S238309

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

RON BRIGGS AND JOHN VAN DE KAMP,

Petitioners,

vs.

JERRY BROWN, in his official capacity as the Governor of California; KAMALA HARRIS, in her official capacity as the Attorney General of California; CALIFORNIA'S JUDICIAL COUNCIL; and DOES I THROUGH XX,

Respondents,

CALIFORNIANS TO MEND, NOT END, THE DEATH PENALTY– NO ON PROP. 62, YES ON PROP. 66,

Intervenor.

PRELIMINARY OPPOSITION OF INTERVENOR CALIFORNIANS TO MEND, NOT END, THE DEATH PENALTY– NO ON PROP. 62, YES ON PROP. 66 TO THE PETITION FOR EXTRAORDINARY RELIEF

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NO ON PROP. 62, YES ON PROP. 66

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I. Introduction.

Over the course of 44 years, the people of California have repeatedly and emphatically expressed their moral judgment that death is the appropriate punishment for the worst murderers and that properly imposed sentences of death should be carried out. In 1972, this court took it upon itself to declare the death penalty unconstitutional despite the fact that the constitutional convention had expressly considered the precise issue and decided it the other way. (See *People v. Anderson* (1972) 6 Cal.3d 628; Browne, Debates in the Convention of California (1850) pp. 45-46. The people swiftly and emphatically abrogated this decision. (See Cal. Const.,

art. I, § 27; 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment § 486 (purpose to nullify *Anderson*).)

The people voted for capital punishment again in 1978, when they enacted a broader capital punishment law to replace the narrow one passed by the legislature the year before over the governor's veto. (See Witkin & Epstein, Cal. Criminal Law, *supra*, § 486, p. 778.) Capital punishment was also included in subsequent ballot measures, including Propositions 114 and 115 of 1990, Propositions 195 and 196 of 1996, and Propositions 18 and 21 of 2000.

Yet despite the consistent popular support for capital punishment, the process of carrying it out has ground to a halt, and no judgments have been executed for almost 11 years. There are multiple reasons for this dysfunction, as discussed later in this brief under the individual provisions at issue. Opponents of capital punishment have cited this dysfunction as a reason to repeal it, but the people have rejected that alternative twice. In 2012, the people rejected repeal as proposed in Proposition 34 by a vote of 52.0% to 48.0%, a margin of nearly 500,000 votes. (See Cal. Secretary of State, Statement of the Vote, Gen. Elec. (Nov. 6, 2012) p. 69.) In the election just passed, the people rejected repeal by a *greater* margin than four years ago, 53.2% to 46.8%, a margin of nearly a million votes. (See Cal. Secretary of State, Statement of the Vote, Gen. Elec. (Nov. 8, 2016) p. 73.) The people of California have voted many times for capital punishment and never against it.

Given the people's consistent rejection of repeal, the choice is between reform to make the system effective and the dysfunctional, wasteful, pointless status quo. Proposition 66 was put on the ballot to give the people a chance of meaningful reform after attempts to fix the problem legislatively were killed in committee time after time. The people approved Proposition 66 and chose reform over the status quo. (See *id*. at p. 76.) The margin was narrow, to be sure, no doubt due in large part to a

confusing ballot label that merely described the procedural changes and failed to inform the voters of the purpose and effect of those changes.[1] Even so, Proposition 66 did prevail, and it is the decision of the people in our majority-rule democracy.

Petitioners Ron Briggs and John Van de Kamp now ask this court to preserve the dysfunctional status quo that both sides denounced during the campaign. They ask this court to nullify the people's choice to fix via Proposition 66 the system of capital punishment that they chose to keep when they rejected Proposition 62. Such a drastic action in defiance of the people's will would require exceptionally compelling justification. The petition in this case shows none. Its arguments are as thin as tissue paper.

II. There is no basis for enjoining the implementation of Proposition 66 as a whole.

A. Severability.

Petitioners have asked for a writ of mandate against enforcement and a declaration of voidness against Proposition 66 in its entirety, not discrete provisions of it. (See Amended and Renewed Petition for Extraordinary Relief 16-17.) Even if their arguments in Parts II, III, and V of their memorandum had merit (which they do not, as explained in Parts III and IV, *infra*), they would not warrant the relief requested. These parts are all wind-up and no pitch. They attack particular provisions of Proposition 66 but provide no argument at all as to why the supposed invalidity of these

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1. Before the election, public opinion polls that told the interviewees the purpose of Proposition 66 showed it winning by a large margin, while those that only gave interviewees the ballot label showed a smaller margin and a very large undecided portion. (See Scheidegger, *Polls and the Importance of Question Wording*, Crime and Consequences Blog (Sept. 23, 2016) <http://www. crimeandconsequences.com/ crimblog/2016/09/polls-and-the-importance-quest.html> [as of December 16, 2016] (collecting and linking several polls).)

provisions warrants the drastic action of striking down the initiative in its entirety.

Raven v. Deukmejian (1990) 52 Cal.3d 336 is a rare case finding that a constitutional amendment was actually a revision and therefore could not be made by initiative. That case involved a sweeping provision that effectively transferred the interpretation of the California Declaration of Rights as applied to criminal cases from this court to the United States Supreme Court. (See *id*. at p. 352.) Yet even this extreme provision did not warrant striking down the entire initiative. The duty of the court to preserve the people's precious right of initiative required that the invalid provision be severed and the rest of the initiative be given effect. (See *id*. at p. 341.)

In Part II, Petitioners complain about several reforms of the habeas corpus process, including specification of the appropriate venue, use of appeal rather than successive petition as the procedure for review of a denial, appointment of counsel by the superior court, and specification of the jurisdiction to consider method of execution challenges. (See Petitioners' Memorandum of Points and Authorities in Support of Amended and Renewed Petition for Extraordinary Relief 20-27 ("Pet. MPA"). In Part III, they complain about overall time limits, modifications of the existing limits on untimely and successive petitions, and specification of the issues which may be considered on appeal of a habeas denial. (See Pet. MPA 28-37.) In Part V, they attack the successive petition reform by claiming that providing different procedure for capital and noncapital cases lacks a rational basis in violation of the Equal Protection Clause (see Pet. MPA 52-55) a frivolous argument consistently rejected by state and federal courts nationwide. Completely absent from their memorandum is any argument at all that these provisions cannot be implemented independently of each other or that the other reforms in Proposition 66 cannot be implemented independently of the challenged ones.

These reforms are obviously independent. For example, the venue provision specifying which court should normally hear these cases, absent good cause to hear them elsewhere (see Prop. 66, § 6, *adding* Pen. Code, § 1509, subd. (a)), can be implemented independently of the provisions regarding the timeliness and successive petition rules. (See *id*. subds. (c), (d).) Rules imposing deadlines or giving preclusive effect to prior adjudication do not depend on which court hears the case and applies those rules.

The challenged reforms are similarly independent of those that are not challenged outside of the single subject claim. For example, section 11 of the initiative adds section 3604.1 to the Penal Code. The first sentence of subdivision (a) simply abrogates a relatively recent Court of Appeal decision that subjected execution protocols to the Administrative Procedure Act (APA) for the first time in history (see *Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729) and restores the law to what it was understood to be before that decision. (See *infra* at p. 20.) Petitioners provide no argument whatever why this provision cannot stand independently of the provisions they attack.

Proposition 66, like the measure at issue in *Raven*, contains an express severability clause. (See Prop. 66, § 21; *Raven*, 52 Cal.3d at p. 355.) Other than the single subject challenge, Petitioners have made no challenge to any provision that is not severable from other reforms in the initiative. Therefore, if this court decides that the single subject challenge is not valid, Petitioners are not entitled to the relief they seek regardless of the merits of their other arguments.

B. Single Subject.

Petitioners' challenge to four of Proposition 66's provisions on grounds the measure violates the Constitution's single subject rule (Cal. Const., art. II, § 8, subd. (d)) is unsupportable. This court's recent decision

in *Brown v. Superior Court* (2016) 63 Cal.4th 335, 350 [Proposition 57] conclusively refutes that contention.

In *Brown v. Superior Court*, this court affirmed the traditional liberal construction of the single subject rule for initiative measures, and the standard that provisions of a measure must only be "reasonably germane" to one another.

> "We have long held that the constitutional 'single subject' rule is satisfied 'so long as challenged provisions meet the test of being *reasonably germane* to a common theme, purpose, or subject.' (*Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 764 (*McPherson*), and cases cited.) This standard reflects our ' "liberal interpretative tradition . . . of sustaining statutes and initiatives which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose." ' (*Legislature v. Eu* (1991) 54 Cal.3d 492, 512, quoting *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 253.)"

(*Id*. at p. 350, original italics.)

> "Accordingly, we review this proposed measure remembering 'that the initiative process occupies an important and favored status in the California constitutional scheme,' and therefore the 'reasonably germane' standard 'should not be interpreted in an unduly narrow or restrictive fashion.' (*Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1157, and cases cited.) We have consistently deemed it our duty to guard the people's right to exercise the initiative power. (*Id.* at p. 1168.) The proponents of an initiative measure are captains of the ship when it comes to deciding which provisions to take on board."

(*Id*. at p. 351.)

The Petitioners challenge four specific provisions of Proposition 66 as not reasonably germane to the chief purposes of the measure. The challenged provisions are:

1. Proposition 66, section 8, *adding* Penal Code, section 2700.1, which provides for victim restitution along with the requirement that death-sentenced prisoners work if they are determined by the California Department of Corrections & Rehabilitation (CDCR) to be able to do so. (See Pet. MPA, Part IV B.)

2. Proposition 66, section 11, *adding* Penal Code, section 3604.1, which exempts CDCR's death penalty protocol decisions from APA review. (See Pet. MPA, Part IV C.)

3. Proposition 66, section 12, *adding* Penal Code, section 3604.3, which authorizes physicians to provide advice to CDCR to develop an execution protocol which minimizes the risk of pain to the inmate and protects physicians who do so from adverse actions by licensing boards and other entities. (See Pet. MPA, Part IV D.)

4. Proposition 66, section 17, *amending* Gov. Code, section 68664, subdivisions (b) and (c), which places the Habeas Corpus Resource Center (HCRC) under the purview of this court, disbanding its separate governance. (See Pet. MPA, Part IV E.)

Section 2 of Proposition 66, which was entitled "Death Penalty Reform and Savings Act of 2016," reflects the measure's purposes in 11 findings and declarations. All 11 of these findings and declarations relate to the overall theme of *enforcing judgments in capital cases*. The judgment in a capital case is not limited to the execution itself. "Imprisonment pending execution of a death sentence is a part of the punishment for the crime." (*People v. Rittger* (1961) 55 Cal.2d 849, 852.) Restitution is also part of the criminal judgment. (See Pen. Code, § 1202.4, subd. (b); Cal. Const., art. I, § 28, subd. (b)(13).)

Petitioners note, correctly, that the theme of an initiative cannot be so broad as to render the single subject requirement meaningless, and that themes which have been held to violate this standard include "voter

approval," "fiscal affairs," "statutory adjustments," "public disclosure," "truth-in-advertising," and "regulation of the insurance industry." (See Pet. MPA 42.) However, this court has upheld against single subject challenges a number of initiatives with themes much broader than Proposition 66's. These include "real property tax relief" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 230), "political practices" (*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 43), "promoting the rights of actual or potential crime victims" (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 247; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 347), "problems caused by tobacco use" (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 253), and "incumbency reform." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 512.)

Viewed next to these broad but valid themes, Proposition 66's theme of enforcement of judgments in capital cases is laser focused in comparison. It has many provisions because it deals with a complex subject. "Our society being complex, the rules governing it whether adopted by legislation or initiative will necessarily be complex." (*Fair Political Practices Com. v. Superior Court*, 25 Cal.3d at p. 42.) The enforcement of judgments in capital cases has been attacked on many fronts, and an effective reform must therefore respond on many fronts. To hold that Proposition 66's theme is excessively broad (see Pet. MPA 43), this court would have to clear-cut nearly four decades of precedent, and it would cripple the ability of the people to address complex problems with comprehensive reforms by initiative.

