress. For

Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
	rule still requires courts to endeavor to resolve petitions within 60 days; to do so is to encourage them to dispense with the careful review to which petitioners are entitled under state, federal, and international law. Additionally, although the statute recognizes that claims of actual innocence can require significantly more time to fully address by providing up to twice as long for their resolution, the proposed deadlines do not make any accommodation for the unique needs of these especially critical claims. Instead, in light of the fact that petitioners have constitutional rights to have their claims fairly adjudicated, the rules simply should not dictate how much consideration courts may give to capital habeas petitions.	these reasons, the working group declines to revise the deadlines for party filings in the proposed rules. The deadlines imposed on the courts are similarly ambitious and also reflect an effort to be consistent with the mandates of Proposition 66. Proposition 66 provides that a "superior court shall resolve the initial petition within one year of filing unless the court finds that a delay is necessary to resolve a substantial claim of actual innocence, but in no instance shall the court take longer than two years to resolve the petition." (Pen. Code, § 1509(f).) When the deadlines in the proposed rules are taken together, they provide for the adjudication of a petition in roughly a year. Although the Supreme Court has held that the deadlines in Penal Code section 1509(f) are "directory" (*Briggs v. Brown* (2016) 3 Cal.5th 808, 859–860), the working group was reluctant to make a recommendation that would incorporate in the Rules of Court deadlines that exceeded the timeframes provided in Proposition 66. Nonetheless, the working group is cognizant of the Supreme Court's thoughts on Penal Code section 1509(f): > If in a particular case the time limits imposed by section 1509, subdivision (f) are not "consistent with a fair adjudication," as the statute requires, the voters signaled that the interest of fairness must prevail. Moreover, . . . nothing in section 1509 suggests the voters contemplated that courts would neglect their other business in order to comply with the time limits. Proposition 66 presumes that the courts will have sufficient

Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
		resources to manage their caseloads. (*Id.* at p. 860.) With respect to the 60-day deadline in proposed rule 4.571(e) that is cited by the commenter, this deadline relates to the court's *preliminary* review of the petition—to determine whether the court needs additional briefing, (i.e., to request an informal response, issue an order to show cause), or has a sound basis from that preliminary review to deny the petition. Thus, the deadline addresses only the first possible step in a court's review of a petition and is not intended to encourage courts to "dispense with the careful review of filings in these proceedings."
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	*Rule 4.571(b)(1)* Proposed Rule 4.57 1(b)(1) states that the "record prepared for the automatic appeal, including any exhibits admitted in evidence, refused, or lodged, are deemed part of the supporting documents for the petition." Although this subdivision helpfully ensures that the trial record is incorporated into the documents supporting the habeas corpus petition, it does not go far enough. Capital habeas corpus petitions often raise claims relating to issues addressed in the automatic appeal and request that errors found on appeal or habeas corpus be evaluated for prejudice cumulatively. Thus, the habeas corpus petition directly implicates the appellate process. The California Supreme Court has recognized that habeas proceedings will	The working group agrees in part and has revised proposed rule 4.571(b)(1) to state that the briefs, rulings, and other documents filed with the Supreme Court in the automatic appeal are deemed part of the supporting documents in the superior court proceeding. The commenter suggests in addition, however, that the respondent should bear the responsibility for lodging copies of the appellate filings with the superior court and argues that this is consistent with the requirement that the California Attorney General is responsible for filing such documents with the federal district court. The working group concluded that it should be the responsibility of the party citing to or relying upon a document to assure that the superior court has access to the document. The working group also notes that rule 8.360(g)(3) already

Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
	routinely require review of the appellate record, including appellate briefing and other documents. In *In re Reno* (2012) 55 Cal.4th 428, the Court directed that "[p]etitioners need not separately or specifically request judicial notice of all documents connected with their past appeals and habeas corpus proceedings, as in capital cases this court routinely consults prior proceedings irrespective of a formal request." (*Reno,* 55 Cal.4th at 484.) The Court made clear that petitioner only needs to incorporate by reference material from the automatic appeal – not make it part of the habeas corpus record directly > We add that petitioners may cite and incorporate by reference prior briefing, petitions, appellate transcripts, and opinions in the same case but no longer need to separately request judicial notice of such matters, as this court routinely consults these documents when evaluating exhaustion petitions. Thus, an argument raised in a prior appeal or habeas corpus petition and reraised in a subsequent petition may be incorporated by reference and need not be reargued (subject to the discussion, post). (*Reno,* 55 Cal.4th at 484.) The Court also noted that this "rule will help streamline consideration of habeas corpus petitions in capital cases" and eliminate the need for judicial notice motions. *Id.* at 484. The beneficial procedure adopted by the Supreme Court in	requires all briefs filed by the parties in an appeal to be served on the superior court clerk for delivery to the trial judge. The working group recognizes that for various reasons some superior courts may not have retained all the copies that were previously served on them, but this is a matter that will need to be addressed on a case-by-case basis.

Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
	Reno should be enshrined in the new superior court habeas corpus rules. To do so, the Working Group should add language to subdivision (b)(l) stating that all briefing and other documents filed in the automatic appeal are deemed part of the supporting documents for the habeas corpus petition. If there is a concern about the superior courts having ready access to the appellate materials, the rule could simply require that respondent's counsel lodge a copy of the appellate materials with the superior court once a habeas corpus petition is filed. Such requirement would be analogous to the practice in capital habeas corpus cases in California's federal court. (See, e.g., Habeas Corpus Local Rules, N.D. Cal., R. 2254- 27(a) [directing respondent to lodge, inter alia, "appellant's and respondent's briefs on direct appeal to the California Supreme Court, and the opinion or orders of that Court"]; Local Civil Rules, C.D. Cal., Loc. R. 83-17.l(a) [same].)	
	Rule 4.571(c)(3) and throughout Proposed Rule 4.571(c)(3) requires petitioner to serve "the People." We understand that the Attorney General or the local District Attorney will normally defend against the relief sought by the petitioner, and that the Attorney General or District Attorney in the criminal context represent the "the People." But habeas corpus proceedings are not criminal proceedings. Rather, in habeas proceedings the warden of the facility at which the condemned inmate is housed is the respondent, see Pen. Code § 1477, and the Attorney General or the local District Attorney is counsel for the respondent. Referring to "the People" in the habeas corpus petition service requirement seems unnecessarily inaccurate and potentially confusing.	Please see the response to Robert D. Bacon, above, regarding revision of the proposal to make reference to the district attorney and the Attorney General, instead of "the People."

Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
	We suggest the proposed habeas rules omit any references to "the People." In its place, the rules should refer simply to "respondent," "counsel for respondent," or to be more precise, "the District Attorney as counsel for respondent." Any such change would make the proposed capital case rules more consistent with the non-capital rules, which refer simply to "the respondent" throughout. *Rule 4.571(e)(3)* Proposed Rule 4.571(e)(3) requires that the court must either "issue an order to show cause or deny the petition within 60 days of receipt of the *informal response.*" Emphasis added. We believe it makes more sense to require the court to act under 4.571(e)(3) within 60 days of receipt of the *informal reply.* This change makes sense for several reasons, including the following. First, it is clearer and more orderly to time the court's ruling on the petition to the filing of the final informal brief, rather than the initial brief. We recognize that the non-capital habeas rules also time the court's ruling to the filing of the initial brief, but that appears to be because the vast majority of non-capital habeas petitioners are uncounseled and informal replies are rare. By contrast, informal replies in capital habeas proceedings are filed in every case. Second, capital habeas petitions are expansive, and they will continue to be so even under the tighter filing deadlines of Penal Code section 1509. Respondent routinely takes anywhere between eight months and one year to file an informal response, and petitioner routinely takes equally as long to file an informal reply. Proposing a rule that starts the 60-day clock on the filing on the informal response, knowing	Please see the response to CAP-SF regarding this provision, above.

Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
	that the informal reply routinely will be filed months beyond that time frame, makes the 60-day period largely irrelevant. Finally, our suggested change would bring proposed Rule 4.571(e)(3) into closer harmony with proposed Rule 4.573(a)(4), which prohibits the denial of the petition before the filing of the informal reply, or the expiration of the time period to file one.	
Hon. Morris Jacobson, Judge, Superior Court of Alameda County	Rule 4.571(e), requires the Court to rule on the petition within 60 days, and then follows with the requirement that the issue an OSC or denial within 60 days of receipt of the informal response. These time requirements appear to be extremely unrealistic given the size of the typical death penalty case trial record (10,000 plus pages) and the size and complexity of the habeas petitions that are being filed with these cases (of the four cases we received, the petitions were between 300-500 each, and each contained hundreds of paragraphs of allegations of error and/or misconduct). After consulting with the Supreme Court Capital case supervising attorney, we estimate that it will take a Superior Court research attorney between 4-6 months of full time work to do an initial review of the trial record and the habeas petition, before we can make an intelligent decision as to whether we should request informal briefing. Thus, 60 days for this initial review is a time line that we will not be able to meet. Assuming that we will request informal briefing in most, if not all cases, 60 days to synthesize the positions of the parties and then decide whether to issue OSC or deny (which would require a statement of decision articulating the facts and the law that are being relied on) is not enough time to perform the required tasks. * * *	Please see the response to the Government of Mexico, above, regarding the deadlines in the proposed rules generally.

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Rule 4.571 (Filing of Petition in Superior Court)		
Commenter	**Comment**	**Working Group Response**
	As to the deadlines included in the proposed rules, they are inadequate to the point of being impossible to meet. (Please see above comments.)	
Superior Court of San Bernardino County by Anabel Romero, Deputy Court Executive Officer	CRC 4.571(b)(4) For consistency within the California Rules of Court, this rule should be modified to require reference to previously filed documents by case number, date, and title as in California Rule of Court 3.1110(d) for referring to previously filed documents in civil law and motion.	The working group agrees with this suggestion and has modified proposed rule 4.571(b)(4) to require the filing date and title of a referenced document.
Superior Court of San Diego County by Mike Roddy, Executive Officer	Proposed rule 4.571(b) – a petition that has already been transferred to our court from the California Supreme Court incorporates by reference documents filed in conjunction with the appeal, such as the appellate briefs, that the superior court does not have. Our court suggests a rule that, in such cases, the party must file within a certain time from the date of transfer those documents incorporated by reference (other than the certified record on appeal) if the party wants those documents to be considered in conjunction with the habeas petition. Proposed rule 4.571(e)(1) – in some superior courts, 60 days is going to be an extremely difficult, if not impossible, deadline to meet given the complexity of issues and volume of documents the court will have to review in these cases. The court has 60 days in non-death penalty cases, so it should have more time in the more complex death penalty cases.	Please see the response to the Habeas Corpus Resource Center concerning rule 4.571(b), above. Please see the response to the Government of Mexico, above, regarding the deadlines in the proposed rules generally.

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Rule 4.571(d) (Noncomplying Filings)		
Commenter	**Comment**	**Working Group Response**
California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	**4.571(d): Noncomplying filings** Recommendation: CAP-SF recommends that the rule be modified to ensure that when a petition is noncomplying, the clerk be required to notify counsel (or petitioner if unrepresented) immediately of any noncompliance, and must allow a minimum of 30 days for counsel (or petitioner if unrepresented) to bring the petition into compliance.	The language is modeled after rule 8.384, which is limited in scope to attorney-filed petitions. Although all indigent petitioners are entitled to counsel for the initial petition, the working group has revised the proposal to clarify that this provision is similarly limited to attorney-filed petitions. It is expected that attorneys will be familiar with relevant filing requirements and comply with those requirements. The provision assures that the clerk will accept the filing regardless of compliance with filing requirements, but gives the court discretion to have the attorney correct any defects before a petition could be dismissed. The rule does not require a court to dismiss the petition. The court may give an extension of any reasonable length of time to correct the petition, so long as it gives at least five court days; this will allow the court to tailor the length of the time to correct the petition to the scope of work necessary to bring the petition into compliance. Please also see the response to Michael Ogul, below.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	***Should the proposed rules include a provision like that in rule 8.384(d) and proposed rule 4.571(d) that authorizes the court to notify the attorney that it may strike a noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days?*** The attorney must be notified and allowed no less than 30 days to submit a proper petition with extensions for due cause.	Please see the response to CAP-SF, above, and the response to Michael Ogul, below.
Government of Mexico by Gerónimo Gutiérrez Fernández,	The Judicial Council has specifically requested input on proposed Rule 4.571(d), which requires notice to counsel if a	Please see the response to CAP-SF, above, and the response to Michael Ogul, below.

Rule 4.571(d) (Noncomplying Filings)		
Commenter	**Comment**	**Working Group Response**
Ambassador Washington, D.C.	petition does not comply with the rules of court, with an opportunity to correct the problem. Mexico agrees that such notice is essential, but to more fully protect petitioners from potentially disastrous effects of technical errors by counsel, courts should be required to provide at least 30 days to remedy any problems.	
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should the proposed rules include a provision like that in rule 8.384(d) and proposed rule 4.571(d) that authorizes the court to notify the attorney that it may strike a noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days?*** Yes, but for the reasons discussed above (see section related to proposed Rule 4.571(d)) the five-day minimum time frame is inadequate.	With respect to this issue, please see the response to CAP-SF, above, and the response to Michael Ogul, below.
Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	Rule 4.571(d): I would suggest that the minimum required notice be five court days, not merely five days, because there will be only a minimal opportunity to cure the defect if those five calendar days include weekend, especially a holiday weekend (e.g., the four-day Thanksgiving holiday weekend).	The working group agrees with this suggestion and has modified proposed rule 4.571(d) to clarify that the minimum notice required is five *court* days.
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	***Should the proposed rules include a provision like that in rule 8.384(d) and proposed rule 4.571(d) that authorizes the court to notify the attorney that it may strike a noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days?*** Yes.	The working group appreciates this input.

Rule 4.572 (Transfer of Petitions)		
Commenter	**Comment**	**Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	***Should the rules address Supreme Court transfer of petitions from one superior court to another and, if so, what should the rule provide?*** When transferring a case to a superior court, any court, including the Supreme Court, should issue an order with the basis of its decision. ***Should the rules address Supreme Court transfer of a petition pending before it to a superior court and, if so, what should the rule provide?*** To minimize duplication of effort, all petitions pending in the Supreme Court should remain in the Supreme Court.	Please see the response to the Habeas Corpus Resource Center, below.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	Finally, allow me to address the topics that are not covered in the proposal. First, the proposal does not include any rules for the transfer of petitions, and thus also declines to address the status of protective petitions filed on behalf of petitioners without counsel in the California Supreme Court. Mexico believes that the Judicial Council should address these issues so as to provide guidance and clarity to petitioners, counsel and other interested parties as to what they can expect to occur. The Judicial Council should develop a proposal, which it should then distribute for comment. Only then will my Government be properly able to address the rules that may be implemented on this subject.	Please see the response to the Habeas Corpus Resource Center, below.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should the rules address Supreme Court transfer of petitions pending before it to a superior court, and if so, what should the rule provide?*** Yes, a rule addressing the transfer of petitions filed in or	The working group appreciates this comment. Because

Rule 4.572 (Transfer of Petitions)		
Commenter	**Comment**	**Working Group Response**
	pending in the Supreme Court would be helpful. At a minimum, we believe that petitioners exercising their right to access the Supreme Court's original habeas corpus jurisdiction by filing their petitions in that court must be provided notice and an opportunity to be heard by both parties on the question of whether the petition should be transferred prior to ruling on the merits of the petition, and, if so, whether good cause exists to transfer the petition to a superior court other than that which issued the death sentence. For example, if a petitioner files his habeas corpus petition in the Supreme Court and proffers what he believes is good cause to file in that Court rather than the superior court that issued the death sentence, both respondent and the petitioner should be provided an opportunity to be heard on the question of transfer - and to which court the petition should be transferred – when the Supreme Court decides not to maintain its jurisdiction over the matter. Similarly, prior to transferring a petition that was filed in the Supreme Court before enactment of Proposition 66, the parties should be provided notice and an opportunity to be heard on the matter if the Supreme Court makes a preliminary determination not to maintain its jurisdiction and rule on the merits of the petition. This makes sense particularly given the fact that counsel appointed by the Supreme Court prior to passage of Proposition 66 was expected to file in that Court, and would not have had an opportunity to brief the question of pre-OSC transfer since that was not part of the Supreme Court's practice before October of 2017. In addition to providing time frames for these procedures, rules on this subject could also set out factors that the Supreme Court may consider "good cause" to warrant maintaining jurisdiction	the Supreme Court is currently reviewing questions regarding the circumstances under which it would exercise its discretion to transfer pending petitions to a superior court under Penal Code section 1509(g), it would be premature for the working group to recommend rules relating to such transfers. (*In re Joseph P. Mora on Habeas Corpus*, Supreme Court Case No. S248835.) In addition, under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time for the working group to consider, develop, and circulate another proposal in time for the working group to present proposed rules to the Judicial Council for adoption by the deadline imposed by Proposition 66. The working group will refer this suggestion to be considered by the appropriate Judicial Council advisory body at a later time.

Rule 4.572 (Transfer of Petitions)		
Commenter	**Comment**	**Working Group Response**
	over the matter or transferring the petition to a court other than that which issued the death judgment. Many questions exist concerning what constitutes "good cause" within the meaning of Penal Code section 1509's transfer provisions. For example, can factors of judicial economy constitute "good cause," or can good cause exist only when the proffered justifications are based on case specific factors tethered to the allegations within the petition, or both? We understand that the Supreme Court and the lower court can slowly define these rules over time by ruling on questions such as these when presented with them. But given that the Proposition 66 Rules Working group currently exists, there seems little reason not to propose clear rules so as to avoid years of counsel having to divine from court rulings what those rules might be.	
Hon. Morris Jacobson, Judge, Superior Court of Alameda County	Regarding transfer of petitions, cases that had venue changed and were tried in the receiving court should be transferred in the first instance to the sending court, rather than starting the case in the receiving court. (See People v. Peoples (2016) 62 Cal.4th 718, 791-792; Penal Code section 1033; CRC 4.150(b) and 4.154.)	The working group appreciates this comment, but it is unclear whether this suggestion would be consistent with Penal Code section 1509(a), which requires a petition to be heard in the court that imposed the sentence unless good cause is shown. The case cited by the commenter predates the amendments to Penal Code section 1509(a) made by Proposition 66, and it is uncertain how a reviewing court would resolve that potential inconsistency. In addition, under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time for the working group to consider, develop, and

Rule 4.572 (Transfer of Petitions)		
Commenter	**Comment**	**Working Group Response**
		circulate another proposal in time for the working group to present proposed rules to the Judicial Council for adoption by the deadline imposed by Proposition 66. The working group will refer this suggestion to be considered by the appropriate Judicial Council advisory body at a later time.
Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	Page 10: the rules should state that, when the Supreme Court transfers a petition to a superior court and the petitioner already has counsel, that counsel should continue to act as petitioner's counsel in the superior court unless (1) counsel moves to withdraw or (2) there is good cause to replace counsel; further, they should require such counsel to continue to be compensated on the same terms already set by the California Supreme Court. All parties, the courts, and the public will benefit from the continuity of representation unless there is a good reason to discharge counsel.	Please see the response to the Habeas Corpus Resource Center, above.
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	As we note below, we also have concerns of the impact of cases tried in a county based on a change of venue. Which county should assume jurisdiction over the case. Orange County had several cases transferred into our county for trial and to our knowledge has had no cases transferred out of this county. We view that that pretrial publicity issues that resulted in the cases being transferred to our county should not result in the automatic need for these petitions to be processed by the trial county instead of the county with the original venue. * * * ***Should the rules address Supreme Court transfer of petitions from one superior court to another and, if so, what should the***	Please see the response to Hon. Morris Jacobson, above.

Rule 4.572 (Transfer of Petitions)		
Commenter	**Comment**	**Working Group Response**
	rule provide? No. ***Should the rules address Supreme Court transfer of a petition pending before it to a superior court and, if so, what should the rule provide?*** We offer no comment.	The working group appreciates this response. No response required.

Rule 4.573 (Proceedings After the Petition is Filed)		
Commenter	**Comment**	**Working Group Response**
Aderant CompuLaw by Miri Wakuta, Associate Rules Attorney	Aderant CompuLaw respectfully submits the following comments to the proposed adoption of California Rules of Court 4.573. Proposed Rule 4.573(a)(2) states, "The response must be served and filed within 45 days or as the court specifies…" (Emphasis added.) Proposed Rule 4.573(a)(4) states, "If a response is filed, the court must notify the petitioner that a reply may be served and filed within 30 days or as the court specifies." (Emphasis added.) As currently written, the rules do not set a specific triggering event from which to count the 45-day and 30-day periods. Including a triggering event from which to count the time periods may be helpful in avoiding any confusion or misinterpretation of the rules.	The working group agrees that the rule should specify the event from which a deadline is calculated. The working group considers the date on which a paper is "filed," rather than the date on which it is "received," to be a more transparent and precise date from which to calculate deadlines. It would also be more consistent with other provisions on deadlines in the proposed rule. The working group has amended proposed rule 4.573 where appropriate to calculate deadlines from the dates on which papers are filed.

Rule 4.573 (Proceedings After the Petition is Filed)		
Commenter	**Comment**	**Working Group Response**
	We respectfully suggest the following amendments to the proposed rules: Proposed Rule 4.573(a)(2): The response must be served and filed within 45 days of receipt of the courts request for an informal written response or as the court specifies. Proposed Rule 4.573(a)(4): If a response is filed, the court must notify the petitioner that a reply may be served and filed within 30 days of receipt of the notice or as the court specifies.	
California Appellate Project – San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	**Proposed Rule 4.573: Proceedings after the petition is filed** **4.573(a): Informal response and reply** **4.573(a)(4)** Recommendation: As indicated in CAP-SF's recommendation regarding rule 4.571(e)(3), the rule should be modified so that the Court has 60 days after receipt of the informal reply, or 60 days after the time to file an informal reply has expired, to rule on the petition. Petitioner should have a minimum of 45 days to file an informal reply, and a court should not be allowed to order less time for the filing. A court may still specify that more time will be allowed for the filing of an informal reply.	Please see the response to that comment, under rule 4.571, above. The working group appreciates this comment. For the reasons explained in response to the Habeas Corpus Resource Center and Michael Ogul, below, the working group has revised proposed rule 4.573(a)(4) and other filing deadlines so that a court may extend, but not reduce the time in which to file a reply. However, for the

Rule 4.573 (Proceedings After the Petition is Filed)		
Commenter	**Comment**	**Working Group Response**
		reasons explained in response to the Government of Mexico on rule 4.571, above, the working group is not increasing the 30 days to 45 days as the commenter suggests.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	This apparent commitment to artificially compressed timelines also affects the deadlines for the parties to file documents. Proposed Rule 4.573 provides only 45 days for an informal response and 30 days for a reply. These time periods are insufficient given the sheer volume of material the parties must address. For instance, in the case of one Mexican national with which I am familiar, habeas counsel recently filed a petition that is 702 pages in length. Another petition, running 558 pages, was resolved after the state filed a 368-page informal response. Accordingly, 30- and 45-day time limits are simply not realistic for proceedings of this magnitude.	Please see the earlier response to the Government of Mexico on rule 4.571, above, regarding the deadlines in the proposed rules generally.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	*Rule 4.573(a)(2) and 4.573(a)(4)* Proposed Rule 4.573(a)(2) requires respondent to file the informal response "within 45 days *or as the court specifies.*" Emphasis supplied. Given the enormity of the task of filing an informal response, we suspect the intention of this rule is to provide respondent *at least* 45 days to respond to a capital habeas corpus petition. As written, however, the rule suggests that the court could order respondent to file its informal brief in fewer than 45 days. While we doubt any superior court would take such an unreasonable approach, we suggest modifying the rule to clarify its apparent intent by simply removing the language "or as the court specifies." Subdivision (a)(6) of the proposed rule already provides the court the ability to extend time, so removing the language "or as the court specifies" from (a)(2) will ensure respondent	The working group agrees that the language of rule 4.573 as proposed ("or as the court specifies") allows for the possibility that a superior court could require parties to submit filings in fewer days than specified in the rule. The working group has revised proposed rule 4.573 with the language similar to that proposed by commenter Michael Ogul ("or a later date if the court so orders"), below, to clarify that the deadlines in rule 4.573 are the shortest deadlines possible, but that the superior court may extend those deadlines.

Rule 4.573 (Proceedings After the Petition is Filed)		
Commenter	**Comment**	**Working Group Response**
	has at least 45 days to file an informal response, and permits the court to extend time for good cause. Turning to proposed Rule 4.573(a)(4), we suggest two changes. First, for the reasons stated above, we suggest removing the language "or as the court specifies" from this provision as well. Second, we do not see any good reason to provide petitioner less time to file its informal reply than respondent is provided to file its informal response. As a practical matter, we note that the informal briefing periods in capital cases will far exceed the 30-day and 45-day time limits provided by these sections. But by providing petitioner only 30 days to reply, the rule may be viewed as endorsing the concept that it is generally acceptable to provide petitioners less time than respondent is given – indeed, 33% less time – to file their informal pleadings. We know of no basis in case law or scholarly research supporting or encouraging such an assumption. Indeed, because the petitioner has the burden of proof in these proceedings, we believe it would make just as much sense to provide petitioner *greater* time to file their informal brief. Nevertheless, we suggest that both parties receive the same amount of presumptive time to file their informal briefs.	Please see the response to the Government of Mexico on rule 4.571, above, regarding the deadlines in the proposed rules generally.
Hon. Morris Jacobson, Judge, Superior Court of Alameda County	Rule 4.573(a)(6) states: "If a request for an extension of a filing deadline under this subdivision is requested, counsel for the party requesting the deadline must explain the additional work required to file the informal response or reply." This rule is confusing as written (e.g. "counsel requesting the deadline…") and it also appears to preclude other possible bases for showing good cause (e.g. illness, family emergency etc). We suggest that the rule simply state that counsel requesting the extension	The working group considers it important that parties explain what additional work is necessary to assure that the court has the ability to monitor the progress of the parties in meeting deadlines and complying with the goals of Proposition 66 to reduce the amount of time necessary to conduct death penalty–related habeas corpus proceedings. To avoid the impression that any good cause basis for granting an extension would be

Rule 4.573 (Proceedings After the Petition is Filed)		
Commenter	**Comment**	**Working Group Response**
	must show good cause for extending the deadline.	precluded by this requirement, the working group has revised the proposal to place the two requirements in separate sentences and repeated the provision in proposed rules 4.571, 4.573, and 4.574.
Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	Rule 4.573(a)(2) could be written more clearly. I would delete "One copy of" from the end of the 3d line/beginning of the 4th. In addition, the provision should be modified to require a copy of the response have to be served on petitioner. Rule 4.573(a)(4) should state "….filed within 30 days or a later date if the court so specifies.." I.e., the court should not be allowed to shorten the 30-day period.	Service on a party is typically effected by service on that party's counsel of record. (Rule 1.6(15) provides that " 'petitioner' . . . or any other designation of a party includes the party's attorney of record.") References to service on "petitioner's counsel" have therefore been removed from the proposed rules to be consistent with this understanding and to avoid confusion on this point. The working group agrees and has revised the proposed rules. Please also see the response to the Habeas Corpus Resource Center, above.

Rule 4.574 (Proceedings Following an Order to Show Cause)		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	Rule 4.574(b): I suggest a less confusing title than "Denial" for the petitioner's rebuttal pleading. "Reply," "Traverse," and "Rebuttal" are all in more common use than "Denial," and any one of those words is likely to be better understood.	The working group deliberately selected the term "denial" as that is the term most commonly used in the superior courts, where these proceedings will be conducted. The working group notes that the definitions section that applies to these rules specifically states "The 'denial' is the petitioner's pleading in response to the return. The denial may be also referred to as the 'traverse.'" (Rule 4.550(b)(4), which will be renumbered effective April 25, 2019, as rule 4.545(4).) Accordingly, the working group is of the view that the use of the term

Rule 4.574 (Proceedings Following an Order to Show Cause)		
Commenter	**Comment**	**Working Group Response**
		"denial" should result in no confusion.
Court of Appeal, Sixth Appellate District by Hon. Mary J. Greenwood, Administrative Presiding Justice	The proposed rules provide deadlines for the superior court to act on a petition. These deadlines are modeled after the provisions of existing rule 4.551. There appears to be a gap in the proposed rules. Existing rule 4.551(f) provides in relevant part: "Within 30 days after the filing of any denial or, if none is filed, after the expiration of the time for filing a denial, the court must either grant or deny the relief sought by the petition or order an evidentiary hearing." The proposed rule 4.574 does not contain a similar deadline for the court to deny the petition or set it for an evidentiary hearing after the return and denial are filed. This appears to be an oversight. The provisions of proposed rule 4.574(e) [submission of cause] do not remedy this gap since it applies only after an evidentiary hearing.	The working group agrees with the commenter's observation and has revised proposed rule 4.574 to include a deadline comparable to that in proposed rule 4.571 providing deadlines for the court to act after the initial briefing.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	*Submission of the Cause* Proposed Rule 4.574(e) is correct for cases with an evidentiary hearing, but it does not specify a date for cases without an evidentiary hearing. For a case that can be decided on the pleadings, that would normally be oral argument on the legal questions in the pleadings.	Please see the response to Hon. Mary J. Greenwood, above.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	*Rule 4.574(a)(1) and Rule 4.574(b)(1)* Proposed Rules 4.574(a)(l) and 4.574(b)(l) set out a presumptive time frames for the parties to file the return and denial (traverse). Like the concerns we identified with proposed Rules 4.573(a)(2) and 4.573(a)(4), discussed immediately above, we suggest the proposed rules be amended so that a court may not order the filing of a return or	Please see the response to the Habeas Corpus Resource Center on rule. 4.573, above.

Rule 4.574 (Proceedings Following an Order to Show Cause)		
Commenter	**Comment**	**Working Group Response**
	denial in less time than the presumptive time identified in the rule. Also, like the concerns identified immediately above, and for the same reasons stated there, we believe the rules should afford the parties the same presumptive amount of time to file their post-order to show cause pleadings. *Rule 4.574(c)(1)* Proposed Rule 4.574(c)(l) [Renumbered as rule 4.574(d)(1) in the current proposal] states that an "evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds *there is a reasonable likelihood that the petitioner may be entitled to relief* and the petitioner's entitlement to relief depends on the resolution of an issue of fact." Emphasis added. (See also Cal. Ct. R. 4.55l(t) [same]; Cal. Ct. R. 8.386(t) [same].) The requirement that the court find a "reasonable likelihood" of entitlement to relief before it orders an evidentiary hearing is not grounded in California Supreme Court case law defining the habeas corpus process. The Supreme Court has made clear that an evidentiary hearing must be ordered "if the court finds material facts in dispute." *(People v. Duvall* (1995) 9 Cal. 4th 464, 75; *see also People v. Romero* (1994) 8 Cal.4th 728, 740 (explaining "if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing."); Cal. Penal Code § 1484.) Because the "reasonable likelihood" requirement is contrary to governing case law, it should be removed from the proposed rule.	This language in rule 4.574(d)(1) was modeled on rule 4.551(f), which governs when an evidentiary hearing is required in a habeas corpus proceeding in the superior courts, and almost identical language in rule 8.386(f)(1), which governs evidentiary hearings in habeas corpus proceedings in the appellate courts. The language has been in rule 4.574 or its predecessor since 1981 and was added to rule 8.386 in 2009. We have found no case law holding this language is in error, and there is no basis for concluding that the standard in death penalty cases is different from those in noncapital cases. The working group is recommending proposed rules that use the same language found in the two long-standing rules. Were the Judicial Council to adopt language for capital cases that differed from that in noncapital cases, there would be a risk that the different language would be construed as setting two different standards. It may be appropriate for the relevant Judicial Council advisory bodies (the Criminal Law and Appellate advisory committees) to review this issue with regard to all three rules at a later date.
Hon. Morris Jacobson, Judge, Superior Court of Alameda County	Rule 4.574(a)(1): For the reasons stated above re Rule 4.571(e), the 45 day timeline for filing the return seems	Please see the response to the Habeas Corpus Resource Center on rule. 4.573, above.

Rule 4.574 (Proceedings Following an Order to Show Cause)		
Commenter	**Comment**	**Working Group Response**
	extremely short, particularly when petitioners often take as long as five years to file the petition.	
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	**Draft Rule 4.574** First, the listing of the items to be reviewed as part of the court's decision whether to hold an evidentiary hearing is too restrictive. In presenting support for the claims in a habeas petition, California law provides that a petitioner supply "reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (In re Duvall (1995) 9 Cal.4th 464, 474.) Support for a habeas claim may come in many forms, including transcripts, police reports, investigative reports, prison records, medical records, and so forth. Yet the language of draft rule 4.574(c)(l) states that in considering whether an evidentiary hearing is necessary, the court should consider "the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken." OSPD notes that this listing leaves out exhibits and supporting documents that are not affidavits/declarations in contradiction of Duvall and other opinions. Second, the standard set forth for deciding whether to hold a hearing fails to recognize that material factual disputes relating to things other than the merits of a claim might have to be resolved by taking testimony during a hearing. For example, there might be a factual dispute over a procedural matter such as whether a petition is timely. (See, e.g., Orthel v. Yates (9th Cir. 2015) 795 F.3d 935, 940; Roy v. Lampert (9th Cir. 2006) 465 F.3d 964, 975.) The California Supreme Court has itself	Please see response to the Habeas Corpus Resource Center, above, regarding the standard for conducting an evidentiary hearing.

Rule 4.574 (Proceedings Following an Order to Show Cause)		
Commenter	**Comment**	**Working Group Response**
	noted that an evidentiary hearing must be ordered, simply, "if the court finds material facts in dispute." (People v. Duvall (1995) 9 Cal.4th 464, 475; see also People v. Romero (1994) 8 Cal.4th 728, 740. Thus, requiring that a court find "a reasonable likelihood that the petitioner may be entitled to relief" sets out the wrong standard. The proper standard should be an assessment whether there is a material fact in dispute. Thus, the OSPD submits the following suggested changes: Rule 4.574(c) An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any exhibits or proffers, including any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a material factual dispute.	The working group agrees in part with the suggested language, and has revised proposed rule 4.574(d)(1) (previously circulated as part of proposed rule 4.574(c)) to add "exhibits" to the list of items that a court may consider in determining whether an evidentiary hearing is required. The working group did not add a reference to "proffers." The purpose of proposed rule 4.574(d)(1) is for the superior court to determine whether an evidentiary hearing is required. The only proffers relevant in this context are those provided in proposed rule 8.397 (proposed in the working group's concurrently submitted report), which would be offered to provide evidence to the Court of Appeal to seek remand of a claim to the superior court. In such case, if the matter is remanded to the superior court, there will be no need for the court to determine whether an evidentiary hearing is required under proposed rule 4.574(d)—the Court of Appeal has already made that determination and remanded it to the superior court to conduct that evidentiary hearing. Consequently, there is no need to include proffers in the list of items the superior court may consider under proposed rule 4.574(d).

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.574 (Proceedings Following an Order to Show Cause)		
Commenter	**Comment**	**Working Group Response**
Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	Rule 4.574(b)(1) should similarly be changed to read: "Unless the court otherwise orders a longer period, within 30 days ….." Further, the rule should be modified to state "…the petitioner may serve and file a denial or traverse." Rule 4.574(c)(1), as with Rule 4.574(b)(1), the rule should be modified to state "…the petitioner may serve and file a denial or traverse."	Please see the response to Robert D. Bacon, above, on the use of the term "denial."

Rule 4.575 (Decision in Death Penalty–Related Habeas Corpus Proceedings)		
Commenter	**Comment**	**Working Group Response**
Court of Appeal, Sixth Appellate District by Hon. Mary J. Greenwood, Administrative Presiding Justice	The proposed rules provide that the decision on the petition is to be served by the clerk of the court on the petitioner, respondent, the clerk/executive officer of the Supreme Court, and the assisting entity or counsel. We believe that the proposed rule should be amended to include service of the decision on the clerk/executive officer of the Court of Appeal. Given the potential impact of a likely appeal on the court's workload, it would be helpful to have some advance notice of the potential appeal.	The working group agrees with this suggestion and has revised proposed rule 4.575 to include service on the clerk/executive officer of the Court of Appeal.
Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	Rule 4.575 needs to modified to include a requirement that the statement of decision must be served on petitioner's counsel, in addition to petitioner.	Service on a party is typically effected by service on that party's counsel of record. References to service on "petitioner's counsel" have therefore been removed from these proposed rules to be consistent with this understanding and to avoid confusion on this point.

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.575 (Decision in Death Penalty–Related Habeas Corpus Proceedings)		
Commenter	**Comment**	**Working Group Response**
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	We also have concerns about the requirement of "statement of decision" in rule 4.575. As this is a term of art in civil proceedings with strict time and content requirements, does the use of this phrase carry those same requirements? If it does, please specify. If it does not, perhaps the use of a different phrase would be appropriate.	It is the term used in the applicable statute as amended by Proposition 66. (Pen. Code, § 1509(f) ["On decision of an initial petition, the court shall issue a statement of decision explaining the factual and legal basis for its decision."].)

Rule 4.576 (Successive Petitions)		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	Rule 4.576: Paragraph (a) refers to an order "dismissing" a petition. Paragraph (b) refers to a decision "denying relief." The two references appear to be to the same orders. The same term should be used in both paragraphs. Alternatively, if two different classes of orders are meant, the two classes should be defined and distinguished.	The proposed rules track the use of these terms in statute as amended or added by Proposition 66. (Pen. Code, § 1509(d) ["a successive petition whenever filed shall be dismissed . . . ."]; Pen. Code, § 1509.1 ["The petitioner may appeal the decision of the superior court denying relief on a successive petition . . . .])
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	***Should there be a Judicial Council form for the superior court to issue a certificate of appealability?*** The superior court should only be required to state that the requirements of section 1509 have been met and that the court is certifying the issues for appeal. ***Should the rule require the superior court to include in a certificate of appealability not only the substantial claim or claims for relief, which is required by Penal Code section 1509.1, but also include a finding of a substantial claim that the requirements of Penal Code section 1509(d) have been met?***	Penal Code section 1509.1(c) requires the substantial claim of relief to be identified in the certificate of appealability.

Rule 4.576 (Successive Petitions)		
Commenter	**Comment**	**Working Group Response**
	No.	The working group is of the view that it may be helpful to the Court of Appeal if the superior court identifies the petitioner's substantial claim that the requirements of Penal Code section 1509(d) have been met and has therefore revised the proposed rule to require the certificate of appealability issued by a superior court to provide this information.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs San Francisco, California and Katy Graham, Senior Appellate Court Attorney Court of Appeal, Second Appellate District, Division Six Ventura, California	***Should there be a Judicial Council form for the superior court to issue a certificate of appealability?*** Yes. The Committee recognizes that every case will raise different issues, and therefore the form must be able to accommodate individualized input. However, most judges are unlikely to develop significant experience preparing a certificate of appealability. A general form will therefore help to provide guidance and ensure some uniformity of practice throughout the state.	The working group appreciates this comment and will refer it to the appropriate advisory body for future consideration.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	Successive petitions are different and should be treated differently. In nearly all capital cases, a successive petition can and should be quickly dismissed, and a stay denied, on the ground that the petitioner has no substantial claim of innocence. (See Pen. Code, § 1509, subd. (d).) Successive petitions are often filed as last-ditch efforts to stop execution of an indisputably guilty murderer who has already received far more than due process of law through exhaustive consideration of myriad claims. Proposed Rule 4.576(a) seems quite bare-bones. Of course the	The working group appreciates this suggestion. There is

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Rule 4.576 (Successive Petitions)		
Commenter	**Comment**	**Working Group Response**
	petitioner gets notice and an opportunity to respond. There should be a mechanism for the People to quickly have the motion dismissed on lack of innocence grounds.	nothing in the rule that precludes the People from filing a motion to dismiss. In addition, under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time for the working group to consider, develop, and circulate another proposal in time for the working group to present proposed rules to the Judicial Council for adoption by the deadline imposed by Proposition 66. The working group will refer this suggestion to be considered by the appropriate Judicial Council advisory body at a later time.
	The working group asked if the certificate of appealability should "include a finding of a substantial claim that the requirements of Penal Code section 1509(d) have been met." Of course. The statute unambiguously requires such a finding. Further, the rule should not just refer to the statute but state the requirement in clear text. To issue a certificate, the court must find a substantial claim that the petitioner is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. Restating the standard will serve to emphasize just how rare it will be for a successive petition to qualify.	The working group modified the proposal to require that the certificate identify both the substantial claim or claims for relief shown by the petitioner and the substantial claim that the requirements of Penal Code section 1509(d) have been met.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	Regarding successive petitions, proposed Rule 4.576 requires superior courts to grant or deny a certificate of appealability when it denies relief on a successive petition, and provides that the court "may order the parties to submit arguments on	The working group appreciates this comment, but declines to make the suggested change. If a court plans to dismiss a successive petition, rule 4.576(a) already requires the court to provide the petitioner notice and an

Rule 4.576 (Successive Petitions)		
Commenter	**Comment**	**Working Group Response**
	whether a certificate of appealability should be granted." The rule should instead provide that the court must provide parties with this opportunity. No good reason exists to permit courts to deny relief and, without any further opportunity to explain why that denial may be incorrect, refuse to authorize appellate review. Superior courts will make errors; petitioners must be allowed to identify them, and seek review. If the court denies the certificate without input from the parties, petitioners must be provided with an opportunity to dispute this denial in the court that issued it before proceeding to the Court of Appeal. Further, this proposed rule does not require inclusion of a finding regarding the basis for overcoming the Penal Code section 1509(d) limitations. Mexico agrees that the certificate of appealability should address the substantive claim for relief, not the procedural issues surrounding that claim. * * * The Judicial Counsel has asked for input on whether it ought to provide a form for superior courts to use when granting or denying a certificate of appealability. Mexico believes such a form may be helpful, and could facilitate courts' consistent and fair consideration of this question.	opportunity to respond. If, after having had a response from petitioner the court believes it has enough information to dismiss the petition and deny a certificate of appealability, it should not be compelled to delay the proceedings and request further arguments. Penal Code section 1509(f), as amended by Proposition 66, states "Proceedings under his section shall be conducted *as expeditiously as possible*, consistent with a fair adjudication." (Italics added.) The working group is of the view that this procedure achieves a balance between these two considerations. The working group appreciates this comment and will refer it to the appropriate advisory body for future consideration.
Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	Rule 4.576(a), likewise needs to be modified to include a requirement that the statement of decision must be served on petitioner's counsel, in addition to petitioner. Rule 4.576(b) should be modified to also require that an assisting entity or attorney receive a copy of the certificate.	Service on a party is typically effected by service on that party's counsel of record. References to service on "petitioner's counsel" have therefore been removed from these proposed rules to be consistent with this understanding and to avoid confusion on this point. The working group agrees and has revised proposed rule 4.576(b) to require service on the assisting entity or

Rule 4.576 (Successive Petitions)		
Commenter	**Comment**	**Working Group Response**
	And once again, both the petitioner and petitioner's counsel should receive it, not just petitioner's counsel.	counsel, if any.
Superior Court of Los Angeles County	***Should there be a Judicial Council form for the superior court to issue a certificate of appealability?*** Yes, there should there be a Judicial Council form for the superior court to issue a certificate of appealability.	The working group appreciates this comment and will refer it to the appropriate advisory body for future consideration.
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	***Should there be a Judicial Council form for the superior court to issue a certificate of appealability?*** Yes. ***Should the rule require the superior court to include in a certificate of appealability not only the substantial claim or claims for relief, which is required by Penal Code section 1509.1, but also include a finding of a substantial claim that the requirements of Penal Code section 1509(d) have been met?*** Yes.	The working group appreciates this comment and will refer it to the appropriate advisory body for future consideration. The working group appreciates this comment and has revised proposed rule 4.576(b) to require the superior court to identify the petitioner's substantial claim that the requirements of Penal Code section 1509(d) have been met.
Superior Court of San Bernardino County by Anabel Romero, Deputy Court Executive Officer	CRC 4.576(a) This rule is inconsistent with the intent of the electorate in adopting Proposition 66, which was to expedite handling of death penalty cases. Indeed, Penal Code section 1509,	The working group disagrees. As the commenter notes Penal Code section 1509(f), as amended by Proposition 66, states "Proceedings under this section shall be conducted as expeditiously as possible, *consistent with a*

Rule 4.576 (Successive Petitions)		
Commenter	**Comment**	**Working Group Response**
	subdivision (f), requires these new proceedings to be conducted as expeditiously as possible, consistent with a fair adjudication. Currently, a successive petition may be summarily denied without any notice or additional hearing. This is a well-established practice not previously considered inconsistent with a fair adjudication. This rule prevents such a summary response, like the dismissal called for in section 1509, subdivision (d), and instead requires an additional notice and opportunity to be heard. This is inconsistent with expeditious handling of these cases. Accordingly, this proposed rule should not be adopted and if adopted would increase the burden of handling these cases by requiring an additional procedure not currently required for handling petitions for writ of habeas corpus and not required or intended by the electorate. Adopting this rule would also lengthen the time to disposition of successive petitions.	*fair adjudication*." (Italics added.) The working group debated whether dismissal without an opportunity to correct or explain a successive petitioner would be "consistent with a fair adjudication." The working group recognized that successive petitions are often filed by self-represented litigants and that the fairness of the process would require petitioners be given at least a rudimentary opportunity to respond to the court's intent to dismiss a successive petition. The working group deliberately used the phrase "opportunity to respond," to give each court the opportunity to determine the format and scope of the response and tailor it to the specific petition. The only other commenter on this provision agreed with the working group that such a procedure was consistent with Proposition 66. (Comment of the Criminal Justice Legal Foundation, above.)

Amendments to Petitions		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**1. Amendments to petitions should be liberally authorized** "It is the settled law of this state that motions to amend pleadings to the end that justice may be promoted are to be liberally granted." (*Sanguinetti v. Moore Dry Dock Co.* (1951) 36 Cal.2d 812, 827, and cases there cited.) The rules should include provision for amendments to petitions. The stringent limitation on successor petitions in Penal Code § 1509(d), and the restriction of federal habeas corpus review to	Please see the response to the Habeas Corpus Resource Center, below.

Amendments to Petitions		
Commenter	**Comment**	**Working Group Response**
	claims and supporting facts that were before the state court (see *Cullen v. Pinholster* (2011) 563 U.S. 170) make it essential that new claims for relief and supporting facts, whenever reasonably discovered, be amended into a pending first state habeas petition. The federal habeas courts, as well as the litigants, expect the adjudication of the first state habeas petition to be comprehensive. As in other types of cases, amendments should be allowed up to and including amendments following an evidentiary hearing to conform the allegations to the proof. The prosecution is, of course, entitled to a reasonable opportunity to respond to any amendment. If the prosecution asserts specific prejudice from a particular amendment, the remedy should be a continuance of sufficient time for the prosecution to attempt to cure the prejudice. Permission to amend should be denied on this ground only if it is clear that the prejudice is significant and is necessarily incurable by a continuance of any length.	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	***Should the proposed rules address amendments to petitions?*** The rules should define the process for amending petitions upon a showing of good cause. ***If the proposed rules were to address amendments:*** • ***How would amendments affect the deadlines provided in the rules?*** • ***Under what circumstances should amendments be permitted? •*** Same as amendments to capital habeas corpus petitions currently.	Please see the response to the Habeas Corpus Resource Center, below.

Amendments to Petitions		
Commenter	**Comment**	**Working Group Response**
	• ***Should the rule address amendment of Morgan or shell petitions differently from other petitions?*** *Morgan* petitions should have the same deadlines and rules starting from the date of appointment of counsel as the original petition. * * * The rules do not adequately define the procedure for amending petitions including *Morgan* petitions.	
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	The working group asked for comments on amendments. Penal Code section 1509, subdivision (c), requires the petitioner to put all his cards on the table within one year of appointment or waiver of counsel. Any amendment after that which adds a claim may be allowed only if the petitioner qualifies under subdivision (d), actual innocence or ineligibility. A related issue to amendments concerns other devices to try to reopen a case. Section 1509.1, subdivision (a), establishes appeal as the means of reviewing a denial of habeas relief, expressly forbidding the use of successive petitions for that purpose. Evasion of this rule through other devices to reopen the case, as is now routinely done in federal court through misuse of rule 60(b)(6) of the Federal Rules of Civil Procedure, should be expressly precluded.	Please see the response to the Habeas Corpus Resource Center, below.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	The rules also must address amendments to petitions. Counsel cannot possibly effectively represent petitioners without clear guidance on what is permitted by way of amendment, and what would be considered a successive petition. A lack of clarity on	Please see the response to the Habeas Corpus Resource Center, below.

Amendments to Petitions		
Commenter	**Comment**	**Working Group Response**
	this subject could be disastrous for petitioners whose claims are accidentally forfeited by counsel believing they could be included in an amendment when in fact a court, without the guidance of a clear rule, treats it as a successive petition. Mexico cannot reasonably comment on the contents of such a rule until the Judicial Council proposes one and distributes it for comment. However, any such rule must address the treatment of protective petitions filed by petitioners without counsel in the California Supreme Court. This situation is central to the problems facing capital habeas corpus procedure in California, and it is up to the Judicial Council to acknowledge and address this problem and propose a viable solution.	
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	***Should the proposed rules address amendments to petitions?*** ***If the proposed rules were to address amendments:*** • ***How would amendments affect the deadlines provided in the rules?*** • ***Under what circumstances should amendments be permitted? •*** • ***Should the rule address amendment of Morgan or shell petitions differently from other petitions?*** Yes, rules concerning amendments to capital habeas corpus petitions should be promulgated. Of course, nothing in Proposition 66 limits the filing of amendments to a petition for writ of habeas corpus, and existing law has long permitted courts to accept amendments and supplements to pending habeas corpus petitions, leaving such decisions to the discretion of the court. Indeed, liberally permitting amendments and supplemental allegations to existing habeas corpus petitions	The working group appreciates the many comments it received on this topic. As evidenced by those comments, there is already an extensive body of law on amendments, but there is also an argument that Proposition 66 was intended to limit the scope and timeframe for making amendments to a petition. This poses a challenge to recommending rules. On the one hand, rules could help give the parties some clarity and direction. On the other hand, rules could stifle the more

Amendments to Petitions		
Commenter	**Comment**	**Working Group Response**
	when new evidence comes to light during the proceedings is important to avoid piecemeal litigation and fosters the type of efficiency that Proposition 66 was aimed at ensuring. As for the deadlines provided in the rules, our experience is that the courts are well equipped to determine whether good cause exists to permit the filing of amendments and supplemental allegations, and to provide the parties the necessary time to respond to any new allegations. That said, it makes sense that a rule concerning amendments acknowledges the court's authority to extend time to permit and fully address new allegations and claims. *Morgan* petitions must be addressed differently because their amendment is non- discretionary. That is, they are uncounseled petitions that cannot be resolved on their merits *until* they are amended. For purposes of clarity, particularly because the superior courts are unfamiliar with *Morgan* petitions, it makes sense to have a rule that reflects *Morgan-petition* practice, which should include the following principles: (1) when the appeal becomes final but no habeas counsel has been appointed, appellate counsel or the assisting entity may file a *Morgan* in the Supreme Court; (2) when the appeal becomes final and habeas counsel already has been appointed, habeas counsel may file a *Morgan* petition in the court in which counsel was appointed; (3) when a *Morgan* petition was filed in the Supreme Court, after the superior court receives notice pursuant to proposed Rule 4.651(d)(1-3), and notifies the Supreme Court pursuant to Rule 4.651(d)(4) that it is prepared to appoint counsel, the Supreme Court may transfer the *Morgan* petition to the superior court for appointment of counsel; and (4) counsel may amend the *Morgan* petition	organic development of the law arising from specific fact patterns and, if the rules were challenged, could even be misleading or create more problems than they solve. The working group therefore declined to revise the proposal to recommend the adoption of rules governing amendment of petitions. The working group emphasizes, however, that nothing in the rules precludes amendment of petitions. In addition, under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revisions would not be minor substantive changes and thus would need to be circulated for public comment. There is not sufficient time for the working group to consider, develop, and circulate another proposal in time for the working group to present proposed rules to the Judicial Council for adoption by the deadline imposed by Proposition 66. The working group will refer this suggestion to be considered by the appropriate Judicial Council advisory body at a later time.

Amendments to Petitions		
Commenter	**Comment**	**Working Group Response**
	within the time frame prescribed by policy or law at the time the *Morgan* petition was filed.	
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	***Should the proposed rules address amendments to petitions?*** Yes. ***If the proposed rules were to address amendments: How would amendments affect the deadlines provided in the rules?*** We view the Morgan petition issue as the most troublesome area and would greatly appreciate specific guidance in the rules. ***Under what circumstances should amendments be permitted?*** Strict showing of good cause. ***Should the rule address amendment of Morgan or shell petitions differently from other petitions?*** Yes – or at a minimum expressly state that a particular rule applies to both represented and unrepresented petitions.	Please see the response to the Habeas Corpus Resource Center, above.
Superior Court of Riverside County by Susan Ryan, Chief Deputy of Legal Services	We would like to see some guidance in the rules on amended petitions. It would appear that the practice in the Supreme Court has been to file a shortened petition, sometimes called a shell petition, and then amend it much later on. Under the timelines imposed by Prop 66, it would be impossible for the court to meet its goals if a petitioner could as a matter of right drop an amended petition at any time prior to the hearing; on the other hand, there may be a need for counsel to file the shell petition to meet the Prop 66 deadline and then later amend in some circumstances. I would suggest that a rule of court	Please see the response to the Habeas Corpus Resource Center, above.

Amendments to Petitions		
Commenter	**Comment**	**Working Group Response**
	clarifying the extent to which leave to amend can and should be allowed would be appropriate. This is also important because later federal review is going to need to know whether a claim was denied by the state court on procedural grounds and whether that was done so properly.	

Assisting Entity or Counsel		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**2. The provisions concerning the assisting entity should be clarified** The proposed rules concerning the appointment of counsel (Nos. SP18-12 & SP18-13), rightly emphasize the importance of an assisting entity to work with the appointed counsel for the petitioner. The references to the assisting entity in the present set of proposed rules appear inadequate. Rules 4.573(a)(2) and 4.574(a)(3) require the respondent to make service on the assisting entity, and Rule 4.575 requires the clerk to do so, but no rule requires the petitioner's counsel to serve the assisting entity. The assisting entity cannot do its job adequately without a complete and authoritative file of the documents prepared by the attorneys it is assisting. This is not a hypothetical problem. I regularly use the online brief bank maintained by CAP-SF as part of the assistance it offers to appointed counsel. Frequently I find in that brief bank a response from the Attorney General, but not the document filed by the appellant or petitioner to which the Attorney General is responding. Even in the absence of a rule, the Attorney General	The working group has revised the proposed rules to require service of the petition and other filings on the assisting entity or counsel, if any.

Assisting Entity or Counsel		
Commenter	**Comment**	**Working Group Response**
	seems to be more faithful in serving CAP-SF than are some of the attorneys CAP-SF is assisting. This rulemaking offers an opportunity to address this problem. Rule 4.576(b) requires service of a certificate of appealability on the district appellate project, rather than generically on the assisting entity. As I discuss in my comments on Proposal No. SP18-21, there are good reasons why the district appellate project probably should not be the assisting entity for an appeal in a habeas case. The Working Group, in its deliberations on prior sets of rules, decided not to name CAP-SF in the rules as the default assisting entity. Rule 4.576(b) similarly should not name the district appellate project.	The working group disagrees. The Courts of Appeal may rely on the district appellate projects to carry out duties as authorized under rule 8.300(e), or the Courts of Appeal may designate the appellate projects in some or all cases as an assisting entity. This is a matter for each Court of Appeal to decide. Because there is a great likelihood of the projects being involved in one capacity or the other, the working group concluded it was appropriate to require the projects be served with a copy of any certificate of appealability.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	The rules must address appointment of habeas corpus co-counsel and define the interaction between appointed habeas corpus counsel and assisting entities. * * * Assisting and appellate agencies will need additional staff to support habeas corpus attorneys and habeas corpus appellate attorneys.	This proposal addresses the procedures in death penalty–related habeas corpus proceedings, not the appointment of counsel. The working group will refer the comment to the appropriate advisory body for future consideration. The working group appreciates this comment, but the staffing of these entities is outside the scope of the working group's charge.

Implementation and Funding		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**3. The rules, even if adopted now, should not take effect until the habeas corpus process is fully funded**	The working group appreciates these comments. As noted in the invitation to comment, the working group recognizes that the changes made by Proposition 66 to

Implementation and Funding		
Commenter	**Comment**	**Working Group Response**
	As the Working Group recognizes, implementing these rules "will likely have substantial costs [and] operational impacts" for the superior courts. (Proposal, p. 9.) My overriding concern with the proposed rules is the absence of adequate funding to implement them. Inadequate funding is widely recognized as the most important reason for the dysfunction of the California capital case review system. (See *In re Morgan* (2010) 50 Cal.4th 932, 937-939; California Commission on the Fair Administration of Justice, Final Report (2008) at pp. 132-135; Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 S. Cal. L. Rev. 697, 717-720, 734-738; see also *Jones v.Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050, 1056-1058, *rev'd on other grounds* (9th Cir. 2015) 806 F.3d 538.) Paradoxically, it is the one factor that Proposition 66 did nothing about. The inadequate funds for the fees and expenses of the petitioner's counsel usually gets the most attention, but these proposed rules also identify other areas in which substantially increased funding will be necessary before the rules can function in the manner they appear to be intended: additional judgeships; additional court staff (both chambers staff and the clerk's office staff) and all the other infrastructure that goes with additional judgeships; attorney and investigative staff to represent the prosecution; new or expanded assisting entities. These rules can be adopted now, as required by statute, but the effective date should be postponed until after the Legislature has appropriated sufficient funds for these purposes, which will be an annual sum considerably greater than the amounts appropriated in recent years for capital habeas corpus. An	the procedures for review of death penalty cases, particularly making the superior courts generally responsible for hearing habeas corpus proceedings in these cases, will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. The commenter raises legitimate concerns about how implementation of Proposition 66 will be funded given that the proposition included no additional funding to address these additional costs and did not address who would be responsible for funding counsel for petitioners. Funding, however, is outside the working group's charge and the scope of these rules, and involves entities outside the judicial branch. Furthermore, delaying the effective date of these rules will not result in delaying either the implementation of Proposition 66 or the impact of the associated costs. The superior courts currently have multiple pending death penalty-related habeas corpus proceedings that were transferred to them by the Supreme Court under the proposition and the first appeals have now been filed in the Courts of Appeal. The working group's view is that litigants in these cases and the courts that must handle these proceedings cannot wait until full funding is provided to receive guidance on how to proceed.

Implementation and Funding		
Commenter	**Comment**	**Working Group Response**
	attempt to implement the rules without substantially increased funds is sure to fail. This point is sufficiently important that I repeat it here, even though when I made the same recommendation with respect to Proposal No. SP18-13, the Working Group did not adopt it.	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	The Judicial Council cannot expect implementation of these rules until funding sources and allocation are established.	Please see the response to Robert D. Bacon, above.
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C	Moreover, Mexico believes that any proposal for new rules needs to address the fiscal and operational impacts of these procedures. The Working Group should be charged with determining what the impact of these rules will be on the criminal justice system. Without this information, the courts and the legislature cannot ensure adequate funding for the fair and consistent implementation of the new procedures. Moreover, other parties, such as assisting entities, will require this information to prepare for the implementation of the new rules. It is impossible to fairly assess the proposed procedures without information about their impacts on the operations of the justice system.	Please see the response to Robert D. Bacon, above.
Hon. Morris Jacobson, Judge, Superior Court of Alameda County	Regarding the question as to how well would this proposal work in courts of different sizes, our Court, which is a large Court, is struggling already having received 4 cases on transfer from the Supreme Court. We do not have available staff attorneys to review these voluminous cases. We are currently seeking to hire two additional attorneys to work on these cases. We are expecting at least 8 more cases over the next year based	The working group appreciates these comments.

Implementation and Funding		
Commenter	**Comment**	**Working Group Response**
	on projections by the Habeas Corpus Resource Center. For us, 11 cases represents 3 to 4 years of full time work for two attorneys. Given what our experience is as a large Court, I cannot imagine how a small court, perhaps with no research attorneys on staff, will be able to cope with even a single case. I would hope that some thought will be given to perhaps establishing regional resources to help the small courts handle this very specialized and time consuming workload.	
Superior Court of Los Angeles County	***What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?*** We estimate four hours of 'new legislation' training for Judicial Assistants and Appeal Clerks. Another 16 hours would be needed to draft written procedures for processing the Petition. ***Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*** Yes, one month would be sufficient.	The working group appreciates this comment. The working group appreciates this comment.
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	**Lack of Resources and Funding Mechanism for the Petitioner** As with previous proposed rules relating to the changes in the law caused by Proposition 66, there is a lack of any	Please see the response to Robert D. Bacon, above.

Implementation and Funding		
Commenter	**Comment**	**Working Group Response**
	discussion of funding. Habeas counsel must be adequately compensated and the reasonable expenses of preparing and litigating a habeas corpus petition must be funded. At the very least, the rules should contain a provision mandating that counsel are adequately compensated and that litigation expenses will be paid. Additionally, and related, is the question of funding for the superior court staff that must implement these procedures. The rule is silent and the omission glaring.	
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	One area of note are questions related to financial savings and the implementation requirements and the need for training staff, revising processes and procedures, creating new docket codes for case management systems and any potential modifications to the case management systems. We do not have the ability at this time to quantify the costs of these proposed changes, however the Court would be faced with the challenge of hiring additional legal research attorneys that are qualified to review death penalty related habeas corpus proceedings, selecting a panel of attorneys that will qualify under the new rules and technical upgrades (i.e. electronic filings) that may occur in the future. **We thank the committee for its specific work in this area and offer these additional general comments and concerns:** • As to the financial impact for the Superior Court now processing and ruling on petitions in Capital cases – we believe an additional 18 research attorneys would need to be hired, trained and assigned to this task to assist this task. The Orange County Superior Court has 75 pending capital cases in post-conviction proceedings. Further judicial training and clerk training would also	The working group appreciates these comments.

Implementation and Funding		
Commenter	**Comment**	**Working Group Response**
	be required. * * * ***Would the proposal provide cost savings? If so, please quantify.*** No. ***What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?*** (This area is of concern; see comments in opening.) [Above.] ***Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*** No, additional time would be needed, however we cannot quantify at this time. ***How well would this proposal work in courts of different sizes?*** Not sure, however this Court would propose that in cases that involve a change of venue, it should return to the originating county.	
Superior Court of Orange County by Ada Maldonado, Administrative Analyst	This process is completely new for us and would require training for our bench and courtroom staff. As well as new procedures be created.	The working group appreciates these comments.

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

Implementation and Funding		
Commenter	**Comment**	**Working Group Response**
	I do not foresee any cost savings for the court. I feel that one month is not enough time to prepare for the implementation.	

Other		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**3. The rules should explicitly call for mediation and settlement efforts** The rules should explicitly provide, as a matter of course in every case, an opportunity for court-annexed and court-encouraged mediation, settlement negotiations, or other alternative dispute resolution procedures. Prompt resolution through ADR without a full evidentiary hearing is in the interest of the court, the prosecution, the petitioner, and the victim's family. It is one of the most obvious ways to reduce the crushing burden that capital habeas cases will otherwise place on the superior courts. Many appellate courts have mediation or settlement conference programs. By definition, all the cases resolved with the help of these programs – like cases in which a habeas petition has been filed – did not settle before trial. Parties' perceptions, expectations, and motivations have a way of changing once a jury has returned its verdict (or once the judgment has been affirmed on appeal). The Ninth Circuit's mediation program has had some success settling capital habeas cases. If the petitioner is incarcerated at a great distance from the	The working group appreciates this comment. However, under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time for the working group to consider, develop, and circulate another proposal in time for the working group to present proposed rules to the Judicial Council for adoption by the deadline imposed by Proposition 66. The working group will refer this suggestion to be considered by the appropriate Judicial Council advisory body at a later time.

Other		
Commenter	**Comment**	**Working Group Response**
	court, provision should be made for his participation in ADR sessions by two-way video or similar means. Alternatively, preliminary conferences could be held in his absence based on his counsel's representations concerning the petitioner's position concerning settlement, with the petitioner participating personally only as the need for his personal consent to a settlement draws near *** * *** **5. The rules should address the significant number of cases in which assignment of an out-of-county judge, or a change of venue, is likely to be necessary** The Working Group's prefatory comments imply that balancing the workload would be the only reason to transfer petitions between counties. (Proposal, pp. 7-8.) But regardless of workload concerns and regardless of the statutory preference for the venue in which the case was tried, a significant number of these cases are likely to require a change of venue or assignment of an out-of-county judge. This is sufficiently likely to occur that it may be wise for the rules to address it. Among the situations in which this remedy would be required: The petition may include claims of misconduct (as opposed to legal error) against the judge who tried the case. The petition may include claims of ineffective assistance of defense counsel or prosecutorial misconduct against a lawyer who is now a superior court judge in the same county. In these situations, it would be unseemly and not in the interest of justice for a judge to sit in judgment on a current colleague.	The working group appreciates this comment. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time before the working group has determined this proposal needs to be presented to the Judicial Council for the working group to consider, develop, and circulate another proposal. The working group recommends that this suggestion be considered by the appropriate Judicial Council advisory body at a later time.

Other		
Commenter	**Comment**	**Working Group Response**
	Capital habeas cases frequently present systemic issues concerning a county's procedures for appointing and compensating trial counsel and experts, and the like. (See, e.g., *Rich v. Calderon* (9th Cir. 1999) 187 F.3d 1064, 1069; *Proctor v. Ayers* (E.D. Cal.) 2007 WL 1449720 at *49-*54.) In addition to direct process-related and resource-related claims, systemic deficiencies can be relevant to the explanation for claims of ineffective assistance of counsel. (E.g., *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1205.) The superior court may have an institutional interest in these issues such that an individual judge of the court would be, or would be perceived to be, unable to decide these issues impartially in the habeas context. The petition may include claims concerning off-the-record events during and related to the trial, such as security measures, juror management, spectator misconduct, and the like. In any of these situations (or in any of the situations described in the two previous paragraphs), judges, clerks, bailiffs, and other court personnel may be percipient witnesses whose credibility will be at issue. In the aggregate, the percentage of capital habeas petitions that raise one or more of these issues is probably fairly large. Whether the best remedy is a change of venue, or assignment of an out-of-county judge to hear the case in the county of trial, will probably vary from case to case. But the rules should explicitly put this issue on the superior court's radar	

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

Other		
Commenter	**Comment**	**Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	***Are the deadlines included in the proposed rule for submitting papers adequate?*** No. The deadlines should be the same as current deadlines. * * * The rules fail to define procedures supporting the "oldest goes first" policy.	Please see the response to the Government of Mexico on rule 4.571, above, regarding the deadlines in the proposed rules generally. Those procedures are found in the proposal addressing appointment of counsel that was adopted by the Judicial Council on November 30, 2018.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs San Francisco, California and Katy Graham, Senior Appellate Court Attorney Court of Appeal, Second Appellate District, Division Six Ventura, California	The Committee suggests that the timeframe for filing briefs in death-penalty habeas petitions in the superior court should be reconsidered when compared with the timeframe for filing briefs in the appellate court. Specifically, the Committee is concerned that (1) the proposed rule for superior court briefing would afford only 45 days to file response briefs and 30 days to filer replies, while (2) the proposed rule for appellate courts would permit 120 days to file response briefs and 60 days to file replies. In the habeas context, briefs filed in the superior court and appellate court are likely to raise many similar issues. The Committee therefore suggests that the timeframe to respond and reply should be similar during each phase. The timeframe for superior court briefing seems unnecessarily short, given the magnitude of issues potentially presented, so the Committee recommends adopting a 120-day response and 60-day reply timeframe for both the superior and appellate courts.	Please see the response to the Government of Mexico on rule 4.571, above, regarding the deadlines in the proposed rules generally.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

Other		
Commenter	**Comment**	**Working Group Response**
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	The first question in the Request for Specific Comments is, "Does the proposal appropriately address the stated purpose?" If this refers to the purpose stated in statute, Penal Code section 190.6, subdivision (d), the answer is no. The statutory purpose is to "expedite ... the initial state habeas corpus review in capital cases." The Judicial Council is tasked with monitoring progress and amending its rules as needed to achieve the goal of "complet[ing] the state appeal and initial state habeas corpus proceedings within the five-year period provided in this subdivision." Though the five-year limit is not jurisdictional and cannot be achieved in every case, it is the duty of the judicial branch "to handle [these] cases as expeditiously as is consistent with the fair and principled administration of justice." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 859.) The five-year limit is not meaningless; it is a benchmark to be met whenever reasonably possible. (*Id.* at p. 860.) At each decision point, then, the question to be asked is what is the most expeditious of the feasible alternatives. *Pleading Sequence* The first missed opportunity concerns California's extended, multi- layered system for pleading in habeas corpus cases. It does not appear that the working group even considered whether this system is necessary or appropriate in capital cases or whether it could be streamlined. As the proposal notes at page 4, a major difference between capital and noncapital habeas corpus cases is that noncapital petitioners are normally unrepresented at the initial stage of	The working group appreciates the commenter's proposal. Under rule 10.22, substantive changes to the Rules of Court need to be circulated for public comment before being recommended to the Judicial Council for adoption unless they are minor changes that are unlikely to create controversy. The suggested revision would not be a minor substantive change and thus would need to be circulated for public comment. There is not sufficient time for the working group to consider, develop, and circulate another proposal in time for the working group to present proposed rules to the Judicial Council for adoption by the deadline imposed by Proposition 66.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Other		
Commenter	**Comment**	**Working Group Response**
	pleading while capital petitioners have a statutory right to counsel. The pleading structure for noncapital cases should not be adopted reflexively but should instead be reconsidered with this difference in mind and the mandate of expedition as a priority. Sifting through *pro se* habeas corpus petitions has long been compared to searching a haystack for a needle. (See *Brown v. Allen* (1953) 344 U.S. 443, 537 (conc. opn. of Jackson, J.).) A study of noncapital federal habeas corpus cases found that only 0.29% ended in a grant of relief. (See King, Cheesman, & Ostrom, Final Technical Report: Habeas Litigation in U.S. District Court (2007) 52.) For this reason, both the state and federal systems have mechanisms for screening out insubstantial petitions. Federal courts have a preliminary review by the judge. (See Rules Governing Section 2254 Proceedings for the United States District Courts, Rule 4 (Preliminary Review); Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 4 (same for federal prisoners).) California courts have an extended sequence of briefing that has a substantial amount of redundancy in cases that run the full gauntlet. As carried forward in this proposal, a habeas corpus case goes through these stages: 1. Petition by the inmate 2. Informal response by the state 3. Reply by the inmate 4. Order to show cause by the court 5. Return by the state	The working group will refer this suggestion to be considered by the appropriate Judicial Council advisory body at a later time.

Other		
Commenter	**Comment**	**Working Group Response**
	6. Traverse by the inmate 7. [Possibly] Evidentiary hearing 8. Decision by the court Obviously, this full sequence involves a considerable waste in time and effort as the same issues are briefed and re-briefed. It makes sense in noncapital cases for two reasons. First, a large number of cases are dismissed after step 3, avoiding the expense of full briefing. Second, in a noncapital case the right to counsel only arises at step 4 (see Proposal, *supra*, at p. 4), so the traverse is the first attorney-written pleading on behalf of the indigent inmate. Although the traverse is the third time the issues have been briefed for the inmate, it is not redundant in a noncapital case because the first two were typically written by the inmate himself. The second reason does not apply to capital cases, and the first is unlikely to apply in many cases under the Proposition 66 reforms. It is true that the California Supreme Court has disposed of many capital habeas corpus petitions by summary orders without an order to show cause, but this situation has caused serious problems in the subsequent federal proceedings, and changing it is one of Proposition 66's major reforms. The unexplained disposition is flatly prohibited on an initial petition. (See Pen. Code, § 1509, subd. (f).) Although the King study of federal courts does not specifically track Rule 4 dispositions, the study does indicate that rapid disposition is far more common in noncapital cases than capital cases. (See King et al., *supra*, at pp. 39-41.) We can expect a similar pattern in California Superior Court dispositions under	

Other		
Commenter	**Comment**	**Working Group Response**
	Proposition 66. The extended briefing sequence is not required by statute. It is a creature of case law and rules, and it can be changed by rules. With the reason for steps 2-4 inapplicable to capital cases, they should simply be abandoned for initial habeas corpus petitions. If the working group is unwilling to go that far, it should at least permit the People to stipulate to an order to show cause and proceed directly to the return if they wish to do so. It is also worth noting here that statements in the case law to the effect that the state's return is the "principal pleading" (see, *e.g.*, *People v. Romero* (1994) 8 Cal.4th 728, 738-739) make little sense in a system where all petitions are attorney-written unless the petitioner affirmatively chooses to proceed pro se. The first attorney-written paper, i.e., the petition, should have the same function in capital habeas corpus that it does in civil litigation. *Briefing Times* The working group asked if the deadlines in the proposed rules are adequate. We believe they are adequate in length generally, although district attorneys are in a better position than CJLF to address that.	
Government of Mexico by Gerónimo Gutiérrez Fernández, Ambassador Washington, D.C.	The approach to time limits in these proposed rules is problematic. While Mexico understands that the statute itself purports to dictate timelines on which these cases must be resolved, as you know, the California Supreme Court	Please see the earlier response to the Government of Mexico on rule 4.571, above, regarding the deadlines in the proposed rules generally.

Other		
Commenter	**Comment**	**Working Group Response**
	determined last year that these time limits are "merely directive" and are benchmarks to apply when it is "reasonably possible" to complete review in the allotted periods. *Briggs v. Brown*, 3 Cal. 5th 808, 860 (2017). Mexico agrees that the timelines should be considered advisory. The proposed rules, however, contain binding deadlines apparently intended to produce uniform compliance with the statute's purported schedule for resolution, undoing much of the flexibility the Court correctly required. Comments on specific deadlines are addressed above, under the specific rule to which the deadline is relevant. * * * Similarly, the Judicial Council should propose rules for method-of-execution claims at this time. Concerns about evolving law can be addressed by drafting the rule broadly. Without any guiding rule at all, petitioners will face potential procedural challenges to constitutional claims they have a right to present because different courts and parties may interpret the statute's requirements differently. When this council proposes a rule, Mexico will be able to comment on its substance.	The working group appreciates this comment. As explained in the invitation to comment, however, currently, there are no rules of court that specifically address challenges to methods of execution. This area of law is characterized by uncertainty, including on basic questions of when and in what form a challenge may be raised. Thus, any proposed rule would risk being too broad or too narrow, and have the unintended consequence of permitting or foreclosing challenges beyond what is prescribed by law and was desired by the electorate in approving Proposition 66. Concluding there exists a real possibility that rule-making could get ahead of or otherwise inhibit the development of this area of the law by the courts and interested parties, the working group declined to propose rules at this time.

SP 18-22

Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 4.571–4.577)

All comments are verbatim unless indicated by an asterisk (*).

Other		
Commenter	**Comment**	**Working Group Response**
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	***Are the deadlines included in the proposed rule for submitting papers adequate?*** Yes.	The working group appreciates this comment.
Superior Court of San Diego County by Mike Roddy, Executive Officer	The proposed changes appear to be adding "Article 3" to Title 4, Div. 6, Ch. 3, but there does not appear to be an article 1 or 2.	This observation is correct. Articles 1 and 2 were created in a proposal adopted by the Judicial Council on November 30, 2018 that becomes effective until April 25, 2019, and so are not found in the current Rules of Court or in this proposal.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

From:	Miri Wakuta
To:	Invitations
Subject:	RE: Invitation to Comment - SP18-22, OFC 11/19/18
Date:	Monday, November 19, 2018 5:07:26 PM
Attachments:	image849000.png

RE: Invitation to Comment - SP18-22, OFC 11/19/18

Dear Proposition 66 Rules Working Group,

Aderant CompuLaw respectfully submits the following comments to the proposed adoption of California Rules of Court 4.573.

Proposed Rule 4.573(a)(2) states, "The response must be served and filed within 45 days or as the court specifies…" (Emphasis added.)

Proposed Rule 4.573(a)(4) states, "If a response is filed, the court must notify the petitioner that a reply may be served and filed within 30 days or as the court specifies." (Emphasis added.)

As currently written, the rules do not set a specific triggering event from which to count the 45-day and 30-day periods. Including a triggering event from which to count the time periods may be helpful in avoiding any confusion or misinterpretation of the rules.

