

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT SP18-13

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Title	Action Requested
Criminal and Appellate Procedure: Superior Court Appointment of Counsel in Death Penalty–Related Habeas Corpus Proceedings	Review and submit comments by Friday, August 24, 2018
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Adopt Cal. Rules of Court, rules 8.654 and 8.655; and adopt forms HC-100 and HC-101	January 1, 2019
Proposed by	Contact
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### Executive Summary and Origin

The Proposition 66 Rules Working Group is proposing the adoption of two new rules and two new forms relating to the superior court appointment of counsel in death penalty–related habeas corpus proceedings. These proposed rules and forms are intended to partially fulfill the Judicial Council’s rule-making obligations under Proposition 66 by providing procedures for superior courts to determine if an attorney meets the minimum qualifications for counsel in death penalty–related habeas corpus proceedings and to appoint such counsel for indigent persons subject to a judgment of death.

### Background

#### Proposition 66

On November 8, 2016, the California electorate approved Proposition 66, the Death Penalty Reform and Savings Act of 2016. This act made a variety of changes to the statutes relating to review of death penalty (capital) cases in the California courts, many of which were focused on reducing the time spent on this review. Among other provisions, Proposition 66 effected several changes to the procedures for filing, hearing, and making decisions on death penalty–related habeas corpus petitions. Relevant here is that the act requires trial courts to offer and, unless the offer is rejected, appoint habeas corpus counsel for indigent persons subject to a judgment of

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. It is circulated for comment purposes only.*

death. ([Pen. Code, § 1509\(b\)](#); [Gov. Code, § 68662](#).) In addition, the act calls for the Judicial Council to adopt, within 18 months of the act’s effective date, “initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review.” ([Pen. Code, § 190.6\(d\)](#).)

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

### **Existing processes for appointing counsel in habeas corpus proceedings**

***Death penalty–related habeas corpus proceedings.*** Before the act took effect, the Supreme Court generally was responsible for the appointment of counsel for both direct appeal and state habeas corpus proceedings in capital cases. The Supreme Court draws on several sources of attorneys when appointing counsel to initiate and pursue habeas corpus proceedings for indigent persons subject to a judgment of death. The first is the Habeas Corpus Resource Center (HCRC), which was established by legislation<sup>1</sup> in 1997.<sup>2</sup> HCRC employs 34 attorneys to represent indigent persons in death penalty–related habeas corpus proceedings, among other potential duties.<sup>3</sup>

The second source is the California Appellate Project – San Francisco (CAP-SF). CAP-SF is a nonprofit corporation established by the State Bar of California in 1983. The Supreme Court, acting through the Judicial Council, contracts with CAP-SF for a variety of services related to the review of capital judgments. Although the bulk of those services involves the support of attorneys representing individuals subject to a judgment of death, discussed below, the Supreme Court has also, on occasion, appointed attorneys employed by CAP-SF to represent indigent persons in death penalty–related habeas corpus proceedings.

The third, and currently the largest, source that the Supreme Court draws on for habeas corpus counsel for indigent persons subject to a judgment of death is private attorneys. Private attorneys interested in an appointment to represent an indigent person in a capital case before the Supreme

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<sup>1</sup> Sen. Bill 513 (Lockyer; Stats. 1997, ch. 869, § 3).

<sup>2</sup> The Office of the State Public Defender, which is also established by statute ([Gov. Code, §§ 15400–15425](#)), is primarily appointed to represent defendants in the automatic appeal of a judgment of death, but continues to represent clients in a small number of proceedings in which there had been a dual-appointment (i.e., to represent the same client on the automatic appeal and the habeas corpus petition).

<sup>3</sup> [Gov. Code, § 68661](#).

Court may apply online through the [Supreme Court Appointed Counsel System](#),<sup>4</sup> or may submit an application on the [nine-page form](#)<sup>5</sup> provided by the Supreme Court on its webpage on Death Penalty Cases. Applications are reviewed by staff at the Supreme Court, who make recommendations to the court. The court makes the appointment by means of a brief order.

The only current rule of court that relates to the Supreme Court appointment of counsel for indigent persons in capital cases is California Rules of Court, [rule 8.605\(b\)](#), which provides that the Supreme Court may appoint an attorney “only if it has determined, after reviewing the attorney’s experience, writing samples, references, and evaluations . . . that the attorney has demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant.” The Supreme Court also makes available on its Death Penalty Cases webpage its [policies](#) regarding the compensation of counsel and other matters related to the duties of appointed counsel.

***Assisting Entities and Counsel.*** In addition to serving, on occasion, as appointed counsel to represent individuals, CAP-SF is frequently designated as an “assisting entity” to provide, under contract, a broad range of services related to appointed counsel in capital habeas corpus proceedings. Specifically relevant here, CAP-SF provides (1) services before counsel is appointed to protect and preserve the record and facilitate the recruitment of counsel; (2) assistance and support for private attorneys appointed to represent petitioners; (3) consultation with the Supreme Court on the qualifications of attorneys who apply for appointment and the suitability of attorneys for appointment to specific cases; and (4) common case services, such as maintaining a brief bank and providing training to appointed counsel. When CAP-SF considers itself unable to carry out some or all of its contractual responsibilities due to a conflict of interest—this most often occurs in cases in which there are co-defendants—the Supreme Court “will designate an alternative assisting entity, or an experienced private capital appellate and/or habeas corpus practitioner, as appropriate.”<sup>6</sup>

Although the California Rules of Court require appointed counsel to cooperate with an assisting counsel or entity and define the term “assisting counsel or entity” (Cal. Rules of Court, [rule 8.605\(b\) and \(c\)\(5\)](#)), no rule of court currently requires the Supreme Court to designate an assisting counsel or entity.

***Counsel in noncapital habeas corpus proceedings.*** Under [Government Code section 27706](#), public defenders are required to provide indigent criminal defense “at all stages of the proceedings.” If a county has not established a public defender’s office, or when the public defender is unable to represent a defendant because of a conflict of interest or is otherwise unavailable to represent a defendant, [Penal Code section 987.2](#) governs. That statute authorizes

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<sup>4</sup> <https://scacs.courts.ca.gov/index.cfm?fuseaction=Security.Login>.

<sup>5</sup> [http://www.courts.ca.gov/documents/blank\\_application.pdf](http://www.courts.ca.gov/documents/blank_application.pdf).

<sup>6</sup> Supreme Court of Cal. Memo, *Appendix of Appointed Counsel’s Duties* (rev. 2011), [www.courts.ca.gov/documents/applica9.pdf](http://www.courts.ca.gov/documents/applica9.pdf), p. 3.

superior court judges to appoint private counsel for indigent defendants who request representation in certain criminal proceedings (including capital trials)<sup>7</sup> and requires the expense to be paid out of the county general fund, subject to a number of conditions.