The four provisions of Proposition 66 that the Petitioners allege do not fall within the single subject of the measure consist of provisions directly addressed in the purposes of Proposition 66, section 2, and they are germane to the overall theme of making the enforcement of capital

judgments more effective, more timely, and less expensive.[2] As this Court made clear in *Brown v. Superior Court*, *supra*, "the 'reasonably germane' standard 'should not be interpreted in an unduly narrow or restrictive fashion' " in order to fulfill the Court's role as jealously guarding the initiative power and process. (63 Cal.4th at p. 351, quoting *Senate of the State of California v. Jones* (1999) 21 Cal.4th 1142, 1157.)

1. Work and Victim Restitution.

Providing for victim restitution associated with the requirement that eligible death-sentenced prisoners work (Prop. 66, § 8, *adding* Pen. Code, § 2700.1) implements Finding and Declaration #5 and is directly related to enforcing the imprisonment and restitution portions of the judgment in criminal cases. Imprisonment until execution is part of the judgment, as noted *supra*, and a requirement to work has long been part of imprisonment under California law. (See Pen. Code, § 2700.) A requirement that death row inmates not be exempt by reason of their sentence alone is germane. The Marsy's Law initiative (Prop. 9, 2008, *adding* Cal. Const., art. I, § 28(b)(13)) presently requires restitution awards, but they are unenforce-able unless the inmate has some assets or income. The work requirement provides a method of at least partially enforcing the restitution portion of the judgment, even if a small part.

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2. At one point, Petitioners refer broadly to "sections 8 through 14 and sections 17 and 18" of the initiative. (See Pet. MPA 46.) However, these sections include such obviously germane provisions as removing the pointless statutory requirement that nearly all male death row inmates be housed at antiquated San Quentin, thereby allowing CDCR to house them wherever makes the most economic sense within the constraints of needed security. (See Prop. 66, § 9, *amending* Pen. Code, § 3600; Cal. Legislative Analyst's Office, 2007-08 Analysis, Judicial and Criminal Justice, D-77 to D-79.) Intervenor therefore responds only to the four specific challenges.

The provision bears a reasonable and common-sense relationship among the various components of Proposition 66 in furtherance of a common purpose or purposes, enforcing judgments in capital cases, and as such is "reasonably germane" to those purposes.

It is worth noting that inmate work and victim restitution provisions have been included in all three of the capital punishment initiatives that the people have voted on in the last four years. The provision for victim restitution by eligible death row inmates was a feature of Proposition 34, the death penalty repeal measure that was rejected by voters in 2012. Moreover, the proponents of Proposition 62, the death penalty repeal measure that appeared on the November 8, 2016 ballot opposite Proposition 66, contained a similar provision. (Prop. 62, § 2, Findings and Declarations, #1, 5, and 6; *id*. § 3, Purpose and Intent, subd. 2.) Petitioner Briggs signed the ballot pamphlet rebuttal to the argument against Proposition 62, arguing that it would "keep vicious killers locked up, working and paying restitution to the families of their victims." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) p. 83.) Such regularity of inclusion further negates the idea that provisions of this type are unrelated.

2. Execution Protocols and the APA.

Exempting CDCR's death penalty protocol decisions from APA review (Prop. 66, § 11, *adding* Pen. Code, § 3604.1) implements Findings and Declarations #1 and 9 and also relates to enforcing capital judgments and doing so within a reasonable time.

Since 2006, execution of capital sentences in California have been hit with injunctions from two directions. A federal district court enjoined the use of the prior three-drug protocol but held that "execution accomplished solely by an anesthetic, such as sodium pentobarbital, would eliminate any constitutional concerns . . . ." (See *Morales v. Tilton* (N.D.Cal. 2006) 465 F.Supp.2d 972, 983.) Despite this ruling, CDCR failed to establish a barbiturate-only protocol until forced to do so by litigation. The protocol

was finally published in the California Regulatory Notice Register on November 6, 2015. (See California Department of Corrections & Rehabilitation, History of Capital Punishment in California < http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html> [as of Dec. 12, 2016].)

The other injunction preventing execution of capital judgments is based on the APA. In 2008, the Court of Appeal for the First District held that execution protocols are subject to the APA even though they never had been before (see *Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729), and CDCR strangely sought only depublication, not review. This court denied depublication and declined to review the case on its own motion. (See *Morales v. California Dept. of Corrections & Rehabilitation* (Feb. 25, 2009, No. S169827.) CDCR then attempted to comply with the APA. The Office of Administrative Law (OAL) found that it had validly done so on the second attempt (see *Sims v. California Dept. of Corrections & Rehabilitation* (2013) 216 Cal.App.4th 1059, 1064), but the Court of Appeal applied an exacting standard of review and held, contrary to the OAL finding, that CDCR had not complied with the APA. (*Id*. at p. 1075.) It upheld an injunction against carrying out any executions until CDCR had issued a protocol complying with the APA. (See *id*. at pp. 1083-1084.) That injunction remains in effect to this day.

Given this history, to say that abrogating *Morales* "is far afield from Proposition 66's general purpose" (Pet. MPA 48) is absurd, and Petitioners do so only by stating their own narrow view of the purpose. The initiative is all about enforcing capital judgments, and this provision removes the basis for an existing statewide injunction against carrying out death sentences. This provision has much more than a "reasonable and common sense relationship" to the central purpose of the initiative; it has a powerful and direct relationship.

3. Protection of Assisting Medical Professionals.

As the federal litigation discussed in the previous section illustrates, enforcement of capital judgments can be halted statewide if CDCR is not able to develop an execution protocol that complies with the Eighth Amendment or not able to defend that protocol when it is challenged. Expert advice and testimony are obviously essential. (See, *e.g.*, *Glossip v. Gross* (2015) 135 S.Ct. 2726, 2740-2741 (noting "battle of experts" testimony).) New Penal Code section 3604.3 authorizes physicians to provide such advice in subdivision (a) and authorizes pharmacists to provide the needed drugs in subdivision (b). However, medical professionals providing the needed assistance have been threatened in recent years with politically motivated expansions of the prohibition against participating in executions that go far beyond the prior limited understanding of that rule to prohibit even the giving of advice.

For example, in North Carolina, the state medical board has taken the extreme position that even "rendering of technical advice regarding execution" is an ethical violation. (See North Carolina Medical Board, Position Statement on Capital Punishment <http://www.ncmedboard.org/resources-information/professional-resources/laws-rules-position-statements/position-statements/print/ capital_punishment> [as of Jan. 4, 2017].) Only intervention by the courts in a suit by the state corrections department prevented the imposition of professional discipline. (See *North Carolina Dept. of Corrections v. North Carolina Med. Bd.* (2009) 363 N.C. 189, 205, 675 S.E.2d 641, 651 ("Position Statement exceeds its authority").) The North Carolina ruling depended on a state statute (see *ibid*.), and until Proposition 66 California had no comparable statute. Subdivision (c) therefore provides these professionals with protection. Petitioners baldly assert without any citation or discussion that this protection of essential assistance has no relation to the theme of Proposition 66. (See Pet. MPA 49.) It is not only germane, it is necessary to the enforcement of capital judgments.

4. HCRC Governance.

Placing the Habeas Corpus Resource Center (HCRC) under the purview of the California Supreme Court and disbanding its separate governance (Prop. 66, § 17, *amending* Gov. Code, § 68664, subds. (b) and (c)) implements Findings and Declarations #1, 3, 6, and 8. It is related to achieving fiscal savings from reducing waste and inefficiencies in the system and to reducing delay by ensuring accountability of the HCRC, which has been operating without effective oversight.

HCRC was created by SB 513 in 1997. (See Stats. 1997, ch. 869, § 3, pp. 6236-6238.) In the political compromise needed to get the bill passed, HCRC was not placed in the executive branch with appointment by the Governor. (Cf. Gov. Code, § 15400 (State Public Defender).) Instead, it was placed in the judicial branch and governed by a board elected by organizations of criminal defense lawyers. (See Gov. Code, §§ 68661, 68664 (prior to amendment by Prop. 66).) An organization spending 15 million dollars of taxpayer money a year (see Cal. Dept. of Finance, 2016-17 State Budget, Judicial Branch <http://www.ebudget.ca.gov/ 2016-17/Enacted/StateAgencyBudgets/ 0010/0250/department.html> [as of Dec. 13, 2016]) is not responsible, directly or indirectly, to any official elected by the people.[3]

Given its governance, it is not surprising that HCRC has shown little interest in the purpose for which it was created: reducing delay in capital cases. Among the HCRC board's initial actions was the appointment of Michael Laurence as executive director. Mr. Laurence was a leading member of the legal team that had been chastised by the United States Supreme Court for "abusive delay . . . compounded by last-minute attempts

3. The constitutionality of HCRC's pre-Proposition 66 governance is doubtful. (See Cal. Const., art. XVI, § 3.) The initiative moots that question.

to manipulate the judicial process." (*Gomez v. United States District Court* (1992) 503 U.S. 653, 654 (*per curiam*).)

The work HCRC is authorized to perform is listed in the pre-Proposition 66 version of section 68661 of the Government Code. All of it relates to postconviction and clemency proceedings in capital cases. Not a word authorizes civil litigation. Yet HCRC has seen itself as a general litigation agency for condemned murderers. It has spent its resources in unauthorized work to the detriment of the job it was created to do. Appendix A is a scheduling statement and supporting declaration of Michael Laurence filed February 17, 2009, in a federal habeas corpus case, *Ashmus v. Wong*, (N.D.Cal., 93-594).[4] To support HCRC's argument that it needed more time in that case than the Attorney General proposed, Mr. Laurence explained in paragraph 4 that he was tied up with his extensive work as primary counsel in a civil case in federal court to block the implementing regulations for the federal habeas corpus "fast track," work unauthorized by the law creating HCRC. In paragraph 5, he discussed his work in a Public Records Act case, also unauthorized by law and with only the most tangential relation to the purposes for which HCRC was created. Last year, HCRC represented condemned murderer Mitchell Sims in a civil case, attempting to intervene to oppose the promulgation of an execution protocol.[5] (See Appendix B.) Again, this civil litigation was not authorized by law, and the resources spent on it are necessarily resources not spent on HCRC's real mission of providing counsel in capital habeas corpus cases.

This diversion of resources from HCRC's authorized mission is directly addressed in section 15 of Proposition 66, which Petitioners admit

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4. A request for judicial notice of these documents is filed concurrently with this opposition.

5. Proponent Kermit Alexander was a petitioner in that case. The petitioners were represented by Kent Scheidegger, counsel in this case.

serves the general purpose of the initiative. (See Pet. MPA 45.) Clearly, then, replacement of the irresponsible governing board that permitted the diversion in the first place is "reasonably germane" to the same purpose.

5. Conclusion.

"Whether or not these various provisions are wise or sensible, and will combine *effectively* to achieve their stated purpose, is not [the court's] concern in evaluating the present single-subject challenge." (*Legislature v. Eu*, 54 Cal.3d at p. 514, original italics.) It is sufficient that the framers of the initiative reasonably believe that the provisions will reduce the evil at which the initiative is directed. (See *id*. at pp. 513-514.) *Legislature v. Eu* does not state a standard for evaluating the framers' belief, but given the broad, deferential wording of the opinion it seems clear that a mere rational basis will suffice.

All of the challenged provisions "fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose," the longstanding standard for evaluating single subject compliance as set forth in *Legislature v. Eu*, *Brosnahan v. Brown* and affirmed recently in *Brown v. Superior Court*.

