Opinion Analysis: Briggs v. Brown (2017) Part I

Introduction

In the November 2016 elections, the California electorate narrowly approved Proposition 66: The Death Penalty Reform and Savings Act. Proposition 66 enacted a series of statutory reforms that can be grouped under three general categories: (1) provisions to expedite review in capital appeals and habeas corpus proceedings; (2) provisions governing the confinement of prisoners sentenced to death and the administration of the death penalty; and (3) provisions pertaining to the California Habeas Corpus Resource Center.[1] It was promptly challenged in court, and on August 24, 2017, the California Supreme Court issued its opinion on the challenge in *Briggs v. Brown (2017)*.[2] The court struck down one provision of Proposition 66: the mandatory 5-year deadline for California courts to complete review of both the direct appeal and habeas corpus petition. To be more precise, the court re-interpreted the provision from being mandatory to being aspirational.[3] The majority of the media attention has understandably been directed at this part of the opinion, particularly in light of the dissent on this issue authored by Justice Cuéllar.[4] However, there has been little commentary on the numerous provisions of Proposition 66 that were upheld and which will now, in all likelihood, go into effect.[5]

This is the first of three articles analyzing this case. This article will focus on the changes implemented by Proposition 66 to capital habeas corpus procedures. These represent the most substantial changes in death penalty review procedure enacted by Proposition 66. They also greatly change judicial branch workflow for these cases by shifting most work on capital habeas corpus petitions from the California Supreme Court to the Superior Court and the Court of Appeal. Death penalty proponents have long been concerned that attorneys representing capital inmates have used legal procedures for the purpose of delay. Ironically, Proposition 66, designed to speed up the death penalty review process, adds new layers of procedure that could result in further delay.

Capital Habeas Corpus Procedure Before Proposition 66

Because habeas corpus procedure in general (let alone capital habeas corpus procedure, in particular) is an area that is unknown to most lawyers, some introductory remarks are in order. A habeas corpus petition is different from a direct appeal. A direct appeal is entirely based on the trial record, and under the California constitution, prisoners sentenced to death must file their direct appeal in the California Supreme Court.[6] A habeas corpus petition is a second, separate method of challenging a criminal conviction. A habeas corpus petition is supposed to be focused on claims of error based on facts *outside* the record, which typically include claims of ineffective assistance of trial counsel.[7]

Proposition 66 changed nothing about the direct appeal process for capital inmates. This is because Proposition 66 did not change any constitutional provisions, only statutory ones, and, as mentioned, the state constitution regulates the capital direct appeal process. Presumably, the decision by the proponents of Proposition 66 to only pursue a ballot initiative affecting statutory provisions was motivated by the fact that fewer signatures are required to qualify a ballot initiative that changes statutory provisions than are required to qualify an initiative that amends the California constitution.[8] This decision may ultimately have been driven by money, since more money is required to gather more signatures. The result is that Proposition 66 is an attempt to reform the capital review process that only makes changes to one half of that process (the capital habeas part) while leaving the other half (the direct appeal part) untouched.

Under the California constitution, all three levels of California courts have jurisdiction to hear a habeas corpus petition.[9] Therefore, an inmate challenging a capital conviction is technically able to bring a petition in all three courts, starting with the lowest; then proceed to file a *new* petition in the next two levels of courts, as opposed to taking an appeal of the denied petition to the next highest court.[10]

As a practical matter, capital inmates have been filing their habeas corpus petitions only in the California Supreme Court because that court’s policy previously only provided for appointed lawyers for capital inmates to be paid to file habeas corpus petitions there.[11] As discussed below, Proposition 66 now requires that capital

habeas corpus petitions be initially filed in the Superior Court. As far as state funding of habeas representation goes, indigent capital inmates still get funding for at least one thorough habeas corpus petition. The funding for that habeas corpus petition, however, is now for one filed in the Superior Court, not in the California Supreme Court.[12]

Changes to Capital Habeas Corpus Procedure Made by Proposition 66

Under Proposition 66, capital inmates are required to file their habeas corpus petitions in the Superior Court that imposed the sentence, to be reviewed by the trial judge who imposed the sentence unless that judge is unavailable or there is other good cause to assign the case to a different judge.[13] If the capital inmate files anywhere else, the petition will be promptly transferred to the original Superior Court.[14]

One of the most frequently-cited sources of delay in the capital review process is the filing of "successive" habeas corpus petitions: a new petition, not an appeal of the previously rejected petition. Before Proposition 66, it was common for the California Supreme Court to be presented with a new capital habeas corpus petition after having denied a capital habeas corpus petition in the same case years ago. This successive petition would typically include all the claims rejected in the first petition, along with many more newly-added claims. For the court, this would be like starting from scratch.[15]