The scope of the public defender’s duties arguably includes representing a petitioner in a habeas corpus proceeding. In *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 862–863, the Court of Appeal, citing Government Code section 27706, held that the public defender had a duty to represent a petitioner on a writ of habeas corpus if petitioner had stated a prima facie case or otherwise raised a nonfrivolous claim, and that private counsel cannot be appointed unless the public defender is unavailable under [Penal Code section 987.2](#). Although *Charlton* involved a noncapital case and is therefore procedurally distinguishable from the proceedings that are subject to this proposal, the principles and argument underlying the holding in that case may well apply to death penalty–related habeas corpus proceedings, too.

### **Cases awaiting appointment of counsel for death penalty–related habeas corpus proceedings**

As of July 9, 2018, there were almost 750 individuals on death row in California.<sup>8</sup> Approximately 360 of these individuals are waiting for attorneys to be appointed to represent them for habeas corpus petitions. Of these, about half have been waiting for over 10 years since their sentences were imposed,<sup>9</sup> and 100 have already completed their automatic appeals. Members of the working group report that approximately 30 individuals have been waiting *over* two decades for attorneys to be appointed. Although there are a number of explanations for the delay in appointments, a key factor is the “serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case.”<sup>10</sup>

### **The Proposition 66 model for expanding the pool of counsel**

Based on information about Proposition 66 in the Voter Information Guide, the proponents of Proposition 66 intended that its passage would reduce the delay in making appointments by expanding “the pool of available lawyers.”<sup>11</sup> This expansion may be accomplished by having superior courts, rather than the Supreme Court, make the appointments because the superior courts should be in a better position to recruit attorneys from within their respective local communities. Some believe it might also be aided by reducing the amount of time attorneys have

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<sup>7</sup> Penal Code section 987.2 applies to felony charges and, “when it appears that the appointment is necessary to provide an adequate and effective defense for the defendant,” to misdemeanor charges. Infractions are subject to Penal Code section 19.6. (Pen. Code, § 987.2(i).)

<sup>8</sup> California Department of Corrections and Rehabilitation, Death Row Tracking System, [Condemned Inmate List](#), [www.cdcr.ca.gov/Capital\\_Punishment/docs/CondemnedInmateListSecure.pdf?pdf=Condemned-Inmates](http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf?pdf=Condemned-Inmates) (as of July 12, 2018); see *Briggs v. Brown et al.* (2017) 3 Cal.5th 808, 863 (conc. opn. of Liu, J.).

<sup>9</sup> *Briggs v. Brown*, *supra*, at p. 864, citing *Voter Information Guide*, Gen. Elec. (Nov. 8, 2016), analysis of Prop. 66 by Legis. Analyst, p. 105.

<sup>10</sup> *In re Morgan* (2010) 50 Cal.4th 932, 937–938.

<sup>11</sup> *Voter Information Guide*, Gen. Elec. (Nov. 8, 2016), argument in favor of Proposition 66, p. 108.

to work on habeas corpus petitions from three years<sup>12</sup> to one year,<sup>13</sup> allowing attorneys to take on more petitions with less of a time commitment than they have had in the past.<sup>14</sup>

Although the working group is unable to predict the long-term success of these efforts to expand the pool of available attorneys,<sup>15</sup> it believes the expansion of the pool will not take place immediately. Among other reasons, the working group notes that Proposition 66 did not provide any additional funding source for the appointment of habeas corpus counsel. In addition, the requirement that petitions be filed within one year from the date of appointment combined with the proposition's limits on successive habeas corpus petitions<sup>16</sup> may be a strong disincentive for qualified counsel to accept appointment. Some attorneys have expressed the view that one year is too short a time in which to competently investigate potential issues and prepare a habeas corpus petition in a capital case. These concerns may be especially acute if an attorney is new to the area of practice. Overall, even with the adoption of these proposed rules and forms, the working group considers it unlikely that counsel will be immediately available for all of the approximately 360 individuals waiting for habeas corpus counsel to be appointed.

## The Proposal

Proposition 66 vests superior courts, for the first time, with primary responsibility for offering to appoint and then, subject to the necessary findings, appointing counsel for indigent persons in death penalty–related habeas corpus proceedings. ([Pen. Code, § 1509\(b\)](#); [Gov. Code, § 68662](#).) This proposal is intended to help fulfill the Judicial Council's rule-making obligations under Proposition 66 by proposing two new rules and two new forms designed to facilitate the superior courts' exercise of their new responsibility for appointing counsel in death penalty–related habeas corpus proceedings in an orderly and fair way. Before summarizing the details of the proposal, two guiding principles are discussed.

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<sup>12</sup> Supreme Court of Cal., *Supreme Court Policies Regarding Cases Arising From Judgments of Death* (as amended Jan. 1, 2008), Policy 3, paragraph 1-1.1, [www.courts.ca.gov/documents/PoliciesMar2012.pdf](http://www.courts.ca.gov/documents/PoliciesMar2012.pdf): (“A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant’s reply brief on the direct appeal or within 36 months after appointment of habeas corpus counsel, whichever is later”).

<sup>13</sup> Pen. Code, § 1509(c), enacted as part of Proposition 66 (“Except as provided in subdivisions (d) and (g), the initial petition must be filed within one year of the order entered under Section 68662 of the Government Code”).

<sup>14</sup> [Government Code section 68665\(b\)](#), which was added by Proposition 66, also requires the Supreme Court and the Judicial Council, in adopting rules of court related to the qualifications of counsel, to consider, among other factors, “the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment.”

<sup>15</sup> Justice Liu, joined by three other justices in his concurring opinion, raised doubt about the likelihood of Proposition 66 increasing the pool of available attorneys or expediting the appointment process. (*Briggs v. Brown*, *supra*, at pp. 866–869, discussing appointment of counsel for direct appeals and habeas corpus petitions in capital cases.)

<sup>16</sup> A “successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence . . . that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence.” ([Pen. Code, § 1509\(d\)](#).)

## **Guiding principles**

***Local control with regional and statewide support.*** The working group’s proposal is intended to balance two interests that exist in some tension. On the one hand, Proposition 66 clearly requires superior courts to appoint counsel for death penalty–related habeas corpus proceedings. On the other hand, the superior courts have expressed concern about their ability to take on this new responsibility without some level of statewide help and guidance, at least initially. The proposal is intended to balance these interests by designing a procedural framework for recruiting and screening potential counsel that includes elements of local responsibility coupled with elements of regional and statewide coordination and assistance. The proposal also allows individual superior courts to opt out of some of these elements. The intent is that the rules will provide support for the superior courts’ appointment efforts, not control.