Petitioners wish to take charge and captain the ship (see *supra*, at 15) by their challenge to Proposition 66 on single subject grounds. However, their role is not captain of the ship—and the proponent of Proposition 66 performed his constitutional mandate as captain of the ship when it comes to deciding which provisions to take "on board" the measure.

For these reasons, Petitioners' single subject rule challenge should be denied. Given that none of the other arguments made by Petitioners could possibly justify enjoining enforcement of the entire initiative, the court can and should stop there. Even so, we will continue on to demonstrate that the other challenges lack merit. If the court does decide to proceed past the preliminary opposition stage, by issuing an order to show cause, to consider

challenges to individual provisions, the blanket stay issued on December 20 should be lifted. The claim that Proposition 66 is invalid in its entirety has essentially zero chance of success, and the work of implementing the unchallenged provisions should not be further delayed. The state should not waste resources litigating the APA compliance of the new execution protocol when there is no genuine question that the people could and did exempt execution protocols from the APA.

III. The habeas corpus reforms are well within the people's reserved legislative power.

A. Habeas Corpus Venue.

In re Roberts (2005) 36 Cal.4th 575, 582 (*Roberts*) noted that even though all three levels of California courts have statewide habeas corpus jurisdiction there are "procedural rules governing the choice of an *appropriate venue* to entertain a petition for writ of habeas corpus." (Italics added.) Petitioners' attack on the venue provision of Proposition 66 (§ 6, *adding* Pen. Code, § 1509, subd. (a)), simply ignores the distinction between venue and jurisdiction. The word "venue" is conspicuous by its absence from their discussion. Petitioners simply ignore the main holding of *Roberts*, even while citing that case. (See Pet. MPA 22.)

The relevant history is traced in *Roberts*. Briefly, the constitutional provision on habeas corpus jurisdiction was revised in 1966 to grant statewide jurisdiction to the superior and appellate courts. (36 Cal.4th at p. 582; Cal. Const., art. VI, § 10.) However, this sweeping jurisdictional provision did not give prisoners *carte blanche* to file anywhere they choose and demand that their petition be decided in the court of their choice. "Our conclusion that a territorial limitation on the exercise of habeas corpus jurisdiction no longer exists does not mean that this court cannot provide rules of judicial procedure to be followed by superior courts in the exercise

of that unlimited jurisdiction." (*Griggs v. Superior Court* (1976) 16 Cal.3d 341, 346-347.)

In *Griggs*, this court established a procedure whereby the court in which the petition was filed first reviewed it to determine if it stated a prima facie case. "If the challenge is to a particular judgment or sentence, the petition should be transferred to the court which rendered judgment if that court is a different court from the court wherein the petition was filed . . . ." (*Id*. at p. 347.) Except for the screening for a prima facie case, the provision of Proposition 66 at issue is identical to the rule this court established in *Griggs* and found to be fully compatible with the jurisdictional provision of the Constitution.

Petitioners quote *Roberts* for the proposition that "*generally speaking* a petition for writ of habeas corpus should not be transferred to another court *unless* a substantial reason exists for such transfer." (See 36 Cal.4th at p. 585, italics added; Pet. MPA 22.) Far more important here is the specific rule of the case. *Roberts* reaffirmed the holding of *Griggs* that directing collateral attacks on criminal judgments to the original trial court was a sufficiently substantial reason, and *Roberts* even extended that holding to review of parole decisions. (See 36 Cal.4th at pp. 586-588.)

Although not necessary to its constitutionality, it is worth noting here that the *Griggs*/Proposition 66 rule of directing collateral attacks on criminal judgments to the original trial court is widely recognized as good policy. Congress took this step in 1948 (see 28 U.S.C. § 2255), and the United States Supreme Court upheld it. (See *United States v. Hayman* (1952) 342 U.S. 205 (unanimous in result).) Just one day before the election at which the people adopted Proposition 66, this court unanimously declared, "When the judge assigned to examine and rule on the habeas corpus petition is the same judge who presided at the petitioner's criminal trial, 'there is no judge better suited for making a determination of the issues raised in [the] petitioner's petition' . . . ." (*Maas v. Superior

Court (2016) 1 Cal.5th 962, 980, citation omitted.) In the specific context of capital cases, sending the habeas corpus workload to the superior courts will "radically reduce the Supreme Court's backlog." (Alarcon, Remedies for California's Death Row Deadlock (2007) 80 So.Cal.L.Rev. 697, 743.)

The rules established in the *Griggs-Roberts* line of cases do not come from the Constitution. They are explicitly based on this court's supervisory power over the courts of the state. (See *Roberts*, 36 Cal.4th at p. 593.) Unlike rules that are founded directly on the Constitution, supervisory power rules are "subordinate to legislative will." (*People v. Storm* (2002) 28 Cal.4th 1007, 1024, fn. 7.)

Petitioners rely on *In re Kler* (2010) 188 Cal.App.4th 1399, but that case is not to the contrary. *Kler* held that a rule of court promulgated to implement *Roberts* could not prevent a court of appeal from hearing a habeas corpus parole case in the first instance when that case "present[ed] an 'extraordinary' situation" in which "no court is better suited to first consider this petition; no court is more familiar with the intricate details of the case." (*Id*. at p. 1404.) The "good cause" standard of Proposition 66 easily accommodates this variation on the theme. In almost all cases, it will be the superior court that fits that description, as this court said in *Maas*, *supra*, but if an extraordinary case should arise where an appellate court is the better venue, as in *Kler*, that is "good cause."

Petitioners contend that the rule of court in *Kler* "did not pose an absolute bar to the Court of Appeal's jurisdiction" citing pages 1402-1403 of *Kler*. (See Pet. MPA 27.) *Kler* does, in fact, interpret the rule as absolute. *Kler* emphasized that *Roberts* said "should" while the rule said "must." (See 188 Cal.App.4th at 1402-1404.) Petitioners quote Proposition 66 saying "should" and in the same paragraph tell this court it means "must" (Pet. MPA 23-24) ignoring the distinction that *Kler* found controlling.

The statutory venue rule of Proposition 66 differs only slightly from the case law venue rule of *Griggs*. It allows a court other than the original trial court to make an exception and hear a habeas corpus petition when good cause is shown. This rule falls easily within the people's reserved legislative authority. The claim that it is inconsistent with article VI, section 10 of the California Constitution has no merit.

B. Successive Petitions.

Of all the steps in the review of capital cases, no step has been more wasteful and less productive than successive habeas corpus petitions. The capital defense bar has routinely abused this process to bury this court in worthless paper. *In re Clark* (1993) 5 Cal.4th 750 established criteria for successive petitions that are rarely met, and that should have fixed the problem. Regrettably, it did not. "In the 18 years since *In re Clark*, . . . experience has taught that in capital cases, petitioners frequently file second, third, and even fourth habeas corpus petitions raising nothing but procedurally barred claims." (*In re Reno* (2012) 55 Cal.4th 428, 458.) The petition in *Reno* exemplified abusive practices. It was over 500 pages raising 143 claims, nearly all of which were either not cognizable or procedurally barred, and such abuse is common. (See *id*. at p. 443.) These petitions are a heavy burden on judicial resources (see *id*. at pp. 452-453) and a largely unnecessary one.

The problem of abusive habeas corpus petitions is not limited to California. The evolution of the federal rule is instructive, particularly for its demonstration that the legislative and judicial branches both have roles to play in formulating an appropriate rule.

The federal courts have had a statutory successive petition rule since the adoption of the modern judicial code in 1948. (See Historical and Revision Notes to 28 U.S.C. § 2244, 28 U.S.C., p. 489 (2015).) The language was general, however, and in 1963 the Supreme Court construed this language so broadly as to open the doors wide to successive petitions

and potential abuse. (See *Sanders v. United States* (1963) 373 U.S. 1, 16-17.) Congress revised the language in 1966 (see Pub.L. No. 89-711, 80 Stat. 1104), but the new language was still vague ("otherwise abused the writ"), and the Supreme Court did not give the new law concrete meaning for over 20 years.

In 1986, Justice Lewis Powell, writing for a plurality of the United States Supreme Court, examined the statute and its history, noting the purpose "to introduce 'a greater degree of finality' " while still providing for the "rare case" when the " 'ends of justice' " would be served by considering a successive petition seeking to relitigate a previously denied claim. (See *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 450-452.)[6] "Our task is to provide a definition of the 'ends of justice' that will accommodate Congress' intent to give finality to federal habeas judgments with the historic function of habeas corpus to provide relief from unjust incarceration." (*Id*. at pp. 451-452.) The plurality concluded that "ends of justice" means factual innocence. They adopted for successive petitions the standard proposed in 1970 by Judge Henry Friendly for collateral review of criminal judgments generally. Review should only be provided to prisoners who have colorable claims of factual innocence, considering all available evidence, admissible or not, in making that determination. (See *id*. at p. 454; Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments (1970) 38 U. Chi. L. Rev. 142, 160.)

The *Kuhlmann* plurality decided to dispense with inquiries about why a prior adjudication ended with a result that is arguably wrong. The reason might well have been beyond the petitioner's control, such as a new precedent being decided after the resolution of his first petition. (See 477 U.S. at pp. 442-443.) The appropriate balance of the need for finality with

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6. Parts II and III of *Kuhlmann*, the parts relevant here, are a plurality opinion. Parts I, IV, and V are the opinion of the Court. (See *id*. at p. 438.)

the need to correct fundamentally unjust incarcerations was best served, in the plurality's view, by going straight to the question of actual innocence. If overwhelming evidence demonstrates guilt, nothing further need be decided. (See *id*. at p. 455.) That necessarily means that some guilty prisoners might remain in prison or be executed under judgments that might be decided differently if they were reconsidered *de novo*, but in the absence of an actual miscarriage of justice such a result was deemed to be a price worth paying for the finality needed in the criminal law.

Kuhlmann was never accepted by a majority of the high court. In 1991, the Supreme Court made a different rule for cases in which a new claim was raised in a second or subsequent petition. In *McCleskey v. Zant* (1991) 499 U.S. 467, 493, the high court adopted for this class of cases the same rule it had crafted for claims defaulted in an earlier review, *i.e.*, defaulted in state court for state-prisoner cases or defaulted on direct appeal for federal-prisoner cases. This standard requires either (1) " 'some objective factor external to the defense' " plus resulting prejudice or (2) an "extraordinary instance[] when a constitutional violation probably has caused the conviction of one innocent of the crime." (*Id*. at pp. 493-494.)

The following year, the Supreme Court clarified that the "actual innocence" or "miscarriage of justice" exception under federal law includes *ineligibility* for the punishment. (See *Sawyer v. Whitley* (1992) 505 U.S. 333, 345.) It does not, however, extend to the jury's discretionary decision to impose the death penalty after weighing the aggravating and mitigating factors. In most states, that means that if the defendant is clearly guilty of first-degree murder plus a statutory aggravating circumstance (known in California as a "special circumstance") and no categorical exclusion applies, the eligibility inquiry is concluded. (See *id*. at pp. 344-345.)[7] The defendant's mitigating evidence is irrelevant to the miscarriage

7. *Sawyer* did not address categorical exclusions from punishment as ineligibility claims, but Proposition 66 treats them as such, so we assume

of justice inquiry. (*Id*. at pp. 345-346.) The standard under this line of cases is quite demanding:

> "The meaning of actual innocence as formulated by *Sawyer* and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that *no reasonable juror* would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, *no juror*, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." (*Schlup v. Delo* (1995) 513 U.S. 298, 329, italics added.)

Four years after *Sawyer*, Congress decided that both the *Kuhlmann* and *McCleskey* standards provided insufficient finality and replaced them both with more stringent standards. In lieu of *Kuhlmann* we have an absolute bar. Claims litigated in a first petition must be dismissed in a second with no exceptions. (See 28 U.S.C. § 2244(b)(1).) In lieu of *McCleskey*, claims omitted from a first petition must be dismissed from a second unless the petitioner shows either (A) a retroactive new rule of constitutional law, or (B) both facts that could not have been discovered previously *and* actual innocence of the underlying offense using the *Sawyer* standard. (See 28 U.S.C. § 2244(b)(2).)