We respectfully suggest the following amendments to the proposed rules:

> Proposed Rule 4.573(a)(2):
>
> The response must be served and filed within 45 days of receipt of the courts request for an informal written response or as the court specifies.
>
> Proposed Rule 4.573(a)(4):
>
> If a response is filed, the court must notify the petitioner that a reply may be served and filed within 30 days of receipt of the notice or as the court specifies.

Aderant CompuLaw is a software-based court rules publisher providing deadline information to many firms practicing in the State of California. We expect these issues will be important to practitioners. We greatly appreciate your attention and consideration of our comment. Thank you.

Very truly yours,

Miri K. Wakuta
Rules Attorney

Miri Wakuta
Associate Rules Attorney

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STATE BAR NO. 73297

November 16, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Avenue
San Francisco, California 94102

Re: No. SP18-22: Superior Court Capital Habeas Procedure

Ladies and Gentlemen:

Thank you for the opportunity to comment on these proposed rules. I hope you will find my comments useful.

To introduce myself, I am in the fairly unique position of having been involved in the criminal justice system as an appellate court manager, an appellate prosecutor, and now an attorney representing persons under sentence of death on appeal and in state and federal habeas corpus. I have been found qualified to represent capital habeas petitioners by the California Supreme Court and by the federal district courts for the Northern and Eastern Districts.

1. The rules, even if adopted now, should not take effect until the habeas corpus process is fully funded

As the Working Group recognizes, implementing these rules "will likely have substantial costs [and] operational impacts" for the superior courts. (Proposal, p. 9.)

My overriding concern with the proposed rules is the absence of adequate funding to implement them. Inadequate funding is widely recognized as the most important reason for the dysfunction of the California capital case review system. (See *In re Morgan* (2010) 50 Cal.4th 932, 937-939; California Commission on the Fair Administration of Justice, Final Report (2008) at pp. 132-135; Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 S. Cal. L. Rev. 697, 717-720, 734-738; see also *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050, 1056-1058, *rev'd on other grounds* (9th

Cir. 2015) 806 F.3d 538.) Paradoxically, it is the one factor that Proposition 66 did nothing about.

The inadequate funds for the fees and expenses of the petitioner's counsel usually gets the most attention, but these proposed rules also identify other areas in which substantially increased funding will be necessary before the rules can function in the manner they appear to be intended: additional judgeships; additional court staff (both chambers staff and the clerk's office staff) and all the other infrastructure that goes with additional judgeships; attorney and investigative staff to represent the prosecution; new or expanded assisting entities.

These rules can be adopted now, as required by statute, but the effective date should be postponed until after the Legislature has appropriated sufficient funds for these purposes, which will be an annual sum considerably greater than the amounts appropriated in recent years for capital habeas corpus. An attempt to implement the rules without substantially increased funds is sure to fail. This point is sufficiently important that I repeat it here, even though when I made the same recommendation with respect to Proposal No. SP18-13, the Working Group did not adopt it.

2. Amendments to petitions should be liberally authorized

"It is the settled law of this state that motions to amend pleadings to the end that justice may be promoted are to be liberally granted." (*Sanguinetti v. Moore Dry Dock Co.* (1951) 36 Cal.2d 812, 827, and cases there cited.)

The rules should include provision for amendments to petitions. The stringent limitation on successor petitions in Penal Code § 1509(d), and the restriction of federal habeas corpus review to claims and supporting facts that were before the state court (see *Cullen v. Pinholster* (2011) 563 U.S. 170) make it essential that new claims for relief and supporting facts, whenever reasonably discovered, be amended into a pending first state habeas petition. The federal habeas courts, as well as the litigants, expect the adjudication of the first state habeas petition to be comprehensive. As in other types of cases, amendments should be allowed up to and including amendments following an evidentiary hearing to conform the allegations to the proof.

The prosecution is, of course, entitled to a reasonable opportunity to respond to any amendment. If the prosecution asserts specific prejudice from a particular amendment, the remedy should be a continuance of sufficient time for the prosecution to attempt to cure the prejudice. Permission to amend should be denied on this ground only if it is clear that the prejudice is significant and is necessarily incurable by a continuance of any length.

3. The provisions concerning the assisting entity should be clarified

The proposed rules concerning the appointment of counsel (Nos. SP18-12 & SP18-13), rightly emphasize the importance of an assisting entity to work with the appointed counsel for the petitioner. The references to the assisting entity in the present set of proposed rules appear inadequate.

Rules 4.573(a)(2) and 4.574(a)(3) require the respondent to make service on the assisting entity, and Rule 4.575 requires the clerk to do so, but no rule requires the petitioner's counsel to serve the assisting entity. The assisting entity cannot do its job adequately without a complete and authoritative file of the documents prepared by the attorneys it is assisting. This is not a hypothetical problem. I regularly use the online brief bank maintained by CAP-SF as part of the assistance it offers to appointed counsel. Frequently I find in that brief bank a response from the Attorney General, but not the document filed by the appellant or petitioner to which the Attorney General is responding. Even in the absence of a rule, the Attorney General seems to be more faithful in serving CAP-SF than are some of the attorneys CAP-SF is assisting. This rulemaking offers an opportunity to address this problem.

Rule 4.576(b) requires service of a certificate of appealability on the district appellate project, rather than generically on the assisting entity. As I discuss in my comments on Proposal No. SP18-21, there are good reasons why the district appellate project probably should not be the assisting entity for an appeal in a habeas case. The Working Group, in its deliberations on prior sets of rules, decided not to name CAP-SF in the rules as the default assisting entity. Rule 4.576(b) similarly should not name the district appellate project.

4. The rules should explicitly call for mediation and settlement efforts

The rules should explicitly provide, as a matter of course in every case, an opportunity for court-annexed and court-encouraged mediation, settlement negotiations, or other alternative dispute resolution procedures. Prompt resolution through ADR without a full evidentiary hearing is in the interest of the court, the prosecution, the petitioner, and the victim's family. It is one of the most obvious ways to reduce the crushing burden that capital habeas cases will otherwise place on the superior courts.

Many appellate courts have mediation or settlement conference programs. By definition, all the cases resolved with the help of these programs – like cases in which a habeas petition has been filed – did not settle before trial. Parties' perceptions, expectations, and motivations have a way of changing once a jury has returned its verdict (or once the judgment has been affirmed on appeal). The Ninth Circuit's mediation program has had some success settling capital habeas cases.

If the petitioner is incarcerated at a great distance from the court, provision should be made for his participation in ADR sessions by two-way video or similar means. Alternatively, preliminary conferences could be held in his absence based on his counsel's representations concerning the petitioner's position concerning settlement, with the petitioner participating personally only as the need for his personal consent to a settlement draws near.

5. The rules should address the significant number of cases in which assignment of an out-of-county judge, or a change of venue, is likely to be necessary

The Working Group's prefatory comments imply that balancing the workload would be the only reason to transfer petitions between counties. (Proposal, pp. 7-8.) But regardless of workload concerns and regardless of the statutory preference for the venue in which the case was tried, a significant number of these cases are likely to require a change of venue or assignment of an out-of-county judge. This is sufficiently likely to occur that it may be wise for the rules to address it. Among the situations in which this remedy would be required:

The petition may include claims of misconduct (as opposed to legal error) against the judge who tried the case. The petition may include claims of ineffective assistance of defense counsel or prosecutorial misconduct against a lawyer who is now a superior court judge in the same county. In these situations, it would be unseemly and not in the interest of justice for a judge to sit in judgment on a current colleague.

Capital habeas cases frequently present systemic issues concerning a county's procedures for appointing and compensating trial counsel and experts, and the like. (See, e.g., *Rich v. Calderon* (9th Cir. 1999) 187 F.3d 1064, 1069; *Proctor v. Ayers* (E.D. Cal.) 2007 WL 1449720 at *49-*54.) In addition to direct process-related and resource-related claims, systemic deficiencies can be relevant to the explanation for claims of ineffective assistance of counsel. (E.g., *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1205.) The superior court may have an institutional interest in these issues such that an individual judge of the court would be, or would be perceived to be, unable to decide these issues impartially in the habeas context.

The petition may include claims concerning off-the-record events during and related to the trial, such as security measures, juror management, spectator misconduct, and the like. In any of these situations (or in any of the situations described in the two previous paragraphs), judges, clerks, bailiffs, and other court personnel may be percipient witnesses whose credibility will be at issue.

In the aggregate, the percentage of capital habeas petitions that raise one or more of these issues is probably fairly large. Whether the best remedy is a change of venue, or assignment of an out-of-county judge to hear the case in the county of trial, will probably vary from case to case. But the rules should explicitly put this issue on the superior court's radar.

6. Other specific rules in need of revision

Rule 4.571(c): The petition must be served on "the People." Clarify whether the District Attorney, the Attorney General, or both must be served. Also, current Supreme Court policies require the petition to be served on the petitioner himself, although service may be made in person within 30 days rather than by mail on the day of filing. (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4.) I suggest that this Supreme Court policy be incorporated into the rules.

Rule 4.574(b): I suggest a less confusing title than "Denial" for the petitioner's rebuttal pleading. "Reply," "Traverse," and "Rebuttal" are all in more common use than "Denial," and any one of those words is likely to be better understood.

Rule 4.576: Paragraph (a) refers to an order "dismissing" a petition. Paragraph (b) refers to a decision "denying relief." The two references appear to be to the same orders. The same term should be used in both paragraphs. Alternatively, if two different classes of orders are meant, the two classes should be defined and distinguished.

Thank you again for the opportunity to comment.

Sincerely,

/s/ *Robert D. Bacon*
Robert D. Bacon

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Project

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a non-profit corporation established by the State Bar of California

November 19, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Ave.
San Francisco, CA 94102

Re: Invitations to Comment SP18-21, SP18-22

The California Appellate Project-San Francisco ("CAP-SF") submits the following comments on the proposed "Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings" (Item Number SP18-21) and the proposed rules and forms "Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings" (Item Number SP18-22).

SP18-21 –Appellate Review of Superior Court Capital Habeas Proceedings

General Comment:

Recommendation: The rules should provide that habeas counsel must either transmit, or make arrangements to transmit, her complete file to appellate counsel, within a week of appellate counsel's appointment. The rules should further include a non-exhaustive list of the type of documents and materials habeas counsel should include in the file transmitted to appellate counsel. That list should include, but not be limited to the following: trial counsel's file; all work product from habeas counsel [*e.g.* draft and final pleadings, requests for funds and payment, investigation reports, working documents, research memos, correspondence] investigators and experts; and, counsel's paper and electronic calendars related to the case.

Appellate counsel must review both trial counsel's file and habeas counsel's file, to determine if any viable claims of IAC against trial counsel were not raised in the superior court petition. An established rule mandating the transfer of habeas counsel's complete superior court trial file will help to prevent any misunderstandings that these files belong to petitioner, and that successor counsel is entitled to them. The promulgation of this rule would go far in ensuring that appellate counsel would not need to spend unnecessary time attempting to convince habeas counsel to release all files to her.

General Comment:

Recommendation: The rules should mandate that counsel appointed to represent capital habeas petitioners in the Court of Appeal be provided with the assistance of a qualified counsel or entity, such as CAP, since assistance is provided to appointed counsel in all other state capital and non-capital appellate proceedings.

As indicated in comments to prior proposed rules, CAP-SF submits that its unique expertise in providing assistance to counsel in capital appellate and habeas proceedings makes it uniquely qualified to fill this role, and that it is better suited to do so than the district appellate projects that specialize in non-capital appeals.

Regardless of whether CAP-SF is specifically referenced as a potential assisting entity, the proposed rules should expressly provide for assistance to counsel, particularly given the unique complexity of these cases.

Proposed Rule 8.391: Qualifications of counsel appointed by the Court of Appeal

Recommendation: The rule should require that counsel appointed to appeals from superior court habeas decisions meet the qualifications both for habeas appointments in superior court and direct appeal appointments to capital cases in the California Supreme Court, and that counsel have experience with both direct appeals and habeas.

Appeals taken from habeas petitions require a specialized skill set that encompasses skills necessary to properly litigate both habeas corpus and appellate issues. Habeas corpus experience is required since counsel can

raise, for the first time, claims of trial counsel ineffective assistance of counsel ("IAC") on appeal. As such, it is only logical that attorneys appointed to appeals arising from habeas cases meet appointment requirements for both direct appeal and habeas cases.

Proposed Rule 8.392: Filing the appeal; certificate of appealability

8.392(a): Notice of appeal

Recommendation: The rule should be modified to provide that counsel appointed in the Superior Court be expressly assigned the responsibility of filing the notice of appeal on behalf of the petitioner when relief has not been granted.

This is necessary to avoid an inadvertent failure to file the notice of appeal.

8.392(b): Appeal of decision denying relief on a successive habeas corpus petition

8.392(c): Notification of appeal

8.392(b)5-6; 8.392(c)(1)

Recommendation: CAP-SF requests that these rules be clarified. All notices of appeal and orders thereon, including grants and denials of certificates of appealability, should be served on the assisting counsel or entity.

It is unclear when, if ever, the district appellate projects, which currently handle only non-capital cases, will be able to adequately assist appellate habeas counsel. As demonstrated by the Supreme Court's service of all orders and letters on the assisting counsel or entity, service of all filings and orders originating with the superior or appellate courts on the assisting entity is necessary.

8.392(c)(2)

Recommendation: The rule should be modified to provide that court reporters be required to prepare a record of superior court proceedings, once the proceedings have concluded, regardless of whether a certificate of appealability has been issued.

Whether a certificate of appealability is issued or not, a record will need to be prepared because litigation in state court will be subject to review in federal court. Failure to promptly prepare transcripts invites the risk of a failure to preserve an accurate record for later review.

8.392(c)(6):

Recommendation: Proposed rules 8.392(c)(1) should be revised to include service on the assisting counsel or entity. If CAP-SF's proposed revisions are not included, in cases in which counsel has been discharged, disqualified, suspended, disbarred, the clerk must receive a signed receipt that the notice was received by the assisting counsel or entity, and if there is no assisting counsel or entity by CAP-SF and the Habeas Corpus Resource Center.

Proposed Rule 8.395: Record on appeal

8.395(a): Contents

Recommendation: CAP-SF believes that attempts to truncate or abbreviate the record on appeal of a capital habeas decision will ultimately be counterproductive. Regardless of the scope of the habeas appeal, the federal courts will need to conduct a full review of petitioner's claims. Basic federal constitutional requirements of reliability, accuracy and completeness in death penalty proceedings also mandate a comprehensive record on appeal. The record on appeal must include, at a minimum, all contents required by the current rule 8.610. Current rules 8.613 through 8.622 also provide guidance to ensure the record on appeal is complete and accurate.

8.395(a)(5)

Recommendation: CAP-SF recommends that the rule should only state, "All supporting documents under rule 4.571." A separate and new subsection 8.395(a)(6) should state, "And any other documents and exhibits submitted to the Court."

Rule 4.571, referenced in Rule 8.395(a)(5), does not adequately clarify the scope and breadth of "supporting documents" needed for a capital appeal. Rule 4.571(b) should first be modified based upon CAP-SF's recommendations, *infra*, before it can be referenced here.

8.395(b): Stipulation to a Partial Transcript

Recommendation: CAP-SF recommends this provision be removed. It creates an impermissible risk that a partial record or transcript will impede full review of petitioner's case in federal court.

8.395(c): Preparation of clerk's transcript

8.395(c)(2)

Recommendation: CAP-SF believes a clerk should prepare a transcript of superior court proceedings regardless of whether a certificate of appealability has been issued.

Whether a certificate of appealability is issued or not, a record will need to be prepared because litigation in state court will most likely be subject to review in federal court. Failure to promptly prepare transcripts invites the risk of a failure to preserve an accurate record for later review.

8.395(c)(4)

Recommendation: The rule should be modified to provide the clerk must also prepare a copy of the clerk's transcript for an assisting counsel or entity, whether or not such counsel or entity requests it.

8.395(d): Preparation of reporter's transcript

8.395(d)(1)

Recommendation: The reporter should prepare a transcript of superior court proceedings regardless of whether a notice of appeal has been filed.

Given that the purpose of Proposition 66 is to expedite state review of capital cases, and the improbability that neither party would appeal either the grant or denial of habeas corpus relief in the superior court, the preparation of the reporter's transcript should begin immediately upon the conclusion of the superior court proceedings.

8.395(g): Sending the transcripts

Recommendation: The rule should be modified to provide that in all cases the clerk must send a copy of the record on appeal to any assisting counsel or entity, regardless of the status of petitioner's representation.

Proposed Rule 8.396: Briefs by parties and amici curiae

8.396(b): Length

8.396(b)(1)(A), 8.369(b)(3)(A) & 8.396(b)(5)

Recommendation: CAP-SF believes the word count should not include ineffective assistance of trial counsel claims. Just as IAC claims raised in the superior court have no word limitation, so should IAC claims raised in the appellate court have no such limitation.

Prop 66 expressly allows the presentation of claims of IAC of trial counsel that were not presented in the superior court. Nothing in Prop 66 requires or provides a basis for making it more difficult to adequately plead IAC claims first presented on appeal. Appellate counsel, like habeas counsel, must be afforded the ability to set forth an adequate claim for relief without the burden of a word count.

8.396(b)(6)

Recommendation: The rule should be amended to include language that "good cause" will be evaluated under the same criteria as for capital direct appeals. (Cal. Rules of Court, rule 8.631.)

Defining how good cause must be determined will help promote clarity, regularity and predictability in approvals or denials of applications for over-length briefs. The same factors warranting over-length briefs on direct appeal from conviction must also govern appeals from superior court denials of relief on habeas.

8.396(c): Time to File

8.396(c)(1)

Recommendation: CAP-SF recommends that the rule provide for a filing deadline of one year from appointment.

The proposed filing deadline fails to take into account that appellate counsel will be required to review trial counsel's file, habeas counsel's file, the record on appeal from the trial, and the record on appeal from the habeas denial. Significantly more time is required to complete these tasks and to write a legally competent appellate brief that includes claims of trial counsel's IAC. A one-year time frame, mirrors the statutory filing deadline for a superior court habeas petition. In order to attract competent counsel to take these cases, counsel must be given adequate time to fulfill their duties.

8.396(d): Service

8.396(d)(1)

Recommendation: CAP-SF recommends that all pleadings and orders be served on the assisting counsel or entity.

The California Supreme Court requires counsel in capital cases to serve all pleadings on the assisting counsel or entity.[1] (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4; *see also* Cal. Rules of Court, rule 8.630(g).) There is no reason to abandon a long-standing practice that serves the interests of both counsel and the assisting counsel or entity.

8.396(d)(1) & 8.396(d)(2)

Recommendation: CAP-SF recommends that the rules regarding service allow for personal service of petitioner, and additional time to do so, as

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[1] "Consistently with longstanding practice and court policy, except as specified below, counsel for the defendant must serve ... the assisting entity or attorney ..." (Policy 4.)

permitted in the Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4.

Proposed rule 8.396(d)(1) should include the following language, borrowed primarily from Policy 4:

> If counsel for petitioner elects to serve petitioner personally, counsel may indicate on the proof of service that counsel will serve petitioner within 30 calendar days. Counsel must notify the court in writing after petitioner has been served.

Proposed rule 87.396(d)(2) should be amended to include personal service.

As the California Supreme Court recognized, due to the nature of habeas corpus, pleadings often contain sensitive and difficult to understand information that is best explained to a client in person.

8.396(d)(3)

Recommendation: CAP-SF recommends that "assisting counsel or entity" replace "district appellate project".

The assisting counsel or entity must receive service of all pleadings and orders. Currently, the district appellate projects do not have the necessary capital experience to act as an assisting entity. It is unclear at this time who will be assisting appointed counsel in the appellate courts, and the proposed rules should include the potential for other counsel or entities providing assistance to appointed counsel.

Proposed Rule 8.397 Claim of ineffective assistance of trial counsel not raised in the superior court

8.397(c): Proffer

8.397(c)(3)

Recommendation: CAP-SF recommends that the rule be modified to ensure that when a proffer is noncomplying, the clerk is required to notify the filer (e.g., petitioner's counsel or petitioner if unrepresented) immediately of any

noncompliance, and must allow a minimum of 30 days for the filer to bring the proffer into compliance.

SP18-22-Superior Court Capital Habeas Procedures

Proposed Rule 4.571 Filing of the petition in the superior court

4.571(b): Supporting Documents

4.571(b)(6)

Recommendation: CAP-SF recommends that the rule be modified to separately address the need for a clear process for confidential records.

Rules 2.550 and 2.551 on their face address sealed records, but do not reference confidential records. Current Rule 8.47 ("Confidential Records") may serve as a useful guide in modifying Rule 4.571(b)(6).

4.571(c): Filing and service

4.571(c)(3)

Recommendation: CAP-SF recommends that the rule be revised to require all pleadings and supporting documents and orders to be served on the assisting counsel or entity.

As stated above, the California Supreme Court requires counsel in capital cases to serve all pleadings on the assisting counsel or entity. (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4; *see also* Cal. Rules of Court, rule 8.630(g).) There is no reason to abandon a long-standing practice that serves the interests of both counsel and the assisting counsel or entity.

4.571(d): Noncomplying filings

Recommendation: CAP-SF recommends that the rule be modified to ensure that when a petition is noncomplying, the clerk be required to notify counsel (or petitioner if unrepresented) immediately of any noncompliance, and must

allow a minimum of 30 days for counsel (or petitioner if unrepresented) to bring the petition into compliance.

4.571(e)(3)

Recommendation: CAP-SF recommends that the rule be modified so that the Court has 60 days after receipt of the informal reply, or 60 days after the time to file an informal reply has expired, to rule on the petition.

The requirement for the Court to issue an order to show cause or deny the petition within 60 days of receipt of the informal response fails to take into account the current capital habeas practice that virtually all petitioners choose to file an informal reply.

4.571(e)(5)

Recommendation: CAP-SF recommends that all rulings by the superior court be served on the petitioner, her counsel, and the assisting counsel or entity.

Proposed Rule 4.573: Proceedings after the petition is filed

4.573(a): Informal response and reply

4.573(a)(4)

Recommendation: As indicated in CAP-SF's recommendation regarding rule 4.571(e)(3), the rule should be modified so that the Court has 60 days after receipt of the informal reply, or 60 days after the time to file an informal reply has expired, to rule on the petition.

Petitioner should have a minimum of 45 days to file an informal reply, and a court should not be allowed to order less time for the filing. A court may still specify that more time will be allowed for the filing of an informal reply.

Thank you for this opportunity to comment.

Very truly yours,

JOSEPH SCHLESINGER
Executive Director

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November 19, 2018

Proposition 66 Rules Working Group
Judicial Council of California
455 Golden Gate Ave.
San Francisco, CA 94102

Re: Invitation to Comment SP18-21 and SP18-22

To the Hon. Dennis M. Perluss, and to members of the Proposition 66 Rules Working Group:

These comments reflect the concerns of California Attorneys for Criminal Justice (CACJ) regarding the proposed rules for filing habeas corpus petitions in superior courts, and filing appeals of habeas corpus decisions in the courts of appeals.

CACJ understands that Proposition 66 was passed and is the law. We respect the Judicial Council's role in creating rules to implement the law. Our main concern is that implementation of Proposition 66 not infringe on the constitutional rights of condemned inmates.

CACJ's main concern is to ensure that counsel for the condemned inmate have an unobstructed opportunity to investigate and litigate collateral relief issues, including ineffective assistance of trial counsel in the superior court, the opportunity to appeal the habeas corpus rulings of the superior court, and present new claims of ineffective assistance of habeas corpus counsel in the court of appeals.

The Judicial Council should recognize that the habeas corpus process defined in Proposition 66 will necessarily be more time- and resource-intensive than current habeas corpus procedures. Currently, the Supreme Court has discretion to review only those claims it finds have merit . Proposition 66 demands that the superior courts review every claim raised by the capital habeas corpus petitioner, determine and document the merits of each claim. Each petition will be different and may require vastly different court resources for resolution. Flexibility, where there is good cause, is necessary to adequately meet the petitioner's due process needs and the demands of the superior court.

Request for Specific Comments on SP18-21

Does the proposal appropriately address the stated purpose?
The proposed rules do not adequately address the procedures for taking an appeal from a Superior Court ruling in capital habeas corpus proceedings. Importantly, these rules cannot be implemented without defined sources and proper allocation of funding. Until the Judicial Council, Superior Courts, Courts of Appeals, and the

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Legislature have addressed funding, appointed counsel, assisting entities, superior court judges and staff, and appellate courts and staff, cannot implement these measures.

Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?
The qualifications for capital habeas corpus appellate counsel should be the same as those for appointment on capital habeas corpus. (See CACJ comments to SP18-12 and SP18-13.) At the bare minimum, habeas corpus appellate counsel must have capital postconviction experience.
Because of the possibility of conflicts of interest, attorneys appointed for appeals from capital habeas corpus proceedings should not be the same attorneys as those in the superior court habeas corpus proceedings, unless there is a valid waiver by the petitioner.

Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal?
We have no opinion.

Would it be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period?
Yes. The rule should be as clear as possible. There are situations where both parties may have different grounds to appeal. The rule must allow each party 30 days to file their notice of appeal. Furthermore, if a party timely appeals from the ruling on a habeas corpus proceeding, the time for any other party to appeal should be extended until 20 days after the superior court clerk serves notification of the first appeal.

Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations?

No. It is unlikely that it would be useful in capital proceedings. And, it may create problems in federal courts considering the exhaustion of claims or the determination of facts in state court.

When should preparation of the record begin for these appeals?
Preparation of the record should begin when the notice of appeal is filed.

Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals?
No. It is highly unlikely that the complete record of habeas corpus proceedings could be collected in less than 90 days. The rules for certification of the clerk's transcript and the reporter's transcript must include a process and time for correction of the record by the parties. Rule 8.616(c) and (d) allow 30 days for preparation of the record in capital appeals and provide that the trial court can extend the time for an

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additional 30 days and that the clerk and reporters can apply to the state Supreme Court for further extensions. We propose that the habeas rule incorporate similar time frames and mechanisms for granting extensions.
As in rule 8.622, there must be provisions for appellate counsel to augment and correct the record. Proposed rule 8.395(h) would model record correction procedures on those set out in current rule 8.340, which governs correction of records in non-capital appeals. The procedures for the parties to correct the record in habeas corpus appeals should be modeled after rule 8.622, with the clerk and reporter certifying the record to the trial court and the trial court presiding over proceedings by appellate counsel to correct, augment, and settle the record.

Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals?
No. The superior court judge, and not the appellate court, must have authority to grant time for the court clerk to complete the clerk's transcripts and the court reporter to complete the reporter's transcripts.

Should the rules require that habeas corpus counsel transmit their file to appellate counsel when appellate counsel is appointed?
Yes. Habeas corpus counsel should be required to transfer the entire original file.

Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition?
The time to file should be no less than filing a capital appeal in the Supreme Court, and should, in addition, allow extensions of time upon a showing of necessity of investigation and expert preparation of ineffective assistance claims. Rule 8.630, governing time to file briefs in capital appeals, states: If the clerk's and reporter's transcripts combined exceed 10,000 pages, the time limits stated in (A) and (B) are extended by 15 days for each 1,000 pages of combined transcript over 10,000 pages." (Rule 8.630 (c)(1)(c).) The proposed rules also allow for extensions for long records in habeas appeals; furthermore, in determining the length of the record for the purpose of extending time, the record of a habeas corpus appeal should include not only the habeas petition and exhibits and the record of the evidentiary hearing, but the record and briefs in the direct appeal, since they are part of the habeas proceeding and are routinely incorporated by reference into the habeas corpus petition. Rule 8.396(b) should apply only to the direct appeal of the capital habeas corpus proceedings. The rule should not limit the length of the ineffective assistance of counsel claims and supporting exhibits.
The rules on length of content of the habeas corpus appeal must contemplate the petitioner's right to appeal ineffective assistance of habeas corpus counsel and request an evidentiary hearing. The rules on length of content must allow enlargement as necessary to develop ineffective assistance claims and provide supporting exhibits.

Are the proposed rule provisions relating to the content and format of a proffer in

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appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition appropriate?
The proffer of exhibits on appeal should have the same rules governing form and content as those for exhibits submitted with a habeas corpus petition; i.e., they should have similar rules for contents, pagination, etc.

Request for Specific Comments on SP18-22

Does the proposal appropriately address the stated purpose?
The proposed rules do not properly address the procedures for capital habeas corpus proceedings in Superior Court. These rules cannot be implemented and will fail without defined sources and allocation of funding. Until the Judicial Council, Superior Courts, and the legislature have defined and allocated funding, appointed counsel, assisting entities, superior court judges and staff cannot implement these measures.

Should the rules address Supreme Court transfer of petitions from one superior court to another and, if so, what should the rule provide?
When transferring a case to a superior court, any court, including the Supreme Court, should issue an order with the basis of its decision.

Should the rules address Supreme Court transfer of a petition pending before it to a superior court and, if so, what should the rule provide?
To minimize duplication of effort, all petitions pending in the Supreme Court should remain in the Supreme Court.

Should the proposed rules address amendments to petitions?
The rules should define the process for amending petitions upon a showing of good cause.

If the proposed rules were to address amendments:
o How would amendments affect the deadlines provided in the rules?
o Under what circumstances should amendments be permitted?
Same as amendments to capital habeas corpus petitions currently.
o Should the rule address amendment of Morgan or shell petitions differently from other petitions?
Morgan petitions should have the same deadlines and rules starting from the date of appointment of counsel as the original petition .

Should the proposed rules include a provision like that in rule 8.384(d) and proposed rule 4.571(d) that authorizes the court to notify the attorney that it may strike a noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days?
The attorney must be notified and allowed no less than 30 days to submit a proper petition with extensions for due cause.

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Should there be a Judicial Council form for the superior court to issue a certificate of appealability?
The superior court should only be required to state that the requirements of section 1509 have been met and that the court is certifying the issues for appeal.

Should the rule require the superior court to include in a certificate of appealability not only the substantial claim or claims for relief, which is required by Penal Code section 1509.1, but also include a finding of a substantial claim that the requirements of Penal Code section 1509(d) have been met?
No.

Are the deadlines included in the proposed rule for submitting papers adequate?
No. The deadlines should be the same as current deadlines.

Omissions in SP18-21 and SP18-22:

The rules do not adequately define the procedure for amending petitions including *Morgan* petitions.

The rules must address appointment of habeas corpus co-counsel and define the interaction between appointed habeas corpus counsel and assisting entities.

The rules fail to define procedures supporting the "oldest goes first" policy.

Under Rule 8.300, the Court of Appeal has authority to appoint appellate counsel. Capital habeas corpus appellate counsel will require assisting counsel, such as CAP/SF. If CAP/SF is not available in a specific case, e.g. because of a conflict among multiple petitioners, counsel assigned to assist appointed counsel should themselves meet the standards for appointment in a habeas corpus appeal.

Assisting and appellate agencies will need additional staff to support habeas corpus attorneys and habeas corpus appellate attorneys.

The Judicial Council cannot expect implementation of these rules until funding sources and allocation are established.

Thank you for the opportunity to comment on SP18-21 and SP18-22.

Sincerely,

Steve Rease, President CACJ

To: Judicial Council of California
Presiding Justice Dennis M. Perluss, Chair
Proposition 66 Rules Working Group

From: Committee on Appellate Courts, Litigation Section

Date: November 15, 2018

Re: Invitations to Comment
SP 18-21: Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings
SP 18-22: Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings

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The Committee on Appellate Courts appreciates the Working Group's efforts to balance the mandates of Proposition 66 with the need to ensure reasonable procedures and qualifications for death penalty habeas proceedings. The current invitations to comment contain numerous issues, and the Committee provides the following responses for the issues on which it has substantive suggestions.

1. Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings – SP 18-21

The Committee on Appellate Courts generally supports this proposal, and responds as follows to the Working Group's request for specific comments.

> Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?

The Committee agrees that attorney qualifications in superior court death-penalty habeas proceedings should be similar to attorney qualifications in appeals from those proceedings. The Committee also recognizes that the Working Group must consider the ability to increase the pool of qualified attorneys.

However, the Committee reiterates concerns it raised in response to SP 18-12, when the Working Group first solicited comments on the qualification process for death-penalty habeas appointments in superior courts. Specifically, the Committee suggests that:

- appointed counsel should have significant experience representing a defendant/appellant/petitioner, rather than solely representing the prosecution/respondent;

- appointed counsel should have some experience handling other murder cases; and,

- appointed counsel should have experience with habeas matters, rather than merely direct appeals.

As a possible middle ground between these suggestions and the Working Group's SP 18-12 proposals, the Committee suggests adopting a two-tiered qualification structure. Attorneys with the above experience could be deemed "fully qualified," and operate without direct supervision. Meanwhile, attorneys with less experience could be deemed "provisionally qualified." Such attorneys would be permitted to handle a capital habeas petition, but their first such appointment should be supervised by a "fully qualified" attorney.

While California confers no constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings, the long-standing practice of the California Supreme Court has been to appoint qualified counsel to work on behalf of an indigent inmate in the investigation and preparation of a petition for a writ of habeas corpus that challenges the legality of a death judgment. (*See, In re Barnett* (2003) 31 Cal. 4th 466, 475 citing *In re Sanders* (1999) 21 Cal.4th 697, 717; *In re Anderson* (1968) 69 Cal.2d 613, 633; Cal. Supreme Ct., Internal Operating Practices & Proc., XV, Appointment of Attorneys in Criminal Cases; Cal. Supreme Ct., Policies Regarding Cases Arising from Judgments of Death, policy 3].)

That practice was codified in principle at Government Code section 68662, which promotes the state's interest in the fair and efficient administration of justice and, at the same time, protects the interests of all capital inmates by assuring that they are provided a reasonably adequate opportunity to present their habeas corpus claims.

Moreover, competent state habeas counsel protects victims' interests in finality and promotes the purpose of Proposition 66 to more efficiently resolve capital cases. The most efficient approach is to appoint fully qualified counsel at the state trial court level who will conduct a competent investigation and spot claims that must be raised.

Over the last 20 years alone, federal courts have granted relief in at least 13 serious felony (non-capital) California cases, where those individuals were later *exonerated.* Six of those cases involved the denial of petitioners' Sixth Amendment right to effective counsel. In five of the six IAC cases, state courts summarily denied relief without ordering an evidentiary hearing or stating reasons for denying relief. The state courts' error rate in evaluating IAC claims is distressing. Lowering the standards for who qualifies as competent counsel to represent

petitioners in state court capital habeas proceedings, whether in superior court or the appellate courts, will only increase the state courts' error rate in those proceedings.

As of 2010, federal courts have rendered final judgment in 63 habeas corpus challenges to California death penalty judgments and granted either a new guilt trial or a new penalty hearing in 43 of those cases. Of the 43 cases, relief was granted in 25 on the ground that the condemned prisoner's appointed trial counsel was ineffective—in six cases during the guilt phase and in 19 cases during the penalty phase—typically for counsel's failure to investigate mitigating evidence. In all of those 25 cases, the state courts found *no* Sixth Amendment error; whereas the federal courts—wherein petitioners are represented by qualified habeas counsel appointed by the federal courts—determined that the petitioners *did* suffer Sixth Amendment constitutional violations and granted some form of relief. It is imperative that post-conviction counsel representing condemned inmates, whether in the superior court or in the appellate courts, have significant experience working on capital cases so they understand the importance of investigating and presenting mitigating evidence, among other capital-case specific issues.

These requirements would help to ensure that appointed counsel have some familiarity conducting investigations, which form a vital component of death-penalty habeas practice. This experience is critical in order to avoid unnecessary delay during the federal habeas process. And the experience is especially critical at the appellate level, given the expanded scope of appellate issues for ineffective assistance of habeas counsel under Penal Code § 1509.1.

> Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal?

Yes, the People's representative should generally receive notice whenever the Court of Appeal issues an order in a death penalty case. Providing this notice requires the Court to perform relatively little additional work, and helps to avoid any unnecessary confusion.

> Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations?

The Committee does not anticipate that parties will stipulate to a limited record with any frequency. By doing so, petitioner's counsel would run an unnecessary risk of providing ineffective assistance. Both parties may be required to perform significant additional work in order to determine which portions of the record were relevant to the specific issue raised. The Committee therefore does not believe the rules should include such a provision.

> Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition?

The Committee suggests that the timeframe for filing briefs in death-penalty habeas appeals should be considered in conjunction with the timeframe for filing briefs in the superior court. Specifically, the Committee is concerned that (1) the proposed rule for superior court briefing

would afford only 45 days to file response briefs and 30 days to file replies, while (2) the proposed rule for appellate courts would permit 120 days to file response briefs and 60 days to file replies.

In the habeas context, briefs filed in the superior court and appellate court are likely to raise many similar issues. The Committee therefore suggests that the timeframe to respond and reply should be similar during each phase. The timeframe for superior court briefing seems unnecessarily short, given the magnitude of issues potentially presented, so the Committee recommends adopting a 120-day response and 60-day reply timeframe for both the superior and appellate courts.

> What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.

Intermediate appellate court attorneys and justices will need training on procedural and substantive issues. Although they already have experience in handling "jumbo" special circumstance murder cases, *Batson-Wheeler* issues, etc., they will need special training on the new procedures (such as the standard of review on an appeal from a habeas ruling). They will also need training on capital-specific substantive issues such as death qualifying a jury, law governing penalty phase and mitigation evidence, and law on standards for effective representation in the penalty phase. The importance of court attorney education will increase if the experience of assigned counsel is limited, as court staff may not have the benefit of reliable briefing.

The Committee has been generating appellate specialization CLE webinars and in-person programs for many years, and is at your service if it can be of any help in developing educational material for the courts. Our members include court attorneys, attorneys from the state attorney general's office, and capital defense counsel who would be happy to volunteer their services in this regard.

2. Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings – SP 18-22

The Committee on Appellate Courts supports this proposal as a whole, and responds as follows to the Working Group's request for specific comments.

> Should there be a Judicial Council form for the superior court to issue a certificate of appealability?

Yes. The Committee recognizes that every case will raise different issues, and therefore the form must be able to accommodate individualized input. However, most judges are unlikely to develop significant experience preparing a certificate of appealability. A general form will therefore help to provide guidance and ensure some uniformity of practice throughout the state.

Are the deadlines included in the proposed rule for submitting papers adequate? Concern re informal response deadline.

The Committee suggests that the timeframe for filing briefs in death-penalty habeas petitions in the superior court should be reconsidered when compared with the timeframe for filing briefs in the appellate court. Specifically, the Committee is concerned that (1) the proposed rule for superior court briefing would afford only 45 days to file response briefs and 30 days to file replies, while (2) the proposed rule for appellate courts would permit 120 days to file response briefs and 60 days to file replies.

In the habeas context, briefs filed in the superior court and appellate court are likely to raise many similar issues. The Committee therefore suggests that the timeframe to respond and reply should be similar during each phase. The timeframe for superior court briefing seems unnecessarily short, given the magnitude of issues potentially presented, so the Committee recommends adopting a 120-day response and 60-day reply timeframe for both the superior and appellate courts.

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MEMO

TO: Judicial Council of California, Attn: Invitations to Comment; invitations@jud.ca.gov

FROM : Mary J. Greenwood, Administrative Presiding Justice, Sixth District Court of Appeal

DATE : 11/27/2018

RE: **Response to Invitation to Comment SP18-22 -** New Rules of Court, rules 4.571, 4.572, 4.573, 4.574, 4.575, and 4.576 Proposed by The Proposition 66 Rules Working Group, Hon. Dennis M. Perluss, Chair specifically relating to Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings: Proposed Rules 4.571-4.576.

The Sixth District Court of Appeal has the following comment as to Proposed Rules 4.574(c) and 4.575:

Proposed Rule 4.574(c) – Proceedings following an order to show cause; evidentiary hearing.

The proposed rules provide deadlines for the superior court to act on a petition. These deadlines are modeled after the provisions of existing rule 4.551. There appears to be a gap in the proposed rules. Existing rule 4.551(f) provides in relevant part: "Within 30 days after the filing of any denial or, if none is filed, after the expiration of the time for filing a denial, the court must either grant or deny the relief sought by the petition or order an evidentiary hearing." The proposed rule 4.574 does not contain a similar deadline for the court to deny the petition or set it for an evidentiary hearing after the return and denial are filed. This appears to be an oversight. The provisions of proposed rule 4.574(e) [submission of cause] do not remedy this gap since it applies only after an evidentiary hearing.

Proposed Rule 4.575 – Decision in death penalty-related habeas corpus proceedings.

The proposed rules provide that the decision on the petition is to be served by the clerk of the court on the petitioner, respondent, the clerk/executive officer of the Supreme Court, and the assisting entity or counsel. We believe that the proposed rule should be amended to include service of the decision on the clerk/executive officer of the Court of Appeal. Given the potential impact of a likely appeal on the court's workload, it would be helpful to have some advance notice of the potential appeal.

FIRST DISTRICT APPELLATE PROJECT

475 Fourteenth Street, Suite 650 • Oakland, California 94612 • (415) 495-3119 • Facsimile: (415) 495-0166

To: Proposition 66 Rules Working Group

From: Court of Appeal Appellate Projects[1]

Date: November 19, 2018

Re: Invitations to Comment - (1) Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings (SP18-21), and (2) Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings (SP18-22)

The Court of Appeal appellate projects provide the following comments and suggestions regarding the proposed rules governing superior court and Court of Appeal capital habeas corpus proceedings.

1. Terminology – Replace "District Appellate Project" with "Assisting Entity." (SP18-21 and SP18-22)

The proposed rules for appellate procedure (SP18-21) incorporate Rule 8.300, which governs appointment of counsel in criminal appeals. (Proposed Rule 8.390(b).) We agree that it is proper to incorporate Rule 8.300, including subdivision (e) which authorizes the Courts to contract with administrators (the current Court of Appeal appellate projects) to administer the appointed counsel panels. There will be a similar need for such organizations to administer the panel for Proposition 66 appointed capital habeas appeals. And the proposed rules for the superior court (SP18-22) contain references to such an assisting entity for the superior court. (Proposed Rules 4.573(a)(2), 4.574(a)(3), 4.575,

However, the proposed rules elsewhere provide that documents or records should be served on, or sent to, "the district appellate project." (4.576(b) (certificate of appealability), 8.392(b)(5) (transmittal of copy of COA), 8.395(g)(2) (sending transcripts), 8.396(d)(3) (service of briefs). These references should be corrected to "assisting entity." Until it is resolved who will be the assisting entity, the rules should not assume it will be the current appellate projects, whose existing contracts are for non-capital work. If

[1] Appellate Defenders, Inc., the California Appellate Project-Los Angeles, Central California Appellate Program, the First District Appellate Project, and the Sixth District Appellate Program.

not corrected and if some other organizations become the assisting entities, errors in the transmittal of documents (including potentially large transcripts) will occur.

Accordingly, we propose replacing "district appellate project" with "assisting entity" in the proposed rules 4.576(b), 8.392(b)(5), 8.395(g)(2) , and 8.396(d)(3).

2. Qualification of Counsel (SP18-21)

In SP18-21, Proposed Rule 8.391 ("Qualifications of counsel appointed by the Court of Appeal") states:

> To be appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under this article, an attorney must meet the minimum qualifications established by rule 8.652 for attorneys to be appointed to represent a person in a death penalty–related habeas corpus proceeding.

Habeas proceedings require specialized skills, so we do not disagree with this requirement. But appellate matters required appellate skills, ranging from exemplary writing skills to a depth of knowledge of appellate standards of review and prejudice, and default rules. Accordingly, these hybrid habeas/appellate matters should be assigned to attorneys who also meet the minimum qualifications for attorneys to be appointed to death penalty appeals. (See Rule 8.605(d)). And because there may not be enough attorneys meeting both appellate and habeas qualifications, the courts should have the option to appoint two attorneys who jointly hold the requisite skills and experience, just as is provided in the current rules for appointment of capital post-conviction counsel (Rule 8.605(i)(2).) We propose modifying proposed Rule 8.391 as follows:

> To be appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under this article, an attorney must meet the minimum qualifications established by rule 8.652 for attorneys to be appointed to represent a person in a death penalty–related habeas corpus proceeding **and the minimum qualifications established pursuant to Rule 8.605(d) for attorneys to be appointed to represent a person in death penalty appeal. Alternatively, two attorneys together may be eligible for appointment to represent a defendant in an appeal from a superior court habeas proceeding if the Court of Appeals finds that their qualifications in the aggregate satisfy the provisions of both Rule 8.605(d) and Rule 8.652.**

3. Copy of Record to Assisting Entity (SP18-21)

Just as 8.395(c)(4) and (g)(1)(c) provide that an extra copy of the record can go to the DA or AG (whichever is not counsel on appeal), an extra copy should be made available to the assisting entity in addition to appointed counsel. Without a record, the assisting entity will not be able to provide the necessary support and oversight. Sharing a record would delay proceedings substantially.

Accordingly, we recommend adding subdivision (g)(1)(E) to proposed Rule 8.395, reading:

> (E) The assisting entity.

4. Record from the capital appeal (SP18-21 and SP18-22)

While the proposed rules go into detail about the composition of the appellate record for the habeas appeals, neither the superior court nor appellate rules say anything about access to the original trial record. At each level, each of the participants (the court, defense counsel, prosecution counsel) will need access to the complete trial record from the original capital appeal. It will be impossible to brief and decide the habeas claims without the trial record, especially as to prejudice. In most cases, at least for the foreseeable future, it may be possible for each side's record to be passed to successor counsel -- from direct appeal counsel to superior court habeas counsel to appellate habeas counsel. (This is assuming that, at least for first several years, all the new habeas appointments will be on post-affirmance cases.) However, the superior court and the appellate court will each need the record as well.

For the appellate proceedings, one solution might be to add subdivision (a)(12) to proposed Rule 8.395 stating,

> (12) The entire record on appeal in the California Supreme Court on the defendant's related direct appeal.

The superior court rules don't have a section governing the record, so some other solution might be necessary.

5. Claims Not Raised in the Superior Court (SP18-21)

Proposition 66 requires a hybrid appellate/collateral review procedure in which new evidence can presented in the appeal of the habeas denial, allowing counsel to raise IAC of superior court habeas counsel. The proposed rules require that defendant include in his or her opening brief IAC claims not raised in the superior court. (Proposed Rule 8.397(a)-(b).) Such a brief must be accompanied by a "proffer" including documentary evidence supporting such claims. (Proposed Rule 8.397(c).)

This process may actually impede rather than promote judicial economy. The record-based conventional appellate arguments inevitably will be ready prior to the collateral arguments because they're based on the existing record and won't require outside investigation and pre-authorization for retaining investigators and experts. Requiring both the true appellate and the collateral arguments to be combined in the same pleading will put undue pressure on completion of that brief and will likely delay ultimate adjudication of the appeal. If it were possible to bifurcate the appellate and collateral components, counsel could file the conventional appellate brief, even while still working on the collateral investigation. That would allow the Attorney General and ultimately the Court to begin working on the conventional appellate arguments, rather than delay that process until after submission of the new evidence and collateral arguments. This would also be more in line with current Court of Appeal practice in non-capital cases under which habeas petitions are not typically filed concurrently with the AOB. They ordinarily are filed at a later point in the briefing of the appeal.

Accordingly, we recommend that proposed Rule 8.397(b) be modified to create flexibility, such that IAC of habeas trial counsel claims can be raised either in the first brief or in a separately filed supplemental brief (perhaps titled "Section 1509.1(b) Opening Brief on IAC Claims Not Raised in the Superior Court"), depending on the timing of the development of those IAC claims. However, the rules should provide that if there are multiple IAC claims they should all be raised together in the same pleading.

Criminal Justice Legal Foundation

November 19, 2018

Proposition 66 Rules Working Group
Judicial Council of California
455 Golden Gate Ave.
San Francisco, CA 94102

Re: SP18-22, Criminal Procedure: Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings

Proposition 66 Rules Working Group:

The Criminal Justice Legal Foundation, an organization dedicated to promoting the interests of victims of crime in the criminal justice system, submits these comments on SP18-22.

The first question in the Request for Specific Comments is, "Does the proposal appropriately address the stated purpose?" If this refers to the purpose stated in statute, Penal Code section 190.6, subdivision (d), the answer is no.

The statutory purpose is to "expedite ... the initial state habeas corpus review in capital cases." The Judicial Council is tasked with monitoring progress and amending its rules as needed to achieve the goal of "complet[ing] the state appeal and initial state habeas corpus proceedings within the five-year period provided in this subdivision." Though the five-year limit is not jurisdictional and cannot be achieved in every case, it is the duty of the judicial branch "to handle [these] cases as expeditiously as is consistent with the fair and principled administration of justice." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 859.) The five-year limit is not meaningless; it is a benchmark to be met whenever reasonably possible. (*Id.* at p. 860.) At each decision point, then, the question to be asked is what is the most expeditious of the feasible alternatives.

Pleading Sequence

The first missed opportunity concerns California's extended, multi-layered system for pleading in habeas corpus cases. It does not appear that the working group even considered whether this system is necessary or appropriate in capital cases or whether it could be streamlined.

As the proposal notes at page 4, a major difference between capital and noncapital habeas corpus cases is that noncapital petitioners are normally unrepresented at the initial stage of pleading while capital petitioners have a statutory right to counsel. The pleading structure for noncapital cases should not be adopted reflexively but should instead be reconsidered with this difference in mind and the mandate of expedition as a priority.

Sifting through *pro se* habeas corpus petitions has long been compared to searching a haystack for a needle. (See *Brown v. Allen* (1953) 344 U.S. 443, 537 (conc. opn. of Jackson, J.).) A study of noncapital federal habeas corpus cases found that only 0.29% ended in a grant of relief. (See King, Cheesman, & Ostrom, Final Technical Report: Habeas Litigation in U.S. District Court (2007) 52.) For this reason, both the state and federal systems have mechanisms for screening out insubstantial petitions. Federal courts have a preliminary review by the judge. (See Rules Governing Section 2254 Proceedings for the United States District Courts, Rule 4 (Preliminary Review); Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 4 (same for federal prisoners).) California courts have an extended sequence of briefing that has a substantial amount of redundancy in cases that run the full gauntlet. As carried forward in this proposal, a habeas corpus case goes through these stages:

1. Petition by the inmate
2. Informal response by the state
3. Reply by the inmate
4. Order to show cause by the court
5. Return by the state
6. Traverse by the inmate
7. [Possibly] Evidentiary hearing
8. Decision by the court

Obviously, this full sequence involves a considerable waste in time and effort as the same issues are briefed and re-briefed. It makes sense in noncapital cases for two reasons. First, a large number of cases are dismissed after step 3, avoiding the expense of full briefing. Second, in a noncapital case the right to counsel only arises at step 4 (see Proposal, *supra*, at p. 4), so the traverse is the first attorney-written pleading on behalf of the indigent inmate. Although the traverse is the third time the issues have been briefed for the inmate, it is not redundant in a noncapital case because the first two were typically written by the inmate himself.

The second reason does not apply to capital cases, and the first is unlikely to apply in many cases under the Proposition 66 reforms. It is true that the California Supreme Court has disposed of many capital habeas corpus petitions by summary orders without an order to show cause, but this situation has caused serious problems in the subsequent federal proceedings, and changing it is one of Proposition 66's major reforms. The unexplained disposition is flatly prohibited on an initial petition. (See Pen. Code, § 1509, subd. (f).)

Although the King study of federal courts does not specifically track Rule 4 dispositions, the study does indicate that rapid disposition is far more common in noncapital cases than capital cases. (See King et al., *supra*, at pp. 39-41.) We can expect a similar pattern in California Superior Court dispositions under Proposition 66.

The extended briefing sequence is not required by statute. It is a creature of case law and rules, and it can be changed by rules. With the reason for steps 2-4 inapplicable to capital cases, they should simply be abandoned for initial habeas corpus petitions. If the working group is unwilling to go that far, it should at least permit the People to stipulate to an order to show cause and proceed directly to the return if they wish to do so.

It is also worth noting here that statements in the case law to the effect that the state's return is the "principal pleading" (see, *e.g.*, *People v. Romero* (1994) 8 Cal.4th 728, 738-739) make little sense in a system where all petitions are attorney-written unless the petitioner affirmatively chooses to proceed pro se. The first attorney-written paper,

i.e., the petition, should have the same function in capital habeas corpus that it does in civil litigation.

As a final note on this point, the term "ruling on the petition" is used inconsistently in proposed Rules 4.571(e) and 4.573(a). The former says that asking for an informal response constitutes "ruling on the petition," while that latter says the court may ask for that response "[b]efore ruling on the petition ...." Consistent nomenclature is desirable.

Successive Petitions

Successive petitions are different and should be treated differently. In nearly all capital cases, a successive petition can and should be quickly dismissed, and a stay denied, on the ground that the petitioner has no substantial claim of innocence. (See Pen. Code, § 1509, subd. (d).) Successive petitions are often filed as last-ditch efforts to stop execution of an indisputably guilty murderer who has already received far more than due process of law through exhaustive consideration of myriad claims.

Proposed Rule 4.576(a) seems quite bare-bones. Of course the petitioner gets notice and an opportunity to respond. There should be a mechanism for the People to quickly have the motion dismissed on lack of innocence grounds.

The working group asked if the certificate of appealability should "include a finding of a substantial claim that the requirements of Penal Code section 1509(d) have been met." Of course. The statute unambiguously requires such a finding. Further, the rule should not just refer to the statute but state the requirement in clear text. To issue a certificate, the court must find a substantial claim that the petitioner is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. Restating the standard will serve to emphasize just how rare it will be for a successive petition to qualify.

Briefing Times

The working group asked if the deadlines in the proposed rules are adequate. We believe they are adequate in length generally, although district attorneys are in a better position than CJLF to address that

aspect. Our concern is the open-ended provisions for longer time. We have seen grievous abuse of the extension authority in the California Supreme Court, with parties getting extension after extension after extension. Dozens of extensions for a single brief are not uncommon. For this reason, Proposition 66 added section 1239.1 to the Penal Code limiting extensions on direct appeal to "compelling or extraordinary reasons." No similar provision was added for habeas corpus, but the duty of the Judicial Council to make rules to expedite the cases includes preventing extension abuse.

Deadlines should be set that are appropriate to capital cases and the length of the records involved. Those deadlines should be met in most cases without extensions. More than one extension should be extremely rare and reserved for extreme circumstances such as the sudden death of the appointed attorney. "I'm busy" is not ground for an extension in a case that should be at the top of the priority list. The wording of the rules should reflect this priority.

Submission of the Cause

Proposed Rule 4.574(e) is correct for cases with an evidentiary hearing, but it does not specify a date for cases without an evidentiary hearing. For a case that can be decided on the pleadings, that would normally be oral argument on the legal questions in the pleadings.

Amendments

The working group asked for comments on amendments. Penal Code section 1509, subdivision (c), requires the petitioner to put all his cards on the table within one year of appointment or waiver of counsel. Any amendment after that which adds a claim may be allowed only if the petitioner qualifies under subdivision (d), actual innocence or ineligibility.

A related issue to amendments concerns other devices to try to reopen a case. Section 1509.1, subdivision (a), establishes appeal as the means of reviewing a denial of habeas relief, expressly forbidding the use of successive petitions for that purpose. Evasion of this rule through other devices to reopen the case, as is now routinely done in federal court

through misuse of rule 60(b)(6) of the Federal Rules of Civil Procedure, should be expressly precluded.

In conclusion, this proposal needs a lot of work to effectively perform the task assigned by the statute. We would be glad to work with the working group if further input from us is needed.

Very truly yours,

Kent S. Scheidegger

KSS:iha

EMBAJADA DE MÉXICO

Washington, DC
November 19, 2018

Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688

Re: SP 18-22, Comment from the Government of the United Mexican States

Dear members of the Judicial Council of California,

On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the procedures for death penalty-related habeas corpus proceedings in superior courts. Mexico welcomes the opportunity to convey its views on this very important matter.

I. INTRODUCTION

The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives.[1] While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad.

Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the execution of Mexican nationals, Mexico respects the right of the States to determine the punishment for crimes occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as

[1] *See, e.g.*, Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261.

they relate to Mexican nationals under sentence of death. As you may know, there are currently 39 Mexican nationals on death row in California.

Please understand that these provisional comments are necessarily limited, and submitted with the November 19, 2018 deadline in mind. The SP18-22 proposal is extensive and the topic complex. My government cannot reasonably respond to all of the questions raised in this proposal within the time allotted. Additionally, given this complexity and the grave importance of these procedures, Mexico urges the Judicial Council to postpone implementation of these new rules beyond the April 25, 2019 date currently contemplated. More time is necessary to fully consider the implications of these proposals, and to develop and refine new proposals addressing topics the current proposal admits.

As a general matter, Mexico agrees with the Judicial Council's findings that "[t]here are significant differences between death penalty-related and noncapital habeas corpus proceedings" and that the "scope and complexity of a death penalty-related habeas corpus proceeding is far greater than the scope and complexity of a noncapital habeas corpus proceeding" (Proposal SP18-22 p. 4). In this vein, the American Bar Association has advised that "Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation." American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition, Feb. 2003), Guideline 10.15.1(C). Thus, any new rules for death penalty cases must account for the unique needs these cases command.

II. SPECIFIC COMMENTS

The approach to time limits in these proposed rules is problematic. While Mexico understands that the statute itself purports to dictate timelines on which these cases must be resolved, as you know, the California Supreme Court determined last year that these time limits are "merely directive" and are benchmarks to apply when it is "reasonably possible" to complete review in the allotted periods. *Briggs v. Brown,* 3 Cal. 5th 808, 860 (2017). Mexico agrees that the timelines should be considered advisory. The proposed rules, however, contain binding deadlines apparently intended to produce uniform compliance with the statute's purported schedule for resolution, undoing much of the flexibility the Court correctly required.

Specifically, proposed Rule 4.571(e) provides that a superior court "must rule on the petition within 60 days." Given the complexity and high stakes of capital habeas proceedings, it is unrealistic to expect that trial courts will be able to give petitions the thorough consideration they demand on this timeline, especially given their tremendous caseloads. The provision permitting parties to move to shorten or extend the time does not resolve this concern. For one thing, courts should never be permitted to order a *shorter* timeline for resolving a petition. The proposed rule would permit the state to move

the court for an order requiring the petition to be ruled on within 30 days, or even 10 days, and a court to grant such a motion. Under no circumstances would this be appropriate. Nor does it make sense for parties to move courts to consider petitions for longer periods of time after they have been filed. Parties have no way to know what the court's other obligations are in a given timeframe, or how much consideration the court may already have given the petition. A motion to extend the timeframe for the court's consideration would necessarily be based on the length and complexity of what was filed; the rules should instead account for this length and complexity, which is predictable in capital habeas cases.

Although the provision also permits courts to extend the time on their own motion "for good cause stated in the order," the rule still requires courts to endeavor to resolve petitions within 60 days; to do so is to encourage them to dispense with the careful review to which petitioners are entitled under state, federal, and international law. Additionally, although the statute recognizes that claims of actual innocence can require significantly more time to fully address by providing up to twice as long for their resolution, the proposed deadlines do not make any accommodation for the unique needs of these especially critical claims. Instead, in light of the fact that petitioners have constitutional rights to have their claims fairly adjudicated, the rules simply should not dictate how much consideration courts may give to capital habeas petitions.

This apparent commitment to artificially compressed timelines also affects the deadlines for the parties to file documents. Proposed Rule 4.573 provides only 45 days for an informal response and 30 days for a reply. These time periods are insufficient given the sheer volume of material the parties must address. For instance, in the case of one Mexican national with which I am familiar, habeas counsel recently filed a petition that is 702 pages in length. Another petition, running 558 pages, was resolved after the state filed a 368-page informal response. Accordingly, 30- and 45-day time limits are simply not realistic for proceedings of this magnitude.

The Judicial Council has specifically requested input on proposed Rule 4.571(d), which requires notice to counsel if a petition does not comply with the rules of court, with an opportunity to correct the problem. Mexico agrees that such notice is essential, but to more fully protect petitioners from potentially disastrous effects of technical errors by counsel, courts should be required to provide at least 30 days to remedy any problems.

Regarding successive petitions, proposed Rule 4.576 requires superior courts to grant or deny a certificate of appealability when it denies relief on a successive petition, and provides that the court "may order the parties to submit arguments on whether a certificate of appealability should be granted." The rule should instead provide that the court *must* provide parties with this opportunity. No good reason exists to permit courts to deny relief and, without any further opportunity to explain why that denial may be incorrect, refuse to authorize appellate review. Superior courts will make errors; petitioners must be allowed to identify them, and seek review. If the court denies the

certificate without input from the parties, petitioners must be provided with an opportunity to dispute this denial in the court that issued it before proceeding to the Court of Appeal. Further, this proposed rule does *not* require inclusion of a finding regarding the basis for overcoming the Penal Code section 1509(d) limitations. Mexico agrees that the certificate of appealability should address the substantive claim for relief, not the procedural issues surrounding that claim.

Finally, allow me to address the topics that are not covered in the proposal. First, the proposal does not include any rules for the transfer of petitions, and thus also declines to address the status of protective petitions filed on behalf of petitioners without counsel in the California Supreme Court. Mexico believes that the Judicial Council should address these issues so as to provide guidance and clarity to petitioners, counsel and other interested parties as to what they can expect to occur. The Judicial Council should develop a proposal, which it should then distribute for comment. Only then will my Government be properly able to address the rules that may be implemented on this subject.

Similarly, the Judicial Council should propose rules for method-of-execution claims at this time. Concerns about evolving law can be addressed by drafting the rule broadly. Without any guiding rule at all, petitioners will face potential procedural challenges to constitutional claims they have a right to present because different courts and parties may interpret the statute's requirements differently. When this council proposes a rule, Mexico will be able to comment on its substance.

The rules also must address amendments to petitions. Counsel cannot possibly effectively represent petitioners without clear guidance on what is permitted by way of amendment, and what would be considered a successive petition. A lack of clarity on this subject could be disastrous for petitioners whose claims are accidentally forfeited by counsel believing they could be included in an amendment when in fact a court, without the guidance of a clear rule, treats it as a successive petition. Mexico cannot reasonably comment on the contents of such a rule until the Judicial Council proposes one and distributes it for comment. However, any such rule must address the treatment of protective petitions filed by petitioners without counsel in the California Supreme Court. This situation is central to the problems facing capital habeas corpus procedure in California, and it is up to the Judicial Council to acknowledge and address this problem and propose a viable solution.

The Judicial Counsel has asked for input on whether it ought to provide a form for superior courts to use when granting or denying a certificate of appealability. Mexico believes such a form may be helpful, and could facilitate courts' consistent and fair consideration of this question.

Moreover, Mexico believes that any proposal for new rules needs to address the fiscal and operational impacts of these procedures. The Working Group should be charged with determining what the impact of these rules will be on the criminal justice system. Without this information, the courts and the legislature cannot ensure adequate funding for the fair and consistent implementation of the new procedures. Moreover, other parties, such as assisting entities, will require this information to prepare for the implementation of the new rules. It is impossible to fairly assess the proposed procedures without information about their impacts on the operations of the justice system.

III. CONCLUSION

Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States.

I avail myself of this opportunity to convey to you the assurances of my esteem and consideration.

Sincerely,

Gerónimo Gutiérrez Fernández
Ambassador

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Memorandum

To: Proposition 66 Rules Working Group

From: Michael J. Hersek, Interim Executive Director

Date: November 19, 2018

Re: SP18-22 – Criminal Procedure: Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings

The below comments to SP18-22 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients.

Comments on Specific Provisions:

Rule 4.571(b)(1)

Proposed Rule 4.571(b)(1) states that the "record prepared for the automatic appeal, including any exhibits admitted in evidence, refused, or lodged, are deemed part of the supporting documents for the petition." Although this subdivision helpfully ensures that the trial record is incorporated into the documents supporting the habeas corpus petition, it does not go far enough.

Capital habeas corpus petitions often raise claims relating to issues addressed in the automatic appeal and request that errors found on appeal or habeas corpus be evaluated for prejudice cumulatively. Thus, the habeas corpus petition directly implicates the appellate process. The California Supreme Court has recognized that habeas proceedings will routinely require review of the appellate record, including appellate briefing and other documents. In *In re Reno* (2012) 55 Cal.4th 428, the Court directed that "[p]etitioners need not separately or specifically request judicial notice of all documents connected with their past appeals and habeas corpus proceedings, as in capital cases this court routinely consults prior proceedings irrespective of a formal request." (*Reno*, 55 Cal.4th at 484.) The Court made clear that petitioner only needs to incorporate by reference material from the automatic appeal – not make it part of the habeas corpus record directly:

> We add that petitioners may cite and incorporate by reference prior briefing, petitions, appellate transcripts, and opinions in the same case but no longer need to separately request judicial notice of such matters, as this court routinely consults these documents when evaluating exhaustion petitions. Thus, an argument raised in a prior appeal or habeas corpus petition and reraised in a subsequent petition may be incorporated by reference and need not be reargued (subject to the discussion, post).

(*Reno*, 55 Cal.4th at 484.) The Court also noted that this "rule will help streamline consideration of habeas corpus petitions in capital cases" and eliminate the need for judicial notice motions. *Id.* at 484.

The beneficial procedure adopted by the Supreme Court in *Reno* should be enshrined in the new superior court habeas corpus rules. To do so, the Working Group should add language to subdivision (b)(1) stating that all briefing and other documents filed in the automatic appeal are deemed part of the supporting documents for the habeas corpus petition. If there is a concern about the superior courts having ready access to the appellate materials, the rule could simply require that respondent's counsel lodge a copy of the appellate materials with the superior court once a habeas corpus petition is filed. Such requirement would be analogous to the practice in capital habeas corpus cases in California's federal court. (See, e.g., Habeas Corpus Local Rules, N.D. Cal., R. 2254-27(a) [directing respondent to lodge, inter alia, "appellant's and respondent's briefs on direct appeal to the California Supreme Court, and the opinion or orders of that Court"]; Local Civil Rules, C.D. Cal., Loc. R. 83-17.1(a) [same].)

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Rule 4.571(c)(3) and throughout

Proposed Rule 4.571(c)(3) requires petitioner to serve "the People." We understand that the Attorney General or the local District Attorney will normally defend against the relief sought by the petitioner, and that the Attorney General or District Attorney in the criminal context represent the "the People." But habeas corpus proceedings are not criminal proceedings. Rather, in habeas proceedings the warden of the facility at which the condemned inmate is housed is the respondent, *see* Pen. Code § 1477, and the Attorney General or the local District Attorney is counsel for the respondent. Referring to "the People" in the habeas corpus petition service requirement seems unnecessarily inaccurate and potentially confusing.

We suggest the proposed habeas rules omit any references to "the People." In its place, the rules should refer simply to "respondent," "counsel for respondent," or to be more precise, "the District Attorney as counsel for respondent." Any such change would make

the proposed capital case rules more consistent with the non-capital rules, which refer simply to "the respondent" throughout.

***

Rule 4.571(d)

Proposed Rule 4.571(d) permits the court to strike a noncomplying habeas corpus petition "or lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days." It is our view that five days is simply too short a period of time to expect counsel to receive notice of the court's intentions to impose a sanction, bring the petition into compliance, and refile the complying petition. We appreciate that the five-day period is the minimum amount of time that a superior court must provide to perfect the filing, but we are concerned that period will become the default, and it is our experience that communications between the superior court and capital habeas counsel are often conducted via mail, and that such communications routinely take more than five days to transmit. Because the potential sanction of striking a noncomplying but otherwise timely initial capital habeas corpus petition is so extreme, it is our view that the court should be required to provide at least 15 days from the date of the notice to bring the petition into compliance.

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Rule 4.571(e)(3)

Proposed Rule 4.571(e)(3) requires that the court must either "issue an order to show cause or deny the petition within 60 days of receipt of the *informal response*." Emphasis added. We believe it makes more sense to require the court to act under 4.571(e)(3) within 60 days of receipt of the *informal reply.* This change makes sense for several reasons, including the following.

First, it is clearer and more orderly to time the court's ruling on the petition to the filing of the final informal brief, rather than the initial brief. We recognize that the non-capital habeas rules also time the court's ruling to the filing of the initial brief, but that appears to be because the vast majority of non-capital habeas petitioners are uncounseled and informal replies are rare. By contrast, informal replies in capital habeas proceedings are filed in every case. Second, capital habeas petitions are expansive, and they will continue to be so even under the tighter filing deadlines of Penal Code section 1509. Respondent routinely takes anywhere between eight months and one year to file an informal response, and petitioner routinely takes equally as long to file an informal reply. Proposing a rule that starts the 60-day clock on the filing on the informal response, knowing that the informal reply routinely will be filed months beyond that time frame, makes the 60-day period largely irrelevant. Finally, our suggested change would bring proposed Rule 4.571(e)(3) into closer harmony with proposed Rule 4.573(a)(4), which prohibits the

denial of the petition before the filing of the *informal reply*, or the expiration of the time period to file one.

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Rule 4.573(a)(2) and 4.573(a)(4)

Proposed Rule 4.573(a)(2) requires respondent to file the informal response "within 45 days *or as the court specifies*." Emphasis supplied. Given the enormity of the task of filing an informal response, we suspect the intention of this rule is to provide respondent *at least* 45 days to respond to a capital habeas corpus petition. As written, however, the rule suggests that the court could order respondent to file its informal brief in fewer than 45 days. While we doubt any superior court would take such an unreasonable approach, we suggest modifying the rule to clarify its apparent intent by simply removing the language "or as the court specifies." Subdivision (a)(6) of the proposed rule already provides the court the ability to extend time, so removing the language "or as the court specifies" from (a)(2) will ensure respondent has at least 45 days to file an informal response, and permits the court to extend time for good cause.

Turning to proposed Rule 4.573(a)(4), we suggest two changes. First, for the reasons stated above, we suggest removing the language "or as the court specifies" from this provision as well. Second, we do not see any good reason to provide petitioner less time to file its informal reply than respondent is provided to file its informal response. As a practical matter, we note that the informal briefing periods in capital cases will far exceed the 30-day and 45-day time limits provided by these sections. But by providing petitioner only 30 days to reply, the rule may be viewed as endorsing the concept that it is generally acceptable to provide petitioners less time than respondent is given – indeed, 33% less time – to file their informal pleadings. We know of no basis in case law or scholarly research supporting or encouraging such an assumption. Indeed, because the petitioner has the burden of proof in these proceedings, we believe it would make just as much sense to provide petitioner *greater* time to file their informal brief. Nevertheless, we suggest that both parties receive the same amount of presumptive time to file their informal briefs.

***

Rule 4.574(a)(1) and Rule 4.574(b)(1)

Proposed Rules 4.574(a)(1) and 4.574(b)(1) set out a presumptive time frames for the parties to file the return and denial (traverse). Like the concerns we identified with proposed Rules 4.573(a)(2) and 4.573(a)(4), discussed immediately above, we suggest the proposed rules be amended so that a court may not order the filing of a return or denial in less time than the presumptive time identified in the rule. Also, like the concerns identified immediately above, and for the same reasons stated there, we believe the rules

should afford the parties the same presumptive amount of time to file their post-order to show cause pleadings.

***

Rule 4.574(c)(1)

Proposed Rule 4.574(c)(1) states that an "evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds *there is a reasonable likelihood that the petitioner may be entitled to relief* and the petitioner's entitlement to relief depends on the resolution of an issue of fact." Emphasis added. (See also Cal. Ct. R. 4.551(f) [same]; Cal. Ct. R. 8.386(f) [same].) The requirement that the court find a "reasonable likelihood" of entitlement to relief before it orders an evidentiary hearing is not grounded in California Supreme Court case law defining the habeas corpus process. The Supreme Court has made clear that an evidentiary hearing must be ordered "if the court finds material facts in dispute." (*People v. Duvall* (1995) 9 Cal. 4th 464, 75; *see also People v. Romero* (1994) 8 Cal.4th 728, 740 (explaining "if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing."); Cal. Penal Code § 1484.) Because the "reasonable likelihood" requirement is contrary to governing case law, it should be removed from the proposed rule.

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Responses to Selected Requests for Specific Comments:

- *Should the rules address Supreme Court transfer of petitions pending before it to a superior court, and if so, what should the rule provide?*

Yes, a rule addressing the transfer of petitions filed in or pending in the Supreme Court would be helpful. At a minimum, we believe that petitioners exercising their right to access the Supreme Court's original habeas corpus jurisdiction by filing their petitions in that court must be provided notice and an opportunity to be heard by both parties on the question of whether the petition should be transferred prior to ruling on the merits of the petition, and, if so, whether good cause exists to transfer the petition to a superior court other than that which issued the death sentence.

For example, if a petitioner files his habeas corpus petition in the Supreme Court and proffers what he believes is good cause to file in that Court rather than the superior court that issued the death sentence, both respondent and the petitioner should be provided an opportunity to be heard on the question of transfer – and to which court the petition should be transferred – when the Supreme Court decides not to maintain its jurisdiction over the

matter. Similarly, prior to transferring a petition that was filed in the Supreme Court before enactment of Proposition 66, the parties should be provided notice and an opportunity to be heard on the matter if the Supreme Court makes a preliminary determination not to maintain its jurisdiction and rule on the merits of the petition. This makes sense particularly given the fact that counsel appointed by the Supreme Court prior to passage of Proposition 66 was expected to file in that Court, and would not have had an opportunity to brief the question of pre-OSC transfer since that was not part of the Supreme Court's practice before October of 2017.

In addition to providing time frames for these procedures, rules on this subject could also set out factors that the Supreme Court may consider "good cause" to warrant maintaining jurisdiction over the matter or transferring the petition to a court other than that which issued the death judgment. Many questions exist concerning what constitutes "good cause" within the meaning of Penal Code section 1509's transfer provisions. For example, can factors of judicial economy constitute "good cause," or can good cause exist only when the proffered justifications are based on case specific factors tethered to the allegations within the petition, or both? We understand that the Supreme Court and the lower court can slowly define these rules over time by ruling on questions such as these when presented with them. But given that the Proposition 66 Rules Working group currently exists, there seems little reason not to propose clear rules so as to avoid years of counsel having to divine from court rulings what those rules might be.

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- *Should the proposed rules address amendments to petitions?*
- *If the proposed rules were to address amendments:*
    - *o How would amendments affect the deadlines provided in the rules?*
    - *o Under what circumstances should amendments be permitted?*
    - *o Should the rule address amendment of Morgan or shell petitions differently from other petitions?*

Yes, rules concerning amendments to capital habeas corpus petitions should be promulgated. Of course, nothing in Proposition 66 limits the filing of amendments to a petition for writ of habeas corpus, and existing law has long permitted courts to accept amendments and supplements to pending habeas corpus petitions, leaving such decisions to the discretion of the court. Indeed, liberally permitting amendments and supplemental allegations to existing habeas corpus petitions when new evidence comes to light during the proceedings is important to avoid piecemeal litigation and fosters the type of efficiency that Proposition 66 was aimed at ensuring. As for the deadlines provided in the rules, our experience is that the courts are well equipped to determine whether good

cause exists to permit the filing of amendments and supplemental allegations, and to provide the parties the necessary time to respond to any new allegations. That said, it makes sense that a rule concerning amendments acknowledges the court's authority to extend time to permit and fully address new allegations and claims.

Morgan petitions must be addressed differently because their amendment is non-discretionary. That is, they are uncounseled petitions that cannot be resolved on their merits *until* they are amended. For purposes of clarity, particularly because the superior courts are unfamiliar with *Morgan* petitions, it makes sense to have a rule that reflects *Morgan*-petition practice, which should include the following principles: (1) when the appeal becomes final but no habeas counsel has been appointed, appellate counsel or the assisting entity may file a *Morgan* in the Supreme Court; (2) when the appeal becomes final and habeas counsel already has been appointed, habeas counsel may file a *Morgan* petition in the court in which counsel was appointed; (3) when a *Morgan* petition was filed in the Supreme Court, after the superior court receives notice pursuant to proposed Rule 4.651(d)(1-3), and notifies the Supreme Court pursuant to Rule 4.651(d)(4) that it is prepared to appoint counsel, the Supreme Court may transfer the *Morgan* petition to the superior court for appointment of counsel; and (4) counsel may amend the *Morgan* petition within the time frame prescribed by policy or law at the time the *Morgan* petition was filed.

***

- *Should the proposed rules include a provision like that in rule 8.384(d) and proposed rule 4.571(d) that authorizes the court to notify the attorney that it may strike a noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days?*

Yes, but for the reasons discussed above (see section related to proposed Rule 4.571(d)) the five-day minimum time frame is inadequate.