***Prioritization of oldest judgments.*** Given the existing shortage of qualified counsel willing and able to serve as habeas corpus counsel,<sup>17</sup> not every person subject to a judgment of death will have counsel appointed immediately following adoption of the rules. It is, therefore, important to put in place a structure that allows for the orderly appointment of counsel, as they become available. The working group concluded that the least inequitable solution would be to appoint counsel first for those individuals who are subject to the oldest judgments of death. The reasoning underlying this principle is that those individuals who have only recently been sentenced to death should not obtain counsel while those who have waited decades are required to wait even longer. This reasoning applies equally to the families of the crime victims who have been waiting for a resolution to these cases. The principle is not intended to be applied rigidly. The working group recognizes that the availability of counsel may vary regionally and depend on the specific facts of a case.

## **Proposed rules and forms**

***Mechanism for prioritizing the oldest judgments.*** Proposed rule 8.654(b) expresses the aspiration that “California courts should appoint death penalty–related habeas corpus counsel first for those persons subject to the oldest judgments of death.” The provision stating this principle deliberately qualifies the prioritization based on the age of the judgment with the clause “whenever possible,” to allow it to be applied with flexibility and in recognition that making appointments may be more difficult in some cases than in others. The prioritization of older judgments should not prevent appointments from being made when qualified counsel are available and willing to accept appointments.

Proposed rule 8.654(c)–(d) establishes the mechanism by which that priority is implemented on a statewide basis. Under the proposal, HCRC will compile and maintain a statewide list of persons subject to a judgment of death, organized by the date the judgment was entered by the sentencing court. HCRC will then identify the 25 oldest judgments of death for which habeas corpus counsel has not been appointed and advise the presiding judge of the courts in which such judgments are

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<sup>17</sup> *In re Morgan*, *supra*, 50 Cal.4th at pp. 937–938.

pending. Once counsel has been appointed (or is otherwise not required)<sup>18</sup> for 20 of these judgments, HCRC will identify the next 20 oldest judgments and send out notices to the presiding judges of the courts in which those judgments are pending. HCRC will continue sending out notices every time another 20 appointments have been made. The rule is intended to give enough direction that HCRC's role in this procedure would be entirely ministerial and require no discretion on the part of HCRC. Nonetheless, the efforts of HCRC as a state entity will be crucial in facilitating the smooth transition to superior court appointment of habeas corpus counsel.

In the absence of these notices, superior courts would lack the information they need regarding the status of judgments pending in their respective courts in relation to the status of judgments pending and appointments being made in other courts within the state. The proposal does not interfere with the superior courts' statutory authority to appoint counsel, but allows for an orderly process to have the limited number of qualified counsel appointed first for those persons who are subject to the oldest judgments in the state, regardless of the county in which their sentence was entered.

The reason for having the new batch of notices go out after 20 appointments have been made, rather than waiting for the full 25, is to provide flexibility. Some cases are going to be more difficult to find counsel for than others. The overall progress of appointments statewide should not be slowed because of delays in making appointments in a small group of the cases.<sup>19</sup>

***Appointment procedure.*** After receiving information that a judgment entered in its court is one of the oldest in the state without counsel, the presiding judge must identify the appropriate judge within the court to make an appointment and notify that judge that the judgment is among the oldest in the state for which a habeas corpus counsel appointment has not been made. If the court has made the findings required by Government Code section 68662, the judge may then seek out available counsel that can be appointed for the individual subject to that judgment.

Under the proposal, the court must first request that HCRC accept representation of the person subject to the sentence of death and, if it has no conflict and has attorneys available, appoint HCRC. If HCRC is unable to accept representation, the court must appoint an attorney or attorneys from the statewide panel of attorneys authorized in proposed rule 8.655(d)(4), discussed below.<sup>20</sup> The court may request that the regional habeas corpus panel committee assist

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<sup>18</sup> Counsel would not be required if, for example, if defendant prevailed in the automatic appeal of the case.

<sup>19</sup> Proposition 66 imposes on the Judicial Council a continuing responsibility to monitor the timeliness of capital cases and authorizes it to amend rules of court and standards, as necessary. ([Pen. Code, § 190.6\(d\)](#)) [“The Judicial Council shall continuously monitor the timeliness of review of capital cases and shall amend the rules and standards as necessary . . . .”].) Once the proposed rules are implemented, if the Judicial Council determines that sending notices in batches of 20 is impeding appointments, it can amend the rule to change the number to trigger a new batch or adopt a new procedure, as appropriate.

<sup>20</sup> For reasons explained in Alternatives Considered, below, the current proposal does not require the court first to attempt to appoint a public defender.

it in identifying an attorney on the panel who is suitable for the appointment. In a court that has adopted a local rule under proposed rule 8.654, the judge may appoint counsel who the court has determined has met minimum qualifications under the California Rules of Court. If the court is appointing private counsel (as opposed to HCRC), it must designate an assisting entity or counsel to provide assistance and support to the appointed counsel.<sup>21</sup>

Proposed rule 8.654 requires the use of proposed *Order Appointing Counsel in Death Penalty–Related Habeas Corpus Proceeding* (form HC-101) when making an appointment. The form is modeled after [Order Appointing Counsel in Capital Case \(form CR-190\)](#), which is already used by superior court judges for the appointment of counsel for death penalty trials. The form requires the court to designate whether the attorney is appointed as lead or assisting counsel. The form also provides a place to designate an assisting entity or counsel. The proposed rule requires that a copy of the order be sent to HCRC, among others, so that it can update the list of judgments for which habeas corpus counsel have not been appointed.

If counsel is available for appointment to a case for which a petition is pending in the Supreme Court, the judge must provide written notice to the Supreme Court that it has counsel available for appointment, before making the appointment. The rule does not set a deadline for or require the Supreme Court to act and does not prohibit the superior court from making an appointment.

***Recruitment and determination of qualifications of counsel.*** The proposed rules make superior courts responsible for developing and implementing a plan to identify and recruit qualified habeas corpus counsel who can be appointed for indigent persons subject to a judgment of death. This responsibility is consistent with the statutory authority for superior courts to offer to appoint and to appoint counsel after entry of judgment, which was enacted as part of Proposition 66. ([Pen. Code, § 1509\(b\)](#); [Gov. Code, § 68662](#).)

The proposed rules require the establishment of regional habeas corpus panel committees, one in each appellate district. The committees are modeled in part on committees that vet attorneys and recommend them for inclusion on capital habeas corpus panels in the federal courts (e.g., in the Central District of California<sup>22</sup> and the Eastern District of California<sup>23</sup>).

