DUTIES OF CAPITAL TRIAL COUNSEL UNDER THE CALIFORNIA “DEATH PENALTY REFORM AND SAVINGS ACT OF 2016”

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ABSTRACT

Every trial lawyer who is handling a capital case in California or who has handled a capital case for which the decision of the California Supreme Court is not final on a pending habeas corpus petition, needs to be aware of certain specific duties and strategies required by The Death Penalty Reform and Savings Act of 2016,1 Proposition 66, enacted by the voters2 on November 8, 2016.3 The Act imposes new duties on capital trial counsel following a judgment of death, will require more prompt discharge of other duties and may even present an opportunity. While the article focuses on trial counsel, post-conviction counsel will need to be familiar with much of this same information to both effectively work with trial counsel, to seamlessly raise issues and, eventually, to evaluate trial counsel’s conduct.

Trial counsel’s new duties include the duty to proactively assert herself as counsel of record after judgment by objecting and engaging in strategies in the trial court in response to the Act. Trial counsel will have to advise her client during a difficult period and, when habeas counsel is appointed, work closely with that counsel to investigate and file a petition for a writ of

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2 An initiative measure is submitted to the people in accordance with the provisions of § 8 of Art. II of the California Constitution.

3 As of this writing, the Act has not been finally certified by the Secretary of State due to the closeness of the vote. If it is certified, it will take effect as of November 9, 2016.
habeas corpus. The duty to object, the duty to engage in strategies to protect the client and the duty to advise the client must be commenced in the trial court by trial counsel as soon as there is a judgment of death. These duties will also extend to cases which may be transferred to the Superior Court by the California Supreme Court. In addition, immediately upon appointment of habeas counsel and throughout the entire course of the habeas proceedings, counsel will have a more urgent duty than she did pre-Act to be available and responsive to assist habeas counsel.

Objections must be made to the Act on statutory grounds as well as both California and United States Constitutional grounds. Some of the objections will be systemic and others will be case specific. There are reasons for the trial court, or, eventually, the higher courts, to find the Act inoperable, unconstitutional or otherwise to stay or delay the process. The Act is inoperable because it is not self-executing and because it is unfunded. The Act is unconstitutional because it violates the right to habeas corpus, interferes with the jurisdiction of the courts generally and specifically regarding capital cases, violates the separation of powers and the single subject rule and, if applied retroactively, violates the ex post facto clause. The Act also contributes to the overall unconstitutionality of the flawed capital punishment system in California.

Under the Act, trial counsel must also take specific action regarding the “offer” of counsel by the trial judge and the “orders” made pursuant to the “offer.” Strategically, delay in implementation of the “offer” and the orders pursuant thereto may be required to assure appointment of qualified counsel, to avoid the premature commencement of the habeas filing limitation and to allow trial counsel to prepare the files, materials and record necessary for habeas counsel to commence work. Trial counsel will have a duty to advise the client regarding the client’s rights following the “offer” which will be critical in light of the trial judge’s apparent power to make a finding that the client has waived habeas counsel, potentially forever.

Finally, trial counsel will have to make critical decisions and will have an important role regarding any potential claims of actual innocence or ineligibility of the client for the death penalty. For instance, trial counsel must decide with the client and habeas counsel what information will or will not be disclosed and what litigation strategy will be employed to resist waiver of privileges that purport to be compelled under the Act. Finally, if there are grounds for factual innocence or ineligibility for the sentence of death, trial counsel must work with habeas counsel in presenting them early enough to obtain additional time to file the initial petition, if appropriate.
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I. INTRODUCTION

A. To Whom This Applies

This article applies to all trial lawyers who are handling a capital case in California. No one wants to think about the possibility that their special circumstances homicide case will result in a penalty phase and no one wants to imagine that the penalty phase will end in a death verdict and a judgment of death. Nevertheless, any lawyer engaged in such a case needs to be ready, in advance, for the provisions of this new Act.4

This article also applies to all trial lawyers who have had clients suffer death judgments whose cases have not reached a final determination on habeas corpus from the California Supreme Court. Those cases may be transferred back to the original trial court for processing under the Act.5 If so, especially if habeas counsel has not been appointed, trial counsel must be prepared to deal with the same issues as if the case had not left the Superior Court. In addition, even after habeas counsel has been appointed, trial counsel will have a duty to cooperate with habeas counsel, as promptly as possible, to convey all information and take all actions that may be of help in the timely filing of the initial petition.

4 The preamble to the Act (see, Section 2, uncodified) suggests that goals of the Act include efficiency and expedition, however, trial counsel will correctly insist that matters be considered in due course. The act is internally inconsistent and in conflict with existing laws. Even resolving those issues, the application of the Act is complicated and will require extensive interpretation, litigation and possibly amendment to make it operable.

5 Cal. Pen. Code § 1509(g).
This article also applies to post-conviction counsel handling cases subject to the Act to the extent that certain issues affect both the trial lawyer and post-conviction counsel. First, counsel appointed on habeas will, of course, interact with the trial counsel extensively and, under the new time limits, prompt interaction will be more urgent. Each lawyer will need to know what the other can do to help the client. Second, post-conviction counsel, including counsel on direct appeal, will have the inevitable duty to evaluate what trial counsel did and what she could have done. However, there are issues pertaining to this Act that will be of interest primarily to post-conviction lawyers and those will be referred to here but a fuller discussion will be left for another publication.  

B. What Can be Done

1. Trial Counsel’s Role in the Trial Court

Part II of this article will outline the various duties that trial counsel has regarding her duties during the initial phases following the death judgment and thereafter until the habeas is final. Trial counsel will be responsible for raising all objections and making written motions with the intention to both obtain correct rulings from the trial judge and to preserve any issue for subsequent state and federal review. This Act creates new law. Ironically, many of the death penalty challenges that have been made to the 1977 and 1978 death penalty laws, prior to the amendments under the Act, have been rejected multiple times.  

There are certainly areas that are still vulnerable to

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6 Issues under the Act that will be primarily of interest to post-conviction counsel but will only be referenced in this article include, the conscription of direct appeal counsel from the appointed counsel lists (Cal. Pen. Code 1239.1(b)), the time limits on proceedings (Cal. Pen. Code §§ 190.6(d), 1239.1(a), 1501(c) and (f), and 1509.1(a) and (c)), the movement of prisoners from San Quentin (Cal. Pen. Code § 3600), the ten-day window on executions (Cal. Pen. Code § 1227), the limitations and degradations to the Habeas Corpus Resource Center (Cal. Gov. Code §§ 68660.5, 68661, 68661.1 and 68664) the reduction of the requirements for appointment on direct appeal (Cal. Pen. Code § 1239.1(b) and Cal. Gov. Code § 68665(b)), the limitation on the subject matter of successor petitions (Cal. Pen. Code § 1509(d)), the exception of lethal injection protocols from the Administrative Procedures Act and limitation of challenges to the mode of execution (Cal. Pen. Code § 3604.1), the required stockpiling of means of execution (Cal. Pen. Code § 3604(d)), and the exemption of medical personnel from ethical compliance or sanctions of their licensing agencies (Cal. Pen. Code §§ 3604.3(a), (b), and (c)).

7 Trial counsel may include one or more lawyers working on the trial team in a capital case. The duties described herein apply to all team members, however, like any other activity undertaken by the team, there is ultimate responsibility on each member, including lead counsel, to assure that every duty is met.

8 In 1972, the California Supreme Court found the death penalty unconstitutional as then practiced, People v. Anderson, 6 Cal. 3d 628 (1972), holding that capital punishment
Duties of Capital Trial Counsel in California

The first specific duty of trial counsel once a death judgment is imposed is to assert the fundamental right to be there and to be heard in an orderly fashion. This would seem uncontroversial, but the prosecution or the trial judge might attempt to expedite the process. Trial counsel must insist on being present and insist on being given the time to brief important issues in writing and to fully litigate contested issues. In cases where the death judgment was just rendered, counsel will need to immediately assert herself into the post judgment proceedings lest appointment or denial of habeas counsel or rulings on other matters adversely affect the client.

If the case is transferred from the Supreme Court before appointment of counsel on habeas, trial counsel should promptly appear and assert

degrades and dehumanizes everyone involved and that the death penalty is "unnecessary to any legitimate goal of the state and incompatible with the dignity of man and the judicial process." The United States Supreme Court the same year, in Furman v. Georgia, 408 U.S. 238 (1972), held the death penalty unconstitutional under the federal constitution but, four years later in Gregg v. Georgia, 428 U.S. 153 (1976), found a new state system in Georgia to meet constitutional requirements. The California Legislature followed this in 1977 by enacting a new death penalty scheme followed by the more expansive Briggs Initiative, Proposition 7, in 1978. Since that time, hundreds of death penalty decisions have been issued by the California Supreme Court and the federal courts interpreting the California statutes and ruling on their constitutional validity.

As an example, Rauf v. Delaware, 145 A.3d 430 (2016) applied Hurst v. Florida, 136 S.Ct. 616 (2016) on the right to a jury trial and the right to proof beyond a reasonable doubt to the penalty phase law in Delaware. These issues have been raised for years in California to no avail even though the procedures in both states are similar. Hence, if Hurst is applied by the state or federal courts to the California law, as it was in Delaware in Rauf, these long "settled" claims will be "re-settled" and require reversals.

See, for instance, In re Reno, 55 Cal.4th 428 (2012), which pertained to successor exhaustion petitions, in which Justice Werdeger said that prior habeas counsel was not obligated to raise issues rejected in other cases. That supposes that the court would never consider overruling or distinguishing precedent. Of course, the lesson of Rauf v. Delaware, supra, n. 9, is that issues which have been raised and rejected for years may become the basis to overturn the entire death penalty.

Anecdotally, the author has had conversations with capital case deputy district attorneys regarding the Act who have expressed frustration privately over what they consider to be legislation that will engender years of litigation. They felt that this new legislation, from their perspective, will result in marginal benefits if it is ever resolved in the courts. The opinion of the California District Attorneys Association, many of their members and the head county District Attorneys who sponsored the Act obviously differ.

objections before the trial judge appoints habeas counsel. This will require some quick work. It will also require attentiveness on the part of all lawyers or institutions whose cases may be affected so that they are ready to intercede immediately. In addition, if original trial counsel is no longer available, new “trial” counsel must be designated to intercede. Trial counsel also may have to confront conflict issues, especially, if the trial judge believes it is possible to appoint from the local trial bar.

2. Issues to Litigate regarding Inoperability and Unconstitutionality

Part III of this article will deal with the systemic issues related to the Act. It will cover the fact that the Act calls for the adoption of “initial rules and standards of administration” to implement the Act and is, therefore, inoperable unless and until those enabling regulations are enacted. It is unfunded and is inoperable until funded. The Act is also unconstitutional in that it interferes with the state right of prisoners to the writ of habeas corpus. It seeks to limit the original jurisdiction of the Supreme Court to hear petitions for writs of habeas corpus and interferes with the litigation of capital cases. It also violates the constitutional separation of powers, the single subject rule, and, if applied retroactively, the ex post facto clause. Finally, the death penalty system is unconstitutional and flawed as it stands and, specifically, in light of the exacerbation of the flaws by the

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13 Cal. Pen. Code § 190.6(d).
14 Even though the courts are now consolidated, Cal. Pen. Code § 987.6 provides for a maximum of ten percent reimbursement to trial courts for capital expenditures. Under consolidation there is no provision for additional funding in the Act either to the trial and appellate courts or to the judiciary as a whole.
15 Article I, § 10 of the California Constitution.
16 Cal. Const. VI, § 10 (“The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. . . .”) and § 11(a) (“The Supreme Court has appellate jurisdiction when judgment of death has been pronounced.”).
17 Such as mandamus, prohibition and certiorari, (Cal. Const. VI, § 10) as well as other proceedings for extraordinary relief such as coram nobis and coram vobis, and civil litigation, including civil rights litigation (e.g., 42 U.S.C. § 1983).
18 Cal. Const., Art. III, § 3. (“The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”)
19 Cal. Const., Art. II, § 8(d). (“An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”)
20 U.S. Const. Art. I, § 9, Cl. 3. (“No bill of attainder or ex post facto Law shall be passed.”); Cal. Const. Art. I, § 16. (“A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed.”).
3. Issues to Litigate regarding Actual Appointment of Habeas Counsel

Part IV of this article will cover the duties of trial counsel relating to the actual appointment of habeas counsel. First, the appointment should be delayed so that habeas counsel can be effective -- for instance, after transcripts are prepared -- since the one year limitation runs from the date of the order made by the trial judge following the “offer” of counsel. Second, although the trial judge is obligated to offer counsel, if this offer is extended by the trial judge immediately after the death judgment, trial counsel must advise the client patiently regarding the importance of that appointment. Third, trial counsel must review and possibly litigate the qualifications of potential habeas counsel. Fourth, trial counsel must be ready to litigate a possible rejection of counsel by the client or the potential finding that the client is not indigent.