From:	Giden, Michael
To:	Downs, Benita
Cc:	Anderson, Heather
Subject:	FW: Invitation to comment SP 18-22 Superior Court Procedures for Death Penalty Related Habeas Corpus Proceedings
Date:	Monday, November 19, 2018 4:18:13 PM

Benita—just in case you didn't get this directly.

Michael I. Giden, Managing Attorney
Legal Services
Judicial Council of California
415-865-7977

From: Jacobson, Judge Morris, Superior Court <mjacobson@alameda.courts.ca.gov>
Sent: Monday, November 19, 2018 4:15 PM
To: Giden, Michael <Michael.Giden@jud.ca.gov>
Cc: Anderson, Heather <Heather.Anderson@jud.ca.gov>; Lee, Seung <Seung.Lee@jud.ca.gov>
Subject: Invitation to comment SP 18-22 Superior Court Procedures for Death Penalty Related Habeas Corpus Proceedings

Dear Mr. Giden,

I have reviewed the proposed Rules of Court 4.571-4.576, and have just a couple of brief comments to add for consideration.

Rule 4.571(e), requires the Court to rule on the petition within 60 days, and then follows with the requirement that the issue an OSC or denial within 60 days of receipt of the informal response. These time requirements appear to be extremely unrealistic given the size of the typical death penalty case trial record (10,000 plus pages) and the size and complexity of the habeas petitions that are being filed with these cases (of the four cases we received, the petitions were between 300-500 each, and each contained hundreds of paragraphs of allegations of error and/or misconduct). After consulting with the Supreme Court Capital case supervising attorney, we estimate that it will take a Superior Court research attorney between 4-6 months of full time work to do an initial review of the trial record and the habeas petition, before we can make an intelligent decision as to whether we should request informal briefing. Thus, 60 days for this initial review is a time line that we not be able to meet. Assuming that we will request informal briefing in most, if not all cases, 60 days to synthesize the positions of the parties and then decide whether to issue OSC or deny (which would require a statement of decision articulating the facts and the law that are being relied on) is not enough time to perform the required tasks.

Rule 4.573(a)(6) states: "If a request for an extension of a filing deadline under this subdivision is requested, counsel for the party requesting the deadline must explain the additional work required to file the informal response or reply." This rule is confusing as written (e.g. "counsel requesting the deadline…") and it also appears to preclude other possible bases for showing good cause (e.g. illness, family emergency etc). We suggest that the rule simply state that counsel requesting the extension must show good cause for extending the deadline.

Rule 4.574(a)(1): For the reasons stated above re Rule 4.571(e), the 45 day timeline for filing the return seems extremely short, particularly when petitioners often take as long as five years to file the petition.

Request for specific comments:

Regarding transfer of petitions, cases that had venue changed and were tried in the receiving court should be transferred in the first instance to the sending court, rather than starting the case in the receiving court. (See People v. Peoples (2016) 62 Cal.4th 718, 791-792; Penal Code section 1033; CRC 4.150(b) and 4.154.)

As to the deadlines included in the proposed rules, they are inadequate to the point of being impossible to meet. (Please see above comments.)

Regarding the question as to how well would this proposal work in courts of different sizes, our Court, which is a large Court, is struggling already having received 4 cases on transfer from the Supreme Court. We do not have available staff attorneys to review these voluminous cases. We are currently seeking to hire two additional attorneys to work on these cases. We are expecting at least 8 more cases over the next year based on projections by the Habeas Corpus Resource Center. For us, 11 cases represents 3 to 4 years of full time work for two attorneys. Given what our experience is as a large Court, I cannot imagine how a small court, perhaps with no research attorneys on staff, will be able to cope with even a single case. I would hope that some thought will be given to perhaps establishing regional resources to help the small courts handle this very specialized and time consuming workload.

Thank you for the opportunity to comment. Have a Happy Thanksgiving, Morris Jacobson

Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, California 94607-4139
Telephone: (510) 267-3300
Fax: (510) 452-8712

November 19, 2018

Judicial Council of California
Attn: Invitations to Comment
Sent via email to: invitations@jud.ca.gov

Re: Comments on Item SP18-22, Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings

Dear Members of the Judicial Council:

The Office of the State Public Defender ("OSPD") is the state agency with the "primary responsibility" of representing death-sentenced inmates in direct appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD has many staff attorneys with significant experience in habeas proceedings.

We submit the following comments on the proposed rules relating to Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings, SP18-22.

Draft Rule 4.574

First, the listing of the items to be reviewed as part of the court's decision whether to hold an evidentiary hearing is too restrictive. In presenting support for the claims in a habeas petition, California law provides that a petitioner supply "reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (*In re Duvall* (1995) 9 Cal.4th 464, 474.) Support for a habeas claim may come in many forms, including transcripts, police reports, investigative reports, prison records, medical records, and so forth. Yet the language of draft rule 4.574(c)(1) states that in considering whether an evidentiary hearing is necessary, the court should consider "the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken." OSPD notes that this listing leaves out exhibits and supporting documents that are not affidavits/declarations in contradiction of *Duvall* and other opinions.

Second, the standard set forth for deciding whether to hold a hearing fails to recognize that material factual disputes relating to things other than the merits of a claim might have to be resolved by taking testimony during a hearing. For example, there might be a factual dispute over a procedural matter such as whether a petition is timely. (See, e.g., *Orthel v. Yates* (9th Cir. 2015) 795 F.3d 935, 940; *Roy v. Lampert* (9th Cir. 2006) 465 F.3d 964, 975.) The California Supreme Court has itself noted that an evidentiary hearing must be ordered, simply, "if the court finds material facts in dispute." (*People v. Duvall* (1995) 9 Cal.4th 464, 475; see also *People v. Romero* (1994) 8 Cal.4th 728, 740. Thus, requiring that a court find "a reasonable likelihood that the petitioner may be entitled to relief" sets out the wrong standard. The proper standard should be an assessment whether there is a material fact in dispute.

Thus, the OSPD submits the following suggested changes:

Rule 4.574(c)

> (1) An evidentiary hearing is required if, after considering the verified petition, the return, any denial, *any exhibits or proffers*, including any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds *there is a material factual dispute.*

Lack of Resources and Funding Mechanism for the Petitioner

As with previous proposed rules relating to the changes in the law caused by Proposition 66, there is a lack of any discussion of funding. Habeas counsel must be adequately compensated and the reasonable expenses of preparing and litigating a habeas corpus petition must be funded. At the very least, the rules should contain a provision mandating that counsel are adequately compensated and that litigation expenses will be paid. Additionally, and related, is the question of funding for the superior court staff that must implement these procedures. The rule is silent and the omission glaring.

Sincerely,

Mary K. McComb
State Public Defender

From:	Ogul, Michael S
To:	Invitations
Subject:	Criminal Procedure: Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings, Item Number SP18-22
Date:	Monday, November 19, 2018 3:43:55 PM

RE: Criminal Procedure: Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings, Item Number SP18-22

Dear Judicial Council of California:

I am pleased to submit the following comments in regards to the proposed changes to the Rules of Court concerning Criminal Procedure: Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings, Item Number SP18-22.

Statement of Interest

I am the attorney supervising the homicide unit ("Special Trial Unit") of the Santa Clara County Public Defender's Office. I also continue to litigate murder cases, including as lead counsel in a pending death penalty case. I have been a public defender for over 37 years, and I have been counsel of record in death penalty cases throughout that time, with occasional short breaks in between capital cases. I have been lead counsel at the penalty or punishment phase of three death penalty jury trials, each of which resulted in verdicts, two of life imprisonment without the possibility of parole, and one of death. I was also counsel in over 20 other death penalty cases that eventually resolved for lesser sentences or resulted in the prosecution dropping the death penalty. I am the author of the chapter on Death Penalty Cases in *California Criminal Law, Procedure and Practice*, Continuing Education of the Bar, 2016-2018 annual editions; was the defense attorney consultant to the *Death Penalty Benchguide*, California Center for Judicial Education and Research, © Judicial Council of California, from its inception through 2011 (I believe that is the most recent edition); and have been the editor of, and author of selected chapters in, the *California Death Penalty Defense Manual*, California Attorneys for Criminal Justice and the California Public Defenders Association, from 2004 through the present. I have been active in training defense counsel in capital cases since 1990, and have authored well over 100 articles on various topics of capital defense.

Position

I agree with some of the proposals if they are modified. My position is spelled out in detail below.

Comments

Page 10: the rules should state that, when the Supreme Court transfers a petition to a superior court and the petitioner already has counsel, that counsel should continue to act as petitioner's counsel in the superior court unless (1) counsel moves to withdraw or (2) there is good cause to replace counsel; further, they should require such counsel to continue to be compensated on the same terms already set by the California Supreme Court. All parties, the courts, and the public will benefit from the continuity of representation unless there is a good reason to discharge counsel.

Rule 4.571(d): I would suggest that the minimum required notice be five court days, not

merely five days, because there will be only a minimal opportunity to cure the defect if those five calendar days include weekend, especially a holiday weekend (e.g., the four-day Thanksgiving holiday weekend).

Rule 4.573(a)(2) could be written more clearly. I would delete "One copy of" from the end of the 3d line/beginning of the 4th. In addition, the provision should be modified to require a copy of the response have to be served on petitioner.

Rule 4.573(a)(4) should state "….filed within 30 days or a later date if the court so specifies.." I.e., the court should not be allowed to shorten the 30-day period.

Rule 4.574(b)(1) should similarly be changed to read: "Unless the court otherwise orders a longer period, within 30 days ….." Further, the rule should be modified to state "…the petitioner may serve and file a denial or traverse."

Rule 4.574(c)(1), as with Rule 4.574(b)(1), the rule should be modified to state "…the petitioner may serve and file a denial or traverse."

Rule 4.575 needs to modified to include a requirement that the statement of decision must be served on petitioner's counsel, in addition to petitioner.

Rule 4.576(a), likewise needs to be modified to include a requirement that the statement of decision must be served on petitioner's counsel, in addition to petitioner.

Rule 4.576(b) should be modified to also require that an assisting entity or attorney receive a copy of the certificate. And once again, both the petitioner and petitioner's counsel should receive it, not just petitioner's counsel.

Thank you for your consideration,

Michael S. Ogul
Deputy Public Defender
408.299.7817 (direct line)
Michael.Ogul@pdo.sccgov.org

Michael Ogul
Deputy Public Defender
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San Jose, CA 95110
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constitutes a privileged and confidential communication pursuant to California Evidence Code Section 952 and California Code of Civil Procedure Section 2018. If you are NOT an authorized recipient, you are prohibited from using, delivering, distributing, printing, copying, or disclosing the message or content to others and must delete the message from your computer. If you have received this message in error, please notify the sender by return mail.

Item SP18-22 Response Form

TITLE: **Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings**

X **Agree** with proposed changes
Agree with proposed changes **only if modified**
Do not agree with proposed changes

Comments:

Please see the attached document.

PLEASE NOTE:
These comments are from the Los Angeles Superior Court and not from any one person in particular.

ORGANIZATION:	**LOS ANGELES SUPERIOR COURT** **111 N. Hill Street, Los Angeles, CA 90012**
RESPONSE TO:	**Judicial Council, 455 Golden Gate Avenue, San Francisco, CA 94102**
DEADLINE FOR COMMENT:	**Monday, November 19, 2018**

Your comments may be written on this Response Form or as a letter. Make sure your letter includes all of the above identifying information. All comments will become part of the public record for this proposal.

Circulation for comment does not imply endorsement by the Judicial Council.

SP18-22 Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings

Request for Specific Comments:

- **Should there be a Judicial Council form for the superior court to issue a certificate of appealability?**

  Yes, there should there be a Judicial Council form for the superior court to issue a certificate of appealability.

- **What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?**

  We estimate four hours of 'new legislation' training for Judicial Assistants and Appeal Clerks. Another 16 hours would be needed to draft written procedures for processing the Petition.

- **Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?**

  Yes, one month would be sufficient.

Invitation to Comment
SP 18-21 and SP 18-22

The Judicial Council, Proposition 66 Rules Working Group has requested comments recently which include proposed rules relating to death penalty-related habeas corpus proceedings. We have included comments in regard to establishing procedures for the Superior Courts to process this type of proceeding.

One area of note are questions related to financial savings and the implementation requirements and the need for training staff, revising processes and procedures, creating new docket codes for case management systems and any potential modifications to the case management systems. We do not have the ability at this time to quantify the costs of these proposed changes, however the Court would be faced with the challenge of hiring additional legal research attorneys that are qualified to review death penalty related habeas corpus proceedings, selecting a panel of attorneys that will qualify under the new rules and technical upgrades (i.e. electronic filings) that may occur in the future.

We thank the committee for its specific work in this area and offer these additional general comments and concerns:

- As to the financial impact for the Superior Court now processing and ruling on petitions in Capital cases – we believe an additional 18 research attorneys would need to be hired, trained and assigned to this task to assist this task. The Orange County Superior Court has 75 pending capital cases in post-conviction proceedings. Further judicial training and clerk training would also be required.
- We also have concerns about the requirement of "statement of decision" in rule 4.575. As this is a term of art in civil proceedings with strict time and content requirements, does the use of this phrase carry those same requirements? If it does, please specify. If it does not, perhaps the use of a different phrase would be appropriate.
- As we note below, we also have concerns of the impact of cases tried in a county based on a change of venue. Which county should assume jurisdiction over the case. Orange County had several cases transferred into our county for trial and to our knowledge has had no cases transferred out of this county. We view that that pretrial publicity issues that resulted in the cases being transferred to our county should not result in the automatic need for these petitions to be processed by the trial county instead of the county with the original venue.

The specific questions with our comments in red are included below:

SP18-21

Request for Specific Comments

- Does the proposal appropriately address the stated purpose? **Yes.**

- Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1? **We are not prepared to respond; the Court has only recently received the minimum qualifications.**

- Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal? **Yes.**

- Would be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period? **Yes.**

- Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations? **No / No**

- When should preparation of the record begin for these appeals? **Applies to the Court of Appeal?**

- Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals? **We propose 30 days as an appropriate timeframe allowing a small additional time to prepare the record (especially the clerk's transcript).**

- Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals? **Yes.**

- Should the rules require that habeas corpus counsel transmit their file to appellate counsel when appellate counsel is appointed? **Yes.**

- Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition? **We offer no comment.**

- Are the proposed rule provisions relating to the content and format of a proffer in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition appropriate? **We offer no comment.**

Court questions

The advisory working group also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify. **No.**

- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. **(This area is of concern; see comments in opening.)**

- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **No. Training and implementation of new/additional staff would require at a minimum 120 days.**

- How well would this proposal work in courts of different sizes? **Not sure, however this Court would propose that in cases that involve a change of venue, it should return to the originating county.**

SP18-22

Request for Specific Comments

- Does the proposal appropriately address the stated purpose? **Yes.**

- Should the rules address Supreme Court transfer of petitions from one superior court to another and, if so, what should the rule provide? **No.**

- Should the rules address Supreme Court transfer of a petition pending before it to a superior court and, if so, what should the rule provide? **We offer no comment.**

- Should the proposed rules address amendments to petitions? **Yes.**

- If the proposed rules were to address amendments:
- How would amendments affect the deadlines provided in the rules? **We view the *Morgan* petition issue as the most troublesome area and would greatly appreciate specific guidance in the rules.**
- Under what circumstances should amendments be permitted? **Strict showing of good cause.**
- Should the rule address amendment of *Morgan* or shell petitions differently from other petitions? **Yes – or at a minimum expressly state that a particular rule applies to both represented and unrepresented petitions.**

- Should the proposed rules include a provision like that in rule 8.384(d) and proposed

rule 4.571(d) that authorizes the court to notify the attorney that it may strike a noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days? **Yes.**

- Should there be a Judicial Council form for the superior court to issue a certificate of appealability? **Yes.**

- Should the rule require the superior court to include in a certificate of appealability not only the substantial claim or claims for relief, which is required by Penal Code section 1509.1, but also include a finding of a substantial claim that the requirements of Penal Code section 1509(d) have been met? **Yes.**

- Are the deadlines included in the proposed rule for submitting papers adequate? **Yes.**

Court questions

The working group also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify. **No.**

- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **(This area is of concern; see comments in opening.)**

- Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **No, additional time would be needed, however we cannot quantify at this time.**

- How well would this proposal work in courts of different sizes? **Not sure, however this Court would propose that in cases that involve a change of venue, it should return to the originating county.**

Orange County Superior Court
Hon. Gregg L. Prickett
Capital Case Committee Chair

Hon. Kimberly K. Menninger
Supervising Judge / Felony Panel

Hon. Sheila F. Hanson
Former Supervising Judge / Felony Panel

John Wood
Courtroom Operations Supervisor / Capital Case Supervisor

From: Invitations
To: Invitations
Subject: Invitation to Comment: sp18-22
Date: Monday, November 19, 2018 4:41:18 PM

Proposal: sp18-22
Position: Agree if modified
Name: Ada Maldonado
Title: Administrative Analyst
Organization: Orange County Superior Court
Comment on Behalf of Org.: Yes
Address: 8141 13th Street
City, State, Zip: Westminster CA, 92683
Telephone: 657-622-5987
Email: amaldonado@occourts.org
COMMENT:
This process is completely new for us and would require training for our bench and courtroom staff. As well as new procedures be created.

I do not foresee any cost savings for the court. I feel that one month is not enough time to prepare for the implementation.

From: Invitations
To: Invitations
Subject: Invitation to Comment: sp18-22
Date: Friday, November 16, 2018 2:32:59 PM

Proposal: sp18-22
Position: Agree if modified
Name: Susan Ryan
Title: Chief Deputy of Legal Services
Organization: Riverside Superior Court
Comment on Behalf of Org.: Yes
Address:
City, State, Zip: Riverside CA,
Telephone:
Email: susan.ryan@riverside.courts.ca.gov
COMMENT:
We would like to see some guidance in the rules on amended petitions. It would appear that the practice in the Supreme Court has been to file a shortened petition, sometimes called a shell petition, and then amend it much later on. Under the timelines imposed by Prop 66, it would be impossible for the court to meet its goals if a petitioner could as a matter of right drop an amended petition at any time prior to the hearing; on the other hand, there may be a need for counsel to file the shell petition to meet the Prop 66 deadline and then later amend in some circumstances. I would suggest that a rule of court clarifying the extent to which leave to amend can and should be allowed would be appropriate. This is also important because later federal review is going to need to know whether a claim was denied by the state court on procedural grounds and whether that was done so properly.

From: Invitations
To: Invitations
Subject: Invitation to Comment: sp18-22
Date: Monday, November 19, 2018 12:59:05 PM

Proposal: sp18-22
Position: Agree if modified
Name: Anabel Romero
Title: Deputy Court Executive Officer
Organization: San Bernardino Superior Court
Comment on Behalf of Org.: Yes
Address: 8303 Haven Avenue
City, State, Zip: Rancho Cucamonga CA, 91730
Telephone: 909-285-3799
Email: aromero@sb-court.org
COMMENT:
The San Bernardino Superior Court has reviewed invitation to comment and has two suggestions surrounding consistency within the rules, as follows:

CRC 4.571(b)(4)
For consistency within the California Rules of Court, this rule should be modified to require reference to previously filed documents by case number, date, and title as in California Rule of Court 3.1110(d) for referring to previously filed documents in civil law and motion.

CRC 4.576(a)
This rule is inconsistent with the intent of the electorate in adopting Proposition 66, which was to expedite handling of death penalty cases. Indeed, Penal Code section 1509, subdivision (f), requires these new proceedings to be conducted as expeditiously as possible, consistent with a fair adjudication. Currently, a successive petition may be summarily denied without any notice or additional hearing. This is a well-established practice not previously considered inconsistent with a fair adjudication. This rule prevents such a summary response, like the dismissal called for in section 1509, subdivision (d), and instead requires an additional notice and opportunity to be heard. This is inconsistent with expeditious handling of these cases. Accordingly, this proposed rule should not be adopted and if adopted would increase the burden of handling these cases by requiring an additional procedure not currently required for handling petitions for writ of habeas corpus and not required or intended by the electorate. Adopting this rule would also lengthen the time to disposition of successive petitions.

Item SP18-22 Response Form

Title: Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings

☐ **Agree** with proposed changes

☒ **Agree** with proposed changes **if modified**

☐ **Do not agree** with proposed changes

Comments:

The proposed changes appear to be adding "Article 3" to Title 4, Div. 6, Ch. 3, but there does not appear to be an article 1 or 2.

Proposed rule 4.571(b) – a petition that has already been transferred to our court from the California Supreme Court incorporates by reference documents filed in conjunction with the appeal, such as the appellate briefs, that the superior court does not have. Our court suggests a rule that, in such cases, the party must file within a certain time from the date of transfer those documents incorporated by reference (other than the certified record on appeal) if the party wants those documents to be considered in conjunction with the habeas petition.

Proposed rule 4.571(e)(1) – in some superior courts, 60 days is going to be an extremely difficult, if not impossible, deadline to meet given the complexity of issues and volume of documents the court will have to review in these cases. The court has 60 days in non-death penalty cases, so it should have more time in the more complex death penalty cases.

Name: Mike Roddy **Title:** Executive Officer

Organization: Superior Court of California, County of San Diego

☒ Commenting on behalf of an organization

Address: Central Courthouse, 1100 Union Street

City, State, Zip: San Diego, California 92101

Email: invitations@jud.ca.gov

Mail: Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Avenue
San Francisco, CA 94102

Item number: 04

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: February 6, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings (Adopt Cal. Rules of Court, rules 8.390 through 8.398; amend rule 8.388; and adopt form HC-200)

Committee or other entity submitting the proposal:
Proposition 66 Rules Working Group

Staff contact (name, phone and e-mail): Seung Lee, 415-865-5393, seung.lee@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: The working group's charge is attached and is also in the "About" tab at the following link: http://www.courts.ca.gov/prop66-working-group.htm
Project description from annual agenda: n/a

If requesting July 1 or out of cycle, explain:
The working group previously requested that this proposal be circulated for public comment on a shortened special cycle, from October 19 through November 19, 2018, so that the proposal could be presented to the Judicial Council for adoption at its March meeting. RUPRO approved this request at its meeting on October 19, 2018.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
This report is submitted concurrently with working group's report titled: Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings, which is the subject of a separate RAR.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on March 15, 2019

Title
Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200

Recommended by
Proposition 66 Rules Working Group
Hon. Dennis M. Perluss, Chair

Agenda Item Type
Action Required

Effective Date
April 25, 2019

Date of Report
February 6, 2019

Contact
Seung Lee, 415-865-5393
seung.lee@jud.ca.gov
Michael I. Giden, 415-865-7977
michael.giden@jud.ca.gov

Executive Summary

The Proposition 66 Rules Working Group recommends amendments to an existing rule relating to appeals from decisions in habeas corpus proceedings and the adoption of several new rules and a form addressing appeals from superior court decisions on death penalty–related habeas corpus petitions. These proposed rules and the form are intended to partially fulfill the Judicial Council's rule-making obligations under Proposition 66 by establishing procedures for this new type of appeal. This proposal is submitted concurrently with a separate report to the Judicial Council containing the working group's proposal for rules governing procedures for death penalty–related habeas corpus proceedings in the superior courts.

Recommendation

The Proposition 66 Rules Working Group recommends that the Judicial Council, effective April 25, 2019:

1. Adopt rule 8.390 to provide that the rules in article 2 apply only to appeals from superior court decisions in death penalty–related habeas corpus proceedings, and to specify what existing appellate rules also apply to these appeals;
2. Adopt rule 8.391 to establish qualifications of counsel eligible for appointment and to require the designation of an assisting counsel or entity;
3. Adopt rule 8.392 to establish procedures for filing these appeals, including for:
    a. Signing, serving, and filing a notice of appeal;
    b. Requesting, responding to, and granting or denying a certificate of appealability; and
    c. Notification of the filing of a notice of appeal by a superior court clerk;
4. Adopt rule 8.393 to implement the 30-day time limit for filing a notice of appeal set forth in Penal Code section 1509.1(a);
5. Adopt rule 8.394 to provide that a petitioner may apply for a stay of execution pending appeal, and that a reviewing court may grant interim relief pending its ruling on the application;
6. Adopt rule 8.395 to specify, with respect to the record on appeal:
    a. The contents and form, the number of copies required, and to whom they must be sent;
    b. That the parties may stipulate to a partial transcript;
    c. When preparation must begin and when it must be completed; and
    d. Procedures for augmentation and correction and for judicial notice;
7. Adopt rule 8.396 to specify, for the briefs on appeal, their contents and form, length, time for filing, and to whom they must be sent;
8. Adopt rule 8.397 to establish procedures for raising and hearing claims of ineffective assistance of counsel under Penal Code section 1509.1(b), including that:
    a. The claim must be raised in the first brief filed by petitioner;
    b. The claim must be accompanied by a proffer;
    c. An evidentiary hearing may be required;
    d. The claim may be considered by the superior court, pursuant to a limited remand;
    e. The Court of Appeal may stay the remainder of the appeal pending the decision of the superior court on remand;
    f. A new notice of appeal must be filed to challenge the superior court's decision on remand, and any resulting appeal may be consolidated with the pending appeal of the habeas corpus decision;

9. Adopt rule 8.398 to provide that rule 8.366 regarding finality also applies to these appeals, except that the Court of Appeal's denial of an application for a certificate of appealability is final in that court on filing;
10. Amend rule 8.388 to limit its application to non-capital habeas corpus appeals;
11. Adopt *Petitioner's Notice of Appeal—Death Penalty–Related Habeas Corpus Decision* (form HC-200) for mandatory use by petitioners; and
12. Refer to the Judicial Council's Rules and Projects Committee all proposals for additional substantive changes that the working group discussed or received from commenters, but that it was not able to address during its work, so that the Rules and Projects Committee may determine which advisory body, if any, should consider such proposals in the future.
13. The text of the new and amended rules and the new form are attached at pages 31–48.

Relevant Previous Council Action

Prior to the passage of Proposition 66, there was no need for rules on appeals from superior court decisions in death penalty–related habeas corpus proceedings. As a practical matter, superior courts almost never decided death penalty–related habeas corpus matters, which were heard almost exclusively by the California Supreme Court. In the rare instance when a death penalty–related habeas corpus petition was heard by a superior court, the petitioner had no right to appeal any denial of the petition. (See Pen. Code, § 1506 [providing a right to appeal only to the People if a petition was granted, and then directly to the Supreme Court].) The only remedy after such a denial was to file a new petition with a reviewing court. (*In re Reed* (1983) 33 Cal.3d 914, 918, fn. 2.) In contrast, as discussed further, below, Proposition 66 now requires that initial death penalty–related habeas corpus petitions generally be heard in the superior court and provides to both parties the right to appeal the resulting decision to the Court of Appeal.

The council has, however, previously adopted and amended rules relating to automatic appeals to the Supreme Court in capital cases (rules 8.600–8.642), as well as appeals to the Court of Appeal from superior court decisions in felony cases (rules 8.300–8.368) and in non-capital habeas corpus proceedings (rule 8.388). The original Rules on Appeal adopted by the Judicial Council, effective July 1, 1943, contained a provision, rule 33(c), addressing the content of the record on appeal in a capital case.

In January 2018, the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the proposition.[1] The council charged the working group with considering what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the proposition's provisions. The working group subsequently proposed, and the Judicial Council adopted, rule amendments, and new rules and forms, effective April 25, 2019, governing the following:

[1] A copy of the working group's charge and a roster of its membership are attached at pages 28–30.

- Preparation of the record on appeal in capital cases (adopted at the September 21, 2018 Judicial Council meeting);
- Qualifications of counsel for appointment in death penalty appeals and habeas corpus proceedings (adopted at the November 30, 2018 Judicial Council meeting); and
- Superior court appointment of counsel in death penalty–related habeas corpus proceedings (also adopted at the November 30, 2018 Judicial Council meeting).

In addition, this recommendation is being submitted to the council concurrently with the working group's separate council report and recommendation addressing the adoption of rules governing superior court procedures for death penalty–related habeas corpus proceedings.[2]

Analysis/Rationale

Background

Proposition 66

On November 8, 2016, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. This act made a variety of changes to the statutes relating to review of capital cases in the California courts. Among other things, the act made several changes to the procedures for hearing death penalty–related habeas corpus petitions, including that such petitions are generally to be heard in the superior court. The act also provided for an appeal to the Court of Appeal by either party as the only mechanism for seeking relief from a superior court decision on the petition. Penal Code section 1509.1, added by the act, does the following, among other things:

- Authorizes either party to appeal the decision of a superior court on an initial habeas corpus petition in a capital case;
- Sets the time for filing the notice of appeal in these cases;
- Limits the issues that can be considered by the Court of Appeal in such an appeal to claims raised in the superior court and claims of ineffective assistance of trial counsel that were not raised in the habeas corpus petition if the failure of habeas corpus counsel to present that claim also constituted ineffective assistance;
- Authorizes the People to appeal a decision granting relief on a successive habeas corpus petition;
- Provides that the petitioner may appeal a denial of relief on a successive habeas corpus petition only if the superior court or the Court of Appeal issues a certificate of appealability;

[2] Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings* (Feb. 2019).

- Limits the circumstances in which a certificate of appealability may be issued to when the petitioner has shown both a substantial claim of relief and a substantial claim of actual innocence or ineligibility for the death penalty;
- Sets the time for the courts to grant or deny a certificate of appealability; and
- Limits the claims that can be considered by the Court of Appeal in appeals by petitioners in successive petition cases to those identified in the certificate of appealability or added by the Court of Appeal within a specified deadline.

Proposition 66 did not take effect immediately upon approval by the electorate because its constitutionality was challenged in a petition filed in the California Supreme Court, *Briggs v. Brown et al.* (S238309). On October 25, 2017, the Supreme Court's opinion in *Briggs* ((2017) 3 Cal.5th 808) became final, and the act took effect. Shortly thereafter, the Judicial Council formed the Proposition 66 Rules Working Group to assist the council in carrying out its rule-making responsibilities under the act. The council charged the working group with considering what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions, including, among other things, those governing the procedures for appeals of the superior court's rulings on death penalty–related habeas corpus petitions to the Court of Appeal. Copies of the working group's charge and a roster of the members are attached at pages 28–30.

Existing procedures relating to appeals from superior court habeas corpus decisions

As previously noted, prior to Proposition 66, there was no appeal to the Court of Appeal from a superior court's decision in a death penalty–related habeas corpus proceeding. As a result, there are no existing rules addressing such appeals.

Penal Code section 1506, last amended in 1975, authorizes appeals only by the People to the Court of Appeal from a superior court decision granting relief in a non-capital habeas corpus proceeding. Rule 8.388 addresses the procedures for People's appeals of superior court decisions granting relief in non-capital habeas corpus proceedings under Penal Code section 1506. Rule 8.388 generally provides that, with the exception of the contents of the record on appeal, the rules relating to appeals in felony cases, rules 8.304 through 8.368, apply to appeals under Penal Code section 1506.

Working group process and considerations

The Judicial Council charged the Proposition 66 Rules Working Group with considering what new or amended court rules or forms might be needed to address Proposition 66's provisions. A subgroup of working group members was formed to consider specifically what procedures may be needed to address appeals to the Court of Appeal from the superior court's rulings on death penalty–related habeas corpus petitions, and to make recommendations for consideration by the full working group. In undertaking this task, the working group was guided by a wide range of considerations and criteria.

With respect to developing and considering qualifications for counsel eligible for appointment to these appeals, the working group considered:

- The criteria articulated in Government Code section 68665, including what qualifications are needed to achieve competent representation and qualify for chapter 154 of title 28 of the United States Code (hereafter chapter 154),[3] while avoiding unduly restricting the available pool of attorneys so as to provide timely appointment; and
- The new and amended qualifications standards for counsel eligible for appointment in capital automatic appeals and initial habeas corpus proceedings in the superior courts, adopted and approved by the council at its November 30, 2018 meeting.

With respect to developing procedures addressing the record and briefing, the working group considered existing rules that might be analogous, including those for non-capital felony appeals, as well as those for capital automatic appeals and habeas corpus proceedings. This included consideration of the working group's three prior proposals to the council. Where appropriate, the working group tried to adapt and model the proposal on existing rules, so as to promote consistency and uniformity. At the same time, the working group departed from some existing rules, as necessary, to reflect the unique and novel nature of these appeals. Whether adapting or departing from existing rules, the working group was ever mindful of its charge to "strive to promote the expeditious review of death penalty judgments while ensuring justice and fairness."

Throughout the development and consideration of this proposal, the working group also was mindful that this proposal, if adopted and approved, would establish *initial* procedures for this new category of appeals. To a certain extent, developing this proposal required the working group to imagine and predict how these appeals will unfold in practice. The working group took a conservative approach in some instances and declined to make detailed predictions in the absence of relevant and sufficient data. In other instances, the working group had to make educated predictions and reasonable assumptions, which may prove to be not entirely correct. Thus, the working group expects that, as these rules are implemented and appeals are filed, litigated, and decided, litigants and the courts may very well conclude that the rules must be modified, supplemented, or otherwise amended in some way. That the working group did not make certain recommendations or include certain provisions is not intended to foreclose their future consideration, particularly with the benefit of additional information and data regarding these new appeals.

[3] Chapter 154 establishes "fast-track" procedures for federal habeas corpus proceedings. State procedures for the appointment of counsel in death penalty–related habeas corpus proceedings must meet certain standards in order to qualify for these fast-track procedures. To certify a state is in compliance, the Attorney General must find that the state has established a mechanism for the appointment and compensation of competent counsel in state postconviction proceedings and provides adequate standards of competency for such counsel. (28 U.S.C. § 2265(a)(1); see *id*., § 2261(b).) If a state's standards of competency meet or exceed the benchmarks set by the federal government's implementing regulations, those state standards are presumptively adequate under chapter 154.

The Proposal

This proposal is intended to help fulfill the Judicial Council's obligation under Proposition 66 to adopt, within 18 months of the act's effective date, initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review. Specifically, this proposal addresses procedures for appeals under Penal Code section 1509.1, from superior court decisions on death penalty–related habeas corpus petitions. The proposed rules adopt the overall approach embodied in current rule 8.388, addressing non-capital habeas corpus appeals and applying many of the existing rules applicable to felony appeals. Portions of the proposal also are adapted from and modeled on the rules applicable to capital automatic appeals and habeas corpus proceedings.

The proposed rules also include many distinct provisions that reflect the unique requirements of Penal Code section 1509.1. For example, Proposition 66 established special requirements for appeals from decisions regarding successive habeas corpus petitions. Proposition 66 also specified that claims of ineffective assistance of trial counsel not raised in the superior court—which would normally be considered outside the scope of an appeal—may in fact be considered on appeal in limited circumstances. Additionally, while, as a general matter, the California Rules of Court typically do not repeat statutory provisions, these proposed rules do so in certain instances to provide context for related rule provisions.

This proposal is submitted concurrently with a separate but related report to the Judicial Council containing the working group's proposal for rules governing procedures for death penalty–related habeas corpus proceedings in the superior courts.

Below is a discussion of the specified proposed changes.

Qualifications of petitioner's counsel appointed by the Court of Appeal

Proposed rule 8.391 would establish the qualifications of counsel appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under Penal Code section 1509.1. Specifically, proposed rule 8.391 would require that, to be eligible for appointment to these appeals, an attorney must meet the minimum qualifications set forth in rule 8.652.[4] In other words, counsel on appeal from a superior court's death penalty–related habeas corpus decision must meet the same qualifications standards as counsel seeking appointment in the superior court habeas corpus proceeding.

The working group ultimately concluded that it was important that counsel appointed in these appeals be fully conversant in death penalty–related habeas corpus representation. These appeals will involve considering issues raised and potentially not raised in a death penalty–related habeas

[4] Rule 8.652 was adopted by the Judicial Council at its November 30, 2018 meeting. (See Judicial Council of Cal., Proposition 66 Rules Working Group, *Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings* (Nov. 9, 2018), *https://jcc.legistar.com/View.ashx?M=F&ID=6786821&GUID=9BBA8EAC-8EDA-405D-B1A8-E1A0399A020D*.)

corpus proceeding. Thus, they necessarily will require counsel to have familiarity with investigating, considering, and asserting habeas corpus claims.

However, to address in part commenters' concerns that an attorney also must have appellate knowledge and skills, as the appointment is for purposes of an appeal, proposed rule 8.391 also would require that counsel "[b]e familiar with appellate practices and procedures in the California courts, including those related to death penalty appeals." Additionally, as is discussed further, below, the proposal would require that appointed counsel be assisted by an assisting entity or counsel. The working group expects that the assisting entity or counsel will be able to provide assistance and consultation on appellate matters.

Assisting entity or counsel

The proposal would expressly require the Court of Appeal to designate an assisting counsel or entity.[5] The proposal would state that the applicable qualifications standards include a willingness by counsel to cooperate with an assisting counsel or entity. The proposed provisions are consistent with rule 4.561(e)(2), which also expressly requires designation of an assisting counsel or entity by the superior courts in death penalty–related habeas corpus proceedings. The proposal also is consistent with the qualifications standards, which were developed with the presumption that counsel in death penalty–related habeas corpus proceedings would be assisted.[6] The working group concluded that the availability of such assistance may not only help to achieve competent representation in these appeals, but also help to attract new counsel who might otherwise be less willing to accept appointments in this novel category of appeals.

Service, copies, and notices

The proposal would require that various copies of documents must be served, delivered, or otherwise sent to a variety of persons and entities, including the assisting entity or counsel, if one has been designated, and the district appellate project, as well as counsel for petitioner and the petitioner. The proposal also would require that both the district attorney and the Attorney General receive copies of documents in most instances. While some might view this as overinclusive, this proposal would help to ensure that documents relating to this new type of appeal are received by all reasonably necessary parties and their counsel, and the relevant courts. (See, e.g., proposed rule 8.396(d) [requiring petitioner's counsel to deliver copies of petitioner's

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[5] "Assisting counsel or entity" is defined in rule 8.601(5), also adopted by the Judicial Council at its November 30, 2018 meeting (see note 4, *supra*), and "means an attorney or entity designated by the appointing court to provide appointed counsel with consultation and resource assistance." Thus, an assisting entity provides services that are separate from the functions of an administrator to which the Court of Appeal may delegate its duties as provided for in existing rule 8.300(e). Of course, this does not mean that they must actually be two separate entities. A single entity could serve in dual roles and provide both services.

[6] Judicial Council of Cal., Proposition 66 Rules Working Group, *Rules and Forms: Qualifications of Counsel for Appointment in Death Penalty Appeals and Habeas Corpus Proceedings* (Nov. 9, 2018), p. 10, *https://jcc.legistar.com/View.ashx?M=F&ID=6786821&GUID=9BBA8EAC-8EDA-405D-B1A8-E1A0399A020D*; see also Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings* (Oct. 19, 2018), p. 20, *https://jcc.legistar.com/View.ashx?M=F&ID=6786824&GUID=CA85EBD4-E947-4E81-A1B5-21B857789B56*.

briefs to petitioner, and permitting up to 30 days after filing for personal delivery; requiring the People to serve copies of their briefs on the district attorney or the Attorney General, whichever is not representing the People on appeal].)

Thus, for example, the Court of Appeal's decision on a request for a certificate of appealability would be sent not only to petitioner or petitioner's counsel, but also to the district appellate project and any assisting entity or counsel, both the district attorney and the Attorney General, the superior court clerk, and the clerk/executive officer of the Supreme Court. (Proposed rule 8.392(b).) Similarly, the notice of appeal would be sent to the aforementioned individuals and entities, as well as the reviewing court clerk, and each court reporter and any primary reporter or reporting supervisor. (Proposed rule 8.392(c).)

New counsel on appeal

Proposed rule 8.391(a)(3) would require that, to be eligible for appointment to these appeals, an attorney must "[n]ot have represented the petitioner in the habeas corpus proceedings that are the subject of the appeal unless the petitioner and counsel expressly request, in writing, continued representation." In other words, absent an express request to the contrary, petitioner would be appointed new counsel in these appeals.

The language in the proposal is modeled after similar language in Chapter 154 and Government Code section 68663, both of which prohibit trial counsel from continuing as habeas corpus counsel, absent express request by counsel and petitioner.[7] The same reasons underlying chapter 154's prohibition against continued representation by trial counsel—that prior counsel cannot be expected "to raise a vigorous challenge to his own effectiveness" and are "less able to undertake a fresh and dispassionate consideration of the issues raised or possibly overlooked"—are also applicable here.[8]

[7] Government Code section 68663 states, "No counsel appointed to represent a state prisoner under capital sentence in state postconviction proceedings shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made, unless the prisoner and counsel expressly requests continued representation." Title 28 United States Code section 2261(d) similarly states that no attorney appointed pursuant to the state counsel mechanism for capital postconviction proceedings "shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation." The federal regulation addressing chapter 154 certification also specifies that the state counsel "mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly requested continued representation." (28 C.F.R. § 26.22(a) (2019).)

[8] As explained in the final report of the Judicial Conference's Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, from which many of the relevant features of chapter 154 derive, including the prohibition against having trial counsel continue as habeas corpus counsel:

> The primary reason for the rule is that during the post-conviction review, ineffective assistance of trial and appellate counsel is frequently a major issue. It would be unrealistic to expect a capital defendant's trial or appellate counsel to raise a vigorous challenge to his own effectiveness. A secondary reason is that trial and appellate counsel in death penalty cases serve under great pressure and often work themselves to the point of emotional and physical exhaustion. They are

Accordingly, the working group concluded that new counsel was both necessary and efficient in light of the appeals mechanism established by Proposition 66, which does not limit appeals to claims raised in the superior court proceedings. Instead, on appeal, counsel is to consider and potentially raise claims "of ineffective assistance of trial counsel if the failure of habeas counsel to present that claim . . . constituted ineffective assistance." (Pen. Code, § 1509(b).) Appointing new counsel avoids the potential conflicts of interest and inherent practical difficulties in requiring habeas corpus counsel to vigorously investigate their own ineffectiveness on appeal.

Notice of appeal

Proposed rule 8.392(a) is modeled on existing rule 8.304(a), and would provide that the notice of appeal must be filed in the superior court and must be signed by counsel for the People or counsel for petitioner, or, if unrepresented, petitioner. Proposed form HC-200 would be a mandatory form notice of appeal for use by petitioner and petitioner's counsel. Proposed rule 8.392(c) would require the superior court clerk to send notification of the filing of the notice of appeal to the identified persons and entities.

Proposed rule 8.393 would provide that a notice of appeal "must be filed within 30 days after the rendition of the judgment or the making of the order being appealed." The 30-day time limit is taken from Penal Code section 1509.1, which provides that an appeal from a superior court decision on an initial habeas corpus petition "shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision granting or denying the habeas petition." (*Id*., subd. (a).) The statute also provides that an appeal of a superior court decision on a successive habeas corpus petition "shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision." (*Id*., subd. (c).)

Unlike existing rule 8.308(b), this proposal does not provide additional time for the filing of a cross-appeal. It is unclear whether Penal Code section 1509.1 permits such an extension of the time, by rule, to file a cross-appeal, or whether its 30-day deadline applies to both appeals and cross-appeals.

Certificate of appealability

Proposed form *Petitioner's Notice of Appeal—Death Penalty–Related Habeas Corpus Decision* (form HC-200) and proposed rule 8.392(b) are designed to implement the detailed requirements articulated in Penal Code section 1509.1 for certificates of appealability. Penal Code section 1509.1 provides that the petitioner may only appeal a denial of relief on a successive habeas corpus petition if either the superior court or the Court of Appeal issues a certificate of appealability.

> understandably less able to undertake a fresh and dispassionate consideration of the issues raised or possibly overlooked at trial and on direct appeal. The appointment of new counsel at the state habeas phase will do as much as can be done to overcome these difficulties.

(135 Cong. Rec. at p. 24696 (1989).)

Among other things, proposed rule 8.392(b) would require that petitioner's notice of appeal must indicate if the appeal is from a decision denying relief on a successive petition and whether the superior court granted or denied a certificate of appealability. The proposed rule would also require that, if the superior court denied a certificate of appealability, the petitioner must attach to the notice of appeal a request to the Court of Appeal for a certificate of appealability that identifies the petitioner's claim or claims for relief and explains how the requirements of Penal Code section 1509(d)—addressing when successive petitions may proceed—have been met. Consistent with the proposed rule, proposed form HC-200 would include a notice that, if a certificate of appealability was not issued by the superior court, the appellant must submit a request to the Court of Appeal for a certificate. The second page of the form would be used to make such a request.

Proposed rule 8.392(b) also would require the Court of Appeal to grant or deny a request for a certificate of appealability within 10 days of the filing of the request. This is taken from Penal Code section 1509.1(c), which requires a decision "within 10 days of an application for a certificate." The rule also would require that a certificate must identify the substantial claim for relief shown by the petitioner. This is intended to address the provision in Penal Code section 1509.1(c), that the jurisdiction of the Court of Appeal is limited in part "to the claims identified in the certificate."

In light of the very short period of time provided by statute to decide the request, the proposed rule provides that the People "need not file an answer to a request" but may be ordered to do so. Because, by statute, petitioner may not proceed on appeal from the denial of a successive habeas petition without a certificate of appealability, the proposed rule would require that, if the Court of Appeal denies the request, the notice of appeal must be marked "Inoperative." This provision is modeled on existing rule 8.304(b)(3), relating to the handling of a notice of appeal in non-capital felony appeals when no certificate of probable cause has been issued.

Stay of execution on appeal

Proposed rule 8.394 would provide that a petitioner may request from the reviewing court a stay of execution of the death penalty during the pendency of the appeal. The proposed rule also would provide that the reviewing court may grant interim relief pending its ruling on the request. Both provisions are modeled, in part, on existing rule 8.312(a) and (d), relating to stays in non-capital felony appeals.

Contents of record on appeal

Proposed rule 8.395(a), which addresses the contents of the record, specifies that documents filed or submitted in the underlying habeas corpus proceedings *and* the record prepared for the automatic appeal, as well as all documents filed in the automatic appeal, would be part of the clerk's transcript for the record in these appeals. The provision is modeled in part on rule 8.388(b), which specifies the contents of the record in appeals by the People under Penal Code section 1506 from superior court decisions granting habeas corpus relief. However, that language has been adapted to reflect the fact that these appeals may be taken by either party, and may be from a denial with or without issuance of an order to show cause. Thus, the proposed rule would

specifically require that the record include any order to show cause, return, denial, or traverse, any informal response to the petition, any statement of decision required by Penal Code section 1509(f), all supporting documents and any other documents and exhibits submitted to the court, and any certificate of appealability required under Penal Code section 1509.1.

Stipulations for limited record

Proposed rule 8.395(b), which is modeled on rule 8.320(f) addressing stipulations for limited records in non-capital felony appeals, would also provide for such stipulations in these appeals. While such stipulations are unlikely to be common, when the parties do take advantage of the provision, it may help to expedite the record preparation process, and thus shorten the time needed for capital review proceedings in appropriate cases.

Timing and form of record

Commencement. Proposed rule 8.395(b) would provide that record preparation is to begin immediately after the superior court issues its decision on an initial (as opposed to successive) death penalty–related habeas corpus petition. However, in the case of a successive petition, record preparation would not begin until after the filing of the notice of appeal or—if one is required—the granting of a certificate of appealability, whichever is later. These provisions are modeled on existing rule 8.336, which provides that (1) in felony cases where there is a trial on the merits, preparation of the record generally begins immediately after a verdict or finding of guilt of a felony is announced, but (2) if a certificate of probable cause is required, record preparation begins after its filing.

Completion. Proposed rule 8.395(c) and (d) would provide that the record must be completed within 30 days after the clerk and reporter were required to begin preparation. The superior court would be able to extend the deadlines by no more than 30 days; further extensions would have to be requested from the Court of Appeal. The proposal also would provide that good cause for an extension may be presumed when the combined record is over 10,000 pages. These proposed provisions are modeled on existing rule 8.616, which addresses preparation of the trial record in capital automatic appeals.

Form. The proposal provides that the reporter's transcript must be in electronic form and the clerk's transcript is encouraged to be in electronic form.

Length of briefs

Proposed rule 8.396(b) would provide length limits for briefs (e.g., 300 pages for opening briefs) in these appeals, which limits may be expanded by the presiding justice for good cause. The limits are modeled on those in existing rule 8.630(b), relating to briefs in capital appeals in the Supreme Court. These length limits are longer than for briefs in general felony appeals in the Court of Appeal (see existing rule 8.360(b)), due to the complexity of death penalty cases. In particular, these appeals will not only require that counsel brief appellate issues but also may require briefing on new claims of ineffective assistance of trial counsel not raised in the superior court.

Filing deadlines for briefs
Proposed rule 8.396(c) would provide filing deadlines for briefs in these appeals that are substantially identical to those for the capital direct appeals. However, in these appeals, the proposal would cap automatic extensions for records over 10,000 pages to an additional 150 days (in other words, for the first 10,000 pages over the initial 10,000 pages of combined transcripts). Further extensions may be granted by the presiding justice.

Ineffective assistance of counsel claims not raised in the superior court
Proposed rule 8.397 would establish procedures for presenting and handling, on appeal, ineffective assistance of counsel claims that were not raised in the habeas corpus proceeding in the superior court, as authorized by Penal Code section 1509.1. The proposed advisory committee comment would expressly refer to section 1509.1(b), as a reminder that the claims that may be raised are limited by statute. The proposal would require such claims to be raised in petitioner's first brief and to be addressed in a separate portion of the briefs.

Because ineffective assistance claims not raised in the habeas corpus proceeding in the superior court generally will require evidentiary support outside of the existing record, the proposal requires that such claims must be accompanied by a "proffer" containing relevant material not in the record on appeal or of which the court has taken judicial notice. The proposal would establish requirements governing the form and content similar to those for exhibits submitted with a habeas corpus petition, and also would permit the clerk to strike noncomplying filings after notice and an opportunity to correct within a reasonable time of not less than five court days.

The proposal would articulate when the Court of Appeal must order an evidentiary hearing on such a claim and would provide several options for how such an evidentiary hearing may take place, including through a limited remand to the superior court, as stated in Penal Code section 1509.1. The proposal also would provide that, on limited remand, the superior court must proceed under the specified proposed rules governing evidentiary hearings and decisions, which are included in the separate but related report and proposal addressing death penalty–related habeas corpus proceedings in the superior courts. This provision is intended to make clear that the superior court is to commence its proceedings on limited remand with an evidentiary hearing. By the time a limited remand has been ordered, the Court of Appeal already will have concluded that additional findings of fact are required to consider the ineffective assistance claim. Thus, rules regarding the filing of an informal response or the issuance of an order to show cause would not apply.

The proposal would permit, but not require, the Court of Appeal to stay the proceedings on other claims raised in the appeal if it orders such a limited remand. The proposal also would make clear that a new notice of appeal would need to be filed to challenge the superior court's decision on remand, and that the reviewing court may consolidate such an appeal with the pending appeal of the habeas corpus decision.

Policy Implications

This proposal would establish procedures for a new category of appeals in the Courts of Appeal. As these appeals are actually litigated and decided, the working group expects that some aspects of these proposed rules may benefit from or otherwise require adjustments in the future.

The proposed rules also may require future adjustments as questions of funding are answered. The issue of funding was raised during the course of the working group's discussions of this proposal, as well as during discussions of the prior and concurrent proposals developed by the working group. Similarly, as with previous proposals, commenters raised concerns about funding for these appeals. The question of funding is outside the scope of the working group's charge, but may have an impact on how these rules will function in the real world.

Additional policy implications raised by this proposal are addressed in the Comments section, below.

Comments

This proposal circulated for public comment in a special cycle between October 19 and November 19, 2018. In addition to its posting on the California Courts website, the proposal was distributed to the standard list of presiding judges and justices, court executive officers, and bar associations. Working group members also were asked to distribute it to all those they thought might be interested in commenting.

Twenty-four entities or individuals submitted comments on this proposal. Commenters included three Courts of Appeal, four superior courts, 12 organizations or individuals who represent criminal defendants (including all five district appellate projects, which commented together in a single submission), two professional associations, one victims' rights organization, one foreign government, and one private business. Two commenters indicated that they agreed with the proposal and two indicated that they agreed with the proposal if amended. The remainder did not specify an overall position on the proposal, but provided comments. Many commenters agreed with parts of the proposal and disagreed with or suggested modifications to other parts. The main substantive comments and the working group responses to those comments are discussed below.

The text of comments directly addressed to the proposal, along with the working group responses, are available in the comment chart attached at pages 49–153. The chart begins with a table of the individuals and entities that submitted comments. That table is followed by additional tables containing the substantive comments organized by rule number, form number, or topic. Following the chart are copies of the complete set of comments received by the working group on this proposal. The name of the commenter in the first part of the comment chart links to the copy of the full text of that individual's or entity's comments.

The working group received many suggestions from commenters over the course of its work on each of its five proposals. The working group appreciates all the comments it received. However, for a variety of reasons, the working group was not able to address some of the suggestions by the deadline necessary to make its recommendation to the Judicial Council for the initial set of

rules required by Penal Code section 190.6(d). In some cases, the working group lacked the information necessary to consider the proposal (e.g., the entity responsible for funding appointed counsel for petitioners); in other cases, the working group lacked the time to discuss a suggestion, draft a proposal, and circulate it for public comment. The comment chart documents these reasons in greater detail. Although the working group has completed its charge, Penal Code section 190.6(d) requires the Judicial Council to amend the rules "as necessary." Therefore, the working group recommends that the Judicial Council refer to its Rules and Projects Committee all of the outstanding suggestions that the working group has collected during its tenure so that the Rules and Projects Committee can refer them to the appropriate advisory body or bodies, if any, to consider these proposals in the future.

Qualifications

These appeals involve considering issues both raised and potentially not raised in a death penalty–related habeas corpus proceeding. Accordingly, multiple commenters recommended that counsel should meet both sets of qualifications—those for appointment to capital automatic appeals and those for death penalty–related habeas corpus proceedings in the superior court.

The working group considered this alternative both when developing the proposal and again after receiving comments. While requiring counsel to meet both sets of qualifications might help to ensure the highest quality representation, ultimately, the working group concluded that such a requirement could unduly restrict the pool of attorneys eligible and available for appointment. The pool of attorneys who meet either set of qualifications is limited. The pool of attorneys who meet both sets of qualifications is certain to be much smaller. Additionally, appointing an attorney who meets both sets of qualifications to a habeas corpus appeal likely means that that same attorney will be unavailable to accept an appointment in a capital automatic appeal or habeas corpus proceeding in the superior court, thereby shrinking the pool of attorneys available to accept such cases.

The working group's view was that requiring counsel to meet all of the qualifications for appointment to capital automatic appeals was not necessary to achieve competent representation in these habeas corpus appeals. The working group concluded that commenters' concerns could be addressed in part with two additional modifications to the proposal as circulated: (1) an additional qualification was included to require counsel to be familiar with appellate practices and procedures, including those related to death penalty appeals, and (2) a requirement was added to expressly provide for the designation of an assisting entity or counsel, with the expectation that the designated entity or counsel will be able to provide appointed counsel with assistance and consultation on appellate matters.

Assisting entity or counsel

The proposal, as circulated for comment, implied but did not expressly specify that counsel appointed in these appeals would be assisted by an assisting counsel or entity. The circulated proposal assumed that the district appellate projects would be the assisting entities for these appeals. Thus, the circulated proposal did not refer to the assisting entities when identifying who must receive various copies and notifications relating to the appeal.

Multiple commenters suggested that the rules must expressly require the designation of an assisting entity, as is required in the underlying habeas corpus proceedings. One commenter noted the increased need for guidance on matters of appellate procedure if counsel on appeal are required only to meet the qualifications standards for habeas corpus counsel. Another commenter noted the unique complexity of this new type of appeal. Based in part on the weight of the comments received, the working group clarified the proposal to expressly require the Court of Appeal to designate an assisting counsel or entity.

However, as was discussed in an earlier report to the council addressing the appointment rules in death penalty–related habeas corpus proceedings in the superior court, a small minority of the working group objected to requiring the designation of an assisting entity.[9] These objections were renewed with respect to requiring an assisting entity or counsel for these appeals. Even though all capital counsel appointed by the Supreme Court are currently supported by an assisting entity or counsel, the practice is not required by rule or statute, but is discretionary and contractual. Some members objected to imposing a new legal obligation on appointing courts, rather than leaving it to their discretion. The working group, however, ultimately concluded that an assisting entity or counsel should be required in these appeals, just as they are required for capital counsel appointed by the superior court, and just as they are provided to every private capital counsel appointed by the Supreme Court.

Multiple commenters also suggested that the rules should not assume that the district appellate projects, which have no capital experience, will be designated the assisting entities in each of these appeals. Accordingly, the working group modified the circulated proposal to include references to the assisting counsel or entity when identifying who would need to receive copies and notifications relating to the appeal.

Service, copies, and notices

As discussed above, in response to multiple comments, the working group modified the proposal to add the assisting entity or counsel to the list of persons and entities to whom various copies of documents must be served, delivered, or otherwise sent. The working group also modified the proposal to ensure that both the district attorney and the Attorney General receive documents and notices. For example, the circulated proposal stated that the district attorney's brief must be served on the Attorney General. This was modified to instead require that the People's brief must be served on the district attorney or the Attorney General, whichever is not representing the People in the appeal.

Several commenters noted that counsel for petitioners may prefer to personally deliver briefs to their clients and suggested that counsel be given 30 days to do so. The working group modified the proposal to permit a proof of service to include a statement of counsel's intent to deliver the brief to petitioner personally within 30 days of the filing of the brief.

[9] Judicial Council of Cal., Proposition 66 Rules Working Group, *Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings* (Oct. 19, 2018), p. 20.

New counsel on appeal

The circulated proposal implied but did not expressly require that new counsel must be appointed for these appeals. Commenters addressing the issue all noted that it could be a conflict of interest for counsel who represented the petitioner in the superior court habeas corpus proceedings to also have to determine whether they provided ineffective assistance in the superior court habeas corpus proceedings. At a minimum, someone other than the attorney who represented the petitioner in the superior court habeas corpus proceedings would need to be appointed to determine whether to make such a claim on appeal. Thus, one commenter suggested that perhaps new counsel could be appointed just for the ineffective assistance claim.

The working group declined to propose a mechanism that would require appointment of at least two attorneys on appeal. The working group concluded that, given the already small pool of attorneys qualified and available to be appointed in these proceedings, it would unduly restrict the pool of available counsel if at least two attorneys were needed in every appeal—one for the ineffective assistance claim and one for all other appellate issues. Also, it was unclear whether two attorneys would necessarily be more efficient—even if one of those attorneys is already familiar with the case from having represented petitioner in the superior court. The attorney appointed to investigate the ineffective assistance claim would still need to review the record in the habeas corpus proceedings in order to thoroughly consider and investigate counsel's effectiveness. Additionally, having petitioner represented by two sets of counsel, one who is investigating the other, seems likely to give rise to practical difficulties and conflicts. For these reasons, the working group concluded that it would be more efficient to appoint new counsel on appeal, except where petitioner and existing counsel request continued representation on appeal.

Notice of appeal

Signature. Proposed rule 8.392(a), as circulated for comment, did not initially specify who must sign the notice of appeal. One commenter suggested that the proposed rule should be consistent with existing rule 8.304(a), which does specify who must sign. The working group modified the proposal to make that change.

Notice. Proposed rule 8.392(c), as circulated for comment, required notification to petitioner's counsel. After receiving comments that petitioner may be unrepresented, the working group modified the proposal to include notice to petitioner if unrepresented. As noted in the discussion on assisting entities, the working group also modified the proposal to include notice to any assisting entity or counsel.

Time to file. Penal Code section 1509.1(a) states that "[a]n appeal shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision granting or denying the habeas petition." The working group initially understood that provision to require all appeals, including cross-appeals, to be filed within 30 days. Thus, the invitation to comment on this proposal asked whether it would be helpful to include an advisory committee comment highlighting that all appeals must be filed within the 30-day time limit. Commenters disagreed: some suggested an advisory committee comment would be confusing, while others thought it

might be helpful. Not only did this lack of agreement weigh against including such an advisory committee comment, but it also suggested the statute was not as clear as the working group had initially thought. Upon further consideration and discussion, the working group concluded that the statutory 30-day time limit also could be read as applying only to the initial notice of appeal. The statute's silence on cross-appeals could be interpreted as permitting the usual extension of time, by rule, for filing a notice of cross-appeal.

This lack of clarity concerning the 30-day time limit militated against proposing an advisory committee comment definitively stating, one way or another, whether cross-appeals must be filed within the statutory 30-day time limit. The working group could not develop a proposal expressly permitting cross-appeals to be filed after the 30-day time limit, and thereby risk misleading a party whose cross-appeal could later be determined by a court to be jurisdictionally barred. The working group also did not want to foreclose future litigants from arguing, or the courts from concluding, that the statute does, in fact, permit the filing of cross-appeals after the initial 30-day deadline.

Some members of the working group were of the view that an advisory committee comment should notify the parties that the statute is unclear. The concern was that counsel—who are likely to be familiar with the usual rule extending time limits to file cross-appeals—may otherwise fail to file their cross-appeal (or a protective appeal) within the initial 30 days, as may be required by Penal Code section 1509.1. However, the working group concluded that advisory committee comments are not intended to give practice advice when a statute may be unclear, and declined to propose such a comment. The working group expects that trainings, practice guides, and assisting entities will advise counsel of the possible need to file all notices of appeal within the initial 30-day period, including cross-appeals, as well as, strategically, whether and how counsel should decide to file protective notices of appeal.

Certificate of appealability

The proposal, when circulated for comment, did not state when the Court of Appeal must decide a request for a certificate. Multiple commenters stated that it would be helpful to clarify what event triggers the 10-day deadline in Penal Code section 1509.1(c). The working group modified the proposal to clarify that the 10-day deadline runs from the filing of the request in the Court of Appeal. Also, as circulated, the proposed form did not include an area for the contact information of petitioner or petitioner's counsel. The working group corrected this oversight to include space for this information.

As circulated, the proposal originally stated that the People "must not file an answer to a request." This language was modeled on rule 8.268(b)(2), relating to answers to petitions for rehearing. One commenter suggested that the certificate must not be granted unless the People have a chance to respond. In response, the working group modified the language to provide that the People "need not file an answer," in recognition that the People may wish to answer a request even absent a court order.

One commenter suggested that a certificate granted by the Court of Appeal also must "state the basis for its conclusion that the petitioner has a substantial claim of innocence or ineligibility for the penalty, as ineligibility is defined in the statute." The working group declined to make this change, because it is not required by statute. Another commenter suggested that the rules should permit a request to the California Supreme Court for a certificate. The working group also declined to make this change as existing rules already establish the general procedure for seeking review from the Supreme Court.

The working group initially did not develop a form certificate on the ground that the certificate likely would need to be tailored to each individual case, potentially undermining the usefulness of a form. Notably, no form exists for the potentially analogous certificate of probable cause required in some non-capital felony appeals. However, several commenters noted that it still might be helpful to have a form certificate of appealability. There was not sufficient time for the working group to further consider and develop a form certificate. Thus, the working group recommends that the question of whether a form certificate would be beneficial be referred for consideration by the appropriate Judicial Council advisory body at a later date.

Stay of execution on appeal

Several commenters suggested that a stay of execution pending appeal should be mandatory. The working group declined to make this change. Generally, absent a statute providing otherwise, a stay of execution is an equitable remedy that is not available as a matter of right. Unlike in direct appeals from a judgment of death, where there is a statute that automatically stays the execution pending appeal (Pen. Code, § 1243(a)), here no such statute applies to these appeals. There is no automatic stay even in an initial death penalty–related habeas corpus petition. Instead, Supreme Court policy requires the filing of a motion requesting a stay. The working group concluded that, similarly, such relief should be discretionary rather than automatic on appeal, in the absence of statutory authority to the contrary.

Other commenters suggested that the rules should provide additional guidance on the criteria courts should apply in determining whether to grant or deny a stay of execution. One commenter suggested that the rules should establish a threshold showing that must be met before a court may grant temporary interim relief. The working group declined to articulate additional criteria at this time on how courts should exercise their discretionary authority to grant a stay of execution. The working group concluded that more detailed rule-making on this topic could have the unintended effect of broadening or narrowing the authority of the courts and the rights of the parties beyond what is warranted by statute and case law.

Contents of record on appeal

Several commenters suggested that the record must include the record prepared for the automatic appeal. The circulated proposal actually did provide that the record in these appeals must include the record prepared for the automatic appeal. Based on the comments, the working group modified the provision to more clearly and expressly state that the record prepared for the automatic appeal and documents filed in the appeal must be part of the record for these

appeals.[10] At the suggestion of another commenter, the working group further modified the provision to adapt language from rule 8.610 (adopted by the council in September 2018) to make clear that visual aids, transcripts of recordings, and written communications between the court and the parties are part of the record of the habeas corpus proceedings.

Several commenters suggested that the proposal should include rules for certifying the record for accuracy, as established in existing rule 8.622. The working group declined to make this change. A two-step record certification process—first for completeness and then for accuracy—is required by statute for the record on automatic appeal of the capital trial proceedings. In contrast, two-step certification is not required by statute for the record in these appeals. Nor is it apparent that requiring an additional step to the record preparation process would be more efficient or expeditious. Thus, the proposal instead provides that the parties may ensure the record is both complete and accurate by using the usual procedure for augmenting or correcting the record.

Stipulations for limited record

Multiple commenters expressed the view that such stipulations were unlikely to be used and suggested deleting the provision. Several commenters noted that they do not see the process used in non-capital felony appeals. Others noted that stipulating to a limited record risked potentially providing ineffective assistance of counsel or failing to exhaust petitioner's claims for purposes of federal habeas proceedings. This provision was the subject of substantial discussion both when developing the proposal for circulation and again after receiving comments.

The working group agrees that the provision is unlikely to be used with any frequency. However, mindful of its charge to "strive to promote the expeditious review of death penalty judgments while ensuring justice and fairness," the working group ultimately retained the provision in the hope that it may expedite record preparation in at least some appropriate cases. Several members of the working group were of the view that, since the parties likely may enter into such stipulations even absent the proposed rule, there was little harm in reminding the parties of this potential opportunity for expediting and limiting record preparation.

One commenter was concerned that this provision could instead delay the process as the clerk and reporter wait to see if the parties submit a stipulation. The proposal, however, does not provide for such a waiting period. Indeed, another commenter was concerned that, without a deadline for the stipulation, the clerk and reporter will expend time and resources preparing a record that may later prove unnecessary by stipulation. The working group declined to add a deadline so as not to limit or otherwise discourage parties from reaching a stipulation where appropriate. However, the working group did modify the proposal to change the phrase "must not" to instead provide that the clerk and reporter "need not" prepare and send unnecessary

[10] The circulated proposal provided that the record in these appeals must include all supporting documents under proposed rule 4.571. Rule 4.571, which is set forth in the separate council report and recommendation addressing the adoption of rules relating to superior court procedures for death penalty–related habeas corpus proceedings, stated that the record prepared for the automatic appeal is deemed part of the supporting documents. After receiving the comments, the working group modified that proposed rule as well, to also include all documents filed in the automatic appeal.

portions of the record, to reflect that by the time a stipulation is submitted, those portions of the record may already have been prepared.

Timing and form of record

Commencement. As circulated, the proposal would have begun record preparation only after a notice of appeal had been filed from a decision on an initial petition. This would have provided time for the parties to consider whether to stipulate to a limited record on appeal. Multiple commenters suggested that preparation should begin immediately after the superior court's decision on an initial petition, reasoning that these rules are supposed to expedite review and noting the improbability of neither party filing an appeal, as well as the unlikelihood of a stipulation limiting the record. Some members of the working group objected to a rule that presumes that an appeal will be filed and were of the view that preparation should not begin until the notice of appeal has been filed.

Ultimately, the working group concluded that, since, as a practical matter, appeals generally will be filed, it would be more efficient to begin record preparation immediately, rather than build in additional delay at this stage of the proceedings. This way, the clerk and reporter are not waiting for the filing of a notice of appeal, and can begin preparation immediately, while memories are fresh, and potentially before the press of business requires they turn their attention to other matters.

Some commenters suggested that record preparation also should begin immediately after the superior court's decision on a successive petition. The working group declined to make the suggested change. Under Proposition 66, petitioner's appeal of a decision on a successive petition may not proceed without a certificate of appealability. The working group concluded that requiring immediate preparation of a record on appeal, when, in many cases, the notice of appeal may be inoperative, would be inefficient.

Completion. The proposal as circulated was modeled on existing rule 8.336, which addresses preparation of the record in non-capital felony appeals. Thus, the proposal would have required completion of the record within 20 days after the clerk and reporter were required to begin preparation, which, in that version of the proposal, was after the filing of the notice of appeal from a decision on an initial petition. The proposal also would not have permitted the time to be extended by the superior court. Multiple commenters objected to both of these provisions. They were of the view that 20 days is unreasonably short. Some commenters also were of the view that the superior court should be authorized to extend the time for record preparation. The working group made these changes, thereby modifying the proposal to be more consistent with existing rule 8.616. The working group also clarified that rules 8.60 and 8.63, which generally govern requests for extension of time, apply to extensions to prepare the record in these appeals.

Some commenters suggested that the deadlines should automatically be extended when the record is likely to be more than 10,000 pages. The commenters suggested that automatic extensions would eliminate the need for repetitive requests. Also, such a provision arguably would be consistent with the recent amendments to rule 8.619, regarding the record on automatic

appeal in capital cases, approved by the council last September. The working group declined to make this change. The working group expects that records often will exceed 10,000 pages, particularly since the proposal would require that a record on appeal include the record prepared for the automatic appeal and filings in the automatic appeal. Extensions may not be needed in those cases where much of the record was already previously compiled, such as for the automatic appeal. The working group concluded that requiring extensions to be requested was, on balance, preferable to automatically granting more time where none might be needed.

Form. Several commenters questioned whether the proposal should incorporate the opt-out provisions of Code of Civil Procedure section 271. That statute requires an electronic transcript unless, prior to January 1, 2023, the reporter lacks the technical ability to create such a transcript or the court lacks the ability to use or store the transcript. The working group declined to incorporate this opt-out provision on the ground that it was highly unlikely that any court or reporter will require it in these capital cases. The working group also felt strongly that electronic transcripts are necessary to expediting review in capital cases.

Since 2000, Penal Code section 190.8 has required superior courts to assign a court reporter who uses computer-aided transcription equipment to report all proceedings conducted in the superior court in any case in which a death sentence may be imposed. There is no opt-out provision for such capital proceedings. Proposed rule 4.574, which is recommended for adoption in the separate concurrently submitted report to the Judicial Council, clarifies that this requirement extends to death penalty–related habeas corpus proceedings in the superior courts and does not include an opt-out provision. Thus, the court reporter assigned to the superior court habeas corpus proceeding already would be required to deliver transcripts in electronic form.

With respect to the courts, rules 8.613 and 8.619 already require that court reporters deliver copies of transcripts from capital trials in electronic form. Thus, the superior courts that have had capital trials, and thus may have related habeas corpus proceedings, already should have received and distributed reporter's transcripts in electronic form. Additionally, all of the Court of Appeal districts in California are capable of accepting, using, and storing electronic transcripts. Thus, the working group is unaware of any courts likely to hear these habeas corpus proceedings that will be unable to use or store electronic transcripts.

In short, because existing and concurrently proposed rules would already require electronic transcripts, thereby rendering any opt-out provision unnecessary for purposes of these appeals, the working group declined to include such a provision.

Length of briefs

Several commenters suggested that while the length limits may be appropriate for the strictly appellate issues, they should not apply to the ineffective assistance of counsel claims not previously raised in the superior court, as such claims are more akin to habeas corpus claims rather than appellate claims. Notably, there are no length limits on death penalty–related habeas corpus petitions. The working group declined to make this change at this time, because it is not clear that the 300 pages that would be provided for the opening brief generally will be

insufficient to accommodate any new ineffective assistance of counsel claims. Additionally, the presiding justice may permit overlength briefs where appropriate. If, as the rules are implemented and such claims are actually filed, courts find that they must regularly extend the length limits because 300 pages is inadequate, an appropriate Judicial Council advisory body may wish to revisit this suggestion.

One commenter suggested the rules should explain what constitutes good cause for extending the length. This is a new type of appeal. The good cause factors for overlength briefs in other types of cases will not necessarily apply here. Thus, the working group declined to make this change at this time. The working group was mindful that articulating what may constitute good cause at this stage, before any of these appeals have even been briefed, might be premature and unnecessarily restrictive.

Another commenter suggested that the length limits for typewritten briefs should be deleted as obsolete. While the working group agrees that counsel are unlikely to be using typewriters to draft their briefs, this provision is repeated in multiple other existing rules, including the length limits for capital automatic appeals. Consideration should be given to eliminating this provision in all of the rules where it appears. Thus, the working group recommends that this suggestion be referred for consideration by the appropriate Judicial Council advisory body at a later date.

Filing deadlines for briefs

As circulated, the proposal did not provide for automatic extensions based on voluminous records. Multiple commenters suggested including such automatic extensions, as are provided for in the rule on briefs in capital automatic appeals. Some members of the working group were concerned that providing such automatic extensions would unnecessarily delay the filing of the briefs. The records in these appeals generally will be longer than in the automatic appeals. Additionally, requiring extensions be requested, rather than automatically granted, might help limit extensions to where they are reasonably needed, and also would provide the court with a status update of sorts, to ensure that appointed counsel is making progress on briefing and not engaging in any unnecessary delay.

On the other hand, as a practical matter, briefing will take longer for very voluminous records because it will take counsel longer to review the records. Providing automatic extensions arguably is more efficient because it will save counsel and the courts from having to request and consider extensions that are reasonably and foreseeably necessary. Additionally, some members of the working group were of the view that this provision could impact the pool of counsel available and willing to accept appointments for these appeals. Their argument was that counsel may be less willing to accept appointments where the record is particularly voluminous if they are concerned that they will not be given adequate time to review the record and file the opening brief. Ultimately, the working group concluded that granting limited automatic extensions totaling no more than 150 additional days, while permitting the presiding justice to grant further extensions based on record-length, struck the appropriate balance.

One commenter suggested that the deadlines were excessive and should be shorter. Multiple commenters suggested instead that the opening brief deadline was too short, particularly to adequately raise new ineffective assistance claims, with one commenter stating that it should run from the final augmentation or correction to the record, and another stating that it should be one year from appointment of counsel, as for the filing of the underlying petition. The working group declined to modify the proposal in response to these suggestions, concluding that it made the most sense to model these appellate briefing deadlines on the deadlines in the capital automatic appeal. The proposal expressly permits extending these deadlines where appropriate.

Ineffective assistance of counsel claims not raised in the superior court

One commenter suggested that the proposal suggests that all omitted claims of ineffective assistance of trial counsel may be raised on appeal, rather than the narrower subset where the failure to raise the claim in the habeas corpus petition itself amounts to ineffective assistance by habeas corpus counsel. The working group modified the proposal to include an advisory committee comment referencing Penal Code section 1509.1(b), to make clear that what claims may be raised are limited by statute.

The proposal, as circulated, provided that, if a proffer does not comply with the formatting requirements, a clerk could notify the filer that it may strike the proffer if it is not brought into compliance within a reasonable period of time "not less than five days." One commenter suggested this should be "five court days." The working group made this change. Another commenter suggested the five days should instead be 30 days. The working group declined to make this change, as some formatting edits might be quite simple to make and not require more than 30 days.

One commenter suggested automatically staying the remainder of the appeal when such claims are remanded to the superior court. Another commenter suggested, following consolidation of appeals after a remand, the rules should provide a deadline for when a superior court must augment the record to include the proceedings on the remanded claims. The working group declined to make these changes, concluding that, at this stage, leaving these decisions to the discretion of the courts would permit them to more efficiently manage these novel proceedings.

One commenter objected to the articulated standard for requiring an evidentiary hearing. However, the proposed language is repeated in existing rule 4.551(f) and rule 8.386(f), which relate to habeas corpus proceedings in the superior court and appellate courts, respectively. The working group's view is that proposed rule 8.397(d) should be consistent with those existing provisions, and thus declined to modify the provision.

Responsibilities of habeas corpus counsel

Transmission of habeas corpus counsel's file to appellate counsel. Multiple commenters suggested that the rules should require that habeas corpus counsel transmit their files to appellate counsel. Accordingly, such a provision is recommended in the separate, but related and concurrently submitted, report to the Judicial Council containing the working group's proposal

for rules governing procedures for death penalty–related habeas corpus proceedings in the superior courts.