Under the proposal, the committees would be required to:

- Support superior court efforts to recruit applicants;

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<sup>21</sup> This designation does not encompass other services currently provided by CAP-SF to the court under contract, e.g., preappointment services.

<sup>22</sup> See U.S.D.C., C.D.Cal., General Order 13-14-Establishing a Capital Habeas Corpus Attorney Panel, [www.cacd.uscourts.gov/sites/default/files/general-orders/GO-13-14.pdf](http://www.cacd.uscourts.gov/sites/default/files/general-orders/GO-13-14.pdf) (filed Nov. 6, 2013); Procedures for the Capital Habeas Attorney Panel for the Central District of California (rev. Feb. 11, 2014), [www.cacd.uscourts.gov/sites/default/files/documents/Procedures-for-the-Capital-Habeas-Attorney-Panel-updated-2.11.2014.pdf](http://www.cacd.uscourts.gov/sites/default/files/documents/Procedures-for-the-Capital-Habeas-Attorney-Panel-updated-2.11.2014.pdf).

<sup>23</sup> U.S.D.C., E.D.Cal., Local Rule 191(b) (eff. Apr. 1, 2017), [www.caed.uscourts.gov/caednew/assets/File/EDCA%20Local%20Rules%20Effective%204-1-2017.pdf](http://www.caed.uscourts.gov/caednew/assets/File/EDCA%20Local%20Rules%20Effective%204-1-2017.pdf).

- Review applications of attorneys who want to serve as habeas corpus counsel;
- Determine if the applicants meet the minimum qualifications;
- Contribute names of attorneys who meet the minimum qualifications to a statewide panel of counsel available for appointment by superior courts;
- On request, assist superior courts in matching counsel to cases that require appointments; and
- Reevaluate attorneys' inclusion on the statewide panel in light of disciplinary action or a finding that counsel has provided ineffective assistance.

The committees would be chaired by an appellate justice appointed by the administrative presiding justice and include at least three superior court judges from within the appellate district and three members from the legal community with expertise in capital and appellate defense and familiarity with the local bar. The chair and members will serve for staggered terms of three years. Regional committees will have the option of working together.

A committee will be required to accept applications only from attorneys whose principal place of business is in the appellate district. (Attorneys whose principal place of business is located outside California will be accepted only by the committee formed by the First Appellate District.) This requirement is intended to give applicants a specific committee to which to submit their applications and avoid overloading one or two committees with a disproportionate number of the applications. It serves only an administrative purpose because all attorneys determined to meet the minimum qualifications will be included on the statewide panel, and appointing judges may appoint any attorney on the panel, regardless of which committee determined that the attorney met the minimum qualifications.

Superior courts may adopt a local rule authorizing the judges of the court to appoint qualified counsel who are not members of the statewide panel.

Whether an attorney is applying to a regional committee for inclusion on a statewide panel, or to a superior court that has elected by local rule to authorize judges of the court to appoint qualified counsel who are not members of the statewide panel, the attorney must submit the application using *Declaration of Counsel re Minimum Qualifications for Appointment for Death Penalty–Related Habeas Corpus Proceedings* (form HC-100). The form is modeled after *Declaration of Counsel for Appointment in Capital Case* ([form CR-191](#)), which is used to apply to serve as trial counsel for appointment in a capital case in the superior courts, but tracks the qualifications for death penalty–related habeas corpus counsel found in proposed rule 8.662, which is being circulated concurrently with this invitation to comment. It is intended to collect only the information and written materials necessary to determine if an attorney meets the minimum qualifications. It is not intended to collect information that a judge may want in attempting to match a qualified attorney to a particular case (e.g., what kinds of cases an attorney will accept appointment to, or in what geographic locations).

## **Alternatives Considered**

### **Adopt no rule**

The working group considered the possibility of recommending that no rule need be adopted on the ground that the direction in Proposition 66 to appoint counsel “[a]fter the entry of a judgment of death in the trial court” is sufficient direction to the superior courts. ([Pen. Code, § 1509\(b\).](#))

The benefit of such an approach would be to leave to the discretion of each sentencing judge the timing of when to appoint counsel. Alternatively, in the absence of a state rule of court, individual courts could adopt local rules to govern the practice among all of the judges within that superior court. This option would allow each trial court or judge to determine the timing and method for appointing counsel that would work for that court or judge, and allow the trial court to manage the flow of death penalty–related habeas corpus petitions that are filed in that court or before that judge. Arguably, the trial court may consider that its experience with a specific case puts it in a unique position to determine the best time to appoint habeas corpus counsel.

The disadvantage of this approach is that it could easily lead to inequities for petitioners and the families of victims. When a petitioner was assigned counsel would depend on which judge or court sentenced the petitioner. There is some risk that the appointment could trigger the one-year time frame to file the petition before the record on appeal has even been prepared, possibly foreclosing habeas corpus counsel’s ability to properly investigate and raise claims dependent on the appellate record or arising during the direct appeal.

The working group concluded that the disadvantages of this approach outweighed the potential advantages.

### **Prioritize oldest judgments by county or region**

The working group considered whether the notices sent out identifying the oldest judgments should determine what is oldest locally (i.e., by county), regionally, or statewide. CAP-SF provided the working group with informal data indicating that prioritizing within a county or region would result in some fairly recent cases in a number of courts receiving appointments before many of the oldest cases in other courts. This information led the working group to the conclusion that the prioritization needed to be determined statewide.

### **Require appointment of public defenders**

As noted in the Background, under [Government Code section 27706](#), public defenders are required to provide indigent criminal defense “at all stages of the proceedings,” and under *Charlton, supra*, 93 Cal.App.3d at pp. 862–863, this likely includes representation of a petitioner on a writ of habeas corpus if petitioner had stated a prima facie case or otherwise raised a nonfrivolous claim. Under the same authorities, private counsel could not be appointed unless the public defender was unavailable under [Penal Code section 987.2](#). Although *Charlton* involved a noncapital case and is therefore procedurally distinguishable from the proceedings

that are subject to this proposal, the principles and argument underlying the holding in that case may well apply to death penalty–related habeas corpus proceedings, too.

Members of the working group debated whether superior courts should be required to attempt to appoint a public defender to represent indigent persons in death penalty–related habeas corpus proceedings. Some members argued that a conflict of interest would almost always require a public defender to decline the representation. Most habeas corpus petitions involve a claim of ineffective assistance of counsel, which would often be directed at the public defender who provides representation in a large proportion of capital cases. In addition, some members contemplated that very few public defenders would meet the minimum qualifications for appointment. Thus, these members reasoned that the appointing court should be allowed to skip the futile step of offering the appointment to a public defender and focus instead on appointing private counsel.