Part V of this article will address the requirements of trial counsel to continue to cooperate with habeas counsel. It is even more critical that this be done promptly considering the short time period for the filing of the initial petition for writ of habeas corpus or the need to establish grounds to extend time for filing where there is substantial evidence of actual innocence or ineligibility for the death penalty. There is also a critical decision to be made as to the nature and extent of the disclosure required by the client and trial counsel as to evidence of innocence or ineligibility for

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21 The right to due process, to counsel, to equal protection, and to heightened reliability in capital cases under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and relevant provision of the California Constitution.

22 Some issues have been raised by attorneys Christina Von de Abe Rayburn and Lillian Jennifer Mao filed the Petition for Extraordinary Relief, in Ron Briggs and John Van de Kamp v. Jerry Brown, et al., filed on November 9, 2016 in the California Supreme Court, Case Number S238309 (hereinafter, “Briggs v. Brown”). Trial counsel preparing a brief on these issues should read the entire Briggs v. Brown petition carefully and consider the appropriateness of any other litigation that may filed on these subjects.

23 Cal. Pen. Code § 1509(c). Note that there is no time limit on the time within which to “offer” counsel under Cal. Pen. Code § 1509(b) or to make an appointment or other order pursuant to Cal. Gov. Code §68662.

24 Id.

25 A client is liable to be despondent and may not want to accept an attorney. Under Cal. Gov. Code § 68662(c), there is no provision for appointment of counsel if counsel is rejected. Of course, if the situation presents itself, an argument could be made that the client could later opt for counsel and that may or may not affect time periods.

26 Cal. Gov. Code § 68662 (a), (b) and (c).

27 One year from the orders following the offer of counsel. Cal. Pen. Code § 1509(c).

28 Cal. Pen. Code § 1509(f) as defined in 1509(d) and (g).
the death penalty in order to avoid the petition on those grounds from being dismissed.\(^{29}\)

There are many other provisions of the Act that are objectionable and will lead to litigation primarily by counsel on habeas and on direct appeal.\(^{30}\) Trial counsel may find them of use in arguing the systemic flaws of the Act. A detailed discussion of these provisions is beyond the scope of this article and will be addressed elsewhere.\(^ {31}\) Nevertheless, trial counsel should keep all issues in mind when fashioning motions such as the lack of single subject or as a systemic challenge to the constitutionality of the Act.

Finally, Part VI of this article will discuss the obligation of trial counsel to seek a continuance or stay of the provisions of the Act if the other remedies are denied. There will be concurrent litigation in various forums\(^ {32}\) and premature implementation of the provisions of the Act will lead to confusion and the requirement to relitigate issues. In addition, even if the systemic issues are resolved, it would still be necessary for the legislature to resolve some of the individual issues by way of amendment. Therefore, at the very least, trial counsel should move for a stay pending resolution by litigation or amendment.

II. THE RIGHT OF TRIAL COUNSEL TO APPEAR AND ADVISE THE CLIENT

The first issue trial counsel will confront under the Act is her status as counsel of record at what is still a critical state of the proceedings. It is the right of the client to have counsel to advise the client and to object to and litigate the procedures. In cases where the death judgment was just rendered by the trial judge, counsel will need to assert herself into the proceedings immediately following the judgment of death. If the case is transferred from the Supreme Court before appointment of counsel on habeas, trial counsel should immediately appear and assert objections. This will require some quick work and some, possibly institutional, decisions if original trial counsel is no longer available so that new “trial” counsel can intercede. In addition, trial counsel may have to confront conflict issues, especially, if the trial judge is attempting to appoint from the local trial bar.

A. The Right of Counsel to Continue after Death Judgment

\(^{29}\) Cal. Pen. Code 1509(e).

\(^{30}\) See n. 6, supra.

\(^{31}\) See text accompanying notes 119-132, infra, and the notes themselves.

\(^{32}\) Briggs v. Brown, n. 22, supra, is one lawsuit and one can expect other lawsuits as well as cases that make their way through the state and federal courts on the numerous new issues presented by this Act.
As will be demonstrated substantively in the remainder of this article, the period of time from the entry of the judgment of death through the appointment of habeas counsel and beyond is a critical stage of the proceedings. Counsel is called for by statute and counsel is required under the Fifth and Eighth Amendment rights to due process and heightened reliability and the Sixth Amendment right to counsel. Failing to have counsel would prejudice the defendant in a significant way and, therefore, counsel is required as a matter of due process. While it is true that the right to counsel under the Sixth Amendment has not generally been recognized in post-conviction proceedings, the Act actually created the right by keeping the habeas proceedings in the trial court and by requiring that work be done before the direct appeal is final.

The case will not be final on appeal before most if not all of trial counsel’s work is done. The direct appeal is still filed in the California Supreme Court. The Act suggests that the Supreme Court “expedite the review of the case.” However, given the time to appoint counsel for direct appeal, certify the record and to allow even expedited time for briefing, oral argument and decision, the direct appeal will still take years. Meanwhile, trial counsel will be required to do the work called for under the Act, including appearing at all critical stages of the proceedings before habeas counsel is appointed and, as shown below, after such appointment. Since

33 The Act, itself, calls for appointment of counsel and purports to amend prior statutes that provide for the appointment of counsel for post-conviction proceedings in capital cases under California law. (Cal. Pen. Code § 1509(b)) Yet, the Act creates a situation in which multiple issues must be resolved at hearing before habeas counsel can be appointed. (Cal. Gov. Code § 68662.) In addition, the Anti-terrorism and Effective Death Penalty Act (AEDPA), PL 104–132, April 24, 1996, 110 Stat 1214 has requirements for counsel in order for its fast track provisions to be invoked. (28 U.S.C. § 2261(b) and (c)) If a defendant were to be deprived of counsel at hearings at which multiple issues had to be resolved, it would arguably make the fast track provisions of AEDPA inapplicable to the case in later federal litigation.

34 “[T]he essence of a “critical stage” is ... the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel.” (United States v. Yamashiro, 788 F.3d 1231, 1235 (9th Cir.2015);

35 The initial petition must be filed within one year of the order following the “offer” of counsel (Cal. Pen. Code § 1509(c)) and the trial court must decide the petition within one year (or two at the most) from the date of the petition (Cal. Pen. Code § 1509(f)). Furthermore, it is mandated that the Supreme Court on direct appeal and the other state courts shall have a total of five years from the entry of judgment to complete the appeal and state court review of habeas issues (Cal. Pen. Code § 190.6(d)). Therefore, most of what trial counsel is called upon to do will be done before the case is final on appeal.


37 Cal. Pen. Code § 190.6(d) provides for five years to complete the direct appeal and the initial state habeas.
this all occurs before the case is final on appeal, the federal right to counsel still pertains.\textsuperscript{38}

Trial counsel is also required a matter of due process and heightened reliability because of the need to raise systemic operational issues and constitutional issues. These rights are meaningless if counsel is not available to assert them. As detailed in the remainder of the article, trial counsel will have a duty to interpose objections to the operability of the Act since it is non-self-executing\textsuperscript{39} and to object to the fact that it is unfunded,\textsuperscript{40} to assert claims that the Act is unconstitutional with regard to the right to habeas corpus,\textsuperscript{41} the limitation on the jurisdiction of the courts to hear habeas petitions,\textsuperscript{42} the interference with capital litigation,\textsuperscript{43} the separation of powers,\textsuperscript{44} the single subject rule,\textsuperscript{45} and, if applied retroactively, the \textit{ex post facto} clause,\textsuperscript{46} as well as, being unconstitutional and flawed as it stands and, specifically, in light of the application of the Act.\textsuperscript{47}

Trial counsel’s participation will be critical, therefore, to the rights of the client before the appointment of habeas counsel and will continue to be critical to work with and interact with the habeas counsel during the period of investigation and filing of the initial petition for writ of habeas corpus and the traverse (or denial) to the return if an order to show cause is granted or the informal opposition and reply if not.\textsuperscript{48} Particularly due to the short period of time and the need to convey information and participate in decisions, such as disclosure of information regarding innocence or ineligibility for death, trial counsel will not be free from duties until the

\textsuperscript{38} In \textit{Pennsylvania v. Finley}, 107 S.Ct. 1990, 1993 (1987), the United States Supreme Court specifically characterized the type of post-conviction proceeding for which there is no Sixth Amendment right to counsel as that in which the judgment was final on appeal.

\textsuperscript{39} See § II.A. \textit{infra}.

\textsuperscript{40} See § II.B. \textit{infra}.

\textsuperscript{41} Article I, § 10 of the California Constitution.

\textsuperscript{42} Cal. Const. VI, §§ 10 and 11(a).

\textsuperscript{43} Cal. Const. VI, § 10.

\textsuperscript{44} Cal. Const., Art. III, § 3.

\textsuperscript{45} Cal. Const., Art. II, § 8(d).

\textsuperscript{46} U.S. Const. Art. I, § 9, Cl. 3; Cal. Const. Art. I, § 16.

\textsuperscript{47} Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and relevant provision of the California Constitution.

\textsuperscript{48} Under the current Rules of Court, the order of the superior court, if there is a denial of habeas, “must contain a brief statement of the reasons for the denial.” (Cal. Rule of Ct. Rule 4.551(g)). Under the Act, the trial court is required to “issue a statement of decision explaining the factual and legal basis for its decision.” (Cal. Pen. Code § 1509(f)) The statutory provision of the Act contemplates a more comprehensive statement than the present Rule. Thus, it would be expected that the trial court would request full briefing, either by way of informal opposition and reply or the granting of an order to show cause entailing a return and traverse (denial), in order to consider all of the issues in order to prepare the required statement of decision.
initial writ is heard and, if an evidentiary hearing is granted, perhaps through that as well.\[49\]

Even where the Sixth Amendment does not require counsel, the Fifth Amendment right to due process may require counsel for an incarcerated defendant.\[50\] For instance, at a post-conviction proceeding at which counsel is not required by the Sixth Amendment,\[51\] such as a Proposition 47 hearing following a finding of eligibility, the court has found a right to due process and equal protection under the Fifth and Fourteenth Amendments. Since trial counsel’s role under the Act is critical to securing the right to appropriate habeas counsel and assisting that counsel in providing effective assistance, as well as making decisions about confidential information, trial counsel’s representation is required by due process at the least.

Furthermore, if trial counsel were to essentially withdraw after the judgment of death, trial counsel would be abandoning her duties. As described herein, there are numerous duties of trial counsel which require counsel to stay on the job. Even where counsel is not required by the Sixth Amendment, it has been held that an abandonment of duties by counsel could require the subsequent reviewing courts to allow the presentation of claims that were not presented as a result of that abandonment.\[52\] If the Act is intended to expedite proceedings, or at least not prolong them, it must provide proactively for adequate representation to assure that the due process rights are met so that the proceedings do not have to be repeated.