Filing the notice of appeal. Because these appeals are newly authorized, there was some concern that counsel or petitioner might inadvertently fail to file a notice of appeal from the superior court's decision in death penalty–related habeas corpus proceedings. While the proposal would provide that "petitioner's counsel . . . is responsible for signing the notice of appeal," it does not actually require counsel to file the notice appeal. The working group considered including such a provision in the separate, but related and concurrently submitted, report to the council, but concluded there was not sufficient time to develop and circulate the proposal. Accordingly, the working group recommends this suggestion be referred for consideration by the appropriate Judicial Council advisory body at a later date.

Transfer of appeals

One commenter suggested the working group should propose rules addressing the possible transfer of these appeals, both by the Supreme Court from one Court of Appeal district to another district, as well as by the Court of Appeal from one division to another division within the same district. The working group declined to propose rules regarding the Supreme Court's potential transfer of appeals. The working group concluded that the Supreme Court likely is in the best position to determine whether it requires procedures and policies regarding the exercise of its own transfer authority. Also, with respect to transfers between appellate divisions, the working group initially concluded that such a rule was unnecessary in light of existing rule 10.1000, which addresses the transfer of causes between divisions. However, in light of the commenter's suggestion that the existing rule may not be sufficient for these appeals, and that additional rules on the topic would be beneficial, the working group recommends that the suggestion be referred for consideration by the appropriate Judicial Council advisory body at a later time.

Funding

As with prior proposals developed by the working group, this proposal received multiple comments concerning funding. Many commenters questioned how the proposal can be implemented before sources and levels of funding are determined. Other commenters noted the likelihood of increased costs and burdens on the superior courts and the Courts of Appeal as a result of having to hear these habeas corpus proceedings and related appeals. Multiple commenters noted that these appeals will result in greatly increased workloads for many court staff and judicial officers as their caseloads are increased, and may require the hiring of additional staff, including research attorneys, to assist in processing these appeals. Multiple commenters also noted that increased training would be required for both staff and judicial officers. Several commenters noted that there would be related administrative costs, such as adapting case management systems to handle these new appeals. Some commenters also noted that the burdens are likely to fall unevenly, as most appeals are likely to be filed in just a few districts of the Court of Appeal.

The proposal was not modified in response to these comments because the question of funding is outside the scope of the working group's charge. However, the working group agrees that

funding is critical and will impact implementation of this proposal. As funding questions are answered, the working group expects that some of the proposed rules recommended herein may merit reconsideration in light of such additional information.

Alternatives considered

The working group considered many different alternatives to the recommended actions. Although most of these have been addressed above in the Comments section, additional alternatives are discussed below.

Time for beginning preparation of the record on appeal

In addition to the alternatives discussed in the Comments section, the working group also considered whether to require preparation of the record begin immediately upon the superior court's granting of a certificate of appealability. Rather than assume all such decisions will be appealed, the working group concluded it was better not to require transcript preparations until after the filing of an operative notice of appeal. This alternative may merit revisiting if, in practice, it turns out that petitioners almost universally appeal decisions where a certificate of appealability is issued.

Filing deadlines for briefs

Several commenters raised concerns that the new ineffective assistance of counsel claims might require more time to prepare than those claims limited to the record on appeal. As a result, the working group considered whether to modify the proposal to expressly permit the reviewing court to set a special briefing schedule for these claims. The working group ultimately rejected such a modification because it concluded that piecemeal or bifurcated briefing likely would be less efficient. Instead, such a modification seemed likely to make briefing more complicated. Additionally, the reviewing court has a great deal of discretionary authority to manage the appeal, and likely could order a separate or supplemental briefing schedule for the ineffective assistance of counsel claims, perhaps making an additional rule unnecessary.[11]

Ineffective assistance of counsel claims not raised in the superior court

The proposed rule on the evidentiary hearing, when circulated, stated that, on limited remand, the superior court "must proceed under the rules for habeas corpus cases in capital cases in the superior court." The working group, after further considering the matter, concluded that it would be more beneficial to have the proposal specify that the superior court must proceed under the rules governing evidentiary hearings and decisions.

However, several members of the working group were of the view that the proposal should not specify what rules should govern the superior court's proceedings on limited remand. The concern was that such specificity could unintentionally limit the scope of the proceedings. For example, a future petitioner may wish to argue that, on limited remand, the superior court—after

[11] Proposed rule 8.396 provides that briefs must comply with rule 8.200. Rule 8.200(a)(4) provides that "[n]o other briefs may be filed except with the permission of the presiding justice," thereby authorizing additional briefs with permission.

holding an evidentiary hearing and concluding that habeas corpus counsel was ineffective in failing to raise a claim that trial counsel was ineffective—may then proceed to consider the underlying habeas corpus argument and possibly even grant habeas corpus relief on the basis that trial counsel was ineffective.

The working group, in specifying that the superior court must proceed under the rules governing evidentiary hearings and decisions, does not intend to foreclose such arguments. Rather, as explained in the Proposal section, above, the working group's intent is to make clear that a new petition, informal response and reply, and order to show cause are not required on limited remand in order to hold an evidentiary hearing the Court of Appeal already concluded would be necessary to deciding the claim, or to decide the question of whether habeas corpus counsel was ineffective in failing to raise a claim that trial counsel was ineffective.

Fiscal and Operational Impacts

The changes made by Proposition 66 to the procedures for review of death penalty cases, particularly making the superior courts generally responsible for hearing habeas corpus proceedings in these cases and providing for appeals by either party of superior court habeas corpus decisions, will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. However, the specific rule changes recommended herein relating to appeals from superior court decisions in death penalty–related habeas corpus proceedings are unlikely, on their own, to impose any appreciable implementation requirements, costs, or operational impacts beyond requiring additional training for judicial officers and court staff.

Attachments and Links

1. Charge to Proposition 66 Rules Working Group, at page 28
2. Roster of Proposition 66 Rules Working Group, at pages 29–30
3. Cal. Rules of Court, rules 8.388 and 8.390–8.398, at pages 31–46
4. Form HC-200, at pages 47–48
5. Chart of comments, at pages 49–153
6. Copies of comments received, at pages 154–242
7. Link A: Ballot description and arguments for and against Prop. 66, and text of Prop. 66, *November 2016 Official Voter Information Guide* (pp. 104–109 and 212–218 of the linked document, respectively)

Charge to Proposition 66 Rules Working Group

The Proposition 66 Rules Working Group is charged with reviewing California Rules of Court, Standards of Judicial Administration, Judicial Council forms, and other authorities relevant to the processing of capital appeals and state habeas corpus petitions to determine whether and what modifications should be recommended to fulfill the Judicial Council's rule-making obligations under Proposition 66, the Death Penalty Reform and Savings Act of 2016.

The working group will consider what new or amended court rules, judicial administration standards, and Judicial Council forms are needed to address the act's provisions, including those governing:

- Appointment of counsel for indigent capital inmates for both the direct appeal and habeas corpus proceedings, including the time frame for appointments and the qualifications necessary to achieve competent representation, the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code (Pen. Code, § 1509 and § 1239.1 and Gov. Code, § 68665);
- The filing of habeas corpus petitions and other matters in the sentencing court and all procedures attendant thereto, including those pertaining to assignment of habeas corpus matters, briefing requirements, certificates of appealability, successive or untimely petitions, and method of execution (Pen. Code, § 1509 and § 3601.1(c));
- Appeals of the sentencing court's rulings on capital habeas corpus petitions to the Court of Appeal and all procedures attendant thereto, including those pertaining to certificates of appealability, priority of such appeals, and the possibility of California Supreme Court review (Pen. Code, § 1509.1); and
- Supreme Court procedures and time frames pertaining to record preparation and briefing in capital appeals (Pen. Code, § 190.6).

In formulating any proposed new or amended court rule, judicial administration standard, or Judicial Council form, the working group will strive to promote the expeditious review of death penalty judgments while ensuring justice and fairness to both defendants and victims. The working group will take into account the language of the act, *Briggs v. Brown* ((2017) 3 Cal.5th 808), and constitutional standards and principles. While participating in the working group, members are expected to not act as advocates of the interests of any stakeholder group, but to contribute to this statewide endeavor by drawing on their expertise in capital litigation, court administration, or other matters relevant to the act.

The working group will propose recommendations to the Judicial Council for adoption, effective April 26, 2019.

Proposition 66 Rules Working Group

As of February 5, 2018

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Second Appellate District
Division Seven

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Appellate Defenders, Inc.
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Proposition 66 Rules Working Group

As of February 5, 2018

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Rules 8.390–8.398 of the California Rules of Court are adopted and rule 8.388 is amended, effective April 25, 2019, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 4. Habeas Corpus Appeals and Writs

Article 1. Habeas Corpus Proceedings Not Related to Judgment of Death

Rules 8.380–8.387 * * *

Rule 8.388. Appeal from order granting relief by writ of habeas corpus

(a) Application

Except as otherwise provided in this rule, rules 8.304–8.368 and 8.508 govern appeals under Penal Code section 1506 or 1507 from orders granting all or part of the relief sought in a petition for writ of habeas corpus. This rule does not apply to appeals under Penal Code section 1509.1 from superior court decisions in death penalty–related habeas corpus proceedings.

(b) * * *

Article 2. Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

Rule 8.390. Application

(a) Application

The rules in this article apply only to appeals under Penal Code section 1509.1 from superior court decisions in death penalty–related habeas corpus proceedings.

(b) General application of rules for criminal appeals

Except as otherwise provided in this article, rules 8.300, 8.316, 8.332, 8.340–8.346, and 8.366–8.368 govern appeals subject to the rules in this article.

Rule 8.391. Qualifications and appointment of counsel by the Court of Appeal

(a) Qualifications

To be appointed by the Court of Appeal to represent an indigent petitioner not represented by the State Public Defender in an appeal under this article, an attorney must:

(1) Meet the minimum qualifications established by rule 8.652 for attorneys to be appointed to represent a person in a death penalty–related habeas corpus proceeding, including being willing to cooperate with an assisting counsel or entity that the court may designate;

(2) Be familiar with appellate practices and procedures in the California courts, including those related to death penalty appeals; and

(3) Not have represented the petitioner in the habeas corpus proceedings that are the subject of the appeal unless the petitioner and counsel expressly request, in writing, continued representation.

(b) Designation of assisting entity or counsel

Either before or at the time it appoints counsel, the court must designate an assisting entity or counsel.

Rule 8.392. Filing the appeal; certificate of appealability

(a) Notice of appeal

(1) To appeal from a superior court decision in a death penalty–related habeas corpus proceeding, the petitioner or the People must serve and file a notice of appeal in that superior court. To appeal a decision denying relief on a successive habeas corpus petition, the petitioner must also comply with (b).

(2) If the petitioner appeals, petitioner's counsel, or, in the absence of counsel, the petitioner, is responsible for signing the notice of appeal. If the People appeal, the attorney for the People must sign the notice.

(b) Appeal of decision denying relief on a successive habeas corpus petition

(1) The petitioner may appeal the decision of the superior court denying relief on a successive death penalty–related habeas corpus petition only if the superior court or the Court of Appeal grants a certificate of appealability under Penal Code section 1509.1(c).

(2) The petitioner must identify in the notice of appeal that the appeal is from a superior court decision denying relief on a successive petition and indicate whether the superior court granted or denied a certificate of appealability.

(3) If the superior court denied a certificate of appealability, the petitioner must attach to the notice of appeal a request to the Court of Appeal for a certificate of appealability. The request must identify the petitioner's claim or claims for relief and explain how the requirements of Penal Code section 1509(d) have been met.

(4) On receiving the request for a certificate of appealability, the Court of Appeal clerk must promptly file the request and send notice of the filing date to the parties.

(5) The People need not file an answer to a request for a certificate of appealability unless the court requests an answer. The clerk must promptly send to the parties and the assisting entity or counsel copies of any order requesting an answer and immediately notify the parties by telephone or another expeditious method. Any answer must be served on the parties and the assisting entity or counsel and filed within five days after the order is filed unless the court orders otherwise.

(6) The Court of Appeal must grant or deny the request for a certificate of appealability within 10 days of the filing of the request in that court. If the Court of Appeal grants a certificate of appealability, the certificate must identify the substantial claim or claims for relief shown by the petitioner. The clerk must send a copy of the certificate or its order denying the request for a certificate to:

(A) The attorney for the petitioner or, if unrepresented, to the petitioner;

(B) The district appellate project and, if designated, any assisting entity or counsel other than the district appellate project;

(C) The Attorney General;

(D) The district attorney;

(E) The superior court clerk; and

(F) The clerk/executive officer of the Supreme Court.

(7) If both the superior court and the Court of Appeal deny a certificate of appealability, the clerk/executive officer of the Court of Appeal must mark the notice of appeal "Inoperative," notify the petitioner, and send a copy of the marked notice of appeal to the superior court clerk, the clerk/executive officer of the Supreme Court, the district appellate project, and, if designated, any assisting entity or counsel other than the district appellate project.

(c) Notification of the appeal

(1) Except as provided in (2), when a notice of appeal is filed, the superior court clerk must promptly—and no later than five days after the notice of appeal is filed—send a notification of the filing to:

(A) The attorney for the petitioner or, if unrepresented, to the petitioner;

(B) The district appellate project and, if designated, any assisting entity or counsel other than the district appellate project;

(C) The Attorney General;

(D) The district attorney;

(E) The clerk/executive officer of the Court of Appeal;

(F) The clerk/executive officer of the Supreme Court;

(G) Each court reporter; and

(H) Any primary reporter or reporting supervisor.

(2) If the petitioner is appealing from a superior court decision denying relief on a successive petition and the superior court did not issue a certificate of appealability, the clerk must not send the notification of the filing of a notice of appeal to the court reporter or reporters unless the clerk receives a copy of a certificate of appealability issued by the Court of Appeal under (b)(6). The clerk must send the notification no later than five days after the superior court receives the copy of the certificate of appealability.

(3) The notification must show the date it was sent, the number and title of the case, and the dates the notice of appeal was filed and any certificate of appealability was issued. If the information is available, the notification must also include:

(A) The name, address, telephone number, e-mail address, and California State Bar number of each attorney of record in the case; and

(B) The name of the party each attorney represented in the superior court.

(4) The notification to the clerk/executive officer of the Court of Appeal must also include a copy of the notice of appeal, any certificate of appealability or denial of a certificate of appealability issued by the superior court, and the sequential list of reporters made under rule 2.950.

(5) A copy of the notice of appeal is sufficient notification under (1) if the required information is on the copy or is added by the superior court clerk.

(6) The sending of a notification under (1) is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(7) Failure to comply with any provision of this subdivision does not affect the validity of the notice of appeal.

Advisory Committee Comment

Subdivision (b). This subdivision addresses issuance of a certificate of appealability by the Court of Appeal. Rule 4.576(b) addresses issuance of a certificate of appealability by the superior court.

Rule 8.393. Time to appeal

A notice of appeal under this article must be filed within 30 days after the rendition of the judgment or the making of the order being appealed.

Rule 8.394. Stay of execution on appeal

(a) Application

Pending appeal under this article, the petitioner may apply to the reviewing court for a stay of execution of the death penalty. The application must be served on the People.

(b) Interim relief

Pending its ruling on the application, the reviewing court may grant the relief requested. The reviewing court must notify the superior court under rule 8.489 of any stay that it grants. Notification must also be sent to the clerk/executive officer of the Supreme Court.

Rule 8.395. Record on appeal

(a) Contents

In an appeal under this article, the record must contain:

(1) A clerk's transcript containing:

(A) The petition;

(B) Any informal response to the petition and any reply to the informal response;

(C) Any order to show cause;

(D) Any reply, return, answer, denial, or traverse;

(E) All supporting documents under rule 4.571, including the record prepared for the automatic appeal and all briefs, rulings, and other documents filed in the automatic appeal;

(F) Any other documents and exhibits submitted to the court, including any transcript of a sound or sound-and-video recording tendered to the court under rule 2.1040 and any visual aids submitted to the court;

(G) Any written communication between the court and the parties, including printouts of any e-mail messages and their attachments;

(H) All court minutes;

(I) Any statement of decision required by Penal Code section 1509(f) and any other written decision of the court;

(J) The order appealed from;

(K) The notice of appeal; and

(L) Any certificate of appealability issued by the superior court or the Court of Appeal.

(2) A reporter's transcript of any oral proceedings.

(b) Stipulation for partial transcript

If counsel for the petitioner and the People stipulate in writing before the record is certified that any part of the record is not required for proper determination of the appeal, that part need not be prepared or sent to the reviewing court.

(c) Preparation of record

(1) The reporter and the clerk must begin preparing the record immediately after the superior court issues the decision on an initial petition under Penal Code section 1509.

(2) If either party appeals from a superior court decision on a successive petition under Penal Code section 1509.1(c):

(A) The clerk must begin preparing the clerk's transcript immediately after the filing of the notice of appeal or, if one is required, the superior court's issuance of a certificate of appealability or the clerk's receipt of a copy of a certificate of appealability issued by the Court of Appeal under rule 8.391(b)(5), whichever is later. If a certificate of appealability is required to appeal the decision of the superior court, the clerk must not begin preparing the clerk's transcript until a certificate of appealability has issued.

(B) The reporter must begin preparing the reporter's transcript immediately on being notified by the clerk under rule 8.392(c) that the notice of appeal has been filed.

(d) Clerk's transcript

(1) Within 30 days after the clerk is required to begin preparing the transcript, the clerk must complete preparation of an original and four copies of the clerk's transcript.

(2) On request, the clerk must prepare an extra copy for the district attorney or the Attorney General, whichever is not counsel for the People on appeal.

(3) The clerk must certify as correct the original and all copies of the clerk's transcript.

(e) Reporter's transcript

(1) The reporter must prepare an original and the same number of copies of the reporter's transcript as (d) requires of the clerk's transcript, and must certify each as correct.

(2) As soon as the transcripts are certified, but no later than 30 days after the reporter is required to begin preparing the transcript, the reporter must deliver the original and all copies to the superior court clerk.

(3) Any portion of the transcript transcribed during superior court habeas corpus proceedings must not be retyped unless necessary to correct errors, but must be repaginated and combined with any portion of the transcript not previously transcribed. Any additional copies needed must not be retyped but, if the transcript is in paper form, must be prepared by photocopying or an equivalent process.

(4) In a multireporter case, the clerk must accept any completed portion of the transcript from the primary reporter one week after the time prescribed by (2) even if other portions are uncompleted. The clerk must promptly pay each reporter who certifies that all portions of the transcript assigned to that reporter are completed.

(f) Extension of time

(1) Except as provided in this rule, rules 8.60 and 8.63 govern requests for extension of time to prepare the record.

(2) On request of the clerk or a reporter showing good cause, the superior court may extend the time prescribed in (d) or (e) for preparing the clerk's or reporter's transcript for no more than 30 days. If the superior court orders an extension, the order must specify the reason justifying the extension. The clerk must promptly send a copy of the order to the reviewing court.

(3) For any further extension, the clerk or reporter must file a request in the reviewing court showing good cause.

(4) A request under (2) or (3) must be supported by:

(A) A declaration showing good cause. The court may presume good cause if the clerk's and reporter's transcripts combined will likely exceed 10,000 pages, not including the supporting documents submitted with the petition, any informal response, reply to the informal response, return, answer, or traverse; and

(B) In the case of a reporter's transcript, certification by the superior court presiding judge or a court administrator designated by the presiding judge that an extension is reasonable and necessary in light of the workload of all reporters in the court.

(g) Form of record

(1) The reporter's transcript must be in electronic form. The clerk is encouraged to send the clerk's transcript in electronic form if the court is able to do so.

(2) The clerk's and reporter's transcripts must comply with rules 8.45–8.47, relating to sealed and confidential records, and rule 8.144.

(h) Sending the transcripts

(1) When the clerk's and reporter's transcripts are certified as correct, the clerk must promptly send:

(A) The original transcripts to the reviewing court, noting the sending date on each original; and

(B) One copy of each transcript to:

(i) Appellate counsel for the petitioner;

(ii) The assisting entity or counsel, if designated, or the district appellate project;

(iii) The Attorney General or the district attorney, whichever is counsel for the People on appeal;

(iv) The district attorney or Attorney General if requested under (d)(2); and

(v) The Governor.

(2) If the petitioner is not represented by appellate counsel when the transcripts are certified as correct, the clerk must send that copy of the transcripts to the assisting entity or counsel, if designated, or the district appellate project.

(i) Supervision of preparation of record

The clerk/executive officer of the Court of Appeal, under the supervision of the administrative presiding justice or the presiding justice, must take all appropriate steps to ensure that superior court clerks and reporters promptly perform their duties under this rule. This provision does not affect the responsibility of the superior courts for the prompt preparation of appellate records.

(j) Augmenting or correcting the record in the Court of Appeal

Rule 8.340 governs augmenting or correcting the record in the Court of Appeal, except that copies of augmented or corrected records must be sent to those listed in (h).

(k) Judicial notice

Rule 8.252(a) governs judicial notice in the reviewing court.

Rule 8.396. Briefs by parties and amici curiae

(a) Contents and form

(1) Except as provided in this rule, briefs in appeals governed by the rules in this article must comply as nearly as possible with rules 8.200 and 8.204.

(2) If, as permitted by Penal Code section 1509.1(b), the petitioner wishes to raise a claim in the appeal of ineffective assistance of trial counsel that was not raised in the superior court habeas corpus proceedings, that claim must be raised in the first brief filed by the petitioner. A brief containing such a claim must comply with the additional requirements in rule 8.397.

(3) If the petitioner is appealing from a decision of the superior court denying relief on a successive death penalty–related habeas corpus petition, the petitioner may only raise claims in the briefs that were identified in the certificate of appealability that was issued and any additional claims added by the Court of Appeal as provided in Penal Code section 1509.1(c).

(b) Length

(1) A brief produced on a computer must not exceed the following limits, including footnotes, except that if the presiding justice permits the appellant to file an opening brief that exceeds the limit set in (1)(A) or (3)(A), the respondent's brief may not exceed the same length:

(A) Appellant's opening brief: 102,000 words.

(B) Respondent's brief: 102,000 words.

(C) Reply brief: 47,600 words.

(2) A brief under (1) must include a certificate by appellate counsel stating the number of words in the brief; counsel may rely on the word count of the computer program used to prepare the brief.

(3) A typewritten brief must not exceed the following limits, except that if the presiding justice permits the appellant to file an opening brief that exceeds the limit set in (1)(A) or (3)(A), the respondent's brief may not exceed the same length:

(A) Appellant's opening brief: 300 pages.

(B) Respondent's brief: 300 pages.

(C) Reply brief: 140 pages.

(4) The tables required under rule 8.204(a)(1), the cover information required under rule 8.204(b)(10), a certificate under (2), any signature block, and any attachment permitted under rule 8.204(d) are excluded from the limits stated in (1) and (3).

(5) A combined brief in an appeal governed by (e) must not exceed double the limit stated in (1) or (3).

(6) On application, the presiding justice may permit a longer brief for good cause.

(c) Time to file

(1) The appellant's opening brief must be served and filed within 210 days after either the record is filed or appellate counsel is appointed, whichever is later.

(2) The respondent's brief must be served and filed within 120 days after the appellant's opening brief is filed.

(3) The appellant must serve and file a reply brief, if any, within 60 days after the filing of respondent's brief.

(4) If the clerk's and reporter's transcripts combined exceed 10,000 pages, the time limits stated in (1) and (2) are extended by 15 days for each 1,000 pages of combined transcript over 10,000 pages, up to 20,000 pages. The time limits in (1) and (2) may be extended further by order of the presiding justice under rule 8.60.

(5) The time to serve and file a brief may not be extended by stipulation, but only by order of the presiding justice under rule 8.60.

(6) If a party fails to timely file an appellant's opening brief or a respondent's brief, the clerk/executive officer of the Court of Appeal must promptly notify the party in writing that the brief must be filed within 30 days after the notice is sent, and that failure to comply may result in sanctions specified in the notice.

(d) Service

(1) The petitioner's appellate counsel must serve each brief for the petitioner on the assisting entity or counsel, the Attorney General, and the district attorney, and must deliver a copy of each to the petitioner unless the petitioner requests otherwise.

(2) The proof of service must state that a copy of the petitioner's brief was delivered to the petitioner or will be delivered in person to the petitioner within 30 days after the filing of the brief, or counsel must file a signed statement that the petitioner requested in writing that no copy be delivered.

(3) The People must serve each of their briefs on the appellate counsel for the petitioner, the assisting entity or counsel, and either the district attorney or the Attorney General, whichever is not representing the People on appeal.

(4) A copy of each brief must be served on the superior court clerk for delivery to the superior court judge who issued the order being appealed.

(e) When the petitioner and the People appeal

When both the petitioner and the People appeal, the petitioner must file the first opening brief unless the reviewing court orders otherwise, and rule 8.216(b) governs the contents of the briefs.

(f) Amicus curiae briefs

Amicus curiae briefs may be filed as provided in rule 8.200(c), except that an application for permission of the presiding justice to file an amicus curiae brief must be filed within 14 days after the last appellant's reply brief is filed or could have been filed under (c), whichever is earlier.

Advisory Committee Comment

Subdivision (a)(3). This subdivision is intended to implement the sentence in Penal Code section 1509.1(c) providing that "[t]he jurisdiction of the court of appeal is limited to the claims identified in the certificate [of appealability] and any additional claims added by the court of appeal within 60 days of the notice of appeal."

Subdivision (b)(4). This subdivision specifies certain items that are not counted toward the maximum brief length. Signature blocks referred to in this provision include not only the signatures, but also the printed names, titles, and affiliations of any attorneys filing or joining in the brief, which may accompany the signature.

Rule 8.397. Claim of ineffective assistance of trial counsel not raised in the superior court

(a) Application

This rule governs claims under Penal Code section 1509.1(b) of ineffective assistance of trial counsel not raised in the superior court habeas corpus proceeding giving rise to an appeal under this article.

(b) Discussion of claim in briefs

(1) A claim subject to this rule must be raised in the first brief filed by the petitioner.

(2) All discussion of claims subject to this rule must be addressed in a separate part of the brief under a heading identifying this part as addressing claims of ineffective assistance of trial counsel that were not raised in a superior court habeas corpus proceeding.

(3) Discussion of each claim within this part of the brief must be under a separate subheading identifying the claim. Petitioner's brief must include a summary of the claim under the subheading, and each claim must be supported by argument and, if possible, by citation of authority.

(4) This part of the brief may include references to matters:

(A) In the record on appeal prepared under rule 8.395. Any reference to a matter in the record must be supported by a citation to the volume and page number of the record where the matter appears.

(B) Of which the court has taken judicial notice.

(C) In a proffer required under (c). Any reference to a matter in a proffer must be supported by a citation to its index number or letter and page.

(c) Proffer

(1) A brief raising a claim under Penal Code section 1509.1(b) of ineffective assistance of trial counsel not raised in a superior court habeas corpus proceeding must be accompanied by a proffer of any reasonably available documentary evidence supporting the claim that is not in either the record on appeal prepared under rule 8.395 or matters of which the court has taken judicial notice. A brief responding to such a claim must be accompanied by a proffer of any reasonably available documentary evidence the People are relying on that is not in the petitioner's proffer, the record on appeal prepared under rule 8.395, or matters of which the court has taken judicial notice.

(A) If a brief raises a claim that was the subject of an evidentiary hearing, the proffer must include a certified transcript of that hearing.

(B) Evidence may be in the form of affidavits or declarations under penalty of perjury.

(2) The proffer must comply with the following formatting requirements:

(A) The pages must be consecutively numbered.

(B) It must begin with a table of contents listing each document by its title and its index number or letter. If a document has attachments, the table of contents must give the title of each attachment and a brief description of its contents.

(C) If submitted in paper form:

(i) It must be bound together at the end of the brief or in separate volumes not exceeding 300 pages each.

(ii) It must be index-tabbed by number or letter.

(3) The clerk must file any proffer not complying with (2), but the court may notify the filer that it may strike the proffer and the portions of the brief referring to the proffer if the documents are not brought into compliance within a stated reasonable time of not less than five court days.

(4) If any documents in the proffer are sealed or confidential records, rules 8.45–8.47 govern these documents.

(d) Evidentiary hearing

An evidentiary hearing is required if, after considering the briefs, the proffer, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact. The reviewing court may take one of the following actions:

(1) Order a limited remand to the superior court to consider the claim under Penal Code section 1509.1(b). The order for limited remand vests jurisdiction over the claim in the superior court, which must proceed under rule 4.574(d)(2)–(3) and (e)–(g) and rule 4.575 for death penalty–related habeas corpus proceedings in the superior court. The clerk/executive officer of the Court of Appeal must send a copy of any such order to the clerk/executive officer of the Supreme Court.

(2) Appoint a referee to conduct the hearing and make recommended findings of fact.

(3) Conduct the hearing itself or designate a justice of the court to conduct the hearing.

(e) Procedures following limited remand

(1) If the reviewing court orders a limited remand to the superior court to consider a claim under Penal Code section 1509.1(b), it may stay the proceedings on the remainder of the appeal pending the decision of the superior court on remand. The clerk/executive officer of the Court of Appeal

must send a copy of any such stay to the clerk/executive officer of the Supreme Court.

(2) If any party wishes to appeal from the superior court decision on remand, the party must file a notice of appeal as provided in rule 8.392.

(3) If an appeal is filed from the superior court decision on remand, the reviewing court may consolidate this appeal with any pending appeal under Penal Code section 1509.1 from the superior court's decisions in the same habeas corpus proceeding. A copy of any consolidation order must be promptly sent to the superior court clerk. The superior court clerk must then augment the record on appeal to include all items listed in rule 8.395(a) from the remanded proceedings.

Advisory Committee Comment

Penal Code section 1509.1(b) states when a claim of ineffective assistance of trial counsel not raised in the superior court habeas corpus proceeding may be raised in an appeal under this article.

Rule 8.398. Finality

(a) General rule

Except as otherwise provided in this rule, rule 8.366(b) governs the finality of a Court of Appeal decision in a proceeding under this article.

(b) Denial of certificate of appealability

The Court of Appeal's denial of an application for a certificate of appealability in a proceeding under this article is final in that court on filing.

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	**DRAFT**
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		**01/31/19**
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		**Not approved by the Judicial Council**
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
In re _____ (NAME OF PETITIONER)	on Habeas Corpus	
PETITIONER'S NOTICE OF APPEAL Death Penalty–Related Habeas Corpus Decision (Pen. Code, § 1509.1; Cal. Rules of Court, rule 8.392)		CASE NUMBER:

NOTICE

- **You must file this form in the SUPERIOR COURT WITHIN 30 DAYS after the court rendered the judgment or made the order you are appealing.**
- **IMPORTANT:** If you are appealing the decision of a superior court denying relief on a successive habeas corpus petition related to a sentence of death, and the superior court did not grant you a certificate of appealability, you must complete the Request for Certificate of Appealability on page 2 of this form.

1. Petitioner appeals from a judgment rendered or an order made by the superior court in a death penalty–related habeas corpus proceeding.

   NAME of petitioner:

   DATE of the order or judgment:

2. ☐ This is an appeal from the decision of a superior court denying relief on a successive habeas corpus petition related to a sentence of death. (*If you check this box, you must check a or b.*)

   a. ☐ The superior court granted a certificate of appealability.

   b. ☐ The superior court did not grant a certificate of appealability. *(You must complete the Request for Certificate of Appealability on page 2 of this form.)*

3. ☐ Petitioner requests that the court appoint an attorney for this appeal. Petitioner ☐ was ☐ was not represented by an appointed attorney in the superior court.

4. Petitioner's mailing address is: ☐ same as in attorney box above.
   ☐ as follows:

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER OR ATTORNEY)

Form Approved for Mandatory Use
Judicial Council of California
HC-200 [New April 25, 2019]

PETITIONER'S NOTICE OF APPEAL—DEATH PENALTY–RELATED HABEAS CORPUS DECISION

Penal Code, § 1509.1;
Cal. Rules of Court, rule 8.392
www.courts.ca.gov

In re _____ on Habeas Corpus (NAME OF PETITIONER)	CASE NUMBER:

REQUEST FOR CERTIFICATE OF APPEALABILITY

Penal Code section 1509.1(c) provides that a certificate of appealability may be issued only if the petitioner has shown both "a substantial claim for relief" and "a substantial claim that the requirements of subdivision (d) of section 1509 have been met."

Penal Code section 1509(d) provides, in full:

> An initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. A stay of execution shall not be granted for the purpose of considering a successive or untimely petition unless the court finds that the petitioner has a substantial claim of actual innocence or ineligibility. "Ineligible for the sentence of death" means that circumstances exist placing that sentence outside the range of the sentencer's discretion. Claims of ineligibility include a claim that none of the special circumstances in subdivision (a) of Section 190.2 is true, a claim that the defendant was under the age of 18 at the time of the crime, or a claim that the defendant has an intellectual disability, as defined in Section 1376. A claim relating to the sentencing decision under Section 190.3 is not a claim of actual innocence or ineligibility for the purpose of this section.

1. I request that the Court of Appeal issue a certificate of appealability. My claims for relief are:

2. My claim that the requirements of Penal Code section 1509(d) have been met is:

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

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER OR ATTORNEY)

SP18-21

Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings
(Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
1.	Aderant CompuLaw by Miri K. Wakuta, Associate Rules Attorney	NI	Dear Proposition 66 Rules Working Group, Aderant CompuLaw respectfully submits the following comments to the proposed adoption of California Rules of Court 8.393 and form HC-200. See comments on specific provisions below.	See responses to specific comments below.
2.	Robert D. Bacon, Attorney at Law Oakland, California	NI	Thank you for the opportunity to comment on these proposed rules. I hope you will find my comments useful. To introduce myself, I am in the fairly unique position of having been involved in the criminal justice system as an appellate court manager, an appellate prosecutor, and now an attorney representing persons under sentence of death on appeal and in state and federal habeas corpus. I have been found qualified to represent capital habeas petitioners by the California Supreme Court and by the federal district courts for the Northern and Eastern Districts. I also regularly represent individuals convicted of murder in non-capital appeals in the Courts of Appeal. See comments on specific provisions below.	See responses to specific comments below.
3.	California Appellate Defense Counsel by Kyle Gee, Chair, CADC Government Relations Committee Oakland, California	NI	These comments are submitted on behalf of California Appellate Defense Counsel, Inc. ("CADC"), whose more than 400 members act as appointed counsel in a large number of criminal appeals, including capital appeals. We limit our	See responses to specific comments below.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
			comments to SP-21, "Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty Related Habeas Procedures." Our experience is in the appellate courts, and it is there that our experience might be of greatest assistance to the Working Group. We leave it to others to comment on issues and concerns on which they have a better universe of knowledge. CADC has three comments in reference to SP 21. The first concerns whether appointed counsel on the habeas appeal should receive the benefit of – and be required to cooperate with – an "assisting entity or counsel," as with counsel on the automatic appeal and in the Superior Court habeas proceedings. The second concerns the time at which the opening brief should be first due in the Court of Appeal, with focus on the "triggering event" for commencement of the 210-day period. The third concerns the need for a rule requiring Superior Court habeas counsel immediately to deliver the entire file to counsel on the habeas appeal. See comments on specific provisions below.	
4.	California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	NI	The California Appellate Project–San Francisco ("CAP-SF") submits the following comments on the proposed "Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings" (Item Number SP18·21).	See responses to specific comments below.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
			See comments on specific provisions below.	
5.	California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	NI	These comments reflect the concerns of California Attorneys for Criminal Justice (CACJ) regarding the proposed rules for filing habeas corpus petitions in superior courts and filing appeals of habeas corpus decisions in the courts of appeals. CACJ understands that Proposition 66 was passed and is the law. We respect the Judicial Council's role in creating rules to implement the law. Our main concern is that implementation of Proposition 66 not infringe on the constitutional rights of condemned inmates. CACJ's main concern is to ensure that counsel for the condemned inmate have an unobstructed opportunity to investigate and litigate collateral relief issues, including ineffective assistance of trial counsel in the superior court, the opportunity to appeal the habeas corpus rulings of the superior court, and present new claims of ineffective assistance of habeas corpus counsel in the court of appeals. The Judicial Council should recognize that the habeas corpus process defined in Proposition 66 will necessarily be more time- and resource-intensive than current habeas corpus procedures. Currently, the Supreme Court has discretion to review only those claims it finds have merit. Proposition 66 demands that the superior courts review every claim raised by	See responses to specific comments below.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
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			the capital habeas corpus petitioner, determine and document the merits of each claim. Each petition will be different and may require vastly different court resources for resolution. Flexibility, where there is good cause, is necessary to adequately meet the petitioner's due process needs and the demands of the superior court. See comments on specific provisions below.	
6.	California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	NI	Thank you for the opportunity to provide comments on behalf of the California Judges Association (CJA). In response to your request for specific comments, we offer the following comments and recommendations: * * * Our comments here are intended to assist with this proposal at this stage and are not representative of a position on the proposal. Thank you for the opportunity to provide these comments; we welcome any questions and further discussion. See comments on specific provisions below.	See responses to specific comments below.
7.	California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs San Francisco, California	NI	The Committee on Appellate Courts appreciates the Working Group's efforts to balance the mandates of Proposition 66 with the need to ensure reasonable procedures and qualifications for death penalty habeas proceedings. The current invitations to comment contain numerous issues, and the	See responses to specific comments below.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
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	and Katy Graham, Senior Appellate Court Attorney Court of Appeal, Second Appellate District, Division Six Ventura, California		Committee provides the following responses for the issues on which it has substantive suggestions. * * * The Committee on Appellate Courts generally supports this proposal and responds as follows to the Working Group's request for specific comments. See comments on specific provisions below.	
8.	Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	NI	The Fourth Appellate District submits the following comments on the proposed rules concerning appeals from decisions in death penalty-related habeas corpus proceedings. • Does the proposal appropriately address the stated purpose? Response: Yes. See comments on specific provisions below.	See responses to specific comments below.
9.	Court of Appeal, Sixth Appellate District by Mary J. Greenwood, Administrative Presiding Justice	NI	See comments on specific provisions below	See responses to specific comments below.
10.	Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman,	NI	The following comments are provided in response to Invitation to Comment SP18-21. See comments on specific provisions below.	See responses to specific comments below.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
	Assistant Clerk/Executive Officer			
11.	Court of Appeal Appellate Projects by Jonathan Soglin, Executive Director First District Appellate Project	NI	From: Court of Appeal Appellate Projects[1] Footnote 1: Appellate Defenders, Inc., the California Appellate Project-Los Angeles, Central California Appellate Program, the First District Appellate Project, and the Sixth District Appellate Program. The Court of Appeal appellate projects provide the following comments and suggestions regarding the proposed rules governing superior court and Court of Appeal capital habeas corpus proceedings. See comments on specific provisions below.	See responses to specific comments below.
12.	Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	NI	The Criminal Justice Legal Foundation, an organization dedicated to promoting the interests of victims of crime in the criminal justice system, submits these comments on SP18-21. As with our comment submitted today on SP18-22, we are concerned that not enough priority has been given to the statutory mandate to expedite the process. See comments on specific provisions below.	See responses to specific comments below.
13.	Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	NI	On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the procedures for appeals from superior court	See responses to specific comments below.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
			decisions on death penalty-related habeas corpus proceedings. Mexico welcomes the opportunity to convey its views on this very important matter. **I. INTRODUCTION** The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives.[1] While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad. Footnote 1: *See, e.g.*, Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261. Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the	

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
			execution of Mexican nationals, Mexico respects the right of the States to determine the punishment for crimes occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as they relate to Mexican nationals under sentence of death. As you may know, there are currently 39 Mexican nationals on death row in California. Please understand that these provisional comments are necessarily limited and submitted with the November 19, 2018 deadline in mind. The SP18-21 proposal is extensive and the topic complex. My government cannot reasonably respond to all of the questions raised in this proposal within the time allotted. As a general matter, the Government of Mexico agrees with the Judicial Council's findings, as stated in its companion proposal SP18-22 concerning capital habeas proceedings in superior courts, that "[t]here are significant differences between death penalty-related and noncapital habeas corpus proceedings" and that the "scope and complexity of a death penalty-related habeas corpus proceeding is far greater than the scope and complexity of a noncapital habeas corpus proceeding" (Proposal SP18-22 p. 4). In this vein, the American Bar Association has advised that "Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense	

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
			representation." American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition, Feb. 2003), Guideline 10.15.1(C). Thus, any new rules for death penalty cases must account for the unique needs these cases command. * * * III. **CONCLUSION** Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States. I avail myself of this opportunity to convey to you the assurances of my esteem and consideration. See comments on specific provisions below.	
14.	Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	NI	The below comments to SP 18-21 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients. See comments on specific provisions below	See responses to specific comments below.
15.	Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	NI	The Office of the State Public Defender (OSPD) represents over 120 men and women on California's death row. By statute, OSPD's primary responsibility is representing death-sentenced inmates in direct	See responses to specific comments below.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
			appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD also has many attorneys with significant experience in habeas corpus proceedings. We submit the following comments on the proposed rules relating to Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings, SP18-21. See comments on specific provisions below.	
16.	Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	AM	I am pleased to submit the following comments in regard to the proposed changes to the Rules of Court concerning Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings, Item Number SP18-21. <u>Statement of Interest</u> I am the attorney supervising the homicide unit ("Special Trial Unit") of the Santa Clara County Public Defender's Office. I also continue to litigate murder cases, including as lead counsel in a pending death penalty case. I have been a public defender for over 37 years, and I have been counsel of record in death penalty cases throughout that time, with occasional short breaks in between capital cases. I have been lead counsel at the penalty or punishment phase of three death penalty jury trials, each of which resulted in verdicts, two of life imprisonment without the possibility of parole, and one of death. I was also counsel in over 20 other death penalty cases that	See responses to specific comments below.

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
			eventually resolved for lesser sentences or resulted in the prosecution dropping the death penalty. I am the author of the chapter on Death Penalty Cases in *California Criminal Law, Procedure and Practice*, Continuing Education of the Bar, 2016-2018 annual editions; was the defense attorney consultant to the *Death Penalty Benchguide*, California Center for Judicial Education and Research, © Judicial Council of California, from its inception through 2011 (I believe that is the most recent edition of the *Benchguide*); and have been the editor of, and author of selected chapters in, the *California Death Penalty Defense Manual*, California Attorneys for Criminal Justice and the California Public Defenders Association, from 2004 through the present. I have been active in training defense counsel in capital cases since 1990 and have authored well over 100 articles on various topics of capital defense. <u>Position</u> I agree with some of the proposals if they are modified. My position is spelled out in detail below. See comments on specific provisions below.	
17.	Superior Court of Los Angeles County	A	These comments are from the Los Angeles Superior Court and not from any one person in particular. * * *	See responses to specific comments below.

SP18-21

Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings
(Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Working Group Response**
			Does the proposal appropriately address the stated purpose? Yes. See comments on specific provisions below.	
18.	Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	NI	The Judicial Council, Proposition 66 Rules Working Group has requested comments recently which include proposed rules relating to death penalty-related habeas corpus proceedings. We have included comments in regard to establishing procedures for the Superior Courts to process this type of proceeding. * * * • Does the proposal appropriately address the stated purpose? **Yes.** See comments on specific provisions below.	See responses to specific comments below.
19.	Superior Court of Riverside County by Susan Ryan, Chief Deputy of Legal Services	A	See comments on specific provisions below.	See responses to specific comments below.
20.	Superior Court of San Diego County by Mike Roddy, Executive Officer	AM	See comments on specific provisions below.	See responses to specific comments below.

Rule 8.391: Qualifications of counsel **(Are the qualifications standards for habeas corpus counsel in rule 8.652 also appropriate for counsel in these appeals?)**		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**2. The proposed rules regarding counsel are good ones, but clarification of some points would be useful** I heartily endorse Rule 8.391, requiring that appeal counsel be capital-habeas-qualified. This is particularly important given the responsibility of appeal counsel to perform the functions of habeas counsel in investigating potential claims of ineffective assistance of prior habeas counsel. While it might be ideal for these counsel to be *both* habeas-qualified and also qualified for major criminal appeals (either automatic appeals of death judgments in the Supreme Court or first-degree murder appeals in the Courts of Appeal, or both), the number of attorneys with both sets of qualifications is probably too small to make this realistic. The habeas credential is the more important of the two, given the responsibility of these counsel to function as habeas counsel in the first instance when they investigate second-level ineffective assistance claims.	Based on the comments, the working group has retained the proposed requirement that counsel appointed to represent a person in an appeal from a superior court decision in a death penalty–related habeas corpus proceeding must meet the minimum qualifications established by rule 8.652 for counsel appointed by the superior court in the habeas corpus proceeding. These qualifications include a willingness to cooperate with an assisting entity or counsel, who may have significant experience assisting counsel in the Courts of Appeal. Additionally, to address concerns raised by commenters, the working group modified the proposal to require—consistent with rule 8.605 for appointment in an automatic appeal—that counsel in these appeals be familiar with appellate practices and procedures in the California courts, including those related to capital appeals.
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	<u>Proposed Rule 8.391: Qualifications of counsel appointed by the Court of Appeal</u> Recommendation: The rule should require that counsel appointed to appeals from superior court habeas decisions meet the qualifications both for habeas appointments in superior court and direct appeal appointments to capital cases in the California Supreme Court, and that counsel have experience with both direct appeals and habeas.	Both when developing the proposal circulated for public comment and when reviewing the public comments received, the working group considered the option suggested—whether to require counsel to meet the qualifications requirements for both direct appeals and habeas corpus proceedings in capital cases. The working group, guided in part by

Rule 8.391: Qualifications of counsel **(Are the qualifications standards for habeas corpus counsel in rule 8.652 also appropriate for counsel in these appeals?)**		
Commenter	**Comment**	**Working Group Response**
	Appeals taken from habeas petitions require a specialized skill set that encompasses skills necessary to properly litigate both habeas corpus and appellate issues. Habeas corpus experience is required since counsel can raise, for the first time, claims of trial counsel ineffective assistance of counsel ("IAC") on appeal. As such, it is only logical that attorneys appointed to appeals arising from habeas cases meet appointment requirements for both direct appeal and habeas cases.	Proposition 66's direction, in Government Code section 68665(b), that the Judicial Council consider the qualifications needed to achieve competent representation and the need to avoid unduly restricting the available pool of attorneys, the working group decided against recommending that counsel meet both sets of requirements. The working group concluded that such a requirement could not only restrict the pool of available counsel for these appeals, but likely also would decrease the number of counsel available for appointment to automatic appeals. The working group agrees that counsel must have the knowledge and skills to enable them to properly litigate appellate issues. The working group's view is that this can be achieved in part through the support of an assisting entity or counsel who has expertise in appellate practice. Additionally, the working group modified the proposal to require—consistent with rule 8.605 for appointment in an automatic appeal—that counsel in these appeals be familiar with appellate practices and procedures in the California courts, including those related to capital appeals.
California Attorneys for Criminal Justice	The qualifications for capital habeas corpus appellate counsel should be the same as those for appointment on capital habeas corpus. (See	Please see the response to the comments of Robert D. Bacon above.

SP18-21

Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings
(Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

All comments are verbatim unless indicated by an asterisk (*).

Rule 8.391: Qualifications of counsel **(Are the qualifications standards for habeas corpus counsel in rule 8.652 also appropriate for counsel in these appeals?)**		
Commenter	**Comment**	**Working Group Response**
by Steve Rease, President Sacramento, California	CACJ comments to SP18-12 and SP18-13.) At the bare minimum, habeas corpus appellate counsel must have capital postconviction experience.	
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	The appellate projects (FDAP, CAP-LA, CCAP, ADI and SDAP) and Appellate Indigent Defense Oversight Advisory Committee (AIDOAC) are in the best position to comment on this proposed rule. CJA has no comment on this issue.	No response required.
California Lawyers Association Litigation Section by Saul Bercovitch, Director of Governmental Affairs San Francisco, California and Katy Graham, Senior Appellate Court Attorney Court of Appeal, Second Appellate District, Division Six Ventura, California	The Committee agrees that attorney qualifications in superior court death-penalty habeas proceedings should be similar to attorney qualifications in appeals from those proceedings. The Committee also recognizes that the Working Group must consider the ability to increase the pool of qualified attorneys. However, the Committee reiterates concerns it raised in response to SP 18-12, when the Working Group first solicited comments on the qualification process for death-penalty habeas appointments in superior courts. Specifically, the Committee suggests that: • appointed counsel should have significant experience representing a defendant/appellant/petitioner, rather than solely representing the prosecution/respondent; • appointed counsel should have some experience handling other murder cases; and, • appointed counsel should have experience with habeas matters, rather than merely direct appeals. As a possible middle ground between these suggestions and the Working Group's SP 18-12 proposals, the Committee suggests adopting a two-tiered qualification structure. Attorneys with the above	Please see the response to the comments of Robert D. Bacon above. The working group notes that the final version of rule 8.652 adopted by the Judicial Council on November 30, 2018, provides that counsel appointed by the superior court in death penalty–related habeas corpus proceedings must, among other things, have served as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony. Rule 8.652 also provides that counsel who do not meet the qualifications may work under the supervision of appointed counsel to gain additional experience.

Rule 8.391: Qualifications of counsel **(Are the qualifications standards for habeas corpus counsel in rule 8.652 also appropriate for counsel in these appeals?)**		
Commenter	**Comment**	**Working Group Response**
	experience could be deemed "fully qualified," and operate without direct supervision. Meanwhile, attorneys with less experience could be deemed "provisionally qualified." Such attorneys would be permitted to handle a capital habeas petition, but their first such appointment should be supervised by a "fully qualified" attorney. While California confers no constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings, the long-standing practice of the California Supreme Court has been to appoint qualified counsel to work on behalf of an indigent inmate in the investigation and preparation of a petition for a writ of habeas corpus that challenges the legality of a death judgment. (*See*, *In re Barnett* (2003) 31 Cal. 4th 466, 475 citing *In re Sanders* (1999) 21 Cal.4th 697, 717; *In re Anderson* (1968) 69 Cal.2d 613, 633; Cal. Supreme Ct., Internal Operating Practices & Proc., XV, Appointment of Attorneys in Criminal Cases; Cal. Supreme Ct., Policies Regarding Cases Arising from Judgments of Death, policy 3].) That practice was codified in principle at Government Code section 68662, which promotes the state's interest in the fair and efficient administration of justice and, at the same time, protects the interests of all capital inmates by assuring that they are provided a reasonably adequate opportunity to present their habeas corpus claims. Moreover, competent state habeas counsel protects victims' interests in finality and promotes the purpose of Proposition 66 to more efficiently resolve capital cases. The most efficient approach is to appoint fully qualified counsel at the state trial court level who will conduct a competent investigation and spot claims that must be raised.	

Rule 8.391: Qualifications of counsel **(Are the qualifications standards for habeas corpus counsel in rule 8.652 also appropriate for counsel in these appeals?)**		
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	Over the last 20 years alone, federal courts have granted relief in at least 13 serious felony (noncapital) California cases, where those individuals were later *exonerated.* Six of those cases involved the denial of petitioners' Sixth Amendment right to effective counsel. In five of the six IAC cases, state courts summarily denied relief without ordering an evidentiary hearing or stating reasons for denying relief. The state courts' error rate in evaluating IAC claims is distressing. Lowering the standards for who qualifies as competent counsel to represent petitioners in state court capital habeas proceedings, whether in superior court or the appellate courts, will only increase the state courts' error rate in those proceedings. As of 2010, federal courts have rendered final judgment in 63 habeas corpus challenges to California death penalty judgments and granted either a new guilt trial or a new penalty hearing in 43 of those cases. Of the 43 cases, relief was granted in 25 on the ground that the condemned prisoner's appointed trial counsel was ineffective—in six cases during the guilt phase and in 19 cases during the penalty phase—typically for counsel's failure to investigate mitigating evidence. In all of those 25 cases, the state courts found *no* Sixth Amendment error; whereas the federal courts—wherein petitioners are represented by qualified habeas counsel appointed by the federal courts—determined that the petitioners *did* suffer Sixth Amendment constitutional violations and granted some form of relief. It is imperative that post-conviction counsel representing condemned inmates, whether in the superior court or in the appellate courts, have significant experience working on capital cases so they understand the importance of investigating and presenting mitigating evidence, among other capital-case specific issues.	

Rule 8.391: Qualifications of counsel **(Are the qualifications standards for habeas corpus counsel in rule 8.652 also appropriate for counsel in these appeals?)**		
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	These requirements would help to ensure that appointed counsel have some familiarity conducting investigations, which form a vital component of death-penalty habeas practice. This experience is critical in order to avoid unnecessary delay during the federal habeas process. And the experience is especially critical at the appellate level, given the expanded scope of appellate issues for ineffective assistance of habeas counsel under Penal Code § 1509.1.	
Court of Appeal Appellate Projects by Jonathan Soglin, Executive Director First District Appellate Project	Habeas proceedings require specialized skills, so we do not disagree with this requirement. But appellate matters required appellate skills, ranging from exemplary writing skills to a depth of knowledge of appellate standards of review and prejudice, and default rules. Accordingly, these hybrid habeas/appellate matters should be assigned to attorneys who also meet the minimum qualifications for attorneys to be appointed to death penalty appeals. (See Rule 8.605(d)). And because there may not be enough attorneys meeting both appellate and habeas qualifications, the courts should have the option to appoint two attorneys who jointly hold the requisite skills and experience, just as is provided in the current rules for appointment of capital post-conviction counsel (Rule 8.605(i)(2).) We propose modifying proposed Rule 8.391 as follows: To be appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under this article, an attorney must meet the minimum qualifications established by rule 8.652 for attorneys to be appointed to represent a person in a death penalty–related habeas corpus proceeding **and the minimum qualifications established pursuant to Rule 8.605(d) for attorneys to be appointed to**	Please see the response to the comments of the California Appellate Project–San Francisco above. The working group notes that rule 8.652 requires, among other things, that to qualify to be appointed in a death penalty–related habeas corpus proceeding, an attorney must demonstrate proficiency in writing. The working group also notes that the proposed rules do not foreclose the Court of Appeal from appointing more than one counsel to a case.

Rule 8.391: Qualifications of counsel **(Are the qualifications standards for habeas corpus counsel in rule 8.652 also appropriate for counsel in these appeals?)**		
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	represent a person in death penalty appeal. Alternatively, two attorneys together may be eligible for appointment to represent a defendant in an appeal from a superior court habeas proceeding if the Court of Appeals finds that their qualifications in the aggregate satisfy the provisions of both Rule 8.605(d) and Rule 8.652.	
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: Yes.	The working group appreciates this input and has retained the proposed requirement that counsel appointed in these appeals must meet the minimum qualifications established by rule 8.652.
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	Regarding qualifications of appointed counsel, Mexico agrees that counsel for capital habeas corpus appeals must be "fully conversant in capital habeas corpus representation,' (Proposal SP18-21 p. 3), and supports the adoption of required qualifications as addressed in its comment on SP18-12, submitted August 23, 2018.	The working group appreciates this input and has retained the proposed requirement that counsel appointed in these appeals must meet the minimum qualifications established by rule 8.652.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	The proposed qualifications in Rule 8.391 are incomplete. Because an appeal under 1509.1 is a death penalty appeal, an attorney accepting such an appointment should also meet the minimum qualification found in proposed Rule 8.605.	Please see the response to the comments of the California Appellate Project–San Francisco above.
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	The working group asks for comments on rule 8.391 defining the qualifications of counsel appointed under section 1509.1. (Invitation to Comment, page 3.) The OSPD strongly supports the working group's decision to require such attorneys meet the minimum qualifications proposed for attorneys appointed to represent a person in death penalty-related habeas proceedings, but suggests modifications to	Please see the response to the comments of Robert D. Bacon above.

Rule 8.391: Qualifications of counsel **(Are the qualifications standards for habeas corpus counsel in rule 8.652 also appropriate for counsel in these appeals?)**		
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	assure that counsel also has the needed appellate knowledge and skills. The requirement that attorneys representing death penalty habeas petitioners on appeal have the qualifications of habeas counsel appropriately takes into consideration the fact that these attorneys must be fully conversant with habeas law and procedures. A significant part of the responsibilities of section 1509.1 counsel are not record-based. Rather, the attorney must conduct a comprehensive extra-record investigation, essentially as habeas counsel. Nevertheless, the appeal of the superior court's decision will be a central focus of the attorney's representation. Counsel for the appeal must have a thorough understanding of the rules relating to appellate procedure, and the skills of an experienced appellate practitioner. Additionally, counsel will need to understand issues unique to capital appeals, for instance, penalty-phase jury instructions and *Witt* jury selection issues, which might be presented to the superior court as stand- alone claims or as part of ineffective assistance of counsel claims. The OSPD recommends that draft rule 8.391 be amended to include a provision that to meet the qualifications to represent someone in an appeal related to section 1501.9, the attorney must have appellate-related knowledge and skills. Thus, the following changes are suggested: **<u>Rule 8.391. Qualifications of counsel appointed by the Court of Appeal</u>** To be appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender *or the Habeas*	The working group notes that rule 8.652 requires, among other things, that to be qualified to appointed in a death penalty–related habeas corpus proceeding, an attorney must demonstrate "the commitment,

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Rule 8.391: Qualifications of counsel **(Are the qualifications standards for habeas corpus counsel in rule 8.652 also appropriate for counsel in these appeals?)**		
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	Corpus Resource Center in an appeal under this article, an attorney must meet the minimum qualifications established by rule 8.652 for attorneys to be appointed to represent a person in a death penalty-related habeas corpus proceeding. *In addition, applicants must demonstrate a substantial knowledge and understanding of the relevant state and federal law, both procedural and substantive, governing capital cases; skill in legal research, analysis, and the drafting of documents related to the appeal; and skill in presenting oral argument.*	knowledge, and skills necessary to competently represent a person in a habeas corpus proceeding related to a sentence of death[,]" as well as proficiency in "issue identification, research, analysis, writing, investigation, and advocacy." Additionally, rule 8.652(h)(1) already provides that "[n]otwithstanding any other provision of this rule, the Habeas Corpus Resource Center . . . [is] qualified to serve as appointed counsel in death penalty–related habeas corpus proceedings."
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	We are not prepared to respond; the Court has only recently received the minimum qualifications.	No response required.

Rule 8.391: Assisting entity or counsel		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**4. The rules should require an assisting entity, and the district appellate project should not be the default assisting entity** Your rules concerning superior court habeas counsel stress the importance of an assisting entity to work with appointed counsel. (See Rule 8.654(e)(4), in Proposal No. SP18-13.) The present proposal is silent on the subject, except for requiring service of a few documents on the district appellate project. An assisting entity is just as important	In response to this and other comments, the working group modified the proposal to clarify that, before or at the time that counsel is appointed, the court is to designate an assisting entity or counsel. The working group also added references to assisting entities or counsel in the provisions that identify who must

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	on these appeals as it is in the superior court, and the rule should be equally explicit in requiring designation of one, and requiring appointed counsel to work with the assisting entity. The district appellate projects, at least as they are currently structured and operated, do not appear to be the best assisting entities. Your proposed rules for the superior courts (Nos. SP18-12 and SP18-13) leave open the identity of the assisting entity. The rules for the Court of Appeal should do likewise. I suggest you replace the references to the district appellate project in Rules 8.392(b)(5) & (6), 8.392(c)(1), 8.395(g)(2), and 8.396 (d)(3) with the same type of general references to an assisting entity that are in the other sets of proposed rules. The district appellate projects do not have capital expertise. They spend a large part of their time assisting less-experienced counsel with less-serious cases. Experienced counsel litigating murder appeals work largely independently of the projects. Taking on the more intensive level of assistance required in capital cases would require significant changes in their mode of operation, as well as increased staffing levels, recruitment of capital-qualified assisting counsel for their staffs, and more funds. As discussed earlier, the possibility of IAC claims concerning superior court habeas counsel will require the appointment of new counsel for the appeal. It seems possible but less certain that in some cases the assisting entity from the superior court would also be conflicted. The possibility that a different assisting entity will need to be designated on appeal should be acknowledged in the rules, but can be left to case-by-case evaluation.	receive various documents and notices relating to these appeals.
California Appellate Defense Counsel by Kyle Gee, Chair, CADC	<u>The Need for an Assisting Entity or Counsel</u> Proposed Rules 8.605(d)(2) and 8.652(d)(2) provide for appointment	Please see the response to the comments of Robert D. Bacon above.

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Government Relations Committee Oakland, California	of a "entity or counsel" to assist counsel on an automatic appeal and on the Superior Court habeas, respectively. Proposed Rules 8.605(b) and 8.652(b) require counsel on the automatic appeal and in the Superior Court habeas, respectively, to cooperate with the "assisting entity or counsel." However, no proposed rule provides for appointment of an "entity or counsel" to assist counsel on the habeas appeal. CADC submits that such assistance is highly likely to be necessary. First, new Penal Code section 1509.1, subdivision (b), grafts onto the habeas appeal an as-yet-explored element of "ineffective assistance" of habeas counsel in the Superior Court, which will create perhaps unknowable problems for counsel on the habeas appeal. Second, the current proposals reasonably require only habeas experience for counsel on the habeas appeal, and counsel on the habeas appeal may need guidance on matters of appellate procedure. Third and finally, the time requirements under Proposition 66 -- although aspirational -- may create pressure to move the habeas appeal forward expeditiously. There appears to be a significant need for assistance and support of counsel on the habeas appeal. An "assisting entity or counsel" should be available.	
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	Recommendation: The rules should mandate that counsel appointed to represent capital habeas petitioners in the Court of Appeal be provided with the assistance of a qualified counsel or entity, such as CAP, since assistance is provided to appointed counsel in all other state capital and non-capital appellate proceedings. As indicated in comments to prior proposed rules, CAP-SF submits that its unique expertise in providing assistance to counsel in capital appellate and habeas proceedings makes it uniquely qualified to fill	Please see the response to the comments of Robert D. Bacon above.

Rule 8.391: Assisting entity or counsel		
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	this role, and that it is better suited to do so than the district appellate projects that specialize in non-capital appeals. Regardless of whether CAP-SF is specifically referenced as a potential assisting entity, the proposed rules should expressly provide for assistance to counsel, particularly given the unique complexity of these cases. * * * 8.396(d)(3) Recommendation: CAP-SF recommends that "assisting counsel or entity" replace "district appellate project". The assisting counsel or entity must receive service of all pleadings and orders. Currently, the district appellate projects do not have the necessary capital experience to act as an assisting entity. It is unclear at this time who will be assisting appointed counsel in the appellate courts, and the proposed rules should include the potential for other counsel or entities providing assistance to appointed counsel.	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	Under Rule 8.300, the Court of Appeal has authority to appoint appellate counsel. Capital habeas corpus appellate counsel will require assisting counsel, such as CAP/SF. If CAP/SF is not available in a specific case, e.g. because of a conflict among multiple petitioners, counsel assigned to assist appointed counsel should themselves meet the standards for appointment in a habeas corpus appeal.	Please see the response to the comments of Robert D. Bacon above.
Court of Appeal Appellate Projects by Jonathan Soglin, Executive Director	**1. Terminology – Replace "District Appellate Project" with "Assisting Entity." (SP18-21 and SP18-22)** The proposed rules for appellate procedure (SP18-21) incorporate Rule	Please see the response to the comments of Robert D. Bacon above.

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First District Appellate Project	8.300, which governs appointment of counsel in criminal appeals. (Proposed Rule 8.390(b).) We agree that it is proper to incorporate Rule 8.300, including subdivision (e) which authorizes the Courts to contract with administrators (the current Court of Appeal appellate projects) to administer the appointed counsel panels. There will be a similar need for such organizations to administer the panel for Proposition 66 appointed capital habeas appeals. And the proposed rules for the superior court (SP18-22) contain references to such an assisting entity for the superior court. (Proposed Rules 4.573(a)(2), 4.574(a)(3), 4.575, However, the proposed rules elsewhere provide that documents or records should be served on, or sent to, "the district appellate project." (4.576(b) (certificate of appealability), 8.392(b)(5) (transmittal of copy of COA), 8.395(g)(2) (sending transcripts), 8.396(d)(3) (service of briefs). These references should be corrected to "assisting entity." Until it is resolved who will be the assisting entity, the rules should not assume it will be the current appellate projects, whose existing contracts are for non-capital work. If not corrected and if some other organizations become the assisting entities, errors in the transmittal of documents (including potentially large transcripts) will occur. Accordingly, we propose replacing "district appellate project" with "assisting entity" in the proposed rules 4.576(b), 8.392(b)(5), 8.395(g)(2), and 8.396(d)(3).	
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	Rule 8.300(e)(l) provides that the Court of Appeal may contract "with an administrator having substantial experience in handling appellate court appointments to perform any of the duties prescribed by this rule." The Courts of Appeal currently contract out the responsibility of matching case to attorney to the non-capital appellate projects. However, none of these agencies appear to have the necessary	The working group declined to make this suggested change. Currently, CAP-SF is the only entity likely to meet the suggested criteria. The working group acknowledges and appreciates CAP-SF's experience in the field of capital post-conviction representation.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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	experience to administer appointments in capital habeas appeals, which require an understanding of capital appellate and habeas issues. Draft rule 8.300(e)(l) does not require the Court of Appeal to contract with an administrator who has such experience. It is critical that if the Court of Appeal is going to contract with an administrative entity that it do so with an organization that has experience with both capital appeals and capital habeas proceedings. The OSPD proposes the following amendment: **Rule 8.300. Appointment of Appellate Counsel by the Court of Appeal** ..... (e) Contracts to perform administrative functions ..... *(3) In cases where the appointment of counsel is for purposes of proceedings under Penal Code section 1509.1, the court may contract with an administrator having substantial experience in handling capital habeas and appellate appointments to perform any of the duties prescribed by this rule.*	However, a rule of court that requires the Court of Appeal to utilize the services of CAP-SF would effectively mandate the court's use of a specific private contractor. Rules of court may dictate a function or set a standard, but the working group's view is that it would not be appropriate for the rules to require contracting with a specific private entity contractor. Furthermore, because this type of appeal is new, no entity has experience with such appeals. Administering the appointed counsel process in these appeals will be a novel endeavor for any entity contracted to perform this function. For these reasons, the working group has left to the discretion of the Court of Appeal with what entity it may contract as the administrator.
	Proposed new subsection to Draft Rule 8.300 Under current rules, both counsel on direct appeal and counsel on habeas are assigned an assisting entity or counsel (usually the California Appellate Project in San Francisco) when appointment of counsel is made. (See California Rules of Court, rule 8.605(b).) The draft rule on the appointment of habeas counsel in superior court also requires that an assisting entity be appointed when counsel is appointed in the superior court unless HCRC is appointed. (Proposed rule 4.561(e)(2).) The OSPD recommends that rule 8.300 be amended	Please see the response to the comments of Robert D. Bacon above.

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Commenter	**Comment**	**Working Group Response**
	to require an assisting entity be designated at the time appellate counsel is appointed. The demands of a section 1509.1 appeal are as complex as those of a direct appeal, and include the additional complexities of habeas claims relating to the ineffective assistance of counsel. An assisting entity is required. The OSPD's proposal would add a section to 8.300, requiring that unless HCRC or OSPD is appointed, the Court of Appeal must also designate an assisting entity at the time counsel is appointed. **Rule 8.300. Appointment of Appellate Counsel by the Court of Appeal** ..... *(f) Appointment of an assisting entity in proceedings governed by Penal Code section 1501.9* *Unless the Habeas Corpus Resource Center or the Office of the State Public Defender is appointed to represent an indigent defendant in section 1509.1 proceedings, at the time counsel is appointed for the purpose of those proceedings, the Court of Appeal must designate an assisting entity or counsel to provide assistance to the appointed counsel.*	

Rule 8.391(a)(3): New counsel on appeal		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	B. Rule 8.391 should be revised to affirmatively state, rather than merely implying, that the petitioner's superior court habeas counsel may not continue with the case on appeal. By definition, claims of superior court habeas IAC do not appear on the face of the record the	The working group has revised the proposal to clarify that counsel who represented the petitioner in the superior court habeas corpus proceedings is eligible to be appointed as

Rule 8.391(a)(3): New counsel on appeal		
Commenter	**Comment**	**Working Group Response**
	Court of Appeal will receive from the superior court. It is unlikely that superior court habeas counsel will recognize such claims and, even if they do, they cannot ethically litigate their own effectiveness. (*Christeson v. Roper* (2015) 135 S.Ct. 891, 894.) At a minimum, the Court of Appeal would be required to appoint independent counsel to investigate the possibility of missed issues; in many if not most cases, it will be necessary to substitute new counsel for the entire appeal. The Court of Appeal cannot realistically condition the appointment of new counsel on the prior identification of a missed issue, because the first responsibility of new counsel is to look for missed issues. (*Mendoza v. Stephens* (5th Cir. 2015) 783 F.3d 203, 207-208 (conc. opn. of Owen, J.).) This also makes it unrealistic for a petitioner to waive in advance appointment of new counsel; a waiver could not be sufficiently *knowing* to withstand scrutiny, since no one – neither the petitioner nor anyone else – knows what new counsel might find until new counsel looks for it. The federal courts are developing significant experience with this issue, since *Martinez v. Ryan* (2012) 566 U.S. 1, allows litigation of the effectiveness of state habeas counsel as a means of overcoming defaults that might preclude litigation of claims in federal habeas corpus. The prevailing view is that new counsel is necessary; *Martinez* ordinarily makes it inappropriate for state habeas counsel to continue as federal habeas counsel. (*Juniper v. Davis* (4th Cir. 2013) 737 F.3d 288 [qualified independent counsel is required]; *Mendoza, supra*.)	counsel on appeal of the decision in that habeas proceeding only if counsel and the petitioner request such continued representation. The modified language is modeled after similar language in Government Code section 68663 and Chapter 154, 28 U.S.C. section 2261(d). The working group's view is that this limitation is necessary to avoid unduly reducing the pool of counsel available for appointment in both these appeals and in the trial court habeas corpus proceedings. Commenters addressing the issue all noted that it would be a conflict of interest for counsel who represented the petitioner in the superior court habeas corpus proceedings to also have to determine whether they provided ineffective assistance of counsel in the superior court habeas corpus proceedings. At a minimum, someone other than the attorney who represented the petitioner in the superior court habeas corpus proceedings would need to be appointed to determine whether to make such a claim on appeal. The working group concluded that, given the already small pool of attorneys qualified and available to be appointed in these proceedings, it would unduly restrict the pool of available counsel if at least two attorneys were needed in every appeal—one for the ineffective assistance claim and one for all other appellate issues. In addition, the working group was concerned that such an

Rule 8.391(a)(3): New counsel on appeal		
Commenter	**Comment**	**Working Group Response**
		arrangement—having petitioner concurrently represented by two sets of counsel, one of whom is investigating whether the other has been ineffective—is likely to interject difficulties and delays into the appellate process. For these reasons, the working group concluded that it would be more efficient to appoint new counsel on appeal, except where petitioner and existing counsel request continued representation on appeal. The working group has revised the proposal to clarify this.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	Because of the possibility of conflicts of interest, attorneys appointed for appeals from capital habeas corpus proceedings should not be the same attorneys as those in the superior court habeas corpus proceedings, unless there is a valid waiver by the petitioner.	Please see the response to the comments of Robert D. Bacon above.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	*Counsel on Appeal* The proposal seems to assume that the superior court attorney will not continue on appeal. Obviously, for the *Martinez* claim an attorney cannot be expected to argue his or her own ineffectiveness. However, as to the issues that were presented to the superior court, there would be a considerable loss of efficiency in changing counsel at this point. It may in some cases be more efficient to appoint a second attorney for that one issue and have the original attorney proceed with briefing the rest. The assisting entity may be in a position to advise the court of appeal whether any *Martinez* issues are so substantial in relation to the rest of the case to warrant appointing a new attorney for the entire appeal.	Please see the response to the comments of Robert D. Bacon above.
Government of Mexico	The rule should also specify that the attorney appointed for the appeal	Please see the response to the comments of

Rule 8.391(a)(3): New counsel on appeal		
Commenter	**Comment**	**Working Group Response**
by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	of a decision on a capital habeas corpus petition must not be the same attorney who filed the petition in the superior court, unless petitioner and counsel make a proper informed and voluntary waiver.	Robert D. Bacon above.
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	Section 1509.1 permits the Court of Appeal to consider a claim of ineffective assistance of trial counsel on appeal "if the failure of habeas counsel to present that claim to the superior court constituted ineffective assistance of counsel." It is an obvious conflict for habeas counsel to investigate his or her own ineffectiveness. Therefore, new counsel must be appointed to handle the appeal. (*See, e.g*, Gov. Code, §68663 ("No counsel appointed to represent a state prisoner under capital sentence in state postconviction proceedings shall have previously represented the prisoner at trial or direct appeal in the case for which the appointment is made, unless the prisoner and counsel expressly requests [sic] continued representation.").) The OSPD favors a more explicit indication that counsel for the habeas appeal under section 1509.1 will not be the same as habeas counsel. The OSPD additionally favors an exception to the general rule, modeled on the language of Government Code section 68663, allowing habeas counsel to continue as section 1509.1 counsel if the petitioner and habeas counsel expressly request continued representation. **Rule 8.300. Appointment of Appellate Counsel by the Court of Appeal** ..... (c) Demands of the Case ..... *(5) In cases of the appointment of counsel on appeal pursuant to Penal Code section 1509.1, the Court of Appeal shall not appoint counsel previously appointed in the case by the superior court under section 1509 absent the written*	Please see the response to the comments of Robert D. Bacon above.

Rule 8.391(a)(3): New counsel on appeal		
Commenter	**Comment**	**Working Group Response**
	request of both the prisoner and previously appointed counsel.	

Rule 8.392: Filing the appeal; certificate of appealability Form HC-200: *Petitioner's Notice of Appeal—Death Penalty–Related Habeas Corpus Decision*		
Commenter	**Comment**	**Working Group Response**
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.392(a): Notice of appeal Recommendation: The rule should be modified to provide that counsel appointed in the Superior Court be expressly assigned the responsibility of filing the notice of appeal on behalf of the petitioner when relief has not been granted. This is necessary to avoid an inadvertent failure to file the notice of appeal. * * * 8.392(b)5-6; 8.392(c)(1) Recommendation: CAP-SF requests that these rules be clarified. All notices of appeal and orders thereon, including grants and denials of certificates of appealability, should be served on the assisting counsel or entity. It is unclear when, if ever, the district appellate projects, which currently handle only non-capital cases, will be able to adequately assist appellate habeas counsel. As demonstrated by the Supreme Court's service of all orders and letters on the assisting counsel or entity, service of all filings and orders originating with the superior or appellate courts on the assisting entity is necessary.	The working group concluded there was not sufficient time to develop and circulate a proposal making the suggested change. Accordingly, the working group recommends this suggestion be referred for consideration by the appropriate Judicial Council advisory body at a later date. The working group has revised the proposal as suggested by the commenter and also to clarify that if the Court of Appeal denies a certificate of appealability, a copy of the denial must be sent to those who would receive a copy of a certificate if one had been granted.

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Rule 8.392: Filing the appeal; certificate of appealability **Form HC-200: *Petitioner's Notice of Appeal—Death Penalty–Related Habeas Corpus Decision***		
Commenter	**Comment**	**Working Group Response**
	* * * 8.392(c)(6): Recommendation: Proposed rules 8.392(c)(l) should be revised to include service on the assisting counsel or entity. If CAP-SF's proposed revisions are not included, in cases in which counsel has been discharged, disqualified, suspended, disbarred, the clerk must receive a signed receipt that the notice was received by the assisting counsel or entity, and if there is no assisting counsel or entity by CAP-SF and the Habeas Corpus Resource Center.	The working group has revised proposed rule 8.392(c)(1) as suggested.
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	Should subdivision (c)(1) recognize that a petitioner may be unrepresented at the time of filing a notice of appeal and require a copy of the notice to be served on the petitioner? Similar to California Rules of Court, rule 8.304(c), an unrepresented defendant is sent a notification of filing when the appeal is filed. Page 4 of Executive Summary indicates that the Court of Appeal must grant or deny a certificate of appealability within 10 days of a request for a certificate. The rules do not reiterate that requirement. Plus, the rules should be clear that the 10 days runs upon filing the request for certificate of appealability in the Court of Appeal.	The working group has revised the proposal to provide for service of the notice on the petitioner if petitioner is not represented. The working group has revised the proposal as suggested.
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Subdivision (a) of proposed rule 8.392 states that to appeal a decision in a death penalty–related habeas corpus proceeding, the petitioner or the People must serve and file a notice of appeal in the superior court. Unlike rule 8.304(a)(3), the proposed rule does not specify who must sign the notice of appeal. Because rule 8.304 is not applicable to these appeals, the Fourth District recommends specifying the appropriate	The working group has revised the proposal to incorporate language similar to that in rule 8.304(a)(3).