In practice, the retroactive new rules under paragraph (A) have been innocence or eligibility claims, including categorical exclusion claims. Procedural changes are not retroactive on habeas corpus, even when they involve constitutional claims as basic as trial by jury. (See *Schriro v. Summerlin* (2004) 542 U.S. 348, 358.) On the other hand, claims that a death row inmate is ineligible on the ground of intellectual disability were considered on the merits in successive petitions filed after *Atkins v.*

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for the sake of argument that they are.

Virginia (2002) 536 U.S. 304. (See, *e.g.*, *Moormann v. Schriro* (9th Cir. 2012) 672 F.3d 644, 648-649.)[8]

In cases not involving a retroactive new rule, the federal standard is severe. A claim of actual innocence alone, no matter how strong, would not be enough. Paragraph (b)(2)(B)(i) requires in addition that the facts had not been previously discoverable. Where the previously undiscoverable facts requirement is met, paragraph (b)(2)(B)(ii) still requires "clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

Even so, the United States Supreme Court swiftly and unanimously rejected a constitutional attack on this statute. The decisions about which successive petitions should be considered had been made largely in case law to that point, but that did not prevent Congress from exercising its authority to legislate in the area. "[J]udgments about the proper scope of the writ are 'normally for Congress to make.' " (*Felker v. Turpin* (1996) 518 U.S. 651, 664, quoting *Lonchar v. Thomas* (1996) 517 U.S. 314, 323.)

The contention that the new limitation on successive petitions amounted to an unconstitutional suspension of the writ of habeas corpus had no merit.

> "The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.' . . . The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process [described in *McCleskey*], and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9." (*Id*. at p. 664.)

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8. *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, 734 held that *Miller v. Alabama* (2012) 132 S.Ct. 2455 was retroactive by characterizing it as an eligibility decision.

With the federal example in mind, we return to Proposition 66. California's new statutory successive petition rule is far more generous to defendants than the federal statute unanimously upheld in *Felker*. It is similar to the rule that a plurality of the United States Supreme Court decided was appropriate in *Kuhlmann*, *supra*. No showing that the facts were previously undiscoverable is required. To get a stay of execution in order to have his claim considered, the petitioner need only show a "substantial claim" of actual innocence. (Pen. Code, § 1509, subd. (d).) To prevail on the merits he need only make his case by the preponderance of the evidence. (*Ibid*.) Unlike the federal statute, there is no "clear and convincing" requirement. No reference to the minimum evidence that *any* reasonable factfinder might have found sufficient to convict is required. Eligibility is defined consistently with *Sawyer*, explicitly including categorical exclusions such as minority and intellectual disability. Unlike the federal statute, "innocence" is not limited to innocence of the underlying offense, *i.e.*, murder. A petitioner can be guilty of murder and still meet Proposition 66's requirement of ineligibility for the punishment.

Petitioners make no mention of the California equivalent of the Suspension Clause, article I, section 11 of the California Constitution. They do not ask this court to construe it differently from the federal clause interpreted in *Felker*. Instead they oddly claim that because Proposition 66 makes a different value judgment about what amounts to a "fundamental miscarriage of justice" it somehow places "undue restrictions on the courts' constitutional power to adjudicate habeas corpus proceedings . . . ." (See Pet. MPA 39; see also Pet. MPA 27.)

Such an argument would require far more support than Petitioners have provided, if indeed such an argument could be made at all. Establishing the rules of law by which courts will decide cases in the future is the very essence of the legislative power. "The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to 'prescribe the rules by which the duties and rights

of every citizen are to be regulated,' but the power of 'the interpretation of the laws' would be 'the proper and peculiar province of the courts.' " (*Plaut v. Spendthrift Farm* (1995) 514 U.S. 211, 222, quoting Federalist No. 78.)

Generally speaking, the legislative authority[9] has plenary authority to determine the rules of law, both substantive and procedural, by which causes of action will be decided by the courts. As the U.S. Supreme Court noted in *Felker*, *supra*, habeas corpus is not an exception to this principle. There are, of course, limitations. The constitutional requirement of due process forbids some grossly unfair procedures. (See, *e.g.*, *Mullane v. Central Hanover Bank* (1950) 339 U.S. 306, 314 (notice reasonably calculated to apprise parties of action).) There are also constitutional limitations on substantive law. (See Cal. Const., art. I, §§ 17, 27 (cruel or unusual punishment, specifically excluding the death penalty).)

Yet Petitioners do not invoke any of these limitations. They simply characterize Proposition 66's reforms as "extreme" (Pet. MPA 37), despite the fact that they are more generous to habeas petitioners than the limits that Congress has deemed appropriate for federal courts and the U.S. Supreme Court has upheld, as well as more generous for petitioners claiming actual innocence than the existing California successive petition rule.[10] Petitioners are entitled to that opinion, of course. They were entitled to make that case to the people, and they did. The people decided

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9. In California, unlike the federal government, the people have not delegated the entire legislative authority to their elected representatives but have retained a portion themselves. (Cal. Const., art. II, §§ 8, 9; Cal. Const., art. IV, § 1.) We therefore use the term "legislative authority" to include both the Legislature and the people by initiative and referendum.

10. Petitioners' claim that Proposition 66 makes execution of an innocent person more likely (Pet. MPA 39) is completely wrong. The initiative *lowers* the bar for actual innocence claims. There are, of course, very few such claims of any substance in California capital cases.

against them. Absent any specific provision of the Constitution removing the decision of these questions of policy from the legislative authority, and Petitioners have cited none, it is not for this court to decide otherwise.

Petitioners bemoan the fact that Proposition 66 disrupts existing law by making a different rule from the rule of *In re Clark* and *In re Robbins* (1998) 18 Cal.4th 770. (See Pet. MPA 36-38.) Of course it does. Major reforms are supposed to be disruptive. If the existing system were functioning well, no reform would be needed. The failure of *Clark* to adequately restrain successive petitions was a major reason the system was "broken," and a more stringent rule was needed to fix it.

Petitioners cite *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45 for their claim that Proposition 66's limits on habeas corpus violate the separation of powers (see Pet. MPA 39), but that case is actually strong authority to the contrary. That opinion notes that a statute is not unconstitutional merely because it "increases a court's burden" or "restrict[s] the authority previously exercised by the court." (*Id*. at p. 59, fn. 6.) The separation of powers doctrine points in the other direction. "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Id*. at p. 53.)

In *County of Mendocino*, this court rejected a facial separation-of-powers attack on a statute that directed that a court not be in session on designated unpaid furlough days. The claim was "untenable," and the statute did not impair any function reserved to the judicial branch. (See *id*. at p. 61.) The statute in this case is even further removed from interference in the judiciary's performance of its functions. Proposition 66's successive petition rule does not prevent a court from deciding a successive petition; it prescribes a rule of law by which the decision is to be made. Petitioners

are the ones who seek a violation of the separation of powers by asking this court to supplant the policy judgment of the people on a matter within their retained legislative power.

Petitioners have cited no constitutional prohibition. They simply disagree with the policy choices made by Proposition 66's new successive habeas corpus rule. The rule is valid on its face. Details of its implementation can and should await concrete cases.

C. Untimely Petitions.

Similar considerations apply to the new timeliness requirement. Petitioners describe the preexisting rule on timeliness, with its vague and broadly worded language, as if it were a successful and essential body of jurisprudence. (See Pet. MPA 36-37.) However, the Habeas Corpus Resource Center informed the United States Supreme Court that fixed limits are the norm and California is very much the outlier. (See Brief for the Habeas Corpus Resource Center as Amicus Curiae in *Walker v. Martin*, U.S. Supreme Court No. 09-996, pp. 12-13 <http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/09-996_RespondentAmCuHabeasCorpusResCtr.pdf> [as of December 16, 2016].) HCRC argued that this "indeterminate" rule failed to give petitioners notice as to when their petitions were due, was subject to arbitrary application, and was inadequate for federal procedural default purposes. (See *id*. at pp. 4-5, 10-15.) Although the high court rejected the argument that these issues rendered the rule "inadequate" as a matter of federal law (see *Walker v. Martin* (2011) 562 U.S. 307, 318-321), that does not mean the criticisms of the indeterminate standard have no merit as a matter of policy. There are good reasons why the federal courts and most states have determinate limits, usually tempered by exceptions or tolling rules to deal with situations where strict application would be unjust.

Proposition 66 holds the door wide open in the clearest case of unjust application, the untimely petition by the demonstrably innocent

prisoner. (See Pen. Code, § 1509, subd. (d).) Whether other extreme cases might justify use of equitable tolling (see *Holland v. Florida* (2010) 560 U.S. 631, 652) is a question that should be resolved with a concrete case before the court. Equitable tolling must be reserved for exceptional situations, or else it will defeat the purpose of the rule, but Proposition 66 does not expressly preclude it.

California's quirky rule causes such problems for the federal courts that the U.S. Supreme Court has suggested that "the California Legislature might itself decide to impose more determinate time limits, conforming California law in this respect with the law of most other States." (*Evans v. Chavis* (2006) 546 U.S. 189, 199.) Proposition 66 does so for capital cases.[11]

There is no basis for a facial attack on this important and overdue reform.

D. Time for Adjudication.

Reading Petitioners' argument on "impermissible" time limits, one might think that courts enjoy complete constitutional autonomy regarding the length of time they take to complete cases and that the legislative power has no say in the matter. (See Pet. MPA 32-35.) That is not the law, and, again, the very case Petitioners rely on contradicts their argument.

People v. Engram (2010) 50 Cal.4th 1131, 1146 does indeed note that California courts have " 'the inherent and implied powers necessary to properly and effectively function as a separate department . . . .' "

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11. The rule was limited to capital cases to keep the initiative focused solely on capital cases, a single subject beyond reasonable dispute. See Part II B, *supra* (refuting Petitioners' unreasonable dispute). The high court's invitation to the Legislature remains outstanding for noncapital cases, and since that subject is considerably less heated without the capital punishment dimension, perhaps it will now be accepted.

(Quoting *Brydonjack v. State Bar* (1929) 208 Cal. 439, 442.) However, *Engram* goes on to recognize that the legislative authority also has a role. " 'Of necessity the judicial department . . . must in most matters yield to the power of statutory enactments. [Citations.] The power of the legislature to regulate criminal and civil proceedings and appeals is undisputed.' " (*Id*. at p. 1147, quoting *Brydonjack*.)

Engram involved Penal Code section 1050, which directs that criminal cases have priority over civil cases. That statute had been part of California law for over 80 years at the time of the decision. *Engram* reviewed two precedents involving statutes that directed timing or priority of cases. (See *id*. at pp. 1147-1150, discussing *Lorraine v. McComb* (1934) 220 Cal. 753 and *Thurmond v. Superior Court* (1967) 66 Cal.2d 836.) Neither of these cases held the statute at issue unconstitutional on its face, the action Petitioners seek in the present case. Instead, both cases interpreted and applied the statutes in question so as to implement the statutory policy consistently with the need "to safeguard the interests of all those before the court." (*Engram*, 50 Cal.4th at p. 1150.)

Proposition 66 directs the courts to complete the direct appeal and first habeas corpus petition within five years of sentence. Experience in other jurisdictions indicates that this is sufficient time even in the most complex cases when those cases are given the priority that they deserve. John Allen Muhammad, the notorious serial killer known as the "D.C. Sniper," was sentenced to death on March 29, 2004. (See *Muhammad v. Commonwealth* (2005) 269 Va. 451, 477, 619 S.E.2d 16, 30.) His direct appeal and initial state habeas petition were completed a little over three years later. (See *Muhammad v. Warden* (2007) 274 Va. 3, 646 S.E.2d 182.) Timothy McVeigh was sentenced to death on August 14, 1997, for the bombing of the federal courthouse in Oklahoma City, which killed 168 people. (See *United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1176, 1179.) Direct appeal took 19 months in total. (See *id*. at p. 1222 (affirmed), cert. den. *McVeigh v. United States* (March 8, 1999) 526 U.S.