If there is any indication that the trial judge is inclined to take any action without providing for trial counsel, a written motion should be filed citing the statutory and case law as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and relevant provisions of the California Constitution.

**B. The Right of Counsel to Resume Representation upon Transfer**

\[49\] Trial counsel’s active representation of the client, for instance, to protect privileged information or make appropriate tactical decisions about the purported duty to turn over all information relating to actual innocence or ineligibility for death (Cal. Pen. Code § 1509(e)), may be required through the evidentiary hearing and beyond.

\[50\] People v. Rouse, 245 Cal.App.4th 292 (2016): “It is well established that due process requires an incarcerated defendant be afforded the right to counsel in various circumstances where the Sixth Amendment does not.”

\[51\] Under the doctrine of Pennsylvania v. Finley (n. 38, supra), since this is a stage where the case not final on appeal, it would still be argued that the Sixth Amendment would require counsel.

\[52\] If counsel abandoned the case, even where counsel was not required by the Sixth Amendment, “fundamental fairness” (a due process concept) may require counsel and any abandonment by that counsel could be considered as “cause” for the purpose of procedural default. Maples v. Thomas, 132 S.Ct. 912 (2012).
If a case currently pending before the California Supreme Court is transferred back to the trial court for further proceedings, the client will also be faced with a critical stage of the proceedings. The trial judge may be inclined to precipitously appoint habeas counsel, however, that would be inappropriate without representation of trial counsel. As established below, there is much to be done before counsel is appointed, especially because the one year statute will start running for any such case from the date of the trial judge’s order following the “offer” of counsel. In addition, even if habeas counsel had already been appointed by the Supreme Court, time is still running and cooperation with habeas counsel is still critical.

The need to immediately identify cases that are subject to transfer will require the advance indexing and tracking of all capital cases that a lawyer has handled in which there was a death judgment and, as to which, the habeas petition has not been finally ruled upon by the California Supreme Court. In addition to individual lawyers, law offices (including the Public Defender or Alternate Defender), or groups (such as appointment panels or contractors), must immediately index and track all such cases. If an order is made by the Supreme Court to transfer a case, the responsible lawyer, with or without assistance from the office or group, will have a duty to be prepared and to appear as soon as the case is on calendar.

Because counsel must be “offered” to the defendant and findings, possibly requiring a hearing, must be made, the presence of the defendant is also mandatory. However, as experience dictates, judges may

54 See text accompanying note 46, supra and the note itself.
55 Cal. Pen. Code § 1509(c). As noted, there is no time period for the appointment of counsel. There is also no time period specified between the “offer” of counsel and the time the trial judge must hold hearings on the offer nor a time period between the holding of the hearings and any order. As a result, it would be possible for the trial judge to allow the direct appeal to proceed before commencing the habeas proceedings.
56 Cal. Pen. Code § 1509(g) stating that a transferred petition must be filed within the time limit already in place or one year, whichever is shorter.
57 The provisions of Cal. Pen. Code § 1509(d), (e) and (f) pertaining to claims of actual innocence and ineligibility for the death penalty may conflict with the general transfer provisions of Cal. Pen. Code § 1509(g). The former sections impose a new requirement on such claims and the latter potentially would not accommodate a full and fair hearing on them.
60 The California Supreme Court in People v. Davis, 36 Cal.4th 510 (2005), said, “We have summarized the federal law governing a defendant's presence at trial as follows: “‘A criminal defendant’s right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution.... [Citations.] A defendant, however, “does not have a right to be present at every hearing held in the course of a trial.” [Citation.] A defendant's presence is required if it “bears a reasonable and substantial
sometimes attempt to expedite a process and could attempt to make orders
*ex parte* without transporting the client. Therefore, trial counsel should
immediately determine the status of the case and determine whether the
client is being transported as soon as the order of transfer of the proceedings
is made. If the trial judge is attempting to make orders in the client’s
absence, the trial lawyer should put the case on calendar and file a written
motion to object and for an order immediately transporting the client for
attendance at court.61

Furthermore, in some cases, it is possible that the original trial lawyer
who handled the trial will no longer be available. In that case, arrangements
must be made immediately to obtain substitute counsel. Such substitute
counsel must immediately obtain all the files of the original trial counsel,
become familiar with them, contact the client, and make personal visits
when the client is transported, if not before. Substitute trial counsel will be
required to make all the objections, file all motions, advise the client and
work with the habeas counsel just as original counsel would have if
available. If substitute trial counsel is necessary, a significant continuance
of all proceeding should be requested.62

III. DUTY TO OBJECT ON INOPERABILITY AND UNCONSTITUTIONALITY OF
THE ACT

The Act was not carefully drafted and contains provisions that are
conflicting or may have unintended consequences. One issue arises in that

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61 Some clients who have been at San Quentin for a while do not like to be transported
back to county jail. This is sometimes an aversion to the conditions in the county jail and
sometimes because they have established their “home” at San Quentin. First, in the
author’s opinion, the matters at stake require personal decisions and interaction between
the client and the trial lawyer and between the client and the court. They are too important
to waive personal appearance, if it is even possible. Second, Cal. Pen. Code § 3604 now
provides that the client can be moved from one prison to another. Thus, there is no
assurance that they would be establishing some sort of seniority in residence wherever they
are housed.

62 The Act makes several references to expediting the process, however, it also
acknowledges, as it must, that the speed of the process must be consistent with the rights of
the defendant and with the principles set forth in Chapter 154 of 28 U.S.C. Any request
for continuance should include the constitutional rights to due process, fair trial, effective
assistance of counsel and heightened reliability of death cases under the Fifth, Sixth, Eighth
and Fourteenth Amendments to the United States Constitution, the relevant provisions of
the California Constitution as well as the specific provisions of the Act, itself, that
acknowledge these rights, including Cal. Gov. Code §§ 68660.5 and 68665.
the Act calls for the adoption of “initial rules and standards of administration” to implement the Act and, therefore, is not self-executing.\textsuperscript{63} Another issue is that it is unfunded.\textsuperscript{64} The third is that the Act is unconstitutional for various reasons which will be set forth below.\textsuperscript{65} Trial counsel should consider the issues raised in this article but also be creative and look for guidance in other publications and litigation that will proliferate as a result of the Act. Noticed motions in writing should be filed to raise each of the issues, raising all statutory, case law and federal and state Constitutional grounds. Hearings should be set in due course to allow full consideration of all contested matters. Trial counsel must not only attempt to persuade the trial judge but must, as always, keep an eye on making an appropriate record for further litigation.

A. The Act is Inoperable as Not Self-Executing

The Act states, “Within 18 months of the effective date of this initiative, the Judicial Council shall adopt initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review.”\textsuperscript{66} There are significant issues that are not resolved by the Act itself and are left to be determined by the Judicial Council by the terms of the Act. Among the issues to be resolved are: when shall appointments of habeas counsel be made;\textsuperscript{67} how much preparation time should be trial counsel be allowed before commencing the one year time limit;\textsuperscript{68} what will be the source of funding for the appointment of habeas counsel in the lower courts; what will be the source of funding for experts and investigators to assist habeas counsel; what will be the source of funding for trial counsel to continue to represent the client after the judgment of death; what will be the source of additional funding for local sheriff transportation and custody expenses; how will the Habeas Corpus Resource Center (HCRC) be governed and function under the new statutes;\textsuperscript{69} how will existing entities,

\begin{itemize}
  \item \textsuperscript{63}Cal. Pen. Code § 190.6(d).
  \item \textsuperscript{64}Cal. Pen. Code § 987.6 provided for a maximum of ten percent reimbursement to the trial court by the state pre-consolidation but, after consolidation, there still is no provision for additional funding although the Act mandates an increased burden of litigation, costs of counsel and costs of investigators and experts to the trial courts.
  \item \textsuperscript{65}Section C, Subsections 1 through 7 of this Section III.
  \item \textsuperscript{66}Cal. Pen. Code § 190.6(d) and Cal. Gov. Code § 68662.
  \item \textsuperscript{67}Cal. Pen. Code § 1239.1 states “as soon as possible” for the appointment of counsel on direct appeal but Cal. Pen. Code § 1509(b) does not have any time period for the trial judge to “offer counsel” to the defendant.
  \item \textsuperscript{68}Cal. Pen. Code § 1509(c).
  \item \textsuperscript{69}Cal. Gov. Code §§ 68661(c) (HCRC will work with the courts), (d) (HCRC to provide a list of attorneys and the Supreme Court will make the “final determination”), (e) (maintain a list of qualified investigators and experts), (h) (assure availability of a brief
like HCRC, the San Francisco office of the California Appellate Project (CAP-SF) and the Office of the State Public Defender (OSPD) be compensated for travel and lodging in order to visit with clients transferred to prisons outside the Bay Area; what changes, if any, to the appointment criteria for either direct appeal or habeas will be made consistent with the constitutional and federal statutory requirements; what time periods apply and what are the obligations of counsel and the client regarding claims of actual innocence and ineligibility for the death penalty? The Judicial Council is mandated to make appropriate rules for those issues and for any other ambiguity that arises.

In *Van Riessen v. City of Santa Monica*, the Court of Appeal considered the effect of non-self-executing language in housing legislation. In *Van Riessen*, the court considered a 1971 Amendment the Santa Monica Municipal Code which stated that, “Maximum accumulation of sick leave days and payment in lieu of unused days may be further regulated by resolution or Memorandum(s) of Understanding approved or adopted by the City Council. It is the specific intent of the City County that this subsection shall be retroactive to July 1, 1970.”

The court held,

“This language is permissive and not self-executing. It merely authorized, without requiring, payment in lieu of unused sick leave days. [Citation] Where nonself-executing language is involved, it is inoperative except as supplemented or implemented by a legal recognized manner. [Citations].”

One of the cases cited by *Van Riessen* was *Frank Curran Lumber Co. v. Eleven Co.* which considered a state constitutional enactment, then Art. XX, § 15 of the California Constitution. As it read at the time,

“Mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or

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70 The Act refers to AEDPA and its fast track provisions while acknowledging the purpose of providing “quality representation in state habeas corpus for inmates sentenced to death.” Cal. Gov. Code § 68660.5. Section 68665 then states that the Judicial Council and the Supreme Court consider the qualifications of appointed counsel “so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code.” Whether or not California is certified for the AEDPA fast track provisions, the Act mandates that the qualifications for counsel meet AEDPA fast track standards.

71 See Cal. Pen. Code § 1509(d), (e) and (f) in the context of the general transfer provisions of Cal. Pen. Code § 1509(g).

72 Cal. Pen. Code § 190.6(d) and Cal. Gov. Code § 68662.


75 Repealed in 1976.
furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.”

The court in *Frank Curran Lumber* held that this provision was “…not self-executing, and is inoperative except as supplemented by legislation.”

The general principle is that, where legislation provides that another body enact regulations or laws to implement the more general principles of that legislation, the legislation is not self-executing and is inoperable. Here, the Judicial Council is specifically given eighteen months to “adopt initial rules and standards of administration.” Those rules and standards of administration are necessary to determine how the Act should be executed. Therefore, the provisions of The Act are inoperable unless and until the Judicial Council has fulfilled its obligations. Trial counsel should file a comprehensive written motion to object to the operability of the Act as not self-executing.

**B. The Act is Inoperable as Unfunded**

The Act is unfunded. The trial judges should not attempt to implement the Act unless and until it is funded. This Act is not mandated by federal law or the Constitution. Without any source of funding, it will place a significant financial burden on the trial courts to fund trial counsel and ancillary services while continuing after the judgment of death to represent the client. There will be a greater burden on the trial courts to fund the habeas investigation with investigators and experts and to pay for the continued services of trial counsel through the litigation in the trial court over the initial petition. Thereafter, there will be expense to the court of appeal for the appointment of counsel for the appeal, if appealed by either party, and for petition for rehearing and petition for review in the Supreme Court. Trial counsel, habeas counsel, appellate counsel, the courts, the sheriff or anyone else who will incur additional expense as a result of the Act should not be required to undertake the obligations created by the Act until funding is established.