Rule 8.392: Filing the appeal; certificate of appealability **Form HC-200: *Petitioner's Notice of Appeal—Death Penalty–Related Habeas Corpus Decision***		
Commenter	**Comment**	**Working Group Response**
	signatories for notices of appeal to avoid confusion. * * * Subdivision (c)(2) pertains to notification of the filing of a notice of appeal to the court reporter or reporters. The rule states that if the petitioner is appealing from a superior court decision denying relief on a successive petition and the superior court did not issue a certificate of appealability, the clerk must not send notification of the notice of appeal to the court reporter or reporters unless and until the clerk receives a certificate of appealability issued by the Court of Appeal. The Fourth District suggests adding a deadline for the clerk to notify the court reporter. For consistency with subdivision (b)(l), the Fourth District recommends a deadline of no later than five days after the Court of Appeal issues a certificate of appealability. Additionally, the Fourth District notes that superior court staff will need training to ensure that notifications to court reporters are properly done. Based on the Fourth District's experience, court reporters are often not properly noticed in non-capital felony appeals. Given the time constraints imposed by these rules, proper notification is critical.	The working group has revised the proposal as suggested.
Court of Appeal, Sixth Appellate District by Mary J. Greenwood, Administrative Presiding Justice	The Sixth District Court of Appeal has the following comment as to **Proposed Rule 8.392(b)** – Appeal of decision denying relief on a successive habeas corpus petition; certificate of appealability. Penal Code section 1509.1, subdivision (c) provides that the petitioner may appeal the decision of the superior court denying relief on a successive petition only if the superior court or the Court of Appeal grants a certificate of appealability. The statute also provides that the	The working group has revised the rule to clarify that the Court of Appeal must grant or deny a request for a certificate of appealability within 10 days of the filing of the request in that court.

Rule 8.392: Filing the appeal; certificate of appealability **Form HC-200: *Petitioner's Notice of Appeal—Death Penalty–Related Habeas Corpus Decision***		
Commenter	**Comment**	**Working Group Response**
	Court of Appeal "shall grant or deny a request for a certificate of appealability within 10 days of an application for a certificate" and that the "jurisdiction of the court of appeal is limited to the claims identified in the certificate and any additional claims added by the court of appeal within 60 days of the notice of appeal." The proposed rule does not directly address either the 10-day limit or the 60-day limit provided in the statute. We are particularly concerned with the lack of a clear trigger date in the proposed rule for the commencement of these time periods. The proposed rule requires the petitioner to "attach to the notice of appeal a request to the Court of Appeal for a certificate of appealability" (8.392(b)(3)), and the proposed rule requires the superior court clerk to "promptly—and no later than five days after the notice of appeal is filed—send a notification of the filing" of the appeal (8.392(c)(1)). In our experience, there has been a great deal of variation in the length of time between the filing of a notice of appeal and the receipt of the notice of appeal in our court. The proposed rule seems to imply that the superior court clerk's sending of the notification of the appeal, with an attached request for a certificate of appealability, will trigger the 10-day time limit for the Court of Appeal to rule on the request. It would be helpful to have express provisions dealing with the issue. At minimum, the proposed rule should be amended to reflect that the 10-day time limit does not commence until the notice of appeal and a request for a certificate of appealability are lodged in the Court of Appeal.	
Court of Appeal, Third Appellate District Office of the Clerk	<u>Rule 8.392</u> Should subdivision (c)(1) recognize that a petitioner may be unrepresented at the time of filing a notice of appeal and require a	Please see the response to the comments of the California Judges Association above.

Rule 8.392: Filing the appeal; certificate of appealability **Form HC-200: *Petitioner's Notice of Appeal—Death Penalty–Related Habeas Corpus Decision***		
Commenter	**Comment**	**Working Group Response**
by Colette M. Bruggman, Assistant Clerk/Executive Officer	copy of the notice to be served on the petitioner? Similar to rule 8.304(c), California Rules of Court, an unrepresented defendant is sent a notification of filing when the appeal is filed. Page 4 of Executive Summary indicates that the Court of Appeal must grant or deny a certificate of appealability within 10 days of a request for a certificate. The rules do not reiterate that requirement. Plus, the rules should be clear that the 10 days runs upon filing the request for certificate of appealability in the Court of Appeal. * * * <u>Form HC-200</u> Petitioner's Notice of Appeal does not include an area for the Attorney's information, or if unrepresented, the petitioner's information. See Form CR-120 for an example. The form includes the same language "order made by the superior court," which is the subject of an earlier comment. The form does not include the box to check that petitioner is requesting court-appointed counsel on appeal. Including the Request for Certificate of Appealability as page of the Notice of Appeal may pose problems. The time for the Court of Appeal to act on a request is within 10 days of a request. However, the request is submitted to the trial court, and it is unclear when the time	 The working group appreciates the commenter pointing out this oversight. The working group has modified the proposed form to include the area for this information. The working group has revised proposed rule 8.393 to use the same language as proposed form HC-200, which is modeled on rule 8.308. The working group has revised the proposed form to include this check box. The working group has revised the rule to clarify that the Court of Appeal must grant or deny a request for a certificate of appealability within 10 days of the filing of the request in

Rule 8.392: Filing the appeal; certificate of appealability **Form HC-200: *Petitioner's Notice of Appeal—Death Penalty–Related Habeas Corpus Decision***		
Commenter	**Comment**	**Working Group Response**
	begins to run for the Court of Appeal to act. The time should run from the filing of the request in the Court of Appeal, so the Court of Appeal has adequate time to act on the request. There are two ways to accomplish this: (1) include in the rules that the time for the Court of Appeal to act on the request for a certificate of appealability is from the filing of the request in the Court of Appeal; (2) create a form separate from the Notice of Appeal that is filed directly in the Court of Appeal.	that court.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	*Certificate of Appealability* Proposed Rule 8.392(b)(4) says, "The People must not file an answer to a request for a certificate of appealability unless the court requests an answer." It should be added expressly that the court will not issue a certificate without giving the People a chance to respond. Parallel to our comment to the superior court rules, if the court of appeal grants a certificate after the superior court denied it, it should state the basis for its conclusion that the petitioner has a substantial claim of innocence or ineligibility for the penalty, as ineligibility is defined in the statute.	The working group has revised the rule to instead state that the People "need not" file an answer. This modification leaves the decision whether to file an answer in the absence of an order to the discretion of counsel for the People. The working group declined to make this suggested change, which is not required by statute.
Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	Rule 8.392(6) should be changed to include a provision to enable a petitioner to ask the California Supreme Court to issue a certificate of probable cause (i.e., to reverse the refusals of both the trial court and court of appeal).	The working group declined to make this suggested change. Rules 8.500 et seq. already address the general procedure for seeking review in the California Supreme Court. Thus, the working group concluded that additional rules focused solely on the Supreme Court's review of decisions regarding a certificate of

Rule 8.392: Filing the appeal; certificate of appealability **Form HC-200: *Petitioner's Notice of Appeal—Death Penalty–Related Habeas Corpus Decision***		
Commenter	**Comment**	**Working Group Response**
	Rule 8.392(c)(1) should be modified to require the clerk to also send a notification to the petitioner. Rule 8.392(c)(6): the notice under subpar. (1) should not be sufficient performance despite the discharge, disbarment, death, etc. of petitioner's attorney unless notice was sent to the petitioner. Otherwise the petitioner would not be able to protect his/her rights under the circumstances.	appealability are not necessary at this time. The working group has revised the proposal to provide that the petitioner will be sent the notification if he or she is not represented and to provide that the assisting entity also will receive the notification. Given these changes, the working group declined to modify the proposed language of rule 8.392(c)(6) as suggested.

Form for the certificate of appealability **(Would a form be useful?)**		
Commenter	**Comment**	**Working Group Response**
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Subdivision (b) of proposed rule 8.392 pertains to certificates of appealability under Penal Code section 1509.1, subdivision (c). The Fourth District suggests preparation of a form for the certificate of appealability. While the Fourth District understands the working group's concern that certificates of appealability must he individualized, a form would be useful to ensure that superior courts prepare the certificates and include all required information.	The working group appreciates this input. The working group concluded there was not sufficient time to develop and circulate a proposed form for the certificate of appealability. The working group recommends this suggestion be referred for consideration by the appropriate Judicial Council advisory body at a later date.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman,	No, because it seems the issues would have to be identified on a case-by-case basis.	Please see the response to the comments of Court of Appeal, Fourth Appellate District, above.

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All comments are verbatim unless indicated by an asterisk (*).

Form for the certificate of appealability (Would a form be useful?)		
Commenter	**Comment**	**Working Group Response**
Assistant Clerk/Executive Officer		
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	The Judicial Counsel has also asked for input on whether it ought to provide a form for courts of appeals to use when granting or denying a certificate of appealability. Mexico believes such a form may be helpful and could facilitate courts' consistent and fair consideration of this question.	Please see the response to the comments of Court of Appeal, Fourth Appellate District, above.

Rule 8.392(b): Notice of the grant or denial of a certificate of appealability by the Court of Appeal (Should the People receive notice?)		
Commenter	**Comment**	**Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	We have no opinion.	No response required.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs San Francisco, California and Katy Graham, Senior Appellate Court Attorney Court of Appeal, Second Appellate District, Division Six Ventura, California	Yes, the People's representative should generally receive notice whenever the Court of Appeal issues an order in a death penalty case. Providing this notice requires the Court to perform relatively little additional work and helps to avoid any unnecessary confusion.	Based on these comments, the working group has modified the proposal to provide notice to the Attorney General and the district attorney, as well as others, of either a grant or denial of a certificate of appealability.

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Rule 8.392(b): Notice of the grant or denial of a certificate of appealability by the Court of Appeal (Should the People receive notice?)		
Commenter	**Comment**	**Working Group Response**
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: Yes.	Please see the response to the comments of the California Lawyers Association above.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	It does no harm to include them on the notice.	Please see the response to the comments of the California Lawyers Association above.
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	Yes	Please see the response to the comments of the California Lawyers Association above.

Rule 8.393: Time to appeal (Should there be an advisory committee comment highlighting that all appeals must be filed within the statutory time period?)		
Commenter	**Comment**	**Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	Yes. The rule should be as clear as possible. There are situations where both parties may have different grounds to appeal. The rule must allow each party 30 days to file their notice of appeal. Furthermore, if a party timely appeals from the ruling on a habeas corpus proceeding, the time for any other party to appeal should be extended until 20 days after the superior court clerk serves notification of the first appeal.	Based on the comments, the working group has decided not to add such an advisory committee comment at this time. After further consideration, the working group concluded that an advisory committee comment was not appropriate at this time because it is not entirely clear whether the statutory time limit applies to

Rule 8.393: Time to appeal **(Should there be an advisory committee comment highlighting that all appeals must be filed within the statutory time period?)**		
Commenter	**Comment**	**Working Group Response**
		all notices of appeal, including cross-appeals, or only to the initial notice of appeal.
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	No. An advisory note may lead to confusion.	Please see the response to the comments of California Attorneys for Criminal Justice above.
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: Yes, to avoid confusion and the consequences of missing a critical deadline, the rule should include an advisory comment stating that all appeals by both the petitioner and the People must be filed within 30 days. * * * The Fourth District suggests adding an advisory comment to this rule, highlighting that all appeals by both the petitioner and the People must he filed within the 30-day deadline set forth in the rule.	Please see the response to the comments of California Attorneys for Criminal Justice above.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	No. An advisory note may lead to confusion.	Please see the response to the comments of California Attorneys for Criminal Justice above.
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	The Judicial Council has requested input on whether it should include an advisory comment emphasizing that all appeals must be filed within the 30-day time period. Mexico supports such an inclusion; it is preferable to be explicit where topics such as deadlines are	Please see the response to the comments of California Attorneys for Criminal Justice above.

Rule 8.393: Time to appeal (Should there be an advisory committee comment highlighting that all appeals must be filed within the statutory time period?)		
Commenter	**Comment**	**Working Group Response**
	concerned.	
Superior Court of Los Angeles County	Yes, it would be helpful to include this advisory comment to rule 8.393.	Please see the response to the comments of California Attorneys for Criminal Justice above.
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	Yes	Please see the response to the comments of California Attorneys for Criminal Justice above.

Rule 8.393: Commencement of the time to appeal		
Commenter	**Comment**	**Working Group Response**
Aderant CompuLaw by Miri K. Wakuta, Associate Rules Attorney	We are writing to comment on a possible conflict between Proposed Rule 8.393 and Proposed Form HC-200. Proposed Rule 8.393 states, "Time to appeal. A notice of appeal under this article must be filed within 30 days after the making of the order being appealed." (Emphasis added.) Proposed HC-200 form, in the Notice box says, "You must file this form in the Superior Court within 30 days after the court rendered the judgment or made the order you are appealing." (Emphasis added.) While the rule sets the deadline to file the notice of appeal for within "30 days after the making of the order," the form states that the form must be filed "within 30 days after the court rendered the judgment or	The working group has revised proposed rule 8.393 to use the same language as is proposed for form HC-200. This language is modeled on language in rules 8.308, 8.853, and 8.902, relating to appeals in felony, misdemeanor, and infraction cases, respectively. The working group's view is that it is best to use the same language for this rule as well.

Rule 8.393: Commencement of the time to appeal		
Commenter	**Comment**	**Working Group Response**
	made the order…" It may help avoid any misinterpretation of the rules for the language in the form to match the language in the rule. We proposed the following changes: HC-200 form, in the "Notice" box: "You must file this form in the Superior Court within <u>30 days after the court made the order you are appealing</u>."	
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	What is meant by "after the making of the order?" It is unclear what "making of the order" means. Under proposed rule 4.575, the trial court must prepare and file a statement of decision specifying its order and explaining the factual and legal basis for the decision. To be consistent with rule 4.575, the notice of appeal should be filed within 30 days after the filing of the trial court's statement of decision or order.	This language is modeled on language in rules 8.308, 8.853, and 8.902, relating to appeals in felony, misdemeanor, and infraction cases, respectively. The working group's view is that it is best to use the same language for this rule as well.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	Under proposed rule 4.575, the trial court must prepare and file a statement of decision specifying its order and explaining the factual and legal basis for the decision. To be consistent with rule 4.575 and for clarity, should the notice of appeal be filed within 30 days after the filing of the trial court's statement of decision or order?	Please see response to the comments of the California Judges Association above.

Rule 8.394: Stay of execution on appeal		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**5. A stay of execution pending appeal should be mandatory** Rule 8.394 should be revised to make a stay of execution mandatory pending the decision of the Court of Appeal on the merits of the appeal, and pending any subsequent petition for review to the	The working group declined to make this suggested change. The working group discussed this issue both before circulating the proposal for public comment and after receipt of the

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All comments are verbatim unless indicated by an asterisk (*).

Rule 8.394: Stay of execution on appeal		
Commenter	**Comment**	**Working Group Response**
	Supreme Court.[1] The quality of the work product of courts and counsel suffers when they are under the artificial time pressure and emotional pressure of an execution date. Unpressured reflection is one of the great virtues of the appellate process. It should not be sacrificed in this category of appeals in which the stakes are highest and the records likely much larger and more complex than the average appeal. (Footnote 1: And pending a timely petition for certiorari thereafter. (See *Emmett v. Kelly* (2007) 552 U.S. 942 (statement of Stevens, J.) [criticizing the state of Virginia for setting an execution date that required the U.S. Supreme Court to expedite consideration of a certiorari petition after the denial of a first federal habeas petition; he would require a "routine" stay pending certiorari in all such cases].) With respect to successor petitions, there will be no appeal unless a certificate of appealability has been granted, so there is no risk that appeals in such cases will be pursued in bad faith for solely dilatory reasons.	public comments. Unlike in direct appeals from a judgment of death, in which executions are automatically stayed by statute (Pen. Code, § 1243(a)), generally, in all other instances, a stay of execution is an equitable remedy that is not available as a matter of right. Thus, there is no automatic stay even in an initial death penalty–related habeas corpus petition; instead, Supreme Court policy requires the filing of a motion requesting a stay. The working group's view is that this issue should not be addressed differently at the trial court and Court of Appeal. Such relief should remain discretionary rather than automatic in these appeals, in the absence of statutory authority to the contrary.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	*Stay of Execution* Proposed Rule 8.394 appears reasonable for initial petition appeals, but the real problem arises on successive petitions. If the petition was denied in superior court on the ground that the petitioner is clearly guilty and clearly eligible for the death penalty, the court of appeal should not grant a stay unless there is reason to doubt that conclusion. Granting a certificate of appealability would constitute the needed finding, but with the rule as written a court might grant a stay while considering the certificate with no showing at all. The rule should address this situation and require some threshold showing for even a brief stay.	The working group considered but declined at this time to propose rules providing additional guidance directing courts on how to exercise their discretionary authority to grant a stay of execution. The working group was mindful that rule-making at this stage could have the unintended effect of broadening or narrowing the authority of the courts and the rights of the parties beyond what is warranted by statute and caselaw. The working group ultimately concluded that, at this time, this area of law was better left to be developed by the courts.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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Rule 8.394: Stay of execution on appeal		
Commenter	**Comment**	**Working Group Response**
Superior Court of Riverside County by Susan Ryan, Chief Deputy of Legal Services	Rule 8.394(b): This rule provides that a reviewing court "may" – meaning in its discretion – grant a stay when a death penalty habeas denial is appealed. There is no standard given for how the appellate court is to exercise this discretion, however. We suggest that the rule provide additional guidance. If a habeas petition is on appeal, either it is a first habeas petition (in which case federal review has not started yet) or a certificate of appealability has been issued under Penal Code §1509.1(c) (requiring a substantial claim for relief on actual innocence or ineligibility). Consider adding some definition of how a reviewing court is supposed to exercise its discretion in either of these situations.	Please see response to the comments of the Criminal Justice Legal Foundation above.

Responsibilities of habeas corpus counsel **(Should counsel be required to transmit their file to appellate counsel when appellate counsel is appointed?)**		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	The rules should also require prompt transfer of superior court habeas counsel's file to appeal counsel. Appeal counsel must review the file in order to fulfill their function of evaluating the performance of superior court habeas counsel. The file is the necessary starting point for either identifying or ruling out claims of ineffective assistance by superior court habeas counsel. Lack of cooperation between former and successor counsel is too often a problem in capital cases. Any attempt to facilitate that cooperation would be most helpful. (See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) § 10.13.)	Based on the comments, the working group has revised the proposed rules for the trial court habeas corpus proceedings, addressed in the separate report to the council, to add a requirement that trial counsel transmit their file to appellate counsel.
California Appellate Defense Counsel	A Rule to Require Habeas Counsel to Surrender the File Immediately	Please see response to the comments of Robert

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Responsibilities of habeas corpus counsel (Should counsel be required to transmit their file to appellate counsel when appellate counsel is appointed?)		
Commenter	**Comment**	**Working Group Response**
by Kyle Gee, Chair, CADC Government Relations Committee Oakland, California	Penal Code section 1509.1(b) will require counsel on the habeas appeal to investigate habeas counsel's effectiveness, and that investigation will be done under time pressure. Superior Court habeas counsel should be required to release the file immediately. There should be no potential for resistance or delay.	D. Bacon above.
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	Recommendation: The rules should provide that habeas counsel must either transmit, or make arrangements to transmit, her complete file to appellate counsel, within a week of appellate counsel's appointment. The rules should further include a non-exhaustive list of the type of documents and materials habeas counsel should include in the file transmitted to appellate counsel. That list should include, but not be limited to the following: trial counsel's file; all work product from habeas counsel [e.g. draft and final pleadings, requests for funds and payment, investigation reports, working documents, research memos, correspondence] investigators and experts; and, counsel's paper and electronic calendars related to the case. Appellate counsel must review both trial counsel's file and habeas counsel's file, to determine if any viable claims of IAC against trial counsel were not raised in the superior court petition. An established rule mandating the transfer of habeas counsel's complete superior court trial file will help to prevent any misunderstandings that these files belong to petitioner, and that successor counsel is entitled to them. The promulgation of this rule would go far in ensuring that appellate counsel would not need to spend unnecessary time attempting to convince habeas counsel to release all files to her.	Please see response to the comments of Robert D. Bacon above.
California Attorneys for Criminal	Yes. Habeas corpus counsel should be required to transfer the entire	Please see response to the comments of Robert

Responsibilities of habeas corpus counsel (Should counsel be required to transmit their file to appellate counsel when appellate counsel is appointed?)		
Commenter	**Comment**	**Working Group Response**
Justice by Steve Rease, President Sacramento, California	original file.	D. Bacon above.
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: Yes.	Please see response to the comments of Robert D. Bacon above.
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	Turning to matters not covered by the proposed rules, Mexico believes that the rules should explicitly require superior court habeas corpus counsel to transmit their file to appellate habeas counsel when appointed. There is no conceivable situation where appellate counsel would not need access to the file to provide complete and competent representation.	Please see response to the comments of Robert D. Bacon above.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	Yes. The file belongs to the client and it must be transferred to successor counsel as the matter proceeds into the appellate court. In our experience, trial counsel does not always understand their obligation to relinquish their case files to habeas counsel. Using the courts to compel transfer of the file is cumbersome, time consuming, and may result in delays in the proceedings. Requiring habeas counsel to immediately transfer their file to successor counsel will lessen such delays.	Please see response to the comments of Robert D. Bacon above.
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	**Support for proposed rule requiring habeas counsel transmit their file to appellate counsel when counsel is appointed** The working group asks for comment on whether a rule should be included requiring that habeas counsel transmit the file to counsel on	Please see response to the comments of Robert D. Bacon above.

Responsibilities of habeas corpus counsel (Should counsel be required to transmit their file to appellate counsel when appellate counsel is appointed?)		
Commenter	**Comment**	**Working Group Response**
	appeal. (Invitation to Comment, pages 7-8.) The OSPD supports such a rule. The OSPD urges the working group to adopt such a rule for three reasons. First, inspection of prior counsel's file is essential to assessing any claim of the ineffective assistance of counsel. Ineffective assistance of counsel claims usually turn on what trial counsel did or did not do as part of their representation, and the file is a vital source of information about such performance. Second, counsel for appellant has only a short time to develop any missed claims of ineffective assistance of trial counsel. Such claims must be included as part of appellant's brief on appeal, which must be filed within 210 days after the record is filed. In that time, appellate counsel must become familiar with many thousands of pages of trial record, as well as the potentially very lengthy habeas record from the superior court. It would make appellate counsel's task much more efficient if appellate counsel had access to habeas counsel's file. Third, appellate counsel will find it difficult to obtain the file through court processes if prior counsel fails to voluntarily transmit the file. In the superior court, habeas counsel may get a subpoena for documents, or something equivalent, should counsel fail to turn over the file. While it is not impossible for counsel to get an order for the files in the Court of Appeal, *see* Code of Civil Procedure section 909 [the reviewing court may make any order as the case may require], the Court of Appeal is much less equipped to make appropriate orders. The OSPD also recommends that the rule also include a provision that trial counsel be required to provide its file to appellate counsel, if trial	

Responsibilities of habeas corpus counsel (Should counsel be required to transmit their file to appellate counsel when appellate counsel is appointed?)		
Commenter	**Comment**	**Working Group Response**
	counsel has not already transmitted the file to habeas counsel. Appellate counsel needs both the trial file and the habeas file to assess whether the performance of both sets of counsel amounted to the ineffective assistance of counsel. We propose a rule as follows: **Rule 8.: XXX. Transmittal of prior counsel files** *Upon the request of appellate counsel appointed to represent petitioner pursuant to Penal Code section 1509.1, habeas counsel appointed pursuant to Penal Code section 1509 shall transmit to appellate counsel the entire file generated in the course of habeas counsel's representation. Upon request, trial counsel shall provide to appellate counsel the entire file generated in the court of trial counsel's representation, unless the file has previously been transmitted to habeas counsel.*	
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	Yes	Please see response to the comments of Robert D. Bacon above.

Rule 8.395: Record on appeal, generally		
Commenter	**Comment**	**Working Group Response**
California Attorneys for Criminal Justice	As in rule 8.622, there must be provisions for appellate counsel to augment and correct the record. Proposed rule 8.395(h) would model	The working group declines to make this suggested change. The record preparation and

Rule 8.395: Record on appeal, generally		
Commenter	**Comment**	**Working Group Response**
by Steve Rease, President Sacramento, California	record correction procedures on those set out in current rule 8.340, which governs correction of records in non-capital appeals. The procedures for the parties to correct the record in habeas corpus appeals should be modeled after rule 8.622, with the clerk and reporter certifying the record to the trial court and the trial court presiding over proceedings by appellate counsel to correct, augment, and settle the record.	correction procedures that apply following a capital trial were established by statute. Here, no statute makes those procedures applicable to record preparation following a superior court habeas corpus proceeding.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	The proposal adopts the same protracted process for correcting the record in the court of appeal. We believe there is a missed opportunity here to eliminate unnecessary delay, but it would require the involvement of people more familiar than we are with the nuts and bolts of this process to suggest concrete changes.	The proposed rules do not apply the same procedures as are established by statute for preparation, correction, and certification of the record following a capital trial. The procedures for correction and augmentation included in the proposed rules are those followed in felony and other appeals.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	Proposed Rule 8.395 concerns how the superior court will compile the record for the appeal, the material that will be included in the appellate record, and the time frames by which the clerk of the court and the court reporters must generate the clerk's transcripts and reporter's transcripts, respectively. Because these rules appear to be modeled after the non-capital rules for record preparation, rather than the capital case rules for assembling and correcting the record for the appeal, they impose a severely truncated timeframe for the court clerk and the court reporters to complete their tasks (discussed in more detail below), do not permit the superior court to enter an order to extend time when good cause justifies such an order, and do not contemplate any participation by the parties to ensure the appellate record is complete and accurate before it is transmitted to the appellate court. Involving the parties in compiling the record of capital case	Please see response to the comments of California Attorneys for Criminal Justice above and the responses to the comments concerning the timeframes for preparing the record and extensions of those timeframes below. The proposed rules do provide for involvement of the parties in correcting the record. As in non-capital felony appeals and civil appeals, a party may move to correct or augment the record.

Rule 8.395: Record on appeal, generally		
Commenter	**Comment**	**Working Group Response**
	proceedings is critical to ensuring the appellate record is accurate, correct, and complete. And including the parties in the process from the outset accomplishes this critical goal and conserves resources by ensuring the completeness and accuracy of the record from the outset. For these reasons, we believe the capital habeas appeal rules should parallel the rules for compiling and certifying the record in a death penalty appeal, rather than the non-capital case rules. Those rules are found at Rule 8.160 to Rule 8.622. * * * We also note that the rule is incomplete in that it does not provide for participation of the parties in the compiling the record and ensuring that it is accurate and complete.	
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	Draft rule 8.395(a) delineates the contents of the "record on appeal." Unlike rule 8.320, which defines the normal record on appeal in a non-capital case, 8.860, which defines the normal record in a misdemeanor appeal, and 8.610(a) which defines the contents of the record on appeal in the appeal of a death judgment, draft rule 8.395(a) does not distinguish between the clerk's transcript on appeal and the reporter's transcript on appeal. However, draft rule 8.396(c) provides that the clerk must begin preparing the "clerk's transcript" immediately after the notice of appeal is filed. The failure to define the clerk's transcript creates a potential confusion as to what items from the record on appeal delineated in 8.935(a) should be included in the clerk's transcript. To avoid confusion, OSPD proposes 8.935(c) be modified to make explicit which items from the record must be included in the clerk's transcript.	Based on this comment, the working group has modified proposed rule 8.395 to identify separately what is included in the clerk's and reporter's transcripts.

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Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings
(Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

All comments are verbatim unless indicated by an asterisk (*).

Rule 8.395: Record on appeal, generally		
Commenter	**Comment**	**Working Group Response**
	Rule 8.395. Record on Appeal. ... **(c) Preparation of clerk's transcript** (1) Except as provided in (2), the clerk must begin preparing the clerk's transcript immediately after the notice of appeal is filed. *The clerk's transcript includes items described in 8.395(a)(1) through (a)(5) and (a)(7) through (a)(11)[15].*	

Rule 8.395(a): Contents of the record on appeal		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	Rule 8.395(a): The record in every habeas appeal must include the complete trial record certified for purposes of the automatic appeal. Deciding the habeas appeal will require familiarity with what happened at the *trial* as well as with the superior court habeas proceedings. (See, e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 397-398 [state habeas court's "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding"]; *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100, 1131 [habeas court must "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently"].)	The proposed rules that were circulated for comment required, through a cross-reference to rule 4.571, that the record prepared for the automatic appeal be included in the record prepared for the appeal of a superior court habeas corpus decision. Specifically, proposed rule 8.395 provided that the record must contain "[a]ll supporting documents under rule 4.571 and any other documents and exhibits submitted to the court." In turn, proposed rule 4.571 provided that the supporting documents in the superior court habeas corpus proceedings are deemed to include the "record prepared for the automatic appeal, including any exhibits admitted in evidence, refused, or lodged[.]" However, the comments indicate that this was not sufficiently clear. Therefore, the working

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Rule 8.395(a): Contents of the record on appeal		
Commenter	**Comment**	**Working Group Response**
		group has revised proposed rule 8.395 to specifically refer to the record prepared for the automatic appeal. In addition, in the separate companion proposal relating to the rules for superior court habeas corpus proceedings, the working group has revised proposed rule 4.571(b) to clarify that the supporting documents to a petition for a writ of habeas corpus in a capital case are deemed to include not only the record prepared for the automatic appeal, but all briefs, rulings, and other documents filed in the automatic appeal as well. Therefore, the working group has revised proposed rule 8.395 to also specifically refer to these materials.
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.395(a): Contents Recommendation: CAP-SF believes that attempts to truncate or abbreviate the record on appeal of a capital habeas decision will ultimately be counterproductive. Regardless of the scope of the habeas appeal, the federal courts will need to conduct a full review of petitioner's claims. Basic federal constitutional requirements of reliability, accuracy and completeness in death penalty proceedings also mandate a comprehensive record on appeal. The record on appeal must include, at a minimum, all contents required by the current rule 8.610. Current rules 8.613 through 8.622 also provide guidance to ensure the record on appeal is complete and accurate. 8.395(a)(5) Recommendation: CAP-SF recommends that the rule should only state, "All supporting documents under rule 4.571." A separate and new subsection 8.395(a)(6) should state, "And any other documents	Please see the response to the comments of Robert D. Bacon above. Based on this comment, the working group has modified proposed rule 8.395 to separate the two categories of documents as suggested.

Rule 8.395(a): Contents of the record on appeal		
Commenter	**Comment**	**Working Group Response**
	and exhibits submitted to the Court." Rule 4.571, referenced in Rule 8.395(a)(5), does not adequately clarify the scope and breadth of "supporting documents" needed for a capital appeal. Rule 4.571(b) should first be modified based upon CAP-SF's recommendations, *infra*, before it can be referenced here.	Please see the responses to the comments on the companion proposal addressing the superior court habeas corpus proceedings.
Court of Appeal Appellate Projects by Jonathan Soglin, Executive Director First District Appellate Project	**4. Record from the capital appeal** While the proposed rules go into detail about the composition of the appellate record for the habeas appeals, neither the superior court nor appellate rules say anything about access to the original trial record. At each level, each of the participants (the court, defense counsel, prosecution counsel) will need access to the complete trial record from the original capital appeal. It will be impossible to brief and decide the habeas claims without the trial record, especially as to prejudice. In most cases, at least for the foreseeable future, it may be possible for each side's record to be passed to successor counsel -- from direct appeal counsel to superior court habeas counsel to appellate habeas counsel. (This is assuming that, at least for first several years, all the new habeas appointments will be on post-affirmance cases.) However, the superior court and the appellate court will each need the record as well. For the appellate proceedings, one solution might be to add subdivision (a)(12) to proposed Rule 8.395 stating, (12) The entire record on appeal in the California Supreme Court on the defendant's related direct appeal. The superior court rules don't have a section governing the record, so some other solution might be necessary.	Please see the response to the comments of Robert D. Bacon above.

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Rule 8.395(a): Contents of the record on appeal		
Commenter	**Comment**	**Working Group Response**
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	Proposed rule 8.395(a) lists the items to be included in the record on a habeas appeal. The rule, as noted by the staff report, is modeled on rule 8.388(b) relating to the content of the record in appeals by the People from superior court decisions. Using this as a model is largely satisfactory. However, there are some gaps in the listed items, which the working group can remedy with modest additions to the proposed rule. First, the draft rule does not include any provision for the reviewing court to obtain as part of the record transcripts of sound or sound and video evidence, such as is required for the clerk's transcript in a non-capital appeal (rule 8.320(b)(11)) and the clerk's transcript in a capital appeal (newly adopted rule 8.610(a)(l)(J)). The OSPD proposes that a subsection be added to draft rule 8.395(a) to include a provision that transcripts of sound and video recordings furnished to the superior court be made part of the record on appeal. The reviewing court must have transcripts of these tapes to review the superior court's decision relating to claims involving taped evidence. Second, the rule does not include a provision for the reviewing court to review copies of visual aids provided to the clerk under newly adopted rule 4.230(f) (effective April 27, 2019). The parties could well employ visual aids at an evidentiary hearing in the superior court during the habeas proceedings, perhaps a visual aid that counsel used at trial, perhaps something that was uncovered in the investigation of habeas claims. As the working group recognized when it added a provision for visual aids to be part of the record on appeal in capital cases, such visual aids are part of the parties' presentation of the case and should be available to the reviewing court.	The working group has modified the proposal to include a requirement that these transcripts be included in the record. The working group has modified the proposal to require the inclusion of any visual aids that are submitted to the court.

Rule 8.395(a): Contents of the record on appeal		
Commenter	**Comment**	**Working Group Response**
	Third, the Judicial Council recently adopted a rule requiring that written email communications and text messages and attachments between the court and the parties be included in the clerk's transcript on appeal. (Rule 8.610(a)(l)(e), effective April 27, 2019.) The OSPD proposes that there be an equivalent provision for the record on appeal in habeas cases. The rise of email communication between the court and parties necessitates the inclusion of such communications in the appellate record.	The working group has revised the proposal to specify that "written communications" includes, for example, e-mail messages and attachments.
	Fourth, the statement of decision ((a)(8)) and the "order appealed from" ((a)(9)) appear to be the only court orders listed. All written orders issued as part of the habeas proceedings should be included. The rule here should pattern the rule regarding the record on appeal in a capital case, which includes "Any written opinion of the court." (Rule 8.610(a)(l)(G).) In sum, the OSPD suggests that the following new subdivisions be added to draft rule 8.395(a): **Rule 8.395. Record on Appeal** **(a) Contents** .... *(12) Any transcript of sound or sound-and-video recording furnished to the superior court or tendered to the superior court under rule 2.1040;* *(13) Any copies of visual aids provided to the clerk under rule 4.230(f). If a visual aid is oversized, a photograph of that visual aid must be included in place of the*	The proposal, as circulated, would have required that the record include "Any statement of decision required by Penal Code section 1509(f) or other written decision of the court." The working group has modified this to read "Any statement of decision required by Penal Code section 1509(f) *and any* other written decision of the court."

Rule 8.395(a): Contents of the record on appeal		
Commenter	**Comment**	**Working Group Response**
	original. For digital or electronic presentations, printouts showing the full text of each slide or image must be included; *(14) Any written communication including printouts of any e- mail or text messages and their attachments between the court and the parties;* *(15) Any written opinion of the court.*	
Superior Court of San Diego County by Mike Roddy, Executive Officer	Proposed rule 8.395(a) appears to have a typo. It says: "In an appeal under this *rule article*, the record must contain:…" Is it supposed to just be "under this article"? Proposed rule 8.395(a)(5) – specify that it's documents and exhibits submitted *in support of the habeas petition*.	The working group appreciates the comment. The error has been fixed. The working group declined to make this change, which would exclude documents and exhibits submitted in opposition to the petition.

Rule 8.395(b): Stipulation for partial transcript **(Are such stipulations likely to be used or helpful? Should the rules address such stipulations?)**		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law	Rule 8.395(b): It is sufficiently unlikely that there would be a stipulation for a partial record in any capital habeas appeal, so that that possibility need not be mentioned in the rules. It would be imprudent in the extreme for the petitioner's superior court counsel, about to be replaced by counsel directed to second-guess their work, to stipulate to a partial record. It would be equally imprudent for new counsel to enter into such a stipulation at the very outset of their work, before they know the case well. A stipulation for a partial record is never entered into, or even considered, in an appeal to the Supreme Court from a judgment of death, for very good reason, and it	Both when developing the proposal circulated for public comment and when reviewing the public comments received, the working group considered whether to omit the proposed provision. The working group agrees that such stipulations are unlikely to be common. However, the working group, mindful of its charge to "strive to promote the expeditious review of death penalty judgments while ensuring justice and fairness[,]" ultimately

Rule 8.395(b): Stipulation for partial transcript (Are such stipulations likely to be used or helpful? Should the rules address such stipulations?)		
Commenter	**Comment**	**Working Group Response**
	should not be considered in a capital habeas appeal, either. Rule 8.395(b) should be deleted.	retained the provision in the hope that it may expedite record preparation, as appropriate, in at least some cases.
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.395(b): Stipulation to a Partial Transcript Recommendation: CAP-SF recommends this provision be removed. It creates an impermissible risk that a partial record or transcript will impede full review of petitioner's case in federal court.	Please see the response to the comments of Robert D. Bacon above.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	No. It is unlikely that it would be useful in capital proceedings. And, it may create problems in federal courts considering the exhaustion of claims or the determination of facts in state court.	Please see the response to the comments of Robert D. Bacon above.
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	We do not see this process used for non-capital felony appeals, so it would probably not be used for this type of appeal either.	Please see the response to the comments of Robert D. Bacon above.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs San Francisco, California and Katy Graham, Senior Appellate Court Attorney Court of Appeal, Second Appellate District, Division Six Ventura, California	The Committee does not anticipate that parties will stipulate to a limited record with any frequency. By doing so, petitioner's counsel would run an unnecessary risk of providing ineffective assistance. Both parties may be required to perform significant additional work in order to determine which portions of the record were relevant to the specific issue raised. The Committee therefore does not believe the rules should include such a provision.	Please see the response to the comments of Robert D. Bacon above.

Rule 8.395(b): Stipulation for partial transcript (Are such stipulations likely to be used or helpful? Should the rules address such stipulations?)		
Commenter	**Comment**	**Working Group Response**
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: As a practical matter, stipulations to a limited record will likely be rare. However, for the rare occasion when such stipulations do occur, a rule addressing the matter is helpful. The Fourth District suggests shortening the deadline for stipulations to a limited record to prevent superior courts from incurring unnecessary costs related to record preparation. * * * Proposed rule 8.395 relates to the record on appeal. Subdivision (b) states that if the parties stipulate in writing to a limited record before the record is certified, the portions the parties agree are not required for determination of the appeal must not be prepared or sent to the reviewing court. The Fourth District suggests that the rule include a shorter deadline for stipulations to a limited record. If the parties can stipulate at any point before record certification, it is likely that superior courts will incur costs and burdens of preparing portions of the record that the parties ultimately deem unnecessary for the appeal.	The working group declined to recommend a shorter deadline, which could discourage parties from utilizing the stipulation provision.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	We do not see this process used for non-capital felony appeals, so it would probably not be used for this type of appeal either.	Please see the response to the comments of Robert D. Bacon above.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	The limited record approach is unlikely to be used often. Holding up the record preparation while the parties consider it seems to be an unnecessary source of delay. We suggest deleting this option and beginning record preparation promptly upon the filing of the notice of appeal.	Please see the response to the comments of Robert D. Bacon above, regarding omitting the stipulation provision. However, the working group has modified the proposed rule 8.395(c)(1) to require that record preparation begin immediately after the superior court

Rule 8.395(b): Stipulation for partial transcript (Are such stipulations likely to be used or helpful? Should the rules address such stipulations?)		
Commenter	**Comment**	**Working Group Response**
		issues the decision on an initial petition. The working group also has modified the stipulation provision to provide that an unrequired portion of the record "need not be prepared or sent"—rather than "must not"—to reflect that record preparation may begin prior to any stipulation by the parties.
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	Concerning the record on appeal, Mexico does not believe the rules should allow the parties to stipulate to a limited record in these death penalty cases. As established by the ABA guidelines cited above, counsel has a duty to raise every conceivable claim. If material is omitted from the record on appeal in California appellate courts, it could potentially have the effect of rendering any argument encompassing that material unexhausted for purposes of federal review. There is simply no good reason to limit the material from the case that is available for courts to review and future attorneys to address.	Please see the response to the comments of Robert D. Bacon above.
Superior Court of Los Angeles County	Stipulations to a limited record on appeal are not likely to be used.	Please see the response to the comments of Robert D. Bacon above.
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	No/No	Please see the response to the comments of Robert D. Bacon above.

Rule 8.395(c): Preparation of record (When should preparation begin?)		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	Rule 8.395(c)(2): In a case in which the superior court denied a certificate of appealability, it is likely that the Court of Appeal will need to examine the superior court record in order to rule on either a renewed motion for certificate of appealability or a motion for stay of execution. (See Rule 8.112(a)(4) [papers that must be filed in the Court of Appeal with a petition for writ of supersedeas]; Ninth Circuit Local Rule 22-1(b) [if district court denies COA, it must forward the entire record to the appellate court for use in deciding whether to grant a COA].) Rule 8.395(c)(2), deferring the preparation of the record until after the COA motion is ruled on, is unrealistic and should be dropped. As a practical matter, no money or other resources will be saved. The expense is an insignificant one given that a human life is at stake.	Penal code section 1509.1(c), enacted as part of Proposition 66, provides that the "court of appeal shall grant or deny a request for a certificate of appealability within 10 days of an application for a certificate." The federal appellate courts are not subject to a similar deadline. For this reason, the procedures with respect to consideration of certificates of appealability in the California courts will need to be different from the procedures in federal courts. Even if preparing a record on appeal were appropriate in these circumstances, it would generally not be possible for the record to be prepared and reviewed by the Court of Appeal before the court must rule on a request for a certificate of appealability. Petitioners will need to use other methods to provide the Court of Appeal with information relevant to determining whether to issue a certificate of appealability. Under proposed rule 4.574(c), if there is an evidentiary hearing in the superior court, the assigned court reporter is required to prepare and certify daily transcripts of the proceedings, so these daily transcripts will be available for consideration.
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.392(c)(2) Recommendation: The rule should be modified to provide that court reporters be required to prepare a record of superior court proceedings, once the proceedings have concluded, regardless of	The working group declined to make this suggested change. The purpose of preparing clerk's and reporter's transcripts is to create the form of the record necessary for an appeal in the

Rule 8.395(c): Preparation of record (When should preparation begin?)		
Commenter	**Comment**	**Working Group Response**
	whether a certificate of appealability has been issued. Whether a certificate of appealability is issued or not, a record will need to be prepared because litigation in state court will be subject to review in federal court. Failure to promptly prepare transcripts invites the risk of a failure to preserve an accurate record for later review. * * * 8.395(c)(2) Recommendation: CAP-SF believes a clerk should prepare a transcript of superior court proceedings regardless of whether a certificate of appealability has been issued. Whether a certificate of appealability is issued or not, a record will need to be prepared because litigation in state court will most likely be subject to review in federal court. Failure to promptly prepare transcripts invites the risk of a failure to preserve an accurate record for later review. * * * 8.395(d)(l) Recommendation: The reporter should prepare a transcript of superior court proceedings regardless of whether a notice of appeal has been filed. Given that the purpose of Proposition 66 is to expedite state review of capital cases, and the improbability that neither party would appeal either the grant or denial of habeas corpus relief in the superior court,	state courts. If no such appeal is permissible because a certificate of appealability has not issued, the working group's view is that the record on appeal should not be prepared. This does not mean that the materials needed for federal habeas corpus proceedings will be unavailable. All of the records that are required to be included in the clerk's transcript will be in the superior court case file and must be retained by the court. Under proposed rule 4.574(c), if there is an evidentiary hearing, the assigned court reporter is required to prepare and certify daily transcripts of the proceedings, so these daily transcripts will be available. Based on the comments received, the working group has revised the proposal to provide for immediate preparation of the record after the superior court issues the decision on an initial petition and, in the case of successive petitions, immediately after the appeal may proceed (i.e., after the notice of appeal or the certificate of appealability is issued or has been received, if one is required).

Rule 8.395(c): Preparation of record (When should preparation begin?)		
Commenter	**Comment**	**Working Group Response**
	the preparation of the reporter's transcript should begin immediately upon the conclusion of the superior court proceedings.	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	Preparation of the record should begin when the notice of appeal is filed.	Please see the response to the comments of California Appellate Project–San Francisco above.
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	Immediately for the non-successive petition appeals; upon issuance of the certificate of appealability in successive petition appeals.	Please see the response to the comments of California Appellate Project–San Francisco above.
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: The Fourth District understands that proposed rule 8.395 requires that the clerk of the superior court begin preparing the clerk's transcript "immediately after the notice of appeal is filed" to provide the parties with time to consider whether to stipulate to a limited record on appeal. However, those stipulations are unlikely. Accordingly, the Fourth District suggests that preparation of the record should begin immediately upon decision by the superior court in the capital habeas corpus proceeding. This suggestion is consistent with rule 8.336(a)(l), which requires that for non-death penalty felony appeals, "the clerk must begin preparing the record immediately after a verdict or finding of guilt of a felony is announced following a trial on the merits."	Please see the response to the comments of California Appellate Project–San Francisco above.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman,	Immediately for the non-successive petition appeals; upon issuance of the certificate of appealability in successive petition appeals.	Please see the response to the comments of California Appellate Project–San Francisco above.

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Rule 8.395(c): Preparation of record (When should preparation begin?)		
Commenter	**Comment**	**Working Group Response**
Assistant Clerk/Executive Officer		
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	We suggest deleting this [stipulation to limited record] option and beginning record preparation promptly upon the filing of the notice of appeal.	Please see the response to the comments of California Appellate Project–San Francisco above.
Superior Court of Los Angeles County	Preparation of the record should begin upon filing of the Notice of Appeal.	Please see the response to the comments of California Appellate Project–San Francisco above.

Rule 8.395(d): Clerk's transcript, copies		
Commenter	**Comment**	**Working Group Response**
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.395(c)(4) Recommendation: The rule should be modified to provide the clerk must also prepare a copy of the clerk's transcript for an assisting counsel or entity, whether or not such counsel or entity requests it.	The working group has modified the proposal to require that copies of the transcripts be prepared for the assisting entity or counsel.
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Subdivision (c)(4) provides that upon request, the clerk must prepare an extra copy of the clerk's transcript for the district attorney or the Attorney General, whichever is not counsel for the People on appeal. The Fourth District suggests including a deadline for the request.	Because similar language appears in other rules, the working group's view is that a potential deadline should be considered in all of the similar provisions. The working group concluded there was not sufficient time to develop and circulate a proposal making the suggested change. Accordingly, the working group recommends this suggestion be referred for consideration by the appropriate Judicial

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Rule 8.395(d): Clerk's transcript, copies		
Commenter	**Comment**	**Working Group Response**
		Council advisory body at a later date.

Rule 8.395(d) and (e): Clerk's and reporter's transcripts (Is 20 days from the filing of the notice of appeal appropriate for completion of the clerk's and reporter's transcripts?)		
Commenter	**Comment**	**Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	No. It is highly unlikely that the complete record of habeas corpus proceedings could be collected in less than 90 days. The rules for certification of the clerk's transcript and the reporter's transcript must include a process and time for correction of the record by the parties. Rule 8.616(c) and (d) allow 30 days for preparation of the record in capital appeals and provide that the trial court can extend the time for an additional 30 days and that the clerk and reporters can apply to the state Supreme Court for further extensions. We propose that the habeas rule incorporate similar time frames and mechanisms for granting extensions.	Based on this and other comments, the working group has modified the proposal to mirror the 30-day timeframe for the clerk and court reporters to prepare the transcripts of a capital trial. The working group also modified the proposal to provide that the superior court may extend the time for up to an additional 30 days, after which any further extensions must be sought from the reviewing court.
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	Preparation of the record is a laborious and time-consuming process. The initial time should be more than 20 days (more like 60 days?), and the time should be automatically extended when the record is over 10,000 pages.	Please see response to the comments of California Attorneys for Criminal Justice above. Rather than modify the proposal to provide automatic extensions for these appeals, the working group retained the presumption of good cause for overlong records, which is consistent with rule 8.616(d)(2), addressing the record in death penalty automatic appeals.
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: Based on the Fourth District's experience with records in non-capital felony appeals and requests for extensions of time, 20 days is insufficient for preparation of the clerk's and reporter's transcripts, especially given the likely size of these records.	Please see response to the comments of California Attorneys for Criminal Justice above.

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Rule 8.395(d) and (e): Clerk's and reporter's transcripts (Is 20 days from the filing of the notice of appeal appropriate for completion of the clerk's and reporter's transcripts?)		
Commenter	**Comment**	**Working Group Response**
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	The rules recognize that the briefs will take a much longer time to prepare and file; however, they do not recognize that preparation of the record is also a laborious and time-consuming process. The initial time should be more than 20 days (a 60-volume record in a capital case from our largest county takes about two months to prepare and certify), and the time should be automatically extended when the record is over 10,000 pages. This eliminates the need for repetitive extension of time requests.	Please see response to the comments of California Attorneys for Criminal Justice above.
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	In terms of the timeframe for preparation of the record, Mexico notes that 20 days is highly likely to be an insufficient length of time to permit preparation of a complete record. Mexico would suggest at least 90 days; setting too short of a timeline has the effect of forcing courts and parties to expend resources on filing and ruling on requests for extensions of time.	Please see response to the comments of California Attorneys for Criminal Justice above.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	Although there does not appear to be any overall deadline by which the superior court must ensure completion of the record for the appeal, proposed Rule 8.395(c)(3) provides the clerk only 20 days from receipt of the notice of appeal to complete preparation of the clerk's transcript. Similarly, proposed Rule 8.395(d)(3) provides the court reporters just 20 days from receipt of the notice of appeal to complete and certify the reporter's transcript of the proceedings. * * * It is our view that these 20-day time frames are unreasonably short. When an order to show cause issues and an evidentiary hearing occurs, the record in a capital habeas corpus proceeding can resemble a capital trial. Litigation of certain claims routinely involves documentary evidence that consists of tens of thousands of pages, and	Please see responses to the comments of California Attorneys for Criminal Justice above and also of the California Judges Association above.

Rule 8.395(d) and (e): Clerk's and reporter's transcripts (Is 20 days from the filing of the notice of appeal appropriate for completion of the clerk's and reporter's transcripts?)		
Commenter	**Comment**	**Working Group Response**
	many volumes of reporter's transcripts involving numerous different reporters. We strongly suggest that the rules provide the clerks and court reporters the same timeframes provided for preparing the record in the automatic appeal. * * * For all the reasons stated above, twenty days from the filing of the notice of appeal is not an appropriate maximum timeframe for completion of the clerk's and reporters' transcripts, especially in those cases where the superior court has conducted an evidentiary hearing.	
Superior Court of Los Angeles County	Yes, with provisions for extension, 20 days is appropriate.	Please see response to the comments of California Attorneys for Criminal Justice above.
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	We propose 30 days as an appropriate timeframe allowing a small additional time to prepare the record (especially the clerk's transcript).	Please see response to the comments of California Attorneys for Criminal Justice above.

Rule 8.395(e): Extension of time to complete record on appeal (Is the proposed provision for extensions of time appropriate in these appeals?)		
Commenter	**Comment**	**Working Group Response**
California Attorneys for Criminal Justice by Steve Rease, President	No. The superior court judge, and not the appellate court, must have authority to grant time for the court clerk to complete the clerk's transcripts and the court reporter to complete the reporter's	Based on this and other comments, the working group has modified proposed rule 8.395 to provide that the superior court may extend the

Rule 8.395(e): Extension of time to complete record on appeal (Is the proposed provision for extensions of time appropriate in these appeals?)		
Commenter	**Comment**	**Working Group Response**
Sacramento, California	transcripts. * * * Rule 8.616(c) and (d) allow 30 days for preparation of the record in capital appeals and provide that the trial court can extend the time for an additional 30 days and that the clerk and reporters can apply to the state Supreme Court for further extensions. We propose that the habeas rule incorporate similar time frames and mechanisms for granting extensions.	time for up to an additional 30 days, after which any further extensions must be sought from the reviewing court. The working group also modified the proposed rule to clarify that rules 8.60 and 8.63, which generally govern requests for extension of time, also apply to extensions to prepare the record in these appeals.
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	The elimination of the 60-day limit for extensions is necessary.	This appears to be a reference to a provision in rule 8.336 limiting the reviewing court to granting extensions not exceeding a total of 60 days. Proposed rule 8.390(b), as circulated, would have made rule 8.336 applicable to these appeals. In response to this comment, the working group deleted the reference to rule 8.336. In addition to addressing the 60-day limit, the working group concluded that this change would make the rules clearer, since proposed rule 8.395, as circulated, already covered most topics addressed in rule 8.336. The working group also revised proposed rule 8.395 to include provisions from rule 8.336 regarding portions of a transcript that were previously transcribed, multi-reporter cases, and supervision of the record-preparation process that were not previously addressed in rule 8.395.
Court of Appeal,	Response: Yes.	Please see response to the comments of

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Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

(Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

All comments are verbatim unless indicated by an asterisk (*).

Rule 8.395(e): Extension of time to complete record on appeal (Is the proposed provision for extensions of time appropriate in these appeals?)		
Commenter	**Comment**	**Working Group Response**
Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice		California Attorneys for Criminal Justice above.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	The elimination of the 60-day limit for extensions is necessary for this category of case.	Please see the response to the comments of the California Judges Association above.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	And proposed Rule 8.395(e)(1) flatly prohibits the superior court from exercising any discretion to extend time for the clerk or court reporter to prepare their portions of the record. * * * The trial court is in the best position to understand the requirements of each case and the needs of court staff. We see no good reason to prohibit superior courts from extending time when necessary for their clerks and court reporters to do their jobs. * * * Further, the superior court judge should have the discretion to extend time when necessary to ensure an accurate and complete appellate record.	Please see response to the comments of California Attorneys for Criminal Justice above.
Superior Court of Los Angeles County	Yes, the proposed provision addressing extensions are appropriate.	Please see response to the comments of California Attorneys for Criminal Justice above.

Rule 8.395(e): Extension of time to complete record on appeal (Is the proposed provision for extensions of time appropriate in these appeals?)		
Commenter	**Comment**	**Working Group Response**
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	Yes	Please see response to the comments of California Attorneys for Criminal Justice above.
Superior Court of Riverside County by Susan Ryan, Chief Deputy of Legal Services	Rule 8.395(e)(1): This provides that "The superior court may not extend the time for preparing the record" on appeal of a death penalty habeas. The phrasing seems odd. We suggest modifying the language to state: "All applications for an extension of time for preparing the record shall be made to the reviewing court".	Please see response to the comments of California Attorneys for Criminal Justice above.

Rule 8.395(f): Form of record		
Commenter	**Comment**	**Working Group Response**
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	Should subdivision (f) on the form of the record recognize the opt-out provisions in Code of Civil Procedure section 271 pertaining to delivery of a reporter's transcript in electronic form? Code of Civil Procedure section 271, subdivision (a) provides: "An official reporter or official reporter pro tempore shall deliver a transcript in electronic form, in compliance with the California Rules of Court, to any court, party, or person entitled to the transcript, unless any of the following apply: (1) The party or person entitled to the transcript requests the reporter's transcript in paper form. (2) Prior to January 1, 2023, the court lacks the technical ability to use or store a transcript in electronic form pursuant to this section and provides advance notice of this fact to the official reporter or official reporter pro tempore. (3) Prior to January 1, 2023, the official reporter or official	The working group declined to modify the requirement in proposed rule 8.395(f) that the reporter's transcripts in these capital habeas corpus proceedings must be in electronic form. Since 2000, Penal Code section 190.8 has required superior courts to assign a court reporter who uses computer-aided transcription equipment to report all proceedings conducted in the superior court in any case in which a death sentence may be imposed. Proposed rule 4.574, which is recommended for adoption in a separate companion report to the Judicial Council, extends this requirement to death penalty–related habeas corpus proceedings in the superior courts. Thus, the court reporter assigned to the superior court habeas corpus

Rule 8.395(f): Form of record		
Commenter	**Comment**	**Working Group Response**
	reporter pro tempore lacks the technical ability to deliver a transcript in electronic form pursuant to this section and provides advance notice of this fact to the court, party, or person entitled to the transcript." Perhaps Rule 8.395(f)(1) should state something like the following: "The reporter's transcript must be in electronic form, subject to the provisions of Code of Civil Procedure section 271. The clerk is encouraged to send the clerk's transcript in electronic form if the court is able to do so."	proceeding already would be required to be able to deliver a transcript in electronic form. Additionally, rules 8.613 and 8.619 already require that court reporters deliver copies of transcripts from capital trials in electronic format, so the superior courts that will have death penalty–related habeas corpus proceedings should already be capable of receiving and distributing reporter's transcripts in electronic format. All of the Court of Appeal districts are capable of using and storing an electronic transcript and thus will be able to accept a transcript in this form.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	Should subdivision (f) on the form of the record recognize the opt-out provisions in Code of Civil Procedure section 271 pertaining to delivery of a reporter's transcript in electronic form? Code of Civil Procedure section 271, subdivision (a) provides: "An official reporter or official reporter pro tempore shall deliver a transcript in electronic form, in compliance with the California Rules of Court, to any court, party, or person entitled to the transcript, unless any of the following apply: [¶] (1) The party or person entitled to the transcript requests the reporter's transcript in paper form. [¶] (2) Prior to January 1, 2023, the court lacks the technical ability to use or store a transcript in electronic form pursuant to this section and provides advance notice of this fact to the official reporter or official reporter pro tempore. [¶] (3) Prior to January 1, 2023, the official reporter or official reporter pro tempore lacks the technical ability to deliver a transcript in electronic form pursuant to this section and provides advance notice of this fact to the court, party, or person entitled to the transcript." Perhaps Rule 8.395(f)(1) should state something like the following: "The reporter's transcript must be in electronic form, subject to the	Please see the response to the comments of the California Judges Association above.

Rule 8.395(f): Form of record		
Commenter	**Comment**	**Working Group Response**
	provisions of Code of Civil Procedure section 271. The clerk is encouraged to send the clerk's transcript in electronic form if the court is able to do so."	
Superior Court of Los Angeles County	Regarding **Rule 8.395 (f)(1)** (page 19) language being modeled on language that will be added to rule 8.619(f)(2) relating to the preparation of the record for the automatic appeal, effective April 25, 2019: 8.395 (f) Form of record (1) The reporter's transcript must be in electronic form. The clerk is encouraged to send the clerk's transcript in electronic form in the court is able to do so. Most courts are not prepared to receive or deliver a reporter transcript in electronic form at this time. Will CCP 271(a)(2) apply? CCP 271: (a) An official reporter or official reporter pro tempore shall deliver a transcript in electronic form, in compliance with the California Rules of Court, to any court, party, or person entitled to the transcript, unless any of the following apply: (1) The party or person entitled to the transcript requests the reporter's transcript in paper form. **(2) Prior to January 1, 2023, the court lacks the technical ability to use or store a transcript in electronic form pursuant to this section and provides advance notice of this fact to the official reporter or official reporter pro**	Please see the response to the comments of the California Judges Association above.

Rule 8.395(f): Form of record		
Commenter	**Comment**	**Working Group Response**
	tempore. (3) Prior to January 1, 2023, the official reporter or official reporter pro tempore lacks the technical ability to deliver a transcript in electronic form pursuant to this section and provides advance notice of this fact to the court, party, or person entitled to the transcript.	

Rule 8.395(g): Sending the transcripts		
Commenter	**Comment**	**Working Group Response**
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.395(g): Sending the transcripts Recommendation: The rule should be modified to provide that in all cases the clerk must send a copy of the record on appeal to any assisting counsel or entity, regardless of the status of petitioner's representation.	The working group has modified the proposal to require that copies of the transcripts be sent to the assisting entity or counsel, if designated, or the district appellate project.
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	Subdivision (g)(2) refers to "petitioner's counsel's copy" of the transcripts; however, the copy of transcripts has always belonged to petitioner. Should the word "counsel's" be deleted?	The working group declined to make this change. The language of this proposed provision is modeled on the current rules for both capital appeals and non-capital felony appeals, which provide for a copy to go to appellate counsel, if appointed. When the appeal is completed, this copy can be given by counsel to the client.
Court of Appeal Appellate Projects by Jonathan Soglin, Executive Director First District Appellate Project	**3. Copy of Record to Assisting Entity (SP18-21)** Just as 8.395(c)(4) and (g)(1)(c) provide that an extra copy of the record can go to the DA or AG (whichever is not counsel on appeal), an extra copy should be made available to the assisting entity in addition to appointed counsel. Without a record, the assisting entity	Please see the response to the comments of California Appellate Project–San Francisco above.

Rule 8.395(g): Sending the transcripts		
Commenter	**Comment**	**Working Group Response**
	will not be able to provide the necessary support and oversight. Sharing a record would delay proceedings substantially. Accordingly, we recommend adding subdivision (g)(1)(E) to proposed Rule 8.395, reading: (E) The assisting entity.	
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	Subdivision (g)(2) refers to "petitioner's counsel's copy" of the transcripts; however, the copy of transcripts has always belonged to petitioner. Should the word "counsel's" be deleted?	Please see response to the comment of the California Judges Association above.

Rule 8.396(b): Length of briefs (Are the proposed limits appropriate?)		
Commenter	**Comment**	**Working Group Response**
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.396(b): Length 8.396(b)(l)(A), 8.369(b)(3)(A) & 8.396(b)(5) Recommendation: CAP-SF believes the word count should not include ineffective assistance of trial counsel claims. Just as IAC claims raised in the superior court have no word limitation, so should IAC claims raised in the appellate court have no such limitation. Prop 66 expressly allows the presentation of claims of IAC of trial counsel that were not presented in the superior court. Nothing in Prop 66 requires or provides a basis for making it more difficult to adequately plead IAC claims first presented on appeal. Appellate	The working group declined to exclude ineffective assistance of counsel ("IAC") claims from the length limits for briefs, reasoning in part that the 300-page limit for opening briefs is not so clearly restrictive as to necessarily require additional pages for IAC claims at this time. This assessment may change in the future, as IAC claims are actually raised and briefed in this brand new type of appeal. If courts find that they must regularly expand the length limits to accommodate these IAC claims, an advisory body may wish to revisit this suggestion.

Rule 8.396(b): Length of briefs (Are the proposed limits appropriate?)		
Commenter	**Comment**	**Working Group Response**
	counsel, like habeas counsel, must be afforded the ability to set forth an adequate claim for relief without the burden of a word count. 8.396(b)(6) Recommendation: The rule should be amended to include language that "good cause" will be evaluated under the same criteria as for capital direct appeals. (Cal. Rules of Court, rule 8.631.) Defining how good cause must be determined will help promote clarity, regularity and predictability in approvals or denials of applications for over-length briefs. The same factors warranting over-length briefs on direct appeal from conviction must also govern appeals from superior court denials of relief on habeas.	The working group declined to make this change. It was not apparent that the same factors identified in rule 8.631 also should be relevant to determining good cause for purposes of extending the time to file briefs in this new type of appeal. The working group concluded that it would be premature to identify factors supporting good cause in these novel proceedings at this time. However, an appropriate Judicial Council advisory body may wish to revisit this suggestion at a later time.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	Rule 8.396(b) should apply only to the direct appeal of the capital habeas corpus proceedings. The rule should not limit the length of the ineffective assistance of counsel claims and supporting exhibits. The rules on length of content of the habeas corpus appeal must contemplate the petitioner's right to appeal ineffective assistance of habeas corpus counsel and request an evidentiary hearing. The rules on length of content must allow enlargement as necessary to develop ineffective assistance claims and provide supporting exhibits.	Please see the response to the comments of California Appellate Project–San Francisco above.
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: Yes, the Fourth District believes it is appropriate to model rule 8.630 relating to briefs in capital appeals.	The working group appreciates this input.

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Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings
(Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

All comments are verbatim unless indicated by an asterisk (*).

Rule 8.396(b): Length of briefs (Are the proposed limits appropriate?)		
Commenter	**Comment**	**Working Group Response**
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	Proposed rule 8.396, addressing appellate briefs, provides length limits that Mexico considers to be on the low side, given the unique nature of these cases. Whatever limit is set, it is important that the final rule retains the provision permitting longer briefs where necessary.	Please see the response to the comments of California Appellate Project–San Francisco above.
Superior Court of Riverside County by Susan Ryan, Chief Deputy of Legal Services	Rule 8.396(b)(3): This should be deleted. It allows for a brief on appeal to be typewritten instead of prepared on a computer and then sets a page limit rather than the word-count limit of (b)(1) that is used when a brief is prepared on a computer. If by April of 2019 an attorney does not have a computer and cannot afford both a computer and staff capable of using a word processor, it is questionable that the attorney is qualified to handle a death penalty habeas. On the other hand, some petitioners may want to handle their own habeas petitions, in which case the petition would be handwritten, not typed. We suggest that pro per petitions be given a page limit in subdivision (b)(3) and all attorneys be required to abide by (b)(1) and (b)(2) (word count).	The working group declined to make this suggested change at this time. Currently, there are multiple rules relating to briefing in the Court of Appeal and Supreme Court, including the rule relating to briefs in automatic capital appeals, that include similar provisions addressing typewritten briefs (see rules 8.204, 8.360, 8.504, 8.520, and 8.630). The working group's view is that proposed rule 8.396 should not differ in this respect from these other rules. If the option for typewritten briefs is to be eliminated or limited, consideration should be given to addressing this in all of these rules.

Rule 8.396(c): Time to file briefs (Are the proposed timeframes appropriate?)		
Commenter	**Comment**	**Working Group Response**
California Appellate Defense Counsel by Kyle Gee, Chair, CADC Government Relations Committee Oakland, California	<u>The Triggering Event for the Opening Brief Due Date</u> Proposed Rule 8.396(c)(1) provides that the opening brief is due 210 days after "the record is filed" on appeal, subject to discretionary extensions of time. Proposed Rule 8.395(c)(3) requires the Clerk's Transcript to be produced within 20 days of filing of the Notice of	Based on this and other comments, the working group has revised proposed rule 8.396 to: • Provide that the opening brief is due within 210 days after either the record is filed or appellate counsel is appointed,

Rule 8.396(c): Time to file briefs (Are the proposed timeframes appropriate?)		
Commenter	**Comment**	**Working Group Response**
	Appeal, and proposed Rule 8.395(d)(3) requires the Reporter's Transcript to be produced within 20 days of notice to the reporter. Finally, proposed Rule 8.395(h) makes current Rule 8.340 available to augment and/or correct the record. Based on the experience of CADC members in capital appeals and noncapital appeals with complex records, we anticipate that counsel on the habeas appeal will not have a complete, augmented, and corrected record for a substantial time after filing of the original record on appeal. Furthermore, the existence of Penal Code section 1509.1(b) will require counsel on the habeas appeal to review the "entire" record of the Superior Court habeas, as well as Superior Court habeas counsel's file and perhaps the file of the "assisting entity or counsel" in the Superior Court. Counsel on the habeas appeal might also need to obtain the opinions of experts. For these reasons, we believe that 210 days after "the record is filed" will only be realistic if the record filing date is the date of filing of the last augmented or corrected record. In more simple cases, where record augmentation and correction is minor or non-existent, 210 days may prove a reasonable goal. In complex cases, however, record augmentation and correction may take many months, despite the best efforts of appellate counsel, the Superior Courts, and the appellate courts. It seems more reasonable to "trigger" the 210-day due date upon filing of the last augmented or corrected record.	whichever is later; and • Automatically extend the time for filing briefs if the clerk's and reporter's transcripts combined exceed 10,000 pages. The working group's view is that these changes will make proposed rule 8.396 more consistent with the rule on the deadlines for filing briefs in the automatic appeal. The working group declined, however, to modify the proposed rule to provide that the 210 days starts with the filing of the last augmented or corrected record, which would be inconsistent with the time limits for briefs in capital automatic appeals. In automatic appeals, the 210-day period is triggered by the filing of the record certified for completeness or the delivery of the completed record to the defendant's appellate counsel, whichever is later. This is before the record is certified for accuracy and before any augmentations or corrections are made by the California Supreme Court. The need for extensions of the deadline to file briefs is handled through extension requests made to and considered by the Supreme Court. The working group's view is that the need for extensions of time to file briefs in these appeals from superior court decisions in death penalty–related habeas corpus proceedings, including when needed due to augmentation or correction

Rule 8.396(c): Time to file briefs (Are the proposed timeframes appropriate?)		
Commenter	**Comment**	**Working Group Response**
		of the record, similarly should be handled through extension requests made to and considered by the Court of Appeal.
Court of Appeal Appellate Projects by Jonathan Soglin, Executive Director First District Appellate Project	**5. Claims Not Raised in the Superior Court** Proposition 66 requires a hybrid appellate/collateral review procedure in which new evidence can presented in the appeal of the habeas denial, allowing counsel to raise IAC of superior court habeas counsel. The proposed rules require that defendant include in his or her opening brief IAC claims not raised in the superior court. (Proposed Rule 8.397(a)-(b).) Such a brief must be accompanied by a "proffer" including documentary evidence supporting such claims. (Proposed Rule 8.397(c).) This process may actually impede rather than promote judicial economy. The record-based conventional appellate arguments inevitably will be ready prior to the collateral arguments because they're based on the existing record and won't require outside investigation and pre-authorization for retaining investigators and experts. Requiring both the true appellate and the collateral arguments to be combined in the same pleading will put undue pressure on completion of that brief and will likely delay ultimate adjudication of the appeal. If it were possible to bifurcate the appellate and collateral components, counsel could file the conventional appellate brief, even while still working on the collateral investigation. That would allow the Attorney General and ultimately the Court to begin working on the conventional appellate arguments, rather than delay that process until after submission of the new evidence and collateral arguments. This would also be more in line with current Court of Appeal practice in non-capital cases under which habeas petitions are not typically filed concurrently with the AOB. They ordinarily are filed at a later	It is not apparent to the working group, at this time, that bifurcated or otherwise piecemeal briefing will be more efficient. Nor is it clear that counsel would necessarily prefer to defer investigating potential IAC claims until after counsel has briefed the other appellate arguments. In a specific case where separate additional briefing may be desired, existing rule 8.200 already provides that the presiding justice may permit supplemental briefing. The working group concluded that it would be premature, at this time, to propose a rule more expressly permitting bifurcated briefing, which, by multiplying the number of briefs, may complicate rather than expedite the overall review process. However, the appropriate Judicial Council advisory body may wish to revisit this suggestion at a later time, after counsel, the parties, and the courts gain greater experience in litigation and deciding such claims.

Rule 8.396(c): Time to file briefs (Are the proposed timeframes appropriate?)		
Commenter	**Comment**	**Working Group Response**
	point in the briefing of the appeal. Accordingly, we recommend that proposed Rule 8.397(b) be modified to create flexibility, such that IAC of habeas trial counsel claims can be raised either in the first brief or in a separately filed supplemental brief (perhaps titled "Section 1509.1(b) Opening Brief on IAC Claims Not Raised in the Superior Court"), depending on the timing of the development of those IAC claims. However, the rules should provide that if there are multiple IAC claims they should all be raised together in the same pleading.	
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.396(c)(l) Recommendation: CAP·SF recommends that the rule provide for a filing deadline of one year from appointment. The proposed filing deadline fails to take into account that appellate counsel will be required to review trial counsel's file, habeas counsel's file, the record on appeal from the trial, and the record on appeal from the habeas denial. Significantly more time is required to complete these tasks and to write a legally competent appellate brief that includes claims of trial counsel's IAC. A one-year time frame, mirrors the statutory filing deadline for a superior court habeas petition. In order to attract competent counsel to take these cases, counsel must be given adequate time to fulfill their duties.	Please see the response to the comments of California Appellate Defense Counsel above.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	The time to file should be no less than filing a capital appeal in the Supreme Court, and should, in addition, allow extensions of time upon a showing of necessity of investigation and expert preparation of ineffective assistance claims. Rule 8.630, governing time to file briefs in capital appeals, states: If the clerk's and reporter's transcripts combined exceed 10,000 pages, the time limits stated in (A) and (B)	Based on this and other comments, the working group has revised proposed rule 8.396 to automatically extend the time for filing briefs for each 1,000 pages of combined transcript over 10,000 pages, up to 10,000 pages. In the companion proposal relating to

Rule 8.396(c): Time to file briefs (Are the proposed timeframes appropriate?)		
Commenter	**Comment**	**Working Group Response**
	are extended by 15 days for each 1,000 pages of combined transcript over 10,000 pages." (Rule 8.630 (c)(1)(c).) The proposed rules also allow for extensions for long records in habeas appeals; furthermore, in determining the length of the record for the purpose of extending time, the record of a habeas corpus appeal should include not only the habeas petition and exhibits and the record of the evidentiary hearing, but the record and briefs in the direct appeal, since they are part of the habeas proceeding and are routinely incorporated by reference into the habeas corpus petition.	the rules for superior court habeas corpus proceedings, the working group has revised proposed rule 4.571(b) to clarify that the supporting documents to a petition for a writ of habeas corpus in a capital case are deemed to include not only the record prepared for the automatic appeal, but all briefs, rulings, and other documents filed in the automatic appeal as well. Under proposed rule 8.395, all of these supporting documents must be included in the record on appeal.
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	Should the rule specify the sanctions that may be imposed if there is a failure to file the brief? E.g., like those in California Rules of Court, rule 8.360(c)?	The working group considered this topic both before circulating the proposal for public comment and in light of the comments received. The working group concluded that, because the circumstances of when a brief is late may vary considerably, the appropriate sanctions should be left to the discretion of the Court of Appeal.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs San Francisco, California and Katy Graham, Senior Appellate Court Attorney Court of Appeal, Second Appellate District, Division Six Ventura, California	The Committee suggests that the timeframe for filing briefs in death-penalty habeas appeals should be considered in conjunction with the timeframe for filing briefs in the superior court. Specifically, the Committee is concerned that (1) the proposed rule for superior court briefing would afford only 45 days to file response briefs and 30 days to file replies, while (2) the proposed rule for appellate courts would permit 120 days to file response briefs and 60 days to file replies. In the habeas context, briefs filed in the superior court and appellate court are likely to raise many similar issues. The Committee therefore suggests that the timeframe to respond and reply should be similar	Please see the response to the comments in the companion report on the proposed rules relating to superior court habeas corpus proceedings.

Rule 8.396(c): Time to file briefs (Are the proposed timeframes appropriate?)		
Commenter	**Comment**	**Working Group Response**
	during each phase. The timeframe for superior court briefing seems unnecessarily short, given the magnitude of issues potentially presented, so the Committee recommends adopting a 120-day response and 60-day reply timeframe for both the superior and appellate courts.	
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: Yes, the Fourth District believes it is appropriate to model rule 8.630 relating to briefs in capital appeals.	The working group appreciates this input.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	Subdivision (c)(5) is a notice provision for failure to file the brief. The notice is to include that failure to comply may result in sanctions specified in the notice; however, the rule does not specify what sanctions may be given. Should the rule specify sanctions like those in rule 8.360(c), California Rules of Court, e.g., dismissal for appellant?	Please see the response to the comments from the California Judges Association above.
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	*Time to File* Copying the time limits from direct appeal seems excessive. The appeal from denial of habeas corpus is not a primary review. It is a review of a procedure that is itself a review of the underlying judgment, albeit an original proceeding in form. As a secondary "review of a review" it should proceed more expeditiously. All the issues except the *Martinez* issue, if any, have all been briefed and decided in a written opinion in the superior court. Shorter times are in order. As noted in our comment on the superior court rules, completely	The working group's view is that it is appropriate to apply the timeframes for filing briefs in the automatic appeal in appeals from the superior court decision in a death penalty–related habeas corpus proceeding. The working group expects that these briefs will raise multiple, complex issues and that drafting of the briefs will require review of a lengthy record. The timeframes for filing briefs in the automatic appeal were set to reflect such circumstances. The working group's view is that, given the absence of a statutory provision directing

Rule 8.396(c): Time to file briefs (Are the proposed timeframes appropriate?)		
Commenter	**Comment**	**Working Group Response**
	open-ended authority for extension of time is inadvisable. Extensions should be allowed only for stronger reasons than in other litigation, and only once except in extreme circumstances.	otherwise, the Court of Appeal should have discretion to grant an extension of time to file a brief in these appeals upon a showing of good cause.
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	The timeframes, however, are entirely unrealistic given the complexity of capital habeas petitions and the sheer volume of pages some petitions contain. Moreover, although the statute-and these rules-provide for the addition at this stage of a claim of ineffective assistance of trial counsel even if that claim was omitted from the petition in superior court, these time and length limits make no provision for extra time to develop and plead that claim or claims. The rules must account for the monumental undertaking such claims require. For instance, a claim that trial counsel conducted an inadequate mitigation investigation requires counsel to fully reinvestigate the defendant's entire background and life history. In the cases of Mexican nationals, this is especially time consuming, given that the majority of records and witnesses are usually located in Mexico. To expect counsel developing such a claim to proceed on the same schedule as those simply arguing legal errors in the superior court's resolution of a petition is unrealistic.	Please see the response to the comments from California Appellate Defense Counsel above.
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	Proposed Rule 8.396(c)(1) requires the habeas appellant's opening brief to be filed within 210 days of the filing of the record on appeal. This time frame assumes, however, that a qualified habeas appeals lawyer will be quickly available and appointed to the case by the time the appellate record is filed. Given the well-established shortage of qualified habeas counsel generally, the likelihood of significant delay between the filing of the appellate record and the identification of qualified counsel who is ready and available to immediately accept a capital habeas appeal appointment is substantial. For this reason, we	Please see the response to the comments of California Appellate Defense Counsel above.

