Case No. S238309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RON BRIGGS AND JOHN VAN DE KAMP,

Petitioners,

v.

JERRY BROWN, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF CALIFORNIA; XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA; CALIFORNIA'S JUDICIAL COUNCIL; AND DOES I THROUGH X,

Respondents.

APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* THE INNOCENCE NETWORK, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AND AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF

The Innocence Network and the California affiliates of the American Civil Liberties Union urge the Court to grant the relief sought in the Writ Petition. Proposition 66 violates the Equal Protection Clauses of both the California and United States Constitutions by irrationally limiting the grounds upon which capital defendants may file habeas corpus petitions. These limitations impermissibly increase the risk that an innocent person will be executed.

Proposed *amici* are the Innocence Network and the California affiliates of the American Civil Liberties Union (ACLU). The Innocence Network provides pro bono legal and investigative services to wrongly convicted individuals seeking to prove their innocence. The Network represents hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. The Network and its members also seek to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan, membership organization with 1.3 million members dedicated to the defense and promotion of the guarantees of liberty and other individual rights embodied in the state and federal constitutions and statutes. *Amici* American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, and American Civil Liberties Union of San Diego and Imperial Counties are the geographic affiliates of the ACLU in California. The ACLU is deeply involved in criminal justice reform issues, and to the extent the death penalty remains

in effect, is committed to ensuring that those facing a sentence of death receive quality legal representation and that executions are conducted in a humane and transparent manner.

Because of these interests, *amici* respectfully request that this Court allow them to submit this brief addressing this constitutional issue. *See* Rule of Ct. 8.520(f).

No person or entity other than *amici* and their counsel authored the attached brief or made any monetary contribution to its preparation.

Dated: March 30, 2017

Respectfully submitted,

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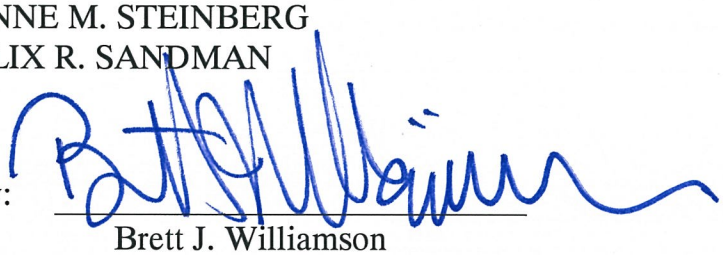
By: 

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INTRODUCTION

The risk that even one wrongfully convicted defendant is executed in California cannot be tolerated by our civilized society. As Justice Blackmun observed over twenty years ago, when "tinker[ing] with the machinery of death," no margin for error is acceptable.[1] Yet, as Justice Breyer recently detailed, our system of enforcing the death penalty is plagued with "serious unreliability," "convincing[ly] evidence[d]" by the "striking" fact that this irreversible penalty has "been wrongly imposed" on more than 100 innocent men and women.[2]

Proposition 66 imposes an unacceptably high risk that California will execute an innocent person by imposing rigid, unrealistic timelines and other limits on capital defense challenges. It does so even though social science shows us that there is a greater likelihood of wrongful conviction in capital cases,[3] and even though the proposition passed by the slimmest of voter margins. Specifically, Proposition 66 requires that initial habeas corpus petitions be filed within one year of capital defendants being appointed habeas counsel, and dictates that a successive habeas petition "shall be dismissed" absent a finding that the defendant is likely actually innocent or categorically ineligible for the death penalty—thereby creating an actual innocence gateway through which capital prisoners must pass before obtaining review of successive petitions.

History teaches us that such ill-considered constraints—driven by political whims, and not any social science or experience—are certain to have devastating consequences for capital defendants who have been

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[1] *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).
[2] *Glossip v. Gross*, 135 S. Ct. 1197, 2756 (2015) (Breyer, J., dissenting), *reh'g denied*, 136 S. Ct. 20, 192 L. Ed. 2d 990 (2015).
[3] *See id*. at 2757.

wrongfully convicted, as well as for the moral legitimacy of our system of justice.

The stark reality of our criminal justice system teaches us that mistaken convictions happen, whether for pernicious reasons or inadvertent ones. Because of this, the post-conviction process is vitally important but often quite complex, requiring substantial time and resources for even the most experienced habeas counsel. In many cases, evidence necessary to establish that a defendant is likely actually innocent takes years—and sometimes decades—to uncover. And sometimes the first objective proof of innocence has nothing to do with the individual defendant or new facts about the crime, but in the discovery of a broader and more systemic flaw inherent in the prosecution, a particular investigator, or some other aspect of conviction.

Amici submit three experience-bound arguments for why Proposition 66's differential treatment of death-sentenced inmates is irrational and therefore violates equal protection. First, evidence that ultimately establishes innocence is often not uncovered until years or even decades after a defendant's conviction and initial habeas petition. This is illustrated in case after case involving convictions wrongfully obtained because of false eyewitness testimony, faulty forensic evidence, or the state's failure to disclose exculpatory evidence.