The budget for the operation of the entire court system in the State of California is approximately 1.2 percent of the overall operating budget of

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77 An example of an unfunded act not mandated by federal or constitutional law, is the Public Interest Attorney Loan Repayment Program under Cal. Educ. Code §§ 69741, *et seq.*, enacted in 2001. It remained inoperable and no loan repayments were ever made due to the fact it remained unfunded.
the State\(^78\) and a little over one half of the judicial budget is derived from “user fees” such as fines, assessments and, in civil cases, filing fees.\(^79\)

The trial judge and proposed appointed counsel on habeas have no assurance that there will be funding for the additional work required by the Act. This must include, not only attorneys’ fees but funding for experts and investigators.\(^80\) Thus far, the Judicial Council has not made any allocation of funds to the trial courts from their 2016-2017 budget to cover the enhanced costs of services in the trial court, nor has the state increased the overall General Budget allocation for the judicial branch operating expenses to reflect the projected overall increase in costs of capital punishment, in the area of tens of millions of dollars annually, under the Act for many years.\(^81\) There is no allocation anywhere in the State budget for an additional “tens of millions” of dollars.\(^82\)

In addition, there will be additional costs associated with transportation and housing of inmates who are in the process of having habeas counsel appointed. Trial counsel should insist that the client remain in, or be transported back to, the local county jail pending the resolution of matters, at least, through the appointment of counsel.\(^83\) It will be necessary to meet and confer regularly regarding the appointment of counsel and have a hearing in the trial court on whether counsel is rejected by the client or is refused by the judge due to non-indigency or the client is not competent or capable of making the determination.\(^84\) Furthermore, the delicate issues of disclosure by the client or counsel of information and materials relating to actual innocence or ineligibility for the death penalty need to be discussed in person and while the client has his materials at the county jail which he

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\(^78\) See the Court website: http://www.courts.ca.gov/finance.htm


\(^81\) The Legislative Analyst for the State of California stated that the overall long term costs of implementing the Act were unknown. However, the Analyst stated, regarding the initial costs, that, “It is possible, however, that such costs could be in the tens of millions of dollars annually for many years.” See, the Legislative Analyst’s summary: http://voterguide.sos.ca.gov/en/propositions/66/analysis.htm.


\(^83\) Cal. Pen. Code § 1509(b).

\(^84\) Cal. Gov. Code § 68662.
accumulated during preparation of trial and trial itself. 85 This additional time in local custody of the county jail as well as transportation expenses involve significant expense to the county for which there is no provision for reimbursement or other funding.

Therefore, trial counsel should move in writing for the trial judge to declare that the entire Act is inoperable until funded. Since this Act is not a federal mandate or required by the Constitution, any attempt to make it operable without funding would deprive the client of the client’s constitutional rights to due process, the effective assistance of counsel, equal protection and heightened reliability under the Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution and relevant provisions of the California Constitution.

C. The Act is Unconstitutional

1. The Act Interferes with the Right to Habeas Corpus

a. The Act Restricts the Jurisdiction of Courts to Hear Habeas Petitions

The Act adds a provision that the “court that imposed sentence” is the court in which a petition for writ of habeas corpus must be filed and that, if it is filed elsewhere, “it should be promptly transferred to that court.” 86 Furthermore, the Act provides that successive petitions cannot be filed in the court of appeal or the Supreme Court and that the remedy for denial of a petition for writ in the trial court is to appeal to the court of appeal. 87 This conflicts with the California Constitution which confers original jurisdiction for an original writ of habeas corpus on all three of the California courts: “the Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas proceedings.” 88 But it also interferes with the right of habeas corpus by reducing its constitutional availability.

Capital habeas proceedings are typically brought before the Supreme Court due to the provisions of the statute appointing counsel which designated the Supreme Court as the court that “shall offer to appoint counsel for the purpose of state post-conviction proceedings.” 89 This is interpreted by Court Rule to apply to proceedings in the Supreme Court and not in the trial or appellate courts. 90 As a practical matter, almost all post-

89 Cal. Gov. Code § 68662 (prior to amendment by The Act).
90 Cal. Supreme Ct. Policies Regarding Cases Arising from Judgments of Death, policy
conviction petitions for writ of habeas corpus have been filed in the Supreme Court, even though it is possible to file a habeas petition in the trial court and the direct appeal in the Supreme Court. The California Supreme Court, however, has encouraged counsel to file the habeas petition in that Court by only compensating counsel for work done filing petitions therein rather than in the superior courts or courts of appeal.

The California Constitution grants special status to the writ of habeas corpus. It says, “Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion.” In other words, to restrict any of the courts from jurisdiction over the writ is to unconstitutionally interfere with it. And that is precisely what the Act purports to do in California.

Even though the federal right of habeas corpus under the federal Constitution is not directly applicable to the states, the United States Supreme Court, in Ex Parte Yerger, historically related the right to bring the petition for writ in all courts of record back to the laws of England, “The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom.” The Court then quoted the United States Constitution whose words are almost identical to those of the California Constitution, and said,

“The terms of this provision necessarily imply judicial action. In England, all the higher courts where open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.”

This historical context applies with equal force to all of the courts of the state, especially in states like California with guarantees of the right to habeas corpus in their individual constitutions.

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91 In Re Carpenter, 9 Cal. 4th 834 (1995).
92 California Supreme Court, Policies Regarding Cases Arising from Judgments of Death, Policy 3. Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to Such Petitions, 2-1, “Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition, or pleading in any other California or federal court . . .”
94 75 U.S. 85 (1868).
95 Id. at 95. (British spelling of “defence” in original).
96 "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. Art. I, § 9, Cl. 2.
b. The Act Changes the Standard of Proof and Conditions Relief on the Waiver of Rights

There is another way the jurisdiction of all of the California courts, including the Supreme Court, is interfered with by the Act. First, it says that successor petitions asserting actual innocence or ineligibility for death must establish facts to support the claims “by the preponderance of all available evidence, whether or not admissible in trial.” First, it is a matter of settled law in California that the standard of proof for the petitioner on habeas is “by a preponderance of the evidence,” not “all available evidence whether or not admissible.”

Second, this change in the standard of proof is coupled with a bizarre requirement that both the client and present and former counsel disclose “all material information” on the subject and, if they fail to do so, the petition shall be dismissed. There is no limitation under the existing law that restricts habeas only to those who waive, and who have their attorneys waive, the attorney client privilege and the attorney work product doctrine or the right against self-incrimination. Because the Act changes the standard of proof for habeas and conditions habeas relief on waiver of certain rights, it unconstitutionally interferes with the writ of habeas corpus.

2. The Act Deprives the Courts of their Constitutional Jurisdiction

The original jurisdiction over petitions for writ of habeas corpus not only lies with the California Supreme Court and the courts of appeal but has routinely been exercised in the Supreme Court as described in the preceding section. The Act not only interferes with the writ of habeas corpus itself but with the actual jurisdiction of the courts. This conflicts with the California Constitution which confers original jurisdiction for an original writ of habeas corpus on all three of the California courts: “the Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas proceedings.” This is related to the interference with the right to habeas corpus but is a separate constitutional defect in the Act relating to the constitutional jurisdiction of the courts.

In consequence of these facts the Act is in direct conflict with the Constitution. Constitutional jurisdiction of the court cannot “be taken away or impaired by a legislative act.” Statutory initiatives are “subject to the
same state and federal limitations as are the Legislature and the statutes which it enacts.”

3. The Act Specifically Diminishes the Jurisdiction of the California Supreme Court over Capital Cases and Removes Safeguards

Almost all the provisions of the Act are designed to interfere with the California Supreme Court’s jurisdiction over capital cases. The Act grants the appointment of counsel for habeas proceedings to the trial judge taking that function away from the Supreme Court. It provides that successive petitions cannot be filed in the court of appeal or the Supreme Court and that the remedy for denial of a petition for writ in the trial court is to appeal to the court of appeal. The Act purports to remove any jurisdiction from the Supreme Court or courts of appeal to hear “any claim by a condemned inmate that the method of execution is unconstitutional or otherwise invalid.” It interferes with the Court’s appointment of counsel both on direct appeal and habeas. It reduces of the time limits on proceedings. It places the limitations on the Habeas Corpus Resource Center which has always been in the Court’s budget. It transfers writs from the Supreme Court to the trial courts and places the limitation on the filing of the initial petition for writ of habeas corpus to one year. It places limitations on the subject matter of successor petitions and exempts lethal injection protocols from the Administrative Procedures Act and, therefore,

Article VI, § 11(a).

103 Cal. Gov. Code § 68662 (following amendment by The Act).
106 Cal. Pen. Code § 1239.1(b) (appointing unwilling counsel); Cal. Gov. Code § 68665(b) (revising standards for the pool of attorneys for direct appeal as well as habeas, including people relying on prosecution experience).
107 Cal. Pen. Code §§ 190.6(d) (five years to complete all appellate and habeas procedures), 1239.1(a) (the Supreme Court shall appoint counsel on direct appeal as soon as possible), 1501(c) (one year to file initial habeas petition) and (f) (one year for the court to decide), 1501(1509.1(a) and (c) (limits on notice of appeal of habeas decision and on successor petitions).
108 Cal. Gov. Code §§ 68660.5 (requiring the HCRC to expedite capital habeas proceedings), 68661 (restricting representation to habeas corpus only), 68661.1 (restricting federal habeas representation to cases where full compensation is obtained from the federal court) and 68664 (imposing an executive director appointed by the Supreme Court, requiring “expeditions” representation and limiting salaries).
111 Cal. Pen. Code § 1509(d) (limiting to actual innocence or restrictively defined ineligibility for execution).
court review.\textsuperscript{112}

The only conclusion that can be reached is that the Act is expressly intended to make it easier for the prosecution to have a judgment of death affirmed on direct appeal and habeas. It is a one-sided diminution of rights of the clients and makes the execution of the innocent more likely. It does this by diminishing the power of the courts, including the Supreme Court, as safeguards against an improper execution.

The United States Supreme Court in \textit{Pulley v. Harris}\textsuperscript{113} considered the fact that the California death penalty system did not include some safeguards other states had. In \textit{Pulley}, the Court considered that the California capital punishment system lacked proportionality review which would be useful in avoiding unconstitutional death sentences under the Eighth Amendment. The Court held, however, that California had other safeguards, including review of death judgments by the California Supreme Court and that such review was one of the safeguards that compensated for not having the proportionality review safeguard.\textsuperscript{114}

The Act seeks to all but eliminate meaningful review by the California Supreme Court on habeas. In addition, the Act also seeks to significantly interfere with its direct appeal review in that it lessens the standards for qualification of counsel\textsuperscript{115} and places a limit on the time within which the Court must decide direct appeals.\textsuperscript{116} This concerted effort to eviscerate the jurisdiction of the Supreme Court and weaken the other California capital punishment system safeguards violates the assurances of \textit{Pulley} and renders the Act unconstitutional.

4. The Act Violates the Separation of Powers

By imposing the requirements on the courts, including the California Supreme Court, addressed in the preceding sections, the Act violates the separation of powers.\textsuperscript{117} Statutory initiatives are “subject to the same state

\textsuperscript{112} Cal. Pen. Code § 3604.1 (also limiting challenges to the mode of execution).


\textsuperscript{114} In this case, the 1977 law was being reviewed. The subsequent Brings initiative in 1978, the statute as amended by the Act under consideration here, added more special circumstances and diminished the protections of the 1977 law. Therefore, the safeguard of Supreme Court review would be even more important under the Briggs initiative than under the 1977 law considered by \textit{Pulley}.