Rule 8.396(c): Time to file briefs (Are the proposed timeframes appropriate?)		
Commenter	**Comment**	**Working Group Response**
	suggest modifying the proposed rule to require the filing of the opening brief 210 days from the appointment of counsel or the date the record is filed, whichever is later.	
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	Draft rule 8.396(c)(l) provides that appellant's opening brief on appeal must be served and filed within 210 days after the record is filed. This rule makes no provision for the possibility that, due to a delay in securing qualified counsel, the record might be filed prior to the appointment of counsel. The OSPD suggests a modification to the rule providing that the opening brief is due 210 days from the date of appointment of counsel or the date the record is filed, whichever is later. The OSPD proposes the following change: **Rule 8.396. Briefs by parties and amici curiae** **(c) Time to file** *(1) The appellant's opening brief must be served and filed within 210 days after the record is filed or 210 days after counsel is appointed, whichever is later.*	Please see the response to the comments of California Appellate Defense Counsel above.
Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	Rule 8.396(a)(2) needs to include a good cause exception to allow a petitioner/appellant to raise a claim that the initial habeas attorney (who filed the habeas petition in superior court) was ineffective (pursuant to Penal Code section 1509.1(b)) **after** the first brief filed by petitioner, e.g., where the facts necessary to support the claim are not developed until a later time despite due diligence. Rule 8.397(b)(1): the immediately preceding comment (re Rule	Proposed rule 8.396(a)(1) provides that briefs in these appeals must comply as nearly as possible with rule 8.200. Rule 8.200 in turn permits the presiding justice of the Court of Appeal to permit briefing beyond the appellant's opening, respondent's, and appellant's reply briefs.

Rule 8.396(c): Time to file briefs (Are the proposed timeframes appropriate?)		
Commenter	**Comment**	**Working Group Response**
	8.396(a)(2)) applies here.	

Rule 8.396(d): Service of briefs		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	Rule 8.396(d)(1) refers to service on "the People and the district attorney." I presume that what is meant is that both the Attorney General and the district attorney must be served, and the rule should be clarified accordingly.	The working group has revised proposed rule 8.396(d)(1) to refer to the Attorney General.
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.396(d)(l) Recommendation: CAP·SF recommends that all pleadings and orders be served on the assisting counsel or entity. The California Supreme Court requires counsel in capital cases to serve all pleadings on the assisting counsel or entity.[1] (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4; see also Cal. Rules of Court, rule 8.630(g).) There is no reason to abandon a long-standing practice that serves the interests of both counsel and the assisting counsel or entity. Footnote 1: "Consistently with longstanding practice and court policy, except as specified below, counsel for the defendant must serve ... the assisting entity or attorney ... " (Policy 4.) 8.396(d)(l) & 8.396(d)(2) Recommendation: CAP-SF recommends that the rules regarding service allow for personal service of petitioner, and additional time	The working group has revised rule 8.396 to require that a copy of all briefs be served on the assisting entity or counsel. The working group has revised rule 8.396(d)(2) to permit a proof of service that states that the brief will be delivered in person to the petitioner within 30 days after the filing of the brief.

Rule 8.396(d): Service of briefs		
Commenter	**Comment**	**Working Group Response**
	to do so, as permitted in the Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4. Proposed rule 8.396(d)(l) should include the following language, borrowed primarily from Policy 4: If counsel for petitioner elects to serve petitioner personally, counsel may indicate on the proof of service that counsel will serve petitioner within 30 calendar days. Counsel must notify the court in writing after petitioner has been served. Proposed rule 87 .396(d)(2) should be amended to include personal service. As the California Supreme Court recognized, due to the nature of habeas corpus, pleadings often contain sensitive and difficult to understand information that is best explained to a client in person. 8.396(d)(3) Recommendation: CAP-SF recommends that "assisting counsel or entity" replace "district appellate project". The assisting counsel or entity must receive service of all pleadings and orders. Currently, the district appellate projects do not have the necessary capital experience to act as an assisting entity. It is unclear at this time who will be assisting appointed counsel in the appellate courts, and the proposed rules should include the potential for other counsel or entities providing assistance to appointed counsel.	The working group has revised proposed rule 8.396 to replace references to the district appellate project with references to assisting entity or counsel.
Superior Court of San Diego County by Mike Roddy, Executive Officer	Proposed rule 8.396(d)(1) regarding service on "the People and the district attorney." Since the People may be represented by either the district attorney or the Attorney General, this portion of the sentence	The working group has revised proposed rule 8.396(d)(1) to refer to the Attorney General.

Rule 8.396(d): Service of briefs		
Commenter	**Comment**	**Working Group Response**
	doesn't make sense. Other possibilities are "on the district attorney and Attorney General," or "on the representative of the People." Proposed rule 8.396(d)(3) says in part "If the district attorney is representing the People, one copy of the district attorney's brief must be served on the Attorney General." Not vice versa too? Proposed rule 8.396(d)(4): "superior judge" should be "superior court judge."	 The working group has revised proposed rule 8.396(d)(3) to require service of the brief on either the Attorney General or the district attorney, whichever is not representing the People on appeal. The working group has revised proposed rule 8.396(d)(4) to correct this.

Rule 8.396(f): Amicus briefs		
Commenter	**Comment**	**Working Group Response**
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	The proposed rule follows the current California practice of amicus curiae briefs being filed at the end of the process, thereby extending the briefing schedule. Given the importance of prompt completion of the briefing, we suggest adoption of the federal rule of filing amicus briefs seven days after the brief of the party supported. (See Federal Rule of Appellate Procedure 29(e); United States Supreme Court Rule 37.3(a).) In federal practice, responses to amicus briefs are included in the respondent's main brief and the appellant's reply brief, and the latter brief concludes the briefing.	The working group declined to make this change to the proposal at this time. As noted, it is standard practice in the California courts to require that amicus briefs be filed after the last appellant's reply brief is filed or could have been filed. This helps ensures that any amicus briefing is focused on issues not already fully addressed by the parties. The working group's view is that proposed rule 8.396(f) should not deviate from standard California court practice. If changes are to be considered, the working group's view is that modification of all of the amicus curiae rules should be considered together.

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Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

(Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

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Rule 8.397(a): Claim of ineffective assistance of trial counsel not raised in the superior court		
Commenter	**Comment**	**Working Group Response**
Criminal Justice Legal Foundation by Kent S. Scheidegger, Legal Director and General Counsel Sacramento, California	Proposition 66 contains a provision to cope with the procedural conundrum created by the United States Supreme Court in *Martinez v. Ryan* (2012) 566 U.S. 1 and *Trevino v. Thaler* (2013) 569 U.S. 413. It is not clear that the working group understands the reason for the rule or its boundaries. In *Martinez*, the Supreme Court created a "narrow" exception to the procedural default rule, specific to Arizona's unusual practice. A petitioner in federal habeas corpus could show good cause for defaulting a claim of ineffective assistance of trial counsel in the initial state collateral proceeding if the failure to raise it constituted ineffective assistance of the habeas corpus attorney. In *Trevino*, the Supreme Court expanded the rule beyond Arizona's system to include most states, including California. Last year in *Davila v. Davis* (2017) 137 S. Ct. 2058, the high court refused to extend the rule beyond claims of ineffective assistance of *trial* counsel. In any state system where, as a practical matter, ineffective assistance of trial counsel claims cannot be reviewed on direct appeal, "counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default." (*Martinez*, 566 U.S. at p. 13.) To cope with this rule and preserve the integrity of California's procedural rules, Proposition 66 makes a narrow exception to the usual rule that issues on appeal are limited to those raised in the trial court. The appeal from denial of habeas relief is not an "initial-review collateral proceeding" within the meaning of *Martinez*. Thus, any claim not presented in either this appeal or the direct appeal is defaulted under federal habeas corpus procedure. Tracking *Martinez*, the exception does not apply to any and all	The working group understands that Penal Code section 1509.1 limits the circumstances in which claims of ineffective assistance of trial counsel not raised in the superior court habeas corpus proceeding may be raised in an appeal. It is the general practice of the Judicial Council not to repeat statutory provisions in the Rules of Court unless doing so is necessary for rule users to understand the content of the rules. This is to avoid both the potential for errors in repeating such statutory language and the need to modify the rules in the event of a statutory change. While the working group's view is that it is not necessary to modify the language of the rule to incorporate the limitations specified in section 1509.1(b), it has modified the proposal to include an advisory body comment noting that section 1509.1(b) states when a claim of ineffective assistance of trial counsel not raised in the superior court habeas corpus proceeding may be raised in an appeal under this article.

Rule 8.397(a): Claim of ineffective assistance of trial counsel not raised in the superior court		
Commenter	**Comment**	**Working Group Response**
	claims of ineffective assistance of trial counsel, but only to the limited subset where failure to raise the claim amounts to ineffective assistance on the part of the habeas corpus attorney. Omission of a claim, the Supreme Court has made clear, is not by itself ineffective assistance. Effective attorneys can and indeed should winnow out the claims they judge to be weak and focus on the strong ones. "[F]ar from being evidence of incompetence, [winnowing] is the hallmark of effective appellate advocacy." (*Smith v. Murray* (1986) 477 U.S. 527, 536.) This essential element of the *Martinez* exception is completely missing from proposed Rule 8.397. The rule on its face appears to open the door to any and all omitted claims of ineffective assistance of trial counsel. That is contrary to both the purpose and the letter of the statute. Along with the underlying claim of ineffective assistance of trial counsel, an appellant making a claim under this provision must also make a showing that the omission of the claim in the superior court was so egregious as to constitute ineffective assistance of the habeas corpus attorney. That requirement should be prominent in the rule.	

Rule 8.397(c): Proffer **(Are the proposed provisions relating to the content and format of a proffer appropriate?)**		
Commenter	**Comment**	**Working Group Response**
California Appellate Project–San Francisco (CAP-SF) by Joseph Schlesinger, Executive Director	8.397(c)(3) Recommendation: CAP-SF recommends that the rule be modified to ensure that when a proffer is noncomplying, the clerk is required to notify the filer (e.g., petitioner's counsel or petitioner if	The working group declined to make these suggested changes. Proposed rule 8.397(c)(3) permits the clerk not to require corrections and, if corrections are required, provides discretion to

Rule 8.397(c): Proffer **(Are the proposed provisions relating to the content and format of a proffer appropriate?)**		
Commenter	**Comment**	**Working Group Response**
	unrepresented) immediately of any noncompliance and must allow a minimum of 30 days for the filer to bring the proffer into compliance.	set an appropriate timeframe for that correction. The working group's view is that this is a preferable approach, as some format errors may not require correction and others may be corrected quickly and easily.
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	The proffer of exhibits on appeal should have the same rules governing form and content as those for exhibits submitted with a habeas corpus petition; i.e., they should have similar rules for contents, pagination, etc.	The working group appreciates this input.
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Response: Although proffers are a new concept in appeals, the proposed rule appears to adequately and appropriately address the concept.	The working group appreciates this input.
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	Content and format should be consistent with the rules on exhibits for original proceedings.	The working group appreciates this input.
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	The Judicial Council has specifically requested input on the form and contents of the proffer accompanying an ineffective assistance of trial counsel claim raised for the first time on appeal. Mexico believes such a proffer should be akin to what would be presented in the superior court if the claim had been raised there. Thus, the proffer should include the exhibits that usually accompany a habeas corpus petition.	Proposed rule 8.397(c) provides that the proffer is to include any reasonably available documentary evidence, which would include exhibits as appropriate.

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Rule 8.397(c): Proffer **(Are the proposed provisions relating to the content and format of a proffer appropriate?)**		
Commenter	**Comment**	**Working Group Response**
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	In *In re Duvall,* (1995) 9 Cal.4th 464, 474, the California Supreme Court held that a petitioner must include "copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." Incorporating the language of *Duvall,* proposed 8.397(c)(l) properly defines the proffer (that must accompany a brief including an ineffective assistance of counsel claim not raised in superior court) as including "any *reasonably available documentary evidence supporting the claim* that is not in either the record on appeal prepared under rule 8.395 or matters of which the court has taken judicial notice." (Emphasis supplied.) Draft Rule 8.397(c)(l) has two additional subdivisions further defining the proffer. Draft rule 8.397(c)(l)(A) requires that the proffer include a certified transcript of any previous evidentiary hearing, and draft rule 8.397(c)(l)(B) states "[o]ther evidence may be in the form of affidavits or declarations under penalty of perjury." However, per *Duvall,* the evidence submitted as a proffer for an ineffective assistance of counsel claim is not limited to transcripts and affidavits/declarations. Rather, *Duvall* states that "*any* reasonably available documentary evidence" may be submitted. In keeping with *Duvall,* habeas petitioners frequently submit other documentation as a part of support for a claim, e.g., certified court records. Rules 8.397(c)(l)(A) and (B) implies that the evidence that can be submitted as part of a proffer is limited to transcripts and affidavits/declarations. The OSPD suggests that a subdivision 8.397(c)(l)(B) be modified to make it clear that the proffer may include any documentation supporting a claim of ineffective assistance of counsel.	It was not the working group's intent to limit the format of evidence included in the proffer to either transcripts or affidavits and declarations. The working group has modified proposed rule 8.397(c) to delete "Other" and the beginning of (c)(1)(B). This should clarify that this paragraph is intended to permit evidence to be presented in the form of affidavits or declarations in appropriate circumstances, rather than require all evidence to be in that format or in a reporter's transcript.

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Rule 8.397(c): Proffer **(Are the proposed provisions relating to the content and format of a proffer appropriate?)**		
Commenter	**Comment**	**Working Group Response**
	<u>Rule 8.397. Claim of ineffective assistance of trial counsel not raised in the superior court</u> ..... (c) Proffer (1) ..... (A) .... *(B) Petitioner may include any documentary evidence supporting the claim, including affidavits or declarations under penalty of perjury.*	
Michael Ogul, Deputy Public Defender Santa Clara County Public Defender San Jose, California	Rule 8.397(c)(3), I would suggest that the minimum required notice be five court days, not merely five days, because there will be only a minimal opportunity to cure the defect if those five calendar days include weekend, especially a holiday weekend (e.g., the four-day Thanksgiving holiday weekend).	The working group modified proposed rule 8.397(c)(3) to make this suggested change.

Rule 8.397(d): Evidentiary hearing		
Commenter	**Comment**	**Working Group Response**
Habeas Corpus Resource Center by Michael J. Hersek, Interim Executive Director San Francisco, California	Proposed Rule 8.397(d) states that an "evidentiary hearing is required if, after considering the briefs, the proffer, and matters of which judicial notice may be taken, the court finds *there is a reasonable likelihood that the petitioner may be entitled to relief* and the petitioner's entitlement to relief depends on the resolution of an issue of fact." (Emphasis added.) The requirement that the court find	The working group declined to make this change. This language is modeled on language that is currently in both rule 4.551(f) and rule 8.386(f), which relate to habeas corpus proceedings in the superior court and appellate courts, respectively. The working group's view is that proposed rule

Rule 8.397(d): Evidentiary hearing		
Commenter	**Comment**	**Working Group Response**
	a "reasonable likelihood" of entitlement to relief before it orders an evidentiary hearing is not grounded in statute and is contrary to California Supreme Court case law defining the habeas corpus process in capital cases. The Supreme Court has made clear that an evidentiary hearing must be ordered "if the court finds material facts in dispute." *People v. Duvall*, 9 Cal. 4th 464, 75 (1995); *see also People v. Romero*, 8 Cal. 4th 728, 740 (1994) (explaining "if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing."); Cal. Penal Code § 1484. Because the "reasonable likelihood" requirement is contrary to governing case law, it should be removed from the proposed rule.	8.397(d) should be consistent with those existing provisions. If changes should be considered, the working group's view is that changes to all of these rules should be considered together by the appropriate Judicial Council advisory body.

Rule 8.397(e): Procedures following limited remand		
Commenter	**Comment**	**Working Group Response**
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	Subdivision (e)(3) provides that if the reviewing court consolidates a pending appeal under Penal Code section 1509.1 with an appeal from a superior court decision on limited remand, the superior court clerk must augment the record to include the remanded proceedings. This proposed rule should set a time frame for the augment or state the time requirements in proposed rule 8.395 apply unless otherwise ordered by the reviewing court.	The working group declined to make this change at this time. The circumstances likely will vary a great deal from case to case, depending upon the scope of the remanded proceedings. The working group concluded that setting a uniform deadline would not be beneficial at this time.
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	If the Court of Appeals orders a limited remand to the superior court to conduct an evidentiary hearing, proposed rule 8.397(e)(1) currently provides that the court of appeals may order a stay of the remainder of the appeal. Mexico believes this stay should be mandatory; allowing an appeal to proceed piecemeal can only create confusion, including on the issue of federal review.	Please see the response to the comments of Court of Appeal, Fourth Appellate District, above.

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Rule 8.397(e): Procedures following limited remand		
Commenter	**Comment**	**Working Group Response**

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
California Judges Association by Erinn Ryberg, Legislative Director Sacramento, California	We foresee no cost savings. This type of appeal is new and is added to the current caseload of the intermediate courts of appeal. While there may be some variation in appellate districts, generally the Clerk's Offices are already under resourced for their current caseload, and it will be a challenge to add the work anticipated for this type of appeal. And, the workload for the attorneys and justices at the Court of Appeal will be greatly increased. * * * Courts of Appeal will need to create a new training manual for this type of appeal and there are already discussions to add docket codes to existing case management systems. We are not able to quantify the time it will take to train staff. In addition, hours of training for attorneys and justices will likely be required.	The working group appreciates this input regarding implementation and potential associated costs.
California Lawyers Association Litigation Section Committee on Appellate Courts by Saul Bercovitch, Director of Governmental Affairs San Francisco, California and Katy Graham, Senior Appellate Court Attorney Court of Appeal, Second Appellate District, Division Six	Intermediate appellate court attorneys and justices will need training on procedural and substantive issues. Although they already have experience in handling "jumbo" special circumstance murder cases, *Batson-Wheeler* issues, etc., they will need special training on the new procedures (such as the standard of review on an appeal from a habeas ruling). They will also need training on capital-specific substantive issues such as death qualifying a jury, law governing penalty phase and mitigation evidence, and law on standards for effective representation in the penalty phase. The importance of court attorney education will increase if the experience of assigned	The working group appreciates this input and the offer of training assistance and expertise.

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
Ventura, California	counsel is limited, as court staff may not have the benefit of reliable briefing. The Committee has been generating appellate specialization CLE webinars and in-person programs for many years and is at your service if it can be of any help in developing educational material for the courts. Our members include court attorneys, attorneys from the state attorney general's office, and capital defense counsel who would be happy to volunteer their services in this regard.	
Court of Appeal, Fourth Appellate District by Hon. Judith D. McConnell, Administrative Presiding Justice	• Would the proposal provide cost savings? If so, please quantify. Response: No. The Fourth and Second Districts will be overly burdened by appeals from decisions in death penalty-related habeas corpus proceedings. The costs and burdens of these appeals is immeasurable at this point. The Fourth District recognizes that Article 6, section 12 of the California Constitution and Rule 10.1000 address transfers of cases by the Supreme Court. Rule 10.1000 generally allows the Supreme Court to transfer cases between the Courts of Appeal. However, given the tremendous impact of death penalty-related habeas corpus proceedings on the appellate courts, the Fourth District suggests a rule of court should specifically address the issue of transfers in these cases between appellate districts and divisions. The Fourth District proposes that the rules allow for the Supreme Court to transfer appeals between Courts of Appeal at the request of an Administrative Presiding Justice and allow for the Administrative Presiding Justice to transfer	The working group appreciates the input regarding implementation and potential associated costs. The working group declined to propose rules regarding the Supreme Court's potential transfer of appeals between Courts of Appeal. The working group concluded that the Supreme Court likely is in the best position to determine whether

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
	appeals within his or her district. These mechanisms give the courts flexibility and are also consistent with Proposition 66, which did not require that appeals be heard in the district or division of the trial court that imposed the death penalty or heard the petition for writ of habeas corpus. Based on the experience of the Fourth District, transfers should occur after the record is prepared and the appeal is fully briefed. The Court of Appeal for the trial court that heard the petition for writ of habeas corpus is in the best position to manage and oversee record preparation because of established relationships between clerk's offices and staff handling these matters. • What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. Response: Implementing these new rules will require significant efforts for the Courts of Appeal, as described below: Management and supervisors, in conjunction with presiding justices, will need to develop procedures and policies for implementing the new rules concerning appeals from decisions in death penalty-related habeas corpus petitions. The courts will also need to create form orders and notices within the case management system that are specific to these appeals.	it requires procedures and policies regarding the exercise of its own transfer authority and to develop any such procedures and policies as appropriate. With respect to transfers between appellate divisions, there was not time to develop this proposal. The working group recommends that the suggestion be referred for possible consideration by the appropriate Judicial Council advisory body at a later time.

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
	All deputy clerks and supervisors in the clerk's office will need training on the requirements and procedures for the new rules, including education on certificates of appealability and proffers because these concepts are new to the courts. Additionally, the local case management system administrator must create event rules and category codes within the court's case management system to coincide with the filing deadlines and requirements of the rules. All justices and attorneys within the Courts of Appeal will need training on appeals from decisions in death penalty-related habeas corpus petitions. The Fourth District anticipates that CJER will need to create training programs specifically related to the new rules, death penalty-related habeas corpus petitions, and appeals from these petitions. At this point, it is difficult to quantify the hours of training that will be required. Some courts will need additional staffing to handle appeals from decisions in death penalty-related habeas corpus petitions.	
	• Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Response: Two months is likely sufficient to fully train clerk's office staff members on the requirements of the new rules and processing of appeals from decisions in death penalty-related habeas corpus petitions. However, two months from the effective date of the rules is likely not	The working group recommends that the Center for Judicial Education and Research help make available to the Courts of Appeal education (e.g., through trainings or informational materials)

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
	sufficient to fully train attorneys and justices on review and resolution of these appeals. • How well would this proposal work in courts of different sizes? Response: As previously stated, the Fourth and Second Districts will be overly burdened by appeals from decisions in death penalty-related habeas corpus proceedings. Without transfer of these appeals to other appellate districts, the Fourth District will experience a significant delay in handling and resolving all other types of appeals.	relating to these new rules, death penalty–related habeas corpus petitions, and appeals from these petitions.
Court of Appeal, Sixth Appellate District by Mary J. Greenwood, Administrative Presiding Justice	1) Would the proposal provide cost savings? If so, please quantify. No. We believe the proposal will not provide cost savings. Proposition 66 imposes a burden on the resources of the courts of appeal that is not remedied by these rules. By strictly limiting the time to complete the habeas petition process at the trial courts and courts of appeal, Proposition 66 will require a significant allocation of resources to complete the process within the mandated time. The proposed rules do nothing to alleviate that burden. 2) What would the implementation requirements be for courts? The Sixth District believes that implementation will require significant additional resources.	The working group appreciates the input regarding implementation and potential associated costs.

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
	Additional Staff - Given the number of death penalty cases in this District, we anticipate needing to hire one to two additional staff attorneys to work on these appeals. We understand from HCRC that the Supreme Court currently has 8 full time attorneys working on death penalty habeas petitions who complete 12 petitions per year. That averages out to around 9 months per petition. The Supreme Court has represented that it takes one of their experienced attorneys an average of six months' work for disposition. The courts of appeal will not have the benefit of experienced staff. Unlike the Supreme Court under the current system, in a Proposition 66 appeal, the courts of appeal will need to produce an opinion, not just a summary disposition. Therefore, we anticipate that it would take a staff attorney between 12 to 18 months to complete one appeal from a decision in a death penalty habeas corpus proceeding. Because the Sixth District does not have a centralized staff of attorneys, we do not have any attorney resources or vacant central staff positions that we can allocate to work on these appeals. The Sixth District may need to increase our staff of writ attorneys 1) to timely address writ petitions that may be filed during the pendency of the habeas corpus proceedings in the trial court, (we anticipate an increase given the issues of first impression that may be raised relating to implementation of Proposition 66 procedures and rules), 2) to assist staff attorneys working on these appeals with the details of habeas procedures, and 3) to work on any requests for certificates of appealability. **Recruitment** - Recruitment of qualified staff attorneys to work on these cases will require significant staff time. Our usual recruitment time for attorneys is three to four months. This includes work by a committee of attorneys and justices to screen resumes, conduct screening interviews, test applicants, review and score tests and	

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
	conduct a final interview. The screening for these applicants will be more extensive given the complexity of death penalty habeas work. Because we anticipate that there are few attorneys willing and qualified to work on death penalty habeas appeals at the court of appeal, it may take upward of six months to complete the recruitment for each additional Proposition 66 attorney. **Training** - Currently the Sixth District does not have any attorneys specifically trained to work on appeals from decisions in death penalty habeas corpus proceedings. According to experts we have consulted, these cases are extremely complex and require very specialized knowledge. Training of existing or newly hired staff attorneys will be paramount and challenging. The Habeas Corpus Resource Center or CAP SF are the only public entities in California qualified to provide this type of training. However, providing training for Court of Appeal staff is not within CAP's current scope of work. HCRC is also not set up to provide the substantive training that will be necessary for court of appeal attorneys. They currently provide some annual training for practitioners, but not for court staff. It is unclear whether CJER will take on the development of necessary training for staff and justices of the courts of appeal. Because of limited or currently unavailable state resources, we may be required to look for one or more training opportunities from private vendors or training in other death penalty states. We anticipate that training would take multiple weeks and involve substantial seminar, lodging and travel costs. For example, The Bryan R. Shechmeister Death Penalty College, sponsored by Santa Clara University School of Law, Arizona Capital Representation Project and the ABA Death Penalty Representation Project, costs nearly $1000, and lasts 6 days. That college addresses issues associated with death penalty cases generally. The Making a	

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Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
	Case for Life Seminar held in Memphis Tennessee lasts three days, costs $600 for the registration, and covers issues relating to mitigation that are frequent issues in death penalty habeas corpus proceedings. We will likely need to send our staff attorneys to multiple seminars to prepare them for the complex work required for death penalty habeas appeals. Justices and Support staff will all need detailed training on the new rules of court. Although CJER could offer such training, we are unaware of any trainings planned for the roll-out of the new rules in the Spring. **Revising processes and procedures** - This District will face several challenges in implementing new processes and procedures for dealing with appeals from decisions in death penalty habeas corpus proceedings. New procedures regarding timelines will have to be drafted, approved and implemented. New docket codes and associated rules will have to be created. Detailed training will have to be offered to our deputy clerks on the new procedures and codes. In our court, we will also need to implement additional protocols because our APJ was the public defender of Santa Clara County during several of the death penalty cases now pending, and the trial attorney on two of the cases. The protocols will need to ensure that one of our other six justices takes on the administrative role for those cases. 3) Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Given the many uncertainties and difficulties surrounding staffing,	The working group recommends that the Center for Judicial Education and Research help make available to the Courts of Appeal education (e.g., through trainings or informational materials) relating to these new rules, death penalty–related habeas corpus petitions, and appeals from these petitions.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
	training and procedural revisions discussed above, the Sixth District believes that six months is a more realistic time frame for implementation. 4) How well would this proposal work in courts of different sizes? The Sixth District believes that small courts will be disproportionately impacted because those courts have significantly less flexibility in staff and resource allocation. Additionally, smaller courts in smaller districts will likely have a more limited pool of qualified attorneys to work on the petitions and to work as staff attorneys for the court.	
Court of Appeal, Third Appellate District Office of the Clerk by Colette M. Bruggman, Assistant Clerk/Executive Officer	Would the proposal provide cost savings? If so, please quantify. There is definitely no cost savings. This type of appeal is new and is added to our current caseload. The Clerk's Office is already under resourced for its current caseload, and it will be a challenge to add the work anticipated for this type of appeal. And, the workload for the attorneys and justices at the Court of Appeal will be greatly increased. What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. We need to write a new training manual for this type of appeal and are already in discussions to add docket codes to our existing case management system. I am not able to quantify the time it will take to train staff. In addition, hours of training for attorneys and justices will likely be required.	The working group appreciates the input regarding implementation and potential associated costs.

SP18-21

Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings
(Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

All comments are verbatim unless indicated by an asterisk (*).

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
	Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? We will process the appeals as we get them, and until then, there is nothing to implement. How well would this proposal work in courts of different sizes? Maybe this question is meant for trial courts. Theoretically, larger courts have more resources, but Courts of Appeal only have what we have. All of us will have to process these appeals within the constraints of our current resources.	
Superior Court of Los Angeles County	**Would the proposal provide cost savings? If so, please quantify.** No. **What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.** Implementation would require at least four hours of new procedure training for Judicial Assistants and Appeal Clerks. **Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?** Yes, two months would be sufficient.	The working group appreciates the input regarding implementation and potential associated costs.
Superior Court of Orange County by Hon. Gregg L. Prickett, Capital Case Committee Chair, and others	**We thank the committee for its specific work in this area and offer these additional general comments and concerns:** • As to the financial impact for the Superior Court now	The working group appreciates the input regarding implementation and potential associated costs.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

Implementation costs and requirements		
Commenter	**Comment**	**Working Group Response**
	processing and ruling on petitions in Capital cases – we believe an additional 18 research attorneys would need to be hired, trained and assigned to this task to assist this task. The Orange County Superior Court has 75 pending capital cases in post-conviction proceedings. Further judicial training and clerk training would also be required. * * * • Would the proposal provide cost savings? If so, please quantify. **No.** • What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **(This area is of concern; see comments in opening.)** • Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **No, additional time would be needed, however we cannot quantify at this time.** • How well would this proposal work in courts of different sizes? **Not sure, however this Court would propose that in cases that involve a change of venue, it should return to the originating county.**	

SP18-21

Criminal and Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings
(Adopt Cal. Rules of Court, rules 8.390–8.398; amend rule 8.388; and adopt form HC-200)

All comments are verbatim unless indicated by an asterisk (*).

Funding; Effective date of rules		
Commenter	**Comment**	**Working Group Response**
Robert D. Bacon, Attorney at Law Oakland, California	**1. The rules, even if adopted now, should not take effect until the habeas corpus process is fully funded** As the Working Group recognizes, implementing these rules "will likely have substantial costs [and] operational impacts" for the Courts of Appeal. (Proposal, p. 8.) My overriding concern with the proposed rules is the absence of adequate funding to implement them. Inadequate funding is widely recognized as the most important reason for the dysfunction of the California capital case review system. (See *In re Morgan* (2010) 50 Cal.4th 932, 937-939; California Commission on the Fair Administration of Justice, Final Report (2008) at pp. 132-135; Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 S. Cal. L. Rev. 697, 717-720, 734-738; see also *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050, 1056-1058, *rev'd on other grounds* (9th Cir. 2015) 806 F.3d 538.) Paradoxically, it is the one factor that Proposition 66 did nothing about. Indeed, Proposition 66 substantially increases the costs: capital habeas petitions will go through three courts, two of them for full plenary review, rather than one. An additional set of counsel will be required for the petitioner on appeal from the superior court decision on habeas corpus. The inadequate funds for the fees and expenses of the petitioner's counsel usually gets the most attention, but it is clear from these proposed rules that substantially increased funding will be necessary for the Courts of Appeal, the prosecution, and the assisting entities as well. These rules can be adopted now, as required by statute, but the effective date should be postponed until after the Legislature has appropriated sufficient funds for these purposes, which will be an	The working group appreciates these comments. As noted in the invitation to comment, the working group recognizes that the changes made by Proposition 66 to the procedures for review of death penalty cases, particularly making the superior courts generally responsible for hearing habeas corpus proceedings in these cases and providing that either party may appeal from superior court habeas corpus decisions, will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. The commenter raises legitimate concerns about how implementation of Proposition 66 will be funded given that the proposition included no new funding to address these additional costs. Funding, however, is outside the scope of these rules and involves entities outside the judicial branch. Furthermore, delaying the effective date of these rules will not result in delaying either the implementation of Proposition 66 or the impact of the associated costs. The superior courts currently have multiple pending death penalty–related habeas corpus proceedings that were transferred to them by the Supreme Court under the proposition and the first death penalty–related habeas corpus appeals have now been filed in the Courts of Appeal. The working group's view is that litigants in these cases and the courts that must handle these proceedings cannot wait until full funding is provided to receive guidance on how to proceed.

Funding; Effective date of rules		
Commenter	**Comment**	**Working Group Response**
	annual sum considerably greater than the amounts appropriated in recent years for capital habeas corpus. An attempt to implement the rules without substantially increased funds is sure to fail. This point is sufficiently important that I repeat it here, even though when I made the same recommendation with respect to Proposal No. SP18-13, the Working Group did not adopt it.	
California Attorneys for Criminal Justice by Steve Rease, President Sacramento, California	The proposed rules do not adequately address the procedures for taking an appeal from a Superior Court ruling in capital habeas corpus proceedings. Importantly, these rules cannot be implemented without defined sources and proper allocation of funding. Until the Judicial Council, Superior Courts, Courts of Appeals, and the Legislature have addressed funding, appointed counsel, assisting entities, superior court judges and staff, and appellate courts and staff, cannot implement these measures. * * * Assisting and appellate agencies will need additional staff to support habeas corpus attorneys and habeas corpus appellate attorneys. The Judicial Council cannot expect implementation of these rules until funding sources and allocation are established.	Please see the response to the comments of Robert D. Bacon above.
Government of Mexico by Gerónimo Gutiérrez Fernandez, Ambassador Washington, D.C.	Mexico also believes that any proposal for new rules needs to address the fiscal and operational impacts of these procedures. The Working Group should be charged with determining what the impact of these rules will be on the criminal justice system. Without this information, the courts and the legislature cannot ensure adequate funding for the fair and consistent implementation of the new procedures. Moreover, other parties, such as assisting entities, will require this information to prepare for the implementation of the new	Please see the response to the comments of Robert D. Bacon above. The working group agrees that an assessment of the fiscal and operational impacts of Proposition 66 is needed. The invitation to comment sought such information from the courts and the responses received are reflected in this chart and in the report to the Judicial Council. The working

Funding; Effective date of rules		
Commenter	**Comment**	**Working Group Response**
	rules. It is impossible to fairly assess the proposed procedures without information about their impacts on the operations of the justice system.	group expects that more information about the actual costs will become available as the proposition is implemented and will be reviewed at a later date by others within the judicial branch.
Office of the State Public Defender by Mary K. McComb, State Public Defender Oakland, California	**Lack of Resources and Funding Mechanism for the Petitioner** As with previous proposed rules relating to the changes in the law caused by Proposition 66, there is once again a lack of any discussion of funding. Appellate counsel must be adequately compensated for the reasonable expenses of preparing and litigating an appeal. Further, the investigation of the ineffective assistance of counsel claims allowed by the new statute must be funded as well. At the very least, the rules should contain a provision mandating that counsel are adequately compensated and that litigation expenses will be paid. The working group has previously recognized that not everyone waiting for habeas counsel (365 men and women at last count) will get counsel now or in the near future. The small pool of attorneys qualified to represent individuals in superior court is the same pool of lawyers needed for the appeal. The shortage of attorneys will plague the Court of Appeal as it seeks counsel for its list of qualified capital attorneys and the failure to provide for the adequate compensation of appellate counsel only aggravates the problem. Additionally, and related, is the question of funding for the court of appeal staff that must implement these procedures. The rule is silent and the omission glaring.	Please see the response to the comments of Robert D. Bacon above. While the working group agrees that the compensation of appointed counsel and the reimbursement of appropriate counsel expenses need to be addressed, this is not a topic that is generally addressed in the Rules of Court. For capital appeals and other cases in which litigants are entitled to appointed counsel, this topic has been addressed through a combination of statute, local court policies, and contracts.

From:	Miri Wakuta
To:	Invitations
Subject:	RE: Invitation to Comment - SP18-21, OFC 11/19/18
Date:	Monday, November 19, 2018 4:57:32 PM
Attachments:	image687000.png

RE: Invitation to Comment - SP18-21, OFC 11/19/18

Dear Proposition 66 Rules Working Group,

Aderant CompuLaw respectfully submits the following comments to the proposed adoption of California Rules of Court 8.393 and form HC-200.

We are writing to comment on a possible conflict between Proposed Rule 8.393 and Proposed Form HC-200.

Proposed Rule 8.393 states, “Time to appeal. A notice of appeal under this article must be filed within 30 days after the making of the order being appealed.” (Emphasis added.)

Proposed HC-200 form, in the Notice box says, “You must file this form in the Superior Court within 30 days after the court rendered the judgment or made the order you are appealing.” (Emphasis added.)

While the rule sets the deadline to file the notice of appeal for within “30 days after the making of the order,” the form states that the form must be filed “within 30 days after the court rendered the judgment or made the order… .” It may help avoid any misinterpretation of the rules for the language in the form to match the language in the rule.

We proposed the following changes:

> HC-200 form, in the “Notice” box:
> “You must file this form in the Superior Court within 30 days after the court made the order you are appealing.”

Aderant CompuLaw is a software-based court rules publisher providing deadline information to many firms practicing in the State of California. We expect these issues will be important to practitioners. We greatly appreciate your attention and consideration of our comment. Thank you.

Very truly yours,

Miri K. Wakuta
Rules Attorney

Miri Wakuta
Associate Rules Attorney

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STATE BAR NO. 73297

November 16, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Avenue
San Francisco, California 94102

Re: No. SP18-21: Capital Habeas Appeals

Ladies and Gentlemen:

Thank you for the opportunity to comment on these proposed rules. I hope you will find my comments useful.

To introduce myself, I am in the fairly unique position of having been involved in the criminal justice system as an appellate court manager, an appellate prosecutor, and now an attorney representing persons under sentence of death on appeal and in state and federal habeas corpus. I have been found qualified to represent capital habeas petitioners by the California Supreme Court and by the federal district courts for the Northern and Eastern Districts. I also regularly represent individuals convicted of murder in non-capital appeals in the Courts of Appeal.

1. The rules, even if adopted now, should not take effect until the habeas corpus process is fully funded

As the Working Group recognizes, implementing these rules "will likely have substantial costs [and] operational impacts" for the Courts of Appeal. (Proposal, p. 8.)

My overriding concern with the proposed rules is the absence of adequate funding to implement them. Inadequate funding is widely recognized as the most important reason for the dysfunction of the California capital case review system. (See *In re Morgan* (2010) 50 Cal.4th 932, 937-939; California Commission on the Fair Administration of Justice, Final Report (2008) at pp. 132-135; Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 S. Cal. L. Rev. 697, 717-720, 734-738; see also *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3d 1050, 1056-1058, *rev'd on other grounds* (9th

Cir. 2015) 806 F.3d 538.) Paradoxically, it is the one factor that Proposition 66 did nothing about. Indeed, Proposition 66 substantially increases the costs: capital habeas petitions will go through three courts, two of them for full plenary review, rather than one. An additional set of counsel will be required for the petitioner on appeal from the superior court decision on habeas corpus.

The inadequate funds for the fees and expenses of the petitioner's counsel usually gets the most attention, but it is clear from these proposed rules that substantially increased funding will be necessary for the Courts of Appeal, the prosecution, and the assisting entities as well.

These rules can be adopted now, as required by statute, but the effective date should be postponed until after the Legislature has appropriated sufficient funds for these purposes, which will be an annual sum considerably greater than the amounts appropriated in recent years for capital habeas corpus. An attempt to implement the rules without substantially increased funds is sure to fail. This point is sufficiently important that I repeat it here, even though when I made the same recommendation with respect to Proposal No. SP18-13, the Working Group did not adopt it.

2. The proposed rules regarding counsel are good ones, but clarification of some points would be useful

A. I heartily endorse Rule 8.391, requiring that appeal counsel be capital-habeas-qualified. This is particularly important given the responsibility of appeal counsel to perform the functions of habeas counsel in investigating potential claims of ineffective assistance of prior habeas counsel.

While it might be ideal for these counsel to be *both* habeas-qualified and also qualified for major criminal appeals (either automatic appeals of death judgments in the Supreme Court or first-degree murder appeals in the Courts of Appeal, or both), the number of attorneys with both sets of qualifications is probably too small to make this realistic. The habeas credential is the more important of the two, given the responsibility of these counsel to function as habeas counsel in the first instance when they investigate second-level ineffective assistance claims.

B. Rule 8.391 should be revised to affirmatively state, rather than merely implying, that the petitioner's superior court habeas counsel may not continue with the case on appeal. By definition, claims of superior court habeas IAC do not appear on the face of the record the Court of Appeal will receive from the superior court. It is unlikely that superior court habeas counsel will recognize such claims and, even if they do, they cannot ethically litigate their own effectiveness. (*Christeson v. Roper* (2015) 135 S.Ct. 891, 894.) At a minimum, the Court of Appeal would be required to appoint independent counsel to

investigate the possibility of missed issues; in many if not most cases, it will be necessary to substitute new counsel for the entire appeal. The Court of Appeal cannot realistically condition the appointment of new counsel on the prior identification of a missed issue, because the first responsibility of new counsel is to look for missed issues. (*Mendoza v. Stephens* (5th Cir. 2015) 783 F.3d 203, 207-208 (conc. opn. of Owen, J.).) This also makes it unrealistic for a petitioner to waive in advance the appointment of new counsel; a waiver could not be sufficiently *knowing* to withstand scrutiny, since no one – neither the petitioner nor anyone else – knows what new counsel might find until new counsel looks for it.

The federal courts are developing significant experience with this issue, since *Martinez v. Ryan* (2012) 566 U.S. 1, allows litigation of the effectiveness of state habeas counsel as a means of overcoming defaults that might preclude litigation of claims in federal habeas corpus. The prevailing view is that new counsel is necessary; *Martinez* ordinarily makes it inappropriate for state habeas counsel to continue as federal habeas counsel. (*Juniper v. Davis* (4th Cir. 2013) 737 F.3d 288 [qualified independent counsel is required]; *Mendoza, supra*.)

C. The rules should also require prompt transfer of superior court habeas counsel's file to appeal counsel. Appeal counsel must review the file in order to fulfill their function of evaluating the performance of superior court habeas counsel. The file is the necessary starting point for either identifying or ruling out claims of ineffective assistance by superior court habeas counsel. Lack of cooperation between former and successor counsel is too often a problem in capital cases. Any attempt to facilitate that cooperation would be most helpful. (See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) § 10.13.)

3. Rule 8.395, concerning the record on appeal, should be revised in several particulars

Rule 8.395(a): The record in every habeas appeal must include the complete trial record certified for purposes of the automatic appeal. Deciding the habeas appeal will require familiarity with what happened at the *trial* as well as with the superior court habeas proceedings. (See, e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 397-398 [state habeas court's "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding"]; *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100, 1131 [habeas court must "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently"].)

Rule 8.395(b): It is sufficiently unlikely that there would be a stipulation for a partial record in any capital habeas appeal, so that that possibility need not be mentioned in the

rules. It would be imprudent in the extreme for the petitioner's superior court counsel, about to be replaced by counsel directed to second-guess their work, to stipulate to a partial record. It would be equally imprudent for new counsel to enter into such a stipulation at the very outset of their work, before they know the case well. A stipulation for a partial record is never entered into, or even considered, in an appeal to the Supreme Court from a judgment of death, for very good reason, and it should not be considered in a capital habeas appeal, either. Rule 8.395(b) should be deleted.

Rule 8.395(c)(2): In a case in which the superior court denied a certificate of appealability, it is likely that the Court of Appeal will need to examine the superior court record in order to rule on either a renewed motion for certificate of appealability or a motion for stay of execution. (See Rule 8.112(a)(4) [papers that must be filed in the Court of Appeal with a petition for writ of supersedeas]; Ninth Circuit Local Rule 22-1(b) [if district court denies COA, it must forward the entire record to the appellate court for use in deciding whether to grant a COA].) Rule 8.395(c)(2), deferring the preparation of the record until after the COA motion is ruled on, is unrealistic and should be dropped. As a practical matter, no money or other resources will be saved. The expense is an insignificant one given that a human life is at stake.

4. The rules should require an assisting entity, and the district appellate project should not be the default assisting entity

Your rules concerning superior court habeas counsel stress the importance of an assisting entity to work with appointed counsel. (See Rule 8.654(e)(4), in Proposal No. SP18-13.) The present proposal is silent on the subject, except for requiring service of a few documents on the district appellate project. An assisting entity is just as important on these appeals as it is in the superior court, and the rule should be equally explicit in requiring designation of one, and requiring appointed counsel to work with the assisting entity.

The district appellate projects, at least as they are currently structured and operated, do not appear to be the best assisting entities. Your proposed rules for the superior courts (Nos. SP18-12 and SP18-13) leave open the identity of the assisting entity. The rules for the Court of Appeal should do likewise. I suggest you replace the references to the district appellate project in Rules 8.392(b)(5) & (6), 8.392(c)(1), 8.395(g)(2), and 8.396 (d)(3) with the same type of general references to an assisting entity that are in the other sets of proposed rules.

The district appellate projects do not have capital expertise. They spend a large part of their time assisting less-experienced counsel with less-serious cases. Experienced counsel litigating murder appeals work largely independently of the projects. Taking on the more intensive level of assistance required in capital cases would require significant changes in

their mode of operation, as well as increased staffing levels, recruitment of capital-qualified assisting counsel for their staffs, and more funds.

As discussed earlier, the possibility of IAC claims concerning superior court habeas counsel will require the appointment of new counsel for the appeal. It seems possible but less certain that in some cases the assisting entity from the superior court would also be conflicted. The possibility that a different assisting entity will need to be designated on appeal should be acknowledged in the rules, but can be left to case-by-case evaluation.

5. A stay of execution pending appeal should be mandatory

Rule 8.394 should be revised to make a stay of execution mandatory pending the decision of the Court of Appeal on the merits of the appeal, and pending any subsequent petition for review to the Supreme Court.[1] The quality of the work product of courts and counsel suffers when they are under the artificial time pressure and emotional pressure of an execution date. Unpressured reflection is one of the great virtues of the appellate process. It should not be sacrificed in this category of appeals in which the stakes are highest and the records likely much larger and more complex than the average appeal.

With respect to successor petitions, there will be no appeal unless a certificate of appealability has been granted, so there is no risk that appeals in such cases will be pursued in bad faith for solely dilatory reasons.

6. A miscellaneous clarification

Rule 8.396(d)(1) refers to service on "the People and the district attorney." I presume that what is meant is that both the Attorney General and the district attorney must be served, and the rule should be clarified accordingly.

Thank you again for the opportunity to comment.

Sincerely,

/s/ *Robert D. Bacon*
Robert D. Bacon

[1] And pending a timely petition for certiorari thereafter. (See *Emmett v. Kelly* (2007) 552 U.S. 942 (statement of Stevens, J.) [criticizing the state of Virginia for setting an execution date that required the U.S. Supreme Court to expedite consideration of a certiorari petition after the denial of a first federal habeas petition; he would require a "routine" stay pending certiorari in all such cases].)

CALIFORNIA APPELLATE DEFENSE COUNSEL

Judicial Council of California
455 Golden Gate Ave.
San Francisco, CA 94102

BY E-MAIL

Re: Proposition 66 Rules Working Group
Request for Comments: SP-21
Procedure for Habeas Appeals

Introduction

These comments are submitted on behalf of California Appellate Defense Counsel, Inc. ("CADC"), whose more than 400 members act as appointed counsel in a large number of criminal appeals, including capital appeals. We limit our comments to SP-21, "Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty Related Habeas Procedures." Our experience is in the appellate courts, and it is there that our experience might be of greatest assistance to the Working Group. We leave it to others to comment on issues and concerns on which they have a better universe of knowledge.

CADC has three comments in reference to SB 21. The first concerns whether appointed counsel on the habeas appeal should receive the benefit of – and be required to cooperate with – an "assisting entity or counsel," as with counsel on the automatic appeal and in the Superior Court habeas proceedings. The second concerns the time at which the opening brief should be first due in the Court of Appeal, with focus on the "triggering event" for commencement of the 210-day period. The third concerns the need for a rule requiring Superior Court habeas counsel immediately to deliver the entire file to counsel on the habeas appeal.

2626 Harrison Street, Oakland, CA 94612, 510/435-6707, kylegee@pacbell.net

The Need for an Assisting Entity or Counsel

Proposed Rules 8.605(d)(2) and 8.652(d)(2) provide for appointment of a "entity or counsel" to assist counsel on an automatic appeal and on the Superior Court habeas, respectively. Proposed Rules 8.605(b) and 8.652(b) require counsel on the automatic appeal and in the Superior Court habeas, respectively, to cooperate with the "assisting entity or counsel." However, no proposed rule provides for appointment of an "entity or counsel" to assist counsel on the habeas appeal. CADC submits that such assistance is highly likely to be necessary.

First, new Penal Code section 1509.1, subdivision (b), grafts onto the habeas appeal an as-yet-explored element of "ineffective assistance" of habeas counsel in the Superior Court, which will create perhaps unknowable problems for counsel on the habeas appeal. Second, the current proposals reasonably require only habeas experience for counsel on the habeas appeal, and counsel on the habeas appeal may need guidance on matters of appellate procedure. Third and finally, the time requirements under Proposition 66 -- although aspirational -- may create pressure to move the habeas appeal forward expeditiously.

There appears to be a significant need for assistance and support of counsel on the habeas appeal. An "assisting entity or counsel" should be available.

The Triggering Event for the Opening Brief Due Date

Proposed Rule 8.396(c)(1) provides that the opening brief is due 210 days after "the record is filed" on appeal, subject to discretionary extensions of time. Proposed Rule 8.395(c)(3) requires the Clerk's Transcript to be produced within 20 days of filing of the Notice of Appeal, and proposed Rule 8.395(d)(3) requires the Reporter's Transcript to be produced within 20 days of notice to the reporter.

Finally, proposed Rule 8.395(h) makes current Rule 8.340 available to augment and/or correct the record.

Based on the experience of CADC members in capital appeals and non-capital appeals with complex records, we anticipate that counsel on the habeas appeal will not have a complete, augmented, and corrected record for a substantial time after filing of the original record on appeal. Furthermore, the existence of Penal Code section 1509.1(b) will require counsel on the habeas appeal to review the "entire" record of the Superior Court habeas, as well as Superior Court habeas counsel's file and perhaps the file of the "assisting entity or counsel" in the Superior Court. Counsel on the habeas appeal might also need to obtain the opinions of experts.

For these reasons, we believe that 210 days after "the record is filed" will only be realistic if the record filing date is the date of filing of the last augmented or corrected record. In more simple cases, where record augmentation and correction is minor or non-existent, 210 days may prove a reasonable goal. In complex cases, however, record augmentation and correction may take many months, despite the best efforts of appellate counsel, the Superior Courts, and the appellate courts. It seems more reasonable to "trigger" the 210-day due date upon filing of the last augmented or corrected record.

A Rule to Require Habeas Counsel to Surrender the File Immediately

Penal Code section 1509.1(b) will require counsel on the habeas appeal to investigate habeas counsel's effectiveness, and that investigation will be done under time pressure. Superior Court habeas counsel should be required to release the file immediately. There should be no potential for resistance or delay.

Conclusion

We hope that these observations will be of assistance to the Working Group. Thank you for your time and consideration.

Very truly yours,

KYLE GEE
Chair, CADC Government Relations Committee

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a non-profit corporation established by the State Bar of California

November 19, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Ave.
San Francisco, CA 94102

Re: Invitations to Comment SP18-21, SP18-22

The California Appellate Project-San Francisco ("CAP-SF") submits the following comments on the proposed "Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings" (Item Number SP18-21) and the proposed rules and forms "Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings" (Item Number SP18-22).

SP18-21 –Appellate Review of Superior Court Capital Habeas Proceedings

General Comment:

Recommendation: The rules should provide that habeas counsel must either transmit, or make arrangements to transmit, her complete file to appellate counsel, within a week of appellate counsel's appointment. The rules should further include a non-exhaustive list of the type of documents and materials habeas counsel should include in the file transmitted to appellate counsel. That list should include, but not be limited to the following: trial counsel's file; all work product from habeas counsel [*e.g.* draft and final pleadings, requests for funds and payment, investigation reports, working documents, research memos, correspondence] investigators and experts; and, counsel's paper and electronic calendars related to the case.

Appellate counsel must review both trial counsel's file and habeas counsel's file, to determine if any viable claims of IAC against trial counsel were not raised in the superior court petition. An established rule mandating the transfer of habeas counsel's complete superior court trial file will help to prevent any misunderstandings that these files belong to petitioner, and that successor counsel is entitled to them. The promulgation of this rule would go far in ensuring that appellate counsel would not need to spend unnecessary time attempting to convince habeas counsel to release all files to her.

General Comment:

Recommendation: The rules should mandate that counsel appointed to represent capital habeas petitioners in the Court of Appeal be provided with the assistance of a qualified counsel or entity, such as CAP, since assistance is provided to appointed counsel in all other state capital and non-capital appellate proceedings.

As indicated in comments to prior proposed rules, CAP-SF submits that its unique expertise in providing assistance to counsel in capital appellate and habeas proceedings makes it uniquely qualified to fill this role, and that it is better suited to do so than the district appellate projects that specialize in non-capital appeals.

Regardless of whether CAP-SF is specifically referenced as a potential assisting entity, the proposed rules should expressly provide for assistance to counsel, particularly given the unique complexity of these cases.

Proposed Rule 8.391: Qualifications of counsel appointed by the Court of Appeal

Recommendation: The rule should require that counsel appointed to appeals from superior court habeas decisions meet the qualifications both for habeas appointments in superior court and direct appeal appointments to capital cases in the California Supreme Court, and that counsel have experience with both direct appeals and habeas.

Appeals taken from habeas petitions require a specialized skill set that encompasses skills necessary to properly litigate both habeas corpus and appellate issues. Habeas corpus experience is required since counsel can

raise, for the first time, claims of trial counsel ineffective assistance of counsel ("IAC") on appeal. As such, it is only logical that attorneys appointed to appeals arising from habeas cases meet appointment requirements for both direct appeal and habeas cases.

Proposed Rule 8.392: Filing the appeal; certificate of appealability

8.392(a): Notice of appeal

Recommendation: The rule should be modified to provide that counsel appointed in the Superior Court be expressly assigned the responsibility of filing the notice of appeal on behalf of the petitioner when relief has not been granted.

This is necessary to avoid an inadvertent failure to file the notice of appeal.

8.392(b): Appeal of decision denying relief on a successive habeas corpus petition

8.392(c): Notification of appeal

8.392(b)5-6; 8.392(c)(1)

Recommendation: CAP-SF requests that these rules be clarified. All notices of appeal and orders thereon, including grants and denials of certificates of appealability, should be served on the assisting counsel or entity.

It is unclear when, if ever, the district appellate projects, which currently handle only non-capital cases, will be able to adequately assist appellate habeas counsel. As demonstrated by the Supreme Court's service of all orders and letters on the assisting counsel or entity, service of all filings and orders originating with the superior or appellate courts on the assisting entity is necessary.

8.392(c)(2)

Recommendation: The rule should be modified to provide that court reporters be required to prepare a record of superior court proceedings, once the proceedings have concluded, regardless of whether a certificate of appealability has been issued.

Whether a certificate of appealability is issued or not, a record will need to be prepared because litigation in state court will be subject to review in federal court. Failure to promptly prepare transcripts invites the risk of a failure to preserve an accurate record for later review.

8.392(c)(6):

Recommendation: Proposed rules 8.392(c)(1) should be revised to include service on the assisting counsel or entity. If CAP-SF's proposed revisions are not included, in cases in which counsel has been discharged, disqualified, suspended, disbarred, the clerk must receive a signed receipt that the notice was received by the assisting counsel or entity, and if there is no assisting counsel or entity by CAP-SF and the Habeas Corpus Resource Center.

Proposed Rule 8.395: Record on appeal

8.395(a): Contents

Recommendation: CAP-SF believes that attempts to truncate or abbreviate the record on appeal of a capital habeas decision will ultimately be counterproductive. Regardless of the scope of the habeas appeal, the federal courts will need to conduct a full review of petitioner's claims. Basic federal constitutional requirements of reliability, accuracy and completeness in death penalty proceedings also mandate a comprehensive record on appeal. The record on appeal must include, at a minimum, all contents required by the current rule 8.610. Current rules 8.613 through 8.622 also provide guidance to ensure the record on appeal is complete and accurate.

8.395(a)(5)

Recommendation: CAP-SF recommends that the rule should only state, "All supporting documents under rule 4.571." A separate and new subsection 8.395(a)(6) should state, "And any other documents and exhibits submitted to the Court."

Rule 4.571, referenced in Rule 8.395(a)(5), does not adequately clarify the scope and breadth of "supporting documents" needed for a capital appeal. Rule 4.571(b) should first be modified based upon CAP-SF's recommendations, *infra*, before it can be referenced here.

8.395(b): Stipulation to a Partial Transcript

Recommendation: CAP-SF recommends this provision be removed. It creates an impermissible risk that a partial record or transcript will impede full review of petitioner's case in federal court.

8.395(c): Preparation of clerk's transcript

8.395(c)(2)

Recommendation: CAP-SF believes a clerk should prepare a transcript of superior court proceedings regardless of whether a certificate of appealability has been issued.

Whether a certificate of appealability is issued or not, a record will need to be prepared because litigation in state court will most likely be subject to review in federal court. Failure to promptly prepare transcripts invites the risk of a failure to preserve an accurate record for later review.

8.395(c)(4)

Recommendation: The rule should be modified to provide the clerk must also prepare a copy of the clerk's transcript for an assisting counsel or entity, whether or not such counsel or entity requests it.

8.395(d): Preparation of reporter's transcript

8.395(d)(1)

Recommendation: The reporter should prepare a transcript of superior court proceedings regardless of whether a notice of appeal has been filed.

Given that the purpose of Proposition 66 is to expedite state review of capital cases, and the improbability that neither party would appeal either the grant or denial of habeas corpus relief in the superior court, the preparation of the reporter's transcript should begin immediately upon the conclusion of the superior court proceedings.

8.395(g): Sending the transcripts

Recommendation: The rule should be modified to provide that in all cases the clerk must send a copy of the record on appeal to any assisting counsel or entity, regardless of the status of petitioner's representation.

Proposed Rule 8.396: Briefs by parties and amici curiae

8.396(b): Length

8.396(b)(1)(A), 8.369(b)(3)(A) & 8.396(b)(5)

Recommendation: CAP-SF believes the word count should not include ineffective assistance of trial counsel claims. Just as IAC claims raised in the superior court have no word limitation, so should IAC claims raised in the appellate court have no such limitation.

Prop 66 expressly allows the presentation of claims of IAC of trial counsel that were not presented in the superior court. Nothing in Prop 66 requires or provides a basis for making it more difficult to adequately plead IAC claims first presented on appeal. Appellate counsel, like habeas counsel, must be afforded the ability to set forth an adequate claim for relief without the burden of a word count.

8.396(b)(6)

Recommendation: The rule should be amended to include language that "good cause" will be evaluated under the same criteria as for capital direct appeals. (Cal. Rules of Court, rule 8.631.)

Defining how good cause must be determined will help promote clarity, regularity and predictability in approvals or denials of applications for over-length briefs. The same factors warranting over-length briefs on direct appeal from conviction must also govern appeals from superior court denials of relief on habeas.

8.396(c): Time to File

8.396(c)(1)

Recommendation: CAP-SF recommends that the rule provide for a filing deadline of one year from appointment.

The proposed filing deadline fails to take into account that appellate counsel will be required to review trial counsel's file, habeas counsel's file, the record on appeal from the trial, and the record on appeal from the habeas denial. Significantly more time is required to complete these tasks and to write a legally competent appellate brief that includes claims of trial counsel's IAC. A one-year time frame, mirrors the statutory filing deadline for a superior court habeas petition. In order to attract competent counsel to take these cases, counsel must be given adequate time to fulfill their duties.

8.396(d): Service

8.396(d)(1)

Recommendation: CAP-SF recommends that all pleadings and orders be served on the assisting counsel or entity.

The California Supreme Court requires counsel in capital cases to serve all pleadings on the assisting counsel or entity.[1] (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4; *see also* Cal. Rules of Court, rule 8.630(g).) There is no reason to abandon a long-standing practice that serves the interests of both counsel and the assisting counsel or entity.

8.396(d)(1) & 8.396(d)(2)

Recommendation: CAP-SF recommends that the rules regarding service allow for personal service of petitioner, and additional time to do so, as

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[1] "Consistently with longstanding practice and court policy, except as specified below, counsel for the defendant must serve ... the assisting entity or attorney ..." (Policy 4.)

permitted in the Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4.

Proposed rule 8.396(d)(1) should include the following language, borrowed primarily from Policy 4:

> If counsel for petitioner elects to serve petitioner personally, counsel may indicate on the proof of service that counsel will serve petitioner within 30 calendar days. Counsel must notify the court in writing after petitioner has been served.

Proposed rule 87.396(d)(2) should be amended to include personal service.

As the California Supreme Court recognized, due to the nature of habeas corpus, pleadings often contain sensitive and difficult to understand information that is best explained to a client in person.

8.396(d)(3)

Recommendation: CAP-SF recommends that "assisting counsel or entity" replace "district appellate project".

The assisting counsel or entity must receive service of all pleadings and orders. Currently, the district appellate projects do not have the necessary capital experience to act as an assisting entity. It is unclear at this time who will be assisting appointed counsel in the appellate courts, and the proposed rules should include the potential for other counsel or entities providing assistance to appointed counsel.

Proposed Rule 8.397 Claim of ineffective assistance of trial counsel not raised in the superior court

8.397(c): Proffer

8.397(c)(3)

Recommendation: CAP-SF recommends that the rule be modified to ensure that when a proffer is noncomplying, the clerk is required to notify the filer (e.g., petitioner's counsel or petitioner if unrepresented) immediately of any

noncompliance, and must allow a minimum of 30 days for the filer to bring the proffer into compliance.

SP18-22-Superior Court Capital Habeas Procedures

Proposed Rule 4.571 Filing of the petition in the superior court

4.571(b): Supporting Documents

4.571(b)(6)

Recommendation: CAP-SF recommends that the rule be modified to separately address the need for a clear process for confidential records.

Rules 2.550 and 2.551 on their face address sealed records, but do not reference confidential records. Current Rule 8.47 ("Confidential Records") may serve as a useful guide in modifying Rule 4.571(b)(6).

4.571(c): Filing and service

4.571(c)(3)

Recommendation: CAP-SF recommends that the rule be revised to require all pleadings and supporting documents and orders to be served on the assisting counsel or entity.

As stated above, the California Supreme Court requires counsel in capital cases to serve all pleadings on the assisting counsel or entity. (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 4; *see also* Cal. Rules of Court, rule 8.630(g).) There is no reason to abandon a long-standing practice that serves the interests of both counsel and the assisting counsel or entity.

4.571(d): Noncomplying filings

Recommendation: CAP-SF recommends that the rule be modified to ensure that when a petition is noncomplying, the clerk be required to notify counsel (or petitioner if unrepresented) immediately of any noncompliance, and must

allow a minimum of 30 days for counsel (or petitioner if unrepresented) to bring the petition into compliance.

4.571(e)(3)

Recommendation: CAP-SF recommends that the rule be modified so that the Court has 60 days after receipt of the informal reply, or 60 days after the time to file an informal reply has expired, to rule on the petition.

The requirement for the Court to issue an order to show cause or deny the petition within 60 days of receipt of the informal response fails to take into account the current capital habeas practice that virtually all petitioners choose to file an informal reply.

4.571(e)(5)

Recommendation: CAP-SF recommends that all rulings by the superior court be served on the petitioner, her counsel, and the assisting counsel or entity.

Proposed Rule 4.573: Proceedings after the petition is filed

4.573(a): Informal response and reply

4.573(a)(4)

Recommendation: As indicated in CAP-SF's recommendation regarding rule 4.571(e)(3), the rule should be modified so that the Court has 60 days after receipt of the informal reply, or 60 days after the time to file an informal reply has expired, to rule on the petition.

Petitioner should have a minimum of 45 days to file an informal reply, and a court should not be allowed to order less time for the filing. A court may still specify that more time will be allowed for the filing of an informal reply.

Thank you for this opportunity to comment.

Very truly yours,

JOSEPH SCHLESINGER
Executive Director

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November 19, 2018

Proposition 66 Rules Working Group
Judicial Council of California
455 Golden Gate Ave.
San Francisco, CA 94102

Re: Invitation to Comment SP18-21 and SP18-22

To the Hon. Dennis M. Perluss, and to members of the Proposition 66 Rules Working Group:

These comments reflect the concerns of California Attorneys for Criminal Justice (CACJ) regarding the proposed rules for filing habeas corpus petitions in superior courts, and filing appeals of habeas corpus decisions in the courts of appeals.

CACJ understands that Proposition 66 was passed and is the law. We respect the Judicial Council's role in creating rules to implement the law. Our main concern is that implementation of Proposition 66 not infringe on the constitutional rights of condemned inmates.

CACJ's main concern is to ensure that counsel for the condemned inmate have an unobstructed opportunity to investigate and litigate collateral relief issues, including ineffective assistance of trial counsel in the superior court, the opportunity to appeal the habeas corpus rulings of the superior court, and present new claims of ineffective assistance of habeas corpus counsel in the court of appeals.

The Judicial Council should recognize that the habeas corpus process defined in Proposition 66 will necessarily be more time- and resource-intensive than current habeas corpus procedures. Currently, the Supreme Court has discretion to review only those claims it finds have merit . Proposition 66 demands that the superior courts review every claim raised by the capital habeas corpus petitioner, determine and document the merits of each claim. Each petition will be different and may require vastly different court resources for resolution. Flexibility, where there is good cause, is necessary to adequately meet the petitioner's due process needs and the demands of the superior court.

Request for Specific Comments on SP18-21

Does the proposal appropriately address the stated purpose?
The proposed rules do not adequately address the procedures for taking an appeal from a Superior Court ruling in capital habeas corpus proceedings. Importantly, these rules cannot be implemented without defined sources and proper allocation of funding. Until the Judicial Council, Superior Courts, Courts of Appeals, and the

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Legislature have addressed funding, appointed counsel, assisting entities, superior court judges and staff, and appellate courts and staff, cannot implement these measures.

Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?
The qualifications for capital habeas corpus appellate counsel should be the same as those for appointment on capital habeas corpus. (See CACJ comments to SP18-12 and SP18-13.) At the bare minimum, habeas corpus appellate counsel must have capital postconviction experience.
Because of the possibility of conflicts of interest, attorneys appointed for appeals from capital habeas corpus proceedings should not be the same attorneys as those in the superior court habeas corpus proceedings, unless there is a valid waiver by the petitioner.

Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal?
We have no opinion.

Would it be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period?
Yes. The rule should be as clear as possible. There are situations where both parties may have different grounds to appeal. The rule must allow each party 30 days to file their notice of appeal. Furthermore, if a party timely appeals from the ruling on a habeas corpus proceeding, the time for any other party to appeal should be extended until 20 days after the superior court clerk serves notification of the first appeal.

Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations?

No. It is unlikely that it would be useful in capital proceedings. And, it may create problems in federal courts considering the exhaustion of claims or the determination of facts in state court.

When should preparation of the record begin for these appeals?
Preparation of the record should begin when the notice of appeal is filed.

Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals?
No. It is highly unlikely that the complete record of habeas corpus proceedings could be collected in less than 90 days. The rules for certification of the clerk's transcript and the reporter's transcript must include a process and time for correction of the record by the parties. Rule 8.616(c) and (d) allow 30 days for preparation of the record in capital appeals and provide that the trial court can extend the time for an

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additional 30 days and that the clerk and reporters can apply to the state Supreme Court for further extensions. We propose that the habeas rule incorporate similar time frames and mechanisms for granting extensions.
As in rule 8.622, there must be provisions for appellate counsel to augment and correct the record. Proposed rule 8.395(h) would model record correction procedures on those set out in current rule 8.340, which governs correction of records in non-capital appeals. The procedures for the parties to correct the record in habeas corpus appeals should be modeled after rule 8.622, with the clerk and reporter certifying the record to the trial court and the trial court presiding over proceedings by appellate counsel to correct, augment, and settle the record.

Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals?
No. The superior court judge, and not the appellate court, must have authority to grant time for the court clerk to complete the clerk's transcripts and the court reporter to complete the reporter's transcripts.

Should the rules require that habeas corpus counsel transmit their file to appellate counsel when appellate counsel is appointed?
Yes. Habeas corpus counsel should be required to transfer the entire original file.

Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition?
The time to file should be no less than filing a capital appeal in the Supreme Court, and should, in addition, allow extensions of time upon a showing of necessity of investigation and expert preparation of ineffective assistance claims. Rule 8.630, governing time to file briefs in capital appeals, states: If the clerk's and reporter's transcripts combined exceed 10,000 pages, the time limits stated in (A) and (B) are extended by 15 days for each 1,000 pages of combined transcript over 10,000 pages." (Rule 8.630 (c)(1)(c).) The proposed rules also allow for extensions for long records in habeas appeals; furthermore, in determining the length of the record for the purpose of extending time, the record of a habeas corpus appeal should include not only the habeas petition and exhibits and the record of the evidentiary hearing, but the record and briefs in the direct appeal, since they are part of the habeas proceeding and are routinely incorporated by reference into the habeas corpus petition. Rule 8.396(b) should apply only to the direct appeal of the capital habeas corpus proceedings. The rule should not limit the length of the ineffective assistance of counsel claims and supporting exhibits.
The rules on length of content of the habeas corpus appeal must contemplate the petitioner's right to appeal ineffective assistance of habeas corpus counsel and request an evidentiary hearing. The rules on length of content must allow enlargement as necessary to develop ineffective assistance claims and provide supporting exhibits.

Are the proposed rule provisions relating to the content and format of a proffer in

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appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition appropriate?
The proffer of exhibits on appeal should have the same rules governing form and content as those for exhibits submitted with a habeas corpus petition; i.e., they should have similar rules for contents, pagination, etc.

Request for Specific Comments on SP18-22

Does the proposal appropriately address the stated purpose?
The proposed rules do not properly address the procedures for capital habeas corpus proceedings in Superior Court. These rules cannot be implemented and will fail without defined sources and allocation of funding. Until the Judicial Council, Superior Courts, and the legislature have defined and allocated funding, appointed counsel, assisting entities, superior court judges and staff cannot implement these measures.

Should the rules address Supreme Court transfer of petitions from one superior court to another and, if so, what should the rule provide?
When transferring a case to a superior court, any court, including the Supreme Court, should issue an order with the basis of its decision.

Should the rules address Supreme Court transfer of a petition pending before it to a superior court and, if so, what should the rule provide?
To minimize duplication of effort, all petitions pending in the Supreme Court should remain in the Supreme Court.

Should the proposed rules address amendments to petitions?
The rules should define the process for amending petitions upon a showing of good cause.

If the proposed rules were to address amendments:
o How would amendments affect the deadlines provided in the rules?
o Under what circumstances should amendments be permitted?
Same as amendments to capital habeas corpus petitions currently.
o Should the rule address amendment of Morgan or shell petitions differently from other petitions?
Morgan petitions should have the same deadlines and rules starting from the date of appointment of counsel as the original petition .

Should the proposed rules include a provision like that in rule 8.384(d) and proposed rule 4.571(d) that authorizes the court to notify the attorney that it may strike a noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days?
The attorney must be notified and allowed no less than 30 days to submit a proper petition with extensions for due cause.

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Should there be a Judicial Council form for the superior court to issue a certificate of appealability?
The superior court should only be required to state that the requirements of section 1509 have been met and that the court is certifying the issues for appeal.

Should the rule require the superior court to include in a certificate of appealability not only the substantial claim or claims for relief, which is required by Penal Code section 1509.1, but also include a finding of a substantial claim that the requirements of Penal Code section 1509(d) have been met?
No.

Are the deadlines included in the proposed rule for submitting papers adequate?
No. The deadlines should be the same as current deadlines.

Omissions in SP18-21 and SP18-22:

The rules do not adequately define the procedure for amending petitions including *Morgan* petitions.

The rules must address appointment of habeas corpus co-counsel and define the interaction between appointed habeas corpus counsel and assisting entities.

The rules fail to define procedures supporting the "oldest goes first" policy.

Under Rule 8.300, the Court of Appeal has authority to appoint appellate counsel. Capital habeas corpus appellate counsel will require assisting counsel, such as CAP/SF. If CAP/SF is not available in a specific case, e.g. because of a conflict among multiple petitioners, counsel assigned to assist appointed counsel should themselves meet the standards for appointment in a habeas corpus appeal.

Assisting and appellate agencies will need additional staff to support habeas corpus attorneys and habeas corpus appellate attorneys.

The Judicial Council cannot expect implementation of these rules until funding sources and allocation are established.

Thank you for the opportunity to comment on SP18-21 and SP18-22.

Sincerely,

Steve Rease, President CACJ

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November 19, 2018

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RE: Invitation to Comment SP18-21
Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

To whom it may concern:

Thank you for the opportunity to provide comments on behalf of the California Judges Association (CJA). In response to your request for specific comments, we offer the following comments and recommendations:

Rule 8.391. Qualifications of counsel appointed by the Court of Appeal

The appellate projects (FDAP, CAP-LA, CCAP, ADI and SDAP) and Appellate Indigent Defense Oversight Advisory Committee (AIDOAC) are in the best position to comment on this proposed rule. CJA has no comment on this issue.

Rule 8.392. Filing the appeal; certificate of appealability

Should subdivision (c)(1) recognize that a petitioner may be unrepresented at the time of filing a notice of appeal and require a copy of the notice to be served on the petitioner? Similar to California Rules of Court, rule 8.304(c), an unrepresented defendant is sent a notification of filing when the appeal is filed.

Page 4 of Executive Summary indicates that the Court of Appeal must grant or deny a certificate of appealability within 10 days of a request for a certificate. The rules do not reiterate that requirement. Plus, the rules should be clear that the 10 days runs upon filing the request for certificate of appealability in the Court of Appeal.

Rule 8.393. Time to appeal

What is meant by "after the making of the order?" It is unclear what "making of the order" means. Under proposed rule 4.575, the trial court must prepare and file a statement of decision specifying its order and explaining the factual and legal basis for the decision. To be consistent with rule 4.575, the notice of appeal should be filed within 30 days after the filing of the trial court's statement of decision or order.

Rule 8.394. Stay of execution on appeal

No comment on this proposed rule.

Rule 8.395. Record on appeal

Should subdivision (f) on the form of the record recognize the opt-out provisions in Code of Civil Procedure section 271 pertaining to delivery of a reporter's transcript in electronic form?

Code of Civil Procedure section 271, subdivision (a) provides: "An official reporter or official reporter pro tempore shall deliver a transcript in electronic form, in compliance with the California Rules of Court, to any court, party, or person entitled to the transcript, unless any of the following apply:

(1) The party or person entitled to the transcript requests the reporter's transcript in paper form.
(2) Prior to January 1, 2023, the court lacks the technical ability to use or store a transcript in electronic form pursuant to this section and provides advance notice of this fact to the official reporter or official reporter pro tempore.
(3) Prior to January 1, 2023, the official reporter or official reporter pro tempore lacks the technical ability to deliver a transcript in electronic form pursuant to this section and provides advance notice of this fact to the court, party, or person entitled to the transcript."

Perhaps Rule 8.395(f)(1) should state something like the following: "The reporter's transcript must be in electronic form, subject to the provisions of Code of Civil Procedure section 271. The clerk is encouraged to send the clerk's transcript in electronic form if the court is able to do so."

Subdivision (g)(2) refers to "petitioner's counsel's copy" of the transcripts; however, the copy of transcripts has always belonged to petitioner. Should the word "counsel's" be deleted?