Second, limiting review of successive habeas petitions to claims establishing "actual innocence" will screen out meritorious claims. One study of DNA exonerees—that is, people who did not actually commit the crime for which they were convicted—found that more than 90% who brought claims related to actual innocence in post-conviction proceedings were initially unable to prevail in court on those grounds.[4] Had these

[4] Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 110 (2008).

innocent people been barred from filing successive habeas petitions, as contemplated by Proposition 66, ***they would have been executed***.

Third, Proposition 66's limitation on successive petitions cannot be justified by the fact that capital defendants are assigned counsel to prepare an initial petition. This is especially true given Proposition 66's requirement that the initial habeas petition be filed within one year. Given the amount of time and effort required to effectively handle post-conviction cases, these new time limitations impose a nearly insurmountable burden on an already understaffed habeas bar. Indeed, in 2014 alone, "six death row inmates were exonerated based on actual innocence. All had been imprisoned for more than 30 years (and one for almost 40 years) at the time of their exonerations."[5]

These defects in Proposition 66 matter deeply. California currently houses 749 death row inmates, 25 percent of the nation's total.[6] Post-conviction exonerations over the past 30 years demonstrate that some of California's death row inmates are likely innocent.[7] Furthermore, and as this brief will show, such miscarriages of justice often coincide with evidence of other defects in the state's case (*e.g.*, a problematic lab or investigator) that often come to light before affirmative evidence of innocence is discovered and many years after the appointment of initial habeas counsel. By hamstringing the ability of condemned prisoners to advance fact-intensive wrongful conviction claims, Proposition 66 codifies the risk that exculpatory evidence will not be found or introduced before a death sentence is carried out.

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[5] *Glossip*, 135 S. Ct. at 2726, 2757.

[6] California Department of Corrections and Rehabilitation, *Death Row Tracking System: Condemned Inmate Summary List* (Mar. 2, 2017) http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf .

[7] Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* (2000) (noting DNA exonerations have "laid bare" the "fabric of false guilt.").

Proposition 66's proponents discount these risks and suggest they are tolerable. The U.S. and California Constitutions reject these propositions, and the Equal Protection clauses, embodied in both, demand that similarly situated individuals be treated the same. Petitioners have persuasively demonstrated that Proposition 66—by depriving capital defendants of the same process afforded non-capital defendants—fails this test on its face.

The effect of this unequal treatment will be nothing short of catastrophic. Indeed, the finality and severity of a capital sentence necessitates *greater* post-conviction protections for capital defendants—not fewer. The stakes in this case are life and death, and the State has not established and cannot establish a rational basis for this disparate treatment of capital defendants. If the history of wrongful convictions in this country is any guide, innocent defendants will be executed by the State of California under the blind restrictions imposed by Proposition 66.

ARGUMENT

As Petitioners have established, Proposition 66 violates the constitutional guarantee of equal protection by limiting the successive habeas petitions of capital defendants—and capital defendants only—unless a capital defendant can satisfy a heightened standard of actual innocence.[8] The State and Intervenor argue that these limitations are justified under the rational basis standard given that capital defendants are provided with court-appointed counsel and investigative resources for their first habeas petition, thus suggesting that these resources mean that capital defendants should be able to advance any and all relevant grounds for relief

[8] *See* Petitioner's Further Reply in Support of Petition for Extraordinary Relief at 38-39.

in that first petition.[9] Building upon this assumption, the State and Intervenor contend that successive petitions by capital defendants are less likely to have merit—both because capital defendants have access to counsel for their first petition and because capital defendants are incentivized to file meritless successive petitions in order to obtain a stay of execution while their petition is pending.[10]

But these arguments are based on the flawed premise that, even with the assistance of counsel, capital defendants can always fully develop all grounds for relief in their first petition. On the contrary, and as the history of exonerations shows, it can take years to uncover new evidence, or establish that false or flawed evidence was used to convict a capital defendant and sentence him or her to death. This is especially true where evidence is deliberately suppressed or false testimony is purposefully elicited.[11] The risk that capital defendants will not be able to fully develop all grounds for relief in their first petition is compounded by the fact that Proposition 66 requires an initial petition to be filed within one year of the appointment of counsel. Once this flawed premise is exposed, the notion that successive petitions are less likely to have merit necessarily fails as a rational justification for the differential treatment of capital defendants.

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[9] *See* State's Return at 52; Intervenor's Return at 47-49. The basis for this conclusion is unclear, since researchers estimate that approximately 4.1% of capital prisoners are wrongfully convicted. *See* Samuel R. Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced To Death*, 111 Proc. Natl. Acad. Sci., 7230, 7230 (2014), http://www.pnas.org/content/111/20/7230.full.pdf.

[10] *See* State's Return at 52; Intervenor's Return at 47-49.

[11] As detailed *infra* at Section II.D., California has very recently experienced *systemic* prosecutorial misconduct involving undisclosed use of informants who solicited jailhouse confessions in violation of the Sixth Amendment. *See e.g.* Press Release, United States Department of Justice, "Justice Department Opens Investigations of Orange County, California, District Attorney's Office and Sheriff's Department (Dec. 15, 2016), https://www.justice.gov/opa/pr/justice-department-opens-investigations-orange-county-california-district-attorney-s-office-0.