\textsuperscript{115} Cal. Pen. Code § 190.6(d) (“shall amend the rules and standards” as necessary to meet the timelines); Cal. Pen. Code § 1239.1(b) (appointing unwilling counsel); Cal. Gov. Code § 68665(b) (revising standards for the pool of attorneys for direct appeal as well as habeas, including people relying on prosecution experience).

\textsuperscript{116} Cal. Pen. Code § 190.6(d).

\textsuperscript{117} “The powers of state government are legislative, executive, and judicial. Persons
and federal limitations as are the Legislature and the statutes which it enacts." Therefore, the Act is the same as a legislative enactment for a separation of powers analysis. “Courts have the inherent power, derived from the state constitution, to ensure the orderly administration of justice; this power is not confined by or dependent on statute.”

More specifically, it is a violation of the separation of powers for the legislature (or voters by initiative) to restrict the court’s constitutional jurisdiction. “Where the jurisdiction of the court is defined by the Constitution, the legislature cannot ordinarily diminish, enlarge, or interfere with such jurisdiction.” For the reasons set forth in the preceding sections, the Act seeks to significantly diminish the jurisdiction of the courts both procedurally and substantively. As such the Act is also unconstitutional as a violation of the separation of powers.

5. The Act Violates the Single Subject Rule

There are dozens of provisions of the Act and those provisions are not limited to a single subject. Under the California Constitution, “An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.” An initiative embraces only one subject if all its provisions are “reasonably germane” to each other “and to the general purpose or object of the initiative.”

It is difficult, if not impossible, to identify one general purpose or object of this Act. Not so cynically, the purpose or object could be said to be to make sure people who have received a death judgment are executed quickly and cheaply with as little interference as possible from the courts, the HCRC or competent counsel. That may, in fact, be the purpose and object of the Act given its actual provisions.

The provisions of The Act include: the conscription of direct appeal counsel from the appointed counsel lists, reduction of the time limits on

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120 People ex rel. Dorris v. McKamy, 168 Cal. 531 (1914); Chinn v. Superior Court of San Joaquin County, 156 Cal. 478 (1909).
123 Counsel for Briggs, settled on a purpose of the “expedient of death penalty appeals and reduction of costs.” See, id. at 40. That is as good as any but the burden should be on the proponent to establish the “general purpose or object” of the initiative.
proceedings,\textsuperscript{125} the movement of prisoners from San Quentin,\textsuperscript{126} the ten day window on executions,\textsuperscript{127} the limitations and seemingly gratuitous insults to the Habeas Corpus Resource Center,\textsuperscript{128} the reduction of the requirements for appointment on direct appeal,\textsuperscript{129} the changes on appointment of counsel on habeas,\textsuperscript{130} the transfer of writs from the Supreme Court to the trial courts,\textsuperscript{131} the limitation on the subject matter of successor petitions,\textsuperscript{132} the limitation on the filing of the initial petition for writ of habeas corpus to one year,\textsuperscript{133} the requirement of work and restitution,\textsuperscript{134} the exception of lethal injection protocols from the Administrative Procedures Act,\textsuperscript{135} the required stockpiling of means of execution,\textsuperscript{136} and the exemption of medical personnel from ethical compliance or sanctions of their licensing agencies.\textsuperscript{137}

Counsel in \textit{Briggs v. Brown} are more charitable in construing the purpose and object of the Act and argue that, at least, the provisions relating to work and restitution, the exemption from the Administrative Procedures Act, and the various insults to HCRC are not related to the general purpose or object of the initiative.\textsuperscript{138} At a minimum, that is true for the purpose or object that they chose. However, it is the burden of the proponents to establish a credible purpose or object and, it is not clear that one could be

\textsuperscript{125} Cal. Pen. Code §§ 190.6(d) (five years to complete all appellate and habeas procedures), 1239.1(a) (the Supreme Court shall appoint counsel on direct appeal as soon as possible), 1501(c) (one year to file initial habeas petition) and (f) (one year for the court to decide), 1501(1509.1(a) and (c) (limits on notice of appeal of habeas decision and on successor petitions)

\textsuperscript{126} Cal. Pen. Code § 3600 (the California Department of Corrections and Rehabilitation – the latter word added ironically in death statutes – may transfer inmates to other prisons).

\textsuperscript{127} Cal. Pen. Code § 1227 (ten-day window for execution set by trial judge between thirty and sixty days from order).

\textsuperscript{128} Cal. Gov. Code §§ 68660.5 (requiring the HCRC to expedite capital habeas proceedings), 68661 (restricting representation to habeas corpus only), 68661.1 (restricting federal habeas representation to cases where full compensation is obtained from the federal court) and 68664 (requiring that HCRC’s executive director be appointed by the Supreme Court, requiring “expeditions” representation and limiting salaries).

\textsuperscript{129} Cal. Pen. Code § 1239.1(b) (appointing unwilling counsel) and Cal. Gov. Code § 68665(b) (revising standards for the pool of attorneys for direct appeal as well as habeas, including people relying on prosecution experience).

\textsuperscript{130} Cal. Gov. Code §§ 68662 and 68665

\textsuperscript{131} Cal. Pen. Code § 1509(a).

\textsuperscript{132} Cal. Pen. Code § 1509(d) (limiting to actual innocence or restrictively defined ineligibility for execution).

\textsuperscript{133} Cal. Pen. Code § 1509(c).

\textsuperscript{134} Cal. Pen. Code § 2700.1.

\textsuperscript{135} Cal. Pen. Code § 3604.1 (also limiting challenges to the mode of execution).

\textsuperscript{136} Cal. Pen. Code § 3604(d).

\textsuperscript{137} Cal. Pen. Code §§ 3604.3(a), (b), and (c).

\textsuperscript{138} Supra, n. 22, 42-47.
established. It is also not clear that, among the multitude of provisions restricting jurisdiction and disabling safeguards, that the proponents should be allowed to choose something that seems to be related to what could have been a purpose or object but is belied by the presence of the other provisions.

In other words, the only way to make all provisions germane to the general purpose or object of the Act is to honestly acknowledge that the general purpose or object of the Act is to make it difficult for people who have suffered a judgment of death to avail themselves of their constitutional rights. That is the only explanation that ties all the provisions together under a single subject. However, to do that would concede that the entire enterprise was unconstitutional as described in the preceding sections.

6. Retroactive Application of the Act Violates the Prohibition against *Ex Post Facto* Laws

There are two reasons that any application of the Act, even if it were operable and constitutional, could not be applied retroactively to offenses that occurred prior to November 9, 2016. The first is that the provisions of the Act make death more likely and therefore alter punishment in a fashion that is more likely to result in a harsher penalty. The second is that, based on a California Supreme Court case directly on point, it shortens the time between judgment and execution. Both consequences of the Act render it in violation of the *ex post facto* clause.


The Act is an *ex post facto* law in violation of the federal and state constitutions if it is applied to offenses which occurred before November 9, 2016. It does not create a new criminal law or increase punishment, however, based on the facts set forth in the preceding sections, to the extent that the Act applies to cases in which the alleged crime occurred before its enactment, the Act makes a person more likely to be punished by death.

An argument can be made that making a harsher punishment more likely, even if not statutorily compelled, is sufficient to activate the *ex post facto* clause. There is an analogy to cases based on the periodic amendment of the United States Sentencing Guidelines (U.S.S.G.). Pursuant to the “one book rule,” a defendant may use only one edition of the U.S.S.G. for

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139 U.S. Const. Art. I, § 9, Cl. 3.
141 Sect. III.C. 1-5, *supra*.
sentencing in a case.\textsuperscript{142} Even though the U.S.S.G. guidelines are just guidelines and not mandatory,\textsuperscript{143} they can influence the sentencing judge. It has been held to be a violation of the \textit{ex post facto} clause for a sentencing court to not “apply the Guidelines Manual in effect at the time the offense was committed if retroactive application of the later Manual would result in harsher penalties.”\textsuperscript{144}

The application of the U.S.S.G. Guidelines Manual does not require a harsher sentence. The sentence is prescribed by the statute and the Manual provides guidelines from which the sentencing judge may vary. However, the influence of the U.S.S.G. Manual can influence a judge to impose a harsher (or lighter) sentence.

Similarly, the potential for making death more likely by truncating post-conviction review, lessening the qualifications of counsel, and limiting the issues of actual innocence and ineligibility for the death penalty, to name a few of the Act’s purportedly retroactive changes, would violate the \textit{ex post facto} clause. Just like the use of the Manual, the use of the Act’s procedures make a harsher sentence -- in this case, death – more likely.

This argument is not without challenges in light of the retroactive application of other provisions which would seem to create harsher conditions of a defendant, such as changes in the rules of evidence or collateral consequences, such as registration. However, what makes this argument more compelling is that there is a Constitutional right to “heightened reliability” in the judgment of death.\textsuperscript{145} Allowing the review of a death judgment to be so profoundly diminished would arguably be Constitutionally cognizable because “death is different.”\textsuperscript{146}

\textbf{b. The Act Decreases the Time between Judgment and Execution}

The Act also violates the \textit{ex post facto} clause because it expressly seeks to expedite the process of post-conviction review and the ultimate imposition of death.\textsuperscript{147} As such, it reduces the time between the judgment of death and execution for those who are not successful in post-conviction proceedings. This is a not just a result of encouraging more efficiency but a

\begin{itemize}
\item \textsuperscript{142} As to any case, a “Guidelines Manual in effect on a particular date shall be applied in its entirety.” U.S.S.G. § 1B1.11(b)(2).
\item \textsuperscript{143} \textit{United States v. Booker}, 543 U.S. 220 (2005).
\item \textsuperscript{144} \textit{United States v. Saferstein}, 673 F.3d 237, 244 (3rd Cir. 2012) (citations omitted); see also, \textit{United States v. Stevens}, 462 F.3d 1169 (9th Cir. 2006).
\item \textsuperscript{146} \textit{Woodson v. North Carolina}, 428 U.S. 280 (1976).
\item \textsuperscript{147} Section 2, subsection 6, uncodified.
\end{itemize}
result of actually modifying the mandatory time limits.\textsuperscript{148}

The California Supreme Court ruled on this issue in \textit{People v. DeMoss}.
\textsuperscript{149} There the Supreme Court considered an amendment to the Penal Code section that pertained to the setting of an execution date upon the filing of the remittitur following unsuccessful post-conviction proceedings in capital cases.\textsuperscript{150} The amendment provided that an execution date would be set from thirty to forty-five days after the remittitur, whereas, at the time of the offense, the statutory time period was sixty to ninety days.\textsuperscript{151} In other words, the defendant would have had a potential forty-five more days to live. The Court held,

“But it is obvious that there is a hopeless inconsistency as to the time element between the original section and the section as amended. It would be impossible to fix a date that would satisfy both provisions. In making the order of December 2, 1935, the trial judge assumed to act under the amended section which was in force at that date. As applied to this defendant, such act was clearly ex post facto, and within the prohibition of article 1, § 10, cl. 1, of the Federal Constitution, and of article 1, § 16, of the Constitution of California. The authorities uniformly hold such provisions as section 1193, as amended in 1935, to be ex post facto, if applied to crimes committed prior to the enactment of the law . . .”\textsuperscript{152}

In the case of the Act, the entire scheme is expressly intended to expedite the process. The net effect of the Act, if successfully applied on its own terms, would advance the state process of death by years. Therefore, the Act is unconstitutional if applied retroactively.

7. The Present Capital Punishment System is Unconstitutional

\textit{a. The Capital Punishment System is Dysfunctional and Flawed}

Trial Counsel should object to proceeding under the Act on the grounds that the California death penalty system as it stands is unconstitutional. It violates due process of law, equal protection, the right to effective assistance of counsel and the right to heightened reliability in capital cases

\textsuperscript{148} Cal. Pen. Code §§ 190.6(d) (five years to complete all appellate and habeas procedures), 1239.1(a) (the Supreme Court shall appoint counsel on direct appeal as soon as possible), 1501(c) (one year to file initial habeas petition) and (f) (one year for the court to decide), 1501(1509.1(a) and (c) (limits on notice of appeal of habeas decision and on successor petitions).