Rule 8.396. Briefs by parties and amici curiae

Should the rule specify the sanctions that may be imposed if there is a failure to file the brief? E.g., like those in California Rules of Court, rule 8.360(c)?

Rule 8.397. Claim of ineffective assistance of trial counsel not raised in the superior court

No comment on this proposed rule.

Rule 8.398. Finality

The committee has no comment on this proposed rule.

Requests for Specific Comments (See pages 8-9 of the Executive Summary)

CJA has comments on the following points:

Would it be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period? *No. An advisory note may lead to confusion.*

Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations? *We do not see this process used for non-capital felony appeals, so it would probably not be used for this type of appeal either.*

When should preparation of the record begin for these appeals? *Immediately for the non-successive petition appeals; upon issuance of the certificate of appealability in successive petition appeals.*

Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals? *Preparation of the record is a laborious and time-consuming process. The initial time should be more than 20 days (more like 60 days?), and the time should be automatically extended when the record is over 10,000 pages.*

Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals? *The elimination of the 60-day limit for extensions is necessary.*

Would the proposal provide cost savings? If so, please quantify. *We foresee no cost savings. This type of appeal is new and is added to the current caseload of the intermediate courts of appeal. While there may be some variation in appellate districts, generally the Clerk's Offices are already under resourced for their current caseload, and it will be a challenge to add the work anticipated for this type of appeal. And, the workload for the attorneys and justices at the Court of Appeal will be greatly increased.*

What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. *Courts of Appeal will need to create a new training manual for this type of appeal and there are already discussions to add docket codes to existing case management systems. We are not able to quantify the time it will take to train staff. In addition, hours of training for attorneys and justices will likely be required.*

Our comments here are intended to assist with this proposal at this stage and are not representative of a position on the proposal. Thank you for the opportunity to provide these comments; we welcome any questions and further discussion.

Sincerely,

Erinn Ryberg

Erinn Ryberg, Legislative Director

To: Judicial Council of California
Presiding Justice Dennis M. Perluss, Chair
Proposition 66 Rules Working Group

From: Committee on Appellate Courts, Litigation Section

Date: November 15, 2018

Re: Invitations to Comment
SP 18-21: Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings
SP 18-22: Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings

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The Committee on Appellate Courts appreciates the Working Group's efforts to balance the mandates of Proposition 66 with the need to ensure reasonable procedures and qualifications for death penalty habeas proceedings. The current invitations to comment contain numerous issues, and the Committee provides the following responses for the issues on which it has substantive suggestions.

1. Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings – SP 18-21

The Committee on Appellate Courts generally supports this proposal, and responds as follows to the Working Group's request for specific comments.

> Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?

The Committee agrees that attorney qualifications in superior court death-penalty habeas proceedings should be similar to attorney qualifications in appeals from those proceedings. The Committee also recognizes that the Working Group must consider the ability to increase the pool of qualified attorneys.

However, the Committee reiterates concerns it raised in response to SP 18-12, when the Working Group first solicited comments on the qualification process for death-penalty habeas appointments in superior courts. Specifically, the Committee suggests that:

- appointed counsel should have significant experience representing a defendant/appellant/petitioner, rather than solely representing the prosecution/respondent;

- appointed counsel should have some experience handling other murder cases; and,

- appointed counsel should have experience with habeas matters, rather than merely direct appeals.

As a possible middle ground between these suggestions and the Working Group's SP 18-12 proposals, the Committee suggests adopting a two-tiered qualification structure. Attorneys with the above experience could be deemed "fully qualified," and operate without direct supervision. Meanwhile, attorneys with less experience could be deemed "provisionally qualified." Such attorneys would be permitted to handle a capital habeas petition, but their first such appointment should be supervised by a "fully qualified" attorney.

While California confers no constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings, the long-standing practice of the California Supreme Court has been to appoint qualified counsel to work on behalf of an indigent inmate in the investigation and preparation of a petition for a writ of habeas corpus that challenges the legality of a death judgment. (*See, In re Barnett* (2003) 31 Cal. 4th 466, 475 citing *In re Sanders* (1999) 21 Cal.4th 697, 717; *In re Anderson* (1968) 69 Cal.2d 613, 633; Cal. Supreme Ct., Internal Operating Practices & Proc., XV, Appointment of Attorneys in Criminal Cases; Cal. Supreme Ct., Policies Regarding Cases Arising from Judgments of Death, policy 3].)

That practice was codified in principle at Government Code section 68662, which promotes the state's interest in the fair and efficient administration of justice and, at the same time, protects the interests of all capital inmates by assuring that they are provided a reasonably adequate opportunity to present their habeas corpus claims.

Moreover, competent state habeas counsel protects victims' interests in finality and promotes the purpose of Proposition 66 to more efficiently resolve capital cases. The most efficient approach is to appoint fully qualified counsel at the state trial court level who will conduct a competent investigation and spot claims that must be raised.

Over the last 20 years alone, federal courts have granted relief in at least 13 serious felony (non-capital) California cases, where those individuals were later *exonerated.* Six of those cases involved the denial of petitioners' Sixth Amendment right to effective counsel. In five of the six IAC cases, state courts summarily denied relief without ordering an evidentiary hearing or stating reasons for denying relief. The state courts' error rate in evaluating IAC claims is distressing. Lowering the standards for who qualifies as competent counsel to represent

petitioners in state court capital habeas proceedings, whether in superior court or the appellate courts, will only increase the state courts' error rate in those proceedings.

As of 2010, federal courts have rendered final judgment in 63 habeas corpus challenges to California death penalty judgments and granted either a new guilt trial or a new penalty hearing in 43 of those cases. Of the 43 cases, relief was granted in 25 on the ground that the condemned prisoner's appointed trial counsel was ineffective—in six cases during the guilt phase and in 19 cases during the penalty phase—typically for counsel's failure to investigate mitigating evidence. In all of those 25 cases, the state courts found *no* Sixth Amendment error; whereas the federal courts—wherein petitioners are represented by qualified habeas counsel appointed by the federal courts—determined that the petitioners *did* suffer Sixth Amendment constitutional violations and granted some form of relief. It is imperative that post-conviction counsel representing condemned inmates, whether in the superior court or in the appellate courts, have significant experience working on capital cases so they understand the importance of investigating and presenting mitigating evidence, among other capital-case specific issues.

These requirements would help to ensure that appointed counsel have some familiarity conducting investigations, which form a vital component of death-penalty habeas practice. This experience is critical in order to avoid unnecessary delay during the federal habeas process. And the experience is especially critical at the appellate level, given the expanded scope of appellate issues for ineffective assistance of habeas counsel under Penal Code § 1509.1.

> Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal?

Yes, the People's representative should generally receive notice whenever the Court of Appeal issues an order in a death penalty case. Providing this notice requires the Court to perform relatively little additional work, and helps to avoid any unnecessary confusion.

> Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations?

The Committee does not anticipate that parties will stipulate to a limited record with any frequency. By doing so, petitioner's counsel would run an unnecessary risk of providing ineffective assistance. Both parties may be required to perform significant additional work in order to determine which portions of the record were relevant to the specific issue raised. The Committee therefore does not believe the rules should include such a provision.

> Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition?

The Committee suggests that the timeframe for filing briefs in death-penalty habeas appeals should be considered in conjunction with the timeframe for filing briefs in the superior court. Specifically, the Committee is concerned that (1) the proposed rule for superior court briefing

would afford only 45 days to file response briefs and 30 days to file replies, while (2) the proposed rule for appellate courts would permit 120 days to file response briefs and 60 days to file replies.

In the habeas context, briefs filed in the superior court and appellate court are likely to raise many similar issues. The Committee therefore suggests that the timeframe to respond and reply should be similar during each phase. The timeframe for superior court briefing seems unnecessarily short, given the magnitude of issues potentially presented, so the Committee recommends adopting a 120-day response and 60-day reply timeframe for both the superior and appellate courts.

> What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.

Intermediate appellate court attorneys and justices will need training on procedural and substantive issues. Although they already have experience in handling "jumbo" special circumstance murder cases, *Batson-Wheeler* issues, etc., they will need special training on the new procedures (such as the standard of review on an appeal from a habeas ruling). They will also need training on capital-specific substantive issues such as death qualifying a jury, law governing penalty phase and mitigation evidence, and law on standards for effective representation in the penalty phase. The importance of court attorney education will increase if the experience of assigned counsel is limited, as court staff may not have the benefit of reliable briefing.

The Committee has been generating appellate specialization CLE webinars and in-person programs for many years, and is at your service if it can be of any help in developing educational material for the courts. Our members include court attorneys, attorneys from the state attorney general's office, and capital defense counsel who would be happy to volunteer their services in this regard.

2. Criminal Procedure: Superior Court Procedures for Death Penalty–Related Habeas Corpus Proceedings – SP 18-22

The Committee on Appellate Courts supports this proposal as a whole, and responds as follows to the Working Group's request for specific comments.

> Should there be a Judicial Council form for the superior court to issue a certificate of appealability?

Yes. The Committee recognizes that every case will raise different issues, and therefore the form must be able to accommodate individualized input. However, most judges are unlikely to develop significant experience preparing a certificate of appealability. A general form will therefore help to provide guidance and ensure some uniformity of practice throughout the state.

Are the deadlines included in the proposed rule for submitting papers adequate? Concern re informal response deadline.

The Committee suggests that the timeframe for filing briefs in death-penalty habeas petitions in the superior court should be reconsidered when compared with the timeframe for filing briefs in the appellate court. Specifically, the Committee is concerned that (1) the proposed rule for superior court briefing would afford only 45 days to file response briefs and 30 days to file replies, while (2) the proposed rule for appellate courts would permit 120 days to file response briefs and 60 days to file replies.

In the habeas context, briefs filed in the superior court and appellate court are likely to raise many similar issues. The Committee therefore suggests that the timeframe to respond and reply should be similar during each phase. The timeframe for superior court briefing seems unnecessarily short, given the magnitude of issues potentially presented, so the Committee recommends adopting a 120-day response and 60-day reply timeframe for both the superior and appellate courts.

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CHAMBERS OF
JUDITH McCONNELL
PRESIDING JUSTICE

November 8, 2018

TO: Heather Anderson
Michael Giden
Seung Lee

CC: Presiding Justice Dennis M. Perluss, Chair of the Proposition 66 Rules Working Group
Presiding Justice Manuel A. Ramirez
Presiding Justice Kathleen E. O'Leary
Bob Lowney
Deborah Collier-Tucker

FROM: Administrative Presiding Justice Judith D. McConnell
Court of Appeal, Fourth Appellate District

DATE: November 8, 2018

RE: Invitation to Comment SP18-21 (Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings)

The Fourth Appellate District submits the following comments on the proposed rules concerning appeals from decisions in death penalty–related habeas corpus proceedings.

Responses to Requests for Specific Comments

- Does the proposal appropriately address the stated purpose?

  Response: Yes.

- Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for

counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?

Response: Yes.

- Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal?

  Response: Yes.

- Would it be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period?

  Response: Yes, to avoid confusion and the consequences of missing a critical deadline, the rule should include an advisory comment stating that all appeals by both the petitioner and the People must be filed within 30 days.

- Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations?

  Response: As a practical matter, stipulations to a limited record will likely be rare. However, for the rare occasion when such stipulations do occur, a rule addressing the matter is helpful. The Fourth District suggests shortening the deadline for stipulations to a limited record to prevent superior courts from incurring unnecessary costs related to record preparation.

- When should preparation of the record begin for these appeals?

  Response: The Fourth District understands that proposed rule 8.395 requires that the clerk of the superior court begin preparing the clerk's transcript "immediately after the notice of appeal is filed" to provide the parties with time to consider whether to stipulate to a limited record on appeal. However, those stipulations are unlikely. Accordingly, the Fourth District suggests that preparation of the record should begin immediately upon decision by the superior court in the capital habeas corpus proceeding. This suggestion is consistent with rule 8.336(a)(1), which requires that for non-death penalty felony appeals, "the clerk must begin preparing the record immediately after a verdict or finding of guilt of a felony is announced following a trial on the merits."

- Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals?

  Response: Based on the Fourth District's experience with records in non-capital felony appeals and requests for extensions of time, 20 days is insufficient for preparation of the clerk's and reporter's transcripts, especially given the likely size of these records.

- Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals?

  Response: Yes.

- Should the rules require that habeas corpus counsel transmit their file to appellate counsel when appellate counsel is appointed?

  Response: Yes.

- Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition?

  Response: Yes, the Fourth District believes it is appropriate to model rule 8.630 relating to briefs in capital appeals.

- Are the proposed rule provisions relating to the content and format of a proffer in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition appropriate?

  Response: Although proffers are a new concept in appeals, the proposed rule appears to adequately and appropriately address the concept.

Cost and Implementation

- Would the proposal provide cost savings? If so, please quantify.

  Response: No. The Fourth and Second Districts will be overly burdened by appeals from decisions in death penalty–related habeas corpus proceedings. The costs and burdens of these appeals is immeasurable at this point.

The Fourth District recognizes that Article 6, section 12 of the California Constitution and Rule 10.1000 address transfers of cases by the Supreme Court. Rule 10.1000 generally allows the Supreme Court to transfer cases between the Courts of Appeal. However, given the tremendous impact of death penalty–related habeas corpus proceedings on the appellate courts, the Fourth District suggests a rule of court should specifically address the issue of transfers in these cases between appellate districts and divisions.

The Fourth District proposes that the rules allow for the Supreme Court to transfer appeals between Courts of Appeal at the request of an Administrative Presiding Justice and allow for the Administrative Presiding Justice to transfer appeals within his or her district. These mechanisms give the courts flexibility and are also consistent with Proposition 66, which did not require that appeals be heard in the district or division of the trial court that imposed the death penalty or heard the petition for writ of habeas corpus.

Based on the experience of the Fourth District, transfers should occur after the record is prepared and the appeal is fully briefed. The Court of Appeal for the trial court that heard the petition for writ of habeas corpus is in the best position to manage and oversee record preparation because of established relationships between clerk's offices and staff handling these matters.

- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.

  Response: Implementing these new rules will require significant efforts for the Courts of Appeal, as described below:

  Management and supervisors, in conjunction with presiding justices, will need to develop procedures and policies for implementing the new rules concerning appeals from decisions in death penalty–related habeas corpus petitions. The courts will also need to create form orders and notices within the case management system that are specific to these appeals.

  All deputy clerks and supervisors in the clerk's office will need training on the requirements and procedures for the new rules, including

education on certificates of appealability and proffers because these concepts are new to the courts.

Additionally, the local case management system administrator must create event rules and category codes within the court's case management system to coincide with the filing deadlines and requirements of the rules.

All justices and attorneys within the Courts of Appeal will need training on appeals from decisions in death penalty–related habeas corpus petitions. The Fourth District anticipates that CJER will need to create training programs specifically related to the new rules, death penalty–related habeas corpus petitions, and appeals from these petitions.

At this point, it is difficult to quantify the hours of training that will be required. Some courts will need additional staffing to handle appeals from decisions in death penalty–related habeas corpus petitions.

- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

  Response: Two months is likely sufficient to fully train clerk's office staff members on the requirements of the new rules and processing of appeals from decisions in death penalty–related habeas corpus petitions. However, two months from the effective date of the rules is likely not sufficient to fully train attorneys and justices on review and resolution of these appeals.

- How well would this proposal work in courts of different sizes?

  Response: As previously stated, the Fourth and Second Districts will be overly burdened by appeals from decisions in death penalty–related habeas corpus proceedings. Without transfer of these appeals to other appellate districts, the Fourth District will experience a significant delay in handling and resolving all other types of appeals.

Proposed Rule 8.392

Subdivision (a) of proposed rule 8.392 states that to appeal a decision in a death penalty–related habeas corpus proceedings, the petitioner or the People must serve and file a notice of appeal in the superior court. Unlike rule 8.304(a)(3), the proposed rule does not specify who must sign the notice of appeal. Because rule 8.304 is not applicable to these appeals, the Fourth District recommends specifying the appropriate signatories for notices of appeal to avoid confusion.

Subdivision (b) of proposed rule 8.392 pertains to certificates of appealability under Penal Code section 1509.1, subdivision (c). The Fourth District suggests preparation of a form for the certificate of appealability. While the Fourth District understands the working group's concern that certificates of appealability must be individualized, a form would be useful to ensure that superior courts prepare the certificates and include all required information.

Subdivision (c)(2) pertains to notification of the filing of a notice of appeal to the court reporter or reporters. The rule states that if the petitioner is appealing from a superior court decision denying relief on a successive petition and the superior court did not issue a certificate of appealability, the clerk must not send notification of the notice of appeal to the court reporter or reporters unless and until the clerk receives a certificate of appealability issued by the Court of Appeal. The Fourth District suggests adding a deadline for the clerk to notify the court reporter. For consistency with subdivision (b)(1), the Fourth District recommends a deadline of no later than five days after the Court of Appeal issues a certificate of appealability.

Additionally, the Fourth District notes that superior court staff will need training to ensure that notifications to court reporters are properly done. Based on the Fourth District's experience, court reporters are often not properly noticed in non-capital felony appeals. Given the time constraints imposed by these rules, proper notification is critical.

Proposed Rule 8.393

The Fourth District suggests adding an advisory comment to this rule, highlighting that all appeals by both the petitioner and the People must be filed within the 30-day deadline set forth in the rule.

Proposed Rule 8.395

Proposed rule 8.395 relates to the record on appeal. Subdivision (b) states that if the parties stipulate in writing to a limited record before the record is certified, the portions the parties agree are not required for determination of the appeal must not be prepared or sent to the reviewing court. The Fourth District suggests that the rule include a shorter deadline for stipulations to a limited record. If the parties can stipulate at any point before record certification, it is likely that superior courts will incur costs and burdens of preparing portions of the record that the parties ultimately deem unnecessary for the appeal.

Subdivision (c)(4) provides that upon request, the clerk must prepare an extra copy of the clerk's transcript for the district attorney or the Attorney General, whichever is not counsel for the People on appeal. The Fourth District suggests including a deadline for the request.

Proposed Rule 8.397

Subdivision (e)(3) provides that if the reviewing court consolidates a pending appeal under Penal Code section 1509.1 with an appeal from a superior court decision on limited remand, the superior court clerk must augment the record to include the remanded proceedings. This proposed rule should set a time frame for the augment or state the time requirements in proposed rule 8.395 apply unless otherwise ordered by the reviewing court.

The Fourth District appreciates consideration of the above comments. Please do not hesitate to contact me to discuss these comments further.

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MEMO

TO: Judicial Council of California, Attn: Invitations to Comment; invitations@jud.ca.gov

FROM: Mary J. Greenwood, Administrative Presiding Justice, Sixth District Court of Appeal

DATE: 11/27/2018

RE: **Response to Invitation to Comment SP18-21** - New and Amended Rules of Court, rules 8.390 –8.398, 8.388 Proposed by The Proposition 66 Rules Working Group, Hon. Dennis M. Perluss, Chair specifically relating to appeals from decisions in habeas corpus proceedings.

The Sixth District Court of Appeal has the following comment as to **Proposed Rule 8.392(b)** – Appeal of decision denying relief on a successive habeas corpus petition; certificate of appealability.

Penal Code section 1509.1, subdivision (c) provides that the petitioner may appeal the decision of the superior court denying relief on a successive petition only if the superior court or the Court of Appeal grants a certificate of appealability. The statute also provides that the Court of Appeal "shall grant or deny a request for a certificate of appealability within 10 days of an application for a certificate" and that the "jurisdiction of the court of appeal is limited to the claims identified in the certificate and any additional claims added by the court of appeal within 60 days of the notice of appeal."

The proposed rule does not directly address either the 10-day limit or the 60-day limit provided in the statute. We are particularly concerned with the lack of a clear trigger date in the proposed rule for the commencement of these time periods. The proposed rule requires the petitioner to "attach to the notice of appeal a request to the Court of Appeal for a certificate of appealability" (8.392(b)(3)), and the proposed rule requires the superior court clerk to "promptly—and no later than five days after the notice of appeal is filed—send a notification of the filing" of the appeal (8.392(c)(1)). In our experience, there has been a great deal of variation in the length of time between the filing of a notice of appeal and the receipt of the notice of appeal in our court. The proposed rule seems to imply that the superior court clerk's sending of the notification of the appeal, with an attached request for a certificate of appealability, will trigger the 10-day time limit for the Court of Appeal to rule on the request. It would be helpful to have express provisions dealing with the issue. At minimum, the proposed rule should be amended to reflect that the 10-day time limit does not commence until the notice of appeal and a request for a certificate of appealability are lodged in the Court of Appeal.

In response to the Proposition 66 Working Group's specific questions for courts, the Sixth District Court of Appeal responds as follows.

1) Would the proposal provide cost savings? If so please quantify.

No. We believe the proposal will not provide cost savings. Proposition 66 imposes a burden on the resources of the courts of appeal that is not remedied by these rules. By strictly limiting the time to complete the habeas petition process at the trial courts and courts of appeal, Proposition 66 will require a significant allocation of resources to complete the process within the mandated time. The proposed rules do nothing to alleviate that burden.

2) What would the implementation requirements be for courts?

The Sixth District believes that implementation will require significant additional resources.

Additional Staff - Given the number of death penalty cases in this District, we anticipate needing to hire one to two additional staff attorneys to work on these appeals. We understand from HCRC that the Supreme Court currently has 8 full time attorneys working on death penalty habeas petitions who complete 12 petitions per year. That averages out to around 9 months per petition. The Supreme Court has represented that it takes one of their experienced attorneys an average of six months work for disposition. The courts of appeal will not have the benefit of experienced staff. Unlike the Supreme Court under the current system, in a Proposition 66 appeal, the courts of appeal will need to produce an opinion, not just a summary disposition. Therefore, we anticipate that it would take a staff attorney between 12 to 18 months to complete one appeal from a decision in a death penalty habeas corpus proceeding. Because the Sixth District does not have a centralized staff of attorneys, we do not have any attorney resources or vacant central staff positions that we can allocate to work on these appeals.

The Sixth District may need to increase our staff of writ attorneys 1) to timely address writ petitions that may be filed during the pendency of the habeas corpus proceedings in the trial court, (we anticipate an increase given the issues of first impression that may be raised relating to implementation of Proposition 66 procedures and rules), 2) to assist staff attorneys working on these appeals with the details of habeas procedures, and 3) to work on any requests for certificates of appealability.

Recruitment - Recruitment of qualified staff attorneys to work on these cases will require significant staff time. Our usual recruitment time for attorneys is three to four months. This includes work by a committee of attorneys and justices to screen resumes, conduct screening interviews, test applicants, review and score tests and conduct a final interview. The screening for these applicants will be more extensive given the complexity of death penalty habeas work. Because we anticipate that there are few attorneys willing and qualified to work on death penalty habeas appeals at the court of appeal, it may take upward of six months to complete the recruitment for each additional Proposition 66 attorney.

Training - Currently the Sixth District does not have any attorneys specifically trained to work on appeals from decisions in death penalty habeas corpus proceedings. According to experts we have consulted, these cases are extremely complex and require very specialized knowledge. Training of existing or newly hired staff attorneys will be paramount and challenging. The Habeas Corpus Resource Center or CAP SF are the only public entities in California qualified to provide this type of training. However, providing training for Court of Appeal staff is not within CAP's current scope of work. HCRC is also not set up to provide the substantive training that will be necessary for court of appeal attorneys. They currently provide some annual training for practitioners, but not for court staff. It is unclear whether CJER will take on the development of necessary training for staff and justices of the courts of appeal. Because of limited or currently unavailable state resources, we may be required to look for one or more training opportunities from private vendors or training in other death penalty states. We anticipate that training would take multiple weeks and involve substantial seminar, lodging and travel costs.

For example, The Bryan R. Shechmeister Death Penalty College, sponsored by Santa Clara University School of Law, Arizona Capital Representation Project and the ABA Death Penalty Representation Project, costs nearly $1000, and lasts 6 days. That college addresses issues associated with death penalty cases generally. The Making a Case for Life Seminar held in Memphis Tennessee lasts three days, costs $600 for the registration, and covers issues relating to mitigation that are frequent issues in death penalty habeas corpus proceedings. We will likely need to send our staff attorneys to multiple seminars to prepare them for the complex work required for death penalty habeas appeals.

Justices and Support staff will all need detailed training on the new rules of court. Although CJER could offer such training, we are unaware of any trainings planned for the roll-out of the new rules in the Spring.

Revising processes and procedures - This District will face several challenges in implementing new processes and procedures for dealing with appeals from decisions in death penalty habeas corpus proceedings. New procedures regarding timelines will have to be drafted, approved and implemented. New docket codes and associated rules will have to be created. Detailed training will have to be offered to our deputy clerks on the new procedures and codes.

In our court, we will also need to implement additional protocols because our APJ was the public defender of Santa Clara County during several of the death penalty cases now pending, and the trial attorney on two of the cases. The protocols will need to ensure that one of our other six justices takes on the administrative role for those cases.

3) Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Given the many uncertainties and difficulties surrounding staffing, training and procedural revisions discussed above, the Sixth District believes that six months is a more realistic time frame for implementation.

4) How well would this proposal work in courts of different sizes?

The Sixth District believes that small courts will be disproportionately impacted because those courts have significantly less flexibility in staff and resource allocation. Additionally, smaller courts in smaller districts will likely have a more limited pool of qualified attorneys to work on the petitions and to work as staff attorneys for the court.

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Assistant Clerk/Executive Officer

November 19, 2018

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Ave.
San Francisco, CA 94102

Re: Invitation to Comment SP18-21
Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings

The following comments are provided in response to Invitation to Comment SP18-21.

Rule 8.392, Filing the appeal; certificate of appealability.

Should subdivision (c)(1) recognize that a petitioner may be unrepresented at the time of filing a notice of appeal and require a copy of the notice to be served on the petitioner? Similar to rule 8.304(c), California Rules of Court, an unrepresented defendant is sent a notification of filing when the appeal is filed.

Page 4 of Executive Summary indicates that the Court of Appeal must grant or deny a certificate of appealability within 10 days of a request for a certificate. The rules do not reiterate that requirement. Plus, the rules should be clear that the 10 days runs upon filing the request for certificate of appealability in the Court of Appeal.

Rule 8.393. Time to appeal.

Under proposed rule 4.575, the trial court must prepare and file a statement of decision specifying its order and explaining the factual and legal basis for the decision. To be consistent with rule 4.575 and for clarity, should the notice of appeal be filed within 30 days after the filing of the trial court's statement of decision or order?

Rule 8.395. Record on appeal.

Should subdivision (f) on the form of the record recognize the opt-out provisions in Code of Civil Procedure section 271 pertaining to delivery of a reporter's transcript in electronic form? Code of Civil Procedure section 271, subdivision (a) provides: "An official reporter or official reporter pro tempore shall deliver a transcript in electronic form, in compliance with the California Rules of Court, to any court, party, or person entitled to the transcript, unless any of the following apply: [¶] (1) The party or person entitled to the transcript requests the reporter's transcript in paper form. [¶] (2) Prior to January 1, 2023, the court lacks the technical ability to use or store a transcript in electronic form pursuant to this section and provides advance notice of this fact to the official reporter or official reporter pro tempore. [¶] (3) Prior to January 1, 2023, the official reporter or official reporter pro tempore lacks the technical ability to deliver a transcript in electronic form pursuant to this section and provides advance notice of this fact to the court, party, or person entitled to the transcript." Perhaps Rule 8.395(f)(1) should state something like the following: "The reporter's transcript must be in electronic form, subject to the provisions of Code of Civil Procedure section 271. The clerk is encouraged to send the clerk's transcript in electronic form if the court is able to do so."

Subdivision (g)(2) refers to "petitioner's counsel's copy" of the transcripts; however, the copy of transcripts has always belonged to petitioner. Should the word "counsel's" be deleted?

Rule 8.396. Briefs by parties and amici curiae.

Subdivision (c)(5) is a notice provision for failure to file the brief. The notice is to include that failure to comply may result in sanctions specified in the notice; however, the rule does not specify what sanctions may be given. Should the rule specify sanctions like those in rule 8.360(c), California Rules of Court, e.g., dismissal for appellant?

Form HC-200

Petitioner's Notice of Appeal does not include an area for the Attorney's information, or if unrepresented, the petitioner's information. See Form CR-120 for an example.

The form includes the same language "order made by the superior court," which is the subject of an earlier comment.

The form does not include the box to check that petitioner is requesting court-appointed counsel on appeal.

Including the Request for Certificate of Appealability as page of the Notice of Appeal may pose problems. The time for the Court of Appeal to act on a request is within 10 days of a request. However, the request is submitted to the trial court, and it is unclear when the time begins to run for the Court of Appeal to act. The time should run from the filing of the request in the Court of Appeal, so the Court of Appeal has adequate time to act on the request. There are two ways to accomplish this: (1) include in the rules that the time for the Court of Appeal to act on the request for a certificate of appealability is from the filing of the request in the Court of Appeal; (2) create a form separate from the Notice of Appeal that is filed directly in the Court of Appeal.

Requests for Specific Comments.

Does the proposal appropriately address the stated purpose?

Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?

Should the Attorney General and/or district attorney receive notice if a request for a certificate of appealability is denied by the Court of Appeal? It does no harm to include them on the notice.

Would be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period? No. An advisory note may lead to confusion.

Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations? We do not see this process used for non-capital felony appeals, so it would probably not be used for this type of appeal either.

When should preparation of the record begin for these appeals? Immediately for the non-successive petition appeals; upon issuance of the certificate of appealability in successive petition appeals.

Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals? The rules recognize that the briefs will take a much longer time to prepare and file; however, they do not recognize that preparation of the record is also a laborious and time-consuming process. The initial time should be more than 20 days (a 60-volume record in a capital case from our largest county takes about two months to prepare

and certify), and the time should be automatically extended when the record is over 10,000 pages. This eliminates the need for repetitive extension of time requests.

Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals? The elimination of the 60-day limit for extensions is necessary for this category of case.

Should the rules require that habeas corpus counsel transmit their file to appellate counsel when appellate counsel is appointed?

Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition?

Are the proposed rule provisions relating to the content and format of a proffer in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition appropriate? Content and format should be consistent with the rules on exhibits for original proceedings.

Whether a form for the certificate of appealability itself should be proposed? No, because it seems the issues would have to be identified on a case-by-case basis.

The advisory working group also seeks comments from *courts* on the following cost and implementation matters:

Would the proposal provide cost savings? If so, please quantify. There is definitely no cost savings. This type of appeal is new and is added to our current caseload. The Clerk's Office is already under resourced for its current caseload, and it will be a challenge to add the work anticipated for this type of appeal. And, the workload for the attorneys and justices at the Court of Appeal will be greatly increased.

What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. We need to write a new training manual for this type of appeal and are already in discussions to add docket codes to our existing case management system. I am not able to quantify the time it will take to train staff. In addition, hours of training for attorneys and justices will likely be required.

Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? We will process the appeals as we get them, and until then, there is nothing to implement.

How well would this proposal work in courts of different sizes? Maybe this question is meant for trial courts. Theoretically, larger courts have more resources, but Courts of Appeal only have what we have. All of us will have to process these appeals within the constraints of our current resources.

Sincerely,

By: Colette M. Bruggman
Assistant Clerk/Executive Officer

cmb

FIRST DISTRICT APPELLATE PROJECT

475 Fourteenth Street, Suite 650 • Oakland, California 94612 • (415) 495-3119 • Facsimile: (415) 495-0166

To: Proposition 66 Rules Working Group

From: Court of Appeal Appellate Projects[1]

Date: November 19, 2018

Re: Invitations to Comment - (1) Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings (SP18-21), and (2) Superior Court Procedures for Death Penalty-Related Habeas Corpus Proceedings (SP18-22)

The Court of Appeal appellate projects provide the following comments and suggestions regarding the proposed rules governing superior court and Court of Appeal capital habeas corpus proceedings.

1. Terminology – Replace "District Appellate Project" with "Assisting Entity." (SP18-21 and SP18-22)

The proposed rules for appellate procedure (SP18-21) incorporate Rule 8.300, which governs appointment of counsel in criminal appeals. (Proposed Rule 8.390(b).) We agree that it is proper to incorporate Rule 8.300, including subdivision (e) which authorizes the Courts to contract with administrators (the current Court of Appeal appellate projects) to administer the appointed counsel panels. There will be a similar need for such organizations to administer the panel for Proposition 66 appointed capital habeas appeals. And the proposed rules for the superior court (SP18-22) contain references to such an assisting entity for the superior court. (Proposed Rules 4.573(a)(2), 4.574(a)(3), 4.575,

However, the proposed rules elsewhere provide that documents or records should be served on, or sent to, "the district appellate project." (4.576(b) (certificate of appealability), 8.392(b)(5) (transmittal of copy of COA), 8.395(g)(2) (sending transcripts), 8.396(d)(3) (service of briefs). These references should be corrected to "assisting entity." Until it is resolved who will be the assisting entity, the rules should not assume it will be the current appellate projects, whose existing contracts are for non-capital work. If

[1] Appellate Defenders, Inc., the California Appellate Project-Los Angeles, Central California Appellate Program, the First District Appellate Project, and the Sixth District Appellate Program.

not corrected and if some other organizations become the assisting entities, errors in the transmittal of documents (including potentially large transcripts) will occur.

Accordingly, we propose replacing "district appellate project" with "assisting entity" in the proposed rules 4.576(b), 8.392(b)(5), 8.395(g)(2) , and 8.396(d)(3).

2. Qualification of Counsel (SP18-21)

In SP18-21, Proposed Rule 8.391 ("Qualifications of counsel appointed by the Court of Appeal") states:

> To be appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under this article, an attorney must meet the minimum qualifications established by rule 8.652 for attorneys to be appointed to represent a person in a death penalty–related habeas corpus proceeding.

Habeas proceedings require specialized skills, so we do not disagree with this requirement. But appellate matters required appellate skills, ranging from exemplary writing skills to a depth of knowledge of appellate standards of review and prejudice, and default rules. Accordingly, these hybrid habeas/appellate matters should be assigned to attorneys who also meet the minimum qualifications for attorneys to be appointed to death penalty appeals. (See Rule 8.605(d)). And because there may not be enough attorneys meeting both appellate and habeas qualifications, the courts should have the option to appoint two attorneys who jointly hold the requisite skills and experience, just as is provided in the current rules for appointment of capital post-conviction counsel (Rule 8.605(i)(2).) We propose modifying proposed Rule 8.391 as follows:

> To be appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender in an appeal under this article, an attorney must meet the minimum qualifications established by rule 8.652 for attorneys to be appointed to represent a person in a death penalty–related habeas corpus proceeding **and the minimum qualifications established pursuant to Rule 8.605(d) for attorneys to be appointed to represent a person in death penalty appeal. Alternatively, two attorneys together may be eligible for appointment to represent a defendant in an appeal from a superior court habeas proceeding if the Court of Appeals finds that their qualifications in the aggregate satisfy the provisions of both Rule 8.605(d) and Rule 8.652.**

3. Copy of Record to Assisting Entity (SP18-21)

Just as 8.395(c)(4) and (g)(1)(c) provide that an extra copy of the record can go to the DA or AG (whichever is not counsel on appeal), an extra copy should be made available to the assisting entity in addition to appointed counsel. Without a record, the assisting entity will not be able to provide the necessary support and oversight. Sharing a record would delay proceedings substantially.

Accordingly, we recommend adding subdivision (g)(1)(E) to proposed Rule 8.395, reading:

> (E) The assisting entity.

4. Record from the capital appeal (SP18-21 and SP18-22)

While the proposed rules go into detail about the composition of the appellate record for the habeas appeals, neither the superior court nor appellate rules say anything about access to the original trial record. At each level, each of the participants (the court, defense counsel, prosecution counsel) will need access to the complete trial record from the original capital appeal. It will be impossible to brief and decide the habeas claims without the trial record, especially as to prejudice. In most cases, at least for the foreseeable future, it may be possible for each side's record to be passed to successor counsel -- from direct appeal counsel to superior court habeas counsel to appellate habeas counsel. (This is assuming that, at least for first several years, all the new habeas appointments will be on post-affirmance cases.) However, the superior court and the appellate court will each need the record as well.

For the appellate proceedings, one solution might be to add subdivision (a)(12) to proposed Rule 8.395 stating,

> (12) The entire record on appeal in the California Supreme Court on the defendant's related direct appeal.

The superior court rules don't have a section governing the record, so some other solution might be necessary.

5. Claims Not Raised in the Superior Court (SP18-21)

Proposition 66 requires a hybrid appellate/collateral review procedure in which new evidence can presented in the appeal of the habeas denial, allowing counsel to raise IAC of superior court habeas counsel. The proposed rules require that defendant include in his or her opening brief IAC claims not raised in the superior court. (Proposed Rule 8.397(a)-(b).) Such a brief must be accompanied by a "proffer" including documentary evidence supporting such claims. (Proposed Rule 8.397(c).)

This process may actually impede rather than promote judicial economy. The record-based conventional appellate arguments inevitably will be ready prior to the collateral arguments because they're based on the existing record and won't require outside investigation and pre-authorization for retaining investigators and experts. Requiring both the true appellate and the collateral arguments to be combined in the same pleading will put undue pressure on completion of that brief and will likely delay ultimate adjudication of the appeal. If it were possible to bifurcate the appellate and collateral components, counsel could file the conventional appellate brief, even while still working on the collateral investigation. That would allow the Attorney General and ultimately the Court to begin working on the conventional appellate arguments, rather than delay that process until after submission of the new evidence and collateral arguments. This would also be more in line with current Court of Appeal practice in non-capital cases under which habeas petitions are not typically filed concurrently with the AOB. They ordinarily are filed at a later point in the briefing of the appeal.

Accordingly, we recommend that proposed Rule 8.397(b) be modified to create flexibility, such that IAC of habeas trial counsel claims can be raised either in the first brief or in a separately filed supplemental brief (perhaps titled "Section 1509.1(b) Opening Brief on IAC Claims Not Raised in the Superior Court"), depending on the timing of the development of those IAC claims. However, the rules should provide that if there are multiple IAC claims they should all be raised together in the same pleading.

Criminal Justice Legal Foundation

November 19, 2018

Proposition 66 Rules Working Group
Judicial Council of California
455 Golden Gate Ave.
San Francisco, CA 94102

Re: SP18-21, Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings

Proposition 66 Rules Working Group:

The Criminal Justice Legal Foundation, an organization dedicated to promoting the interests of victims of crime in the criminal justice system, submits these comments on SP18-21. As with our comment submitted today on SP18-22, we are concerned that not enough priority has been given to the statutory mandate to expedite the process.

The Martinez/Trevino Provision

Proposition 66 contains a provision to cope with the procedural conundrum created by the United States Supreme Court in *Martinez v. Ryan* (2012) 566 U.S. 1 and *Trevino v. Thaler* (2013) 569 U.S. 413. It is not clear that the working group understands the reason for the rule or its boundaries.

In *Martinez*, the Supreme Court created a "narrow" exception to the procedural default rule, specific to Arizona's unusual practice. A petitioner in federal habeas corpus could show good cause for defaulting a claim of ineffective assistance of trial counsel in the initial state collateral proceeding if the failure to raise it constituted ineffective assistance of the habeas corpus attorney. In *Trevino*, the Supreme Court expanded the rule beyond Arizona's system to include most states, including California. Last year in *Davila v. Davis* (2017) 137 S.Ct. 2058, the high court refused to extend the rule beyond claims of ineffective assistance of *trial* counsel.

In any state system where, as a practical matter, ineffective assistance of trial counsel claims cannot be reviewed on direct appeal,

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"counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default." (*Martinez*, 566 U.S. at p. 13.) To cope with this rule and preserve the integrity of California's procedural rules, Proposition 66 makes a narrow exception to the usual rule that issues on appeal are limited to those raised in the trial court. The appeal from denial of habeas relief is not an "initial-review collateral proceeding" within the meaning of *Martinez*. Thus, any claim not presented in either this appeal or the direct appeal is defaulted under federal habeas corpus procedure.

Tracking *Martinez*, the exception does not apply to any and all claims of ineffective assistance of trial counsel, but only to the limited subset where failure to raise the claim amounts to ineffective assistance on the part of the habeas corpus attorney. Omission of a claim, the Supreme Court has made clear, is not by itself ineffective assistance. Effective attorneys can and indeed should winnow out the claims they judge to be weak and focus on the strong ones. "[F]ar from being evidence of incompetence, [winnowing] is the hallmark of effective appellate advocacy." (*Smith v. Murray* (1986) 477 U.S. 527, 536.)

This essential element of the *Martinez* exception is completely missing from proposed Rule 8.397. The rule on its face appears to open the door to any and all omitted claims of ineffective assistance of trial counsel. That is contrary to both the purpose and the letter of the statute.

Along with the underlying claim of ineffective assistance of trial counsel, an appellant making a claim under this provision must also make a showing that the omission of the claim in the superior court was so egregious as to constitute ineffective assistance of the habeas corpus attorney. That requirement should be prominent in the rule.

Counsel on Appeal

The proposal seems to assume that the superior court attorney will not continue on appeal. Obviously, for the *Martinez* claim an attorney cannot be expected to argue his or her own ineffectiveness. However, as to the issues that were presented to the superior court, there would be a considerable loss of efficiency in changing counsel at this point. It may in some cases be more efficient to appoint a second attorney for that one

issue and have the original attorney proceed with briefing the rest. The assisting entity may be in a position to advise the court of appeal whether any *Martinez* issues are so substantial in relation to the rest of the case to warrant appointing a new attorney for the entire appeal.

Certificate of Appealability

Proposed Rule 8.392(b)(4) says, "The People must not file an answer to a request for a certificate of appealability unless the court requests an answer." It should be added expressly that the court will not issue a certificate without giving the People a chance to respond.

Parallel to our comment to the superior court rules, if the court of appeal grants a certificate after the superior court denied it, it should state the basis for its conclusion that the petitioner has a substantial claim of innocence or ineligibility for the penalty, as ineligibility is defined in the statute.

Stay of Execution

Proposed Rule 8.394 appears reasonable for initial petition appeals, but the real problem arises on successive petitions. If the petition was denied in superior court on the ground that the petitioner is clearly guilty and clearly eligible for the death penalty, the court of appeal should not grant a stay unless there is reason to doubt that conclusion. Granting a certificate of appealability would constitute the needed finding, but with the rule as written a court might grant a stay while considering the certificate with no showing at all. The rule should address this situation and require some threshold showing for even a brief stay.

Time to File

Copying the time limits from direct appeal seems excessive. The appeal from denial of habeas corpus is not a primary review. It is a review of a procedure that is itself a review of the underlying judgment, albeit an original proceeding in form. As a secondary "review of a review" it should proceed more expeditiously. All the issues except the *Martinez* issue, if any, have all been briefed and decided in a written opinion in the superior court. Shorter times are in order.

As noted in our comment on the superior court rules, completely open-ended authority for extension of time is inadvisable. Extensions should be allowed only for stronger reasons than in other litigation, and only once except in extreme circumstances.

The proposed rule follows the current California practice of amicus curiae briefs being filed at the end of the process, thereby extending the briefing schedule. Given the importance of prompt completion of the briefing, we suggest adoption of the federal rule of filing amicus briefs seven days after the brief of the party supported. (See Federal Rule of Appellate Procedure 29(e); United States Supreme Court Rule 37.3(a).) In federal practice, responses to amicus briefs are included in the respondent's main brief and the appellant's reply brief, and the latter brief concludes the briefing.

The Record

The limited record approach is unlikely to be used often. Holding up the record preparation while the parties consider it seems to be an unnecessary source of delay. We suggest deleting this option and beginning record preparation promptly upon the filing of the notice of appeal.

The proposal adopts the same protracted process for correcting the record in the court of appeal. We believe there is a missed opportunity here to eliminate unnecessary delay, but it would require the involvement of people more familiar than we are with the nuts and bolts of this process to suggest concrete changes.

In conclusion, we hope these comments are helpful. We would be glad to work with the working group if further input from us is needed.

Very truly yours,

Kent S. Scheidegger

KSS:iha

EMBAJADA DE MÉXICO

Washington, DC
November 19, 2018

Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688

Re: SP 18-21, Comment from the Government of the United Mexican States

Dear members of the Judicial Council of California,

On behalf of the Government of Mexico, I have the honor to submit the comments and concerns of my Government regarding the proposed rules governing the procedures for appeals from superior court decisions on death penalty-related habeas corpus proceedings. Mexico welcomes the opportunity to convey its views on this very important matter.

I. INTRODUCTION

The Government of Mexico has a vital stake in ensuring that all of its nationals abroad receive the legal protections to which they are entitled under both international and domestic law. Under treaty provisions binding on the United States and the State of California, Mexican consular officers are empowered to assist their imprisoned nationals, to address the authorities on their behalf, and to safeguard their fundamental rights. Mexican nationals imprisoned in California are likewise endowed with treaty rights of communication and contact with their consular representatives.[1] While Mexico's consulates provide essential services in a wide range of cases and circumstances, nowhere is their assistance more vital than when a Mexican national has been sentenced to death abroad.

Although Mexico opposes the death penalty as a matter of principle and is particularly opposed to the execution of Mexican nationals, Mexico respects the right of the States to determine the punishment for crimes occurred within their jurisdiction. At the same time, Mexico has specific concerns about the provisions of these regulations as

[1] *See, e.g.*, Consular Convention Between the United Mexican States and the United States of America, Aug. 12, 1942, U.S.-Mex., article VI, 125 U.N.T.S. 301; and, Vienna Convention on Consular Relations, arts. 36,38, Apr. 24, 1963, 596 U.N.T.S. 261.

they relate to Mexican nationals under sentence of death. As you may know, there are currently 39 Mexican nationals on death row in California.

Please understand that these provisional comments are necessarily limited, and submitted with the November 19, 2018 deadline in mind. The SP18-21 proposal is extensive and the topic complex. My government cannot reasonably respond to all of the questions raised in this proposal within the time allotted. Given this complexity and the grave importance of these procedures, Mexico urges the Judicial Council to postpone implementation of these new rules beyond the April 25, 2019 date currently contemplated. More time is necessary to fully consider the implications of these proposals, and to develop and refine new proposals addressing topics the current proposal omits.

As a general matter, the Government of Mexico agrees with the Judicial Council's findings, as stated in its companion proposal SP18-22 concerning capital habeas proceedings in superior courts, that "[t]here are significant differences between death penalty-related and noncapital habeas corpus proceedings" and that the "scope and complexity of a death penalty-related habeas corpus proceeding is far greater than the scope and complexity of a noncapital habeas corpus proceeding" (Proposal SP18-22 p. 4). In this vein, the American Bar Association has advised that "Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation." American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition, Feb. 2003), Guideline 10.15.1(C). Thus, any new rules for death penalty cases must account for the unique needs these cases command.

II. SPECIFIC COMMENTS

Regarding qualifications of appointed counsel, Mexico agrees that counsel for capital habeas corpus appeals must be "fully conversant in capital habeas corpus representation,' (Proposal SP18-21 p. 3), and supports the adoption of required qualifications as addressed in its comment on SP18-12, submitted August 23, 2018. The rule should also specify that the attorney appointed for the appeal of a decision on a capital habeas corpus petition must not be the same attorney who filed the petition in the superior court, unless petitioner and counsel make a proper informed and voluntary waiver.

The Judicial Council has requested input on whether it should include an advisory comment emphasizing that all appeals must be filed within the 30-day time period. Mexico supports such an inclusion; it is preferable to be explicit where topics such as deadlines are concerned.

Concerning the record on appeal, Mexico does not believe the rules should allow the parties to stipulate to a limited record in these death penalty cases. As established by

the ABA guidelines cited above, counsel has a duty to raise every conceivable claim. If material is omitted from the record on appeal in California appellate courts, it could potentially have the effect of rendering any argument encompassing that material unexhausted for purposes of federal review. There is simply no good reason to limit the material from the case that is available for courts to review and future attorneys to address. In terms of the timeframe for preparation of the record, Mexico notes that 20 days is highly likely to be an insufficient length of time to permit preparation of a complete record. Mexico would suggest at least 90 days; setting too short of a timeline has the effect of forcing courts and parties to expend resources on filing and ruling on requests for extensions of time.

Proposed rule 8.396, addressing appellate briefs, provides length limits that Mexico considers to be on the low side, given the unique nature of these cases. Whatever limit is set, it is important that the final rule retains the provision permitting longer briefs where necessary. The timeframes, however, are entirely unrealistic given the complexity of capital habeas petitions and the sheer volume of pages some petitions contain. Moreover, although the statute—and these rules—provide for the addition at this stage of a claim of ineffective assistance of trial counsel even if that claim was omitted from the petition in superior court, these time and length limits make no provision for extra time to develop and plead that claim or claims. The rules must account for the monumental undertaking such claims require. For instance, a claim that trial counsel conducted an inadequate mitigation investigation requires counsel to fully reinvestigate the defendant's entire background and life history. In the cases of Mexican nationals, this is especially time consuming, given that the majority of records and witnesses are usually located in Mexico. To expect counsel developing such a claim to proceed on the same schedule as those simply arguing legal errors in the superior court's resolution of a petition is unrealistic.

The Judicial Council has specifically requested input on the form and contents of the proffer accompanying an ineffective assistance of trial counsel claim raised for the first time on appeal. Mexico believes such a proffer should be akin to what would be presented in the superior court if the claim had been raised there. Thus, the proffer should include the exhibits that usually accompany a habeas corpus petition.

If the Court of Appeals orders a limited remand to the superior court to conduct an evidentiary hearing, proposed rule 8.397(e)(1) currently provides that the court of appeals may order a stay of the remainder of the appeal. Mexico believes this stay should be mandatory; allowing an appeal to proceed piecemeal can only create confusion, including on the issue of federal review.

Turning to matters not covered by the proposed rules, Mexico believes that the rules should explicitly require superior court habeas corpus counsel to transmit their file to appellate habeas counsel when appointed. There is no conceivable situation where

appellate counsel would not need access to the file to provide complete and competent representation.

The Judicial Counsel has also asked for input on whether it ought to provide a form for courts of appeals to use when granting or denying a certificate of appealability. Mexico believes such a form may be helpful, and could facilitate courts' consistent and fair consideration of this question.

Mexico also believes that any proposal for new rules needs to address the fiscal and operational impacts of these procedures. The Working Group should be charged with determining what the impact of these rules will be on the criminal justice system. Without this information, the courts and the legislature cannot ensure adequate funding for the fair and consistent implementation of the new procedures. Moreover, other parties, such as assisting entities, will require this information to prepare for the implementation of the new rules. It is impossible to fairly assess the proposed procedures without information about their impacts on the operations of the justice system.

III. CONCLUSION

Finally, on behalf of the Government of Mexico, I would like to convey to you our greatest appreciation for your consideration of this submission, and our continuing respect for the criminal justice system of the United States.

I avail myself of this opportunity to convey to you the assurances of my esteem and consideration.

Sincerely,

Gerónimo Gutiérrez Fernández
Ambassador

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Memorandum

To: Proposition 66 Rules Working Group

From: Michael J. Hersek, Interim Executive Director

Date: November 19, 2018

Re: SP18-21 – Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings

The below comments to SP18-21 are submitted on behalf of the Habeas Corpus Resource Center (HCRC) and its seventy-six clients.

Comments on Specific Provisions:

Rule 8.395, generally

Proposed Rule 8.395 concerns how the superior court will compile the record for the appeal, the material that will be included in the appellate record, and the time frames by which the clerk of the court and the court reporters must generate the clerk's transcripts and reporter's transcripts, respectively. Because these rules appear to be modeled after the *non-capital* rules for record preparation, rather than the capital case rules for assembling and correcting the record for the appeal, they impose a severely truncated timeframe for the court clerk and the court reporters to complete their tasks (discussed in more detail below), do not permit the superior court to enter an order to extend time when good cause justifies such an order, and do not contemplate any participation by the parties to ensure the appellate record is complete and accurate before it is transmitted to the appellate court.

Involving the parties in compiling the record of capital case proceedings is critical to ensuring the appellate record is accurate, correct, and complete. And including the parties in the process from the outset accomplishes this critical goal and conserves resources by ensuring the completeness and accuracy of the record from the outset. For these reasons, we believe the capital habeas appeal rules should parallel the rules for compiling and certifying the record in a death penalty appeal, rather than the non-capital case rules. Those rules are found at Rule 8.160 to Rule 8.622.

***

Rules 8.395(c)(3), 8.395(d)(3) and 8.395(e)(1),

Although there does not appear to be any overall deadline by which the superior court must ensure completion of the record for the appeal, proposed Rule 8.395(c)(3) provides the clerk only 20 days from receipt of the notice of appeal to complete preparation of the clerk's transcript. Similarly, proposed Rule 8.395(d)(3) provides the court reporters just 20 days from receipt of the notice of appeal to complete and certify the reporter's transcript of the proceedings. And proposed Rule *8.395(e)(1)* flatly prohibits the superior court from exercising any discretion to extend time for the clerk or court reporter to prepare their portions of the record.

It is our view that these 20-day time frames are unreasonably short. When an order to show cause issues and an evidentiary hearing occurs, the record in a capital habeas corpus proceeding can resemble a capital trial. Litigation of certain claims routinely involves documentary evidence that consists of tens of thousands of pages, and many volumes of reporter's transcripts involving numerous different reporters. We strongly suggest that the rules provide the clerks and court reporters the same timeframes provided for preparing the record in the automatic appeal. The trial court is in the best position to understand the requirements of each case and the needs of court staff. We see no good reason to prohibit superior courts from extending time when necessary for their clerks and court reporters to do their jobs.

***

Rule 8.396(c)(1)

Proposed Rule 8.396(c)(1) requires the habeas appellant's opening brief to be filed within 210 days of the filing of the record on appeal. This time frame assumes, however, that a qualified habeas appeals lawyer will be quickly available and appointed to the case by the time the appellate record is filed. Given the well-established shortage of qualified habeas counsel generally, the likelihood of significant delay between the filing of the appellate record and the identification of qualified counsel who is ready and available to immediately accept a capital habeas appeal appointment is substantial. For this reason, we suggest modifying the proposed rule to require the filing of the opening brief 210 days from the appointment of counsel or the date the record is filed, whichever is later.

***

Rule 8.397(d)

Proposed Rule 8.397(d) states that an "evidentiary hearing is required if, after considering the briefs, the proffer, and matters of which judicial notice may be taken, the court finds *there is a reasonable likelihood that the petitioner may be entitled to relief* and the petitioner's entitlement to relief depends on the resolution of an issue of fact." (Emphasis

added.) The requirement that the court find a "reasonable likelihood" of entitlement to relief before it orders an evidentiary hearing is not grounded in statute and is contrary to California Supreme Court case law defining the habeas corpus process in capital cases. The Supreme Court has made clear that an evidentiary hearing must be ordered "if the court finds material facts in dispute." *People v. Duvall*, 9 Cal. 4th 464, 75 (1995); *see also People v. Romero*, 8 Cal. 4th 728, 740 (1994) (explaining "if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing."); Cal. Penal Code § 1484. Because the "reasonable likelihood" requirement is contrary to governing case law, it should be removed from the proposed rule.

Responses to Selected Requests for Specific Comments:

- *Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1?*

The proposed qualifications in Rule 8.391 are incomplete. Because an appeal under 1509.1 is a death penalty appeal, an attorney accepting such an appointment should also meet the minimum qualification found in proposed Rule 8.605.

***

- *Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals?*
- *Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals?*

For all the reasons stated above, twenty days from the filing of the notice of appeal is not an appropriate maximum timeframe for completion of the clerk's and reporters' transcripts, especially in those cases where the superior court has conducted an evidentiary hearing. We also note that the rule is incomplete in that it does not provide for participation of the parties in the compiling the record and ensuring that it is accurate and complete. Further, the superior court judge should have the discretion to extend time when necessary to ensure an accurate and complete appellate record.

***

- *Should the rules require that habeas corpus counsel transmit their file to habeas appellate counsel when appellate counsel is appointed?*

Yes. The file belongs to the client and it must be transferred to successor counsel as the matter proceeds into the appellate court. In our experience, trial counsel does not always understand their obligation to relinquish their case files to habeas counsel. Using the courts to compel transfer of the file is cumbersome, time consuming, and may result in delays in the proceedings. Requiring habeas counsel to immediately transfer their file to successor counsel will lessen such delays.

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November 19, 2018

Re: Comments on Item SP18-21, proposed rules relating to Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

Dear Members of the Judicial Council:

The Office of the State Public Defender (OSPD) represents over 120 men and women on California's death row. By statute, OSPD's primary responsibility is representing death-sentenced inmates in direct appeal proceedings. (Gov. Code, § 15420.) In addition, the OSPD also has many attorneys with significant experience in habeas corpus proceedings.

We submit the following comments on the proposed rules relating to Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings, SP18-21.

Draft Rule 8.391

The working group asks for comments on rule 8.391 defining the qualifications of counsel appointed under section 1509.1. (Invitation to Comment, page 3.) The OSPD strongly supports the working group's decision to require such attorneys meet the minimum qualifications proposed for attorneys appointed to represent a person in death penalty-related habeas proceedings, but suggests modifications to assure that counsel also has the needed appellate knowledge and skills.

The requirement that attorneys representing death penalty habeas petitioners on appeal have the qualifications of habeas counsel appropriately takes into consideration the fact that these attorneys must be fully conversant with habeas law and procedures. A significant part of the responsibilities of section 1509.1 counsel are not record-based. Rather, the attorney must conduct a comprehensive extra-record investigation, essentially as habeas counsel. Nevertheless, the appeal of the superior court's decision will be a central focus of

the attorney's representation. Counsel for the appeal must have a thorough understanding of the rules relating to appellate procedure, and the skills of an experienced appellate practitioner. Additionally, counsel will need to understand issues unique to capital appeals, for instance, penalty-phase jury instructions and *Witt* jury selection issues, which might be presented to the superior court as stand-alone claims or as part of ineffective assistance of counsel claims.

The OSPD recommends that draft rule 8.391 be amended to include a provision that to meet the qualifications to represent someone in an appeal related to section 1501.9, the attorney must have appellate-related knowledge and skills.

Thus, the following changes are suggested:

Rule 8.301. Qualifications of counsel appointed by the Court of Appeal

To be appointed by the Court of Appeal to represent an indigent person not represented by the State Public Defender *or the Habeas Corpus Resource Center* in an appeal under this article, an attorney must meet the minimum qualifications established by rule 8.652 for attorneys to be appointed to represent a person in a death penalty–related habeas corpus proceeding. *In addition, applicants must demonstrate a substantial knowledge and understanding of the relevant state and federal law, both procedural and substantive, governing capital cases; skill in legal research, analysis, and the drafting of documents related to the appeal; and skill in presenting oral argument.*

Draft Rule 8.300(c)

Section 1509.1 permits the Court of Appeal to consider a claim of ineffective assistance of trial counsel on appeal "if the failure of habeas counsel to present that claim to the superior court constituted ineffective assistance of counsel." It is an obvious conflict for habeas counsel to investigate his or her own ineffectiveness. Therefore, new counsel must be appointed to handle the appeal. (*See, e.g,* Gov. Code, §68663 ("No counsel appointed to represent a state prisoner under capital sentence in state postconviction proceedings shall have previously represented the prisoner at trial or direct appeal in the case for which the appointment is made, unless the prisoner and counsel expressly requests [sic] continued representation.").)

The OSPD favors a more explicit indication that counsel for the habeas appeal under section 1509.1 will not be the same as habeas counsel. The OSPD additionally favors an exception to the general rule, modeled on the language of Government Code section 68663, allowing habeas counsel to continue as section 1509.1 counsel if the petitioner and habeas counsel expressly request continued representation.

Rule 8.300. Appointment of Appellate Counsel by the Court of Appeal

.....

(c) Demands of the Case

.....

(5) In cases of the appointment of counsel on appeal pursuant to Penal Code section 1509.1, the Court of Appeal shall not appoint counsel previously appointed in the case by the superior court under section 1509 absent the written request of both the prisoner and previously appointed counsel.

Draft Rule 8.300(e)

Rule 8.300(e)(1) provides that the Court of Appeal may contract "with an administrator having substantial experience in handling appellate court appointments to perform any of the duties prescribed by this rule." The Courts of Appeal currently contract out the responsibility of matching case to attorney to the non-capital appellate projects. However, none of these agencies appear to have the necessary experience to administer appointments in capital habeas appeals, which require an understanding of capital appellate and habeas issues. Draft rule 8.300(e)(1) does not require the Court of Appeal to contract with an administrator who has such experience. It is critical that if the Court of Appeal is going to contract with an administrative entity that it do so with an organization that has experience with both capital appeals and capital habeas proceedings.

The OSPD proposes the following amendment:

Rule 8.300. Appointment of Appellate Counsel by the Court of Appeal

.....

(e) Contracts to perform administrative functions

.....

(3) In cases where the appointment of counsel is for purposes of proceedings under Penal Code section 1509.1, the court may contract with an administrator having substantial experience in handling capital habeas and appellate appointments to perform any of the duties prescribed by this rule.

Proposed new subsection to Draft Rule 8.300

Under current rules, both counsel on direct appeal and counsel on habeas are assigned an assisting entity or counsel (usually the California Appellate Project in San Francisco) when appointment of counsel is made. (See California Rules of Court, rule 8.605(b).) The draft rule on the appointment of habeas counsel in superior court also requires that an assisting entity be appointed when counsel is appointed in the superior court unless HCRC is appointed. (Proposed rule 4.561(e)(2).) The OSPD recommends that rule 8.300 be amended to require an assisting entity be designated at the time appellate counsel is appointed. The demands of a section 1509.1 appeal are as complex as those of a direct appeal, and include the additional complexities of habeas claims relating to the ineffective assistance of counsel. An assisting entity is required.

The OSPD's proposal would add a section to 8.300, requiring that unless HCRC or OSPD is appointed, the Court of Appeal must also designate an assisting entity at the time counsel is appointed.

Rule 8.300. Appointment of Appellate Counsel by the Court of Appeal

.....

(f) Appointment of an assisting entity in proceedings governed by Penal Code section 1501.9

Unless the Habeas Corpus Resource Center or the Office of the State Public Defender is appointed to represent an indigent defendant in section 1509.1 proceedings, at the time counsel is appointed for the purpose of those proceedings, the Court of Appeal must designate an assisting entity or counsel to provide assistance to the appointed counsel.

Draft Rule 8.395(a)

Proposed rule 8.395(a) lists the items to be included in the record on a habeas appeal. The rule, as noted by the staff report, is modeled on rule 8.388(b) relating to

the content of the record in appeals by the People from superior court decisions. Using this as a model is largely satisfactory. However, there are some gaps in the listed items, which the working group can remedy with modest additions to the proposed rule.

First, the draft rule does not include any provision for the reviewing court to obtain as part of the record transcripts of sound or sound and video evidence, such as is required for the clerk's transcript in a non-capital appeal (rule 8.320(b)(11)) and the clerk's transcript in a capital appeal (newly adopted rule 8.610(a)(1)(J)). The OSPD proposes that a subsection be added to draft rule 8.395(a) to include a provision that transcripts of sound and video recordings furnished to the superior court be made part of the record on appeal. The reviewing court must have transcripts of these tapes to review the superior court's decision relating to claims involving taped evidence.

Second, the rule does not include a provision for the reviewing court to review copies of visual aids provided to the clerk under newly adopted rule 4.230(f) (effective April 27, 2019). The parties could well employ visual aids at an evidentiary hearing in the superior court during the habeas proceedings, perhaps a visual aid that counsel used at trial, perhaps something that was uncovered in the investigation of habeas claims. As the working group recognized when it added a provision for visual aids to be part of the record on appeal in capital cases, such visual aids are part of the parties' presentation of the case and should be available to the reviewing court.

Third, the Judicial Council recently adopted a rule requiring that written email communications and text messages and attachments between the court and the parties be included in the clerk's transcript on appeal. (Rule 8.610(a)(1)(e), effective April 27, 2019.) The OSPD proposes that there be an equivalent provision for the record on appeal in habeas cases. The rise of email communication between the court and parties necessitates the inclusion of such communications in the appellate record.

Fourth, the statement of decision ((a)(8)) and the "order appealed from" ((a)(9)) appear to be the only court orders listed. All written orders issued as part of the habeas proceedings should be included. The rule here should pattern the rule regarding the record on appeal in a capital case, which includes "Any written opinion of the court." (Rule 8.610(a)(1)(G).)

In sum, the OSPD suggests that the following new subdivisions be added to draft rule 8.395(a):

Rule 8.395. Record on Appeal

(a) Contents

....

(12) Any transcript of sound or sound-and-video recording furnished to the superior court or tendered to the superior court under rule 2.1040;

(13) Any copies of visual aids provided to the clerk under rule 4.230(f). If a visual aid is oversized, a photograph of that visual aid must be included in place of the original. For digital or electronic presentations, printouts showing the full text of each slide or image must be included;

(14) Any written communication including printouts of any e-mail or text messages and their attachments between the court and the parties;

(15) Any written opinion of the court.

Draft rule 8.395(c)

Draft rule 8.395(a) delineates the contents of the "record on appeal." Unlike rule 8.320, which defines the normal record on appeal in a non-capital case, 8.860, which defines the normal record in a misdemeanor appeal, and 8.610(a) which defines the contents of the record on appeal in the appeal of a death judgment, draft rule 8.395(a) does not distinguish between the clerk's transcript on appeal and the reporter's transcript on appeal. However, draft rule 8.396(c) provides that the clerk must begin preparing the "clerk's transcript" immediately after the notice of appeal is filed. The failure to define the clerk's transcript creates a potential confusion as to what items from the record on appeal delineated in 8.935(a) should be included in the clerk's transcript.

To avoid confusion, OSPD proposes 8.935(c) be modified to make explicit which items from the record must be included in the clerk's transcript.

Rule 8.395. Record on Appeal.

...

(c) Preparation of clerk's transcript

(1) Except as provided in (2), the clerk must begin preparing the clerk's transcript immediately after the notice of appeal is filed. *The clerk's transcript includes items described in 8.395(a)(1) through (a)(5) and (a)(7) through (a)(11)[15].*

Draft Rule 8.396(c)(1)

Draft rule 8.396(c)(1) provides that appellant's opening brief on appeal must be served and filed within 210 days after the record is filed. This rule makes no provision for the possibility that, due to a delay in securing qualified counsel, the record might be filed prior to the appointment of counsel. The OSPD suggests a modification to the rule providing that the opening brief is due 210 days from the date of appointment of counsel or the date the record is filed, whichever is later.

The OSPD proposes the following change:

Rule 8.396. Briefs by parties and amici curiae

(c) Time to file

(1) The appellant's opening brief must be served and filed within 210 days after the record is filed or 210 days after counsel is appointed, whichever is later.

Draft Rule 8.397(c)(1)

In *In re Duvall*, (1995) 9 Cal.4th 464, 474, the California Supreme Court held that a petitioner must include "copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." Incorporating the language of *Duvall,* proposed 8.397(c)(1) properly defines the proffer (that must accompany a brief including an ineffective assistance of counsel claim not raised in superior court) as including "any *reasonably available documentary evidence supporting the claim* that is not in either the record on appeal prepared under rule 8.395 or matters of which the court has taken judicial notice." (Emphasis supplied.)

Draft Rule 8.397(c)(1) has two additional subdivisions further defining the proffer. Draft rule 8.397(c)(1)(A) requires that the proffer include a certified transcript of any previous evidentiary hearing, and draft rule 8.397(c)(1)(B) states "[o]ther evidence may be in the form of affidavits or declarations under penalty of perjury." However, per *Duvall*, the evidence submitted as a proffer for an ineffective assistance of counsel claim is not limited to transcripts and affidavits/declarations. Rather, *Duvall* states that "*any* reasonably available documentary evidence" may be submitted. In keeping with *Duvall*, habeas petitioners frequently submit other documentation as a part of support for a claim, e.g., certified court records. Rules 8.397(c)(1)(A) and (B) implies that the evidence that can be submitted as part of a proffer is limited to transcripts and affidavits/declarations.

The OSPD suggests that a subdivision 8.397(c)(1)(B) be modified to make it clear that the proffer may include any documentation supporting a claim of ineffective assistance of counsel.

Rule 8.397. Claim of ineffective assistance of trial counsel not raised in the superior court

.....

(c) Proffer

(1) .....

(A) ....

(B) Petitioner may include any documentary evidence supporting the claim, including affidavits or declarations under penalty of perjury.

Support for proposed rule requiring habeas counsel transmit their file to appellate counsel when counsel is appointed

The working group asks for comment on whether a rule should be included requiring that habeas counsel transmit the file to counsel on appeal. (Invitation to Comment, pages 7-8.) The OSPD supports such a rule.

The OSPD urges the working group to adopt such a rule for three reasons. First, inspection of prior counsel's file is essential to assessing any claim of the ineffective assistance of counsel. Ineffective assistance of counsel claims usually turn on what trial counsel did or did not do as part of their representation, and the file is a vital source of information about such performance. Second, counsel for

appellant has only a short time to develop any missed claims of ineffective assistance of trial counsel. Such claims must be included as part of appellant's brief on appeal, which must be filed within 210 days after the record is filed. In that time, appellate counsel must become familiar with many thousands of pages of trial record, as well as the potentially very lengthy habeas record from the superior court. It would make appellate counsel's task much more efficient if appellate counsel had access to habeas counsel's file. Third, appellant counsel will find it difficult to obtain the file through court processes if prior counsel fails to voluntarily transmit the file. In the superior court, habeas counsel may get a subpoena for documents, or something equivalent, should counsel fail to turn over the file. While it is not impossible for counsel to get an order for the files in the Court of Appeal, *see* Code of Civil Procedure section 909 [the reviewing court may make any order as the case may require], the Court of Appeal is much less equipped to make appropriate orders.

The OSPD also recommends that the rule also include a provision that trial counsel be required to provide its file to appellate counsel, if trial counsel has not already transmitted the file to habeas counsel. Appellate counsel needs both the trial file and the habeas file to assess whether the performance of both sets of counsel amounted to the ineffective assistance of counsel.

We propose a rule as follows:

Rule 8.XXX. Transmittal of prior counsel files

Upon the request of appellate counsel appointed to represent petitioner pursuant to Penal Code section 1509.1, habeas counsel appointed pursuant to Penal Code section 1509 shall transmit to appellate counsel the entire file generated in the course of habeas counsel's representation. Upon request, trial counsel shall provide to appellate counsel the entire file generated in the court of trial counsel's representation, unless the file has previously been transmitted to habeas counsel.

Lack of Resources and Funding Mechanism for the Petitioner

As with previous proposed rules relating to the changes in the law caused by Proposition 66, there is once again a lack of any discussion of funding. Appellate counsel must be adequately compensated for the reasonable expenses of preparing and litigating an appeal. Further, the investigation of the ineffective assistance of counsel claims allowed by the new statute must be funded as well. At the very least,

the rules should contain a provision mandating that counsel are adequately compensated and that litigation expenses will be paid.

The working group has previously recognized that not everyone waiting for habeas counsel (365 men and women at last count) will get counsel now or in the near future. The small pool of attorneys qualified to represent individuals in superior court is the same pool of lawyers needed for the appeal. The shortage of attorneys will plague the Court of Appeal as it seeks counsel for its list of qualified capital attorneys and the failure to provide for the adequate compensation of appellate counsel only aggravates the problem.

Additionally, and related, is the question of funding for the court of appeal staff that must implement these procedures. The rule is silent and the omission glaring.

Sincerely,

Mary K. McComb
State Public Defender

From:	Ogul, Michael S
To:	Invitations
Subject:	Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings, Item Number SP18-21
Date:	Monday, November 19, 2018 3:45:51 PM

RE: Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings, Item Number SP18-21

Dear Judicial Council of California:

I am pleased to submit the following comments in regards to the proposed changes to the Rules of Court concerning Appeals from Superior Court Decisions in Death Penalty-Related Habeas Corpus Proceedings, Item Number SP18-21.

Statement of Interest

I am the attorney supervising the homicide unit ("Special Trial Unit") of the Santa Clara County Public Defender's Office. I also continue to litigate murder cases, including as lead counsel in a pending death penalty case. I have been a public defender for over 37 years, and I have been counsel of record in death penalty cases throughout that time, with occasional short breaks in between capital cases. I have been lead counsel at the penalty or punishment phase of three death penalty jury trials, each of which resulted in verdicts, two of life imprisonment without the possibility of parole, and one of death. I was also counsel in over 20 other death penalty cases that eventually resolved for lesser sentences or resulted in the prosecution dropping the death penalty. I am the author of the chapter on Death Penalty Cases in *California Criminal Law, Procedure and Practice*, Continuing Education of the Bar, 2016-2018 annual editions; was the defense attorney consultant to the *Death Penalty Benchguide*, California Center for Judicial Education and Research, © Judicial Council of California, from its inception through 2011 (I believe that is the most recent edition of the *Benchguide*); and have been the editor of, and author of selected chapters in, the *California Death Penalty Defense Manual*, California Attorneys for Criminal Justice and the California Public Defenders Association, from 2004 through the present. I have been active in training defense counsel in capital cases since 1990, and have authored well over 100 articles on various topics of capital defense.

Position

I agree with some of the proposals if they are modified. My position is spelled out in detail below.

Comments

Rule 8.392(6) should be changed to include a provision to enable a petitioner to ask the California Supreme Court to issue a certificate of probable cause (i.e., to reverse the refusals of both the trial court and court of appeal).

Rule 8.392(c)(1) should be modified to require the clerk to also send a notification to the petitioner.

Rule 8.392(c)(6): the notice under subpar. (1) should not be sufficient performance despite the

discharge, disbarment, death, etc. of petitioner's attorney unless notice was sent to the petitioner. Otherwise the petitioner would not be able to protect his/her rights under the circumstances.

Rule 8.396(a)(2) needs to include a good cause exception to allow a petitioner/appellant to raise a claim that the initial habeas attorney (who filed the habeas petition in superior court) was ineffective (pursuant to Penal Code section 1509.1(b)) **after** the first brief filed by petitioner, e.g., where the facts necessary to support the claim are not developed until a later time despite due diligence.

Rule 8.397(b)(1): the immediately preceding comment (re Rule 8.396.(a)(2)) applies here.

Rule 8.397(c)(3), I would suggest that the minimum required notice be five court days, not merely five days, because there will be only a minimal opportunity to cure the defect if those five calendar days include weekend, especially a holiday weekend (e.g., the four-day Thanksgiving holiday weekend).

Thank you for your consideration,

Michael S. Ogul
Deputy Public Defender
408.299.7817 (direct line)
Michael.Ogul@pdo.sccgov.org

Michael Ogul
Deputy Public Defender
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Item SP18-21 Response Form

TITLE: **Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings**

X **Agree** with proposed changes
Agree with proposed changes **only if modified**
Do not agree with proposed changes

Comments:

Please see the attached document.

PLEASE NOTE:
These comments are from the Los Angeles Superior Court and not from any one person in particular.

ORGANIZATION:	**LOS ANGELES SUPERIOR COURT** **111 N. Hill Street, Los Angeles, CA 90012**
RESPONSE TO:	**Judicial Council, 455 Golden Gate Avenue, San Francisco, CA 94102**
DEADLINE FOR COMMENT:	**Monday, November 19, 2018**

Your comments may be written on this Response Form or as a letter. Make sure your letter includes all of the above identifying information. All comments will become part of the public record for this proposal.

SP18-21 Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

Comments:

Regarding **Rule 8.395 (f)(1)** (page 19) language being modeled on language that will be added to rule 8.619(f)(2) relating to the preparation of the record for the automatic appeal, effective April 25, 2019:

8.395 (f) Form of record

(1) The reporter's transcript must be in electronic form. The clerk is encouraged to send the clerk's transcript in electronic form in the court is able to do so.

Most courts are not prepared to receive or deliver a reporter transcript in electronic form at this time. Will CCP 271(a)(2) apply?

CCP 271:

(a) An official reporter or official reporter pro tempore shall deliver a transcript in electronic form, in compliance with the California Rules of Court, to any court, party, or person entitled to the transcript, unless any of the following apply:

(1) The party or person entitled to the transcript requests the reporter's transcript in paper form.

(2) Prior to January 1, 2023, the court lacks the technical ability to use or store a transcript in electronic form pursuant to this section and provides advance notice of this fact to the official reporter or official reporter pro tempore.

(3) Prior to January 1, 2023, the official reporter or official reporter pro tempore lacks the technical ability to deliver a transcript in electronic form pursuant to this section and provides advance notice of this fact to the court, party, or person entitled to the transcript.

Request for Specific Comments:

In addition to comments on the proposal as a whole, the working group is particularly interested in comments on the following:

- **Does the proposal appropriately address the stated purpose?**

  Yes.