Other members argued that Penal Code section 987.2 allows the appointment of private counsel only when the public defender is unavailable and that the rule should not circumvent this requirement, even if public defenders would often be unable to accept appointments. By crafting a rule that did not address the appointment of public defenders, the rule could foreclose the possible future use of alternate public defender offices or other solutions that a county might consider, such as assembling a professional local staff of counsel prepared to handle death penalty–related habeas corpus petitions.

Because a majority of the working group concluded that public defenders would rarely, if ever, accept appointments to represent petitioners for death penalty–related habeas corpus proceedings, the rule does not impose such a requirement. Given the strength of the minority position, however, the working group would especially appreciate comments on this particular issue.

### **Exclude petitions pending in the Supreme Court**

Many of the oldest judgments without habeas corpus counsel have habeas corpus petitions pending before the Supreme Court.<sup>24</sup> The working group considered excluding cases with such petitions pending from the cases considered for prioritization under proposed rule 8.654(c)–(d) on the grounds that a superior court could not or should not appoint habeas corpus counsel for cases with habeas corpus petitions pending in the Supreme Court.

Proposition 66 does not provide clear guidance on this question. On the one hand, it specifically amended Government Code section 68662 to provide that the superior court, rather than Supreme Court, must offer to appoint, and then appoint, habeas corpus counsel. (*Voter Information Guide*, Gen. Elec. (Nov. 8, 2016), text of Prop. 66, § 16, p. 217 [deleting the words “Supreme Court” from the first paragraph of Government Code section 68662, and substituting in the words “superior court that imposed the sentence.”]) However, Proposition 66 also

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<sup>24</sup> Many of these are the petitions typically referred to as “*Morgan* petitions” or “shell petitions.” (*In re Morgan*, *supra*, 50 Cal.4th at p. 941.)

specifically recognizes that habeas corpus petitions would be pending in the Supreme Court at the time the proposition became effective and allows, but does not require, the Supreme Court to retain jurisdiction over these petitions.<sup>25</sup>

The working group did not reach a consensus on this issue. Instead, the working group proposes a rule that requires a superior court, before appointing counsel for a petition pending before the Supreme Court, to give the Supreme Court notice that it has counsel available. This rule gives the Supreme Court an opportunity to act but imposes no requirement to do so. Neither, on the other hand, does the proposal specifically prevent a superior court from making an appointment if it has qualified counsel available. This proposal, therefore, reflects the deference due to the Supreme Court when a habeas corpus petition is pending before it without impeding a superior court from making an appointment if it has counsel available. Consistent with this deference to the Supreme Court, the rule does not set a timeline for the Supreme Court to take any action. Rather, the rule assumes that the timeline may depend on the specifics of each case and that the Supreme Court has the incentive and discretion to act expeditiously or otherwise make its intent known if the superior court is in a position to appoint counsel.

#### **Require CAP-SF as an assisting entity**

Several members of the working group argued that CAP-SF should be mandated as the default assisting entity under the proposed rules. Although the Supreme Court designates CAP-SF as the assisting entity for most private counsel, this is accomplished through a contract, not an order or rule of court. Rules of court may dictate a function, or set a standard, but to require the use of a specific contractor is likely outside the scope of a rule. For this reason, the rule requires the designation of an assisting entity or counsel but does not require superior courts to designate CAP-SF specifically.

#### **Fiscal and Operational Impacts**

The changes made by Proposition 66 to the procedures for review of death penalty cases, particularly making the superior courts generally responsible for appointing counsel and hearing habeas corpus proceedings in these cases, will likely have substantial costs, operational impacts, and implementation requirements for courts and justice system partners. The proposed new rules and forms are likely to require some initial training for judges and court staff, and they would impose new requirements on HCRC and attorneys seeking appointment in death penalty–related habeas corpus proceedings. However, these rules and forms are anticipated to facilitate the transition that superior courts are required by Prop. to make in appointing qualified attorneys for indigent persons in death penalty–related habeas corpus proceedings.

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<sup>25</sup> Penal Code section 1509(g) provides, “If a habeas corpus petition is pending on the effective date of this section, the court may transfer the petition to the court which imposed the sentence.” In addition, section 1509(a) allows the Supreme Court to retain jurisdiction over a petition filed after the effective date of the proposition if good cause is shown: “A petition filed in any court other than the court which imposed the sentence should be promptly transferred to that court unless good cause is shown for the petition to be heard by another court.”

## **Request for Specific Comments**

In addition to comments on the proposal as a whole, the working group is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

### ***Prioritization and Appointment***

- Should courts prioritize the appointment of counsel for the oldest judgments of death?
- Should the first group of judgments for which HCRC sends out notices include 25 judgments or a different number?
- Should the number of judgments for which HCRC sends out subsequent notices include 20 judgments or a different number?
- For purposes of prioritizing the oldest judgments without counsel, should the rule distinguish (or exclude) those cases in which a petition is pending before the Supreme Court from those that do not have a petition pending before the Supreme Court?
- For purposes of prioritizing the oldest judgments without counsel, should the rule distinguish (or exclude) those cases in which a *Morgan* petition is pending before the Supreme Court (as opposed to a petition filed by counsel, but for which there is not currently an attorney as a result of, for example, death or withdrawal of the attorney)?
- Should a superior court judge be authorized to appoint counsel within a certain time if the Supreme Court has not acted after the judge advises the Supreme Court that counsel is available for appointment? If so, how long? Would 60 days be appropriate?
- Should the proposed rules provide requirements or guidance on how many attorneys should be appointed to initiate and pursue a petition?
- Should judges be required to request that a public defender or alternate public defender accept representation of the person subject to a judgment of death before appointing private counsel?
- Should superior courts be required to designate an assisting entity or counsel to assist and support private counsel?
- Should the proposal designate a specific assisting entity (e.g., CAP-SF)?
- Should the proposal require use of a mandatory form for a superior court to appoint counsel?
- Does the proposed form provide the fields necessary for a superior court to appoint counsel?

### ***Regional Committees and Vetting of Attorney Qualifications***

- Should regional committees be formed to assist the superior courts in vetting attorneys seeking appointment as death penalty–related habeas corpus counsel?
- Should regional committees take on duties different from those specified in the proposal?