\textsuperscript{149} 5 Cal.2d 612 (1936).


\textsuperscript{151} \textit{People v. DeMoss, supra}, at 613.

\textsuperscript{152} \textit{Id.} 613-614.
under the Fifth, Sixth, Eighth and Fourteenth Amendments, relevant provisions of the California constitution and case law.\(^\text{153}\) The problems with the California system of capital punishment are legion and well documented.\(^\text{154}\) It has been deemed “dysfunctional” and “broken” by two successive Chief Justices of the Supreme Court,\(^\text{155}\) it has been criticized by the California Commission on the Fair Administration of Justice,\(^\text{156}\) by federal Judges Arthur L. Alarcon,\(^\text{157}\) and Cormac Carney,\(^\text{158}\) by academics\(^\text{159}\) and, most recently, by Justice Breyer of the United States Supreme Court.\(^\text{160}\)

The objection by trial counsel to proceeding under the Act are an adjunct to the overall objections to the death penalty as it stands in California both before and after the Act. As argued below, the Act


\(^{160}\) In Boyer v. Davis, 136 S.Ct. 1446 (2016) (Breyer, J., dissenting from a denial of certiorari), Justice Breyer’s said, “Put simply, California's costly 'administration of the death penalty' likely embodies 'three fundamental defects' about which I have previously written: '(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose.' Glossip v. Gross, 135 S.Ct. 2726, 2756 (2015) (Breyer, J., dissenting) [additional citations omitted]"
exacerbated the flaws in the pre-existing condition. But, whatever its effect, the system as a whole is broken and it remains so. The trial judge should not implement the individual or collective provisions of the Act with the individual and collective provisions of the capital punishment system in general because individually and collectively the system is no better than the one described by the Chief Justices, the federal judges and the academics described above.

b. The Act did not Reform but, Instead, Exacerbated the Flaws in the Capital Punishment System

However, the Act made the flaws worse. The Act was advertised as a Death Penalty Reform initiative. It was claimed that it would obtain justice for victims of horrific crimes and would eventually save some money for the taxpayers while claiming that “[r]eforming the existing inefficient appeals process for death penalty cases will ensure fairness for both defendants and victims.” Instead of reform and ensuring fairness, the Act cynically truncates the procedures and reduces safeguards that might be effective in avoiding wrongful conviction and the execution of the innocent. The Act effectively eliminates the right to a habeas corpus proceeding that is separated in time and place from the trial itself.

One of the safeguards of the death penalty system in California as it was before this Act, was that there was a separate opportunity for new counsel to obtain transcripts and files from trial counsel but also to investigate and reinvestigate matters that trial counsel may not have thoroughly investigated. Habeas counsel had an opportunity to do Brady demands and post-conviction discovery and, possibly, retesting. Habeas counsel also had a chance to determine if there was ineffective assistance of counsel, prosecutorial misconduct, juror misconduct or even judicial misconduct. All of this takes time, reflection and a certain distance from the trial proceedings.

Under the law prior to the Act, a habeas petition was deemed timely if filed the later of six months after full briefing on direct appeal to the California Supreme Court or three years from the date of appointment of

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161 Section 2, subsection 6, uncodified.
166 See, e.g., People v. Bryant, 191 Cal.App.4th 1457 (2011) and cases cited.
counsel. After the Act, there is a one year limitation triggered by the order following the “offer” of counsel by the trial court. The trial court could delay the “offer” of counsel or the orders following the “offer.” Such a delay would be consistent with the Supreme Court’s stated reasons for its existing Policies to give counsel in complex cases time to investigate issues that may have arisen over time and during the course of the appeal. However, absent further rules from the Judicial Council or Supreme Court, on its face, the Act does not provide for this protection.

Following a death verdict, any modestly competent trial lawyer would make a motion for new trial and also ask the trial judge to review the death verdict. Such motions, even if made by competent counsel who put substantial effort into them, often do not reach all the issues later found by habeas counsel after careful reading of the transcripts and after having the time and distance to do all the work referred to above. Thus, on the face of the Act, one of the most troubling aspects is that it potentially eliminates the protections of the traditional filing of a habeas petition, which took place only after the full briefing of the direct appeal and was to be heard in a different court than the one that just denied the motion for new trial and the review of the death verdict.

The Act is not just oriented, as advertised, toward expediting the process or saving money but is oriented toward making a conviction and death sentence final. It risks habeas counsel not being appointed at all; it requires habeas to be presented to the judge who just imposed death; it accelerates the process so much that there is insufficient time to read, review, investigate, discover, test and write a competent petition; it limits successor petitions and narrowly defines actual innocence and ineligibility for death; it limits habeas review by the court of appeal to an appeal on the four corners of the hastily created trial court habeas record; it allows quick setting of executions; it eliminates other methods of reprieve;

168 California Supreme Court, Policies Regarding Cases Arising from Judgments of Death, Policy 3. Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to Such Petitions, 1-1.1, “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.”

169 In re Clark, 5 Cal.4th 750, 783-84 (1993).
174 Cal. Pen. Code § 1509(c) and (f).
175 Cal. Pen. Code §§ 1509(c) and (d) and 1509.1(c).
and it seeks to eviscerate the ranks of competent counsel to handle habeas matters and appeals.\textsuperscript{179}

Despite the rhetoric in the Findings and Declaration of the Act\textsuperscript{180} or in the Ballot statements,\textsuperscript{181} it is no accident that the actual quality of the review of a death sentence will be reduced significantly. This will lead to more wrongful convictions, wrongful death sentences and execution of the innocent. Out of the 750 people on death row in California\textsuperscript{182} there are many who are innocent\textsuperscript{183} and many more who will join their ranks as the death penalty marches on.\textsuperscript{184} The estimates of wrongfully convicted vary. When Illinois’ Governor finally commuted sentences, seventeen of the approximately 170 people on Illinois death row were exonerated, mostly by DNA evidence and the identification of the real killer.\textsuperscript{185} California’s capital punishment system was on par with that of Illinois\textsuperscript{186} and, while Illinois made reforms and then repealed the death penalty anyway, California’s system has remained essentially unchanged.\textsuperscript{187} If, like Illinois, ten percent

\textsuperscript{178} Cal. Pen. Code § 1509(a).

\textsuperscript{179} Cal. Pen. Code § 1239.1(b) and note the stealth inclusion of the ability to qualify to represent people condemned to death based on a prosecutor’s experience in putting people on death row in Cal. Gov. Code § 68665(b): “Experience requirements shall not be limited to defense experience.”

\textsuperscript{180} Section 2, uncodified.


\textsuperscript{182} According to the California Department of Corrections and Rehabilitation, as of November 3, 2016.

\textsuperscript{183} According to the National Registry of Exonerations maintained by the University of Michigan, nationwide there have been 1866 documented exonerations of people convicted from 1956 to present, most occurring after 1980 (see, http://www.law.umich.edu/special/exoneration/Pages/ExonerationConvictionYearCrimeType.aspx) and, according to the Death Penalty Information Center, 156 of the innocent were sentenced to death (see, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row).


\textsuperscript{185} After the complete exoneration of 17 people on Illinois death row, Governor Ryan commuted the sentences of 167 condemned people, 164 to life without the possibility of parole, and three others to conform to the sentences of their co-defendants. Jeff Flock, Blanket Commutation Empties Illinois Death Row, CNN.com, http://www.cnn.com/TRANSCRIPTS/0301/11/cst.07.html.


of California’s death row inmates were innocent, that would be 75 people now facing death.

Judge Kozinski wrote that,

“The significant number of inmates freed in recent years as the result of various innocence projects and especially as a result of DNA testing in cases where the convictions were obtained in the pre-DNA era, should cause us to question whether the current system is performing as effectively as we’ve been led to believe. It’s no answer to say that the exonerees make up only a minuscule portion of those convicted. For every exonerated convict, there may be dozens who are innocent but cannot prove it.”

Hence, we will never know how many people are innocent on any death row. Given the flaws in the California system, even prior to the Act, the number of wrongfully convicted people undiscovered will remain substantial.

By all rights, any reform of the death penalty, if the death penalty were to be retained and not repealed, should have addressed the issues that concerned the scholars and jurists who have attended to this in the last several decades. The Act made none of these reforms and innocent people are just as vulnerable to conviction and execution as they were during the entire period since California reinstituted the death penalty.

Tragically, the Act does make it more likely that the innocent will be executed. Considering that fact, the entire system is unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments and relevant California constitutional provisions. The failures of these purported reforms render the death penalty system even less able than it was to provide the type of heightened reliability required for a valid capital punishment system.

Written motions should be filed on all the matters referred to in this Section V with declarations as appropriate. No doubt, counsel will discover other issues that pertain to operability or constitutionality that can be raised as well.

IV. DUTY TO BE HEARD REGARDING THE APPOINTMENT OF HABEAS COUNSEL

Trial counsel has duties relating to the actual appointment of habeas

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counsel. First, the appointment hearing should be delayed so that eventual habeas counsel can be effective -- for instance, after transcripts are prepared and trial counsel has had time to prepare the trial files and assemble materials -- since the one year limitation runs from the date of the trial judge’s orders following the “offer” of counsel. Second, the trial judge is obligated to offer counsel but there is no time limit for doing so. When the offer is extended by the trial judge, especially if it is extended immediately after the death judgment, trial counsel must advise the client patiently regarding the importance of that appointment. Third, trial counsel must review and possibly litigate the qualifications of potential habeas counsel. Fourth, trial counsel must be ready to litigate a possible rejection of counsel by the client or the potential finding that the client is not indigent.

A. Habeas Counsel Appointed Early Will Not be Effective

1. There is No Time Limit for Appointment of Habeas Counsel.

There is no time limit for the appointment of habeas counsel under the provisions of the Act. It says, “After the entry of judgment of death in the trial court, that court shall offer counsel to the prisoner as provided in Section 68662 of the Government Code.” The Government Code simply says, “The superior court that imposed the sentence shall offer to appoint counsel to represent a state prisoner subject to capital sentence for the purpose of state postconviction proceedings . . .”

By comparison, the Act added a new statute relating to the Supreme Court’s duty to appoint counsel on direct appeal: “It is the duty of the

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191 Id. There is no time limit anywhere in the code within which the trial judge is obligated to appoint counsel.
192 A client is liable to be despondent and may not want to accept an attorney. When a client facing death wants to give up, it poses special ethical and practical problems for the lawyer. Imprisonment in general and imprisonment under a sentence of death, in particular, can understandably lead to depression and hopelessness. J. C. Oleson, “Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution,” 63 Wash. & Lee L. Rev. 147, 170, et seq. (2006). Under Cal. Gov. Code § 686662(c), there is no express provision for appointment of counsel at a later time if counsel is rejected. Of course, if the situation presented itself, an argument could be made that the client could later opt for counsel and that may or may not affect time periods.
193 Cal. Gov. Code § 686662 (a), (b) and (c).
195 Cal. Gov. Code § 686662, which is followed by the three possible orders, all of which may require a hearing.
Supreme Court in a capital case to expedite the review of the case. The court shall appoint counsel for an indigent appellant as soon as possible.”\textsuperscript{196} The provision goes on to remove any “substantial backlog in appointment of counsel” by conscripting counsel who accept appointments on non-capital cases.\textsuperscript{197} However, this pertains to the Supreme Court and direct appeals and there are no similar rules for appointment of habeas counsel.

It is a fundamental rule of statutory construction that the plain meaning of the statute should prevail. That is, if there is no ambiguity, there is no need for construction.\textsuperscript{198} That seems to be the case here. There simply is no time period specified nor any exhortation to expedite. On the other hand, if the prosecutor or the judge seek to imply some time period or expedition, it is proper under the doctrine of statutory construction to consider that the drafters of the Act knew how to specifically invoke time periods and exhortations when addressing the Supreme Court and, therefore, the lack of same when addressing the trial courts must have been intentional.