This phenomenon of successive habeas corpus petitions with ever-burgeoning numbers of claims results from the complex interplay between federalism and federal habeas corpus relief. When a California capital inmate files a federal petition for habeas corpus, the inmate is required to have presented to the state court all the claims that are contained in the federal petition.[16] The federalism concern is that the state court should be provided the initial opportunity to respond to any claims. Because federal public defenders typically add more claims to the federal habeas corpus petition than were contained in the state habeas corpus petition, the capital inmate is required to return to state court to file a new "exhaustion" petition to present all the new federal claims to the state court. The practical result is that, after having rejected the first state habeas corpus petition, the California Supreme

Court ends up facing one or more new "successive" habeas corpus petitions by the same capital inmate.

The problem of successive petitions, however, could be further exacerbated if the capital inmate were required to file initially in the Superior Court, as Proposition 66 now requires. As mentioned, the California constitution gives jurisdiction to hear habeas petitions to all three levels of the California courts. Under the old regime, an inmate could, after having a petition rejected in the Superior Court, go on to file a new original petition in the Court of Appeal, and then a new original petition in the California Supreme Court.[17] As discussed above, because capital habeas corpus attorneys previously were only funded to file their initial capital habeas petition at the California Supreme Court, filings in multiple court levels did not present a problem. Once the petitioner had been rejected by the top court, there was no point in filing in a lower court. But because Proposition 66 shifts the initial funding to filing at the Superior Court, this raises the possibility of successive petitions to the Court of Appeal and the Supreme Court.

To get around this problem of spawning successive petitions at the different levels of the California courts, Proposition 66 makes a significant change in habeas procedure for capital inmates by instituting a mandatory system of appeals.[18] As mentioned, under the prior state of the law, if the petitioner filed and was rejected by the Superior Court, the petitioner could file a new petition in a higher court.[19] The prosecution had a statutory right to appeal a *grant* of relief in a capital case directly to the California Supreme Court.[20] Proposition 66 altered these procedures by permitting either party to take an appeal from a trial court decision on an initial habeas corpus petition to the Court of Appeal, and by specifying that "[a] successive petition shall not be used as a means of reviewing a denial of habeas relief."[21] The issues on appeal are limited to those raised below, and to claims of ineffective assistance of trial counsel if habeas counsel's failure to raise such claims itself constituted ineffective assistance.[22]

New Burdens on the Superior Court and Court of Appeal

Proposition 66 seeks to eliminate the burden of claim-multiplying successive petitions by instituting an appeals system that is limited to the issues raised below.

But it may merely shift that burden elsewhere. Proposition 66 requires that, "[o]n decision of an initial petition, the court shall issue a statement of decision explaining the factual and legal basis for its decision."[23] This requirement represents a new and potentially onerous burden on the Superior Court.

To be sure, the Superior Court has previously been governed by California Rules of Court, Rule 4.551(g), which states:

Any order denying a petition for writ of habeas corpus must contain a brief statement of the reasons for the denial. An order only declaring the petition to be "denied" is insufficient.

To this extent, trial courts have already been required to give a brief statement of the reason for denial of a habeas corpus petition. In the past, for patently unmeritorious habeas corpus petitions, the trial court's ruling could nonetheless be brief: "Petition is denied for failure to plead a prima facie case." Proposition 66 now requires much more than this, and may require the kind of statement of decision that a trial court would issue in a complicated civil bench trial requiring an extensive presentation of the relevant facts and legal reasons for the decision. One might contend that spreading the work of capital habeas petitions across 58 trial courts is less of a burden to the judicial branch than concentrating it with seven justices.[24] Yet the primary job of the superior courts is trials and moving along new causes of action, and they are currently swamped with doing that.

The traditional argument in favor of starting capital habeas corpus petitions with the trial courts is that the trial courts are "closer to the action" and would be better able to sniff out issues worthy of granting an evidentiary hearing. But capital habeas corpus petitions as they have currently developed are now far closer to appellate briefing than to trial motions, with numerous convoluted legal claims based on every conceivable assignment of error (to the trial attorney, to the prosecution, to the trial court). The argument for returning the petition to the judge who presided over the capital trial is that this will allow for judicial efficiency because the judge will already be up to speed on the case. But given the lengthy time period that it currently takes for a capital habeas corpus petition to become ready for review (10 or more years), many of the original trial judges may be retired or otherwise

unavailable. Even if the original judge is available, how well will they remember a decade-old case? And since habeas claims are largely based on facts outside the record, even the original trial judge would need to spend time assimilating all the new information necessary to rule on the habeas petition.