1007.) The district court completed collateral review six months after filing, three years and two months after sentencing. (See *United States v. McVeigh* (D.C.Colo. Oct. 12, 2000) 118 F.Supp.2d 1137, 1139.) Although McVeigh did not appeal from this judgment, there is no reason to believe that the Court of Appeals could not have handled an appeal from the collateral review with the same dispatch as the direct appeal from the judgment. The full standard review of direct appeal and first collateral review could have been completed within five years even without the waiver.

Given that the complexity of capital cases does not inherently require processing times exceeding five years, the question becomes whether the system can put all the needed pieces together to get cases done in this time frame. That is far too complex a question to decide on a writ petition with no facts. The place to work out the details of implementation of this question of judicial administration is the Judicial Council, and that is exactly where Proposition 66 places it. (See Prop. 66, § 3, *adding* Pen. Code, § 190.6, subd.(d).) The Judicial Council has 18 months to establish rules and standards. There is no reason to preempt this legislatively directed process.

Petitioners argue that legislation authorizing a higher court to issue a writ of mandate to a lower court as a remedy for undue delay somehow violates the separation of powers. (See Pet. MPA 31, 35.) Actually, the United States Supreme Court recognized the propriety of writ relief in exactly this situation 25 years ago, although it chose to fire a warning shot rather than actually issue the writ in the particular case. (See *In re Blodgett* (1992) 502 U.S. 236, 240-241.) Congress has since authorized writ relief for unwarranted delay twice. The Crime Victims' Rights Act provides a "right to proceedings from unreasonable delay." (18 U.S.C. § 3771(a)(7).) In subdivision (d)(3), that statute provides for mandamus relief for violation of this right among others, and it imposes on the court of appeals the extraordinary requirement of deciding within 72 hours, a much more

stringent time limitation than anything in Proposition 66. In addition, Congress provided for time limits for decision of habeas corpus cases from qualifying states, enforceable by mandamus, in the Antiterrorism and Effective Death Penalty Act of 1996, as amended in 2006. (See 28 U.S.C. § 2266(b)(1)(A), (b)(4)(B).)[12] Far from being "a blatant legislative intervention into the judicial realm" (Pet. MPA 35), this provision follows a path well established by both the U.S. Supreme Court and Congress.

Engram, like *Thurmond* and other cases before it, interpreted and applied the statute in a manner consistent with the Constitution, recognizing that it "cannot properly be interpreted as establishing an absolute or inflexible rule . . . ." (50 Cal.4th at p. 1151.) Proposition 66, on its face, negates the notion that it creates an absolute or inflexible rule. It specifically provides that failure to comply with the time limit is not a ground for dismissal of an appeal or habeas corpus petition. (See Prop. 66, § 3, *adding* Pen. Code, § 190.6, subd. (e).) It expressly recognizes that some cases may go longer, limiting the writ of mandate remedy to cases of *unjustified* delay. Petitioners' assertion that Proposition 66 makes courts "subject to mandamus to compel action when adjudication of a matter *legitimately* takes longer than demanded by an arbitrarily imposed deadline" (Pet. MPA 35, italics added) is contrary to the plain wording of the initiative.

Proposition 66's time limits were crafted with enough flexibility to preserve the judicial branch's ability "to properly and effectively function as a separate department." (*Engram*, 50 Cal.4th at p. 1146.) Its direction to reorder priorities so as to resolve capital cases within a reasonable time is thus within the "undisputed" legislative power "to regulate criminal and

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12. Implementation of this law has been delayed to date by an injunction issued by a district court without jurisdiction to issue it, but that decision has now been vacated. (See *Habeas Corpus Resource Center v. U.S. Dept. of Justice* (9th Cir. 2016) 816 F.3d 1241, rehg. en banc den. Nov. 15, 2016, mandate issued Dec. 14, 2016.)

civil proceedings and appeals." (*Id*. at p. 1147.) Petitioners' argument that these sections should be declared unconstitutional on their face and enjoined from enforcement is contrary to this court's entire line of cases in this area and should be rejected.

E. Method of Execution Challenges.

Petitioners include in their memorandum a cryptic paragraph claiming that new Penal Code section 3601.4, subdivision (c), placing jurisdiction for method of execution challenges in the original trial court, somehow "rob[s]" the appellate courts of original jurisdiction over such cases. This paragraph is included in the habeas corpus section, indicating that Petitioners are arguing that habeas corpus is the appropriate vehicle for method of execution challenges. It is not.

In federal courts, method of execution challenges are regularly brought as civil suits for injunctive relief under 42 U.S.C. § 1983. (See *Hill v. McDonough* (2006) 547 U.S. 573, 583; *Morales v. Hickman* (9th Cir. 2006) 438 F.3d 926, 927 (*per curiam*).) In California courts as well, challenges to the validity of the execution protocol have been brought as ordinary civil suits for declaratory and injunctive relief, over which the superior courts and not the appellate courts have original jurisdiction. (See *Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729; *Sims v. California Dept. of Corrections & Rehabilitation* (2013) 216 Cal.App.4th 1059.)

Petitioners have not cited any California case in which habeas corpus was used to challenge the method of execution, and Intervenor has not found any published opinion on this point. In a summary disposition, this court rejected a method of execution challenge "for the reasons set out in *People v. Samayoa* (1997) 15 Cal.4th 795, 864, 938 P.2d 2, 64 Cal.Rptr. 2d 400." (*In re Hughes* (Jan. 15, 2003, No. S089357).) *Samayoa*, a direct appeal, rejected a challenge to lethal injection on the ground that it went to the execution of the sentence and not the validity of the sentence. The

implication, then, is that method of execution can be challenged neither in the automatic appeal nor on habeas corpus but only in another proceeding, including a civil suit for injunctive relief or possibly an objection in the trial court in the criminal case at the time an execution date is set. In either case, placing the action in the original trial court is well within the legislative power.

Proposition 66 requires the inmate to bring his method of execution challenge, by whatever vehicle, in the original trial court simply to prevent "court shopping." The broad venue rules for suits against the government have allowed the opponents of capital punishment to obtain dubious rulings obstructing the execution of valid death sentences, with an injunction by one superior court against the execution of judgments issued by other superior courts statewide. The purpose and principal application of this provision of the initiative is merely to specify *which* superior court will hear these cases and not to change the allocation of jurisdiction between trial and appellate courts. If this provision is thought to be inconsistent with the constitutionally vested jurisdiction of appellate courts, that would only be unconstitutionality as applied. It would not warrant invalidation of the section on its face, it would not prevent its application in the circumstances it was intended for, and it certainly would not invalidate the initiative as a whole.

F. Conclusion.

Petitioners' challenges to the habeas corpus reforms of Proposition 66 are meritless in their entirety. They disagree with the policy, but they made their case to the people, and the people decided in favor of these reforms. The California Constitution vests the decision of these matters in the people.

IV. Proposition 66's successive habeas corpus rule for capital cases has a rational basis and is consistent with the Equal Protection Clauses of the United States and California Constitutions.

Petitioners make a claim that the successive habeas corpus provision of Proposition 66 violates equal protection because of a claimed difference with a successive petition rule that is supposedly contained in a bill enacted by the legislature after Proposition 66 had qualified for the ballot. (See Pet. MPA 52-55.) This argument is incorrect in nearly every respect. Petitioners incorrectly describe the bill they rely on, they misstate the differences between the successive habeas corpus rules for capital and noncapital prisoners after Proposition 66, and their argument of the lack of a rational basis for treating the two classes of prisoners differently has been uniformly rejected by state and federal courts throughout the nation.

A. Senate Bill 1134.

Petitioners claim that Senate Bill 1134 amended Penal Code section 1485.55 "to permit any person convicted of a crime—capital or noncapital—to pursue a *successive* claim for habeas relief regarding actual innocence." (Pet. MPA 52, italics added.) This statement bears little resemblance to what SB 1134 actually provides.

First, Penal Code section 1485.55 has nothing to do with grounds for habeas corpus relief or successive petitions. That section deals with compensation of wrongly convicted persons after their criminal judgments have been overturned by other proceedings. SB 1143 did, however, also amend section 1473, which does deal with grounds for habeas corpus relief. The pertinent portion of the bill is the addition of new subdivision (b)(3) to section 1473. Paragraph (A) of the new subdivision adds to the grounds for which habeas relief may be granted "[n]ew evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial."

With this enactment, the California Legislature has taken a stand on the question of whether a "freestanding claim of actual innocence" constitutes a substantive ground for habeas corpus relief, absent a claim of procedural error in the defendant's trial, a question that remains unresolved at the federal level. (See *McQuiggin v. Perkins* (2013) 133 S.Ct. 1924, 1931, 185 L.Ed.2d 1019, 1030.) The bill says nothing about the distinct question of whether and by what standard a claim of actual innocence can serve as a gateway to the consideration of a claim that would otherwise be barred as procedurally defaulted or successive. (See *id*. at pp. 1931-1932.) The purpose of the bill was to change the standard as stated in this court's decision in *In re Lawley* (2008) 42 Cal.4th 1231, 1239. (See Senate Floor Analysis for SB 1134 (Aug. 19, 2016) pp. 4-5.) *Lawley* was a straightforward case on the standard of proof for a timely initial petition. (See 42 Cal.4th at p. 1237.) Neither *Lawley* nor SB 1134 has anything to do with the standard for consideration of a successive petition. The word "successive" does not appear in the bill or the analysis. SB 1134 did not amend section 1475 of the Penal Code or purport to change this court's case law on successive petitions. (See *In re Clark* (1993) 5 Cal.4th 750, 770-774 (discussing section 1475 and case law limitations on successive petitions).)

With the amended versions of sections 1473 and 1509 both in force (*i.e.*, both SB 1143 and Proposition 66), a capital defendant who can satisfy his substantive burden of proof under subdivision (b)(3)(A) of section 1473 will almost always qualify for the gateway to make that claim in a successive or untimely petition under subdivision (d) of section 1509.[13] The Proposition 66 gateway requires preponderance of the evidence, the same standard as SB 1473's substantive requirement of "more likely than not." For noncapital defendants, the successive petition requirement

13. One possible exception is a petitioner who appears to be innocent when considering only admissible evidence but who is proved to be guilty by evidence that is reliable but suppressed under the Fourth Amendment exclusionary rule. This slim possibility need not concern the court here.

remains the more stringent rule of " 'irrefutable evidence of innocence of the offense or the degree of offense of which the petitioner was convicted.' " (*In re Robbins* (1998) 18 Cal.4th 770, 813, quoting *Clark*, *supra*, 5 Cal.4th at p. 798, fn. 33.) The entire premise of Petitioners' argument is incorrect. For successive petitions based on claims of actual innocence, the rule for capital cases is more *lenient* than the rule for noncapital cases.

B. Differences and Rational Basis.

There are, to be sure, some differences between habeas review for capital as opposed to noncapital cases. There were differences before Proposition 66, and the initiative eliminated one difference and created some others. Procedural differences such as these are reviewed only for having a rational basis (see, *e.g.*, *Estelle v. Dorrough* (1975) 420 U.S. 534, 537-539), and Proposition 66 easily "withstands this relaxed scrutiny." (See *People v. Fitch* (1997) 55 Cal.App.4th 172, 184.)