- **Would be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period?**

Yes, it would be helpful to include this advisory comment to rule 8.393.

- **Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations?**

  Stipulations to a limited record on appeal are not likely to be used.

- **When should preparation of the record begin for these appeals?**

  Preparation of the record should begin upon filing of the Notice of Appeal.

- **Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals?**

  Yes, with provisions for extension, 20 days is appropriate.

- **Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals?**

  Yes, the proposed provision addressing extensions are appropriate.

The advisory working group also seeks comments from *courts* on the following cost and implementation matters:

- **Would the proposal provide cost savings? If so please quantify.**

  No.

- **What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.**

  Implementation would require at least four hours of new procedure training for Judicial Assistants and Appeal Clerks.

- **Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?**

  Yes, two months would be sufficient.

Invitation to Comment
SP 18-21 and SP 18-22

The Judicial Council, Proposition 66 Rules Working Group has requested comments recently which include proposed rules relating to death penalty-related habeas corpus proceedings. We have included comments in regard to establishing procedures for the Superior Courts to process this type of proceeding.

One area of note are questions related to financial savings and the implementation requirements and the need for training staff, revising processes and procedures, creating new docket codes for case management systems and any potential modifications to the case management systems. We do not have the ability at this time to quantify the costs of these proposed changes, however the Court would be faced with the challenge of hiring additional legal research attorneys that are qualified to review death penalty related habeas corpus proceedings, selecting a panel of attorneys that will qualify under the new rules and technical upgrades (i.e. electronic filings) that may occur in the future.

We thank the committee for its specific work in this area and offer these additional general comments and concerns:

- As to the financial impact for the Superior Court now processing and ruling on petitions in Capital cases – we believe an additional 18 research attorneys would need to be hired, trained and assigned to this task to assist this task. The Orange County Superior Court has 75 pending capital cases in post-conviction proceedings. Further judicial training and clerk training would also be required.
- We also have concerns about the requirement of "statement of decision" in rule 4.575. As this is a term of art in civil proceedings with strict time and content requirements, does the use of this phrase carry those same requirements? If it does, please specify. If it does not, perhaps the use of a different phrase would be appropriate.
- As we note below, we also have concerns of the impact of cases tried in a county based on a change of venue. Which county should assume jurisdiction over the case. Orange County had several cases transferred into our county for trial and to our knowledge has had no cases transferred out of this county. We view that that pretrial publicity issues that resulted in the cases being transferred to our county should not result in the automatic need for these petitions to be processed by the trial county instead of the county with the original venue.

The specific questions with our comments in red are included below:

SP18-21

Request for Specific Comments

- Does the proposal appropriately address the stated purpose? **Yes.**

- Are the minimum qualifications that the working group is proposing for attorneys appointed to represent a person in a death penalty–related habeas corpus proceeding in the superior court also the appropriate qualifications for counsel appointed to represent such person in appeals from superior court decisions in such proceedings under Penal Code section 1509.1? **We are not prepared to respond; the Court has only recently received the minimum qualifications.**

- Should the Attorney General and/or district attorney receive notice if a request for a notice of appealability is denied by the Court of Appeal? **Yes.**

- Would be helpful to include an advisory comment to rule 8.393 highlighting that all appeals must be filed within the statutory 30-day time period? **Yes.**

- Are stipulations to a limited record on appeal likely to be used or helpful in these appeals and should the rules include a provision addressing such stipulations? **No / No**

- When should preparation of the record begin for these appeals? **Applies to the Court of Appeal?**

- Is 20 days from the filing of the notice of appeal an appropriate timeframe for completion of the clerk's and reporter's transcripts in these appeals? **We propose 30 days as an appropriate timeframe allowing a small additional time to prepare the record (especially the clerk's transcript).**

- Is the proposed provision addressing extensions of time to complete the record appropriate in these appeals? **Yes.**

- Should the rules require that habeas corpus counsel transmit their file to appellate counsel when appellate counsel is appointed? **Yes.**

- Are the proposed timeframes for filing briefs in these appeals and the proposed limits on the length of the briefs in these appeals appropriate, including in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition? **We offer no comment.**

- Are the proposed rule provisions relating to the content and format of a proffer in appeals that raise a claim of ineffective assistance of trial counsel that was not raised in the habeas corpus petition appropriate? **We offer no comment.**

Court questions

The advisory working group also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify. **No.**

- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. **(This area is of concern; see comments in opening.)**

- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **No. Training and implementation of new/additional staff would require at a minimum 120 days.**

- How well would this proposal work in courts of different sizes? **Not sure, however this Court would propose that in cases that involve a change of venue, it should return to the originating county.**

SP18-22

Request for Specific Comments

- Does the proposal appropriately address the stated purpose? **Yes.**

- Should the rules address Supreme Court transfer of petitions from one superior court to another and, if so, what should the rule provide? **No.**

- Should the rules address Supreme Court transfer of a petition pending before it to a superior court and, if so, what should the rule provide? **We offer no comment.**

- Should the proposed rules address amendments to petitions? **Yes.**

- If the proposed rules were to address amendments:
- How would amendments affect the deadlines provided in the rules? **We view the *Morgan* petition issue as the most troublesome area and would greatly appreciate specific guidance in the rules.**
- Under what circumstances should amendments be permitted? **Strict showing of good cause.**
- Should the rule address amendment of *Morgan* or shell petitions differently from other petitions? **Yes – or at a minimum expressly state that a particular rule applies to both represented and unrepresented petitions.**

- Should the proposed rules include a provision like that in rule 8.384(d) and proposed

rule 4.571(d) that authorizes the court to notify the attorney that it may strike a noncomplying petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days? **Yes.**

- Should there be a Judicial Council form for the superior court to issue a certificate of appealability? **Yes.**

- Should the rule require the superior court to include in a certificate of appealability not only the substantial claim or claims for relief, which is required by Penal Code section 1509.1, but also include a finding of a substantial claim that the requirements of Penal Code section 1509(d) have been met? **Yes.**

- Are the deadlines included in the proposed rule for submitting papers adequate? **Yes.**

Court questions

The working group also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify. **No.**

- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **(This area is of concern; see comments in opening.)**

- Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **No, additional time would be needed, however we cannot quantify at this time.**

- How well would this proposal work in courts of different sizes? **Not sure, however this Court would propose that in cases that involve a change of venue, it should return to the originating county.**

Orange County Superior Court
Hon. Gregg L. Prickett
Capital Case Committee Chair

Hon. Kimberly K. Menninger
Supervising Judge / Felony Panel

Hon. Sheila F. Hanson
Former Supervising Judge / Felony Panel

John Wood
Courtroom Operations Supervisor / Capital Case Supervisor

From: Invitations
To: Invitations
Subject: Invitation to Comment: SP18-21
Date: Friday, November 16, 2018 2:27:43 PM

Proposal: SP18-21
Position: Agree
Name: Susan Ryan
Title: Chief Deputy of Legal Services
Organization: Riverside Superior Court
Comment on Behalf of Org.: Yes
Address:
City, State, Zip: Riverside CA,
Telephone:
Email: susan.ryan@riverside.courts.ca.gov
COMMENT:
Comments on Specific Rules:
Rule 8.394(b): This rule provides that a reviewing court "may" – meaning in its discretion – grant a stay when a death penalty habeas denial is appealed. There is no standard given for how the appellate court is to exercise this discretion, however. We suggest that the rule provide additional guidance. If a habeas petition is on appeal, either it is a first habeas petition (in which case federal review has not started yet) or a certificate of appealability has been issued under Penal Code §1509.1(c) (requiring a substantial claim for relief on actual innocence or ineligibility). Consider adding some definition of how a reviewing court is supposed to exercise its discretion in either of these situations.

Rule 8.395(e)(1): This provides that "The superior court may not extend the time for preparing the record" on appeal of a death penalty habeas. The phrasing seems odd. We suggest modifying the language to state: "All applications for an extension of time for preparing the record shall be made to the reviewing court".

Rule 8.396(b)(3): This should be deleted. It allows for a brief on appeal to be typewritten instead of prepared on a computer and then sets a page limit rather than the word-count limit of (b)(1) that is used when a brief is prepared on a computer. If by April of 2019 an attorney does not have a computer and cannot afford both a computer and staff capable of using a word processor, it is questionable that the attorney is qualified to handle a death penalty habeas. On the other hand, some petitioners may want to handle their own habeas petitions, in which case the petition would be handwritten, not typed. We suggest that pro per petitions be given a page limit in subdivision (b)(3) and all attorneys be required to abide by (b)(1) and (b)(2) (word count).

Item SP18-21 Response Form

Title: Appellate Procedure: Appeals from Superior Court Decisions in Death Penalty–Related Habeas Corpus Proceedings

☐ **Agree** with proposed changes

☒ **Agree** with proposed changes **if modified**

☐ **Do not agree** with proposed changes

Comments:

Proposed rule 8.395(a) appears to have a typo. It says: "In an appeal under this *rule article*, the record must contain:…" Is it supposed to just be "under this article"?

Proposed rule 8.395(a)(5) – specify that it's documents and exhibits submitted *in support of the habeas petition*.

Proposed rule 8.396(d)(1) regarding service on "the People and the district attorney." Since the People may be represented by either the district attorney or the Attorney General, this portion of the sentence doesn't make sense. Other possibilities are "on the district attorney and Attorney General," or "on the representative of the People."

Proposed rule 8.396(d)(3) says in part "If the district attorney is representing the People, one copy of the district attorney's brief must be served on the Attorney General." Not vice versa too?

Proposed rule 8.396(d)(4): "superior judge" should be "superior court judge."

Name: Mike Roddy **Title:** Executive Officer

Organization: Superior Court of California, County of San Diego

☒ Commenting on behalf of an organization

Address: Central Courthouse, 1100 Union Street

City, State, Zip: San Diego, California 92101

Email: invitations@jud.ca.gov

Mail: Judicial Council of California
Attn: Invitations to Comment

455 Golden Gate Avenue
San Francisco, CA 94102

DEADLINE FOR COMMENT: 5:00 p.m., Monday, November 19, 2018.

Item number: 05

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: February 6, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Rules and Forms: Miscellaneous Technical Changes

Committee or other entity submitting the proposal:
Judicial Council staff

Staff contact (name, phone and e-mail): Susan R. McMullan, 415-865-7990 susan.mcmullan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: N/A
Project description from annual agenda: N/A

If requesting July 1 or out of cycle, explain:
These proposals were not circulated for public comment because they are noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: March 15, 2019

Title
Rules and Forms: Miscellaneous Technical Changes

Rules, Forms, Standards, or Statutes Affected
Revise forms CH-110, CH-130, CH-160, CH-165, JV-682, JV-683, POS-040, and SC-300.

Recommended by
Judicial Council staff
Susan R. McMullan, Supervising Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
March 15, 2019

Date of Report
February 06, 2019

Contact
Susan R. McMullan, 415-865-7990
susan.mcmullan@jud.ca.gov

Executive Summary

Various members of the judicial branch, members of the public, and Judicial Council staff have identified errors in the California Rules of Court and Judicial Council forms resulting from typographical errors and changes resulting from legislation and previous rule amendments and form revisions. Judicial Council staff recommend making the necessary corrections to avoid causing confusion for court users, clerks, and judicial officers.

Recommendation

Judicial Council staff recommend that the council, effective March 15, 2019, revise:

1. *Temporary Restraining Order* (form CH-110) to add one additional line to Item 3 "Additional Protected Persons," to create parallel construction to *Request for Civil Harassment Restraining Order* (form CH-100), which has 4 lines for Item 3, to ensure the Petitioner carries their additional protected persons forward from the CH-100 to form CH-110.

2. *Civil Harassment Restraining Order After Hearing* (form CH-130) to add two additional lines to Item 3 "Additional Protected Persons," to create parallel construction to *Request for Civil Harassment Restraining Order* (form CH-100), which has 4 lines for Item 3, to ensure the Petitioner carries their additional protected persons forward from the CH-100 to form CH-130.

3. *Request to Keep Minor's Information Confidential* (form CH-160) at the first paragraph of instructions on the first page of the form, to replace the incorrect reference to "domestic violence restraining order" with "civil harassment restraining order".

4. *Order on Request to Keep Minor's Information Confidential* (form Ch-165*),* Item 6 to replace the incorrect reference to "Attachment (2)(b)" with "Attachment 6."

5. *Findings and Orders After Hearing to Modify Delinquency Jurisdiction to Transition Jurisdiction for Child Younger Than 18 Years of Age* (form JV-682). The form is missing checkboxes. There should be a checkbox that lists Welf. and Inst. Code section 450(a)(1), as well as checkboxes in front of items 17a.(3) and 17a.(4). The addition of these checkboxes does not change the substance of the form or implement any substantive legal change; in fact, item 9a.(1) references the distinction that should also be contained in item 17. The purpose of the revisions to these forms in 2018 was to implement legislation that allows young people who were convicted of a crime related to commercial sexual exploitation (CSEC) to continue on in extended foster care. The addition of the checkboxes to this form simply clarifies whether the young person is a former CSEC youth or not.

6. *Findings and Orders After Hearing to Modify Delinquency Jurisdiction to Transition Jurisdiction for Ward Older Than 18 Years of Age* (form JV-683). The form would be more clear if there were checkboxes in front of items 16a and 16b. Adding these two checkboxes does not change the form in any material way or make any substantive legal change. It simply enables the court to more clearly identify which of two subsections applies to allow the court to continue jurisdiction.

7. *Proof of Service—Civil* (form POS-040). Revise the hours during which service may be made at a party's residence, stated in item 6.a. on the form, to between eight in the morning and eight in the evening (the form currently states six in the evening as the latest time), to comply with recently amended Code of Civil Procedure section 1011(b)(1), effective upon approval.

8. *Petition for Writ (Small Claims)* (form SC-300). Revise the citation in the footer on the first page of the form to reflect the correct rules of court relevant to the form, rules 8.970-8.977, effective upon approval. These rules are correctly cited in the accompanying information sheet (form SC-300 INFO), but are not correct on in the footer of the form itself.

The revised forms are attached at pages 4–44.

Previous Council Action

Although the Judicial Council has acted on these rules and forms, this proposal recommends only minor corrections unrelated to any prior action.

Rationale for Recommendation

The changes to these forms are technical in nature and necessary to correct inadvertent omissions and incorrect references.

Comments, Alternatives Considered, and Policy Implications

These proposals were not circulated for public comment because they are noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Implementation Requirements, Costs, and Operational Impacts

Operational impacts are expected to be minor. The proposed revisions may result in reproduction costs if courts provide hard copies of any of the forms recommended for revision. Because the proposed changes are technical corrections, case management systems are unlikely to need updating to implement them.

Attachments and Links

1. Forms CH-110, CH-130, CH-160, CH-165, JV-682, JV-683, POS 040, and SC-300, at pages 4–44.

CH-110 Temporary Restraining Order

Clerk stamps date here when form is filed.

Person in (1) must complete items (1), (2), and (3) only.

(1) Protected Person

a. Your Full Name: _____

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.):*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Restrained Person

Full Name: _____

Description:

Sex: ☐ M ☐ F Height: _____ Weight: _____ Date of Birth: _____

Hair Color: _____ Eye Color: _____ Age: _____ Race: _____

Home Address *(if known)*: _____

City: _____ State: _____ Zip: _____

Relationship to Protected Person: _____

(3) ☐ Additional Protected Persons

In addition to the person named in (1), the following family or household members of that person are protected by the temporary orders indicated below:

Full Name	Sex	Age	Household Member?	Relation to Protected Person
			☐ Yes ☐ No	
			☐ Yes ☐ No	
			☐ Yes ☐ No	
			☐ Yes ☐ No	

☐ *Check here if there are additional persons. List them on an attached sheet of paper and write "Attachment 3—Additional Protected Persons" as a title. You may use form MC-025, Attachment.*

The court will complete the rest of this form.

(4) Expiration Date

This Order expires at the end of the hearing scheduled for the date and time below:

Date: _____ Time: _____ ☐ a.m. ☐ p.m.

This is a Court Order.

Case Number:

To the Person in (2):

The court has granted the temporary orders checked as granted below. If you do not obey these orders, you can be arrested and charged with a crime. You may be sent to jail for up to one year, pay a fine of up to $1,000, or both.

(5) Personal Conduct Orders

☐ **Not Requested** ☐ **Denied Until the Hearing** ☐ **Granted as Follows:**

a. You must **not** do the following things to the person named in (1)
☐ and to the other protected persons listed in (3):

(1) ☐ Harass, intimidate, molest, attack, strike, stalk, threaten, assault (sexually or otherwise), hit, abuse, destroy personal property of, or disturb the peace of the person.

(2) ☐ Contact the person, either directly or indirectly, in **any** way, including, but not limited to, in person, by telephone, in writing, by public or private mail, by interoffice mail, by e-mail, by text message, by fax, or by other electronic means.

(3) ☐ Take any action to obtain the person's address or location. If this item (3) is not checked, the court has found good cause not to make this order.

(4) ☐ Other *(specify):*

☐ Other personal conduct orders are attached at the end of this Order on Attachment 5a(4).

b. Peaceful written contact through a lawyer or a process server or other person for service of legal papers related to a court case is allowed and does not violate this order. However, you may have your papers served by mail on the person in (1).

(6) Stay-Away Order

☐ **Not Requested** ☐ **Denied Until the Hearing** ☐ **Granted as Follows:**

a. You must stay at least _____ yards away from *(check all that apply):*

(1) ☐ The person in (1)
(2) ☐ Each person in (3)
(3) ☐ The home of the person in (1)
(4) ☐ The job or workplace of the person in (1)
(5) ☐ The school of the person in (1)
(6) ☐ The school of the children of the person in (1)
(7) ☐ The place of child care of the children of the person in (1)
(8) ☐ The vehicle of the person in (1)
(9) ☐ Other *(specify):*

b. This stay-away order does not prevent you from going to or from your home or place of employment.

(7) No Guns or Other Firearms and Ammunition

a. You cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get guns, other firearms, or ammunition.

b. You must:

(1) Sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms in your immediate possession or control. This must be done within 24 hours of being served with this Order.

This is a Court Order.

(2) File a receipt with the court within 48 hours of receiving this Order that proves that your guns or firearms have been turned in, sold, or stored. *(You may use form CH-800,* Proof of Firearms Turned In, Sold, or Stored, *for the receipt.)*

c. ☐ The court has received information that you own or possess a firearm.

8 Possession and Protection of Animals

☐ **Not Requested** ☐ **Denied Until the Hearing** ☐ **Granted as Follows** *(specify):*

a. ☐ The person in (1) is given the sole possession, care, and control of the animals listed below, which are owned, possessed, leased, kept, or held by him or her, or reside in his or her household. *(Identify animals by, e.g., type, breed, name, color, sex.)*

b. ☐ The person in (2) must stay at least _____ yards away from, and not take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm, or otherwise dispose of, the animals listed above.

9 Other Orders

☐ **Not Requested** ☐ **Denied Until the Hearing** ☐ **Granted as Follows** *(specify):*

☐ Additional orders are attached at the end of this Order on Attachment 9.

To the Person in (1):

10 Mandatory Entry of Order Into CARPOS Through CLETS

This Order must be entered into the California Restraining and Protective Order System (CARPOS) through the California Law Enforcement Telecommunications System (CLETS). *(Check one):*

a. ☐ The clerk will enter this Order and its proof-of-service form into CARPOS.

b. ☐ The clerk will transmit this Order and its proof-of-service form to a law enforcement agency to be entered into CARPOS.

c. ☐ By the close of business on the date that this Order is made, the person in (1) or his or her lawyer should deliver a copy of the Order and its proof-of-service form to the law enforcement agency listed below to enter into CARPOS:

Name of Law Enforcement Agency	Address *(City, State, Zip)*

☐ Additional law enforcement agencies are listed at the end of this Order on Attachment 10.

This is a Court Order.

(11) No Fee to Serve (Notify) Restrained Person ☐ **Ordered** ☐ **Not Ordered**

The sheriff or marshal will serve this Order without charge because:

a. ☐ The Order is based on unlawful violence, a credible threat of violence, or stalking.

b. ☐ The person in (1) is entitled to a fee waiver.

(12) Number of pages attached to this Order, if any: _____

Date: _____ _____

Judicial Officer

Warnings and Notices to the Restrained Person in (2)

You Cannot Have Guns or Firearms

You cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get guns, other firearms, or ammunition while this Order is in effect. If you do, you can go to jail and pay a $1,000 fine. You must sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms that you have or control as stated in item (7) above. The court will require you to prove that you did so.

Notice Regarding Nonappearance at Hearing and Service of Order

If you have been personally served with this Temporary Restraining Order and form CH-109, *Notice of Court Hearing,* but you do not appear at the hearing either in person or by a lawyer, and a restraining order that is the same as this Temporary Restraining Order except for the expiration date is issued at the hearing, a copy of the order will be served on you by mail at the address in item (2).

If this address is not correct or you wish to verify that the Temporary Restraining Order was converted into a restraining order at the hearing without substantive change, or to find out the duration of the order, contact the clerk of the court.

After You Have Been Served With a Restraining Order

- Obey all the orders.
- Read form CH-120-INFO, *How Can I Respond to a Request for Civil Harassment Restraining Orders?,* to learn how to respond to this Order.
- If you want to respond, fill out form CH-120, *Response to Request for Civil Harassment Restraining Orders,* and file it with the court clerk. You do not have to pay any fee to file your response if the Request claims that you inflicted or threatened violence against or stalked the person in (1).
- You must have form CH-120 served by mail on the person in (1) or that person's attorney. You cannot do this yourself. The person who does the mailing should complete and sign form CH-250, *Proof of Service of Response by Mail*. File the completed proof of service with the court clerk before the hearing date or bring it with you to the hearing.
- In addition to the response, you may file and have declarations served, signed by you and other persons who have personal knowledge of the facts. You may use form MC-030, *Declaration,* for this purpose. It is available from the clerk's office at the court shown on page 1 of this form or at *www.courts.ca.gov/forms*. If you do not know how to prepare a declaration, you should see a lawyer.

This is a Court Order.

- Whether or not you file a response, you should attend the hearing. If you have any witnesses, they must also go to the hearing.
- At the hearing, the judge can make restraining orders against you that last for up to five years. Tell the judge why you disagree with the orders requested.

Instructions for Law Enforcement

Enforcing the Restraining Order

This order is enforceable by any law enforcement agency that has received the order, is shown a copy of the order, or has verified its existence on the California Restraining and Protective Orders System (CARPOS). If the law enforcement agency has not received proof of service on the restrained person, the agency must advise the restrained person of the terms of the order and then must enforce it. Violations of this order are subject to criminal penalties.

Start Date and End Date of Orders

This order *starts* on the date next to the judge's signature on page 4. The order *ends* on the expiration date in item (4) on page 1.

Arrest Required if Order Is Violated

If an officer has probable cause to believe that the restrained person had notice of the order and has disobeyed the order, the officer must arrest the restrained person. (Pen. Code, §§ 836(c)(1), 13701(b).) A violation of the order may be a violation of Penal Code section 166 or 273.6. Agencies are encouraged to enter violation messages into CARPOS.

Notice/Proof of Service

The law enforcement agency must first determine if the restrained person had notice of the order. Consider the restrained person "served" (given notice) if (Pen. Code, § 836(c)(2)):

- The officer sees a copy of the Proof of Service or confirms that the Proof of Service is on file; or
- The restrained person was informed of the order by an officer.

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the restrained person cannot be verified, the agency must advise the restrained person of the terms of the order and then enforce it.

If the Protected Person Contacts the Restrained Person

Even if the protected person invites or consents to contact with the restrained person, this order remains in effect and must be enforced. The protected person cannot be arrested for inviting or consenting to contact with the restrained person. The order can be changed only by another court order. (Pen. Code, § 13710(b).)

This is a Court Order.

Conflicting Orders—Priorities for Enforcement

If more than one restraining order has been issued, the orders must be enforced according to the following priorities (see Pen. Code, § 136.2; Fam. Code, §§ 6383(h)(2), 6405(b)):

1. *EPO:* If one of the orders is an *Emergency Protective Order* (form EPO-001) and is more restrictive than other restraining or protective orders, it has precedence in enforcement over all other orders.
2. *No Contact Order:* If there is no EPO, a no-contact order that is included in a restraining or protective order has precedence over any other restraining or protective order.
3. *Criminal Order:* If none of the orders includes a no contact order, a domestic violence protective order issued in a criminal case takes precedence in enforcement over any conflicting civil court order. Any nonconflicting terms of the civil restraining order remain in effect and enforceable.
4. *Family, Juvenile, or Civil Order:* If more than one family, juvenile, or other civil restraining or protective order has been issued, the one that was issued last must be enforced.

(Clerk will fill out this part.)

Clerk's Certificate
[seal]

—Clerk's Certificate—

I certify that this *Temporary Restraining Order* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____ , Deputy

This is a Court Order.

CH-130 Civil Harassment Restraining Order After Hearing

Clerk stamps date here when form is filed.

Person in (1) must complete items (1), (2), and (3) only.

(1) Protected Person

a. Your Full Name: _____

Your Lawyer *(if you have one for this case)*
Name: _____ State Bar No.: _____
Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*
Address: _____
City: _____ State: _____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(2) Restrained Person

Full Name: _____
Description:

Sex: ☐ M ☐ F Height: _____ Weight: _____ Date of Birth: _____
Hair Color: _____ Eye Color: _____ Age: _____ Race: _____
Home Address *(if known)*: _____
City: _____ State: _____ Zip: _____
Relationship to Protected Person: _____

(3) ☐ Additional Protected Persons

In addition to the person named in (1), the following family or household members of that person are protected by the orders indicated below:

Full Name	Sex	Age	Lives with you?	How are they related to you?
			☐ Yes ☐ No	
			☐ Yes ☐ No	
			☐ Yes ☐ No	
			☐ Yes ☐ No	

☐ *Check here if there are additional persons. List them on an attached sheet of paper and write "Attachment 3—Additional Protected Persons" as a title. You may use form MC-025,* Attachment.

(4) Expiration Date

This Order, except for any award of lawyer's fees, expires at

Time: _____ ☐ a.m. ☐ p.m. ☐ midnight on *(date):* _____

If no expiration date is written here, this Order expires three years from the date of issuance.

This is a Court Order.

5 Hearing

a. There was a hearing on *(date):* _____ at *(time):* _____ in Dept.: _____ Room: _____
(Name of judicial officer): _____ made the orders at the hearing.

b. These people were at the hearing:

(1) ☐ The person in 1. (3) ☐ The lawyer for the person in 1 *(name):* _____

(2) ☐ The person in 2. (4) ☐ The lawyer for the person in 2 *(name):* _____

☐ Additional persons present are listed at the end of this Order on Attachment 5.

c. ☐ The hearing is continued. The parties must return to court on *(date):* _____ at *(time):* _____.

To the Person in 2:

The court has granted the orders checked below. If you do not obey these orders, you can be arrested and charged with a crime. You may be sent to jail for up to one year, pay a fine of up to $1,000, or both.

6 ☐ Personal Conduct Orders

a. You must **not** do the following things to the person named in 1

☐ and to the other protected persons listed in 3:

(1) ☐ Harass, intimidate, molest, attack, strike, stalk, threaten, assault (sexually or otherwise), hit, abuse, destroy personal property of, or disturb the peace of the person.

(2) ☐ Contact the person, either directly or indirectly, in **any** way, including, but not limited to, in person, by telephone, in writing, by public or private mail, by interoffice mail, by e-mail, by text message, by fax, or by other electronic means.

(3) ☐ Take any action to obtain the person's address or location. If this item (3) is not checked, the court has found good cause not to make this order.

(4) ☐ Other *(specify):*

☐ Other personal conduct orders are attached at the end of this Order on Attachment 6a(4).

_____

b. Peaceful written contact through a lawyer or process server or other person for service of legal papers related to a court case is allowed and does not violate this Order.

7 ☐ Stay-Away Orders

a. You **must** stay at least _____ yards away from *(check all that apply):*

(1) ☐ The person in 1.

(2) ☐ Each person in 3.

(3) ☐ The home of the person in 1.

(4) ☐ The job or workplace of the person in 1.

(5) ☐ The school of the person in 1.

(6) ☐ The school of the children of the person in 1.

(7) ☐ The place of child care of the children of the person in 1.

(8) ☐ The vehicle of the person in 1.

(9) ☐ Other *(specify):*

_____

_____

_____

_____

b. This stay-away order does not prevent you from going to or from your home or place of employment.

This is a Court Order.

8 No Guns or Other Firearms and Ammunition

a. **You cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get guns, other firearms, or ammunition.**

b. If you have not already done so, you must:

- Within 24 hours of being served with this Order, sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms in your immediate possession or control.
- File a receipt with the court within 48 hours of receiving this Order that proves that your guns or firearms have been turned in, sold, or stored. *(You may use form CH-800,* Proof of Firearms Turned In, Sold, or Stored, *for the receipt.)*

c. ☐ The court has received information that you own or possess a firearm.

d. ☐ The court has made the necessary findings and applies the firearm relinquishment exemption under Code of Civil Procedure section 527.9(f). Under California law, the person in (2) is not required to relinquish this firearm *(specify make, model, and serial number of firearm(s)):* _____

The firearm must be in his or her physical possession only during scheduled work hours and during travel to and from his or her place of employment. Even if exempt under California law, the person in (2) may be subject to federal prosecution for possessing or controlling a firearm.

9 ☐ Lawyer's Fees and Costs

The person in ___ must pay to the person in ___ the following amounts for

☐ lawyer's fees ☐ costs:

Item	Amount	Item	Amount
	$		$
	$		$

☐ Additional items and amounts are attached at the end of this Order on Attachment 9.

10 ☐ Possession and Protection of Animals

a. ☐ The person in (1) is given the sole possession, care, and control of the animals listed below, which are owned, possessed, leased, kept, or held by him or her, or reside in his or her household.
(Identify animals by, e.g., type, breed, name, color, sex.)

b. ☐ The person in (2) must stay at least _____ yards away from, and not take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm, or otherwise dispose of, the animals listed above.

11 ☐ Other Orders *(specify):*

☐ Additional orders are attached at the end of this Order on Attachment 11.

This is a Court Order.

To the Person in (1):

(12) Mandatory Entry of Order Into CARPOS Through CLETS

This Order must be entered into the California Restraining and Protective Order System (CARPOS) through the California Law Enforcement Telecommunications System (CLETS). *(Check one):*

a. ☐ The clerk will enter this Order and its proof-of-service form into CARPOS.

b. ☐ The clerk will transmit this Order and its proof-of-service form to a law enforcement agency to be entered into CARPOS.

c. ☐ By the close of business on the date that this Order is made, the person in (1) or his or her lawyer should deliver a copy of the Order and its proof-of-service form to the law enforcement agency listed below to enter into CARPOS:

Name of Law Enforcement Agency	Address *(City, State, Zip)*

☐ Additional law enforcement agencies are listed at the end of this Order on Attachment 12.

(13) Service of Order on Restrained Person

a. ☐ The person in (2) personally attended the hearing. No other proof of service is needed.

b. ☐ The person in (2) did not attend the hearing.

(1) ☐ Proof of service of form CH-110, *Temporary Restraining Order,* was presented to the court. The judge's orders in this form are the same as in form CH-110 except for the expiration date. The person in (2) must be served with this Order. Service may be by mail.

(2) ☐ The judge's orders in this form are different from the temporary restraining orders in form CH-110. Someone—but not anyone in (1) or (3)—must personally serve a copy of this Order on the person in (2).

(14) ☐ No Fee to Serve (Notify) Restrained Person

The sheriff or marshal will serve this Order without charge because:

a. ☐ The Order is based on unlawful violence, a credible threat of violence, or stalking.

b. ☐ The person in (1) is entitled to a fee waiver.

(15) Number of pages attached to this Order, if any: _____

Date: _____

_____
Judicial Officer

This is a Court Order.

Warning and Notice to the Restrained Person in ❷:

You Cannot Have Guns or Firearms

Unless item 8d is checked, you cannot own, have, possess, buy or try to buy, receive or try to receive, or otherwise get guns, other firearms, or ammunition while this Order is in effect. If you do, you can go to jail and pay a $1,000 fine. You must sell to or store with a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms that you have or control as stated in item ⑧ above. The court will require you to prove that you did so.

Instructions for Law Enforcement

Enforcing the Restraining Order

This Order is enforceable by any law enforcement agency that has received the Order, is shown a copy of the Order, or has verified its existence on the California Restraining and Protective Order System (CARPOS). If the law enforcement agency has not received proof of service on the restrained person, and the restrained person was not present at the court hearing, the agency must advise the restrained person of the terms of the Order and then must enforce it. Violations of this Order are subject to criminal penalties.

Start Date and End Date of Orders

This Order *starts* on the date next to the judge's signature on page 4 and *ends* on the expiration date in item ④ on page 1.

Arrest Required If Order Is Violated

If an officer has probable cause to believe that the restrained person had notice of the order and has disobeyed it, the officer must arrest the restrained person. (Pen. Code, §§ 836(c)(1), 13701(b).) A violation of the order may be a violation of Penal Code section 166 or 273.6. Agencies are encouraged to enter violation messages into CARPOS.

Notice/Proof of Service

The law enforcement agency must first determine if the restrained person had notice of the order. Consider the restrained person "served" (given notice) if (Pen. Code, § 836(c)(2)):

- The officer sees a copy of the *Proof of Service* or confirms that the *Proof of Service* is on file; *or*
- The restrained person was at the restraining order hearing or was informed of the order by an officer.

An officer can obtain information about the contents of the order and proof of service in CARPOS. If proof of service on the restrained person cannot be verified and the restrained person was not present at the court hearing, the agency must advise the restrained person of the terms of the order and then enforce it.

If the Protected Person Contacts the Restrained Person

Even if the protected person invites or consents to contact with the restrained person, this Order remains in effect and must be enforced. The protected person cannot be arrested for inviting or consenting to contact with the restrained person. The orders can be changed only by another court order. (Pen. Code, § 13710(b).)

This is a Court Order.

Conflicting Orders—Priorities of Enforcement

If more than one restraining order has been issued, the orders must be enforced according to the following priorities: *(See Pen. Code, § 136.2; Fam. Code, §§ 6383(h)(2), 6405(b).)*

1. *EPO:* If one of the orders is an *Emergency Protective Order* (form EPO-001) and is more restrictive than other restraining or protective orders, it has precedence in enforcement over all other orders.
2. *No-Contact Order:* If there is no EPO, a no-contact order that is included in a restraining or protective order has precedence over any other restraining or protective order.
3. *Criminal Order:* If none of the orders includes a no contact order, a domestic violence protective order issued in a criminal case takes precedence in enforcement over any conflicting civil court order. Any nonconflicting terms of the civil restraining order remain in effect and enforceable.
4. *Family, Juvenile, or Civil Order:* If more than one family, juvenile, or other civil restraining or protective order has been issued, the one that was issued last must be enforced.

Clerk's Certificate
[seal]

(Clerk will fill out this part.)

—Clerk's Certificate—

I certify that this *Civil Harassment Restraining Order After Hearing* is a true and correct copy of the original on file in the court.

Date: _____ Clerk, by _____, Deputy

This is a Court Order.

CH-160 Request to Keep Minor's Information Confidential

CONFIDENTIAL

Clerk stamps date here when form is filed.

When do I use this form?
Complete this form if you want the court to keep information about a minor in a civil harassment restraining order proceeding confidential and not available to the public or the restrained person. If you only want to keep your home address confidential, you may use a mailing address on your other forms rather than using this form.

What if there is information I don't want the restrained person to have?
You can make this request at item (8) if you want to ask the court to keep information confidential from the restrained person. If the court grants your request to keep certain information confidential from the restrained person, the information will have to be blacked out from all forms before the restrained person gets a copy. But be aware that if the court denies your request, the information may be provided to the restrained person.

Who will see this form?
The public will NOT have access to this form.
The restrained person will have access to the entire form unless the court grants the request made in item (8) below.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

(1) Parties in This Case

a. Person who requested restraining order (form CH-100, item (1)):
Full Name: _____

b. Person from whom protection is sought (form CH-100, item (2)):
Full Name: _____

(2) Person Making Request for Confidentiality

a. Full Name: _____

b. I am:

(1) ☐ The minor requesting confidentiality.

(2) ☐ The ☐ parent ☐ legal guardian of the minor or minors listed here.

List all the minors that you are making the request for:

Name: _____

Name: _____

Name: _____

Name: _____

☐ *Check here if there are additional minors. Attach a sheet of paper and write "Attachment 2b(2)—Additional Minors" for a title.*

This is not a Court Order.

Case Number:

3 Contact Information

a. Your lawyer *(if you have one for this case):*
Name: _____ State Bar No.: _____
Firm Name: _____

b. Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.)*
Address: _____
City: _____ State: ____ Zip: _____
Telephone: _____ Fax: _____
E-Mail Address: _____

4 ☐ Requests for More Than One Minor *(ONLY for parents or legal guardians)*

I am making this request for two or more minors.

a. ☐ The information I want confidential (as checked in item 5) is the SAME for all minors.

b. ☐ The information I want confidential (as checked in item 5) is NOT the same for all minors.

If you checked b, make sure you list all the information you want confidential for each minor in 5. If you need more space in 5, attach a separate piece of paper.

5 Information to Be Kept Confidential from the Public

I want the information checked below to be made confidential and NOT available to the public.

Check ALL that apply:

a. ☐ **Minor's name**

(Note: If your request is granted, the public will not have access to your name in this case, but the restrained person and law enforcement must be given this information.)

b. ☐ **Minor's address**

The address I want kept confidential is: _____

(Note: You do NOT have to make this request if you use a mailing address that does not need to be kept confidential. Use that mailing address on all forms in this case and any other civil case.)

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 5b" for the title.*

This is not a Court Order.

c. ☐ **Information relating to the minor**

(Note: If information relating to the minor is made confidential by the court, the public will not have access to this information but the restrained person must be given the information that is necessary to comply with the restraining order and to respond to the restraining order request.)

Describe all information in the documents that will be filed that you want kept confidential.

You may either *(check one):*

(1) ☐ Attach a copy of form CH-100 or other document that you are filing. Circle all the information you want kept confidential.

(2) ☐ List the information below, identifying the location of the statements in form CH-100 or other document that you are filing.

Location of Information *(for example, form #, page #, paragraph #, line #, attachment #, or exhibit #)*	**Information to Be Redacted** *(not viewable by the public)*

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 5c(2)" for a title.*

(a) _____ _____

(b) _____ _____

(c) _____ _____

(d) _____ _____

This is not a Court Order.

6 Reasons for Request

To approve your request, the court must expressly find all of the following:

- The minor's right to privacy overcomes the right of the public access to the information;
- There is a substantial probability that the minor's interest will be prejudiced if the information is not kept confidential;
- The order to keep the information confidential is narrowly tailored; and
- No less restrictive means exist to protect the minor's privacy.

Use these four requirements to help you answer the questions below.

a. Why should the information about the minor provided in item 5 be kept private or confidential?

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 6a" for a title.*

b. What do you think would happen if the information was NOT made private or confidential?

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 6b" for a title.*

This is not a Court Order.

7 If any portion of the request for confidentiality from the public (item 5) is denied, I want to *(check one)*:

a. ☐ **Cancel my request for restraining order**
I ask the court NOT to make a decision on my *Request For Civil Harassment Restraining Orders* (form CH-100). I understand that cancelling my request means that I will not receive a restraining order at this time. *(Note: You may file a request on the same or different facts at a later date.)*

b. ☐ **Move forward with my request for restraining order**
I ask the court to make a decision on my *Request For Civil Harassment Restraining Orders* (form CH-100). *(Note: Choosing this option means that the information in your request for restraining order (form CH-100) and other related documents and forms will be available to the public and must be seen by the restrained person unless you make a request in item 8 and the court approves the request.)*

8 ☐ Information to Be Kept Confidential from the Restrained Person

(Note: The restrained person must be given information necessary to comply with the restraining order and to respond to the restraining order request.)

I do not want the restrained person to have access to some of the information checked in item 5.

a. What information do you want to be confidential and not given to the restrained person?

(1) ☐ Minor's name

(2) ☐ Minor's address

(3) ☐ Other information relating to the minor from item 5
☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 8a(3)" for a title.*
(specify):

b. Why should the information listed in (a) be kept confidential and not given to the restrained person?
☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 8b" for a title.*

c. What do you think would happen if the information listed in (a) is given to the restrained person?
☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 8c" for a title.*

This is not a Court Order.

d. If any portion of the request for confidentiality from the restrained person (item 8) is denied, I want to:

(1) ☐ **Cancel my request for restraining order**
I ask the court NOT to make a decision on my *Request For Civil Harassment Restraining Orders* (form CH-100). I understand that cancelling my request means that I will not receive a restraining order at this time. *(Note: You may file a request on the same or different facts at a later date.)*

(2) ☐ **Move forward with my request for restraining order**
I ask the court to make a decision on my *Request for Civil Harassment Restraining Orders* (form CH-100). (*Note: Choosing this option means that all of the information in your request for restraining order (form CH-100) must be seen by the restrained person.)*

9 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____
Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on all attachments is true and correct.

Date: _____

_____ ▶ _____
Type or print your name *Signature of person making this request*

This is not a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

CH-165 Order on Request to Keep Minor's Information Confidential

Clerk stamps date here when form is filed.

☐ **CONFIDENTIAL** ☐ **PUBLIC VERSION (REDACTED)**

Person in (2) must complete items (1) and (2) only.

(1) Parties in This Case

a. Person who requested restraining order (form CH-100, item (1)):
Full Name: _____

b. Person from whom protection is sought (form CH-100, item (2)):
Full Name: _____

Fill in court name and street address:

Superior Court of California, County of

(2) Person Making Request for Confidentiality

Full Name: _____

Court will complete item (3) if request is denied or items (4)–(13) if request is granted or partially granted.

Court fills in case number when form is filed.

Case Number:

Court's Decision

The court has reviewed the request for confidentiality and makes the following decision:

(3) ☐ Denied in Whole or in Part or More Information Needed

a. ☐ **DENIED.** The request to keep information of a minor or minors confidential is denied.
   (1) ☐ **The court will NOT make a decision on the *Request for Civil Harassment Restraining Orders* (form CH-100).** The request for restraining order and proposed order forms must be returned to the requestor personally, destroyed, or deleted from electronic files and not filed with the court unless the person requesting the restraining order agrees to file them without any changes.
   (2) ☐ **The court will make a decision on the request for restraining order.** The request for restraining order and any accompanying orders will be filed.

b. ☐ **More information is needed for court decision.** You must go to court on the date and time below to provide more information on why you need a request for confidentiality.

Hearing Date → Date: _____ Time: _____
Dept.: _____ Room: _____

Name and address of court if different from above:
_____
_____
_____

c. If (3) is checked, only this page of this order form will be issued. All other pages may be discarded.

Date: _____

_____
Judge (or Judicial Officer)

Instructions to Clerk

If item (3) is checked, file page 1 in a public file and discard pages 2–5.
File the request for confidentiality (form CH-160) in a confidential file.

This is a Court Order.

Court will complete the rest of this form if the request is partially or fully granted

4 ☐ GRANTED

a. ☐ **Granted in full.** The request to keep the information of a minor or minors confidential is granted in full. Details of the order are stated below in items 5–12 .

b. ☐ **Partially granted**. The request to keep the information of a minor or minors confidential is granted only in part. Details of the order are stated below in items 5–12 .

5 Findings

☐ The court finds all of the following *(all of these findings are required if granting in full or in part)*:

a. The right to privacy of the minors listed in item 6 overcomes the public's right of access to the information;

b. There is a substantial probability that the interests of the minors listed in item 6 will be prejudiced if the information is not kept confidential;

c. The order is narrowly tailored; and

d. No less restrictive means exist to protect the privacy of the minors in item 6.

6 ☐ Minors Subject to This Order

This order protects the information listed in item 8 for the following minors:

a. Name: _____

b. Name: _____

c. Name: _____

d. Name: _____

☐ *Check here if there are additional minors. Attach a sheet of paper and write "Attachment 6—Additional Minors" for a title.*

References in this order to "the minor" refer to all minors listed here.

7 WARNING: If the information listed in item 8 is misused or disclosed to anyone other than law enforcement, you may be fined up to $1,000 for contempt of court or face other sanctions.

8 Information to Be Kept Confidential From Public

The following information must be kept confidential and not viewable by the public. *(Check all that apply.)*

a. ☐ **Name of minor**

True name of minor in item 6 *(to be kept confidential)*	**Initials viewable by the public** *(to be used in redacted version)*

This is a Court Order.

b. ☐ **Address of minor**

The following addresses of the minors listed in item (6) must be redacted and must not be viewable to the public.

c. ☐ **Information relating to minor** *(check one):*

(1) ☐ The information CIRCLED in the attached copy of form CH-100 or other document or form is made confidential by this order.

(2) ☐ The information below is made confidential by this order:

Location of Information *(for example, form #, page #, item #, line #, attachment #, or exhibit #)*	**Information to Be Redacted** *(not viewable by the public)*
(a)	
(b)	
(c)	
(d)	

☐ *Check here if there is not enough space for your answer. Put your complete answer on an attached sheet of paper, and write "Attachment 8c(2)" for a title.*

d. ☐ **Other:**

This is a Court Order.

9 Information to Be Kept Confidential from the Restrained Person

The restrained person *(full name)* _____ will have access to the following information checked in item 8 to comply with the protective order and prepare a response:

a. ☐ All the information, unredacted.

b. ☐ All the information except for the following:

☐ *Check here if additional space is needed and include the information on a separate piece of paper, write "Attachment 9" on top, and attach to this form.*

_____

_____

_____

WARNING: If the information listed in item 8 is misused or disclosed to anyone other than law enforcement, you may be fined up to $1,000 for contempt of court or face other sanctions.

10 Responsibility for Redacting All Forms and Documents

a. All forms and documents submitted with the request for confidentiality **must be redacted and filed with the court** no later than *(number of court days or date)* _____, by the:

(1) ☐ Court

(2) ☐ Person making the request

(3) ☐ Other: _____

b. The redacted documents must be filed in a public file, and the unredacted documents must be filed in a confidential file.

11 Court Records and Hearings

The information listed in item 8 must NOT be disclosed by the court in any:

a. Registers of actions, indexes, court calendars, court transcripts, or minute orders in this case.

b. Future court hearings, including any documents introduced during a hearing in this case or any civil case in the State of California.

12 To All Parties

a. The information made confidential by this order must NOT be made public in this case or any other civil case.

b. Any documents filed in this case or any other civil case that includes information listed in item 8 must be filed with form CH-175, *Cover Sheet for Confidential Information*, attached to the front.

This is a Court Order.

Case Number:

13 To the Person Making the Request for Confidentiality

You must do the following:

a. ☐ Have a copy of each form listed in item (c) below **personally served** on (given to) the restrained person.

(*See form CH-200-INFO to find out how to meet this requirement. Personal service is required when the protected person is making this request and when forms CH-100, CH-109, and CH-110 have NOT been served on the restrained person.)*

b. ☐ Have a copy of each form listed in item (c) mailed to the:

(1) ☐ Restrained person

(2) ☐ Protected person

(3) ☐ Other: _____

(See form CH-250 to find out how to meet this requirement.)

c. Forms to serve:

(1) Form CH-170, *Notice of Order Protecting Information of Minor*
(Form CH-170 should be the first page with all others stapled behind.)

(2) ☐ Form CH-100, *Request for Civil Harassment Restraining Order*

(3) ☐ Form CH-109, *Notice of Court Hearing*

(4) ☐ Form CH-110, *Temporary Restraining Order*

(5) ☐ Form CH-160, *Request to Keep Minor's Information Confidential*
☐ Unredacted ☐ Redacted (if item 9b on CH-165 is checked)

(6) Form CH-165, *Order on Request to Keep Minor's Information Confidential*
☐ Unredacted ☐ Redacted (if item 9b on CH-165 is checked)

(7) Form CH-175, *Cover Sheet for Confidential Information* (leave blank)

(8) ☐ Other: _____

d. In any OTHER civil cases involving the minor, provide a copy of this order to the court in the other case.

Date: _____

_____
Judge (or Judicial Officer)

Instructions to Clerk

The originals of all unredacted documents containing the information checked in item 8 must be kept in a confidential file and the information provided in item 8 must not appear in:

- Any register of action;
- Any calendar;
- Any index;
- Any transcript; or
- Any minute order.

Any information listed in item 9b must be sealed and filed in a confidential file.

This is a Court Order.

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD'S NAME:	

FINDINGS AND ORDERS AFTER HEARING TO MODIFY DELINQUENCY JURISDICTION TO TRANSITION JURISDICTION FOR CHILD YOUNGER THAN 18 YEARS OF AGE

CASE NUMBER:

Judicial Officer:	Court Clerk:	Court Reporter:
Bailiff:	Other Court Personnel:	Interpreter: Language:

Use this form to document the findings and orders regarding the modification of delinquency jurisdiction to transition jurisdiction for a child older than 17 years, 5 months and younger than 18 years of age, who:

- Qualifies for vacatur of his or her underlying adjudication and dismissal of the petition pursuant to Penal Code section 236.14 or has met his or her rehabilitative goals;
- Is under an order for foster care placement;
- Wants to remain in extended foster care under the transition jurisdiction of the juvenile court;
- Is not receiving reunification services; and
- Does not have a hearing set for termination of parental rights or establishment of guardianship.

1. Parties *(name)*			Present	Attorney *(name):*	Present
a. Ward:			☐		☐
b. Probation officer:			☐		☐
c. County agency social worker:			☐		☐
d. Other *(specify):*			☐		☐
2. Parent					
a. *(Name):*	☐ Father	☐ Mother	☐		☐
b. *(Name):*	☐ Father	☐ Mother	☐		☐
3. Legal guardian *(name):*			☐		☐
4. Indian custodian *(name):*			☐		☐
5. Tribal representative *(name):*			☐		☐

6. ☐ Others present
   a. Other *(name):*
   b. Other *(name):*
   c. Other *(name):*

Form Approved for Optional Use
Judicial Council of California
JV-682 [Rev. March 15, 2019]

Welfare and Institutions Code, §§ 450, 451;
Cal. Rules of Court, rule 5.814
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

7. **The court has read and considered and admits into evidence**
   a. ☐ Report of social worker dated:
   b. ☐ Report of probation officer dated:
   c. ☐ Other *(specify):*
   d. ☐ Other *(specify):*
   e. ☐ Other *(specify):*

BASED ON THE FOREGOING AND ALL OTHER EVIDENCE RECEIVED, THE COURT FINDS AND ORDERS

Findings

8. Notice ☐ has ☐ has not been given as required by law.

9. a. ☐ The child comes within the description of Welfare and Institutions Code section 450, in that:
   (1) ☐ The child is older than 17 years and 5 months and younger than 18, and the underlying adjudication is subject to vacatur under Penal Code section 236.14, or ☐ the child's rehabilitative goals as stated in the case plan have been met, and juvenile court's delinquency jurisdiction over him or her as a ward is no longer required.
   (2) The child is older than 17 years, 5 months and younger than 18 years of age and is subject to an order for foster care placement.
   (3) The child was removed from the physical custody of his or her parents or legal guardian, adjudged to be a ward of the juvenile court under Welfare and Institutions Code section 725, and ordered into foster care placement as a ward, or the child was removed from the custody of his or her parents as a dependent of the court with an order for foster care placement in effect at the time the court adjudged him or her to be a ward of the juvenile court under Welfare and Institutions Code section 725.

   b. ☐ The child does not come within the description of Welfare and Institutions Code section 450, in that *(check all that apply):*
   (1) ☐ The child is not more than 17 years, 5 months and less than 18 years of age and subject to a foster care placement order.
   (2) ☐ The child was not removed from the physical custody of his or her parents or legal guardian, adjudged to be a ward of the juvenile court under Welfare and Institutions Code section 725, and ordered into foster care placement as a ward, nor was the child removed from the custody of his or her parents as a dependent of the court with an order for a foster care placement in effect at the time the court adjudged him or her to be a ward of the juvenile court under Welfare and Institutions Code section 725.
   (3) ☐ The child's rehabilitative goals as stated in the case plan have not been met, and the juvenile court's delinquency jurisdiction over him or her as a ward is required.

10. ☐ The child ☐ has ☐ has not been informed that he or she may decline to become a nonminor dependent and may have juvenile court jurisdiction terminated at a hearing under Welfare and Institutions Code section 391 and rule 5.555 of the California Rules of Court.

11. ☐ The child's return to the home of his or her legal guardian ☐ would ☐ would not create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. The facts supporting this finding were stated on the record.

12. Reunification services ☐ have ☐ have not been terminated.

13. The child's case ☐ has ☐ has not been set for a hearing to terminate parental rights or establish a guardianship.

CHILD'S NAME:	CASE NUMBER:

14. The child ☐ does ☐ does not intend to sign a mutual agreement for a placement in a supervised setting as a transition dependent.

15. The child's Transitional Independent Living Case Plan ☐ does ☐ does not include a plan for the child to satisfy at least one of the following conditions of eligibility to remain under juvenile court jurisdiction as a transition dependent *(check all that apply):*

a. ☐ The child plans to continue attending high school or a high school equivalency certificate (GED) program.

b. ☐ The child has made plans to attend a college, a community college, or a vocational education program.

c. ☐ The child plans to participate in a program or activities to promote employment or overcome barriers to employment.

d. ☐ The child has made plans to be employed at least 80 hours per month.

e. ☐ The child may not be able to attend school, college, a vocational program, or a program or activities to promote employment or overcome barriers to employment or to work 80 hours per month due to a medical condition.

16. The child ☐ has ☐ has not had an opportunity to confer with his or her attorney.

17. ☐ The court makes the following orders modifying jurisdiction:

a. The young person comes within the juvenile court's transition jurisdiction as described in ☐ Welfare and Institutions Code section 450(a)(1)(B) and 450(a)(2)(C) or ☐ section 450(a)(1)(A).

(1) Continuance in the home is contrary to the child's welfare;

(2) Reasonable efforts have been made to prevent or eliminate the need for removal, and the child remains removed from the parent or guardian;

(3) ☐ The adjudication in petition number is vacated, the petition is dismissed, and the underlying arrest is expunged under Penal Code section 236.14;

(4) ☐ The Department of Justice and any law enforcement agency that has records of the arrest is ordered to seal those records and then destroy them three years from the date of the arrest or one year after the order to seal, whichever occurs later; and

(5) The ☐ probation department ☐ child welfare services department is responsible for the child's placement and care.

b. The child is adjudged a transition dependent under the transition jurisdiction of this court.

c. Delinquency jurisdiction is terminated.

d. *(Insert name):* ☐ continues his/her court appointment ☐ is appointed by the court as the attorney of record for the child.

e. The matter is continued for a nonminor dependent status review hearing set under Welfare and Institutions Code section 366.31, and rule 5.903 of the California Rules of Court on *(date):* . This date is within six months of the child's most recent status review hearing under Welfare and Institutions Code section 727.2 or 727.3.

CHILD'S NAME:	CASE NUMBER:

18. ☐ **The court makes the following orders not modifying jurisdiction:**

a. The child does not come within the juvenile court's transition jurisdiction as described in Welfare and Institutions Code section 450.

b. The child continues under the delinquency jurisdiction of the court.

c. The matter is continued for a status review hearing on *(date):* . This date is within six months of the child's most recent status review hearing under Welfare and Institutions Code section 727.2 or 727.3.

19. ☐ **The court makes the following additional findings and orders to terminate jurisdiction:**

a. The child has met his or her rehabilitative goals and does not wish to become a transition dependent.

b. A hearing to consider termination of jurisdiction under Welfare and Institutions Code section 391 and rule 5.555 of the California Rules of Court is set on *(date):*

Date:

JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD'S NAME:	

FINDINGS AND ORDERS AFTER HEARING TO MODIFY DELINQUENCY JURISDICTION TO TRANSITION JURISDICITON FOR WARD OLDER THAN 18 YEARS OF AGE

CASE NUMBER:

Judicial Officer:	Court Clerk:	Court Reporter:
Bailiff:	Other Court Personnel:	Interpreter: Language:

		Present	Attorney *(name):*	Present
1.	Parties *(name)*			
	a. Nonminor:	☐		☐
	b. Probation officer:	☐		☐
	c. County agency social worker:	☐		☐
	d. Other *(specify):*	☐		☐
2.	Parent			
	a. *(Name):* ☐ Father ☐ Mother	☐		☐
	b. *(Name):* ☐ Father ☐ Mother	☐		☐
3.	Legal guardian *(name):*	☐		☐
4.	Indian custodian *(name):*	☐		☐
5.	Tribal representative *(name):*	☐		☐

6. ☐ Others present
   a. Other *(name):* *(Name):*
   b. Other *(name):* *(Name):*
   c. Other *(name):*

7. **The court has read and considered and admits into evidence**
   a. ☐ Report of social worker dated:
   b. ☐ Report of probation officer dated:
   c. ☐ Other *(specify):*
   d. ☐ Other *(specify):*
   e. ☐ Other *(specify):*

Form Approved for Optional Use
Judicial Council of California
JV-683 [Rev. March 15, 2019]

NONMINOR'S NAME:	CASE NUMBER:

BASED ON THE FOREGOING AND ALL OTHER EVIDENCE RECEIVED, THE COURT FINDS

Findings

8. Notice ☐ has ☐ has not been given as provided by law.

9. a. ☐ The nonminor comes within the description of Welfare and Institutions Code section 450 in that:

   (1) The ward is a nonminor ward in foster care placement who was a ward subject to an order for foster care placement on the day of his or her 18th birthday and is under the age of 21.

   (2) The ward was removed from the physical custody of his or her parents or legal guardian, adjudged to be a ward of the juvenile court under Welfare and Institutions Code section 725, and ordered into foster care placement as a ward, or the ward was removed from the custody of his or her parents as a dependent of the court with an order for foster care placement in effect at the time the court adjudged him or her to be a ward of the juvenile court under Welfare and Institutions Code section 725.

   (3) The ward's rehabilitative goals as stated in the case plan have been met, and juvenile court's delinquency jurisdiction over him or her as a ward is no longer required.

   b. ☐ The nonminor comes within the description of Welfare and Institutions Code section 450 in that the young person is under 21 years of age and in a foster care placement based on an adjudication that is subject to vacatur under Penal Code section 236.14.

      (1) ☐ The child was removed from the physical custody of his or her parents or legal guardian, adjudged to be a ward of the juvenile court under Welfare and Institutions Code section 725, and ordered into foster care placement as a ward, or the child was removed from the custody of his or her parents as a dependent of the court with an order for foster care placement in effect at the time the court adjudged him or her to be a ward of the juvenile court under Welfare and Institutions Code section 725.

   c. ☐ The ward does not come within the description of Welfare and Institutions Code section 450, in that *(select all that apply):*

      (1) ☐ The ward was not subject to an order for foster care placement on the day of his or her 18th birthday.

      (2) ☐ The ward is over the age of 21.

      (3) ☐ The ward was not removed from the physical custody of his or her parents or legal guardian, adjudged to be a ward of the juvenile court under Welfare and Institutions Code section 725, and ordered into foster care placement as a ward, nor was the ward removed from the custody of his or her parents as a dependent of the court with an order for a foster care placement in effect at the time the court adjudged him or her to be a ward of the juvenile court under Welfare and Institutions Code section 725.

      (4) ☐ The ward's rehabilitative goals as stated in the case plan have not been met, and the juvenile court's delinquency jurisdiction over him or her as a ward is required.

10. ☐ The ward ☐ has ☐ has not been informed that he or she may decline to become a nonminor dependent and may have juvenile court jurisdiction terminated at a hearing under rule 5.555 of the California Rules of Court.

11. ☐ The nonminor ☐ was ☐ was not informed that if juvenile court jurisdiction is terminated, the nonminor can file a request to return to foster care and may have the court resume jurisdiction over the ward as a nonminor dependent.

12. ☐ The benefits of remaining under juvenile court jurisdiction as a nonminor dependent ☐ were ☐ were not explained ☐ and the nonminor understands them.

13. ☐ The ward ☐ has ☐ has not signed a mutual agreement with the responsible agency for placement in a supervised setting as a nonminor dependent.

NONMINOR'S NAME:	CASE NUMBER:

14. The ward's Transitional Independent Living Case Plan ☐ does ☐ does not include a plan for the ward to satisfy at least one of the following conditions of eligibility to remain under juvenile court jurisdiction as a transition dependent *(check all that apply):*
    a. ☐ The ward plans to continue attending high school or a high school equivalency certificate (GED) program.
    b. ☐ The ward has made plans to attend a college, a community college, or a vocational education program.
    c. ☐ The ward plans to participate in a program or activities to promote employment or overcome barriers to employment.
    d. ☐ The ward has made plans to be employed at least 80 hours per month.
    e. ☐ The ward may not be able to attend school, college, a vocational program, or a program or activities to promote employment or overcome barriers to employment or to work 80 hours per month due to a medical condition.

15. The ward ☐ has ☐ has not had an opportunity to confer with his or her attorney.

16. ☐ **The court makes the following orders modifying jurisdiction:**
    a. ☐ The nonminor comes within the juvenile court's transition jurisdiction as described in Welfare and Institutions Code section 450(a)(1)(B) and 450(a)(2)(C).
        (1) Continuance in the home is contrary to the child's welfare;
        (2) Reasonable efforts have been made to prevent or eliminate the need for removal and the child remains removed from the parent or guardian;
        (3) The adjudication in petition number is vacated, the petition is dismissed, and the underlying arrest is expunged under Penal Code section 236.14;
        (4) The Department of Justice and any law enforcement agency that has records of the arrest is ordered to seal those records and then destroy them three years from the date of the arrest or one year after the order to seal, whichever occurs later; and
        (5) The ☐ probation department ☐ child welfare services department is responsible for the nonminor's placement and care.
    b. ☐ The ward comes within the juvenile court's transition jurisdiction as described in Welfare and Institutions Code section 450(a)(1)(A).
        (1) The ward was originally removed from the physical custody of his or her parents or legal guardians on *(specify date of detention hearing when removal findings were made):* and continues to be removed from their custody.
        (2) The removal findings—"continuance in the home is contrary to the child's welfare" and "reasonable efforts were made to prevent removal"—made at that hearing remain in effect.
        (3) The ☐ probation department ☐ social services agency is responsible for the nonminor's placement and care.
    c. The nonminor is adjudged a nonminor dependent under the transition jurisdiction of this court.
    d. Delinquency jurisdiction is terminated.
    e. *(Insert name):* ☐ continues his/her court appointment ☐ is appointed by the court as the attorney of record for the nonminor dependent.
    f. The matter is continued for a nonminor dependent status review hearing set under rule 5.903 of the California Rules of Court on *(date):* . This date is within six months of the nonminor's most recent status review hearing under Welfare and Institutions Code section 727.2 or 727.3.

NONMINOR'S NAME:	CASE NUMBER:

17. ☐ **The court makes the following orders not modifying jurisdiction:**

a. The nonminor does not come within the juvenile court's transition jurisdiction as described in Welfare and Institutions Code section 450.

b. The nonminor continues under the delinquency jurisdiction of the court.

c. The matter is continued for a status review hearing on *(date):* . This date is within six months of the nonminor's most recent status review hearing under Welfare and Institutions Code section 727.2 or 727.3.

18. ☐ **The court makes the additional findings and orders to terminate jurisdiction:**

a. The ward has met his or her rehabilitative goals, but does not wish to become a nonminor dependent.

b. A hearing to consider termination of jurisdiction under Welfare and Institutions Code section 607.3, and rule 5.555 of the California Rules of Court is set on *(date):*

Date:

JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **01-28-19** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
Plaintiff/Petitioner: Defendant/Respondent:	JUDICIAL OFFICER:
PROOF OF SERVICE—CIVIL **Check method of service *(only one):*** ☐ By Personal Service ☐ By Mail ☐ By Overnight Delivery ☐ By Messenger Service ☐ By Fax	DEPARTMENT:

Do not use this form to show service of a summons and complaint or for electronic service.
See USE OF THIS FORM on page 3.

1. At the time of service I was over 18 years of age **and not a party to this action**.
2. My residence or business address is:

3. ☐ The fax number from which I served the documents is *(complete if service was by fax):*

4. On *(date):* I served the following **documents** *(specify):*

   ☐ The documents are listed in the *Attachment to Proof of Service–Civil (Documents Served)* (form POS-040(D)).

5. I served the documents on the **person or persons** below, as follows:
   a. Name of person served:
   b. ☐ *(Complete if service was by personal service, mail, overnight delivery, or messenger service.)*
      Business or residential address where person was served:
   c. ☐ *(Complete if service was by fax.)*
      Fax number where person was served:

   ☐ The names, addresses, and other applicable information about persons served is on the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)).

6. The documents were served by the following means *(specify):*
   a. ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and eight in the evening.

Form Approved for Optional Use
Judicial Council of California
POS-040 [Rev. March 15, 2019]

PROOF OF SERVICE—CIVIL
(Proof of Service)

Code of Civil Procedure, §§ 1011, 1013, 1013a, 2015.5; Cal. Rules of Court, rule 2.306
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

6. b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and *(specify one)*:

   (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

   (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

   I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state):*

   c. ☐ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

   d. ☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)*

   e. ☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

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

Date:

(TYPE OR PRINT NAME OF DECLARANT) ▶ (SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on *(date):*

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

Date:

(NAME OF DECLARANT) ▶ (SIGNATURE OF DECLARANT)

INFORMATION SHEET FOR PROOF OF SERVICE—CIVIL

(This information sheet is not part of the official proof of service form and does not need to be copied, served, or filed.)

USE OF THIS FORM

This form is designed to be used to show proof of service of documents by (1) personal service, (2) mail, (3) overnight delivery, (4) messenger service, or (5) fax.

This proof of service form should **not** be used to show proof of service of a summons and complaint. For that purpose, use *Proof of Service of Summons* (form POS-010).

Also, this proof of service form should **not** be used to show proof of electronic service. For that purpose, use *Proof of Electronic Service* (form POS-050).

Certain documents must be personally served. For example, an order to show cause and temporary restraining order generally must be served by personal delivery. You must determine whether a document must be personally delivered or can be served by mail or another method.

GENERAL INSTRUCTIONS

A person must be over 18 years of age to serve the documents. The person who served the documents must complete the Proof of Service. **A party to the action cannot serve the documents**.

The Proof of Service should be typed or printed. If you have Internet access, a fillable version of this proof of service form is available at *www.courts.ca.gov/forms.htm.*

Complete the top section of the proof of service form as follows:

First box, left side: In this box print the name, address, and telephone number of the person for whom you served the documents.

Second box, left side: Print the name of the county in which the legal action is filed and the court's address in this box. The address for the court should be the same as the address on the documents that you served.

Third box, left side: Print the names of the plaintiff/petitioner and defendant/respondent in this box. Use the same names as are on the documents that you served.

Fourth box, left side: Check the method of service that was used. You should check only one method of service and should show proof of only one method on the form. If you served a party by several methods, use a separate form to show each method of service.

First box, top of form, right side: Leave this box blank for the court's use.

Second box, right side: Print the case number in this box. The case number should be the same as the case number on the documents that you served.

Third box, right side: State the judge and department assigned to the case, if known.

Complete items 1–6:

1. You are stating that you are over the age of 18.
2. Print your home or business address.
3. If service was by fax service, print the fax number from which service was made.
4. List each document that you served. If you need more space, check the box in item 4, complete the *Attachment to Proof of Service—Civil (Documents Served)* (form POS-040(D)), and attach it to form POS-040.
5. Provide the names, addresses, and other applicable information about the persons served. If more than one person was served, check the box on item 5, complete the *Attachment to Proof of Service—Civil (Persons Served)* (form POS-040(P)), and attach it to form POS-040.
6. Check the box before the method of service that was used, and provide any additional information that is required. The law may require that documents be served in a particular manner (such as by personal delivery) for certain purposes. Service by fax generally requires the prior agreement of the parties.

You must sign and date the proof of service form. By signing, you are stating under penalty of perjury that the information that you have provided on form POS-040 is true and correct.

SC-300 Petition for Writ (Small Claims)

Clerk stamps date here when form is filed.

DRAFT

01-28-19

Not approved by the Judicial Council

Petitioner
(fill in the name of the person asking for the writ)

v.

Superior Court of California, County of _____

Respondent
(fill in the name of the court whose action or ruling you are challenging)

Real Party in Interest
(fill in the name of any other parties in the trial court case)

Clerk will fill in the number below:

Appellate Division Case Number:

☐ **Stay requested**
(see item (12) c. on page 6)

Instructions

- This form is only for requesting a **writ** in a small claims case which does *not* relate to an action enforcing the small claims judgment.
- Do not use this form for the appeal or trial de novo of a small claims matter or for writs on the appeal of a small claims matter. Other forms or pleadings should be used for those those kinds of actions.
- For requesting a writ relating to a court action regarding *enforcement* of a small claims judgment, you should use form APP-151, *Petition for Writ (Misdemeannor, Infraction, or Limited Civil Case)*. You can get that form and other forms for other writs and for appeals at any courthouse or county law library or online at *www.courts.ca.gov/forms.*
- Before you fill out this form, read *Information on Writ Proceedings in Small Claims Cases* (form SC-300-INFO) to know your rights and responsibilities. You can get form SC-300-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms.*
- Generally, you should file this form no later than **30 days** after the date the small claims court took the action or issued the ruling you are challenging in this petition (see form SC-300-INFO for more information about the deadline for filing a writ petition). It is your responsibility to find out if a special statute sets an earlier deadline. If your petition is filed late, the appellate division may deny it.
- Fill out this form and make a copy of the completed form for your records and for the small claims court whose action or ruling you are challenging (called the respondent) and each of the other party or parties in the small claims case (called real party in interest).
- Serve a copy of the completed form on the small claims court and serve a copy of the form and a copy of form SC-300-INFO on each real party in interest and keep proof of this service. *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm*.
- Take or mail the completed form and your proof of service to the clerk's office for the appellate division of the court that took the action or issued the ruling you are challenging.

(1) Your Information

a. Petitioner (the party who is asking for the writ):

Name: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different)*: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail *(if available)*: _____

b. Petitioner's lawyer *(skip this if the petitioner does not have a lawyer for this petition)*:

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different)*: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail *(if available)*: _____

Fax *(if available)*: _____

The Small Claims Court Action or Ruling You Are Challenging

(2) I am/My client is filing this petition to challenge an action taken or ruling made by the small claims court in the following case:

a. Case name *(fill in the small claims court case name)*: _____

b. Case number *(fill in the small claims court case number)*: _____

(3) The small claims court action or ruling I am/my client is challenging is *(describe the action taken or ruling made by the small claims court)*: _____

(4) The small claims court took this action or made this ruling on the following date *(fill in the date)*: _____

(5) *If you are filing this petition more than 30 days after the date that you listed in (4), explain the extraordinary circumstances that caused the delay in filing this petition:* _____

The Parties in the Small Claims Court Case

(6) I/My client *(check and fill in a or b):*

a. ☐ was a party in the case identified in (2).

b. ☐ was not a party in the case identified in (2) but will be directly and negatively affected in the following way by the action taken or ruling made by the small claims court *(describe how you/your client will be directly and negatively affected by the small claims court's action or ruling):*

_____

_____

_____

_____

(7) The other party or parties in the case identified in (2) was/were *(fill in the names of the parties):*

_____

_____

Appeals or Other Petitions for Writs in This Case

(8) Did you or anyone else file an appeal about the same small claims court action or ruling you are challenging in this petition? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(fill in the date the appeal/new trial is set for):* _____

(9) Have you filed a previous petition for a writ challenging this action or ruling? *(Check and fill in a or b):*

a. ☐ No

b. ☐ Yes *(Please provide the following information about this previous petition).*

(1) Petition title *(fill in the title of the petition):* _____

(2) Date petition filed *(fill in the date you filed this petition):* _____

(3) Case number *(fill in the case number of the petition):* _____

If you/your client filed more than one previous petition, attach another page providing this information for each additional petition. At the top of each page, write "SC-300, item 9.")

Reasons for This Petition

(10) The small claims court made the following legal error or errors when it took the action or made the ruling described in (3) *(check and fill in at least one):*

a. ☐ The small claims court has not done or has refused to do something that the law says it *must* do.

(1) *Describe what you believe the law says the small claims court must do:* _____

_____

_____

_____

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the small claims court must do this:* _____

_____

_____

_____

10 (continued)

(3) *Identify the supporting documents (the documents from the small claims case) and describe what the judge said or did that shows that the court did not do or refused to do this:*

_____

_____

_____

_____

(4) *If something was said at the small claims court that is relevant to your request for a writ, provide a fair summary of what was said by you and others, including the court (other than what you described above), that is relevant to your request for writ.* _____

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "SC-300, item 10a."*

b. ☐ The small claims court has done something that the law says the court *cannot or must not* do.

(1) *Describe what the small claims court did:* _____

_____

_____

_____

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the small claims court cannot or must not do this:* _____

_____

_____

_____

(3) *Identify the supporting documents (the documents from the small claims case) and describe what the judge said or did that shows that the court did this:* _____

_____

_____

_____

(4) *If something was said at the small claims court that is relevant to your request for a writ, provide a fair summary of what was said by you and others, including the court (other than what you described above), that is relevant to your request for writ.* _____

_____

_____

_____

☐ *Check here if you need more space to describe the reason for your petition and attach a separate page or pages describing it. At the top of each page, write "SC-300, item 10b."*

10 (continued)

c. ☐ The small claims court has performed or said it is going to perform a judicial function (like deciding a person's rights under law in a particular situation) in a way the court does not have the legal power to do.

(1) *Describe what the small claims court did or said it is going to do:*

(2) *Identify the law (the section of the Constitution or statute, published court decision, or other legal authority) that says the small claims court does not have the power to do this:*

(3) *Identify the supporting documents (the documents from the small claims case) that shows that the court did or said it was going to do this:*

(4) *If something was said at the small claims court that is relevant to your request for a writ, provide a fair summary of what was said by you and others, including the court (other than what you described above), that is relevant to your request for writ.*

☐ *Check here if you need more space to describe this reason for your petition and attach a separate page or pages describing it. At the top of each page, write "SC-300, item 10c."*

d. ☐ *Check here if there are more reasons for this petition and attach an additional page or pages describing these reasons. At the top of each page, write "SC-300, item 10d."*

11 This petition will be granted only if there is no other adequate way to address the small claims court's action or ruling other than by issuing the requested writ.

a. *Explain why there is no way other than through this petition for a writ—through an appeal, for example—for your arguments to be adequately presented to the appellate division:*

b. *Explain how you/your client will be irreparably harmed if the appellate division does not issue the writ you are requesting:*

Order You Are Asking the Appellate Division to Make

12 I request that this court *(check and fill in all that apply):*

a. ☐ order the small claims court to do the following *(describe what, if anything, you want the court to be ordered to do):* _____

b. ☐ order the small claims court not to do the following *(describe what, if anything, you want the court to be ordered NOT to do)*: _____

c. ☐ issue a stay ordering the small claims court not to take any further action in this case until this court decides whether to grant or deny this petition *(describe below why it is urgent that the small claims court not take any further action and check the Stay requested box on page 1 of this form):*

I/My client:

(1) ☐ asked the small claims court to stay these proceedings, but the small claims court denied this request *(include in your supporting documents a copy of the small claims court's order denying your request for a stay).*

(2) ☐ did not ask the small claims court to stay these proceedings for the following reasons *(describe below why you did not ask the small claims court to stay these proceedings):*

d. ☐ take other action *(describe):* _____

e. ☐ grant any additional relief that the appellate division decides is fair and appropriate.

Supporting Documents

13 Are the following documents attached as required by rule 8.972(b)(1) *(Check a or b):*

- The small claims court ruling being challenged in this petition
- All documents and exhibits submitted to the small claims court supporting and opposing you/your client's position
- Any other documents or portions of documents submitted to the small claims court that are necessary for a complete understanding of the case and the ruling being challenged?

a. ☐ Yes, these documents are attached.

b. ☐ No, these documents are not attached for the following reasons *(explain why these documents are not attached and give a fair summary of what is in these documents. Note that rule 8.972 provides that, in extraordinary circumstances, the petition may be filed without these documents, but the petitioner must explain the urgency and the circumstances making the documents unavailable):*

14 Number of pages attached to this form, if any: _____

Date: _____

_____ ▶ _____

Lawyer's name (if any) *Lawyer's signature*

I declare under penalty of perjury under the laws of the State of California that the information above and on any attached pages providing further responses to the questions above is true and correct.

Date: _____

_____ ▶ _____

Type or print petitioner's name *Petitioner's signature*