Because the next step in the new system for capital habeas review is an appeal to the Court of Appeal, the statement of decision will have to be specific enough to support taking an appeal. If the statement of decision is not specific enough on any of the claims rejected by the trial court, the appellant will re-raise them on appeal, thereby reproducing for the Court of Appeal the old successive petitions problem in a new form. And the Court of Appeal will have no choice but to issue a full (if unpublished) opinion on these habeas appeals. These will be appeals governed by the same rules as any other appeal.[25]

Additionally, as with any other appeal rejected by the Court of Appeal, the losing party will be able to file a petition for review in the California Supreme Court. Like any other non-direct capital appeal, granting a petition for review will be discretionary, and it is likely that the California Supreme Court will grant only a few. But capital inmates will likely nonetheless routinely file petitions for review, because the United States Supreme Court has expressed the state exhaustion requirement for federal habeas corpus relief as follows: "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."[26] It is therefore likely that, under the new Proposition 66 habeas corpus appellate process, capital inmates will routinely file petitions for review in the California Supreme Court to ensure that they have completed the state's appellate process.[27]

Because capital habeas corpus petitions typically contain 50 to 100 discrete claims (even if many are simply permutations of each other), the potential burden on the trial courts in issuing such statements of decision is huge. In the California Supreme Court, the memos analyzing capital habeas corpus petitions are substantial — around 50 to 100 pages.[28] These are documents purely for internal consumption (technically bench memos), in which some compression or short-handing of the facts and legal arguments is allowable. In a publicly-issued statement of decision, any omission or imperfection in any area will be seized upon by the appellant.

Although Proposition 66 nowhere mentions its potential effect on federal habeas corpus practice, the new appellate system for state capital inmate habeas corpus petitions might, oddly enough, have the effect of addressing a long-standing anomaly on the federal side. As discussed, considerable care is taken by the California Supreme Court in considering the numerous claims in capital habeas corpus petitions. Yet the federal courts see none of that, in the sense that all they have is the state court order rejecting a set of claims that the federal courts must consider de novo in a new federal habeas corpus petition. The federal courts now will see reasons for the denial of the claims that they will have to consider in federal habeas corpus petitions. But counter-balancing that exposure to the reasoning of the state courts will be the extreme complexity of the arguments the federal courts will encounter after at least two stages of state court pronouncements by the state trial and intermediate appellate courts, and the corresponding replies by the capital inmate petitioner/appellant.[29]

Conclusion

One problem with Proposition 66 is that the attempt to speed up the capital review process by shifting habeas review to the trial and intermediate appellate courts may have the unexpected consequence of retarding the process by requiring at least two rounds of decisions, rather than one. In this regard, the concurring opinion by Justice Liu in *Briggs* gives a nice overview of previous capital review reform proposals. There were three: (1) amending the state constitution to allow the Court of Appeal to decide capital direct appeals; (2) allowing or requiring capital habeas corpus petitions to be filed in the Superior Court; and (3) increasing the size and budget of the State Public Defender's Office and the Habeas Corpus Resource Center.[30] As Justice Liu's concurrence points out, if all three reforms could be implemented, there would be a more realistic hope of speeding up a complex system with many actors and moving parts.[31] But the only major capital review reform that Proposition 66 implements is redirecting capital habeas petitions to the Superior Court. This may have the eventual effect of partially freeing the California Supreme Court from some of its previous burden concerning capital habeas corpus petitions[32] However, it also adds increased burdens for the trial and appellate courts, with the potential of actually slowing down the capital habeas corpus review process in the California courts as a whole.

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[1] *Briggs v. Brown (2017),* at 3.

[2] *Briggs*.

[3] *Briggs* at 36-59. The majority found the mandatory five-year deadline on the courts to complete review of both the direct capital appeal and habeas corpus petition to be unconstitutional because it violated separation of powers. In this, the majority followed established law in this state and other states that the judicial branch cannot be compelled by the legislative (or the people acting through the initiative process as the legislature) to adhere to mandatory deadlines in deciding cases. The majority, however, did not strike the deadline and invalidate the proposition, but rather converted the mandatory deadline into a "directory" (i.e. aspirational) one. (In the near future, the SCOCA blog will be present a separate analysis on the separation of powers issues raised in *Briggs*.)

[4] *Briggs*, *supra* note 1 at 1-28 (conc. & dis. opn. of Cuéllar, J.). Justice Cuéllar dissented on the ground that, because the heart of Proposition 66 was the five-year mandatory deadline and because Proposition 66 was sold to the voters on the basis of that mandatory deadline, the court could not simply change that deadline to be aspirational and uphold Proposition 66. He contended that because the five-year mandatory deadline was so central to the whole proposition, one cannot assume that the voters would have approved the rest of Proposition 66 without the mandatory deadline.