The most important difference, by far, between capital and noncapital habeas corpus[14] is the statutory guarantee of appointed counsel as a matter of right for death row inmates (see Gov. Code, § 68662), with compensation and pre-petition investigative resources, generous relative to other states, that California provides to counsel. (See *In re Reno* (2012) 55 Cal.4th 428, 456-457, and fns. 9-10.) In noncapital cases, by contrast, the petitioner has no right to appointed counsel until he has filed the petition and cleared the first hurdle, a finding of a prima facie case, unassisted. (See Cal. Rules of Court, rule 4.551(c)(1) & (2).) It is no exaggeration to say that this difference is more important than all other differences combined, and it runs in favor of the death row inmate.

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14. We consider here only the modern use of habeas corpus to collaterally attack criminal judgments. The "Great Writ" as it existed and was used at common law is a different subject.

In capital cases before Proposition 66, the appointment of counsel was typically done by this court, and the petition was typically filed in this court, while the judicially created venue rule required that most noncapital habeas corpus petitions be filed in the superior court where the judgment was entered. (See *supra* at 26.) Proposition 66 eliminates this difference. (See Prop. 66, § 6, *adding* Pen. Code, § 1509, subd. (a); Prop. 66, § 16, *amending* Gov. Code, § 68662.)

Proposition 66 imposes a tighter limitation on successive petitions for capital cases than exists for noncapital cases. There are two obvious and wholly legitimate reasons for this difference. First, the provision of counsel and resources for a first petition makes it far less likely that a successive petition has merit. "Absent . . . unusual circumstance[s] . . . such successive petitions rarely raise an issue even remotely plausible, let alone state a prima facie case for actual relief." (*In re Reno*, 55 Cal.4th at pp. 457-458.) Second, an inmate sentenced to prison does not receive a stay while a habeas corpus petition is pending. The judgment continues to be executed. There is, therefore, little incentive to file meritless successive petitions in noncapital cases, yet they are common in capital cases. (See *id*. at p. 458.)

Proposition 66 also imposes a tighter time limitation on initial petitions. Again, the fact that death row inmates are provided with counsel and investigative resources that noncapital inmates are not provided with is more than a rational basis for the difference. An appointed attorney with investigative resources who has a year to investigate and file is better than a lifetime to file for an inmate in prison with no resources on the outside. The difference in incentives to delay, noted above, also provides a rational basis.

Proposition 66 gives death row inmates an unqualified right to appeal denial of their initial habeas corpus petitions. (See Prop. 66, § 7, *adding* Pen. Code, § 1509.1, subd. (a).) In noncapital cases the state

reserves appeal to itself (Pen. Code, § 1506), and nonprevailing inmates must employ California's quirky process of appeals disguised as original writs. (See *supra* at 37.) The appellate court may deny such a writ petition without stating a reason, the much-criticized "postcard denial." (See Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2d ed. 2016) § 45.21(3), p. 1509.) The difference here runs in the capital inmate's favor.

Proposition 66 also requires a certificate of appealability for successive but not initial habeas corpus petitions. (See Prop. 66, § 7, *adding* Pen. Code, § 1509.1, subd. (c).) Federal law has had this requirement in one form or another for initial as well as successive petitions since 1948. (See 28 U.S.C. § 2253(c).) Because of the strong potential for successive petitions to be abused for delay (see *In re Reno*, 55 Cal.4th at p. 447, fn. 3), this provision is a necessary adjunct of giving the inmate a right to appeal.

C. Authority in Other Jurisdictions.

California is hardly the first jurisdiction to draw a distinction between capital and noncapital collateral review. Indeed, we are quite tardy. Other states' distinctions have been challenged as equal protection violations, and those challenges have been uniformly rejected by both state and federal courts.

The Supreme Judicial Court of Massachusetts considered a similar equal protection claim in *Dickerson v. Attorney General* (Mass. 1986) 488 N.E.2d 757. Capital defendants needed a certificate from a justice of that court to appeal denial of postconviction relief, while noncapital defendants did not. (See *id*. at pp. 758-759.) The court held that the "rational basis" standard applied, and the requirement survived that scrutiny. (See *id*. at pp. 759-760.) The "gatekeeper" requirement was a rational part of a system that provided the capital defendant greater review rights in other ways. (See *ibid*.) The federal court of appeals came to the same conclusion. (See *Dickerson v. Latessa* (1st Cir. 1989) 872 F.2d 1116, 1119-1121.)

State v. Beam (Idaho 1988) 766 P.2d 678 rejected an equal protection challenge to a state law that imposed tighter time deadlines in capital cases. The court held that the rational basis standard applied and that the greater need to curb delay in capital cases was a sufficient basis. (See *id*. at pp. 681-683.) The Ninth Circuit rejected the same challenge to the statute. (See *Rhoades v. Henry* (9th Cir. 2010) 611 F.3d 1133, 1143-1144.) We see the same pattern whenever equal protection challenges are made to procedural differences between capital and noncapital cases. The rational basis test applies, and the state has a rational basis for treating capital cases differently. (See *State v. Smith* (Ohio 1997) 684 N.E.2d 668, 682; *Smith v. Mitchell* (6th Cir. 2009) 567 F.3d 246, 262; *Abdool v. Bondi* (Fla. 2014) 141 So.2d 529, 546; *State v. Ramirez* (Ariz. 1994) 871 P.2d 237, 243; *United States v. Johnson* (8th Cir. 2007) 495 F.3d 951, 962-963.)

California faces a problem in capital cases that it does not face in noncapital cases. Long delays in habeas corpus proceedings delay and therefore deny justice. Further, capital defendants are provided other advantages that noncapital defendants are not, particularly appointed counsel and investigative resources as a matter of right. These two differences are far more than sufficient to provide a rational basis for Proposition 66's procedural distinctions between capital and noncapital habeas review. Petitioners' equal protection claim is utterly without merit.

CONCLUSION

1. The petition for writ of mandate should be promptly denied without issuing an order to show cause.

2. The stay of implementation of the entire initiative issued on December 20, 2016, should be vacated even if the court issues an order to show cause to consider the validity of one or more individual provisions.

January 9, 2017

Respectfully Submitted,

____

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CALIFORNIANS TO MEND, NOT END,
THE DEATH PENALTY–
NO ON PROP. 62, YES ON PROP. 66

APPENDIX A

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

SAN FRANCISCO HEADQUARTERS

TROY A. ASHMUS, Petitioner, v. ROBERT K. WONG, Acting Warden of California State Prison at San Quentin, Respondent.	Case Number 3:93-cv-00594-TEH DEATH PENALTY CASE SUPPLEMENTAL CASE MANAGEMENT STATEMENT Date: February 23, 2009 Time: 10:00 a.m. Place: Courtroom 12, San Francisco Judge: Hon. Thelton E. Henderson

I. INTRODUCTION

In the Joint Case Management Statement ("Joint Statement), filed February 13, 2009, Respondent included a suggested schedule of pre-hearing procedures. As indicated in the Joint Statement, Petitioner did not have sufficient time to review and comment on Respondent's requests. (Joint Statement at 9 n.5; *see also* Declaration of Michael Laurence at 4-5, ¶ 12, attached to this Supplemental Case Management Statement.) Petitioner therefore submits this Supplemental Case Management Statement to address Respondent's proposed procedures and schedule.

Respondent seeks to require counsel for Petitioner to operate under virtually impossible time constraints, preparing numerous declarations and previewing Petitioner's case in chief months in advance of the August 31, 2009 hearing date. (*See* Declaration of Michael Laurence, at 1-3, ¶¶ 2-7 (outlining counsel's workload and competing commitments).) In addition to burdening Petitioner without justification, Respondent's timetable promotes inefficiency by requiring Petitioner to prepare

his witnesses twice over the span of many months. Petitioner, therefore, requests that this Court adopt the alternative schedule contained in Section II.C., *infra*.

II. PETITIONER'S POSITIONS REGARDING THE PROCEDURES AND SCHEDULE FOR CONDUCTING THE EVIDENTIARY HEARING

A. PETITIONER'S RECOMMENDATION ON THE FORMAT FOR THE HEARING

For the reasons previously stated, Petitioner recommends that this Court order that the parties submit the direct testimony of their witnesses by declaration and that the in-court testimony be limited to cross examination of those witnesses designated by the other party and re-direct and re-cross examinations, if necessary. In order to conserve limited resources, the parties also should be ordered to limit cross-examination to those witnesses who have provided testimony that the party disputes in good faith.

B. PETITONER'S POSITION ON RESPONDENT'S PROCEDURES AND SCHEDULING

Respondent has been aware of the factual and legal bases for Petitioner's claims since April 1998, when the Petition for Writ of Habeas Corpus was filed in the California Supreme Court.[1] Any remaining questions that Respondent may have had were resolved in May 2008 when Petitioner detailed eighty pages of specific facts that he intended to prove at the hearing and expressly identified which facts Respondent proffered were in dispute. (*See* Joint Statement on Undisputed and Disputed Facts, Discovery Status and Proposal for Further Scheduling, filed May 21, 2008.) Moreover, Petitioner voluntarily has provided to Respondent thousands of pages of documents relating to the

[1] The state petition was supported by over 2,500 pages of exhibits, including 24 declarations by individuals petitioner may call at the evidentiary hearing. All but two of the 78 exhibits contain information directly relevant to at least one of the claims for which this Court granted an evidentiary hearing and upon which an expert may rely in forming an opinion. Petitioner further explained the bases for the claims in the briefing on the Motion for Summary Judgment and Motion for Evidentiary Hearing. (*See* Notice of and Motion for Evidentiary Hearing, filed July 1, 1999; Opposition to Motion for Summary Judgment, filed August 2, 1999.) In addition, in March 2001, this Court issued the Evidentiary Hearing Order, identifying the salient factual and legal bases underlying the claims to be resolved at the hearing. (Order Re: Motion For Evidentiary Hearing, filed March 14, 2001.)

claims to be litigated at the evidentiary hearing.[2] Finally, counsel for Respondent conducted a six-hour deposition of Mr. Richard Fathy who was the attorney responsible for developing and presenting the penalty phase portion of Petitioner's trial.

Despite Petitioner previewing his case and providing Respondent with thousands of pages of relevant material, Respondent requests this Court order further "disclosures that are required to ensure a rational, merits-based adjudication of [Petitioner's] challenges. (Joint Statement at 12 n.6.) Specifically, Respondent requests that Petitioner draft the declarations of trial counsel, the trial investigator, and any expert witnesses; provide citations to hundreds of facts contained in the Joint Statement on Undisputed and Disputed Facts, Discovery Status and Proposal for Further Scheduling, and schedule additional depositions by May 26, 2009 – over three months before the start of the evidentiary hearing. Respondent then proposes to conduct depositions of Mr. Fathy, Mr. Arkelian, and Mr. Smith and seek "further discovery related to petitioner's proposed expert testimony . . . including but not limited to a mental examination of petitioner to be performed by an expert appointed by the Court, and expert retained by respondent, or both." (Joint Statement at 11.)

1. Disclosure Of The Additional Fathy Material

Respondent requests that this Court enter the following order regarding the recently located material from Mr. Fathy's file:

> On or before March 2, 2009, petitioner shall (i) provide to respondent so much of the defense file as exists but has not yet been produced to respondent, including but not limited to Mr. Fathy's billing records, but excluding all materials as to which the Court has previously authorized non-disclosure, (ii) provide to respondent and to the Court a privilege log specifying any material petitioner proposes to withhold other than those materials as to which the Court has already authorized non-disclosure, and (iii) provide to the Court those portions of the defense file that petitioner has not produced to respondent and has not received prior authorization to withhold.

(Joint Statement at 10.)