2. Delay in Appointment of Habeas Counsel Will Postpone the Deadline for Filing of the Initial Habeas Petition

If there is no time period for the appointment of habeas counsel by the trial judge, the trial lawyer should move to postpone the hearing on the offer of counsel. The deadline for the filing of the initial habeas petition extends one year from the date that the trial judge rules following the “offer” of counsel.\textsuperscript{199} But delay for the sake of delay is not the reason to postpone the hearing. There are very practical reasons for the delay that work to the benefit of trial counsel, the client and the court, itself.

First, the time that trial counsel has to deal with the emotional state of the client will be beneficial to both the client and the judge in obtaining the most rational response to an “offer” of counsel. Second, the additional time will allow the court reporter and clerk to prepare the record on appeal and for trial counsel to assemble the trial file and collect materials that will assist habeas counsel. Since habeas counsel will only have a year to file the initial petition, it makes sense not to waste a portion of the year waiting for transcripts, files and materials. Third, the additional time will give trial counsel an opportunity to collect her thoughts and be prepared to be as efficient as possible in communicating with habeas counsel. Fourth, it will give trial counsel time to discuss the obligations imposed by the Act on the

\textsuperscript{197} Cal. Pen. Code § 1239.1(b).
\textsuperscript{198} Caminetti v. United States, 242 U.S. 470 (1917).
\textsuperscript{199} Cal. Pen. Code § 1509(c).
client and counsel to provide information relating to factual innocence or ineligibility for the death penalty. And, fifth, the time will be well used by the judge and trial counsel in briefing and scheduling hearings on the other motions that trial counsel will file between the time of the entry of the judgment of death and the hearing on the “offer” of counsel.

B. Duty to Counsel Client

A client is likely to be despondent and the client’s mental state may impinge on the ability to accept an attorney. When a client facing death wants to “give up,” it poses special ethical and practical problems for the lawyer. Imprisonment in general, and imprisonment under a sentence of death in particular, can understandably lead to depression and hopelessness. One of the most important things a lawyer can do in death penalty work is to provide a human connection with the client. Some clients fight a constant battle against depression and hopelessness. Others stop fighting and yet others seem to do quite well. It is the duty of any capital defense lawyer to try to help the client through difficult emotional times and help him or her to not become despondent or lose hope.

In the context of the appointment of counsel for habeas under the Act, depression and hopelessness is particularly likely depending, of course, how trial counsel and the judge, at counsel’s insistence, handle the matter. First, to some clients the reality of a death sentence may just be setting in. Their hopes for acquittal or, for instance, that special circumstances would not be found, or that the jury would return life, have come crashing down. Second, the client is in the same courtroom and in front of the same judge who just presided over the death verdict, denied the defense motion for a new trial and denied the review of the jury’s death verdict. Third, the thought of being transported to death row (or some other maximum security facility) could be overwhelming. If the judge acts precipitously and “offers” counsel before there is time to process the situation, a client may be inclined to reject the offer or not be in a mental state to accept or reject habeas counsel.

204 Counsel must make it clear to the client that the order following the “offer” of counsel triggers the one year limitation. Cal. Pen. Code § 1509(c). Therefore, rejection of the offer under Cal. Gov. Code § 68662(b) or a finding on non-indigency under Cal. Gov. Code § 68662(c), will commence the one year limitation. If the client is able to hire a lawyer, the client should do so before the hearing. An order finding the client incompetent
C. Duty to Litigate Qualifications of Counsel

It is not known how trial judges will address the appointment of habeas corpus counsel. The appointment statutes themselves do not set forth specifications or procedures for individual appointments. A code section amended in part by the Act retains its original language: “The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings . . .” There is an extensive form that must be submitted to the Supreme Court by any applicant for appointment. Historically, the California Appellate Project, rather than HCRC, assisted the Court in the appointment of counsel and kept watch for qualified counsel who might be willing to take capital cases either on direct appeal or habeas. Furthermore, habeas counsel in capital cases have to competently represent their clients and must be able to effectively raise ineffective assistance of counsel of trial counsel. Otherwise, as the United States Supreme Court in Martinez v. Ryan held, such ineffectiveness of habeas counsel may constitute “cause” for a procedural default and permit a federal successor petition. The Act acknowledges this same principle regarding the appeal of a denial of the state habeas petition in the trial court. Therefore, independent and competent counsel must be selected.

In addition, the proponents of the Act attempted to draft it in a fashion that would not run afoul of AEDPA fast track requirements regarding the mechanism for appointment and compensation of competent counsel in state post-conviction proceedings. To fail to meet these requirements would

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under Cal. Gov. Code § 68662(a) or not capable of “a full understanding of the legal consequences of the decision” under Cal. Gov. Code § 68662(b) should not trigger the commencement of the limitation period, although that is not expressly stated in the statute. If the trial judge’s ruling is going to be contested, a petition for writ of mandate or prohibition should be taken immediately. However, any collateral writ should be pursued concurrently with any other means by which to prepare for the habeas petition since, other than a writ of mandate on behalf of a victim (Cal. Pen. Code § 190.6(e)), mandate and prohibition are not necessarily favored and there is no guarantee of a stay.

206 Cal. Gov. Code § 68665(a), although
207 Cal. Rules of Court 8.605.
210 Cal. Pen. Code § 1509.1(b) allowing the court of appeal to hear the claim and to remand to the trial court to consider it. It should be noted that the language for the appellate provisions of the Act are heavily influenced by the language of the federal habeas appeal rule, 28 U.S.C. § 2253.
be to make AEDPA’s fast track inapplicable to California cases. The language is remarkably similar and the trial judge should be concerned about respecting not only the constitutional provisions for counsel but be aware that the drafters of the Act intended to meet the advanced standards of qualifying counsel for appointment under AEDPA.

At this point, trial counsel should insist that any lawyer who seeks, or who is being considered by the court, to be appointed as habeas counsel, meet the strict requirements of the Judicial Council and Supreme Court as well as the Constitution. Any such lawyer must have met the requirements of the Rule of Court, submitted the form, and have been approved to be on the “roster of attorneys qualified as counsel in habeas corpus proceedings in capital cases.” The Government Code states that the qualification requirements are “binding and mandatory” and places the Judicial Council and the Supreme Court in charge.

Trial counsel must object to any deviation from the statutory requirements as implemented by the Rules of Court and under the supervision of the Judicial Council and Supreme Court. Unless these protocols are strictly adhered to, it will be up to trial counsel to make a motion in writing documenting the shortcomings of the potential appointee. The motion should be couched in terms of the present statutory and Rule

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212 18 U.S.C. § 2261(b) and (c) provide that AEDPA fast track only applies to prisoners in state custody if:
   “(b) . . . a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.
   “(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—
   “(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;
   “(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or
   “(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.”
215 While this seems clear in the statute, the author was involved in a discussion with the Assisting Presiding Judge of a major county during which a member of the appointed trial panel opined that he and “fifty of his fellow panel members” were qualified and ready to accept assignments.
based scheme but also in terms of the right to the effective assistance of counsel under the state and federal constitutions. If the local judge is inclined to appoint in some other fashion, the record that trial counsel is able to make will be critical to future review. This will be the only protection the client has since an underqualified counsel is unlikely to raise the issue on him or herself.

D. Duty to Litigate Rejection of Counsel or Lack of Indigency

1. Trial Counsel will be Attorney of Record for the Offer and Appointment Procedures.

Participation of trial counsel will be critical at the stage that the trial judge sets about to determine if habeas counsel will be appointed for the client. Trial counsel will be the attorney of record for client during the procedures called for under the Act.216 The statute states that there are three possible orders217 that may be made by the trial judge following the “offer” of counsel for habeas:

“(a) The appointment of one or more counsel to represent the prisoner . . . upon finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject the offer.

“(b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.

“(c) The denial to appoint counsel upon a finding that the person is not indigent.”218

Each option will be considered in succession.

2. Appointment

First, as discussed above,219 under subsection (a)220 there should be a hearing thoroughly addressing the qualifications of any of the lawyers who might be appointed. If the trial judge is offering specific lawyer, then that lawyer must meet the criteria for appointment as noted above. Also,

216 Cal. Gov. § 68662.
217 There would be other possible orders that are not on the list, including, continuance, stay, and determination of unconstitutionality. See, §§ VI.A and B, infra.
218 Note the congruity with 28 U.S.C. § 2261(b) and (c).
219 § IV.C, supra.
220 For the purposes of this section IV.D, references to “subsection (a),” “(b)” or “(c)” will be to the corresponding subsections of Cal. Gov. § 68662.
whether the trial judge offers a specific lawyer or the prospect of choosing a lawyer through a process, the trial lawyer should object to anything that suggests that counsel is being selected by the trial judge based on any bias or prejudice. For instance, appointment of local counsel who appears regularly in the judge’s court might suggest, or have the appearance, that the judge is selecting counsel who will not be as objective on certain issues. Again, a written motion should be filed if there is anything out of the ordinary.

Second, subsection (a) seems to contain one of the few positive notes in the Act. It states that “one or more” counsel may be appointed. In that regard, trial counsel should be prepared to document in a written motion any facts that suggest that the case is complicated or otherwise would be appropriate for the appointment of multiple lawyers. Part of the documentation should be to explain the nature of the case in conjunction with the limited time period to complete the initial petition for filing within one year. One or two lawyers might not be adequate to the task and a team of three or four might be required to get job done effectively and on time.

Third, subsection (a) may require a hearing on indigency. The right to competent counsel is contingent on obtaining competent counsel which, generally, means paying substantial sums or having counsel appointed. If there is any question, trial counsel should prepare a written motion along with declarations from experienced counsel who can offer an opinion on how much money would be required to retain private counsel.

Fourth, subsection (a) may require a determination of competence to “accept or reject” the offer of counsel. Trial counsel may decide to have a confidential psychological examination to determine how to proceed. Although competency also comes into play if a client seeks to reject counsel, the mental state of the client should be explored before any decision is made. Despondent clients who have recently been sentenced to death will need extra counselling and may benefit from the time it takes to do a proper mental examination before they are forced to choose.

The results of this examination could require trial counsel to ask the judge to declare a doubt if, for instance, the client has decompensated or gone into depression because of the death judgment. Those procedures could result in substantial delay while there is a trial on competency and, if necessary, a process to restore competency to assist counsel with the appointment process. This statutory requirement under subdivision (a) that the client be competent to accept or reject counsel is not related to the claim that a client must be competent to cooperate with counsel on the habeas

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221 And, of course, it would violate the principles discussed in section IV.C, supra.
petition itself.²²³ It is also independent of the requirement that the trial court find under subsection (b) that the client rejected counsel “with full understanding of the legal consequences of the decision.”

3. Rejection

Section (b) allows the trial judge to find that the client has rejected the offer to appoint habeas counsel. Trial counsel should work with the client to avoid this decision. There is no provision for appointment of counsel ever again in the California courts if the client rejects this one offer. Trial counsel cannot and should not offer a negative opinion on the chances on habeas or suggest that habeas counsel is not necessary since trial counsel’s own conduct would be one of the possible issues.²²⁴ Ethically, trial counsel would have to strongly recommend that the client accept habeas counsel and have that counsel review the case anew.

Furthermore, as described in detail above, a decision to reject counsel would require a serious inquiry into the client’s competence. However, it should be noted that the standard set forth in (b) is not the competency standard of being “mentally competent,”²²⁵ and of being able to competently cooperate with counsel and understand the nature of the proceedings. The standard in (b) is that the client must make the decision to reject the offer of counsel “with full understanding of the legal consequences of the decision.”

This higher standard should be briefed and supported by expert testimony. Considering the virtual decision to volunteer for death by rejecting habeas counsel, it seems unlikely that many clients, if any, could decide to reject counsel “with full understanding of the legal consequences of the decision.”