[5] A petition for rehearing has been filed by the challengers of Proposition 66 and is pending before the Court. However, historically, it is extremely unlikely that petitions for rehearing result in major reconsiderations of an opinion.

[6] Cal. Const., art. VI, § 11. This is unlike all other appeals of criminal convictions in California that initially go to the Court of Appeal, with the possibility of an optional appeal to the California Supreme Court if that court, in its discretion, grants a petition for review.

[7] *Briggs*, *supra* note 1 at 3 (conc. & dis. opn. of Cuéllar, J.).

[8] See Cal. Const., art. II, § 8, subd. (b) [requiring signatures equal to 8 percent of the votes cast in the last gubernatorial election to place an initiative amending the state Constitution on the ballot, but only 5 percent for a statutory initiative].) (*Briggs*, *supra* note 1 at 7 (conc. & dis. opn. of Cuéllar, J.).

[9] Cal. Const., art. VI, § 10.

[10] *Briggs*, *supra* note 1 at 6.

[11] See Supreme Court Policies Regarding Cases Arising From Judgments of Death, policy 3.

[12] Cal. Pen. Code, § 1509, subd. (b); Cal. Gov. Code, § 68662, as amended by Prop. 66.

[13] Cal. Pen. Code, § 1509, subd. (a).

[14] Cal. Pen. Code, § 1509, subd. (a).

[15] There are so-called procedural bars that the court can evoke to reject a habeas claim it has previously rejected. (See *In Re Clarke (1993)* at 763-768.) However, practically, the court would still face considerable work in adjudicating the new petition.

[16] 28 U.S.C. § 2254.

[17] *Briggs*, *supra* note 1 at 6, citing *In re Reed (1983)* at 918, fn. 2.

[18] Proposition 66 only changes this for capital inmates. All other inmates are still governed by the traditional procedures. The *Briggs* majority rejected the argument that this constitutes a violation of Equal Protection. *Briggs*, *supra* note 1 at 30-35.

[19] *Briggs*, *supra* note 1 at 6., citing *In re Reed* at 918, fn. 2.

[20] *Briggs*, *supra* note 1 at 6, citing Cal. Pen. Code, § 1506.

[21] *Briggs*, *supra* note 1 at 6, citing Cal. Pen. Code, § 1509.1, subd. (a).

[22] *Briggs*, *supra* note 1 at 6, citing Cal. Pen. Code, § 1509.1, subd. (b).

[23] Cal. Pen. Code, § 1509.1, subd. (f).

[24] Furthermore, the habeas petitions would not be evenly spread out among the 58 superior courts in any event. A handful of counties account for the majority of the death sentences returned in California. In a perverse way, this might be considered appropriate by those who have criticized the ability of county prosecutors to unilaterally decide to seek a death sentence without coordinating the state-wide consequences of that decision with the state Attorney General. However, the burden of those consequences will now fall on the superior courts of certain counties, who themselves had no say in the decision to seek a death sentence.

[25] See California Rules of Court, Rule 8.388, which states that the general appellate rules apply to appeals taken to the Supreme Court, pursuant to Penal Code section 1506, by the prosecution from the granting of a habeas corpus petition. Proposition 66 has changed section 1506 by allowing either the prosecution or the inmate to file an appeal with the court of appeal concerning a habeas corpus petition but the same logic behind Rule 8.388 would apply.

[26] *O'Sullivan v. Boerckel (1999)* at 845.

[27] California Rules of Court, Rule 8.508 already allows for the filing of an abbreviated petition for review in the California Supreme Court for the sole purpose of exhausting state remedies before presenting a claim for federal habeas corpus relief. Whether capital inmates will make use of this provision or whether they will file more substantial petitions for review remains to be seen.

[28] See *Briggs*, *supra* note 1 at 5 (conc. opn. of Liu, J.).

[29] As mentioned, one expects that practically all capital habeas petitioners will file

a petition for review with the California Supreme Court concerning the rejection of their appeal by the court of appeal. But only a small amount of these petitions for review will be granted. For those that are granted but whose habeas petitions are denied in an opinion, the federal courts will have three rounds of opinions to review.

[30] *Briggs*, *supra* note 1 at 4-6 (conc. opn. of Liu, J.).

[31] *Briggs*, *supra* note 1 at 7-9 (conc. opn. of Liu, J.).

[32] It is not immediately clear what will happen to the backlog of capital habeas petitions that were filed with the California Supreme Court prior to the effective date of Proposition 66. The language of Proposition 66 appears to leave it to the discretion of the California Supreme Court whether it wants to hold onto or transfer to the Superior Court some or all of these petitions: "If a habeas corpus petition is pending on the effective date of this section, the court *may* transfer the petition to the court which imposed the sentence." (Cal. Pen. Code, § 1509.1, subd. (g), italics added.)