As set forth in the Joint Statement, counsel for Petitioner intends to review the newly

[2] In July 2005, Petitioner provided respondent with almost 6,000 pages of trial counsels' files. At Respondent's request, in December 2007, Petitioner provided 615 pages of juror questionnaires to Respondent's counsel. In January 2008, Petitioner disclosed three boxes of social history documents (approximately 5770 pages) relevant to Claim 5.

discovered material as soon as possible. (Joint Statement at 4-5.) Petitioner agrees that this process will be concluded by March 2, 2009.[3]

2. Annotations of the Joint Statement of Undisputed and Disputed Facts

Respondent requests that this Court enter the following order regarding the Joint Statement of Undisputed and Disputed Facts:

> On or before April 24, 2009, petitioner shall file and serve an amended version of the Joint Factual Statement (Doc. 368), annotated to reflect the evidentiary sources upon which he intends to rely when attempting to demonstrate the truth of each factual assertion set forth therein.

(Joint Statement at 10-11.)

As set forth in the Joint Statement, Petitioner objects to this unnecessary and unduly burdensome task. (Joint Statement at 7.) Respondent provides no legal authority to require Petitioner, in effect, to present his case-in-chief both as annotations to the Joint Statement of Undisputed and Disputed Facts and at the evidentiary hearing. Indeed, there is no authority for such a position even in civil cases in which a party is entitled to propound interrogatories. *See* Fed. R. Civ. 33(a)(1) (limiting number of interrogatories); *see also In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 337 (N.D. Cal. 1985) (noting that there is "substantial reason to believe" that "interrogatories that systematically track all the allegations in an opposing party's pleadings is a serious form of discovery abuse" and imposes great burdens on opponents).

3. Submission of the Declarations of Trial Counsel and the Trial Investigator

Respondent requests that this Court enter the following order regarding the declarations of Petitioner's trial counsel and trial investigator:

> On or before April 24, 2009, petitioner shall determine whether he intends to call Richard Fathy, Michael Arkelian, or John Smith to testify at the evidentiary hearing, and if he does, petitioner shall, on or before that same date, prepare and submit a declaration from each summarizing his proposed testimony.

(Joint Statement at 11.)

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[3] For clarity, Petitioner requests that the Court's order use the language suggested in Section II.C., *infra*.

1 Requiring Petitioner to produce these declarations over four months prior to the evidentiary
2 hearing is unreasonable, particularly in light of counsel's other commitments. As outlined in the
3 Declaration of Michael Laurence, counsel for Petitioner are responsible for numerous other cases in
4 the next several months. These responsibilities include investigating, drafting, and filing of two state
5 habeas corpus petitions and three replies to informal responses to state habeas corpus petitions;
6 litigating actions against the United States Department of Justice and the California Department of
7 Justice seeking material regarding the development of the regulations to govern certification of state
8 mechanisms pursuant to Chapter 154 of the Antiterrorism and Effective Death Penalty Act; drafting
9 extensive comments on the Department of Justice's final rule for such certification determinations;
10 and numerous other tasks. (Declaration of Michael Laurence at 1-3, ¶¶ 3-7.) Petitioner respectfully
11 submits that the direct testimony declarations from trial counsel and the trial investigator should be
12 filed and served on or before July 31, 2009, which affords Respondent with thirty days to prepare for
13 cross-examination. (*See* Section III.C., *infra*.)

14 **D. Additional Depositions of Trial Counsel and the Trial Investigator**

15 Respondent requests that this Court enter the following order regarding the depositions of
16 Petitioner's trial counsel and trial investigator:

17 On or before May 26, 2009, respondent shall determine whether he intends to
18 depose Richard Fathy, Michael Arkelian, or John Smith, and if he does, respondent shall, on or before that same date, notice any deposition he intends to conduct of each on dates mutually agreed upon by the deponent(s) and counsel for the parties.
19

20 (Joint Statement at 11.)

21 For the reasons stated in the Joint Statement, Petitioner opposes any further depositions.
22 (Joint Statement at 4.)

23 **E. Declarations of Expert Witnesses**

24 Respondent requests that this Court enter the following order regarding the declarations of
25 any experts:

26 On or before May 26, 2009, petitioner shall determine whether he intends to call
27 any expert witness(es) to testify at the evidentiary hearing, and if he does, petitioner shall, on or before that same date, furnish respondent with a report containing a
28 summary complete statement of all opinions the witness(es) will express and the basis

> and reasons for them, the data or other information considered by the witness in forming those opinions, any exhibits that will be used to summarize or support the opinions, as well as any additional information prescribed in Rule 26(a)(2)(B) as the Court in its discretion directs.

(Joint Statement at 11.)[4]

Petitioner is amenable to a bifurcated production of direct testimony declarations, by which Petitioner will provide the declarations of any mental health experts proffered in support of the prejudice prong of Claim 5 on or before July 17, 2009, and the remainder of the direct testimony declarations on or before July 31, 2009. This timetable affords Respondent six weeks to review the expert declarations and prepare for cross-examination prior to the hearing. Petitioner, however, continues to object to any requirements or application of Rule 26 of the Federal Rules of Civil Procedure.[5]

F. Declarations of Expert Witnesses

Respondent requests that this Court enter the following order regarding the declarations of any experts:

> On or before June 25, 2009, respondent shall determine whether further discovery relating to petitioner's proposed expert testimony is indicated, including but limited to a mental examination of petitioner to be performed by an expert appointed by the Court, an expert retained by respondent, or both, and if he does, respondent shall seek leave therefor on or before that same date.

(Joint Statement at 11.)

Although it has been almost eight years since this Court ordered an evidentiary hearing on issues of Petitioner's mental health, Respondent has never requested leave of this Court to examine Petitioner. Such dilatory conduct is sufficient reason alone to deny Respondent's attempt for additional time to "determine whether further discovery . . . is indicated." (Joint Statement at 11.) Nonetheless, Petitioner submits that Respondent should be permitted to file and the Court to consider

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[4] Although the language in this request includes "any expert witness(es)," Respondent previously raised this issue with respect to "mental health" experts, which corresponds to his next request for mental examinations of Petitioner. (Declaration of Michael Laurence at 4, ¶9 (discussion on February 10, 2009, was limited to mental health experts and diagnoses of mental illness).

[5] Rule 26 expressly excludes habeas proceedings from the rule's initial disclosure requirements, Fed. R. Civ. P. 26(a)(1)(B), and the Rules Governing § 2254 Cases make Rule 26 inapplicable in all respects unless ordered by this Court, *see* Rule 6(a) of the Rules Governing § 2254 Cases in the United States District Courts.

1 such a motion.

2 This Court, however, should require Respondent to file his motion immediately to permit its
3 resolution well in advance of the hearing. (*See* Section II.C.4, *infra*.) Respondent has asserted that
4 such an examination is warranted to counter any expert's diagnosis of Petitioner. (Declaration of
5 Michael Laurence at 4, ¶9.) Petitioner believes that there is no legal authority for permitting such an
6 examination, and that this Court's reasons for denying the motion will not be altered by any
7 conclusions drawn by any expert who may be called to testify at the hearing. Nonetheless, nothing
8 prevents Respondent from filing a motion to reconsider a ruling after Petitioner's submission of the
9 direct testimony declaration of any expert.

10 **F. Exchange of Exhibits**

11 Respondent requests that this Court enter the following order regarding the exchange of
12 exhibits :

13 > On or before July 31, 2009, (i) the parties shall exchange copies of all exhibits
14 > proposed to be used at the evidentiary hearing and final witness lists, and if respondent's list includes any experts, respondent shall, on or before that same date,
15 > also furnish petitioner with a report containing a summary complete statement of all opinions the witness(es) will express and the basis and reasons for them, the data or
16 > other information considered by the witness in forming those opinions, any exhibits that will be used to summarize or support the opinions, as well as any additional information
17 > prescribed in Rule 26(a)(2)(B) as the Court in its discretion directs, and (ii) petitioner shall deposit with the Court the complete original defense file.

18 (Joint Statement at 11-12.)

19 Petitioner agrees that the parties should exchange and deliver to the Court copies of the
20 exhibits, witness lists, and the direct testimony declarations on or before July 31, 2009. (*See* Section
21 II.C.3, *infra*.) Petitioner objects to the requirement to file the original defense file with the Court
22 thirty days prior to hearing, which will deprive Petitioner of access to the file. Instead, Petitioner
23 believes that lodging a copy of the trial file is sufficient. Petitioner also objects to any application of
24 Rule 26.

25 **C. PETITIONER'S RECOMMENDATIONS FOR THE PRE-HEARING SCHEDULE**

26 Petitioner respectfully submits that conducting an evidentiary hearing in this case should not
27 require an elaborate morass of procedures or a protracted timetable of events that necessarily results
28

in an inefficient expenditure of resources. Petitioner therefore proposes a schedule that permits orderly and efficient preparation for the hearing.

1. Disclosure of Additional Material from Mr. Richard Fathy's File.

As set forth in the Joint Statement, counsel for Petitioner intends to review the newly discovered material as soon as possible (Joint Statement at 4-5), and agrees with Respondent that this process can be accomplished by March 2, 2009. Thus, Petitioner requests that this Court order the following:

> On or before March 2, 2009, Petitioner will (i) provide to Respondent any non-privileged and relevant material from the Mr. Richard Fathy's trial file and billing records that has not yet been produced to Respondent, (ii) provide to Respondent and the Court a privilege log specifying any material petitioner proposes to withhold other than those materials as to which the Court has already authorized non-disclosure, and (iii) provide to the Court those portions of the defense file to which Petitioner has withheld from Respondent for the Court's in camera review. All material disclosed to Respondent is protected by this Court's Order Granting Motion to Compel & Protective Orders & Scheduling Order, filed April 27, 2005.

2. Submission of Mental Health Experts' Declarations

Petitioner requests that this Court order the following regarding the submission of mental health declarations:

> On or before July 17, 2009, Petitioner will file and serve declarations in lieu of the direct testimony of any mental health experts that Petitioner intends to have the Court consider on the question of whether trial counsel's performance prejudiced Petitioner.

3. Submission of All Other Witnesses' Declarations and Exhibits

Petitioner requests that this Court order the following regarding the submission of direct testimony declarations and exhibits and the identification of which witnesses will be cross examined at the hearing:

> On or before July 31, 2009, Petitioner and Respondent will file declarations in lieu of the direct testimony of all persons (other than those disclosed on July 17, 2009) and all exhibits, including a complete copy of the defense trial file, that they intend to have the Court consider on Claims 4, 5, and 7. On or before July 31, 2009, the parties also will file witness and exhibit lists. On or before August 10, 2009, the parties will notify opposing counsel of which witnesses that they intend to cross-examine at the evidentiary hearing. The parties are not to require the attendance of any witness unless there exists a good faith basis to dispute his or her testimony.

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4. Filing of Respondent's Motion Regarding Any Mental Health Examination of Petitioner

Petitioner requests that this Court order the following regarding a motion to conduct a mental health examination of Petitioner:

> On or before March 30, 2009, Respondent will file any motion for leave to conduct any mental health examinations of Petitioner. The motion will specify the type of examination to be conducted, the tests to be administered, and the expert(s) to conduct such examination. On or before April 13, 2009, Petitioner will file any opposition to the motion. On or before April 20, 2009, Respondent will file any reply. The hearing on the motion will be conducted at 10:00 am on May 4, 2009.

III. CONCLUSION

Petitioner respectfully requests that this Court issue a scheduling order consistent with the recommendations Petitioner has set forth in the Joint Statement and this Supplemental Statement

Respectfully submitted,

Dated: February 17, 2009

/s/ Michael Laurence

MICHAEL LAURENCE
Habeas Corpus Resource Center
Attorney for Petitioner

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DECLARATION OF MICHAEL LAURENCE

I, Michael Laurence, declare as follows:

1. I am an attorney licensed to practice by the State of California and admitted to practice before this Court. I am the Executive Director of the Habeas Corpus Resource Center (HCRC), which this Court appointed to represent Petitioner Troy Ashmus in this matter. Susan Garvey and I are the two attorneys primarily responsible for preparing for and conducting the evidentiary hearing.