I. EVIDENCE OF INNOCENCE IS FREQUENTLY NOT AVAILABLE UNTIL YEARS INTO A CAPITAL PROCEEDING, AND DEFENDANTS MUST OFTEN REPEATEDLY CHALLENGE WRONGFUL CONVICTIONS BEFORE INJUSTICE IS EXPOSED

The case of Curtis McCarty, an innocent man who spent nineteen years on death row, is one of scores of illustrative examples of the time and persistence it takes to overturn a wrongful conviction after an initial habeas petition. Indeed, his story is a textbook example of the repugnant consequences of Proposition 66 that could cause innocent defendants in California to be executed.[12]

On December 10, 1982, Pamela Kaye Willis was murdered in an Oklahoma City home. Curtis McCarty, an acquaintance of the victim, became a suspect after a different suspect identified him as the killer. Forensic analyst Joyce Gilchrist analyzed hairs from the crime scene and determined that they were not a match for McCarty. But police believed McCarty was the perpetrator, and Gilchrist secretly changed her notes and reversed her findings, claiming that the hairs could have been McCarty's. In 1985 McCarty was arrested and charged with capital murder. [13]

Before the trial, McCarty's defense team requested all forensic samples and reports from Gilchrist. However, Gilchrist did not deliver the samples by the first day of trial. [14] Gilchrist testified that McCarty "was in fact" at the crime scene and that his blood type matched the blood type of sperm found on the victim's body. [15] When the defense tried to counter the forensic evidence, Gilchrist claimed that since the defense had only just

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[12] Innocence Project, *Curtis McCarty*, https://www.innocenceproject.org/cases/906/ (last visited, Mar. 20, 2017).
[13] *Id.*
[14] Paul C. Giannelli, *Scientific Fraud*, 46 No. 6 Crim. Law Bulletin ART 7 (2010)
[15] Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009).

received the forensic samples, it could not have conducted a competent examination in that short length of time. [16] The jury convicted McCarty and he was sentenced to death. [17]

McCarty was on death row for two years before the Oklahoma Court of Criminal Appeals overturned his conviction due to prosecutorial misconduct, improper forensic procedures, and comments made on the stand by Gilchrist. McCarty was re-tried in 1989 with Gilchrist again testifying for the state. The jury was again told that hairs from the crime scene could have come from McCarty. He was again convicted and sentenced to death. In 1995, an appellate court upheld McCarty's conviction but ordered a new sentencing hearing due to a jury instruction problem in the second trial. A new jury heard four days of testimony in 1996 and handed down McCarty's third death sentence. [18]

In 2000, Gilchrist came under investigation for allegedly reporting false forensic results in other cases. At the close of the investigation, Gilchrist was fired due to the forensic fraud she had committed in several cases. [19] McCarty's attorneys eventually secured DNA testing in 2002 on the sperm that was recovered from the victim's body. The results were not a match for McCarty. In 2005, post-conviction attorneys won a new trial for McCarty. In 2007, additional DNA testing showed that evidence recovered from scrapings of the victim's fingernails did not match McCarty. Further forensic analysis showed that a bloody footprint on the victim's body could not have been McCarty's. Based on this exculpatory evidence, as well as the misconduct by Gilchrist, McCarty's attorneys moved to dismiss the charges before a fourth trial was held. On May 11,

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[16] Paul C. Giannelli, *Scientific Fraud*, 46 No. 6 Crim. Law Bulletin ART 7 (2010)
[17] Innocence Project, *Curtis McCarty*, https://www.innocenceproject.org/cases/906 / (last visited, Mar. 20, 2017).
[18] *Id.*
[19] *Id.*

2007, Judge Gray granted the motion and McCarty was released from state custody. Prosecutors did not appeal the decision. [20]

The post-conviction proceedings that eventually led to McCarty's release spanned 11 years after he was sentenced to death for the third time, during which period intervening developments in science, as well as an investigation into the conduct of a state investigator, dramatically changed the understanding of his case and spared an innocent man from death. During these intervening years—a time period Proposition 66 is designed to eliminate—McCarty's attorneys filed two habeas petitions, one initial petition and another successive petition, before he was finally granted relief in 2007.[21] Without the intensive re-investigation and successive requests for relief by McCarty's post-conviction attorneys, the State of Oklahoma would have killed Curtis McCarty, an innocent man.

Unfortunately, Mr. McCarty is only one of many innocent Americans who erroneously have been sentenced to death. Wrongful convictions are a fact of the American justice system—documented in multiple court cases and a wave of academic studies. As of January 2017, no fewer than 157 men and women have been exonerated from death row. Much like Mr. McCarty, many of these individuals endured years of failed appeals and legal dismissals before the evidence of their innocence came to light. By arbitrarily imposing both time and substantive limitations on the filing of successive petitions in habeas cases, Proposition 66 all but ensures that meritorious cases will slip through the cracks.

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[20] Innocence Project, *Curtis McCarty*, https://www.innocenceproject.org/cases/906/ (last visited, Mar. 20, 2017).
[21] *McCarty v. Gilchrist*, 646 F.3d 1281, 1283 (10th Cir. 2011).