- Should it be mandatory that one or more of the attorney members of the regional habeas corpus panel committees have death penalty–related habeas corpus experience? If yes, how many of the three?
- Should committees be composed of a membership different than specified in the proposal?
- Should the proposed rule specify who is responsible for appointing members of the committee? If yes, should it be the chair of the committee?
- Should the proposed rule specify that the three superior court judges be selected from among those “nominated by” the superior courts, rather than “agreed upon” by the superior courts (as provided in the current draft)?
- Should the proposed rule require that the attorney members be selected from among those nominated by the attorney groups? Or should the proposed rule require the chair to select the attorney groups from which it wants to draw members and let the groups designate an attorney?
- Should the proposed rule require a specific term for the members of the regional habeas corpus panel committees? If yes, is a three-year term appropriate?
- Should the regional habeas corpus panel committees be authorized to contract with an assisting entity to perform the committees’ duties?
- Should the rule require committees to provide for procedures for the removal and replacement of its own members?
- Should the committees be managed or governed in a way different from what is specified in the proposal?
- Should the proposal provide broader, narrower, or more specific circumstances or language regarding when an attorney would be removed from a panel?
- Should the proposal require removal of an attorney from the statewide panel (or reconsideration of the attorney’s inclusion on the panel) if the attorney has been found by a court to have rendered ineffective assistance of counsel?
- Should courts be authorized to appoint qualified attorneys who are not members of the statewide panel?
- If a court determines that an attorney is qualified pursuant to a local rule, should that qualification be provisional, pending approval of a regional committee?
- Should attorneys who are on the statewide panel also be allowed to seek inclusion on a local panel? Should the rule clarify whether this is allowed or prohibited?
- Should the rule require use of a mandatory Judicial Council form for attorneys to submit applications to be considered for the statewide panel?
- Does the proposed form require the information necessary to determine the qualifications of an attorney, or should it require different information?

The working group also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and

procedures (please describe), changing docket codes in case management systems, or modifying case management systems?

- Would one month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### **Attachments and Links**

1. Cal. Rules of Court, rules 8.654 and 8.655, at pages 16–22
2. Forms HC-100 and HC-101, at pages 23–25

Rules 8.654 and 8.655 of the California Rules of Court would be adopted, effective January 1, 2019, to read:

1 **Title 8. Appellate Rules**  
2

3 **DRAFTERS' NOTES ON PROPOSED DIVISION 2 OF TITLE 8:** This proposal  
4 includes the creation of a new division 2 within the Appellate Rules that would  
5 focus on capital appeals and death penalty–related habeas corpus proceedings.  
6 The working group’s companion proposals relating to the record on appeal and  
7 qualifications of counsel include provisions in other chapters and articles. This  
8 proposal addresses only the rules in chapter 3, article1 relating to the  
9 appointment of counsel for death penalty–related habeas corpus proceedings.  
10

11 **Division 2. Rules Relating to Death Penalty Appeals and Death Penalty–Related**  
12 **Habeas Corpus Proceedings**  
13

14 **Chapter 3. Death Penalty–Related Habeas Corpus Proceedings**  
15

16 **Article 1. Appointment of Counsel**  
17

18 **Rule 8.654. Superior court appointment of counsel in death penalty–related habeas**  
19 **corpus proceedings**  
20

21 **(a) Purpose**  
22

23 This rule, in conjunction with rule 8.655, establishes a mechanism for superior  
24 courts to appoint qualified counsel to represent indigent persons in death penalty–  
25 related habeas corpus proceedings. This rule governs the appointment of counsel by  
26 superior courts only, including when the Supreme Court or a Court of Appeal has  
27 transferred a habeas corpus petition without having appointed counsel for the  
28 petitioner. It does not govern the appointment of counsel by the Supreme Court or a  
29 Court of Appeal.  
30

31 **(b) Prioritization of oldest judgments**  
32

33 In the interest of equity, both to the families of victims and to persons sentenced to  
34 death, California courts, whenever possible, should appoint death penalty–related  
35 habeas corpus counsel first for those persons subject to the oldest judgments of  
36 death.  
37

38 **(c) List of persons subject to a judgment of death**  
39

40 The Habeas Corpus Resource Center must maintain a list of persons subject to a  
41 judgment of death, organized by the date the judgment was entered by the  
42 sentencing court. The list must indicate whether death penalty–related habeas

1 corpus counsel has been appointed for each person and, if so, the date of the  
2 appointment. The list must also indicate for each person whether a petition is  
3 pending in the Supreme Court.

4  
5 **(d) Notice of oldest judgments without counsel**

6  
7 (1) Within 30 days of the effective date of this rule, the Habeas Corpus Resource  
8 Center must identify the persons on the list required by (c) with the 25 oldest  
9 judgments of death for whom death penalty–related habeas corpus counsel  
10 have not been appointed.

11  
12 (2) The Habeas Corpus Resource Center must notify the presiding judges of the  
13 superior courts in which these 25 judgments of death were entered that these  
14 are the oldest cases in which habeas corpus counsel have not been appointed.  
15 The Habeas Corpus Resource Center will send a copy of the notice to the  
16 administrative presiding justice of the appellate district in which the superior  
17 court is located.

18  
19 (3) The presiding judge must identify the appropriate judge within the court to  
20 make an appointment and notify the judge that the case is among the oldest  
21 cases in which habeas corpus appointments are to be made.

22  
23 (4) If counsel is available for appointment to a case for which a petition is  
24 pending in the Supreme Court, before making the appointment, the judge  
25 must provide written notice to the Supreme Court that counsel is available for  
26 appointment.

27  
28 (5) On entry of an order appointing death penalty–related habeas corpus counsel,  
29 the appointing court must promptly send a copy of the appointment order to  
30 the Habeas Corpus Resource Center, which must update the list to reflect that  
31 counsel was appointed, and to the Clerk of the Supreme Court, the Attorney  
32 General, and the district attorney.

33  
34 (6) When a copy of an appointment order, or information indicating that an  
35 appointment is for any reason not required, has been received by the Habeas  
36 Corpus Resource Center for 20 judgments, the center will identify the next 20  
37 oldest judgments of death in cases in which death penalty–related habeas  
38 corpus counsel have not been appointed and send out a notice identifying  
39 these 20 judgments, and the procedures required by paragraphs (3) through  
40 (6) of this subdivision must be repeated.

41  
42 (7) The presiding judge of a superior court may designate another judge within  
43 the court to carry out his or her duties in this subdivision.

