JUDICIAL COUNCIL OF CALIFORNIA

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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 22, 2019

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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 an existing rule 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. 22, 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. The Supreme Court has held that this deadline is "merely directive," but may also serve as a benchmark "to guide courts, if meeting the limits is reasonably possible." (*Briggs v. Brown*, *supra*, 3 Cal.5th at p. 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 found 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 petition pertaining to the judgment that was previously filed in any court, along with any order that disposes of any claim or portion of a claim raised in a proceeding on such a petition.

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 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 4.574 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.

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

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 give 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 an 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 the 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

[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 jointly submitted a single 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.

organized by rule number or topic. Following the chart, at pages 96–163, are copies of a complete set of comments on this proposal in the form 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.

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 authorized 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 comports 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 proposed rules would 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 in its application what additional work was required to meet the extended deadline. 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 category 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 involves 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 "originating 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 originating 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 should expressly authorize the filing of so-called "*Morgan*" or "shell" petitions.[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 on noncomplying filings 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

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

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

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.

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 noncapital 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 may 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. For example, two superior courts stated that they would need to hire additional research attorneys to assist with these proceedings. 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.

[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).

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
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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Second Appellate District
Division Seven

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Proposition 66 Rules Working Group

As of February 5, 2018

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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.

 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 (*).

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	

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			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.

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	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.

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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. Position I agree with some of the proposals if they are modified. My position is spelled out in detail below.	

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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 (*).

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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.

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

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

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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.

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

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

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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)		
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	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.

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	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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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 4.571 (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.

 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 (*).

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.

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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 4.572 (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

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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Appellate
Project

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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].)

***

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.

***

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.

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- *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

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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