II. PROPOSITION 66'S HEIGHTENED STANDARD FOR SUCCESSIVE PETITIONS IS NOT JUSTIFIED BY THE FALSE NOTION THAT SUCCESSIVE PETITIONS ARE LESS LIKELY TO HAVE MERIT

The limitation on successive petitions imposed by Proposition 66—that the petitioner's claim rise to the level of establishing "actual innocence" to merit review—will deny innocent capital defendants opportunities to challenge their convictions. It will do so by prohibiting review of successive petitions which present evidence of systemic failures that do not necessarily establish actual innocence. Systemic failures such as false eyewitness testimony, false confessions, improperly elicited informant testimony, and prosecutorial misconduct often lead to wrongful convictions.[22] Indeed, "systemic failures that lead to wrongful convictions are likely to be more common in capital than other cases."[23] As Justice Breyer has suggested, this disparity may be the result of more intense community pressure on police and prosecutors to secure a conviction in capital cases.[24]

In his landmark study of prisoners who were ultimately exonerated based on DNA evidence, Professor Brandon Garrett reported that of the 33 exonerees who raised innocence-related claims, only three received vacaturs.[25] Garrett suggests that the small number of claims denominated as "actual innocence" is likely due to the fact that, prior to DNA testing, most exonerees could not develop sufficiently persuasive evidence.[26] Indeed, in nearly 10% of all cases with written decisions, the courts rejected the innocent defendant's challenge to his wrongful conviction by describing

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[22] Garrett, *supra* note 4, at 75-76.
[23]Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 Tex. L. Rev. 353, 360 (2010).
[24] *Glossip v. Gross*, 135 S. Ct. 2726, 2757, reh'g denied, 136 S. Ct. 20, 192 L. Ed. 2d 990 (2015)
[25] Garrett, *supra* note 4, at 110.
[26] *Id.* at 165.

the evidence of guilt as "overwhelming."[27] Intervenor argues that "[i]f overwhelming evidence demonstrates guilt, nothing further need be decided."[28] Yet the actual cases demonstrate otherwise. These challenges were not unsuccessful because they were without merit—later DNA analysis ***proved*** that these defendants were innocent.[29] And while the exonerees in this study were fortunate in that they were eventually able to prove their innocence through the use of DNA testing, for many of them it took years. Proposition 66 eliminates one of the only vehicles through which such evidence may be uncovered.

The study of DNA exonerees shows that if capital defendants are denied review because their petition does not rise to the level of proving actual innocence, they face the risk of execution before they are able to uncover evidence conclusively establishing their innocence. Because the sentence of death is final, capital defendants must not be limited in their ability to challenge their convictions in successive petitions when cognizable claims of error other than actual innocence arise. The following examples are illustrative of the reality that evidence plausibly rising to the level of actual innocence often is not uncovered until long after a defendant's conviction and initial habeas petition.

A. Exonerations Based On DNA Evidence

In 1996, Damon Thibodeaux was convicted of the rape and murder of his 14-year-old step-cousin.[30] Thibodeaux confessed to the murder after a nine-hour interrogation. Although Thibodeaux's confession was inconsistent with the known facts about the crime and unsupported by forensic testimony, he was convicted and sentenced to death. Thibodeaux's

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[27] Garrett, *supra* note 4, at 109.
[28] Intervenor Opp. at 30.
[29] Garrett, *supra* note 4, at 111.
[30] Innocence Project, *Damon Thibodeaux*, https://www.innocenceproject.org/cases/damon-thibodeaux/ (last visited, Mar. 20, 2017).

initial appeal to the trial court was denied. His attorneys subsequently filed an appeal to the Supreme Court of Louisiana arguing Thibodeaux's confession was false and unreliable and that he had been fed details of the crime by the police. This appeal was also denied. It was not until 2012, after an extensive investigation and multiple rounds of DNA testing, that Thibodeaux was able to present "newly discovered evidence" to the trial court and his conviction was finally overturned. Thibodeaux spent 16 years in prison, 15 of which were spent in solitary confinement, awaiting execution for a crime he did not commit.[31]

Mr. Thibodeaux's case is hardly unique. Professor Garrett's 2007 study of 200 defendants (14 capital defendants) exonerated by DNA evidence revealed that on average, *it took 12 years for exculpatory DNA evidence to come to light.* Under the new myopic time limitations mandated by Proposition 66, even a five-year delay in discovering such exculpatory evidence would result in an innocent man like Damon Thibodeaux being killed by the state, with no way to remedy this grievous injustice.

B. Exonerations Based On The Discovery Of False Witness Testimony

The falsity of witness testimony used to convict capital defendants may, like DNA evidence, take years to uncover. Improperly elicited eyewitness or informant testimony has played a role in the convictions of 45.9% of death row exonerees since 1970 and is a leading cause of wrongful convictions in capital cases.[32] Since 1989, 1,115 defendants,

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[31] *Id.*

[32] Northwestern University School of Law, Center on Wrongful Convictions, *The Snitch System, How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row, A Center on Wrongful Convictions Survey* (2004), https://www.aclu.org/other/snitch-system-how-snitch-testimony-sent-randy-steidl-and-other-innocent-americans-death-row (last visited, March 29, 2017).

including some capital defendants, have been released, in part, because of the discovery of false accusations or perjured testimony.[33] The following is just one example of a capital defendant who was wrongfully convicted in California based on false eyewitness testimony.