2. In the Joint Case Management Statement, filed on February 13, 2009, Respondent requested, *inter alia*, that this Court order Petitioner to file "an amended version of the Joint Factual Statement (Doc. 368), annotated to reflect the evidentiary sources upon which he intends to rely" and file declarations of trial counsel and the trial investigator on or before April 24, 2009, and file declarations of any experts on or before May 26, 2009.

3. My workload over the next several months precludes my ability to perform the work that Respondent requested. I currently am responsible for supervising and litigating nineteen cases, many of which have immediate and time-consuming deadlines. In particular, I have primary responsibility for supervising the investigation, drafting, and filing of a petition for writ of habeas corpus in the California Supreme Court on March 16, 2009, and four petitions in 2010. I anticipate that these petitions will be approximately 250-450 pages in length and accompanied by several thousands of pages of exhibits. I also have responsibility for researching, drafting, and filing three replies to informal responses to state court habeas corpus petitions in June and September 2009, and one in early 2010. I anticipate that these replies will consist of approximately 150-250 pages of factual and legal analysis and will be accompanied by additional exhibits.

4. I have primary responsibility for litigating an action before this Court in *HCRC v. United States Dep't of Justice*, Case No. 08-02649 CW (N.D. Cal.), which involves a challenge to the United States Attorney General's efforts to certify states for expedited judicial review of capital judgments. In March 2006, Congress enacted the Patriot Act Reauthorization Act, which transferred the authority to decide whether a state mechanism qualified pursuant to Chapter 154 of Title 28 from the federal judiciary to the Attorney General of the United States. When the Department of Justice published proposed regulations that would govern the certification process in June 2007, I submitted

lengthy comments on behalf of the HCRC and its current and future clients. In May 2008, I filed a lawsuit against the Attorney General and the Department of Justice, alleging violations of the Freedom of Information Act (FOIA) and the Administrative Procedure Act (APA) by refusing to disclose documents that I requested in July 2007 (during the public comment period for the proposed regulations). The Attorney General published the Final Rule on December 11, 2008, with an effective date of January 12, 2009. After the Final Rule was published, I filed an amended complaint, adding four causes of action regarding the Department of Justice's failure to comply with the APA. After expedited briefing, this Court issued a temporary restraining order and, on January 20, 2009, a preliminary injunction, precluding the Final Rule from becoming effective without reopening the public comment period. On February 5, 2009, the Department of Justice announced a new sixty-day comment period on the Chapter 154 regulations. Thus, in addition to submitting summary judgment and other briefing and conducting discovery in the action, I will be responsible for drafting and submitting substantive comments to the Final Rule on or before April 6, 2009.

5. In conjunction with my responsibilities in the federal FOIA and APA action, I am responsible for litigating a California Public Records Act mandamus proceeding against the California Department of Justice in *HCRC v. Cal. Dep't of Justice*, San Francisco Superior Court Case No. CPF-08-508835. In that action, I am requesting that the Superior Court order the California Department of Justice to produce the public record of its efforts to promote and influence legislation and administrative regulations that adversely affect the ability of death-row inmates to obtain full and fair state and federal review of their convictions and death sentences. The HCRC's public records request sought information about the Department of Justice's efforts to, in their own words, "ensure that [United States Department of Justice] will promulgate regulations that will allow California to be certified for the 'fast track'" provisions of Chapter 154 of Title 28." On February 6, 2009, the Superior Court issued an Order to Show Cause and established an expedited timetable in which to resolve the California Department of Justice's assertion of privilege to over six hundred pages of responsive material. In particular, the Superior Court recognized that judicial review of the appropriateness of the assertion of privileges should be made in time for the HCRC to submit comments on the Final Rule on or before April 6, 2009.

6. In addition to my legal responsibilities, I have ongoing administrative duties as the Executive Director of the agency. My administrative workload over the next several months includes responding to the on-going budget crisis in this fiscal year and participating in discussions and decision-making for the 2009-2010 budget; making and reviewing administrative decisions regarding the agencies eighty-eight full-time employees; attending judicial meetings; conducting training sessions; and drafting and reviewing numerous reports.

7. Similarly, Susan Garvey's workload will interfere with our ability to comply with Respondent's schedule. Ms. Garvey currently is assigned to eight cases. She is responsible for investigating, drafting, and filing two petitions for writ of habeas corpus, one in March 2009 and one in August 2009. In addition, as a Senior Habeas Corpus Counsel, Ms. Garvey has numerous on-going administrative and supervisory duties over the next six months.

8. On February 10, 2009, I spoke with Mr. Ronald Matthias and Mr. Glenn Pruden regarding the matters to be discussed at the Status Conference scheduled for February 23, 2009. We discussed the following topics: (1) disclosure of the additional material copied from Mr. Richard Fathy's files by former habeas corpus counsel; (2) Respondent's request to take additional depositions of Petitioner's trial counsel and trial investigator; (3) stipulations concerning the authenticity of the trial file and government and business records; (4) annotations to the Joint State of Undisputed and Disputed Facts; (5) stipulations concerning Claim 4 and Claim 7; (6) the status of discovery in *Frye v. Ayers*; and (7) Respondent's request for disclosures of any mental health experts that Petitioner intends to call as witnesses at the hearing. The discussion regarding item (7) stemmed from Respondent's e-mail request sent February 5, 2009, for the following:

> Please disclose the names of any experts you propose to call at the evidentiary hearing and provide a summary of their qualifications (including a list of all publications authored in the previous 10 years), their opinions (including but not limited to any diagnoses of petitioner) and the basis therefor, any exhibits that will be used to support their opinions, a statement of the compensation each will be paid for their study and testimony in this proceeding, and a list of cases in which the expert testified as an expert at trial or by deposition within the previous four years. If you are unwilling to provide this information at this time, propose the means and date by which you would be willing to do so. Please bear in mind that respondent will need to receive this information sufficiently in advance of a discovery cut-off date to allow respondent to seek leave for, and to conduct, any additional discovery shown by your disclosures to be warranted, including but not limited to a mental examination of petitioner, to be performed by respondent's expert, the Court's own expert, or both. Also, when addressing these and

related subjects (see, e.g., paragraph 5), please bear in mind as well that I have honored the request set forth in your letter of May 6, 2008; I have done so as a courtesy to you, and largely on the assumption that you would timely disclose to me such information as is necessary to ensure the fairness of the evidentiary hearing. Unless you are now prepared to validate that assumption with binding assurances, specific as to timing and content, respecting disclosure of the evidentiary sources upon which you intend to demonstrate petitioner's entitlement to relief, I will be forced to consider alternative lawful means of discovering the identity of those sources, including but not limited to resorting to the very means you have asked me to avoid.

9. During the discussion of this request, I stated that it was unreasonable to require Petitioner to produce such information. Mr. Matthias, counsel for Respondent, stated that such information was necessary to determine whether to seek a mental health examination of Petitioner. He stated that, without one or more diagnoses of Petitioner's mental illness, Respondent would not be able to establish good cause for such an examination. I stated that I did not believe that Respondent was entitled to conduct an examination under any circumstances.

10. During the discussion of this request, I also stated that July 31, 2009, was an acceptable date for the parties to produce direct testimony declarations. I further stated that I *might* be able to draft and produce limited mental health expert declarations sixty days in advance of the hearing, but that I would need to review my other commitments. When asked by counsel for Respondent if ninety days prior to the hearing was possible for such declarations, I stated that such a deadline was impossible, given my workload between now and the start of the hearing. With the exception of this limited discussion of dates for the exchange of direct testimony declarations, there was no discussion of any other scheduling. Finally, I stated my preference that the Court first determine the format for the hearing prior to resolving Respondent's requests for further discovery.

11. Following our conversation on February 10, 2009, I took responsibility for drafting the Joint Case Management Statement, which I provided to counsel for Respondents at 4:18 pm on February 12, 2009. In accordance with the topics of our discussion, I included a general description of the issues to be discussed at the Case Management Conference, but did not include any dates for pre-hearing proceedings.

12. I received Respondent's contribution to the Joint Case Management Report at 2:41 pm on February 13, 2009. Prior to reviewing it, I had no knowledge that Respondent intended to request an order requiring Petitioner to perform the listed tasks in the proposed schedule. Had counsel for

Respondent inquired, I would have explained that his schedule was unduly burdensome and created substantial conflicts with my other responsibilities. As I was unable to review and draft a response to Respondent's proposed schedule, I stated in the Joint Case Management Statement that I intended to file a supplemental statement.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on February 17, 2009.

/s/ Michael Laurence
MICHAEL LAURENCE

APPENDIX B

Michael Laurence (Bar No. 121854)
Sara Cohbra (Bar No. 193270)
Jennifer Molayem (Bar No. 269249)
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ORIGINAL
Filed
Superior Court Of California,
Sacramento
02/05/2015
amacias
By ____________, Deputy
Case Number:
34-2014-80001968

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

BRADLEY WINCHELL and KERMIT ALEXANDER, Petitioners, v. **JEFFREY A. BEARD,** Respondent.	Case No. 34-2014-80001968 **Notice of Application and Application for Leave to File Complaint in Intervention by Mitchell Carlton Sims and Memorandum of Points and Authorities in Support Thereof; and Complaint in Intervention** Hon. Shellyanne Chang Dept.: 24 Date: June 5, 2015 Time: 11:00 a.m.

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

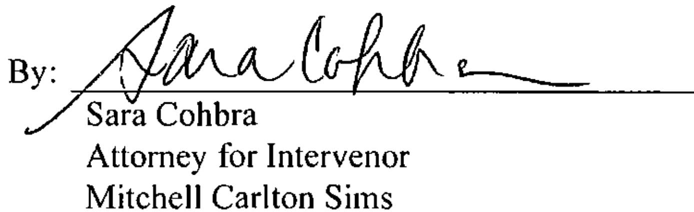
Notice is hereby given that on June 5, 2015, in the above-captioned Department of the Sacramento Superior Court, Intervenor Mitchell Carlton Sims, by and through counsel the Habeas Corpus Resource Center, will move and hereby moves this Court for leave to intervene in the above-captioned case.[1]

[1] Following the proceedings on January 30, 2015, counsel for Intervenor Mitchell Carlton Sims requested from the Clerk the earliest possible date that this matter may be heard. The Clerk informed counsel that June 5, 2015, was the next available court date. Counsel has received confirmation from counsel for both parties that neither objects to

This Application is based upon the facts and grounds set forth in the accompanying Memorandum of Points and Authorities; the proposed Complaint in Intervention; the pleadings and exhibits in the record; as well as any other relevant statements, evidence, testimony, or argument in this matter.

Dated: February 4, 2015

Respectfully submitted,
HABEAS CORPUS RESOURCE CENTER



By: ______________________
Sara Cohbra
Attorney for Intervenor
Mitchell Carlton Sims

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the June 5, 2015 date. In light of the Court's finding that neither petitioner nor respondent objects to Mr. Sims' intervention in this case, *see* Tentative Ruling on Demurrer at 2 (Jan. 29, 2015), and given the progress of this case, *id.* at 6 (requiring respondent to file an Answer in 10 days), Mr. Sims requests that this Court grant this Application solely on the papers. In the alternative, Mr. Sims requests that this Application be set for hearing on the next date that proceedings are held in this Court related to this case.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kent S. Scheidegger, hereby certify that the attached preliminary opposition of intervenor contains 12,344 words, as indicated by the computer program used to prepare the brief, WordPerfect.

Date: January 9, 2017

Respectfully Submitted,

KENT S. SCHEIDEGGER
Attorney for Intervenors
CALIFORNIANS TO MEND, NOT END,
THE DEATH PENALTY–
NO ON PROP. 62, YES ON PROP. 66

DECLARATION OF SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document (1) by electronic mail, sending true copies of the PDFs to the addresses listed below, and (2) by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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Attorneys for Respondents Governor Jerry Brown,
Attorney General Kamala Harris, and the California Judicial Council

Executed on January 9, 2017, at Sacramento, California.

____
Irma H. Abella