1 **(e) Appointment of counsel**

- 2
- 3 (1) After the court receives a notice under subdivision (d)(2) and has made the  
4 findings required by Government Code section 68662, the appropriate judge  
5 must appoint a qualified attorney or attorneys to represent the person in death  
6 penalty–related habeas corpus proceedings.
- 7
- 8 (2) The court must first request that the Habeas Corpus Resource Center accept  
9 representation of the person. If the Habeas Corpus Resource Center accepts  
10 representation of the person, the court will enter an order appointing the  
11 center.
- 12
- 13 (3) If the Habeas Corpus Resource Center declines to represent the person, the  
14 court must appoint an attorney or attorneys from the statewide panel of  
15 qualified attorneys authorized by rule 8.655(d)(4), unless the court has  
16 adopted a local rule allowing appointment of qualified attorneys not on the  
17 panel. The court must at this time also designate an assisting entity or counsel  
18 to provide assistance to the appointed counsel.
- 19
- 20 (4) When the court appoints counsel to represent a person in a death penalty–  
21 related habeas corpus proceeding under this subdivision, the court must  
22 complete and enter an *Order Appointing Counsel in Death Penalty–Related*  
23 *Habeas Corpus Proceeding* (form HC-101).
- 24

25 **Rule 8.655. Recruitment and determination of qualifications of attorneys for**  
26 **appointment in death penalty–related habeas corpus proceedings**

27

28 **(a) Purpose**

29

30 This rule provides for a panel of attorneys from which superior courts may appoint  
31 counsel in death penalty–related habeas corpus proceedings.

32

33 **(b) Regional habeas corpus panel committees**

34

35 Each Court of Appeal must establish a death penalty–related habeas corpus panel  
36 committee as provided in this rule.

37

38 **(c) Composition of regional habeas corpus panel committees**

- 39
- 40 (1) Each committee must, at a minimum, be composed of:
- 41
- 42 (A) One justice, designated by the administrative presiding justice of the  
43 Court of Appeal, to serve as the chair of the committee;

1 (B) A total of three judges, as agreed on by the presiding judges of the  
2 superior courts located within the appellate district; and

3  
4 (C) A total of three attorneys drawn from the following categories, as  
5 selected by the judicial officers on the committee:

6  
7 (i) An attorney from the Habeas Corpus Resource Center;

8  
9 (ii) An attorney from the California Appellate Project - San  
10 Francisco;

11  
12 (iii) An attorney from the appellate project with which the Court of  
13 Appeal contracts;

14  
15 (iv) An attorney from the federal public defenders' offices of the  
16 federal districts in which the participating courts are located;

17  
18 (v) An attorney from a public defender's office in a county where the  
19 participating courts are located; and

20  
21 (vi) An attorney designated by another entity, as authorized by the  
22 chair.

23  
24  
25 (2) Each committee may also include advisory members, as authorized by the  
26 chair.

27  
28 (3) The term of the chair and committee members is three years. Terms are  
29 staggered so that an approximately equal number of each committee's  
30 members changes annually. When a member is unable to complete a term, a  
31 replacement will serve out the existing term.

32  
33 (4) Except as otherwise provided in this rule, each committee is authorized to  
34 establish the procedures under which it is governed.

35  
36 **(d) Regional habeas corpus panel committee responsibilities**

37  
38 The committee will have the following responsibilities:  
39

1           (1) Support superior court efforts to recruit applicants

2  
3           Each committee must assist the participating superior courts in their efforts to  
4           recruit attorneys to represent indigent petitioners in death penalty–related  
5           habeas corpus proceedings in the superior courts.

6  
7           (2) Accept applications

8  
9           Each committee must accept applications from attorneys that seek to be  
10          included on the panel of attorneys qualified for appointment in death penalty–  
11          related habeas corpus proceedings in the superior courts.

12  
13          (A) The application must be on a Declaration of Counsel re Minimum  
14          Qualifications for Appointment in Death Penalty–Related Habeas  
15          Corpus Proceeding (form HC-100).

16  
17          (B) Except as provided in (C), each committee must accept applications  
18          only from attorneys whose principal place of business is within the  
19          appellate district.

20  
21          (C) In addition to accepting applications from attorneys whose principal  
22          place of business is in its district, the committee for the superior courts  
23          located in the First Appellate District must also accept applications  
24          from attorneys whose principal place of business is outside the state.

25  
26          (3) Review qualifications

27  
28          Each committee must review the applications it receives and determine  
29          whether the applicant meets the minimum qualifications stated in this  
30          division to represent persons in death penalty–related habeas corpus  
31          proceedings in the superior courts.

32  
33          (4) Statewide panel of qualified counsel

34  
35          (A) If a committee determines by a majority vote that an attorney is  
36          qualified to represent persons in death penalty–related habeas corpus  
37          proceedings in the superior court, it must include the name of the  
38          attorney on a statewide panel of qualified attorneys.

39  
40          (B) Committees will provide to the Habeas Corpus Resource Center the  
41          names of attorneys who the committees determine meet the minimum  
42          qualifications. The Habeas Corpus Resource Center must consolidate  
43          the names into a single statewide panel, update the names on the panel

1 at least quarterly, and make the most current panel available to superior  
2 courts on its website.

3  
4 (C) Unless removed from the panel under (d)(6), an attorney included on  
5 the panel may remain on the panel for up to six years without  
6 submitting a renewed application.

7  
8 (D) Inclusion on the statewide panel does not entitle an attorney to  
9 appointment by a superior court, nor does it compel an attorney to  
10 accept an appointment.

11  
12 (5) Matching qualified attorneys to cases

13  
14 Each committee must assist a participating superior court in matching one or  
15 more qualified attorneys from the statewide panel to a person for whom  
16 counsel must be appointed under Government Code section 68662.

17  
18 (6) Removal from panel

19  
20 Suspension or disbarment of an attorney will result in removal of the attorney  
21 from the panel. Other disciplinary action, or a finding that counsel has  
22 provided ineffective assistance of counsel, may result in a reevaluation of the  
23 attorney's inclusion on the panel by the committee that initially determined  
24 the attorney to have met minimum qualifications.

25  
26 (e) **Consolidated habeas corpus panel committees**

27  
28 The administrative presiding justices of two or more Courts of Appeal may elect,  
29 following consultation with the presiding judges of the superior courts within their  
30 respective appellate districts, to operate a single committee to collectively fulfill the  
31 committee responsibilities for the superior courts in their appellate districts.

32  
33 (f) **Recruitment of qualified attorneys**

34  
35 The superior courts in which a judgment of death has been entered against an  
36 indigent person for whom habeas corpus counsel has not been appointed must  
37 develop and implement a plan to identify and recruit qualified counsel who may  
38 apply to be appointed.

39  
40 (g) **Local rule**

41  
42 A superior court may, by adopting a local rule, authorize appointment of qualified  
43 attorneys who are not members of the statewide panel. The local rule must establish

1 procedures for submission and review of a *Declaration of Counsel re Minimum*  
2 *Qualifications for Appointment in Death Penalty-Related Habeas Corpus*  
3 *Proceedings* (form HC-100) and require attorneys to meet the minimum  
4 qualifications under rule 8.652(c).