In 1983, Oscar Lee Morris was convicted of the murder of William Maxwell and sentenced to death.[34] Morris' conviction was based, in part, on the testimony of a Joe West, who contacted the police several months after the murder to tell them that his friend (Morris) had murdered Maxwell. West said he had dropped Morris off at the scene of the incident with the murder weapon, and that Morris said he "had to kill" a homosexual. West had known Morris since childhood, and the two men had a falling out shortly before West went to the police. Morris was ultimately charged with the killing. On his death bed, West recanted his testimony against Morris, and in 1988 Morris' death sentence was vacated by this Court. Although the Court did not overturn the conviction, it later ordered an evidentiary hearing which resulted in the ordering of a new trial. Based on the dearth of remaining evidence, prosecutors chose not to retry the case, and Morris was released in 2000.[35] Under Proposition 66, Oscar Morris would likely be dead.

C. Exonerations Based On The Discovery Of Faulty Forensic Evidence

The use of invalidated or flawed forensics is "the second-greatest contributor to wrongful convictions that have been overturned with DNA

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[33] University of Michigan Law School, *The National Registry of Exonerations*, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={b8342ae7-6520-4a32-8a06-4b326208baf8}&SortField=Exonerated&SortDir=Asc (last visited, Mar. 20, 2017).
[34] University of Michigan Law School, *The National Registry of Exonerations: Oscar Morris*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3493 (last visited, Mar. 20, 2017).
[35] *Id.*

testing."[36] In 2009, a study of 137 convictions overturned by DNA evidence revealed that in 60% of the cases reviewed, a forensic analyst had supplied faulty testimony.[37] Unfortunately, uncovering faulty forensics takes time—often years—to fully develop, as was the case for William Richards.

On August 10, 1993, William Richards' wife was strangled and beaten outside her family home.[38] Richards discovered his wife's body after coming home from work and immediately called the police.[39] Richards was charged with the murder, and the prosecution introduced evidence that a blue thread, allegedly from Richards' shirt, was found under his wife's fingernail.[40] Richards was tried twice, both trials resulting in hung juries. At the third trial, the prosecution presented expert testimony that a bite mark found on his wife's body matched Richards' teeth.[41] Richards was convicted of murder,[42] a crime that carried the possibility of the death penalty, but was sentenced to life in prison.

In 2007—over a decade after the crime at issue—Richards filed a habeas petition based on new DNA evidence.[43] Two experts testified that the DNA found at the crime scene did not match Richards' and that the bite mark evidence was unreliable. The trial court reversed Richards' conviction, but the case was appealed.[44] In 2010, the California Court of Appeal reversed the trial court's ruling, and in a 4-3 opinion this Court

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[36] Innocence Project, *Misapplication of Forensic Science*, https://www.innocenceproject.org/causes/misapplication-forensic-science/ (last visited, Mar. 20, 2017).
[37] Garrett & Neufeld, *supra* note 15, at 9.
[38] *In re Richards*, 63 Cal. 4th 291, 295 (2016) (*"Richards II"*).
[39] *Id.*
[40] *Id.* at 300.
[41] *Id.* at 300-01.
[42] *Id.* at 293.
[43] *Id.* at 305.
[44] Id. at 306-07.

affirmed.[45]

Richards remained in prison until the California legislature amended Penal Code section 1473 to allow the "false evidence" ground for habeas relief to include instances of expert recantation of trial testimony. Richards filed a successive habeas petition under *In re Clark*,[46] which was permitted because of the intervening change in the law, and in 2016, this Court reversed his conviction in a 7-0 decision, holding there was a "reasonable probability" that the false evidence affected the outcome of his trial.[47] Had Richards been sentenced to death under the Proposition 66 regime, he would be dead for three reasons. First, Proposition 66 strives to eliminate the multi-year delay that eventually led the false evidence to be uncovered and presented. Second, it bars successive petitions where such false evidence could be raised, even if an intervening change in the law expands or alters the grounds for habeas relief. And third, it replaces the *Clark* gateways with the lofty standard of actual innocence, which even evidence of false testimony often does not satisfy.[48]

Faulty forensics have infected the federal system as well, and the FBI's overreliance on some such methods have impacted state proceedings, particularly in cases where the FBI trained state investigators on these flawed methods. For example, the U.S. Justice Department conducted a major study of microscopic hair evidence that revealed serious flaws in

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[45] *In re Richards*, 55 Cal.4th 948 (2012).
[46] 5 Cal. 4th 750 (1993).
[47] *Richards II*, 63 Cal. 4th at 293, 313.
[48] *Id.* at 313 ("Although in *Richards I*, supra, 55 Cal.4th 948, 150 Cal.Rptr.3d 84, 289 P.3d 860, we characterized the evidence against petitioner as strong, we did so in the context of whether the evidence was strong enough to overcome any suggestion that evidence discrediting Dr. Sperber's conclusion pointed "unerringly" to petitioner's innocence. Now, however, we must decide whether the evidence is strong enough to rule out a reasonable probability that the admission of Dr. Sperber's trial testimony affected the outcome of the case. In that context, the case against petitioner was entirely based on circumstantial evidence, and much of that evidence was heavily contested. Upon examination of this circumstantial evidence admitted against petitioner, it appears that Dr. Sperber's testimony was "material" for purposes of section 1473.").