4. Finding on Non-Indigency

Finally, the finding of non-indigency under subsection (c) is the obverse of the finding required in subsection (a). Once again, if there is any

²²³ The courts have not ruled that a petitioner must be competent to cooperate with counsel on state habeas although an argument can be made to that effect. In Ryan v. Gonzales, 133 S.Ct. 696 (2013), the United States Supreme Court decided that a petitioner need not be competent on federal habeas. Nevertheless, because the statute requires competence to accept or reject the offer of habeas counsel or a “full understanding” mental state to reject, the client must meet both standards before embarking on the hearing.

²²⁴ Trial counsel could, of course, offer an honest opinion as to the potential good issues to be raised on habeas. However, there would be a clear conflict of interest for trial counsel to consciously or subconsciously influence the client not to accept habeas counsel.

possibility that such a finding is possible, unless the client is actually wealthy, trial counsel should file a written motion with declarations establishing that the client does not have the funds and that the costs of competent habeas investigation and litigation is substantial. If the client is wealthy and able to afford habeas counsel, the client should make arrangements as soon as possible to have that counsel start working on the case. The rulings made after “offer” of counsel start the clock, so the hearing will still have to be held, however, any time spent preparing before the rulings is “found” time.

V. DUTY OF TRIAL COUNSEL TO COOPERATE PROMPTLY WITH HABEAS COUNSEL

Once habeas counsel is appointed, trial counsel will have a duty to continue to cooperate with habeas counsel. It is even more critical that this be done promptly considering the short time period for the filing of the initial petition for writ of habeas corpus or the need to establish grounds for a possible extension where there is substantial evidence of actual innocence or ineligibility for the death penalty. There is also a critical decision to be made as to the nature and extent of the disclosure required by the client and trial counsel as to evidence of innocence or ineligibility for the death penalty in order to avoid the petition on those grounds from being dismissed.

A. Time Limits on Habeas Counsel to File Initial Petition

Once habeas counsel is appointed, counsel has one year to file the initial petition for writ of habeas corpus. If the petition is not filed within the one year time period, it shall be dismissed. This is a harsh penalty that not only would jeopardize any further consideration by the state courts but by the federal courts as well. Therefore, trial counsel has a duty to do whatever is helpful to habeas counsel during this short period of time. There is always a duty of trial counsel to cooperate with habeas counsel and the relationship can sometimes be tense. It often takes a while for the two counsel (or sets of counsel) to understand each other’s positions and to

227 Cal. Pen. Code § 1509(f) as defined in 1509(d) and (g).
231 28 U.S. Code § 2254, requires that all claims be exhausted in the state courts before they can be heard on a federal habeas petition.
work together. Bluntly put, there is no time for that under the Act.

**B. Possibility of Obtaining Additional Time**

According to the language of the Act, it may be possible to obtain additional time for the filing of the initial petition, although the exact time period is not clear. The initial petition must be filed within one year\(^{232}\) or it will be dismissed unless there is a showing of actual innocence or ineligibility for execution.\(^{233}\) The court has one year from the date of filing the petition to decide the case but it may have two years to decide if “finds that a delay is necessary to resolve a substantial claim of actual innocence.”\(^{234}\) The one year court extension does not have any direct relationship to the extension that might be granted to counsel but it might be used by analogy. This is another example of poor drafting that leaves the courts and counsel to guess. As a matter of caution, however, there should be no expectation that any extension will be granted, let alone a lengthy one.

The safest approach would be for habeas counsel to file a pleading early in the proceedings requesting additional time if there are grounds. In doing so, trial counsel must assist to the extent possible since habeas counsel may have only been on the case for a short period of time and may not be able to come up to speed quickly enough to make the appropriate showing.\(^{235}\)

The showing to obtain an extension of time to file the initial petition is circumscribed. Habeas counsel, with the assistance of trial counsel, must prove, “by a preponderance of all available evidence, whether or not admissible in trial,” that the defendant is “actually innocent” or “ineligible for the death penalty.”\(^{236}\) The first issue relates to the reference to “all available evidence.” This appears to be code for everything, even things covered by privilege. This may require the assertion of privilege by trial counsel or a conscious decision to waive it, in consultation with habeas counsel and the client.

The second issue relates to the definition of “actual innocence” which is limited to “actual innocence of the crime of which he or she was convicted.”\(^{237}\) That may provide some room to work where a client might be guilty of another non-capital crime but not the capital offense of which

\(^{233}\) Cal. Pen. Code § 1509(d).
\(^{235}\) This is not to preclude other possible means to extend the time, such as the doctrine of equitable tolling.
\(^{237}\) *Id.*
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convicted. However, the requirement of “all evidence whether or not admissible” and proof by preponderance make it a formidable hurdle. And, if it is surmounted, it may or may not result in a significant period of additional time to file the initial petition.

The third issue relates to “ineligible for the death penalty” which is defined as, “circumstances exist placing that sentence outside of the range of the sentencer’s discretion.” This potentially eliminates claims pertaining to the penalty phase jury but the statute also says,

“Claims of ineligibility include a claim that none of the special circumstances in subdivision (a) of Section 190.2 is true, a claim that the defendant was under the age of 18 at the time of the crime, or that the defendant has an intellectual disability, as defined in Section 1376. A claim relating to the sentencing decision under Section 190.3 is not a claim of innocence or ineligibility for the purpose of this section.”

If trial counsel has any information that might fit into this schema, counsel should share it immediately with habeas counsel. If habeas counsel intends to pursue this avenue, trial counsel should do everything possible to properly document the claims. Obviously, in addition to offering this information for the purpose of helping the habeas counsel obtain more time, factual innocence and ineligibility for the death penalty are important dispositive issues on the merits. Given the shortness of time, even with an extension, trial counsel must help develop them expeditiously.

C. Possible Requirement to Disclose Information held by Client or Trial Counsel

Finally, though, trial counsel has a potentially larger role in this process relating to a claim of innocence or ineligibility for execution under the Act. The section in question reads as follows:

“A petitioner claiming innocence or ineligibility under subdivision (d) shall disclose all material information relating to guilt or eligibility in the possession of the petitioner or present or former counsel for petitioner. If the petitioner willfully fails to make the disclosure required by this subdivision and authorize disclosure by counsel, the petition must be dismissed.”

Again, this is poorly drafted but seems to suggest that the client, the

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238 Id.
239 Id.
241 Note that the language shifts from “ineligibility” to “eligibility.” Note also that this may or may not be read in conjunction with the language from Cal. Pen. Code § 1509(c) that “all available evidence” includes all evidence “whether or not admissible at trial.”
trial counsel and the habeas counsel might need to waive privileges, including attorney-client and attorney work product and the right against self-incrimination if the client is to be allowed to pursue any claim for innocence or ineligibility. This will require prompt litigation on the constitutionality of the requirement to waive privileges in order for the client to exercise her or his constitutional rights. Trial counsel must stand by to assist in written pleadings including declarations, perhaps to be filed under seal, or to assist by taking some issues up to the higher courts by way of petition for writ of mandate or prohibition.

Nevertheless, if there is even a shadow of a claim of innocence or ineligibility for death, trial counsel must begin early to reaccumulate the material, confer with the client, confer with habeas counsel as soon as counsel is appointed and decide on the litigation strategy that will best serve the interests of the client.

VI. TRIAL COUNSEL SHOULD SEEK A CONTINUANCE OR STAY OF THE PROVISIONS OF THE ACT UNTIL ITS PROVISIONS ARE FULLY LITIGATED OR AMENDED

A. Trial Counsel Should Request for a Continuance or Stay Pending Litigation of the Provisions of the Act

In addition to objecting by way of written motions on the grounds of inoperability or unconstitutionality, trial counsel can request, if other remedies are denied, that the trial judge grant a continuance or stay the provisions of the Act in order that the trial court itself, or higher court by way of writ or appeal, can have time to fully litigate the issues. While there is a restriction on the use of extraordinary writs, other than habeas, a challenged Act cannot prevent review of the construction or implementation of act itself.

There is at least one major piece of litigation in the courts at this time,

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242 Although it is not express, it might also suggest that other privileges would be subject to waiver, such as psychotherapist/patient or even marital privilege. The extent of this interpretation would further support the argument that the provisions of Cal. Pen. Code § 1509(e) on this subject are unconstitutional.

243 A person cannot be compelled to waive certain constitutional rights in order to exercise other constitutional rights. Simmons v. United States, 390 U.S. 377 (1968).

244 This would be analogous to the challenge to an arbitration clause. A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, unless grounds exist for the revocation of the contract as unconscionable. See, Sanchez v. Valencia Holding Company, 61 Cal. 4th 899 (2015).
Briggs v. Brown.\textsuperscript{245} It covered some of the points made in this article, including, that The Act violates the original jurisdiction of the Supreme Court; violates the single subject rule; violates the separation of powers doctrine; and violates the right to effective assistance of counsel. Other lawsuits will be brought and all or part of the Act may be challenged successfully. Because of the serious consequences of proceeding under untested and \textit{prima facie} invalid provisions, if the trial judge will not grant other relief, the trial judge can grant a continuance or stay until other courts make a determination.

\textbf{B. Trial Counsel Should Request for a Continuance or Stay Pending the Amendment of the Act}

The Act is riddled with inconsistencies and errors as chronicled throughout this article. One possible solution for prosecutors or proponents of the Act would be to seek amendments. Ironically, the proponents of the Act outsmarted themselves by making the provisions enacted by the Act virtually impossible to amend. It states,

“The statutory provisions of this act shall not be amended by the Legislature, except by a statute passed in each house by rollcall vote entered in the journal, three-fourths of the membership of each house concurring, or by statute that becomes effective only when approved by the voters.”\textsuperscript{246}

Nevertheless, trial counsel should, at the very least, seek a stay of the proceedings awaiting amendment. The fact that amendments may never occur is not counsel’s concern.

If the provisions of the Act are defective, the proponents cannot offer a defense that they drafted something so carelessly on so many subjects and then made it almost impossible to amend. That is their problem. Trial counsel, in making a motion for a stay pending amendment, must persuade the trial judge to “call the balls and strikes,” that is, to call it defective and unconstitutional as written and not to rewrite it for the prosecution or to give the prosecution the benefit of the doubt when seeking the death of the client.

\textbf{CONCLUSION}

The Death Penalty Reform and Savings Act of 2016, Proposition 66 on the California ballot in November of 2016, is inoperable and unconstitutional for a variety of reasons. Trial counsel needs to be there in

\textsuperscript{245} Note 22, \textit{supra}.

\textsuperscript{246} Section 20, uncodified.
full force to assert these objections, make appropriate motions, advise the client, monitor the appointment of habeas counsel and then cooperate with that counsel. Proponents of the Act have attempted to simply make it easier to execute people by diminishing and eliminating aspects of existing law and constitutional safeguards that, even prior to the Act, were part of a flawed capital punishment system. The death penalty evokes emotion – even the conservative jurist, Justice John Paul Stevens, recognized that the only real argument for retaining the death penalty is not the good of society, deterrence or incapacitation, but was sheer retribution. He said in his concurrence in *Baze v. Rees*,

“. . . that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.”

The death penalty is a throw-back to another time. Any modern look at it reveals the serious flaws in the system. The concept of putting prisoners to death is based on emotion not logic. One of the most significant flaws is the that it is irreversible. Once a person is *executed* there is nothing meaningful that can be done if the person was innocent or should not have been eligible for execution. Yet, this Act makes it more likely that such irreversible errors will occur and such people will be executed.

As Justice Stevens observed almost a decade ago,

“Our former emphasis on the importance of ensuring that decisions in death cases be adequately supported by reason rather than emotion, [Citation], has been undercut by more recent decisions placing a thumb on the prosecutor's side of the scales.”

Regrettably, that is what this Act does. It places an even heavier thumb on the prosecutor’s side of the scales.

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248 Id. at 85.