NAME:	STATE BAR NUMBER:
STREET ADDRESS:	
CITY:	STATE:      ZIP CODE:
TELEPHONE NO.:	MOBILE NO.:
E-MAIL ADDRESS:	

**DECLARATION OF COUNSEL RE MINIMUM QUALIFICATIONS FOR APPOINTMENT FOR DEATH PENALTY-RELATED HABEAS CORPUS PROCEEDINGS**

1. I request that (*check one*):
  - a.  the regional habeas corpus panel committee for the \_\_\_\_\_ Appellate District determine that I meet the minimum qualifications for appointment for death penalty-related habeas corpus proceedings in a superior court and that I be included in the statewide panel of qualified attorneys.
  - b.  the Superior Court of \_\_\_\_\_ County determine I meet the minimum qualifications for appointment for death penalty-related habeas corpus proceedings in that court and that I be included on the panel of qualified attorneys for that court. (Applicable only in superior courts that have adopted a local rule of court authorizing a local panel.)
  
2. I meet the experience and training requirements in rule 8.652 (*please check a or b*):
  - a.  I meet the minimum qualifications stated in rule 8.652(c)(1)-(2).
    - (1) I have engaged in the active practice of law in California for at least five years.
    - (2) I have served as (please check one of the following and attach a list of the case(s)-including a *case name, case number and court*-that satisfy the checked criterion).
      - (a)  counsel of record for a person in a death penalty-related habeas corpus proceeding in which the petition has been filed in the California Supreme Court, a Court of Appeal, or a superior court.
      - (b)  supervised counsel in two death penalty-related habeas corpus proceedings in which the petition has been filed *and* counsel for record in a combination of at least five completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed. (Attached are the attestations and recommendations of lead or associate counsel in the two cases in which I was supervised counsel.)
      - (c)  counsel of record for either party in a combination of at least eight completed appeals, habeas corpus proceedings, or jury trials in felony cases, including as counsel of record for a petitioner in at least two habeas corpus proceedings, each involving a serious felony in which the petition has been filed.
  - (3) I have satisfied the training requirement in rule 8.652(c)(4) (please check one or more):
    - (a)  In the last three years, I have completed \_\_\_\_\_ hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, \_\_\_\_\_ hours of which address death penalty habeas corpus proceedings. (Attached are the dates and descriptions of the trainings.)
    - (b)  In the last three years, I have served as an instructor in an appellate criminal defense or habeas corpus defense training. The training is approved for \_\_\_\_\_ hours of Minimum Continuing Legal Education credit by the State Bar of California. I request that my instruction constitute compliance with \_\_\_\_\_ hours of the training requirement. The training materials are attached.
    - (c)  I have represented a petitioner in a death penalty-related habeas corpus proceeding and request that this representation constitute compliance with \_\_\_\_\_ hours of the training requirement. The petition, docket, and decision on the case are attached.

NAME:

STATE BAR NUMBER:

- 2. b.  I have at least five years of experience substantially equivalent to that of an attorney qualified under rule 8.652(c)(1)–(2). Attached is a description of my experience. In the last two years, I have completed at least 18 hours of appellate criminal defense or habeas corpus defense training approved for Minimum Continuing Legal Education credit by the State Bar of California, at least 10 hours of which involved death penalty habeas corpus proceedings. Attached are the dates and descriptions of my trainings. I understand that this experience does not qualify me for appointment under rule 8.655(g) by a superior court under local rule.
- 3. I am familiar with the practices and procedures of the California courts and the federal courts in death penalty–related habeas corpus proceedings.
- 4. Attached are three writing samples, including *(please check one or more)*
  - a.  one or more filed petitions where I served as lead counsel of record for petitioner in a death penalty–related habeas corpus proceeding.
  - b.  portion(s) of habeas corpus petition(s) prepared by me in my capacity as associate or supervised counsel for petitioner in a death penalty–related habeas corpus proceeding.
  - c.  two or more filed habeas corpus petitions involving a serious felony in cases where I served as counsel of record for petitioner.
- 5. The following two attorneys are familiar with my qualifications and performance and recommend me for appointment as counsel for a person in a death penalty–related habeas corpus proceeding:
 

<u>Name of Attorney</u>	<u>Address</u>	<u>Phone</u>
a.		
b.		
- 6. Trial experience *(please check one)*
  - a.  I have experience in conducting trials or evidentiary hearings.
  - b.  I do not have experience in conducting trials or evidentiary hearings, and agree to associate with an attorney who has such experience if an evidentiary hearing is ordered in a death penalty–related habeas corpus proceeding in which I have been appointed to represent the petitioner.
- 7. Membership on a panel eligible for appointments to represent indigent appellants in the Court of Appeal *(please check one)*:
  - a.  I am not a member of an appellant district panel.
  - b.  I am a member of the following appellate district panels:
- 8. Previous application
  - a.  I am a member of the statewide panel of attorneys provided for in rule 8.655. I am renewing my application for inclusion on the panel for another six-year term.
  - b.  I previously applied for inclusion on the statewide panel of attorneys provided for in rule 8.655 but was not accepted. The date of the previous application was:
  - c.  I previously applied for appointment under rule 8.655(g), by a superior court under a local rule (please state date of the application, the name of the court, and whether the application was accepted or denied):
- 9. Attached is a copy of my current resume.

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

Date:

\_\_\_\_\_  
(TYPE OR PRINT NAME)

 \_\_\_\_\_  
(SIGNATURE)

<p><b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b></p> <p>STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:</p>	<p><i>FOR COURT USE ONLY</i></p> <p><b>DRAFT</b></p> <p><b>07-30-2018</b></p> <p><b>Not approved by the Judicial Council</b></p>
<p>In re _____ on Habeas Corpus (NAME OF PETITIONER)</p>	
<p><b>ORDER APPOINTING COUNSEL IN DEATH PENALTY-RELATED HABEAS CORPUS PROCEEDING</b></p>	<p>CASE NUMBER:</p>

1. On *(date)*: \_\_\_\_\_ the court appointed *(attorney)*: \_\_\_\_\_ as counsel to represent *(petitioner)*: \_\_\_\_\_ in the above-entitled case.
  
2. The court finds counsel qualified for appointment in this matter
  - a.  as lead counsel under rule 8.652(c) of the California Rules of Court.
  - b.  as associate counsel under rule 8.652(c) of the California Rules of Court.
  - c.  as *(specify)*: \_\_\_\_\_ counsel under rule 8.652(d) of the California Rules of Court. The basis for finding counsel qualified under this section is:

3. The court designates as assisting entity or counsel the following:

Date: \_\_\_\_\_  \_\_\_\_\_  
(SIGNATURE OF JUDGE OF THE SUPERIOR COURT)