analyses previously relied on by certain FBI investigators. For some capital defendants, the investigation came too late:

> We found that it took the FBI almost 5 years to identify the 64 defendants on death row whose cases involved analyses or testimony by 1 or more of the 13 examiners. The Department did not notify state authorities that convictions of capital defendants could be affected by involvement of any of the 13 criticized examiners. Therefore, state authorities had no basis to consider delaying scheduled executions. As a result, *one defendant (Benjamin H. Boyle) was executed 4 days after the 1997 OIG report was published* but before his case was identified and reviewed by the Task Force. The prosecutor deemed the Lab analysis and testimony in that case *material to the defendant's conviction*. An independent scientist who later reviewed the case found the FBI Lab analysis to be scientifically unsupportable and the testimony overstated and incorrect. Two other capital defendants were executed (Michael Lockhart in 1997 and Gerald E. Stano in 1998) 2 months and 7 months, respectively, before their cases were identified for Task Force review as cases involving 1 or more of the 13 examiners.[49]

Proposition 66 singles out innocent capital defendants from other innocent defendants and impedes them from taking advantage of such findings. And yet the FBI and DOJ are in the midst of conducting a review of criminal cases involving microscopic hair analysis, given the exoneration of three men convicted in part based on the scientifically flawed testimony of three different FBI hair examiners.[50]

The case of Timothy Bridges presents yet another example of this problem. In 1991, Bridges was convicted of the sexual assault of Modine

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[49] United States Department of Justice Office of the Inspector General, *An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory* (July 2014) (emphasis added) https://oig.justice.gov/reports/2014/e1404.pdf (last visited, Mar. 20, 2017).

[50] Press Release, Federal Bureau of Investigation, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review* (Apr. 20, 2015) https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review (last visited, Mar. 20, 2017).

Wise.[51] His conviction was based, in part, on the testimony of a forensic analyst who testified that he could make a "strong identification" that the hair at the scene matched Bridges' hair and the chance that anyone other than Bridges had left the hair was 1 in 1,000.[52] Bridges' conviction was affirmed repeatedly by the North Carolina courts on appeal.[53]

In 2015, 24 years after his conviction, an audit of faulty FBI testimony regarding microscopic hair analysis helped reveal errors in Bridges' case. An FBI-trained analyst had handled Bridges' case for the state, and despite Bridges being advised that the physical evidence in his case no longer existed, the trial court agreed with him that the introduction of scientifically invalid hair microscopy evidence violated his due process rights.[54] Just prior to Bridges' release from prison—and 10 years after being informed that the evidence in his case had been destroyed—the crime scene evidence in Bridges' case was located, and DNA evidence led to his full exoneration.[55]

Injustices caused by the FBI's and others' introduction of unreliable microscopic hair analysis remain far from resolved. Last summer, the Northern California Innocence Project began a coalition to review California hair microscopy cases.[56] In an initial screening, researchers

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[51] University of Michigan Law School, *National Registry of Exonerations*: *Timothy Bridges*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4845 (last visited, Mar. 20, 2017).
[52] *Id.*
[53] *See State v. Bridges*, 421 S.E.2d 806 (N.C. Ct. App. 1992); *State v. Bridges*, 333 N.C. 572, 572, 429 S.E.2d 347 (N.C. 1993)
[54] *See State v. Bridges*, 2015 WL 12670468 (N.C. Super. Ct. Oct. 1, 2015); *see also National Registry of Exonerations*: *Timothy Bridges*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4845 (last visited, Mar. 20, 2017).
[55] The Charlotte Observer, *McCrory Pardons Man in 27-Year-Old Charlotte Rape Case*, (Dec. 1, 2016), http://www.charlotteobserver.com/news/local/crime/article118243778.html (last visited, Mar. 20, 2017).
[56] Press Release, Santa Clara Law School, *Legal Updates: NCIP Spearheads Statewide Coalition to Review Microscopic Hair Analysis Cases; Habeas Petition Filed in Client's Case*, (July 29,

identified nearly 70 noncapital and capital cases in which experts may have provided improper testimony regarding hair comparisons.[57] Investigations such as these will have dramatic consequences for many of the 749 men and women currently awaiting execution in California,[58] and yet Proposition 66 would only stand as an impediment to getting a just result in these case.

D. Exonerations Based On State Actors' Failure To Disclose Discoverable Evidence

The National Registry of Exonerations estimates that the discovery of official misconduct was involved in three quarters of homicide exonerations in 2015.[59] Likely given the pressures inherent in such cases, the rate of misconduct is higher overall in capital cases as compared to non-capital cases.[60] Unfortunately, official misconduct is very difficult to uncover and prove. Moreover, because prosecutors and other law enforcement officials are unlikely to report their own misconduct, its discovery typically happens by chance and is often not capable of being uncovered quickly or through counsel diligence alone.

For example, in 2015, the Oktibbeha County District Attorney announced that he would drop charges against Willie Manning, who had

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2016), http://law.scu.edu/northern-california-innocence-project/legal-update-ncip-spearheads-statewide-coalition-to-review-microscopic-hair-analysis-cases/ (last visited, Mar. 20, 2017).

[57] *Id.*

[58] *See* California Department of Corrections and Rehabilitation Division of Adult Operations, *Condemned Inmate List*, (Mar. 2, 2017). http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf (last visited, Mar. 20, 2017); *see also* Los Angeles Times, *These are the 749 inmates awaiting execution on California's death row*, (December 20, 2016) http://www.latimes.com/projects/la-me-death-row/ (last visited, Mar. 20, 2017).

[59] *See* University of Michigan Law School, *The National Registry of Exonerations: Exonerations in 2015*, at *1 (Feb. 3, 2016). http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf.

[60] S. Gross, M. Possley & K. Stephens, *Race and Wrongful Convictions in the United States*, National Registry of Exonerations (Mar. 7, 2017). https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf (last visited, Mar. 20, 2017)

been sentenced to death nearly eleven years before his wrongful conviction was finally overturned.[61] Prior to the vacatur of his conviction, Manning pursued state and federal habeas relief and filed a successive petition in state court.[62] He was denied relief at all turns.[63]

Charges were dropped based on a finding from the Mississippi Supreme Court that "key evidence" in the case had been withheld.[64] Among the evidence withheld was an eye witness's recanting of his testimony against Manning, in which the witness stated that he was afraid he would be charged for the murder if he did not inculpate Manning.[65] More than a decade of post-conviction work was necessary to expose this horrible injustice.

California is not immune to the problems resulting from prosecutorial misconduct. On December 15, 2016, the United States Department of Justice opened an investigation into the Orange County, California, District Attorney's Office and Sheriff's Department.[66] The investigation was initiated due to "allegations that the district attorney's office and the sheriff's department systematically used jailhouse informants to elicit incriminating statements from specific inmates who had been charged and were represented by counsel, in violation of the Sixth

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[61] University of Michigan Law School, *The National Registry of Exonerations: Willie Manning*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4679 (last visited, Mar. 20, 2017).
[62] *See Manning v. State*, 929 So. 2d 885 (Miss. 2006); *Manning v. Epps*, 133 S. Ct. 1633, (2013); *Manning v. State of Miss.*, No. 2013-DR-00491-SCT (Miss. Sup. Ct. Apr. 9, 2013).
[63] *Id.*
[64] University of Michigan Law School, *The National Registry of Exonerations: Willie Manning*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4679 (last visited, Mar. 20, 2017).
[65] R. L. Nave, *Why Does the State Still Want to Kill Willie Jerome Manning?*, Jackson Free Press, (April 29, 2015) http://www.jacksonfreepress.com/news/2015/apr/29/why-does-state-still-want-kill-willie-jerome-manni/ (last visited, Mar. 20, 2017).
[66] *See, e.g.*, Press Release, United States Department of Justice, "Justice Department Opens Investigations of Orange County, California, District Attorney's Office and Sheriff's Department (Dec. 15, 2016) .

Amendment."[67] The DOJ is also investigating allegations that the DA's office failed to disclose promises of leniency that would have substantially undermined the credibility of the informants' trial testimony.[68]

* * *

In sum, as these few exemplary stories vividly demonstrate, it can take years to develop evidence sufficient to warrant overturning a capital defendant's conviction, and often the first cracks in a case do not establish innocence, but rather call for further and deeper inquiry. Proposition 66's harsh time limits on initial habeas petitions—coupled with the imposition of an actual innocence standard of proof for any successive petition—will lead to the execution of innocent men and women, as the cases above show.

III. PROPOSITION 66'S HEIGHTENED STANDARD FOR SUCCESSIVE PETITIONS IS NOT JUSTIFIED BY CAPITAL DEFENDANTS' RIGHT TO COUNSEL FOR PURPOSES OF INITIAL PETITIONS

Although capital defendants have a right to counsel for their initial habeas petition, this does not justify Proposition 66's differential treatment of capital defendants for two key reasons.

First, the new limitations detrimentally affect the ability of qualified post-conviction attorneys to effectively litigate these matters. Currently, there are not a sufficient number of attorneys qualified to handle habeas petitions in California.[69] This problem is magnified by the limited amount of funding available to employ additional habeas counsel.[70] Of those

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[67] *Id.*
[68] *Id.*
[69] Declaration of Gerald F. Uelmen in Support of Brief of the Innocence Network as Amicus Curiae in Support of Petitioner at ¶ 8; California Commission On The Fair Administration Of Justice, *Official Recommendations on the Fair Administration of The Death Penalty in California*, at *132, (June 30, 2008) ("*CCFAJ Report*") http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs (noting "delays in appointment of counsel to handle direct appeals are attributable to the small pool of qualified California lawyers willing to accept such assignments").
[70] *Id.; CCFAJ Report* at *135.

qualified and willing to take on such cases, requiring them to complete the initial investigation and petition within one year will necessarily force even conscientious attorneys to either cut corners during the course of their representation (thus further necessitating the need for access to successive habeas petitions) or decline the appointment altogether, to avoid violating their ethical obligations.[71]

The time and effort required to effectively investigate a post-conviction case is an issue that has been acknowledged by the American Bar Association. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) ("ABA Guidelines") outline specific duties for post-conviction counsel, which become near impossible feats under the arbitrary mandates of Proposition 66.[72]

Central to these duties is a "continu[ing] and aggressive investigation of all aspects of the case."[73] "[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation."[74] The elements of an investigation include: obtaining and examining all charging documents; seeking out and interviewing potential witnesses; making efforts to secure information in the possession of the prosecution or law enforcement authorities; making prompt requests to relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the

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[71] *See* California Appellate Defense Counsel Amici Letter at *2 (noting "[i]f all the provisions of Proposition 66 are not stayed pending resolution of its validity on all grounds raised, many attorneys will be faced with the career and life-altering choice of accepting appointment in a capital direct appeal or being barred from pursuing their chosen career in indigent appellate advocacy – a decision they may feel compelled to make sooner rather than later.); *see also* ABA Guidelines 10.15.1 – Duties of Post-Conviction Counsel, p.1080 (rev. ed. 2003) http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2003Guidelines.authcheckdam.pdf (last visited, Mar. 20, 2017).
[72] *Id.*
[73] *Id.* at 1080.
[74] *Id.* at 1085-86.

underlying materials; immediately viewing the scene of the alleged offense; and investigating mitigating circumstances.[75]

The "well-defined norms"[76] of the Guidelines represent the floor, not the ceiling, of reasonable counsel performance for lawyers representing a condemned client,[77] and thus highlight the substantial difficulty of adequately addressing every aspect of complex capital litigation in initial habeas petitions. This difficulty becomes unconstitutionally burdensome by Proposition 66's proposal to cut the current timeframe for filing an initial habeas petition (three years after appointment of counsel) by two-thirds. The higher standard for successive petitions cannot be justified by the fact that capital defendants have a right to counsel for their initial petition.

Second, even the most qualified habeas counsel cannot address instances in which evidence is withheld or unavailable due to as-of-yet undiscovered forensic advances. As discussed in Section I, *supra*, when it comes to evidence establishing wrongful convictions, the delayed discovery of such evidence is the norm rather than the exception. Obviously, if exculpatory evidence comes to light after the initial petition (such as through the development of new forensic techniques, or through witnesses who recant their statements years later), the capital defendant's counsel on the first petition could not have included this evidence as a ground for relief. The argument that court-appointed counsel affords a capitally sentenced prisoner sufficient due process is exposed as an empty platitude

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[75] *Id.* at 1018–27.

[76] *See In re Lucas*, 94 P.3d 477, 503 (Cal. 2004) (referring to the ABA Guidelines as "well-defined norms*"); In re Welch*, 351 P.3d 306, 323 (Cal. 2015); *see also Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (describing the guidelines as a guide to "what reasonableness means."); *Rompilla v. Beard*, 545 U.S. 374, 400 (2005); *Florida v. Nixon*, 543 U.S. 175, 191 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

[77] *See* ABA Guidelines at 920 ("[t]hese Guidelines are not aspirational. Instead, they embody the current consensus about what is minimally required to provide effective defense representation in capital cases.").

in such cases, and provides no justification for assuming that all potentially meritorious grounds for relief will be uncovered within the timeframe imposed by Proposition 66. Nor does it ensure that when such evidence does emerge, it will satisfy the actual innocence gateway for review of successive petitions before additional investigative resources and the opportunity for an evidentiary hearing is provided.

CONCLUSION

Proposition 66 violates the Equal Protection Clauses of our Constitutions by singling out capital defendants. It imposes an onerous one-year time limitation on the filing of an initial habeas petition and limits the grounds under which capital defendants may file a successive petition—limitations not imposed on non-capital defendants. Given the severity and finality of a death sentence, capital defendants, if they are to be treated differently from non-capital defendants, must be afforded more, not less process. The lesson learned from the exoneration of 157 men and women from death row is that it takes years, if not decades, to gather and present evidence of innocence—far more than the one year permitted for initial habeas petitions under Proposition 66. Experience also shows that men and women who were ultimately exonerated—who were factually innocent of the crime for which they were convicted—were unable to meet the actual innocence standard that Proposition 66 now seeks to impose on those capital defendants bringing successive petitions. Had these individuals faced Proposition 66's actual innocence standard, they might never have been able to present the evidence that ultimately exonerated them.

This disparate treatment is indefensible. Because it increases the risk that an innocent person will be executed to an unacceptably high level, Proposition 66 must be struck down.

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Respectfully submitted,

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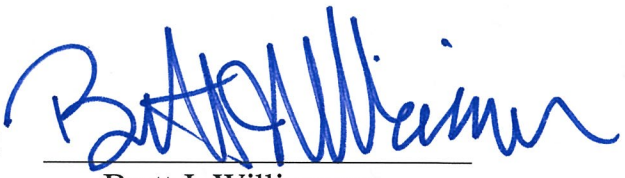
By: 

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CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court 8.204(c)(1) and 8.486(a)(6), counsel for *amici* hereby certifies that the number of words contained in this Application For Leave to File Amici Brief And Proposed Brief of Amici Curiae The Innocence Network, American Civil Liberties Union Of Northern California, American Civil Liberties Union Of Southern California, And American Civil Liberties Union of San Diego and Imperial Counties in Support Of Petitioners, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 6,964 words as calculated using the word count feature of the computer program used to prepare the brief.

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